

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 07-10234-MLB
)	
STEPHEN J. SCHNEIDER,)	
and)	
LINDA K. SCHNEIDER, a/k/a)	
LINDA K. ATTERBURY,)	
d/b/a SCHNEIDER MEDICAL CLINIC,)	
)	
Defendants.)	
_____)	

**GOVERNMENT’S RESPONSE IN OPPOSITION TO DEFENDANTS’
JOINT MOTION FOR ABSTENTION**

The United States of America, by and through Assistant United States Attorney Tanya J. Treadway, hereby submits its Response in Opposition to Defendants’ Joint Motion for Abstention (Doc. 107). The Court should summarily deny the defendants’ motion. The Younger abstention doctrine cannot be used to stay this criminal case in favor of a state administrative proceeding against the defendant Stephen Schneider’s medical license.

INTRODUCTION

Aside from their legally unsound arguments, the defendants’ lack of candor with the Court completely negates the basis on which their abstention motion rests. In the defendants’ current motion, they have unfortunately chosen to continue their attacks on

the government,¹ and in doing so, have also unfortunately chosen to omit material facts. The omitted material facts completely undermine the basis of the defendants' attacks and their credibility.

FACTUAL BACKGROUND

Although the defendants' current motion is completely legally baseless, the government first believes it has an obligation to correct the record with regard to the facts about the proceedings before the Kansas Board of Healing Arts ("KBHA"). The relevant and material facts are as follows:

A. Pending KBHA Proceedings

On May 30, 2006, the KBHA filed a two-Count Petition against defendant Stephen Schneider.² On September 1, 2006, the KBHA filed a comprehensive 10-Count First Amended Petition.³ On October 3, 2006, after being assigned to this case, the undersigned Assistant United States Attorney wrote a letter to the KBHA, which stated as follows:

We would ask that your production of documents be an ongoing one during the administrative proceedings so that we can keep up-to-date about what the KBHA is doing, and what Dr. Schneider is doing in response, so that we can best coordinate with the KBHA in our on-going criminal investigation. **By coordinating, we will avoid duplicating**

¹ As Cicero stated: "We must make personal attack when there is not argumentative basis for our speech."

² See Exhibit 1 (first page of Petition in 06-HA-00100).

³ See Exhibit 2 (first page of First Amended Petition).

efforts and we will stay out of the KBHA's way in its administrative proceedings against Dr. Schneider.⁴

On January 22, 2007, Special Agent James Greer, HHS-OIG, and the undersigned met with individuals at the KBHA offices, at which meeting the KBHA attorney, Kelli Stevens, informed that the KBHA had three new cases; that the KBHA was dismissing two cases; that the KBHA was hiring a new expert; that the KBHA wanted to hold off possibly 3-6 months on discovery so they could file a Second Amended Petition; and the KBHA would seek an agreed order of stay from defense counsel.⁵

Accordingly, on January 29, 2007, **the KBHA and the defendant filed an agreed order to stay proceedings** until the KBHA filed its Second Amended Petition.⁶ On November 13, 2007, the KBHA filed its Second Amended Petition.⁷ On December 20, 2007, the Grand Jury returned the Indictment in the current case.⁸ On December 27, 2007, the KBHA filed a Motion for an Emergency Order for the Temporary

⁴ See Exhibit 3 (October 3, 2006, Letter) (emphasis added). The defendants evidently have access to the correspondence between the KBHA and the United States Attorney's Office, yet there is no mention of this key letter in their abstention motion.

⁵ The KBHA Affidavits do not even correctly identify who was at this meeting.

⁶ See Exhibit 4 (Agreed Order of Stay). The defendants omit any mention of the agreed order of stay.

⁷ See Exhibit 5 (first page of Second Amended Petition). The defendants' motion fails to inform the Court of this Petition.

⁸ See Doc. 2.

Suspension of defendant Stephen Schneider's license, which order was granted on January 28, 2008.⁹

On March 12, 2008, defendant Stephen Schneider filed a motion to stay the KBHA proceedings.¹⁰ By letter dated March 31, 2008, the ALJ denied the motion to stay.¹¹ On May 14, 2008, the ALJ issued a Prehearing Order, setting the hearing for November 11, 2008.¹²

B. Prior KBHA Proceedings

The defendants state, without citation or support, that the KBHA has previously considered several cases involving defendant Stephen Schneider, and in **all** cases reached a finding that he was practicing within the standard of care.¹³ Without further information, it is impossible to know what was at issue in these "cases" and at what

⁹ See Exhibit 6 (Motion and ALJ's Initial Order temporarily suspending license). Defendants make no mention of this Motion or Order.

