IN THE TENTH JUDICIAL DISTRICT
DISTRICT COURT, JOHNSON COUNTY, KANSAS

In the Matter of the Grand Jury Investigation	)	Case No. 07-CV-8495

STATE'S SUPPLEMENTAL RESPONSE TO RESPONDENT'S MOTION TO QUASH THE GRAND JURY SUBPOENA AND SUPPLEMENTAL BRIEF IN SUPPORT OF EXTENDING THE GRAND JURY

COMES NOW THE STATE and in support of its and the Grand Jury's opposition to Respondent's Motion to Quash and in support of the State's motion to extend the Grand Jury provides the following legal authority and argument.

ARGUMENT AND AUTHORITY

I. The Records Sought by the Grand Jury Are Already Compliant With *Alpha*, DO NOT Contain Patient Identities and the Grand Jury Is On Firm Legal Ground In Issuing Its Subpoena.

A. The Honorable Richard Anderson, Judge Shawnee County District Court, Has Confirmed that Patient Identities May Not be Determined By Reviewing the Records Sought As Patient ID Information Has Been Removed.

1. Medical records subpoenas are routinely utilized in criminal investigations and the privacy interests of patients are protected by a finding of reasonable suspicion.

2. The privacy interests of patients in their medical records are significantly reduced if their identities are removed from the records.

3. The records sought by the Grand Jury have already been produced in Inquisition Case No. 04-IQ-3 in Shawnee County District Court and with the permission of the

Court copies of the records were provided to the Office of District Attorney for the 10th Judicial District.[1]

4. The provision of the records to Johnson County was made known to newly sworn Attorney General Paul Morrison through the filing of a "Status and Disposition Report" (hereinafter "Status Report") with the Shawnee County District Court which detailed the ***exact*** locations of all medical records.[2]

5. At the time the records were shared with Johnson County, all patient identifying information had been removed and the Honorable Richard Anderson, Judge, Shawnee County District Court, had certified to the Kansas Supreme Court that the "Alpha[3]" mandate had been complied with regarding the records in that ***it was not possible to identify any patient by reviewing the records***.[4]

6. At hearing on Friday, February 15, 2008, this Court expressly found that the Grand Jury subpoena was on firm legal ground and that the Grand Jury was acting within its statutory authority in issuing the subpoena.

B. The Privacy of Patients Has Always Been Protected and the Records Have Always Been Handled Consistent with Judicial and Investigative Aims.

7. The location of the records was known at all times and copies of the records (all of which did not contain patient identities) were only provided consistent with legitimate law enforcement and/or judicial objectives and were never "scattered" as

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[1] This permission was granted by Judge Anderson at the request of then Attorney General Kline even though both General Kline and Judge Anderson reasoned such permission was not necessary as the executive branch routinely shares information obtained in investigations with others and agencies in order to forward the investigation and all is done on an almost daily basis without leave of court. (See, pages 4-5 infra).

[2] Status and Disposition Report, Inquisition Case No. 04-IQ-3 (filed January 8, 2007) attached as Exhibit 1.

[3] "Alpha" refers to *Alpha/Beta Clinics v. The Honorable Richard D. Anderson et. al,* (Case No. 93,383, decided Feb. 3, 2006)(hereinafter *Alpha*)) attached as Exhibit 2.

[4] (Andeson filing in Nov. of 06) attached as Exhibit 3.

claimed by Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri (hereinafter "CH") and former Attorney General Morrison.[5]

8. The Status Report filed with Judge Anderson was specific and identified that complete or partial copies of the redacted records were located in the following locations:

a. The Shawnee County District Court;

b. The Sedgwick County District Court, as necessitated in demonstrating probable cause in the criminal case entitled *State of Kansas v. George Tiller*, 06-CR-2961 (the documents were filed under seal);

c. the Office of Shawnee County District Attorney Robert Hecht;

d. the office of state retained expert Dr. Paul McHugh of Johns Hopkins Medical Center;

e. the Office of Attorney General for review by incoming Attorney General Paul Morrison; and

g. the Office of District Attorney for the 10th Judicial District.

9. Accordingly, the redacted medical records were provided, as required by law and in order to further legitimate law enforcement objectives, to agencies, courts and one expert witness consistent with such duties.

10. Despite this knowledge, former Attorney General Morrison initiated a media event during which he claimed patient privacy was jeopardized because the records were "scattered" and he announced he was initiating a KBI investigation to "attempt" to retrieve the records.

[5] Soon after becoming Attorney General, Mr. Morrison held a news conference and claimed the medical records were "scattered" and that it was necessary to initiate a KBI investigation to retrieve the records. (Transcript Morrison June 28, 2007 News Conference) attached as Exhibit 4.

11. Specifically, at a June 28, 2007 news conference, General Morrison stated:

> "What we found on the first day in office was that the investigative files, nor the medical records, weren't even in the attorney general's office. They weren't even here. So that began the seven-week equivalent of a scavenger hunt to try to find those records, and we found that they were scattered all over but the one place that they should be. Some were in Sedgwick County, they were in various places in Shawnee County, some were in Johnson County. And we were able to find that Phill Kline had, on his last day in office as attorney general, had used the power of this office to assign those files to him in his new job as Johnson County District Attorney, totally on his own – no oversight. Some of those files were in Baltimore, Maryland. They were literally scattered all over the country."[6]

12. This "investigation" or "scavenger hunt" consisted solely of having KBI agents go to the exact locations indicated in Status Report filed by then General Kline and pick up the records from those exact locations.[7]

C. The Shawnee County District Court Expressly Gave Permission for Copies of the CH Records to be Shared with the Office of the Johnson County District Attorney and the Records Are Lawfully Present in That Office.

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[6] See Exhibit 4.

[7] See Exhibits 5a, 5b, 5c and 5d (KBI Investigation Report (Jan. 10, 2007)(retrieving files from Shawnee County District Court); KBI Investigation Report, (Jan. 24, 2007)(retrieving files from Sedgwick County District Court); KBI Investigation Report, (Jan. 25, 2007)(retrieving files from Shawnee County District Attorney Robert Hecht); and Affidavit of Paul R. McHugh, M.D. (August 29, 2007)).

13. The retrieval of the files did not protect patient privacy but rather thwarted legitimate investigative efforts and served to unnecessarily frighten patients. The provision of the files to experts, courts and other investigative agencies was all known to the District Court and is commonly done in the course of investigations.

14. Furthermore, the Attorney General knew that District Attorney Kline had permission of the District Court to maintain a copy of the CH records in Johnson County. Specifically, the Honorable Judge Richard Anderson, Shawnee County District Court, in response to the motion by the Kansas Attorney General for the subject records to be removed from respondent stated: "I clearly recall discussions specifically naming Planned Parenthood records in conjunction with the transfers to the different law enforcement agencies and I authorized that, to the extent that I needed to give any authority to do that, the records have been de-identified."[8]

15. The District Court further stated:

> "The Planned Parenthood records, the former Attorney General, now Johnson County District Attorney, has adequately represented to the Court that he believes that there is evidence of crimes committed in those records. He does have jurisdiction in Johnson County to initiate criminal proceedings against Planned Parenthood if he chooses to do that. I'm concerned that if I would order all copies of those records to be returned that that would impair investigation that he has authority to conduct. He could clearly open a new one

[8] (Transcript of Proceedings, Inquisition Case No. 04-IQ-3, Shawnee County District Court, at pg. 79, lines 11-16 (April 11, 2007)).

to try to obtain the same information. But ***that does not seem to be in the interests of justice to slow an investigation, to impair the ability to prosecute crimes***." [9]

D. The Grand Jury Subpoena Calls for CH to Remove Patient Identifying Information from the Files Prior to Production.

16. Pursuant to their charge, the Johnson County Grand Jury (hereinafter "Grand Jury") unanimously voted to issue a subpoena to CH.

17. The subpoena is signed by the presiding juror and was issued on January 7, 2008. (Grand Jury Subpoena Duces Tecum, Case #07CV8495 (hereinafter "GJ Subpoena").

18. The subpoena expressly states the following:

> "***You shall redact patient identifying information*** (such as) patient's name, patient's social security number, patient's address, email addresses, patient's phone numbers, patient's next of kin name and address or phone numbers, and patient identifying information in insurance materials."

19. Both of these statements by the District Court occurred at an April 11, 2007 hearing at which Assistant Attorneys General of Attorney General Morrison's office were present.

20. The records subpoenaed are the very same records which the Honorable Richard Anderson has certified comply with the mandates of *Alpha* in that all patient

[9] *Id.*, at pg. 78, lines 15-25 through pg. 79, lines 1-4)(emphasis added)).

identifying information has been removed and that the Shawnee County District Court gave expression permission to be shared with the Office of Johnson County District Attorney. These are the very same records Judge Anderson recognized as evidence in a criminal investigate on that may be shared pursuant to executive branch authority with other investigating agencies.

E. Judge Anderson Has Already Certified to the Supreme Court that the Alpha Mandate Has Been Fully Complied with Regarding the Documents Sought by the Grand Jury.

21. Further, On November 28, 2006, in response to a previous mandamus filed by CH the Honorable Judge Richard Anderson filed a response to the Kansas Supreme Court regarding the very records at issue stating in part:

a. "The District Court has fulfilled all directives by the Supreme Court in Alpha Medical Clinic v. Anderson, 280 Kan. 903, 128 P.3d 364 (2006);"

b. "The District Court has reviewed the Attorney General's (Respondent's) legal theories and has determined the Attorney General stands on firm legal ground;"

c. "No patient can be identified from the review of any medical file;" and

d. "(t)he District Court has further determined that relevant information is contained in the medical files, which may constitute evidence of possible violations of law, and that the files document more than the existence of a reasonable medical debate about some aspect of the application of the criminal abortion and/or mandatory child abuse reporting statutes."[10]

22. Further, the District Court recognized the manner in which Attorney General Kline's office approached the issue as one which appropriately balanced patient

[10] Response to Petition for Mandamus by Respondent Richard D. Anderson, District, attached as Exhibit 3.

privacy rights against the state's compelling interest in investigating crime when the Court stated in an October 21, 2004 order:

> "The Attorney General (Kline) does not contend that the statutory privilege or constitutional right of informational privacy of patients should be given insubstantial consideration. On the contrary, the Attorney General has articulated an awareness of the need to conduct the investigation in the least intrusive manner to the privacy interests of patients."[11]

23. In recognition of the privacy concerns, General Kline and Judge Anderson provided for the redaction of all patient identifying information relating to adult patients prior to production of the records to the Office of Attorney General.

24. The Grand Jury is only seeking limited information relating to these records that were previously redacted by CH and all of which will not allow the identity of a patient to be revealed.[12]

25. The subpoena requests date of births, dates relating to last menstrual period, dates and times of medical procedures and consultations; and dates and times of any required notification and/or compliance with any required waiting period.[13]

26. All of the information sought is relevant to the Grand Jury's inquiry. Birth dates may assist in determining the accuracy of CH records when compared to KDHE reports and also will assist the Grand Jury in knowing mandatory reporting

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[11] October 21, 2004, Anderson Order Denying Motion to Quash.
[12] It is important to note that the Kansas Supreme Court recognized that even patient identities could, if necessary for a criminal investigation,, be subsequently provided to law enforcement when investigating crimes against minors. (See, *Alpha Clinics v. The Honorable Richard Anderson, et. al.,*
[13] Grand Jury Subpoena.

requirements and possible crimes against minor patients. Dates relating to last menstrual periods are essential in determining the accuracy of CH records relating to gestational age and also the time criminal activity may have occurred against a minor child. The dates and times of medical procedures and consultations are necessary to determine if appropriate waiting periods and parental notifications occurred.

F. *Alpha* Does Not Allow the Target of an Investigation to Determine the Relevancy of Information Sought by Subpoena, *Alpha* Only Stands for the Proposition that Patient Identities Should Be Redacted if Not Needed for Investigative Purposes.

27. This information regarding the relevancy of the information sought despite the fact CH sought in *Alpha* an order by the Supreme Court compelling the state to demonstrate in "a hearing that a compelling need for the patient files exists and that the state seeks no more information than that amount absolutely necessary to meet the compelling need."[14] The Kansas Supreme Court rejected this requested remedy and recognized that the target of an investigation does not have the authority to determine the relevancy of the information sought. The Supreme Court adopted the protective order contemplated by Attorney General Kline and Judge Anderson with one change; allowing the clinics to redact patient identifying information. The Court also expressly stated that identities could subsequently be subpoenaed if necessary.[15]

28. The primary holding in *Alpha* Med was Judge Anderson should have allowed the clinics to redact patient identifying information prior to producing the documents to the Court. Here the subpoena does not even seek identifying information and expressly directs CH to redact such information prior to production. Further, Alpha

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[14] *Alpha*, at 5 of 17.
[15] *Alpha*, at 13 of 17 ("*Should patient-identifying information later be required, the district judge may approve appropriate subpoenas for that information at that time*").

states that "(s)hould patient-identifying information later be required, ***the district judge may*** approve appropriate subpoenas for that information at that time."[16] Accordingly, even if the subpoena at issue requested patient identifiers, this Court has the authority to make the determination of relevancy and thus necessity. We are not, however, presented with that issue here.

29. Instead, CH illogically argues that someone may be able to identify a patient by the dates and times of medical procedures that occurred in 2003, and that this irrational supposition should defeat the state's legitimate efforts to investigate crime. CH has failed to provide any evidence that such identification can occur and has only repeatedly and erroneously claimed that HIPAA prevents such disclosure, when in fact the opposite is true.[17]

30. Not only are CH's claims irrational, they are not supported by HIPAA or even CH's own website.

31. HIPPA expressly provides that medical information shall be provided if requested by "subpoena" or "order of a court." 45 CFR 164.51. The Code of Federal Regulations expressly states that a medical provider may provide such information as required by law "in compliance with (a) court order…or a subpoena…(or) ***grand jury subpoena***…." 45 CFR 164.51(f).

G. A Patient's Reasonable Expectation of Privacy is Significantly Reduced by CH's Own Website Which Informs Patients that CH Provides Patient Information to Fundraisers and to Law Enforcement Upon Request.

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[16] *Alpha*, at 13 of 17 (emphasis added).

[17] HIPAA specifically recognizes that *"the legal process in obtaining a court order and the secrecy of the grand jury process provides protections for the individual's private information."* (See, http://www.hhs.gov/hipaafaq/permitted/law/505.html)

32. Further, CH's own website, acknowledges the requirement to provide records pursuant to subpoena when it states:

> How We May Use and Disclose Health Information About You - Law Enforcement
>
> We may release health information if asked to do so by a law enforcement official:
>
> - In response to court order, subpoena, warrant, summons or similar process
> - If you are the victim of a crime and we are unable to obtain your consent
> - In an instance of criminal conduct at our facility
> - In emergency circumstances to report a crime.[18]

33. It is important to note that all of the above disclosures, including those contemplated under Federal Law, *include* patient identities, while compliance with the grand jury subpoena before the court *allows the removal of all patient identities.*

34. CH's continued mischaracterization of the law and feigned concerns about patient privacy especially ring hollow in light of CH's continued policy of revealing abortion patients' names and contact information to professional fundraisers.[19]

35. Despite the fact that female patients are not under investigation, their identities are not known and will not be revealed, CH continues to defy legitimate law

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[18] Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, website, http://www.comprehensivehealth.org/hipaa.asp (Feb. 15, 2008)(hereinafter "CH Website," attached as Exhibit 6).

[19] CH Website, http://www.ppkm.org/hipaa.asp, (Exhibit 6).

enforcement objectives and orders while reserving the right to reveal patient identities to professional fundraisers.

36. Fourth Amendment Jurisprudence is premised on a person's reasonable expectation of privacy in the information sought. Clearly, CH's providing notice to their patients that their contact information may be shared with fundraisers and law enforcement diminishes that expectation. Further, this notice relates to providing the actual patient identities to third parties. The subpoena in question does not even request patient identity.

37. Kansas laws relating to mandatory waiting periods, parental notification, reporting of child sexual abuse and late-term abortion are reasonable, rational and designed to protect women and children. These laws cannot be enforced without reviewing the information sought by the Grand Jury.

38. CH's success in delaying the Grand Jury request for over 40 days renders it impossible for the Grand Jury to complete its work in the 90 day statutory timeframe.

39. This Court, on its own and pursuant to K.S.A. 22-3013(1), may extend the Grand Jury and such extension may allow the Grand Jury not to meet until legal issues are resolved. In this fashion, the Grand Jury will not suffer hardship. Failure to do so, however, will seriously undermine public confidence in the judicial process.

40. CH should not be able to defeat a lawful subpoena of medical records not containing patient identities on the unsubstantiated and illogical claim that somehow, somewhere, by some bizarre coincidence someone may be able to determine a patient identity using the date and time of a sonogram.

41. The State fully supports this Court's suggested "compromise" wherein the subpoenaed records are to be produced in camera to the court for the court's review. The state supports the Court engaging in such review to determine relevancy and that such discussion occurs with the state, not Respondent as Respondent has offered no authority for the proposition that the target of an investigation has standing to determine the relevancy of information sought by a Grand Jury. CH's authority under Alpha is solely to determine if patient identifying information ahs been redacted, nothing more.

II. The Records Sought by the Grand Jury Have Already Had Patient Identifiers Removed and Therefore Comply with the Alpha Case and exceed the precautions necessary to comply with Federal HIPAA regulations.

Medical record subpoenas are routinely initiated in criminal investigations. Most often such subpoenas include the identification of the patient. The protection of patient privacy and compliance with the Fourth Amendment's privacy protections are important and accomplished by requiring a showing of "reasonable suspicion" to believe a crime has been committed and "reasonable suspicion" to believe evidence of the crime is contained in the files sought.[20]

In this instance, the Grand Jury is seeking records that have already been produced pursuant to subpoena. The 16 files subpoenaed were also subpoenaed by the Office of Attorney General in 2004. At the time, since the Attorney General was contemplating a search warrant, an extensive evidentiary hearing was held wherein the Honorable Richard Anderson of Shawnee County District Court found "probable cause" to believe that crimes had been committed and "probable cause" to believe that evidence of the crimes was contained in the files. As this Court is aware,

[20] *Alpha*, at 8 of 17.

probable cause is a much higher evidentiary threshold than reasonable suspicion.

