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 McClenahen), 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 Millers' 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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BAILIWICK NEWS

Reporting and critical analysis of Centre County public affairs

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Digging into original criminal allegations made against District Attorney Stacy Parks Miller.

By Katherine Watt

Part 2 in a series reporting on law enforcement principles as prioritized by incumbent DA Stacy Parks Miller and challenger Bernard Cantorna in their public work on criminal and civil cases.

INTRODUCTION

The first part of this series provided a timeline of events related to several Centre County criminal and civil justice issues: a sting operation designed by Parks Miller to obtain evidence in a murder-for-hire plot; Centre County defense attorneys' concerns about Parks Miller's potentially unethical and/or illegal actions related to the sting operation and other criminal prosecutions, including the McClure trial; multiple investigations into the alleged misconduct of District Attorney staff members; Right-to-Know requests, denials and court appeals; and a retaliatory civil lawsuit filed by Parks Miller against her critics.

For the second installment, I had planned to focus on detailed descriptions of the legal arguments made in the civil litigation briefs filed between October 2015 and January 2016.

However, while re-checking the source documents this week, I found information that prompted me to focus this second installment instead on the original criminal allegations and how they were handled by the only investigation that, so far, has been carried through to a final, public report: the investigation conducted by the 37th Statewide Investigating Grand Jury in 2015.

The investigating grand jury, as reported last month, was supervised by Cambria County President Judge Norman Krumenacker. The grand jury received the case after Parks Miller referred it to the Office of Attorney General, then under the control of AG Kathleen Kane, and the OAG referred the case to the grand jury.

The referral process had several effects. By mid-March 2015, the grand jury's work stopped the Bellefonte Police Department investigation and the Centre County commissioners' pursuit of an independent investigation, both initiated in January 2015.

By August 2015, just a few weeks after the grand jury released its final report, Parks Miller and her attorney (Bruce Castor) used it as the basis of a pivot maneuver, diverting public attention toward the potential civil liability of Parks Miller's critics, away from further public consideration of Parks Miller's potentially criminal actions – and the effects of her actions on the credibility of the Centre County court system of which the prosecutor's office is part.

In the pivot process, a rather important public question got lost. Do the ends – possibly catching "bad guys" – justify any means, including means that compromise the integrity of the Centre County court's public records repository and the criminal justice system overall?

This report includes an overview of the evidence of Parks Miller's potentially criminal acts, followed by overviews of the relevant statutes and standards.

Next, it presents conflicting analysis of the relevance of the grand jury's findings, offered by Parks Miller, Cantorna, Mary Lou Maierhofer, Kathleen Yurchak and other local attorneys involved in the controversy.

The report includes a brief account of US District Judge Matthew Brann's questioning of Parks Miller's attorney, Bruce Castor, regarding the authenticity of the disputed bail order.

The report concludes with a closer look at the "tampering with public records" aspect of the case, followed by critical analysis of Parks Miller's demonstrated beliefs about her position within the Centre County criminal justice system and the role of engaged citizens in providing oversight to public officials.

Evidence of Misconduct: Three Documents

June 5 – Sept. 9, 2013 Email Thread

In late December 2014, Parks Miller's former paralegal, Michelle Shutt, provided State College attorney Philip Masorti with a copy of a July 18, 2013 bail order bearing the signature of Centre County Court of Common Pleas Judge Pamela Ruest, and copies of a supporting email thread describing the bail order as "fake."

Shutt also swore an affidavit that, on Sept. 9, 2013, she witnessed Parks Miller sign Judge Ruest's signature on the fake bail order and had, at Parks Miller's direction, filed the fake bail order with the Prothonotary, entering it into the Centre County court's public record system.

Masorti provided that set of documents to Bellefonte police investigators on Jan. 6, 2015 and the police opened an investigation into three potential crimes: forgery, tampering with public records, and theft of services.

Masorti also provided the information to the Disciplinary Board of the Supreme Court of Pennsylvania, as evidence of violations of attorney ethics rules. The status of the disciplinary board investigation is unknown; the board works in secret.

The email thread began around June 5, 2013. On that date, Parks Miller and Deputy Attorney General Patrick Leonard discussed a confidential informant's demand for "time-served" in exchange for cooperating in a sting operation intended to collect evidence to charge another inmate in a "murder for hire" plot.

The thread concluded on Sept. 9, 2013 with an email from Parks Miller to Matt McClenahen, the confidential informant's attorney, and DAG Leonard. (*Typographical errors in original*.)

> "Matt: Attached is the fake Albro bail Order appearing to set his bail to 10% of 100k. Backdated to the date of Pretrials in an attempt to make it look like an oral motion and to make it look like it would correspond with the time period he was "granted release". (He supposedly said he raised the 10% and then he got out the last day of the month or the 29th.) He also is lodged in Clearfield as Robert Halbro. If you look for him in the inmate locator system, it says he is released even though he is safely tucked away in Clearfield.
>
> Please remember, we have an agreement, I would prefer he not even see the Order so that he does not get confused or ambitious. This is only for cover in the event someone is trying to scope out his situation. And you and I have a specific agreement that he would not act on it as this is not a "real" Order, not authorized by the Attorney General OR THE JDUGE, beyond the "ruse" to place it on the record to protect the plan at this point. Neither the Judge nor the Attorney General agrees that his bail be modified in any manner below $100,000 straight. This is simply to further the public's view of him as being "out.", which is what he wanted. Please write back and assure me you understand the terms of this Order and that you and your client will not act on it." (*Source*: June 5 – Sept. 9, 2013 email thread)

Jan. 24, 2015 – Affidavit of Probable Cause

Following up on Masorti's police report filed Jan. 6, 2015, Bellefonte detective Robert Ruggiero began an investigation. By January 24, he had prepared an affidavit of probable cause seeking judicial approval of a search warrant to seize Parks Miller's computer and other records for further investigation.

Ruggiero listed three state laws that Parks Miller had allegedly violated, on the "Violations" page of his affidavit.

Those alleged crimes included: "Forgery, Title 18 Pa.C.S. §4101; Tampering with Public Records or Information, Title 18, Pa.C.S. §4911; Theft of Services, Title 18 Pa.C.S. §3926(b)."

In support, Ruggiero laid out the sequence of events, including the email thread, the bail order in the public record, Shutt's sworn testimony that she witnessed Parks Miller sign Judge Ruest's signature on the disputed bail order and then filed it with the Prothonotary at Parks Miller's direction; and Ruest's statement that she couldn't recall signing the order and couldn't tell if the signature on it was authentic or not.

Judge Craig Miller of the Clinton County Court of Common Pleas approved the search warrant. (*Source*: Jan. 24, 2015 Affidavit of Probable Cause.)

As reported in *Bailiwick News* Dec. 16, 2016, the Bellefonte Police Department investigation was quickly suspended, after Parks Miller referred the case to the Office of Attorney General, which then referred it to the 37th Statewide Investigating Grand Jury.

July 31, 2015 – Investigating Grand Jury Report

Throughout a report released July 31, 2015, the Grand Jury referred to the disputed bail order as the "phony bail order" and the "fake bail order." The jury noted: "All parties understood that the bail order would never be acted upon and that it had no legal validity." (*Source*: IGJ report, p. 6). The jury further noted: "[Parks Miller] stressed that the order was not real…" (*Source*: IGJ report, p. 7).

Based on the information made available to them, the jury concluded: "we believe that the signature on the 'fake bail order' is in fact the signature of Judge Pamela Ruest and criminal action should not be taken with regard to the forgery claim. Further any allegation of tampering with records or identification is also unfounded as it is clear from the evidence presented that there was no intent to injure or harm another; to the contrary, the intent was to protect Mr. Boob from a murder for hire plot." (*Source*: IGJ report, p. 8)

The jury did find evidence of theft of services, in that they found Parks Miller had used Shutt to do campaign-related work valued at about $224. The jury concluded: "the infraction is *de minimis* at best and no criminal action should be taken." (*Source*: IGJ report, p. 8)

LEGAL STANDARDS - CRIMINAL

The discrepancy I noticed this week, triggering the change in reporting focus, is that the grand jury examined the fake bail order evidence against a different statute than the one cited by Detective Ruggiero in his affidavit of probable cause.

The grand jury listed the statute for "Tampering with records or identification," (§4104) which falls under Title 18, Article C: Offenses Against Property, Chapter 41: Forgery and Fraudulent Practices, and is a first-degree misdemeanor or, in some cases, a summary offense. (*Source*: IGJ report, p. 2)

18 Pa.C.S. §4104 states a person has committed the offense if he or she:

> "knowing that he has no privilege to do so, falsifies, destroys, removes or conceals any writing or record…with intent to deceive or injure anyone or to conceal any wrongdoing"

Ruggiero, however, listed §4911, "Tampering with *Public* Records or Information," (emphasis added) which

specifically deals with public, governmental records. It falls under Article E: Offenses Against Public Administration, Chapter 49: Falsification and Intimidation, Subchapter A: Falsification and perjury in official matters.

18 Pa.C.S. §4911 states a person has committed the offense if he or she:

> "(1) knowingly makes a false entry in, or false alteration of, any record, document or thing belonging to, or received or kept by, the government for information or record, or required by law to be kept by others for information of the government;
>
> (2) makes, presents or uses any record, document or thing knowing it to be false, and with intent that it be taken as a genuine part of information or records referred to in paragraph (1) of this subsection..."

Understandably, tampering with public records in official matters is a more serious crime than tampering with private records. It's a second-degree misdemeanor if committed *without* intent to defraud or injure, and a third-degree felony if intent to defraud or injure is proven.

A conviction at the second-degree misdemeanor level carries a sentence of up to two years incarceration and no more than $5,000 in fines. A conviction at the third-degree felony level carries a sentence of up to 10 years incarceration and no more than $25,000 in fines.

LEGAL STANDARDS - CIVIL

Throughout the ensuing defamation litigation, Parks Miller has insisted that the July 2015 grand jury report comprised "findings of fact," rendering all contrary statements false.

For example, in making claims for "injurious falsehood," Parks Miller argued that her professional reputation as District Attorney is her business, and that the statements made by the defendants to police, county commissioners and the grand jury during investigations into Parks Miller's actions tarnished her reputation.

She claimed the defendants knew their statements were false, or made them with reckless disregard for their truth or falsity, and that they should have known that publishing the false statements would cause her monetary losses.

Defendants argued that their statements were true and supported by sound evidence that Parks Miller had engaged in forgery, tampering with public documents and theft of services; that their intent was to report evidence of wrongdoing to authorities for full and impartial investigation; and that they had serious doubts about whether the investigation conducted by the grand jury met the full and impartial standard.

Attorney Mary Lou Maierhofer, representing the Centre County government defendants, highlighted those concerns in a January 2016 brief.

Maierhofer wrote: "[Parks Miller] fails to cite to case law or any authority to support her conclusions that the Grand Jury investigation was a criminal proceeding being favorably terminated in her favor. Case law cited by [the County defendants] as well as other named Defendants clearly contradict [Parks Miller's] legal position." (*Source*: Jan. 8, 2016 County brief, p. 3-5)

Maierhofer cited "*Commonwealth v. Slick*…(Pa.Super. 1994), [in which] the Court stated, '...the presentment of an investigative grand jury is a written formal *recommendation*, see 42 Pa.C.S.A. §4542, with the power to indict being withheld specifically from that same body, Id at §4548(c), and reserved to the prosecutor.' "

She cited 42 Pa.C.S.A. §4551(e): "When the attorney for the Commonwealth proceeds on the basis of a [grand jury] presentment, a complaint shall be filed and the defendant shall be entitled to a preliminary hearing as in other criminal proceedings."

Maierhofer concluded: "the [grand jury] 'Recommendations/Findings' are not a criminal proceeding…any claims based upon prosecution for the Grand Jury investigation and subsequent determination, are an incorrect application for the role and results of a grand jury investigation." (*Source*: Oct. 2, 2015 County brief, p. 6-7)

Further, to support her claim that the grand jury's impartiality was compromised, Maierhofer presented identical blocks of text quoted from a court petition filed by the Office of Attorney General in February 2015 (part of an effort to halt the parallel independent investigation launched by the county commissioners) and from the July 2015 report issued by the grand jury.

Maierhofer concluded: "The similar wording between the two writings calls into question the influence (or agenda) by the OAG in conducting the Grand Jury, and how much impartiality actually was present during the process. The findings cannot be "unbiased" based upon those writing." (*Source*: Jan. 8, 2016 County brief, p. 3-5)

Shutt's attorney, Kathleen Yurchak, raised additional questions about the impartiality of the grand jury, in the context of a discussion of Parks Miller's claim that the grand jury's findings rendered Shutt's testimony false. If Parks Miller's claim proceeded, to defend herself, Shutt would need an opportunity to prove her testimony was true, by unsealing the grand jury proceedings.

Yurchak wrote: "Shutt would begin with inquiring as to the qualifications of the experts and the 'independence' of the examination. Were the forensic examiners truly 'independent' or were they, in fact, partners in the same office. If they actually were partners in the same office, was the grand jury told this or were they led to believe otherwise? Why did the OAG conduct this investigation when its own officers were involved in the bail order? Were all existing emails and supporting documentation in the possession of the OAG provided to the Grand Jury? If not, why not?" (*Source*: Nov. 13, 2015 Shutt brief, p. 39-40)

The attorneys' view that the grand jury was compromised found additional supported in an April 1, 2016 report published in the *Legal Intelligencer*. Reporter Lizzy McLellan reported that OAG sources said Kane intervened in the grand jury investigation to ensure that Parks Miller would be cleared.

SCHRÖDINGER'S BAIL ORDER

On March 3, 2016, US District Judge Matthew Brann held oral arguments regarding Parks Miller's defamation suit against Shutt, Cantorna, Ruest, and the other local criminal defense attorneys and public officials.

Judge Brann started the hearing by reviewing Parks Miller's characterization of the disputed bail order as "fake" and "pretend," but also authentic, filed and actionable. Brann observed that in his career in the law, he'd never heard of a fake or pretend bail order and asked Castor to explain the concept.

Castor replied that the disputed order was real, in the sense that it was genuine and actionable. The order was formally filed and appeared in online databases accessible to the public, and the subject of the order could have posted bail and been released from prison.

But, Castor said, it was also pretend, in the sense that the subject of the order, through his attorney, agreed not to exercise his right to post bail, so that he could continue cooperating with state police. The goal was "to create a misimpression" for the target of the sting operation and his cohorts, that the confidential informant had been freed on bail.

Castor compared the bail order to government operations using fake lottery winning notifications to track fugitives, by drawing them in to claim non-existent money. Castor also cited the grand jury's July 31 report to argue that the forgery allegation that stemmed from the bail order was a "fallacy from the start," because the grand jury concluded there was "never an intention for it to be perceived as true" or relied upon, except "to fool a bad guy." (*Source*: Author's notes from March 3, 2016 oral arguments).

BRANN RULING CITED PROBABLE CAUSE

On May 11 and Sept. 1, 2016, Judge Brann dismissed all of Parks Miller's claims against paralegal Shutt; attorney Cantorna, Judge Ruest and all the other defendants.

In dismissing the claims, among other reasons proffered, Judge Brann found that there was probable cause supporting the forgery, records tampering and theft of services allegations. Parks Miller has appealed Brann's decisions to the Third Circuit Court of Appeals; her brief is due Jan. 17, 2017.

CRITICAL ANALYSIS

Tampering with Public Records and Intent to Defraud

Among the allegations levied against Parks Miller, I find the "tampering with public records" issue to be the most important. I think it affects the broadest range of victims: everyone who uses public court records for personal, business or governmental purposes, and benefits from confidence in their authenticity.

We don't know who changed the statute number as the investigation moved from the Bellefonte Police Department to the Office of Attorney General and on to the investigating grand jury.

