

BAILIWICK NEWS

Reporting and critical analysis of Centre County public affairs

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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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