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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Criminal No. 1:07CR209 (TSE)
	)	
WILLIAM J. JEFFERSON,	)	FILED UNDER SEAL PURSUANT
	)	TO LOCAL CRIMINAL RULE 49
Defendant.	)	

DEFENDANT'S OPPOSITION TO [redacted] MOTION TO QUASH SUBPOENA

[redacted] has filed a motion to quash a defense trial subpoena for [redacted] on the grounds that [redacted] as that term is defined in the Virginia code. In opposition to her motion, defendant Jefferson submits that state law does not apply in federal criminal cases, no Virginia law provides [redacted] and it is unclear if [redacted] would fall within any such privilege in any event. Moreover, federal law does not require that the subpoena be quashed. Any support for a privacy right to protect medical records based on the Health Insurance Portability and Accountability Act (HIPAA) is misplaced; the defense has satisfied the procedures necessary for [redacted] to comply with HIPAA, HIPAA specifically permits the production of records in connection with a court proceeding where the patient has had an opportunity to contest the request, and the defense has demonstrated a compelling need for the records in this case. Finally, Congressman Jefferson's Sixth Amendment rights outweigh any common law privilege recognized by the federal courts.

I. State Law Regarding Confidential Records Does Not Apply In Federal Criminal Proceedings.

Any Virginia law making records of [redacted] confidential would not apply in federal court. In *United States v. Sutherland*, 143 F. Supp.2d 609 (W.D. Va. 2001), a hospital sought to quash a subpoena for medical records issued in a

criminal prosecution against a doctor and cited a patient right to privacy contained in Virginia statutes. The *Sutherland* court recognized that Virginia law granted patients a substantive right to privacy in their medical records, but it held that a state statutory right was not applicable in federal criminal cases. *Id.* at 611. *See also United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1311 (5th Cir. 1987) (refusing to allow patients to contest the seizure of records in a federal criminal case on state law grounds, despite a Texas statute guaranteeing a privacy right in records). Therefore, the fact that a state statute might grant Mody a privacy interest in records maintained by [redacted] does not limit Congressman Jefferson's right to avail himself of this court's subpoena power.

Ii. Virginia Statutory Privileges Do Not Apply In Criminal Cases.

[redacted] so the court has no basis upon which it can conclude whether [redacted] or not. The fact that Virginia includes [redacted] – Virginia's Medical Malpractice Review panels and Arbitration of Malpractice Claims – does not establish that the state has determined that [redacted]

Moreover, even if [redacted] Virginia law makes no provision [redacted] Va. Code Ann. § 8.01-400.2 only applies in civil

proceedings: "Except at the request of or with the consent of the client, no licensed professional counselor, as defined in § 54.1-3500; licensed clinical social worker, as defined in § 54.1-3700; licensed psychologist, as defined in § 54.1-3600; or licensed marriage and family therapist, as defined in § 54.1-3500, shall be required in giving testimony as a witness in any *civil* action to disclose any information communicated to him in a confidential manner . . . ." Id. (emphasis added). The analogous physician-patient privilege, Va. Code Ann. § 8.01-399 likewise applies only in civil cases. *Gibson v. Commonwealth*, 219 S.E 2d 845, 847 (Va. 1975). Therefore, even if this court applied Virginia law to the case at bar, [redacted] could not claim any privilege on behalf of Mody because Virginia law does not protect the privacy of patient communications in a criminal proceeding. And, even if the statute did apply, it covers only certain communications, not the records of diagnosis and treatment in their entirety.

III. HIPAA Does Not Require That The Subpoena Be Quashed.

By adopting the Government's motion, [redacted] relies on HIPPA for the proposition that there is a clear federal policy protecting health records. However, this court specifically disagreed with that proposition in *In Re Grand Jury Subpoena*, 197 F. Supp.2d 512 (E.D. Va. 2002). In that case, a grand jury subpoenaed hospital records, and the hospital moved to quash the subpoenas citing privacy concerns. To bolster its argument, the hospital claimed that HIPAA demonstrated a federal policy of protecting patient records. *Id.* at 515. The court rejected the argument that HIPAA bars a subpoena for medical records: "This argument is unpersuasive, as the HIPAA regulations themselves make clear that any privacy patients have in their medical records is trumped by a grand jury subpoena that is 'relevant and material to a legitimate law enforcement inquiry.'" *Id. quoting*, 45 C.F.R. § 164.512(f)(1)(ii). This court held that because HIPAA allowed for disclosure of the records, and the government had demonstrated a compelling need for them, the court would not quash the subpoenas. The court also noted that

the patients' rights would be safeguarded by the grand jury secrecy embodied in Fed. R. Crim. P. 6(e). 197 F. Supp.2d at 515.