But it's clear who benefited from the switch. Use of the lesser crime reduced the severity of a worst-case scenario for Parks Miller. If the grand jury recommended prosecution, she would face a first-degree misdemeanor or summary offense charge, rather than a second-degree misdemeanor or third-degree felony charge.

At the same time, the switch opened a path for the OAG prosecutors to focus grand juror attention past Parks Miller's physical actions, instead onto Parks Miller's intent.

This was useful because under the lesser charge, proof of intent is required; no intent means no crime committed.

However, under the standards for tampering with *public* records, proof of intent is only required to seek a third-degree felony conviction. Without proof of intent, a conviction is a second-degree misdemeanor.

To the extent that the grand jury's role is to assess probable cause, analogous to the probable cause assessment conducted Detective Ruggiero and approved by Judge Miller, the grand jury's findings in this case are invalid, because, among other irregularities, the OAG presented the jury with the wrong statute.

The evidentiary record shows that Parks Miller and her colleagues developed a plan to use a "fake" bail order; that she directed her subordinate (Shutt) to file the fake order with the Centre County Prothonotary on Sept. 9, 2013; and that Shutt obeyed the instruction and filed the fake order, which then entered the official public record as if it were authentic.

At a minimum – when lined up against the statute barring tampering with public records – that's evidence of a second-degree misdemeanor, even without proof of intent to defraud or injure.

I agree that there's little to no evidence Parks Miller intended to injure; she was clearly trying to protect a fellow attorney from a perceived threat.

But the statute uses intent to defraud *or* injure. And I do believe Parks Miller intended to defraud, because without such intent, there was no need for the "ruse" at all.

In Parks Miller's own words, the goal of the bail order scheme was to use a public government records repository "to further the public's view of [the confidential informant] as 'out'. "

The target of the deception was Ryan Richards, the inmate who allegedly asked the confidential informant for help hiring an assassin, and anyone Richards was in contact with, in or outside of prison, who could check the online database of court records and report back to Richards on the confidential informant's whereabouts.

The evidence from her own email also shows that she knew the created public impression was false, because she knew the confidential informant was, in fact, imprisoned in Clearfield County under a false name at the time the bail order was filed. That's evidence of a third-degree felony.

Of note: double jeopardy prohibitions don't apply at the level of grand jury investigations; they only kick in when a trial jury is empaneled. Thus Parks Miller remains vulnerable to additional investigation.

Holding Government Accountable to the Governed

Throughout her public service, Parks Miller has repeatedly drawn on the fact that she was elected by Centre County voters in 2009 and 2013, as evidence of her legitimate hold on public office.

She has extrapolated these election results to bar public criticism of her actions while in office, and she's backed up her belief in her non-accountability in non-election years by vigorously blocking public access to information (fighting Right to Know requests through the courts), diverting investigations to secret venues, and suing public critics for defamation.

In one particularly remarkable example, Parks Miller's claimed that the defendants were liable for Intentional and Negligent Infliction of Emotional Distress; she argued that reporting evidence of potential crimes to law enforcement authorities and requesting investigations represent "extreme and outrageous" conduct.

To build that claim, Parks Miller noted that the DA's office is so important that the person holding it must maintain the highest level of public trust. Therefore, she said, any allegation affecting public perception of the integrity of the District Attorney – and through the DA, the entire county criminal justice system – "weighs heavily on the mind of the DA," such that she suffered emotional distress and physical harm "not only for herself, but as the symbol of law enforcement as a whole in the County." (*Source*: Oct. 2015 amended complaint, p. 42)

I concur with Parks Miller that all Centre County citizens have a profound stake in maintaining accountable, impartial, transparent and trustworthy judicial systems.

However, I disagree with her apparent belief that her person and the office of Centre County District Attorney are one and the same, such that challenges to her individual actions are tantamount to attacks on the court system as a whole, and any identified problems with the legitimacy of the criminal justice systems are signs of malfeasance on the part of those who report the infractions, not those who commit them.

I disagree with her belief that possibly catching "bad guys" justifies any means, even violating the integrity of the Centre County court's public records repository and the judicial system overall.

I find those to be odd positions for the county's chief law enforcement officer to take. Taken to their logical conclusions, any citizen who calls the cops to report a crime and ask for investigation should, instead, be sued for undermining the public image of his or her neighborhood as crime-free. And crimes committed by law enforcement officers in the course of investigating other crimes should be ignored.

Blind, mute acceptance of all government agent actions – regardless of their legal or ethical character – is not, in my view, the best way to maintain community trust in the integrity of the courts, the criminal justice system, or any other government entity. For that matter, it's also not a great way to promote community respect for individual law enforcement officers performing their day-to-day work to protect public safety.

To ensure the full accountability of our government, we need accurate, timely, complete information. We need sound public institutions that properly protect the rights of those who are now, or may in the future, be subject to state power.

We're responsible for protecting ourselves not only from individual criminal acts, but also from systemic abuse of governmental power.

It's therefore essential for citizens to watch Parks Miller and all other government officials perform their public service; publicly criticize breaches of ethical and legal standards; promptly report evidence of wrongdoing to authorities; and consistently support independent, thorough investigations.

Trust in the legitimacy of the Centre County courts can't come from ignoring, hiding or excusing abuses of power. It can only be maintained – or in this case rebuilt – through publicly reporting, investigating and then stopping those power abuses.

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BAILIWICK NEWS

Reporting and critical analysis of Centre County public affairs

January 20, 2017

Centre County court texting controversy and the PA Right to Know Law

By Katherine Watt

Part 3 in a series reporting on law enforcement principles as prioritized by incumbent DA Stacy Parks Miller and challenger Bernard Cantorna in their public work on criminal and civil cases.

INTRODUCTION

As reported in earlier installments, January 2015 allegations of forgery, tampering with public records and theft of services triggered Centre County District Attorney Stacy Parks Miller to launch two parallel pivot sequences.

First, she removed the investigation from the Bellefonte Police Department and an independent prosecutor sought by Centre County Commissioners. Instead, she placed the investigation in the control of Kathleen Kane's Office of Attorney General and left a secondary investigation in the hands of the Disciplinary Board of the Pennsylvania Supreme Court.

The Statewide Investigating Grand Jury tasked by the OAG with the criminal allegations, and the Disciplinary Board examining reports of ethical breaches, both conducted their investigations, if any, in secret.

As reported in Part 2, the OAG also presented the investigating grand jury with the wrong statute to examine against the evidence, perhaps because Parks Miller's own emails provided clear evidence that she tampered with public records. The shift moved the jurors off of fact-finding onto her subjective intent.

Then, once the investigating grand jury released its report, Parks Miller immediately launched the defamation case, again pivoting from the facts about her actions, to the actions and motives of those reporting her conduct for review.

This installment looks at a third pivot sequence.

As defense attorneys began to understand how Parks Miller had abused her authority with the fake bail order in December 2014, they connected that sequence of events to an emerging pattern of prosecutorial misconduct whose other strands included *ex parte* communications: texting and phone calls between prosecutors and judges possibly containing discussions about criminal cases that improperly excluded defense attorneys, who were thereby unable to fully advocate for their clients.

The defense attorneys began filing Right to Know requests, to collect information about improper communications between prosecutors and judges.

Instead of releasing the full phone and text records for public examination to bolster public confidence in the integrity of the courts, Parks Miller and the judges deflected public attention away from the existence of and contents of the communications, by first obtaining injunctions against release, and then launching broad attacks on the Right to Know law and the citizens attempting to use it to hold government officials accountable to the governed.

This installment is organized into four main parts. First, it describes the prosecution of Jalene McClure at the investigation and trial court level, as defense attorney Bernard Cantorna used the Right to Know Law to obtain evidence of prosecutorial misconduct.

Next, the report covers similar efforts by other Centre County defense attorneys triggered by the information Cantorna obtained, and the initial deflection steps taken by Parks Miller and two county judges.

Third, it examines the McClure case at the Superior Court appellate level, followed by an account of the last few weeks of activity ahead of McClure's retrial, scheduled to begin in February.

Commonwealth v. McClure: Investigation and Trial

Investigation

In August 2010, Jalene McClure was running a daycare center at her home in Bellefonte. A five-month old female child was at the daycare center on August 18, and sustained a head injury.

McClure described the incident as an accidental trip and fall in an Aug. 23, 2010 written statement to police investigators. She said she stumbled over her flip-flop and toys on the floor while holding the baby, went down on one knee and in the process, bumped the back of the child's head first on a car seat and then on the floor. McClure said she comforted the baby and the baby calmed down within 15 minutes. A few hours later, after a feeding, the baby vomited and became fussy. McClure said she did not connect that behavior to the fall; she attributed it to fussy behavior observed throughout that week, possibly due to teething.

McClure reported to investigators that she informed the child's mother of the vomiting at pickup time but did not mention the fall. The mother drove the child to the emergency room, and the baby was admitted for treatment as doctors realized the baby had sustained head trauma.

When police returned to McClure's home later on August 18 to follow-up, she said no incidents had occurred at the daycare that day. However, on Monday, August 23, McClure initiated contact with the investigators and then gave the written statement describing the trip and fall incident. In her statement, McClure said that if she had believed the trip and fall incident was serious, she would have sought medical treatment for the baby and notified the parents immediately.

The investigation continued, and by October 2010, police and prosecutors had not developed enough evidence to charge McClure, and had relayed that status to a homeowners' insurance adjuster handling McClure's policy.

However, two years later in September 2012, McClure was arrested and charged with aggravated assault, simple assault, recklessly endangering another person, and two counts of endangering the welfare of a child.

Trial

The prosecutor's theory of the case was that McClure was stressed from the number of children at the daycare center, and the baby's fussiness, and that as a result, she lost control, intentionally and violently assaulting and shaking the baby.

Cantorna's defense theory of the case was that McClure was a "competent, experienced daycare provider" with 11 years of experience, who accidentally tripped and fell with the baby on August 18 and then failed to connect the fall with the vomiting a few hours later.

Cantorna brought up several key evidentiary issues during the pretrial period and the trial. Among other motions to Court of Common Pleas Judge Bradley Lunsford, he asked the court to exclude evidence of McClure's contentious divorce in August 2012 from testimony, as irrelevant, unfairly prejudicial and a violation of the Spousal Privilege Rule.

Lunsford allowed the divorce testimony to be presented to the jury.

Cantorna asked Lunsford to allow McClure's full Aug. 23, 2010 witness statement to be presented the jury, to rebut the motive suggested by a redacted portion presented by the prosecutors.

Lunsford denied the request.

Cantorna asked Lunsford to deny the investigating detective (Dale Moore) the right to give his opinion of McClure's credibility to the jury, arguing that credibility assessments are reserved for jurors.

Lunsford allowed Moore to give his opinion.

As a result of these and other rulings, Cantorna came to believe the McClure trial was "fixed" between Judge Lunsford, DA Parks Miller, and two assistant district attorneys: Nathan Boob and Lindsey Foster.

Post-Trial Motions

On the basis of his courtroom observations, and subsequent information about Facebook posts with photos of Judge Lunsford at social events with DA staff, Cantorna filed a motion on Oct. 13, 2014 asking Lunsford to recuse himself from sentencing based on the appearance of bias.

After filing the motion, Cantorna described his experience to Sean McGraw – who served as an assistant district attorney between 2010 and 2013, but had since entered private practice as a defense attorney. In response, McGraw shared court reporter Maggie Miller's account of Judge Lunsford's texting from the bench during the Randall Brooks trial in April 2012.

Pursuing that lead, on Oct. 23, 27 and 29, Cantorna filed a series of document requests under the 2008 Pennsylvania Right to Know Law with Centre County Administrator Timothy Boyde. Cantorna directed his document requests to Boyde because Centre County government pays the Verizon phone bills for DA staff and Centre County judges, placing the phone records in the physical control of the County administration.

Also on October 23, Cantorna filed a motion to preserve and produce evidence, to protect future access to the cell phones and cell phone records, to confirm or refute his belief that the texts were related to the trial.

On October 30, Lunsford held a hearing on the motion to recuse at which he and Parks Miller both flatly denied that any texting had occurred. Lunsford further denied the recusal request, denied the motion to preserve and produce evidence, and quashed Cantorna's efforts to obtain testimony from ADA Foster and ADA Boob.

The next day, October 31, Lunsford sentenced McClure to 10-20 years, significantly in excess of the sentencing guidelines for the charges.

Boyde responded to the Right to Know requests on or about November 6. He 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 (Parks Miller, Boob and Foster) between 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 McClure trial dates, while the judge was sitting on the bench.

By December 5, Centre County President Judge Thomas King Kistler had removed Lunsford from hearing any further criminal cases other than DUIs.

By the end of December, all of Cantorna's post-sentencing motions on McClure's behalf had been denied.

Related Right-to-Know Cases

While McClure's case was developing in late 2014 and early 2015, the initial phone records obtained by Cantorna 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.

Boyde fulfilled several of the requests, revealing extensive texting among Magisterial District Judge Kelley Gillette Walker (presiding over *Commonwealth v. Blake*), Common Pleas Judge Jonathan Grine (presiding over *Commonwealth v. Ryan Fleck*), and prosecutors.

Several of the defense attorneys then used the evidence in post-conviction motions on behalf of their clients, including McGraw's March 6, 2015 motion on behalf of Justin Blake.

On March 16, 2015, Grine and Gillette-Walker filed for emergency injunctions, to stop Boyde from fulfilling further requests and to stop the defense attorneys who had already obtained evidence of *ex parte* communications from releasing the information to the general public.

Parks Miller filed her own request for injunctions on March 23, alleging that Centre County had violated the Right to Know law, the Criminal History Record Information Act (CHRIA) and her own right of privacy by responding to the requests, on grounds that the District Attorney's office is a "judicial agency" and therefore exempt from disclosure of all but financial records, and that the phone records were not financial records.

The development of those Right to Know lawsuits through injunctions, appeals, and appellate rulings will be covered in upcoming installments of this series.

Commonwealth v. McClure – Appeal

In January 2015, Cantorna began the process of filing an appeal to Superior Court on McClure's behalf. He ultimately raised 11 issues for appellate review. Three of those were the Lunsford rulings outlined above: allowing evidence from the August 2012 divorce to be introduced; allowing only a redacted version of McClure's witness statement to be introduced; and allowing Detective Dale Moore to give the jury his assessment of McClure's credibility.

Two of the issues raised on appeal related to the allegations of improper text and phone communications between prosecutors and Judge Lunsford before, during and after the trial.

January 2015, for reference, was the same month that investigators began looking into allegations that Parks Miller had forged and filed a fake bail order.

Further, on Jan. 21, 2015, Michael Martin Garrett, writing for *statecollege.com*, reported that Judge Lunsford had improperly removed files from the public record – including preliminary texting evidence filed by Cantorna with his post-sentencing motion on McClure's behalf. Garrett used the Right to Know Law to obtain copies of correspondence surrounding Lunsford's tampering with the public record, including a letter written by Louis Glantz, then serving as Centre County Solicitor, to Lunsford.

Glantz wrote: "…each of the documents removed from the files by you involved you personally, specifically alleged interactions between yourself and the District Attorney's Office and alleged appearance of bias. Your removal of documents making these types of allegations could erode the public's confidence in the impartiality of the judiciary."

Garrett reported that many of the documents were later returned to the Prothonotary's office, after Lunsford was instructed as to proper procedures for maintaining court records.

Judge Lunsford's Opinion – April 2015

On April 30, 2015, Judge Lunsford filed his Opinion Regarding Matters Complained of on Appeal. He argued that the testimony on the McClure divorce was "observational" and only related to the 2010 timeframe, and therefore relevant.

