IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In re GRAND JURY INVESTIGATION	**No. 09-404-JAR**

SIOBHAN REYNOLDS' AMENDED MOTION TO QUASH SUBPOENAS

Subpoena recipient Siobhan Reynolds, on her own behalf and as records custodian for subpoena recipient Pain Relief Network, hereby moves this Court under Rule 17 to quash the document subpoenas issued to her and PRN on March 10, 2009. *See* Fed. R. Crim. P. 17(c)(2) ("[T]he court may quash or modify the subpoena if compliance would be unreasonable or oppressive.").

BACKGROUND AND SUMMARY OF ARGUMENT

Siobhan Reynolds ("Ms. Reynolds") is a New Mexico-based political activist who lobbies about, and tries to draw public attention to, an important public policy issue: the availability of appropriate pain relief medication for individuals with serious medical conditions. Ms. Reynolds is also President of the Pain Relief Network ("PRN"), a national non-profit advocacy organization that opposes the federal government's prosecution of physicians based on their medical judgments about pain medication for their patients. Ms. Reynolds has testified on this issue before both Houses of Congress.

Among the cases about which she has engaged in public advocacy is that of Dr. Stephen Schneider and his wife Linda, who are currently being prosecuted in federal court in Wichita, Kansas before the Honorable Monti Belot. Ms. Reynolds has spoken out strongly about this prosecution as an example of government interference with the doctor-patient relationship and with doctors' medical judgments.

The Assistant United States Attorney prosecuting the Schneiders, Tanya Treadway ("AUSA Treadway"), has previously attempted to silence Ms. Reynolds' advocacy and failed. AUSA Treadway filed a motion before Judge Belot attempting to have Ms. Reynolds (among other individuals) gagged from speaking about the Schneiders' case. *See* Gov't Mot. Pursuant to Loc. R. 83.2.3, *United States v. Schneider*, No. 07-10234 (D. Kan. Apr. 4, 2008, dkt. no. 57). Recognizing the important First Amendment interests at stake, Judge Belot rejected the prior restraint against Ms. Reynolds urged by AUSA Treadway. *See United States v. Schneider*, No. 07-10234 (D. Kan. July 10, 2008, dkt. no. 146) (order denying motion).

AUSA Treadway's efforts to silence Ms. Reynolds having been stymied before the Schneiders' trial judge, she has now convened a grand jury to subpoena documents from Ms. Reynolds and PRN in an attempt to silence Ms. Reynolds by invading her privacy and by raising the specter of criminal prosecution. These subpoenas constitute an abuse of the grand jury process. In order to employ a grand jury subpoena, a prosecutor must have a good faith basis to believe that the subject of an investigation has committed a criminal offense. This motion will demonstrate that there is no basis for a criminal investigation against Ms. Reynolds and that these subpoenas were obtained solely for the purpose of suppressing Ms. Reynolds' constitutionally-protected speech and association.

The broad and invasive scope of the subpoenas suggests the improper purpose behind the prosecutor's actions. AUSA Treadway has obtained a grand jury subpoena that seeks, among other things, all of Ms. Reynolds' personal communications on any subject whatsoever with any former employees or patients of the Schneider Medical Clinic and with dozens of named individuals including members of the Schneider family

and members of the Schneiders' legal and medical defense team, along with a log of all of Ms. Reynolds' calls for the past seventeen months and all of her visits to the Schneider Medical Clinic. *See* Exh. 1 (Reynolds subpoena). AUSA Treadway also obtained a subpoena seeking similar information from Ms. Reynolds' organization, PRN. *See* Exh. 2 (PRN subpoena). These subpoenas would force Ms. Reynolds and PRN to disclose *all* of their communications, whether or not they are even related to the Schneider case, with dozens of individuals, along with a record of every single call Ms. Reynolds has made for the past seventeen months. The chilling effect of these subpoenas on the advocacy of Ms. Reynolds, PRN, and other potential speakers is undeniable: the government is sending a clear message that the price of speaking out against a government prosecution is compelled disclosure of *all* the speaker's associations (by way of her phone records) and all the speaker's communications about any subject with anyone involved in the case. This type of reprisal for protected speech violates speakers' First Amendment rights of expression and association. This Court should not permit the use of the grand jury to chill advocacy in this manner.

