

IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC04-2219

RUSH LIMBAUGH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

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JURISDICTION

This case is before the Court on a question certified by the Fourth District Court of Appeal as concerning a matter of great public importance. This Court has jurisdiction under article V, section 3(b)(4) of the Florida Constitution.

CERTIFIED QUESTION

The Fourth District certified the following question: “Do §§ 395.3025(4) and 456.057(5)(a) bar the State from obtaining a search warrant to seize and inspect a patient’s medical records without providing the patient notice and a prior hearing to oppose the seizure and inspection?” [A:4:13]

STANDARD OF REVIEW

This Court reviews *de novo* a district court’s interpretation of a statute. *State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004).

STATEMENT OF THE CASE AND FACTS

I.

INTRODUCTION

This case arises out of the state’s seizure of all of Rush Limbaugh’s medical records from his doctors’ offices pursuant to four *ex parte* search warrants. The state seized the medical records without affording Mr. Limbaugh notice or an

opportunity to be heard in court as required by Sections 395.3025(4)(d) and 456.057(5)(a)(3) of the Florida Statutes. Under the principles established by this Court in *Acosta v. Richter*, 671 So. 2d 149, 154 (Fla. 1996), these statutes create “a broad and express privilege of confidentiality as to the medical records and the medical condition of a patient.” Both statutes expressly prohibit disclosure of medical records to any person without the patient’s written consent, except pursuant to the “strict scheme for limited disclosure” set out in the statutes. §§ 395.3025(4)(d), 456.057(5)(a)(3), Fla. Stat. (2003); *Acosta*, 671 So. 2d at 156.

In civil and criminal actions, that strict statutory scheme requires prior notice to the patient, a hearing, and a subpoena issued by a judge before any person may obtain or inspect a patient’s medical records from a doctor’s office, a hospital, or other medical facility. §§ 395.3025(4)(d), 456.057(5)(a)(3). Neither statute authorizes the seizure of medical records from a doctor’s office by an un-noticed, *ex parte* search warrant, as occurred here. This Court should answer the certified question in the affirmative, quash the search warrants, and order the return of Mr. Limbaugh’s privileged medical records.

II. **THE SEIZURES**

On November 25, 2003, the state seized Mr. Limbaugh’s medical records from three of his physicians pursuant to search warrants issued *ex parte* by the

circuit court. [R:297-333].¹ The state obtained the medical records without first providing Mr. Limbaugh notice or an opportunity to be heard in court. [R:271-272]. The state was investigating whether between March 2003 and September 2003, Mr. Limbaugh obtained overlapping prescription medications from one physician without disclosing that fact to another prescribing physician, contrary to Section 893.13(7)(a)(8), Fla. Stat. (2003). [R:297-333]. No charges have been filed against Mr. Limbaugh.

The search warrants for the doctors' offices commanded the seizure of every document in Mr. Limbaugh's medical records, encompassing his entire medical history, as follows:

[R]ecords . . . pertaining to Mr. Rush Limbaugh, including the medical records, medical questionnaire, cash receipts, sections of appointment books pertaining to Mr. Limbaugh, canceled checks, medical insurance forms submitted or prepared to be submitted to insurance companies, computerized records related to the ordering of narcotics, DEA prescriptions numbers and forms, records of dispersing or issuing prescriptions for controlled substances, written and or computerized, pertaining only to Mr. Limbaugh.

¹ The state seized medical records from Drs. Lawrence Deziel and Nathaniel Drourr of the Jupiter Outpatient Surgery Center, and Dr. John Murray of the Palm Beach Ear, Nose & Throat Association. [R:297-333]. Dr. Deziel and Dr. Drourr treated Mr. Limbaugh for serious cervical problems and resulting chronic pain. [R:248-50, 252-54; Appendix (hereinafter "A") at 1:28-30, 32-34]. Dr. Murray is a hearing specialist who treated Mr. Limbaugh for hearing loss. [R:248-50, 252-54; A:1:28-30, 32-34].

[R:297-333]. The state admitted before the Fourth District that these were “pervasive” search warrants, designed to obtain all of Mr. Limbaugh’s medical records from his physicians. [R:797; A:3:2]. The state also admitted that it sought to review Mr. Limbaugh’s entire medical history to see “what it can charge, if anything.” [R:601& n.11].

The state held the seized medical records for six days, without notifying Mr. Limbaugh. [R:338]. On December 1, 2003, Mr. Limbaugh’s counsel received a letter from the state, advising that it had seized Mr. Limbaugh’s medical records and intended to review them. [R:338]. Counsel objected by letter the following day, invoking Mr. Limbaugh’s rights and demanding a court hearing. [R:339].

