

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT

In the Matter of the Petition of the  
Attorney General for Subpoenas,

Case No. 159690

Court of Appeals #342680

30<sup>th</sup> Circuit Court #17-00021-PZ

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**RESPONDENT/APPELLEE'S SUPPLEMENTAL BRIEF**

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**STATEMENT OF QUESTIONS PRESENTED**

I. WHETHER THE CIRCUIT COURT WAS REQUIRED TO HOLD A HEARING BEFORE AUTHORIZING THE DISCLOSURE OF MEDICAL RECORDS UNDER 42 CFR 2.66.

Dr. Proctor/Appellee says YES.

Petitioner/Appellant says NO.

The trial court said NO.

The Court of Appeals said YES.

II. WHETHER THE CIRCUIT COURT ERRED WHEN IT DETERMINED THAT THE PETITIONER ESTABLISHED “GOOD CAUSE” AND OTHERWISE SATISFIED THE CRITERIA SET FORTH IN 42 CFR 2.64(d) AND (e).

Dr. Proctor/Appellee says YES.

Petitioner/Appellant says NO.

The trial court said NO.

The Court of Appeals said YES.

III. WHETHER THE CIRCUIT COURT ERRED IN AUTHORIZING THE DISCLOSURE OF CONFIDENTIAL PATIENT COMMUNICATIONS UNDER 42 CFR 2.63(a).

Dr. Proctor/Appellee says YES.

Petitioner/Appellant says NO.

The trial court said NO.

The Court of Appeals said YES.

## FACTS

On December 13, 2017, Petitioner Attorney General applied for a subpoena from the 30<sup>th</sup> Circuit Court seeking records from addiction patients of Dr. Vernon Proctor. ROA 50. The subpoena had an Attachment that listed patient names. The version filed with the Court used aliases and the version sent to Dr. Proctor had the full names and dates of birth. The patients listed in the Attachment of the subpoena were in fact addiction patients as defined by federal law. Respondent/Appellee's Appendix, pp. R- 1a – 2a [Respondent's Affidavit submitted with his Motion to Quash, ROA 25].

The records requested were protected by special confidentiality protections under federal law. 42 USC §290dd-2. The records may only be disclosed for the purposes contained in and under the circumstances expressly authorized by 42 USC §290dd-2(a). The statutory protections apply even after the person is no longer a patient. 42 USC §290dd-2(d).

Federal regulations also control the specific restrictions of use and disclosure of these protected records. There is a criminal penalty for improper disclosure. 42 USC 290dd-2(f) and 42 CFR §2.3. The restrictions apply to any civil, criminal, administrative, or legislative proceeding conducted by any Federal, State, or local authority and the disclosure, if any, must be limited to that information necessary to carry out the purpose of the disclosure. 42 CFR §2.13. Compliance with the regulations is required even if the holder of the records is presented with a subpoena. 42 CFR §2.13(b). Dr. Proctor is not allowed to even acknowledge in this context whether the patient is or is not an addiction patient. 42 CFR §2.13(c).

State law cannot compel a disclosure prohibited by the regulations. 42 CFR §2.20. Subpart E of the regulations control disclosure with a court order. The regulations do not simply authorize issuance of a subpoena but the order itself must authorize disclosure. 42 CFR §2.61.

All orders obtained under Subpart E are subject to the limitations of 42 CFR §2.63(a) which limits communications made by a patient to a program to three specific types of information:

- a. necessary to protect against an existing threat to life or of serious bodily injury including child abuse/neglect and threats against third parties;
- b. necessary for an investigation of an extremely serious crime; or
- c. in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications. 42 CFR §2.66(b) does require notice to the patient upon implementation of the order so they also have an opportunity to seek revocation or amendment of the order.

#### **PROCEEDINGS BELOW**

The trial court granted the petition without a hearing and without notice to Dr. Proctor or the patients. Appellant's Appendix, p. 4a [Order, ROA 49]. After service of the subpoena, Dr. Proctor filed a motion to quash asserting a lack of compliance with the requirements of 42 USC §290dd-2 and 42 CFR §2.66. ROA 25. A hearing was held on February 14, 2018. ROA 6. The trial court denied the motion and declined to conduct an *in camera* review or make determinations independent of the conclusory allegations in the petition. A written order denying the motion was filed on February 14, 2018. Appellant's Appendix, p. 28a [ROA 5]. Dr. Proctor timely filed his claim of appeal. On February 26, 2019, the Court of Appeals issued a published opinion reversing the trial court and ordering a remand for further proceedings. The Petitioner/Appellant is now—seeking leave to appeal in this Court and the Court has ordered briefing in advance of oral argument on the application.

## LAW/ARGUMENT

### I. WHETHER THE CIRCUIT COURT WAS REQUIRED TO HOLD A HEARING BEFORE AUTHORIZING THE DISCLOSURE OF MEDICAL RECORDS UNDER 42 CFR 2.66.