Subsequently, the Attorney General's Office decided to proceed with a subpoena duces tecum rather than a search warrant and based on his previous finding of "probable cause" Judge Anderson initiated the subpoena.[21]

This Original Subpoena was initiated with the contemplation that the Office of Attorney General would never see the names of the adult patients. The Office sought the names of minor children as they were victims of crime. Furthermore, Judge Anderson and Attorney General Kline were drafting a protective order that provided that the records were to be produced to two physicians and a Guardian Ad Litem for the minor patients. These persons would review the records to redact any adult patient identifying information and irrelevant information before production of the records to the Office of Attorney General.[22] Although this is not required by law, the Office of Attorney General and the District Court desired such an approach due to the nature of the issue.

Respondent Comprehensive Health filed a motion to quash the original subpoena. In October of 2004, a hearing on the motion to quash was held before Judge Anderson. At the hearing, Judge Anderson stated in part that contrary to the claims of CH, "General Kline has recognized. Judge Anderson then denied the clinics motion to quash and ordered the records produced later that October of 2004.

In the face of the denial of its motion, Comprehensive Health filed an original mandamus action before the Kansas Supreme Court. On, the Kansas Supreme Court accepted mandamus and stayed the production of the documents. This stay prevented

[21] Subpoena Ducus Tecum, Inquisition No. 04-IQ-3; Shawnee County District Court (2004)(hereinafter "Original Subpeona)(attached as Exhibit 7).
[22] Transcript of Hearing, Case No. 04-IQ-3 (Shawnee County District Court)(October 4, 2004).

the entering of the protective order originally contemplated by Judge Anderson and Attorney General Kline.

III. Alpha Essentially Directs a District Court to Remove Patient Identifiers Prior to the Production of Abortion Medical Records If Such Identifiers are Not Relevant to the Underlying Investigation.

A. Alpha Does Not Require a Set Production Procedure; But Only Adopted the Procedure Already Contemplated by Judge Anderson and General Kline, With Slight Modifications.

The Kansas Supreme Court considered the mandamus for over 18 months before ruling that the records should be produced. The Court held that if a District Court finds that the executive branch investigative agency stands on "firm legal ground" and that the evidence sought is relevant to the underlying investigation then the records must be produced. The "so-called" Alpha procedure of the appointment of two independent physicians and a guardian was acceded to by the Office of the Attorney General in this case as such procedure was the exact manner in which the production would have taken place without Supreme Court intervention.

At oral argument and in subsequent filings General Kline stated that the Office supported the appointment of the two physicians by the District Court and accordingly, the Kansas Supreme Court order only affected one area of the production.

The Office of Attorney General argued that the District Court should oversee and manage the redaction of patient identifying information. The Attorney General's Office objected to the highly unusual position of Comprehensive Health that the target of the investigation decides what information is to be redacted. Furthermore, General Kline contemplated the necessity of comparing various medical records. It

would be necessary for the District Court to compare such records, initiate a coding system, and then make a finding that the records compared related to the same patient. In this fashion, the adult patient identity would never be known to the Office of Attorney General or to the public.

General Kline stated that he did not require or desire the names of adult patients as they were not under investigation could not be charged with a crime and would not need to be called as witnesses in any subsequent criminal prosecution. The comparison of medical records by the District Court, however, was crucial to the ability to identify the records in a subsequent prosecution and alleviate the necessity of calling any patient as a witness.

Furthermore, then General Kline argued that if law enforcement and the constitution contemplated that during an investigation where probable cause is present the "trusting" a target of a criminal investigation to voluntarily comply with the spirit of the investigation by allowing the target to "white out" information sought by the subpoena prior to production to the Court; that investigations would never be completed as it is reasonable to believe that such targets would be tempted to hamper the investigation by redacting relevant information.

The Supreme Court disagreed and in Alpha stated that the clinics could redact information; however, the Supreme Court did expressly state that the District Court could order that redacted information be provided upon a subsequent showing of "***relevancy and necessity***."[23] This is consistent with longstanding Supreme Court jurisprudence indicating that a claim of privacy cannot shield criminal conduct. Specifically, the Supreme Court in Alpha states "(s)hould patieint identifying

[23] *Alpha*, at 13 of 17.

information later be required, *the district judge may approve* appropriate subpoenas for that information at that time."[24]

Accordingly, Alpha contemplates the production of patient identities as determined necessary by the District Court. In this instance, no identities are requested. Nothing in Alpha places the target of an investigation at the table in determining whether such disclosure should occur.

The entire Alpha production procedure, with the above exception of allowing the clinics to initially de-identify the records, was agreed to by Attorney General Kline's office prior to Supreme Court intervention through mandamus. Accordingly, the fact that patient identities have not been revealed during this multi-year investigation and litigation is not due to judicial branch action but rather agreed approaches by the executive branch.

One can argue that the high profile consistent extraordinary appellate judicial intervention has heightened media attention and jeopardized privacy more than the investigation itself. Further, continued extraordinary judicial involvement in investigative decisions can have the effect of forcing key prosecutorial decisions to be made without complete information.

It is extraordinarily difficult to assess evidence in a vacuum and not compare relevant evidence to other relevant evidence and initiate review by key or expert witnesses in order to complete an understanding. The very argument that evidence can be understood without appropriate context and assessment demonstrates ignorance of the function and purpose of investigations.

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[24] *Id.*

Criminal investigations should not be conducted to bring or refuse to bring charges but rather to ascertain the truth in order to make an appropriate decision. This can only be done with appropriate consultation and a full understanding of relevant evidence. For this reason, prosecutors and Grand Juries are allowed wide latitude to obtain relevant evidence.[25]

The CH records were produced to the Office of Attorney General on October 24, 2006, more than two years after the original subpoena. On November 5, one day before the General Election, CH held a news conference and announced that they were filing a second Mandamus Action. In this mandamus CH sought relief through the appointment of a special prosecutor and removal of the subpoenaed records from Attorney General Kline and from Judge Anderson.

In a response filed on November 28, 2006, Judge Anderson indicated that the full Alpha mandate had been complied with in that identifying information had been removed from the files. Further, Judge Anderson stated General Kline stood on firm legal ground,[26] and that the files likely contained evidence of crimes and more than just a difference of opinion regarding medical issues.

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[25] *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

[26] The Kansas Supreme Court ordered that Judge Anderson determine if the Attorney General stood on firm legal ground in his investigation prior to allowing production of the subpoenaed files. This order was premised on what was obviously a typographical error in a previous order of the District Court in which the District Court stated that a post-viable abortion in Kansas is only allowed if the mother's life is in jeopardy ***and*** she would suffer severe and irreversible impairment of a major bodily function if the abortion was not performed. The statute allows in abortion in either instance, severe impairment ***or*** threat to life. KSA 65-6703. Clearly the placement of and is a typographical error as it is illogical to require both the threat of death and severe impairment before performing a late-term abortion. Regardless, the Supreme Court took great issue with the error and required the District Court to review the legal theories presented to determine if they stood on "solid legal ground." Further, the Kansas Supreme Court relied on CH's Brief and newspaper accounts to question the legal theories under which General Kline was proceeding regarding the allowance of mental health exceptions for late-term abortion. General Kline, however, was relying on AG Opinion 2000-20 by Attorney General Carla Stovall which states that any mental health concern on which a late-term abortion is premised must be "permanent" and "substantial." The District Court made the requisite finding that General Kline stood on firm legal ground.

General Kline, with permission of the court, authorized the sharing of investigative information[27] with other law enforcement agencies. Such sharing is common and routine with law enforcement and essential to a successful investigation.

B. The Records Are Already Properly In The Johnson County District Attorneys Office.

Daily, law enforcement shares the fruits of investigative subpoenas with other law enforcement agencies. As District Attorney, Mr. Kline opens on average 10 inquisitions each week and seeks subpoenas of phone records, bank records, Internet account records, medical records, etc. The request for the subpoenas is accompanied by an affidavit signed by Mr. Kline that is based on representations in investigation reports made by law enforcement officials from other agencies. During his tenure as District Attorney Courts have rejected two inquisition requests and the District Attorney has returned four inquisition requests for further information. In all others, the requisite finding of reasonable suspicion was found to justify a subpoena duces tecum.

In virtually every instance, the fruits of the subpoena were shared, without leave of court, with the original investigative agency, which is typically a Johnson County based police department. Accordingly, the District Attorney appears before an impartial and neutral magistrate (Johnson County District Court Judge) and provides through affidavit form sworn information that provides a sufficient basis for the District Court to find reasonable suspicion to believe a crime has been committed and

[27] Since the Office of Attorney General never sought the names of adult women, none of the investigative information related to adult patient identities. The only effort to obtain patient identities related to minor patients as the office was also investigating sex crimes against children. Efforts to obtain these identities were made by reviewing various hotel records; however, matches could not be established. Furthermore, the identity of minor patients who gave live births was obtained from the Kansas Department of Health and Environment and information was forwarded to local prosecutors for further investigation and/or prosecution.

reasonable suspicion to believe that evidence relating to the crime is contained in the records subpoenaed and then issues the subpoena.

The responding party is ordered by the Court to deliver the fruits of the subpoena either to the District Attorneys Office or directly to the investigative agency. No further leave of court is necessary.

Furthermore, the investigative agency is free to share the information with others in order to forward the investigation. Records are shared with witnesses, expert witnesses and other agencies on a routine basis.

For example, in the recent investigation of the murder of Kelsey Smith, fruits of inquisition subpoenas were shared with the public. Video evidence of persons of interest and showing vehicles of interest were shown to the public in order to forward the investigation.

This is done so routinely that there are not any legal procedures or court procedures to address any alleged requirement to seek leave of court to share investigative information. Such a requirement would bring investigations to a crawl, jeopardize the integrity of information and involve the judicial branch in executive branch functions.

Accordingly, Judge Anderson did not believe it was necessary to grant permission for the CH records to be shared with Johnson County as he correctly reasoned that such sharing was an executive branch function. Regardless, at the request of General Kline, Judge Anderson gave his express approval of the sharing.

The Grand Jury subpoena does not request any patient identities or the identity of any patient's next of kin. The subpoena does ask for the dates of times of medical

procedures and compliance with notification and waiting period requirements. In order to quash this subpoena, you must believe that providing the dates and times of medical procedures allows someone to identify a patient and that such dates and times are not relevant to the underlying investigation.

The Grand Jury is charged with investigating several alleged violations of various Kansas laws dealing with prohibitions against late-term abortion, fetal tissue trafficking, sexual actions with children and failure to report child sexual abuse. [28]

Kansas law, with limited exceptions, requires a minor child to notify their parent of their intent to have an abortion and requires all those seeking an abortion to be provided specific information prior to the abortion and to have a 24 hour waiting period before the abortion is performed.

Compliance with these provisions is impossible if the date and time of the initial intake, initial sonogram, signing of various informed consent and/or notification forms and the exact time and date of the abortion is not known.

CH claims that the provision of this information will allow some person with amazing Kreskin-like skills to possibly identify a patient.

Alpha does not stand for the proposition that records cannot be produced when essential to law enforcement investigative efforts when a most remote and speculative unlikely potential of identification exists.

In fact, Alpha stands for the opposite proposition that when information is essential to law enforcement activities that even identities can be obtained.

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[28] ***See*** Petition for the Formation of a Grand Jury, attached as Exhibit 8.

Consistent with such reasoning, Alpha allowed Judge Anderson to obtain identities if a sufficient showing of necessity was made by the Attorney General. [29]

CH has not provided any evidence nor proffered any support for the belief that the Grand Jury's closed proceedings will result in revealing patient identities due to the provision of the dates and times of medical procedures alone. CH has not made such a showing because it is impossible to make and to contemplate.

IV. Judicial Intervention Beyond Determining Relevancy Will Breach the Separation of Powers Doctrine

"The powers of criminal investigation are committed to the Executive branch." *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Company, et al.*, 593 F.2d 1030, 1065 (D.C. Cir. 1978); *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978) ("[T]he investigation of crime is primarily an executive function."). Indeed, "[g]overnmental investigation and prosecution of crimes is a quintessential executive function." *Morrison v. Olson*, 487 U.S. 654, 706, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (Scalia, J., dissenting) (*see also* majority opinion agreeing that functions in question are executive, *id.* at 691.)

For this reason, "principles of comity and separation of powers counsel courts against intervening in a criminal investigation." *North v. Walsh*, 656 F.Supp. 414, 421 (D.D.C. 1987).

Yet that is exactly what CH is asking of this Court – to intervene in an ongoing criminal investigation initiated by citizens petition under the authority granted Kansans by the legislature under K.S.A. 22-3001 *et. seq.*, and thus, to contravene the separation of powers inherent in the very framework of our government.

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[29] *Alpha*, at 13 of 17.

While neither the United States nor Kansas Constitutions expressly set forth the doctrine of separation of powers, "it has long been recognized that the very structure of our three-branch system gives rise to the doctrine." *State v. Beard*, 274 Kan. 181, 185, 49 P.3d 492 (2002).

The Kansas Constitution creates three separate governmental departments, each with its own distinct sphere of power. With respect to criminal matters, the legislature has the power to define crimes and prescribe punishments, the judiciary is empowered to determine if an offense has been committed and to assess punishment, and "[t]he executive branch is vested with the power to enforce the laws." *Id.*

Further, prosecuting attorneys are members of the executive branch, "charged with the duty to prosecute persons for violations of the criminal laws," with "broad discretion in the performance of [their] duties." *State v. Compton, et al.*, 233 Kan. 690, 698, 664 P.2d 1370 (1983) (citations omitted). The scope of prosecutorial discretion "extends to the power to investigate and to determine who shall be prosecuted and what crimes shall be charged." *Id.*

Recognizing the broad discretion afforded prosecutors, the United States Supreme Court has noted that it "rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review," and has counseled against judicial interference in prosecutorial determinations. *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985).

Here, the Grand Jury, is acting within its lawful authority pursuant to K.S.A. 22-. Indeed, it is not only within the Grand Jury's authority to conduct an inquisition, it is its duty to do so.

To that end, the following statement of the United States Supreme Court is instructive:

> . . . The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. "When the grand jury is performing its investigatory function into a general problem area . . . ***society's interest is best served by a thorough and extensive investigation.***" [citation omitted] A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." [citation omitted] . . . It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made.

Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)(emphasis added).

Accordingly, the investigative powers of a grand jury "are necessarily broad." *Id.* at 688. As the Fourth Circuit Court of Appeals has noted, "[w]hile grand jury investigations are subject to constitutional limits, the grand jury has wide latitude in gathering evidence because this power is essential to the task of criminal investigations." *In re Grand Jury Subpoena v. (Under Seal)*, 836 F.2d 1468, 1471 (4th Cir. 1988).

"***The grand jury has the right to obtain and consider all evidence relevant to its deliberations*** because the nature of the crime and the identity of the accused must be ascertained based upon this evidence at the conclusion of the grand jury's inquiry," and a court should not intervene in a grand jury investigation "absent compelling reason." *Id.* (citations omitted, emphasis added).

In the case at hand, CH is asking this Court to intervene in an ongoing criminal investigation and, essentially, to enter discovery orders, either prohibiting the Grand

Jury from obtaining essential information based on a purely speculative and illogical claim of privacy on behalf of a non-party. Such action would not just breach the separation of powers but would place essentially shift the executive branch function of investigation to this court.

CH is not asking that irrelevant information be redacted, but information that is essential to the very charge before the Grand Jury. Court acquiescence in this request effectively ends the investigation before it began. This Court should not accept this invitation to exercise the duties of the executive branch simply because such request is disguised as a judicial filing.

Addressing a similar issue, the Ninth Circuit Court of Appeals recognized that, "[t]he power of a court to enter discovery orders in a criminal investigation when no case is pending before any court presents difficult problems of separation of powers," and held that the prosecutor's preliminary conduct in control of a criminal investigation was beyond the reach of the courts. *Jett*, 578 F.2d at 845. While this decision was in a federal setting, involving admittedly distinguishing facts, the underlying rationale and separation of powers concerns are still persuasive and applicable to the present case.

As the Court of Appeals for the District of Columbia Circuit advised in *Reporters Committee, supra*, "[o]nly the most extraordinary circumstances warrant anticipatory judicial involvement in criminal investigations. Even where federalism concerns are absent, the fundamental concept of separation of powers dictates judicial restraint." 593 F.2d at 1065.

Addressing concerns similar to those implied by CH here, of executive branch overreaching, the Court cogently recognized, "[t]he balance between the Executive and Judicial branches would be profoundly upset if the Judiciary assumed superintendence over the law enforcement activities of the Executive branch upon nothing more than a vague fear or suspicion that its officers will be unfaithful to their oaths or unequal to their responsibility." *Id.; see also Reporters Committee, supra,* 593 F.2d at 1070 ("It is not normally the role of the courts to hover over law enforcement officers, reviewing, approving, and monitoring each step of a criminal investigation in order to satisfy itself that the officers are acting in good faith."); *LaRouche v. Webster*, 566 F.Supp. 415 (S.D.N.Y. 1983) (noting that where prosecutor can demonstrate reasonable cause to investigate, there is no requirement for government to present evidence that investigation is in good faith). In this case, there is nothing, beyond the mere speculation of CH, to indicate any type overreaching on the part of the Grand Jury.

Further, the records sought were previously provided pursuant to subpoena after review of the State's evidence by a district judge and a finding by that judge of probable cause to believe evidence of a crime might be found within the subpoenaed records. Thus, it is clear that a court, in accordance with K.S.A. 22-3101, has exercised appropriate oversight to protect against abuse. However, that and Judge Anderson's filing indicating compliance with Alpha is the extent of the judiciary's role in this matter as it is currently postured. There is no constitutional or statutory basis for the extraordinary judicial intervention urged by CH since the Grand Jury is not seeking patient identities.

