C O U N T II

MR. KLINE DID NOT VIOLATE THE KRPC AS CHARGED UNDER COUNT II. HE PROPERLY ADVISED THE GRAND JURY REGARDING APPLICABLE LAW, AND PROPERLY USED HIS DISCRETION TO SEEK ENFORCEMENT OF A VALID SUBPOENA.

EXCEPTIONS TO FINDING ONE[48]

The failure of Mr. Kline's office to identify for the Grand Jury by citation the *Aid For Women* case had nothing to do with "dishonesty, fraud, deceit or misrepresentation." The record contains no evidence to support such a finding.

271. The Panel Report finds that Mr. Kline violated KRPC 8.4(c) and engaged in "conduct involving dishonesty, fraud, deceit, or misrepresentation" by allegedly not apprising the Grand Jury formed in Johnson County, Kansas of the *Aid for Women* case.[49] Panel Report, ¶¶ 392-3. The Panel relied upon the testimony of Presiding Juror Stephanie Hensel,[50] the sole grand juror permitted by the Panel to testify. Ms. Hensel, the Panel states, "felt intentionally misled." *Id*. at ¶ 396. The Panel relied upon and summarized Ms. Hensel's testimony as follows:

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[48] *See* Panel Report, at ¶¶ 389-397 (whether Respondent violated the KRPC "when he failed to advise the grand jury of K.S.A. 38-1522 and the *Aid for Women* cases").

[49] Judge Thomas Marten initially issued a preliminary injunction against enforcing the state's mandatory reporting law. 327 F. Supp.2d 1273 (D. Kan. 2004). As Attorney General, Mr. Kline appealed that decision. The Tenth Circuit reversed and remanded for trial. 441 F.3d. 1101 (10th Cir. 2006). After trial, Judge Marten issued a permanent injunction prohibiting the enforcement of the state's mandatory reporting law in cases involving consensual age-mate relationships. 427 F. Supp. 2d 1093 (D. Kan. 2006). Mr. Kline again appealed. After the legislature changed the wording of the Kansas mandatory reporting law, Attorney General Morrison successfully moved to dismiss the case as moot. 2007 WL 6787808 (10th Cir. Sept. 20, 2007).

[50] Ms. Hensel testified at the hearing and has been publicly identified. In the Grand Jury Transcript she is referred to as Grand Juror No. 9. Exhibit 97, Hensel 2417:20-24. These exceptions refer to her both by name and by grand jury number.

> The presiding juror of the grand jury testified that once the grand jury knew about K.S.A. 38-1522 and the federal court [*Aid for Women*] judgment limiting prosecutors from enforcing K.S.A. 38-1522 according to the Respondent's attorney general opinion, the Grand Jury abandoned five of the seven issues they were investigating . . . . [R]ecords were requested and subpoenas were issued based on a misunderstanding of the law . . . ."

Id. at ¶ 396. The Panel found that the prosecutor's role in this case "required the Respondent and his assistants to apprise the Grand Jury of K.S.A. 38-1522 and the *Aid For Women* cases." *Id.* at ¶ 391. The Panel concluded that Mr. Kline was "false and misleading by omission," thus prejudicing both justice and the Grand Jury. *Id. at* ¶ 395-96. The Panel seems to conclude that the so-called "omission" was material and prejudicial to justice because (1) the Grand Jury would not have issued its January 7, 2008 subpoena to Planned Parenthood had it known about *Aid to Woman*, and (2) the Grand Jury abandoned its investigation of mandatory reporting violations after learning about *Aid For Women* on January 9. Mr. Kline takes exception to the Panel's factual findings, which are demonstrably false, and to the Panel's (unsupported) legal conclusions about the duty of a prosecutor. The limited holding of *Aid For Women* and the objective evidence in the record, including the subpoena and the Grand Jury transcripts, establish no legal or factual basis for the Panel's finding. Mr. Kline properly instructed the Grand Jury on the substance of *Aid for Women* on the Grand Jury's first full day of work. Curiously and ironically, the Panel fails to discuss the actual ***holding*** of *Aid for Women* while recommending harsh discipline against Mr. Kline for his initial failure to mention the *case name* to the Grand Jury. *See generally* Panel Report, ¶¶ 231-251 & 389-397. Mr. Kline at all times delivered accurate statements of the law to the Grand Jury. He takes particular exception to

the Panel Report's credibility findings in favor of Ms. Hensel, whose testimony is consistently impeached by the objective Grand Jury record, whose anti-Kline animus was exposed during the Grand Jury proceedings, and whose pro-Planned Parenthood bias culminated in her attempt to impose on her fellow jurors a secretly-negotiated settlement agreement designed to subvert the Grand Jury's efforts and to protect the target of a criminal investigation. Mr. Kline reserves the right to brief all of these issues.

The limited scope and relevance of the Aid For Women holding.

272. Mr. Kline first challenges the finding that the January 9 disclosure of the *Aid For Women* case led the Grand Jury to abandon the investigation of mandatory reporting violations. The fact record disproves that finding convincingly. *Aid for Women* holds that mandatory reporters are not required to report child sexual abuse involving "age-mates" unless they have reason to suspect harm caused by the sexual abuse. "[T]his case is not about whether adult sexual predators will escape detection . . . [but only addresses] mandatory reporting of consensual activity of minors." 427 F. Supp. 2d at 1106, 1116. In issuing the injunction, Judge Marten limited its application to "clear cases of consensual, same-age sexual relations." *Id.* at 1114.

273. In *Aid for Women*, Judge Marten begins his analysis of the Kansas mandatory reporting law by recognizing that the statute defines all sexual activity with minors as "sexual abuse" as a matter of law. *Id. at* 1098. Mr. Kline began his explanation of the statute to the Grand Jury in the same manner. *See* Exhibit 96, 2429:9-22.

274. Judge Marten wrote:

> The core of the reporting statute – providing for the detection and protection of children suffering from incest or abusive sexual activity – is unaffected by this opinion. Such acts were and will remain subject to mandatory reporting. But the statute was not intended to **cover consensual activity between age-mates that does not result in injury.** The injunctive relief barring the Attorney General from implementing a per se rule that all illegal sexual activity involving a minor is injurious . . . .

Aid for Women, 427 F. Supp. 2d at 1113 (emphasis added). In other words, the injunction issued in *Aid for Women* **limits the duty to report certain categories of sexual activity involving minors** but does not the govern or limit investigations into possible criminal activity. Judge Anderson considered the *Aid For Women* injunction and found it to be irrelevant to the issuance of a subpoena for abortion records. Judge Owens also recognized the obvious: investigation of abortion providers is not prohibited by the *Aid for Women* injunction.

Mr. Kline instructed the Grand Jury on the law consistent with the Aid for Women holding on the Grand Jury's first full working day.

275. On December 17, 2007, Mr. Kline appeared before the Grand Jury to provide a general overview of the law. This appearance was only one week after the Grand Jury convened and was the Grand Jury's first full day of work. *See* Panel Report, ¶¶ 232-233. Mr. Kline discussed the law with precision and correctly presented the holding of *Aid for Women*, but without mentioning the case name. He stated that a mandatory reporter must report abuse of a minor if having reason to suspect harm caused by sexual abuse.[51] Exhibit 96, 2429:4-8.

[51] Mr. Kline quoted directly from the Kansas statute then applicable. K.S.A. § 38-2223. The legislature slightly changed the statute from the law in place in 2004 by changing the word

276. Specifically, Mr. Kline stated: **"And here is the operable language – 'has reason to suspect that a child has been harmed** as a result of . . . sexual abuse.'" *Id.* (emphasis added). Continuing, Mr. Kline explains that sexual abuse is defined by Kansas law as sexual interaction with an underage child. Mr. Kline then notes that if a child 13 and under is pregnant, the child has been raped as a matter of law. **"Some might say I don't have reason to believe there was harm to the child. That's an issue for you all to take up . . . ."** *Id.* at 2430:8-15 (emphasis added).

277. Mr. Kline responded to a question by a Grand Juror:

Juror No. 14: There is still mandated reporting for a 14-year old and 15 year-old correct?

Mr. Kline: Yes. Under the statute, **reason to suspect harm caused by sexual abuse. All of this is defined as sexual abuse. The only issue you are dealing with is reason to believe there's harm caused by**.

Exhibit 96, 2431:4-10. (emphasis added).

278. Accordingly, in his first overview of the law with the Grand Jury, Mr. Kline three times emphasized that a mandatory reporter need only report child sexual abuse if having reason to believe the sexual abuse caused harm. Exhibit 96, 2427-2432. Mr. Kline's explanation even expanded beyond the *Aid for Women* holding, stating the Grand Jury must find "reason to suspect harm" even when the sexual partners are not age-mates. *Id.* Mr. Kline's instruction to

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"injury" to "harm." A memo prepared by Mr. Merker's law firm concluded the change had little practical impact. Exhibit P8, at 37. Later, the Grand Jury reviewed evidence obtained in Mr. Kline's investigation of mandatory reporting while he was Attorney General to determine if they had a basis to subpoena records with minor patient identities from Planned Parenthood. The Grand Jury never issued such a subpoena.

the Grand Jury on the law is consistent with the interpretation of every witness who testified at the ethics hearing.

Mr. Kline's explanation of the law to the Grand Jury was supported by the Opinion of Judge Clark Owens in State v. Tiller and on two previous occasions by Judge Anderson.

279. Undaunted by contrary evidence, the Panel concludes that Mr. Kline concealed *Aid for Women* with the intent of enforcing his 2003 Attorney General Opinion (concluding that all underage sexual intercourse was per se reportable). *See* Atty. Gen. Op. No. 2003-17. *Aid for Women* enjoined enforcement of Mr. Kline's 2003 opinion in instances of age-mate consensual relations.

280. Mr. Kline testified that he and his office did not follow the 2003 opinion in the investigation of abortion providers. Kline, 446:3-447:11.[52] Judge Owens explained Mr. Kline's approach in his opinion denying the motion to dismiss in *State v. Tiller*. Dr. Tiller had alleged that Mr. Kline's actions as Attorney General constituted "selective prosecution."

