IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-04-CR-W-FJG
	)	
CHRISTOPHER L. ELDER,	)	
	)	
Defendant.	)	

DEFENDANT ELDER'S ANSWER TO THE TEXAS MEDCIAL BOARD'S MOTION TO QUASH A SUBPOENA SERVED ON THE BOARD REQUIRING PRODUCTION OF WITNESS ADMISSIONS WITH DEFENSE SUGGESTIONS IN SUPPORT

The Attorney General for the State of Texas acting on behalf of and representing the Texas Medical Board (hereinafter TMB) has filed a motion to quash a duly served trial *duces tecum* subpoena served on the custodian of records of that board requesting the production at trial of certain specific records contained within the files of that Board. See motion at doc.183.[1] TMB Counsel has also requested in

[1] As a convenience to the Court and the Parties, references to various docket filings may be quickly and readily viewed by clicking on the docket number that appears as a hyperlink in this pleading. This will link to an online copy of the filed document without necessity of going through the PACER system.

his pleading that he be allowed to appear by telephone in the event a hearing is required on this motion.

Hearing Issue: Defendant Elder has no objection to TMB counsel's appearance by telephonic means. Elder does request an immediate hearing at the earliest possible date to take up this matter, given the distances and logistics involved and the time needed for the court to rule the matter.

Defendant Elder is scheduled for trial on April 27, 2009 in the Western District of Missouri. The current trial was moved from its scheduled January 2009 date in response to a continuance motion filed by the defense. See Order granting the continuance, doc.172.

Prior to the continuance being granted, defendant Elder caused a *duces tecum* subpoena to be served on the TMB requesting appearance by the custodian on the scheduled January trial date. That subpoena directed production of certain specific records presently in the custody of the Texas Medical Board. (see text of subpoena at page 2, TMB pleading). The actual subpoena is also filed as document doc 183-2 as an attachement to TMB's pleading. The subpoena was served by a licensed Texas Process server during October, 2008 and was accompanied by a cover letter dated October 8, 2008 which is the second page of document doc 183-2 filed by TMB. Pursuant to Rule 17, FRCrP, the defendant timely informed TMB of the trial continuance, the new trial date, and the fact that the subpoena remained in full

force and effect. TBM does not now assert any defect in the service of process or the notice provisions of Rule 17, Federal Rules of Criminal Procedure, but instead argues that the subpoena is "unreasonable or oppressive" and that it seeks privileged information.

ANY CLAIM OF STATE PRIVILEGE MUST YIELD TO DEFENDANT'S DUE PROCESS RIGHT TO ACCESS TO EXCULPATORY AND IMEACHING MATERIALS

Privilege: Rule 5, Federal Rules of Evidence governs privilege. The rule provides that privilege in a criminal proceeding is to be determined by federal common law. *Newton v. Kemnia*, 354 F.3d 776 (8th Cir. 2004).

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the defendant, who had been convicted of child molestation, had sought to have records of a state protective services agency responsible for investigating cases of child mistreatment disclosed during pretrial discovery. Pursuant to a Pennsylvania statute, the records were subject to a qualified confidentiality. Id. at 57-58. Applying the rule of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that, when state law provides such a qualified confidentiality, a criminal defendant has the right, under the due process clause of the fourteenth amendment, to have the records reviewed *in camera* by the judicial authority to determine whether they contain potentially exculpatory information. Id. at 57-58. The court made it clear that "the Confrontation Clause

provides two types of protection for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." Id. at 51.

Under *Brady* evidence sought by the defense must be "material," and evidence is material on appeal after the fact if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. See *U.S. v. Sheffield*, 55 F.3d 341 (8th Cir. 1995), citing and relying on *Pennsylvania v. Ritchie, supra.* Also see *Newton v. Kemna*, 354 F.3d 776 (8th Cir. 2004). It is clear that a state privilege must yield to a criminal defendant's 5th, 6th and 14th amendment due process rights and right of confrontation.

In *Exline v. Gunter*, 985 F.2d 487 (10th Cir. 1993), a federal *habeas* proceedings, the Court, citing *Ritchie,* forced the state trial court to conduct an *in camera* review of privileged state records to determine compliance with federal constitutional law. "The district court properly concluded that Exline's rights under the due process clause were violated by the trial court's failure to review the [privileged] DDS records in camera." Id. *Gunter* also notes:

> A similar result was reached by this Court in *Hopkinson v. Shillinger*, 866 F.2d 1185, 1220-1221 (10th Cir. 1989) where we held that although a defendant could not point to specific exculpatory information in records he had never seen, he was

> entitled to an in camera inspection of those records under *Ritchie*.