There are practical reasons for this. Were this Court to become embroiled in a criminal investigation prior to any charges actually being filed, it would set a precedent for future judicial supervision of criminal investigations which would impede effective investigation and prosecution, burden the courts, and improperly blur the dividing line between the executive and judicial branches. As the Court of Appeals for the District of Columbia Circuit aptly noted:

> The rationale behind the judicial policy against intervening in a criminal investigation is threefold. First, the courts want to protect the public's interest in the fair and expeditious enforcement of the criminal laws. Permitting challenges at the pre-indictment stage would impede the criminal investigation by "saddling the grand jury with minitrials and preliminary showings." [citation omitted] Second, the courts seek to balance the defendant's need to assert his rights against the judiciary's interest in conserving its resources. The criminal justice system is structured to provide the criminal defendant ample opportunity to vindicate his rights *after* he is indicted. [citation omitted] [emphasis in original] Finally, principles of comity and separation of powers counsel courts against intervening in a criminal investigation conducted by another branch of government.

North, 656 F.Supp. at 421.

This Court has long recognized that separation of powers is part of the very framework of our government, that prosecutors, as members of the executive branch, have unique power to investigate and prosecute crimes, and that "allowing judicial oversight of what is essentially a function of the prosecutor's office would erode that power." *State v. Dedman*, 230 Kan. 793, 797-98, 640 P.2d 1266 (1982). This case presents no compelling reason to retreat from that well-reasoned conclusion.

V. Continued Judicial Pampering of CH's Claims Serve Only to Unnecessarily Prolong a Relatively Simple Investigation and ineffectively Results in Judicial Participation in CH's Strategy of Fostering Delay and Fear.

Typically, a subpoena duces tecum filed either in an Inquisition or initiated by a Grand Jury contemplates 3 days for compliance. This time period is often extended to 10 days for hardship reasons.

Production of the redacted records initially sought by subpoena in this matter were produced to law enforcement over two years after the initial subpoena. In fact, without legislative action, the statute of limitations on the initial crimes investigative would have run while the action was pending before the Kansas Supreme Court.[30]

The Grand Jury initiated this subpoena on January 7th and CH was ordered to comply by January 16, 2008. This was not the first subpoena issued by the Grand Jury, however, it was the first one issued to CH. Previous subpoenas resulted in swift compliance and contain some of the information to which CH objects. It is essential, however, for the Grand Jury to compare information and records contained from different sources to the filed maintained by CH. Kansas law requires strict compliance with record maintenance and previous evidence and testimony indicates probable cause to believe that CH fails to maintain files as required by law and has engaged in false writings.[31]

It is now over 40 days since the subpoena was issued. By law, the Grand Jury only has 90 days to complete its work. Clearly, CH is aware of this clock as they feigned concern about the Grand Jury's ability to complete its work in 90 days. This Court should now allow speculative and non-substantiated claims of privacy concerns to essentially allow CH to wait out the Grand Jury.

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[30] The Kansas Legislature extended the statute of limitations from two years to five years effective July 1, 2005. Accordingly, any criminal activity for which the two year statute had not run as of the effective date of the new law was extended to five years.

[31] See, State of Kansas v. Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Case No 07CR02701

Unfortunately, however, this has likely already occurred. For this reason and to protect public confidence in the judicial branch, it is essential that this Court, on its own motion, extend the Grand Jury. The Grand Jury members can escape undue hardship by not meeting during times that legal issues are being addressed.

The Grand Jury will need additional information from CH in order to complete its charge and it is likely that CH will once again engage in delay.

The Grand Jury will need similar records from 2004, 2005, 2006 and 2007. The Grand Jury will need to review the reports that CH is required to file with the Kansas Department of Health and Environment under K.S.A. 65-67a05 regarding its sell of fetal tissue to researchers and brokers and redacted versions of the mother's consent to such use of the fetal tissue. The Grand Jury will need to review financial information regarding the above transactions to ensure that profiteering did not occur and the Grand Jury will want to review CH's procedures for reporting child sexual abuse and providing counseling to its patients. Failure to review any of these materials effectively prevents the Grand Jury from completing its task.

None of this effort, however, jeopardizes patient privacy in that it is not necessary for patient names to be shown to the Grand Jury except in cases of failure to report child sexual abuse.

Yet, despite this experience teaches us that CH will publicly claim and proclaim that patients may wake up one day and see their names plastered in the local newspaper. Such fear tactics are a disservice to CH's own patients and should not be heeded by this Court.

VI. Former Attorney General Morrison's "Clearance Letter" is Irrelevant and Only Demonstrates the Degree of Collaboration Between the Office of Attorney General and CH.

CH has repeatedly fed public perception with claims that patient identities would somehow, someday be revealed as a result of this investigation. Former Attorney General Morrison joined this effort when he falsely claimed that the records produced pursuant to subpoena had been "scattered" around the state and that it took a KBI investigation to retrieve the records.

The Attorney General also, upon assuming office, immediately went to work to obtain all copies of the redacted records for the purpose of returning said records to CH and preventing further review by investigative agencies. This includes extensive efforts to remove the records from this Office.

Further, the Attorney General's "clearance" letter was issued after General Morrison became aware of "serious" discrepancies in the CH records. These discrepancies were so serious, that Judge Anderson, on his own initiative, took the records to a handwriting expert with the Topeka Police Department, who after analysis, found the records "did not match up."[32]

As a result, Judge Anderson testified in Johnson County District Court that he was stunned that General Morrison would issue his clearance letter despite clear reason to be concerned about the authenticity of the documents produced by CH pursuant to Court order. Judge Anderson was also surprised when General Morrison filed a motion in Shawnee County for Judge Anderson to order the removal of the documents from Johnson County and to return all of the documents back to CH. The

[32] Testimony of the Honorable Richard Anderson, January 16, 2006, Case No 07CR02701. CH attaches the "Clearance Letter' as Exhibit A in their Motion to Quash.

Court's surprise continued when a few days after the "clearance" letter CH's counsel, Mr. Irigonegaray, arrived on his own initiative to demand the return of the CH records. Judge Anderson testified that he informed Mr. Irigonegaray that there were serious issues regarding the records and that the Court would refuse to disgorge the records as they contained potential evidence of criminal activity.

To date, Judge Anderson and Judge Vano have both found probable cause relating to the subject records. Judge Vano has also found probable cause that the 29 abortion records originally produced by CH contain evidence that CH committed 107 criminal acts. Mr. Morrison's "clearance" letter issued in the face of such evidence is legally meaningless even if CH believes it still contains some residual public relations value.

VII. Extending the Grand Jury Is Necessary to Protect the Interests of Justice and May Be Done Without Undue Hardship to Grand Jury Members

It is anticipated that by the time CH produces the redacted records, the Grand Jury will have awaited for over 50% of its allotted time for that production. Again, this is the first subpoena the Grand Jury has issued to CH and already over 40 days have been consumed considering a motion to quash based on the speculative claim that patient identity may be determined by such matters as the date and time a sonogram was provided.

This Court has express authority under K.S.A. 30-3013(1) to extend the Grand Jury for an additional 90 days. This authority is broad as the statute states that extension is allowed if the court finds "that an investigation begun by the grand jury cannot be completed within the initial three months period and that the public interest requires the continuation of the grand jury." K.S.A. 30-3013(1).

The petition calling for the formation of this grand jury was signed by thousands of Johnson County residents requesting a specific investigation relating to CH's activities. To date, the Grand Jury has been unable to obtain any CH records. This initial subpoena in no fashion represents the entire information the Grand Jury will need from CH and other sources in order to complete its investigation. This only represents a beginning. Again, it is fully anticipated that adult patient identities will never be sought from CH; but additional records will be.

Further, this Court acknowledged that it anticipates that CH will seek appellate relief if this court acts contrary to the motion to quash. Clearly, the Grand Jury will not have sufficient time.

Further, the Office of District Attorney is severely taxed during the next several weeks. District Attorney Kline and Deputy District Attorney Maxwell will be engaged in a murder trial from February 25 through approximately March 7, 2008. An extension is clearly required to protect public perception of an impartial judiciary and for the Grand Jury to complete its task. Such an extension can be accomplished with limited practical impact on the Grand Jury. The Grand Jury can set in abeyance until certain legal issues are resolved and not suffer the inconvenience of meeting without consequence.

Accordingly, the State respectfully requests this Court, on its own motion and pursuant to its authority under K.S.A. 30-3013(1) to extend the Grand Jury for an additional 90 days.

WHEREFORE, the State respectfully requests this Court to deny Respondent's Motion to Quash and for the Court to enter its order, pursuant to its authority under

K.S.A. 30-3013(1) to extend the Grand Jury with the direction to the Grand Jury to consider only meeting on its own motion and/or when various legal issues regarding the production of evidence are resolved.

Respectfully Submitted,

Phill Kline
District Attorney
10th Judicial District

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and forgoing document was placed in the United States Mail and faxed to the following counsel, on the 19th day of February, 2008:

Pedro Irigonegaray
Robert Eye
Elizabeth Herbert
Irigonegaray & Associates
1535 S.W. 29th Street
Topeka, KS 66611
Fax 785-267-9458

Megan Harmon

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RDI

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

In re: Inquisition)
)
) Case No. 04-IQ-3

STATUS AND DISPOSITION REPORT

COMES NOW the State of Kansas by and through Stephen D. Maxwell, Senior Assistant Attorney General, and reports to the Court of the status and disposition of files and certain evidence. The State shows the Court:

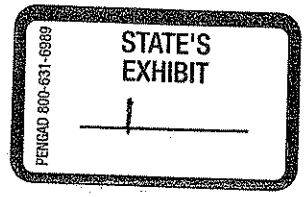
1) Since Special Agent in Charge Tom Williams and Special Agent Jared Reed will not be employed by the Attorney General after noon on January 8, 2007, and due to sensitive nature of the evidence and files, and in light of this Court's protective orders, the following evidence is hereby returned to custody of the Court for safekeeping:

a) Copies of medical files #s: 34, 35, 36, 42, 45, 46, 47, 48, 49, 50, 51, 52, 54, 56, 57, 60, 61, 62.

b) Copies 2003, 2004 and Jan. 2005 KDHE reports for induced termination of pregnancy

c) 2 floppy disks containing KDHE electronic files

2) Certain medical files, KDHE documents along with inquisition testimony and affidavits have been filed with the Sedgwick County Clerk of the District Court and remain there as the confidential supporting documents to show probable cause in the criminal case entitled *State of Kansas v. George Tiller*, 06-CR-2961. A copy of the complaint and summons filed, which



lists the files and evidence, is attached to this pleading. These files and evidence are readily accessible by the Sedgwick County District Attorney should she wish to view such evidence. The medical files are #: 30, 31, 32, 59, 33, 37, 38, 39, 40, 41, 55, 43, 44, 58, and 53. The files, evidence and documents constitute the evidence supporting said charges and upon which Judge Eric Yost found probable cause to believe the defendant had committed the crimes charged. These documents are not accessible to the public.

3) Copies of the following documents have been submitted to Robert Hecht, Shawnee County District Attorney, for his review and contemplation of criminal charges. DA Hecht has been fully advised of this Court's protective orders. Those files are:

b) Copies of medical files #s: 1-62

c) Copies of the Inquisition testimony of Dr. Kristin Neuhaus

d) Copies of KDHE forms corresponding to the above medical files

e) Affidavit of Dr. Paul McHugh and notes

f) Affidavits of SAC Williams

g) Copies of the official investigative case file and reports of SAC Williams and others

4) Donald McKinney, the special prosecutor appointed by Attorney General Kline, was given temporary access to the pleadings, correspondence, and other documents (no medical files were given to him) gathered during the inquisition and criminal investigation in order for him to perform the duties of his appointment. When it was announced and became apparent that the incoming Attorney General was going to terminate the appointment, the files were retrieved from the special prosecutor, although it is unknown what, if any, files were copied by the special prosecutor. The special prosecutor was fully advised of this Court's protective orders.

5) Dr. Paul McHugh, a psychiatrist at Johns Hopkins Medical Center, was given copies of medical files 1-62. Dr. McHugh has returned 30-62, but still is reviewing 1-29. Dr. McHugh was directed by this office to return the files directly to the Court.

6) The subpoenaed records of SRS for 2002 and 2003 will be returned to SRS as these files are no longer necessary.

7) Due to recent court decisions on the legal authority for the original prosecution of crimes by the Attorney General and by direction of Attorney General Kline, the 29 medical files from Planned Parenthood in Johnson County along with copies of testimony, other documents and pleadings have been referred to the District Attorney for the 10th Judicial District for his determination on whether criminal charges should be considered.

8) The case file, containing pleadings, orders, correspondence, and documents gathered during this inquisition and criminal investigation have been secured in the Office of the Attorney General for review by the incoming Attorney General and/or administration. Copies of all protective orders issued by this Court are contained in those files.

WHEREFORE, the State submits this status and disposition report to the Court.

Stephen D. Maxwell
Senior Assistant Attorney General

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 93,383

ALPHA MEDICAL CLINIC AND

BETA MEDICAL CLINIC,

Petitioners,

v.

HONORABLE RICHARD ANDERSON, JUDGE OF THE THIRD JUDICIAL DISTRICT, SHAWNEE COUNTY, KANSAS, AND PHILL KLINE,

ATTORNEY GENERAL FOR THE STATE OF KANSAS,

Respondents.

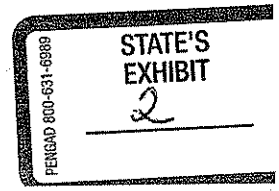
SYLLABUS BY THE COURT

1. K.S.A. 22-3101 *et seq.* governs the conduct of inquisitions in criminal cases in Kansas. K.S.A. 2004 Supp. 22-3101(1) authorizes the attorney general, if he or she has knowledge of any alleged violation of Kansas law, to apply to a district judge to conduct an inquisition. Once the attorney general's verified application setting forth the alleged violation of the law is filed, the judge "shall issue a subpoena for the witnesses named in such praecipe commanding them to appear and testify concerning the matters under investigation." K.S.A. 2004 Supp. 22-3101(1).

2. Although K.S.A. 2004 Supp. 22-3101 does not mention subpoenas duces tecum, such subpoenas are authorized in both judicial and prosecutorial inquisitions.

3. The standard governing a district court's review of the attorney general's allegations before issuing inquisition subpoenas is reasonable suspicion rather than probable cause.

4. K.S.A. 65-6703, the criminal abortion statute, provides that a pregnant woman who desires an abortion must have her treating physician determine the gestational age of the fetus. If that age is less than 22 weeks, then the woman may obtain an abortion as long as appropriate documentation requirements are met. If the gestational age is 22 weeks or more, the treating physician must then make a determination of fetus viability, *i.e.*, the ability of the fetus to survive outside the womb. If the fetus is not viable, the woman may obtain an abortion as long as appropriate documentation and reporting requirements are met. If the fetus is viable, then the treating physician and the physician who will perform the abortion must agree that the abortion is necessary to preserve the life of the pregnant woman or because continuation of the pregnancy will cause substantial and irreversible impairment of a major bodily function of the woman, before an abortion can be performed and documented.



5. K.S.A. 2004 Supp. 38-1522 requires health care providers, *inter alia,* to file a report with Kansas Department of Social and Rehabilitation Services when they have reason to suspect that a child has been injured as a result of physical, mental, or emotional abuse or neglect or sexual abuse. Sexual abuse is defined to include sexual intercourse with a child under 16 years of age.

6. The Kansas Constitution provides this court with original jurisdiction for proceedings in mandamus. Kan. Const. Art. 3, § 3. In addition, K.S.A. 60-801 provides for mandamus.

7. Mandamus is an appropriate avenue to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of public business. Also, although a district judge's discretion cannot be controlled by mandamus, if the judge's order threatens to deny a litigant a right or privilege that exists as a matter of law and there would be no remedy by appeal, mandamus may be invoked. The Supreme Court also may exercise its original jurisdiction and settle a question through mandamus if the petition presents an issue of great public importance and concern.

8. In a judicial inquisition under K.S.A. 2004 Supp. 22-3101(1), the court has a duty to prevent abuse of the judicial process by prosecutors.

9. The petitioner has the burden of demonstrating a right to relief in mandamus.

10. On the facts of this case, three federal constitutional rights to privacy are potentially implicated by the attorney general's inquisition and subpoenas duces tecum seeking records of abortions performed in Kansas: the right to maintain the privacy of certain information; the right to obtain confidential health care; and the fundamental right of a pregnant woman to obtain a lawful abortion without the government's imposition of an undue burden on that right.

11. Abortion providers can assert their patients' constitutional rights to privacy.

12. Under the facts of this case, the court must balance the State's compelling interest in pursuing criminal investigations and the privacy rights of patients who have received abortions, considering the type of information requested, the potential harm in disclosure, the adequacy of safeguards to prevent unauthorized disclosure, the need for access, and statutory mandates or public policy considerations.

13. A judge called upon by the attorney general to issue inquisition subpoenas under K.S.A. 2004 Supp. 22-3101(1) must consider any legal interpretations on which the attorney general relies to support the need for the subpoenas.

14. On the facts of this case, at this time, we do not hold the attorney general in contempt.

Original action in mandamus. Opinion filed February 3, 2006. Writ of mandamus granted.

Lee Thompson, of Thompson Law Firm, LLC, of Wichita, argued the cause, and *Daniel E. Monnat,* of Monnat & Spurrier, Chartered, of Wichita, *Pedro L. Irigonegaray*, *Robert V. Eye*, and *Elizabeth R. Herbert*, of Irigonegaray & Associates, of Topeka, *Douglas N. Ghertner* and *Robert A. Stopperan,* of Slagle, Bernard & Gorman, P.C., of Kansas City, Missouri, *Roger Evans,* of New York, New York, and *Helene T. Krasnoff,* of Washington, D.C., were with him on the briefs for petitioners.

