Case No. 2007-98747-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI, INC.,
PETITIONER

and

STEPHEN SIX, ATTORNEY GENERAL FOR THE STATE OF KANSAS
INTERVENOR

v.

PHILL KLINE, JOHNSON COUNTY DISTRICT ATTORNEY
RESPONDENT

RESPONDENT'S BRIEF IN SUPPORT OF HIS MOTION TO DISMISS AND HIS OPPOSITION TO MANDAMUS

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NATURE OF THE CASE

This Court should be under no illusions about what Petitioner is asking of it. Petitioner, a ***criminal defendant*** in a pending criminal proceeding, is asking this Court to strip the prosecutor in that action of evidence lawfully obtained and, essentially, give that evidence back to the criminal defendant. In an unprecedented attack on executive authority and prosecutorial discretion, not to mention on the ordinary rules of criminal procedure, Petitioner has been allowed to sue its prosecutor after failing to obtain the desired relief through the normal procedures afforded every criminal defendant.

Advancing a mythical claim of "patient privacy," Petitioner is attempting an end run

around the law that applies to every other criminal defendant by filing the instant mandamus which amounts to a replevin action seeking the return of evidence lawfully obtained through subpoena power. Replevin is not a cause of action available in a mandamus proceeding and there is no basis to suppress this legally obtained evidence.[1]

Until very recently, this criminal defendant's action was aided and abetted by former Attorney General Morrison who was more interested in satisfying a political grudge against Respondent than in investigating and prosecuting possible crimes. It is important to note, however, that current Attorney General Six—an Intervenor in this action—has now altered the State's position and has explained to this Court that the records need not be returned until "the conclusion of any pending litigation (***including prosecution***) concerning the records." *See* Attorney General's Response to Show Cause Order at 3, *Six v. Anderson*, filed May 22, 2008 (emphasis added). Although this filing occurred in the context of the related mandamus action filed against Judge Anderson, the Intervenor's statement can only mean that Attorney General Six acknowledges that the criminal prosecutions must proceed to completion through the normal channels. The only way for that to occur is for the evidence possessed by the State to be used by prosecutors such as Respondent.

Should Petitioner's relief be granted, this Court would strike a blow to our republican form of government and to the functioning of our criminal justice system. The clear findings of fact by Judge King and every legal precedent discussed below demand an immediate dismissal.[2]

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[1] As one court has noted in the context of such actions: "a motion for return of property ... if granted, promises the same effect as a suppression order." *DeMassa v. Nunez*, 747 F.2d 1283, 1286 (9th Cir. 1984). Suppression of evidence under the "fruit of the poisonous tree" doctrine is unavailable to Petitioner in this matter and identical relief cannot be had simply by disguising a suppression motion as a mandamus suit.

[2] Respondent incorporates herein all arguments and briefing previously submitted in this action.

STATEMENT OF FACTS

The level of scrutiny applied to the actions of Respondent in this action is unprecedented in Kansas law and far exceeds even that level of scrutiny applied to the most serious criminal prosecutions. Even so, Respondent's actions in the handling of this matter have been fully vindicated by the intense factual scrutiny. The procedural facts leading up to the instant action are well known to this Court and will not be repeated here. *See generally Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006).

I. The Records Contain Evidence of Crimes.

The Honorable Judge Richard Anderson oversaw every aspect of the investigation into Petitioner's practices while Respondent was the Kansas Attorney General, up to and including the transfer of the records at issue to the Johnson County District Attorney's office. He is the judicial officer possessing the greatest familiarity with the records at issue and with the evidence contained in them. Judge Anderson has stated that the records have "intrinsic evidentiary value" which will be irretrievably lost if they are returned to the criminal defendant. *See* Anderson Mandamus at 54.[3] Judge Anderson further stated that he "believes that returning evidence to [the criminal defendants] at this point in time would unacceptably increase the risk that evidence could be lost, destroyed, or compromised while active investigations and prosecutions are ongoing. It is difficult to understand how this could benefit the citizens of Kansas." *Id.* at 60.

Judge Anderson has concluded, based upon his review of the KDHE records provided by Petitioner in response to subpoena, that "it appears" the records are not what they purport to be and have instead been "manufactured." *Id.* at 65. As a result of this and other evidence

[3] All citations to the publicly released file of *Morrison v. Anderson*, Case No. 07-99050-S will be made to the continuous page numbering applied to that file by the Court.

contained in the records, Judge Anderson concluded that Respondent "has evidence which raises substantial factual and legal issues about [Petitioner's] compliance with law." *Id.* at 67. Judge Anderson describes the evidence of "possible false writings" as meaning that Petitioner "may have committed a felony in an attempt to cover up a misdemeanor." *Id.* at 67. In a letter to Attorney General Morrison on July 13, 2007, Judge Anderson clearly informed Morrison of the possibility, based on his review of the evidence, that "certain records were fabricated for production under the subpoena." *Id.* at 201. During an April 10, 2007, hearing Judge Anderson told Attorney General Morrison's office in no uncertain terms: "***there is evidence of crimes in these records [Petitioner's patient records and KDHE records produced by Petitioner] that need to be evaluated.***" *Id.* at 212-213 (emphasis added).

In addition, Steven Cavanaugh, Judge Anderson's consultant, stated in affidavit form that Petitioner's files "did not contain a finding that the fetus was not viable for these files for patients with a gestational age of 22.0 weeks LMP or greater." *Id.* at 123. The law requires that this determination be made and that the determination of viability be entered into the medical records. *Id.* at 124; *see also* K.S.A. § 65-6703.

Finally, on October 16-17, 2007, in his capacity as District Attorney, Respondent appeared before the Honorable Judge James Vano and presented Judge Vano with evidence lawfully obtained, including portions of the records at issue in the instant matter, in order to obtain the requisite probable cause finding for the filing of criminal charges against the criminal defendant Petitioner. Judge Vano found probable cause to believe that crimes were committed and accordingly, on October 17, 2008, Respondent filed a 107-count criminal complaint alleging that Petitioner committed 84 violations of Kansas late-term abortion laws and 23 felonies for making a false information in violation of K.S.A. § 21-3711. *See State v. Comprehensive Health*

of Planned Parenthood of Kansas and Mid-Missouri, Inc, Case No. 07-CR-2701, 10th Judicial District of Kansas.

