

# BAILIWICK NEWS

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## ***Pro se* Motion to Intervene, Motion for Access to Judicial Record and Memorandum of Law** Filed in Centre County Court of Common Pleas, August 31, 2018

By Katherine Watt

Editor's Note: The disputed May 2018 transcripts referenced below are currently listed as "image-restricted" at Webia, the Centre County online public judicial records database. Further, as of 2:30 p.m. on Sept. 5 (date of publication) the following Motion to Intervene had not been posted at Webia. The name of the court reporter has been deleted from this *Bailiwick News* publication, because the author does not believe the court reporter acted independently if, as it appears, tampering occurred, and does not wish to harm his or her professional reputation. The author believes the court reporter was directed to tamper with the transcript by prosecutors and/or judges.

### Motion to Intervene and Motion for Access to Judicial Record

To the Honorable Pamela A. Ruest, Judge of Said Court, Intervenor, *pro se*, respectfully represents as follows:

#### Introduction

KW Investigations LLC is an incorporated for-profit corporation in the State of Pennsylvania, established in January 2016 for the purpose of engaging in small-scale local investigative reporting. Intervenor Katherine Watt is the sole manager of the company.

KW Investigations LLC began electronically publishing a small independent newspaper, *Bailiwick News* (bailiwicknews.wordpress.com) on Sept. 9, 2016, and has published roughly two to three long-form investigative reports per month from that date through the present.

*Bailiwick News* has published several issues regarding former Centre County District Attorney Stacy Parks Miller, the multi-defendant Beta Theta Pi prosecutions and other matters relating to corruption, prosecutorial and judicial misconduct, and tampering with public records within the Centre County criminal justice system, including issues published on Dec. 12, 2016; Jan. 6, 2017; Jan. 20, 2017; Feb. 5, 2017; April 21, 2017; May 8, 2017; May 13, 2017; April 19, 2018; April 20, 2018; July 10, 2018; and August 8, 2018.

These reports were written based on information and documents gathered by KW Investigations LLC, including personal attendance at public court proceedings, and review of court transcripts, legal filings, legal correspondence, press releases and other public documents. The authenticity and accuracy of court transcripts and

other public records is critical for the accuracy, credibility and usefulness to the public of Intervenor's publishing.

Intervenor does not engage in broadcast journalism via radio or television.

#### Background

The Beta Theta Pi prosecutions have generated intense public interest in Centre County, and extensive local, regional, national and international press coverage.

On July 25, 2018, Intervenor obtained a copy of a transcript prepared by [a court reporter], purporting to provide an accurate account, for the public record, of questioning, witness testimony and colloquy at the May 4, 2018 preliminary hearing in the matter of *Commonwealth v. Becker et al.*, OTN No. T 991715-4 et al.

Intervenor was not present in the courtroom on May 4, 2018.

On July 30, 2018, Intervenor obtained information from a confidential source stating that eyewitness accounts of the content of the May 4 preliminary hearing differed substantially from the content as recorded in the transcript by [the court reporter].

The altered and omitted testimony and colloquy related to evidence that the alleged victim, Timothy Piazza, consumed "whip-its" of nitrous oxide shortly before his fall down the basement steps. One key aspect of the Commonwealth's theory of the case is that the furnishing of alcohol to an underage, intoxicated individual, by the defendants, was the aggregate, direct cause of Piazza's cognitive and physical impairments, which led to his fall, which led to his death from injuries allegedly sustained during the fall. To the extent that Piazza's voluntary consumption of nitrous oxide, which is not an illegal substance but has extremely potent physical, cognitive and neurological effects, provides an alternative explanation for his severe intoxication, it is of public interest as it relates to the *prima facie* case presented by the Commonwealth against the defendants.

On July 30, 2018, Intervenor contacted District Magistrate Judge Steven Lachman and President Judge Pamela Ruest via email, alerting both to the potential inaccuracy of the public record filed by [the court reporter], and requesting an investigation into the matter, to include comparison of the original, un-edited audio recording of the May 4, 2018 preliminary hearing with the text of the [court reporter's] transcript.

Intervenor's purpose was to investigate the accuracy of the tampering claims preparatory to publishing additional *Bailiwick News* reports on the matter.