Eric K. Rucker, chief deputy attorney general, and *Robert T. Stephan,* special assistant attorney general, argued the cause, and *Jared S. Maag,* deputy attorney general, *Stephen D. Maxwell,* senior assistant attorney general, and *Kristafer Ailslieger*, assistant attorney general, were with him on the brief for

respondent Phill Kline.

Thomas J. Drees, Ellis County Attorney, was on the brief for *amicus curiae* Kansas County and District Attorneys' Association.

The opinion of the court was delivered by

BEIER, J.: This is an original action in mandamus brought by petitioners Alpha Medical Clinic and Beta Medical Clinic arising out of an inquisition in which respondent Attorney General Phill Kline subpoenaed the entire, unredacted patient files of 90 women and girls who obtained abortions at petitioners' clinics in 2003. At the time the petition in this action was filed, respondent Shawnee County District Judge Richard Anderson had ordered the files produced to the court for an initial in camera review by an attorney appointed by the judge and a physician or physicians appointed by the attorney general. We stayed that order pending our consideration of the matter.

The parties' pleadings and briefs raise several issues: (1) Is mandamus an appropriate avenue for relief? (2) To what degree, if any, must the inquisition subpoenas be limited because of the patients' constitutional right to privacy? (3) To what degree, if any, must the inquisition subpoenas be limited because of the Kansas statutory physician-patient privilege? (4) To what extent, if any, are the petitioners entitled to be further informed regarding the purpose and scope of the inquisition? (5) Should the nondisclosure provisions of the subpoenas be enforced? and (6) Should the attorney general be held in contempt for speaking publicly about matters held under seal in this court?

Factual and Procedural Background

The two subject subpoenas were issued September 21, 2004. Each contained a return date of October 5, 2004, and provided that objections, if any, would be due by September 24, 2004. The subpoenas stated the district court had found there was probable cause "to believe that evidence of a crime or crimes may be located" in the patient files, identified by state record number, provider number, and patient identification number. Further, each subpoena provided: "The existence of this subpoena and any records produced pursuant to such are to remain confidential and not to be disclosed to any other person or entity."

Petitioners filed a motion to quash the subpoenas and sought additional information about the violations of the law under investigation so they could analyze and argue whether the subpoenas were reasonable or an abuse of process. On October 5, 2004, Judge Anderson heard the parties' arguments on the motion to quash.

At that hearing, Stephen Maxwell of the attorney general's office characterized the inquisition as "massive in nature." Potential violations of two specific statutes were mentioned: K.S.A. 65-6703, which deals with abortions performed at or after 22 weeks' gestational age, and K.S.A. 2004 Supp. 38-1522, which governs mandatory reporting of suspected child abuse.

Petitioners, for their part, argued that the attorney general is a vocal opponent of abortion rights and interprets the K.S.A. 65-6703 exception to prohibition of abortions at 22 weeks' gestational age or later to be limited to consideration of the physical health of the pregnant woman, rather than including consideration of her mental health. Petitioners asserted that this interpretation conflicts with United States Supreme Court precedent and could not therefore provide a basis for the court's probable cause determination. Petitioners conceded, however, that if the files could contain evidence of violations of Kansas law not premised on a new or unannounced legal interpretation, and the evidence could not

otherwise be obtained, the State had demonstrated a compelling interest justifying an order to produce at least parts of the files.

In an apparent response to petitioners' argument regarding the unconstitutionality of the attorney general's interpretation of the statutory exception, Maxwell agreed that no crime had been committed (or, presumably, would need to be prosecuted) if the investigation ultimately turned up no more than a reasonable medical debate over the condition of each of the patients and the threats posed to her by continuing her pregnancy to term.

At the conclusion of the hearing, Judge Anderson orally denied the motion to quash and ordered production of the subpoenaed files by October 15, 2004.

Petitioners filed a motion for reconsideration on October 8, 2004, and informed Judge Anderson of their intent to file a petition for writ of mandamus in the event their motion for reconsideration was denied. Five days later, Judge Anderson ordered a stay of the production of the files until his further order.

On October 21, 2004, the judge issued a written Memorandum and Order, requiring petitioners to produce the 90 unredacted patient files by October 28, 2004. The order stated that K.S.A. 65-6703 prohibited an abortion when the fetus is viable unless the referring physician and performing physician "determine that the abortion is necessary to preserve the life of the pregnant woman *and* that a continuation of the pregnancy would cause a substantial and irreversible impairment of a major bodily function of the pregnant woman." (Emphasis added.) Judge Anderson also noted that the statute required the gestational age of the fetus to be determined, the basis for that determination to be documented, and both ultimately to be reported to the Kansas Department of Health and Environment. He continued:

"The Court has considered the medical facilities' assertions of constitutional flaws in the application of K.S.A. 65-6703. The Court does not find the presumed flaws preclude production of the records. The Attorney General has described sufficient basis for conducting the inquisition. Even assuming the constitutional flaws in the presumed application of K.S.A. 65-6703 as suggested by the medical facilities, the Court finds the Attorney General is authorized to conduct the inquisition."

Judge Anderson's order also discussed K.S.A. 2004 Supp. 38-1522, the statute governing mandatory reporting of suspected child abuse, specifically distinguishing the case before him from an ongoing federal court action. See *Aid for Women v. Foulston*, ___ F.3d ___, 2006 WL 218185, 3 (10th Cir. January 27, 2006). Judge Anderson noted that the federal case involved investigations of "mandatory reporting of sexual activity between similar age minors when injury is not reasonably suspected," which this case does not. Kline has issued a formal written opinion stating that all sexual intercourse engaged in by anyone younger than 16 is, by definition, rape and inherently injurious. Att'y Gen. Op. No. 2003-17. Kline's opinion deviates from the position of his predecessor once removed, now his lawyer in the contempt proceeding, Robert T. Stephan. See Att'y Gen. Op. No. 1992-48.

Judge Anderson's order also provided for certain precautions to guard against unnecessary disclosure of sensitive, confidential, or irrelevant information in the patient files: (1) The files were to be deposited in the district court and would not be disclosed to anyone, including the attorney general or his agents, until further court order; (2) the court would select special counsel to conduct an initial in camera review of the files and to assist in identifying sensitive, confidential, or irrelevant information; and (3) the court would require the attorney general to "nominate one or more licensed physicians to examine medical records" and to explain to the court the relevance of any document designated for photocopying. Judge Anderson also stated that the redaction of patient-identifying information would be considered before any copies of the files would be released. Finally, petitioners were to be given an opportunity to make

suggestions regarding the management of the records to cause no broader intrusion into the patients' privacy than necessary.

In response, petitioners filed a motion for a protective order, asking Judge Anderson to permit them to redact identifying information from the files before production. Judge Anderson had not ruled on this motion when the petition for mandamus was filed with this court on October 26, 2004, 2 days before production was required under the district court order.

Certain additional facts concerning the inquisition have been revealed in the course of the proceedings in the district court and before us. An affidavit generated by a lawyer in the attorney general's office confirms that the inquisition had been ongoing for approximately 2 years as of May 2005, and focuses on at least allegedly unjustified "late-term" abortions and possible unreported child sexual abuse. Maxwell also asserted before Judge Anderson that crimes other than violations of the criminal abortion and mandatory child abuse reporting statutes might be uncovered. Moreover, Deputy Attorney General Eric Rucker stated at oral argument before this court that the inquisition concerned emotional abuse, as well as sexual abuse, of minors.

Approximately three-fourths of the files sought deal with adult patients; the remainder detail services provided to minors. Approximately two-thirds of the files are sought from Alpha Medical Clinic, the remaining one-third from Beta Medical Clinic, which does not perform "late-term" abortions.

Rucker also stated before this court that petitioners and child molesters are the targets of this criminal inquisition and that there is probable cause to believe that each of the 90 files would provide evidence of at least one felony and one misdemeanor. Indeed, he said that each of the adult patients' files was expected to contain evidence of more than one felony. Rucker also informed this court that none of the patients whose files are sought is a target of the inquisition. See K.S.A. 65-6703(c) (patient cannot be prosecuted under criminal abortion statute). Rucker was -- and the record is -- silent on whether individual physicians also are targets of the inquisition.

The Parties' Positions

In their brief, petitioners assert that we must compel Judge Anderson and Kline to cease further enforcement of the subpoenas. Should we regard this outcome as too extreme, they propose several alternatives: (1) An order that respondents desist from seeking further enforcement of the subpoenas without first demonstrating in a hearing that a compelling need for the patient files exists and that the State seeks no more protected information than that amount absolutely necessary to meet the compelling need; (2) an order permitting petitioners to redact all patient-identifying and irrelevant information from the files before production; and (3) an order requiring Judge Anderson to enter a protective order to protect the patients' rights before the files are produced.

The attorney general argues: (1) Mandamus is not an appropriate remedy because respondents have not failed to perform a clear legal duty owed to petitioners, because mandamus cannot be used to thwart a criminal investigation, and because the petition improperly seeks injunctive relief based on issues not ripe for review; (2) even if mandamus is hypothetically appropriate, there is no constitutional or statutory basis for the extraordinary judicial intervention urged by the petitioners, and such intervention would do violence to the prosecutorial function and the separation of powers; (3) the enforcement of the subpoenas will not violate any patient's constitutional right to privacy, because investigation and prosecution of crimes are compelling state interests and the district court's order is narrowly tailored to protect the rights of the patients while meeting the needs of the inquisition; and (4) the physician-patient privilege is not applicable in this matter.

Petitioners' and the attorney general's positions on one other aspect of the case also are worth noting at this point. Since the beginning of this mandamus proceeding, petitioners also sought to stay the subpoenas' nondisclosure provision. Petitioners' supplemental motion on this subject was granted by this court on March 9, 2005. Earlier -- on October 28, 2004 -- we had entered an order requiring all filings in the mandamus action to be kept under seal.[1] We eventually made an exception for the formal briefs to be filed by the parties. Ultimately, these orders and their potential intersection gave rise to petitioners' allegation that the attorney general is in contempt of this court because of certain attachments to his brief and his public comments thereon.

In this mandamus action, Judge Anderson does not argue the points raised by the other parties. Rather, in his Answer and Statement Regarding Joint Petition for Writ of Mandamus and Order Staying Production of Medical Records, he seeks guidance from this court on the following four questions:

"1. After a motion to quash an inquisition subpoena has been filed or otherwise, does a district court have the authority or any obligation under the inquisition statute or other applicable law to grant a person or entity challenging the subpoena any other procedural rights, such as a hearing, in addition to filing a motion to quash and, if so, what are these rights?

"2. After a motion to quash an inquisition subpoena has been filed or otherwise, does a district court have the authority or any obligation under the inquisition statute or other applicable law to disclose to the subpoena recipient all or any portion of the information constituting the factual basis for the reasonable suspicion upon which the subpoena was issued, and, if so, under what circumstances and to what extent?

"3. To what extent, if any, does the recipient of an inquisition subpoena have a right to confront or challenge the evidence of reasonable suspicion upon which the subpoena was issued and, if so, at what stage of the inquisition?

"4. Upon motion to quash an inquisition subpoena or otherwise, is a district court authorized to conduct or supervise an in camera review of subpoenaed materials or utilize other measures it deems appropriate to protect the competing interests of the Attorney General under the inquisition statute and those of a subpoena recipient or others?"

Finally, this court also received an *amicus curiae* brief from the Kansas County and District Attorneys' Association. The Association argues that the judicial branch has only a limited role in the pre-charge phase of criminal investigations and should involve itself in review of the prosecutor's actions only "if extraordinary circumstances warrant it and no other relief would satisfy the cause of justice."

Filings Since Oral Argument

After oral argument on September 8, 2005, the attorney general's office filed two Motions to Clarify statements made by Rucker earlier that day.

One of the motions states that the attorney general "has no qualms with" the district court, rather than the attorney general, selecting the physician who would do the initial in camera review of the patient files. The attorney general "simply opposes said physician(s) being appointed by petitioners who are the targets of the criminal investigation." This motion also states that the attorney general does not oppose redaction of all patient-identifying information before the district court's special counsel and physician perform the in camera review, although it asserts that Judge Anderson will need to be provided with the redacted information "in order to cross-reference the files with records and evidence from other

sources."

The other motion, despite its caption, changes rather than clarifies certain statements made by Rucker in response to questions from members of this court during oral argument. It states in pertinent part:

"1. As part of this criminal investigation and/or inquisition, respondent has sought records and information from other mandatory reporters besides the petitioners in the present mandamus action. This effort has included subpoenas for records relating to live births involving mothers under the legal age of sexual consent.

"2. At oral argument, counsel was unable to directly and adequately respond to the questions from the bench specifically relating to this topic because of the secret nature of the criminal investigation and inquisition and the existence of a do not disclose order relating to the subpoenas of live birth records."

It is evident that, at least in the attorney general's judgment, whatever order allegedly compelled Rucker to be less than forthright in his answers to this court's questions on September 8, 2005, had either been lifted or dissipated or overcome by a competing priority by mid-October 2005, when Kline called a press conference and announced that he had obtained the birth records of 62 babies born to girls younger than 16. The mechanism by which Kline obtained these records remains somewhat unclear, as does the reason for and timing of the press conference.

We also note that petitioners, since oral argument, filed a Motion for Order Directing the District Court to Forward the Entire Inquisition Record to This Court, and that the attorney general filed a response to this motion. We deny this motion at this time, because we are able to address the issues raised in this mandamus proceeding on the record before us.

The Criminal Inquisition Statutory Scheme

K.S.A. 2004 Supp. 22-3101 *et seq.* governs the conduct of inquisitions in criminal cases in Kansas.

K.S.A. 2004 Supp. 22-3101(1) authorizes the attorney general, if he or she has knowledge of any alleged violation of Kansas law, to apply to a district judge to conduct an inquisition. Once the attorney general's verified application setting forth the alleged violation of the law is filed, the judge "shall issue a subpoena for the witnesses named in such praecipe commanding them to appear and testify concerning the matters under investigation." K.S.A. 2004 Supp. 22-3101(1).

K.S.A. 2004 Supp. 22-3101 does not mention subpoenas duces tecum such as those at issue here, but they are used regularly in criminal cases across the state. Our Court of Appeals has previously held that such subpoenas may issue in a prosecutor's inquisition focused on violations of narcotics laws under K.S.A. 2004 Supp. 22-3101(2). *Southwestern Bell Tel. Co. v. Miller*, 2 Kan. App. 2d 558, 583 P.2d 1042, *rev. denied* 225 Kan. 845 (1978). In addition, this court has implicitly upheld the *Southwestern Bell* decision on at least three separate occasions. See *State ex rel. Brant v. Bank of America*, 272 Kan. 182, 188, 31 P.3d 952 (2001) (State Securities Commissioner subpoenas of bank documents in connection with administrative investigation); *State v. Schultz*, 252 Kan. 819, 822-23, 850 P.2d 818 (1993) (inquisition subpoenas of bank, phone records); *State ex rel. Cranford v. Bishop*, 230 Kan. 799, 800-01, 640 P.2d 1271 (1982) (district court has the inherent power to refuse to issue subpoenas to avoid abuse of judicial process); see also *State, ex rel. v. Rohleder*, 208 Kan. 193, 490 P.2d 374 (1971) (pre-*Southwestern Bell* decision; inquisition subpoena sought testimony and production of books, records, and invoices). We agree that both the K.S.A. 2004 Supp. 22-3101(1) *judicial* inquisition of this case and the K.S.A. 2004 Supp. 22-3101(2) *prosecutorial* inquisition at issue in the Court of Appeals'

Southwestern Bell case permit subpoenas calling for the production of documents as well as subpoenas calling for witness testimony.

The statute also provides that "[a]ny person who disobeys a subpoena issued for such appearance or refuses to be sworn as a witness or answer any proper question propounded during the inquisition, may be adjudged in contempt of court." K.S.A. 2004 Supp. 22-3101(3). Similarly, this provision would apply if a person or entity refuses without justification to respond to an inquisition subpoena duces tecum.

The statute is silent on the standard that governs a district court's pre-subpoena review of the attorney general's allegations, and there appears to be some confusion on this point in the record before us: The two subpoenas at issue recite that Judge Anderson has found "*probable cause* exists to believe that evidence of a crime or crimes may be located in the medical records identified." (Emphasis added.) However, two of the questions Judge Anderson directed to our attention in this proceeding specifically assume that a district judge's only duty before issuing inquisition subpoenas duces tecum is to find *reasonable suspicion* that evidence of the alleged violations will be found in the documents sought. Although the parties have not focused on this question, we believe it necessary to address it so that we are responsive to Judge Anderson's questions.

The purpose of an inquisition is to gather information to determine whether probable cause exists to support a criminal prosecution. *State v. Cathey*, 241 Kan. 715, 720, 741 P.2d 738 (1987); *In re Investigation into Homicide of T.H.*, 23 Kan. App. 2d 471, 473, 932 P.2d 1023 (1997). It does not make sense to require a prosecutor seeking an inquisition subpoena to meet a probable cause standard in order to gather information he or she needs to determine whether probable cause for prosecution exists. We therefore hold that the standard to be employed by a district judge evaluating whether to issue subpoenas for witness testimony or documents under K.S.A. 2004 Supp. 22-3101(1) is reasonable suspicion rather than probable cause.

The Known Criminal Statutes at Issue

As previously mentioned, the attorney general has expressly alleged that petitioners violated two statutes: K.S.A. 65-6703, the criminal abortion statute, and K.S.A. 2004 Supp. 38-1522, which requires reporting of sexual abuse of children.

The structure of K.S.A. 65-6703 is as follows:

A pregnant woman who desires an abortion must have her treating physician determine the gestational age of the fetus. If that age is less than 22 weeks, then the woman may obtain an abortion as long as appropriate documentation requirements are met. K.S.A. 65-6703(b)(1).