Two days later, the search warrants listing Mr. Limbaugh’s private prescription medications for various medical conditions were featured on national television shows. [R:255-56; A:1:35-36]. The state had filed the warrants as public record with the Clerk of the Court so it could direct the media to the court file. [R:255-56; A:1:35-36]. On December 5, 2003, during the MSNBC television show “Hardball with Chris Matthews,” Mr. Limbaugh’s counsel learned for the

first time that the state had seized Mr. Limbaugh's medical records from a fourth physician, Dr. Antonio De La Cruz. [R:181, 352].²

Despite having assured Mr. Limbaugh's counsel to the contrary, the state never sought a court hearing. [R:335]. On December 15, 2003, Mr. Limbaugh filed his Petition for Expedited Hearing on Disclosure of Confidential Medical Records. [R:334-39].

III. THE HEARING

The circuit court heard the petition on December 22, 2003. [A:1]. The state offered no evidence and simply argued that it was entitled to obtain Mr. Limbaugh's medical records by *ex parte* search warrants pursuant to *State v. Viatical Serv. Inc.*, 741 So. 2d 560 (Fla. 4th DCA 1999), a case authorizing a search warrant for medical records held by a commercial business establishment and voluntarily disclosed by terminally ill individuals as part of a viatical investment scheme. [R:225-29; A:1:5-9].³ The state acknowledged that it had intentionally bypassed the notice and hearing requirements of Sections 395.3025(4)(d) and 456.057(5)(a)(3) in favor of an *ex parte* search warrant under

² Dr. De La Cruz is a hearing specialist. In 2001, he implanted a cochlear device in Mr. Limbaugh's skull to relieve Mr. Limbaugh's deafness. [R:249-50; A:1:29-30].

³ Mr. Limbaugh's medical records were seized from his private physicians and were not disclosed by Mr. Limbaugh as part of any commercial transaction.

Section 933.07 of the Florida Statutes. [R:225-31; A:1:5-11]. The state argued that its warrant powers preempted all patient rights conferred by Sections 395.3025(4)(d) and 456.057(5)(a)(3). [R:226-28, 277-78; A:1:6-8, 57-58].⁴

Before the court adjourned the hearing, Mr. Limbaugh's counsel requested a stay to prevent further irreparable harm to Mr. Limbaugh while he appealed any adverse ruling. [R:281; A:1:61]. The state did not object and acknowledged that a stay was within the court's discretion. [R:282-83; A:1:62-63].

IV. **THE TRIAL COURT'S ORDER**

On the morning after the hearing, the trial court issued its order denying Mr. Limbaugh's petition. [R:2-6; A:2:1-5]. The court recognized that medical records are confidential under Florida law, and that patients are entitled to notice and a court hearing before their medical records are released to third parties. [R:3-4; A:2:2-3]. The court also recognized that "the purpose of the notice requirement" is to give the patient "an opportunity to object to the release of the medical records, thus requiring the state to show the relevance of the records requested before the subpoena issued." [R:3-4; A:2:2-3].

⁴ The state also argued that its right to obtain all of Mr. Limbaugh's medical records had been conclusively decided by the judge who found probable cause to issue the search warrants. [R:227-28; A:1:7-8] According to the state, this probable cause determination, despite being *ex parte*, was *res judicata* on the issue of the state's right to Mr. Limbaugh's medical records. [R:227-28; A:1:7-8].

Nonetheless, the court concluded that the state may seize medical records by *ex parte* search warrants without notice to the patient because “[t]here is no authority in Florida that would require this Court to apply the procedures set out in Section 395.3025, Fla. Stat. (2003), to search warrants.” [R:5; A:2:4]. The court held that Mr. Limbaugh was not entitled to the strict statutory protections of pre-seizure notice and a hearing because the state had used a search warrant rather than a subpoena to obtain his medical records. [R:5; A:2:4].⁵

The court reserved ruling on the request for a stay, directing Mr. Limbaugh to file a written motion. [R:6; A:2:5]. Before Mr. Limbaugh could file his motion, the Palm Beach County State Attorney personally instructed his investigators to review Mr. Limbaugh’s medical records. [R:366-67]. As Mr. Limbaugh was filing his motion that afternoon, the state was reviewing his medical records. [R:366-67].⁶

The trial court granted a stay, which the Fourth District has extended for the duration of these proceedings. [R:59, 871]. The Fourth District also ordered the

⁵ The court also found that the state’s criminal investigation was “a compelling state interest” and that the pervasive search warrants constituted “the least intrusive means.” [R:4-5; A:2:3-4]. Although the court never reviewed the medical records, it found that they were all “relevant” to the state’s investigation. [R:4-5; A:2:3-4].

⁶ The medical records remained in the state’s possession following the seizures. [R:264; A:1:44].

state to surrender Mr. Limbaugh's medical records to the circuit court under seal, to be held *in camera* pending further order of the court. [R:59].