Emphasis added.

Defendant believes that TMB's argument that the sought after records are privileged is without merit in light of the aforesaid authority. Indeed, as will be more fully discussed below, notwithstanding assertions by TMB to the contrary, defendant has carefully crafted his subpoena such that it requests only admissions by Doctor Okose, both direct and vicarious. The subpoena by its very language excludes any demand for production of what might be viewed as deliberative work product of the TMB not subject to disclosure under *Ritchie*. See *U.S. v. Fernandez*, 231 F.3d 1240 (9th Cir. 2000) (Department of Justice internal memoranda on decision to approve death penalty certification is privileged).

THE SUBPOENA IS CLEARLY NOT UNREASONABLE, OPPROSSIVE, OR OVERBROAD

Counsel for TMB notes that a prior request for a Rule 17(c) pre-production motion was filed by Defendant Elder on August 20, 2008. This is indeed true. See doc.88. Defendant Elder in that pleading provided valid reasons in the motion as to why production of certain confidential TMB files on Okose were necessary to the defense of this case and those arguments and factual assertions are re-alleged here and incorporated herein by reference. The proposed language in the prior motion requesting a pre-production order was:

> Provide all books, records, documents, and information contained in the public files and non-public investigate files pertaining to Doctor Peter Okose assembled and compiled in connection with the investigation of the Doctor because of alleged improper conduct by the Doctor.

This and a number of other issues were taken up on September 24, 2009 at a hearing before the Magistrate Judge. The court thereafter entered an Order, (Doc.120), which stated *inter alia*:

> ORDERED that the Motion Requesting That the Court Issue a Subpoena Pursuant to Rule 17(c) to the Texas Medical Board Directing Production of Certain Files That Are Relevant and Necessary to Defendant Elder's Defense (doc #88) is denied as being overbroad. Defendant Elder may refile a request for a Rule 17(c) subpoena that is more narrowly tailored.

It is counsel's recollection that when the issue of the subpoena was discussed at the hearing, undersigned counsel readily conceded that the language was fairly broad and agreed that it should be amended. Rather than burden the Court with yet an additional motion upon which to rule, counsel then simply modified the language to focus strictly on statements made by Okose to the TMB, orally or in writing, as well as statements made to the board, orally or in writing, by any third parties acting on his behalf which would constitute vicarious admissions. See *American Eagle*

Insurance Company v. Thompson, 85 F.3d 327 (8th Cir. 1996) (vicarious admissions as evidence). The subpoena, doc 183-2, was then served on the TMB Custodian of Records directing that individual to appear for testimony with the records in hand on the date of the scheduled January trial. As noted, above, proper notice was thereafter provided to TMB as to the new trial date and the fact that the subpoena remains in effect.

The net result of the modification of the language in the current subpoena is to significantly narrow the originally proposed request so as to call for production only of statements directly attributable to Okose, thereby avoiding any claim that defendant Elder is attempting to intrude on the internal administrative decision making function of the TMB. See *U.S. v. Fernandez* (work product is privileged information). And it is of course worthwhile to note that TMB does not in fact directly make any claim that defendant is seeking protected work product.

On September 9, 2008, defendant's private investigator was able to obtain a telephone interview with Doctor Okose. See Okose Interview, Appendix A to this pleading. This interview took place approximately three weeks after defendant filed his original request for a Rule 17(c) pre-production subpoena. During the interview Okose was evasive and provided information that was contrary to information contained in other discovery provided by the government, further affirming the defense need for the requested information. As noted, Okose has been and remains a

center piece of this case and is very likely the one responsible for criminal acts for which Doctor Christopher Elder has been charged.

