

REMEMBERING 'KIDS FOR CASH:' NEVER AGAIN? LET'S BE SURE

Remarks of the Hon. John M. Cleland, S.J. James E. Anderson Conference on Juvenile Justice Harrisburg, Pennsylvania November 7, 2018

Kids for Cash. It has been called the biggest judicial corruption scandal in Pennsylvania history, or even in American legal history.

It is hard to know whether or not that is an accurate description because scandal is a hard term to quantify. It is hard to compare one scandal to another scandal. But the so-called "kids for cash" case was a big scandal by any measure.

Perhaps for some the case has faded from memory. A quick summary: In January 2009, two Luzerne County Common Pleas judges, Michael Conahan and Mark Ciavarella, were indicted by the US Attorney for a variety of crimes connected with the construction of a private juvenile detention center in Luzerne County. Among other things, they were accused of receiving \$2.6 million in extortion money and kickbacks from the detention center's developer. One of the judges, Conahan, eventually pled guilty and was sentenced to 17 ½ years in federal prison. The other judge, Ciavarella, the juvenile court judge, went to trial, was convicted on charges of mail fraud, racketeering, conspiracy and tax evasion, and was sentenced to 28 years in prison.

In February 2009, acting on a petition filed by the Juvenile Law Center, the Pennsylvania Supreme Court appointed Judge Arthur Grim as a special master to review Ciavarella's juvenile adjudications between 2003 and May 2008. The Court subsequently accepted Judge Grim's recommendation and vacated every juvenile adjudication in Luzerne County entered during that 5 ½ year period, expunging the record of 2,401 juveniles. Judge Grim was also assigned to oversee victim claims that were paid from a fund created by the Legislature as a result of an Interbranch Commission recommendation.

As part of the larger federal investigation some 30 indictments were issued, including another judge, a county commissioner, the court administrator, the chief juvenile probation officer, housing authority officials, a superintendent of schools, school board members, a state senator and more.

Even the court-appointed psychologist was implicated. He was Conahan's brother-in-law. During a seven year period he was paid \$1,222,205 for what could be charitably called less than professional evaluations of juveniles that were ordered by Ciavarella. The finding of the state board that suspended his license contains a passage that might be a fitting description of the conduct of so many involved in the scandal. It concluded, he "generally demonstrated conduct of gross incompetence, negligence or misconduct in carrying out his duties...."

Investigating how the juvenile justice scandal happened, and how it could be prevented from happening again elsewhere, was the responsibility of the Interbranch Commission on Juvenile Justice. The Commission was created ten years ago as a collective effort by all three branches of government to come to terms with what had happened in the kids for cash scandal.

Ours was a noncriminal investigation. The statute that created the Commission gave us three responsibilities: to learn what had happened to get the system so far off track; to make recommendations to correct the situation and prevent similar things from happening elsewhere; and to restore the public's confidence in the juvenile justice system.

We held our first work session in Pittsburgh in August 2009, just days after the final appointment to the eleven-member Commission had been made. We had to begin our work quickly because we had a nine-month deadline to conduct an investigation, prepare recommendations, and write our report. No small task.

There was no precedent for doing this in Pennsylvania. It was not as though there was a blueprint for how to do it, or anyone we could call to ask just exactly how we were to accomplish our tasks in the time allowed. We were working this out on the fly as we went along. And we were

doing it in a very public eye. The scandal, and our work, attracted the attention from news organizations all over the country and, indeed, from around the world.

Nine months later, on time and under budget, we filed our report.

Who was it that did all of that remarkable work? Many of them are sitting up here with me:

There were three common pleas judges with juvenile court experience – Judge Dwayne Woodruff from Pittsburgh, Judge John Uhler from York, and me.