In the interests of fully understanding the nature of the evidence at issue in the instant action, it is vital that this Court conduct its own review. To that end, attached as an Exhibit to this Brief is one example among many of the alleged false writings. Two documents are included in the Exhibit—the first is the copy of the KDHE record received from KDHE pursuant to subpoena. The second is the document referencing the same abortion received from Petitioner pursuant to subpoena and which Petitioner ***represented was a photocopy of the document as filed with KDHE.***[4] Respondent is confident that even a cursory comparison of the two documents contained in the Exhibit will demonstrate to this Court the possibility, indeed the probability, that documents were ***manufactured in response to the subpoena and are not in fact copies of the forms as filed with KDHE.*** Each alleged false writing contains similar discrepancies. In fact, as Judge Anderson has stated, the evidence indicates the commission of a

[4] Respondent is cognizant of the sensitivities involved in producing these records as an Exhibit. To that end, the utmost care and caution has been taken. First, the records are *not* medical records but rather are government forms which are required to be filed and maintained by law. Second, the second document in the Exhibit ***is in fact a fiction drafted by Petitioner to cover up crimes and was not in fact ever filed with KDHE and therefore is neither a protected patient record nor a legal record of any kind.*** Finally, in light of this Court's order of May 2, 2008, Respondent has taken the utmost care to not disclose any ***information*** contained in the forms that has not already been released to the public by the Court itself. Thus, the Exhibit has been further redacted to include only the following information: a) gestational age on page 1; and b) non-viability determination on page 2. The gestational age determination has been released by this Court when releasing the November 8, 2006 and September 10, 2007 Affidavits of Mr. Stephen Cavanaugh (*see* Anderson Mandamus at 96-101, 123-127) and the letter of Mr. Bob Eye to Mr. Cavanaugh of August 15, 2006 (*see id.* at 128-129). Further, the Eye letter reveals that Petitioner does not make any additional finding of viability as required by K.S.A. 65-6703(b)(2) ("if the gestational age... exceeds 22 weeks, prior to performing an abortion...the physician shall determine if the fetus is viable...") but rather simply assumes non-viability prior to 24 weeks based on its purported standard of reasonable probability. The KDHE forms themselves are publicly available from KDHE and the initial copies of the KDHE forms filed by Planned Parenthood were obtained by separate subpoena unrelated to the *Alpha* case. Accordingly, all of the information in the redacted Exhibit is already available in the public realm and is needed here to support Respondent's legal position.

felony in an attempt to cover up a misdemeanor.

Simple common sense, fairness, and justice require this Court to give far more weight to the conclusions of all judicial officials and agents who have actually reviewed the records in question and concluded that they contain evidence of crimes than it gives to the self-serving claims of the criminal defendant Petitioner and the now-disgraced former Attorney General who never conducted a bona fide review of the records and who was found by Judge Anderson to have "either misunderst[ood] or ... misrepresent[ed] the true nature of the records held by the Court" and to have had an interest in "direct[ing] criticisms at Kline" but "show[ed] very little curiosity about substantive issues involved in the investigation." *See* Anderson Mandamus at 52, 61-62.

Given the strong evidence of crimes contained in the records, justice demands that the evidence be presented to a jury—where all the protections afforded criminal defendants by our criminal justice system will be accorded to Petitioner—for a final determination.

II. The Records Contain No Information Implicating Patient Privacy.

The legal basis for Petitioner's standing to assert its claims in this action is that patient privacy is implicated in the redacted records. The evidence does not support this conclusion. Judge King concluded that: "The evidence presented in this matter supports a conclusion that the redacted patient medical records [Respondent] received ... complied with the *Alpha* mandate, the Orders of Judge Anderson, and had patient identifying information removed to a degree that they complied with the federal Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d. (HIPAA)." *See* King Report at ¶ 11.

III. The Records Were Lawfully Transferred to Johnson County.

Petitioner further claims that Respondent "illegally" transferred the records to Johnson

County. While Respondent maintains that the doctrine of separation of powers establishes that the discretion of a prosecutor to transfer evidence to other prosecutors is not subject to judicial review or prior authorization, in the interest of complete transparency and judicial involvement, Respondent sought and received approval from Judge Anderson for both the transfer and for the method of the transfer of the records at issue in the instant action. Both before and after the transfer, Judge Anderson put "the imprint of apparent judicial approval on the transfer as made." *Id.* at ¶¶ 132-133.

IV. The Records Were Handled Properly and No Patient Identities Have Been Disclosed.

The hobby horse whipped endlessly by Petitioner to drag the instant case forward has been to accuse Respondent of abusing his prosecutorial position to improperly publicize aspects of this case to Petitioner's political enemies. Granted, at the heart of this case lies perhaps the most contentious political issue of our time, but the evidence simply ***does not support Petitioner's claims*** as Judge King's Report demonstrates. The specific allegations of improper distribution simply did not hold up to factual scrutiny before Judge King. Petitioner is left with vague claims that boil down to "no one can talk about this" and deeply offend First Amendment protected open political debate and freedom of speech.[5]

A. The Records Were Not "Scattered".

Attorney General Morrison has repeatedly made the claim, latched onto by Petitioner, that when Respondent left the office of Attorney General the records were "scattered" to the

[5] For this reason, application of vague or unduly burdensome prohibitions on attorneys' litigation-related First Amendment speech is subject to searching scrutiny; a state supreme court, for example, cannot render an unduly broad interpretation of otherwise facially constitutional and narrowly drawn ethics rules (such as Rule 3.6, governing attorneys' trial publicity). *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-1051, 1075-1076 (1991).

winds necessitating a massive "treasure hunt" to track them all down. The factual record simply does not support this claim. The records were exactly where Respondent informed both Attorney General Morrison and Judge Anderson they would be with one minor exception.[6] During the evidentiary hearing conducted before Judge King, Petitioner and Attorney General Morrison relied on the testimony of Theresa Salts, an investigator with the Attorney General's office, to establish their claim that the records were not where Respondent said they were. Judge King, however, found Ms. Salts' testimony unreliable and insufficient to establish the claim. Judge King found that: "Salts testimony, is of limited usefulness. She testified that the Status and Disposition report was inaccurate in that Paragraph 8 inaccurately describes documents left at the Attorney General's office. However, on further questioning she indicated that she didn't know whether Paragraph 8 was accurate or inaccurate because she didn't go through all the records." *See* King Report at ¶ 118.

