No. _____

In The
Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
ROBERT P. BAUCHWITZ, M.D., PH.D.,

Petitioner,

v.

WILLIAM K. HOLLOMAN, PH.D.,
CORNELL UNIVERSITY MEDICAL COLLEGE,
ERIC B. KMIEC, PH.D.,
THOMAS JEFFERSON UNIVERSITY,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The question presented in this case is whether the trial court judge erred by acting independently, outside the courtroom and outside the presence of counsel, as an independent investigator in this case, which investigation he relied on to deny Petitioner's motion? Similarly, whether the appellate court erred in sanctioning the trial court judge's conduct by affirming the trial court's decision and, in fact, crediting the judge's findings as the reason for its decision?

PARTIES TO THE PROCEEDING

The Petitioner in the matter is the United States of America ex rel. Robert Bauchwitz, M.D., Ph.D. ("Dr. Bauchwitz"). Dr. Bauchwitz acts as relator to bring this lawsuit on behalf of the United States Government under the False Claims Act, 31 U.S.C. §§ 3729-3733. He acted as Relator/Plaintiff before the trial court, and as appellant before the court of appeals. Neither the United States nor Dr. Bauchwitz is a corporate entity, requiring a statement pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States. Respondents, who were Defendants and Appellees in the lower courts are: William K. Holloman, Ph.D., Cornell University Medical College, Eric B. Kmiec, Ph.D., and Thomas Jefferson University.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

On February 24, 2016, the United States District Court for the Eastern District of Pennsylvania entered an Order, denying Dr. Bauchwitz's Motion for Access to Court Reporter's Original Stenographic Hearing Records. (Appendix B). On February 25, 2016, the court entered an Amended Order, which substantive content was the same. (Appendix C). Dr. Bauchwitz appealed to the Third Circuit Court of Appeals. On November 29, 2016, the Third Circuit Court of Appeals affirmed the Orders of the United States District Court for the Eastern District of Pennsylvania. (Appendix A). The court specifically found that "the District Court's determination that the information Appellant seeks does not exist is credible." (Appendix A, p. 3). On December 12, 2016, Dr. Bauchwitz filed a Petition for Rehearing with the court, which was denied by Order dated December 28, 2016. (Appendix D).

STATEMENT OF JURISDICTION

The Third Circuit Court of Appeals originally entered judgment on November 29, 2016. (Appendix A). Dr. Bauchwitz timely filed a Petition for Rehearing. The court entered judgment denying the Petition for Rehearing on December 28, 2016. (Appendix D). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455(b)(1):

> [A Judge] shall also 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.

Code of Conduct for United States Judges:

> Canon 2(A): Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> Canon 3(A)(4): . . . Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. . . .

ABA Model Code of Judicial Conduct:

> Rule 2.9(C): 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.

28 U.S.C. § 753(b):

> Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means,

> electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. . . .
>
> The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.
>
> . . . Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee thereof, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.
>
> . . .
>
> The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

6 Guide to Judiciary Policy:

> Section 290.23.30(c)(1): If 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.

STATEMENT OF THE CASE

On June 30, 2004, Robert P. Bauchwitz, M.D., Ph.D. ("Dr. Bauchwitz") filed a qui tam action as a relator, on behalf of the United States, under the False Claims Act, 31 U.S.C. § 3729-3733, against William K. Holloman, Ph.D., Cornell University Medical College, Eric B. Kmiec, Ph.D., and Thomas Jefferson University. On October 17, 2005, the United States District Court for the Eastern District of Pennsylvania held a hearing on a Notice to Show Cause. The hearing was initially sealed, but it was subsequently unsealed by order of the court.

On December 1, 2009, the district court reached a decision on Defendants' Motion for Summary Judgment, granting it in part and denying it in part. *United States ex rel. Bauchwitz v. Holloman*, 671 F.Supp.2d 674, 705-06 (E.D. Pa. 2009). On April 1, 2010, the court dismissed the remaining action by stipulated order.

Subsequently, Dr. Bauchwitz sought a transcript of the October 17, 2005 hearing. The court, however, refused to provide a transcript to him, indicating that the same did not exist. Specifically, by letter dated September 20, 2012, Joan Carr, Supervisor of Court Reporters, wrote to Dr. Bauchwitz from the trial court's clerk's office:

> 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 proceedings, and the court reporter – who is now retired – cannot otherwise explain the absence of transcription notes of the hearing.

(Appendix E, p. 18).