The subpoena is also a misuse of the grand jury process because it is aimed at invading the defense camp of the Schneiders and obtaining privileged defense information that is obtainable only (if at all) through the regular criminal discovery process. Tellingly, two-thirds of the individuals whose correspondence with Ms. Reynolds and PRN is ordered by the subpoena are either members of the Schneiders' defense team – from their lawyers (such as Lawrence Williamson, Eugene Gorokhov, and Kevin Byers, among others) to their medical experts (such as Drs. Barry Cole, Steven Karach, and Steven Passick, among others), *see* Exh. 1, items 1x, 1y, 1z, 1jj, 1kk & 1*ll*;

Exh. 2, items 1x, 1y, 1z, 1jj, 1kk & 1*ll* – or the Schneiders' former or potential lawyers, or family members. And this is not the first time AUSA Treadway has tried to drive a wedge between the Schneiders and their lawyers: AUSA Treadway has previously filed an unsuccessful motion seeking a determination of conflict and disqualification of the Schneiders' lawyers. *See* Gov't Mot. for Determination of Conflict and Memo. in Support, *United States v. Schneider*, No. 07-10234 (D. Kan. Mar. 7, 2008, dkt. no. 38); *United States v. Schneider*, No. 07-10234 (D. Kan. Mar. 14, 2008, no dkt. number) (order finding potential conflicts waived and permitting the Schneiders' lawyers to continue to represent them). This Court should not permit the grand jury process to be used to undermine the Schneiders' defense or their relationship of trust with their attorneys.

Because this investigation lacks any good faith basis, Ms. Reynolds does not claim a Fifth Amendment privilege with respect to any of the materials sought by the subpoena.[1] Ms. Reynolds maintains that she has committed no crime and that there is nothing in the requested materials that could inculpate her in the obstruction of justice, witness tampering or jury tampering. For all of these reasons, this Court should quash the March 10 subpoenas issued to Siobhan Reynolds and PRN.

ARGUMENT

I. The Subpoenas Unjustifiably Invade Ms. Reynolds' and PRN's Freedoms of Speech and Association.

Although grand jury subpoenas are normally afforded a presumption of regularity, the March 10 subpoenas, particularly when viewed against the backdrop of AUSA Treadway's efforts to silence Ms. Reynolds and invade the defense camp in the

[1] Counsel previously indicated to this Court, in a motion for an extension of time and to amend the original motion, that a Fifth Amendment assertion might be forthcoming. Now that counsel has had time to investigate the called-for production, Ms. Reynolds and her counsel are satisfied that no Fifth Amendment privilege claim is necessary.

Schneiders' criminal case, are anything but regular. "[M]ere inconvenience not amounting to harassment does not justify judicial interference with the functions of the grand jury," but courts nonetheless have "inherent power over their process to prevent abuse, oppression and injustice." *United States v. Gurule*, 437 F.2d 239, 241 (10th Cir. 1970) (citation and internal quotation marks omitted); *accord, In re Grand Jury Proceedings*, 857 F.2d 707, 709 (10th Cir. 1988). Additionally, courts should exercise their considerable discretion in this area with care, in light of the fact that grand jury subpoenas "are issued pro forma with no prior court approval" and thus "are instrumentalities of the United States Attorney's office although issued under the district court's name and for the grand jury." *In re Grand Jury Subpoena*, 829 F.2d 1291, 1296-97 (4th Cir. 1987).