#### A. Standard of review.

Statutory interpretation is a question of law that this Court reviews de novo, *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005), as is the interpretation of administrative regulations, *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 157; 680 NW2d 840 (2004). This standard applies to the interpretation of federal statutes and regulations, *In Re Petition of Atty General for Investigative Subpoenas*, 274 Mich App 696; 736 NW2d 594 (2007), citing *Andersen v Director, Office of Workers' Compensation Programs*, 455 F3d 1102, 1103 (CA 10, 2006). “Clear and unambiguous statutory language is given its plain meaning, and is enforced as written.” *Ayar, supra* at 716; 698 NW2d 875.

#### B. Statutory protections.

The addiction records requested are protected by special confidentiality protections under federal law. 42 USC §290dd-2. The records may be disclosed only for the purposes contained in and under the circumstances expressly authorized by 42 USC §290dd-2(a). The statutory protections apply even after the person is no longer a patient. 42 USC §290dd-2(d). Respondent’s affidavit attached to his motion to quash confirmed that the listed patients were in fact addiction patients. Respondent’s Appendix, p. R-1a – 2a. [ROA 25, Affidavit, ¶¶ 5, 6].

The privilege should not be “lightly abrogated.” *Fannon v Johnston*, 88 FSupp2d 753, 758 (EDMich 2000). The statute and the regulations carry a strong presumption against disclosure. 42 USC §290dd–2. *The express purpose of this provision is to encourage patients to seek treatment for substance abuse without fear that by so doing, their privacy will be compromised.* See 42 CFR §2.64(f). See also *United States v Graham*, 548 F2d 1302, 1314 (CA8 1977). See, *United States*

*v Cresta*, 825 F2d 538, 551–552 (CA 1 1987), cert. denied, 486 US 1042; 108 SCt 2033; 100 LEd2d 618 (1988). “Congress felt ‘the strictest adherence’ to the confidentiality provision was needed, lest individuals in need of drug abuse treatment be dissuaded from seeking help.” *Fannon*, 88 FSupp2d at 757, quoting *Ellison v Cocke County, Tennessee*, 63 F3d 467, 470 (CA 6 1995).

At the time this petition and trial court order occurred,<sup>1</sup> 42 USC §290dd-2(b)(2)(C) read as follows:

(2) Method for disclosure

Whether or not the patient, with respect to whom any given record referred to in subsection (a) is maintained, gives written consent, the content of such record may be disclosed as follows:

(A) [To medical personnel for medical emergencies].

(B) [Research if sanitized as to patient identity].

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause *the court shall weigh* the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, *the court*, in determining the extent to which any disclosure of all or any part of any record is necessary, *shall impose* appropriate safeguards against unauthorized disclosure. (Emphasis added).

1. Requiring good cause.

The first sentence of this paragraph establishes the requirement for “good cause” and also provides a singular example of what would be included. While not intended to limit the scope of “good cause,” it is demonstrative of what the Legislature intended to be included to breach the additional privacy the Legislature wanted to give to addiction treatment records. The phrase “a substantial risk of death or serious bodily harm” is strong evidence that the Legislature wanted to set a high threshold for disclosure.

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<sup>1</sup> Amendments went into effect on March 27, 2020 but do not impact this case.

The word “substantial” is a common word and has available dictionary definitions. The *Cambridge Dictionary* defines it as “large in size, value, or importance.”<sup>2</sup> One of the definitions from Merriam-Webster provides “considerable in quantity; significantly great.”<sup>3</sup> This creates a strong inference that a “moderate” risk or “slight” risk will not satisfy the requirements of the statute. This translates to the general concept of “good cause” by suggesting that the agency’s need for the record should likewise be substantial but not a fishing expedition or mere curiosity. In *In Re August, 1993 Regular Grand Jury (Hospital Subpoena)*, 854 FSupp 1380 (SD Ind 1994), a federal district court resolved a dispute between a government subpoena (grand jury) and a hospital. While the case is discussed in more detail later concerning confidential communications within the records, it is important for its other content. While it is not clear what type (if any) “hearing” occurred, that trial court knew:

- The nature of the investigation (billing fraud) (*Id*, at 1386); and
- The scope of the content of the records (“psychological histories and/or thoughts, detailed psychological profiles, accounts of therapy sessions, and detailed treatment plans, . . .” *Id*, at 1387).

That particular federal court was aware of a lot of detail from either the pleadings, affidavits, or other presentations that enabled it to actually engage in a weighing of interests process and otherwise comply with the specific requirements of the statutes and the regulations.

In *Fannon, supra*, a civil suit against a narcotics detective for wrongful incarceration focused in part on the detective’s abuse of cocaine and addiction to pain killers. The *Fannon* Court granted the plaintiff’s motion to obtain the treatment records. While the holdings are not

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<sup>2</sup> <https://dictionary.cambridge.org/us/dictionary/english/substantial>

<sup>3</sup> <https://www.merriam-webster.com/dictionary/substantial>

controlling or necessarily applicable, the *Fannon* Court had the benefit of pleadings, depositions, and a review of the actual treatment records as it performed its duties under the regulations.