B. Bill O'Reilly.

Petitioner has alleged that Respondent "leaked" the records to media personality Bill O'Reilly for use on his television show "The O'Reilly Factor." Again, this allegation does not stand up to factual investigation. The only evidence introduced at the evidentiary hearing by Petitioner to support this allegation was the testimony of Morrison's Assistant Attorney General Jared Maag. Mr. Maag testified that he believed Respondent had leaked the records to O'Reilly.

[6] In the "Status and Disposition Report" filed by Respondent's office upon vacating the office of Attorney General Respondent informed both Judge Anderson and Attorney General Morrison of the location of all files. The one exception concerns one copy of the Tiller Records, records which are not at issue here, which was transferred to Johnson County. The factual record makes clear the following: 1) that Respondent believed Judge Anderson to be aware of this transfer; 2) that Respondent self-disclosed to Judge Anderson the fact of this transfer in April of 2007; and 3) that Respondent returned the copy of the Tiller Records transferred to Johnson County and did not retain any copies of those records. Further, Judge King concluded that the "failure to disclose in the Status and Disposition Report that [Tiller] records were being taken to Johnson County was not a deliberate attempt to deceive, or make misrepresentations to, Judge Anderson." *See* King Report at ¶ 158.

However, Judge King determined that "[a] reasonable fact-finder is justified in being skeptical of Jared Maag's testimony regarding the claimed disclosure to O'Reilly. ***Maag's conclusions are based on suspicion and assumptions that are not supported by facts. He is willing to state his suspicions and assumptions as if they are facts.***"[7] *Id.* at ¶ 186 (emphasis added). Moreover, Judge King found that the information supposedly leaked to O'Reilly was "available in the public domain before the O'Reilly program." *Id.* at ¶ 187. Finally, Judge Anderson also conducted an evidentiary hearing on this question and concluded that "O'Reilly had not seen the records" and that "Kline had not given the records to O'Reilly." *Id.* at ¶ 195.

C. Dr. McHugh.

Petitioner also alleges that Respondent is somehow responsible for alleged disclosures made by Dr. McHugh, an expert witness in the employ of the Attorney General's office during both Respondent and Morrison's tenures. Contrary to Petitioner's allegations, the factual record shows that Respondent took extraordinary measures to guide Dr. McHugh and protect patient information, ***even after Respondent had left the Attorney General's office and Dr. McHugh was no longer his witness.***

During Respondent's tenure as Kansas Attorney General, Assistant Attorney General Stephen Maxwell handled Dr. McHugh as an expert witness. Mr. Maxwell undertook all of the standard precautions that prosecutors normally take in like circumstances. Judge King found that "Maxwell advised Dr. McHugh of the court's orders in relation to the records. He discussed with Dr. McHugh that the matter related to a criminal investigation; that the investigation involved a sensitive matter; that the case was sealed; and that the court had ordered non-

[7] In fact, Judge King's description of Assistant Attorney General Maag's testimony fairly describes the character and nature of ***all*** of Petitioner's and Attorney General Morrison's allegations in the instant matter. Such unreliable and outright false accusations and suspicions stated as fact with no evidentiary support have been the norm.

disclosure of the file." *Id.* at ¶ 60.

Later, after Respondent was no longer Attorney General and had no control over Dr. McHugh, Respondent took the extra precaution of continuing to remind Dr. McHugh of his duty to protect private patient information and went so far as to monitor an interview that Dr. McHugh gave to make certain that patient identities were not disclosed. *Id.* at ¶¶ 200-201.

Later still, ***at Judge Anderson's request***, Respondent secured an affidavit from Dr. McHugh that would set forth his role in the Tiller prosecution and would shield Judge Anderson from some of the unsubstantiated criticism being leveled at him by Attorney General Morrison and Petitioner. That affidavit, obtained by Respondent but executed by Dr. McHugh at the direct request of Judge Anderson, was eventually disclosed to the Kansas Legislature's Special Committee on Federal and State Affairs. Petitioner has alleged that Respondent was the source of that disclosure, however, as before, the claim does not stand up to factual scrutiny. Judge King found that "[t]he evidence does not support a conclusion that Respondent Kline or his subordinates were responsible for these disclosures to the legislature." *Id.* at ¶ 205. The facts further show that Respondent "specifically told [Fed & State Chairman Arlen] Siegfried that ***he could not discuss the contents of the medical clinic records.***" *Id.* at ¶ 211 (emphasis added).

D. The Records Were Stored Safely and No Unauthorized Access Ever Occurred.

Finally, Petitioner has alleged that Respondent and his staff carelessly and negligently stored and maintained the records in question. As above, this claim is unsupported by the facts. During Respondent's tenure as Kansas Attorney General the records were stored and maintained under the constant care, control, and supervision of the Attorney General's investigative staff headed by Special Agent Thomas Williams, a highly experienced law enforcement officer and investigator with a career spanning three decades with the U.S. Treasury Department, Bureau of

ATF, the Federal Bureau of Investigation, and the Kansas Attorney General's office. *See* Public Case File at Vol. II, 549. No record evidence exists that suggests that Special Agent Williams did not possess the requisite experience, training, and trustworthiness to fully execute his duties to manage the care and control of the records within his investigative unit.