The Tenth Circuit has repeatedly recognized that a grand jury subpoena that invades First Amendment rights cannot stand unless justified by a compelling governmental interest. *See, e.g., In re First Nat'l Bank, Englewood, Colo.,* 701 F.2d 115, 118-19 (10th Cir. 1983); *National Commodity and Barter Ass'n (NCBA) v. United States*, 951 F.2d 1172, 1174 (10th Cir. 1991). *Accord*, *In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-03 (2d Cir. 1985); *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972), *overruled in part on other grounds, In re Grand Jury Proceedings*, 863 F.2d 667, 669-70 (9th Cir. 1988); *In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*, 26 Media L. Rptr. 1599, 1601 (D.D.C. 1998). A good faith investigation qualifies as a sufficient government interest in this context, *see NCBA,* 951 F.2d at 1174-75, but a district court must "consider whether the Government can acquire the material it ostensibly seeks" with a more limited production, *see First Nat'l Bank*, 701 F.2d at 119.

The facts of this case demonstrate the chilling effect of these subpoenas on Ms. Reynolds' First Amendment rights and raise serious doubts about whether a good faith investigation is present here. Emblematic of the subpoenas' targeting of protected speech rather than criminal activity is the request for Ms. Reynolds' and PRN's communications with and payments to George Lay Signs, *see* Exh. 1, items 1rr & 3*ll*; Exh. 2; items 1rr & 3mm. This is a company that PRN paid to erect a billboard in support of the Schneiders – an obvious example of protected speech that cannot possibly be construed as a criminal offense. *See, e.g., Turney v. Pugh*, 400 F.3d 1197, 1204 (9th Cir. 2005) (noting in dicta that it would "intrude into the realm of protected expression" to criminalize an "advertisement supporting a particular outcome in a pending case (e.g., 'OJ Was Framed!')"). Likewise, the subpoenas call for copies of a "movie" shown to former Schneider Medical Clinic patients. *See* Exh. 1, item 6; Exh. 2, item 8. To the best of Ms. Reynolds' knowledge, these items refer to an advocacy video, not in Ms. Reynolds' possession but available online, that Ms. Reynolds made to highlight the plight of individuals in severe pain who are unable to obtain proper medication because the government's "war on drugs" is making doctors fearful of prescribing necessary medication.[2] This video does not ask or instruct viewers to behave in any particular way or take any action in relation to any criminal proceeding – as witnesses, jurors or in any other capacity. Like the billboard, this speech is self-evidently protected political speech and not a crime. As these examples reflect, AUSA Treadway's investigation is, at best, based on a fundamental misunderstanding of the broad gulf between protected advocacy and witness tampering. At worst, AUSA Treadway's investigation is a pretext for the

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[2] *Available at* http://www.painreliefnetwork.org/media (click on "The Chilling Effect").

chilling of the speech and association of a person whose message AUSA Treadway does not wish to be heard.

As president of PRN, Ms. Reynolds has publicly supported Dr. Stephen Schneider and his wife Linda throughout their prosecution.[3] Ms. Reynolds' interest in the pain relief issue is intensely personal, stemming from her own experience watching her husband die of a devastatingly painful illness without adequate pain relief.[4] Because of her personal experience, she has become not only a public advocate for the Schneiders but also their friend, providing personal moral support for them in a difficult time.[5] Ms. Reynolds has also been a resource for their defense, helping the Schneiders obtain counsel and relevant experts;[6] in this capacity, Ms. Reynolds has had extensive contact with lawyers and experts to secure their help for the Schneiders. As a public advocate for the Schneiders' cause, Ms. Reynolds has done such things as erect a billboard ad in January 2009 in support of the Schneiders.[7]

It is beyond dispute that the First Amendment protects the right to associate with criminal defendants and to facilitate *their* association with lawyers and experts who can help them, *see, e.g., NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (recognizing as constitutionally protected the "freedom to engage in association for the advancement of beliefs and ideas"); *In re First Nat'l Bank, Englewood, Colo.,* 701 F.2d 115, 117 (10th

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3 *See, e.g.*, CJOnline.com, *Advocate Subject to Grand Jury*, Apr. 14, 2009, *available at* http://www.cjonline.com/news/local/2009-04-14/advocate_subject_to_grand_jury.

