APPENDIX G

No. 16-1669

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA ex rel.
ROBERT BAUCHWITZ, M.D., Ph.D.,

Plaintiff-Below/Appellant,

v.

WILLIAM K. HOLLOMAN, et al.,

Defendants-Below/Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
Honorable Timothy A. Savage, U.S. District Judge
Case No. 2:04-cv-02892

BRIEF FOR APPELLANT

(Filed May 23, 2016)

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Dated: May 23, 2016

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Cases

[1] JURISDICTION

This is an appeal from a post-dismissal order denying Appellant's motion for access to the court reporter's original stenographic hearing data (the "Motion"). The District Court had jurisdiction over the underlying qui tam action pursuant to 28 U.S.C. §1331 and 31 U.S.C. §3730.

The District Court issued its Order denying the Motion on February 24, 2016 (A-2), and issued an Amended Order on February 25, 2016. (A-3). Appellant filed a timely Notice of Appeal on March 22, 2016. (A-1). This Court has jurisdiction pursuant to 28 U.S.C. §1291, as orders denying access to judicial records are appealable final orders. U.S. v. Antar, 38 F.3d 1348, 1355-56 (3rd Cir. 1994); In re Capital Cities/ABC, Inc's Application for Access to Sealed Transcripts, 913 F.2d 89, 92 (3rd Cir. 1990).

ISSUE PRESENTED

Where the First Amendment grants a right of access to a recording of a judicial proceeding, and there is no claim that the record should be sealed, and the electronic data to be converted into the transcript is entered onto digital storage disks or other media, and the court reporter claims that a malfunction prevented a "working copy" of the storage disk from being created, should the party seeking access be permitted [2] access to any medium on which such data was stored, including an ostensibly nonworking disk, to see if the data can be recovered to create a transcript?

RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings.

STATEMENT OF THE CASE

On June 30, 1994, relator-below/appellant Robert P. Bauchwitz filed a qui tam against William K. Holloman, Cornell University Medical College, Eric B. Kmiec, and Thomas Jefferson University. Matters were originally sealed by the District Court, but were subsequently unsealed.

Specifically relevant to this appeal, on October 17, 2005, the District Court held a hearing on a Notice to Show Cause (the "Oct. 17 Hearing"). (D.I. 20). Although the hearing was sealed originally, it was unsealed by subsequent Order. (D.I. 83). A minute entry for the

hearing was created (D.I. 20), but no hard copy transcript is indicated or included on the docket.

On December 1, 2009, the District Court entered summary judgment in favor of defendants Thomas Jefferson University and Eric B. Kmiec, and against defendants William K. Holloman and Cornell University Medical College. U.S. ex rel. Bauchwitz v. Holloman, 671 F.Supp.2d 674 (E.D. Pa 2009). (D.I. 116-18). On April 1, 2010, the action was dismissed with prejudice by stipulated order. (D.I. 135).

[3] Since then, Appellant has sought access to a transcript of the Oct. 17 Hearing. By letter dated Sept. 20, 2012, the Clerk' s office informed Appellant that:

> I was advised by the court reporter assigned to transcribe the hearing that the equipment he had used to burn a CD of the hearing apparently malfunctioned and that he does not have a working copy of the disk on which the hearing is recorded. The court reporter's files in storage in the Clerk's Office do not contain his notes of this particular proceeding, and the court reporter – who is now retired – cannot otherwise explain the absence of transcription notes of the hearing.

(A-35).

That letter did not contain any explanation of the location of the purportedly nonworking cow of the disk on which the hearing is recorded, nor the existence or location of other backup forms of the original record of the hearing. The nature of the malfunction was not

explained, nor was time any explanation of whether any steps had been taken to recover the data forensically. Further, Appellant was not afforded the opportunity to attempt forensic restoration at his own expense.

On October 16, 2015, Appellant filed a motion in the District Court, requesting access to nonworking storage media suggested by the Clerk's Office, as well as any related backup files, audio files, documents, and stenographic output, so that he could have a forensic expert attempt to make available the hearing data (A-29-35).

