IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Sean McClendon,	)	
	)	No. 22-cv-5472
Plaintiff,	)	
	)	*(Judge Coleman)*
-vs-	)	
	)	*(Magistrate Judge Valdez)*
City of Chicago, et al.	)	
	)	
Defendants.	)	

PLAINTIFF AND THIRD-PARTY WITNESS EMMANUEL POE'S MOTION TO QUASH

Plaintiff and third-party witness Emmanuel Poe, by counsel, respectfully request that the Court quash defendant City of Chicago's subpoenas for prison and jail phone calls and for prison and jail records of Mr. Poe.

The Court granted plaintiff's first motion to quash defendant's subpoena for the recordings of all calls that plaintiff made while incarcerated. (ECF No. 48.) Defendant now seeks recordings of calls that plaintiff made to Mr. Poe. This is another fishing expedition based on "mere speculation that the recordings could house relevant evidence." *DeLeon-Reyes v. Guevara*, No. 18-cv-01028, 2020 WL 7059444, at *5 (N.D. Ill. Dec. 2, 2020). The Court should quash the new subpoena.

The Court should also bar defendant's attempt to subpoena prison and jail records of Mr. Poe. That Poe will be a witness is not a sufficient basis to permit defendant "to rummage through confidential and sensitive records

based on nothing but the hope that something relevant will be found." *Arms v. Milwaukee County*, No. 18-CV-1835, 2020 WL 5292146, at *2 (E.D. Wis. Sept. 4, 2020).

I. Background

Plaintiff Sean McClendon alleges that he was wrongfully imprisoned because defendant police officers fabricated evidence against him. Following his arrest on October 2014, plaintiff spent six months at the Cook County Jail before being released on bond. He returned to the Jail on July 13, 2016, on a finding of guilty and was transferred to the Illinois Department of Corrections on November 10, 2016. Plaintiff was released from IDOC on June 13, 2022, when his conviction was vacated.

The evidence against plaintiff was the statement of defendant Cadichon that he had seen plaintiff hide a gun on the porch where officers arrested plaintiff and the statement of defendant McHale that plaintiff acknowledged possessing a gun. Plaintiff testified at his criminal trial on July 13, 2016, and denied both contentions.

Plaintiff was with his friend Emmanuel Poe at the time of arrest. Mr. Poe testified at trial; his testimony was consistent with plaintiff's trial testimony. Poe also testified to his version of events at a suppression hearing held on November 4, 2015.

A jury found plaintiff guilty, but the Appellate Court reversed, holding that the gun should have been suppressed because it was found as the result of

an illegal seizure. Plaintiff filed this lawsuit after his conviction was overturned, contending that the defendants fabricated the evidence that was used to prosecute him.

II. Defendant's Subpoenas and Local Rule 37.2 Compliance

On September 25, 2023, defendant notified plaintiff of its intent to serve the subpoenas at issue in this motion. The parties exchanged emails about their positions on the subpoenas, and on October 2, 2023 at about 4:00 p.m., Attorney Brian Wilson for defendant City of Chicago and Attorney Joel Flaxman for plaintiff conferred over the Google Meet platform. The parties made good faith attempts to resolve their differences, and they are unable to reach an accord.

Defendant seeks to serve three subpoenas. The first subpoena, attached as Exhibit 1, requests recordings of calls that plaintiff made to Mr. Poe's phone number while plaintiff was in the custody of the Illinois Department of Corrections from 2016 to 2022.

The other two subpoenas request information about Mr. Poe. Exhibit 2 is a subpoena to the Illinois Department of Corrections seeking Poe's (a) disciplinary records, (b) visitor logs/lists, (c) telephone number list requests, and (d) phone call printouts/logs. Exhibit 3 is a subpoena to the Cook County Sheriff seeking Poe's (a) disciplinary history, (b) disciplinary records, (c) visitor logs, (d) telephone call logs, and (e) "any documents indicating the names of individuals associated with any phone number that called Emmanuel Poe, or that

Emmanuel Poe called while in custody, including any approved caller list or similar document."

III. The Court Should Quash the Subpoenas for Plaintiff's Calls

Defendant's request for recordings of every phone call that plaintiff made to Mr. Poe while plaintiff was in prison is a quintessential fishing expedition. Production of the recordings of these intimate conversations will serve no purpose except to invade the privacy rights of plaintiff and Mr. Poe.

Defendant has produced records showing that plaintiff called Mr. Poe 238 times between May of 2019 and March of 2022. Assuming the two spoke with similar frequency between November 2016 and May 2019, defendant's subpoena seeks about 500 phone calls. The hundreds of hours of attorney time required to review these phone calls is not proportional to the needs of the case.

Under Federal Rule of Civil Procedure 26, "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." FED. R. CIV. P. 26(b)(1). The Rule sets out four factors for the Court to consider about proportionality: "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.*

The relevancy and proportionality standards of Rule 26 apply to subpoenas issued under Rule 45. Advisory Committee Note to 1991 Amendments to

Rule 45 ("The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34"). When a party objects to a subpoena, the subpoenaing party has the burden to justify the subpoena. *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923, 931 (7th Cir. 2004). Plaintiff shows below that defendant cannot meet this burden.

