

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 MOTION TO ENFORCE GRAND JURY'S SUBPOENA AND
ORIGINAL CITIZEN PETITION**

COMES NOW the State of Kansas by and through District Attorney Phill Kline and moves this honorable Court to enforce the Grand Jury's subpoena of January 7th, 2008.

In support of said motion the State argues that:

1. The Grand Jury issued a subpoena on January 7th, 2008, ordering that Planned Parenthood Comprehensive Health be ordered to produce 16 patient records.
2. The issuance of subpoenas is set forth in Kansas Statute, K.S.A. 22-3008(1) which states "*Whenever required by a grand jury, its presiding juror or the prosecuting attorney, the clerk of the court shall issue subpoenas and other process to bring witnesses to testify before the grand jury.*"
3. Enforcement of subpoenas are also called for in K.S.A. 22-3008(2) which states: "*If any witness duly summoned to appear and testify before a grand jury fails or refuses to obey, compulsory process shall be issued...and the court may punish the delinquent in the same manner and upon the same proceedings as provided by law for disobedience of a subpoena issued out of the court in other cases.*"

CLERK OF DISTRICT COURT
JOHNSON COUNTY, KS

2008 FEB 26 PM 4: 26

4. The issuing and enforcing of subpoenas is not only provided for in Kansas statute, but has also been carried out by this Court during previous grand jury proceedings.
5. In 2007 a Grand Jury was empanelled by citizen petition to investigate obscenity.
6. Said Grand Jury, 07CV3918, was presided over by Judge Moriarty.
7. Said Grand Jury was extremely aggressive in its investigative duties.
8. Said Grand Jury issued 39 indictments and heard testimony from over 45 witnesses concerning those indictments and issued various subpoenas to the targets of those investigations.
9. Kansas statutes and past experience in this very Court demonstrate that if a Grand Jury is to be successful in its mission, and effectively complete its investigation, it must initiate an investigation by issuing subpoenas, obtaining evidence from those subpoenas, and obtaining sworn testimony from witnesses.
10. This Grand Jury was convened on December 10, 2007 and was commissioned to investigate Planned Parenthood for 90 days per K.S.A. 22-3013.
11. The Grand Jury's 90 day period of time for investigation is set to expire on March 9, 2008.
12. If the Grand Jury had met for investigation on every business day between December 10, 2007 and March 9, 2008 they would have worked a mere 66 days investigating.
13. This Grand Jury has convened no more than two business days each week, did not meet at all over the Christmas Holiday period, and recessed for another 21 days

while waiting for compliance with the only subpoena issued thus far to Planned Parenthood.

14. According Johnson County Sheriff's records, the Grand Jury has only convened 11 days as of this filing.
15. Under such short time constraints, subpoenas must be complied with in a timely manner. Kansas law expresses concern for the short duration of a grand jury; in K.S.A. 22-3009 it expressly orders any witness needing an attorney to comply with the Grand Jury's subpoena within three days.
16. To date, 50 days after the issuing of the subpoena, this Court still has not ordered that it be complied with. Due to this delay, the Grand Jury has been prevented from obtaining evidence which could serve as the basis for its investigation. This investigation could have lead to addition substantive evidence, documents, and witnesses based upon the evidence to be found only in those documents.
17. No grand jury can complete a well reasoned investigation in so little time without subpoenas, directed at the target of the investigation, being enforced by the Court.
18. Many statutory irregularities have occurred surrounding this investigation and in particular the enforcement of this subpoena.
19. On Friday, February 22nd, 2008, Assistant District Attorney Steve Maxwell objected in open court to an order negotiated between Planned Parenthood and the attorneys for the Grand Jury, Larry McClain and Rick Merker. Maxwell specifically objected to onerous provisions within that order, including conditions which could place the Grand Jurors under civil and criminal liability, in contradiction to the immunity already granted to members of a grand jury.

Additionally, Assistant District Attorney Maxwell objected to provisions in the agreement which would tie the hands of the District Attorney's Office in the prosecution of an existing criminal case against Planned Parenthood. Furthermore, Maxwell argued this order would prevent the Grand Jury from using these documents to indict and subsequently prosecute Planned Parenthood.

