EXCEPTIONS TO FINDING TWO[74]

The Motion of February 26, 2008 did not prejudice the administration of justice.

381. The Complaint alleges that on February 26, 2008, Mr. Kline "filed a pleading in the Grand Jury matter entitled State's Motion to Enforce Grand Jury's Subpoena and Original Citizen Petition."[75] Mr. Hazlett further states: "In that motion, the respondent requested that the court enforce the Grand Jury subpoena issued to CHPP on January 7, 2008. This request was contrary to the wishes of the Grand Jury at that time." The only rules possibly implicated in the filing of this motion are 4.1(a) and 8.4(d). Because Mr. Hazlett does not allege in ¶ 50 that any false statement was made, Rule 8.4(d) seems to be the only candidate for a violation.

382. The Panel concludes that Mr. Kline violated KRCP 8.4(g) because he failed to obtain permission of the Grand Jury when filing pleadings to enforce the Grand Jury's subpoena of redacted Planned Parenthood records. Final Report, at ¶¶398-400. The Panel Report states the Grand Jury "admonished" Mr. Kline that "it wished to review and approve" Mr. Kline's filings. Mr. Kline takes exception to this conclusion and this factual representation. Mr. Kline does not need the permission of the Grand Jury to file a motion on behalf of his office and the Grand Jury never insisted that it approve Mr. Kline's filings. The Grand Jury simply *requested* that it review pleadings filed *in its name* filed by any person. This request came only seven days after the Presiding Juror and Special Counsel had signed and entered into the record,

[74] See Panel Report, at ¶¶ 398-400 (whether Respondent violated the KRPC "by filing the state's motion to enforce the grand jury' subpoena and original citizen petition and the state's fourth request to enforce subpoena").
[75] Amended Complaint, ¶ 50 (Aug. 3, 2010). *See* Panel Report, ¶ 20.

without the knowledge of Grand Juror members, an agreement with Planned Parenthood that bound the Grand Jury. At the time Ms. Hensel made her request, the Grand Jury still desired the enforcement of its subpoena.

383. The Grand Jury issued a valid subpoena on January 7, 2008. The Grand Jury did not withdraw its subpoena until March 3, 2008, as it disbanded. During the interim, Judge Moriarty never enforced the Grand Jury subpoena and never ruled on Planned Parenthood's Motion to Quash that subpoena.

384. The Grand Jury repeatedly stated its desire to have the subpoena enforced. and refused to grant Planned Parenthood an extension of time to comply. *See e.g*., Exhibit 104, 3913-3914; 3241:14-21 (February 27, 2008 transcript); Merker, 2672.

332. In her letter of complaint to Mr. Hazlett, Ms. Hensel writes:

> On February 27, 2008, the Grand Jury **specifically directed** Christopher Pryor, of the District Attorney's Office, the office was **not to file any brief** related to the January 7, 2008 subpoena **without the approval of the Grand Jury**. On March 3, 2008, the District Attorney's office submitted a brief to the court that had not been approved by their clients, the Grand Jury, as directed.

Exhibit 7, at 4) (emphasis added).

385. Ms. Hensel's complaint, however, misrepresents the February 27 record.

> Ms. Hensel: Second is **a request**, and while we understand that **we don't have the authority** to issue this, **we are asking the DA's office *and anyone else*** that might submit any documents to the Court in our name, **that the Grand Jury be advised** of those prior to the filing . . . . the Grand Jury would like to review any **documents that are provided to the Court in our name**. For example, if there are to be any more briefs related to the subpoena, we would like to see

that information since it's being submitted in our name prior to that.

The Court: Okay.

Ms. Hensel: **It's a request**.

Mr. Pryor: In all candor from our office's standpoint, I don't have the authority to accept or reject, but I will pass it on. I just wanted to--

Ms. Hensel: We understand that.

Mr. Pryor: Unless you order it.