V.
THE FOURTH DISTRICT'S DECISION

The Fourth District made three core rulings. *First*, the court held that Sections 395.3025(4) and 456.057(5)(a) do not create a broad physician-patient privilege. *Limbaugh v. State*, 887 So. 2d 387, 393-94 (Fla. 4th DCA 2004). The court ruled that the privilege exists only when the state seeks medical records by subpoena, but not when the state seeks the same records by search warrant. *Id.* at 394. The court characterized Sections 395.3025(4)(d) and 456.057(5)(a)(3) as mere "subpoena statutes" of "limited purpose," and held that the rights of patients to confidentiality, notice, and a hearing "apply only to subpoenas" because neither statute mentions search warrants. *Id.*

Second, the court held that when a judge in an *ex parte* proceeding issues a search warrant for the medical records of a patient under criminal investigation, the patient is entitled to neither notice nor a hearing before the state may seize and immediately inspect the medical records. *Id.* at 397. The court found that an *ex parte* probable hearing provides patients with "greater protections" than a hearing under Sections 395.3025(4)(d) and 456.057(5)(a)(3), and that a patient who is the

target of a criminal investigation has no “rights which merit protection” at an adversarial hearing. *Id.* at 395, 396.

Third, the Fourth District held that even if Sections 395.3025(4) and 456.057(5)(a) establish a right to privacy in medical records, that statutory right may not exceed the limited privacy rights afforded under the search and seizure provisions of the Florida and United States Constitutions. *Id.* at 396-97. The court concluded that the Florida legislature may not enact “any statute” that provides greater privacy rights and imposes higher standards for police conduct than the Florida and federal Constitutions. *Id.* at 393.

SUMMARY OF THE ARGUMENT

Sections 395.3025(4)(d) and 456.057(5)(a)(3) are not “subpoena statutes” of “limited purpose,” as the Fourth District held. Rather, under *Acosta* and the plain statutory language, Sections 395.3025(4) and 456.057(5)(a) are broad privilege statutes that require prior notice to the patient and a narrowly-tailored subpoena before any person may obtain privileged medical records from a doctor’s office, a hospital, or other medical facilities.

These strict statutory protections are not limited by the search and seizure provisions of the Florida or United States Constitutions. As this Court held in *Sambrine v. State*, 386 So. 2d 546, 548 (Fla. 1980), the Florida legislature is free to enact statutes granting Florida citizens greater privacy rights and imposing higher

standards for police conduct, than those set forth in the Florida and federal Constitutions.

When the state does not make a good-faith effort to provide the patient with prior notice, the proper relief is suppression of the medical records and an order prohibiting the state from using or seeking the medical records again. *State v. Johnson*, 814 So. 2d 390, 394 (Fla. 2002). Here, the state has admitted that as a matter of strategy, it bypassed the statutory requirements, did not give notice, and proceeded under an *ex parte* search warrant instead. [R:225-31; A:1:5-11]. Suppression is the only fair remedy “when the State does not make a good faith effort to provide the statutorily required notice under section 395.3025(4)(d), a statute designed to protect the privileged and confidential status accorded to a patient's medical records.” *Johnson*, 814 So. 2d at 394 (Pariente, J., concurring).

ARGUMENT

I.

THE FOURTH DISTRICT MISCONSTRUED THE GOVERNING STATUTES

All of Mr. Limbaugh’s medical records were seized from his private physicians. Section 456.057(5)(a)(3), which regulates physicians, provides:

(5)(a) Except as otherwise provided in this section and in s. 440.13(4)(c) [pertaining to worker’s compensation claims], such [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 or treatment of the patient, except upon written authorization of the patient. However, such records may be furnished without written authorization under the following circumstances . . .

* * *

(3) 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 to the patient or the patient's legal representative by the party seeking such records.

§ 456.057(5)(a)(3), Fla. Stat. (2003) (emphasis added). When medical records are held by hospitals or other medical facilities, Section 395.3025(4)(d) applies:

(4) 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 . . .

* * *

(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.

§ 395.3025(4)(d), Fla. Stat. (2003) (emphasis added).

The legislature has spoken clearly. Medical records in the possession of doctors, hospitals, or other medical facilities are confidential and may not be obtained in any civil or criminal action except pursuant to a subpoena, after prior

notice to the patient and a hearing. Neither statute authorizes the seizure of medical records from a doctor's office by search warrant, as occurred here.

The Fourth District is mistaken that “the omission of any reference to search warrants” in Sections 395.3025(4)(d) and 456.057(5)(a)(3) reflects “a plain legislative decision that search warrants for medical records are” appropriate. *Limbaugh v. State*, 887 So. 2d 387, 394 (Fla. 4th DCA 2004). To the contrary, the omission of search warrants reflects a plain legislative decision that search warrants for medical records are *prohibited*.

A. THE BROAD PRIVILEGE OF CONFIDENTIALITY IN MEDICAL RECORDS.

1. The clear statutory language bars the state from using search warrants to seize medical records from a doctor's office, a hospital, or other medical facility.

In *Acosta v. Richter*, 671 So. 2d 149, 154 (Fla. 1996), this Court held that Sections 395.3025(4)(d) and 456.057(5)(a)(3) create “a broad and express privilege of confidentiality as to the medical records and the medical condition of a patient.”⁷ Both statutes provide “in simple, direct language that medical records

⁷ The Court in *Acosta* construed Section 455.241(2), the predecessor to Section 456.057(5)(a). Section 455.241 was renumbered as Section 456.057 in 2000. *Ch. 2000-160, § 79, Laws of Florida*. The opening sentence of Section 455.241(2) was nearly identical to that of Sections 395.3025(4) and 456.057(5)(a).