If the gestational age is 22 weeks or more, the treating physician must then make a determination of fetus viability, *i.e.*, the ability of the fetus to survive outside the womb. K.S.A. 65-6703(b)(2). If the fetus is not viable, the woman may obtain an abortion as long as appropriate documentation and reporting requirements are met. K.S.A. 65-6703(b)(3).

If the fetus is viable, then the treating physician and the physician who will perform the abortion must agree that the abortion is necessary to preserve the life of the pregnant woman or because "continuation of the pregnancy will cause a substantial and irreversible impairment of a major bodily function of the pregnant woman," before an abortion can be performed and documented. K.S.A. 65-6703(a); (b)(4).

Violation of this statute is a Class A nonperson misdemeanor for the first violation and a severity level

10 nonperson felony for any subsequent violation. K.S.A. 65-6703(g).

The second statute known to be at issue, K.S.A. 2004 Supp. 38-1522, requires health care providers, *inter alia*, to file a report with the Kansas Department of Social and Rehabilitation Services when they have "reason to suspect that a child has been injured as a result of physical, mental or emotional abuse or neglect or sexual abuse." K.S.A. 2004 Supp. 38-1522(a). Sexual abuse, as defined under K.S.A. 2004 Supp. 38-1502(c), includes sexual intercourse with a child under 16 years of age. See K.S.A. 2004 Supp. 21-3502(a)(2); K.S.A. 21-3504(1). K.S.A. 2004 Supp. 38-1522(f) provides that willful and knowing failure to report injury to a child arising from abuse is a class B misdemeanor.

There is no dispute between the parties that petitioners have a legal duty to report suspected child sexual or other abuse, including sexual intercourse with a child under 16, under these provisions.

Propriety of Mandamus

The Kansas Constitution provides this court with original jurisdiction for proceedings in mandamus. Kan. Const. Art. 3, § 3. In addition, K.S.A. 60-801 provides:

"Mandamus is a proceeding to compel some inferior court, tribunal, board, 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."

This court also has recognized mandamus as an appropriate avenue to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of public business. *Wilson v. Sebelius*, 276 Kan. 87, 90, 72 P.2d 553 (2003). Also, although a district judge's discretion cannot be controlled by mandamus, if the judge's order threatens to deny a litigant a right or privilege that exists as a matter of law and there would be no remedy by appeal, mandamus may be invoked. *Hulme v. Woleslagel*, 208 Kan. 385, 388, 493 P.2d 541 (1972). This court may also exercise its original jurisdiction and settle a question through mandamus if the petition presents an issue of great public importance and concern. *Wesley Medical Center v. Clark*, 234 Kan. 13, 16, 669 P.2d 209 (1983).

Respondent Kline does not deal directly with these authorities, instead continuing to assert that mandamus must be limited to situations in which a public official has failed to perform a clear legal duty. We agree that such a situation is appropriate for our intervention via mandamus, but mandamus also can be pursued in the situations described by the *Wilson*, *Hulme*, and *Wesley Medical Center* cases cited above. In our view, the situation before us here fits each of those precedents.

It is evident from the questions Judge Anderson submitted to this court that he seeks an authoritative interpretation of the law to guide him in his performance of his judicial responsibilities. In addition, petitioners are correct in their contention that, if Judge Anderson's order is allowed to stand as is, and it is later determined that it relied upon an erroneous interpretation of the law, there will be no sufficient remedy on appeal for patients whose rights to privacy have already been violated. And, finally, no one can argue convincingly that the questions of whether and when a pregnant woman's constitutional right to privacy in her reproductive choices must give way to public regulation of abortion is not an issue of great public concern. The issue of abortion has long had a polarizing effect on national and state politics and policies. Although some may lament this fact, they cannot deny it.

Kline also argues that allowing petitioners to obtain relief through mandamus will thwart his investigation. We disagree. Petitioners do not seek to stop the entire investigation. Rather, at this stage of the proceeding, they appear to insist only that their patients' privacy rights must be balanced with the

State's compelling need for information relevant to the criminal investigation. See *King v. State*, 272 Ga. 788, 791-92, 535 S.E.2d 492 (2000) (State's use of subpoena for compelling interest of enforcing criminal laws must be narrowly tailored to make certain "equally compelling constitutional right of privacy is not unreasonably impacted").

Kline next argues that this action should be dismissed because petitioners seek injunctive relief and because the issues raised are not ripe for review. He is correct that this court does not have original jurisdiction to issue injunctive relief, see *Dean v. State*, 250 Kan. 417, 427, 826 P.2d 1372, *cert. denied* 504 U.S. 973 (1992); *Collins v. York*, 175 Kan. 511, Syl. ¶ 2, 265 P.2d 313 (1954), but this is not the remedy petitioners seek. They do not assert that the inquisition should be enjoined. At least by the time of oral argument before this court, they acknowledged the State's legitimate law enforcement interest and sought only to have their patients' rights weighed appropriately against it.

As for ripeness, Kline emphasizes that the district court has not yet had an opportunity to review the medical records in camera. This is unpersuasive, because, as Judge Anderson's order now stands, a physician or physicians selected solely by the attorney general would be permitted to participate in that review. The attorney general's post-oral argument position recognizes the competing interests at stake, acknowledging the district judge should select the reviewing physician or physicians. It also demonstrates that the ripeness argument is without merit.

Finally, even if mandamus is hypothetically appropriate, Kline argues that there is no constitutional or statutory basis for this extraordinary judicial intervention and that such intervention would do violence to the prosecutorial function and the separation of powers.

The attorney general is correct that prosecution of crime is an executive function. See *State v. Compton*, 233 Kan. 690, 698, 664 P.2d 1370 (1983); *State, ex rel., v. Rohleder*, 208 Kan. 193, 194-95, 490 P.2d 374 (1971). And this court is mindful of its obligation to respect our state constitution's separation of powers among the three branches of government. See *State v. Beard*, 274 Kan. 181, 185, 49 P.3d 492 (2002). However, Kline's separation of powers argument is otherwise unpersuasive. He fails to cite any authority supporting the idea that courts cannot review requests for subpoenas in inquisitions. The statutory language, *i.e.*, K.S.A. 2004 Supp. 22-3101, clearly supports that power in the courts. Moreover, Kline admits that courts are required to prevent abuse of the judicial process by prosecutors. See *State ex rel. Cranford,* 230 Kan. at 800-01.

In view of the foregoing, we hold that mandamus is the appropriate avenue for relief, if petitioners are able to demonstrate that relief is merited. See *State, ex rel., v. Salome*, 169 Kan. 585, 595, 220 P.2d 192 (1950) (burden on mandamus petitioner).

Constitutional Right to Privacy

Petitioners argue that mandamus is warranted because Judge Anderson's order fails to protect the subject patients' constitutional rights to privacy. The attorney general asserts that the patients' rights are adequately protected by Judge Anderson's order.

We discern the possibility for infringement of three federal constitutional privacy interests.

The first is the right to maintain the privacy of certain information. See *Whalen v. Roe*, 429 U.S. 589, 599 n.25, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977) ("right to be let alone" is most valued); *Eastwood v. Dept. of Corrections of State of Okl.*, 846 F.2d 627, 631 (10th Cir. 1988) (information regarding"personal sexual matters"); see also *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir.

1994) ("confidential medical information is entitled to constitutional privacy protection"); *Aid for Women v. Foulston*, 2006 WL 218185 (10th Cir.) (minors' right to informational privacy).

A second, perhaps related, federal constitutional right to obtain confidential health care has been recognized explicitly by at least the Sixth Circuit. See *Gutierrez v. Lynch*, 826 F.2d 1534, 1539 (6th Cir. 1987); *In re Zuniga*, 714 F.2d 632, 642 (6th Cir.), *cert. denied Zuniga v. United States*, 464 U.S. 983 (1983); see also *Mann v. University of Cincinnati*, 824 F. Supp. 1190, 1199 (S.D. Ohio 1993) ("patients' interest in making decisions vital to their health care may be impaired by unwarranted disclosures"). And, as noted in the *Mann* case out of the Southern District of Ohio, other federal district courts have echoed the Sixth Circuit position. *Mann*, 824 F. Supp. at 1196 n.2, citing *Inmates of New York State with Human Immune Deficiency Virus v. Cuomo*, No. 90-CV-252, 1991 WL 16032 (N.D.N.Y. Feb. 7, 1991); *Rodriguez v. Coughlin*, No. CIV-87-1577E, 1989 WL 59607 (W.D.N.Y. June 5, 1989); *Doe v. Meachum*, 126 F.R.D. 452 (D. Conn. 1989); *Plowman v. United States Dep't of Army*, 698 F. Supp. 627, 633 and n.22 (E.D. Va. 1988); *Doe v. Coughlin*, 697 F. Supp. 1234, 1237 (N.D.N.Y. 1988); *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988), *aff'd* 899 F.2d 17 (7th Cir. 1990). See *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994). Compare *Borucki v. Ryan*, 827 F.2d 836, 840 (1st Cir. 1987) (discussing "confidentiality" and "autonomy" aspects of federal constitutional right to privacy: "the individual interest in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions"); *Pesce v. J. Sterling Morton High Sch. Dist.*, 830 F.2d 789, 796 (7th Cir. 1987) (same); *In re Search Warrant*, 810 F.2d 67, 71-72 (3d Cir. 1987) (balancing patients' rights to privacy in medical records against government intrusion through warrant directed to physician under investigation for insurance fraud). But see *Sherman v. Jones*, 258 F. Supp. 2d 440, 442-43 (E.D. Va. 2003) (citing *Whalen v. Roe* and Fourth Circuit precedent to conclude individual's confidential medical information outside constitutionally protected "zone of privacy").

The third federal constitutional right at stake, long recognized and protected by the United States Supreme Court, is the fundamental right of a pregnant woman to obtain a lawful abortion without government imposition of an undue burden on that right. See, *e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874-78, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992). If inquisition subpoenas for documents related to abortions are not handled sensitively, the fundamental rights of women who may seek abortions in the future could be substantially impaired or the assertion of those rights prevented.

We have not previously recognized -- and need not recognize in this case despite petitioners' invitation to do so -- that such rights also exist under the Kansas Constitution. But we customarily interpret its provisions to echo federal standards. See, *e.g.*, *State v. Morris*, 255 Kan. 964, 979-81, 880 P.2d 1244 (1994) (double jeopardy provisions of federal, Kansas constitutions "co-equal"); *State v. Schultz*, 252 Kan. 819, 824, 850 P.2d 818 (1993) (Section 15 of Kansas Constitution's Bill of Rights identical in scope to Fourth Amendment of federal Constitution); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981) (Section 1 of Kansas Constitution's Bill of Rights given same effect as Equal Protection Clause of Fourteenth Amendment of federal Constitution).

Regarding petitioners' standing to assert their patients' rights, the United States Supreme Court has held that abortion providers can take such action. *Singleton v. Wulff*, 428 U.S. 106, 117, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976) (physician had standing to assert rights of patients seeking abortions; patient "may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit"). The Seventh Circuit has followed suit. See *Northwest Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 928 (7th Cir. 2004) (Department of Justice acknowledgment that hospital-custodian of medical records of women's abortions is appropriate representative of patient's privacy interests). And a panel of the Tenth Circuit has concluded that providers of family planning services have third-party standing to assert their patients' informational privacy rights. *Aid for Women v. Foulston*, Slip Copy, 2006 WL

218185, 15-22 (10th Cir.).

Having identified specific constitutional privacy interests and confirmed petitioners' standing to champion them, we next examine the extent of the State's interest in invading patient privacy. It is beyond dispute that the State has a compelling interest in pursuing criminal investigations. See *Branzburg v. Hayes*, 408 U.S. 665, 699-701, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972). And an individual's right to informational privacy is not necessarily "absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest." *Planned Parenthood of Southern Arizona v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002) (citing *In re Crawford*, 194 F.3d 954, 959 [9th Cir. 1999]). Also, the fundamental right to obtain a lawful abortion may be regulated as long as the regulation does not constitute an undue burden. See *Casey,* 505 U.S. 874-78.

Our evaluation necessarily involves weighing of these competing interests, including the type of information requested, the potential harm in disclosure, the adequacy of safeguards to prevent unauthorized disclosure, the need for access, and statutory mandates or public policy considerations. See *Lawall*, 307 F.3d at 790 (citing *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 [3rd Cir. 1980]); see also *Sheets v. Salt Lake County*, 45 F.3d 1383, 1387 (10th Cir. 1995) (disclosure of diary must advance compelling state interest in least intrusive manner).

Petitioners contend the attorney general has not shown a compelling need for *unredacted* patient files. Kline now takes the position that the patients' identifying information may be redacted. Petitioners further assert that it is "inconceivable" the disclosure of *entire* patient files would be the least intrusive way to meet a compelling state interest in uncovering noncompliance with the criminal abortion and mandatory child abuse reporting statutes. Petitioners have pointed to the example of the many details of each patient's sexual and contraceptive history that the files are likely to contain but that are equally likely to be irrelevant to the factors required to be considered and documented under the criminal abortion statute. With regard to the child abuse reporting statute, we expect that nearly all information except the identity and age of the male who impregnated the minor patient, his relationship to the minor patient, the circumstances surrounding the sexual intercourse that produced the pregnancy, and compliance or noncompliance with reporting requirements is likely to be irrelevant to Kline's inquiry.

The type of information sought by the State here could hardly be more sensitive, or the potential harm to patient privacy posed by disclosure more substantial. Judge Anderson's order does not do all it can to narrow the information gathered or to safeguard that information from unauthorized disclosure once it is in the district court's hands. Although the criminal inquisition statutes do not speak to the need for such narrowing and safeguards, the constitutional dimensions of this case compel them.

Under the circumstances of this case, Judge Anderson was correct to hold a closed hearing to allow the parties to address appropriate limitations on disclosure -- limitations that strike the necessary balance between patient privacy and government investigation. His order simply failed to incorporate all that the hearing had revealed. We discern three specific errors:

First, the judge misstated a critical provision of the criminal abortion statute. The two physicians who must agree that an abortion at 22 weeks' gestational age or later is necessary must do so on the basis that the life of the pregnant woman is endangered *or* on the basis that "continuation of the pregnancy would cause a substantial and irreversible impairment of a major bodily function of the pregnant woman." K.S.A. 65-6703(a). Judge Anderson joined these two bases by the conjunction "and" rather than the disjunctive "or." This misstatement of the law must be corrected lest the attorney general be misled as to the limits of his authority to prosecute.

Second, Judge Anderson also stated that "presumed flaws" in the attorney general's interpretation of the criminal abortion or mandatory child abuse reporting statutes would not prevent production of the files called for in the subpoenas. In essence, this statement adopted senior assistant attorney general Maxwell's position that any error in the attorney general's interpretation was irrelevant. We disagree. To hold otherwise could permit exactly the abuse of prosecutorial power the courts must be vigilant to prevent. To the extent the inquisition rests on the attorney general's ignorance, disregard, or misinterpretation of precedent from the United States Supreme Court, subpoenas pursuant to the inquisition cannot be allowed.

For example, the United States Supreme Court has long held, and continues to hold that, in order to be constitutional, state restrictions on abortions must include exceptions to preserve both the life and health of the pregnant woman. See *Casey,* 505 U.S. at 846 (emphasizing this rule as part of the "essential holding" of *Roe v. Wade,* 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705, *reh. denied* 410 U.S. 959 [1973]); see also *Ayotte v. Planned Parenthood of Northern New England,* ___ U.S. ___, 2006 WL 119149 (January 18, 2006). Moreover, "health" has been interpreted by the United States Supreme Court to include the mental or psychological health of the pregnant woman. See *Doe v. Bolton,* 410 U.S. 179, 191-92, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973); *United States v. Vuitch,* 402 U.S. 62, 71-72, 28 L. Ed. 2d 601, 91 S. Ct. 1294 (1971). The attorney general has said he disagrees with requiring an exception to preserve the pregnant woman's mental health. Until the United States Supreme Court or the federal Constitution says otherwise, however, the mental health of the pregnant woman remains a consideration necessary to assure the constitutionality of the Kansas criminal abortion statute. Judge Anderson was not free to decide the subpoenas should issue in the first place or whether the petitioners' motion to quash should be denied without considering the soundness of any legal interpretations on which the attorney general depends. This is true of any district judge who passes on an inquisition application or associated subpoenas.

Third, Judge Anderson erred in refusing to allow redaction of patient-identifying information from the files. This information must be redacted by petitioners before the files are turned over to the court. Should patient-identifying information later be required, the district judge may approve appropriate subpoenas for that information at that time.

As noted above, Judge Anderson's order also permitted the attorney general to select the physician or physicians who would participate in the initial in camera review of the records. At oral argument, Rucker stated that the attorney general was unwilling to trust doctors employed by or associated with petitioners to participate in this segment of the process. Understandably, petitioners are equally reluctant to have a physician or physicians selected by the attorney general do so. Kline's Motion to Clarify eliminates this issue, however. The attorney general has now explicitly stated that he does not oppose Judge Anderson's appointment of the physician or physicians to be trusted with this task.

In sum, Judge Anderson must withdraw his order and first evaluate the inquisition and subpoenas in light of what the attorney general has told him regarding his interpretation of the criminal statutes at issue. If the judge requires additional information in order to perform this evaluation, he should seek it from the attorney general in the inquisition proceeding. As targets of the investigation, petitioners need not be included in any hearing or other communication to enable this evaluation.

Only if Judge Anderson is satisfied that the attorney general is on firm legal ground should he permit the inquisition to continue and some version of the subpoenas to remain in effect. Then he also must enter a protective order that sets forth at least the following safeguards: (1) Petitioners' counsel must redact patient-identifying information from the files before they are delivered to the judge under seal; (2) the documents should be reviewed initially in camera by a lawyer and a physician or physicians appointed by the court, who can then advise the court if further redactions should be made to eliminate information

unrelated to the legitimate purposes of the inquisition. This review should also determine whether any of the files demonstrate nothing more than the existence of a reasonable medical debate about some aspect of the application of the criminal abortion and/or mandatory child abuse reporting statutes, which the attorney general's office has already acknowledged would not constitute a crime. If so, those files should be returned to petitioners; and (3) any remaining redacted files should be turned over to the attorney general.