The District Court denied that motion, asserting that no "working-copy" of a disk was created containing the hearing data due to an equipment malfunction, and [4] no notes were maintained. (A-2, 3). The District Court did not identify the sources of its evidentiary conclusions, nor whether there was any effort made to retrieve any of the original records data forensically. Appellant was not given the opportunity to learn whether or not the nonworking storage medium exists.

SUMMARY OF THE ARGUMENT

Judicial proceedings are presumptively public, as are transcripts of those proceedings. When, due to technological failure, a hard copy transcript cannot be made, the underlying recording becomes a judicial record subject to the First Amendment right of public access. By the same token, when such recording is digital, and there is a claim that the digital data cannot be

translated, then an applicant should be permitted to access the nonworking or other related data to see whether, with the aid of technological experts, the data can be restored.

ARGUMENT

A. STANDARD OF REVIEW.

Issues of access to judicial records are reviewed de novo by this Court U.S. v. Wecht, 537 F.3d 222, 234 (3rd Cir. 2008).

B. ARGUMENT.

[5] This Court has long recognized that consistent with the right of the public under the First Amendment the public has a right to inspect judicial records, including transcripts of judicial proceedings. U.S. v. Antar, 38 F.3d at 1360.

In this case there is no hard copy transcript. Where there is no hard copy transcript the underlying recording of the data must be filed with the Court, and that recording is deemed to be a judicial record. Smith v. U.S. District Court Officers, 203 F.3d 440, 441-42 (11th Cir. 2000); 28 U.S.C. §753(b). As such, in the absence of any other transcription of the hearing, the data produced by the stenographer or the stenographic machine (including, for example, an audio or paper file), or by the courthouse (e.g., also an audio recording), whichever is a remaining original record of the hearing, is a judicial record, and is subject to a right of

public access. Such records are to be preserved by the Court for a period of not less than ten years. 28 U.S.C. §753(b). It is the duty of the Court to ensure strict compliance with this requirement, with or without request Edwards v. U.S., 374 F.2d 24, 26 n. 1 (10th Cir. 1966).

The District Court, in its Order, did not explain what happened to the court reporter's records of the hearing, including more specifically the digital data contained on any storage disk. The District Court ostensibly conducted its own independent ex parte investigation and came to its own conclusions, presumably [6] without the benefit of forensic expertise and without giving Appellant an equal opportunity to question the same sources, with the aid of forensic experts, and possibly arrive at a different result. Nothing in the record suggests that the court reporter had sufficient technological expertise to determine whether or not stenographic or related data could be extracted from nonworking storage media or other places in which the information might reside.

In this digital era, it should not be enough to say "we can't get it" without the benefit of expert evaluation and so frustrate the right of access. The District Court's Order leaves questions unanswered. For example:

1. Although the lower court stated that there was no "working copy" of the disk, does a "nonworking" disk containing the data of the hearing exist? It would be improper to permit the District Court to assume such a conclusion or make such an assessment without

allowing Appellant the opportunity to attempt to show otherwise.

2. What happened to the other forms of data requested that would have been expected using professional stenographic equipment? Were no records of the hearing ever transmitted by the court reporter to the Clerk's Office? Why, in light of 28 U.S.C. § 753(b), is it claimed that no record whatsoever was preserved?

Appellant did not ask the District Court, and is not asking this Court to undertake the expanse of forensic investigation (although, as the problem did not [7] originate with Appellant such would not be appropriate). He is asking for access to the storage media referenced by the Clerk's Office and the District Court as well as any related forms in which the hearing record would have been stored, to assess whether his experts can extract the data and recreate the transcript. Such request is supported by the significance of the public's interest in preserving judicial records. See, e.g., Haas v. U.S. District Court, 2013 WL 2182331 at *2 (S.D. Ind. May 20, 2013) ("there is a strong public interest in maintaining accurate judicial records . . . ").

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellant Robert P. Bauchwitz respectfully requests that this Court reverse the Order of the District Court and remand with instructions to grant Dr. Bauchwitz the right to examine any original records of the Oct. 17

Hearing which can be produced in any form including nonworking disks.

Respectfully submitted,

/s/ David L. Finger

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[Certificate Of Compliance Omitted]

[Third Circuit Rule 28.3(d) Certification Omitted]

[Appendix Omitted]