The evidence shows that Special Agent Williams "received instructions regarding the proper handling of the records from [Respondent] ... that the investigation was a sensitive matter; that he needed to maintain control of the patient records at all times; and that he should not let others not involved in the investigation see the records." *See* King Report at ¶ 35. There is no evidence that Special Agent Williams or his staff deviated from these instructions. Special Agent Williams and his staff are not aware of ***any single instance*** of the redacted records being shown to "anyone for other than a law enforcement purpose." *Id.* at ¶¶ 40-41.

Petitioner has complained bitterly about the manner in which the redacted records were stored immediately after the transfer to Johnson County. Leaving aside for a moment the fact that the ***manner*** of storage could never form the legal basis of a mandamus action, the facts clearly support the decisions of Special Agent Williams regarding the manner of storage. The record establishes, without contravention, that the security situation at the Johnson County District Attorney's office was not satisfactory and incoming Attorney General Morrison and his staff—both at the Attorney General's office and at the Johnson County District Attorney's office—were hostile to Respondent and his staff and to the investigation. *See id.* at 126-130.

Because of a concern for the safety and integrity of the redacted records, they were stored in the manner they were stored. Special Agent Williams testified that the records were "safer" with Agent Reed than they would have been at the Johnson County District Attorney's office. *See generally* King Report at ¶¶134-144. The evidence is uncontroverted that during this

time, no access was had to the records by anyone. *See id.*

The only reasonable conclusion that can be drawn from the factual record as a whole is that Respondent at all times took the greatest care possible to fully protect the contents of the medical records from unauthorized disclosure. In fact, the only disclosures of confidential and protected information during the course of these proceeding were made by Attorney General Morrison and by this Court. The one piece of information contained in the inquisition for which Judge Anderson required complete protection and confidentiality was the identity of the two doctors retained as consultants to that court to assist in the patient file redactions. That information was ***intentionally disclosed*** by Attorney General Morrison to the criminal defendant Petitioner (in violation of Judge Anderson's express orders) and was ***unintentionally disclosed*** by this Court when it failed to redact those names in the mandamus file released to the public.[8] Thus, applying the strictest standards, one must conclude from the evidence that of all the State's agents other than Judge Anderson, Respondent's office has been the ***safest repository of protected information, as Respondent has never improperly disclosed any protected information.***

ARGUMENTS AND AUTHORITIES

I. This Case Should be Dismissed as Non-Justiciable.

[8] Judge Anderson stated on the record in the instant matter: "I can assure you that there's one issue that I have been made aware of that does give me a great deal of concern, and that is the subject matter of the Court's appointed expert witnesses, the two doctors that I chose. ... We took steps to make sure their names were protected as confidential. They were ... not to be used by anyone ... or adversely to be discovered by Planned Parenthood. ... I don't want their names disclosed ... these doctors are to be protected. That is one issue that clearly would be subject to the protective orders." *See* Public Case File at Vol. X, 85. Yet, inexplicably, Attorney General Morrison expressly disregarded Judge Anderson's protective order and disclosed the name of one of these doctors to Petitioner in filing its Witness and Exhibit List. *See id.* at 117. Furthermore, this Court failed to redact the two doctors' names from the public Anderson Mandamus file and has effectively released that protected confidential information to the entire public. *See* Anderson Mandamus at 97.

Petitioner lacks standing, its action is moot, and Petitioner cannot obtain relief through mandamus. This Court should dismiss this action.

A. Petitioner lacks standing to pursue the current action.

An organization has standing to sue on behalf of its clients only when those clients would have standing to sue individually. *312 Educ. Ass'n v. U.S.D. No. 312*, 273 Kan. 875, 879, 47 P.3d 383 (2002). Petitioner alleges only that Respondent's continued possession of redacted records threatens the privacy rights of its patients. *See* Pet. for Writ at ¶ 22. Pursuant to *Alpha*, patient identifying information has been completely redacted from the records. This Court fashioned the redaction remedy in *Alpha* to protect privacy rights such that any threat to those interests has already been sufficiently addressed. Any potential for injury to Petitioner's patients is now too remote and speculative to constitute a concrete and particularized injury in fact. Petitioner has no standing to sue on behalf of its patients.

To the extent that the residue of some less tangible privacy interest remains in the redacted medical records, as suggested by some federal cases cited by Petitioner (*see* Memo. Supp. Pet. at 8-9) this Court has made it clear that those interests do not provide free-standing entitlement to relief. Rather, such residual privacy interests may at times be balanced against other countervailing interests to determine the rights and duties of all interested parties. *Wesley Medical Center v. Clark*, 234 Kan. 13, 28, 669 P.2d 209 (1983). Specifically, in such instances, the court has a "duty, when properly requested, to conduct an *in camera* inspection . . . to ensure that the balance is properly struck between a petitioner's claim of irrelevance and privilege, and a plaintiff's need for the documents." *Id.* As a result of this Court's decision in *Alpha*, Judge Anderson undertook this *in camera* inspection. He inspected the medical records at issue and

balanced the competing interests of Petitioner and Respondent in full and complete compliance with the above-specified duty. Accordingly, the privacy interests of Petitioner's patients have already been protected to the full extent required by this Court.

The evidence presented in the instant case confirms these matters as recited above. According to Judge King "it is fair to conclude that the patient privacy safeguards contemplated by *Alpha*, as implemented through Judge Anderson's Amended Protective Order, were carried out before any records were produced to Attorney General Kline." King Report at ¶ 10. Furthermore, the King Report make clear that the only persons to whom the redacted patient medical files were shown were: 1) potential expert witnesses; 2) other prosecutors; and 3) judicial officials. *See id.* at ¶¶ 47, 151.

Because the records were sufficiently redacted to adequately protect patient privacy interests ***before Respondent received them***, and Respondent has shared the records solely for law enforcement purposes, it is clear that no injury has occurred to patient privacy as a result of Respondent's possession of the records. Petitioner has already vindicated its asserted interest as a result of the *Alpha* decision and therefore may not demonstrate standing to pursue a second case on that basis.