Statutory Physician-Patient Privilege

Petitioners also contend that the subpoenas violate the physician-patient privilege outlined in K.S.A. 60-427. The attorney general counters that public policy demands the physician-patient privilege not be used to shield criminal conduct.

Because we have ruled that all patient-identifying information must be redacted from the files before they are produced to the attorney general, we need not further discuss the statutory physician-patient privilege at this time. We also do not address -- because we have not been asked to do so -- whether federal provisions such as the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d *et seq.*, may have application or effect.

Further Disclosures to Petitioners

Petitioners also contend they should be provided with additional information about the basis for the inquisition. We disagree on current showing. Kansas law clearly establishes that courts should not permit unreasonable subpoenas (see *In re Tax Appeal of Collingwood Grain, Inc.*, 257 Kan. 237, 256-57, 891 P.2d 422 [1995] [subpoenas not unreasonable or oppressive]; *State ex rel. Cranford*, 230 Kan. at 801 [district court has inherent power to refuse issuance of subpoenas]), and we believe the procedure we have required Judge Anderson to follow adequately addresses the concerns raised at this point by the petitioners.

Contempt Proceedings

On April 11, 2005, petitioners filed a Joint Motion for Order Directing Attorney General Kline To Show Cause Why He Should Not Be Held In Contempt Of Court For Violating Court Orders Sealing The Record In This Case. Specifically, petitioners took issue with the attorney general's attachment to his brief of redacted portions of the October 5, 2004, district court hearing transcript and the resulting October 21, 2004, Memorandum and Order and with his later press conference at which the brief and its attachments were openly discussed. We issued an Order to Show Cause to the attorney general, who responded in writing and at oral argument before this court.

It is well established that this court "is a constitutional tribunal and has inherent power to punish for contempt and to determine whether a contempt has been committed." *State v. Rose*, 74 Kan. 260, 261, 85 Pac. 803 (1906); see also *In re Root*, 173 Kan. 512, 515, 249 P.2d 628 (1952) ("Of the right of this court to punish for contempt there can be no doubt."). In addition to contempt authority, Kansas courts have the inherent power to impose sanctions for bad faith conduct, irrespective of any statutory provision for sanctions. See *Wilson v. American Fidelity Ins. Co.*, 229 Kan. 416, 421, 625 P.2d 1117 (1981); *Knutson Mortgage Corp. v. Coleman*, 24 Kan. App. 2d 650, 652, 951 P.2d 548 (1997).

Petitioners contend that the attorney general's actions violated three court orders: (1) Judge Anderson's October 4, 2004, order, requested by the attorney general, that directed the parties not to disclose the transcript of the hearing; (2) this court's October 28, 2004, order directing all filings in this action to be

made under seal; and (3) the February 14, 2005, written notice sent by the Clerk of the Appellate Courts advising all counsel of record that briefs would be "open records" but that the record itself would remain sealed.

The allegations here relate to what is known as indirect contempt, *i.e.,* conduct outside the presence of a judge. The procedure governing indirect contempt is found in K.S.A. 2004 Supp. 20-1204a, which is strictly construed against the moving party. *Cyr v. Cyr*, 249 Kan. 94, Syl. ¶ 5, 815 P.2d 97 (1991).

Under this statute, this court lacks jurisdiction to address the first of petitioners' contentions, that Kline violated Judge Anderson's October 5, 2004, order. K.S.A. 2004 Supp. 20-1204a(a) provides that "the court that rendered" an underlying order may address contempt allegations regarding that order. The statute's requirements are jurisdictional. See *Bond v. Albin*, 29 Kan. App. 2d 262, 263, 28 P.3d 394 (2000), *rev. denied* 271 Kan. 1035 (2001). Judge Anderson, rather than this court, must first address petitioners' contempt allegations regarding the October 5, 2004, order.

Petitioners' remaining allegations are correctly addressed to this court, which issued the subject orders.

Indirect contempt may be either criminal or civil. Criminal contempt proceedings attempt """to preserve the power and vindicate the dignity of the courts and to punish for disobedience""" of court orders; criminal contempt tends to obstruct the administration of justice. *State v. Davis*, 266 Kan. 638, 645, 972 P.2d 1099 (1999). Civil contempt is failing to do something that the court has ordered for the benefit of another party to the proceeding, and civil contempt proceedings are remedial in nature. *Davis*, 266 Kan. 638, Syl. ¶ 2; *State v. Jenkins*, 263 Kan. 351, 358, 950 P.2d 1338 (1997) (citing *Krogen v. Collins*, 21 Kan. App. 2d 723, 726, 907 P.2d 909 [1995]).

Petitioners do not specifically characterize their allegations as either criminal or civil; rather, they say only that Kline committed "contemptuous conduct" through "intentional disclosure of sealed records." Because this complaint centers on an alleged violation of court orders, this qualifies as an allegation of criminal contempt.

"Before 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." *Ensch v. Ensch*, 157 Kan. 107, Syl. ¶ 2, 138 P.2d 491 (1943). Further, a party "should not be punished for contempt for disobeying a decree, if the decree is capable of construction consistent with innocence." *Ensch*, 157 Kan. 107, Syl. ¶ 3; compare *Jenkins*, 263 Kan. at 358 (criminal contempt directed against dignity and authority of court, obstructing administration of justice). Moreover, intent is sometimes considered a necessary element of criminal contempt. See *Threadgill v. Beard*, 225 Kan. 296, Syl. ¶ 6, 590 P.2d 1021 (1979) ("Whether a particular act or omission is contemptuous depends not only upon the nature of the act itself, but upon intent, good faith, and the surrounding circumstances.").

In his initial response to this court's Order to Show Cause, the attorney general contended that the documents attached to his brief were "but a very small fraction of the entire record before the lower court in the inquisition; we attached only what we believed necessary to support our arguments in this segment of the proceedings." As for the news conference, Kline asserted that he "stressed the privacy protections put in place by the lower court and the law to prevent public disclosure of the medical records sought. . . . I did not refer to the transcript of the lower court's hearing, nor did I provide it at the news conference. Later that day, my communications director, after our brief had been filed, provided the transcript electronically to those who requested a copy." He argued that "it was seemingly inconsistent to keep these pleadings under seal while at the same time suggesting that oral argument was likely." Kline also argued that the press conference was "necessitated by the false impression left by the

public filing of Petitioners' brief and [Petitioners'] representation of the record."

Kline's initial responses were troubling. He admitted that he attached sealed court records to a brief he knew would be unsealed; that he did so knowingly because, in his sole estimation, he believed it to be necessary to further his arguments; that he held a press conference on this criminal matter merely because he determined that petitioners had painted his previous actions in an unflattering light; and that he later permitted his staff to provide electronic copies of the sealed transcript to anyone who requested them. In essence, Kline has told this court that he did what he did simply because he believed that he knew best how he should behave, regardless of what this court had ordered, and that his priorities should trump whatever priorities this court had set. Furthermore, although there is conflict between the parties on exactly what was said in the press conference, *i.e.* whether the actual content of the sealed documents was discussed, Kline's stated reason for holding the conference -- to combat what he saw as unflattering earlier press coverage -- does not appear to be among the permissible reasons for an attorney in his position to engage in extrajudicial statements under Kansas Rule of Professional Conduct 3.6 (2005 Kan. Ct. R. Annot. 473). This too is troubling.

At oral argument before this court, Kline's lawyer, a former four-term attorney general, wisely altered the tone of Kline's response. He characterized whatever mistakes Kline may have made as honest ones and said his client was acting in good faith. He also, as Kline eventually had done for himself in his written response, made a classic "no harm, no foul" argument: Any disclosure of sealed material did nothing to impair the orderly nature of this proceeding or the soundness of its eventual result; the attorney general and his staff did not release information harmful to personal privacy, prejudicial to the administration of justice, or detrimental to this court's performance of its duties.

We conclude that, despite the attorney general's initial defiant tone, he should not be held in contempt at this time. No prejudice has resulted from his conduct, a distinguishing feature of the cases cited to us by petitioners. See, *e.g.*, *United States v. Cutler*, 58 F.3d 825, 837 (2d Cir. 1995) (criminal contempt; comments willful and likely to prejudice proceedings); *United States v. Dubon-Otero*, 98 F. Supp. 2d 187, 192 (D. Puerto Rico 2000) (inherent power to sanction counsel; behavior amounted to abuse of judicial process); *In re Holley*, 285 App. Div. 2d 216, 221, 729 N.Y.S.2d 128 (2001) (disciplinary case; public censure for disclosing sealed document to journalist).

This is a highly unusual case, the first in memory when this court has required public briefs and oral argument on a sealed record. Although we believe this directive was more challenging than confusing, and although the actions complained of here might well be characterized as criminal contempt in a different case, we are inclined to grant the attorney general the benefit of the doubt here. This is an unusually high-profile case attracting keen public interest throughout the state. 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.

Petition for mandamus granted. Motions to Clarify Argument noted. Motion for Order Directing the District Court to Forward the Entire Inquisition Record to This Court denied.

LARSON, S.J., assigned.[1]

[1] **REPORTER'S NOTE:** Senior Judge Edward Larson was assigned to hear case No. 93,383 pursuant to the authority vested in the Supreme Court by K.S.A. 20-2616 to fill the vacancy on the court resulting from Justice Gernon's death.

FOOTNOTES

Click footnote number to return to corresponding location in the text.

1. Certain matters that have been contained only in pleadings filed under seal require discussion in order to decide the merits of this mandamus action. This court lifts the seal only to the extent such matters are mentioned of necessity in this opinion.

END

Kansas Opinions | Finding Aids: Case Name » Supreme Court or Court of Appeals | Docket Number | Release Date |

Comments to: WebMaster, kscases@kscourts.org.
Updated: February 03, 2006.
URL: http://www.kscourts.org/kscases/supct/2006/20060203/93383.htm.

MOR-06-016644

IN THE SUPREME COURT OF KANSAS

WOMEN'S HEALTH CARE SERVICES P.A., and COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI, INC., Petitioners.	
vs.	Original Action No. 06-97554-S
PHILL KLINE, ATTORNEY GENERAL FOR THE STATE OF KANSAS; and the HONORABLE RICHARD ANDERSON, JUDGE OF THE THIRD JUDICIAL DISTRICT, SHAWNEE COUNTY, Respondents.	

RESPONSE TO PETITION FOR MANDAMUS
BY RESPONDENT RICHARD D. ANDERSON, DISTRICT JUDGE

Respondent Richard D. Anderson, District Judge, responds to the Petition for Writ of Mandamus by Women's Health Care Services, P.A., and Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. as follows:

1. The District Court has fulfilled all directives stated by the Supreme Court in *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006). The District Court has reviewed the Attorney General's legal theories and has determined the Attorney General stands on firm legal ground. The District Court has entered a protective

order, appointed special counsel for patients, and appointed two physicians to review medical records. The District Court has assured, with the assistance of Special Counsel and the appointed physicians, that the medical records have been redacted pursuant to the protective order. No patient can be identified from the review of any medical file.

2. The District Court has further determined that relevant information is contained in the medical files, which may constitute evidence of possible violations of law, and that the files document more than the existence of a reasonable medical debate about some aspect of the application of the criminal abortion and/or mandatory child abuse reporting statutes.

3. Respondent requests that he be permitted to present further response under seal. The further response will include additional information regarding proceedings before the District Court which may be of importance in the Supreme Court's evaluation of compliance with the directives of *Alpha*, and may aid in the review of whether medical records or protected patient information has been improperly disclosed to anyone. Because these matters have been under seal in the District Court, relate to evidence and deliberations in the sealed criminal investigation, which if disclosed could prejudice or compromise interests of the government or inquisition subjects, and otherwise disclose sensitive confidential information related to the merits of the investigation, the Respondent requests that the Supreme Court review the materials *in camera* and make such decision regarding disclosure to the parties and public as may be deemed in the interests of justice.

Dated this 27th day of November, 2006.

Richard D. Anderson
District Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the above and foregoing Response to Petition for Mandamus by Respondent Richard D. Anderson on this 27th day of November, 2006, to:

Stephen D. Maxwell
Senior Assistant Attorney General
Office of Kansas Attorney General Phill Kline
Criminal Division
120 SW 10th Avenue
Topeka, KS 66612

Pedro L. Irigonegaray
Attorney At Law
1535 SW 20th Street
Topeka, KS 66605-0795

Lee Thompson
Erin C. Thompson
Thompson Law Firm, LLC
Occidental Plaza
106 E. 2nd Street
Wichita, Kansas 67202

Daniel E. Monnat
Laura Shaneyfelt
Monnat & Spurrier, Chartered
221 South Broadway, Suite 512
Wichita, Kansas 67202

Roger K. Evans
Planned Parenthood Federation of America
434 West 33rd Street
New York, NY 10010

Douglas Ghertner
Attorney at Law
Slagle, Bernard and Gorman
4600 Madison Ave., Suite 600
Kansas City, MO 64112-3012

Richard D. Anderson

Morrison Press Conference – June 28, 2007

Transcribed from a two-part video provided by KAKE News at http://www.kake.com/home/headlines/8224672.html.

Part 1:

KANSAS ATTORNEY GENERAL PAUL MORRISON: Let me start off by saying I appreciate the opportunity to speak to you all today and I thank you for coming here. Um. When I was sworn in on January 8th, for the last several months we've spent a great deal of time here in the attorney general's office trying very hard to refocus the priorities of this office, and that's involved a whole lot of things. We spent a massive amount of time trying to rebuild the consumer fraud division, which had fallen on very hard times over the last four years. We've been working on our victim's rights unit, our abuse and neglect division. We've appointed a new KBI director who's working closely with us on working on issues as diverse as how we deal with fraud on the Internet, cyber-crime, what we can do to make Kansans safer from sexual predators, and a whole wide assortment of projects that relate to things as diverse as that.

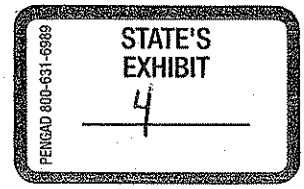
I think that it would be very fair to say that we're working very hard, and have worked very hard and will continue to work very hard on trying to refocus the priorities of this office to the things that an attorney general's office should be doing.

I also think it is really important for me to say at the outset that my job as Attorney General of Kansas is to enforce the law of this state. It's not to try to bend it as I think it should be. It's not to try to shape it as I wish it would be. It is to enforce it. Those decisions are for others to make.

On my first day in office, I inherited the George Tiller investigation. And it would be very fair to say that when I inherited that investigation, and those thirty charges that were filed, I found it ironic that after a four-year term in office, Phill Kline haD waited until literally the last days of his term to file those charges, all the while knowing that I would have to deal with that.

What we found on the first day in office was that the investigative files, nor the medical records, weren't even in the attorney general's office. They weren't even here. So that began the seven-week equivalent of a scavenger hunt to try to find those medical records, and we found that they were scattered all over but the one place that they should be. Some were in Sedgwick County, they were in various places in Shawnee County, some were in Johnson County. And we were able to find that Phill Kline had, on his last day in office as attorney general, had used the power of this office to assign those files to him in his new job as Johnson County District Attorney, totally on his own – no oversight.

Some of those files were in Baltimore, Maryland. They were literally scattered all over the country. Our first priority was to get those files, the investigative files and the medical records, and to lock them down in this office where they would be secure,



because as most of you know, throughout the campaign last year we talked a lot about privacy of these women and how important it was to do everything that the attorney general could do to insure the privacy of these women, and to insure the sanctity of these medical records. And I believe we've been successful in that. We've tracked 'em down, we've locked 'em down, and they've been under lock and key in this office for the last six months with one person, an assistant attorney general who's been assigned to this investigation having ac—

PART 2:

MORRISON: -- purpose, although I've been heavily involved in the decision-making process as to what we do.

Nonetheless, I've still got concerns about copies of those records and where they've ended up. We've seen them discussed on the blogs. We've seen them on various websites. We've heard them discussed on the Bill O'Reilly show. And those were our fears, and continue to a certain extent to be fears that we have today.

The second priority after we found those records was to "fly-speck" that investigation – look at that investigation inside and out, backwards and forwards, to try to figure out whether there was any validity to any of those charges, or whether there is anything else we should look at in terms of whether or not Dr. George Tiller violated the law. And we've done that, and we're ready to talk about that today.

I'm going to begin today by talking about the 30 counts that were filed against Dr. Tiller during Kline's last day – days in office.

Four of those counts related to a form that is required under Kansas law to be filled out and submitted to the Kansas Department of Health and Environment. It's called a Report of Induced Termination of Pregnancy. It's a double-sided form. You can see both sides here. [pointing] One section on that form requires the doctor to say whether or not the fetus is viable, because in this circumstance, we're talking about late-term abortions. And as all of you know, that is a highly restricted procedure under Kansas law.

The first four counts allege that Dr. Tiller lied on the form and provided false information to the Kansas Department of Health and Environment, when in fact it's alleged he said the fetus is not viable when in fact, the fetus was viable, under that theory. What we found when we looked at those reports is that, for some reason, the back side of another report had been copied on the front side of a different procedure making it look as though he stated that the fetus was not viable when in fact the fetus was viable. Mr. Kline attributed that to a copying error, not once, not twice, not three times, but on all four counts. To my way of thinking, at best, that is gross incompetence, and at worst, it's manufacturing evidence. Needless to say, those four counts were completely bogus and untrue.

Next were eleven counts that alleged another violation of the reporting requirement to the Kansas Department of Health and Environment on the same report. There's another box on that report that required the doctor to state what the medical reason for the determination as to why the abortion was necessary. And under Kansas law there are two reasons why you can do that. Protect the health of the mother, or the second reason is if the health of a mother of a major bodily function is going to be irreparably harmed if the pregnancy's carried to full term.