‘may not be furnished’ and the medical condition of a patient ‘may not be discussed’ except upon written authorization of the patient.” *Id.* at 154.

This Court also held in *Acosta* that the “obvious” purpose of the statutes is to (i) “prohibit disclosure of patient medical records and the patient’s medical condition to anyone” without the patient's consent, and (ii) “provide an explicit but limited scheme” for disclosure of medical information. *Id.* That explicit statutory scheme permits non-consensual disclosure of medical records only under strictly limited procedures. *Id.* Those procedures “require little explanation beyond their own terms except to note that they are part of an explicit scheme set out in the statute[s] to strictly control the dissemination of a Florida patient’s medical information.” *Id.* at 155.

Several years after *Acosta*, this Court in *State v. Johnson*, 814 So. 2d 390, 393 (Fla. 2002), again held that Sections 395.3025(4)(d) and 456.057(5)(a)(3) reflect a clear “legislative attempt to balance a patient's privacy rights against legitimate access to medical records.” This Court explained that Section 395.3025(4)

begins with a recognition of the confidential nature of medical records, and subsection (4)(d) provides that before the records can be made available in any civil or criminal action, the patient must be put on notice and a subpoena must issue from a court of competent jurisdiction. The obvious purpose behind the notification requirement is to permit the patient to assert any legal objections he or she may have to the subpoena before the records are produced.

Id.

Thus, the Fourth District erred when it dismissed Sections 395.3025(4)(d) and 456.057(5)(a)(3) as mere “subpoena statutes” of “limited purpose.” *Limbaugh*, 887 So. 2d at 393-94. Rather, Sections 395.3025(4)(d) and 456.057(5)(a)(3) are *privilege* statutes that create a broad physician-patient privilege and prohibit “any person” from obtaining medical records without the patient’s consent, except pursuant to the “strict scheme for limited disclosure” set out in the statutes. *Acosta*, 671 So. 2d at 154, 156; *Johnson*, 814 So. 2d at 393. An *ex parte* search warrant for medical records in a doctor’s office is not part of the strict scheme under the statutes, and therefore is not a lawful means for obtaining medical records.

2. *Sections 395.3025(4)(d) and 456.057(5)(a)(3) cannot be interpreted to allow seizure of medical records by search warrant.*

The Fourth District also erred in holding that “for purposes of this case, the operative effect of the statutes really lies *only* in the subdivisions limiting the use of subpoenas for medical records.” *Limbaugh*, 887 So. 2d at 394 (emphasis added). This Court rejected a similar argument in *Acosta* and held that “a statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts . . . Statutory phrases are not to be read in isolation, but rather within the context of the entire section.” *Acosta*, 671 So. 2d at 153-54; *see*

also id. at 154 (“just as a single word cannot be read in isolation, nor can a single provision of a statute”). Sections 395.3025(4)(d) and 456.057(5)(a)(3) must be read as a whole, in light of the broad physician-patient privilege they create and the strict limitation on disclosure of medical information they require:

The primary purpose of the 1988 amendment was to create a physician-patient privilege where none existed before, and to provide an explicit but limited scheme for the disclosure of personal medical information. We also believe the remaining provisions of the statute should be considered in light of this purpose.

Id. at 154-55.

Section 933.07, which grants the state the authority to seize items pursuant to a search warrant, cannot be construed to infringe on the broad privilege or the limited disclosure provided by Sections 395.3025(4) and 456.057(5)(a). Section 933.07 is a *general* statute that pertains generally to the search and seizure of persons or property. § 933.07, Fla. Stat. (2003). Sections 395.3025(4)(d) and 456.057(5)(a)(3), on the other hand, are *specific* statutes that limit with preciseness the non-consensual disclosure of medical records in criminal actions. Thus, the specific privilege statutes, rather than the general search warrant statute, must govern the non-consensual disclosure of privileged medical records in criminal cases. Under established canons of statutory construction,

A specific statute covering a particular subject area always controls over a statute covering the same area and other subjects in more

general terms. The more specific statute is considered to be an exception to the general terms of the more comprehensive statute.

McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994).

Any other construction would render Sections 395.3025(4)(d) and 456.057(5)(a)(3) meaningless, in disregard of the “fundamental rule of statutory interpretation” that “courts should avoid readings that would render part of a statute meaningless.” *Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996). When possible, “courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.” *Id.* This is consistent with “the general rule that the legislature does not intend to enact purposeless and therefore useless legislation.” *Id.*

The Fourth District’s holding that the state may use a search warrant under Section 933.07 to seize medical records from a doctor’s office renders much of Sections 395.3025(4)(d) and 456.057(5)(a)(3) meaningless. For example, Section 456.057(5)(a), which applies in this case because the state seized the medical records from Mr. Limbaugh’s doctors, opens with the words “*Except as otherwise provided in this section and in s. 440.13(4)(c).*”⁸ The obvious purpose behind this

⁸ Section 440.13(4)(c) states that the medical records of an employee seeking worker’s compensation benefits must be disclosed to the employer.

language is to limit the non-consensual disclosure of medical records only to the means set forth in Sections 456.057(5)(a) and 440.13(4)(c).

