



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,)
MIKE HUNTER,) STATE OF OKLAHOMA) S.S.
ATTORNEY GENERAL OF OKLAHOMA) CLEVELAND COUNTY)

Plaintiff,

FILED

No.: CJ-2017-816

vs.

SEP 24 2019

Judge: BALKMAN

PURDUE PHARMA L.P., et. al.

In the office of the)
Court Clerk MARILYN WILLIAMS)
Defendants.

MOTION FOR THIRD PARTY EXCEPTION TO PROTECTIVE ORDER

COMES NOW, DR. REGAN NICHOLS, who is not a party to the present case, by and through her attorneys of record, S. Thomas Adler II, and Dan Good, and moves this Court for an Order directing the State of Oklahoma to disclose all discoverable evidence gained through the prosecution of this case. In support of this motion, Dr. Regan Nichols asserts the following:

1. Regan Nichols is a practicing physician in Oklahoma City, Oklahoma.
2. On June 23, 2017, Dr. Nichols was charged by the Oklahoma Attorney General in **Oklahoma County CF-2017-3954** with five counts of second-degree murder for the deaths of patients in her care.
3. Dr. Nichols is accused of causing her patients deaths by overprescribing opiates.
4. Dr. Nichols believes that evidence gained by the Oklahoma Attorney General during the prosecution of the present case is relevant to her defense and discoverable.
5. On July 21, 2017 Dr. Nichols filed a general motion for discovery in Oklahoma County CF-2017-3954.
6. On July 11, 2019 Dr. Nichols filed a motion for specific discovery requesting the materials held by the State in the present case.

7. On July 25, 2019, the Oklahoma Attorney General gave Notice to Dr. Nichols that the discovery materials from the present case are subject to a Protective Order executed March 20, 2018.
8. Pursuant to that Protective Order, the Oklahoma Attorney General has given notice to the relevant parties regarding Dr. Nichols's third party request for the discovery materials.
9. Dr. Nichols now petitions this Court to grant an exception pursuant to paragraph 15 of the Protective Order, which states "[n]othing in this Order or any action or agreement of a Party under this Order limits the Court's power to make orders concerning the disclosure of documents produced in discovery or trial."
10. Specifically, Dr. Nichols requests an Order compelling the production of discovery from the present case *without subjecting Dr. Nichols or her Counsel to the previously existing Protective Order*.
11. Dr. Nichols has a right to the requested discovery pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Kyles v. Whitley*, 514 U.S. 419 (1995) and *Giglio v. United States*, 405 U.S. 150 (1972) as well as the Oklahoma Discovery Code.
12. The Protective Order in this matter is a burdensome 22 page document that was formulated and agreed to by the Oklahoma Attorney General and the pharmaceutical industry.
13. Dr. Nichols had no role in creating nor agreeing to the terms of the Protective Order, and there is no legal basis to force her, nor her counsel, to become party to that agreement in order to receive discovery that she is legally entitled to. The Oklahoma Attorney General cannot contract away, or contract undue burdens onto, a criminal Defendant's Constitutional and statutory right to discovery.

BRIEF IN SUPPORT

The Oklahoma Attorney General is suing the pharmaceutical industry for misleading Oklahoma doctors into overprescribing opiates, while simultaneously prosecuting Dr. Nichols for Murder for overprescribing opiates. Central issues at trial will be knowledge and intent. A prosecution for second degree murder requires proof that the defendant's "conduct evinced a depraved mind in extreme disregard of human life." OUI-CR- 4-91. If, as the Attorney General alleges in the Purdue litigation, opioid companies aggressively misinformed Oklahoma doctors about the risks and benefits of prescribing, it logically follows that materials supporting the Attorney General's allegation are likely to contain evidence relevant to Dr. Nichols's mental state when prescribing opiates.

The Defendant is entitled to the requested materials all materials pursuant to the rulings of the Supreme Court of the United States in *Brady v. Maryland*, 373 U.S. 83 (1963), *Kyles v. Whitley*, 514 U.S. 419 (1995) and *Giglio v. United States*, 405 U.S. 150 (1972) as well as those required by Title 22 O.S. § 2002. In substance, *Brady*, requires the prosecution to turn over to the defense any and all materials which may be helpful to the defense in either the evidentiary or the sentencing phases of the case. *Kyles* makes this duty absolute regardless of whether or not the law enforcement agency or agencies have informed the prosecution of the existence of such materials. A failure to comply with these requirements is ipso facto a violation of Due Process. This is clearly stated in *Brady*, page 87:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

It is noted the Supreme Court did not state the evidence must exculpate the defendant nor that it must prove the defendant's innocence, merely that it is favorable to the accused. Such information includes reports and other documents which cast doubt on

either the nature of the investigation or the completeness of such investigation.

The Supreme Court further re-enforced its pronouncement in Brady when it stated in Kyles:

This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But, whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see Brady, 373 U.S., at 87, 83 S.Ct., at 1196-1197), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

The State of Oklahoma has, essentially, codified Brady in its passage of 22 O.S. §2002, which states, in part:

A. Disclosure of Evidence by the State.

1. Upon request of the defense, the state shall be required to disclose the following:

a. the names and addresses of witnesses which the state intends to call at trial, together with their relevant, written or recorded statement, if any, or if none, significant summaries of any oral statement,

b. law enforcement reports made in connection with the particular case,

c. any written or recorded statements and the substance of any oral statements made by the accused or made by a codefendant,

d. any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons,

e. any books, papers, documents, photographs, tangible objects, buildings or places which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused,

f. any record of prior criminal convictions of the defendant, or of any codefendant, and

g. Oklahoma State Bureau of Investigation (OSBI) rap sheet/records check on any witness listed by the state or the defense as a witness who will testify at trial, as well as any convictions of any witness revealed through additional record checks if the defense has furnished social security numbers or date of birth for their witnesses, except OSBI rap sheet/record checks shall not provide date of birth, social security number, home phone number or address.

2. The state shall provide the defendant any evidence favorable to the defendant if such evidence is material to either guilt or punishment.

3. The prosecuting attorney's obligations under this standard extend to:

a. material and information in the possession or control of members of the prosecutor's staff,

b. any information in the possession of law enforcement agencies that regularly report to the prosecutor of which the prosecutor should reasonably know, and

c. any information in the possession of law enforcement agencies who have reported to the prosecutor with reference to the particular case of which the prosecutor should reasonably know.

Furthermore, the Oklahoma Legislature included *Giglio v. United States*, 405 U.S. 150 (1972), by implication, and such material is likewise sought as a part of this motion whether or not such are explicit or tacit in nature.

WHEREFORE, Dr. Nichols requests the Court grant this motion, and Order the Oklahoma Attorney General to produce the discovery in this case to Dr. Nichols with a protective order.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'S' and 'A' followed by a horizontal line.

S. Thomas Adler II, OBA #19997
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Attorneys for Defendant Nichols

CERTIFICATE OF SERVICE

This is to certify that on the date of filing of the above and foregoing instrument, a true and correct copy was delivered to the following:

Oklahoma Attorney General
313 NE 21st St.,
Oklahoma City, OK 73105

A handwritten signature in black ink, appearing to read 'Tommy Adler', written over a horizontal line.

TOMMY ADLER