Lunsford endorsed his ruling allowing only the redacted McClure witness statement, saying that he believed the portion withheld from the jury to be "self-serving" and "hearsay," and suggesting that McClure could have explained her actions by taking the stand to testify.

Lunsford endorsed his ruling allowing Detective Moore's credibility assessment, saying that "in context" the jury would have known anyway that Moore didn't believe McClure, because he charged her with the crimes.

In his opinion, Lunsford acknowledged that he had exchanged text messages with DA staff before, during and after the trial, but asserted they "did not concern Defendant or her criminal case."

He pointed out, "there has been no evidence introduced about the content of the text messages," but didn't acknowledge that it was his own denial of Cantorna's motion to preserve and produce evidence that made collection of that evidence impossible.

Lunsford further acknowledged that he had been "mistaken" when he denied the existence of the texts at the October 30 hearing, but said it wasn't fraud. "Judge Lunsford did not intend to perpetrate a fraud, he was just mistaken and did not recall right then that he sent the one text message to the District Attorney over lunch."

Lunsford announced his re-election campaign in June 2015, but dropped out of the race in September and is no longer serving as a judge.

Cantorna's Appellate Brief – August 2015

In his appeal, Cantorna laid out in detail the 11 grounds for reversal, and argued his allegations were well-founded.

He wrote: "[I]t was disputed whether there were text messages between the Judge and the district attorney and her staff. The court not only made findings of fact regarding these issues, it quashed subpoenas that would have revealed relevant information…In Ms. McClure's case, there was more than an appearance of impropriety. When a Judge and District Attorney make statements on

the record which are patently false, denying social media postings and text messages that exist, this evidences a bias and calls into question the rulings and conduct of the entire trial."

In November 2015, Bruce Castor filed a brief on behalf of the prosecution, supporting Lunsford's analysis of his McClure case rulings as sound.

Superior Court Ruling – August 2016

In an August 8, 2016 opinion drafted by Superior Court Judge Victor Stabile, a three-judge panel vacated McClure's sentence and remanded the case for a new trial, now scheduled to begin in February 2017.

The appellate court found that Judge Lunsford erred in three ways that were "not harmless:" by allowing the prosecutors to introduce evidence about the McClure's contentious 2012 divorce "not even remotely restricted" to the 2010 time period; by ruling that McClure's witness statement could be presented to the jury in redacted form only; and by allowing Detective Dale Moore to make credibility assessments of McClure for the jury.

However, the Superior Court panel wouldn't touch the two *ex parte* communications issues: whether the text message record, the social media posts, and the false statements by Lunsford about the texts raised reasonable questions about Lunsford's bias and impartiality, and whether there should be a separate hearing on the contents of court reporter Maggie Miller's affidavit, regarding *ex parte* texts in the April 2012 *Commonwealth v. Brooks* trial. The appellate panel said those two issues were moot for the time being, because they had vacated McClure's sentence, remanded the case back to the county court for a new trial, and because Lunsford had retired from the bench.

McClure was released on bail on August 25, 2016.

Commonwealth v. McClure – Retrial Preparation

In preparing for the new trial, Cantorna again filed several motions. On October 20, 2016, he filed a Motion to Preclude Retrial Based on Double Jeopardy. Again, he presented the preliminary evidence of *ex parte* communications through texts and phone calls between judges and prosecutors, giving the appearance of bias to the extent that the communications may have been about the cases before the judges, and the fact that, without access to the content, there's no way to know for sure.

Cantorna's motion concluded with a request for an order of discovery and production to obtain the cell phones and the content of the texts, an evidentiary hearing, and an order barring retrial.

In November and December, Judge Kistler (Centre County president judge) authorized subpoenas for Parks Miller and Lunsford, directing Parks Miller to appear at a hearing on November 22, bringing "copies of all text messages" between Parks Miller, ADA Boob, ADA Foster, and Judge Lunsford between August 4 and October 29, 2014. Lunsford was directed to appear December 9, with much the same information.

Out-of-county Judge Michael Williamson of the Clinton County Court of Common Pleas presided over the two hearings. However, Lunsford sought to quash the subpoena. Although Williamson denied the motion, Lunsford has refused to testify, so far without penalty.

By order December 22, Williamson denied Cantorna's motion to bar McClure's retrial. He wrote that while he had attempted to "determine the accuracy" of misconduct allegations, "our efforts have been thwarted" by Lunsford's refusal to testify, and the Judicial Conduct Board's refusal to cooperate with the investigation.

He wrote: "We are deeply disturbed by the incredible number of text communications between Lunsford and members of the District Attorney's Office before and after Defendant's trial, but most particularly during the trial…Unfortunately, no evidence has been disclosed concerning the exact language of the extensive text messaging. One reason for this is that the communication devices used by Lunsford, Foster, Parks Miller and others in the District Attorney's Office are no longer in existence."

Williamson went on to explain that Lunsford's phone had been "set back to factory settings" before being returned to the county, and Foster's phone had been turned over to Parks Miller, who denied knowing where Foster's phone or her own phone are now located.

Williamson wrote: "All of these phones were wiped clean, destroyed or otherwise made unavailable after the issue of the texting between Lunsford and the District Attorney's Office had been raised by defense counsel. Without testimony from Lunsford himself or the assistance of investigating agencies which may have knowledge of the contents…we are unable to determine whether in fact discussions occurred regarding Defendant or her trial."

Williamson "reluctantly" concluded that he had to deny the motion given the lack of evidence, but left the door open for Cantorna to bring the issues forward again if further evidence becomes available.

Enter Brian Sprinkle.

On January 10, State College defense attorney Sean McGraw filed a witness certification in another criminal case: *Commonwealth v. Grove*. In his certification, McGraw listed Brian Sprinkle, a former police officer who is now a "forensic examiner" with PATC Tech.

On January 24, 2015 (two years ago), Bellefonte police seized Parks Miller's cell phone tablet computer and laptop, and provided them to Sprinkle for analysis related to the forgery and tampering with public records allegations then under investigation.

McGraw's certification states that "PATech extracted data in the form of 'forensic images' from these devices, which images included text messages and messages sent by electronic mail," between April 24, 2014 and January 24, 2015 and that this evidence was not returned to the Bellefonte Police Department. Some of the texts were sent through a third party application called Mighty Text, and some were sent as regular texts.

McGraw went on to say that Sprinkle would be able to convert the images to readable text, but would be

"unwilling" to do so "absent a court order," because he is aware of Parks Miller's retaliatory lawsuits and doesn't want to subject himself to such ordeals without explicit court protection.

Cantorna cited McGraw's witness certification of Brian Sprinkle in a "Proffer of Evidence" to further support his motion to bar retrial filed on McClure's behalf on January 18 (last week). In his filing, Cantorna emphasized that Parks Miller has admitted she received an order to preserve evidence around October 23, 2014, and based on Sprinkle's anticipated testimony, Parks Miller deleted regular text messages from her phone "for all times prior to October 25, 2014" before her phone was turned over to Bellefonte police and forensic examiners on January 24, 2015.

Cantorna concluded: "The deletion of text messages after they had been asked to be preserved is evidence of prosecutorial misconduct…destruction of favorable evidence to the accused…leads to the negative inference that the evidence was destroyed because it would have shown that which the defense alleges…and leads to the conclusion that…the Double Jeopardy Clause bars retrial."

McGraw will be back in court in Bellefonte at 10 a.m. on January 25 for an evidentiary hearing, representing the defendant in *Commonwealth v. Grove*. Cantorna will be in court at 2 p.m. the same day for a pretrial conference, representing McClure.

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BAILIWICK NEWS

Reporting and critical analysis of Centre County public affairs

February 5, 2017

Are the prosecutor-judge texts tuna casserole recipes and cat pictures? Late January filings to block independent review suggest the answer: No.

By Katherine Watt

Part 4 in a series reporting on law enforcement principles as prioritized by incumbent DA Stacy Parks Miller and challenger Bernard Cantorna in their public work on criminal and civil cases. Part 1 published Dec. 16, 2016. Part 2 published Jan. 6. Part 3 published Jan. 20.

INTRODUCTION

In the last few weeks, as Bernard Cantorna and Sean McGraw have continued to pursue public accountability, District Attorney Stacy Parks Miller and retired Centre County Judge Bradley Lunsford have successfully evaded that public accountability, by ignoring subpoenas, sealing court records and again shifting venues from public to secret.

This installment begins with a recap of some of the developments that led to the Jan. 24-25, 2017 avalanche of filings, followed by a detailed account of the events that occurred after Jan. 24. It concludes with a critical analysis section.

The story is mostly focused on two cases: *Commonwealth v. Barry Grove*, and *Commonwealth v. Jalene McClure*. Grove's case relates to charges of unauthorized possession of firearms and animal cruelty. McClure's case relates to charges of child endangerment and assault.

The common issue is whether the Centre County court system has been able to uphold these two citizens' rights to fair trials before unbiased tribunals, and if not, whether the breakdown in legitimacy was limited to the Grove and McClure cases, or is systemic corruption potentially affecting any Centre County criminal prosecutions.

RECAP

Oct. – Dec. 2014: McClure Post-Trial Period

Bernard Cantorna defended Jalene McClure during a four-day trial from Sept. 8 to Sept. 11, 2014. DA Stacy Parks Miller prosecuted the case for the Commonwealth. Common Pleas Judge Bradley Lunsford presided.

Through the PA Right to Know Law, Cantorna later learned that between jury selection on August 4 and the start of trial Sept 8, Lunsford and ADA Lindsay Foster exchanged 264 text messages and 24 media messages; Lunsford and Parks Miller exchanged 17 text messages and one media message; and Lunsford and ADA Nathan Boob exchanged 13 text messages.

Cantorna further discovered that during the trial, Lunsford and Foster exchanged 152 text messages and 1 media message; 100 of those messages were exchanged between 8 a.m. and 5 p.m. on the trial dates. Lunsford and Parks Miller exchanged one text message during the trial dates.

Cantorna also learned that after the trial (through Oct. 10), Lunsford and Foster exchanged 195 text messages and three media messages; Lunsford and Parks Miller exchanged 44 media messages; and Lunsford and Boob exchanged 63 text messages and eight media messages.

All of that happened while Cantorna was filing pretrial, trial and post-trial motions and Lunsford was: ruling against McClure; refusing to recuse himself; refusing to order preservation and production of the texting evidence; denying under oath that texting had occurred; quashing subpoenas for Foster and Boob to testify; and sentencing McClure to 10 to 20 years in prison.

Jan. 2015 – Aug. 2016: Cantorna appeals McClure's case,

Between January 2015 and August 2016, Cantorna appealed McClure's conviction and sentencing to Superior Court, and obtained court reporter Maggie Miller's sworn testimony that she had heard Lunsford complain, in April 2012 during a trial recess, that DA Parks Miller "bitched" to him via text during trials about his rulings, and that Maggie Miller had corroborated the information with Joan Parsons, Lunsford's secretary.

In September 2015, Lunsford announced his retirement.

By order August 8, 2016, three of Lunsford's rulings were overturned by a Superior Court panel, vacating McClure's sentence and ordering a new trial for her. Although the Superior Court panel refused to address the texting issues as "moot" given other reasons to vacate the sentence, they found Lunsford erred by allowing the prosecutors to introduce evidence about the McClures' contentious 2012 divorce "not even remotely restricted" to the 2010 time period; by ruling that McClure's witness statement could be presented to the jury in redacted form only; and by allowing Detective Dale Moore to make credibility assessments of McClure for the jury.

McClure was released on bail on Aug. 25, 2016, and returned to Centre County Correctional Facility on or about Nov. 15, 2016, after she babysat for a friend's

daughter who was home sick from school while the mother was at work, in violation of a bail condition that McClure not supervise children. She remained in jail at press time, although she was almost released on Jan. 25, 2017 by order of the new trial judge, Michael Williamson. (More on this below).

October 2016 – McGraw and Cantorna continue efforts

The quest for the contents of the texts continued in October, as two Centre County defense attorneys sought the evidence needed to confirm or refute Lunsford, Parks Miller, Foster and Boob claims that the texts were unrelated to criminal prosecutions. The goal: to enable an informed, independent, public judicial decision on the propriety of extensive texting between judges and prosecutors, in order to ensure Centre County defendants' Constitutional 14th Amendment due process right to an unbiased tribunal.

On Oct. 12, Sean McGraw filed a motion for discovery under the Post-Conviction Relief Act, on behalf of Barry Grove, another defendant convicted during the window of time (April 2012 to October 2014) during which the texting was occurring, through proceedings over which Lunsford presided, and in which Parks Miller and Boob were prosecutors.

On Oct. 20, Cantorna filed a Motion to Preclude Retrial for McClure, based on the prosecutorial and judicial misconduct evidenced by the texting records, even without knowledge of the content of the texts.

In his supporting brief, Cantorna laid out his view of why double jeopardy applied.

> "…Prosecutors and judges are public officials entrusted with substantial and sensitive responsibilities. They are required to act in the public interest, **which includes protecting the rights of the accused**. Society rightfully expects that they maintain professional competence in the exercise of their functions. In [*Commonwealth v. Bolden* (1977)], the court noted that overreaching by both a Judge or a prosecutor will act as a bar to a second prosecution." (Emphasis added.)

The issue Cantorna presented to the new trial judge (Michael Williamson) was "whether the prosecutor's actions were intentionally undertaken to prejudice the defendant and whether the pervasive acts of both the prosecutor and Judge pollute the proceedings to a point where Double Jeopardy bars a retrial."

Nov. – Jan 2017: Subpoenas, hearings, appeals.

In November and December, a lot happened in both the Grove post-conviction relief petition, and the preparation for McClure's new trial, resulting in multiple appeals taken from Judge Williamson's orders to the Pennsylvania Superior Court.

Centre County President Judge Thomas King Kistler signed several subpoenas directing DA Parks Miller and retired Judge Lunsford (among others) to appear at several McClure and Grove hearings, and bring copies of text messages exchanged between Lunsford and prosecutors during relevant time intervals.

Parks Miller and Lunsford filed multiple motions to quash the subpoenas, arguing various rights to privacy.

Judge Michael Williamson denied multiple motions to quash, ordering Parks Miller and Lunsford to bring the evidence to the hearings and testify.

During a McClure hearing on Nov. 21, Judge Williamson affirmed Cantorna's position that "double jeopardy applies if a defendant is forced to go through another trial as a result of misconduct by the District Attorney's Office or the trial judge."

During that hearing, Williamson also had three testy exchanges with Lunsford's attorney, Patrick Casey, who thrice argued some version of: "There has been no evidence that there is improper contact related to this case."

To which Judge Williamson thrice replied with some version of: "Well the problem with that argument is that we don't know because you and Ms. Parks Miller are trying to prevent that evidence from being produced." (*Source*: Transcript of Nov. 21, 2016 hearing).

Under these circumstances, Judge Williamson decided on Nov. 22 to give McGraw explicit permission to seek the Grove evidence through alternate channels, including Centre County government (for texting records and the electronic devices themselves); the Bellefonte Police Department; and the Disciplinary Board and Judicial Conduct Board of the Supreme Court of Pennsylvania.

Both the Disciplinary Board and the Judicial Conduct Board have received numerous misconduct reports about Parks Miller and Lunsford, but neither has taken public action in response to the misconduct reports. They both conduct their investigations, if any, in secret.

Retired Judge Lunsford has refused to testify or turn over evidence, so far without penalty. DA Parks Miller has testified at some hearings and refused to testify at others. Apart from the Nov. 21 hearing, most transcripts have not been made available to the public or, in at least one case, have been sealed by Common Pleas Judge Katherine Oliver, for unexplained reasons.