Since the transcript was not provided to Dr. Bauchwitz, and the letter from the clerk's office did not provide access to the non-working copy of the disk, notes or other backup forms of original data, or any information on attempts to restore the data, Dr. Bauchwitz filed a motion with the district court on October 16, 2015, requesting access to non-working storage media, and related backup files, audio files, documents, and stenographic output, so that he could have a forensic expert attempt to recover the hearing data.

The district court denied Dr. Bauchwitz's motion on the basis that, allegedly, no working copy of the disk exists and no notes were maintained. This decision was based on the district court judge's independent investigation into whether a disk or notes could be recovered. This independent investigation took place outside the courtroom, the parties were not made aware of who was interviewed, and the parties were not given the opportunity to question witnesses or

evaluate the evidence. Most importantly, Dr. Bauchwitz was never given the opportunity to determine whether a forensic expert could attempt to recover the hearing data and has never been given the chance to determine if other forms of records, such as an audio recording, exist.

Dr. Bauchwitz appealed to the Third Circuit Court of Appeals. On November 29, 2016, the Third Circuit Court of Appeals affirmed the Orders of the United States District Court for the Eastern District of Pennsylvania. (Appendix A). The court specifically found that "the District Court's determination that the information Appellant seeks does not exist is credible." (Appendix A, p. 4). After Dr. Bauchwitz filed a Petition for Rehearing, on December 28, 2016, the Third Circuit Court of Appeals affirmed its previous Decision without substantive opinion. (Appendix D).

Dr. Bauchwitz now files this Writ of Certiorari to this Honorable Court, which has jurisdiction under 28 U.S.C. § 1254(1).

CONCISE STATEMENT OF ARGUMENT IN SUPPORT OF ALLOWANCE OF WRIT

This Honorable Court should grant Petitioner's Writ of Certiorari as the United States District Court for the Eastern District of Pennsylvania has so far departed from the accepted and usual course of judicial proceedings, and the Third Circuit Court of Appeals

has sanctioned such a departure, as to call for an exercise of this Court's supervisory power. *See* Rule 10(a) of the Rules of the Supreme Court of the United States.

A. This Court Should Exercise Its Supervisory Authority As The Trial Court Judge Violated Rules Of Judicial Procedure And So Far Departed From Accepted Judicial Practices, That Such An Exercise Is Warranted.

In denying Dr. Bauchwitz's Motion for Access to Court Reporter's Original Stenographic Hearing Records, the trial court so far departed from accepted judicial practices, that this Court should exercise its supervisory power. By way of background, on October 16, 2015, Dr. Bauchwitz filed a Motion for Access to Court Reporter's Original Stenographic Hearing Records with the United States District Court for the Eastern District of Pennsylvania, requesting that, since he had been repeatedly told that a transcript of the October 17, 2005 hearing was not available due to technical issues, he should be allowed "access to the electronic storage medium, damaged or otherwise, so that a forensic expert may attempt to restore it sufficiently." (Appendix E, ¶ 9). He further requested "access to any stenographic paper output, or other document or file, including backup and audio files, relevant to this request." (Appendix E, ¶ 9).

On October 27, 2015, a hearing was held before The Honorable Timothy J. Savage. At the hearing, counsel explained to the court that Dr. Bauchwitz

sought to have a forensic expert attempt to create a transcript from any remaining raw data: if the "recording medium still exists – certainly advances in technological knowledge – to create an opportunity to do some forensic examination to see if that information is still available and can be recreated." (Appendix F, p. 3).

Ultimately, the court asked if Dr. Bauchwitz sought an investigation into what records exist from the hearing, to which counsel responded, yes:

> The Court: How can I order the production of something that does not exist or is inexplicably missing? Would you like me to order that there be a further search to determine whether there exists any medium from which we can get a transcription of the hearing?
>
> Mr. Finger: Yes, Your Honor.

(Appendix F). Pursuant to our adversarial justice system, the discussed inquiry would necessarily occur in the courtroom with all parties present. There was no suggestion that the judge himself would undertake the investigation, look into the facts independently, question witnesses independently, and then reach an order with no opportunity for the parties to respond to the evidence. Further, the judge specifically went on to agree, "I will try to inquire as to whether or not there is something, ***if I grant your motion***." (Appendix F, p. 16) (emphasis added). Accordingly, the discussion was

clearly not that the judge would conduct an investigation in order to determine whether to grant the motion, but that the granting of the motion would give rise to an investigation.

