

CAUSE NO. CR- [REDACTED]

STATE OF TEXAS

* IN THE DISTRICT COURT

*

v.

* [REDACTED] JUDICIAL DISTRICT

*

[REDACTED] [REDACTED] [REDACTED]

* HIDALGO COUNTY, TEXAS

DEFENDANT'S MOTION FOR QUALIFIED PROTECTIVE ORDER FOR COUNSELING/MEDICAL/PHARMACEUTICAL/MENTAL HEALTH RECORDS FROM [REDACTED] [REDACTED] COUNSELING and [REDACTED] COUNSELING SERVICES

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, [REDACTED] Defendant herein, and files this motion requesting that this Honorable Court order production of medical/counseling/pharmaceutical/mental health records and as grounds thereof would show unto the Court as follows:

A. FACTS AND GROUNDS FOR REQUEST

1. Defense has already been provided some Government-selected counseling records.
2. Defense requests the complete set of counseling records from [REDACTED] Counseling and [REDACTED] Counseling Services, pertaining to the Adolescent Accuser.
3. Defendant is indigent. He has appointed counsel.
4. The indictment states that the alleged offenses occurred in the summer of [REDACTED].
5. Adolescent Accuser was diagnosed in June [REDACTED] with [REDACTED]. [REDACTED] Adolescent Accuser suffered from auditory and visual hallucinations. Adolescent Accuser's mother reported to psychiatrist that some symptoms had been noticed since [REDACTED].
6. Adolescent Accuser is reported to have been to emergency rooms up to ten times from [REDACTED] to [REDACTED]. Adolescent Accuser is reported to have been examined by at least three psychiatrists between [REDACTED] and [REDACTED].
7. Defense seeks Adolescent Accuser medical records from [REDACTED] to [REDACTED] in order to specify the time period in which Adolescent Accuser was suffering from psychosis. The Adolescent Accuser's competency as a witness in question and subject of investigation.

8. During some of [REDACTED]-[REDACTED] period, Adolescent Accuser was prescribed psychoactive substances. These substances could have altered her perception during the [REDACTED]-[REDACTED] period.
9. Various possible Adolescent Accuser 'outcries' and symptoms of psychosis could have been noted with counselors/therapists/psychiatrists/doctors/emergency rooms.
10. For a proper investigation and defense, including possible exculpatory information, Defendant requests an order of production of counseling/medical/pharmaceutical/mental health records pertaining to Adolescent Accuser. Serving a subpoena with a copy of the order will expedite the production. It would clear a HIPAA hurdle, in advance.
11. The records pertain to the Adolescent Accuser in this case.

B. HIPAA PROCEDURE REQUIRED FOR DEFENSE

12. Health Insurance Portability and Accountability Act of 1996 (HIPAA) preempts state law.
13. HIPAA allows for consensual release of protected information. HIPAA limits the distribution of protected information, generally.
14. HIPAA 45 CFR §164.512(e)(1)(i), attached as Exhibit 1, permits disclosure of protected information (medical records) in response to a court order. (e)(1)(ii) states that a subpoena generally requires a qualified protective order.
15. A qualified protective order is described in 45 CFR §164.512(e)(1)(v) with the following qualities:
 - a. prohibiting parties from using or disclosing the protected information for any purpose other than the litigation; and,
 - b. require the destruction or return of the protected information at the end of the litigation.

C. HIPAA PROCEDURES AVAILABLE TO LAW ENFORCEMENT

16. To explain the well-meaning, though flawed, advice of the State in this case thus far, the State can simply issue subpoena and acquire protected information.
17. 45 CFR §164.512(f)(1)(i), attached as Exhibit 2, allows the record holder to disclose reportable wounds and injuries.

18. 45 CFR §164.512(f)(1)(ii) allows law enforcement to serve a subpoena, grand jury subpoena or administrative request to obtain protected information.