On Dec. 22, Judge Williamson "reluctantly" denied Cantorna's motion to bar McClure's retrial, without prejudice, meaning that if Cantorna could obtain more evidence, he could bring the motion again. In his order, Williamson wrote that while he had attempted to "determine the accuracy" of misconduct allegations, "our efforts have been thwarted" by Lunsford's refusal to testify, and the Judicial Conduct Board's refusal to cooperate with the investigation.

Williamson professed to be "deeply disturbed by the incredible number of text communications," but forced to admit that no evidence about the text content had been presented, because "all of these phones were wiped clean, destroyed or otherwise made unavailable…"

At least five appeals have been filed in Superior Court based on these events.

Parks Miller appealed Judge Williamson's Nov. 22 order allowing McGraw to collect the text message content

through alternate sources. She asked the Superior Court to review: "Did PCRA court [Williamson] err in finding 'exceptional circumstances' warranting the grant of [Grove's] Motion for Discovery and commit an abuse of discretion in granting [Grove's] Motion for Discovery?"

Lunsford appealed three of Judge Williamson's denials of three of Lunsford's motions to quash three subpoenas to testify.

The question Lunsford presented to the Superior Court is whether Judge Williamson "erred in failing to recognize (1) the Constitutional separation of powers that shield members of the judiciary from testimony and production in these circumstances and vest in the Supreme Court exclusive control over the records and supervision of members of the judiciary, (2) Retired Judge Lunsford's judicial immunity under the circumstances and (3) the deliberative process privilege."

Finally, on Jan. 18, McClure appealed Judge Williamson's Dec. 22 denial of McClure's motion to bar retrial based on double jeopardy.

Jan. 10 – Feb 1, 2017: Text content evidence located

Meanwhile, on Dec. 16, McGraw made some headway in his efforts to obtain information to support Grove's case through alternative channels. McGraw received an email from Bellefonte Police Chief Shawn Weaver, forwarding an email from Brian Sprinkle, PATCtech forensic examiner, stating:

> "As mentioned yesterday in my interview, there were regular text messages and text messages through a 3rd party app called Mighty Text. The date ranges for the Mighty Text messages are 4/24/14 – 1/24/15. The date ranges for the regular texts are 10/25/14 – 1/24/15…Also there are emails between the two parties on the computer that may be of interest and the date ranges for those are much longer and also cover the dates in question."

On Jan. 10, McGraw filed a witness certification that included Brian Sprinkle as a potential witness in *Commonwealth v. Grove*. McGraw stated that Sprinkle would be able to convert "forensic images" of the text messages between Judge Lunsford and Centre County prosecutors, to readable text, but would be "unwilling" to do so "absent a court order," to protect himself from retaliation by Parks Miller.

On Jan. 11 at an evidentiary hearing before Judge Williamson, McGraw called Sprinkle to testify. Parks Miller objected to Sprinkle's testimony as improper, given that the case had been appealed to Superior Court as of Nov. 23, arguably stripping Williamson of jurisdiction.

Judge Williamson nonetheless questioned Sprinkle, and then continued the hearing until Jan. 25 at 10 a.m. Among other things, Sprinkle testified that he had "transcribed images…for another client." (*Source*: McGraw's addendum to Sprinkle's Jan. 23 subpoena)

On Jan. 18, Cantorna attached the McGraw witness certification to a "Proffer of Further Evidence" in support of Cantorna's motion to bar McClure's retrial on double jeopardy grounds.

On Jan. 19, Judge Pamela Ruest scheduled a pretrial hearing in McClure, for Jan. 25 at 2 p.m.

On Jan. 23, Judge Thomas King Kistler signed subpoenas ordering Brian Sprinkle to appear at the two Jan. 25 public hearings: Grove at 10 a.m., and McClure at 2 p.m. – and bring the PATCtech evidence.

At some point on Jan. 24, DA Parks Miller became aware of the Sprinkle subpoenas.

Thus, the stage was set for the deluge of paper filed in Bellefonte and in Harrisburg on Jan. 24 and 25.

Jan. 24 & Jan. 25 – Grove

On Jan. 24, at 2:13 p.m., Parks Miller filed an emergency motion in Superior Court in Harrisburg, asking the appellate court to prevent the trial court judge (Williamson) from proceeding further toward Grove's PCRA hearing while Parks Miller's appeal of Williamson's Nov. 22 discovery order was pending. Parks Miller attached two pages of a 139-page transcript of the ~~Jan. 11~~ Nov. 22 Grove hearing.

At 2:52 p.m., although there is no public record of a motion to seal, Centre County Common Pleas Judge Katherine Oliver filed an order sealing the transcript of the Jan. 11 Grove hearing at which Williamson questioned Sprinkle on the record.

At 4:21 p.m. on Jan. 24, the Superior Court granted Parks Miller's emergency motion to stay Williamson's trial court proceedings in Grove.

On Jan. 25, at 9:21 a.m., Brian Sprinkle's attorney – Tina O. Miller – filed motions to quash the Grove and McClure subpoenas of her client. At 9:22 a.m., she filed motions to seal her memos in support of her motions to quash, presumably based on Judge Oliver's Jan. 24 seal of the Jan. 11 hearing transcript.

More secrecy.

On Jan. 25, at 9:28 a.m. (a half-hour before Grove's scheduled hearing) Judge Williamson filed a Grove order he had drafted on Jan. 23 but not filed, vacating Grove's sentence and releasing him on total house arrest pending resentencing.

On Jan. 25, at 9:47 a.m., Sean McGraw filed a motion for a protective order, asking Judge Williamson to put Sprinkle's evidence into protective custody. McGraw wrote:

> "Upon realizing that PATC Tech has evidence that may reveal these ex parte contacts, Parks Miller has engaged in an aggressive campaign to prevent disclosure of the content of these electronic communications, including: having [her attorney Bruce] Castor seek various forms of relief **in forums removed from public scrutiny, of which this Court is aware yet which can neither be mentioned nor made part of the record of these proceedings**; and seeking, herself, "extraordinary relief in the Superior Court, which has been granted and which, apparently,

> divests this Court of the ability to receive and consider the evidence that would enable this Court to make findings as to the content and significance of Parks Miller's numerous ex parte contacts with Lunsford." (Emphasis added.)

McGraw further noted, regarding the Centre County Investigating Grand Jury that Parks Miller and Judge Kistler convened in August 2015:

> "Parks Miller's grand jury empowers her to conduct secret, ex parte examinations of witnesses with little or no judicial oversight [and] empowers her with essentially untrammeled subpoena power to summon witnesses and to direct them to produce evidence. This subpoena power is tantamount to the power of a search warrant, yet does not depend on the integrity of a police affiant who must swear to facts supporting probable cause. Given the urgency presented to her by the PATC Tech evidence, it is believed, and therefore averred, that Parks Miller may use the powers of her grand jury to compel the production of the PATC Tech evidence and, when produced, **destroy it**." (Emphasis added).

Here we have to take a short detour into informed guesswork to make sense of McGraw's points.

The Krumenacker Grand Jury is back in play**.**

The detour relates to the 37th Statewide Investigating Grand Jury, whose members reviewed evidence of Parks Miller's misconduct between February and July 2015, presented by then-Attorney General Kathleen Kane's OAG staff, under the supervision of Cambria County President Judge Norman Krumenacker. The grand jury reported on or about July 31, 2015 that they had not seen enough evidence to recommend criminal charges against Parks Miller.

Grand jury proceedings are secret: the public and media are excluded from the proceedings, and the transcripts and other records are sealed, so there's no way for a reporter to gain access to the source documents to confirm information.

Nonetheless, it appears that sometime right after the Jan. 11 Grove hearing at which Judge Williamson questioned Brian Sprinkle of PATCtech, Parks Miller's attorney – Bruce Castor – contacted Judge Krumenacker possibly with a complaint about violation of grand jury secrecy.

Krumenacker apparently responded by putting out two secrecy orders (dated Jan. 23 and Jan. 24) and starting contempt proceedings against unknown individuals.

The sources for this account of events include McGraw's Jan. 25 request that Williamson put Sprinkle's evidence into protective custody, plus two explanatory opinions filed by Judge Williamson in Centre County on Feb. 2 (one in McClure and one in Grove).

Both of Williamson's opinions mention Krumenacker's grand jury, pending "ancillary litigation" in that venue, and Krumenacker orders sealing the grand jury record and scheduling a contempt hearing.

Jan. 24 & 25 – Grove, continued

At 10 a.m. on Wednesday, January 25, Judge Williamson took his seat at the bench for Grove's evidentiary hearing, but almost immediately handed the two attorneys (Castor and McGraw) copies of his order releasing Grove to house arrest. Williamson announced that he had received word of the Superior Court stay by telephone the previous afternoon, but that he had written and signed the order on Jan. 23, and so intended to leave it in force.

Castor objected that Parks Miller believed Williamson had lost jurisdiction as of Nov. 23 (the day Parks Miller appealed Judge Williamson's discovery order) and that she would therefore appeal the order releasing Grove.

Judge Williamson acknowledged that possibility, said he wouldn't deal with any other motions (including McGraw's motion to protect Sprinkle's evidence) until the Superior Court clarified matters, and then instructed McGraw to work out the logistics for Grove's house arrest.

The hearing lasted less than ten minutes. Grove's family – in attendance for the public hearing – expressed relief that Grove, who is terminally ill, was to be released. McGraw began working with probation officers to arrange for Grove's release.

Sure enough, at 10:54 a.m., Parks Miller filed an emergency motion asking the Superior Court in Harrisburg to stay Judge Williamson's order releasing Grove.

At 1:53, a Superior Court judge (identity unknown) filed an order granting Parks Miller's motion, stopping Grove's release from prison, and directing McGraw to file a response within a week.

Jan. 24 & 25 - McClure

On Jan. 24 at 3:26 p.m., Parks Miller's office (ADA Nichole Smith) filed a motion to Judge Williamson in Centre County, this time in the McClure case, asking Williamson to "continue" or postpone further action on McClure's retrial preparation, given the fact that McClure had appealed Williamson's Dec. 22 order (denying McClure's motion to bar retrial under double jeopardy) to Superior Court on Jan. 18.

Also on Jan. 24 (time unknown), Parks Miller filed an emergency motion to Superior Court in Harrisburg, asking the appellate court to block Williamson from proceeding further toward McClure's retrial.

On Jan. 25, at 12:58 p.m., another Superior Court judge (identity unknown), granted Parks Miller's emergency motion in McClure. The order directed Judge Williamson to put his rulings on the pending county-level motion to continue on the record by 1 p.m., one hour *before* the scheduled 2 p.m. public pretrial hearing.

Judge Williamson complied.

Sometime between 1 p.m. and 2 p.m., he went on the record with his order granting Parks Miller's motion to continue, cancelling the 2 p.m. public pretrial hearing and postponing McClure's jury selection and retrial to June.

Because of the delay, he also reversed his Nov. 15 order that put McClure back in jail for babysitting a friend's child, so that McClure could be released on bail until the new trial. The paper copy of his order was filed with the Centre County Prothonotary at 2:01 p.m.

The scheduled 2 p.m. public hearing did not take place.

Within a few hours, Parks Miller had filed a second emergency petition to Superior Court, asking the Superior Court to reverse Judge Williamson's release of McClure and keep her imprisoned.

An unknown Superior Court judge granted her second emergency motion, leaving McClure imprisoned and giving Cantorna a week to respond.

Aftermath

Unlike most county and federal court records, Pennsylvania state court records are not available online. Researchers can only see docket sheets listing what was filed, on which date, by whom. To see the actual pleadings, you have to go to the courthouse in Harrisburg.

Cantorna filed a response to Parks Miller's emergency motion on Jan. 27. I drove to Harrisburg on Jan. 30 to read it, and was told that all of the McClure case files had been sealed.

Parks Miller, Castor and Lunsford have therefore been successful, for the time being, at removing the Grove and McClure cases from public view again, in keeping with the pattern of secrecy and obstruction described in previous installments of this series.

However.

Recall Michelle Shutt – the former paralegal for Parks Miller who swore under oath she witnessed Parks Miller forge a fake bail order with Judge Ruest's signature. Parks Miller sued Shutt in federal court for a variety of defamation-related claims. US District Judge Matthew Brann dismissed the claims against Shutt in May 2016, and Parks Miller has appealed that case to the Third Circuit Court of Appeals.

In the meantime, Shutt sued Parks Miller for defamation in July 2016. That litigation is still unfolding, and may – if it goes to trial – also turn on evidence contained in the text messages and emails retained by forensic examiner Brian Sprinkle of PATC Tech.

Thus, Shutt's attorney Kathleen Yurchak on Jan. 27 filed a motion for a protective order in *federal* court, modeled on McGraw's motion for a protective order filed in Centre County court on Jan. 25.

Judge Brann granted the protective order on Feb. 1, directing PATC Tech to "prevent spoliation of the evidence" and noting that he was not yet ordering that the evidence be provided to him or the parties, only that it be protected so that if needed, it will be available.

He emphasized in a footnote: "The parties are advised that should they wish to proceed to discovery of this evidence, the Court will most likely order *in camera* review before the evidence is turned over to any party."

In camera review is a procedure where a judge privately looks at confidential, sensitive, or private information to determine what, if any, information may be used by a party or made public.

CRITICAL ANALYSIS

Set aside, for now, the allegations that Parks Miller has committed crimes including perjury, forgery, tampering with public records and theft of services.

Set aside how Parks Miller and Castor – who simultaneously serves as Parks Miller's personal attorney and a special assistant district attorney for Centre County – killed a Bellefonte Police Department investigation into her alleged crimes.

Set aside how they killed the Centre County Commissioners' request for appointment of a special, independent prosecutor to investigate.

Set aside how they shifted the investigation to Kathleen Kane's Office of Attorney General, which then shifted the investigation to the secret 37th Statewide Investigating Grand Jury, which then examined the records-tampering facts, however those were presented, against the wrong statute, as reported in *Bailiwick News* Jan. 6.

Set aside the preliminary evidence that *ex parte* communications via text message took place between at least three Centre County judges (Lunsford, Jonathan Grine and Kelley Gillette-Walker) and at least three Centre County prosecutors (Parks Miller, Boob, Foster), during criminal trials as early as April 2012 (*Commonwealth v. Brooks*), and as late as October 2014 (*Commonwealth v. McClure*).

Set aside also how Parks Miller and Castor have been fighting citizen exercise of our right to information about those texts and other workings of our government through the PA Right to Know Law, by obtaining county court injunctions, now before the state Supreme Court, after the Commonwealth Court upheld the citizens' right to information against Parks Miller's claims of exemption.

Set aside how Parks Miller and Lunsford have withheld, hidden and destroyed key evidence including cellphones, text message records and email records.

And how Parks Miller and Lunsford have refused to testify under oath.

Set aside how the Disciplinary Board and Judicial Conduct Board of the Supreme Court of Pennsylvania have received multiple reports about misconduct by Parks Miller and Lunsford, with the available evidence, without giving any public indication that they've conducted investigations or made findings, leaving the public with no good reason to believe these boards are fulfilling their supervisory responsibilities.

Set aside also how Parks Miller and Castor used the limited public recommendations of the secret statewide grand jury to retaliate, against people who had sought public accountability, through defamation lawsuits in

federal court, and to call for the criminal prosecution of whistleblowers.

And set aside how Parks Miller created a Centre County Investigating Grand Jury that also works in secret, holding an ongoing threat over the heads of every potential critic from county commissioners to defense attorneys, that they may be subpoenaed to testify and produce records for grand jury review behind closed doors.

It comes down to one fact question, one credibility question, one legal question and one political question.

Are the texts about tuna casserole recipes and cat photos, or are they discussions about criminal defendants under state prosecution conducted without the participation of defense attorneys?

Are Parks Miller and Lunsford credible witnesses, such that their claims that the texts were not related to criminal prosecutions should be accepted without independent public verification?

