LEWIS v. SUPERIOR COURT OF CALIFORNIA

S219811

Supreme Court of California

July 9, 2014

Reporter
2014 CA S. Ct. Briefs LEXIS 991

ALWIN CARL LEWIS, M.D., Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, Respondent, MEDICAL BOARD OF CALIFORNIA, Real Party in Interest.

Type: Petition for Appeal

Prior History: After a Decision by the Court of Appeal Second Appellate District, Division Three. Case No. B252032.

Counsel

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Title

Petition for Review

Text

ISSUES PRESENTED

1. Whether the Medical Board of California (″Medical Board″ or ″Board″) is permitted, pursuant to the State constitutional right to privacy, to conduct a warrantless and unfettered search of records of prescriptions for both controlled and non-controlled substances for hundreds of patients, initiated by the state's computerized Controlled Substance Utilization Review and Evaluation System (CURES) and followed up by general pharmacy audits, regardless of the nature of the patient complaint(s) involved? Petitioner Alwin Carl Lewis, M.D., contends that the applicable legal standard is that the State must show a ″compelling state interest″ to justify such an intrusion into the constitutional privacy right, and that, under this standard, the blanket, warrantless searches conducted herein were not sufficiently narrowly tailored.

2. Whether Fourth Amendment privacy rights under the federal constitution, which do not require balancing [*2] of interests, may be asserted by a physician with respect to patient prescription records.

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

A.

The important constitutional privacy rights involved

Review in this case should be granted because the decision of the Court of Appeal squarely conflicts with the privacy guarantees set forth in the California Constitution.

The facts of the case are not in dispute. [1] The Board's investigation arose out of a single patient complaint that a physician, Petitioner Alwin Carl Lewis, M.D. ("Petitioner" or "Dr. Lewis"), recommended that the patient (V.C.) lose weight and start a diet that the patient considered to be unhealthful. There was no issue whatsoever with respect to prescriptions pertaining to this patient or with the actual care of the patient.

The Board ultimately found that Dr. Lewis did not recommend any sort of "unhealthful diet", as the patient [*3] claimed, nor did the Board find any violations of the standard of care in her treatment (a one-time event on May 8, 2008). The only adverse finding by the Board with respect to V.C. was that some of Petitioner's documentation could have been more thorough.

Nevertheless, based solely on V.C.'s complaint, the Medical Board obtained, via CURES and general pharmacy audits, prescription medication records for all of Dr. Lewis' patients over a four-year period, including records for non-controlled prescription medications for many of these patients. Dr. Lewis had hundreds of patients, and the records obtained revealed the medications taken by these patients over an extended period of time. By reviewing these records, the Medical Board could easily discern the most sensitive private information that patients are entitled to maintain as confidential, such as which persons are being treated for cancer, AIDS, mental illness, or any number of other conditions that are not the Board's concern, absent a compelling interest. These records contain the names and addresses of the patients such that, without privacy protection, there is nothing to prevent investigators from snooping into the health [*4] conditions of celebrities, sports figures, judges or anyone else.

In 1972, the California Constitution was amended to provide express protection to the right of privacy. (Article I, section 1). The state constitutional privacy right is broader than that under the federal constitution. *American Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307, 326-327.* This Court has indicated that the state constitutional amendment was aimed at several "principal mischiefs":

> (1) government snooping and the secret gathering of personal information, (2) the overbroad collection and retention of unnecessary personal information ..., (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party, and (4) the lack of a reasonable check on the accuracy of existing records. … any such intervention must be justified by a compelling interest.

White v. Davis (1975) 13 Cal.3d 757, 775 (emphasis added).

This Court noted that the amendment reflected voter concerns regarding "proliferation of government snooping and data collecting… Government [*5] agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create 'cradle-to-grave' profiles of every American." *People v. Privitera (1979) 23 Cal.3d 697, 709.*

As held in *Medical Quality Assurance v. Gherardini (1979) 93 Cal.App.3d 669* ("*Gherardini*"), and confirmed by numerous subsequent cases, "A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." *Gherardini, supra, 93 Cal.App.3d at 678;* see also *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 41* (quoting the same language from *Gherardini*).