Ms. Hensel: **That's just a general request**.

Exhibit 103, 3160:20-3161:17 (February 27, 2008 transcript) (emphasis added).

386. The Grand Jury did not issue a directive specifically to Mr. Kline, and did not claim to be Mr. Kline's "client." Ms. Hensel recognized that she "probably" did not have the authority to make the request to Mr. Kline. Furthermore, the request did not relate to "any" filing, but rather only to any filing made in the name of the Grand Jury.

387. The request was made to "anyone," including Special Counsel. The request came only one week after Special Counsel had signed and entered into the record a Confidentiality Agreement binding the Grand Jury without notice to the Grand Jury or Mr. Kline's office. The Grand Jury rescinded that agreement.

388. Mr. Kline's Motion to enforce the subpoena was filed at a time the Grand Jury desired the subpoena to be enforced. The Grand Jury subpoena to Planned Parenthood was not withdrawn until an order to that effect was issued by Judge Moriarty and filed on March 4,

2008. Exhibit 118; Panel Report, ¶280. All of Mr. Kline's efforts to seek enforcement of the January 7, 2008 Grand Jury subpoena were filed prior to its withdrawal on March 4.

389. During its tenure, the Grand Jury only issued one subpoena for Planned Parenthood records—on January 7th, 2008. Kansas law provides that a subpoena "shall" issue for any witness or for any documents required by the Grand Jury. The Court "shall" use compulsory process to enforce a Grand Jury subpoena. K.S.A. § 22-3008(1).

390. On January 13, Planned Parenthood filed a motion to quash the subpoena. Despite the statutory requirement that a Grand Jury subpoena shall issue and be supported by compulsory process, Judge Moriarty neither rule on the Motion to Quash nor employed compulsory process, as required by law, to enforce the subpoena.

391. A Grand Jury is authorized to sit for ninety days, but may be extended for a second ninety days. K.S.A. § 22-3013(1).

392. As late as February 27, 2008, fifty-one days after the subpoena issued and only eleven days before the Grand Jury would disband due to the statutory deadline, Judge Moriarty continued to refuse to utilize compulsory process to enforce the Grand Jury subpoena and also refused to rule on the Motion to Quash. This inaction by the Court left the Grand Jury without remedy. On February 27, Mr. Kline was serving as lead prosecutor in the murder trial of John Henry Horton and was not present before the Grand Jury. At that time, Judge Moriarty asked the Grand Jury whether they still desired enforcement of the subpoena.

> It's your decision. Do you want to enforce the subpoena? And I think you have to vote on that yeah or nay. If you want to enforce it, it will have to be enforced.

> If you want to re-call it or withdraw it, you have that option as well. You have to figure that hurdle out first. If you withdraw it, it's a done issue. If you don't withdraw it, then it's going to have be enforced, and I'm prepared to do that.

Exhibit 104, at 3221:17-3222:2.

393. At the time, Special Counsel was still advising the Grand Jury to allow Planned Parenthood to selectively produce records in response to the subpoena. Assistant District Attorney Chris Pryor informed the Grand Jury that simply allowing Planned Parenthood to produce what they believe is relevant to the Grand Jury's inquiries does not constitute an investigation. "I don't see why Planned Parenthood should just say, no, we are not coming in to explain what we are doing. We will give you what documents we say we are going to give you and that's it. That's not an investigation [even] abstractly." *Id.* at 3212:25:3213:6.

394. Mr. Pryor and Mr. Rucker also expressed concern about Special Counsel's informal questioning of Planned Parenthood off the record though phone calls. Special Counsel would call Planned Parenthood on the phone and relate answers provided by phone to the Grand Juror members. Mr. Pryor states:

> You don't do that in an investigation. It's not only silly. It's not anything anyone would rely on. In order to get reliable evidence, they answer the subpoena in the formal process. You have a witness come, and they swear under oath. That way those words are given weight and gravity. If they lie or don't tell the whole truth, they can get in trouble and they know it. But to say, give us what you want, and call that an investigation, that's just not – it's not even intelligent. You can't even do that on your taxes. You have to sign an affidavit that's true.