281. Mr. Kline and his staff were testified at the hearing. Judge Owens explained:

[52] Camille Nohe, former Assistant Attorney General under General Kline, testified at the hearing that she authored the 2003 Attorney General's Opinion, that the research and opinion were hers, and that Mr. Kline did not interfere with her research or conclusions. Ms. Nohe also testified that she is pro-choice, stating that if there had been a litmus test in the office she would "not have passed it." Nohe 1929:5-14. She indicates that Mr. Kline did not direct the outcome of her research. "I actually don't remember any time any attorney general directed an outcome." *Id.* at 1925:24-1926:3. Ms. Nohe stated that she did many hours of research on the Opinion and that she believes the issue in the Opinion "was somewhat different." *Id.* at 1926:14-1926:25. The Opinion determined that "in other words, even if it was consensual, there was injury as a matter of law." *Id.* at 1927:12-14. Ms. Nohe indicates the opinion was based on the research she completed. *Id*. at 1927:15-19. She also testified that, despite the "hot" nature of the issue, "antiabortion sentiment" ***did not*** permeate the office to her knowledge. *Id*. at 1928:17-1929:4.

> The mandatory reporting statute is actually a very difficult law to enforce. A prosecutor not only has to prove that the defendant is a member of the mandatory reporters and that they have reason to believe that a child has been sexually abused. The prosecutor would have to also prove that the mandatory reporter was aware that the child had been injured by the abuse. This additional requirement applies not only to sexual abuse, but also physical, mental and emotional abuse and neglect. How is a prosecutor going to obtain the information that an individual nurse, psychologist or physician has counseled with a child that has been sexually abused and also has the added factor of having been injured by the abuse?
>
> **In the instance of an abortion provider, any child that has received services by definition is pregnant. In the instance of a late-term pregnancy, the abortion provider has obviously reached the conclusion that the procedure is medically necessary for the health of the mother. That would certainly be stronger evidence of injury than can be inferred merely by visiting a nurse or physician. Even in the event of an early term pregnancy, the fact that the minor is obtaining an abortion shows that it is an unwanted pregnancy.**

Exhibit N, at 8-9 (emphasis added). Judge Owen's Opinion was issued in 2009, well after the injunction in *Aid for Women*.

282. Furthermore, in 2004 Mr. Kline's office obtained subpoenas from Judge Anderson to investigate failure to report child sexual abuse. Judge Anderson was aware of *Aid for Women* when he approved subpoenas KDHE, and later Planned Parenthood and WHCS. Both KDHE and the abortion clinics filed motions to stay or quash the subpoenas based on the preliminary injunction in *Aid for Women*. Exhibits RR and V4.

283. Denying the clinics' motion, Judge Anderson wrote:

> The medical facilities have informed the Court that an injunction has been entered in the United States District Court for the District of Kansas prohibiting the enforcement of mandatory reporting requirements of **sexual activity between minors of similar age and injury is not reasonably suspected**. *Aid for Women v. Foulston*, 327 F. Supp. 2d 1273, 1275 (D. Kan. 2004). The facilities indicate that the

> Attorney General has (or will) be joined as a party defendant. Prior to the issuance of the subpoena, the Attorney General provided this Court with a copy of the decision in the federal case. **The Court considered Judge Marten's order in finding that subpoenas for records in this investigation should be issued. This inquisition is not focused on mandatory reporting of sexual activity between similar age minors when injury is not reasonably suspected**.

Exhibit V4, at 4234 (emphasis added).

284. Judge Anderson states that Mr. Maxwell initially made him aware of *Aid for Women*. He then researched the matter. **"I had the Aid for Women case before me in mind. Everything I issued I believed was appropriate, not precluded by a federal court."** Anderson 714:18-21 (emphasis added).

> *Mr. McClain, Special Counsel to the Grand Jury, interpreted the Aid for Women holding consistent with Mr. Kline and Mr. Maxwell.*

285. On December 17, 2007, Attorney Richard T. Merker and former Judge Larry McClain[53] were appointed to serve as Special Counsel for the Grand Jury. Responding to an email from grand juror Hensel dated January 9, 2008, Mr. McClain provided generally the same explanation of the law as Mr. Kline and Mr. Maxwell. "[Y]ou consider whether there is a requirement to report on a case by case basis. You certainly need to look at the under 12 cases,

[53] While Mr. Kline would normally employ the title of "Judge" when referring to a former judge, he is using the less formal title of "Mr. McClain" to refer to former Judge McClain in these exceptions. He does so solely to avoid potential confusion with the many other references to sitting judges involved in this case and referenced herein.

incest and sexual abuse by an adult." Exhibit P8, at 169.[54] The Grand Jury had to investigate to determine if Planned Parenthood was complying with the law.

286. Mr. Kline's office also explained the new "Child Rape Protection Act" to the Grand Jury. The law required a report to KBI with a tissue sample of the aborted child for all abortions on children thirteen and under. This statute, passed in 2005, was not challenged in *Aid for Women*. The law was specific to abortion providers and did not require evidence of harm. *See* K.S.A. § 65-67a09. Mr. Kline informed the Grand Jury of his belief that Planned Parenthood was complying with the new law, belying the notion that he intended to mislead the Grand Jury to gain a true bill. Kline 2934:19-2935:21; Exhibit 96, 2432:3-5.

287. The Panel does not disagree with Mr. Kline's statement of the law as quoted above, or that *Aid for Women* holds otherwise than he explained. Nor does it disagree with Mr. Maxwell or Mr. McClain that a report must be made if there is reason to suspect harm from sexual abuse.

288. Mr. Kline explained that consensual age-mate activity is not per se reportable, with the exception of abortions covered by the Child Rape Protection Act. His instructions to the Grand Jury are contrary to the Attorney General Opinion he signed in 2003, demonstrating that he did not harbor the deceptive intent of hiding the *Aid for Women* holding to enforce his Opinion.

Discussing Aid for Women by name did not materially alter the Grand Jury's plan.

[54] Exhibit P8 is 643 pages of bate-stamped documents produced by Grand Jury Special Counsel Richard Merker.

289. The Panel claims Mr. Kline's failure to inform the Grand Jury of the status of the mandatory reporting statute prior to the 2007 amendments is evidence of intentional deceit. This finding improperly assumes that *Aid for Women* was material to the investigation, and that Mr. Kline deliberately concealed the holding. Neither is true. Mr. Kline takes exception to the Panel's incorrect assumptions and findings, which rest exclusively on the objections of a single (and biased) grand juror. An accurate history, which the Panel failed to provide, is necessary to understand how far the Panel strayed from the truth.

The Grand Jury develops its investigative plan.

290. On December 19, 2007, Mr. Kline introduced Mr. Maxwell, stating that he would be the lead representative from his office to the Grand Jury. Exhibit 97, 2516:2-19. On January 2, 2008, Mr. Maxwell presented investigator Tom Williams as a witness to provide background information on the issues in the citizen petition. Mr. Williams explained the strategy of beginning a mandatory reporting investigation by going to "public source" documents at SRS and KDHE. Exhibit 98, 2957:10-11. This initial review would indicate if the number of underage abortions reported to KDHE was in proportion to the SRS child sexual abuse reports.[55] If not,

[55] The Grand Jury heard testimony from an SRS employee who testified that the agency would "freely exchange" such information with law enforcement agencies. The witness testified that such agencies would include the Office of Attorney General and District Attorneys. She stated this would be done without subpoena. Exhibit 100, at 2838:4-2840:13. This testimony also undermines the Panel's claim that Mr. Kline committed an ethics violation when his office, in 2003, refused SRS demands to reveal in detail the factual basis for the investigation.

further investigation was warranted. Exhibit 98, 2605:6-20, 2607:7-10, 2608:19-2612:25, 2613:1-25, and 2615-2620:20.

291. This explanation was consistent with what Mr. Kline told the Grand Jury on December 17th. By comparing the SRS and KDHE records, he said, "you have a feel whether there are any reports." Exhibit 96, 2452:9-11. "If they match up, there's no need to go further really." *Id.* at 2452:11-12. On the basis of such a comparison, Judge Anderson, in October 2004, found probable cause to issue subpoenas for clinic records.[56] The DeFries Report noted: "It should be kept in mind that the District Court [Judge Anderson] found probable cause to believe that crimes had been committed." Exhibit 142, at 17.[57]

292. The Grand Jury developed an interest in investigating Planned Parenthood's compliance with the state's requirement of a 24-hour waiting period prior to receiving an abortion. Mr. Kline explained that law on December 17, 2007.[58] Exhibit 96, 40:11-14.[59] At the

[56] A review of KDHE and SRS records demonstrated that during a time when 166 abortions were performed on children fourteen and under, Planned Parenthood reported only one case of child sexual abuse. This evidence supported Judge Anderson's probable cause finding. Exhibit 20.

[57] The investigation into allegations of criminal activity by the abortion clinics resulted in four probable cause findings by four separate independent District Court judges spanning a time period of three years. The only charges so far to reach trial were those filed by Attorney General Morrison against Dr. Tiller. The absence of a serious prosecutorial effort resulted in Dr. Tiller's acquittal. Mr. Kline's original charges were dismissed for jurisdictional reasons at the request of Ms. Nola Foulston. Mr. Kline appealed that decision. When he shortly thereafter took office as Attorney General, Mr. Morrison dismissed the appeal.

[58] Mr. Kline also reviewed applicable law for the remaining petition items: standard of care (44:19-46:6), false information (46:9-47:3), fetal tissue trafficking (47:4-48:6), and parental

time, Juror No. 1 asked: "How do they prove the 24 hours? Do they have a record on it?" *Id.* at 41:15-16. Mr. Kline answered that the records should show a "date and time of first contact, and a date and time of the abortion, you can compare it to see if it makes sense. *Id.* at 41:17-42:3. He noted that the jury could review this information without seeking patient identities. "If you end up doing this, you could subpoena records without identities. Identities are not necessary of the patients." *Id.*, 42:18-20.[60]

293. The best starting point for investigating failure to report child sexual abuse is to cross-reference data in the public domain before seeking subpoenas for abortion records. Ultimately, however, charging failure to report child sexual abuse would require identifying the child. Mr. Kline's office advised the Grand Jury to first seek KDHE and SRS records before accessing abortion records.

