IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D03-4973

RUSH LIMBAUGH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

BRIEF OF *AMICUS CURIAE*
THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.
FILED BY LEAVE OF COURT
IN SUPPORT OF APPELLANT RUSH LIMBAUGH

On Appeal of a Non-Final Order of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page

Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of American Physicians and Surgeons, Inc. ("AAPS"), submits this *Amicus Curiae* Brief in support of the position of Appellant Rush Limbaugh pursuant to Florida Rule of Appellate Procedure 9.370. Founded in 1943, AAPS is a nationwide not-for-profit organization organized under the laws of the State of Indiana. It is funded virtually entirely by its members, among whom are many physicians and surgeons who reside and practice medicine in the State of Florida.

AAPS is dedicated to insuring the highest ethical standards in the practice of medicine and defending the confidential patient-physician relationship. AAPS consistently participates in litigation concerning these issues. Its members are deeply concerned about the intrusion of law enforcement into medical judgment and care of patients whose pain is best treated by opioid medications and other controlled substances.

AAPS has a strong interest in the privacy of patient-physician communications, including those of pain patients. The prospect of the State serving search warrants on physicians, without notice to their patients, is chilling to AAPS members and their practice of palliative care. To the extent the State's procedure here violated Mr. Limbaugh's constitutional and statutory rights, it fundamentally impacts the rights of the physicians of this State to practice medicine without fear of unwarranted and illegal State invasion. AAPS is committed to the protection of the physician-patient privilege and all it entails.

SUMMARY OF ARGUMENT

Visiting several physicians for pain relief should not open a patient's records to virtually unlimited access by the State. Millions, including many in Florida, suffer from chronic or undertreated pain. Their frequent trips to multiple physicians reflect their continued pain, not any criminal violation. Florida provides a statutory scheme for the State to subpoena medical records that requires notice and opportunity to object by the patient in protection of his privacy. The State violated the law here. Its search warrants should be quashed and their fruits excluded as a result.

At stake is the 2400-year-old patient-physician confidentiality embodied in the Oath of Hippocrates, a privilege recognized in various forms by the U.S. Supreme Court, Florida Supreme Court, and federal and state statutes and regulations. Doctors are not tools to be exploited to divulge records and testify against their own patients who desperately sought pain relief. It is not a crime for a patient to be in pain and repeatedly seek relief, and doctors should not be turned against patients they tried to help.

The consequences will be dire for countless pain patients if it becomes open season on access to their medical records. The few courageous doctors now willing to treat these patients will be chilled in their efforts, and many of these doctors will leave the already underserved population rather than become witnesses against their patients. Searching medical records to question the treating physicians about what their patients said or did not say would be a dreadful precedent for all sufferers of pain, and for the practice of medicine.

ARGUMENT

I. THE STATE VIOLATED MR. LIMBAUGH'S CONSTITUTIONAL AND STATUTORY RIGHTS IN OBTAINING HIS MEDICAL RECORDS.

A. The standard of review is de novo.

Statutory interpretation is a question of law subject to de novo review. A court's purpose in interpreting a statute is to give effect to legislative intent. *See Bellsouth Telecommunications, Inc. v. Meeks*, 28 Fla. L. Weekly S775, *6 (Fla. 2003). Constitutional interpretation is subject to the same standards. *See, e.g., Caribbean Conservation Corp., Inc. v. Florida Fish and Wildlife Conservation Com'n*, 838 So. 2d 492, 501 (Fla. 2003).

B. Neither the "doctor shopping" statute nor any other authority allows the State to obtain Mr. Limbaugh's medical records in the manner it did.

AAPS opposes the State's demand for virtually unlimited access to Rush Limbaugh's medical records on the meager evidentiary showing in this case. The State obtained its search warrants on an *ex parte* basis, resulting from a sweeping application of the "doctor shopping" statute, section 893.13(7)(a)8, Florida Statutes (quoted *infra* Point III.B n.2). Patient Limbaugh was deprived, without justification, of prior notice and an opportunity to object to this unrestricted search of his medical records. The expansive warrants cannot be supported by a patient having seen several doctors to treat excruciating pain, or even his use of many painkillers. Visits by a patient to multiple prescribing doctors are not remarkable, and cannot legitimize a wholesale search, without notice, of all his records. Such an intrusion violates the patient's federal and state constitutional rights to medical record privacy. Patient-physician confidentiality does not permit the virtually limitless searches performed in this case.

