

## Commentary: A Conscienceless Judiciary

By David Banks – IRP6, April 29, 2014

In reference to the April 16, 2014 New York Times article "Obama Commutes a Prisoner's Sentence, Lengthened More than 3 Years by a Typo", I would like to commend President Obama for commuting the sentence of Cesar Huerta Cantu when federal Judge Jackson L. Kiser refused to do justice after Cantu was sentenced to an extra three and half years due to an undisputed typographical error in his presentence report. Culpable federal prosecutors also showed they were not concerned with correcting the unjust sentence, when they asked Judge Kiser to dismiss Mr. Cantu's claim because it was filed after the one year statute of limitations for challenging the validity of the sentence. Both Judge Kiser and federal prosecutors actions were conscienceless and they need to be formally censured and publically castigated for failing in their duty to do justice. Judge Kiser audaciously stated "While I am sympathetic the petitioner's position, I am not permitted to disregard the law." Judge Kiser, are you permitted to disregard justice!? Where is your moral and judicial conscience!? The standards of justice set by the Supreme Court of the United States (SCOTUS) and a civilized nation does not permit you do casually disregard justice. In fact, SCOTUS stated that the "primary duty of the Judicial Branch [is] to do justice in criminal prosecutions". See U.S. v. Nixon, 418 U.S. 683 (1974). President Lincoln observed in his first State of the Union speech: "It is as much the duty of the Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."

I believe that Judge Kiser and the prosecutor in the Cantu case didn't possess a residue of humanity to allow a man to spend an extra 42 months in prison based on a typographical error. Douglas Berman, a law professor at the Ohio State University, who commented in the article, appropriately stated, "Something is very rotten in our system". Very rotten indeed as is the case of the IRP6 in Colorado where the conduct of judicial officials rises to an even higher level of disgrace. Not only did Judge Christine M. Arguello fail in her duty to do justice when she sentenced my sister Lawanna Clark to six months in prison when irrefutable evidence of her innocence was presented after trial, but she also sentenced the IRP6 from 7-11 years in prison after conspiring to obstruct justice with government prosecutors and the court reporter by refusing to release over 200 pages of court transcript vital for the IRP6 appeal.

My sister Lawanna was wrongly convicted of one count of perjury before a grand jury. Federal prosecutors accused Lawanna of lying to the grand jury about withdrawing money from a bank account that she was an authorized signer. Why would she lie about that in the first place? Lawanna told the grand jury that she authorized my other sister Yolanda to withdraw the money and that she was the one who placed the transaction. The government presented a bank withdrawal slip signed with the name of Lawanna Clark as evidence that Lawanna signed for the money, however, the government did not do any handwriting analysis to check the veracity of Lawanna's statements. One might ask why didn't Yolanda testify at trial to help exonerate her sister? Yolanda was available at trial to testify but Lawanna's attorney Rick Kornfeld of Denver, Colorado, told her it wouldn't be necessary. Kornfeld also told our family that when we wanted to have handwriting analysis conducted, that this was unnecessary and too expensive. We hesitatingly deferred to Kornfeld's judgment and assertion that we would still win the case, which in retrospect was a very bad decision because the jury convicted and we found out that Kornfeld was conspiring with Assistant United States Attorney (AUSA) Matthew Kirsch to ensure my sister's conviction. One might question why we would think Kornfeld conspired with Kirsch?

Before discussing Kornfeld and Kirsch, I would like to discuss what proof Lawanna presented that she was innocent. Our family hired highly respected handwriting expert Judith Housley to analyze the handwriting on the bank withdrawal slip to determine whose handwriting was responsible for the signature. Ms. Housley took exemplars (handwriting samples) from both Lawanna and Yolanda. After conducting her analysis, Housley found within a degree of scientific certainty that the handwriting on the bank withdrawal slip was in fact Yolanda's and excluded Lawanna completely. Lawanna had told the truth to the grand jury and was not guilty of perjury. Surely her case would be overturned and she would be granted a new trial at a minimum. Unfortunately, Judge Arguello and Judge Kiser have something in common --- they both have very low standards when it comes to insuring justice is done, don't about innocence, or that American citizens will unjustly spend time in prison. SCOTUS observed:

A trial judge is "charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial." *Faretta V. California*, 422 U.S. 806 (1975) (Chief Justice Burger, dissenting)

When we filed a motion presenting the handwriting evidence to Judge Arguello, she casually dismissed it. Judge Arguello sophistically justified her actions to imprison Lawanna and her failure to do justice on the basis of Rule 33 of the Federal Rules of Criminal Procedure. "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires" Since Judge Arguello has no interest in justice she denied Lawanna and sent her to prison irrespective of her innocence. Just like Judge Kiser, Judge Arguello failed in her duty to insure that justice was achieved.