After the October 27, 2015 hearing, Dr. Bauchwitz heard nothing from the court until February 24, 2016, when the court entered an Order, and February 25, 2016, when it entered an identical Amended Order, denying Dr. Bauchwitz's Motion:

> AND NOW, this 24th day of February, 2016, upon consideration of the Motion for Access to Court Reporter's Original Stenographic Hearing Records (Document N. 137) and after a hearing, it is ORDERED that the motion is Denied.

(Appendix B). The Order then contained a three paragraph footnote on the reason for the denial. Essentially, based on the court's independent investigation, it concluded the records did not exist:

> The plaintiff moves for production of the court reporter's records of a hearing held on October 17, 2015. The hearing was to show cause why the plaintiff's former attorney should not be permitted to withdraw his appearance.
>
> It is not necessary to address Dr. Bauchwitz's entitlement to a transcript of the proceedings. Assuming that he is, we still must deny his motion because what he seeks does not exist.
>
> The notes were never transcribed. The court reporter's equipment malfunctioned so that a

> working copy of a disc was not created. Additionally, the long-retired court reporter does not have his notes or a file. Nor can the Clerk locate any notes of the hearing. In short, there is no storage medium that can be used to create a transcript of the hearing. Therefore, it is not possible to provide Dr. Bauchwitz what he seeks.

(Appendix B, n. 1).

Judge Savage reached these numerous factual conclusions without any opportunity by counsel to evaluate the facts. Counsel never had an opportunity to cross-examine the "Clerk," who apparently was questioned by Judge Savage.[1] Counsel never had the opportunity to question the court reporter, whose hearsay testimony was apparently relayed to Judge Savage by the "Clerk," and then relied on by Judge Savage. Accordingly, counsel was never given the chance to verify whether the court reporter in fact "does not have his notes or a file," as was found by the judge, or to verify whether the "Clerk" cannot "locate any notes of the hearing." Finally, counsel never learned the basis for Judge Savage's ultimate conclusion that "there is no storage medium that can be used to create a transcript of the hearing." It is not clear whether that conclusion was reached exclusively through conversations with

[1] Counsel was never even told which clerk Judge Savage interviewed. Presumably, he interviewed Joan Carr, the Supervisor of Court Reporters who wrote the September 20, 2012 letter to Dr. Bauchwitz, denying his request for a transcript, but this was never disclosed in the trial court's lengthy footnote.

the "Clerk," or if that was also based on a factual inquiry into whether an electronic storage medium exists.

Judge Savage's independent factual investigation into the key facts related to this case violates rules of judicial procedure. 28 U.S.C. § 455(b)(1). Rules of judicial procedure require that a judge recuse himself when he has "personal knowledge of disputed evidentiary facts" of a case. *Id.* Here, the judge not only refused to recuse himself when he became aware of disputed facts, but he actually sought those facts out himself. The judge chose to acquire personal knowledge of disputed evidentiary facts, and once acquired, did not recuse himself, but reached a decision based on those facts. This is a clear violation of rules of judicial procedure.[2]

Moreover, Judge Savage's independent factual investigation violates Canon 3(A)(4) of the Code of Conduct for United States Judges. This Canon prohibits a judge from considering communications concerning a

[2] Judge Savage must have conducted an independent investigation into this case as the factual findings in his footnote go beyond courtroom discussions and go beyond the facts as alleged in the letter from the clerk's office that was attached to Dr. Bauchwitz's motion to the court. (Appendix E). Specifically, the court's footnote indicates that "the long-retired court reporter does not have his notes or a file." (Appendix B). The letter from the clerk's office, however, only indicates that the court reporter's notes were not filed with the court; it does not indicate that the court reporter did not independently maintain them. Further, there is absolutely no indication in the letter from the clerk's office that "there is no storage medium that can be used to create a transcript of the hearing," as was found by the court.

pending case outside the presence of the parties or their counsel:

> . . . Except as set out below, a judge should not initiate, permit, or consider ex parte communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. . . .

Id. Judge Savage specifically and intentionally violated this provision. He had communications with, at a minimum, a clerk to ask whether recordings existed that could provide Dr. Bauchwitz with the hearing transcript he sought. This communication related to a pending matter and was made outside the presence of the parties and their counsel.

Furthermore, Judge Savage's conduct violated the ABA Model Code of Judicial Conduct, which specifically advises that judges should not investigate facts independently:

> 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.

Rule 2.9(C).[3] Here, Judge Savage specifically and intentionally violated this rule. He conducted an independent factual investigation into the relevant facts of the case.