A. Plaintiff Has Standing to Object to the Subpoena

"A party has standing to move to quash a subpoena addressed to another if the subpoena infringes upon the movant's legitimate interests." See *United States v. Raineri*, 670 F.2d 702, 712 (7th Cir. 1982). In this case, plaintiff and Mr. Poe have standing because of their interests in the privacy of their personal phone calls. This Court recognized standing to quash a subpoena based on a privacy interest in financial records in *Medix Staffing Sols., Inc. v. Connected Care Health Servs., Inc.*, No. 20-cv-2899, 2021 WL 11605607, at *1 (N.D. Ill. Mar. 4, 2021). As the Court explained,

> When a party seeks to quash a third-party subpoena based on the party's privacy interest, "[e]ven a minimal privacy interest has been found sufficient to confer standing." *Bishop v. White*, No. 16-cv-6040, 2020 WL 6149567, at *3 (N.D. Ill. Oct. 20, 2020) (citation omitted).

Id.

In *Bishop*, the case on which this Court relied in *Medix Staffing*, the Court found that a plaintiff seeking to quash a subpoena for calls made while in custody possessed a privacy interest sufficient to confer standing: "[A]lthough

Plaintiff may reasonably have expected prison officials or law enforcement to have access to recordings of his phone calls . . . he may not have anticipated that parties to a civil proceeding would be privy to those conversations." *Bishop v. White*, No. 16 C 6040, 2020 WL 6149567, at *3 (N.D. Ill. Oct. 20, 2020). The ruling in *Simon v. Northwestern University*, No. 15-cv-1433, 2017 WL 66818 (N.D. Ill. Jan. 6, 2017) is in accord:

> The production of every single phone call over the fifteen years Simon was incarcerated undoubtedly will yield details unrelated to the instant litigation. This court doubts, for example, Simon anticipated his remarks to a friend about the weather, slights uttered in a heated lover's quarrel, or any unrelated conversation ranging from the most benign topics (the former) to the most intimate (the later) would find its way as an exhibit in this lawsuit. Accordingly, Simon has standing to move to quash the subpoena.

Id. at *2; *see also DeLeon-Reyes v. Guevara*, No. 18-cv-01028, 2020 WL 7059444, at *2 (N.D. Ill. Dec. 2, 2020); *Pursley v. City of Rockford*, No. 18-cv-50040, 2020 WL 1433827, at *2 (N.D. Ill. Mar. 24, 2020). As the Court found when it granted plaintiff's first motion to quash, plaintiff has standing to challenge defendant's subpoena.

This motion is joined by Emmanuel Poe, who was the other participant on the calls at issue. Mr. Poe also has a privacy interest in the calls that the Court should take into consideration.

B. The Privacy Interests of Plaintiff and Mr. Poe Outweigh Any Possible Relevance of the Material Sought

Plaintiff and Mr. Poe are long-time friends. They recall speaking over the phone about personal matters, but neither recalls any conversations about

the events leading up to plaintiff's arrest. Defendant may argue that the two men must have discussed Poe's testimony, but the calls at issue all take place after plaintiff was convicted and entered the Illinois Department of Corrections. By that time, Mr. Poe had already testified on two separate occasions about the night plaintiff was arrested. Plaintiff had also testified about the arrest. The two men testified consistently.

The Court should follow its ruling on the first motion to quash and the rulings of other courts in this district recognizing that prisoners have a privacy interest in their personal phone calls. *E.g.*, *Bishop v. White*, No. 16-cv-6040, 2020 WL 6149567, at *4 (N.D. Ill. Oct. 20, 2020); *DeLeon-Reyes v. Guevara*, No. 18-cv-01028, 2020 WL 7059444, at *2 (N.D. Ill. Dec. 2, 2020); *Pursley v. City of Rockford*, No. 18-cv-50040, 2020 WL 1433827, at *3 (N.D. Ill. Mar. 24, 2020); *Simon v. Nw. Univ.*, No. 15-cv-1433, 2017 WL 66818, at *2 (N.D. Ill. 2017).

In *Deleon-Reyes*, the Court surveyed these and other cases and concluded that "in order to overcome a prisoner's privacy interest in the recordings of her telephone calls, the subpoenaing party must offer more than mere speculation that the recordings could house relevant evidence." *Deleon-Reyes*, 2020 WL 7059444, at *5. The Court went on to explain, "there must be evidence already discovered indicating that the recordings would probably document something relevant."

Defendant cannot meet this standard because there is nothing other than speculation about the relevance of plaintiff's calls. This is not a case involving a witness who changed his testimony or one who first came forward until after trial. Importantly, the recordings at issue here were made after plaintiff and Mr. Poe had already testified at trial.