4 *See* Testimony of Siobhan Reynolds, *The DEA's Regulation of Medicine: Hearing Before the House Judiciary Comm.*, 110th Cong. (July 12, 2007), *available at* http://www.painreliefnetwork.org/wp-content/uploads/postpdffiles/siodeaTestimony.pdf.

5 *See, e.g.*, KSN News, *Schneider Supporter Subpoena[d]*, Apr. 15, 2009, *available at* http://www.ksn.com/news/local/story/Schneider-Supporter-Subpoena/GiJmokOE9k-XZqct9pUplg.cspx.

6 *See id.*

7 *See* KAKE News, *Citizens Notice Schneider Billboard*, Jan. 29, 2009, *available at* http://www.kake.com/home/headlines/38680617.html ("The solid black billboard exclaims in large white letters, 'Dr. Schneider never killed anybody.'").

Cir. 1983) (same), and that the First Amendment also protects the right to speak out publicly against a criminal prosecution. *See, e.g., Bridges v. California,* 314 U.S. 252, 268 (1941) (admonishing that restrictions on speech concerning pending judicial proceedings are likely to impede discussion of important public issues "at the precise time when public interest in the matters discussed would naturally be at its height"); *Pennekamp v. Florida,* 328 U.S. 331, 336 & n.4, 349-50 (1946) (reversing contempt convictions for publishing editorials critical of pro-defendant rulings in criminal cases); *Wood v. Georgia,* 370 U.S. 375, 376-80, 395 (1962) (reversing the contempt conviction of a local sheriff for publicly denouncing a court's instruction to a grand jury to investigate "Negro bloc voting" in a Georgia county). In fact, the Schneiders' trial judge recognized the protected nature of Ms. Reynolds' advocacy when he denied AUSA Treadway's aggressive motion for a court-ordered gag of Ms. Reynolds and other individuals. *See United States v. Schneider*, No. 07-10234 (D. Kan. July 10, 2008, dkt. no. 146) (order denying motion).

Chastened by Judge Belot's denial of her motion to gag Ms. Reynolds, but undeterred in her efforts to obtain this result, AUSA Treadway resorted to intimidation by way of grand jury subpoenas, notably in a different venue, under the supervision of different judges. The subpoenas AUSA Treadway obtained call for a voluminous production from Ms. Reynolds and PRN, including all of Ms. Reynolds' personal communications on any subject whatsoever with any former employees or patients of the Schneider Medical Clinic and with dozens of named individuals, including members of the Schneider family and members of the Schneiders' legal and medical defense team,

along with a log of all of Ms. Reynolds' calls for the past seventeen months and all of her visits to the Schneider Medical Clinic. *See* Exh. 1, items 1 & 5.

The chilling effect of government investigations that target a person's beliefs, speech or associations is widely recognized. *See, e.g.*, *In re Grand Jury Subpoena*, 829 F.2d 1291, 1299 (4th Cir. 1987) (finding "powerful chilling effect" in subpoenas issued to video distributors for films depicting sexually explicit conduct); *Clark v. Library of Congress,* 750 F.2d 89, 94 (D.C. Cir. 1984) (noting that "government action . . . motivated solely by an individual's lawful beliefs or associations . . . is imbued with the potential for subtle coercion of the individual to abandon his controversial beliefs or associations"); *Alliance To End Repression v. City of Chicago*, 627 F. Supp. 1044, 1056 (N.D. Ill. 1985) (recognizing chilling effect where police "accumulated an extensive dossier" about an activist, "detailing almost all facets of [her] life, from her participation in political events to conversations at a cocktail party, to medical facts about her child"); *Paton v. La Prade*, 469 F. Supp. 773, 778 (D.N.J. 1978) ("There can be no doubt that governmental investigation of a legitimate political group can have a chilling effect both on members of the group and on members of the public who wish to learn about the group.").