*Fannon, supra*, at 767.

2. Weighing competing interests.

The second sentence of the paragraph imposes the first obligation on the trial court. When the Legislature states that “the court shall weigh,” it clearly signals an intent that the trial court perform some function other than merely rubber stamping the conclusory allegations in a petition. More importantly, the three listed items on the non-disclosure side of the scale all fit clearly within the Legislative intent to protect persons seeking addiction treatment for the purpose of encouraging their privacy to foster their willingness to seek treatment. Those are substantial goals and they serve a substantial public interest. On the disclosure side of the scale are the terms “public interest” and “need for disclosure.” Dr. Proctor asserts that the “public interest” would have to be extremely significant since the Legislature has already impliedly determined that strong privacy protections are in the public interest. The “need for disclosure” suggests that a petitioner should provide the trial court with information of a factual nature that can be weighed.

Dr. Proctor has never asserted that every petition submitted for addiction records requires an evidentiary hearing. The statute does not suggest that either party is entitled to a trial so comparing this to motion practice is likely more appropriate. If considered a motion, the Michigan Court Rules require a request for relief to “state with particularity the grounds and authority on which it is based.” MCR 2.119(A)(1)(b). If considered a complaint, the request for relief must contain a “statement of facts” aimed at reasonably informing the adverse party of the nature of the claim. MCR 2.111(B)(1).

Dr. Proctor asserts that this particular petition was so defective that ex parte relief should not have been granted. For purposes of this supplemental brief as this Court considers whether to grant the application, the focus will be on the nature of the dispute once Dr. Proctor filed his motion to vacate. At that point, it was clearly a contested matter. As for motions, the Michigan Court Rules have historically granted broad discretion to trial courts whether to conduct hearings on motions. MCR 2.119(E)(2), however, states that when a motion is based on facts not appearing of record, the trial court may hear the motion on affidavits or wholly or partly on oral testimony or deposition.

C. Regulatory protections.

42 CFR §2.66(a)(1) authorizes the Department to seek a court order such as the one at issue. 42 CFR §2.66(a)(2) clarifies that the applicant establish that the records are needed to provide “material” evidence. 42 CFR §2.66(b) states:

(b) Notice not required. An application under this section may, *in the discretion of the court*, be granted without notice. Although no express notice is required to the part 2 program, to the person holding the records, or to any patient whose records are to be disclosed, upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, *limited to the presentation of evidence on the statutory and regulatory criteria* for the issuance of the court order in accordance with §2.66(c). (Emphasis added).

Both §2.66(a)(2) and (b) use the word “evidence.” When combined with the previous sections, the petitioner must meet its burden of proof by presenting evidence that creates good cause by having the public interest and need outweigh the privacy interests of the patients as protected by the Legislature. Other than the broad conclusory claim in the petition that the Department “has initiated an investigation of a licensee of the Department.” Appellant’s Appendix, p. 1a. The Exhibit attached to the Petition suggests that the licensee being investigated is Dr. Proctor. Appellant’s Appendix, p. 3a. The Petition itself does not even allege that “a licensee of the Department” is, in fact, Dr. Proctor. Based upon the lack of affidavits, declarations, or any other presentation by the Petitioner, the trial court was required to hold some type of hearing once

the motion to vacate was filed to meet the requirements of 42 USC §290dd-2(b)(2)(C); 42 CFR §2.66(a)(2); and 42 CFR 2.66(b).

42 CFR §2.66(c) specifically adopts the requirements of 42 CFR §2.64(d). Dr. Proctor concedes that 42 CFR §2.64(c) was obviously omitted from this requirement but points out that 42 CFR §2.64(c) is only a limitation on how a hearing is conducted which precludes public hearings. This makes perfect sense in a situation where private parties or litigants may be seeking records especially in ongoing cases. In other words, the omission of 42 CFR §2.64(c) from the reference in 42 CFR §2.66(c) does not suggest that hearings are discouraged or prohibited when an agency is the petitioner. To the contrary, 42 CFR §2.66(b) requires the presentation of evidence which logically would require some type of hearing.

In *Mosier v American Home Patient, Inc*, 170 FSupp2d 1211 (ND Florida 2001), that Federal district court denied a defendant's request for a plaintiff's substance abuse records as part of its defense in an employment case. That court had the benefit of pleadings, ongoing litigation, and a deposition. That Court was able to perform its duties under the statute and regulations by actually weighing the interests in the context of the applicable dates, need, and the claims and defenses of the parties. *Id*, at 1214-1215.

In *United States v Hughes*, 95 FSupp2d 49 (D Mass 2000), the government was seeking health records of a patient receiving treatment for drug abuse for use in a prosecution of the patient for making a false statement in connection with the purchase of a firearm and being a drug user in possession of a firearm. Once again, *Hughes* is not directly controlling on the merits because it deals with 42 CFR §2.65 which deals with records for use in the prosecution of a patient. It is, however, instructive because of how that Court went about resolving the challenge to the order for disclosure. That Federal district court allowed part of an affidavit, direct testimony to avoid hearsay objections, and the introduction of exhibits. *Hughes*, at 52. The section at issue also

requires a balancing test. The trial court in *Hughes* provided a detailed analysis of the evidence presented and how it conducted the balancing test. *Id.*, at 59 – 60.