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[3] The facts investigated by Judge Savage were not facts that could "properly be judicially noticed" under Rule 2.9(C). Rule 201 of the Federal Rules of Evidence provides that a court may take

Circuit Courts of Appeals have consistently found that under similar facts, where a judge becomes an advocate and speaks directly to witnesses, he should recuse himself. *See In re Marshall*, 403 B.R. 668, 680 (C.D. Cal. 2009), *aff'd*, 721 F.3d 1032 (9th Cir. 2013) (citing *In re United States*, 441 F.3d 44, 66-68 (1st Cir. 2006) (finding that a judge must recuse himself if he conducts an independent investigation or confers with witnesses outside counsel's presence) and *In re Edgar*, 93 F.3d 256, 258-60 (7th Cir. 1996) (finding that an ex parte meeting with an expert mandates recusal)).

B. This Court Should Exercise Its Supervisory Authority As The Appellate Court Sanctioned The Trial Court's Departure From Established Rules Of Judicial Procedure And Accepted Judicial Practices, By Affirming The Trial Court's Decision And Even Specifically Crediting The Trial Court's Independent Factual Investigation.

On appeal, the Third Circuit Court of Appeals sanctioned these violations of rules of judicial procedure, the Code of Conduct for United States Judges, and the ABA Model Code of Judicial Conduct.

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judicial notice of a fact that: "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The facts at issue here do not fall under either of these categories, as their determination required an investigation, and their accuracy are, in fact, reasonably questioned.

To this end, the Third Circuit Court of Appeals not only affirmed the district court, but specifically sanctioned Judge Savage's independent investigation in its decision:

> In denying the relief, the District Court noted that "there is no storage medium that can be used to create a transcript of the hearing," and it could not provide Appellant something that does not exist. Specifically, the District Court determined that the notes and hearing testimony were never transcribed. The scant record on appeal likewise provides us no basis to grant relief. Eleven years has [sic] passed since the hearing date; six years have passed since the case was dismissed with prejudice; the court reporter has long since retired; and the stenographic equipment no longer functions. Thus, the District Court's determination that the information Appellant seeks does not exist is credible.

(Appendix A, p. 3-4).

The above quote reflects the full depth of error in the appellate court's decision. It found Judge Savage "credible," essentially sanctioning his role as the key, and in fact, only, witness and investigator in the case.[4] It further refused to reverse because the record is "scant." The record would not have been "scant," if Petitioner had been allowed to question witnesses and

[4] Not only is Judge Savage the key and only witness in this matter, but Dr. Bauchwitz seeks the transcript from a hearing that occurred before Judge Savage in 2005.

use an expert to try to recover damaged data. Accordingly, the very basis for its decision was a sanctioning of the trial court's errors.

C. This Court Should Exercise Its Supervisory Authority As The Trial Court Not Only Deviated From Accepted Judicial Practices, Which Deviation Was Sanctioned By The Appellate Court, But The Ultimate Determination, Based On The Court's Independent And Undisclosed Investigation, Does Not Comport With Federal Law Or The Disclosed Facts Of This Case.

Based on federal law and the facts of this case, it is unclear how there is absolutely nothing, even a corrupt disk or illegible notes, recorded with the clerk's office that could be made available to Dr. Bauchwitz for examination. Federal law requires that all court hearings "be recorded verbatim" and that the notes be maintained for at least ten years:

> Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. . . .
>
> The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or

> other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.
>
> . . . Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee thereof, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.
>
> . . .
>
> The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

28 U.S.C. § 753(b). There are generally no caveats to these rules. The records are to be maintained for at least ten years and be open to the public. *Id.* Accordingly, it is completely unclear how a request for a transcript, or other notes if a transcript is not available, could be denied when made within ten years of the hearing date.

Dr. Bauchwitz seeks the hearing transcript from a hearing that occurred on October 17, 2005. He, at the latest, inquired into the transcript in September 2012, as on September 20, 2012, he received written communication from the court that the transcript would not

be provided. (Appendix E). When his efforts to obtain the transcript failed, he filed his motion on October 16, 2015, still within the ten-year period. Accordingly, he requested the documents well before the ten-year minimum period to maintain records elapsed, and even filed a formal motion within the applicable time. The court should have had the records, and the court should have made the records available to him.

Even assuming a mechanical failure occurred, some notes or recording, even if damaged, should have been filed with the court. Court reporters must "attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the court." 28 U.S.C. § 753(b). Again, regardless of whether a transcript is ordered immediately, the court reporter always files something with the court: "If 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." 6 Guide to Judiciary Policy Section 290.23.30(c)(1). Regardless of what was filed, a corrupt CD, shorthand notes, etc., Dr. Bauchwitz has the right to inspect the same even if no official transcript exists.