294. Grand juror Hensel asked Mr. Kline whether the Grand Jury could use the records already in Mr. Kline's possession (*i.e.,* the redacted copies of the Planned Parenthood records). "It seems like your office has already done some investigation. Before you answer that, my next question is: Can we get it?" *Id.* at 58:22-25. Mr. Kline responded: "I'm kind of

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notification, including a discussion of judicial override (48:18-50:9). During these discussions, Mr. Kline made comments **exculpatory** of Planned Parenthood.

[59] The citations to the Grand Jury transcript in this section refer to the page number of the transcript and not the Bates number.

[60] Mr. Kline's statements are consistent with his approach of not seeking the names of adult patients.

weighing that right now." *Id.*, 58:1-2. 269. He advised that investigating 24-hour waiting period compliance begins—unlike mandatory reporting—with abortion records redacted of identities.

The Grand Jury begins to receive evidence.

295. On December 19, 2007, Mr. Kline introduced Maxwell to the Grand Jury, explaining that he would be their primary contact. Mr. Kline then went back to his office. Exhibit 97, 2516:2-19.[61]

296. On January 2, 2008, Mr. Williams explained the evidence that Mr. Kline's office already possessed, and how it was obtained. Exhibit 98, 2598:4-2613:25. A juror asked him why Mr. Morrison did not file charges. Mr. Williams answered: "You have a letter here [exonerating Planned Parenthood]. He looked at all this. He found no violation of law. He looked at it and wrote a letter to Planned Parenthood and told them he didn't see anything." Exhibit 98, 2717:19-23.[62] The presentation to the Grand Jury of Mr. Morrison's **exculpatory** letter further undercuts the claim that Mr. Kline and his staff intentionally deceived them. The Panel omits this fact.

297. Mr. Williams explained the development of the investigation:

> Well, when we looked at the records at SRS, there didn't seem to be a correlation between the numbers of reports that were being filed with SRS as compared with the public source documents that we received from KDHE

[61] Mr. Kline takes exception to the Panel Report's representations and conclusions in ¶ 394.

[62] Mr. Morrison wrote his letter prior to Judge Vano's probable cause finding that Planned Parenthood committed 107 criminal acts, and prior to the filing of *Morrison v. Anderson* in which Judge Anderson informed this Court of the evidence supporting a criminal investigation of Planned Parenthood.

> regarding the number of under-age females receiving abortions in the state of Kansas.

Exhibit 98, 2598:16-22.

298. He testified further:

> Before we ever went to seek medical records we visited with SRS and I talked to some police officers. The police didn't even feel like they were getting good cooperation. So there was an issue about whether there was any reporting at all . . . . there should have been something reported.

Id., at 2681:2-7; 2682:3-4. Mr. Williams' testimony demonstrates the Mr. Kline's office did not expect that every abortion on an underage child would be reported as sexual abuse. Instead, the issue was whether any abortions were <u>ever</u> reported as sexual abuse.[63] Vindicating that suspicion, the investigation revealed that in a period covering over a year Planned Parenthood made only one report of child sexual abuse. During that time, 166 abortions were performed in Kansas on children fourteen years of age and younger. Exhibit 20.

299. Grand Juror No. 2 posed the question: "You had said also that the initial mandate on this or whatever was the failure to report sexual abuse of minors. Yet in these charges that have been filed to date that does not exist. If that was the initial mandate, why

[63] At the hearing, Mr. Hazlett inferred that there was something wrong with Mr. Kline's office presenting this testimony because the office knew the KDHE and SRS numbers would not match up. **Contrary to the Grand Jury record**, Mr. Hazlett claimed that Mr. Kline told the Grand Jury on December 17, 2007, that the numbers would not match up. Mr. Kline did not make that statement. Rather, he simply told the Grand Jury that comparing the reports was a good place to start the investigation. Kline: 3047:1-10. Mr. Hazlett then asks: "Wouldn't there be legitimate reasons why those records would not match up?" Mr. Kline responds: "This is how you start an investigation . . . . There might be, there might not be. You don't know until you investigate." *Id*. at 3047:16-3048:3-15.

was that not acted upon?" Exhibit 98, 2699:24-2700:4. Mr. Maxwell responded: "[B]ut here is the problem. These records came without names. So we don't know the names to ask SRS whether or not they have been reported." *Id.* at 2700:24-2701:3.

300. Mr. Williams added that he had recommended that any abortion records subpoena include a request for the names of the children. Mr. Maxwell then reiterated that a charging decision on mandatory reporting could not move forward unless the names of the child patients were obtained directly from the abortion clinics. Only after investigators compare actual names with the SRS records can they be positive that the report of sexual abuse is missing. *Id.*, at 2701:13-2702:6.

301. Two weeks earlier, Mr. Kline made the same point: "I was never able, because of the Kansas Supreme Court decision, to get the names and ages of the minor children to match up with records." Exhibit 96, 2478:10-14. "The Kansas Supreme Court actually said I could go back and get the names, but I was out of office a month and a half after getting the records. I didn't have sufficient time." *Id.* at 2478:20-24. Mr. Kline had another reason he needed underage patient names. He would not prosecute Planned Parenthood for failure to report to SRS, if instead they reported the abuse to another state law enforcement agency. Names were necessary to identify other possible reports. Mr. Kline took this measured approach even though the law requires a report directly to SRS during business hours. Exhibit 99, 2782:8-19. *See* K.S.A. § 38-2223(c)(1).

302. The Grand Jury also received other evidence of failure to report child sexual abuse. Exhibit 100, 2793-281; 2820:2-6.

The Grand Jury "mandatory reporting" investigation takes a different track.

303. The Grand Jury wanted to know which issues Mr. Kline's office had already investigated, and also how long compliance with new subpoenas might take. Mr. Maxwell said: "I think if you want me to speculate why you were called into existence is because we only were able to look at '03 cases. What about '04, '05, '06, '07?" Exhibit 97, 2540:10-13. Mr. Maxwell's recommendation for the Grand Jury not to revisit 2003 mirrored what Mr. Kline said weeks earlier.

> So I would encourage you not to go back into '03 and try to charge because you are right up to the statute of limitations, but you can learn from our investigation what we have, and it might guide you in helping you decide what you want to look at in '04, '05, '06, '07.

Exhibit 96, 2460:16-21.

304. Mr. Maxwell listed the items in the Grand Jury's charge, identifying those Mr. Kline's office had not investigated. "No. 5 [illegal trafficking in fetal tissue], we did not look at the issue. . . . We didn't look at six [parental notice] and seven [24-hour waiting period]." Exhibit 98, 2714:24-2715:8.

305. Mr. Maxwell explained that when the clinics redacted patient-identifying information they also took out dates. "The problem is that when they went to these files and they provided them to the judge, they not only redacted patient-identifying information, they

redacted the dates and that's throughout the file." *Id.* at 2715:13-18. Without dates, Mr. Maxwell explained, the parental notification and 24-hour waiting period cannot be verified.

> They left the year, but redacted the dates. So you are not able to determine that issue based on these files of the 24-hour waiting period and the parental notification . . . . You are not going to be able to use these files to determine that issue because all of the redactions were done like this.

Id. at 2715:19-2716:4. When asked why Planned Parenthood was not compelled to undo the excessive redaction, Mr. Williams and Mr. Maxwell explained that time ran out. Mr. Kline was defeated in his bid for re-election. *Id.* at 2716:5-2717:11.

306. The Grand Jury then began to consider a new demand for the same records that Mr. Kline subpoenaed in *Alpha*, but without date and time redaction. This strategy, they hoped, would allow a streamlined investigation of parental notification and the 24-hour waiting period with documents that had already been through the *Alpha* process. Perhaps the court would summarily order production. Juror No. 14 asked: "What would determine what would be redacted on a new subpoena? Would we have to go before a judge?" *Id.* at 2719:1-2. Juror No. 9 asked Mr. Williams if he had any "first-hand knowledge or any leads" on petition items 5, 6 and 7. Mr. Williams answered "no." *Id.* at 2720:2-2721:5. Juror No. 2 added: "I think that's where we, as a group, need to take our investigation." *Id.*, at 2721:6-7.

307. At this point, just before noon on January 2, the idea is solidifying—solely on the initiative of the Grand Jury—to seek 2003 files from Planned Parenthood to address parental consent and the 24-hour waiting period. The Grand Jury's investigation of mandatory reporting, and its investigation of the 24-hour waiting period and parental notification, **began to take**

different tracks. The Grand Jury subpoenaed SRS and KDHE records to investigate mandatory reporting and, indeed, looked at SRS records in late February, well after *Aid for Women* was discussed by name on January 9. The Grand Jury also subpoenaed Planned Parenthood files, allowing redaction of patient-identifying information, but insisting that all dates and times of procedures be included. "You must provide . . . dates and/or times of any required notification and/or compliance with any required waiting period." Exhibit 108, at 3378. The purpose of the Planned Parenthood subpoena was not to monitor mandatory reporting, but to investigate compliance with the 24-hour waiting period and parental notification laws. For that purpose, dates are essential.

308. On January 7, 2008, the Grand Jury issued a subpoena to Planned Parenthood for sixteen redacted patient files. Exhibit 108. Of these records, only three related to abortions performed on children.

309. The Panel Report states that the purpose of the January 7 subpoena was to investigate **all seven charges** to the Grand Jury, including compliance with the mandatory reporting statute. Final Report, at ¶245 & n.13.

310. In support of its finding the Panel cites two exhibits: Exhibit 7, at 247-51 (the Grand Jury subpoena to Planned Parenthood); and Exhibit 108 (also the Grand Jury subpoena to Planned Parenthood). Panel Report, ¶ 245 & n.13 The subpoena, however, does not state that its purpose was to investigate non-compliance with laws relating to the reporting of child sexual abuse.

Mr. Maxwell fully and openly discussed Aid for Women with the Grand Jury on January 9th, 2008.