Now to discuss why I feel Kornfeld conspired with the AUSA Kirsch to convict Lawanna. Kornfeld was not retained to handle the appeal for Lawanna. The well-known San Francisco Attorney John Cline was hired for that purpose. During oral arguments before the 10th Circuit Court of Appeals, Kornfeld entered the court, looked at us and smiled, then proceeded to Kirsch and sat with him as he argued that my innocent sister should go to prison. Why was he there? He did not have a case he was arguing before the court. It was if he came to gloat in the fact that he had handed Lawanna over to the government and she was going to prison. The 10th Circuit, like the Fourth Circuit in the Cantu case ultimately upheld injustice and Lawanna spent six months in federal prison. These people are morally depraved and sick.

Judge Arguello wasn't finished after my sister. She violated our 5th Amendment right when she forced us at a sidebar to testify in our criminal proceeding, then lied and conspired to obstruct justice with the court reporter by depriving us of the transcript of the sidebar to prove what was said. Then, with full knowledge she had deprived us of a fair trial and forced our testimony, she denied us bond and sentenced us from 7-11 years in prison. AUSA's Kirsch and Suneeta Hazra, who were present at the sidebar, sadly kept silent while this injustice was done to us.

Just like the Cantu case, Kirsch and U.S. Attorney John Walsh argued against releasing the transcript numerous times --- they argued against doing justice. We have been imprisoned for the last 21 months while the 10th Circuit upheld bond denial and refused to order the transcript turned over to us. When A Just Cause filed a civil case related to court reporter failing to provide them and us with a complete transcript, AUSA Michael C. Johnson filed motions to dismiss the case and requested that discovery be delayed even though he agreed with federal Judge R. Brooke Jackson that justice requires finding out what happened at the sidebar and deal with it. Let's analyze the exchange between Judge Jackson and AUSA Johnson from court records. Johnson is talking out of both sides of his mouth:

COURT: [i]f it turns out that contrary to her recollection Judge Arguello expressed herself in a way that reasonably could be understood by a layperson as ordering them to testify, if such a thing had happened, wouldn't the justice of this case be to know that and then to deal with it?...ultimately those of us who work for the federal government and the Justice department have a goal and that is to achieve justice.

AUSA JOHNSON: I agree, Your Honor.

COURT: And if -- I'm not saying it's even likely, I would rather think it might be improbable -- but if something occurred where a criminal defendant by inadvertence, let's say felt that he was forced to testify and objectively that a reasonable person could so interpret something that a judge said and if that person then took the stand when he otherwise would not have, that would not be just, would it?

AUSA JOHNSON: I agree, Your Honor, that would not. But those are not the facts of this case.

Notice how AUSA Johnson agrees with the Court that justice would be to determine what happened and deal with it, yet his actions to dismiss the case and stay discovery of the facts belie his words. Johnson clearly does not want justice, he wants to obstruct justice and is asking the Court through legal motions to obstruct/delay justice because blame leans towards the government. As I mentioned above, President Lincoln said that the government has a "duty...to render PROMPT justice against itself". Unfortunately, AUSA Johnson and U.S. Attorney John Walsh are conscienceless jurists who don't adhere to the high standards which justice demands. The United States Supreme Court in *Berger v. United States*, 295 U.S. 78 (1935) declared:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and who's interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which guilt shall not escape nor innocence suffer".

Canon 7 of the American Bar Association (ABA) Model Code of Professional Responsibility (1982) states: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict".

Conscience is defined as "consciousness of the moral right and wrong of one's own acts or motives". Judge Kiser, Judge Arguello, U.S. Attorney John Walsh, AUSA's Matthew Kirsch and Michael Johnson's respective actions in the Cantu and IRP6 cases are conscienceless. They have shown no respect for the high standards of justice set forth by their predecessors in the United States Supreme Court. They have shown no respect for justice or humanity. I am grateful and inspired by White House Counsel Kathryn Ruemmler who showed her humanity, compassion and respect for justice when she got involved to present the plight of Mr. Cantu to President Obama. I thank God that President Obama gave justice to Mr. Cantu. It is shameful that President Obama had to do the job of the Judicial Branch through the use of his clemency powers. Ms. Ruemmler and President Obama showed they were creatures of conscience unlike many of the jurists that wear the title of federal prosecutor and federal judge across this country. The transcript of federal Judge R. Brooke Jackson also shows he has a judicial conscience and is mindful and respectful of his duty to insure justice is done. I wish there were more jurists like him. If there were, I am sure that the IRP6 would not have suffered the loss of their freedom. Our families would not have suffered great pain and the loss of their husbands and fathers. Our fight continues...stay tuned.