In *Gherardini*, the Court of Appeal concluded that the Medical Board must make a showing of "good cause" before obtaining patient medical records. The court reached this conclusion based on the "compelling interest" standard set forth in such cases as *White* and *Privitera*, which requires that the State use the "least intrusive means" available when dealing with the constitutional privacy [*6] right. *Gherardini, supra, 93 Cal.App.3d at 677-682.*

The Court of Appeal, in the present case, purported to apply *Gherardini* and the compelling interest standard, yet concluded that warrantless, subpoenaless searches of patient prescription records are freely available to state law enforcement agencies. The Court of Appeal's decision is plainly erroneous for the reasons set forth in detail herein.

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[1] More detailed discussion of the facts, with citations to the record, occurs in subsequent sections.

B.

Specific legal questions raised herein

Review should be granted to clarify at least three distinct legal issues of great statewide significance. First, does the ″compelling state interest″ standard still apply to the state constitutional right to privacy that patients have with respect to their medical records? In this case (*Lewis v. Superior Court (2014) 226 Cal.App.4th 933, 2n*d App. Dist., ″*Lewis I*″), the court called into question the holding in *Gherardini* that the ″compelling state interest″ standard applies to the state constitutional privacy right in medical records, due to this Court's later decision in *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 34-35* (″*Hill*″), in which this [*7] Court determined that the ″compelling state interest″ test does not always apply and that a lesser degree of scrutiny may apply, depending on the context.

Lewis I assumed, without deciding, that the compelling state interest standard does indeed still apply with respect to patient prescription records, after *Hill. Lewis I, supra, 226 Cal.App.4th at 953-954.* [2] There remains an open question about the applicable standard of review in this context.

Perhaps more importantly, the appellate court erred in its application of that test, in that it failed to consider whether less intrusive alternatives were available to meet the asserted state interest at issue; specifically, whether a warrant or ″good cause″ requirement would be [*8] sufficient. Thus, the second critical legal issue raised by this case is: assuming that the compelling state interest test still applies in this context, did *Lewis I* err in applying that test? Because *Lewis I* failed to consider ″less intrusive alternatives″ to protect the privacy right at stake, [3] Petitioner contends that it did so err, and that a warrant, subpoena, or good cause requirement should have been found to be applicable. [4]

The third issue is whether a physician is entitled to assert privacy rights under the Fourth Amendment of the federal constitution with respect to prescription records [*9] of the physician's patients. The court in *Lewis I* suggested that physicians cannot, and thereby distinguished two cases from other jurisdictions, *State v. Skinner, 10 So.3d 1212 (La.2009)* (″*Skinner*″) and Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Administration, F.Supp.2d , 2014 WL 562938 (D.Ore.2014) (″*OPDMP*″). See *Lewis I, 226 Cal.App.4th at 941, fn.5;* and at 952, including fn.16. As far as Petitioner is aware, there is no clearcut authority in California whether a physician has a ″personal″ privacy right (as opposed to a ″vicarious″ right) in patient medical records. If so, the Court of Appeal's attempts in *Lewis I* to distinguish *Skinner* and *OPDMP* fail utterly, and, as acknowledged by the Court of Appeal, no balancing test would apply in this case at all due to the U.S. Supreme Court's ruling in *Whalen v. Roe, 429 U.S. 589, 604, fn.32 (1977)* (*Lewis I, supra, 226 Cal.App.4th at 952),* such that there has been an unequivocal violation of Fourth Amendment rights inasmuch as the searches here were conducted without [*10] warrant, subpoena, or any showing of good cause whatsoever.

BACKGROUND

Petitioner Alwin Carl Lewis, M.D. (″Petitioner″ or ″Dr. Lewis″) practices medicine in southern California. See Supporting Exhibits filed with Court of Appeal, ″S.E.″, Ex. 1, p. 2 (Decision, Finding 4). He received his medical degree and a masters degree in Public Health from Tulane University in New Orleans, Louisiana, in 1997: *Id.* (Finding 3). In 2001, he completed an internal medicine residency at UC Irvine. *Id.* His practice is primarily devoted to adults and weight loss issues. *Id.* (Finding 4).

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[2] In Medical Board of California v. Chiarottino (2014) 225 Cal.App.4th 623, 631-632 (″*Chiarottino*″), the First Appellate District also assumed, without deciding, that the compelling interest standard applied to prescription records.

[3] *Chiarottino* also failed to discuss ″less intrusive alternatives″ such as a good cause requirement.

[4] Dr. Lewis acknowledges that CURES serves a valid public purpose in protecting patient health and safety with respect to controlled substances, but contends that the ″least intrusive means″ of impinging on patient privacy rights requires a warrant or good cause requirement of some sort.