There was a Magisterial District Judge and former Assistant United States Attorney, James Gibbons, who is now a Lackawanna County Common Pleas judge;

Two prosecutors, George Mosee, from the Philadelphia District Attorney's Office and who is now the Executive Director of the Philadelphia Anti-Drug and Anti-Violence Network; and Jason Legg, the District Attorney from Susquehanna County and who is now a Common Pleas judge;

A defense attorney, Robert Listenbee, from the Philadelphia Public Defender's Office, and since that time an official in the United States Department of Justice and now Philadelphia's First Assistant District Attorney;

A former County Commissioner, Ron Williams, from Wyoming County;

Kenneth Horoho, a Pittsburgh attorney and a former President of the Pennsylvania Bar Association;

And two victim advocates, Valerie Bender from Pittsburgh and Tod Allen from Erie.

I was honored to Chair this remarkable group.

Almost as an afterthought, I called on an old friend, Arthur Stroyd, a Pittsburgh attorney, to provide some legal help if we needed it. As it turned out, he and his firm represented the Commission pro bono before the Pennsylvania Supreme Court three times in litigation to get records from the Judicial Conduct Board.

We also had the administrative support of Tom Darr, who was then the Deputy State Court Administrator; Darren Breslin who provided the essential day-to-day legal guidance; Nik

DiPasquale who handled the complex logistical demands; and Stu Ditzen, a retired award-winning reporter for the Philadelphia Inquirer who wove a complex set of facts into a compelling narrative.

We met for four days in Pittsburgh and State College, to prepare and plan how to proceed. We knew, for instance, that at some point we wanted to hear from the children involved in these cases and their parents. Valerie Bender was the only one of us who had any experience in interviewing victims in such a public setting. So, put us all through sensitivity training, training that has now become common, to learn how to talk to victims, how to phrase our questions, how to respond to emotional outbursts, and how to help victims feel comfortable.

By October we were ready for the first of eleven days of public hearings held in both Harrisburg and Wilkes Barre spread over the following months. Every hearing was covered on live television, gavel-to-gavel, by PCN.

During those hearings we heard from 68 different witnesses, some more than once, and received written statements from others. Some hearings started in the morning and finished up with a session after dinner.

In between public hearings we held twice a week conference calls – every Tuesday and Thursday morning at 8:30. Toward the end of our work the conference calls became longer and more frequent. One day we had a conference call at 8:00 in the morning, another at noon, and a third one late in the afternoon. And beyond that, every Commissioner had his or her own areas of responsibility to investigate, line up witnesses, and then question the witness during the hearing. Each member of the Commission was seriously committed to our work. One member kept track of time: it averaged 16 hours a week for nine months.

In the end we produced a report that contained some 43 recommendations in several broad subject areas. They were the product of robust debate representing the different background and experiences of the Commissioners. It was not our intention to rebuild the system; only to make discrete, specific and practical suggestions for its improvement.

The first part of our Report is an account of what happened in Luzerne County's juvenile justice system. It is a narrative. It reads like a crime novel.

The second section contains our Commission's recommendations. They cover a whole range of topics, including: judicial ethics, judicial discipline, crime victims' rights, attorney discipline, funding for juvenile prosecutors and defenders, hiring and personnel practices, collection and analysis of data, appellate procedures, even the education of county commissioners and the elimination of zero tolerance policies by the Department of Education.

A third section is the conclusion in which we try to put all of this in some philosophical context and state the lessons we learned as our investigation unfolded.

Our key recommendations focused on three areas:

First, the system depends on honest and competent judges and capable judicial leadership. We made specific recommendations about mandatory education for juvenile court judges, masters and hearing officers. We also addressed what we perceived to be deficiencies in the system of disciplining corrupt or incompetent judges.

Second, we made recommendations designed to assure that both the Commonwealth and the juveniles are represented by competent and well-trained attorneys. No one can seriously argue that every child must be represented and that effective prosecutors and defense counsel must be present in the courtroom.

Finally, we made recommendations about improving the process for taking an appeal. There must be a realistic opportunity for both the Commonwealth and the juvenile to have a meaningful and time sensitive review by an appellate court to determine whether a judge properly exercised judicial discretion and followed the applicable law. This is an important issue because when the use of power is unreviewable, the abuse of power is inevitable.