Finally, the September 20, 2012 letter from Joan Carr, Supervisor of Court Reporters, implies that a medium did exist which could have had relevant stenographic notes: "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." (Appendix E, p. 18). The fact that the court reporter "does not have a working copy of the disk" certainly implies that a non-working copy of the disk did in fact exist. There was no statement made by anyone that the original stenographic (and likely audio) record was not made or did not work. It was only implied in the Supervisor of Court Reporter's hearsay written statement that two subsequent events occurred: 1) that a backup CD made by the court reporter for his own subsequent use was malfunctioning[5] at the time of her contact with the court reporter in 2012, and 2) that the same reporter, purportedly, may have failed to transmit any form of the original record to the Clerk's Office during the period in 2005-2006 in which such transmittal would have been expected ("the court reporter . . . cannot otherwise explain the absence of transcription notes of the hearing"). 6 Guide to Judiciary Policy Section 290.23.30(c)(1); (Appendix E); (Exhibit A).

As Dr. Bauchwitz argued to the Third Circuit, the Supervisor of the Court Reporter's letter:

> [D]id 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

[5] Note that a malfunction that prevented the use of a file transferred to a CD would not necessarily prevent forensic recovery of a functioning file; in such cases it is CD directory information, rather than the file itself, that has been corrupted.

> not explained, nor was there any explanation of whether any steps had been taken to recover the data forensically.

(Appendix H, p. 52-53). Furthermore,

> 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 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.

(Appendix H, p. 53).

D. This Court Should Exercise Its Supervisory Authority As The Errors Committed By The Lower Courts, Which Call For An Exercise Of This Court's Supervisory Power, Precluded Petitioner From Exercising His Right To Access Public Documents.

The judge's departure from accepted and usual judicial proceedings, and the appellate court's sanctioning of the same, is a critical issue as the public has the right to access court records. 28 U.S.C. § 753(b). A transcript for a court proceeding is a public record, and if no such transcript exists, then the court reporter's back-up records, such as audiotapes, become public records. *See Smith v. United States District Court Officers*, 203 F.3d 440, 441-42 (7th Cir. 2000).

The court asked numerous times at the October 27, 2015 hearing the purpose of the transcript. (Tr., 10/27/15, p. 7, 8, 9, 12). Although there is a critical public purpose to the disclosure of this particular transcript, the open access to information concerning the False Claims Act, this purpose is irrelevant as the public has the right to access public records, regardless of content and purpose.

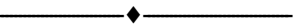
Specifically, although Dr. Bauchwitz's reason for seeking a transcript of the October 17, 2005 hearing is entirely irrelevant as these are public records, this case involves allegations under the False Claims Act, where Dr. Bauchwitz brought an action on behalf of the United States government due to believed fraud. This is undoubtedly an important public interest. The public has the right to understand how these proceedings operate, and accordingly, see the transcript from these proceedings. As was discussed at the October 27, 2015 hearing before the trial court:

> THE COURT: You can't give me a specific public interest, just a general public interest?
>
> MR. FINGER: No, that is not correct, Your Honor. We did make a statement in our papers talking about the False Claims Act. When there is a claim of public access our entitlement is to special considerations by the Court because the public is the true party in interest. I can say there's a general right of action. This is not a slip and fall case. These are actions alleging misuse of government money. It's not a question of whether someone can

> bring a suit. It's a question of how these cases are being treated. . . . [T]he public is not limited to the Court's opinions. The underlying arguments, the underlying facts, the process that leads to the result is as important as the result.

(Appendix F, p. 12).

Finally, both the trial court and appellate court seemed to put great weight on the time that elapsed between the hearing and the request for the transcript, but since the request was made within ten years of the hearing date, this is irrelevant. 28 U.S.C. § 753(b); (Appendix F); (Appendix A). Courts must maintain records for a minimum of ten years. 28 U.S.C. § 753(b). Therefore, the trial court's suggestion that a "balancing test" must be conducted "at some point in time" is erroneous. (Appendix F, p. 8). If that is ever true, it would necessarily occur after the full ten years have elapsed. The Third Circuit Court of Appeals similarly erroneously relied on the passing of time, ignoring that Dr. Bauchwitz made his request within ten years of the hearing. (Appendix A, p. 3) ("Eleven years has [sic] passed since the hearing date; six years have passed since the case was dismissed with prejudice . . . "). These dates ignore that Dr. Bauchwitz requested the transcript well within the ten-year period and even filed his formal motion before the expiration of ten years.



CONCLUSION

Accordingly, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Date: March 27, 2017

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