

IN THE SUPREME COURT OF KANSAS

JANE DOE, ANN ROE, SARAH COE,)
and PAULA POE on behalf of themselves)
and similarly situated patients,)

Petitioners,)

vs.)

Original Action No. 08-99972

HON. MICHAEL CORRIGAN,)
PRESIDING JUDGE, and HON.)
PAUL BUCHANAN, ASSIGNED)
SENIOR JUDGE, both of THE)
EIGHTEENTH JUDICIAL)
DISTRICT COURT, SEDGWICK)
COUNTY, KANSAS,)

Respondents.)

AMENDED PETITION FOR WRIT OF MANDAMUS

Come now Petitioners Jane Doe, Ann Roe, Sarah Coe and Paula Poe¹ on behalf of themselves and similarly situated patients, through undersigned counsel, and pursuant to Supreme Court Rule 9.01, seeking mandamus from this Court directing Respondents to quash the subpoenas duces tecum served on Women's Health Care Services, P.A. ("WHCS") on January 22, 2008 and January 23, 2008 ("WHCS subpoenas"). These subpoenas, which were issued by a citizen-convened grand jury, seek to obtain from Dr. George Tiller's practice the medical records of *all* patients, including Petitioners here, who sought abortion services between July 1, 2003 and January 18, 2008, and whose fetus was determined to be 22 weeks or more, regardless of whether the women actually obtained an abortion. Appendix ("App.") at 7-10. Petitioners Doe and Roe moved the district court to quash the WHCS subpoenas, but on January 30, 2008, Respondents denied the motion. App. at 81-82.

¹ Petitioners have filed this Petition under pseudonyms in order to protect their identities, preserve their privacy rights, and shield themselves against potential harassment and violence.

Petitioners further seek mandamus from this Court directing Respondents to quash the subpoena duces tecum issued January 31, 2008 by the citizen-convened grand jury to the office of the Attorney General (“AG subpoena”). Supplemental Appendix (“Supp. App.”) at 1. That subpoena seeks to obtain copies of patient medical records acquired by the Attorney General’s office from WHCS during a prior inquisition. Those records are a subset of the larger set of patient records sought directly from WHCS via the WHCS subpoenas. The Attorney General moved to quash the AG subpoena on February 12, 2008, but Respondents denied that motion on February 14, 2008. Supp. App. at 11. Petitioners, whose private medical records are at risk of disclosure under the WHCS and AG subpoenas (collectively, “subpoenas”), state the following in support of their petition:

JURISDICTION AND PARTIES

1. This is an original action for Mandamus pursuant to the Kansas Constitution Article 3, § 3; K.S.A. § 60-801 *et seq.*; and Supreme Court Rule 9.01. Petitioners are filing herewith a Memorandum of Points and Authorities, an appendix, and a supplemental appendix containing the documentary evidence and relevant pleadings from the lower court.

2. The challenged subpoenas were issued by a grand jury convened pursuant to a petition drive led by the anti-choice organization, Kansans for Life (“KFL”), to investigate Dr. George Tiller.

3. Dr. Tiller is the Medical Director of Women’s Health Care Services, P.A. (“WHCS”), the health care entity to which the WHCS subpoenas are directed. Dr. Tiller and WHCS moved to quash the WHCS subpoenas in the court below, and Dr. Tiller and WHCS are petitioners in a related action for mandamus, *George R. Tiller, M.D. et al. v. Hon. Michael Corrigan, et al*, No. 08-99,951.

4. Stephen Six is the Attorney General of Kansas, and his office was served with the AG subpoena. Mr. Six moved to quash the AG subpoena in the court below, and Mr. Six is the petitioner in a related action for mandamus, *Stephen Six v. Hon. Michael Corrigan et al*, No. 08-100042.

5. Petitioners Doe, Roe, Coe and Poe are among the approximately 2,000 women who have sought abortion services at WHCS from Dr. Tiller and whose medical records are sought by the grand jury pursuant to the WHCS subpoenas. Doe, Roe, Coe and Poe file this action on behalf of themselves and all other similarly situated patients (“patients”) in order to protect their private medical information from the profound and unjustified intrusions that will occur if the subpoenas are not quashed. Petitioners Doe and Roe moved to quash the WHCS subpoenas in the court below.²

6. Respondent Honorable Michael Corrigan is the Chief District Judge of the Eighteenth Judicial District, District Court of Sedgwick County, Kansas. Respondent Honorable Paul Buchanan is a Senior District Court Judge of the Eighteenth Judicial District, District Court of Sedgwick County, Kansas, and he is assigned to oversee the grand jury that issued the subpoenas. Respondents may be served at the Sedgwick County Courthouse, 501 North Main Street, Wichita, Kansas, 67202. Respondents ordered WHCS and the Attorney General to comply with the subpoenas, denying motions to quash filed by the patients, Dr. Tiller and WHCS, and the Attorney General.