It is telling that in a response to a motion *in limine* filed by defendant Elder seeking to preclude certain testimony as to street drug dealing by a Houston Police Office that the government saw fit to gratuitously discuss Okose's involvement in the case in detail. Parenthetically, this is information that the prosecution contends was only recently developed through an additional interview which has yet to be turned over to the defense in spite of promises it would be forthcoming following the filing of the response. At any rate, in that pleading, doc.177, the prosecutor states:

> In about January 2005, Elder left STWC. The prescriptions sent to Belton switched from Elder to Okose, and Solomon asked Rostie to mail the boxes of filled prescriptions to Ascensia rather than to STWC. In fact, Okose wrote thousands of prescriptions that went through Solomon's hands. Some were filled in Belton, many more were filled by the Ascensia pharmacy. Ascensia had very little walk-in business, nonetheless, during this time period Ascensia was among the sales leaders for Hydrocodone for all pharmacies in the State of Texas.
>
> The prescriptions written by Okose used real patient information from the thousands of patients seen at Okose's clinic. However, Okose's patients received their prescriptions in hand from Okose's clinic and had them filled at pharmacies

> in the Houston area. The prescriptions written by Okose for The Medicine Shoppe and Ascencia never went to an actual patient.
>
> Ascensia employees filled the Okose narcotic prescriptions and placed the filled prescriptions in bags on a shelf at Ascensia. At the end of the day, Delmon Johnson gathered the drugs from the shelf and placed them in another, larger, container, such as a garbage bag. He then placed the drugs in his car. Ostensibly, Delmon Johnson was delivering the drugs to the Okose clinic. In fact, the Okose clinic did not distribute drugs directly to patients.

See doc.177 , Government's response to a motion *in limine* to preclude certain testimony, at page four.

Counsel for TMB cites *United states v. McGrady*, 508 F.2d 13 (8th Cir. 1974), for the proposition that "[a] subpoena issued pursuant to rule 17 may be quashed if it seeks irrelevant or privileged matters." The case does state this as a black letter principle, citing *Bowman Diary Co. v. United States*, 341 U.S. 214 (1951), both cases which of course predate the holding squarely dealing with privilege in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), discussed previously in this pleading. Moreover, in *McGrady*, the Court notes that the third party who received the subpoena provided "great quantities" of material and withheld only a small portion that was deemed "cumulative and sensitive." Noting that a decision whether to quash is one of

discretion to be exercised by the trial court, the Court found that "non-privileged" materials may not be withheld in a criminal case simply because they are "cumulative and sensitive." It would seem that *McGrady* actually is a holding favorable to defendant Elder, particularly when viewed in conjunction with the holding in *Ritchie,* as to priviledge claims.

Counsel for TBM pretty much sums up his entire argument at page four of his pleading when he argues, "[t]he trial subpoena is unreasonable and should be quashed in accordance with FRCRP 17(c)(2), because it is not limited in scope, nor has Elder established that the subpoenaed categories of material are relevant to the prosecution against him or any defense to that prosecution." As stated before, the language of the current subpoena is severely restricted and seeks only statements made by Okose to the board, directly or vicariously. To argue that this is not limited in scope borders on the absurd. For an example of what is really "overbroad" and grounds to quash a subpoena, the Court need only look at the information sought by the government in *In Re Grand Jury Proceedings*, 41 F.3d 377 (8th Cir. 1994). In the latter case the IRS sought to obtain the following which the 8th Circuit deemed to be overbroad:

> [o]riginal records of Doye J. [sic] Bayird and Judy L. Bayird, and/or any business entity they have owned an interest in, which includes but is not limited to notes, letters, agreements, contracts, correspondence, schedules, workpapers, summaries,

> computer printouts, ledgers, journals, bank records (cancelled checks, statements, and deposits slips), loan applications, financial statements, contracts, recap sheets, car invoices, sales summaries, and any other documents regarding financial transactions for the periods of 1989, 1990, 1991, and 1992.

Also see *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906), the earliest case counsel was able to find where a subpoena was deemed overbroad. *Henkel* sought production in similar sweeping language of all the records of MacAndrews & Forbes Company found in their office. The material sought and the language condemned in these cases is of course in sharp and striking contrast to that which defendant Elder seeks from the TMB.

