

BAILIWICK NEWS

Reporting and critical analysis of Centre County public affairs

December 16, 2016

2017 District Attorney race highlights prosecutor accountability to voters, jurors and defendants.

Part 1 in a series reporting on law enforcement principles as prioritized by incumbent District Attorney Stacy Parks Miller and challenger Bernard Cantorna in their public work on criminal and civil cases.

By Katherine Watt

INTRODUCTION

State College trial attorney Bernard Cantorna announced in late November that he is seeking the Democratic nomination for District Attorney, challenging incumbent Stacy Parks Miller. The primary election will be held Tuesday, May 16.

The District Attorney is a county elected office. Once elected, the DA is the county's chief law enforcement officer, working on behalf of the state to prosecute individuals charged with crimes. Parks Miller was first elected in November 2009, sworn in January 2010, and re-elected in 2013.

The race between Parks Miller and Cantorna is interesting for at least two reasons. Cantorna is a criminal defense attorney, so he and Parks Miller are often adversaries during Centre County criminal proceedings, including the Jalene McClure trial held in September 2014, appealed throughout 2015 and 2016, and now scheduled for retrial in February 2017.

Second, they have been adversaries for the past two years in complex federal litigation surrounding public discussion of Parks Millers' conduct while in office.

TIMELINE

2012

In April 2012, Centre County court reporter Maggie Miller was involved in a conversation with Common Pleas Judge Bradley Lunsford during a recess in the four-day *Commonwealth v. Randall Brooks* criminal trial, April 17 to 20. During the conversation, Lunsford told Miller that he and District Attorney Parks Miller were texting to each other during the trial. Lunsford complained that through texts, Parks Miller was "bitching to him" about the way Judge Lunsford handled some objections and how he was handling the trial. Miller consulted with Lunsford's secretary, Joan Parsons, who confirmed that Lunsford regularly texted during trials. Shortly after the incidents, Maggie Miller discussed the issue with Sean McGraw who was, at the time, working as an assistant DA in Parks Miller's office.

2013

In late spring or early summer of 2013, the Pennsylvania State Police informed Parks Miller that a convicted inmate at the Centre County Correctional Facility (Ryan Richard) had told a fellow inmate awaiting trial (Robert Albro) that Richard wanted to hire someone to kill an Assistant District Attorney (Nathan Boob).

Parks Miller responded to the threat by developing a plan for a sting operation to use Albro as a confidential informant able to recruit an assassin and arrange for the hit man to visit Richard in prison to discuss the terms of the contract, to collect evidence needed to charge Richard with a "murder for hire" solicitation.

By June 5, 2013, Parks Miller was part of an email thread discussing the sting operation with Albro's defense attorney (Matt McClenahan), Assistant DA Boob, several state troopers, and a Pennsylvania Deputy Attorney General (Patrick Leonard) serving under then-Attorney General Kathleen Kane.

A key element of the sting operation called for a bail order decreasing the bail amount for Albro, to deceive Richard into thinking Albro had been released, and increase the plausibility of Albro's claim that he could make contact with a contract assassin.

On Sept. 9, 2013, Michelle Shutt – Parks Miller's paralegal – filed a bail order that appeared to bear Centre County Common Pleas Judge Pamela Ruest's signature with the Centre County Prothonotary. The order was dated July 18, 2013, time-stamped filed as of 10:55 a.m. on September 9 and entered into the online public database of court records.

2014

More than two years after the Randall Brooks trial – in September 2014 – Centre County defense attorney Bernard Cantorna was defending his client (Jalene McClure) during a trial resulting from serious injury sustained by a small child enrolled in McClure's day care program. Cantorna observed that the case seemed to be "fixed" between Assistant District Attorney Lindsey Foster and Judge Bradley Lunsford, based on a sequence of pretrial, trial and post-trial rulings appearing to give the prosecutors preferential treatment, by, for example, granting unfounded objections. McClure was convicted, prompting a series of post-trial motions and appeals.

Cantorna described his experience to McGraw – who had since left the DA's office and entered private practice. In response, McGraw shared Maggie Miller's account of Lunsford's texting from the bench during the Randall Brooks trial in 2012. Cantorna obtained Miller's sworn

testimony by affidavit in May 2015, and used the affidavit to support McClure's appeals.

In further follow-up, Cantorna filed a request under the 2008 Pennsylvania Right to Know Law with Centre County Administrator Timothy Boyde, who also served as the designated county administration Right to Know officer. Cantorna was concerned that text messaging had prejudiced his client's interests, and requested phone and email records between Judge Bradley Lunsford, DA Parks Miller, and two assistant district attorneys – Nathan Boob and Lindsay Foster – before, during and after the Sept. 8 – 11, 2014 McClure trial. Cantorna directed his document request to Boyde because Centre County government pays the Verizon phone bills for District Attorney's office staff and Centre County judges, placing the phone records in the physical control of the County administration.

