

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	<u>Trial Division – Criminal Section</u>
	:	
Plaintiff-Respondent,	:	
	:	CP-51-CR-0011614-2007
v.	:	
	:	
ROBERT WILLIAMS,	:	
	:	
Defendant.	:	

[PROPOSED] ORDER

AND NOW, this ____ day of November, 2017, upon consideration of the DEFENDANT'S MOTION FOR RECUSAL, as to which the Commonwealth takes no position, and for good cause shown, the Court hereby **GRANTS** the motion. The President Judge, or the Supervising Judge of the Trial Division, Criminal Section, will assign a new judge for any further proceedings in this case.

BY THE COURT:

GENECE E. BRINKLEY, J.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	<u>Trial Division – Criminal Section</u>
	:	
Plaintiff-Respondent,	:	
	:	CP-51-CR-0011614-2007
v.	:	
	:	
ROBERT WILLIAMS,	:	
	:	
Defendant.	:	

[PROPOSED – ALTERNATIVE] ORDER

AND NOW, this ____ day of November, 2017, upon consideration of the DEFENDANT’S MOTION FOR RECUSAL, as to which the Commonwealth takes no position, and for good cause shown, the Court hereby **RECUSES** itself from consideration of the recusal motion and **REQUESTS** that the President Judge, or the Supervising Judge of the Trial Division, Criminal Section, assign a different judge for consideration and disposition of the motion for recusal.

BY THE COURT:

GENECE E. BRINKLEY, J.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
PHILADELPHIA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	<u>Trial Division – Criminal Section</u>
	:	
Plaintiff-Respondent,	:	
	:	CP-51-CR-0011614-2007
v.	:	
	:	
ROBERT WILLIAMS,	:	
	:	
Defendant.	:	

[PROPOSED – INTERIM ALTERNATIVE] ORDER

AND NOW, this ____ day of November, 2017, upon consideration of the
DEFENDANT’S MOTION FOR RECUSAL, and for good cause shown, it is ORDERED
that pending decision of the recusal motion:

1. The Defendant is forthwith admitted to unsecured bail, pursuant to Pa.R.Crim.P. 521(B), pending decision of the recusal motion and pending adjudication of any timely filed motion to reconsider and modify the sentence imposed on November 6, 2017;
2. The Court Reporter is authorized and directed to release to counsel of record for the defendant, within three days of the date of this Order, a transcript of the sealed portion of the February 5, 2016, hearing in this case; the order placing that portion of the record under seal, however, shall remain in place and is NOT otherwise amended; and
3. Counsel for the parties shall appear in Courtroom ____, CJC, at ____ o’clock, on _____, 2017, for a hearing on the motion for recusal.

BY THE COURT:

, J.

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**IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
PHILADELPHIA COUNTY, PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA,	:	<u>Trial Division – Criminal Section</u>
	:	
Plaintiff-Respondent,	:	
	:	CP-51-CR-0011614-2007
v.	:	
	:	
ROBERT WILLIAMS,	:	
	:	
Defendant.	:	

**DEFENDANT’S MOTION FOR RECUSAL
OF THE HON. GENECE E. BRINKLEY, J.**

TO THE HONORABLE GENECE E. BRINKLEY, JUDGE OF THE SAID COURT:

Defendant-Petitioner, Robert Williams, was resentenced by this Court on November 6, 2017, after a revocation of probation, to a term of two to four years of total confinement. In anticipation of an appeal to the Superior Court, he intends within the next two days to file a timely motion under Pa.R.Crim.P. 708(E) for reconsideration and modification of this sentence. For the following reasons, the defendant moves for the recusal of Judge Brinkley from considering and ruling on that motion and from any further adjudicatory role in this case. Defendant has been authorized to represent to the Court that the Commonwealth will take no position on this motion.