20. At said hearing, Assistant District Attorney Maxwell asked this Court to ignore Planned Parenthood's proposed protective order, which was, disturbingly, defended by the Grand Jury's own counsel, Rick Merker and Larry McClain. Merker stated during the hearing that he had only shown the agreement to the presiding juror before presenting it to the Court for signature. Based upon Merker's testimony, the Grand Jury as a whole had not seen the protective order before Special Counsel presented it to the Court.

21. It was testified in the same hearing that once the Grand Jury had the opportunity to view the already signed protective order, they unanimously requested that they receive the documents without the restrictions enumerated in the protective order. This Court subsequently ordered that there be no constraints ordered against the persons of the Grand Jury and the entire protective order be voided and placed under seal.

22. Planned Parenthood, the subject of the Grand Jury's criminal investigation, was permitted to provide only documents of its own choosing as opposed to complying with the subpoena issued by the Grand Jury. The production of documents was not only insufficient, but also represented a bizarre occurrence

where the subject of an investigation was consulted to determine the course of the investigation.

23. The Grand Jury's Subpoena called for the production of 16 patient records, to include *"date of birth, any dates relating to last menses, dates and times of medical procedures and consultations, date and times of any required notification, and compliance with any required waiting period."* The subpoena also ordered Planned Parenthood to redact any patient identifying information, specifically *"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 such patient identifying information in insurance materials."*

24. On February 25th, 2008, 49 days after the subpoena was issued, Planned Parenthood still had not complied with the subpoena the Grand Jury issued, and the Court had still refrained from ordering them to comply. The information Planned Parenthood provided lacked the specific information requested in the subpoena which is necessary to effectively pursue an investigation in this matter. Full compliance would provide the opportunity for a proper investigation, which would include the subpoena of additional documents and witnesses.

25. The insufficiency of the document production, the unnecessary delay in the complete production of documents, and the attempts to place the Grand Jurors under civil and criminal liability were not the only irregularities concerning the documents under subpoena.

26. On February 25, 2007, Assistant District Attorney John Christopher Pryor objected to the Court that the counsel for the Grand Jury, Larry McClain, had engaged in a conversation, via telephone, with an attorney for Planned Parenthood. Pryor informed the Court that this had occurred during the time the Grand Jury was in session. Pryor objected that McClain's conversation concerned the investigation of the Grand Jury. K.S.A. 22-3012 calls for absolute secrecy concerning the investigation of the Grand Jury. Pryor also objected, that by Planned Parenthood providing responses through counsel McClain, McClain was in effect acting as a witness by providing Planned Parenthood's testimony while neither he nor Planned Parenthood were under oath. As counsel he was not statutorily permitted to provide testimony to the Grand Jury pursuant to K.S.A. 22-3008 and K.S.A. 22-3010.

27. Assistant District Attorney Pryor objected that it was absurd to alert Planned Parenthood of the Grand Jury's investigative focus through McClain's direct phone call to Planned Parenthood. Such actions by the special counsel are outrageous and undermine the duty of the Grand Jury to conduct an independent investigation. Judge Moriarty ordered that should any further need to contact Planned Parenthood arise, the District Attorney's Office and the Court should be consulted.

28. The Grand Jury statute K.S.A. 22-3001 *et seq.*, provides a process of investigation. The Grand Jury is permitted to subpoena records. It can also subpoena the custodian of records to provide sworn testimony concerning those documents. The Grand Jury may also call in the suspects connected with possible

illegal activity and provide them immunity from prosecution. Finally, all the proceedings are to be kept secret. For one reason or another, the Grand Jury has not been able to fully avail itself of the investigative process envisioned by Kansas law.