If this type of petition is considered to be a complaint instead of a motion, the rules of summary disposition might be considered applicable. If so, MCR 2.116(G)(3) would come into play which requires affidavits, depositions, admissions or other documentary evidence where the necessary support for the requested relief is not on the face of the pleadings. The trial court is required to consider these items. MCR 2.116(C)(5). As noted above, the Petitioner in this case merely made conclusory allegations that tracked the language in the federal statute and regulations. Resolving the motion on only the pleadings as contemplated by MCR 2.116(G)(2) and (5) would be inappropriate because it would not give the trial court the ability to comply with the requirements of the federal statute or the regulations.

Also in the trial context, MCR 2.517(A)(1) requires matters tried to the bench to be followed by a decision in which the court “shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.” MCR 2.517(A)(2) requires “brief, definite, and pertinent findings and conclusions on contested matters” without over elaboration. This melds conveniently with the requirements of 42 USC §290dd-2(b)(2)(C) (good cause and weighing of interests), 42 CFR §2.64(d) (good cause) and (d)(2) (weighing of interests), 42 CFR §2.64(e) (required limitations on disclosure), and 42 CFR §2.66(c) (good cause and weighing of interests).

D. The trial court’s approach.

At the hearing on the motion to vacate, the trial court stated that 42 CFR §2.64(d) “does not say that the Court has to have any kind of a hearing or that the Court has to make any findings of fact.” Appellant’s Appendix, p. 23a. This is contrary to the express language in the section

which states: *To make this determination the court must find that. . . .* 42 CFR §2.64(d). This is a significant error because of the presumption against disclosure, *United States v Cresta*, supra, at 551-52, and the allocation of the burden of proof, *Fannon*, supra, at 757.

In summary, Dr. Proctor asserts that to properly perform the requirements under the federal provisions – in this case on this record – a hearing is required. Dr. Proctor is not asking this Court to rule that a *per se* requirement for a hearing is required by trial courts. As noted in the conclusion, the Petitioner/Appellant’s effort as well as the trial court’s effort in this particular case was so weak that this is not the proper case for this Court to determine any type of standard for a hearing.

## II. WHETHER THE CIRCUIT COURT ERRED WHEN IT DETERMINED THAT THE PETITIONER ESTABLISHED “GOOD CAUSE” AND OTHERWISE SATISFIED THE CRITERIA SET FORTH IN 42 CFR 2.64(d) AND (e).

### A. 42 CFR §2.64(d) - Good cause.

42 CFR §2.64(d) provides the following criteria to obtain the order:

(d) *Criteria for entry of order.* An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

- (1) Other ways of obtaining the information are not available or would not be effective; and
- (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

Paragraph 4 of the petition for the subpoena states that “the limited disclosure of the information sought in this petition is the most effective means to investigate the matter at hand.” Appellant’s Appendix, p. 1a. Just because this may be the “most effective” does not mean that other means of gathering the information would not also be effective. No effort was made to address the first phrase of 42 CFR §2.64(d)(1) which requires the trial court to find that “other ways of obtaining the information are not available.” The sentence is in the disjunctive so a finding

that some other way would not be effective would satisfy the requirement. But when no facts are asserted to make the finding, the trial court cannot possibly complete its task of making its independent determination. The plain meaning of the sentence is that if another effective means is available, it must be used before these privacy interests can be breached. This is exactly the type of issue that would be appropriate for a hearing of some type to test the ability of the agency to meet its burdens and allow the trial court to weigh options.

The order contains no findings as to good cause, other means of acquiring the information, the effectiveness of other means, or the weighing of interests. Based upon the type face, font, spacing, and other characteristics of the order, it was generated by the author of the petition. Appellant's Appendix, pp. 1a - 4a.

The petition contains the following claims in Paragraph 4: "Furthermore, the Department is only seeking the records that are necessary to the investigation, and all unique identifiers may be deleted from the records of the licensee's patients. Therefore, the public interest and the need for disclosure outweigh any potential injury." Appellant's Appendix, p. 1a. The order does not even repeat this conclusory allegation and contains no finding by trial court as to its independent weighing of the competing interests.

42 CFR §2.64(d)(2) requires the trial court to weigh three different things on the non-disclosure side of the scale: i) injury to the patient, ii) the physician-patient relationship and iii) the treatment services. The petition contains a conclusory allegation as to injury to the patient but does not seek to allege or establish injury to the other two components. The order fails to address any part of 42 CFR §2.64(d)(2) at all.