1. The defendant was convicted in this Court (Brinkley, J.), on August 19, 2008, following a non-jury trial, of carrying a firearm without a license (18 Pa.C.S. § 6106(a)(1)), carrying a firearm in public in Philadelphia (*id.* § 6108), possession of an instrument of crime (*id.* § 907), and possession of a controlled substance with intent to deliver (35 Pa.Stat. § 780-113(a)(30)). He was convicted at the same time of certain additional lesser-included offenses and acquitted of several other, related charges. The charged offenses occurred on January 24, 2007, nearly eleven years ago, when the defendant was 19 years old. At that time, he had no prior criminal convictions.

2. Based on these convictions (and an additional minor charge to which he pleaded guilty), the Court sentenced Mr. Williams on January 16, 2009, to serve concurrent terms of 11½ to 23 months' county confinement, to be followed by eight years' probation.

3. Following prior probation violation hearings, all of which were based on technical violations (that is, not "direct violations" premised on new criminal conduct), the Court (Brinkley, J.) resentenced Mr. Williams on July 11, 2014, to 3–6 months' confinement plus five years' probation. On February 5, 2016, for other technical violations he was sentenced to a further 6–12 months' confinement, with immediate parole to house arrest subject to daily community service for 90 days, which was subsequently extended by a week (essentially, late February through early June, 2016), followed by six years' probation. (This disposition was affirmed by the Superior Court on September 8, 2017. *See* 2017 WL 3933347 (not precedential).)

4. Most recently, following a hearing held November 6, 2017, this Court revoked probation and sentenced Mr. Williams to serve two to four years' total confinement, with no further probation thereafter. The Court had Mr. Williams taken directly into state custody following the November 6, 2017, hearing.

5. The defendant intends to file a timely motion under Pa.R.Crim.P. 708(E) (not later than November 16, 2017) to modify the latter sentence. He will appeal the sentence if necessary thereafter to the Superior Court. In that connection, he also intends promptly to seek bail pursuant to Pa.R.Crim.P. 521(B). (He now seeks bail as relief ancillary to the instant motion.) Accordingly, notwithstanding the imposition of sentence on November 6, 2017, further proceedings in this Court are anticipated in the near future.

FACTUAL BASIS FOR RECUSAL OF JUDGE BRINKLEY

6. Judge Brinkley assumed a non-judicial, essentially prosecutorial role in the revocation process by personally revising and greatly expanding the assigned Probation Officer's summary report dated October 26, 2017, and then conducting a hostile examination of the officer at the hearing.

a. The Probation Officer's report listed four occasions of potential technical violations, but concluded that Mr. Williams had "responded well" and "actively participated in an effort towards behavioral change"; his conduct while under supervision was "within normal limits," according to his Probation Officer. *See Ex. 1.* The report accordingly did not recommend that the Court take any action. Judge Brinkley nevertheless scheduled a revocation hearing and issued her own revision of the letter dated October 31, 2017, which listed a total of approximately eight occasions when probation conditions may have been technically violated. (The letter does not number them separately, so counting the accusations is a bit subjective.)

b. Several of the added accusations included factual details apparently drawn from the judge's own memory of those events or from the judge's own investigation on "various social media outlets," and at least one accusation (regarding Judge Brinkley's knowledge that drug treatment was taking place in Atlanta, Georgia) directly contradicts the report of the Probation Officer, insofar as it addresses

whether a required notice of travel was provided to the Court. *See also* Tr. 11/6/17, part 1, at 94 (*ll.* 8–13) (judge refers to obtaining information independently from Internet research, to challenge witness concerning whether appearances were scheduled in violation of a judicial order), attached hereto as Exhibit 2.

c. At the revocation hearing, Judge Brinkley personally conducted a lengthy adversarial and accusatory examination of the Probation Officer (Ex. 2, Tr. 11/6/17, part 1, at 25–44). The judge ultimately disregarded or rejected the recommendations of both the Probation Office and the District Attorney that Mr. Williams be continued on probation, and instead imposed a state sentence of total confinement.