Boyde provided Cantorna with Verizon records showing the dates and times of communications, but not the contents. Among more than 800 messages exchanged by Judge Lunsford and the three prosecutors between McClure's jury selection (August 4) and October 10, were 100 text messages exchanged between Lunsford and Foster between 8 a.m. and 5 p.m. on the September trial dates, while the judge was sitting on the bench.

Over the next several months, the initial revelations prompted several other local defense attorneys, including Andrew Shubin, Sean McGraw, Theodor Tanski and Justin McShane, to file Right to Know requests about other time intervals, judges, and prosecutors, to discover whether texting and phone communications had undermined the impartiality of their clients' trials, and to file motions for new trials, new sentencing and recusal of the judges and prosecutors involved in the texting controversy.

Parks Miller and the named judges filed lawsuits to stop the Right-to-Know responses and to prevent information that Boyde had released to individual attorneys from being made public. In December 2014, Centre County President Judge Thomas King Kistler issued an order barring Judge Lunsford from hearing any criminal cases other than DUIs, in an apparent effort to allay public concerns about the compromised judiciary.

By that time (December 2014), paralegal Michele Shutt had left the DA's office and accepted a paralegal position with State College defense attorney Philip Masorti. Local defense attorneys were increasingly sharing their observations of potential improprieties that may have affected the fairness of their clients' trials with each other. Shutt provided testimony supporting their analysis when she swore in a Dec. 30, 2014 affidavit that she had witnessed DA Parks Miller sign Judge Ruest's signature on the Albro bail order, and then filed the forged order at Parks Miller's direction.

2015

In January 2015, Masorti reported Shutt's forgery allegation to the Bellefonte Police Department and to the Disciplinary Board of the PA Supreme Court for investigation. As supporting evidence, Masorti gave police Shutt's affidavit, and copies of the disputed bail order and contemporaneous emails between Parks Miller, Shutt and others involved in the sting operation.

In mid-January, Parks Miller reported the Shutt forgery allegations to the Office of Attorney General, under a provision of the Commonwealth Attorneys Act. The Office of Attorney General, at AG Kathleen Kane's direction, referred the case to the 37th Statewide Investigating Grand Jury meeting in Pittsburgh under the supervision of Cambria County President Judge Norman Krumenacker III, despite a potential conflict of interest for the OAG, because at least one deputy attorney general (Patrick Leonard) was directly involved in the underlying sting operation supported by the disputed bail order.

On Jan. 20, Cantorna and another local defense attorney, Andrew Shubin, spoke to Centre County commissioners during the commissioners' public meeting. Shubin and Cantorna asked the commissioners to seek judicial appointment of a special prosecutor under a provision of the County Code. The commissioners responded by voting unanimously to launch an independent investigation under the County Code provision.

Meanwhile, Bellefonte Police Department officers had been investigating Masorti's report, Shutt's affidavit and the supporting emails, by interviewing Judge Pamela Ruest; by obtaining a search warrant through an affidavit of probable cause signed by a Clinton County judge (Craig Miller); and by serving the warrant on Parks Miller's office on Jan. 24 to seize records and electronic devices.

At the end of the month, Parks Miller's personal attorney (Bruce Castor) wrote to the Centre County Commissioners on Parks Miller's behalf, directing the commissioners to suspend the investigation that had been launched under the County Code provisions. Castor also filed a petition for return of the property seized by police during the Jan. 24 search.

In early February, the parties met before Judge Krumenacker (supervising the statewide Investigating Grand Jury tasked by the OAG with the investigation). By March, Krumenacker had directed the Centre County Commissioners to suspend their parallel investigation, and the Bellefonte Police Department had also suspended its investigation. The Disciplinary Board works in secret; the public does not have access to its findings, or whether it investigated Masorti's report at all.

Investigating Grand Juries

The investigating grand jury is one tool in the public toolbox for holding government officials accountable for apparent criminal misconduct and corruption. It's a group of ordinary citizens from a community called to work together to investigate alleged wrongdoing within their community.

By law, grand juries meet in secret. Witnesses are not cross-examined, and presented evidence is not subject to an adversarial, public fact-finding process. The burden of proof is minimal. Only the final report is published; the supporting records are sealed.

The presentment of an investigating grand jury is only an accusation or recommendation, similar to a criminal complaint and affidavit of probable cause filed by police. Grand juries do not have the power to charge, indict,

arrest, try, determine guilt or innocence, or imprison. The decision about whether to charge the target with a crime remains in the hands of the prosecutor, and the determination of guilt or innocence remains in the hands of the trial judge or jury if the case goes to trial. If the investigating grand jury's report leads to a criminal charge and trial, the prosecution will have to meet the "beyond a reasonable doubt" burden of proof at trial to obtain a conviction.