In a head-to-head matchup – pitting the separation of powers vesting supervision of Pennsylvania judges and attorneys solely and secretly with the state Supreme Court, against ordinary citizens' Constitutional right to a fair trial – who wins?

How can citizens expose and stop public corruption when our access to information is blocked, and when the checks and balances in a delegated separation of powers system are conducted in secret and fail to discipline misconduct by judges and prosecutors?

These are not abstract questions.

Barry Grove and Jalene McClure may have spent years in prison for crimes they didn't commit, convicted through prosecutorial and judicial misconduct. Other Centre County citizens may have been, may now, or could in the future be caught up in a similar mockery of the right to a fair trial.

Sean McGraw, Bernard Cantorna and other defense attorneys may have been blocked from properly representing their clients.

The consequences for Parks Miller, Lunsford and the other prosecutors and judges – so far – have been the logistical headaches of several years of kicking legal sand in the eyes of every critic in their vicinity.

The answers also have harsh consequences for Centre County taxpayers. We've paid the salaries of Parks Miller, Lunsford and the others while they've been fighting off their public accountability to us.

And we're footing the bill to re-do criminal prosecutions through petitions, appeals, reversals and retrials brought about by the appearance of improper prosecutions for defendants tried in Centre County courts between April 2012 and October 2014 – and potentially outside that timeframe.

The overarching question is this: Does the rule of law apply to prosecutors and judges as it applies to other citizens, or not?

If we have one system of law in America, then let's see it function properly, and publicly, to review the contents of the prosecutor-judge texts, and begin cleaning up whatever mess those revelations leave in their wake.

If there are two or more tiers of justice in America – one for the connected, which ensures their impunity, and one for the regulars, which holds them accountable for law-breaking – then so be it.

But let's then stop pretending that we live in a country with a single justice system. Let's stop treating the judges and other officers of the Centre County Court – and their supervisors on the Pennsylvania Supreme Court – with the deference and respect that would be due to public officials acting with integrity in the public interest.

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Weighing competing values: government secrecy, individual privacy and public accountability

By Katherine Watt

Part 5 in a series reporting on legal and political principles as prioritized by incumbent DA Stacy Parks Miller and challenger Bernie Cantorna. Both are running as Democrats; the primary election is May 16, 2017.

INTRODUCTION

This installment takes a closer look at the legal arguments between Centre County District Attorney Stacy Parks Miller and Centre County defense attorney Bernie Cantorna during Parks Miller's federal defamation suit.

The legal arguments are valuable because they provide insight into the candidates' views on how to weigh the conflicting values of government secrecy, privacy rights of public officials and private citizens, and the role of private citizens and public officials in maintaining the moral legitimacy of government entities.

RECAP

As reported in previous installments, Parks Miller interpreted the July 2015 report of the 37th Statewide Investigating Grand Jury as blanket exoneration on forgery and records-tampering allegations made against her by her former paralegal, Michelle Shutt even though – as reported previously – the grand jury did not evaluate the relevant evidence against the appropriate criminal statute.

Parks Miller responded by filing a retaliatory civil defamation lawsuit in late August 2015, against 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 Cantorna. She amended the complaint in mid-October 2015.

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.

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.

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.

In March 2016, US District Judge Matthew Brann held a hearing in Williamsport on Parks Miller's case. In May 2016, Judge Brann dismissed all of Parks Miller's claims against paralegal Michelle Shutt; Cantorna and the other defense attorneys; Centre County Court of Common Pleas Judge Pamela Ruest; and the Centre County government entity. On Sept. 1, after Parks Miller had filed an amended complaint against Centre County officials acting in their individual capacities, Judge Brann dismissed the remaining claims, ruling that probable cause for the search and seizure of Parks Millers' records existed.

On July 29, 2016, Shutt filed a defamation suit against Parks Miller in US District Court, also before Judge Brann, based on Parks Miller's public statements about Shutt (more on this case in a future report).

On Sept. 29, 2016, Parks Miller appealed Brann's dismissals to the US Court of Appeals for Third Circuit, where the appeal is pending.

PARKS MILLER v. CANTORNA

General Arguments

The defendants broadly argued that Parks Miller's lawsuit was an attempt to chill the First Amendment right of citizens to petition their government for the redress of wrongs, and their duty to report potential criminal acts to law enforcement authorities and testify fully and truthfully during criminal investigations. As such, several alleged that Parks Miller's suit was an example of "SLAPP" litigation – Strategic Litigation Against Public Participation.

Immunity to civil claims played a significant part in all the defendants' arguments. The legal definition of immunity is "Exemption from performing duties that the law generally requires other citizens to perform, or from a

penalty or burden that the law generally places upon other citizens." (*Source*: legal-dictionary.thefreedictionary.com)

Immunity attaches to individual people such as grand jury witnesses and groups of people such as governmental bodies. The general principle behind immunity is to protect people who must testify or make decisions on behalf of society from being inhibited by the fear of civil liability if their actions negatively impact others.

The *Noerr-Pennington* doctrine further holds that private citizens are immune from liability derived from the act of petitioning their government to take action to right a wrong or adopt a new law. In their pleadings, Cantorna and other attorney defendants framed their Jan. 20, 2015 appearance at the Centre County commissioners meeting as petitioning the government to take corrective action on a matter of public importance: alleged law-breaking by the district attorney.

Parks Miller generally argued that the defendants didn't have immunity, because they acted with intentional misconduct or actual malice, which strip immunity.

Privileged communications also played a significant role in the defendants' motions to dismiss. Privilege is a "rule of evidence that allows the holder of the privilege to refuse to provide evidence about a certain subject or to bar such evidence from being disclosed or used in a judicial or other proceeding." (*Source*: Wikipedia.org) Privilege attaches to communications, not to individuals.

Defendants claimed at least five types of privilege, including judicial privilege covering statements made by judges, attorneys, witnesses and parties in judicial proceedings; statements given to law enforcement officers to assist in investigations; grand jury testimony; statements made at public meetings of legislative bodies; and the "qualified fair report" privilege, covering public statements about what happened during a public meeting.

Parks Miller argued that the communications were not privileged, for a variety of technical reasons depending on which privilege the defendants claimed in which contexts.

Specific Arguments

Of the 13 total claims, Parks Miller made eight claims against Cantorna including breach of fiduciary duty; negligence; defamation and false light; injurious falsehood; common law abuse of process; intentional and/or negligent infliction of emotional distress; concerted tortious conduct; and conspiracy.

Breach of Fiduciary Duty and Negligence

Parks Miller based her fiduciary breach and negligence claims against Cantorna on the legal theory that, once he had seen copies of emails regarding the "fake" bail order and related sting operation, and realized they were confidential documents, Cantorna had a legal and ethical duty to notify Parks Miller of the confidentiality breach and return the documents to her, instead of pursuing police, disciplinary board or county commissioner investigations. She also claimed all the defendants had a duty to investigate the matters themselves, before reporting the potential crimes to authorities for investigation, and that they failed to fulfill that duty.

Cantorna and the other defense attorneys denied having any fiduciary duty to Parks Miller, on the grounds that lawyers owe no duty to anyone other than their clients, and Parks Miller was not their client.

Cantorna further argued that the Rules of Professional Conduct ethics provisions regarding the return of confidential documents apply to inadvertently sent documents, not whistleblower documents, and that another RPC provision (8.3) requires lawyers with knowledge of ethical violations to report those to the appropriate professional authority, in this case, the PA Supreme Court Disciplinary Board.

Parks Miller replied that paralegal Michelle Shutt had a fiduciary duty because Shutt was in a "position of trust," and that Cantorna aided and abetted Shutt's breach and was therefore liable himself.

At oral arguments on March 3, 2016, Judge Brann asked Parks Miller's attorney, Bruce Castor: "How many of the defendants accused of breach of fiduciary duty are agents of Stacy Parks Miller, and if any, how are they agents?" Brann later asked, on the negligence claims, "What duty do any of these individuals owe to Parks Miller?"

Castor answered that Shutt was an agent at the time she was working as a paralegal for Parks Miller, and breached her duty when she took the key documents – the disputed bail order and corroborating emails – by emailing them from her work account to her personal account.

Castor reiterated Parks Miller's belief that Cantorna and the other defense attorneys had an ethical obligation to her, and that they demonstrated negligence because they didn't conduct independent handwriting analyses; relied on Shutt's affidavit as true; relied on Ruest's comments to police investigators as substantiation; and didn't recognize that the alleged forgery couldn't have been a crime as a matter of law, because "the government is allowed to fool people" using tools including "fake" documents, and because Parks Miller lacked intent to injure. (*Source*: Author's notes from March 3, 2016 oral arguments)

Defamation and False Light

Under defamation law, to protect robust debate on issues of public concern, there's a higher bar for public figures: they have to prove the statements were made with "actual malice." Defamation and false light claims are also subject to a statute of limitations of one year from the date of the public statement.

Parks Miller argued defendants published false statements alleging criminal and professional misconduct by reporting evidence of her alleged criminal acts to police and county commissioners for further investigation, knowing the information was false, or not caring whether it was false or true.

She claimed that the statements harmed her

reputation and standing in the legal community, the law enforcement community, the political community, and the community at large.

She argued that the January 2015 statements were false because a statewide investigating grand jury issued a report in July 2015 asserting that Judge Ruest had signed the disputed bail order.

Parks Miller also argued that even if she, and not Ruest, had signed the disputed bail order, it couldn't have been a crime "as a matter of law" because Parks Miller claimed she didn't intend for anyone to rely on the order or to harm anyone.

Parks Miller argued that – because the statements accused her of a crime and were published with actual malice, they were defamatory *per se* (in themselves) and put her in a false light.

In response, Cantorna and the other defendants argued forcefully that the question of whether a District Attorney has broken the law is a matter of legitimate and significant public importance, not a private matter, and was – in Parks Miller's case – already under public discussion by January 2015.

The defendants also maintained that their statements were true, supported by credible evidence, and that the grand jury process may have been compromised, rendering the July 2015 report unreliable for establishing facts.

Some argued that their statements were opinion statements, expressing their opinion that evidence suggested the DA had forged and filed false documents. Several noted that Parks Miller provided no specific information about when, where and to whom the allegedly defamatory statements were made, and pointed out that reports given to police, county commissioners and ethics board members are protected under the First Amendment as legitimate criticisms of a public official, and under other laws protecting statements made in particular contexts.

Parks Miller countered that she was seeking relief under a provision covering publicity given to private or public matters that are false, but also those "that are true but selectively publicized in a manner creating a false impression." To the extent that the defendants' comments were opinion statements, she raised an exception to the rule, allowing opinion statements that suggest the existence of undisclosed underlying facts justifying the opinion to be considered potentially defamatory.

Parks Miller further argued that her defamation claims against Cantorna arose, *not* from his recorded statements at the Jan. 20, 2015 Centre County commissioners' meeting, but from his probable but unidentified comments to press and other community members; from his Right-to-Know requests for phone and text records that suggested inappropriate relationships existed between DA staff members and judges; and from his motions for Parks Miller's recusal in criminal cases, which also suggested inappropriate DA-judge relationships.

Parks Miller said Cantorna demonstrated actual malice and must have known his statements were false, because the context surrounding the disputed bail order showed Parks Miller lacked intent to defraud, even if she did sign the disputed bail order; because Parks Miller believed the signature was visibly Ruest's, even to a non-expert eye; and because Shutt was not a credible source of information, since she disclosed confidential documents to Philip Masorti, another local defense attorney and named defendant in Parks Miller's defamation suit.

Parks Miller also rejected the notion that statements at the commissioners' meeting were "petitioning the government," since the topic did not appear on the meeting agenda, and the commission was not engaged in legislative fact-finding: no one was placed under oath and the statements were voluntary, not compulsory.

During oral arguments in March 2016, Judge Brann asked Castor, "Does Parks Miller concede she is a public figure?" Castor said Parks Miller concedes she is.

Injurious Falsehood

Parks Miller's argued that her professional reputation as District Attorney – an elected official and an attorney – is her business, and that the statements made by the defendants (rather than the acts the defendants were commenting on) tarnished her reputation. She claimed the defendants knew their statements were false, or made them with reckless disregard for their truth or falsity, and that they should have known that publishing the false statements would cause her monetary losses.

In making these claims, she again leaned heavily on the July 2015 findings of the statewide investigating grand jury, calling the report's conclusions "facts."

In response, Cantorna argued that injurious falsehood claims are not applicable to a person, only goods or property, and that reputation is not property.

Cantorna and other defendants argued they believed their statements were true; had evidence to support their beliefs; and had no intent to harm: their intent was to report evidence of wrongdoing to authorities for investigation. They claimed that Parks Miller could not suffer a monetary loss, since the DA is an elected public servant running a governmental legal department, and is prohibited from running a private law practice. They also indicated a lack of faith in the impartiality of the grand jury investigation.

Parks Miller countered that injurious falsehood is not limited to goods or property, but can apply to statements that "cast doubt upon the quality of another's land, chattels or intangible things." The DA's "professional reputation as a lawyer" is her business, an intangible thing. And, she argued, since she had spent money trying to clear her name, she had suffered pecuniary loss.

Judge Brann followed up with Castor during March 16 oral arguments, asking: "What pecuniary loss did Parks Miller suffer?"

Castor answered that Parks Miller was treated medically for stress related to her loss of status in the community. Brann suggested that loss of status didn't seem to be a monetary loss. Castor replied that it was a jury question, as to how much her career was worth before

her reputation was damaged, citing *Sprague v. Walter* (1995) for the notion that "but for" the defendants' actions, Parks Miller would have continued serving fully as DA, rather than having to hire outside counsel to handle many of her cases, and could have gone on to serve as a senator, governor or other high public office. (*Source*: Author's notes from March 3, 2016 oral arguments).

Common Law Abuse of Process

Parks Miller alleged that defendants, including Cantorna, used legal proceedings in an attempt to discredit her. She argued that defendants had no factual or legal justification for their actions and that they were undertaken with malice to harass and discredit her.

Cantorna responded that Parks Miller had failed to demonstrate that Cantorna used any legal process against her at all, arguing that his suggestion to commissioners on Jan. 20 that Parks Miller be investigated for the crimes of forgery and tampering with public records was an exercise of his First Amendment rights.

Parks Miller retorted that Cantorna had abused Right to Know requests and motions seeking her recusal in criminal cases, and she construed both to be harassing litigation tactics.

Intentional and Negligent Infliction of Emotional Distress

For the IIED claim, Parks Miller argued that all the defendants – including Cantorna – engaged in the "extreme and outrageous conduct" of alleging that the DA had committed a crime. For the NIED claim, she argued that all but Ruest either owed her a fiduciary duty and breached it, or assisted someone with a fiduciary duty in breaching it.

She claimed that the DA's office is so important in a county that the person holding it must maintain the highest level of public trust. Therefore, she said, any allegation affecting public perception of the integrity of the District Attorney – and through the DA, the entire county criminal justice system – "weighs heavily on the mind of the DA," such that she suffered emotional distress and physical harm "not only for herself, but as the symbol of law enforcement as a whole in the County."

Cantorna and the other attorney defendants argued, on both claims, that Parks Miller failed to demonstrate the necessary legal elements and provide the necessary factual support, specifically what physical harm she suffered.

In reply, for both IIED and NIED claims, Parks Miller said that details about the "severe physical, mental, and emotional toll" she suffered were not required at the complaint stage, but that she would provide details during discovery.

On her IIED claims, Parks Miller further argued that "In Pennsylvania, the intentional propagation of a falsehood that leads to one being accused of a crime is sufficiently outrageous conduct to state a claim for IIED." *Banyas v. Lower Bucks Hosp.* (1981). She claimed that the defendants intentionally propagated the falsehood that she had committed forgery, publicly defamed her, called for her resignation, illegally appointed a special prosecutor and coerced the police to illegally raid her office, knowing that she lacked the intent aspect of the crime of forgery.