On August 3, 2018, Intervenor contacted Judge Lachman, Judge Ruest, and Prothonotary Debra Immel via email, providing background as to the Centre County

court's troubled recent history of entering false documents into the public record as that history relates to the current allegations of tampering and the broader issue of public faith in the fairness and openness of the Centre County criminal justice system. Intervenor again requested a public, court investigation into the alleged discrepancies.

Judge Ruest and Prothonotary Immel did not respond.

On August 3, 2018, Judge Lachman responded via email, stating that he did not "have a specific recollection of [the] testimony" that was apparently omitted from the transcript.

On August 8, 2018, Intervenor reported the alleged crime of tampering with public records (18 Pa.C.S. § 4911) to Bellefonte Police Department, Officer Bill Witmer, and provided supporting documentation. The complaint was recorded at Case No. BPD 2018-03688.

On August 9, 2018, Intervenor obtained information from a second confidential source stating that a second eyewitness account of the content of the May 4 preliminary hearing differed substantially from the content as recorded in the transcript by [the court reporter].

Intervenor was unable to provide Officer Witmer with a sworn affidavit from either of the eyewitnesses, because when asked to do so, both expressed fear that their statements would result in judicial and/or prosecutorial retaliation, given Centre County's troubled history of court corruption and prosecutorial and judicial misconduct.

On August 15, 2018, Officer Witmer suggested that Intervenor attempt to obtain the audio recording of the May 4 hearing directly from the Court.

On August 15, 2018, Intervenor filed a Right to Know request with Court Administrator Kendra Miknis, under the Pennsylvania Right to Know Law of 2008.

On August 23, 2018, Ms. Miknis denied Intervenor's RTK request on the grounds that audio recordings are not financial records within the meaning of Pa. R.J.A. No. 509(1).

On August 29, 2018, Intervenor sent an additional written request via email to Judge Ruest, Judge Lachman, and Prothonotary Immel, seeking immediate access to the audio recording of the preliminary hearing. That same day, Officer Witmer notified Intervenor that he had spoken with Administrator Miknis, and she had refused to provide him with a copy of the audio recording without a search warrant.

Ruest, Lachman and Immel did not respond to Intervenor's final written request.

WHEREFORE, Intervenor respectfully requests an Order granting her permission to intervene and granting her immediate access to a copy of the original, un-edited audio recording of the May 4, 2018 preliminary hearing in the above-captioned criminal matter.

#### Memorandum of Law

KW Investigations LLC/Katherine Watt, *pro se*, respectfully submits this Memorandum of Law in support of her Motion to Intervene and Motion for Access, and the Proposed Order, and states the following:

A motion to intervene is an appropriate method for the news media to assert the public right of access to information concerning criminal cases. *Commonwealth v. Fenstermacher*, 515 Pa. 501, 504 n. 1 (1987). This type of intervention has been described as "provisional in nature and for the limited purposes of permitting the intervenor to file a motion, to be considered separately, requesting that access to proceedings or other matters be granted. *Id* at 504 n. There is a common law presumption of openness that accompanies criminal proceedings. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 596, 603, (1982); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 573 (1980). The Pa. Supreme Court has similarly recognized a presumption of openness stemming from Article I, Sections 9 and 11 of the State Constitution, which provide that the accused has a right to a "speedy, public trial" and that "all courts shall be open." *Commonwealth v. Upshur, Appeal of WPXI Inc.*, 592 Pa. 273, 281, n. 5 (2007) citing *Fenstermacher* at 506.

Public access to judicial records is also presumed. *Nixon v. Warner Communications Inc.*, 435 U.S. 589, 602 (1978).

The Pa. Supreme Court has determined that public judicial records or documents must be available for inspection and copying unless the party seeking to seal the materials demonstrated compelling reasons to preclude access. *Fenstermacher* at 513-514.

The scope of the right of access for the news media is identical to that of the general public. *Id* at 504 n. 1.