Dr. Tiller used the statutory language when he filled this box in, and all of those eleven counts involved him using the same statutory language that a major bodily function of the mother will be substantially and irreparably harmed if the fetus is carried to full term. Those complaints – those eleven counts allege that that wasn't a good enough reason under Kansas law, and that was put in the affidavit along with some statements of some experts that Phill Kline had purportedly hired. But what he didn't put in the affidavit was the fact that Dr. Tiller had consulted with the Kansas Department of Health and Environment and it had been approved that the statutory language was in fact the correct language to use in Section 16B of that box. That was left out. And that's what we refer to in the criminal justice system as exculpatory evidence. There's an ethical requirement that you put the evidence that supports your case as well as the evidence that doesn't support your case in the affidavit so the judge will know all the facts when he makes the probable cause finding. I can't help but believe if the judge had known about that, perhaps he wouldn't even have fought – signed off on those charges.

That's 15 charges. What about the other 15? The other 15 we're talking about K.S.A. 65-6703, which is the statute that we're talk – that we're here about today. That statute highly restricts late-term abortions. And it says that no person shall perform or induce an abortion when the fetus is viable unless such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing the abortion, and both physicians determine that, (a) an abortion is necessary to preserve the life of the woman, or a continuation of the pregnancy will cause substantial and irreversible impairment of a major bodily function of the pregnant woman, the two reasons I talked about earlier.

All 15 of those counts allege that that Dr. Tiller did not have a good enough reason count – section two, to justify the abortion. They allege that he did not have a good enough reason and in fact those women would not have suffered substantial and irreversible harm. He missed the mark on all 15 of those as well. If you look at the statute, the statute doesn't say anything other than the two physicians must determine that. It doesn't matter if I think their reason was good or bad. It doesn't matter if I think he's a good doctor or a bad doctor. All that matters under Kansas law is that they sign off on that determination. It's a clear, plain, common sense reading of the statute. Because some might disagree with that determination, it's still not a violation of Kansas law. Those charges were false under that statute and cannot be made under Kansas law.

Where does that leave us? That left us with a review of the investigative file and a review of the medical records, and I think it's important to note that we did not obtain

any other medical in pursuant to our investigation because we are extraordinarily concerned with protecting the privacy of these patients. So we were limited with the medical records that had been subpoenaed by the Kline administration that dealt with the year 2003.

When we looked at those medical records, there was a pattern that emerged to us that we found to be disturbing. And because of that – and I'm going to talk about that in a minute – earlier today in Sedgwick County District Court, we charged Dr. George Tiller with 19 counts of a violation of K.S.A. 65-6703 because what we found – what we charged him with is a violation of the financial or legal affiliation count. The law is very clear that because this is such an important procedure and it's such an important matter, that when two doctors sign off on those documents that are submitted to the Kansas Department of Health and Environment, that those two doctors must be acting totally independent of each other. In other words, they can't be in "cahoots" legally or financially. But what we found, we believe there is a violation of that. We believe that there was a financial and legal affiliation between those two doctors, which thwarts the letter of that statute.

Dr. Tiller's attorney was given a copy of the summons in that case today. His appearance in Sedgwick County District Court will be on August 7 at 10:30. These 19 counts range from July to November of 2003.

We accomplished our goals in this investigation. Number one, to do what ever we could to insure the privacy of these patients, and to lock down those records. Number two, to give a fair, unbiased look at this investigation and the matters at hand. And number three, as I promised, to file charges if warranted, no matter who likes it or who might not like it. Lastly I'm gonna say about these charges, that the ethical rules require me to tell you all that everybody, including Dr. Tiller, is presumed under Kansas law to be innocent until proven guilty in a court of law and these are merely allegations. But I also want to tell you that as Attorney General, this issue and these charges in this case doesn't have anything to do with whether you're pro-choice or pro-life. It's simply about enforcing the law of the State of Kansas.

Are there any questions?

[END]

Kansas Bureau of Investigation

Larry Welch
Director

INVESTIGATION REPORT

Paul Morrison
Attorney General

January 10, 2007
Investigation Date

BLECHA, R.E.
Special Agent

SUBJECT: UNSUB
VICTIM: STATE OF KANSAS
CRIME: RECORD INFORMATION
PLACE & DATE: TOPEKA, SHAWNEE COUNTY KS/JANUARY 2007
REGION/CASE AGENT: TOPEKA/R.E.BLECHA

RE: Collection of medical files from Judge ANDERSON and return to Attorney General's Office.

DETAILS:

On January 10, 2007 at 4:08pm, AD R. E. BLECHA, DAG Rick GUINN and AAG Veronica DERSCH met with Judge Richard D. ANDERSON at his office in the SHAWNEE COUNTY COURTHOUSE, Topeka, Kansas.

Judge ANDERSON delivered 5 file boxes containing evidence in Inquisition Case #04IQ3 to AD R. E. BLECHA. The 5 file boxes were delivered to Judge ANDERSON by Investigator Tom WILLIAMS and Investigator Jared REED on January 8, 2007, and contained medical files for Inquisition Case #04IQ3.

On January 10, 2007 at 5:05pm the 5 file boxes containing evidence in Inquisition Case #04IQ3 and AG-04-0064 were delivered to the KANSAS ATTORNEY GENERAL'S OFFICE and turned over to Investigator Teresa SALTS for safekeeping.

PENDING

REB/cr
462-TI
011707

Enc.

Cc: DAG Guinn
AAG Dersch

9988-289567
KBI Case Number

STATE'S EXHIBIT 5a

PENGAD 800-631-6989

KANSAS BUREAU OF INVESTIGATION
FORENSIC LABORATORY
EVIDENCE CUSTODY RECEIPT

Contributing Agency/Address: Kansas Atty Gen's Office		KBI Case #: 9988-289567
Topeka	Nature of Offense: Record Info - Collection of Medical Files	KBI Lab #
	Victim(s): State of Kansas (First / Middle / Last Name)	DOB or Identifying Nos.
Send Report To: N/A	Suspect(s): Unsub (First / Middle / Last Name)	DOB or Identifying Nos.
Agency Case #	County of Offense: SN	
Agency ORI #	Previous evidence submitted in this case? YES NO	Brief Case Synopsis (See Back) YES NO

Exhibit Number	Number of Items	EXHIBIT DESCRIPTION	Requested Examination
1	1	Large White File Box Containing medical records for Inquisition Case #04IQ3 and #AG-04-0064.	HOLD
2	1	Large White File Box Containing medical records for Inquisition Case #04IQ3 and #AG-04-0064.	HOLD
3	1	Large White File Box Containing medical records for Inquisition Case #04IQ3 and AG-04-0064.	HOLD
4	1	Large White File Box Containing medical records for Inquisition Case #04IQ3 and AG-04-0064.	HOLD
5	1	Small brown file Box containing medical records for Inquisition Case #04 IQ3 and AG-04-0064.	HOLD
		If charges are filed under the Illegal Drug Tax Stamp Law, weighing or counting must be requested.	

Do any of the items submitted constitute a Safety or Health Hazard? ☐ Yes ☐ No
(If answer is Yes, describe hazard in case synopsis)

Date Collected: 10 JAN 2007 | Printed or Typed Name of Collector: Robert E. Blecha, AD | Written Signature of Collector: Robert E. Blecha

Item Nos.	Date	Received From (Name and Title)	Received By (Name and Title)	Purpose of Transfer
1 thru 5	10JAN2007	R E Blecha, AD	Dayna Fields Special Agent	

Kansas Bureau of Investigation

Larry Welch
Director

INVESTIGATION REPORT

Paul Morrison
Attorney General

January 24, 2007
Investigation Date

BLECHA, R. E.
Special Agent

SUBJECT: UNSUB
VICTIM: STATE OF KANSAS
CRIME: RECORD INFORMATION
PLACE & DATE: TOPEKA, SHAWNEE COUNTY, KANSAS/JANUARY 2007
REGION/CASE AGENT: TOPEKA/AD BLECHA

RE: Collection of Medical Files from Sedgwick County District Attorney's Office and Return to Attorney General's Office.

DETAILS:

On January 24, 2007, at 2:15pm, AD R. E. BLECHA and SAC Randy EWY met with Ann E. SWEGLE, Deputy District Attorney, SEDGWICK COUNTY DISTRICT ATTORNEY'S OFFICE, at her office in the SEDGWICK COUNTY COURTHOUSE, Wichita, Kansas. DDA SWEGLE provided the following information.

She is in possession of two small file holders (Inquisition Case #04IQ3) containing court documents only. The files are not complete because the former Kansas Attorney General Phill KLINE's Office did not provide additional information. A clerk from the District Attorney's Office picked up these files from the SEDGWICK COUNTY CLERK OF THE DISTRICT COURT's Office.

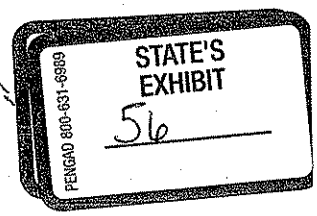
DDA SWEGLE turned over two file holders containing court documents in Inquisition Case #04IQ3 to AD R. E. BLECHA.

On January 26th at 10:00am, the two file holders containing court documents in Inquisition Case #04IQ3 were delivered to the KANSAS ATTORNEY GENERAL'S OFFICE and turned over to AAG Veronica L. DERSCH for safekeeping.

PENDING

REB/cr
467-T1

9988-289567
KBI Case Number



012507

Cc: DAG Guinn
AAG Dersch

9988-289567
KBI Case Number

KANSAS BUREAU OF INVESTIGATION
FORENSIC LABORATORY
EVIDENCE CUSTODY RECEIPT

Contributing Agency/Address: Kansas City Crime Office Topeka	KBI Case #: 9988-289567
Nature of Offense: Record Info - Collected/Redacted Files	KBI Lab #:
Victim(s) First: State of KS Middle: Last Name:	DOB or Identifying Nos.
Send Report To:	Suspect(s): Unsub
Agency Case #: / County of Offense: SN	First: Middle: Last Name:
Agency ORI #:	DOB or Identifying Nos.
Previous evidence submitted in this case? YES NO	Brief Case Synopsis (See Back) YES NO

Exhibit Number	Number of Items	EXHIBIT DESCRIPTION	Requested Examination
1B	1	Small brown file folder containing Court documents for Inquisition Case # 04IQ3.	HOLD
9B	1	Small brown file folder containing Court documents for Inquisition Case # 04IQ3.	HOLD

If charges are filed under the Illegal Drug Tax Stamp Law, weighing or counting must be requested.

Do any of the items submitted constitute a Safety or Health Hazard? ☐ Yes ☐ No
(If answer is Yes, describe hazard in case synopsis)

Date Collected: 4 JAN 2007 | Printed or Typed Name of Collector: Robert E. Blecha, AD | Written Signature of Collector: Robert E. Blecha

Item Nos.	Date	Received From (Name and Title)	Received By (Name and Title)	Purpose of Transfer
1B-2B	4 JAN 2007	Robert E. Blecha, AD	Veronica L. Dewell, AAG	

Kansas Bureau of Investigation

Larry Welch
Director

INVESTIGATION REPORT

Paul Morrison
Attorney General

January 25, 2007
Investigation Date

BLECHA, R. E.
Special Agent

SUBJECT: UNSUB
VICTIM: STATE OF KANSAS
CRIME: RECORD INFORMATION
PLACE & DATE: TOPEKA, SHAWNEE COUNTY, KANSAS/JANUARY 2007
REGION/CASE AGENT: TOPEKA/AD BLECHA

RE: Receipt of documents from SHAWNEE COUNTY DISTRICT ATTORNEY

DETAILS:

On January 25, 2007, at 4:07pm, SHAWNEE COUNTY DISTRICT ATTORNEY Robert D. HECHT met with AD R. E. BLECHA at the KBI in Topeka, Kansas. DA HECHT provided the following information.

After AD BLECHA picked up medical files – Inquisition Case #03IQ3, on January 18, 2007, he found a copy of an affidavit in his office, prepared by Thomas D. WILLIAMS with the KANSAS ATTORNEY GENERAL's OFFICE, dated January 5, 2007. (See attached copy of affidavit.)

DA HECHT also provided AD BLECHA with a memorandum he prepared reference the delivery of the medical records to his office and the fact that they were picked up by AD BLECHA on January 18, 2007.

PENDING

REB/cr
412-TI
012607

Enc.

Cc: DAG Guinn
AAG Dersch

9988-289567
KBI Case Number

PENGAD 800-631-6989

STATE'S EXHIBIT 5c

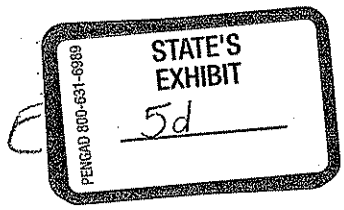
AFFIDAVIT OF
PAUL R. MC HUGH, M.D.
JOHNS HOPKINS HOSPIAL
August 29, 2007

My name is Paul R. McHugh. I was born in 1931 at Lawrence, Massachusetts. I was educated at Harvard College and Harvard Medical School and received further training in the study of medicine and psychiatry at Brigham and Women's University, Massachusetts General Hospital, the Institute of Psychiatry, University of London, and the Division of NeuroPsychiatry at Walter Reed Army Institute of Research. I have served as a Professor of Psychiatry at Cornell University School of Medicine, Clinical Director and Director of Residency Education at the New York Hospital Westchester Division; Professor and Chairman of the Department of Psychiatry at the Oregon Health Science Center. I was the Director of the Department of Psychiatry and Behavioral Sciences at Johns Hopkins University School of Medicine and Psychiatrist-in-Chief at Johns Hopkins Hospital from 1975-2001. I am currently employed by Johns Hopkins Hospital. I am a board certified psychiatrist and hold medical licenses in Massachusetts, New York, Oregon and Maryland. I have attached a copy of my Biographical Sketch and Curriculum Vitae to aid in establishing my professional qualifications.

At the request of Kansas Attorney General Phill Kline, I reviewed 15 medical records delivered to me by Special Agent Thomas D. Williams of the Kansas Attorney General's Office on December 7, 2006 at Johns Hopkins Hospital, Baltimore, Maryland. The records pertain to certain unidentified females who had received an abortion at Women's Health Care Services, P.A., Wichita, KS between the period of July 1, 2003 and December 31, 2003. I also reviewed certain Kansas Department of Health and Environment, *Report of Induced Termination of Pregnancy* reports pertaining to each of the unidentified females. I reviewed each medical file to determine the validity of the diagnosis made by Dr. George Tiller and/or Dr. Ann Kristin Neuhaus that each patient suffered from a condition that presented a substantial and irreversible impairment to a major bodily function. Prior to reviewing the medical records and KDHE reports, I studied the language contained in Kansas Statutes Annotated 65-6703, concerning Abortion.

After reviewing the medical files, I rendered my opinion in affidavit form to Kansas Attorney General Phill Kline. In the affidavit I stated that none of the files reviewed provided a basis for a late-term abortion under Kansas law and that the various diagnosis reflected in the files to justify the abortions were not supported by the medical facts contained in the records.

In summary, it is my professional opinion that none of the abortions received by the female patients represented in the files reviewed were performed in compliance with K.S.A. 65-6703 in as much as the continuation of their individual pregnancies would not



have caused a substantial and irreversible impairment of a major bodily function of the pregnant woman. Further, it is my professional opinion that the diagnosis rendered by Dr. Tiller and Dr. Neuhaus were not based on sound medical standards of practice and failed to include an adequate and thorough determination of the history and mental status of the patient supported by information obtained by someone other than the patient. I further conclude that these late term abortions performed in each of the 15 files described above were NOT done for any reason that would qualify as a substantial and irreversible impairment of a major bodily function of the pregnant woman.

The affidavit was provided to Attorney General Phill Kline and to my knowledge was included as part of the evidence filed in support of criminal charges.

It is my understanding that Mr. Paul Morrison was sworn in as Kansas Attorney General on January 8th, 2007.

Since that date, there has not been any effort by the Office of Kansas Attorney General to contact me regarding my professional opinion of the content or nature of the medical files in this matter. Neither Mr. Morrison nor his agents have made any effort in communication with myself to elicit or seek to better understand my opinions regarding this matter.

Since Mr. Morrison became Kansas Attorney General there have been only two contacts from that office. They are: (1) a call from an unidentified person requesting that I return any medical records still in my possession; and (2) a letter that I received on June 12, 2007 written by Mr. Morrison to me threatening legal action if I were to speak about this case publicly. In the letter Mr. Morrison claimed that I was a witness in his case yet I still have never received any contact from his office regarding the substance of the case.

PAUL R. MC HUGH, M.D.

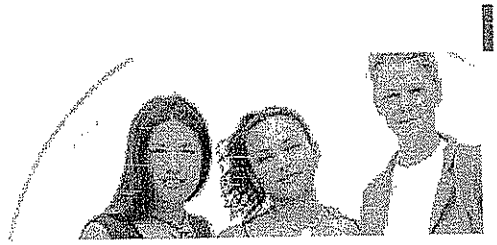
Subscribed and sworn to before me this 31 day of August 2007.

Notary Public

Commission Expires
9/01/07

NOTARY PUBLIC
AUDREY A. BERG
BALTIMORE CO.

COMPREHENSIVE HEALTH OF Planned Parenthood® of Kansas and Mid-Missouri



Notice Of Health Information Privacy Practices

This Notice Describes How Health Information About You May Be Used Or Disclosed By Comprehensive Health of Planned Parenthood Of Kansas & Mid-Missouri (CHPPKM) And How To Access This Information.

Please Review This Notice Carefully

If you have any questions about this notice, please contact CHPPKM's Privacy Official at (913) 312-5100.

Our Pledge Regarding Your Health Information

We understand that health information about you and your healthcare is personal. We are committed to protecting health information about you. We will create a record of the care and services you receive from us. We do so to provide you with quality care and to comply with any legal or regulatory requirements.

This Notice applies to all of the records generated or received by CHPPKM whether we documented the health information, or another doctor forwarded it to us. This Notice will tell you the ways in which we may use or disclose health information about you. This Notice also describes your rights to the health information we keep about you, and describe certain obligations we have regarding the use and disclosure of your health information.