At the hearing on the motion to vacate, the trial court claimed that the petition asserted that other ways of obtaining the information are not available or would not be effective. Appellant's

Appendix, p. 22a. As noted above, the petition makes no such claim. It merely says that the method they chose was “most effective.” The trial court claimed that the petition alleged that the public interest outweighed the three components of 42 CFR §2.64(d). Appellant’s Appendix, p. 22a. As noted above, it only asserts that the first component is outweighed. The trial court rejected the need for a hearing because 42 CFR §2.64 sets forth the criteria for an order and does not require a hearing. Appellant’s Appendix, pp. 23a – 24a. The trial court then stated that §2.64(d) refers only to the content of the petition. On the contrary, the clear and express language of the section requires *the trial court* to find what is stated in the section and simply does not suggest that reliance on the petition is the standard.

B. Procedural irregularities – confusing federal law and state law.

Another interesting point about both the petition and the subpoena is that the use of the federal procedure was mixed with the use of the investigative subpoena process under state law. The federal procedure contemplates obtaining a court order which authorizes disclosure once the criteria are satisfied. The petition and order authorize the subpoena itself which is the state law procedure. MCL 333.16235. The petition and order should focus on the criteria in the federal law which specifically focuses on obtaining a court’s approval for disclosure. See 42 USC §290dd-2(b)(2)(C) and 42 CFR § 2.61.

MCL 333.16235 is the basis stated in the petition but the petition makes no allegation that there is a contested case. Appellant’s Appendix, p. 1a. In fact, the petition incorrectly asserts “Section 16235 of the Public Health Code authorizes the circuit court to issue investigative subpoenas upon application by the Attorney General.” MCL 333.16235 actually states:

Sec. 16235. (1) Upon application by the attorney general or a party *to a contested case*, the circuit court may issue a subpoena requiring a person to appear before a hearings examiner in a contested case or before the department in an investigation and be examined with reference to a matter within the scope of that

contested case or investigation and to produce books, papers, or documents pertaining to that contested case or investigation. (Emphasis added).

While there is language in the body of the statute that talks about appearing before the department, there are two qualifiers that negate the validity of the petition and order in this case. First, the introductory phrase requires a contested case. The petition plainly states that the Department has initiated an investigation and makes no allegation that there is a contested case. There was no contested case and the Department is simply fishing for information. Second, this section is limited to issuing a subpoena to a person to appear before a hearings examiner in a contested case or before the department in an investigation “to be examined” and “to produce . . .” That is not how this subpoena was directed. It was merely to produce a stack of files without limitation as to content.

On the contrary, MCL 333.16231 establishes the procedure for investigations of alleged violations. It does not include the authority to issue subpoenas just for the purpose of completing the investigation.

C. 42 CFR §2.64(e) – contents of the order.

42 CFR §2.64(e) states:

(e) Content of order. An order authorizing a disclosure must:

(1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those persons whose need for information is the basis for the order; and

(3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

The trial court’s order does not comply with this regulation because the first operative paragraph allows a subpoena to be issued to compel "certain records described in Exhibit A. . . ."

Appellant’s Appendix, p. 4a. Exhibit A of the Petition then seeks "*all* medical records, x-ray films

and reports, billing records, incident reports, emergency room records, documentation, treatment records, pathology and laboratory reports pertaining to . . . ." (emphasis added). Appellant's Appendix, p. 3a.

The defects in regulatory compliance are:

1. Essential information and objective of the order.

The only hint in the petition as to the purpose of the records was to further an investigation of the licensee's "treatment of patients and/or controlled substance prescribing practices" which would practically encompass every single investigation of a health profession licensee. This does not foster a determination as to the objective of the order to aid in limitation. 42 CFR §2.64(e)(1) contemplates parsing the records into parts by its express language. Only those parts "essential" to the objective of the order are to be released.

An example of how this limitation is implemented occurred in *Fannon, supra*. A narcotics investigator was abusing cocaine and addicted to pain killers. The Plaintiff alleged that the detective, Johnston, had entrapped Mr. Fannon into selling cocaine to feed the detective's own cocaine addiction. Mr. Fannon wanted the records to support his claim under 42 USC §1983 of a civil rights violation and to impeach Mr. Johnston's credibility. A state appellate court had determined that Mr. Fannon was entrapped by Mr. Johnston, reversed his conviction and he was then released from a life without possibility of parole sentence. *Fannon*, at 755-756. The detail gleaned from these allegations in the pleadings as well as discovery materials allowed the trial court to determine an objective, identify which records could be released, and limit further disclosure of the records through appropriate orders. *Fannon*, at 767.

Appellant has consistently complained about the case law that Dr. Proctor has relied on in the trial court and the Court of Appeals. Dr. Proctor has been willing to concede that cases such as

*United States v Hughes*, *supra*, and *Fannon*, *supra*, deal with different regulations within Part E of 42 CFR. The real pedagogic value of these cases is how those courts complied with their statutory and regulatory duties. None of these cases are binding precedent for this Court. They do, however, show a stark contrast between how the 30<sup>th</sup> Circuit Court and the Petitioner/Appellant approached the issue and how other courts approach the issue.