It is a credit to the legislative, executive and judicial branches that they formed the Commission, and then took our work and recommendations seriously. Our report has not been one that has gathered dust.

And it is especially to the credit of the Luzerne County bench that they took the report to heart and have applied themselves to correct processes and procedures, and to instill a renewed sense of purpose and professionalism to the work of the juvenile court.

Essentially what we heard during our nine-month investigation was that Mark Ciavarella, sitting as a juvenile court judge, simply ignored the law, the rules of evidence and any rudiment of fairness or notion of best practices. His views were well known and had been the subject of news accounts. Some admiringly called him a “no nonsense, zero tolerance” judge. In the post-Columbine era he was popular in the county and in 2005 he easily won his retention election. But his dispositions could only be accurately described as “draconian.” He, alone, accounted for placing some 20% of all children in placement in Pennsylvania.

What sort of things did we hear? Let me read you transcripts – mind you, these are complete transcripts – of two, not untypical, hearings:

“The Court (speaking to the child): It says here that you have been charged with violation of the Controlled Substance Drug Device and Cosmetic Act. How do you wish to plead?

“The Juvenile: Guilty.

“The Court: Based upon her admission, I will adjudicate her delinquent. Where did this occur?

“The Juvenile: School.

“The Court: What grade are you in?

“The Juvenile: Eighth.

“The Court: Were you at the school when I was there?”

“The Juvenile: Yeah.

“The Court: What did I say about drugs in school?”

“The Juvenile: That you’re going to get — well, you’re going to get arrested in school.

“The Court: What else did I tell you?”

“The Juvenile: That you will get arrested and charged.

“The Court: What did I say I will do?”

“The Juvenile: Send us away.

“The Court: Did you think I was kidding?”

“The Juvenile: No.

“The Court: Very good. She will be remanded. Send her to FACT (a juvenile placement facility). Let her stay there until she learns her lesson. I mean what I say. Thank you.”

That’s it. The complete transcript. In full.

Or consider this: the case of an 11 year old boy, four feet two inches tall and 63 pounds:

“The Court: How old are you?”

“The Juvenile: Eleven.

“The Court: You and your brother, it seems you like to do the same thing, harass. There was a fine imposed. You didn’t pay it. Disorderly conduct, engaged in another fight. So you didn’t pay that one. Do you have \$488.50?”

“The Juvenile indicated in the negative.

“The Court: Very good. He’s remanded. He can stay there until he pays the fines.....Put the cuffs on him and get him out of here.”

That’s it. The whole hearing.

And then, that eleven year old, 4’11’, 83 pound boy, was taken out of court in handcuffs and leg shackles. He spent the next two months in a wilderness camp.

Ciavarella vehemently rejected the idea that he supplied kids for cash. He denied he got a share of the profits from the detention facility in return for sending kids there to keep it full. In the end, at his trial federal prosecutors did not pursue that theory, and proceed instead on the more easily proved theory of racketeering, tax fraud and criminal conspiracy.

At Ciavarella’s sentencing, the trial judge quoted the opinion of the Pennsylvania Supreme Court which held that in Ciavarella’s courtroom there was a “complete disregard for the constitutional rights of juveniles” and a “disturbing lack of fundamental fairness.” To which Ciavarella responded: ‘Your Honor, I will respectfully disagree with that Supreme Court opinion. I never violated one child’s right. There’s no hard-core evidence that ever happened. Your Honor, my courtroom was conducted – and it was always conducted in a fair and reasonable manner. Those children were not denied their rights.’”

Ciavarella’s protestations to the contrary, there could be absolutely no dispute that juveniles were routinely deprived of even the rudiments of due process in hearings in his court. And that was the basis for the Supreme Court’s order vacating every juvenile adjudication Ciavarella entered for a 5 ½ years.

It was, by any measure, a breath-taking collapse of the rule of law.

I have spent some considerable time in the ensuing ten years thinking about what happened, and how it happened.