311. Although Mr. Kline fully explained the *Aid for Women* holding on December 17, the actual case citation did not come up before the Grand Jury until January 9. At that time, Mr. Maxwell discusses the *Aid for Women* while referencing the case annotation in the statute book. and explained that the case involved consensual age-mate relationships. Exhibit 100, 2878:14-2880:13. Mr. Maxwell informed the Grand Jury:

> I am aware of that case. I can tell you about that case. That was a case out of Wichita, and the federal judge down there believed and wrote an opinion that two 14-year-olds having sex was not a governmental interest necessarily. That consensual sex between – what he called in his opinion-- age mates, okay, was not a reportable event. Okay.

Exhibit 100, at 2879:2-9.

312. On January 9, 2008 Mr. McClain and Mr. Maxwell continued to discuss the case and both agreed to do some further research. Mr. Kline was not present. The Panel Report claims that the January 9 discussion of *Aid for Women* prompted the Grand Jury to end its investigation of Planned Parenthood's alleged failure to report child sexual abuse: "After becoming familiar with the import of K.S.A. § 38-1522 and the *Aid for Women* case, the Grand Jury discontinued investigating five of the seven items detailed in the original citizen petition." Panel Report, ¶253. The conclusion of the Panel Opinion is contrary to the fact record.

The Grand Jury requested presentation of evidence on all issues more than one month after Aid for Women *was first discussed on January 9.*

313. The Panel Report omits the Grand Jury's discussion on February 20. After explaining his office's opposition to Planned Parenthood's motion to quash the Grand Jury subpoena, Mr. Kline is asked by Ms. Hensel what evidence Mr. Kline's office will present regarding the seven issues being investigated. The very question clearly refutes the notion that any of the seven issues had been abandoned as of February 20. The transcript reads:

> Ms. Hensel: I have a question. Can you specify the subject matter that the witnesses will be testifying towards? What of our seven—
>
> Mr. Kline: We would try to get you witnesses on each count except I did have a discussion—
>
> Ms. Hensel: On what?
>
> Mr. Kline: On each of those items except one. I had a suggestion with Planned Parenthood yesterday about the use of fetal tissue in research. I believe on this – and I believe there's a way to do this without witnesses . . . . The other areas, we have witnesses as relates to failure to report child rape . . . .

Exhibit 102, 3037:11-3038:18.

314. In response, Grand Juror No. 2 mentions the subjects listed in the Petition to form the Grand Jury and requests evidence in all those areas. *Id.* at 3038:23-3039:7. Mr. Kline responds: "We have evidence on all that. I will tell you it would not – that you will need additional information to build on it, but I think it would be sufficient for your to consider a reasonable suspicion to proceed to request that information." *Id.* 3038:8-13.

315. Additionally, later that same day Judge Moriarty informed the Grand Jury that he was reviewing the response of SRS to the Grand Jury subpoena of records relating to their

mandatory reporting investigation. Exhibit 102, at 3118. By omitting these portions of the Grand Jury transcript, the Panel Report committed clear and prejudicial error, namely its concludes that the Grand Jury abandoned the investigation of failure to report after *Aid for Women* was first mentioned by name on January 9. *See* Panel Report, ¶ 253.

> *Presiding Juror Hensel confirms that one purpose of the Grand Jury subpoena after disclosure of the Aid For Women case was to pursue violations of the mandatory reporting requirement.*

316. Immediately after discussing the *Aid for Women* case on January 9, the Grand Jury voted to issue a subpoena to the Kansas Department of Revenue in an effort to obtain the names of Planned Parenthood employees. *Id.*, at 2893:7-108:2.[64] Ms. Hensel testified that the purpose for that subpoena was to assist the investigation of Planned Parenthood's compliance with the mandatory reporting law. Hensel 2348:16-2349:5.

> Q. [By Mr. Hazlett] And did the Grand Jury also issue subpoenas to the Department of Labor and Department of Revenue?
>
> A. Yes.
>
> Q. And with respect to the mandatory reporting issue?
>
> A. It was – that was one of the reasons, yes.

317. In another portion of her testimony, Ms. Hensel emphasized that the subpoena of the Department of Revenue records was to aid the mandatory reporting investigation. "And

[64] At the hearing, Mr. Hazlett led Ms. Hensel into testifying that the subpoena to the Kansas Department of Revenue was issued before the January 9 discussion of the *Aid for Women* issue. Hensel 2485:12-15. The Grand Jury transcript, Exhibit 100, clearly indicates this is **not** the case and that Hensel's testimony was false.

so we came to believe that they weren't reporting as required by law and so our thought process when we issued this [subpoena to KDR] was to allow us to get names of people that worked for Planned Parenthood." Hensel 2349:1-5.

Other evidence in the record refutes the Panel finding that a failure to disclose the Aid for Women *citation led the Grand Jury to abandon the issue.*

318. On January 9, KDHE provided a computer printout of abortion report information for 2004-2007, rather than the original forms. This data was provided to permit the Grand Jury to compare the KDHE data with SRS records to determine if further investigation was warranted on failure to report. Exhibit 99, 2758:5-19; Exhibit 100, 2780:1-2782:19, 2823:1-2824:20 (delivery of records); Exhibit 113 (subpoena of records). The Grand Jury also subpoenaed from SRS all copies of child abuse reports submitted from Planned Parenthood's street address for 2004-2007. Exhibit 100, 2829 (SRS testimony); *id.* at 2856:19-2861:25 (discussion about which records to subpoena). The Court entered a protective order relating to the SRS on February 12, 2008. Exhibit 114.

319. As late as February 25, 2008, a full 46 days after *Aid for Women* was discussed by name on January 9, more than two months after Mr. Kline informed the Grand Jury of the *Aid for Women* holding, and only seven days before the Grand Jury statutorily disbanded, the Grand Jury began reviewing the SRS records in their mandatory reporting investigation. On that date, Mr. McClain indicated that after photocopying he would have the SRS records ready for review. Exhibit 103, 3155a:23-3156:6.

320. The Grand Jury continued to look at SRS records in their mandatory reporting inquiry into late February, well after *Aid for Women* by name was fully known to them. Exhibit 102, 3119. Accordingly, Mr. Kline takes exception to the Panel's finding that after learning of *Aid for Women*, the Grand Jury abandoned its investigation of Planned Parenthood's alleged noncompliance with mandatory reporting laws. Mr. Kline takes exception to the Panel's total reliance on the testimony of Ms. Hensel, while ignoring the transcripts, pleadings and record of the Grand Jury, all which contradict that testimony. Mr. Kline also takes exception to the Panel's finding that Ms. Hensel's testimony alone constitutes clear and convincing evidence when that testimony is directly contradicted by all other evidence in this matter. *See* Panel Report, ¶ 396.

321. The other Panel theory that the "failure" of Mr. Kline and his office to name *Aid For Women* to the Grand Jury served to prejudice justice, aside from the just disproven "abandonment" theory, is that the January 7 subpoena would have never been issued had the *Aid For Women* citation been previously revealed to the Grand Jury. The only support cited by the Panel are **four citations to the trial transcript, all relating to testimony by Ms. Hensel**.[65] *See* Panel Report, ¶¶ 245, 396; Hensel 2347, 2357, 2367, and 2375. These findings are flawed for the same reasons—the record and evidence directly contradict Ms. Hensel's claim.

[65] Mr. Kline takes exception to the Panel citing testimony as being more credible than official documents of the Grand Jury and the Grand Jury transcript. This is especially true since Ms. Hensel's testimony on several fronts is inconsistent with her previous statements, and contradicts the billing records of Mr. Merker. She has repeatedly misrepresented the statements of Mr. Maxwell and Mr. Kline.

322. In that testimony, Ms. Hensel largely paraphrases various excerpts of the Grand Jury transcript in an effort to support the claim that the Planned Parenthood subpoena on January 7 was only for the purpose of investigating failure to report child sexual abuse. The Panel gives full credence to Ms. Hensel's testimony and takes it as proof that Mr. Kline's failure to mention *Aid for Women* by name was prejudicial and material. Panel Report, ¶396.

323. Contrary to Ms. Hensel's testimony, the record is full of references to the reason the Grand Jury issued the January 7, 2008 subpoena. These references ***do not*** include the mandatory reporting investigation as the reason for the subpoena. The Panel discusses none of these references. *See* Panel Report, ¶389-97. The Grand Jury transcript and record do not contain any statement that the purpose of the January 7 subpoena to Planned Parenthood was for the purpose of investigating mandatory reporting.

324. The Panel Report omits that the Grand Jury, Special Counsel, and counsel for Planned Parenthood repeatedly stated that the subpoena of Planned Parenthood records was to investigate claims of failure to comply with parental notification laws and the mandatory waiting period before obtaining an abortion. One need look only to the statement of the Grand Jury itself to remove any doubt about what is true (Mr. Kline's position) and what is fabricated (Ms. Hensel's testimony).

325. In late January, the Grand Jury informed Mr. McClain it wanted to make a formal statement explaining the purpose for its subpoena to Planned Parenthood on January 7. Exhibit Q8, at 302. Mr. McClain memorialized the request in an email dated January 28, 2008:

> The Grand Jury would like to make a formal statement in regards to the subpoena issued to Planned Parenthood of Overland Park. **The purpose of the subpoena** dated on January 7, 2008 to Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc., **was** for the purpose of **determining whether Planned Parenthood complies with** the following:
>
> - **parental consent requirement**
> - **compliance with the 24 hour waiting requirement**
>
> The purpose of the subpoena was not to revisit complaints filed by the District Attorney of Johnson County on October 15, 2007 . . . .

Exhibit Q8, at 260 (emphasis added) The Panel Report omits this email.

326. On February 20, 2008, Planned Parenthood counsel Douglas Ghertner wrote to Mr. Merker and Mr. McClain via email regarding documents to be produced by Planned Parenthood pursuant to the January 7, 2008 subpoena. Exhibit Q8, at 104-119. Mr. Ghertner stated that the agreed protective order and protection agreement was signed and entered into the record that day. *Id.* at 104-105. **"Stipulated Protective Order attached to the letter states that the purpose for the January 7th subpoena is to determine whether Planned Parenthood complies with "Parent [notice] consent (sic) requirement – Compliance with the 24 hour waiting requirement."** Exhibit Q8, at 106 (emphasis added). The Panel Report omits this Exhibit reference.