Our pledge regarding your health information is backed-up by Federal law. The privacy and security provisions of the Health Insurance Portability and Accountability Act ("HIPAA") require us to:

- Make sure that health information that identifies you is kept private;
- Make available this notice of our legal duties and privacy practices with respect to health information about you;
- Follow the terms of the notice that is currently in effect.

How We May Use And Disclose Health Information About You

The following categories describe different ways that we may use or disclose health information about you. Unless otherwise noted each of these uses and disclosures may be made without your permission. For each category of use or disclosure, we will explain what we mean and give some examples. Not every use or disclosure in a category will be listed. However, unless we ask for a separate authorization, all of the ways we are permitted to use and disclose information will fall within one of the categories.

For Treatment

We may use health information about you to provide you with healthcare treatment and services. We may disclose health information about you to doctors, nurses, technicians, health students, volunteers or other personnel who are involved in taking care of you. They may work at our offices, at a hospital if you are hospitalized under our supervision, or at another doctor's office, lab, pharmacy, or other healthcare provider to whom we may refer you for consultation, to take x-rays, to perform lab tests, to have prescriptions filled, or for other treatment purposes. For example, a doctor treating you may need to know if you have diabetes because diabetes may slow the healing process. We may provide that information to a physician treating you at another institution.

For Payment

We may use and disclose health information about you so that the treatment and services you receive from us may be billed to and payment collected from you, an insurance company, a state Medicaid agency or a third party. For example, we may need to give your health insurance plan information about your office visit so your health plan will pay us or reimburse you for the visit. Alternatively, we may need to give your health information to the state Medicaid agency so that we may be reimbursed for providing services to you. In some instances, we may need to tell your health plan about a treatment you are going to receive to obtain prior approval or to determine whether your plan will cover the treatment.

For Healthcare Operations

We may use and disclose health information about you for operations of our healthcare practice. These uses and disclosures are necessary to run our practice and make sure that all of our patients receive quality care. For example, we may use health information to review our treatment and services and to evaluate the performance of our staff in caring for you. We may also combine health information about many patients to decide what additional services we should offer, what services are not needed, whether certain new treatments are effective, or to compare how we are doing with others and to see where we can make improvements. We may remove information that identifies you from this set of health information so others may use it to study healthcare delivery without learning who our specific patients are.

Fundraising Activities

We may use health information about you to contact you in an effort to raise money for our not-for-profit operations. Please let us know if you do not want us to contact you for such fundraising efforts.

As Required By Law

We will disclose health information about you when required to do so by federal, state, or local law.

To Avert a Serious Threat to Health or Safety

We may use and disclose health information about you when necessary to prevent a serious threat to your health and safety or the health and safety of the public or another person. Any disclosure, however, would only be to someone able to help prevent the threat.

Military and Veterans

If you are a member of the armed forces or are separated/discharged from military services, we may release health information about you as required by military command authorities or the Department of Veterans Affairs as may be applicable. We may also release health information about foreign military personnel to the appropriate foreign military authorities.

Workers' Compensation

We may release health information about you for workers' compensation or similar programs. These programs provide benefits for work-related injuries or illness.

Public Health Risks

We may disclose health information about you for public health activities. These activities generally include the following:

- To prevent or control disease, injury or disability
- To report births and deaths
- To report child abuse or neglect
- To report reactions to medications or problems with products

- To notify people of recalls of products they may be using
- To notify a person who may have been exposed to a disease or may be at risk for contracting or spreading a disease or condition
- To notify the appropriate government authority if we believe a patient has been the victim of abuse, neglect, or domestic violence. We will only make this disclosure if you agree or when required or authorized by law.

Health Oversight Activities

We may disclose health information to a health oversight agency for activities authorized by law. These oversight activities include, for example, audits, investigations, inspections, and licensure. These activities are necessary for the government to monitor the health care system, government programs, and compliance with civil rights laws.

Lawsuits and Disputes

If you are involved in a lawsuit or a dispute, we may disclose health information about you in response to an order issued by a court or administrative tribunal. We may also disclose health information about you in response to a subpoena, discovery request, or other lawful process by someone else involved in the dispute, but only after efforts have been made to tell you about the request and you have time to obtain an order protecting the information requested.

Law Enforcement

We may release health information if asked to do so by a law enforcement official:

- In response to a court order, subpoena, warrant, summons or similar process
- To identify or locate a suspect, fugitive, material witness, or missing person
- If you are the victim of a crime and we are unable to obtain your consent
- About a death we believe may be the result of criminal conduct
- In an instance of criminal conduct at our facility
- In emergency circumstances to report a crime; the location of the crime or victims; or the identity, description, or location of the person who committed the crime.

Such releases of information will be made only after efforts have been made to tell you about the request and you have time to obtain an order protecting the information requested.

Coroners, Health Examiners and Funeral Directors

We may release health information to a coroner or health examiner. This may be necessary, for example, to identify a deceased person or determine the cause of death. We may also release health information about patients to funeral directors as necessary to carry out their duties.

Inmates

If you are an inmate of a correctional institution or under the custody of a law enforcement official, we may release health information about you to the correctional institution or law enforcement official. This release would be necessary: (1) for the institution to provide you with healthcare; (2) to protect your health and safety or the health and safety of others; or (3) for the safety and security of the correctional institution.

Your Rights Regarding Health Information About You

You have the following rights regarding health information we maintain about you:

Right to Inspect and Copy

You have certain rights to inspect and copy health information that may be used to make decisions about your care. Usually, this includes health and billing records. This does not include psychotherapy notes.

To inspect and copy health information that may be used to make decisions about you, you must submit your request in writing on a form provided by us to: "The Privacy Official at Comprehensive Health Planned Parenthood of Kansas & Mid-Missouri". If you request a copy of your health information, we may charge a fee for the costs of locating, copying, mailing or other supplies and services associated with your request.

We may deny your request to inspect and copy in certain very limited circumstances. If you are denied access to health information, you may in certain instances request that the denial be reviewed. Another licensed healthcare professional chosen by our practice will review your request and the denial. The person conducting the review will not be the person who denied your initial request. We will comply with the outcome of the review.

Right to Amend

If you feel that health information we have about you is incorrect or incomplete, you may ask us to amend the information. You have the right to request an amendment for as long as we keep the information. To request an amendment, your request must be made in writing on a form provided by us and submitted to: "The Privacy Official at Comprehensive Health Planned Parenthood of Kansas & Mid-Missouri".

We may deny your request for an amendment if it is not the form provided by us and does not include a reason to support the request. In addition, we may deny your request if you ask us to amend information that:

- Was not created by us, unless the person or entity that created the information is no longer available to make the amendment
- Is not part of the health information kept by or for our practice
- Is not part of the information which you would be permitted to inspect and copy
- Is accurate and complete
- Any amendment we make to your health information will be disclosed to those with whom we disclose information as previously specified

Right to an Accounting of Disclosures

You have the right to request a list (accounting) of any disclosures of your health information we have made, except for uses and disclosures for treatment, payment, and health care operations, as previously described.

To request this list of disclosures, you must submit your request on a form that we will provide to you. Your request must state a time period that may not be longer than six years and may not include dates before April 14, 2003 [The compliance date of the Privacy Regulation]. The first list of disclosures you request within a 12-month period will be free. For additional lists, we may charge you for the costs of providing the list. We will notify you of the cost involved and you may choose to withdraw or modify your request at that time before any costs are incurred. We will mail you a list of disclosures in paper form within 30 days of your request, or notify you if we are unable to supply the list within that time period and by what date we can supply the list; but this date should not exceed a total of 60 days from the date you made the request.

Right to Request Restrictions

You have the right to request a restriction or limitation on the health information we use or disclose about you for treatment, payment, or health care operations. You also have the right to request a limit on the health information we disclose about you to someone who is involved in your care or the payment for your care. For example, you could ask that access to your health information be denied to a particular member of our workforce who is known to you personally.

While we will try to accommodate your request for restrictions, we are not required to do so if it is not feasible for us to ensure our compliance with law or we believe it will negatively impact the care we may provide you. If we do agree, we will comply with your request unless the information is needed to provide you emergency treatment. To request a restriction, you must make your request on a form that we will provide you. In your request, you must tell us what information you want to limit and to whom you want the limits to apply.

Right to Request Confidential Communications

You have the right to request that we communicate with you about health matters in a certain manner or at a certain location. For example, you can ask that we only contact you at work or by mail to a post office box. During our intake process, we will ask you how you wish to receive communications about your health care or for any other instructions on notifying you about your health information. We will accommodate all reasonable requests.

Right to a Paper Copy of This Notice

You have the right to obtain a paper copy of this Notice at any time upon request.

Minors And Persons With Guardians

Minors have all the rights outlined in this Notice with respect to health information relating to reproductive healthcare, except for abortion and in emergency situations or when the law requires reporting of abuse and neglect. In the case of abortion, if a parent provides consent to your abortion, the parent has all the rights outlined in this Notice, including the right to access the health information relating to abortion. However, if you obtain a judicial bypass of the consent requirement, you have the same rights as an adult with respect to health information relating to your abortion. If you are a minor or a person with a guardian obtaining healthcare that is not related to reproductive health, your parent or legal guardian may have the right to access your medical record and make certain decisions regarding the uses and disclosures of your health information.

Changes To This Notice

We reserve the right to change this Notice. We reserve the right to make the revised or changed Notice effective for health information we already have about you as well as any information we receive in the future. We will post a copy of the current Notice in our facility and on our website. The Notice contains the effective date on the first page.

Complaints

If you believe your privacy rights have been violated; you may file a complaint with us or with the Secretary of the Department of Health and Human Services. To file a complaint with us, contact: "The Privacy Official" at "Comprehensive Health Planned Parenthood of Kansas & Mid-Missouri." All complaints must be submitted in writing. **You will not be penalized for filing a complaint.**

Other Uses Of Health Information

Other uses and disclosures of health information not covered by this Notice or the laws that apply to us will be made only with your written permission. If you provide us permission to use or disclose health information about you, you may revoke that permission, in writing, at any time. If you revoke your permission, we will no longer use or disclose health information about you for the reasons covered by your written authorization. You understand that we are unable to take back any disclosures we have already made with your permission, and that we are required to retain the records of the care that we provided to you.

Acknowledgment Of Receipt Of Notice Of Health Information Privacy Practices

I HEREBY ACKNOWLEDGE receipt of Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri's NOTICE OF HEALTH INFORMATION PRIVACY PRACTICES. Please print your name, sign and date as indicated below:

Name: _____
(please print)

Signature: _____

Date: _____

(A copy of this acknowledgment will be kept in your patient file.)

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT

IN RE: INQUISITION Case No. 04-IQ-3

Pursuant to K.S.A. Chapter 22

SUBPOENA DUCES TECUM

TO: **COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD**
4401 W. 109th Street
Overland Park, KS 66211

Based upon the application and affidavits under oath filed by a duly authorized law enforcement officer of the State of Kansas, the Court finds that probable cause exists to believe that evidence of a crime or crimes may be located in the medical records identified below and located at the following address:

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD
4401 W. 109th Street
Overland Park, KS 66211

The medical records, subject to this order are identified as follows:

State Record Number	Provider Number	Patient ID
004478	81422	[redacted]
004479	81422	
004480	81422	
004481	81422	
004482	81422	
004483	81422	
004862	81422	
007037	81422	
007041	81422	
007042	81422	
007043	81422	
007044	81422	

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STATE'S EXHIBIT 7

007444	81422
007445	81422
007446	81422
007447	81422
007448	81422
007449	81422
008638	81422
008637	81422
008639	81422
008640	81422
008641	81422
008828	81422
008829	81422
009424	81422
009425	81422
009426	81422
009427	81422
011050	81422

You are commanded to produce the medical records listed above before Richard D. Anderson, Chief Judge of the District Court, at the Shawnee County Courthouse, 200 SE 7th St., in the City of Topeka, Kansas, County of Shawnee 66603, on the _____ day of October, 2004, at 9:00 o'clock a.m., and to testify on behalf of the State of Kansas in an inquisition now pending. Failure to comply with this subpoena may be deemed a contempt of the court.

You may make written objection to the production of any or all of the records listed above by serving such written objection upon Stephen D. Maxwell, Senior Assistant Attorney General, Criminal Division at 120 SW 10th Street, Memorial Building, Topeka, Kansas 66612, on or before September 24, 2004. If such

objection is made, the records need not be produced except upon order of the court, however such objection by the person will be heard on the _____day of October, 2004 at 9:00 am.

Instead of appearing at the time and place listed above, it is sufficient compliance with this subpoena if a custodian of the business records delivers to the Court, by mail or otherwise, the original of all the records described above and mails a copy of the Affidavit of Custodian of Business Records to Stephen D. Maxwell, Senior Assistant Attorney General, 120 SW 10th Street, Memorial Building, Topeka, Kansas 66612, within 14 days after receipt of this subpoena.

The original of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name and address of the witness and the date of this subpoena are clearly inscribed. If return of the originals is desired, the words "return requested" must be inscribed clearly on the sealed envelope or wrapper. The sealed envelope or wrapper shall be delivered to the court.

The records described in this subpoena shall be accompanied by the affidavit of a custodian of the records.

If the business has none of the records described in this subpoena, or only part thereof, the affidavit shall so state, and the custodian shall send only those records of which the custodian has custody. When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED pursuant to K.S.A. 22-3101 that this subpoena be served upon:

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD

4401 W. 109th Street

Overland Park, KS 66211

And that upon such service of this subpoena pursuant to K.S.A. 60-245a, such person and/or representative shall produce to this Court, the original of the medical records identified above. "Medical records" means any and all files, reports histories, charts, graphs, papers, documents, images whether electronic or otherwise, and / or computer files containing medical or patient care information regarding the patient identified above by Patient ID Number.

To insure that the confidentiality of the identity of the patient is maintained, such medical records obtained pursuant to this subpoena shall be deposited with this Court and shall be held pending further orders of this Court.

The existence of this subpoena and any records produced pursuant to such are to remain confidential and not to be disclosed to any other person or entity.

Failure to comply with this order may constitute contempt of this Court.

IT IS SO ORDERED.

_____

Date and Time

_____

Honorable Richard D. Anderson
Chief District Judge
Third Judicial District

Prepared by:

_____

Stephen D. Maxwell
Senior Assistant Attorney General
Criminal Division
Office of Attorney General Phill Kline

Petition to the District Court of Johnson County

The undersigned qualified electors of the **County of Johnson and State of Kansas** hereby request that the **10th District Court of Kansas also known as the District Court of Johnson County,** within 60 days after the filing of this petition, cause a grand jury to be summoned in the county to investigate alleged violations of law and to perform such other duties as may be authorized by law. While not limiting other authority of the grand jury, the grand jury shall investigate **Planned Parenthood of Kansas and Mid-Missouri Inc., commonly known as Planned Parenthood of Overland Park**, and all affiliated entities and persons for allegedly:

(1.) Performing, allowing to be performed, or colluding to perform illegal late term abortions,
(2.) Failing to report suspected child abuse, and suspected child sexual abuse,
(3.) Failing to follow the standard of care in providing medical advice or failure to conduct medical procedures as required by Kansas statute,
(4.) Providing false information in order to induce government action or inaction,
(5.) Harvesting and/or illegal trafficking in fetal tissue,
(6.) Failing to comply with parental consent requirements,
(7.) Failing to enforce the required 24 hour waiting period and other violations of Kansas Statutes:

Furthermore, it is the request of signers that the grand jury issue a report regarding same, as allowed by law and without identifying any patient, or the nature of the evidence reviewed by the 10th District Court of Kansas. The specification provided in this petition shall not be construed to limit the common law, statutory or case law authority of the grand jury in any fashion.

Wcv08495

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	PRINT NAME	SIGNATURE	ADDRESS	CITY/ZIP	PHONE # optional	Email address optional
1	Thomasine M Zahner	Thomasine M Zahner	924 N. Woodland	Olathe, Ks 66061	913 764 4137	
2	Debra S. Palcher	Debra S. Palcher	10717 W. 121st St.	Overland Pk. 66210	913-851-4031	
3	Nancy E. Huffman	Nancy E. Huffman	1337 Prince Edward Isl Circle	Olathe KS	913-393-1578	
4	Maria Hoover	Maria Hoover	1216 Leeview Cir.	Olathe KS 66061	913-768-1957	
5	Danette Goss	Danette Goss	1316 E 153 St	Olathe KS 66062	913-829-8234	
6	Victoria Diedesman		960 E. Pineview St.	Olathe KS 66061		
7	Victor Rivera		162740 156 Reserve	Olathe, Ks 66062	913-720-0982	
8	Patti Geckles	Patti Geckles	412 N. Pinon	Olathe, KS 66061	913-829-3451	
9	Katie Geckles	Katie Geckles	412 N Pinon	Olathe, KS 66061	913-829-3451	
10	JOSEPH W. GECKLES	Joseph W Geckles	412 N PINON	OLATHE, KS 66061	913-829-3451	
	Carrier's Name	Carrier's Signature				
	Gloria Adams	Gloria Adams	601 E. Loula	Olathe 66061	768-4323	

County of Johnson, State of Kansas. I, _____, have signed above as the carrier of this petition and do verify upon the oath that each of the signers on this petition is the genuine signature of the person whose name it purports to be and I believe that the statements in this petition are true.

Signature Gloria Adams

CLERK OF DISTRICT COURT
JOHNSON COUNTY, KS
2007 OCT 26 AM 10: 19

Life Is For Everyone Coalition

PLEASE MAIL SIGNATURES
BY OCTOBER 23, 2007
TO: 119 N. Parker, # 284, Olathe, KS 66061

LIFE COALTION INFO WEBSITES:
Concerned Women for America—KS.CWFA.org
OperationRescue.org
WomenInfluencingtheNation.Com
Lifepetition.com

PENGAD 800-631-6989

STATE'S EXHIBIT
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