Could it happen again? Of course it could. Greed is corrupting and greed knows no limits. It is not just greed for money. There is greed for power; greed for approval; greed for acclaim. It all leads inevitably to corruption. And we should not be so naïve as to think any of us – judges, lawyers, probation officers, legislators, civil servants -- are above it all and immune to it. Unchecked, greed has the power to overwhelm any sense of duty – whether that sense of duty is based in law, or morality, or custom, or simple unadulterated human decency.

Have I lost faith in the honesty and integrity of our system? No. Absolutely not. In the end our system works, however slowly, to correct itself. In the kids for cash scandal the rule of law eventually prevailed. Criminals were held to account. Reform occurred. Values of honesty and compassion and accountability are being reasserted.

As I have reflected on the Luzerne County experience, and on my personal experience as a judge, I have come to believe there is a direct correlation between the public's confidence in the rule of law and the public's confidence in the integrity in the court system. The rule of law is administered not just by judges. There is a host of people who interact with the public and shape the public's perception about the fairness of the system, for better or worse – from clerks and secretaries to police officers to district attorneys, and MDJs and so many others. We can't be concerned only about the fairness and competence of judges. To maintain the public's trust we have to be mindful of the fairness and competence of all of those who work in the entire system.

So many have passed off the kids for cash scandal as aberrant behavior, a rare example of corrupt judges. It is not that simple. When we talk about "judicial corruption" we are not talking only about the criminal acts of a judge who solicits a bribe or who fixes a case or who makes a lucrative appointment in return for a political favor. Judicial corruption involves the corruption of the institution of the judiciary, of the entire court system. It is not just the acts of the judge that are

problematic. We have to be concerned about the corruption of the court system as a whole in which the signs that those kinds of things may be going on are ignored, or that unprofessional conduct goes unreported by those who know.

So, when we talk about corruption, we are not talking only about criminality. We are talking about any action, or any inaction, by anyone involved in the court system that corrupts the process and undermines the rule of law. It is not only criminal behavior. It can take the form of incompetence, cowardice, laziness, inattention, overstepping authority, bias and prejudice, conflict of interest, inappropriate behavior toward staff, violence by staff, lying, and use of office for personal gain.

Ciavarella routinely went to the Luzerne county schools to talk about his role as a juvenile court judge and what would happen to kids if they ended up in his court. To his credit, he clearly stated his philosophy. He made no bones about it. For purposes of this talk, let's assume he really, sincerely believed that he was protecting children's rights, and that the way to change a child's behavior was harsh treatment. Let's assume he was sincere when he said the way to prevent school violence was to enforce zero tolerance.

The trouble was he was so absolutely certain about things that were so absolutely wrong. His views were not supported by any credible juvenile justice research and absolutely ignored the principles of balanced and restorative justice that, even then, were driving Pennsylvania's juvenile justice policy. He demonstrated a stunning absence of humility, or any insight that he might have been mistaken. There is a lesson there for all of us.

I hope at this stage that no judge in Pennsylvania is abusing his or her power by taking kickbacks. But I am realistic enough to be concerned about broader questions involving the use, or rather the abuse, of power. If we are to understand what was going on in Ciavarella's courtroom, or what might, heaven forbid, be going on in other courtrooms or treatment programs or placement

facilities around the Commonwealth, then we have to think about power. We have to think about how power is used. How it is abused. How it is confronted and checked.

We tend to focus on Ciavarella's abuse of judicial power. But there were a lot of other people in his courtroom that had power. Ciavarella abused his power in the way he used it. But others abused their power in the way they did not use it. Inaction, when action is required, can also be an abuse of power.

By action -- or inaction -- a lot of people created an atmosphere in which children were harmed, traumatized, and their constitutional rights were ignored. Lawyers, assistant district attorneys and defense attorneys, were present in Ciavarella's courtroom. But so were probation officers and police officers and school officials.

What can we learn about power from the kids for cash scandal that might have continuing application in Pennsylvania? What do we need to do to guard against the abuse of power in other counties and in other courts and in other places?

First, I think is an understanding that all of us -- judges, hearing officers, probation officers, prosecutors, defense attorneys -- we all have a professional responsibility to confront the abuse of power. And I am not talking only about the abuse of judicial power. Many people exercise, and can abuse, very real power: police officers, probation officers, school officials, even parents.