327. Mr. Ghertner also formalized that information in a letter dated February 20, 2008, mailed to Mr. Merker. The letter indicates that any production of documents provided by Planned Parenthood is made pursuant to the agreed upon "Stipulated Protective Order, executed by you on behalf of the Grand Jury . . . ." Exhibit Q8, at 314, ¶1. The letter also reads:

> These redacted medical records are being produced to the Grand Jury in response to and in satisfaction of the **Grand Jury's stated intentions and purpose of its Subpoena as recited in the enclosed Stipulated Protective Order**. These redacted medical records consist only of documents titled Parent/Guardian Notification, 24 Hour Informed Consent and Kansas Department of Health and Environment Bureau of Children, Youth and Families Certification of Informed Consent – Abortion, Also Referenced as Informed Consent for Abortion Procedure ("Confidential Communication Between Physician and Patient" as defined by K.S.A. §60-427) which are contained in sixteen (16) medical records that are subject to the Subpoena . . . served on Comprehensive Health on January 7, 2008.

Id. (emphasis added).

328. At the February 25 hearing on the Motion To Quash, Mr. McClain stated that the purpose of the subpoena was to look into the 24-hour waiting period and the requirement of parental notification:

> There is a statement there that's in quotes that's a statement from the Grand Jury. It says in the second sentence in the first paragraph "The **purpose of the subpoena dated January 7, 2008** to Comprehensive Health of Planned Parenthood of Kansas and Midwest Missouri, Inc. **was for the purpose of determining whether Planned Parenthood complies with** the following." The first is parental, and it says consent. It should be **parental notice requirement**. The second is compliance with the **twenty-four hour waiting requirement** per the statute.

Exhibit 101, 2916:19-2917:7 (emphasis added).

> *The form of the Grand Jury subpoena to Planned Parenthood also indicates that the subpoena was not relevant to the investigation of mandatory reporting compliance.*

329. The Grand Jury subpoena to Planned Parenthood did not seek patient names. Rather, it sought information relevant to the issues of parental consent and the 24 hour waiting period. The Grand Jury decided to subpoena sixteen records that had been subpoenaed in the

Alpha investigation, only three of which related to children. Exhibit 98:2762:1-19. Those records were already in the possession of the District Attorney's office but they were over-redacted and did not include date and time information necessary to investigate compliance with the 24-hour waiting period and parental notification laws. Exhibit 98, at 2715:11-2716:18. Furthermore, the records did not support a charge of failure to report child sexual abuse because they did not have the names of the child patients. *See, e.g*., Exhibit 98, 2702:1-6. Accordingly, no reason existed to subpoena records already in the possession of the District Attorney's office for the mandatory reporting investigation unless the subpoena sought the relevant evidence missing from the documents originally produced under *Alpha* – **the child names**. The same holds true regarding an investigation of compliance with parental notification and the 24-hour waiting period. The Grand Jury would need to see the dates and times of meetings—redacted in the *Alpha*-produced records— and the parental notification form.[66] The only evidence not in the possession of the Office of District Attorney at the time of the Grand Jury subpoena to Planned Parenthood relevant to the mandatory reporting investigation of the three subpoenaed child patient records was the identity of the minor patients. This Grand Jury did not seek this information, but did seek dates and times—further evidence that the purpose of the subpoena was for the two issues identified and not to investigate mandatory reporting failures. The subpoena orders Planned Parenthood to remove patient-identifying information and requires inclusion of dates and times of procedures. *See* Exhibit 108.

[66] Bringing a true bill on parental notification would necessitate obtaining child patient and parents' names. However, the Grand Jury wanted to start somewhere.

330. In a memorandum in support of its Motion to Quash, Planned Parenthood identifies the information sought by the Grand Jury that was not in the records originally produced to Judge Anderson. The information includes:

1. Any dates or times contained in any record
2. Dates of birth
3. Any dates relating to the last menstrual period
4. Dates and/or times of medical procedures and consultations
5. Dates and/or times of any required notification and/or compliance with any required waiting period
6. Any information contained in KDHE reports of induced termination of pregnancy forms
7. Names of insurance companies
8. Names of physicians or personnel working for Comprehensive Health
9. Patient ID codes as used in the KDHE forms
10. Any other information that cannot logically be used independently to identify a patient from the files.

Exhibit 111, at 3402.

331. Accordingly, Mr. Kline takes exception to the Panel's finding that Ms. Hensel's testimony alone, in clear contradiction of the content of the subpoena and express statements in the Grand Jury record (and related documents) provides clear and convincing evidence that the discussion of the *Aid for Women* citation on January 9 was material to the Grand Jury

decisions. As a matter of actual history and in every other respect, the Panel Report is error piled on error.

The Grand Jury process is threatened and corrupted by off-the-record secret agreements. Mr. Kline takes exception to the Panel's mischaracterization of his objection to the secret agreement, and also to the finding that the grand juror participating in the corruption is a credible witness.

332. The Panel states that Mr. Kline and Mr. Maxwell complained about the terms of a "proposed" confidentiality agreement without knowing the terms of the agreement. The Panel also states that the Grand Jury would not accept the agreement based on the "protestations" of Mr. Kline. Panel Report, ¶¶ 258-9. The Panel Report places those events in a false light while whitewashing the attempted corruption of the Grand Jury process by Ms. Hensel, Mr. Merker, and Planned Parenthood's counsel. This Court must understand these extraordinary facts when considering (a) the performance, the bias and the conclusions of the Panel, and (b) the credibility given by the Panel to the agenda-driven presiding juror.

333. At the February 15, 2008 hearing on Planned Parenthood's Motion to Quash the Grand Jury subpoena, Judge Moriarty requested that Mr. Kline meet with attorneys for Planned Parenthood in an effort to work out an agreement.

334. During those discussions Planned Parenthood maintained the position of refusing the subpoena's request for the dates and times of procedures, refusing to provide the date of the patient's last menstrual period, refusing to produce any witnesses to explain any documents and generally refusing to comply with the subpoena. Exhibit 102, at 3047:5-23. Mr.

Kline invited Mr. McClain to attend his meeting with Planned Parenthood but Mr. McClain declined. *Id.*

335. At the hearing February 15 hearing, Mr. Kline learned for the first time that Special Counsel was already working to negotiate the scope of the subpoena with Planned Parenthood and that Special Counsel believed that they had reached an agreement. Mr. Kline continued to argue for enforcement of the valid subpoena issued on January 7, 2008. Mr. Kline also advocated that any Grand Jury action be taken only by a vote on the record and not the informal guidance of a few of the Grand Jurors. Mr. Kline also observed that the Grand Jury's time was running out. Mr. Kline agreed to a meeting, which was set for February 19th. *See* Exhibit 101 (Transcript of hearing on Motion to Quash). It was Mr. Kline's position that the Grand Jury would need to vote on any agreement reached and to rescind its subpoena. *Id.*

336. The following day, on February 16, 2008, Mr. McClain emailed Hensel and stated that it was necessary to review a few matters prior to the February 20 Grand Jury meeting. Mr. McClain stated that Planned Parenthood and Mr. Kline were scheduled to meet on February 19 and that "I am fairly certain they will not reach full agreement so likely the[y] (sic) will accomplish little." Exhibit P8, at 548. Mr. Mr. McClain also informed Hensel that Planned Parenthood will deliver information specific to the 24 hour waiting period and parental notification issues consistent with a "confidentiality agreement." Mr. McClain wrote:

> I believe this is reasonable and indicated we would (sign)…I suggested Merker sign and Stephanie, as presiding juror. **Kline was not a party to the agreement and I am not comfortable giving him access**. Rick and I should be the custodian of those records also. Judge Moriarty requests the Jury clarify their needs under

> the subpoena and to clarify if they can accept modification to the original subpoena. We should provide this to the Judge in writing.

Id. (emphasis added).

337. That the confidentiality agreement was negotiated in secret, with the express purpose of not informing the Office of District Attorney, is beyond doubt:

a. Mr. Merker was aware that Douglas Ghertner, counsel for Planned Parenthood, intended to complete the agreement without notifying Mr. Kline. Merker 2673:7-22. Mr. Merker received an email from Ghertner dated February 18, 2009 in which Mr. Ghertner reveals that he did not intend to show the agreement to "Kline." Exhibit P8, at 538; Merker 2673:7-22. When asked if he told Mr. Ghertner that it would be prudent or important to tell Mr. Kline, Mr. Merker responded "I didn't intend to tell Mr. Ghertner how to do his job." Merker 2673:20-25. Mr. Merker also does not dispute that Grand Juror No. 15 had not seen the agreement prior to February 20th. Merker 2674:19-25.

b. Mr. McClain provided Hensel with an email indicating that he intended to negotiate the terms of any confidentiality agreement without informing Mr. Kline or his office. Ms. Hensel testified:

> Q. [By Mr. Holbrook] Ms. Hensel, do you see that e-mail where Mr. McClain says he doesn't want to disclose or inform Mr. Kline of his plans to negotiate or cut a deal with Planned Parenthood?
>
> A. It says Kline is not a party to the agreement and I'm not comfortable giving him access. Does it say something else?

Q. Did you ever communicate to Mr. McClain that he should be forthright and honest with the District Attorney and inform him of what his proposed activities were?

A. It was not a question of honesty or dishonesty, so, no.

Q. Can you answer my question? Did you or didn't you?

A. No.

Hensel 2435:5-22.

