APPENDIX H

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

PETITION OF APPELLANT
ROBERT BAUCHWITZ, M.D., Ph.D., FOR
REHEARING AND/OR REHEARING EN BANC

(Filed Dec. 12, 2016)

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Dated: Dec. 12, 2016

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[1] **STATEMENT OF COUNSEL REQUIRED BY FED. R. APP. P. 35(b)(1)**

I, the undersigned counsel for movant, express a good-faith belief, based on reasoned and studied professional judgment that rehearing en banc is necessary to address the following questions of exceptional importance:

1. Does the raw electronic data in a court reporter's stenographic machine, or any storage medium to which the data was transferred, constitute a "judicial record" subject to the public's right of access where 28 U.S.C. §753(b) requires the court reporter to file the "original records" of the transcription with the Court, but fails to do so due to some claimed technical error?

2. Is it proper, consistent with principles of Due Process and Canons 2(A) and 3(A)(4) of the Code of Conduct of United States Judges, for a judge to investigate the facts independently, without prior notice to the movant and an opportunity to participate, and then base his ruling on his investigation, particularly

where the issue involves a matter of expertise in electronic data recovery?

3. Is it proper for an appellate court, consistent with the rule that appellate courts do not assess the credibility of witnesses, to pass on the credibility of a District Court judge, based on that judge's finding of fact as a result of his independent determination, where the movant was denied the opportunity to test the conclusions of the judge?

[2] /s/ David L. Finger

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[3] **FACTUAL BACKGROUND**

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. *US. ex rel. Bauchwitz v. Holloman*, 671 F.Supp.2d 674 (RD. Pa. 2009). (D.I. 116-18). On April 1, 2010, the action was dismissed with prejudice by stipulated order. (D.I. 135).

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 [4] 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 copy of the disk on which the hearing is recorded, nor the existence or

location of other backup forms of the original data containing a record of the hearing. The nature of the malfunction was not explained, nor was there 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 as 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 recover 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 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 [5] participate in any investigation taken by the District Court to learn whether or not the nonworking storage medium exists and the data can be recovered.

On October 16, 2015, Appellant filed a Motion for Access to Court Reporter's Original Stenograph Records. The District Court denied that motion by Order dated February 24, 2016, which was superseded by an Amended Order dated February 256, 2016, attached

hereto as Exhibit A. That Order was affirmed by this Court on Nov. 29, 2016. *U.S.A. ex rel. Bauchwitz v. Holloman*, ___ Fed. Appx. ___, 2016 WL 6962257 (3rd Cir. 2016) (appended hereto as Exhibit B).

ARGUMENT

I. A COURT REPORTER'S ELECTRONIC DATA IS A JUDICIAL RECORD WHERE NO OTHER RECORDS OF THE HEARING ARE AVAILABLE.

The appellate panel concluded that storage media is not subject to the right of public access because it is not within the District Court's files. A similar issue was addressed in *Smith v. United States District Court Officers*, 203 F.3d 440 (7th Cir. 2000). In that opinion, Judge Posner wrote:

> The public, including the parties to a suit, have a right of access to the records of a judicial proceeding. The right is not absolute, but none of the exceptions is applicable to this case. The question presented by the present case a question on which we cannot find any case law is whether, or more precisely when, audiotapes of a judicial proceeding should be deemed judicial records within the meaning of the access rule. We can get help from the statute that governs the use of court reporters in federal courts. 28 U.S.C. § 753. It requires that proceedings in open [6] court be recorded verbatim, but permits the recording to be done by any reliable method, including taping; and it also requires the reporter to file the "original

records" in court. § 753(b). At a minimum, those records are judicial records within the meaning of the access rule. It follows that if an audiotape is the only record made of a proceeding, it must be filed with the court. This understanding is confirmed by regulations issued by the Judicial Conference of the United States, 6 Guide to Judiciary Policies and Procedures § 16.4.4 (Court Reporters Manual) (Jan. 1998), pursuant to a statutory delegation of authority to flesh out the provisions of section 753. See § 753(b). At least one of the audiotapes that Smith wants is the original record of a part of the criminal proceeding against him, namely a pretrial hearing held on April 29, 1993. A transcript was made from the tape, but the transcript is not the original; the tape is. As to that tape and any others that are likewise the original (rather than merely a backup) record of a stage in the proceedings, he has a right of access that the district court unjustifiably denied.