AUSA Treadway contends that Ms. Reynolds' continued advocacy is proof that her speech has not been chilled and therefore no First Amendment infringement has occurred. This is incorrect. As the Third Circuit has aptly noted:

> The . . . defense . . . that because plaintiffs persisted in their First Amendment activities they cannot complain of any constitutional violation, is . . . unacceptable. Such a defense would limit the protection of the First Amendment to those who are timid but eliminate it for those who are brave. It would indeed be ironic were we to hold that persons who are persevering and resolute, who overcome their inhibitions and

> fears to proceed on a course they believe constitutionally protected, would thereby lose the very protection which they rely on in asserting their rights.

Trotman v. Bd. of Trustees of Lincoln Univ., 635 F.2d 216, 227 (3d Cir. 1980); *accord, Zieper v. Metzinger*, 392 F. Supp. 2d 516, 527 (S.D.N.Y. 2005), *aff'd*, 474 F.3d 60 (2d Cir. 2007).

Finally, Ms. Reynolds' activities are a far cry from the offenses of witness tampering, jury tampering and conspiracy (under 18 U.S.C. §§ 1503 & 1512 and 18 U.S.C. § 371), which are what the government claims to be investigating. For the crime of witness tampering to have occurred, someone must have interfered with, delayed or prevented testimony, the production of evidence or communications with law enforcement about criminal activity by means of one of the following:

> (a) "kill[ing] or attempt[ing] to kill another person" or "us[ing] physical force or the threat of physical force against any person, or attempt[ing] to do so";
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> (b) "knowingly us[ing] intimidation, threaten[ing], or corruptly persuad[ing] another person, or attempt[ing] to do so, or engag[ing] in misleading conduct toward another person";
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> (c) "corruptly alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object, or attempt[ing] to do so," or "corruptly . . . obstruct[ing], influenc[ing], or imped[ing] any official proceeding, or attempt[ing] to do so"; or
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> (d) "intentionally harass[ing] another person and thereby hinder[ing], delay[ing], prevent[ing], or dissuad[ing] any person" from testifying, reporting criminal activity to law enforcement, or catalyzing someone's arrest or prosecution.

18 U.S.C. § 1512(a)-(d). There is no basis for AUSA Treadway to believe Ms. Reynolds has done any of these things – it is quite a broad leap from advocacy in support of defendant to the inference that the advocate has committed or attempted murder, physical

violence, or threats; concealed documents; *corruptly* (i.e. "with the purpose of obstructing justice," *United States v. Erickson*, 561 F.3d 1150, 1160 (10th Cir. 2009)) influenced an official proceeding; or intentionally harassed anyone and thereby impeded someone's testimony or communications to law enforcement. Permitting prosecutors to make such a leap does worse than subject Ms. Reynolds and PRN to a burdensome and unnecessary investigation; it imperils all First Amendment advocacy in the context of any court case by blurring the law's clear line between advocacy and obstruction of justice. As the Supreme Court long ago held, First Amendment freedoms need "breathing space . . . to survive." *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964) (citation and internal quotation marks omitted). AUSA Treadway's conduct would strangle them.

Jury tampering is an even less plausible suspicion here. That offense covers anyone who "corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror," or other judicial officer. 18 U.S.C. § 1503. Again, there is simply no basis to infer from Ms. Reynolds' advocacy that she has "endeavor[ed] to influence, intimidate or impede" any juror "corruptly" (i.e. "with the purpose of obstructing justice," *see Erickson*, 561 F.3d at 1160) or by any type of threat. Particularly since the jury for the Schneiders' case has not been selected yet, it would be hard for Ms. Reynolds to have tried to influence or intimidate jurors here even had she been inclined to do so. At a more fundamental level, once again, there is a serious danger to First Amendment rights where prosecutors are permitted to infer criminal obstruction of justice from mere First Amendment advocacy in a criminal case.