29. Kansas law does not provide counsel for the Grand Jury to telephone the subject of the investigation to discuss the investigation. On the contrary, such behavior under K.S.A. 22-3012 is strictly forbidden.
30. The issue of grand jury secrecy pursuant to K.S.A. 22-3012 continues to be a matter of concern for the Grand Jury as evidenced by its questions to the Court on the afternoon of February 25, 2008. It should be noted that the proceedings and investigations of the Grand Jury continue to be covered by this statute concerning confidentiality even after the end of the Grand Jury's term, whether or not an indictment is issued. (See Attorney General Opinion 95-20). K.S.A. 22-3012 states "*...Otherwise a juror, attorney, interpreter, reporter...may disclose matters occurring before the grand jury only when so directed as by the court preliminarily to or in connection with a judicial proceeding or at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.*"
31. K.S.A. 22-3012 leaves no room for doubt. Attorneys are not permitted to "chit chat" with the subjects of investigation during proceedings concerning those proceedings, and the jurors are not permitted to appear on "Oprah" or otherwise discuss grand jury proceedings with the media or public.

32. For the Grand Jury to fulfill its statutory mandate, and its obligations to the citizens of Johnson County, the subpoena must be enforced by this Court, and the Grand Jury must pursue all leads and evidence "cognizable by it," to include the examination of records kept by Planned Parenthood which may resolve the questions set forth in the original citizen petition.

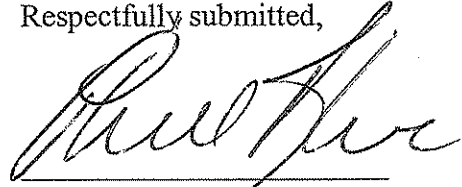
CONCLUSION

To date, Planned Parenthood has refused to comply with first subpoena issued to it by the Grand Jury. As well, the Grand Jury continues to wait for the Court to enforce the very first subpoena issued to Planned Parenthood, which is the main target of the investigation demanded by the residents of Johnson County. In addition to this, there have been serious irregularities of grand jury secrecy and enforcement of subpoenas. The interests of justice are not served when the target of an investigation can evade a subpoena that sits on "solid legal ground," and the Court fails to enforce that subpoena.

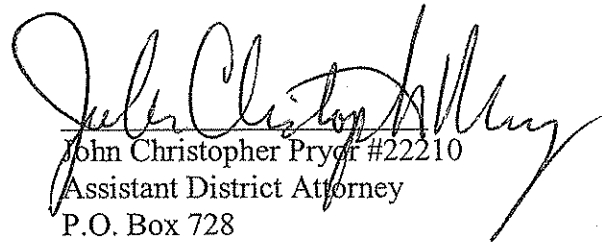
At this point, it would be improper for the Grand Jury to issue an indictment against Planned Parenthood without the Grand Jury's subpoena being fully complied with and without the necessary supplemental investigation which would naturally follow. If the Grand Jury is prevented from viewing the documents, testimony and other evidence, it cannot in good conscience come to any conclusion one way or the other.

WHEREFORE, the State respectfully requests that the Court grant its motion and order the subpoena enforced and that the grand jury be clearly directed to carry out its investigative functions pursuant to K.S.A. 22-3001 *et seq.*

Respectfully submitted,



Phill Kline #13249
District Attorney
P.O. Box 728
Olathe, Kansas 66051-0728



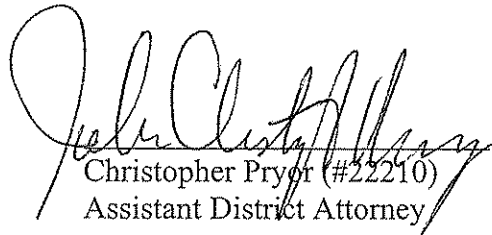
John Christopher Pryor #22210
Assistant District Attorney
P.O. Box 728
Olathe, Kansas 66051-0728

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 on the 26th day of February, 2008 to the following parties:

To: Pedro L. Irigonegaray (#08079)
Robert V. Eye (#10689)
Elizabeth R. Herbert (#9420)
Irigonegaray & Associates
1535 S.W. 29th Street
Topeka, KS 66611
Fax 785-267-9458

Robert A. Stopperan (KS #17524)
Douglas N. Ghertner (MO #22086)
Slagle, Bernard & Gorman, P.C.
4600 Madison Avenue, Suite 600
Kansas City, Missouri 64112-3031
Fax: 816-561-4498


Christopher Pryor (#22210)
Assistant District Attorney