The Fourth District's contrary interpretation, allowing non-consensual disclosure of medical records under Section 933.07, nullifies the phrase "*Except as otherwise provided in this section and in s. 440.13(4)(c),*" rendering it superfluous. The court essentially re-wrote the opening clause of Section 456.057(5)(a)(3) to provide: Except as otherwise provided in this section and in s. 440.13(4)(c) *and in s. 933.07*. Courts, however, "are not at liberty to add words to statutes that were not placed there by the Legislature." *Reynolds v. State*, 842 So. 2d 46, 49 n.2 (Fla. 2002).

The Fourth District's reasoning that the use of search warrants is proper because search warrants are not mentioned in Sections 395.3025(4)(d) and 456.057(5)(a)(3), *Limbaugh*, 887 So. 2d at 394, ignores the express statutory language "*in any civil or criminal action*" and the strict command that medical records may not be furnished to "*any person*" without the patient's consent. The words "*any person*" necessarily include police and prosecutors; and the requirement of notice and a subpoena "*in any civil or criminal action*" reflects the legislature's clear intent that the requirements apply in the criminal context.

If the legislature had intended to allow the state to elect whether to seize medical records from a doctor's office by subpoena or by *ex parte* search warrant,

the legislature would have said so in the statutes. Instead, the legislature specifically *excluded* search warrants by prohibiting non-consensual disclosure of medical records “to any person,” even in “criminal actions,” except pursuant to a properly noticed subpoena.

The Fourth District’s construction of Sections 395.3025(4) and 456.057(5)(a) leads to an absurd result that the legislature could not have intended. It would be senseless under Sections 395.3025(4)(d) and 456.057(5)(a)(3) to require a properly noticed subpoena before the state may seize medical records from a doctor’s office, and at the same time allow the exact same seizure by *ex parte* search warrant under Section 933.07. If the Fourth District’s decision stands, pre-seizure notice and a hearing will be required when the state seeks discrete medical records pursuant to a narrowly-tailored subpoena, but not when it seizes an entire medical file by pervasive search warrants.

The impact of the Fourth District’s decision goes far beyond its evisceration of the broad physician-patient privilege and the strict statutory scheme of limited disclosure. If the court’s decision stands, a police officer holding a patient’s entire medical file has an *unreviewable* right to examine that file as long as the file was seized by search warrant. That a patient may be “the target of a criminal investigation” does not mean the patient has no “rights which merit protection,” as the Fourth District held. *Limbaugh*, 887 So. 2d at 396. Neither *Acosta*, *Johnson*,

nor Sections 395.3025(4)(d) and 456.057(5)(a)(3) deny the statutory protections to “targets of a criminal investigation.” To the contrary, this Court in *Johnson* specifically recognized that under Section 395.3025(4)(d), a patient under criminal investigation for DUI manslaughter was entitled to prior notice and a hearing before the state obtained her hospital records. *Johnson*, 814 So. 2d at 391, 393.

Sections 395.3025(4)(d) and 456.057(5)(a)(3) expressly *safeguard* the rights of patients under investigation by requiring prior notice and a hearing in “any civil or *criminal* action.” The patient’s status as the target of a criminal investigation *triggers*, rather than extinguishes, the statutory rights to notice, a hearing, and a subpoena issued by a judge.

B. AN EX PARTE PROBABLE CAUSE FINDING IS INSUFFICIENT TO PROTECT A PATIENT’S STATUTORY RIGHTS

The Fourth District’s suggestion that an *ex parte* probable cause hearing provides patients with “greater protection,” *Limbaugh*, 887 So. 2d at 395, misapprehends the nature of the statutory protections under Sections 395.3025(4)(d) and 456.057(5)(a)(3). A determination that probable cause exists to believe that an offense has been committed, that the defendant committed it, and that evidence may be available, does not address the legislature’s concern for the confidentiality of patient records as expressed in the strict statutory scheme. That scheme is designed to protect the dissemination of medical information by

ensuring that the medical records sought by the state are actually relevant to the state's investigation. *Johnson*, 814 So. 2d at 393 & n.7; *Klossett v. State*, 763 So. 2d 1159, 1160 (Fla. 4th DCA 2000) ("The purpose of the notice requirement under section 395.3025(4)(d) is to allow the patient an opportunity to object to the release of his or her medical information, thus requiring the State to show the relevancy of the records requested before the subpoena issues"). An affidavit supporting a search warrant application does not address relevance.