---Note: As reported previously, prosecutors only need to prove intent to convict a defendant for violations of 18 Pa.C.S. §4104: "Tampering with records or identification." Before his short-lived investigation was derailed by the statewide investigating grand jury, Bellefonte Detective Robert Ruggiero was investigating Parks Miller for violation of Pa.C.S. §4911, "Tampering with Public Records or Information," which is a second degree misdemeanor without proof of intent, and a third degree felony with proof of intent.

Further, Parks Miller has stated, in planning emails and pleadings, that the purpose of filing the "fake" bail order in the public record was to give public readers of the record the false impression that an inmate had been released on bail, when in fact he was imprisoned under a false name, providing clear evidence of her intent that that the fake bail order "be taken as a genuine part of [public] information or records." Pa.C.S. §4911(2)---

On her NIED claims, Parks Miller argued that there are four scenarios (not two) permitting recovery, including "(1) situations where the defendant had a contractual or fiduciary duty toward the plaintiff..." Parks Miller repeated her assertion that Shutt owed her a fiduciary duty, which she breached, with the help of Cantorna and the other defendants.

Concerted Tortious Conduct & Conspiracy

Parks Miller claimed all the defendants engaged in a series of tortious acts resulting in harm to her: primarily defamation and breach of fiduciary duties. Further, she argued that the defendants worked together in a conspiracy whose common purpose was to illegally prosecute her, remove her from office, and ruin her reputation. She alleged that the defendants were motivated by malice toward her because she had been tough on crime, had won cases, and had had policy disagreements with the county commissioners.

In general, the defendants pointed out that "liability cannot be imposed for inducing legislative, administrative or judicial action" even where parties have acted in a concerted manner, citing *Brownsville Golden Age Nursing Home, Inc. v. Wells* (1988) which upheld an absolute privilege to petition government in its executive, administrative, legislative and judicial capacities.

Further, the defendants cited *Bell Atlantic v. Twombly* (2007) to argue that their mutually reinforcing actions were examples of "lawful and un-choreographed behavior" exhibited by multiple individuals in response to a single set of circumstances: the fake bail order and its effects on the credibility of the criminal justice system and courts in Centre County.

JUDGE BRANN'S DISMISSAL

In dismissing Parks Miller's 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 (there was probable cause supporting the forgery allegations, and the emails related to the bail order scheme were not confidential); the attorneys didn't make any defamatory statements when they publicly expressed disapproving opinions of Parks Miller, a public figure; 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.

CRITICAL ANALYSIS

Parks Miller's arguments – indeed, the mere fact that she filed an expensive, time-consuming federal case to attack specific public actions of individual critics – bespeak a certain sense of entitlement and infallibility. They demonstrate a brittleness of character, and self-absorption (to the exclusion of the concerns of others) at odds with a career in purported public service.

It's a brilliant and effective legal and political tactic. Parks Miller has a strong record of taking rapid and varied action to push opponents in and outside the courtroom off balance, forcing them into reactive postures.

And so far, it's been excellent for her career.

But it comes at a high public cost. She appears to be too ego-fragile to take in robust criticism and respond substantively to challenges to her personal judgment calls.

For example, given her hard-earned and well-deserved reputation for disproportionate retaliation against those who question her judgment, it's hard to imagine any assistant district attorney in Parks Miller's office feeling safe enough to question the wisdom of her original sting operation plan and the "fake" bail order, or any similar plans she may have undertaken since.

Preemptive intimidation of subordinates and bystanders has left her without meaningful access to constructive feedback, let alone the cognitive and social tools to correct identified problems.

In contrast, Cantorna's arguments in defense of his own actions (and the related actions of his co-defendants) demonstrate a sense of outrage at the probable-cause-supported appearance of Centre County courthouse corruption, and indignation at the injustice inherent when concerned citizens engage in the public affairs of their community to uphold the principles of a credible, fair and open justice system, only to find themselves dragged into federal court by their community's chief law enforcement officer.

Note to Readers and Subscribers:

Thank you for reading and financially supporting independent reporting in Centre County.

From the launch on Sept. 2, 2016, my long-term goal has been to develop a reader-supported newspaper publishing business that provides public accountability journalism services to citizens, and a decent wage to me and a handful of staff reporters.

For the first several months, I aimed to publish three to four issues per month and attend about a dozen public meetings each month.

However, partly because progress toward the financial sustainability goal has been slow, I've taken a part-time paid position with a private employer. The job as structured now is a 15-20 hour per week position.

While I hold down that job, I'll be scaling back my publishing target to one or two issues per month and only attending specific public meetings as needed to supplement document-based reporting.

Upcoming issues will include a wrap-up of the Slab Cabin Run water and farmland protection series and further coverage of the Centre County District Attorney primary race through a piece on Parks Miller's and Cantorna's divergent views on public access to information through the PA Right to Know Law, and a piece providing as much coverage as possible (given the court-imposed secrecy) of the McClure and Grove texting cases now on appeal to Superior Court.

I'm also planning coverage of the structure of Centre Region and Centre County political systems and on the proposed expansion of the beneficial reuse sewage management program, alongside the history of the Regional Growth Boundary, Sewer Service Area and implementation of the Centre Region Comprehensive Plan.

And I'm planning coverage the State College zoning code overhaul process, particularly as it relates to public safety, air quality, water quality, high-rise/high density student housing and Penn State enrollment policies.

That list will probably comprise all of the reporting I'll be able to draft and publish over the next six months.

Bailiwick News is an independent newspaper offering reporting and critical analysis of Centre County public affairs.

BAILIWICK NEWS

Reporting and critical analysis of Centre County public affairs

May 8, 2017

Timothy Piazza, Beta Theta Pi fraternity, Penn State Inter-fraternity Council, Pennsylvania investigating grand juries and the Centre County court credibility crisis.

By Katherine Watt

Part 6 in a series reporting on legal and political principles as prioritized by incumbent DA Stacy Parks Miller and challenger Bernie Cantorna. Both are running as Democrats; the primary election is May 16, 2017.

INTRODUCTION

Investigating grand juries currently impact Centre County citizens in two ways. The first is through the lingering effects of the July 2015 statewide grand jury report on Centre County criminal justice credibility.

The second is through a countywide grand jury convened in August 2015 on incumbent District Attorney Stacy Parks Miller's petition, the first public results of which were announced last Friday.

This report is organized into five sections. Section 1 lays out the findings of the Centre County Investigating Grand Jury with respect to the death of Penn State student Timothy Piazza, and the charges filed against some of the people involved.

Section 2 describes the history of the investigating grand jury as a law enforcement tool, and Section 3 describes the specific functions of Pennsylvania investigating grand juries.

Section 4 covers the statewide investigating grand jury's look at the forgery and records tampering allegations made against DA Parks Miller, and how that process led to Parks Miller's petition for the county investigating grand jury.

Section 5, to be published in a few days, will offer critical analysis.

Section 1 – Death of Timothy Piazza

On Friday, May 5, incumbent DA Parks Miller called a press conference for 10 a.m. at the Centre County Courthouse Annex in Bellefonte, to announce criminal charges stemming from the February 4 death of Penn State student Timothy Piazza due to severe alcohol poisoning and two falls down a steep flight of steps at the Beta Theta Pi fraternity house on the night of February 2-3, 2017.

Parks Miller stood at the podium with Piazza's parents, Jim and Evelyn Piazza, at her side. Parks Miller was also flanked by Bruce Castor, her personal attorney and special assistant district attorney, along with State College Police Chief John Gardner, State College Police Lieutenant Keith Robb and State College Police Detective David Scicchitano.

Parks Miller announced that a grand jury presentment would be distributed later Friday, containing details of the investigation and evidence supporting criminal charges against 18 Penn State students – members of the Beta fraternity – along with the Beta Theta Pi national corporation.

During the press conference, Parks Miller gave a general overview of the night of Piazza's death, including the fact that it was "bid acceptance night," during which pledges would run the "Gauntlet," a series of "forced drinking" stations, requiring the pledges to rapidly drink large amounts of vodka, beer, wine and Four Loko.

Parks Miller said the investigation uncovered evidence that the fraternity had run the Gauntlet at least three semesters (Spring 2016, Fall 2016, and Spring 2017), despite holding itself out to the Penn State Inter-fraternity Council as "dry."

According to the presentment, forensic pathologist Harry Kamerow testified regarding regression analysis of Piazza's blood alcohol content. Blood drawn at 12:25 p.m. on February 3 showed that Piazza had a BAC between 0.28 and 0.36 at about 11:00 p.m. on February 2, just before he fell down a steep flight of steps into the basement of the fraternity a first time. Kamerow further testified to the grand jury that Piazza's BAC at about 7:55 a.m. on February 3 would have been between 0.15 and 0.19, just before he fell down the steps for the second time.

Ryan McCann, one of the fraternity members, finally called an ambulance at 10:48 a.m. on February 3. By the time Piazza reached Mount Nittany Medical Center, he had sustained severe brain injury and a life-threatening spleen injury, both of which had been left untreated for more than 12 hours.

Parks Miller said that between the two falls, and after the second fall, video surveillance from inside the house showed several fraternity members carrying Piazza up from the basement stairs and placing him on a couch on the first floor, and attempting to revive him and prevent him from further injuring himself.

Cell phone evidence, she said, showed the students discussing the situation via text message, looking up "head injury" and other related search topics on online search engines, and discussing legal consequences to the fraternity that might ensue from calling for emergency medical assistance. The investigation also uncovered

efforts to delete text messages and group chat records to hide evidence of the sequence of events, along with cleaning the house to remove traces of alcohol.

According to the presentment, several fraternity members testified that during the night they had advocated calling for emergency assistance, but were dissuaded from doing so by other fraternity members.

At the recommendation of the grand jury, the DA's office filed charges on May 5 against Beta Theta Pi fraternity, and eight of the 18 individuals, including Brendan Young, Daniel Casey, Johan Neuman, Nick Kubera, Michael Bonatucci, Gary Dibilio, Luke Visser, and Joe Sala. Charges included involuntary manslaughter; aggravated assault; simple assault; reckless endangerment; hazing; furnishing alcohol to minors; consumption of alcohol by a minor; disorderly conduct; and tampering with evidence.

Parks Miller said charges would be filed the week of May 8 against 10 additional individuals; according to the presentment, those included Michael Angelo Schiavone, Craig Heimer, Lars Kenyon, Parker Jax Yochim, Ed Gilmartin, Ryan McCann, Lucas Rockwell, Braxton Becker, Ryan Foster and Joseph Ems.

Parks Miller said the grand jury further instructed her office to prepare a report with recommendations to the Pennsylvania legislature and Penn State administrators on possible ways to change the fraternity, alcohol-abuse and underage drinking culture in State College that fostered the terrible sequence of events that led to Piazza's death.

Section 2 – History of Investigating Grand Juries

Investigating grand juries are a very old, very strange legal construct, whose power and influence vary a great deal depending on how they are convened and who controls their activities.

In 2013, Brian Gallini wrote an article for the *Tennessee Law Review* entitled "Bringing down a legend: How an 'independent' grand jury ended Joe Paterno's career."

Gallini was motivated to write by the strange procedure under which the 33rd statewide investigating grand jury – investigating allegations of child sexual abuse by Jerry Sandusky in 2011 – publicly implicated a third party who was not the target of the investigation: Joe Paterno.

As part of his analysis, Gallini traced the complex history of the grand jury as a public law enforcement and investigatory entity. He described it as essentially a fourth branch of government more akin to the press than any other democratic institution, with one crucial difference: grand juries operate in secret. The final result of grand jury investigations may be published, but the processes used to reach their decisions is not.

Gallini traced the history back to 1066, when William the Conqueror consulted respected community men on matters of public concern – mostly civil matters related to tax collection and land ownership. In 1166, King Henry II expanded use of the grand jury to include the investigation of crimes. The Assize of Clarendon, for example, was a law established by the King, requiring each county to swear in a group of "the most lawful men" in a geographic region containing households capable of providing roughly one hundred men at arms to "present any man who was suspected of serious crime either to the King's Justice or to the sheriff."

The "presentment" issued by a grand jury was traditionally a statement of suspicion, based on the grand jury's knowledge, from its own secret investigation.

In contrast, a public petit or trial jury traditionally had – and today still retains – the power to find the accused guilty or innocent, based on evidence collected by police and publicly presented by prosecuting attorneys, and on the trial judge's instructions about how the jury members should apply the relevant laws to the facts of the case as presented.

An investigating grand jury can either act as a public prosecutor to identify and hold criminals accountable, or as a protector of individual privacy rights for the unjustly accused. Some authors refer to these dual functions as the "sword" and "shield" role that can be played by grand juries.

Section 3 - How Pennsylvania investigating grand juries work

Authority. There are three main sources of federal and state legal authority for convening a grand jury in the United States. The first is the Fifth Amendment to the US Constitution, which states that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury…"

The second is judicial or common law. Common law is law developed over time by judges and courts, stated in decisions that decide individual cases and have precedential effect on future cases – meaning that judges hearing similar facts in future cases are bound to reach similar conclusions. Common law has the same weight and authority as statutes adopted by legislatures and regulations adopted by the executive branch of government.

The third source of legal authority for grand juries is legislative statute, adopted by state legislatures.

Purpose. Although historically grand juries looked at ordinary criminal activity in their communities, today, grand juries are generally not needed for ordinary crimes, which are investigated by police. Grand juries usually only come into play during complex cases, most often related to organized crime or public corruption.

Types. There are several different types of grand jury with different methods of convening each, different purposes for their work, and different powers available to them. These include "regular grand jury," "special grand jury" and "investigating grand jury." Some of their

powers overlap, and some definitions differ among jurisdictions.

Some grand juries can issue indictments charging individuals with crimes, but some cannot.

Grand jury practice is not uniform across the states. Each state has a mix of judicial/common law grand jury practice and legislative/statutory grand jury practice, and state grand jury practice differs from federal grand jury practice.

In Pennsylvania, the only method for convening an investigating grand jury until 1978 was through common law procedures set by judicial precedent.

However, on November 22, 1978, the Pennsylvania legislature enacted the Investigating Grand Jury Act (42 Pa. C.S. §§ 4541 – 4553), referred to below as the IGJA, adding a legislatively-authorized/statutory investigating grand jury procedure to the judicial/common law procedure. The Pennsylvania Supreme Court concurrently adopted a set of implementing rules (Pa. R. Crim. P. 220-244). The Pennsylvania IGJA and the implementing judicial rules provide the framework in which statewide, multi-county and county statutory investigating grand juries do their work.

This report focuses on legislatively-authorized statutory investigating grand juries operating in Pennsylvania, which are empowered to investigate but not to indict. The Centre County Investigating Grand Jury that Parks Miller convened in August 2015, which has now published its' first public presentment recommending charges to be filed in Piazza's death, and the 37th Statewide Investigating Grand Jury that examined criminal allegations against DA Parks Miller, covered in more detail below, are both statutory investigating grand juries.

Convening. Under the IGJA, there are three individuals who can start the process of convening an investigating grand jury in each county: the state Attorney General, the county District Attorney, and the county Court of Common Pleas President Judge.

If the AG or the DA apply to the president judge, the president judge must issue an order convening the investigating grand jury within 10 days: it's non-discretionary.

The prosecutor does not need to provide details about why he or she wants an investigating grand jury or name any individual. It's enough to say that criminal activity exists within the county, region, or state, and that the criminal activity "can best be fully investigated using the resources of the grand jury."

The statutory investigating grand jury differs from the common law investigating grand jury significantly in this respect (among others), because the common law procedure requires the prosecutor to meet five fairly limited conditions to get a judge to convene a grand jury.