The order states that the disclosure “shall be limited to only that which is necessary for fulfillment of this order. . . .” Appellant’s Appendix, p. 4a. This is too broad since the objective of the order is not identified. The petition claims it is seeking only the records necessary to the investigation. Appellant’s Appendix, p. 1a. Exhibit A and the subsequent subpoena require “all” records pertaining to the identified patients. Appellant’s Appendix, 3a, 6a. The limitation, if any, is left entirely to the Petitioner and not by the trial court.

2. Need for the information.

The order does not limit disclosure of the records to those persons whose need for information is the basis of the order and instead limits the disclosure to "the Department." 42 CFR §2.64(e)(2). The order states that the disclosure “shall be limited to those persons whose need for the information is related to the investigation of the licensee or any following administrative licensing action.” Appellant’s Appendix, p. 4a. Both portions are too broad. The persons who need the information are not limited. Any limitation is left to an unidentified bureaucrat. The phrase about “administrative licensing action” is particularly troublesome because the records and hearings are open to the public.

Proper use of the federal statute and regulations may require multiple trips to a court for disclosure. In light of the presumption and allocation of the burden of proof, this is an appropriate trade-off to further the intent of the law. For example, an initial disclosure could be limited to the

assigned investigator, the review panel contemplated by MCL 333.16231(2)(a), and the reviewing Assistant Attorney General to draft the complaint, if any. If the licensee demanded a contested hearing, then one or both parties might need to approach a court for another order. As noted in this case, 11 patient records were requested. A complaint might only contain allegations regarding a sub-set of these 11 patients. There would be little or no need to further disclose the records of the remaining sub-set of patients. If the Department wanted those records for “other acts” or to show a pattern, then they could simply state that in a proper petition and allow a court to decide whether the federal law had been satisfied. A blanket order for “all” records to be disclosed to those persons whose need is related to an investigation for a group of patients simply does not satisfy 42 CFR §2.64(e)(2). All of these decisions are being left to the petitioner instead of being made by the trial court.

3. Other measures as necessary.

The regulation contains an example of a limitation as described above – anticipating the sealing of records for use in proceedings for which the patient’s record has been ordered. The current order specifically anticipated something other than an investigation by making reference to “any following administrative licensing action.” Appellant’s Appendix, p. 4a.

D. The trial court’s approach.

At the hearing, the trial court asserted that the order included that “disclosure be limited to those persons whose need for the information is the basis for the order” was sufficient. The trial court’s entire analysis of 42 CFR §2.64(e) is in two paragraphs at Appellant’s Appendix, pp. 23a – 24a. The quoted language from the order simply tracks the regulatory language. Dr. Proctor asserts that it is not possible to limit disclosures to essential parts necessary to fulfill objectives

where the parts and the objectives are not identified by reference to any particular facts or circumstances. The language used simply leaves the decision-making to the petitioner.

In summary, in resolving the motion to vacate, the trial court simply relied on the petition and the content of the ex parte order to superficially conclude that both the Petitioner and the trial court complied with the federal requirements. As noted above, certain details are omitted from the petition. Some of those details are included in the order even though omitted from the petition – both of which were drafted by the Petitioner. Also as demonstrated above, the trial court simply made no findings on its own and had no facts on which it could support findings had it made any. This order fails to even approach a semblance of protecting addiction treatment records as required by the federal provisions and utterly fails to comply with 42 CFR §2.64(d) or (e).

### III. WHETHER THE CIRCUIT COURT ERRED IN AUTHORIZING THE DISCLOSURE OF CONFIDENTIAL PATIENT COMMUNICATIONS UNDER 42 CFR §2.63(a).

42 CFR §2.63(a) is an omnibus provision for all releases under Subpart E and provides:

#### §2.63 Confidential communications.

(a) A court order under the regulations in this part may authorize disclosure of confidential communications made by a patient to a part 2 program in the course of diagnosis, treatment, or referral for treatment only if:

(1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime allegedly committed by the patient, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

(b) [Reserved]

By referencing the Exhibit A in the order, the trial court granted approval for all records for the identified patients. Appellant's Appendix, pp. 3a – 4a.

1. Existing threats of death or serious bodily injury.

The petition makes no allegations as to this requirement. In defending against the petition, Appellant claimed that the national opioid crisis was the existing threat to life or serious bodily injury. The trial court agreed. The Court of Appeals disagreed. The problem with Appellant's argument is that no such allegation was ever made in the petition. The response to the motion to vacate contained no affidavits, declarations, depositions, or prescribing reports. It would have been very simple for the Petitioner to obtain records from the Michigan Automated Prescribing Program and by affidavit connect them with any of the John/Jane Does listed in Exhibit A. An explanation as to how or why that patient's life was in jeopardy or serious bodily injury was imminent could have been supported by such records. No such effort was made.