Defendant concedes that there are times when a Rule 17(c) subpoena may be properly quashed if it is nothing more that a bald fishing expedition. *United States v. Hardy*, 224 F.3d 752 (8th Cir. 2000). *Hardy* also holds however that while the Rule is not intended to be a supplemental discovery Rule that broadens Rule 16, FRCrP, "evidentiary materials" may be subpoenaed pursuant to the Rule if there is "a good-faith effort[] made to obtain evidence." Id. at 219-20. In order to gain access to said materials, the moving party need only show that the subpoenaed document (1) is relevant, (2) is admissible, and (3) has been requested with adequate specificity. Also See *United States v. Nixon*, 418 U.S. 683, 700 (1974). And of course at this point defendant is not conducting discovery – he is demanding the

appearance of an essential witness, the TMB Custodian, to appear at trial and be prepared to discuss the requested records and authenticate them for use as evidence in court.

Defendant Elder has made it very clear that he will call Okose as a witness. Defendant's investigator has interviewed him and the investigative files and government pleadings are replete with references to acts by Okose that are directly exculpatory to Elder. Counsel has a strong good faith belief that Okose has made written and oral admissions that are part of the TMB investigative file. These statements attributable to Okose will be useful to Elder to directly establish his innocence to the charged conduct and will provide the jury with a reasonable alternative explanation as to why Elder's testimony is believable and credible.

Moreover, while Elder fully intends to call Okose as a witness, there is no assurance that Okose will not at the eleventh hour attempt to shield himself with Fifth Amendment claims. While he informed Doctor Elder's investigator that he does not presently have counsel, the government has not been reluctant to characterize him as someone who will eventually face possible indictment. Inasmuch as statements made by Okose, a government alleged co-conspirator, were made in during the course of the charged conspiracy, and in furtherance of it, insofar as he was attempting to deflect further investigation and retain his license, such statements will be admissible as direct evidence of a key relevant witness under

various exceptions to the hearsay rule, including but not limited to co-conspirator hearsay and admissions against interest rules whether he is available or not.

The information counsel seeks is useful both as direct substantive evidence of innocence of Doctor Elder and for impeachment of Doctor Okose and other government witnesses in the case. A defendant is always entitled to exculpatory information as a matter of due process. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). And the rule in *Brady* is not limited to strictly evidence of innocence – it also applies to impeachment evidence. See quote from *Exline v. Gunter*, 985 F.2d 487 (10th Cir. 1993) at p. 4, *supra*. Defendant has the absolute right to call Okose as a defense witness and assail his credibility and demonstrate to the jury in the process that he is the likely guilty physician instead of defendant Elder (if indeed there were technical criminal acts by any physicians involved in this investigation, a matter itself that is in dispute). It is well established that a defendant in a federal criminal trial may impeach his own witness. See Rules 607 and 613, Federal Rules of Evidence and *Untied States v. Buffalo*, 358 F.3d 519 (8th Cir. 2004). The use of the requested material is highly relevant to the defense of this case and will serve the dual purpose of substantive evidence of innocence as well as strong impeachment evidence of Okose and other government witnesses including defendants Martin and Rostie.

In summary, the materials sought are direct evidence of Doctor Elder's innocence and will also be useful for other evidentiary purposes. The subpoena is

well tailored and narrow in scope and will likely only require the TMB to expend a short amount of time copying a single file at very small expense to TMB. The Doctor has been identified by name and license number and the subpoena clearly identifies specific dates that are in issue.

ALTERNATIVE PROCEDURES AND *IN CAMERA* INSPECTION

Defendant believes that as an absolute minimum this Court must Order TMB to produce the file for *in camera* inspection. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), *supra*. Counsel has informally discussed with Counsel for TMB the use of a protective order in the event the materials are made available to the defense. Counsel has no problem with an agreement whereby the records would remain in Counsel's sole possession, with the understanding that the contents of the file may be shown only to and discussed with Doctor Elder and other defense team members and perhaps Doctor Okose himself if he is willing. Counsel will agree to treat the records as sensitive and confidential in all other respects until it becomes necessary to actually use the materials in a court proceeding.

CONCLUSION

Defendant does not believe that the TMB has provided any legal basis for this Court to grant the motion to quash. Defendant submits that he, on the other hand, has clearly demonstrated by this pleading and his prior Rule 17(c) motion, (doc.88), that he is entitled to production of the subpoenaed materials.

WHEREFORE, defendant moves the Court to deny TMB's motion to quash or alternatively order TMB to produce the materials forthwith for in camera inspection and a determination by the Court as to their relevancy to the defense.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System on *Thursday, February 19, 2009.*

/s/
JOHN R. OSGOOD