Moreover, where a party obtains the requested relief in a prior action—as Petitioner did in *Alpha*—that party cannot establish the requisite "concrete and particularized injury in fact" to justify standing in a second challenge. *State ex rel. D.S.M. v. Mealey*, 33 Kan. App. 2d 947, 954, 112 P.3d 956 (2005). Petitioner and its patients therefore lack standing to bring this mandamus action. *See F.E.R. v. Valdez*, 58 F.3d 1530, 1533 (10th Cir. 1995). This Court must dismiss the Petition.

B. The Current Action is Moot.

Because Petitioner has already obtained relief curative of the privacy concerns, *see* Part I.A., *supra*; King Report at ¶¶ 10-11, Petitioner does not present an actual, ongoing dispute and its request is moot. The request to have the records turned over to Intervenor rather than returned to Petitioner underscores Petitioner's lack of concern that private, sensitive information remains in the records. Therefore, with respect to the privacy concerns alleged—the sole interest asserted by Petitioner—there is no actual, ongoing dispute. This action is moot. *See, e.g., Steele v. Security Benefit Life Ins. Co.*, 226 Kan. 631, 602 P.2d 1305 (1979) (claim moot because the insured had obtained the relief sought).

C. Mandamus is not a proper avenue for Petitioner to obtain relief it requests.

The burden of showing a right to the relief sought in a mandamus action is on Petitioner. *State ex rel. Fatzer v. Salome*, 169 Kan. 585, 595,220 P.2d 192, 199 (1950). If Respondent does not have a clear legal duty to perform the actions requested by Petitioner, the writ should not issue. *See id.* The requirements for obtaining a writ of mandamus are not met here.

"Mandamus is a proceeding to compel some inferior court, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law." K.S.A. § 60-801. Relief in the nature of mandamus is discretionary. *Wilson v. Sebelius*, 276 Kan. 87, 90, 72 P.3d 553 (2003). Petitioner, however, fails to specify any clear legal duty that Respondent has failed to fulfill. As further explained in Part II.A., *infra*, Respondent was under absolutely no duty as Attorney General, imposed by either the legislature or this Court, to refrain from sharing the medical records at issue with other prosecutorial offices. Likewise, as District Attorney, Respondent is under no duty to refrain from using the redacted records in his criminal prosecution of Petitioner. Indeed, this Court has already expressly acknowledged that Respondent may and will use the

redacted records "as required in the pursuit of a law enforcement investigation or court proceeding." *See* Public Case File at Vol. X, 356. Because Petitioner cites no legal duties that Respondent has violated, Petitioner should not be allowed to utilize a mandamus action to seek the return of the patient records.

Because the action of Respondent upon which Petitioner bases its mandamus claim—his decision as Attorney General to transfer a copy of the medical records to the office of another Kansas prosecutor—was performed under Respondent's discretionary authority, the removal of these records from Respondent's possession is not an act which Petitioner "is owed as a clear right." *State ex rel. Stephan v. O'Keefe*, 235 Kan. 1022, 1024, 686 P.2d 171 (1984). "Unless a respondent's legal duty is clear, the writ should not issue. *Huser v. Duck Creek Watershed Dist. No. 59*, 234 Kan. 257, 671 P.2d 559 (1983)." *Id.* at 1024. The "clearly defined duty" must be a duty imposed by law, as contrasted with any determination involving the exercise of discretion. *State ex rel. Stephan v. Smith,* 242 Kan. 336, 348, 742 P.2d 816 (1987). Under this Court's precedents, therefore, an order of mandamus may not properly issue here.

Petitioner's reliance on this Court's prior mandamus decisions regarding situations in which "an outgoing officer refuses to turn over to his successor the property belonging to the office," *State v. Prather*, 84 Kan. 169, 171, 113 P. 829, 830 (1911), is both misplaced and contrived. Throughout this litigation Petitioner has identified the medical records at issue as belonging either to Petitioner or its female patients, characterizing the Attorney General's interest in the records as merely custodial. *See generally*, Pet. for Writ and Memo. in Supp. In order to invoke mandamus, however, Petitioner shifts gears and argues that the records are the rightful property of the office of the Attorney General. *See* Memo. Supp. Pet. at 6-7. Petitioner may not alter the facts as necessary to support its various arguments. This flip-flop by Petitioner

exposes the reality that mandamus is not proper in these circumstances.

It is telling that Petitioner can cite no source of law requiring Respondent to do anything in particular with the records at issue. There is no indication in this case that Respondent has neglected or refused to perform a clear legal duty; to the contrary, Petitioner seeks to take control of this criminal investigation rather than allow Respondent to perform his duties in this regard.

Petitioner does not argue that the records' maintenance by law enforcement officials is improper. Indeed, Petitioner specifically urges that the records be returned to the sole possession of the Attorney General. As previously explained, neither the official title nor the identity of the prosecutor(s) in possession of the medical records in any way affects the degree to which patient privacy interests in the records are protected, as the sharing of such information among various offices is an inherent and discretionary power attendant to the executive branch that may not be thwarted by the judiciary or the target of the pending criminal investigation. The inevitable result, if this Court grants Petitioner the relief it seeks by ordering Respondent to relinquish possession of the patient records, clearly reveals Petitioner's purpose in pursuing this action. Without possession of the records, Respondent may not effectively prosecute Petitioner for the criminal activity evidenced in those records. Recognizing that this is Petitioner's goal should result in this Court's immediate dismissal of this action, as mandamus may not be invoked by a criminal defendant to thwart the administration of justice.

Indeed, Petitioner's claims actually sound in replevin, a cause of action not available in mandamus and currently unavailable both procedurally and substantively to Petitioner. In fact, this Court has previously held that where a party seeks the return of copies of documents, ***even when the documents were obtained through illicit means*** (which is clearly ***not*** the case in the instant action), an action for replevin will not lie when the party possesses the originals and the

information contained in the documents is not copyrighted. *Kansas Gas & Electric v. Eye*, 246 Kan. 419, 789 P.2d 1161 (1990). The Petition must be dismissed.

II. Petitioner Is Not Entitled to the Relief It Requests in This Action.

The separation of powers doctrine does not permit this Court to order Respondent to return evidence critical to the criminal prosecution of Petitioner. Also, Respondent has acted properly and not engaged in contemptible conduct.