7. Petitioners have standing to seek to quash the grand jury subpoenas because their privacy rights, interests and privileges will be violated if the medical records are produced to the

² Doe and Roe were joined in their motion to quash by Mary Moe. Mary Moe is not included as a petitioner in this mandamus action because subsequent to the denial of Petitioners’ motion to quash, Petitioners’ counsel learned of facts that indicate that Mary Moe’s medical records fall outside the scope of the subpoena. Those facts do not alter the veracity of Mary Moe’s affidavit in any way, and her affidavit is cited herein to illustrate the privacy expectations and concerns of abortion patients of WHCS.

grand jury. See *In re Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d 487, 490 (5th Cir. 1998) (“A third party has standing to challenge a grand jury subpoena where the third party has a claim of privilege respecting information or materials sought by the subpoena.”); *In re Grand Jury*, 111 F.3d 1066, 1073-75 (3d Cir. 1997) (a third party has standing to quash a grand jury subpoena if the grounds for the motion are assertion of a privilege); see also *Jones v. Bordman*, 243 Kan. 444, 451, 759 P.2d 953, 959-60 (1988) (a party having valid grounds to oppose a subpoena has standing to do so, even if not the party served with subpoena); *Turner & Boisseau, Chartered v. Kansas State Bd. of Healing Arts*, 26 Kan. App. 2d 36, 38, 978 P.2d 288, 289 (Ct. App. 1998) (discussing patient’s successful motion to quash subpoena served on her doctor for her medical records).

8. Petitioners have standing to assert the interests not only of themselves but of other similarly situated patients. Petitioners may assert the rights of patients not before the court if their relationship to those patients is such that petitioners are “fully, or very nearly, as effective a proponent of the right” and “the ability of the third party to assert [her] own right” is impeded. *Singleton v. Wulff*, 428 U.S. 106, 115-16 (1976). “[M]ore important than the nature of the relationship between the litigant and those whose rights [s]he seeks to assert is the impact of the litigation on the third-party interests.” *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972). Here petitioners are “fully, or very nearly, as effective” in asserting the rights of the patients not before the court as the other patients themselves because their privacy and privilege interests are identical. In addition, the impact of the subpoenas on the rights of the patients not before the court is both significant and irremediable. Moreover, the impediments to the ability of the other patients to assert their own rights, including lack of knowledge that the records are subject to subpoena, and fear of loss of confidentiality should they come forward, amount to “genuine obstacles,” to their ability to assert their own rights. See, *Singleton*, 428 U.S. at 115-116 (when

“genuine obstacle” exists to the third party’s assertion of rights, “the party who is in court becomes by default the right’s best available proponent”).

9. Respondents each hold a public office and possess corresponding duties and responsibilities under Kansas law, including the obligation to carry out their functions in accordance with the individual rights and privileges guaranteed by the laws of Kansas and the constitutions of Kansas and the United States.

10. Petitioners seek to compel Respondents to perform their public duties and responsibilities because doing so will compel them to quash and/or significantly limit the subpoenas. Mandamus is appropriate here because if the subpoenas are not quashed and/or significantly limited, Petitioners’ privacy rights and interests will be violated and Petitioners will be irreparably injured by the disclosure of information that may lead to their identities being discovered, and by the exposure of their intensely personal medical information. Mandamus is also appropriate because this Petition presents issues of great public importance and concern, upon which this Court’s authoritative interpretation of the law will guide Respondents in their management of the grand jury.

STATEMENT OF RELIEF SOUGHT

11. Petitions seek a writ of mandamus to quash the subpoenas on the grounds that Respondent Buchanan’s enforcement of the subpoenas violates his public duties and responsibilities.

12. Petitioners seek an order directing Respondents to quash the subpoenas on the grounds that the subpoenas are: (a) unconstitutional because they are not based on a finding by a judge, or by a public official bound by the limits of due process and professional ethics, of a likelihood that the documents sought contain any evidence of a crime; (b) overbroad, unreasonable, and/or overly burdensome, and (c) in violation of the standards set forth in *Alpha*

Med. Clinic v. Anderson, 280 Kan. 903 (2006). Alternatively, if this Court declines to quash the subpoenas, Petitioners seek an order directing Respondents to limit the subpoenas in conformity with each of the procedures and protections set forth in *Alpha*.³

STATEMENT OF FACTS

13. Petitioners are women who sought late term abortion services from Dr. Tiller in the context of difficult, and often tragic, medical and personal circumstances. Those women now face the possibility that their detailed and private medical records – including their mental and physical health histories, and all of the circumstances that led them to seek to terminate their pregnancies – will be handed over to the grand jury pursuant to the subpoenas. These patients are terrified and horrified by this prospect.

14. First, Petitioners reasonably fear that their identities, along with personal information from their medical histories, will become known to the members of the grand jury, and may be leaked or otherwise obtained by members of the public. App. at 31-32; *see also* App. at 28-29.