338. So as Mr. Kline was preparing to negotiate with Planned Parenthood's counsel, Special Counsel for the Grand Jury (Mr. Merker) had negotiated a confidentiality agreement with Planned Parenthood which altered the terms of the subpoena without the involvement of the Grand Jury as a whole and with the deliberate intent of withholding the content of the agreement from Mr. Kline's office. *Id.*

339. On February 20, Mr. Kline appeared before the Grand Jury to inform it of the result of his meeting with Planned Parenthood and to discuss the Grand Jury's options. At that time, Mr. Merker announced to the Grand Jury that he had reached an agreement with Planned Parenthood for the production of records (the same agreement mentioned in Mr. McClain's February 16 email). Exhibit 102, at 3052. Mr. Kline expressed concerns about any confidentiality agreement which had not been reviewed by his office. *Id.* Mr. Merker replied

"I'm sorry, Mr. Kline. I represent these people. I understand your position is, frankly, as attorney for these people. I am doing what they have asked for whether you like it or not."[67]

340. Mr. Kline then stated his concern that Planned Parenthood may try to make any agreement binding on his office, as Planned Parenthood had already tried to quash the original subpoena claiming Mr. Kline's office did not have the right to use in the existing criminal case any evidence obtained in the Grand Jury process. *Id.*, at 3052-3. "The point I make – and certainly counsel is right…[w]e need to look at the confidentiality agreement, but we do have a concern . . . ." *Id.*, at 3053:9-13.

341. Juror No. 15 then asks "[h]as anybody here seen the confidentiality agreement?" *Id.*, 3053:14-15. Juror No. 15 had not seen it. Mr. Kline and Mr. Maxwell asked to review the agreement. *Id.* 3053-7. Mr. Merker rejected their request.

Mr. Maxwell: Could we get it? Take a look at it?

Mr. Merker: It hasn't been signed by Judge Moriarty yet.

Mr. Kline: I would like to see it.

Mr. Merker: You are going to get a copy.

Id. at 3053:18-24. Contrary to Merker's representation, the agreement had already been signed and entered into the record by Judge Moriarty at 10:20 a.m. that morning before it was made known to the Grand Jury. Exhibit 102, 3141:20-3142:18.

[67] Mr. Kline's adversaries have imposed a fascinating dynamic in this case. On the one hand, he is required to advise the Grand Jury with perfect precision and to follow every command of Special Counsel or any grand juror. On the other hand, he can be completely fenced off from input or decisions that go to the core of his ability to function properly.

342. Grand Jurors then began expressing their frustration at Hensel and Mr. Merker and the secret nature of their conduct.

Juror No. 15:	Can I say something here? Are you two communicating with each other? I don't like that. We are part of the Grand Jury. If you two are passing notes between each other, is that fair for us?
Ms. Hensel:	No.
Juror No. 15:	So why are you doing that?
Ms. Hensel:	Because I'm trying not to be rude.
Juror No. 15:	You are being rude to us because I would like to know what you are discussing.
Ms. Hensel:	I apologize. I will share it later.[68]

Exhibit 102, 3057:15-3058:6. Juror No. 15 stated that he has not seen the agreement between Special Counsel and Planned Parenthood. *Id.* at 3052:21.

343. Mr. Kline restated his desire to see the agreement: "I would like to see it before it is signed, but if that is the position that we shouldn't, then we will deal with it afterwards." *Id*., at 3066:6-9. Mr. Merker finally relents and provides Mr. Kline a photocopy. Mr. Kline asks

[68] Mr. Merker testified at the hearing that Juror No. 15 was referring to Mr. Maxwell and Mr. Kline passing notes and expressed anger at Mr. Kline. Merker, 2675:7-2676:24. The transcript, however, clearly indicates the reference is to Mr. Merker and Ms. Hensel passing notes. Exhibit 102, 3057:15-3078:6. Mr. Maxwell and Mr. Pryor testified that members of the Grand Jury were upset about the developments of February 20th and that frustration was expressed at the Presiding Juror. Pryor, 2774:9-2775:17 and 2777:3-14; Maxwell 2763:2-14. The transcript reveals that Ms. Hensel, Juror No. 9, apologized for her behavior. Exhibit 102, 3057:15-3078:6. This misconduct and dishonest inconsistency among Mr. Kline's accusers, like other instances in the record, get a free pass from the Panel.

Merker: “Are you saying that you have the authority on your own [to enter the agreement] without them voting to enter into this?”

Mr. Merker: I’m not getting into a debate with you.

Mr. Kline: I’m not trying – I’m asking.

Mr. Merker: I’m not under oath, and I’m not answering any of your questions. What happens in this room when these people are here is between me and the 15 people. What has been accomplished is what these people want.

Mr. Kline: I was just asking. If you don’t want to answer, that’s fine.

Mr. Merker: I just answered.

Mr. Kline: I would ask the Grand Jury to let us know if this was entered into by counsel on your behalf or if you voted.

Juror No. 15: I don’t know anything. You know what, I don’t know anything. I don’t know what you guys discussed. McClain. Merker. You. I don’t know nothing. Does anybody here know anything about this? I have not a clue.

Presiding Juror: Can we have a private discussion.

Exhibit 102, 3066:25-3067:25.

At the hearing, Mr. Merker testified that he didn’t provide the agreement to Mr. Kline at the February 20 hearing because “I don’t think I had it.” Merker, 2666:16. Mr. Merker then altered his testimony and said he couldn’t remember if he refused Mr. Kline a copy and whether he provided one or even had a copy. *Id*., at 2666:17-25. The record clearly shows Mr. Merker had a copy and had already signed the agreement. He initially refused to provide Mr.

Kline a copy, but relented when the Grand Jurors he and Ms. Hensel had kept in the dark demanded to see it.

344. This disturbing exchange is another vindication of Mr. Kline, whose office had originally requested that all Grand Jury communications be on the record in case an indictment was forthcoming. Mr. Kline and his staff explained that a criminal defendant had a right to review the record to ensure that the indictment was developed without tainted evidence and that the conduct of all involved was lawful and appropriate. Judge Moriarty, however, ruled that Grand Jury discussions with Special Counsel and with Mr. Kline's staff did not need to be on the record. Mr. Kline decided that his staff's communications with the Grand Jury would be on the record. Special Counsel, with the Court's approval, elected to communicate off the record. *See* Exhibit 98, 2582:1-2589:17. In hindsight, the record establishes quite clearly that Mr. Kline's methods and conduct served the Grand Jury process, or attempted to, while the methods and conduct of Special Counsel and the Presiding Juror subverted it.

345. After the Grand Jury convened back on the record Mr. Kline explained his concerns about the secret agreement provided by Mr. Merker. The agreement:

a. disallowed the use of any evidence from Planned Parenthood-produced documents in Mr. Kline's existing criminal case. Exhibit P8, at 187-189, ¶¶ 2 & 7(iv);

b. disallowed the use of any evidence obtained from Planned Parenthood-produced documents in any fashion that may harm Planned Parenthood's proprietary interest. *Id.* at 190, ¶¶ 10, 14;

c. allowed Planned Parenthood to determine what evidence and documents were relevant to the subpoena and to produce only that evidence. *Id*. at 187, ¶2; Exhibit 102: 3091:8-18;

d. provided expressly that the Grand Jurors waive their civil immunity, exposing themselves to a civil suit if any of the evidence obtained was used in a manner harmful to Planned Parenthood's proprietary interest. Exhibit P8, at 190, ¶10.

See generally Exhibit P8, at 187-194.

346. Among its terms the agreement specifically provided that "[t]he authorized personnel shall not reveal the contents of the confidential responses and documents to any person or entity or otherwise utilize the confidence of the documents **in any way such as will or may harm the proprietary interest of Comprehensive Health.**" Exhibit P8, at 249, ¶ 10 (emphasis added); Maxwell 2739:22-2740:10.

347. At hearing, Mr. Maxwell testified extensively and specifically about his concerns relating to terms of the agreement. Maxwell 2737:1–2743:20. Mr. Maxwell referred to paragraph 14 of the agreement which reads that "violation of any provision of this protective order by any person or entity subject thereto may be punishable by contempt of court and shall subject such person or entity to the jurisdiction of the court for enforcement of the order and appropriate civil and/or criminal remedy." Maxwell: 2742:21-2743:2. Mr. Maxwell was "stunned and horrified" by the terms of the agreement. Maxwell 2728:16. He was particularly concerned because Special Counsel and the Presiding Juror had already approved and signed the agreement, and the Court had entered it into the record before anyone else, including the

Grand Jury and the District Attorney, knew about it. Maxwell 2728:16-2729:14; Exhibit P8, at 187 (A file stamp shows the agreement was entered into the record at 10:33 that morning).

348. Mr. Kline also testified at hearing about his concerns regarding the agreement. Mr. Chubb asked Mr. Kline to state his basis for the belief that Grand Jurors received civil immunity. Mr. Kline answered with case cites and references to common law and the Kansas Tort Claims Act. Kline 2914:25-2916:4.

349. Although Mr. Kline's office was not a party to the agreement, the agreement nonetheless purported to prohibit Mr. Kline's office from using any information obtained from Planned Parenthood and further purported to remove from Mr. Kline and his office all immunity from suit should Planned Parenthood wish to sue. Exhibit P8, at 187-194.This was accomplished by defining the District Attorney's Office as "authorized personnel" in ¶7 (iv) of the agreement. *Id*. at 189.

350. Contrary to the facts surrounding creation and signing of the secret agreement, the Presiding Juror testified that the Grand Jury did not take any action unless it was unanimous. Hensel 2410:12-22. She also testified that she did not participate in the drafting of the secret agreement and that she was not aware of the terms of the confidentiality agreement until the morning of February 20:

> Q. [By Mr. Holbrook] Was it a unanimous decision by the Grand Jury to have either Mr. McClain or Mr. Merker or both of them talk to a representative of Planned Parenthood?
>
> A. Yes.

Q. Did Mr. McClain or Mr. Merker work out this confidentiality agreement with representatives of Planned Parenthood?

A. Yes.

Q. Were you involved in the drafting of that document?

A. No.

2483:8-2484:1.

351. During the February 20, 2008, Grand Jury proceeding, Ms. Hensel informed Judge Moriarty on the record that she had not seen the agreement. Exhibit 102, at 3118:19-21. Mr. McClain, however, had informed Hensel that the agreement existed on February 16. Mr. Merker's billing records indicate that he provided the draft of the agreement to Hensel on February 18 ***for her approval***. Exhibit P8, at 412. The relevant billing entries read:

2/15/08 RTM Lengthy (sic) call with Larry McClain RE; Judges Rulings and upcoming issues for Grand Jury.