Grand jury secrecy has two main purposes. It protects grand jury targets from reputational damage in the event that they are not charged with the crimes for which they're being investigated, and it protects witnesses from retaliation by targets, to encourage full witness testimony.

However, because there is no public oversight of the process, evidence can be suppressed and non-credible witnesses can present evidence without being subjected to cross-examination, tainting the grand jury's published recommendations. If the targeted individual is wrongly accused, the subsequent public trial will provide an opportunity to clear his or her name. If the targeted individual is wrongly cleared, the public has no recourse through appellate review of the investigating grand jury's process or decision.

2015, continued

The year wore on, and the Right-to-Know cases were assigned to Huntingdon County Common Pleas Judge Stewart Kurtz. Kurtz heard oral arguments and reviewed emergency injunctions in early April. In May, Kurtz ordered Centre County Administrator Boyde to stop responding to Right to Know requests for communications to and from Parks Miller, other District Attorney staff members and Centre County judges. Mary Lou Maierhofer, the county officials' attorney, appealed Kurtz's orders to Commonwealth Court. (Details to be covered in future *Bailiwick News* reporting.)

Also in May 2015, Maggie Miller filed her sworn affidavit. She testified: "Judge Lunsford told me that he and the District Attorney were texting to each other during the four-day [Brooks] trial [in April 2012]. Then he complained that through texts, Stacy Parks Miller was 'bitching to him' about the way Judge Lunsford handled some objections and how he was handling the trial."

Cantorna attached Miller's affidavit to an appeal to Superior Court, seeking to overturn the September 2014 conviction of his client, Jalene McClure. Cantorna argued McClure was "denied a fair trial and that Judge [Lunsford] should have recused himself due to the existence of hundreds of text messages between the Court and the District Attorney's office; *ex parte* [one-sided] communications...and patently false statements made at the [Oct. 30, 2014] motion for recusal hearing." (Source: Cantorna's Oct. 20, 2016 motion to preclude McClure's retrial, at p. 1)

July 2015 – Key Turning Point

In late July, the public paper trail for the Investigating Grand Jury meeting under Krumenacker's supervision

reemerged, when the grand jury released its final report, finding that there was not enough evidence to charge Parks Miller with forgery.

Upon release of the grand jury report, Parks Miller convened a press conference, equating the grand jury's conclusion that there was a lack of evidence supporting a criminal charge with a finding of innocence. Parks Miller interpreted the grand jury report as "findings of fact" that rendered the preceding allegations false and the individuals involved in reporting and testifying about the disputed bail order as liars subject to civil liability for their misrepresentations.

A month later, on Aug. 28, Parks Miller filed a civil defamation suit in Centre County Court of Common Pleas, against Centre County as a government entity and 11 individuals who participated in reporting the forgery incident and initiating the investigations, including county commissioners, a county solicitor, a county administrator, a sitting county judge, and several local defense attorneys including Bernard Cantorna.

In her complaint, Parks Miller claimed that the defendants had breached fiduciary duties owed to Parks Miller; defamed her; placed her in a false light; published injurious falsehoods about her; engaged in malicious prosecution and common law abuse of process; committed negligent acts and acts of legal malpractice; intentionally or negligently inflicted emotional distress on her; engaged in concerted tortious conduct and conspiracy against her; and violated her Fourteenth Amendment due process rights, her Fourth and Fourteenth Amendment privacy rights, and her First Amendment free speech rights. By October, the case had been moved to US District Court, based on the federal civil rights claims.

During briefing rounds from late October 2015 through January 2016, the defendants moved for dismissal, arguing that Parks Miller had failed to state any valid cause of action and failed to provide factual evidence to support her claims, and that the defendants held various immunities to civil liability and their communications held various privileges. (Part 2 of this series will include detailed reporting on the legal arguments made in the briefs.)

The defendants, including Cantorna, made it clear that they didn't share Parks Miller interpretation of the legal significance of the grand jury's report; her confidence in the impartiality of the grand jury process; her expansive interpretation of her privacy rights as a public figure; or her narrow interpretation of the defendants' free speech rights as citizens and public officials.

2016 – Federal Defamation Litigation

In March 2016, US District Judge Matthew Brann held a hearing in Williamsport on Parks Miller's federal defamation suit. On April 1, 2016, as public scrutiny of Pennsylvania Attorney General Kathleen Kane's leadership intensified, Lizzy McLellan, writing for the *Legal Intelligencer*, reported that OAG sources said Kane intervened in the Krumenacker statewide grand jury investigation to ensure that the jury would clear Parks Miller of the forgery charges.