7. Judge Brinkley stepped out of the proper judicial role in a second way by personally visiting the community service site where Mr. Williams was assigned to serve the homeless. This visit was made surreptitiously and without prior notice to the parties. At the revocation hearing, Judge Brinkley contended that Mr. Williams was not – as she wanted, but had never ordered – serving food to the homeless but, rather, was sorting clothes for the homeless at the same location. (Although this incident apparently occurred in early 2016, the first mention of it on the record was during Judge Brinkley’s colloquy with Mr. Williams at the conclusion of the November 6, 2017, hearing. *See* Tr. 11/6/17, part 2, at 67–74, attached hereto as Exhibit 3.) Judge Brinkley thereby made herself a fact witness on the question of whether Mr. Williams was in compliance on that occasion, as well as to any statements he may have made. Judge Brinkley then relied on her own version of this incident (in contradiction of Mr. Williams’s allocution, which was under oath (Ex. 2, Tr. 11/6/17, part 1, at 4) but without providing any notice or opportunity to present evidence) among the reasons for imposing a state prison sentence. Ex. 3, Tr. 11/6/17, part 2, at 74.

8. Further exceeding the proper and limited judicial role and into that of the prosecutor, Judge Brinkley directed the parties and the Probation Office to include former

Assistant District Attorney DeSantis, who had handled prior violation hearings, as a recipient of notices and communications concerning Mr. Williams after Ms. DeSantis had left the District Attorney's Office and had no further official role in these proceedings.

9. Additionally *de hors* the proper bounds of the judicial role, even as supervisor of a probationary sentence, Judge Brinkley has repeatedly offered inappropriate personal and professional advice to the defendant, who had become a successful professional entertainer during the pendency of this case. On some occasions, Judge Brinkley has done so off the record, or on the record while attempting inappropriately to keep that record secret from the defendant and his counsel (thus preventing or at least impeding them from seeking appropriate relief). Specifically:

a. Judge Brinkley has repeatedly suggested to the defendant that he break his contract with his present professional management (Roc Nation of New York) and return to his prior management with Charles Alston (p/k/a Charlie Mack) of Philadelphia. *See, e.g.*, Tr. 12/17/12, at 125:21-126:7, attached hereto as Exhibit 4; Tr. 3/15/13, at 53:6-54:9, attached hereto as Exhibit 5 (colloquy with prosecutor, in defendant's presence); Tr. 8/18/14, at 62:19-63:2, attached hereto as Exhibit 6 (same); *See* Tr. 4/7/16, at 24:13-25:6, attached hereto as Exhibit 7 (Judge recounting matters discussed with defendant on 2/15/16 in chambers: "There was also some discussion concerning the defendant's management. ... I don't want this to be taken out of context by anyone down the road either for appeal purposes or whatever, that there was some discussion because the defendant, prior to Roc Nation, had been represented by Mr. Alston[,] whose stage name is 'Charlie Mack,' and that there was some discussion about his involvement in continuing to assist Mr. Williams because it seemed as if while Mr. Mack was representing him there were fewer problems with the probation department[,] and I think I said on the record Mr. Williams chooses

who he wants for his management and he's obviously chosen to have whoever he wants as his management"¹ See also Tr. 12/17/15, at 47:24-51:15, attached hereto as Exhibit 8 (ADA DeSantis's questioning of witness Shawn Gee making same suggestion, in defendant's presence); Sentencing Hearing Tr. 2/5/16, at 32:6-35:5, attached hereto as Exhibit 9 (ADA DeSantis's leading examination of witness Dyana Williams, in defendant's presence); Tr. 1/31/14, at 49-50, attached hereto as Exhibit 10 (referencing initial approval of Mr. Mack as Mr. Williams's manager, despite his felony record).

b. At the conclusion of the February 5, 2016, hearing Judge Brinkley invited the defendant and his then-girlfriend (Onika Maraj, p/k/a Nicki Minaj, also a prominent musical performer) into chambers, without counsel, for a conversation that was not recorded. See Ex. 9, Sentencing Hearing Tr. 2/5/16, at 91:3-8.² On information and belief (to which Mr. Williams and Ms. Maraj can testify, if a hearing is required), during that discussion Judge Brinkley made additional personal, injudicious and/or extrajudicial suggestions concerning the defendant's professional endeavors. During this in camera discussion, Judge Brinkley suggested that Mr. Williams record a version of a song by the popular group Boyz II Men called "On Bended Knee" and to mention the judge specifically in the song. Mr. Williams declined to do so, to which (on information and belief) Judge Brinkley replied, "Suit yourself."