2/18/08 RTM Lengthy T/C W/ Dough Ghertner Re: Confidentiality Order: **E-mail to Stephanie: Review Proposed Agreements: Send to Stephanie for Approval.**

2/20/08 RTM Meeting with Judge Moriarty Re: SRS Documents: Attend Grand Jury Hearing.

Id. (emphasis added).

353. Mr. Kline informed the Grand Jury that he thought they needed to act by a vote and that they should vote whether to accept the agreement or reject it. Exhibit 102. Several of the Grand Jurors expressed concern about the terms of the agreement. Hensel 2442:17-2443:11. Juror No. 4 stated: "That's the problem I have, and that's the way I look at it . . . .The

way it's written, I just can't go along with it the way it's written because it doesn't do us any good." Exhibit 102, at 3134:7-11. After an extended discussion the Grand Jury voted to withdraw the agreement and to obtain the documents demanded in the subpoena without any restrictions. Exhibit 102, at 3140:8-18.

354. Once the Grand Jury rescinded the agreement, Mr. Merker expressed concern to Judge Moriarty that he could be sued:

> Judge, here is my concern. I signed off on this document, as you did, and if the Court is going to do something about that document - - I'm not telling you how to do your job – I want to be removed from any liability . . . . I didn't get into this to get sued . . . . When you called me, you didn't tell me part of the bargain was to get sued.

Exhibit 102, at 3141:21-3142:9.

355. Judge Moriarty responded that the parties will work through that issue. Mr. Kline said that any rescission order by Judge Moriarty would supersede the signed confidentiality order, relieving Merker from liability. *Id.*, at 3142:10-22.

356. Mr. Kline and Mr. Maxwell testified that the secret negotiation of the confidentiality agreement and its terms exposed a split in the Grand Jury and caused significant frustration that prevented the Grand Jury from being effective.

357. Maybe nothing speaks more powerfully to the misguided inclinations of this Panel than the Panel's ability to turn the factual history of the subversive secret agreement into a criticism of Mr. Kline. The entire episode cries out for an independent investigation of what transpired behind closed doors between Ms. Hensel, Mr. Merker, and Planned Parenthood's

counsel. Accordingly, Mr. Kline takes exceptions to the Panel Report's observations about his reaction to the secret agreement, and to any finding by the Panel giving credibility to the participants in signing a secret agreement that compromised the Grand Jury's ability to perform its duty. Furthermore, Ms. Hensel's credibility is undermined in that she repeatedly misrepresents the statements of Mr. Kline and his staff.

The statements of Mr. Kline and his staff are repeatedly misrepresented by Ms. Hensel and by the Panel.

358. In addition to the substantial documentation already provided of the Panel's reliance on demonstrably false testimony as a basis for its decision, Mr. Kline takes further exception to the factual findings, factual omissions and misguided credibility determinations of the Panel. The following information further bears on the credibility of witnesses and the vindication of Mr. Kline's conduct.

359. In her letter of complaint, Presiding Juror Hensel alleged that Mr. Kline misled the Grand Jury by not revealing applicable law. *See* Exhibit 7. In support of her claim, Ms. Hensel quoted Mr. Kline from this portion of the Grand Jury transcript. On page 1 of her July 31, 2008 letter, Ms. Hensel writes: "When asked by a Grand Jury member of [sic] this mandatory report applied to 14-15 year olds, Mr. Kline states, 'Yes.'" Exhibit 7, at 1. Ms. Hensel omits the remainder of Mr. Kline's statement that "**the only issue that you (the Grand Jury) are dealing with is reason to believe there's harm caused by**." *See* Exhibit 96, 2431:4-10 (emphasis added).

360. Before the Panel, Ms. Hensel was asked about her failure to include the above language in her complaint letter. Ms. Hensel explained that she did not have "the entire

transcript" at the time she wrote the letter. Her letter, however, correctly quotes the portion of the transcript included in her letter, including the question asked of Mr. Kline. Her letter also provides citations to page numbers from the transcript. Additionally, the portion of Mr. Kline's statement that Ms. Hensel omits from her letter is in the transcript immediately following the portion she correctly quotes. *See* Exhibit 7; Exhibit 96, 2431:4-10. Before the Panel, Ms. Hensel testified that she has seen the entire transcript. Asked if her omission was misleading, she testified:

> Q. [By Mr. Holbrook] Okay. Did you eventually have a transcript?
>
> A. Well, I've seen a transcript since.
>
> . . . .
>
> Q. Did you tell him (Mr. Walczak) that you had an error in your complaint and it was incomplete and you'd left something out?
>
> A. I don't consider that an error.
>
> . . . .
>
> Q. But what's here on Exhibit 7 versus what's in the transcript, you'll agree there's a difference?
>
> A. There's more-- sure, there's [sic] more words.
>
> Q. There's more words aren't there?
>
> A. Yep.

Hensel 2460:9-10, 18-21; 2461:15-20. No objective jurist, lawyer or layman, can miss the stunning double standard under which Ms. Hensel operated in this case

361. Despite Mr. Kline's statements during the Grand Jury proceedings that a requisite for enforcing the mandatory reporting law was a finding that the reporter had "reason to suspect" the sexual abuse "harmed" the child, Ms. Hensel continued to misrepresent Mr. Kline's statements to the Panel. She testified:

> Q. [By Mr. Hazlett] Now, moving back to December 17th, you indicated that Mr. Kline addressed the Grand Jury that day, as I understand testified with respect to the issue of mandatory reporting, just in summary could you tell me what he told you about mandatory reporting, the law and mandatory reporting of child abuse?
>
> A. We were – we were advised that the status of the law was any girl 16 or under by law had to be reported to SRS by the fact that she was pregnant, because that, I believe the word per se, I'm not-- I would have to go back and look at the record, was **per se harmed** and so that was a mandatory reporting event.

Hensel 2349:6-12; 2349:19-2350:1 (emphasis added).

362. The Grand Jury transcripts do not reflect any such comment by Mr. Kline. Rather, Mr. Kline correctly stated that sexual contact with an underage child is defined as "sexual abuse." He was also clear that the Grand Jury would need to find reason to suspect the child had been harmed by that abuse. Exhibit 96, 2427-2432.

363. Ms. Hensel's willingness to mischaracterize the statements of Mr. Kline goes back to the convening of the Grand Jury. Mr. McClain was not present when Mr. Kline presented his overview of the law on December 17, 2007. On January 9, 2008, Ms. Hensel informed Mr. McClain that the Office of District Attorney "is still guiding us to believe mandatory reporters must report 14 and under ABs [abortions]. For example, yesterday Mr. Maxwell indicated 'little

Suzie' might say it was 'little Johnnie' down the street when it was really Dad or Uncle." Exhibit P8, at 162.

364. Ms. Hensel's email, however, does not include the entirety of Mr. Maxwell's statement. Mr. Maxwell's full quote is:

> **So the question is: Do you have harm?** If you have a 14-year-old telling a doctor "I'm having sex," is that harm? A lot of people would say no, that's not harm, so that statute is not kicked into effect. Now change that scenario. If a 14-year-old says, "Uncle is having sex with me. He's 35," is that emotional, mental harm? "And I'm 14." A lot of other people would say yes, that is."

Exhibit 100, 2874:7-16 (emphasis added).

365. During that same Grand Jury session, Mr. Maxwell explained that an underage child with an STD is suffering physical harm from sexual abuse. "If you have a 14-year-old with an STD, you have to report it because it's harm to the child, but the kicker in the statue is harm." *Id.* at 2873:2-4. Mr. Maxwell's explanation of the law parallels the findings of Judge Clark Owens, who denied the Motion to Dismiss in *State v. Tiller*. In rejecting Dr. Tiller's claim that Mr. Kline engaged in improper "selective prosecution," Judge Owens reasoned that a minor, especially in the case of a late-term abortion, has likely suffered harm because the statute may require such a finding. *See* Exhibit N, at 8-9. Judge Owens decision was made in 2009, five years after the *Aid for Women* preliminary injunction.

366. Ms. Hensel's email to Mr. McClain also demonstrated a material misunderstanding of law. She asks: "Do we have 'substantial belief that crimes are being committed' required to subpoena more records, other than those under 12, based solely on the

fact we don't find reports to SRS?" Exhibit P8, at 163. Mr. McClain does not correct her. *Id*. at 162. *Tiller v. Corrigan*, 286 Kan. 30, 182 P.3d 719 (Kan. 2008), decided two months after the Grand Jury disbanded, ruled that the evidentiary threshold for a Grand Jury subpoena is relevancy, a much lower burden than "substantial belief that crimes are being committed."[69] Mr. McClain incorrectly informed Ms. Hensel, by private email, that enforcement of the Wichita Grand Jury subpoena was irrelevant to the power of the Johnson County Grand Jury to subpoena records. Exhibit 121. *Tiller v. Corrigan* addressed this power to subpoena records.

367. Mr. Merker was unfamiliar with applicable law. When asked about the *Alpha* redacting criteria, he stated: "I don't have a clue." Merker, 2663:3-7. Questioned whether he knew the secret agreement he signed waived grand juror immunity, he answered: "It's whatever the document said. If you can show me – it is what it is." *Id*., at 2665:11-24.

368. The record contains other evidence of Special Counsel communicating with Ms. Hensel to the exclusion of other Grand Jurors and also confusion regarding the law. These notes indicate ex parte contacts with reporters, suggestions to review newspaper articles, and discussions with potential witnesses. *See generally* P8 and Q8.

369. After speaking with Assistant Attorney General Veronica Dersch, Special Counsel incorrectly interprets the requirements of K.S.A. § 65-6703 and K.S.A. § 65-445 as they apply to abortion providers. Special counsel then communicated this improper interpretation to Ms. Hensel via a private email. Exhibit Q8, at 326. Neither Mr. Kline nor his staff were privy to this

[69] *Corrigan* adopted the relevancy standard for a grand jury subpoena from a 1991 Supreme Court case, *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991).

communication until these documents were produced in this matter. Ms. Dersch worked for former Attorney General Paul Morrison and filed an ethics complaint against Mr. Kline and his staff.