15. Although the subpoenas permit some level of redaction of personal information, App. at 7-10 (permitting redaction of identifying information such as, for example, name, social security number, insurance company), redaction of virtually the entire medical file would be needed to protect the patients' identities from disclosure. The medical records of patients such as Petitioners typically include extensive information about highly sensitive topics, such as the patient's mental health history, each of the factors weighed by the patient in her decision to seek an abortion (which may include any history of abuse by the patient's partner against the patient or her children), the patients' medical history, including past surgeries and births, and any history by the patient of drug abuse, alcohol abuse, or suicide attempts. This information is

³ Petitioners are not concurrently filing a stay motion in connection with the filing of this Petition because this Court entered an order staying enforcement of the WHCS subpoenas on February 5, 2008, and a order staying enforcement of the AG subpoena on February 19, 2008.

communicated by the patients in the context of a physician-patient relationship in which the patient expects the physician to maintain the confidentiality of the information. App. at 31-32; *see also* App. at 28-29. This information is not only highly personal, it is potentially identifying, even if the patient's name and other obviously identifying information are removed. For example, a patient whose medical record indicates that she is a diabetic with two prior births and a history of spousal abuse may well be recognizable to those who know her, including her spouse.

16. Plaintiffs' also fear that if their medical records are turned over to the grand jury, those records and/or their identities may reach other members of the public. These fears are reasonable given the prior history of leaked information in past investigations of Dr. Tiller. At least one member of a prior grand jury that investigated Dr. Tiller disclosed extensive details of the evidence before the grand jury to Operation Rescue, which published the information on its website. App. at 87.

17. Moreover, the patients' fears of disclosure are heightened by the fact that this grand jury was convened not by a state prosecutor bound to comply with the multifold requirements of due process, but by a group of anti-choice activists who are free to act solely on the basis of their opposition to abortion and who remain inextricably entangled in the grand jury's proceeding. This grand jury was convened pursuant to a petition drive led by groups of anti-choice activists, Kansans for Life ("KFL") and Operation Rescue. *See* App. at 88. Leaders from KFL and Operation Rescue have testified before the grand jury, and have provided the grand jury with photographs of pregnant women entering WHCS. The photographs were presented to the grand jury with the specific intention of "prompting the grand jury to subpoena their medical records." App. at 90-91. Operation Rescue subsequently announced its intention to release the patient photographs to the press. *Id.* The grand jury acceded to KFL and Operation Rescue's urgings

almost immediately, issuing the subpoenas that are the subject of this motion. *Id.* Given the integral role that KFL has played in convening and influencing this grand jury, Doe and Roe reasonably fear that private information given to the grand jury will be placed not only in the hands of each private citizen who sits on that grand jury, but will also reach members of the public. App. at 31-32; *see also* App. at 28-29.

18. Plaintiffs fear that if their identities and other information from their medical files are released by WHCS and the Attorney General's office, they and their families will be exposed to aggressive harassment, violence and bodily harm. App. at 31-32; *see also* App. at 28-29. They have already faced harassment when they sought services from Dr. Tiller, *see, e.g.*, App. at 28, and they are "horrified by what [they] see on the news about people going after Dr. Tiller and his patients." App. at 31-32.

19. Second, even if the grand jurors were unable to identify the patients' identities from their medical records, the simple fact of having this group of strangers read the personal details of their medical histories and abortion decisions may be deeply disturbing. Dr. Tiller's patients seek abortion at or beyond 22 weeks pregnancy for highly personal, and often devastating reasons, including maternal health problems and severe fetal anomalies. *See* App. at 92-94; App. at 27-28. The records of Dr. Tillers' patients tell the intimate details of these quintessentially private decisions. Moreover, in situations where the patient has terminated a wanted pregnancy after learning of a severe fetal anomaly, the medical records also often include photographs of the fetus taken after the abortion. *See* App. at 95-96. These pictures may be provided to the referring physician to assist him or her in confirming the fetal diagnosis. *Id.* These photographs may also be provided to the patient and her partner to assist them in their grieving process, and may include pictures of the fetus with baby clothes, stuffed animals or blankets that the parents had hoped to give their child. *See id.* To have these personal histories paraded out before the

members of the grand jury for their scrutiny and judgment is not only a gross intrusion on the patients' privacy, it is cruel. In the words of one of WHCS's patients, it is like "being forced to open these wounds in a new and fresh way." App. at 29; *see also* App. at 32.

20. Petitioners moved the district court to quash the WHCS subpoenas, as did Dr. Tiller, but on January 30, 2008, Respondents denied those motions. App. at 81-82. The Attorney General moved the district court to quash the AG subpoena, but on February 14, 2008, Respondents denied that motion. Supp. App. at 11. In denying each of these motions, Respondents failed to do some or all of the following: (a) to make a finding of reasonable suspicion that the patients' medical records contain evidence of any crime; (b) to determine if the subpoenas were valid and appropriately tailored by recognizing the patients' privacy interests and rights and balancing those interests and rights against the need for grand jury review of these records; (c) to authorize sufficient redacting of the records to preclude the identification of the patients; and (d) to delineate the responsibilities and duties of the independently appointed physician and lawyer who will review the records.

WHEREFORE, Petitioners pray that judgment be entered on their behalf and that this Court issue an order of mandamus ordering Respondents to quash the grand jury subpoenas issued to WCHS on January 22, 2008 and January 23, 2008, and to quash the grand jury subpoena issued to the Attorney General on January 31, 2008.

Dated: February 21, 2008

Respectfully Submitted,

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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I, Jim Lawing, hereby certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, on this 21st day of February, 2008, to the following:

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