The court's reasoning should be the same in the present case. The relevant HIPAA regulation allows health care providers to produce patient records in response to a subpoena as long as the patient has been notified or a proper protective order is in place. 45 C.F.R. § 164.512(e)(1)(ii). Here, both predicates have been satisfied: Mody is aware of the issuance of the subpoena and has joined the government's motion to quash, and a protective order which will protect against the dissemination of any information to third parties is in place. Moreover, in a letter sent on December 11, 2008, attached hereto as Exhibit 1, the defense informed [redacted] of the existence of the protective order. The defense has demonstrated a compelling need for these records as explained in the opposition to the motion to quash based on the Confrontation Clause of the Sixth Amendment. *See* Defendant's Opposition to Government's Motion to Quash, 12/5/08, Dkt. # 249 at 5-10. For these reasons, as in *In Re Grand Jury Subpoena*, HIPAA does not provide legal grounds to quash the subpoena.

IV. The Subpoena Should Not Be Quashed In Reliance On Federal Common Law.

[redacted] does not assert [redacted] but even if she were, there is no [redacted] *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977). By adopting DOJ's pleading, [redacted] is presumably relying upon the federal common law privilege for certain [redacted] in *Jaffee v. Redmond*, 518 U.S. 1 (1996). But *Jaffee* does not require that the subpoena [redacted] must be quashed.

In *Jaffee*, the court exercised its authority under Fed. R. Evid. 501 to recognize a new federal common law privilege covering "confidential communications between a licensed

psychotherapist and her patients in the course of diagnosis or treatment," *id.* at 15, and it extended the privilege to also cover "confidential communications made to licensed social workers in the course of psychotherapy." *Id.* [redacted]

Even if [redacted] Mody were to make the necessary showing, the *Jaffee* decision in a civil case did not reach the issue of how the privilege would be applied in a case in which the Sixth Amendment is also implicated. Indeed, the majority made it clear that it was only addressing the particular case before it at the time: "A rule that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner. Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'" *Id.* at 18. The Court did engage in a balancing analysis in deciding whether or not to recognize the privilege: "the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence.'" *Id.* at 9-10. And the Court explicitly acknowledged that there could be circumstances in which the need for privilege would be outweighed by other factors. *Id.* at 18 n.19.

The Supreme Court has not yet addressed what the contours of the privilege would be in a criminal case, and lower courts that have considered the point have approached the matter differently. As noted in Mr. Jefferson's opposition to DOJ's motion to quash, the court in *United*

States v. Mazzola, 217 F.R.D. 84 (D. Mass. 2003) determined that when the constitutional guarantee of the right to confrontation was involved, the privilege would have to yield.

> Although the societal interest in guarding the confidentiality of communications between a therapist and his or her client is significant, it does not outweigh the need for effective cross examination of this key government witness at the criminal trial.....Reason and experience caution against recognizing a blanket federal common law privilege for therapist records of an important government witness regarding therapy sessions temporally proximate to the criminal charge.

217. F.R.D. at 88 (citations omitted). *See also Bassine v. Hill,* 450 F. Supp.2d 1182, 1185 (D. Or. 2006).

In *Newton v. Kemna,* 354 F.3d 776 (8th Cir. 2004), cited by DOJ, the court did reject a habeas challenge to a conviction on the grounds that the defendant had been denied access to a complainant's psychiatric records for use in cross examination, but the court made it clear that the Supreme Court had not yet spoken on this issue, and that its ruling was governed by the procedural posture of the case:

> We note that the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges....Whether a constitutional right might prevail over a privilege seems to be a function of the relative strength of the privilege and the nature of the constitutional right at stake, and we are unable to discern any transcendental governing principles that foreshadow what the Supreme Court would do in the case before us.. Given the restrictive nature of habeas review, it is not our province to speculate as to whether the Supreme Court, if faced with this issue, would find that Missouri's physician-patient privilege must give way to a defendant's desire to us psychiatric records in cross-examination.