The irony of this claim is that these are addiction patients being treated by Dr. Proctor in an effort to escape the harms caused by the national opioid crisis. The petition does not allege that any of the patients are being prescribed opioids. The petition does not allege that Dr. Proctor ever prescribed an opioid to these 11 patients or anyone else. If a national crisis were truly the basis of the investigation, then his entire practice should be audited and not just these 11 patients. Furthermore, media and political statements of the existence of "a crisis" are suspect in a general sense and woefully insufficient to subvert the strong Congressional intent associated with these provisions. If claiming a crisis is all that is required, then 42 CFR §2.63(a) would offer no protection to any patient or any program.

2. The trial court's approach.

The trial court's entire analysis as to confidential communications is:

There is also a requirement is (sic) 2.63 with regard to confidential communications that applies to a Court order under these regulations. So, I read that as meaning that it would apply to any of the sections. And that does prohibit disclosure of confidential communications made by a patient "unless", and one of

the conditions is "the disclosure is necessary to protect against an existing threat to life or of serious bodily injury."

And it, it's not more specific than that. The allegations of abusive prescribing of opioids definitely represents a threat to life or of serious bodily injury given the opioid crisis and the number of people that die of overdose every single day. That is clearly the basis of the Departments (sic) investigation. And any action that they take in that they are investigating Dr. Proctor for the abuse of prescription or prescription--, prescribing abuse of opioids and that fits to me under 2.63 (a)(1).

So, in that the confidential communications made by a patient may be disclosed to protect against that threat to life or serious bodily injury. So, for all of those reasons, I am denying the Motion to Vacate the Order Authorizing the Subpoena. Appellant's Appendix, pp. 24a – 25a.

No determination was made *by the trial court* as to whether any of the 11 patients in Exhibit A were exposed to a threat of death or serious bodily harm. The investigation is defined as "an investigation into the licensee's treatment of patients and/or controlled substance prescribing practices" with no information given to allow the court to find good cause or to conduct the balance analysis as required. Appellant's Appendix, p. 1a, ¶ 6.

3. The Court of Appeals' approach.

The Court of Appeals found that pursuant to the only available federal authority, a hearing was required before confidential communications could be released. *Attorney General v Vernon E Proctor, MD*, 327 Mich App 136; 933 NW2 351 (2019), citing *Hicks v Talbott Recovery Sys, Inc*, 196 F3d 1226, 1242, n. 32 (CA 11, 1999). The footnote from *Hicks* states that, to comply with 42 CFR §2.64, several requirements must be met including, inter alia, a "closed judicial hearing." Because 42 CFR §2.66 only incorporates 42 CFR §2.64(d) and (e), this may be an overstatement by the *Hicks* opinion. Nonetheless, the Court of Appeals did make note of the fact that the trial court failed to comply with the "only if" requirements of 42 CFR §2.63(a) by making a finding that a proper threat to life or serious bodily injury existed. *Proctor, supra*, at 157-158.

The Court of Appeals focused on the last phrase of 42 CFR §2.63(a)(1) which provides a specific example (child abuse) and specifies that "threats" includes verbal threats. The Court of

Appeals found that inclusion of the specific example was a limitation on the first phrase of the paragraph's substance – “an existing threat to life or of serious bodily injury.” *Id.*, p. 157.

The approach by the Court of Appeals can be expanded upon by examining the entirety of 42 CFR §2.63(a). Sub-paragraph (2) is limited to the investigation or prosecution of an extremely serious crime committed “by the patient.” Sub-paragraph (3) is limited to proceedings whether testimony or other evidence has been presented by “the patient.” The Petitioner has not argued that sub-paragraphs (2) or (3) apply but viewing §2.63(a) in toto reveals that sub-paragraph (1) should also be limited to conduct of the patient which creates an existing threat to life or of serious bodily injury.

4. Other federal authority.

In *United States ex rel Chandler v Cook County, Ill.*, 277 F3d 969 (CA7 2002),<sup>4</sup> a county operated hospital which conducted research on treatment of drug-dependent pregnant women was entitled to a writ of mandamus requiring the federal District Court to vacate its discovery order requiring the hospital to permit attorneys for its former director of the research project to review unredacted patient records in the director's *qui tam* action alleging that the county fraudulently obtained grant funds for the project from the federal government. 42 CFR §2.64(d) protected the confidentiality of the communications from the patients within the records. The Seventh Circuit took the extraordinary step of reviewing the dispute of the discovery order on cross-appeal by the county due to the irreparable harm that would occur to the patients and the clear legislative intent to protect the records. See also *United States ex rel Chandler, supra*, at 983.

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<sup>4</sup> Mandate stayed 282 F3d 448, certiorari granted, 536 US 956; 122 SCt 2657; 153 LEd2d 833, affirmed 538 US 119; 123 SCt 1239; 155 LEd2d 247, on remand 2003 WL 22284199.