Finally, as to conspiracy, the crime is defined as containing two elements: (1) "two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose," and (2) "one or more of such persons do any act to effect the object of the conspiracy." 18 U.S.C. § 371. Presumably, AUSA Treadway is asserting that even if there is no evidence Ms. Reynolds has herself engaged in obstruction of justice, this Court could uphold the subpoena on the ground that she might have conspired with others to do so, or to commit some other crime. Not only is there no indication that this is the case, but such a theory, if accepted, would render grand jury subpoenas for all practical purposes immune from judicial review as long as the prosecutor stated she believed there was some manner of conspiracy. Conspiracy, of course, is one of the broadest and most general crimes in the federal penal code. *See, e.g.*, *Krulewitch v. United States,* 336 U.S. 440, 445-46 (1949) (Jackson, J., concurring) (describing conspiracy as an "elastic, sprawling and pervasive offense . . . so vague that it almost defies definition"); *United States v. Stoner*, 98 F.3d 527, 533 (10th Cir. 1996) (noting the "amorphous" nature of the crime of conspiracy). The first element of conspiracy incorporates by reference the entire federal penal code, *see* 18 U.S.C. § 371 (element satisfied if "two or more persons conspire . . . to commit any offense against the United States"), and so a suspicion of conspiracy, however vague or vacuous in substance, is impossible to disprove. Thus, a conclusory allegation, without more, of some nebulous conspiracy to commit some violation of federal law, cannot serve as the basis to uphold an investigative subpoena, or else the nature of judicial review of the grand jury process would shift from deferential to toothless.

Given the sweeping nature of the subpoenas here, their chilling effect on First Amendment rights, and the circumstances under which they were obtained – a frustrated prosecutor seeking to silence a dissenting advocate – this Court should quash the subpoenas as an unjustified infringement on Ms. Reynolds' and PRN's First Amendment rights.

II. The Subpoenas Are Overbroad.

Even were they not violative of the First Amendment, the subpoenas would still be overbroad. The Tenth Circuit has long recognized a set of a substantive limitations on the scope of a valid subpoena:

> (1) the subpoena may command only the production of things relevant to the investigation being pursued; (2) specification of things to be produced must be made with reasonable particularity; and (3) production of records covering only a reasonable period of time may be required.

United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970); *accord, In re Grand Jury Proceedings*, 857 F.2d 707, 709 (10th Cir. 1988). Even if this Court finds that the First Amendment is not itself a sufficient basis to quash the subpoenas, the general criteria for valid subpoenas should be applied in light of the serious First Amendment concerns raised by AUSA Treadway's actions. *See Branzburg v. Hayes*, 408 U.S. 665, 708 (1972) ("We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth."); *In re Grand Jury Subpoena*, 829 F.2d 1291, 1297 (4th Cir. 1987) (noting that "the context of the first amendment intensifies" other concerns about grand jury subpoenas).

Under the relevancy criterion, the subpoenas here are overbroad because they call for materials unconnected to the purported object of the investigation: allegations of obstruction of justice in the Schneider case. For example, the Reynolds subpoena calls

for all her communications with members of the Schneiders' legal defense team. *See, e.g.*, Exh. 1, items 1x, 1y, 1z, 1aa & 1bb. It is unclear how such communications could reflect that Ms. Reynolds killed, harmed, threatened or corruptly influenced a juror or witness, *see* 18 U.S.C. §§ 1503 & 1512, except on the off-chance that she actually told one of the Schneiders' lawyers she did so – in which case the subpoena might as well cover everyone Ms. Reynolds has talked to since this case began on the off-chance she committed a crime and told someone else about it. Likewise, the Reynolds subpoena seeks a log of all her calls – to anyone – for the last seventeen months. *See* Exh. 1, item 5. This demand, too, is untethered from what AUSA Treadway claims she is investigating. If AUSA Treadway believed there could possibly be some pattern in Ms. Reynolds' calls that would show wrongdoing, she should have requested a log of calls that reflect such a pattern. In the absence of any serious effort to tailor this subpoena to material that could realistically be expected to provide some information about criminal activity, it appears that AUSA Treadway is simply engaging in a fishing expedition to harass Ms. Reynolds and invade her privacy because of her speech. This Court should not countenance such a broad and oppressive use of the subpoena power.