Sections 395.3025(4)(d) and 456.057(5)(a)(3) require that before medical records may be obtained by the state, the court must hold an adversarial evidentiary hearing to determine the relevance of the records sought by the state, and to fashion a narrowly-tailored subpoena for those records only. *Cerroni v. State*, 823 So. 2d 150, 152 (Fla. 5th DCA 2002) (state has "the obligation and burden to demonstrate relevancy, *via evidence*," before subpoena for medical records issues); *Hunter v. State*, 639 So. 2d 72, 73-74 (Fla. 5th DCA 1994) (state has "the obligation and the burden to *present evidence*" to demonstrate that medical records "are relevant to a criminal investigation"). An adversarial evidentiary hearing "allow[s] the trial court to narrow the scope of a subpoena, to separate information relevant to the criminal investigation from facts that are protected from disclosure by the patient's right to privacy." *State v. Rutherford*, 707 So. 2d 1129, 1131 (Fla. 4th DCA), *rev. denied*, 718 So. 2d 171 (1998).

This case precisely illustrates how an *ex parte* probable cause hearing does not afford “greater protections” than an adversarial hearing under Sections 395.3025(4) and 456.057(5)(a), and thus why the statutes prohibit the use of search warrants. The state was investigating whether Mr. Limbaugh had obtained overlapping prescription medications between March 2003 and September 2003. [R:297-333]. Yet the search warrants commanded the wholesale seizure of Mr. Limbaugh’s entire medical file:

[R]ecords . . . pertaining to Mr. Rush Limbaugh, including the medical records, medical questionnaire, cash receipts, sections of appointment books pertaining to Mr. Limbaugh, canceled checks, medical insurance forms submitted or prepared to be submitted to insurance companies, computerized records related to the ordering of narcotics, DEA prescriptions numbers and forms, records of dispersing or issuing prescriptions for controlled substances, written and or computerized, pertaining only to Mr. Limbaugh.

[R:297-333] (emphasis added).¹⁰ Without the statutorily-required notice from the state, Mr. Limbaugh was unaware of and not present during the *ex parte* probable

¹⁰ The Fourth District’s statement that, “[i]n keeping with the actual text of the warrant *application*, we read the warrants as seeking only those medical records ‘related to the ordering of narcotics,’” *Limbaugh*, 887 So. 2d at 390 (emphasis added), ignores the sweeping terms of the warrants and the state’s admission that these were pervasive search warrants, designed to obtain all of Mr. Limbaugh’s medical records, not just records pertaining to the ordering of narcotics. [A:3:45]. The court’s statement also violates the long-standing rule that “[t]he Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents” and “the fact that the application may adequately describe the ‘things to be seized’ does not save the warrant from its facial invalidity.” *Groh v. Ramirez*, 124 S. Ct. 1284, 1299 (2004).

cause hearing. This allowed the state to obtain, without objection, four sweeping search warrants and seize all of Mr. Limbaugh's medical records, some dating back as far as three years.

Clearly, the *ex parte* probable cause hearing did not provide Mr. Limbaugh any "greater protections." To the contrary, the *ex parte* proceedings caused a massive invasion of years of medical records and facilitated the state's desire to fish through Mr. Limbaugh's medical history to see "what it can charge, if anything." [R:601& n.11]; see *State v. Cashner*, 819 So. 2d 227, 229 (Fla. 4th DCA 2002) ("The state's conduct . . . left Cashner with no means for voicing his legitimate and timely objections which would have forced the state to demonstrate the relevancy of the information it sought. By depriving Cashner of the opportunity to object, the state successfully obtained the medical records it needed to prosecute him and, in the process, violated his right to privacy").

Patient rights are not protected by holding *ex parte* proceedings. Instead, they are protected by providing patients the right to participate in the decision-making process *before* medical records are obtained, as provided in Sections 395.3025(4)(d) and 456.057(5)(a)(3). These statutes afford all patients the right to be heard at an adversarial hearing before any person can obtain their medical records. This right is key to protect against arbitrary and unwarranted intrusions into confidential patient records and the broad doctor-patient privilege. "When a

person has an opportunity to speak up in his own defense . . . substantively unfair and mistaken deprivations of property interests can be prevented.” *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

There is no basis for the Fourth District’s conclusion that an *ex parte* probable cause hearing provides patients with “greater protections” than those afforded by the carefully-crafted statutory scheme of Sections 395.3025(4) and 456.057(5)(a).

II.
THE STATUTORY PROTECTIONS ARE NOT LIMITED
BY CONSTITUTIONAL SEARCH AND SEIZURE PROVISIONS

The Fourth District erroneously held that because privacy rights under Article I, Section 23 of the Florida Constitution are subordinate to the Fourth Amendment, Mr. Limbaugh may not invoke Sections 395.3025(4)(d) and 456.057(5)(a)(3) to limit the state’s power to obtain medical records by search warrant. *Limbaugh*, 887 So. 2d at 392. The Fourth District’s mistaken rationale was that “*any statute*” conferring privacy rights to Florida citizens “can have no different application in the context of search and seizure than Article I, Section 23 itself does.” *Id.* at 393 (emphasis added). Thus, the court held, even if Sections 395.3025(4) and 456.057(5)(a) confer privacy rights in medical records, those statutory rights must yield to the search and seizure provisions of the Florida and United States Constitution. *Id.* at 393-94, 396-97.