When there is a pervasive and consistent abuse of power carried out in a way that harms a child, all of us, as professionals, have a responsibility to speak out.

Second, we should not underestimate the power of corruption to lull us into a false sense that abnormal is, in fact, normal. It is possible for corruption to be so visible, so flaunted, that we become numb to it; we don't even recognize it as corruption. As one writer put it: In Luzerne County "questionable practice went unquestioned and became acceptable practice."

Or, as Clarence Earl Gideon, of Gideon v. Wainwright, put it about the state of Florida's refusal to provide him legal counsel in his criminal case: "These people are not vicious. They just

have beliefs they've lived with all their lives. They think it is perfectly all right to take a man into a courtroom and deny him all his rights...these people...are not mean people or anything, they're just used to things."

They're just used to things. That explains a lot.

As professionals, we have a responsibility not to get used to things. On the contrary we have a responsibility to question, to recognize the abuse of power, to be alert to it, and to speak up.

I give so much credit to the reporters at the Wilkes Barre newspapers, for example, who uncovered, and then covered, this story of corruption and abuse of power; especially Terrie Morgan-Besecker who did the hard work, found the facts, and spoke the truth. She was indeed a friend to our democracy.

And credit, too, to Luzerne County Judge Chester Muroski who suspected wrongdoing and took his concerns to the FBI. Those are the kinds of things we should all be prepared to do.

Third, none of us is helpless. There are things professionals can do to hold accountable those who abuse power in our democracy – whether it is by a judge, a teacher, a prosecutor, a probation officer, a detention center staff member, or a school-based security officer. Make a report to a supervisor or disciplinary body, file a lawsuit, consult with colleagues, talk to a news reporter, or confront it face-to-face.

Fourth, fortunately, living and working amidst corruption is something few of us routinely encounter. In a corrupt environment sometimes otherwise good and responsible people might simply lose their way. We have to have some measure of empathy because any of us in a moment of weakness might allow accommodation to triumph over principle, and passivity to trump vigilance.

But to the extent that the work of the Commission assists all of us in the Commonwealth to reaffirm a commitment to the cause of justice, then perhaps all of us, no matter what role we play in the juvenile justice system, will have redeemed ourselves in some small way for the myriad failings a decade ago that so undermined the rule of law.

Perhaps we can be reminded that, of any place in our society, the juvenile court is one place where we have an opportunity to diffuse a victim's anger, to affirm a community's commitment to safety, and to redeem a child's life. It is in the juvenile court that we have the very real opportunity, the tantalizing possibility, of actually creating a better world, one child at a time.

Finally, I end with this: What happened in Luzerne County is an object lesson about what happens when the rule of law breaks down. It was not pretty. It had real and devastating consequences for children and their families. It impacted the original victims of crimes whose restitution orders or sense of finality were swept away by order of the Supreme Court. It ruined reputations.

When we talk about protecting the rule of law, we are not expressing some meaningless slogan. The rule of law -- those commonly agreed on rules of behavior -- is what restrains the use of power in our democracy. The use of power, when restrained by the rule of law, is defined, predictable, thoughtful, and equally applied. When the use of power is not restrained by the rule of law then it is tyranny that follows because there is no power that can restrain the power of the strong. That tyranny can take many forms: a cop on the beat, a disciplinarian at the high school, a revered coach, a trusted priest, an acclaimed political leader, or a feared judge.

It is the most basic tenant of our democracy that no person is above the law. And why? Because ultimately, either the law must prevail and the abuse of power be checked, or the consent of the governed is replaced by the will of the strong, and democracy fails. That is why every citizen has a shared responsibility to protect the rule of law, to assure that the actions of the powerful are restrained by law, and to assure that those who exercise power are held accountable for its use and responsible for its abuse.

And if you ask why that is so, if you ask why every citizen has a shared responsibility to protect the rule of law, if you ask why we must defend the principle that no one is above the law, the answer is this: kids for cash.