The search warrants here derive from a far-reaching application of the "doctor shopping" statute, signaling an attempt by the State ultimately to interrogate Limbaugh's doctors about what he did or did not tell them. This tactic thereby turns the doctor against his own patient, triggering breach of the Oath of Hippocrates that has governed the medical profession for 2400 years. The Oath includes the following:

> All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, **I will keep secret and never reveal.**

www.aapsonline.org/ethics/oaths.htm (emphasis added). The Florida Constitution implicitly codifies this Oath in Article I, Section 23, entitled "Right of Privacy." Art. I, § 23, Fla. Const. That provision mandates that "[e]very natural person has the right to be let alone and free from government intrusion into the person's private life except as otherwise provided herein. . . ." It is an infringement on this honored Oath and the Florida Constitution to force doctors to testify against their own patients based merely on what the patients did or did not say to them in seeking pain relief.

A patient's comments (or lack thereof) to a doctor while seeking treatment for pain is presumptively protected speech under the First Amendment and also under the Fourth and Fourteenth Amendments of the United States Constitution. Only a compelling state interest and strong evidentiary showing, after full notice to the patient, would justify this intrusion, and even then disclosure should only be with the strict safeguards required by *Whalen v. Roe,* 429 U.S. 589 (1977). These heightened requirements are utterly lacking in connection with the search warrants at issue here.

If these warrants for Mr. Limbaugh's records are allowed, then the chilling effect on the practice of medicine in the State of Florida will be enormous. Doctors will reasonably fear "Big Brother" scrutiny of what they include or omit from the medical

charts of patients. To avoid the professional risk, doctors will further refuse to treat pain patients adequately. Only by denying care will doctors be able to honor their Oath of Hippocrates and escape the Catch-22 of being ordered to testify against their own patients. Such a dilemma would never be forced upon the legal profession, and it should not be allowed to disrupt the medical profession either. Pain patients, for their part, will face new apprehension about what is written in their medical files, and a new obligation to review and demand changes lest the State claim that they did not say something to a doctor. If pain patients lose their privacy by seeing multiple doctors, then patients will need to assume control over the charts that may be used against them.

A health care system that is already in crisis can hardly take on these new burdens and intrusions on patient-physician communications. Chronic pain patients, treated like pariahs in health care, are particularly vulnerable to the State's new intrusion. The "doctor shopping" statute cannot and should not be applied so expansively as to give prosecutors unfettered access, without notice to the patient, to the patient's medical records merely because he had undertreated pain and may have received prescriptions from multiple doctors.

II. THE STATE HAS FAILED TO JUSTIFY ITS BROAD DEMAND FOR ACCESS TO MR. LIMBAUGH'S MEDICAL RECORDS.

A. The standard of review is de novo.

Because the State relies upon a construction of the "doctor shopping" statute for its seizure of Mr. Limbaugh's medical records, the same standard explained above applies here.

B. The State failed to comply with federal and Florida law in demanding access to Mr. Limbaugh's medical records.

The contested search warrants demand access to ALL of Rush Limbaugh's medical records at various doctors' offices. By proceeding *ex parte* with wide-ranging warrants, there has been no opportunity for redaction of highly private or potentially embarrassing and irrelevant information from the records. This search and seizure constitute a far greater invasion of Mr. Limbaugh's privacy than, say, a warrantless search on his home. At a minimum, Mr. Limbaugh is entitled to notice and an opportunity to object, particularly with respect to material in the records that is beyond the scope of the investigation. Assertions in the search warrants' affidavits that Mr. Limbaugh saw "four different physicians within a five-month period," which is hardly unusual for someone suffering from great pain, do not justify seizing all of his medical records from those physicians without his consent. *See* § 456.057(5)(a), Fla. Stat. (a patient's medical "records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care of treatment of the patient, **except upon written authorization of the patient")** (emphasis added).