This holding is contrary to established Florida law. This Court's decision in *Sambrine v. State*, 386 So. 2d 546 (Fla. 1980), as well as various decisions by the District Courts make abundantly clear that the Florida legislature may enact statutes providing greater protections against searches and seizures than those found in the Florida and federal Constitutions. *Sambrine*, 386 So. 2d at 548; *State v. Langsford*, 816 So. 2d 136, 139 (Fla. 4th DCA 2002); *State v. Slanley*, 653 So. 2d 422, 425 (Fla. 3d DCA 1995); *State v. McInnis*, 581 So. 2d 1370, 1374 (Fla. 5th DCA), *cause dismissed*, 584 So. 2d 998 (Fla. 1991); *accord Cooper v. California*, 386 U.S. 58, 62 (1967). While courts may not construe Florida's *constitutional* right to privacy to protect against seizures by a lawfully-issued search warrant, the legislature by *statute* may provide that protection. *Slanley*, 653 So. 2d at 425.

Sambrine involved a defendant who refused to consent to a blood test after a car accident. Against his wishes, the police ordered Sambrine's blood drawn at the hospital. Test results revealed an unlawful blood-alcohol content. *Sambrine*, 386 So. 2d at 547.

Sambrine moved to suppress the test results because the non-consensual drawing of his blood – although proper under the search and seizure provisions of the Florida and United States Constitutions – violated Florida's implied consent statute. *Id.* The state argued that the blood had been drawn in compliance with the Fourth Amendment as interpreted by the United States Supreme Court in

Schmerber v. California, 384 U.S. 757 (1966), and that Florida's implied consent statute could not require more. This Court disagreed:

In *Schmerber v. California*, 384 U.S. 757 (1966), the United States Supreme Court held that the taking of a blood sample without consent did not violate the Fourth Amendment of the United States Constitution. This Court, in *Filmon v. State*, 336 So.2d 586 (Fla.1976), upheld the constitutionality of section 322.261, Florida Statutes (1975), against challenges based on the Fourth Amendment as well as the equal protection clauses of the Florida and United States Constitutions. ***What is at issue here, however, is not the constitutionality of this provision but rather the right of the state of Florida to extend to its citizenry protections against unreasonable searches and seizures greater than those afforded by the federal constitution. This it has done through the enactment of section 322.261, Florida Statutes (1975).*** Under this provision, a conscious person is given the right to refuse to take a chemical test if he is willing to suffer a three-month suspension of his driving privilege.

Id. at 548 (emphasis added).

The Third, Fourth, and Fifth Districts have similarly held that the Florida legislature may enact statutes providing greater privacy rights and imposing higher standards for police conduct than those required by the Florida and United States Constitutions. In *Slanley*, the Third District held:

It is equally well settled, however, that the states are privileged under their state law to adopt higher, but not lower, standards for police conduct than those required by the Fourth Amendment. In Florida, these higher standards may not, as a matter of state law, be imposed under the state constitutional guarantee against unreasonable searches and seizures, but may be imposed by other provisions of Florida law, including a state statute.

Slanley, 653 So. 2d at 425.

Citing this Court's decision in *Sambrine* and the Fifth District's decision in *McInnis*, the Third District further ruled:

[I]t is the established law of this state that Florida's implied consent statutes impose, in certain respects, higher standards on police conduct in obtaining breath, urine, and blood samples from a defendant in a DUI case than those required by the Fourth Amendment As further stated by the Fifth District Court of Appeal in *State v. McInnis*, 581 So.2d 1370, 1374 (Fla. 5th DCA), *cause dismissed*, 584 So.2d 998 (Fla.1991), 'One public policy reason for enacting such a statutory scheme [Florida's implied consent statutes] is the legislature's decision to extend to some motorists driving in Florida ***greater protection and rights of privacy than are provided by the state or federal constitutions.***'

Id. (emphasis added).

Ironically, the Fourth District itself previously has recognized that the legislature may provide greater protections by statute than the Florida and federal Constitutions. In *Langsford*, the Fourth District quoted extensively from *Stanley* and held that the Florida Constitution “*does not* prohibit the legislature from passing statutes which give Florida citizens greater protections than the Fourth Amendment.” *Langsford*, 816 So. 2d at 139 (emphasis added). The Fourth District added that a statutory scheme imposing “higher standards for police conduct than those required by the Fourth Amendment” is “*entirely permissible* as a matter of state law.” *Id.* (emphasis added).

The Florida legislature exercised its prerogative to provide patients with greater protections in their medical records under Sections 395.3025(4) and

456.057(5)(a). Both statutes strictly limit the non-consensual disclosure of medical records and impose standards that exceed Fourth Amendment requirements. These added limitations are entirely proper under *Sambrine*, *Slanley*, *Langsford*, and *McInnis*, and the Fourth District erred in holding otherwise.