III. The Subpoenas Are a Misuse of the Grand Jury Process To Circumvent Standard Criminal Discovery.

It is well-established that "it is improper to use the grand jury for the primary purpose of strengthening the Government's case on a pending indictment or as a substitute for discovery." *United States v. Gibbons*, 607 F.2d 1320, 1328 (10th Cir. 1979); *accord, United States v. Apperson*, 441 F.3d 1162, 1189 (10th Cir. 2006); *United States v. Jenkins,* 904 F.2d 549, 559 (10th Cir. 1990). The government may obtain discovery information for a pending case via grand jury subpoena only as an "incidental

benefit" of a grand jury investigation with a separate and legitimate purpose. *Gibbons*, 607 F.2d at 1328. Courts do not frequently find that the grand jury process has been abused for the primary purpose of seeking discovery, but such findings have been made when the circumstances and the aim of the subpoenas are sufficiently suspect. *See, e.g., In re Grand Jury Subpoena (Simels)*, 767 F.2d 26 (2d Cir. 1985) (quashing subpoena aimed at investigating relationship between counsel and client); *Matter of Grand Jury Subpoenas (Nash)*, 858 F. Supp. 132, 136 (D. Ariz. 1994) (same, noting the potential to "drive[] a wedge" between counsel and client); *see also United States v. Raphael*, 786 F. Supp. 355, 359 (S.D.N.Y. 1992) (ordering government to produce grand jury transcripts for in camera inspection where context and timing of subpoenas "shed an unflattering light on the Government's actions"). Judicial inquiry into the question of impermissible purpose is conducted on a case by case basis: "Courts have looked at the circumstances of particular cases in deciding the kind of showing that they would require either from the party challenging the grand jury or from the government." *United States v. Jackson*, 863 F. Supp. 1449, 1453 (D. Kan. 1994) (citation and internal quotation marks omitted).

Although courts normally "should accept at face value" the prosecutor's explanation of a subpoena's dominant purpose, such deference is not appropriate where "there is an 'indicative sequence of events demonstrating an irregularity.'" *Id.* (quoting *Raphael*, 786 F. Supp. at 358). Here, an attempt to invade the defense camp via documents in Ms. Reynolds' possession is the only plausible explanation (other than the clearly impermissible goal of chilling Ms. Reynolds' advocacy) for the scope of the subpoenas here. More than half of the named individuals whose correspondence with Ms. Reynolds or PRN is sought are either members of the Schneiders' defense team –

lawyers, individuals engaged to help the legal team, or experts on medicine or medical fraud – or family members of the Schneiders'. *See* Exh. 1, items 1c, 1f, 1x, 1y, 1z, 1aa & 1bb (the Schneiders' lawyers, a technical consultant to the lawyers, and a private investigator for the lawyers); items 1jj, 1kk, 1*ll*, 1mm, 1nn & 1qq (the Schneiders' medical and medical-fraud experts); items 1g, 1h, 1p, 1q, 1r, 1s, 1t & 1u (the Schneiders themselves, and family members of Linda Schneider). Among the remaining named individuals are the Schneiders' former lawyers or lawyers in other matters, *see* Exh. 1, items 1v, 1cc, 1ee & 1ff, or individuals approached to help with, but not ultimately hired for, the Schneiders' present defense, *see* Exh. 1, items 1dd & 1*ii*. In all, approximately two-thirds of the individuals named by the subpoenas are either members or prospective members of the Schneiders' present defense team, other lawyers for the Schneiders, or individuals personally related to the Schneiders. Such a lopsided list – slanted markedly toward seeking information from those whom the Schneiders have brought into their confidence – belies the ordinary presumption of regularity in the grand jury process and smacks of a win-at-all-costs prosecutor seeking to gain an advantage for her case against the Schneiders.