Defendant apparently contends that scouring hundreds of hours of recordings may turn up some offhand comment by plaintiff that calls into question his credibility. But the "bare assertion that the material sought *may* contain relevant information is insufficient to allow an unlimited subpoena." *Bishop v. White*, No. 16 C 6040, 2020 WL 6149567, at *5 (N.D. Ill. Oct. 20, 2020). Indeed, the only non-speculative evidence about the relevance of plaintiff's calls is his answer to defendant's interrogatory:

> Interrogatory 16. Identify – per the instructions to these interrogatories – every person you had a phone conversation with while you were incarcerated at any jail or prison since October 10, 2014, about (i) your Arrest, (ii) your subsequent criminal prosecution and conviction, or (iii) your efforts to seek a new trial or have your conviction vacated, overturned or reversed.
>
> Response: I never had a phone conversation while I was incarcerated in which I went into detail about these matters.

(Exhibit 4 at 4.) Accordingly, "the subpoena at issue is overbroad and does not target evidence that is sufficiently relevant to overcome even Plaintiff's minimal privacy interest here." *Bishop*, 2020 WL 6149567, at *6. As in *Pursley*, plaintiff has specifically asserted that his phone calls are not relevant, and defendant is unable to rebut this assertion. *Pursley*, 2020 WL 1433827, at *4.

Because mere speculation about relevance fails to overcome the privacy interests of plaintiff and of Mr. Poe, the Court should quash the subpoena for recordings.

C. Defendant's Subpoenas Would Impose a Massive Cost and Undue Burden that Is Not Proportional to the Needs of the Case

In addition to invading the privacy rights of plaintiff and Mr. Poe, the fishing expedition that defendant seek to undertake would be a costly and burdensome one. If defendant gains access to hundreds of hours of recorded phone calls, plaintiff's counsel will be required to make a significant investment of time and money to review these hours of irrelevant personal phone calls.

The cost of reviewing the recordings falls differently on the defense side. Defendant City of Chicago is represented by Nathan & Kamionski; the principals of the firm are the owners of a company called "Pointed Discovery," which touts its ability to provide "Expedited Prison Call Review Services." *See* https://www.pointeddiscovery.com/. The firm has been retained by the City of Chicago to "undertake review of prison and jail phone calls received in discovery." (Exhibit 4.) While reviewing hundreds of hours of irrelevant phone calls may fill the coffers of "Pointed Discovery" and its principals, the fishing expedition defendant proposes is antithetical to Federal Rule of Civil Procedure 1's call for the "the just, speedy, and inexpensive determination of every action and proceeding."

Defendant City of Chicago has unlimited resources to burn reviewing prison phone calls. The same, of course, is not true for plaintiff. The imbalance between the parties' resources is one of the factors to consider in assessing proportionality. FED. R. CIV. P. 26(b)(1). Other factors relevant in this case are "the importance of the discovery in resolving the issues" and "whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* Plaintiff showed above that each of these factors weigh in his favor. The Court should quash the subpoena.

IV. The Court Should Quash the Subpoenas for Records about Emmanuel Poe

Emmanuel Poe joins this motion to separately object to defendant's subpoenas for records about him held by the Cook County Jail and the Illinois Department of Corrections. Mr. Poe entered the Cook County Jail in June of 2015 on charges unrelated to the charges against plaintiff. In August 2015, he was sentenced in two cases to a total of five years in the Illinois Department of Corrections.

Defendant seeks records about any discipline Poe may have received while in custody and about the people he communicated with while in custody. Illinois law recognizes a former inmate's privacy interest in these materials by statute. Under 730 ILCS 5/3-5-1, the records sought by defendant "shall be confidential and access shall be limited to authorized personnel of the respective Department or by disclosure in accordance with a court order or

subpoena." The Court should quash the subpoena because defendants cannot show sufficient relevance to overcome Mr. Poe's privacy interests.

Defendant has not pointed to any connection between plaintiff's lawsuit and discipline that Mr. Poe received while in custody. Plaintiff is seeking damages for his time in custody and does not dispute that records of *his* discipline may be relevant. But Mr. Poe is not a party seeking damages and nothing about his time in custody is relevant to plaintiff's claim.

Defendant may argue that evidence relevant to credibility may be found in the disciplinary records, but courts routinely reject this argument in employment cases when a defendant employer seeks the plaintiff employee's personnel file from previous employers. *E.g.*, *McPhail v. Trustees of Indiana Univ.*, No. 2:22-CV-137, 2023 WL 416173 (N.D. Ind. Jan. 26, 2023); *Dirickson v. Intuitive Surgical, Inc.*, No. 19 C 7249, 2020 WL 11421622, at *2 (N.D. Ill. Dec. 29, 2020), *aff'd*, No. 19-CV-7149, 2021 WL 4461574 (N.D. Ill. July 2, 2021). The same rule should apply here.

Defendant's request is even less relevant because it seeks information about a non-party. The court considered a similar request in *Arms v. Milwaukee County*, No. 18-CV-1835, 2020 WL 5292146 (E.D. Wis. Sept. 4, 2020), where the plaintiff sought personnel files of potential witnesses. The Court rejected the plaintiff's request because "the fact that someone is a 'potential witness' is not a sufficient basis for permitting Arms to rummage through confidential and

sensitive records based on nothing but the hope that something relevant will be found." *Id.* at *2.

The Court should therefore quash the subpoenas for records about Mr. Poe.

V. Conclusion

For all these reasons, the Court should quash the subpoenas.

Respectfully submitted,

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