¹ The defendant does not have access and has repeatedly been denied a copy of this transcript. This motion again seeks access – but not unsealing – at least for the limited purpose of establishing the factual basis for this motion if a hearing is required. At minimum, the jurist reviewing this motion should review the actual transcript of the *in camera* portion.

² Mr. Williams's prior attorney did not object to Judge Brinkley's request that this discussion occur, that it be held *in camera*, that it be uncounseled, or that it be entirely off-the-record.

10. Judge Brinkley has also repeatedly reacted and expressed herself in personal, injudicious terms when ruling or explaining her rulings in Mr. Williams's case.

a. On at least five occasions, including in giving her reasons for the disposition, Judge Brinkley has accused the defendant of having "thumbed his nose" – not at "the court," but rather – specifically "at me." *See, e.g.*, Ex. 4, Tr. 12/17/12, at 111:19-112:6; Tr. 7/11/14, at 159:12-160:3, attached hereto as Exhibit 11; Ex. 6, Tr. 8/18/14, at 85:3-15; Ex. 6, Tr. 8/18/14, at 85:16-86:10 (describing defendant's reluctance to cancel an already-scheduled performance to attend a court hearing concerning travel approvals as "another slap in my face"); Tr. 12/10/15, at 7:13–8:4, 98:18–99:3, attached hereto as Exhibit 12; Ex. 3, 11/6/17, part 2, at 74.

b. Other excessively personal, injudicious statements pepper the record of this case, at many other hearings. *See, e.g.*, Ex. 11, Tr. 7/11/14, at 200:11–201:2 ("Talk about your fans being disappointed, how about me? How about me after doing all I've done for you over all these years trying to help you have a career and to move your career forward?" ... "Because I said you know what? He has the ability to be like Jay-Z. He has the ability to make Jay-Z's kind of money. He has the ability to move his family from here to there if he would just acknowledge that he has to do it a certain way"); Ex. 9, Sentencing Hearing Tr. 2/5/16, at 77:25–79:5 ("I then [in 2009] saw that Mr. Williams had the opportunity to be very big in the music business that I had not seen in anyone before. I saw it. And because I saw it, I was able to fashion the sentence that will allow him to be able to pursue that career with just a small amount of jail time. ... So at every stage of my dealings with this defendant, I have tried to do whatever I believe he needed to do to pursue his career with my first belief and my continuing belief was that he could have a phenomenal career in the music business[,], greater than Jay-Z, greater than a lot of other people that are out

there now. I saw that in 2009.” “Unfortunately, the defendant has really disappointed this court, because even though I allowed him to be able to do his craft[,] to go to studios all over the United States without any restrictions, he still didn’t do – even today he has not done what I can see that he could do even to this day.”); Ex. 3, Tr. 11/6/17, part 2, at 75 (After serving present sentence, “You won’t have to report to me ever, and I don’t have to deal with you ever again.”).

11. Having conducted the day-to-day details of supervision for many years by e-mail, Judge Brinkley repeatedly relied on her (understandably imperfect) personal memory over (and sometimes in disregard of) the actual e-mail record to determine whether and when Mr. Williams had failed to comply with certain technical obligations of his probation. *See, e.g.*, Ex. 2, Tr. 11/6/17, part 1, at 36:15-37:21; 56 (January e-mail to the judge concerning notification of drug treatment being undertaken in Atlanta); 1/13/17 Email with January and February schedules, attached hereto as Exhibit 13; Ex. 3, Tr. 11/6/17, part 2, at 20 (same), Ex. 2, Tr. 11/6/17, part 1, at 81-95 (whether bookings in fall 2017 were made after defendant was told that he could not travel until further order of court³); *id.*, part 2, at 4-5; 12-18; *compare* Ex. 2, 11/6 transcript part 1 at 80 (“Once you received my August 17th e-mail that he could not travel or go to any of these events, why didn’t you cancel everything?”) *with* Ex. 17, August 17 email (“Kindly be advised that Mr. Williams is not permitted to travel to from Houston, TX to Atlanta, GA on August 21, 2017 after completion of his engagement at Rice University. After completion of this engagement, he must return to Philadelphia and remain at home in Montgomery County until 8-31-17, pending further Order of this court.”); *compare* Ex. 2, 11/6 transcript part 1 at 76 (“So let’s