A. An order requiring Respondent to turn over copies of the medical records in question would violate the separation of powers between the executive and judicial branches of government.

Were this Court to grant Petitioner's requested relief and consequently intervene in an ongoing criminal investigation and prosecution, this Court would undoubtedly engage itself in usurping one of the core, foundational powers of another branch of government, violating the doctrine of the separation of powers. This Court is bound to protect the right of Kansas citizens to have a government of separate judicial, executive, and legislative powers under both the Kansas and United States Constitutions. U.S. Const., Art. IV, § 4; *see also VanSickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973).

Foremost among the bundle of specific powers incident to the fundamental power of the executive branch to enforce the laws is the right to decide how to allocate resources among investigative and prosecutorial needs, among various types of criminal activity, across various jurisdictions, and even across various types of defendants. It is this zone of initial investigative and prosecutorial discretion and allocation of resources that must remain within the executive branch and cannot be ceded to the oversight of the legislature or judiciary. *See, e.g., State v. Williamson*, 253 Kan. 163, 165, 853 P.2d 56 (1993); *State v. Dedman*, 230 Kan. 793, 797-98, 640 P.2d 1266 (1982).

By granting the relief sought by Petitioner, this Court would be stepping far beyond the now-familiar territory where targets' clearly implicated constitutional rights are balanced against the criminal enforcement interests of the State (and the public). This was the territory trod by the Court in *Alpha*. By acting now, the Court would move from protecting citizens' constitutional rights to improperly intervening in relationships between prosecutors relating to issues of pure prosecutorial discretion and resource allocation.

Alpha steered well clear of this constitutional precipice. Contrary to Petitioner's mischaracterizations of this Court's opinion (*see* Pet. for Writ, 8, 19), *Alpha* never suggested that the ***identity*** of the law enforcement agency that held and maintained the documents could impact the patients' privacy concerns. There was no discussion that some prosecutors or offices were safer than others. In fact, the propriety, feasibility, safety, or legality of naming any particular law enforcement official or prosecutor as the ultimate and perpetual repository of the *Alpha* documents was not considered in the opinion. The *Alpha* opinion simply stated that the court should pass the documents to "the attorney general"—*i.e.*, then Attorney General Respondent Phill Kline—if the requirements for production were met. It did not issue any instructions or order to the Attorney General regarding whom he should or should not involve in the investigation, whether referrals of the case file should be made, which prosecutors were acceptable and which were not, how the documents should be kept, or whether the Attorney General was required to apportion his limited resources to the continued investigation of the case instead of sending the documents to another prosecutor to take the lead. Thus, this Court's order in *Alpha* had no impact on the inherent power of then Attorney General Kline to refer the case or transfer records to another office.

Petitioner's claim that this Court issued a directive "that the medical records remain

solely in the possession of the Attorney General" (Pet. for Mandamus, ¶ 21; *see also* Memo in Support of Pet. for Mandamus at 1, 7) is a ***necessary fabrication for Petitioner's purpose of attempting to create new rights for itself as a criminal defendant; it is also an entirely erroneous reading of the* Alpha *opinion***.

When this Court intends to limit the use and dissemination of patient records, it knows how to do so without equivocation. In *Tiller v. Corrigan*, recognizing the statutory protection afforded to the secrecy of grand jury proceedings, this Court issued the following directive: "[T]he district court shall enter a protective order, prohibiting the distribution or dissemination of any information from the patient records outside the grand jury proceeding . . . ." 2008 Kan. LEXIS 92, *34-35. In compliance with K.S.A. § 22-3012, however, which recognizes prosecutorial discretion in the performance of job functions, this Court expressly acknowledged that "[o]bviously, disclosures may be made to the prosecuting attorney for use in the performance of his or her duties . . . ." *Id.* at *35. Notably, no limitation was similarly placed on the prosecutor's use of the records for law enforcement purposes.

Respondent's decisions on how to investigate and prosecute matters, including by the enlistment of other officers or jurisdictions, the offering of investigative questions or leads to other officers or jurisdictions, or the sharing or referral of cases or parts of cases to other officers or jurisdictions, are discretionary decisions of the executive branch that are beyond the scope of judicial control.

The King Report explicitly supports Respondent's authority, as a prosecutor, to share with other law enforcement personnel information related to criminal investigations. *See* King Report, ¶ 122 (expressly "[a]cknowledging the propriety of information exchanges between prosecutors"). Indeed, as the King Report indicates, Judge Anderson himself, who was tasked by

this Court with entering the order that would protect any patient privacy interests at stake, merely limited Respondent's "use of the records . . . to 'law enforcement purposes,' [but] he did not get into specifics on what that restriction meant." *Id.* at ¶ 18. The reason for this judicial restraint, including his decision "not [to] restrict re-dissemination of the information" (*id.* at ¶ 19) was that Judge Anderson "did not feel that was a matter for him to try and control." *Id.*; *see also id.* at ¶ 132 (Judge Anderson "did not regard it as his role to prevent Kline from making the transfer"). To the extent Respondent himself felt it prudent to involve Judge Anderson in his prosecutorial decisions regarding re-dissemination of the records, however, the judge specifically approved of Respondent's decision to "shar[e] the information with prosecutors in Sedgwick, Johnson and Shawnee counties" and approved the fact and method of the transfer of the records themselves to Johnson County. *Id.* at ¶¶ 43, 132-133.

Regarding the specific details of the transfer of the records to the Johnson County District Attorney's office, the King Report likewise supports the conclusion that Respondent Kline violated no laws in so doing, as he executed the transfer in his capacity as Attorney General. *See Id.* at ¶ 110 (stating that the transfer was complete "well before noon" on January 8, 2007, which was the time Morrison became Attorney General). Indeed, even Petitioner's filings with this Court indicate that Kline transferred the records to the Johnson County District Attorney's office "prior to his term as Attorney General expiring." Pet. for Mandamus at ¶ 16. The King Report further demonstrates that the precise manner of information transfers within the executive branch is discretionary, as "[i]t does not appear that there are established protocols for transfers of investigative information between prosecutors or criminal investigative agencies," (King Report at ¶ 87) and clearly reveals that there were valid reasons underlying the fact that "the exchange of records in this case from the Attorney General to the Johnson County District Attorney was

handled differently than any other such information exchange describe by any of the witnesses . . . [including] any of the other information exchanges that Attorney General Kline undertook in relation to these records." *Id.* at ¶ 122.