Id., at 3218:1-14.

395. After a five-minute break requested by Ms. Hensel, the Grand Jury reconvenes with Judge Moriarty present. Ms. Hensel states: "We want to advise the Court that we are relatively split as to whether we want to extend or not." *Id.*, 3219:24-3220:1.[76]

396. Judge Moriarty provided the Grand Jury with what he viewed as their options.

> The Court: Okay. We are going to have to go back. You are going to have to figure out - - there's three ways to go. Enforce the subpoena that you have, and it makes no difference to me. ***But if you do that, I promise you one side or the other is going to appeal it, and we are done. By the time that comes to pass, if there's a time issue for some of you, that's going to be well beyond that time frame.*** Number two is: Do you want to do something? Do you want to resolve an issue, period? If you do, what information do you need that you don't have? Number three, you have information, and you want to make a decision.

Id. at 3232:15-3233:4.

397. Judge Moriarty then informed the Grand Jury that the maximum extension to their term is a second ninety days. K.S.A. § 22-3013. If they seek to enforce their subpoena, he

[76] At one point, Judge Moriarty, before the Grand Jury, stated that Mr. Rucker had already seen the files subpoenaed by the Grand Jury: "You had seen in the files. You had them in your car according to the Supreme Court." Exhibit 104, at 3226:1-2. Judge Moriarty then states the *Alpha* decision supports his claim. *Id*. at 3226:5-8. *Alpha*, however, was decided in February of 2006, prior to the transfer of copies of the redacted records to Johnson County. The Supreme Court opinion in *CHPP v. Kline* mentions the method of transfer and that the records were transferred in the trunk of a car, but not Mr. Rucker's car. That opinion, however, was not issued until December, 2008, after this Grand Jury proceeding. This Court, however, did order a hearing before Judge King in the *CHPP v. Kline* case that took place in November and December of 2007. That hearing developed a record on the transfer of the records. *See* Exhibit 90, at ¶102. The King Report finds that Mr. Williams kept the records in his vehicle overnight one night and that they were not disturbed. *Id*. The King Report was not filed with the Court until January 10, 2008 and then it was sealed by the Court until June, 2008. Furthermore, the evidence and testimony at the hearing was also sealed until June, 2008. How was Judge Moriarty privy to this information, even though he misstated the vehicle, on February 27, 2008?

warned, the Grand Jury will expire before an appeal is resolved. *Id.*, at 3233:15-3234:4. Judge Moriarty states: "I don't think our Supreme Court will have a decision in 90 days. Okay. So I think what happens is that everything—I think nothing happens." *Id.* at 3233:25:3234:4.[77]

398. The Grand Jury then voted 7-7 not to withdraw the subpoena. Juror No. 6 stated: "But I would like to say one thing. We are split." *Id.* at 3239:13-14. Juror No. 7 then informs the Court that "we are seven and seven now." *Id.*, at 3239:20.

399. Mr. Pryor explained that a tie vote was insufficient to withdraw the subpoena. Exhibit 104, 3241:14-17. Judge Moriarty agreed with Mr. Pryor's assessment. *Id.* at 3241:21. Judge Moriarty then adds that possibly, since they are split on whether to enforce their subpoena that they likely would not gain sufficient votes for a true bill in any event and this the Grand Jury should disband. Judge Moriarty states:

> Let me point out. I'm thinking a different way, and I will let you know what I'm thinking. I don't know the answers to these questions. I never had it before. You could not bring a true bill on anything with a seven/eight split or a seven/seven split. You can't do it. If you make a decision, you are going to need at least 12 votes one way or the other. One way or the other. And I'm not suggesting that, you know, anybody has any notification one way or the other, but knowing that it is seven to seven, some sides may think they don't have enough there to get a true bill and would have this die.