Millions of Americans, and many Floridians, suffer from painful medical conditions, such as difficult-to-treat back problems. As the physicians belonging to AAPS well know, these patients routinely roam from one doctor to another to obtain second and third opinions, different prescriptions and therapies, and anything else that might relieve their pain. There is nothing unusual about such doctor-shopping, and it does not justify a search warrant for all of a patient's medical records. The acquisition of similar drugs from medical sources is even one of the "behaviors" considered to be a primary indication of the **undertreatment** of pain. To hold that seeing multiple doctors and obtaining multiple prescriptions triggers state access to all of one's medical records would be a dreadful and unconstitutional precedent. It would surely be wrong to violate the privacy rights of a patient and possibly prosecute that patient for merely trying to obtain adequate pain relief.

Federal and state laws expressly recognize the privacy interests of citizens in their own medical records. Under federal law, the "need for security in [Fourth Amendment] 'papers and effects' underscores the importance of protecting information about the person, contained in sources such as . . . medical records." 65 Fed. Reg. 82464 (the Privacy Rule under the Health Insurance Portability and Accountability Act). The federal courts of appeals uniformly protect medical record privacy. "This Court has interpreted [*Whalen v. Roe*] to confer a right to protect from disclosure confidential or sensitive information held by the government." *Sherman v. United States Dep't of the Army,* 244 F.3d 357, 361 n.5 (5th Cir. 2001) (citing *Fadjo v. Coon,* 633 F.2d 1172, 1175 (5th Cir. 1981)). Other Circuits have held likewise. *See Anderson v. Romero,* 72 F.3d 518, 522 (7th Cir. 1995) (Posner, J.) (reaffirming a "constitutional right to conceal one's medical history"); *Doe v. City of New York,* 15

F.3d 264, 267 (2d Cir. 1994); *United States v. Westinghouse Elec. Corp.,* 638 F.2d 570, 578 (3d Cir. 1980); *see also Ferm v. United States Trustee (In re Crawford),* 194 F.3d 954, 958-59 (9th Cir. 1999), *cert. denied,* 528 U.S. 1189 (2000); *Flanagan v. Munger,* 890 F.2d 1557, 1570-71 (10th Cir. 1989); *cf. Kallstrom v. City of Columbus,* 136 F.3d 1055, 1063 (6th Cir. 1998) (denying enforceability to a waiver of this right).

Florida law clearly protects medical record privacy also. A "patient's medical records enjoy a confidential status by virtue of the right to privacy contained in the Florida Constitution, and any attempt on the part of the government to obtain such records must first meet constitutional muster." *State v. Johnson,* 814 So. 2d 390, 393 (Fla. 2002). That requisite showing is lacking for the warrants executed on the various doctors who served Mr. Limbaugh. The Supreme Court of Florida has emphasized that the Florida statutory framework "creates a broad and express privilege of confidentiality as to the medical records and medical condition of a patient," preventing disclosure of a patient's medical information except in very narrow circumstances. *Acosta v. Richter,* 671 So. 2d 149, 150 (Fla. 1996) (citing § 456.057(5)(a), Fla. Stat.).

The *Fadjo* precedent is particularly illustrative.[1] There an assistant State Attorney for Florida's Eleventh Judicial Circuit, Michael Coon, had subpoenaed the plaintiff to testify and produce documents concerning the disappearance of another individual. Fadjo provided highly private information only after Coon assured him that it would not be disclosed to others. But apparently it was. Fadjo alleged that Coon

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[1] *Fadjo* was decided on appeal from the Southern District of Florida by the old Fifth Circuit on Jan. 9, 1981, and is controlling precedent. *See Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1210-11 (11th Cir. Nov. 3, 1981) (adopting Fifth Circuit cases up to Sept. 30, 1981 as precedent).

allowed a private investigator to examine his testimony, who then reported it to life insurance companies obligated on policies naming Fadjo as the beneficiary. Fadjo sued under 42 U.S.C. § 1983 based on infringement of his constitutional rights to privacy and freedom of speech in disclosing this information, and the federal court of appeals concluded that he had properly alleged a violation of a federal constitutional right. *Fadjo,* 633 F.2d at 1175; *see also Whalen,* 429 U.S. at 598 n.23 (recognizing a federal right of privacy in medical records).