The public right to review and copy judicial records and documents provides an important check on the criminal justice system, ensuring not only the fair execution of justice, but also increasing public confidence and understanding. *Upshur* at 282, quoting *Richmond* at 572: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

The constitutional presumption of openness of judicial proceedings extends to pretrial proceedings, including preliminary hearings. *Upshur* at 284 n. 6, citing *Press Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 10 (1986) and *Philadelphia Newspapers Inc. v. Jerome*, 478 Pa. 484, 503 (1978)

The U.S. Supreme Court in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) and *Richmond Newspapers* enunciated factors that militate in favor of public access, including:

"to assure the public that justice is done even-handedly and fairly; to discourage perjury and the misconduct of participants; to prevent decisions based on secret bias or partiality; to prevent individuals from feeling that the law should be taken into the hands of private citizens; to satisfy the natural desire to see justice done; to provide for community catharsis; to promote public confidence in government and assurance that the system of judicial remedy does in fact work; to promote the stability of government by allowing access to its workings, thus assuring citizens that government and the courts are worthy of their continued loyalty

and support; [and] to promote an understanding of our system of government and courts.” *Fenstermacher* at 507.

The common law right of access is based upon knowing about events **as they actually transpire** and not simply on what is filed with a court or formally admitted into evidence. *Upshur*, at 286, citing *Criden 1*, 648 F.2d at 828; *accord US v. Martin*, 746 F.2d 964, 969 (3<sup>rd</sup> Cir. 1984) (Emphasis added).

In *Upshur*, the majority upheld the presumptive right of access to audio recordings.

Compellingly, the majority specifically addressed the issue (raised in a concurring opinion) of whether audio tapes themselves are “not a public judicial record or document in the first instance simply because a transcript exists,” noting that this is “a proposition for which no authority is referenced,” observing “significantly, **written transcripts are not always accurate.**” *Upshur* at 290, n 10, citing *Commonwealth v. Markman*, 591 Pa. 249, 266 n. 5, (2007). Emphasis added.

The *Upshur* court further noted: “examination and dissemination of original public judicial records or documents, where appropriate, allows the media, and thereby the public, to carefully and more directly evaluate the performance of the justice system,” citing *Littlejohn v. Bic Corp.*, 851 F.2d 673, 678 (3<sup>d</sup> Cir.1988) “[T]he bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.”

The *Upshur* ruling further observed:

“Indeed, courts have frequently distinguished between the common law and First Amendment rights to access on the basis that common law access is to **actual copies of public judicial records**, whereas the constitution requires only access to the substance of the information contained within such materials.” *See, e.g., Nixon*, 435 U.S. at 598, and *Commonwealth v. Long*, 922 A.2d 892, 898 n. 6 (2007).

Centre County’s recent history includes public admissions of prosecutorial and judicial court officers tampering with public records by knowingly and deliberately filing a “fake” bail order with the Prothonotary for the purpose of deceiving the general public as to the whereabouts of an inmate. *See, for example, “Grand Jury Report No. 1”* by the 37<sup>th</sup> Statewide Investigating Grand Jury, 64 W.D. MISC. DKT. 2013, Allegheny County Court of Common Pleas, CP-02-MD04931-2013, at p. 6.

“...DA Parks Miller made contact with the state police who were working the case, and [the informant’s] lawyer...to discuss the plan. All were in agreement that a fake bail order would be generated that made it appear that [the informant] had been released when in fact he would be transferred to another jail. To further disguise the fact that he was still incarcerated, when transferred he was lodged under a misspelling of his name. All parties understood that the bail order would never be acted upon and that it had no legal validity.”

Despite its purported lack of “legal validity,” the “fake bail order” was entered into the real public record kept by the Centre County Prothonotary on Sept. 9, 2013.

To date, no one has been held publicly accountable for this act of defrauding the public.

Centre County is now confronted with another instance of tampering with a public record, in this case by altering and omitting testimony and colloquy from the official transcript of a judicial criminal proceeding, and then evading public accountability for the tampering by withholding from the public the audio recording necessary for a full investigation.

These tampering and withholding of evidence actions negate any grounds for the public to rebuild confidence in the government and the "system of judicial remedy."

## Conclusion

Intervenor urges this Court to promote the reconstruction of severely damaged public confidence in the integrity of the Centre County court system by granting her request for immediate access to a copy of the original, un-edited audio recording of the May 4, 2018 preliminary hearing in the above-captioned criminal matter.

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*Bailiwick News is an independent newspaper offering reporting and critical analysis of Centre County public affairs.*

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KW INVESTIGATIONS LLC  
156 W. Hamilton Ave.  
State College PA 16801  
(814) 237-0996

kw.investigations.llc@gmail.com  
bailiwicknews.wordpress.com