Id. at 3241:21-3242:10.

400. Mr. Rucker then explained that being split on whether to enforce a subpoena is a different issue than whether a true bill should issue. Any decision whether a true bill should

[77] Judge Moriarty's assumption that the Supreme Court would accept yet another mandamus from Planned Parenthood is not free of doubt. Mandamus is an extraordinary, not a routine, remedy.

issue prior to enforcement of the subpoena to Planned Parenthood is premature. "It's seven/seven now because you haven't reviewed what it is you have subpoenaed." He also indicated the subpoena was still in force unless withdrawn by vote of the Grand Jury. *Id*. at 3242:13-3243:11.

401. Juror No. 4 then expresses frustration: "That's part of our problem. We don't believe we will ever review what we have subpoenaed." *Id.*, at 3243:12-14. Juror No. 2 agrees, and states that the Grand Jury process is not designed to get a subpoena enforced within its statutory time frame due to the possibility of appeals. "That doesn't lead to a group that's on a time table of 90 days. The subject matter needs to be addressed with a different vehicle. I think that's the reality of the situation." *Id.* at 3243:23-3244:2. Judge Moriarty indicates that he agrees. *Id.* at 3244:3

402. The Court is guiding the Grand Jury to disband without the enforcement of its only subpoena to the target of its investigation. The Court's refusal to rule on the Motion to Quash while also refusing to enforce the subpoena with compulsory process left the Grand Jury without the remedy of appeal and also without its primary investigative tool.

403. Mr. Merker testified at the hearing that the Grand Jury never rescinded the subpoena nor did they tell him that the subpoena should not be enforced. Merker 2672:19-23.

404. On February 28, 2008, Mr. Kline's office submitted a motion to enforce the Grand Jury subpoena filed on behalf of his office and the State of Kansas, not the Grand Jury.

The Motion made arguments consistent with those presented by Mr. Rucker and Mr. Pryor at the February 27 hearing, and was primarily drafted by Mr. Pryor and Mr. Rucker.

405. The Motion at issue in this matter and referenced in ¶50 of the Formal Complaint is styled "***State's Motio*n** to Enforce . . ., and begins: "COMES NOW ***the State of Kansas*** by and through District Attorney Phill Kline . . ." Mr. Kline presents the motion on behalf of the public body he represents in Johnson County, not on behalf of the Grand Jury. The interest of the public in enforcement of the subpoena arises from the citizen petition that brought the Grand Jury into existence. K.S.A. §22-3001; Exhibit 93.

406. These pleadings contrast with Mr. Kline's earlier filing in opposition to Planned Parenthood's motion to quash the subpoena. At that time, the Grand Jury requested Mr. Kline to file a pleading in opposition to the Motion to Quash. That filing began: "COMES NOW THE STATE ***at the request of the grand jury*** . . ." Exhibit Q8, at 299. Mr. Kline's office identified the same purpose in the accompanying brief. "COMES NOW THE STATE and in support of its and the Grand Jury's opposition to Respondent's Motion to Quash and in support of the State's motion to extend the Grand Jury . . . " Exhibit 115, at 1.

407. Judge Moriarty never ruled on the Motion to Quash. The original subpoena to Planned Parenthood was never enforced. At the time the motions were filed, the Grand Jury subpoenas were still in force and had not been rescinded. Mr. Kline's motions to enforce the original subpoena were not prejudicial. Judge Moriarty summarily denied them. The Panel does not identify any evidence of prejudice.

Judge Moriarty held public hearings regarding subpoena enforcement.