In May 2016, Judge Brann dismissed all of Parks Miller's claims against paralegal Michelle Shutt; Centre

County defense attorneys Bernard Cantorna, Philip Masorti, Andrew Shubin and Sean McGraw; Centre County Court of Common Pleas Judge Pamela Ruest; and the Centre County government entity.

In dismissing the claims against Cantorna and the other defense attorneys, Brann ruled that the defense attorneys did not owe Parks Miller any fiduciary duty or duty of care; they didn't "aid and abet" Shutt in any breach, because Shutt did nothing wrong and there was probable cause supporting the forgery allegations; they didn't make any defamatory statements when they publicly expressed disapproving opinions of the District Attorney; they didn't make any false or misleading statements; and that since they didn't do anything wrong, there was no claim against them for concerted tortious conduct or conspiracy.

In dismissing all claims against Centre County government officials in their official capacities, based on governmental immunity, Brann emphasized that county officials' public discussion of District Attorney conduct was of legitimate and significant public concern.

Brann wrote, citing several previous cases:

"This sweeping immunity is not for the benefit of high public officials but for the benefit of the public." "Absolute privilege is designed to protect the official from the suit itself, from the expense, publicity, and danger of defending the good faith of his public actions before the jury. And yet, beyond this lies a deeper purpose, the protection of society's interest in the unfettered discussion of public business and in full public knowledge of the facts and conduct of such business." (Source: Brann's May 11, 2016 memorandum opinion dismissing claims against County defendants acting in their public capacity, at p. 18)

Brann also dismissed all but one claim against the three county commissioners, county solicitor and county administrator in their individual capacities. He allowed Parks Miller to file an amended complaint to present facts to support her claim that the county officials personally violated her Constitutional (Fourth Amendment) privacy rights. Brann directed Parks Miller to show that the county officials individually participated in the Jan. 24, 2015 search and seizure of Parks Miller's property during the Bellefonte Police Department's initial investigation, or individually helped to establish illegal search and seizure practices as the official policy of the Centre County government.

On June 1, Parks Miller filed a second amended complaint, regarding the Centre County defendants acting in their individual capacities. Her primary allegation was that the Bellefonte Police Department executed the January 2015 search warrant without probable cause. She did not name the Bellefonte Police Department or any of its employees in any of her filed complaints, nor did she allege that any Bellefonte police officers lied in the process of applying for the search warrant. Parks Miller based her claims on her allegation that Shutt and Ruest lied in their statements to Bellefonte police officers.

On July 29, Michelle Shutt filed a defamation suit against Parks Miller.

On August 15, a jury found Attorney General Kathleen Kane guilty of perjury.

On Sept. 1, Judge Brann dismissed the remaining claims against Centre County officials, ruling that probable cause for the search and seizure of Parks Miller's records existed.

On Sept. 29, Parks Miller appealed Brann's dismissals to the US Court of Appeals for Third Circuit. The Third Circuit clerk issued a scheduling order on Dec. 6, directing Parks Miller to file her brief by Jan. 17, 2017.

2016 - McClure Appeal

Meanwhile, Cantorna continued advocating for McClure through the Superior Court appeal process. On Aug. 8, the Pennsylvania Superior Court reversed the conviction and ordered a new trial for McClure, currently scheduled for February 2017.

The three-judge panel (Victor Stabile, Jack Panella and James Fitzgerald) did not address the texting and *ex parte* communications issues raised by Maggie Miller's affidavit and the Verizon phone records.

Instead, they based their ruling on other prosecutorial and judicial actions during McClure's first trial. The panel ruled that "the Commonwealth had introduced evidence related to Ms. McClure's divorce in August 2012, two years after the events giving rise to the case...that the testimony was irrelevant, unfairly prejudicial and violated the Spousal Privilege Rule...further grounds for retrial were the admission of a redacted written statement of Ms. McClure and allowing the arresting officer to give his opinion on the credibility of Ms. McClure." (Source: Cantorna's Oct. 20, 2016 motion to preclude McClure's retrial, at p. 2)

On Aug. 25, Jalene McClure was released on bail pending her retrial. On Oct. 20, Cantorna filed a motion to preclude McClure's retrial as barred by double jeopardy due to prosecutorial misconduct as evidenced by (among other acts) texting/*ex parte* communications between prosecutors and Judge Lunsford. Cantorna wrote: "The issue before this court is whether the prosecutor's actions were intentionally undertaken to prejudice the defendant and whether the pervasive acts of both the prosecutor and the Judge pollute the proceedings to a point where Double Jeopardy bars a retrial of the case."

On Nov. 29, Cantorna announced his campaign challenging Parks Miller for the District Attorney position.

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