¹⁰ See Exhibit 7 (Motion). Defendants omit this key fact. Additionally, defendant Stephen Schneider has attempted to stay discovery in the civil malpractice cases. See Exhibit 8 (first few pages of Motion).

¹¹ See Exhibit 9 (Letter). Defendants' motion makes no reference to this ruling.

¹² See Exhibit 10 (Prehearing Order). Defendants fail to inform the Court of this Order.

¹³ See Doc. 107 at p. 2. Notably, "several cases" on page 2 become "numerous times" by page 7. See id. at pp. 2, 7.

level these cases were reviewed.¹⁴ Even if the defendants had provided this necessary contextual information, however, the government fails to understand its relevance to the defendants' abstention motion.

Generally, evidence of lawful, good, or honorable behavior by a defendant is not admissible at trial. Federal Rule of Evidence 404(b) proscribes the admission of character evidence to prove that a defendant has a good character and acted in conformity therewith.¹⁵ If a defendant wishes to admit evidence of "good" behavior, such evidence is admissible only if it comports with the requirements of Federal Rules of Evidence 404 and 405. It is well-established that "[e]vidence of good conduct is not admissible to negate criminal intent."¹⁶ Likewise, evidence of specific acts of good conduct is not admissible to establish the good character of the defendant.¹⁷

Furthermore, evidence that the defendants acted lawfully or laudably on other occasions is irrelevant to defending the charges in the Indictment since it offers no

¹⁴ Not all complaints reach the level of a Board decision. As the government understands the process, once the KBHA receives a complaint, it is reviewed by disciplinary counsel, and if found credible, is assigned to an investigator. If the investigator finds evidence supporting the complaint, the investigator reports back to the disciplinary counsel, who then has a committee review the evidence. The review committee makes a recommendation, which recommendation is then reviewed by a disciplinary panel. Only when the panel finds cause for action is the case submitted to the Board.

¹⁵ United States v. Hill, 40 F.3d 164, 168 (7th Cir. 1994).

¹⁶ United States v. Camejo, 929 F.2d 610, 613 (11th Cir. 1991); see also, Michelson v. United States, 335 U.S. 469, 477 (1948); United States v. Russell, 703 F.2d 1243, 1249 (11th Cir. 1983).

¹⁷ See Camejo, 929 F.2d at 613.

lawful defense to those charges.¹⁸ Proof of an assertion by a negative is inadmissible.¹⁹ A defense must be one cognizable under the law, and must be a defense to the charges brought.²⁰ "A defendant may not seek to establish his innocence . . . through proof of the absence of similar acts on specific occasions."²¹ Therefore, evidence that a defendant has, on occasion, performed lawful acts does not establish the lawfulness of another act and, thus, is inadmissible.²²

Finally, contrary to defendants' assertions, it is clear that the KBHA has certainly not reached a positive finding in **all** cases, since the Board moved for an emergency order of suspension of defendant Stephen Schneider's license.²³

¹⁸ See United States v. Heidecke, 900 F.2d 1155, 1162 (7th Cir. 1990); United States v. Burke, 781 F.2d 1234, 1243 (7th Cir. 1985).

¹⁹ See United States v. Beverly, 913 F.2d 337, 353 (7th Cir. 1990).

²⁰ See United States v. Zang, 703 F.2d 1186, 1195 (10th Cir. 1982).

²¹ United States v. Scarpa, 897 F.2d 63, 70 (2d Cir.1990).

²² See Burke, 781 F.2d at 1243 (7th Cir. 1985); United States v. Glasser, 773 F.2d 1553, 1559 (11th Cir. 1985) ("the fact that appellant did not commit other similar offenses does not tend to prove that she did not commit the ones at issue in this case"); United States v. McGuinness, 764 F. Supp. 888, 896 (S.D.N.Y. 1991) ("The refusal of bribes on specific occasions is not admissible in evidence to prove the character of the accused.").

²³ See Exhibit 6 (Motion and Initial Order).