³ All requests subsequent to 8/31/17 requesting permission to book appearances were appropriate and courteous. *See* e-mails dated 9/1/17, 9/19/17 and 9/25/17, attached hereto as Exhibits 14, 15, and 16. Mr. Williams did not attend any event that was not specifically approved by the Court.

go to the court's orders not to travel outside of Philadelphia and Montgomery counties and not to schedule anything”) *with* Ex. 18, September 5 email chain (“He may schedule entertainment related events in Philadelphia between now and October 15, 2017, provided however, seventy-two (72) hours notice is given prior to any Philadelphia engagement.”); *see also* Ex. 19, August 23 email chain (judge permitting travel to previously scheduled performance in Las Vegas August 25-27 despite prior instruction to remain in Montgomery County).

12. Judge Brinkley prejudged the Court’s reasonable and lawful options in responding to technical violations occurring years after an initial conviction and sentencing. *See* Ex. 5, Tr. 3/15/13, at 52:5-16 (“So no[,] and don’t even ask me again about early termination[,] because that’s not going to happen.”)

13. Judge Brinkley discouraged Mr. Williams from seeking modification of the February 2016 resentencing, and from appealing that sentence, by warning that “when you file a petition for reconsideration, and then file notice of appeal, the petition for reconsideration is scheduled. I can schedule the hearing on the petition to reconsideration and reconsider and give out a greater sentence. So the sentence could go up, not down. But that is your choice. I think it would be a complete waste of money to pursue. That is your choice.” Ex. 20, Tr. 2/9/16, at 11:15-25. (This warning was not only improper but also substantially incorrect, since with rare exceptions any increase in sentence upon reconsideration would violate the Due Process Clause of the Fourteenth Amendment. *See North Carolina v. Pearce*, 395 U.S. 711 (1969); *Commonwealth v. Hernandez*, 783 A.2d 784, 787–88 (Pa. Super. 2001), quoting *Commonwealth v. Serrano*, 727 A.2d 1168, 1170 (Pa. Super. 1999).)

14. Each of the foregoing instances, and any or all of them taken together, reveal a pattern of extrajudicial, personal, and injudicious conduct, culminating at the November 6, 2017, hearing, warranting the recusal of Judge Brinkley at this time.

LEGAL BASIS FOR RECUSAL

15. As most recently explained by the Superior Court, on appeal from a violation of probation:

In the context of criminal sentencing, [the applicable] standard requires that the judge recuse himself not only when he doubts his own ability to preside impartially, but whenever he ‘believes his impartiality can be reasonably questioned.’ *Commonwealth v. Lemanski*, 365 Pa.Super. 332, 529 A.2d 1085, 1088–1089 (1987) (quoting *Commonwealth v. Goodman*, 454 Pa. 358, 311 A.2d 652, 654 (1973)). ... Consequently, ‘a party arguing for recusal need not prove that the judge’s rulings actually prejudiced him; it is enough to prove that the reasonable observer might question the judge’s impartiality.’ *Reilly by Reilly v. Southeastern Pennsylvania Transp. Auth.*, 330 Pa.Super. 420, 479 A.2d 973, 991–993 (1984).

Commonwealth v. Williams, 69 A.3d 735, 749 (Pa.Super. 2013) (resentencing ordered), quoting *Commonwealth v. Rhodes*, 990 A.2d 732, 748 (Pa.Super. 2009). See also *Commonwealth v. White*, 589 Pa. 642, 657–58, 910 A.2d 648, 657 (2006); *In re McFall*, 533 Pa. 24, 617 A.2d 707 (1992). Accord, Code of Judicial Conduct, Canon 3(C).