354 F.3d at 781-82. Since the defendant had been given a full opportunity to cross examine the witness concerning her drinking, drug use, and mental state at the time of the offense, the court found that he did not merit federal habeas relief on that ground. *Id.* at 781. The defendant also complained that he should have been granted access to the complainant's psychiatric records for use in challenging her competency to testify, but since the state trial court and the state Court of Appeals had both reviewed the records in camera and found nothing that would have been of use

in rebutting the presumption that she was qualified to testify, no federal habeas relief was warranted on that issue either. *Id.* at 782.

The *Jaffee* issue came up in *Newton* in the context of the defendant's additional argument that the federal district court should have ordered discovery or in camera review of the [redacted] The court did state that the Supreme Court had rejected a balancing approach in *Jaffee, Newton,* 354 F.3d at 784, but the question before the court was very different from the question in this case. A habeaus petitioner does not have an unfettered right to summon witnesses and documents to trial under the Sixth Amendment and Fed. R. Crim. P. 17 – his post-conviction right to discovery is available only if the trial court grants him leave for good cause shown. *Id.* at 783, *citing* Rule 6(a) of the Rules Governing § 2254 cases. Thus, the Eighth Circuit was considering only whether the district court had abused its discretion when denying such discovery at the § 2254 stage. Since the defendant at that time could point to only a few cases authorizing the discovery, and the Supreme Court had recognized [redacted] in *Jaffee,* the Circuit Court held that the trial court had not abused its discretion. *Newton*, 354 F.3d at 785. But the Eight Circuit

did not indicate how it would rule on the issue when the question presented was the defendant's right to a fair trial in the first instance, and the *Newton* opinion is not controlling here.[1]

One of the factors the Supreme Court took into consideration in *Jaffee* in creating the privilege was the fact that each state had enacted some [redacted] And, the Supreme Court rejected a balancing test in *Jaffee* because it reasoned [redacted] should be able to anticipate from the outset of the relationship whether or not it is going to be confidential. *Id.* at 17-18. But the Court did note that some of those state statutes are not absolute, *id.*, and one of the examples it pointed to was the [redacted] Since the applicable privilege in Virginia applies only in civil cases, Mody could not have reasonably predicted that [redacted] would be shielded from review in a criminal case. Therefore, the reasoning behind *Jaffee's* rejection of a balancing test should not apply here.

Even if this court determines that the *Jaffee* privilege covering certain communications cannot be outweighed by the defendant's confrontation rights in a criminal case, there is nothing

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[1] In its reply, DOJ also cites three post-*Jaffee* District Court opinions. In *United States v. Stone,* 2005 WL 1845153 (D.S.D. 2005), the government, unlike DOJ here, provided the defense [redacted] that were in its possession, and the defendant was seeking additional records of treatment by governmental agencies from the prosecution, not the agencies themselves. The court found the request to be precluded by the Eighth Circuit decision in *Newton* and by *Jaffee,* but this court should not reach the same conclusion for the reasons set forth above. The court in *United States v. Doyle,* 1 F. Supp. 2d 1187 (D. Or. 1998), also found guidance in *Jaffee* when rejecting a defense [redacted] but they were sought for a purpose that is distinguishable from the request here. Doyle pled guilty to an extremely violent crime and claimed that he was entitled to the victim's [redacted] after the attack for use in defending against the government's proposed sentencing enhancement for extreme [redacted] Federal Sentencing Guideline [redacted] Here the defense is seeking evidence for use at trial, not at sentencing, and the evidence relates to [redacted] not after the events in question. In *United States v. Haworth,* 168 F.R.D. 660 (D.N.M. 1996), the court cited *Jaffee,* but it reviewed the records in camera before concluding the records were not subject to discovery, and it permitted the witness to be cross examined [redacted]

in *Jaffee* that places all of the records themselves beyond the reach of the courts. [redacted] *id.* at 10, that are the sole subject of the *Jaffee* privilege. [redacted] asserts that she had [redacted] but even if that vague statement establishes the fact [redacted] does not govern any other aspect of the subpoenaed material.

CONCLUSION

Therefore, [redacted] motion to quash the subpoena duces tecum issued [redacted] should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 23rd day of December 2008, I served a copy of the foregoing opposition by e-mail and first class mail:

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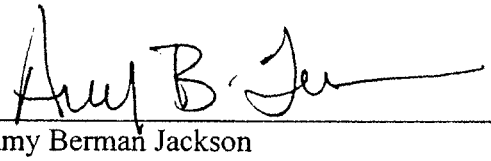

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