Even if the Attorney General or the District Attorney don't petition for an investigating grand jury, the county's president judge can issue an order convening a grand jury on his or her own initiative. That order can only be stopped if the DA and the AG certify that they don't think a grand jury is needed.

Once the order is issued, the president judge, or another judge appointed by the president judge, serves as the "supervising judge" for the grand jury.

For the 37th Statewide Investigating Grand Jury, which met in Pittsburgh, the supervising judge was Cambria County Court of Common Pleas President Judge Norman Krumenacker III.

For the Centre County Investigating Grand Jury, which worked in Bellefonte, the supervising judge has been President Judge Thomas King Kistler.

Every Pennsylvania investigating grand jury has 23 permanent members and between seven and 15 alternates, selected at random from the general public and briefly questioned by the supervising judge (*voir dire*), just as trial juries are selected for jury duty.

County taxpayers pay for a county investigating grand jury convened within their county. State taxpayers pay expenses for multi-county or statewide investigating grand juries.

Terms, oaths and secrecy. The jurors are sworn in by the supervising judge for a term of 18 months, which can be reduced by the supervising judge if the jury decides it has completed business, or extended another six months if the jury decides it needs more time to work. The supervising judge can also discharge the jury if he or she decides that the jury "is not conducting proper investigating activity," although the prosecutor can appeal the discharge order.

The jurors' oath requires that they "solemnly swear to make diligent inquiry with regard to all matters brought before you as well as such things as may come to your knowledge in the course of your duties; that you will keep secret all that transpires in the jury room, except as authorized by law; that you will not present any person for hatred, envy, or malice, or refuse to present any person for love, fear, favor, or any reward or hope thereof; and that you will present all things truly to the court as they come to your knowledge and understanding."

All the participants – jurors, attorneys, interpreters and stenographers – are sworn to secrecy.

The supervising judge "charges" the investigating grand jury, telling them generally what to investigate, in open court (publicly), and appoints a jury foreman.

After the supervising judge charges the jury, they go into a closed room and everything they do from that point forward, until they issue a public report about their findings, is secret.

Secret activity. Behind closed doors, the grand jury members select a jury secretary. The grand jury must have a quorum of 15 to hear testimony and review evidence. Alternate jurors attend sessions but don't participate in deliberations, voting or preparation of written reports, unless a permanent juror is removed, and the alternate is seated in his or her place as a new permanent juror.

The prosecutor can bring new issues to the attention of the investigating grand jury for review (expanding on the original charge) by simply notifying the supervising judge that the issue should be reviewed by the investigating grand jury "because the investigative resources of the grand jury are necessary for proper investigation."

For example, the presentment published by the Centre County Investigating Grand Jury regarding Piazza's death states that the recommendations are being brought "pursuant to Notice of Submission of Investigation No. 11," indicating that between November 2015 and February 2017, Parks Miller submitted 10 earlier investigation issues to the grand jury, but none of those findings have yet been made public.

Similarly, the Centre County DA forgery allegations brought to the 37th Statewide Investigating Grand Jury were brought as Notice 59; that jury investigated many other issues during its term, including child sexual abuse allegations against Catholic clergy in the Altoona-Johnstown diocese.

Another difference between the statutory IGJ and the common law IGJ is that once the common law jury is at work, they're free to follow their investigation anywhere it takes them, based not only on the issues and information presented to them by the prosecutor, but also on their personal knowledge of their community.

The statutory IGJ is limited to issues brought by the prosecutor. Thus, a "runaway" statutory investigating grand jury would be one in which the foreman or other influential jurors investigated a subject against the wishes of the prosecutor.

Only the prosecutor, the permanent and alternate jurors, and the stenographer are in the room with the witnesses during the testimony sessions. The supervising judge and the targets of the investigation are not in the room. If the jurors request interpreters, security officers or experts to help with witnesses and evidence, the supervising judge can authorize those specialists to be in the room, but only for the period of time in which their services are needed.

Testimony and Transcriptions. A court stenographer records the proceedings and prepares transcripts, but the records are kept under tight control by the supervising judge. The testimony may be made available by the supervising judge to the prosecutor – either the Attorney General or the District Attorney – and through them, to local, state or federal law enforcement or investigation agencies, "to assist them in investigating crimes under their jurisdiction."

If formal charges are filed against targets as a result of the investigating grand jury's work, those defendants also have a right to obtain the transcript records of testimony and physical evidence examined by the jury.

Witnesses who testify are entitled to have their attorney in the grand jury room, but the attorney can only speak to their client; they can't address or object to the grand jury or prosecutor's questioning in any way. Witnesses are permitted to disclose their own testimony publicly afterward – what they said to the jury, but nothing else – unless the supervising judge orders them to keep their testimony secret.

Powers of the statutory investigating grand jury. In Pennsylvania, legislatively-derived investigating grand juries have the power of subpoena (forcing people to testify and/or turn over documents), and the power to start civil and criminal contempt proceedings for witness non-compliance.

Grand juries convened for the specific purpose of investigating potential criminal activity do not have the power to indict or charge a person with a crime – they can at most recommend that charges be brought – and they don't have any role in deciding a defendant's guilt or innocence. Only the prosecutor or a grand jury with indicting power can charge a defendant, and only a trial judge or jury can determine guilt or innocence.

Documents issued. An investigating grand jury can issue two types of document – a presentment or a report – and both must be approved by a majority vote of at least 12 of the 23 permanent jurors.

A "presentment" is "a written formal recommendation by an investigating grand jury that specific persons be charged with specific crimes." The jury instructs the prosecutor about what to include in a draft presentment; the prosecutor drafts the document; and then the jury votes on the document.

If approved by a majority (12 or more jurors), the presentment is given to the supervising judge to make sure it complies with the law, and if it does, he or she issues an order formally accepting the presentment, which triggers the prosecutor's authority to file a complaint, charge the defendants and schedule preliminary hearings. Supervising judges can also decide to seal the presentment – keep it secret from the public – until the defendant is in custody or released pending trial.

The presentment of an investigating grand jury is only an accusation, similar to a criminal complaint and affidavit of probable cause filed by police. 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 presentment 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.

The document produced by the Centre County grand jury regarding Piazza's death is a presentment, not a report.

The second formal document an investigating grand jury can produce is called a "report." Reports are "submitted by the investigating grand jury to the supervising judge regarding conditions relating to

organized crime or public corruption or both; or proposing recommendations for legislative, executive, or administrative action in the public interest based upon stated findings."

The supervising judge must assess the report. If he or she finds that the report "is based upon facts received in the course of [the investigating grand jury's work] and is supported by the preponderance of the evidence," then he or she accepts the report and files it as a public record, unless it's temporarily sealed while a related, pending criminal case plays out.

Individuals criticized in reports may be allowed to write responses to the allegations covered in the report, at the judge's discretion, and also at the judge's discretion, those responses may be attached to the final report when it's published.

If the judge refuses to accept the report, the prosecutor can appeal to the Pennsylvania Supreme Court. There is currently no procedure for the public to appeal an accepted report on grounds that the investigating grand jury process itself was corrupted.

The document produced by the Krumenacker grand jury regarding allegations of criminal conduct by DA Parks Miller was a report, not a presentment.

Section 4 – Krumenacker IGJ investigation of DA Parks Miller

As reported previously, in February 2015, Kathleen Kane's Office of Attorney General referred the investigation into the circumstances surrounding the Sept. 9, 2013 signing and public filing of a "fake" bail order to the 37th Statewide Investigating Grand Jury meeting in Pittsburgh under the supervision of Cambria County President Judge Norman Krumenacker III.

Since grand juries meet in secret, and participants are barred from speaking publicly about the proceedings, the public has no knowledge of how the statewide grand jury conducted its four-month inquiry.

The paper trail reemerged in mid-July 2015, when the grand jury sent drafts of its final report to Centre County County Commissioners and to the Bellefonte Police Department, to give witnesses an opportunity to respond with clarifications and corrections.

Five named individuals submitted written responses that were attached to the final report: Parks Miller, Bellefonte Police Chief Shawn Weaver, Bellefonte Police Detective Robert Ruggiero, Centre County Commissioner Chris Exarchos, and Centre County Commissioner Steven Dershem.

On July 21, 2015 Exarchos and Dershem objected, in writing, that the grand jury report had presented as fact the Attorney General's legal opinion that the OAG was empowered to investigate and prosecute allegations of criminal misconduct by a District Attorney, but the Centre County government was not. The county commissioners maintained that the potential conflict between the 1955 and 1980 statutes had not been resolved, and that an equally plausible legal opinion is that the two investigative procedures may be used concurrently.

On July 23, Weaver and Ruggiero objected, in writing, that, contrary to the IGJ's "finding" that the BPD was "coerced" into investigating by the county commissioners, the BPD investigated based on reasonable suspicion that crime had been committed.

The final document published by the 37th Statewide Investigating Grand Jury on July 31, 2015 was a report, not a presentment (more on the distinction above). The grand jury report stated that there was not enough evidence to charge Parks Miller, and recommended that the Pennsylvania legislature take a look at the potential tension between the 1955 County Code provisions cited by the County Commissioners in their investigative efforts, and the 1980 Commonwealth Attorneys Act cited by the OAG.

Several interesting aspects of the case were not addressed in the report, including the affidavit filed by Parks Miller's former paralegal – and key witness – Michelle Shutt, and the supporting emails Shutt provided to Bellefonte police investigators.

Further, as reported previously, the grand jury examined the available evidence against the wrong statute: an error of referral that dramatically reduced the worst case scenario for Parks Miller in the event that the grand jury had recommended charges be filed.

As reported previously, Parks Miller frequently uses pivot maneuvers to redirect public attention away from her own public actions, toward the actions of those who criticize her or report her actions to law enforcement authorities.

She responded to the July 31, 2015 release of the statewide grand jury report with two legal maneuvers.

Parks Miller's first pivot maneuver was to petition Centre County President Judge Thomas King Kistler for the establishment of a Centre County investigating grand jury.

In an August 4, 2015 press release announcing the county grand jury petition, Parks Miller wrote:

> "The District Attorney is acutely aware that some persons may attempt to construe this development as an effort to intimidate her opponents in the recent controversy where she was falsely accused of the crime of forgery. The DA…learned during the [statewide investigating grand jury] proceeding the value to Centre County law enforcement an investigating grand jury could have."

In a comment to StateCollege.com reporter Michael Martin Garrett, Parks Miller added that a grand jury is an important tool because it can "compel people to testify without fear of retaliation." (August 4, 2015, *StateCollege.com*).

In Pennsylvania, judges have no discretion to deny a District Attorney's petition to call a grand jury once made; the judge's order establishing the grand jury is a ministerial act. Accordingly, Judge Kistler issued an

order on August 13, empowering the grand jury for a term of 18 months, with an option for the DA to request a court order for a six-month extension.

Also on August 13, Parks Miller issued another press release, announcing formation of Special Investigations Unit under District Attorney control with wiretapping power and access to the grand jury.

Grand jury selection occurred in November 2015, and – until the press conference Friday, May 5, 2017 – no further information about the work of the Centre County grand jury had been made public.

Parks Miller's second pivot maneuver was her filing – on August 28, 2015, of a retaliatory defamation suit in federal court against Centre County as a government entity and 11 individuals, including key grand jury witness Shutt. She included Shutt in the list of defendant's without any apparent awareness of the irony; three weeks earlier, her own public statement highlighted the fact that grand jury witnesses are *compelled* to testify, and therefore immune from retaliation, to promote their full cooperation with investigations into organized crime and political corruption.

Among other claims in her defamation suit, Parks Miller claimed the actions of the defendants constituted "malicious prosecution," even though she was never charged, arrested, imprisoned or tried.

In due course, US District Judge Matthew Brann heard oral arguments in March 2016, and dismissed all the claims against all the defendants in May and September 2016. Parks Miller promptly appealed Brann's dismissals to the Third Circuit Court of Appeals, where the matter is still pending.

Meanwhile, in April 2016, *The Legal Intelligencer* published a story about the forgery and records tampering investigation conducted by the Krumenacker grand jury. Lizzy McLellan reported that a source claimed Attorney General Kathleen Kane had intervened, instructing the prosecutor to ensure that the jury cleared Parks Miller of the charges. (April 1, 2016, *Legal Intelligencer*.)

The McLellan report substantiated rumors that had been circulating in the Centre County community since the public first learned of the court credibility crisis in January 2015.

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BAILIWICK NEWS

Reporting and critical analysis of Centre County public affairs

May 13, 2017

Critical analysis: Piazza's death, the Centre County court credibility crisis, Beta Theta Pi fraternity, corporate Penn State profiteering, and possibilities for change.

By Katherine Watt

Part 6B: Continuation of Part 6A (Sections 1-4) published May 8, 2017, in a series reporting on legal and political principles as prioritized by incumbent DA Stacy Parks Miller and challenger Bernie Cantorna. Both are running as Democrats; the primary election is May 16, 2017.

Section 5 - CRITICAL ANALYSIS

The involuntary manslaughter; aggravated assault; simple assault; reckless endangerment; hazing; furnishing alcohol to minors; consumption of alcohol by a minor; disorderly conduct; and tampering with evidence charges filed against 18 Penn State students in the February 4, 2017 death of Timothy Piazza are related to allegations of criminal forgery, tampering with public records and destruction of evidence by incumbent DA Stacy Parks Miller in a number of interesting ways.

Further, the charges highlight many other long-festering regional issues, most notably, the corrupt and unaccountable community influence of the Penn State Office of Finance and Business led by Senior Vice President David Gray and tasked with managing a $4 billion annual budget and a perverse incentive structure: maximizing economic profits for the corporate institution by maximizing student enrollment, Greek alumni donations and football program support, regardless of the human and social costs entailed.

The timing of the charges

The timing of DA Stacy Parks Miller's May 5 public announcement of criminal charges against the Penn State students in the alcohol poisoning, bodily injury and death of Timothy Piazza has raised some eyebrows. It was carefully orchestrated to occur at graduation weekend during a Penn State Board of Trustees meeting to maximize national press coverage two weeks before a crucial primary election.

I find the timing and orchestration fairly unremarkable.

Parks Miller is, above all else, a skilled politician motivated primarily by a passion for the survival of her own political career. Politicians are expected to manipulate circumstances for maximum personal gain and exposure at critical electoral moments.

So she did.

Ethical failures, bystander syndrome, and duty to rescue

The fact that none of the young men in the fraternity house on the night of February 2-3 called for emergency medical assistance until almost 12 hours after Piazza's original injury is tragic, and devastating to his family and friends.

However, it's not incomprehensible. As a group, men between the ages of 18 to 22 are not known for their sound judgment at the best of times, even when sober. The Beta brothers were extremely intoxicated – alcohol poisoned to roughly the same blood alcohol content as Piazza, which virtually eliminates the moral, cognitive and physical competency of anyone, of any age.

They were further subject to the well-documented "bystander syndrome" exemplified by the 1964 Kitty Genovese murder case in New York City.

According to Wikipedia,

> "the bystander effect, or bystander apathy, is a social psychological phenomenon in which individuals are less likely to offer help to a victim when other people are present. The greater the number of bystanders, the less likely it is that any one of them will help. Several factors contribute to the bystander effect, including ambiguity, cohesiveness and diffusion of responsibility."

The Wikipedia article cites research by Latané and Darley, listing five characteristics of emergencies that affect bystanders. Emergencies involve threat of harm or actual harm; are unusual and rare; the type of action required in an emergency differs from situation to situation; they cannot be predicted or expected; and they require immediate action.

Latane and Darley further listed five required cognitive and behavioral processes that must happen before a bystander will get involved. Bystanders must notice that something is going on; interpret the situation as being an emergency; develop a threshold degree of responsibility felt; choose a form of assistance; and then implement the action choice.