In *Fadjo,* as here, the issue was "the revelation of intimate information obtained under a pledge of confidentiality . . . ." 633 F.2d at 1176. Mr. Limbaugh saw his doctors in reliance on the veil of confidentiality that all patients enjoy for palliative care. The *Fadjo* precedent implies that a state official may not obtain intimate personal information unless there is a compelling need AND there are safeguards against improper disclosure. No such need or safeguards exist here. Simple invocation of possible violation of an expansive law — the "doctor shopping" statute — is insufficient basis for allowing all-encompassing access to Mr. Limbaugh's medical records. Mr. Limbaugh, like all patients, has a constitutional right of privacy in those records, and unfettered access by the State would infringe on that right. *See Soto v. City of Concord,* 162 F.R.D. 603, 618 (N.D. Cal. 1995) ("The Supreme Court has recognized a limited privacy interest in the confidentiality of one's medical records, derived implicitly from the United States Constitution.").

Florida law expressly protects patients against the type of intrusive search at issue here. § 395.3025(4), (4)(d), Fla. Stat. "Patient records are confidential and must not be disclosed without the consent of the person to whom they pertain, but appropriate disclosure may be made without such consent to: . . . (d) In any civil or

criminal action, unless otherwise prohibited by law, **upon the issuance of a subpoena from a court of competent jurisdiction and proper notice by the party seeking such records to the patient or his or her legal representative."** *Id.* (emphasis added). The search warrants bypassed this mandated protection for plaintiff Limbaugh, in violation of his rights. "[T]he state attorney's subpoena power . . . cannot override the notice requirement of section 395.3025(4)(d). To hold otherwise would render the statute meaningless." *Johnson,* 814 So. 2d at 393 (citations omitted).

Moreover, there are inadequate safeguards in place for the prosecutor to enjoy limitless access to Mr. Limbaugh's records. The Supreme Court in *Whalen* relied on the following safeguards before allowing disclosure of patient prescription information:

> [T]he [medical records] are returned to the receiving room to be retained in a vault for a five-year period and then destroyed as required by the statute. The receiving room is surrounded by a locked wire fence and protected by an alarm system. The computer tapes containing the prescription data are kept in a locked cabinet. When the tapes are used, the computer is run "off-line," which means that no terminal outside of the computer room can read or record any information. Public disclosure of the identity of patients is expressly prohibited by the statute and by a Department of Health regulation. Willful violation of these prohibitions is a crime punishable by up to one year in prison and a $2,000 fine. At the time of trial there were 17 Department of Health employees with access to the files; in addition, there were 24 investigators with authority to investigate cases of overdispensing which might be identified by the computer.

429 U.S. at 593-95 (footnotes deleted).

Here, in sharp contrast, the State has already released confidential settlement information about Mr. Limbaugh to the press, which then published it to his detriment. The State also granted immunity to Mr. Limbaugh's maid, which allowed her to embarrass Mr. Limbaugh further by selling a story to a tabloid. This alarming lack of safeguards is unconstitutional. *Id.* at 606-07 (Brennan, J., concurring). ("[A]s the example of the Fourth Amendment shows, the Constitution puts limits not only on the

type of information the State may gather, but also on **the means it may use to gather it**.") (emphasis added).

The State has no compelling justification for its search warrants for all of Mr. Limbaugh's medical records. The search warrants should be quashed and the medical records should be returned to the physicians' offices.

III. THE STATE'S APPLICATION OF THE "DOCTOR SHOPPING" STATUTE WILL HAVE AN UNCONSTITUTIONAL CHILLING EFFECT ON PATIENT-PHYSICIAN COMMUNICATIONS.