408. The Panel Report claims that public filing of the motions to enforce the subpoena represent a violation of KRCP 8.4(g). The Panel argues that the grand jury subpoena was subject to a confidentiality provision. Panel Report, ¶ 400. The subpoena of January 7, 2008, commanded Planned Parenthood to produce redacted records by January 16. Planned Parenthood filed a Motion to Quash on January 16. Judge Moriarty held a hearing on the motion for February 15—**a hearing open to the public**. Contrary to the Panel's representations, the Court held public hearings on enforcement of the subpoena and the Motion to Quash. The pleadings were public record.[78]

409. The Panel Report also omits that Special Counsel filed documents in the public record reflecting Grand Jury subpoenas. The Grand Jury subpoenaed SRS records in their investigation of compliance with state law requiring the report of child sexual abuse. Special Counsel McClain entered into a protective order with Judge Moriarty without notifying Mr. Kline or allowing Mr. Kline's office access to the records. On February 16, 2008, Judge McClain emailed Mr. Merker and Ms. Hensel regarding the agreement. "The Order limits access of this information to the Jury and their special counsel. The DA [Mr. Kline] is not included and will

[78] *See* Attachment B, *Judge Asks for Compromise in Planned Parenthood Case*, by Jack Weinstein, OLATHE DAILY NEWS (Feb. 15, 2008). Mr. Kline asks the Court to take judicial notice of this newspaper article that quotes from the hearing and demonstrates that it was open to the public. The Panel violated Mr. Kline's due process rights in finding that the public filing of the brief violated the KRPC. Mr. Kline did not have notice of this charge nor an opportunity to be heard on it. He was denied the right to call witnesses who would testify the Court held a public hearing.

need Judge Moriarty's [sic] approval to get the records. I have not provided Kline with a copy of the order, he hasn't asked, and ***it is filed and public record***." Judge McClain states the original order is "***filed with the Clerk's office***." Ex. P8, at 548.[79] Judge McClain was referencing an agreement agreed on and filed on February 12 on the investigation of reporting child sexual abuse. Exhibit Q8, at 263-264. That agreement, much like the eventual Planned Parenthood agreement, provided for Judge Moriarty to review documents provided by SRS and for the Judge to determine what, if anything, would then be provided to the Grand Jury. *Id.*

410. Mr. Kline also takes exception to the Panel's characterization of Mr. Pryor's failure to include Mr. Merker on the certificate of service in one of the filings to enforce the Grand Jury subpoena. Mr. Pryor testified that he accidentally left Mr. Merker and Judge McClain off the certificate of service and explained how he made the mistake. Pryor 2802:1-20. During this time Mr. Kline was serving as lead prosecutor in the murder trial of John Henry Horton. That trial and post-trial motions and activities consumed Mr. Kline's time from February 25 through March 7, 2008. Mr. Pryor's mistake does not evidence intent to prevent Mr. Merker or Judge McClain from seeing the pleadings. By contrast, they sought to keep Mr. Kline in the dark about their own doings.

[79] The Panel also takes issue with the failure of Mr. Kline's office to place Special Counsel on the certificate of service when filing motions to enforce the subpoena. This failing was acknowledged by Mr. Pryor who was the primary author of the motions. From February 25 through March 7, 2008, Mr. Kline was lead prosecutor in the murder trial of John Henry Horton. Mr. Pryor corrected this error on the next pleading and there is not any evidence that Mr. Kline's office intended to keep these filings from Special Counsel, unlike Special Counsel's expressed intent to keep Mr. Kline from knowing of their negotiated agreements.

411. Mr. Kline also takes exception to the finding that the public filing of these pleadings is a violation of the KRPC. Mr. Kline was not provided notice of this claim. The Formal Complaint references these filings in ¶¶ 49 and 50. The Complaint does not mention the pleadings were filed publicly, and does not allege that filing the pleadings in this manner constitute a violation. Mr. Kline did not have the required notice to be heard on this issue. He was prohibited from calling Judge Moriarty as a witness and from calling other Grand Jurors as witnesses. Those witnesses would have testified that the hearings on the Motion to Quash were public. The lack of notice and the inability to call relevant witnesses constitutes a violation of Mr. Kline's due process rights.