370. Kansas law requires abortion providers to file the TOP reports. K.S.A. §65-6703(b)(3) which references K.S.A. §65-445. Kansas law also states that abortion providers must maintain TOP reports in their own files for five years. K.S.A. §65-6703(b)(5). The statue makes is a crime if these records are not maintained.

371. Moreover, the statue requires the abortion provider to keep a written determination of viability or non-viability on all abortions performed on a fetus of greater than 22 weeks gestational age. K.S.A. § 65-6703(b)(3)-(5). These written findings must also be kept in the patient file for five years or a crime has been committed. K.S.A. § 65-6703(b)(3)-(5),(g). Planned Parenthood claimed their TOP reports satisfied the requirement of K.S.A. § 65-6703(b)(2) of a written finding of non-viability. Failure to keep a written determination of non-viability is a crime. K.S.A. § 65-6703(b)(2)(3)(5) and (g). Planned Parenthood, therefore, was required to keep the TOP reports in their files for five years and failure to do so was a misdemeanor crime. K.S.A. § 65-6703.

372. In the summer of 2006, Planned Parenthood was producing the patient files under the *Alpha* subpoena. Judge Anderson retained the assistance of Topeka counsel to assist in the redaction and production of the records. Judge Anderson's counsel first observed all "26 files" involved abortions post 22 weeks he then found the files "did not contain a finding that

the fetus was not viable for those files with patients with a gestational age of 22 weeks LMP (last menstrual period) or greater." Affidavit of [Judge Anderson's Topeka Counsel], (September 10, 2007), *Morrison/Six v. Anderson (Six),* at 123, ¶¶ 1 & 4.[70]

372. Judge Anderson's Topeka Counsel (Topeka Counsel) wrote Planned Parenthood counsel advising him that the production was deficient and that the non-viability findings required by law were not present. *Id.,* 123-126, ¶¶1-12. Planned Parenthood's counsel responded on August 16, 2006 that the required written records were "kept by Planned Parenthood in a separate secure file." Public documents in *Six*, at 128-129 (Letter from Counsel for Planned Parenthood to Topeka Counsel (August 15, 2006)). Planned Parenthood's Counsel states the required finding of non-viability is on the KDHE TOP report and that Planned Parenthood will produce "copies" of those reports as required. *Id.* When provided, however, those required copies of the KDHE reports did not match the reports on file with KDHE. Moreover, the reports did not contain a specific finding of non-viability.

373. Attorney General Morrison made numerous efforts to force Judge Anderson to return to Planned Parenthood's the evidence of its alleged criminal conduct. This activity included motions before Judge Anderson that Mr. Kline return all evidence to Planned

[70] This Court released the pleadings in *Morrison/Six v. Anderson* (*Six*) to the public on May 2, 2008. The documents (306 pages) were released in bulk. The Clerk of the Court manually wrote page numbers on the bottom right hand corner of each page. Page references are to this sequential numbering. The documents are public. *See State v. CHPP*, 291 Kan. 322, 326 241 P.3d 45 (Kan. 2010) (noting "Case No. 99,050 in the Supreme Court. Petition for Writ of Mandamus filed by Morrison against Judge Anderson seeking surrender of redacted patient records produced in the Inquisition and left in the judge's custody ('*Morrison v. Anderson* ')").

Parenthood. Judge Anderson denied these motions. *See e.g.* Public documents in *Six*, at 67 and 199-201 (Anderson letters denying Morrison's motions) (July 13, 2007).

374. Mr. Morrison's efforts culminated on August 7, 2007, with the filing in this Court of a Petition for Mandamus against Judge Anderson. *Morrison v. Anderson*, No. 99,050. Mr. Morrison complained that "respondent Judge refuses to return these highly sensitive records to the health care providers who produced them." Public documents in *Six*, at 162. Mr. Morrison and later General Six continued this effort even after Johnson County District Court Judge James Vano found probable cause based on these documents to believe that Planned Parenthood committed 107 criminal acts.[71] Mr. Morrison also joined Planned Parenthood in suing Mr. Kline in mandamus in *CHPP v. Kline.* In that case Mr. Morrison also sought to remove evidence inculpating Planned Parenthood from Mr. Kline's Office.

375. Judge Anderson resisted the efforts of Mr. Morrison and Mr. Six. "It appears," he stated, "that the KDHE documents were altered." *Id*. at 65, n.1. He further stated:

> The recent disclosures of possible false writings, which in context could mean that somebody may have committed a felony in an attempt to cover up a misdemeanor, convinces the District Court that no hasty decision should be made about management of the files which would risk loss or destruction of the as filed redacted medical files of CHPP.
> . . . .
> The Court believes that returning evidence to [the clinics] at this point in time would unacceptably increase the risk that evidence could be lost, destroyed or

[71] Because this Court sealed the record, Mr. Kline was unaware of this mandamus action. Later, when Mr. Kline learned that this Court had issued an ex parte order prohibiting Judge Anderson from responding to any of Mr. Kline's subpoenas in *State v. Planned Parenthood*, he sought to intervene in *Six*. The motion was denied. *See* Public Documents in *Six*, at 1e & 2-5.

> compromised while active investigations and prosecutions are ongoing. It is difficult to understand how this could benefit the citizens of Kansas."[72]

Id. at 60, 67. "There is evidence of crimes in these records that need to be evaluated." *Id*. at 212-213. All of these statements by Judge Anderson were made in pleadings and exhibits filed with this Court in *Six*.

376. The Grand Jury requested Mr. Kline's office to present evidence about the alteration of documents. Mr. Kline informed the Grand Jury that he did not intend to seek any further indictment regarding the charges already filed. Mr. Williams and Judge Anderson testified regarding the concerns about Planned Parenthood's production.

377. Unknown to Mr. Kline or his staff, Special Counsel for the Grand Jury contacted Ms. Veronica Dersch. According to Mr. Hazlett's investigator, Terry Morgan, on February 5, 2007, Ms. Dersch indicated she was assigned by Mr. Morrison to" investigate the possible leak of confidential information." Morgan Report, Exhibit G9, at 3. Ms. Dersch was assigned to investigate Mr. Kline.

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[72] Judge Anderson's warning proved prophetic. Mr. Kline's office left the original TOP reports produced by KDHE with incoming Attorney General Morrison. Kline's office only maintained working copies of the TOP reports as he became District Attorney. In December 2007, Mr. Morrison resigned and the originally produced documents remained with his appointed replacement, General Six. It has now been learned that these documents were destroyed while they were in the custody of General Six's office after criminal charges were filed against Planned Parenthood. It has also now been learned that KDHE, which resisted Mr. Kline's original subpoenas and resisted all subsequent efforts to verify compliance with that subpoena, destroyed their copies of the originally filed TOP reports in 2005 at a time the agency was aware that the documents were evidence in a criminal investigation. KDHE continued to resist disclosure of these facts through 2009 and did not at any time inform the Court or prosecutors of the document destruction.

378. Ms. Dersch's adversarial posture comports with Judge Anderson's observation. "At this first meeting [with Dersch], Morrison's agents directed criticism toward Kline but appeared to show very little curiosity about substantive issues involved in the investigation." Public documents in *Six*, at 61-62. Judge Anderson wrote to Mr. Morrison on January 9, 2007, his second day in office, to inform him he could pick up the records Mr. Kline's staff left for him. *Id*., at 177-178. Mr. Morrison did not make a copy of the original redacted medical records in Judge Anderson's possession until March 27, 2007. *Id.* at 165. Ms. Dersch eventually joined this Court and Planned Parenthood in filing an ethics complaint against Mr. Kline.

379. On January 18, 2008, Mr. McClain emailed Ms. Hensel about his contact with Ms. Dersch. "I have made contact with [Dersch] . . . ." Mr. McClain relates his conversation with Ms. Dersch and states that K.S.A. § 65-445 only makes it a crime for the Attorney General or KDHE improperly to disclose the TOP reports, not abortion clinics. Q8, at 326, ¶1. "In fact this is the only crime within the provisions of 445. Mr. Kline has a different opinion." *Id.* The information obtained from Ms. Dersch is also reflected in Mr. McClain's notes on his copy of K.S.A. § 65-445: "Only penalty is for improper disclosure by KDHE." *Id*. at 183.[73]

[73] Ms. Dersch's and Mr. McClain's understanding is wrong on three counts. First, Planned Parenthood was not charged with failure to comply with K.S.A. § 65-445 but rather with violation of K.S.A. §§ 65-3703(b)(2)-(5) & (g), which references K.S.A. §65-445. Moreover, Planned Parenthood claimed that the TOP reports were also part of required written record of non-viability required by K.S.A. §65-3703. Third, Mr. Kline did not believe K.S.A. § 65-445 imposed possible criminal penalties on abortion providers. He charged Planned Parenthood under K.S.A. §65-3703. The charges were supported by a probable cause finding made by Judge Vano and the numerous statements and testimony of Judge Anderson.

380. Mr. Kline's office was not aware of these communications or could have easily addressed this issue. A similar misunderstanding occurred when Ms. Hensel emailed Mr. McClain and misrepresented the statements of Mr. Kline's office regarding the mandatory reporting law. *See* P8, at 62. Ms. Hensel's January 9 email misstated Mr. Maxwell's statements to the Grand Jury. She claimed the Office was continuing to insist all underage sexual activity was reportable. P8, at 62. Ms. Hensel also grossly overstated the evidentiary burden the Grand Jury must meet to issue a subpoena. Mr. McClain, who was not present during Mr. Maxwell's comments, was forced to rely on Ms. Hensel's representation. In reply, Mr. McClain speculated as to why Mr. Kline's office would claim all underage sexual activity was reportable. Mr. Kline's office never made such a claim. Mr. McClain never asked for clarification. Although the speculation was flawed, it grew and festered due to the misrepresentations of Ms. Hensel, the secretive off-the-record discussions between Ms. Hensel and Special Counsel, and the simple failure to ask for clarification. Mr. Kline takes exception to the conclusion that Ms. Hensel's testimony— directly conflicting with all other evidence—clearly and convincingly demonstrates ill intent by Mr. Kline or his office.