Regarding audiotapes that merely back up the court reporter's stenographic record, the regulations we have just cited make these the personal property of the reporter except as to audiotapes of arraignments, changes of plea, and sentencing hearings. 6 Guide to Judiciary Policies and Procedures, supra, §§ 16.4.1, 16.4.4. We do not think that these should be deemed judicial records, unless some reason is shown to distrust the accuracy of the stenographic transcript. This position is consistent not only with the regulations, and with the statute

> (which requires only that the reporter's original records be filed with the court), but also with the case law, which defines the right of access as a right of access to those records of a proceeding that are filed in court or that, while not filed, are relied upon by a judicial officer in making a ruling or decision. We think it possible that this dispensation might be stretched to reach records that should have been filed in court, as where a reporter fails to file his original records in court as required by the statute to do, even if the court does not rely on the records in its rulings, though we cannot find any case on this question.

Id. at 441-442 (citations omitted).

[7] Applying the logic of the Seventh Circuit, as no transcript and no stenographic notes were filed with the Court as required by 28 U.S.C. § 753(b)[1], the data in the stenographic machine, or any storage medium to which the data was transferred, effectively constitutes the "original records" required to be filed with the Court. Because the transcript or notes were required to be filed with the District Court, but were not, the panel's conclusion that the storage media does not constitute a judicial record because the stenographic machine or storage equipment is not within the District Court's files applies a restrictive bright-line rule

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[1] *See also* 6 Guide to Judiciary Policy §290.23.30(c)(1) ("[i]f a transcript is not ordered, the court reporter will deliver the original shorthand notes or other original records to the clerk of court within 90 days after the conclusion of the proceeding").

without addressing the issue raised by the specific circumstances of this case: whether a document that was supposed to be filed with the Court by the stenographer, who is an officer of the Court, *U.S. v. City of Pittsburgh*, 757 F.2d 43, 47 (3rd Cir. 1985), is a *de jure* or *de facto* judicial record. The statute, case law and administrative regulations cited above lead to a "yes" answer.

[8] **II. <u>THE DISTRICT COURT ERRED IN ENGAGING IN AN INDEPENDENT INQUIRY WITHOUT NOTICE TO APPELLANT OR ALLOWING APPELLANT TO PARTICIPATE IN THAT INVESTIGATION, AND RELYING ON THAT INQUIRY IN MAKING ESSENTIAL FACTUAL DETERMINATIONS, INCLUDING DETERMINATIONS WHICH REQUIRE TECHNICAL EXPERTISE.</u>**

There is nothing in the record (or in the District Court's ruling) to show that the data could not have been extracted from any storage medium in which the data resided. Yet the District Court concluded that "there is no storage medium that can be used to create a transcript of the hearing." However, the District Court based that conclusion on its conclusion that "[t]e court reporter's equipment malfunctioned so that a *working copy* of a disc was not created." (Italics added). The fact that as "working copy" of the disk was not created does not mean that the raw electronic data does not exist, or that such data cannot be recovered.

The appellate panel accepted the District Court's conclusion, stating "the District Court's determination that the information Appellant seeks does not exist is credible." Why? Again, the District Court did not say that the raw data does not still exist in some storage medium or that the data is otherwise unlocatable. The District Court concluded: "In short, there is no storage medium that can be used to create a transcript of the hearing." But the District Court did not explain the nature of its investigation, or permit Appellant the opportunity to also engage in an investigation. Does the District Court have expertise in data recovery? Did the District Court [9] consult with such an expert? Was there any investigation of sources where the data might exist. The District Court did not state that the stenographic machine, which may be one source of the data, was unavailable. Nor is there any statement of what alternate sources might have the data, such as, for example, off-site backup.

Both the process utilized by the District Court and the use of that process to decide a central question in the case run afoul of both due process and rules of judicial conduct.

Code of Conduct for United States Judges, Canon 3(A)(4) states that a judge should avoid *ex parte* communications. Section 2.9(C) of the ABA Model Code of Judicial Conduct states that "[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." While the ABA Model Code is not binding on federal courts, it has been

cited in federal judicial opinions.[2] *See also* 28 U.S.C. § 455(b) (a judge must "disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding").

