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

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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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