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PLEASE REPLY TO:

June 12, 2024

Honorable Ron DeSantis
Governor, State of Florida
Governor's Legal Office
The Capitol, Room 209
Tallahassee, FL 32399

Attn: Brandi Manley

Re: Executive Order No: 24-51
In Re: Dr. Howard Fetner

Dear Governor DeSantis,

By Executive Order No: 24-51, you assigned my office to review allegations against Dr. Howard Fetner of false and fraudulent insurance claims, schemes to defraud, criminal use of personal identification information, and grand theft. This matter arose from the letter sent to 4th Circuit State Attorney Melissa Nelson by Attorney William Spicola regarding potential illegal conduct by Dr. Howard Fetner in the 4th Judicial Circuit.

These allegations relate to Department of Financial Services, Division of Investigative & Forensic Services (DFS) investigation 22-3997. To evaluate whether any State Attorney action would be proper in this matter, I have acquired and reviewed a complete copy of this investigation from DFS, a complete copy of the 13th Circuit State Attorney's Office investigative file, interviewed the original DFS investigator, conferred with multiple attorneys representing Dr. Fetner, and reviewed all the documentation provided by, and conferred with, Mr. Spicola relating to his concerns.

To summarize, this matter involves a dental practice(s) in South Florida. There were three main allegations of misconduct in relation to this practice that were investigated by DFS. These allegations involved (1) the misuse of billing numbers associated to individual dentists who were no longer associated to the practice; (2) violations of Florida Statute 466.0285 requiring that a dentist control decisions regarding patient care; and (3) the systematic improper application of a billing code at that dental practice. DFS did an extensive investigation and made a series of arrests in South Florida related to this investigation. Eventually the 13th Judicial Circuit and the Statewide Prosecutor both declined to file criminal charges related to this investigation. As a part of that investigation DFS investigated Dr. Fetner and referred Dr. Fetner for criminal charges in the 13th Judicial Circuit, but DFS did not arrest Dr. Fetner, likely because he was cooperating with the DFS investigation.

The 13th Judicial Circuit State Attorney conducted its own investigation. The charged defendants made presentation to the 13th Judicial Circuit of its defenses to these allegations. I have reviewed the materials from that presentation. Ultimately, the 13th Judicial Circuit declined to prosecute any defendant, including Dr. Fetner. DFS then asked the Statewide Prosecutor to review and accept the case for prosecution, and the Statewide Prosecutor declined to prosecute any person involved in this investigation. This matter now comes to my office for further review.

You have necessarily limited the purview of my inquiry to potential criminal conduct occurring and properly charged in the 4th Judicial Circuit against Dr. Fetner, and any related matter. As such, I am limited to charging any crime resulting from criminal conduct where venue is proper in the 4th Judicial Circuit. If criminal conduct occurred in both the 4th and 13th Judicial Circuit, prosecutorial authority for this matter would properly fall to the Statewide Prosecutor. As noted, DFS presented this matter to the Statewide Prosecutor and that office declined to prosecute this matter.

From my review of this matter, I draw no conclusion regarding appropriateness of the decision to not prosecute either Dr. Fetner or the individuals who were arrested during this investigation by either the 13th Judicial Circuit State

Attorney or the Statewide Prosecutor. Prosecutors have broad discretion to decide to charge a crime or not. There are many legitimate factors that a prosecutor may consider in making that decision. In reviewing this matter, there are clearly valid reasons to decline prosecution on the merits of this action.

Turning to Dr. Fetner, even if it is legally possible to bring a criminal charge in the 4th Circuit, I conclude that venue for this matter was proper either in the 13th Judicial Circuit or with the Statewide Prosecutor. Assuming that there were some subsets of criminal charges that could have been filed in the 4th Judicial Circuit, it would be improvident to do so. Florida Statute §910.02 provides that criminal prosecutions shall be tried in the county where the offense was committed. The policy behind this is sound here. All of the witnesses, victims, law enforcement officers, and evidence regarding this matter are in the 13th Circuit. While Dr. Fetner may have been physically present within the 4th Judicial Circuit¹ at the times when the transactions giving rise to this matter occurred, the crimes, if any occurred, occurred in 13th Judicial Circuit. A theory that Dr. Fetner may have been complicit in some of these crimes giving rise to venue in the 4th Circuit is circumspect at best, and there is little evidence to support it.

In addition, the arrest and subsequent dismissal of charges against potential co-defendants hampers any prosecutorial effort as prosecution of these charges against these individuals are barred from prosecution by Florida Rule of Criminal Procedure 1.191, Speedy Trial, as are any charges that arose out of the same criminal episode. *See* 3.191(n). Frequently, in matters of this nature, the State may charge a defendant with a crime and find a settlement of that matter that would involve that defendant providing testimony regarding the other co-defendants. That cannot happen here, as the State is forever barred from bringing criminal charges arising out of this incident against these individuals. More importantly, Dr. Fetner's involvement in the underlying matter was ancillary to main criminal allegations. This is exemplified by DFS using him as a witness. To now focus a criminal investigation on him because it is unavailable against the main defendants would be unjust.

¹ Dr. Fetner's whereabouts during various interactions were not part of the investigation.

Making matters far more complex and difficult, the 13th Judicial Circuit granted use immunity to Dr. Fetner for his testimony regarding this investigation and Dr. Fetner proffered his testimony to the 13th Judicial Circuit. I have been unable to acquire a recording of Dr. Fetner's proffer. In any case where a defendant is charged with a crime and that defendant has received immunity, the State of Florida has burden to prove that the Information or Indictment is supported by evidence independent of any compelled testimony. *Palazzi v. State*, 307 So. 3d 998, 1001 (Fla. Dist. Ct. App. 2020); *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). The lack of recording would make this burden difficult, if not impossible to meet given that this office neither conducted the investigation nor the proffer, and I have been unable to obtain a copy of the proffer, assuming one ever existed.

For these reasons, and others, I decline to charge Dr. Fetner, or any other person, with any crime in the 4th Judicial Circuit related to this matter. As such, all matters connected to this assignment are now concluded and I am closing this matter in my office. As always, my office stands ready to accept assignments of this type whenever you require.

Sincerely,



Brian S. Kramer
State Attorney

cc: File