16. In objectively contemplating the reaction of “the reasonable observer,” the court is to imagine, and then abide by, the reasonable reaction to “all the circumstances” of “a significant minority of the lay community.” *Commonwealth v. Darush*, 501 Pa. 15, 24, 459 A.2d 727, 732 (1983) (denial of recusal reversed and resentencing ordered).

17. The judge’s expression of and apparent reliance on personal feelings about the defendant and the special circumstances of his or her case is itself a ground for recusal in a criminal case. *Commonwealth v. White, supra*, 589 Pa. at 659, 910 A.2d at 658.

18. That many of the instances cited in this motion are “extra-judicial” in nature (that is, implicating either the assumption of a non-judicial role or the making of decisions on a basis other than what has been heard in proceedings held in open court), reinforces the need for recusal. See *Commonwealth v. Druce*, 577 Pa. 581, 590–91, 848 A.2d 104, 109–10 (2004); *Commonwealth v. Kearney*, 92 A.3d 51, 61–62 (Pa.Super. 2014).

19. If this motion is not summarily granted, it must be assigned to a different jurist for hearing. Since a judge may not both testify at and preside over the same proceeding, Pa.R.Evid. 605, and Judge Brinkley by virtue of the course of conduct described in this motion has made herself a necessary witness in this matter, the adjudication of this motion (unless granted without a hearing) must be assigned to a different judge of the Court. *See Municipal Publications, Inc. v. Court of Common Pleas*, 507 Pa. 194, 201–03, 489 A.2d 1286, 1289–90 (1985) (judge disqualified from presiding over hearing on recusal motion raising nonfrivolous factual allegations as to impartiality); *Commonwealth v. McClure*, — A.3d —, 2017 Pa.Super. 334, 2017 WL 4707485, *18 n.30 (Oct. 20, 2017).

20. This motion is being filed on the earliest practicable occasion after the grounds therefore became known. *See Commonwealth v. Luketic*, 162 A.3d 1149, 1157–58 (Pa.Super. 2017). The matters cited in this motion would not necessarily have been sufficient to require Judge Brinkley’s recusal before the adversarial examination of witnesses and statements during the November 6, 2017, hearing, as well as Judge Brinkley’s reliance, at the conclusion of the November 6, 2017, hearing, on a personal account of the judge’s visit to the community service location as a justification for imposing total confinement – a disfavored sanction for responding to technical violations; *see* 42 Pa.C.S. § 9771(c) – as Mr. Williams’s new sentence.

21. Due process under the Fourteenth Amendment requires that the judge at a probation revocation proceeding must be fair and impartial. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), adopting *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972) (decision maker must be “neutral and detached”; cannot be a witness to alleged violation); *see generally Williams v. Pennsylvania*, 579 U.S. —, 136 S.Ct. 1899, 1910 (2016) (due process protects right not to have case heard before judge who should have recused).

WHEREFORE, the defendant, Robert Williams, prays that this Court:

- a. Admit the defendant forthwith to unsecured bail pending determination of this motion, with conditions equivalent to those which most recently applied to his probation;
- b. Enter an order, without a hearing, immediately recusing Judge Brinkley and assigning this case to a different judge of this Court; or alternatively:
- c. Assign a different judge for resolution of this motion and:
 - i. Release to undersigned counsel a transcript of the sealed portion of the February 5, 2016, hearing in this case, without otherwise lifting the seal; and
 - ii. Have the new judge conduct a fact finding hearing on this motion; and then
- d. Enter an order recusing Judge Brinkley and assigning this case to a different judge of this Court for decision of the defendant's Motion to Modify Sentence and for any further proceedings.

Respectfully submitted,
ROBERT WILLIAMS, Defendant
Counsel for Defendant Robert Williams

Dated: November 14, 2017

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PROOF OF SERVICE

On November 14, 2017, I served a copy of the foregoing motion on the attorney for the Commonwealth, Ass't District Attorney Jennifer Hoffman, by filing it electronically with the Court of Common Pleas, Philadelphia County, and hand-delivering a copy to the Deputy Court Administrator, Criminal Trial Division, for the attention of Judge Brinkley.

s/Alexis Cocco
Co-Counsel for Defendant Williams