And this is not the first time AUSA Treadway has attempted to meddle with the Schneiders' defense team. In the underlying criminal case against the Schneiders, AUSA Treadway filed a motion alleging that the Schneiders' lawyers have a conflict of interest and urged the Court to hold a hearing probing the nature of the attorneys' relationship with their clients and with non-parties and to consider disqualifying the Schneiders' lawyers. *See* Gov't Mot. for Determination of Conflict and Memo. in Support, *United States v. Schneider*, No. 07-10234 (D. Kan. Mar. 7, 2008, dkt. no. 38), at 22. A week

later, the Court entered a minute order finding that all potential conflicts had been waived and permitting the Schneiders' lawyers to continue to represent them. *See United States v. Schneider*, No. 07-10234 (D. Kan. Mar. 14, 2008, no dkt. number). Even assuming for the sake of argument that AUSA Treadway has a bona fide suspicion of obstruction of justice, an investigation of these charges would not justify investigating Ms. Reynolds' contacts with members of the Schneiders' defense team, and certainly not with their lawyers. Indeed, as noted, AUSA Treadway has already been down that road, unsuccessfully. As with AUSA's Treadway's motion to gag Ms. Reynolds, it appears that when the court refuses to order what AUSA Treadway wants, she then turns to the grand jury to try to get it for her.

It is additionally curious that AUSA Treadway is representing the government in both the Schneider case and the matter of the Reynolds/PRN subpoenas; if these subpoenas were indeed a bona fide use of the grand jury for an independent and legitimate investigation, it would seem the safest course, to avoid at least the appearance of impropriety if not the fact of it, to assign a different prosecutor to the grand jury matter. *See, e.g.*, *United States v. Raphael*, 786 F. Supp. 355, 359 (S.D.N.Y. 1992) (ordering government to produce grand jury transcripts for inspection, and noting disapprovingly that "the same prosecutors . . . are responsible for the Grand Jury subpoenas at issue" as well as the related trials); *United States v. Kovaleski,* 406 F. Supp. 267, 270 (E.D. Mich. 1976) (quashing grand jury subpoena for impermissible purpose, in part because "[t]he same Assistant United States Attorney was involved in the perjury investigation and the trial"); *see also United States v. Shaygan*, No. 08-20112, 2009 WL 980289, at *12-14, 19, 23 (S.D. Fla. 2009) (sanctioning AUSAs for unethical conduct,

including breaching "taint wall" between a prosecution and a collateral investigation into "witness tampering"). The extent of the Reynolds and PRN subpoenas aimed at members of the Schneiders' defense team, taken together with AUSA Treadway's prior attempts to probe the attorney-client relationship in this case, constitute an "indicative sequence of events demonstrating an irregularity" that calls for this Court to intervene. *United States v. Jackson*, 863 F. Supp. 1449, 1453 (D. Kan. 1994) (citation and internal quotation marks omitted).

On its face, AUSA Treadway's fishing expedition appears to have the impermissible purpose of obtaining information about the Schneiders' defense. Therefore the subpoenas should be quashed as an abuse of the grand jury process.

In the event that the Court is not inclined to grant this Motion on the pleadings, at a minimum, the Court should require an in camera submission from the government detailing the basis for the investigation of Ms. Reynolds, particularly in relation to members of the Schneiders' defense team. The Court would then be in a position to evaluate the government's motives in light of the pending criminal case and craft an appropriate remedy – whether quashing the subpoena, narrowing it substantially, or directing the government to create a wall between AUSA Treadway and the grand jury investigation.

CONCLUSION

For the foregoing reasons, this Court should quash the March 10, 2009 subpoenas issued to Siobhan Reynolds and the Pain Relief Network.

Respectfully Submitted,

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Dated: May 7, 2009

CERTIFICATE OF SERVICE

I certify that on May 7, 2009, I filed with the court clerk and delivered/transmitted the following documents to opposing counsel:

(1) Siobhan Reynolds' Amended Motion to Quash Subpoena;

(2) Attached Exhibit 1; and

(3) Attached Exhibit 2.

The documents were delivered via U.S. postal mail and transmitted via email to:

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