As the Report makes plain, Respondent and his staff were hesitant to leave the records in the hands of then Johnson County District Attorney Morrison or members of his staff, with good reason. "Morrison had made multiple public statements demonstrating hostility to the merit of Kline's investigation." *Id.* at ¶ 126. "District Attorney Morrison and some of his staff were extremely hostile to Attorney General Kline and his staff." *Id.* at ¶ 128. "Morrison and his transition staff were not cooperative with Kline and his transition staff: Kline was denied a secure storage area at the Johnson County District Attorney's office; Kline was not provided with office space in the District Attorney's office." *Id.* at ¶ 129. Thus, the precise manner in which the records were transferred to Johnson County was entirely a product of Respondent's staff's shared "concerns about security at the Johnson County District Attorney's office." *Id.* at ¶ 145. Given these extenuating circumstances, even "when Judge Anderson became more fully aware of the means by which the transfer occurred he declined to require Kline to return the CHPP redacted patient records or other investigatory materials. . . . [because] the materials were evidence that Kline could use in his role as Johnson County District Attorney and he didn't want to take evidence of potential crimes out of the hands of a prosecutor." *Id.* at ¶ 133.

Owing to prosecutorial discretion, the United States Supreme Court has stated that "the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States,* 470 U.S. 598, 607 (1985). Thus, this Court may not expand the reach of mandamus into the field of prosecutorial discretion without violating the separation of judicial and executive powers.

B. Respondent has engaged in no conduct for which he may be held in contempt

***of this Court's order in* Alpha.**

As explained in Part II.A. *supra*, this Court's directive in *Alpha* that any relevant, redacted patient records be "turned over to the attorney general" (280 Kan. at 925) cannot be read to limit the authority of then Attorney General Kline to share the records, which contain evidence of criminal conduct, with others for law enforcement purposes. Judge Anderson clearly testified at the evidentiary hearing that he expected Respondent to use the fruits of the subpoenas to further the investigation and that the decision to share those fruits with others for law enforcement purposes was wholly within the realm of executive discretion. *See* Public Case File at Vol. I, 52-82. As such, Respondent's decision to transfer the records to the Johnson County District Attorney's office cannot form the basis for a finding of contempt. Nor, as Petitioner suggests (*see* Pet. for Writ, ¶ 21, 26) did Respondent have any legal duty, either as Attorney General or as Johnson County District Attorney, to ensure that the records remained solely in the possession of the office of the Attorney General. In fact, in light of the grave and amply justified concern of Respondent and his staff that criminal activity might well be ignored by Attorney General Morrison, absent a transfer of the records to Johnson County, Respondent reasonably considered it a violation of his duty as a law enforcement agent ***not*** to transfer the records.

Furthermore, assuming *arguendo* that a contempt finding could be predicated on the language in *Alpha* regarding "the attorney general," Petitioner has requested this Court to hold Respondent Kline in civil contempt (*see* Pet. for Mandamus, ¶ 26) but has failed to satisfy the requirements for civil contempt, which "must be strictly construed against the movant." *Cyr v. Cyr*, 249 Kan. 94, 99 (1991). "Civil contempt is the failure to do something ***ordered by the court*** for the benefit or advantage of another party to the proceeding." *Id.* at 98 (emphasis added). At no time did this Court order that the redacted records at issue be maintained in the sole

possession of the office of the Attorney General. Nor, as the separation of powers doctrine indicates, would such an order withstand constitutional scrutiny.

Moreover, both this Court and Kansas appellate courts have clarified that "[a] proceeding in civil contempt is remedial in nature," (*id.*) "designed to compensate the complainant for an injury produced by the contemnor's conduct." *Bond v. Albin*, 29 Kan. App. 2d 262, 265 (2000). Because Petitioner has shown absolutely no injury resulting from any action by Respondent, contempt will not lie here. The only injury Petitioner alleges—a threat to its patients' privacy interests—is one for which this Court has already granted relief. As previously articulated, the primary purpose of this Court's order in *Alpha* was to ensure that the interests of Petitioner's "patients' privacy rights" were properly "balanced with the State's compelling need for information relevant to the criminal investigation." 280 Kan. at 917. In the Response to Petition for Mandamus by Respondent Richard D. Anderson, District Judge, filed with this Court in November 2006, Judge Anderson detailed the means by which he had "fulfilled all directives stated by the Supreme Court in *Alpha* . . . ." *Id.* at ¶ 1. Judge King's Report further confirms that "[t]he evidence presented in this matter supports a conclusion that the redacted patient records Kline received on October 24, 2006 complied with the *Alpha* mandate, the Orders of Judge Anderson, and had patient identifying information removed to a degree that they complied with the federal Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d. (HIPAA)." King Report at ¶ 11.

The records at issue in the instant case were sufficiently redacted to comply with this Court's mandate in *Alpha*, which specifically contemplated protecting not only patient privacy interests but also the State's vital interest in the effective investigation of criminal activity. Consequently, Respondent may not be held in contempt for having threatened or caused any

injury to Petitioner's patients.

Finally, at the end of the *Alpha* opinion, in dicta, this Court issued the following caution: "We caution all parties to resist any impulse to further publicize their respective legal positions, which may imperil the privacy of the patients and the law enforcement objectives at the heart of this proceeding." 280 Kan. at 930. This statement was in response to Petitioner's claim that Respondent should have been held in contempt of court for attaching a document filed under seal to a publicly filed document. This Court did not hold Respondent in contempt for such conduct, and any argument that the statement might now support a finding of contempt is without merit.