[10] As one court has stated:

> [A judge's] impartiality can reasonably be questioned, and due process violated, where a judge steps into an advocate's role for one side or another. *See Reyes-Melendez*, *supra.*; *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 166 (3d Cir.1993) ("a judge's participation in a case must never reach the point where it appears, or is even perceived to appear, that the judge is aligned with any party in the pending litigation.") For instance, where a judge conducts an independent investigation or confers with witnesses outside of counsel's presence, section 455(a) requires recusal. *In re United States*, 441 F.3d 44, 66-68 (1st Cir.2006) (recusal under section 455(a) required where judge stays pending criminal matter to conduct investigation of potential misconduct concerning the grand jury); *In re Edgar*, 93

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[2] *See Bennett v. King County Jail Health Services Dept.*, 2013 WL 5724203 at *2 (W.D. Wa. Oct. 21, 2013) ("Obviously, the Court is precluded from obtaining the medical records on its own initiative," citing ABA Model Code of Judicial Conduct R. 2.9(c); Code of Conduct for United States Judges, Canon 3(A)(4) (noting that a judge should avoid *ex parte* communications"). *See also U.S. v. Sanchez-Carillo*, 649 Fed.Appx. 564, 566 (9th Cir. 2016) (citing similar California rule of judicial conduct).

> F.3d 256, 258-60 (7th Cir.1996) (ex parte meeting with experts who had come to favor one party requires recusal under section 445(a)). Likewise, where the judge suggests his preferred resolution of a case, recusal is warranted. *See Furst*, 886 F.2d at 583 (judge suggests that he desires guilty plea).

In re Marshall, 403 B.R. 668, 680 (C.D. Cal. 2009), *aff'd*, 721 F.3d 1032 (9th Cir. 2013). *See also Edgar v. K.L.*, 93 F.3d 256, 258-260 (7th Cir. 1996) (judge's actions in meeting *ex parte* with panel of experts appointed by judge to investigate Illinois mental health institutions and programs to receive preview of panel's conclusions and to persuade judge that their methodology was sound was grounds for disqualification of judge; allowing off the record briefing on issues and prohibiting opposing counsel from discovering what was said in meetings resulted in unauthorized private investigation by judge and examples of judge's comments to counsel raised concerns about judge's impartiality); Edmund M. Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 270-72 (1944) (explaining that, while the "judge is unrestricted in his [11] investigation and conclusion" in determining the content of legal rules, "[t]he situation as to disputed and disputable issues of fact is different," and the judge is not "permitted to make an independent investigation").

The District Court's conclusions went well beyond the information in the letter the Clerk's office sent to Appellant. This indicates that the District Court undertook an independent investigation of the facts

without notice to Dr. Bauchwitz, and apparently without the benefit of anyone knowledgeable in data recovery. Appellant was not given the opportunity to participate in that investigation or to question anyone the District Court contacted, so as to test the conclusion reached by the District Court. The errors in both procedure and in the ruling of the District Court prejudiced Dr. Bauchwitz's ability to either dispute or be satisfied with the District Court's conclusion, and leave relevant and material questions unanswered. This is simply unfair.

III. THE APPEAL PANEL ERRED IN DETERMINING THE CREDIBILITY OF THE DISTRICT COURT BASED ON AN INDEPENDENT INVESTIGATION.

The appellate panel ruled that "the District Court's determination that the information Appellants seek does not exist is credible." WL Op. at *1. As noted above, the District Court reached that conclusion only after an improper independent investigation without notice to Appellant.

[12] The District Court effectively served as its own witness, even its own expert witness. That is not permitted. Fed. R. Evid. 605 ("[t]he presiding judge may not testify as a witness at the trial"). It is also well-established that appellate courts may not on review assess the credibility of a witness. *See Tokash v. Foxco Ins. Management Services, Inc.*, 548 Fed.Appx. 797, 802 (3rd Cir. 2013).

By affirming the credibility of the District Court, the appellate panel assessed credibility of a witness, ignored the independent gathering of evidence (and the apparent deficiencies therein), and put its imprimatur on the improper process. These events alone are prejudicial – and more because they arise in the context where a citizen (and litigant in this case) sought to exercise his First Amendment and common law rights of access to judicial records. To achieve the constitutionally-favored goal, more should be required.

[13] **CONCLUSION**

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that the petition for rehearing and/or rehearing en banc be granted.

Respectfully submitted,

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[Certificate Of Compliance Omitted]

[Third Circuit Rule 28.3(d) Certification Omitted]

[Exhibits Omitted]