As Gillian Fornier put it, "there are two reasons that seem to jump out" to explain the bystander effect:

> "One, when you are in a crowd you automatically assume that someone has done something or will eventually make the call. Two, no one wants to be the person who is behaving differently. If no one is reporting it, clearly it is not socially acceptable."

Parks Miller is undoubtedly aware of this social phenomenon. She alluded to the bystander effect in response to questions posed at her May 5 press conference, about the culpability of Tim Bream, 56, Director of Athletic Training Services and Head Football Athletic Trainer at Penn State and the senior "residential advisor" living at the Beta Theta Pi house.

When asked by a reporter whether Bream was in the house the night of Piazza's catastrophic injury, and if so, why Bream was not being charged with crimes similar to the fraternity members, Parks Miller said she believed Bream was in the house, but that the grand jury had not seen him in any of the surveillance video clips presented to them, and therefore they had not recommended charges.

Parks Miller further commented that "Pennsylvania has no bystander law," thus, although she acknowledged Bream may bear moral responsibility, he can't be criminally prosecuted without probable cause, even if he was aware of the situation and failed to intervene.

"You can't be charged with a crime just because you know it's happening and don't stop it," she explained.

Although the technical term is "duty to rescue," Parks Miller is correct. Again, from Wikipedia:

> "in the common law of most English-speaking countries, there is no general duty to come to the rescue of another. Generally, a person cannot be held liable for doing nothing while another person is in peril."

One exception is when the individual who created the danger to the victim fails to rescue the victim. However, in this case, it will be very difficult to identify an individual fraternity member who created the danger. They created the alcohol poisoning danger as a group and they also experienced the consequences – clouded ethical judgment, cognitive impairment and physical incoordination – as a group.

To the extent that the surveillance videos show individuals slapping and restraining Piazza, they are likely to make a compelling argument that those were drunken, incompetent attempts to revive Piazza or protect him from further self-inflicted injury, not criminal attempts to injure him rising to the level of simple or aggravated assault.

Furthermore, Bream had been living at the house since the 2015-2016 school year. The grand jury presentment states that illegal hazing and underage drinking were regular occurrences at the house during at least three consecutive semesters: Spring 2016, Fall 2016, and the Spring 2017 semester when Piazza died.

All of these hazing and underage drinking incidents violated the fraternity's internal policies, Penn State Interfraternity Council policies, and state law as enforced by State College police.

Yet there's been no evidence presented to the public that Bream reported *any* of the preceding violations to the Beta Theta Pi corporation, the Penn State Interfraternity Council or their private security firm (St. Moritz Security Services), the Penn State Office of Student Conduct, or the State College Police Department for investigation or disciplinary action. Neither Bream, nor the Penn State corporation, have been charged with criminal acts the 18 fraternity members and the Beta corporation now face.

It appears, therefore, that someone involved in managing the grand jury deliberately broke the chain of responsibility connecting the Penn State students' health and welfare to Penn State employee Tim Bream, and through Bream, to the Penn State Interfraternity Council, the Penn State Office of Finance and Business (led by Vice President David Gray) and the Penn State Office of Student Affairs (led by Vice President Damon Sims).

Setting those thorny facts aside, if Bream, Penn State administrators and the Penn State corporation are immune from criminal culpability because they had no duty to rescue, by the same argument, none of the individual drunk fraternity members nor the Beta Theta Pi corporation had a responsibility to intervene, and they bear no criminal culpability for failing to intervene or even for intervening incompetently and abusively because they were so extremely incapacitated themselves.

Although grotesque under the circumstances, it's arguable that their drunken, incompetent attempts to revive Piazza and prevent further injury were protected under "Good Samaritan" laws shielding those who attempt to aid a victim from legal liability for harms inflicted during efforts to render assistance.

As such, criminal convictions of any of the fraternity brothers on the involuntary manslaughter and aggravated assault charges are as likely to induce future bystanders to walk away from emergency situations as they are to induce those future bystanders to call for help.

And criminal convictions of the fraternity brothers, so long as Bream and the Penn State corporate administrators walk free, will likely reinforce the growing public understanding that Centre County courts operate at least two tiers of criminal justice: one for the politically-connected ensuring their impunity, and another for low-level offenders, maximizing their punishment.

Grand jury recap – purpose and risks

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

However, it's a multi-purpose tool whose effectiveness and the legitimacy of the public outcomes both depend very much on the motives, knowledge and skills of the three individuals most in control the group's work: the prosecutor, the jury foreman and the supervising judge.

Because investigating grand juries use a non-adversarial framework with minimal burdens of proof and all participants are sworn to secrecy, the IGJ tool carries serious risks for the community using it.

Parks Miller went through a secret statewide investigating grand jury investigation as a potential criminal defendant between February and July 2015, and

she quickly recognized the extraordinary power of the grand jury to work without public oversight.

In August 2015, in her capacity as District Attorney, she parlayed her experience to convene a secret Centre County investigating grand jury under her direct control. The jury worked intermittently for 18 months between November 2015 and May 2017.

Reasons for grand jury secrecy

The IGJA secrecy provisions have two intended purposes: to protect grand jury targets from reputational damage in the event that they are not charged with the crimes for which they're being investigated, and to protect witnesses from retaliation by targets, to encourage their full 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 final, published conclusions.

If the targeted individual is wrongly accused, the subsequent public trial will provide an opportunity to clear his or her name. But if the targeted individual is wrongly cleared, the public has no recourse through appellate review of the investigating grand jury's process or decision.

Secrecy, texting evidence and tampering

At the press conference, Parks Miller also stated that text messages between fraternity members during the planning and execution of the alcohol poisoning rituals provided key evidence supporting the charges, including evidence that the fraternity members were aware of their liability risks and interested in avoiding responsibility by covering up or destroying evidence. Some of the texting evidence is unavailable, she explained, because it was sent through Groupme chats, which are not stored long-term. Such chats are "not like regular texts, where our forensic guys can get it back," she said.

As reported previously, since March 2015, Parks Miller and several Centre County judges have vigorously fought against efforts for their own text and email records to be released to confirm or refute allegations of *ex parte* communications, up to and including destruction of evidence.

As noted by Judge Michael Williamson in a Dec. 22, 2016 ruling in *Commonwealth v. McClure*, "All of these phones were wiped clean, destroyed or otherwise made unavailable after the issue of the texting between [former Common Pleas Judge Bradley] Lunsford and the District Attorney's Office had been raised by defense counsel [Bernie Cantorna]."

Subsequent to Judge Williamson's order, defense attorneys identified a forensic technician – Brian Sprinkle of PATC Tech – who is one of those "forensic guys" and managed to "get back" many of the deleted DA-judge texts, which the defense attorneys for Jalene McClure and Barry Grove intended to present in support of their clients' interests.

And, as reported previously, as soon as she became aware of Sprinkle's likely testimony in January 2017, Parks Miller moved swiftly to suppress the public production of that evidence, by moving the McClure and Grove cases to state Superior Court and having the proceedings sealed and rendered secret.

Secrecy in grand jury investigation of Piazza's death

At the May 5 press conference, Parks Miller stated that the county grand jury played a key role in collecting and evaluating evidence to charge the Penn State students and the Beta Theta Pi corporation.

In particular, she emphasized the importance of grand jury secrecy, which she claimed, made it possible to compel testimony regarding the fraternity's ritualized alcohol-poisoning practices that would otherwise have been kept secret by the fraternity members, to uphold their cult's secrecy codes.

Parks Miller's claim that she needed a grand jury to investigate hazing and underage drinking rings false. Hazing and underage drinking – even when they lead to death – are straightforward crimes, unlike the organized crime or political corruption that are the intended targets of grand jury investigations.

Moreover, much of the evidence reported in the grand jury presentment came from testimony provided by State College Police Detective David Scicchitano, who relayed to the grand jury testimony he obtained through police interviews with fraternity members, apparently in the course of a standard police investigation.

Grand jury parallels and questions raised

The grand jury investigation of the Beta fraternity members, the grand jury investigation of Parks Miller's "fake" bail order, and the sealing of the McClure and Grove cases on appeal in Superior Court raise the same set of questions.

Is the secrecy being used as a shield to protect the innocent from the injustice of a false accusation?

Is it being used to protect witnesses from potential retaliation?

Is it being used to facilitate retaliation by those privy to the secret witness testimony who find it damaging to their personal interests?

Is it being used to suppress evidence, to help the guilty evade accountability?

With respect to Centre County grand jury investigations one through 10, the public knows very little. There are a few news reports about charges filed in the Corinne Pena murder and 200 counts of child sex abuse filed against Lawrence O'Shell in a case dating back to 1998. But other than the Beta presentment, there have been no publicly released reports or presentments.

Has the grand jury been used for any of those ten secret investigations to interrogate individuals who have sought public accountability for official wrongdoing, or to obtain and destroy incriminating evidence to protect politically connected individuals?

In general, are there any substantive differences between grand jury secrecy in the Beta and Parks Miller investigations, secret Superior Court proceedings in McClure and Grove, secrecy codes used by fraternities to protect themselves from prosecution for hazing and underage drinking, and prosecutorial and judicial secrecy Penn State's administrative secrecy enforced through Right to Know exemptions?

If so, what are those substantive differences?

Above all else, how is the public interest in sound, ethical governance and fair adjudication served by all this secrecy?

Grand jury request for a report on alcohol culture at Penn State

The grand jury presentment, in addition to recommending charges against the Penn State students and the fraternity corporation, directed Parks Miller to supervise drafting of a report on fraternity, binge drinking and hazing culture at Penn State and make recommendations to the Pennsylvania legislature to address identified problems.

Parks Miller referred to the alcohol culture as "a social health crisis" during the May 5 press conference, and said that among other things, her office would recommend that the legislature increase the level of furnishing alcohol to a minor from a misdemeanor 3 crime (on par with disorderly conduct) to a higher level with more severe penalties upon conviction.

In my view, the production of such a report would be redundant and therefore meaningless.

The binge drinking culture at Penn State as it's evolved over the past several decades is already well-known and well-understood. There was, for example, an extensive and widely-heard National Public Radio series on the topic in 2009 (*This American Life*, Episode 396.)

Many individuals and organizations have lobbied for years with the Penn State Board of Trustees, State College Borough Council, State College Police Department, and Pennsylvania legislature, for strong political leadership to address the issues.

The problem is not a lack of awareness or understanding.

The problem is that financial incentives for corporate Penn State make it more profitable to facilitate fraternities and alcohol abuse than to control them, and until the incentive structure changes, corporate Penn State's behavior will not change. Failure is built into the corporate structure, crocodile tears and public condolences notwithstanding.

This is what's most troubling about the death of Timothy Piazza and the prosecutions stemming from it.

It's David Gray's job, as corporate Penn State's chief financial officer, to maximize internal profits, including student tuition and fees from unwitting parents and corporate lenders backed against default by US taxpayers; football, tailgating and ticket fees; and alumni donations disproportionately provided by Greek alumni.

This goal requires a viral marketing strategy, which is in fact thoroughly-implemented, promoting the reputation of Penn State as a hard-drinking, football-loving, frat-supporting academic tourism destination for high school graduates and Penn State alumni.

Another key profiteering strategy is to externalize liabilities, and one of corporate Penn State's most effective tactics is to keep fraternities off-campus, as putative "private" organizations outside direct University responsibility.

A third profiteering strategy is to maintain wide-open front and back channels of communication between University administrators and those in positions that theoretically could hold the corporation and its leadership accountable for misconduct, such as the county DA and state legislators.

David Gray is very good at his job.

And he's ably assisted his endeavors by the placement of his wife Margaret Gray, a former government affairs lobbyist in Harrisburg, who served as Penn State's first Director of Local Government and Community Relations (appointed in February 2015) and is now Centre County Administrator, the chief executive of the Centre County government.

Interestingly, Mrs. Gray filled a position vacated by former County Administrator Timothy Boyde after Boyde fulfilled the Right to Know requests filed by defense attorneys that initially revealed the *ex parte* texting and prosecutorial and judicial misconduct, only to find himself sued by Parks Miller and the embroiled county judges.

Again, to the extent that Margaret Gray's job is to smooth out the political and legal bumps in the road for the largest regional wealth pump, she's great at it.

Conclusion

Parks Miller, Lunsford and others in Centre County court system – along with Penn State administrators - serve as excellent role models for others in the community seeking to withhold, suppress or destroy evidence to evade public accountability for their actions and failures to act.

Thus it's difficult to see public condemnation of Penn State students evading responsibility and tampering with evidence as anything other than rank hypocrisy, and another example of our dual-track system of law enforcement: one for the politically-connected including Parks Miller herself as the chief law enforcement officer, and one for the unprotected.

So long as Parks Miller has free rein to operate the Centre County criminal justice system largely in secret, we will have at least two tiers of county "justice." So long as David and Margaret Gray perform their respective jobs competently, and deflect responsibility for community tragedies from high-level administrators to low-level offenders, there can be no change to corporate Penn State and municipal State College complicity in the maintenance of the binge drinking culture and the human suffering stemming from it.

Change will not come from the top of the power hierarchy, because the top is where the moral rot starts.

Citizens acting in our civic capacities as voters, students, and parents are in the best, perhaps the only position to reform Centre County courts to ensure fair, public adjudication and reform Penn State from a profiteering corporation focused on fraternities, football and finance into a credible, legitimate educational institution.

Prospective students and their families are in good position to force cultural change, by either boycotting Penn State, or, since alternatives are often even more ridiculously cost-prohibitive, sending a disclaimer with their tuition checks:

> "The undersigned student and his/her parents acknowledge the inherent risks involved in Penn State attendance, including but not limited to severe alcohol poisoning, accidental injury, simple assault, aggravated assault, sexual assault, loss of bodily functions, loss of cognitive functions, loss of mobility (paralysis) and death. The student acknowledges that participation in alcohol poisoning activities will result in his/her parents discontinuing financial support for Penn State enrollment. The student and his/her parents hereby waive all civil and criminal claims against corporate Penn State for such injury, maiming and death."

Football fans are in a position to force cultural change, by refusing to tailgate or attend football games.

Alumni donors are in a position to force cultural change, by withholding donations.

And state legislators are in a position to force cultural change, by refusing to subsidize Penn State's profiteering, and opening up Penn State's administrative secrecy to public scrutiny by enacting legislation to bring Penn State and the other state-related universities under the provisions of the Pennsylvania Right to Know Law.

There are good teachers and good academic programs at Penn State. But the higher education cartel has taken over in the last several decades, driving tuition and fees beyond reach, pushing college-educated people into massive debt, and exploding the ranks of corporate middle managers on university payrolls.

Teachers, students and the generational transfer of knowledge do not drive the mission of corporate universities anymore. Profiteers do.

We need citizens to vote for and then support local, county and and state legislators and a district attorney willing to stand firmly against corporate Penn State's secrecy and profiteering. We need family decisions to avoid Penn State in the higher education marketplace. We need donor decisions to avoid Penn State in the philanthropic marketplace. We need state legislator decisions to withhold funding for the corporate Penn State racket and open the administrative suites to public scrutiny.

Without those actions, alcohol poisoning, hazing, injury and death of Penn State students are likely to continue, alongside prosecutorial and judicial misconduct, including grand jury abuse.

But those individual choices – if undertaken by a critical mass of Penn State stakeholders – can break the secrecy down and open two of our core public institutions up to public accountability and reform.

We'll know something has changed when county court proceedings again become public and accountable; when Penn State application numbers, enrollment, football attendance, alumni donations and state subsidies drop; when the Penn State administration opens its' records and daily functions to public review and analysis; and when the streets of downtown State College are no longer clogged with packs of stumbling drunk students Thursday through Sunday whenever Penn State is in session.

Until then, it'll be business as usual.

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