412. The Panel Report does not cite any evidence that the subpoena was kept confidential through the Grand Jury's tenure. Panel Report, ¶¶ 398-400. In fact, despite the lack of notice, the evidence in this hearing indicates that the subpoena was a public record.

413. The Panel does not cite any evidence that Mr. Kline's filing of the motions publicly created prejudice. *Id.* Mr. Kline takes exception to the Panel's implication that the Grand Jury can direct the conduct of the Office of District Attorney.

414. Mr. Kline takes exception to ¶ 272 of the Panel Report, which quotes a statement in Ms. Hensel's letter complaint that the motions contain "misstatements, exaggerations, and outright lies." The record does not contain any evidence that this claim is true. No witness provided testimony that any statements in the motions were "lies" or

"misrepresentations." The Panel simply repeats a baseless accusation from a document that has already been demonstrated to contain inaccuracies and misrepresentations.

415. Mr. Kline's due process rights were further violated in the consideration of Count II because he was denied the right to call other members of the Grand Jury as witnesses. Mr. Hazlett took the position that Ms. Hensel was the "spokesperson" of the Grand Jury and that she spoke officially for them. "She's the spokesperson from the grand jury. . . . All I asked her was whether or not they asked – they wanted Kline to enforce the subpoena." Hensel 2388:14-18 (Mr. Hazlett is responding to Mr. Holbrook's objection).

416. The judge appoints the Presiding Juror. Her authority is defined by statute. This authority does not include being a "spokesperson." The Presiding Juror may take attendance, administer oaths to witnesses, keep vote tallies, and sign any indictment. K.S.A. § 22-3304. The Grand Jury does not speak through the Presiding Juror but rather acts by voting. K.S.A. § 22-3001(3).

417. Prior to and during the hearing, Mr. Kline raised due process objections to the Panel's denial of his ability to call other Grand Jurors as witnesses, and the Panel's reliance on Ms. Hensel's testimony. *See e.g.*, Transcript, 2387:24-2389:11. In Count II, the Panel Report solely depends on Ms. Hensel's testimony to find Mr. Kline violated the KRPC.

418. The Panel finds that the Grand Jury issued its subpoena to Planned Parenthood to forward the investigation of Planned Parenthood's alleged failure to report child sexual abuse, and that the Grand Jury abandoned that investigation after the *Aid for Women* case was

mentioned by name. The Panel then uses these findings to conclude that the failure to mention *Aid for Women* by name was prejudicial to the Grand Jury. These findings are solely based on Ms. Hensel's testimony. Panel Report at ¶¶ 252-253. The Grand Jury record contradicts these findings. Mr. Kline was denied the right to call other members of the Grand Jury who would contradict Ms. Hensel's testimony. The Panel's reliance on Ms. Hensel's testimony while denying Mr. Kline the right to call witnesses who would contradict her is a denial of due process. Mr. Kline takes exception to the Panel's finding that Ms. Hensel's testimony on its own is sufficient to overcome the official Grand Jury transcript and that such is "clear and convincing" evidence.

419. The Panel cites no evidence that the subpoena was not public. Mr. Kline takes exception to the Panel summarily making this finding without evidence. Judge Moriarty held public hearings on the Motion to Quash prior to Mr. Kline filing the motions in question. Mr. Kline was denied the right to call Judge Moriarty or other Grand Jurors as witnesses. He also did not have notice of this claim until the hearing. *See* Formal Complaint ¶ 49 (no mention of the public filing issue).

EXCEPTIONS TO THE PANEL'S APPLICATION OF THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS

Mr. Kline's reference to the 911 Call in closing argument is not a demonstration of "bad faith obstruction."

420. The Panel Report takes issue with Mr. Kline's closing argument in which he made reference to the content of a 911 call. Panel Report, at ¶409. The Panel states that Mr. Kline's