Due process "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Indeed, the United States Supreme Court has explained that "[c]ertainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press, and association for fear of violating an unclear law." *Scull v. Virginia ex rel. Committee on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959). In recognition of the due process concerns at stake, this Court acknowledged in *Alpha*, "[b]efore one can be punished for contempt in not complying with the decree of a court, a particular or precise thing to be done by the party proceeded against must be clearly and definitely stated. Further, a party should not be punished for contempt for disobeying a decree, if the decree is capable of construction consistent with innocence." 280 Kan. at 927 (citations and internal quotation marks omitted). The plain language of the statement at issue makes clear that it cannot be the basis for any finding of contempt, as it did not order the parties to do, or refrain from doing, any particular or precise thing. By its own terms, the statement served merely as a "caution." Since the issuing of the *Alpha* opinion, Respondent has fully respected the sealed nature of all documents filed in

other proceedings. Thus, *Alpha*'s statement in dicta is clearly capable of a construction consistent with Respondent's innocence. In fact, Judge Anderson was asked to hold Respondent in contempt for violating *Alpha* and specifically refused. *See* Public Case File at Vol. I, 126. Similarly, as discussed in detail above, the King Report yields the conclusion that Respondent was not responsible for any publication of the records or their contents in the instant case. There is no basis on which to substantiate a contempt finding.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court deny all of Petitioner's and Intervenor's claims and grant his Motion to Dismiss forthwith.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served by depositing same in the United States mail, postage prepaid, on the 28th day of May, 2008 to counsel for Petitioner Pedro Irigonegaray, 1535 S.W. 29th Street, Topeka, KS 66611 and Intervenor Michael Leitch, Office of the Attorney General, 120 S.W. 10th Ave., Topeka, KS 66612.

Caleb Stegall #19584

TYPE OR PRINT IN PERMANENT INK

KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT
Office of Health Care Information
Curtis State Office Building
1000 SW Jackson, Suite 130
Topeka, Kansas 66612-1354
785-296-0027

REPORT OF INDUCED TERMINATION OF PREGNANCY

[redacted]

INSTRUCTIONS SEE HANDBOOK

STATE FILE NUMBER

[redacted]

9. EDUCATION
(Specify only highest grade completed)

[redacted]

11. CLINICAL ESTIMATE OF GESTATION (Completed) *

12. PREVIOUS PREGNANCIES (Complete Each Section)

[redacted]

13. TERMINATION PROCEDURES

[redacted]

* If clinical estimate of gestational age is 22 weeks or more or a Partial Birth Procedure is performed complete reverse side of form.
Partial Birth Procedure as defined by 18USC Supp KSA 65-6721.

23

[redacted]

WAS FETUS VIABLE?

☐ YES ☒ NO

REASONS FOR THE DETERMINATION.

No reasonable probability at this gestational age.

COMPLETE 16a-c ONLY IF 15a IS YES

16a. WAS THIS ABORTION NECESSARY TO
(Check all that apply)

☐ PREVENT PATIENT'S DEATH
☐ PREVENT SUBSTANTIAL AND IRREVERSIBLE IMPAIRMENT OF A MAJOR BODILY FUNCTION

16b. REASONS FOR DETERMINATION

16c. BASIS FOR DETERMINATION

[redacted]

17a. WAS FETUS VIABLE?

☐ YES ☐ NO

17b. REASONS FOR THE DETERMINATION

COMPLETE 18a-b ONLY IF 17a IS YES

18a. WAS THIS ABORTION NECESSARY TO
(Check all that apply)

☐ PREVENT PATIENT'S DEATH
☐ PREVENT SUBSTANTIAL AND IRREVERSIBLE IMPAIRMENT OF A MAJOR BODILY FUNCTION
IF SO, WAS THE IMPAIRMENT
☐ PHYSICAL
☐ MENTAL

18b. REASONS FOR DETERMINATION

VS-210
Rev. 12/2001

TYPE OR PRINT IN PERMANENT INK

Office of Health Care Information
Curtis State Office Building, Suite 130
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Topeka, Kansas 66612-1354
785-296-8627

REPORT OF INDUCED TERMINATION OF PREGNANCY

INSTRUCTIONS SEE HANDBOOK

STATE FILE NUMBER

[redacted]

9. EDUCATION (Specify only highest grade completed)

[redacted]

11. CLINICAL ESTIMATE OF GESTATION (Weeks) *

23

12. PREVIOUS PREGNANCIES (Complete Each Section)

LIVE BIRTHS

[redacted]

13. TERMINATION PROCEDURES

[redacted]

*If clinical estimate of gestational age is 22 weeks or more or a Partial Birth Procedure is performed complete reverse side of form.
Partial Birth Procedure as defined by 1998 Supp-KSA 65-6721.

-313 Rev. 12/2001

CH 0642-A

[redacted]

[redacted]

16a. WAS FETUS VIABLE?

☐ YES ☒ NO

16b. REASONS FOR THE DETERMINATION:

No Reasonable Probability at this gestational age.

COMPLETE 16a-c ONLY IF 16a IS YES

16a. WAS THIS ABORTION NECESSARY TO
(Check all that apply)

☐ PREVENT PATIENT'S DEATH
☐ PREVENT SUBSTANTIAL AND IRREVERSIBLE IMPAIRMENT OF A MAJOR BODILY FUNCTION

16b. REASONS FOR DETERMINATION

16c. BASIS FOR DETERMINATION

[redacted]

17a. WAS FETUS VIABLE?

☐ YES ☐ NO

17b. REASONS FOR THE DETERMINATION

COMPLETE 18a-b ONLY IF 17a IS YES

18a. WAS THIS ABORTION NECESSARY TO
(Check all that apply)

☐ PREVENT PATIENT'S DEATH
☐ PREVENT SUBSTANTIAL AND IRREVERSIBLE IMPAIRMENT OF A MAJOR BODILY FUNCTION
IF SO, WAS THE IMPAIRMENT
☐ PHYSICAL
☐ MENTAL

18b. REASONS FOR DETERMINATION

/2001

CH 0642-B