D. DEFENSE REQUEST FOR QUALIFIED PROTECTIVE ORDERS

19. Defendant requests Qualified Protective Orders for the production of Adolescent Accuser's counseling/medical/pharmaceutical/mental health records in order for the Court to comply with

- a. Defendant's Confrontation¹, Compulsory Process² Procedural Due Process and Substantive Due Process rights³ under the U.S. and Texas Constitutions; and,
- b. HIPAA.

20. Defense requests the Court amend previous instructions to Defense to serve subpoenas for protected information.

WHEREFORE PREMISES CONSIDERED, DEFENDANT respectfully prays that the court grant this motion and order the production of counseling/medical/pharmaceutical/mental health records.

Respectfully submitted,

Lennard K. Whittaker, Attorney
P.O.Box 720876
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956 821 9918
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By: _____
Lennard K. Whittaker
SBT 24008274
Counsel for [REDACTED]

¹ U.S. Constitution Amendment 6, Tex. Constitution Art. 1, §10

² U.S. Constitution Amendment 6, Tex. Constitution Art. 1, §10

³ U.S. Constitution Amendments 5 & 14

Certificate of Service

I, Lennard K. Whittaker, affirm that a true and correct copy of the foregoing instrument has been delivered to:

Hidalgo County District Attorney

100 E. Cano

Edinburg, TX 78539

██████████@da.co.hidalgo.tx.us

██████████@da.co.hidalgo.tx.us

██████████@da.co.hidalgo.tx.us

Lennard K. Whittaker

45 CFR §154.512(e) (last amended 2013)

(e) Standard: Disclosures for judicial and administrative proceedings -

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(v) of this section.

(2) *Other uses and disclosures under this section.* The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

45 CFR §154.512(f)(1) (last amended 2013)

(f) Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

(i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(i) of this section; or

(ii) In compliance with and as limited by the relevant requirements of:

(A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

(B) A grand jury subpoena; or

(C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

(1) The information sought is relevant and material to a legitimate law enforcement inquiry;

(2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used.

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IN THE DISTRICT COURT

v.

[REDACTED] JUDICIAL DISTRICT

[REDACTED] [REDACTED]

HIDALGO COUNTY, TEXAS

ORDER TO [REDACTED] COUNSELING

On this the ____ day of _____, 2020, came to be heard in the above-entitled and numbered cause DEFENDANT'S MOTION FOR QUALIFIED PROTECTIVE ORDER FOR COUNSELING/MEDICAL/MENTAL HEALTH RECORDS and this court finds that Defendant's motion is hereby:

GRANTED, AND ORDERS [REDACTED] Counseling, to produce ALL counseling/medical/mental health records of [REDACTED] (dob [REDACTED]) to Counsel Lennard K. Whittaker. Mr. Whittaker is obliged to produce a copy of the records to the State of Texas as soon as practicable.

Mr. Whittaker and the State of Texas may only utilize the records under 15 CFR §164.512(e) for the purposes of litigation and must destroy such records when pertinent litigation is terminated.

DENIED.

Signed this ____ day of _____, 2020.

Judge Presiding

cc:

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P.O. Box 720876
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Hidalgo County District Attorney
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CAUSE NO. CR- [REDACTED]

STATE OF TEXAS

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IN THE DISTRICT COURT

v.

[REDACTED] JUDICIAL DISTRICT

[REDACTED], [REDACTED], [REDACTED]

HIDALGO COUNTY, TEXAS

ORDER SETTING HEARING

Hearing on four motions mentioned below is hereby set for ____ day of _____, 2020 at _____ am/pm:

DEFENDANT'S MOTION FOR QUALIFIED PROTECTIVE ORDER FOR COUNSELING/MEDICAL/MENTAL HEALTH RECORDS

MOTION FOR DISCLOSURE OF CPS INVESTIGATIVE RECORDINGS

Zoom Meeting ID: _____

Signed this ____ day of _____, 2020.

Judge Presiding

cc:

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