DISCUSSION

A. The United States Attorney's Office has not interfered with the KBHA proceedings, which are ongoing.

Based on the above facts, it is clear that the KBHA, with the defendant Stephen J. Schneider's agreement, chose to stay proceedings while the KBHA investigated new claims for its Second Amended Petition. The KBHA never stayed its investigation, and proceeded forward. Indeed, the KBHA's actions speak much louder than their mistaken and erroneous Affidavits,²⁴ because one month prior to the Indictment, the KBHA filed its Second Amended Petition, and has moved forward since then. The only other motion to stay was filed by defendant Stephen Schneider, a fact glaringly missing from the defendants' current motion. The United States Attorney's Office never requested that the KBHA defer its investigation or proceedings in favor of the criminal case, and it is clear the KBHA did not defer its investigation or proceedings. Consequently, the defendants' brash statement that the federal government has brought the KBHA's regulatory process to a halt²⁵ is simply false.

Based on the current scheduling order, the final hearing on the suspension and revocation of defendant Stephen Schneider's medical license will occur in November 2008, three months prior to the criminal trial. Thus, the United States Attorney's Office

²⁴ The government respectfully submits that these Affidavits may have been penned at the direction of others whose actions were, at that time, under the intense scrutiny of the Kansas legislature and the media. Evidently, both the media and the legislature found the KBHA's blaming the United States Attorney's Office for its slow pace to be less than credible, as should this Court.

²⁵ See Doc. 107 at p. 1.

has done nothing to interfere with the proceedings before the KBHA, since those proceedings have continued to march on, albeit slowly.

Nor has the United States Attorney's Office "commandeered" the KBHA. Such a suggestion in light of the exhibits defendants attached to their motion is patently absurd.²⁶ Indeed, the correspondence attached to the defendants' abstention motion reveals that the KBHA was not acting at the government's direction in any way, and was only reluctantly cooperative, given that the KBHA withheld evidence responsive to subpoenas, disclosed sensitive law enforcement information without authority, and has had to be repeatedly subpoenaed for information.

Finally, the government notes that defendants' motion is inherently inconsistent and nonsensical. On the one hand, they categorically state that the government has "shut down or indefinitely suspended the process"²⁷ taking place before the KBHA, and then on the other hand want this Court to defer a criminal case in favor of a process that has been "shut down" and "suspended." If the KBHA proceedings were truly suspended, there would be nothing to which this Court could defer, making abstention unnecessary.²⁸ The defendants even claim at one point in their motion that the criminal

²⁶ The government does not agree with defendants' pejorative characterizations of this correspondence as authoritative, threats, rebukes, demands, chastising, or castigations. Such deprecatory references to the United States Attorney and the undersigned are not only without support in the record, but are unprofessional hyperbole.

²⁷ Doc. 107 at p. 5.

²⁸ See Southwest Air Ambulance, Inc. v. City of Las Cruces, 268 F.3d 1162, 1178 (10th Cir. 2001) (Younger abstention inapplicable when state court has stayed its own proceedings pending resolution of the case in a federal forum).

indictment rendered the regulatory process moot.²⁹ If the KBHA process is moot, abstention is also inappropriate. The defendants' motion argues in circles.

B. The defendants' motion turns Younger abstention on its ear and is legally unsound.

As an alternative to their motions to dismiss the Indictment, the defendants, under a Younger abstention theory, want this Court to stay these criminal proceedings in deference to the KBHA's administrative proceedings. As they must admit, such a theory is one of "first impression."³⁰ And, it is a theory that turns the Younger abstention doctrine upside down.

Under the abstention doctrine articulated by the Supreme Court in Younger v. Harris:³¹

[F]ederal courts should not interfere with state court proceedings by granting equitable relief – such as injunctions – of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings when the state forum provides an adequate avenue of relief.³²

The Younger abstention doctrine arises from a desire to "avoid undue interference with states' conduct of their own affairs."³³ As the Tenth Circuit has explained:

²⁹ See Doc. 107 at p. 5.

³⁰ See id. at p. 7. This admission is an incredible understatement.

³¹ 401 U.S. 37 (1971).

³² Southwest Air Ambulance, 268 F.3d at 1177 (internal quotations and citations omitted).

³³ J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1291 (10th Cir. 1999) (quoting Seneca Cayuga Tribe v. Oklahoma, 874 F.2d 709, 711 (10th Cir. 1989)).