Simple redaction does satisfy the federal statute or regulations. *United States ex rel Chandler, supra*, at 983. Compliance with the purpose of the confidentiality law – encouragement to participate in programs – is not accomplished unless *all* patient identifying and confidential communications are redacted. *Id.*<sup>5</sup> Diagnosis and treatment information must also be redacted because Dr. Proctor falls within the definition of a “federally assisted program.” 42 CFR §2.12(a)(1)(ii) and (b)(2)(ii) and (iii).<sup>6</sup>

The underlying purpose of the Drug Abuse Office and Treatment Act of 1972, from which the confidentiality provision of the antecedent Section 290ee–3 derived, was “to bring about the

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<sup>5</sup> “Patient identifying information” “means the name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a program, if that number does not consist of, or contain numbers (such as a social security, or driver’s license number) which could be used to identify a patient with reasonable accuracy and speed from sources external to the program.” 42 CFR §2.11

<sup>6</sup> §2.12 Applicability.

(a) General—(1) Restrictions on disclosure. The restrictions on disclosure in these regulations apply to any information, whether or not recorded, which:

(i) Would identify a patient as an alcohol or drug abuser either directly, by reference to other publicly available information, or through verification of such an identification by another person; and

(ii) Is drug abuse information obtained by a *federally assisted drug abuse program* after March 20, 1972, or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (or if obtained before the pertinent date, is maintained by a federally assisted alcohol or drug abuse program after that date as part of an ongoing treatment episode which extends past that date) for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.

(2) Restriction on use. [criminal charges or investigation of a patient]

(b) Federal assistance. An alcohol abuse or drug abuse program is considered to be federally assisted if:

(1) [Departments or agency of the United States];

(2) It is being carried out under a license, certification, *registration*, or other authorization *granted by any department or agency of the United States* including but not limited to:

(i) Certification of provider status under the Medicare program;

(ii) Authorization to conduct methadone maintenance treatment (see 21 CFR 291.505); or

(iii) Registration to dispense a substance under the Controlled Substances Act to the extent the controlled substance is used in the treatment of alcohol or drug abuse; (emphasis added).

most effective deployment of Federal resources against the devastating growth of drug abuse in the United States.” H.R.Rep. No. 92–775, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 2045, 2045.

In summary, the trial court relied on a very generalized national “crises” and used it to justify intrusion into federally protected records and communications. Dr. Proctor certainly does not desire to belittle the importance of addiction of any kind because he has tailored his practice to addiction medicine to provide individualized relief to those suffering from addiction. A national “crisis” comes into being through media reports, public policy debates, and political purposes. It does not focus on individuals. In contrast, these federal provisions focus very strongly on protecting the confidentiality of the individual patient and the programs that offer these services. Part of that protection is aimed directly at agencies like the Petitioner in this case. The current trial court order eviscerates that confidentiality and undermines the express intent of Congress.

### **CONCLUSION**

Petitioner failed to meet its burden of showing good cause to obtain the records or the additional requirements for obtaining the confidential communication portion of the patient records. The scope of the present order and subpoena are all-encompassing and no determinations of any kind required by the statute or regulations have been made by the trial court. The only allegation is that the Petitioner has authorized an investigation and - because it is conducting an investigation that it authorized - *all records* for all listed patients should be disclosed. With no information provided for the trial court to determine good cause and conduct the required balancing analysis, the current order simply opens up a fishing expedition.

This Court has broad discretion as to which applications for leave to appeal it chooses to review. MCR 7.305(B) provides the grounds upon which a party should focus when seeking

review in this Court. Dr. Proctor concedes that this is likely an issue of first impression for this Court. Dr. Proctor also clearly concedes that protection of the privacy of individuals seeking addiction treatment has significant public interest. See MCR 7.305(B)(2). For example, in 1972, the following statement was included in a Report that memorialized congressional findings on the privacy legislation:

The conferees wish to stress their conviction that the strictest adherence to the provision of this section is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome.

*Hughes, supra*, at 57, quoting H.Conf.Rep. No. 92-920, 92d Cong., 2d Sess, reprinted in 1972 U.S.Code Cong. & Admin.News, 2072.

This Court does not need to be educated on the fact that the opioid crises and other substance abuse issues are still a significant public health issue in the United States. The recognition of this fact by this Court is demonstrated in its support for numerous specialty courts most of which are aimed directly at this type of problem.

Because the Petitioner failed to make even a half-hearted effort to give the trial court what it needed to enable it to comply with the requirements of the law, Dr. Proctor asserts it would be imprudent for this Court to invest resources in resolving this application. While the Court can still interpret the statute and regulations if it chooses for further guidance, this particular case is not deserving of this Court's attention at this time. A case where the Department actually attempts to show good cause (other than "we are investigating"), provides the trial court with enough information to comply with the requirements, and the trial court makes an *independent* effort to comply is a more fitting case for this Court's resources.

**RELIEF REQUESTED**

WHEREFORE, Respondent/Appellee, Dr. Vernon Proctor, requests this Honorable Court deny the application for leave to appeal submitted by Petitioner/Appellant.

5/26/2020  
Date

/s/ J. Nicholas Bostic  
J. Nicholas Bostic P40653  
Attorney for Dr. Proctor