III. **SUPPRESSION IS THE PROPER REMEDY**

In *Johnson*, this Court held that medical records must be suppressed, and the state prohibited from obtaining the medical records again, when the state does not make a good-faith effort to follow the statutory requirements and provide prior notice. *Johnson*, 814 So. 2d at 394 & n.10. Chief Justice Pariente, concurring with the majority, wrote separately “to emphasize” the need to suppress medical records “when the state does not make a good faith effort to provide the statutorily required notice.” *Id.* at 394 (Pariente, J., concurring). Chief Justice Pariente explained:

The requisite procedures for obtaining hospital records – notice to the patient and judicial review – are not complex. The state's required showing under *Hunter* to obtain the records – that they are relevant to a pending criminal investigation – is not onerous. When the cost of losing evidence is compared to the minimal benefits realized from violating the statute, then prosecutorial compliance with the statute will be likely to occur in the future.

Id. at 394-95 (Pariente, J., concurring) (*quoting Rutherford*, 707 So. 2d at 1132); *see Sneed v. State*, 876 So. 2d 1235, 1238 (Fla. 3d DCA 2004) (suppressing medical records obtained *ex parte* where police officer claimed he was unaware the

law required pre-seizure notice); *Klossett*, 763 So. 2d at 1160 (“where the state fails to send notice to a defendant or his attorney prior to issuing a subpoena, the medical records received pursuant to the subpoena are properly suppressed”); *Cashner*, 819 So. 2d at 229 (suppressing medical records because the state's *ex parte* seizure left patient with no means for objecting, “which would have forced the state to demonstrate the relevancy of the information it sought”).

The state in this case made three calculated choices to bypass the statutory requirements. *First*, the state chose to seize Mr. Limbaugh’s medical records from his doctors’ offices without providing Mr. Limbaugh with prior notice under Section 456.057(5)(a)(3). *Second*, the state chose to proceed without the required adversarial evidentiary hearing, which would have forced the state to prove the relevance of the medical records it sought. *Third*, the state chose to use pervasive search warrants, rather than narrowly-tailored subpoenas, to fish through Mr. Limbaugh’s medical records and see “what it can charge, if anything.” [R:601&n.11]. Any relief short of suppression would reward the state for its deliberate decision to disregard Florida law.¹¹

¹¹ That the state seized Mr. Limbaugh’s medical records purportedly in accordance with the Fourth Amendment neither excuses the state’s unlawful actions nor obviates the need for suppression. *See Slanley*, 653 So. 2d at 427 (suppressing evidence obtained in violation of implied consent statute even though evidence “may have otherwise been seized in compliance with Fourth Amendment standards”); *Langsford*, 816 So. 2d at 138 (suppressing evidence due to state’s

From the onset of this investigation, the state has shown a lack of good faith and a disdain for the law. No good faith motivated the state's public filing of the search warrants with the list of Mr. Limbaugh's private prescription medications. Such filing violated Sections 465.017(2)(a) and 893.13(7)(a)(6) of the Florida Statutes, as well as Mr. Limbaugh's fundamental right to privacy under Article I, Section 23 of the Florida Constitution.¹² No good faith motivated the State Attorney when he personally instructed investigators to examine the seized privileged medical records knowing that a motion for a stay was pending.

The proper remedy under Florida law is an order quashing the search warrants, directing return of Mr. Limbaugh's medical records, and prohibiting the state from using or seeking the medical records again.

“failure to comply with the statutory requirements” even though state seized evidence in accordance with Fourth Amendment).

¹² Section 465.017(2)(a) prohibits disclosure of pharmaceutical information to third parties without the patient's consent. § 465.017(2)(a), Fla. Stat. (2003). Section 893.13(7)(a)(6) makes it unlawful for any person “to use to his or her own personal advantage, or to reveal, any information obtained in enforcement of this chapter except in a prosecution or administrative hearing for a violation of this chapter.” § 893.13(7)(a)(6), Fla. Stat. (2003).

CONCLUSION

Based on the foregoing, Mr. Limbaugh requests the Court to quash the Fourth District's decision and remand with directions to quash the search warrants, order return of Mr. Limbaugh's medical records, and prohibit the state from using or seeking the medical records again.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on _____, the foregoing was mailed via Federal Express overnight delivery to **James L. Martz, Esq.**, Assistant State Attorney, 15th Judicial Circuit of Florida, 401 N. Dixie Highway, West Palm Beach, FL 33401-4209; **Jon May, Esq.**, 110 S.E. 6th Street, Suite 1970, Fort Lauderdale, FL 33301; and **Robert C. Buschel, Esq.**, Buschel, Carter, Schwartzreich & Yates, P.A., 1225 S.E. 2nd Avenue, Fort Lauderdale, FL 33316.

I further certify that on this date, the foregoing was mailed via regular air mail to **Randall Marshal, Esq.**, Legal Director, American Civil Liberties Union of Florida, 4500 Biscayne Boulevard, Suite 340, Miami, FL 33137-3227; **Prof. Michael R. Masinter**, Nova Southeastern University, Shepard Broad Law Center, 3305 College Avenue, Fort Lauderdale, FL 33314; and **Andrew Schlafly, Esq.**, Association of American Physicians and Surgeons, 939 Old Chester Road, Far Hills, New Jersey 07931.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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