For Younger abstention to be appropriate, three elements must be present: (1) interference with an ongoing state judicial proceeding; (2) involvement of important state interests; and (3) an adequate opportunity afforded in the state court proceedings to raise the federal claims.³⁴

The government fails to see, and the defendants have failed to explain, how Younger abstention is even colorably applicable in this case. Indeed, it is possible that the defendants raised this completely inscrutable theory for only one purpose – to falsely accuse the government of misconduct.

There is no request for equitable relief before this Court concerning the KBHA proceedings. A criminal case is not a request for equitable relief. Judge Brown dismissed the prior request for equitable relief because the plaintiffs lacked standing and on the basis of Younger abstention.³⁵

The cases the defendants cite in support of their novel theory do not support it at all, and most deal with the typical Younger situation, in which a physician is seeking relief from a state licensing procedure by moving for declaratory or injunctive relief before the federal court.³⁶ The defendants fail to cite any case in which a federal

³⁴ Southwest Air Ambulance, 268 F.3d at 1178.

³⁵ See Pain Relief Network v. The State of Kansas, et al., 08-CV-01045-WEB, Doc. 16. Despite Younger's obvious application in the civil case, plaintiff's counsel, Mr. Ohaebosim, failed to acknowledge Younger in the pleadings and made no attempt to distinguish Younger.

³⁶ See, e.g., Amanatullah v. Colorado Medical Examiners, 187 F.3d 1160 (10th Cir. 1999); Weitzel v. Division of Occupational and Professional Licensing, 240 F.3d 871 (10th Cir. 2001); Simopoulous v. Virginia State Board of Medicine, 644 F.2d 321 (4th Cir. 1981). Other cases the defendants cite found the Younger abstention doctrine to be inapplicable. See, e.g., Gibson v. Berryhill, 411 U.S. 564 (1973) (abstention in appropriate); New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) (abstention inappropriate).

criminal prosecution has been stayed pending a state regulatory decision. The government has found no such cases, and for good reason – staying a criminal prosecution in such a situation would be absurd and unprecedented, and would serve neither the principle of federalism nor the principle of comity. Moreover, under Younger, the federal lawsuit is dismissed, not stayed.³⁷ Clearly, dismissing a criminal indictment because of a pending administrative licensing proceeding has no basis in the law whatsoever.

If defendant Stephen Schneider wanted the KBHA proceedings to be resolved prior to indictment, he should have opposed the KBHA's request for a stay in January 2007 rather than agreeing to it, and he should not have moved to stay the proceedings in March 2008. Furthermore, he could have requested a swifter schedule than is now in place.

The defendants also fail to explain how any decision by the KBHA would be determinative of the criminal conduct at issue in the Indictment, except to speculate that a decision by the KBHA to reverse his suspension could be offered as evidence in his defense. Even assuming, arguendo, the admissibility of such a decision,³⁸ the government contends it would have little, if any effect on the jury's verdict. Whether the defendants conspired to distribute drugs, commit health care fraud, and launder money

³⁷ See Gibson, 411 U.S. at 577.

³⁸ The government does not here take a position on the admissibility of the KBHA decision. But, the government predicts that if the KBHA's temporary suspension is made permanent, the defendants will argue that such a decision will not be admissible.

will not turn on whether the KBHA permanently suspends or reinstates defendant Schneider's license.³⁹

Finally, the defendants ask this Court to "mitigate the damage,"⁴⁰ but do not explain what damage, do not identify who suffered damage, and do not explain how abstention mitigates this unidentified damage. Thus, the government can only respond that the defendants' rhetoric in this motion, as well as others, is completely lacking in substance and is simply "sound and fury, signifying nothing."⁴¹ As such, it merits no relief.

CONCLUSION

The defendants' motion is the proverbial attempt to cram a square peg into a round hole. The government never interfered with the KBHA's proceedings, which are continuing, and which will likely be resolved prior to the trial of this matter. There is simply no factual or legal basis for this Court to stay the criminal proceedings in deference to the state administrative proceedings. Therefore, the Court should deny defendants' motion.

³⁹ The defendants fail to inform the Court that the KBHA's Second Amended Petition concerns 12 former patients of defendant Stephen Schneider, only five of which are named in the pending Indictment. Of these five, only two are specifically named in Counts, Patricia G and Kandace B. The other three are named in Attachment 1 (James C, Darrell H, and Lynnise G).

⁴⁰ Doc. 107 at p. 2.

⁴¹ Macbeth, Act 5, scene 5.

Respectfully submitted,

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s/ Tanya J. Treadway

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following individuals:

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