A. The standard of review is de novo.

The standard of review is again that set out above.

B. The State impermissibly applied the "doctor shopping" statute to chill patient-physician communications.

What a patient says or does not say in obtaining palliative treatment by his doctor is entitled to confidentiality and First Amendment protection. It is an unconstitutionally expansive application of the "doctor shopping" statute to criminalize what patient Limbaugh stated in receiving treatment for pain.[2] Even worse, this expansive interpretation of the statute will cause the State to interrogate patient Limbaugh's physicians about what he told them, impermissibly forcing them to breach their duty of confidentiality to the patient. This highly unusual prosecution of patient Limbaugh over what he allegedly failed to tell his physician would open a Pandora's box that could never be shut.

The U.S. Supreme Court has repeatedly protected against chilling effects on speech by targeted citizens, which in this case would include all pain patients. *See, e.g., Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963). The Court has emphasized the need to strike down statutes that have a censoring effect, like the "doctor shopping" statute. *See R. A. V. v. City of St. Paul,* 505 U.S. 377, 395,

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[2] The "doctor shopping" statute makes it unlawful "[t]o withhold information from a practitioner from whom the person seeks to obtain a controlled substance or a prescription for a controlled substance that the person making the request has received a controlled substance or a prescription for a controlled substance of like therapeutic use from another practitioner within the previous 30 days." § 893.13(7)(a)8, Fla. Stat.

414 (1992) (Justice Scalia, for the Court, deploring the "'danger of censorship,'" *Leathers v. Medlock,* 499 U.S. 439, 448 (1991), and invalidating an ordinance the concurrence described as "fatally overbroad and invalid on its face").

It is essential to protect the confidentiality of patient-physician communications, as it is for other privileges. The U.S. Supreme Court found confidentiality in the legal context to be so strong that it extends beyond even death. *See Swidler & Berlin v. United States,* 524 U.S. 399, 407 (1998) ("Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.").

The U.S. Supreme Court has elevated the patient-physician relationship to that of attorney-client and priest-penitent. "These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." *Trammel v. United States,* 445 U.S. 40, 51 (1980).

See also Jaffee v. Redmond, 518 U.S. 1, 5 (1996) ("By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests."). The Oath of Hippocrates also requires this. *See* Oath of Hippocrates, quoted *supra.*

Patients in Florida, with its large elderly population, are already undertreated for pain. However, due to high-profile investigations like this one, many Florida physicians are afraid to subject themselves and their records to heightened scrutiny. No doctor wants to be forced to breach his Oath of Hippocrates and testify against his patient, and the easiest way out is simply to refuse to prescribe opioids like oxycodone, morphine and methadone, even when they are clearly indicated to treat the pain. The search warrants at bar serve to heighten the fear that obstructs medical treatment, decision-making and ethics. The result is greater suffering than necessary, and ultimately higher long-term costs for the State to address chronically undertreated patients.

The search warrants, if enforced, will scare patients away from doctors and deprive them of information they badly need. Freedom to receive information, such as confidential advice, is a First Amendment right. *See Lamont v. Postmaster General,* 381 U.S. 301 (1965) (upholding a First Amendment right to receive information); *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] . . . necessarily protects the right to receive . . . ."). This right extends to receipt of commercial speech in the context of drug prescriptions. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 757 (1976); *cf. Linmark Assocs., Inc. v. Township of Willingboro,* 431 U.S. 85, 92 (1977). The search

warrants, if enforced, would impermissibly chill the protected First Amendment speech between patient and physician.

CONCLUSION

For the foregoing reasons, the search warrants should be quashed and the State should be ordered to return patient Limbaugh's records to his treating physicians.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We certify that a true and correct copy of the above and foregoing was furnished by U.S. Mail to James L. Martz, Esq., Assistant State Attorney, 401 North Dixie Highway, West Palm Beach, Florida 33401, and to Roy Black, Esq., 201 South Biscayne Boulevard, Suite 1300, Miami, Florida 33131, this 20th day of February, 2004.

CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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