A. The initial complaint

The Board initiated its investigation against Dr. Lewis after a written complaint by patient V.C. on August 11, 2008. S.E., Ex. 1, p. 81 (Investigation Narrative). V.C. was interviewed by a Board investigator on April 7, 2009. S.E., Ex. 1, pp. 82-84. V.C.'s complaint arose out of a single visit with Dr. Lewis on May 8, 2008. S.E., Ex. 1. pp. 81-84. In both her written statement and her interview, V.C. raised no issues whatsoever about medications or prescriptions. Rather, she appeared to be angry that Dr. Lewis had recommended weight loss and her [*11] principal complaint was that Dr. Lewis had purportedly recommended a diet plan, called the ″Five Bite Diet″, that the patient believed is ″not healthy.″ S.E., Ex. 1. p. 81-84.

Upon receipt of patient V.C.'s authorization, Dr. Lewis forwarded V.C.'s medical records to the Board for review; Dr. Lewis had only seen V.C. once, briefly, and she had declined to return for any follow-ups. S.E., Ex. 1, pp. 81-82. The Board sent the results of their investigation of V.C. to two experts for review. S.E., Ex. 1, p. 7 (Decision, Finding 23) and p. 88.

The Board's original Accusation was dated May 10, 2011. S.E., Ex. 1, p. 3 (Decision, Finding 1) and pp. 61-66. The Accusation pertained solely to Dr. Lewis' care and treatment of V.C. on May 8, 2008. S.E., Ex. 1, pp. 4-7 (Decision, Findings 6-22); and pp. 61-66. The original Accusation (as well as all amended Accusations) merely alleged, with respect to patient V.C., that Dr. Lewis had not performed a full medical exam on V.C. on May 8, 2008, but had instead focused on her weight, and that he had tried to put her on the ″Five Bite Diet.″ S.E., Ex. 1. pp. 34-35 (P 10); and p. 64 (P 9). No issues regarding medications [*12] or prescriptions- or even of care provided, other than the purported dietary recommendation- were ever raised by the Board at the administrative hearing with respect to V.C.

After fully considering the evidence at hearing, the Board concluded that Dr. Lewis' medical exam of V.C. was indeed within the standard of care and that he had not, in fact, put the patient on the ″Five Bite Diet″ or any other diet, but instead had merely suggested a healthy lifestyle. S.E, Ex. 1, p. 10 (Decision, Finding 32). The only ″misconduct″ ultimately found by the Board with respect to V.C. was a few minor issues with documentation- specifically, he had not documented some of the routine questions he had asked the patient in the course of his exam; he had not quantified the extent to which the patient's weight was excessive except for a reference to ″central obesity″; and he did not document that the patient was being treated by another physician for her headaches. S.E., Ex. 1, pp. 5-6 (Decision, Findings 11-13) and p. 9 (*Id*., Finding 28-d).

B. The intrusive CURES searches and subsequent pharmacy audits, conducted without warrant, subpoena, or showing of good cause

The Board subsequently [*13] amended its Accusation twice, on June 21, 2011 and February 1, 2012. S.E., Ex. 1, p. 3 (Decision, Finding 1) and pp. 29-46. The amended Accusations were substantially identical to the original in their allegations regarding V.C. but also added entirely new allegations and charges related to five additional patients, W.G., M.U., D.L., D.S., and M.M. *Id.*

None of these five patients had filed any sort of complaint about Dr. Lewis. Rather, the Board had, without any prior notice or warning to the patients or Dr. Lewis, conducted a broad and intrusive search of all of Petitioner's patients' medical prescription records, via the state's Controlled Substance Utilization Review and Evaluation System (CURES). S.E., Ex. 1, p. 82. On November 25, 2008, the Board obtained a 205-page CURES report which set forth the records for prescriptions for controlled medications for all of Dr. Lewis' patients, from November 2005 to November 25, 2008. *Id* at 82, 116-320.

CURES records are maintained in a statewide databank and contain confidential patient information such as a patient's first and last name, home address, the particular medication prescribed, the quantity of medication [*14] prescribed, and the location of the pharmacy.

Pursuant to California Health and Safety (″Cal. H&S″) Code section 11165(a), CURES includes all prescriptions of controlled substances in California. Pharmacies are required to file regular reports of new controlled substance

prescriptions on a weekly basis with CURES, and this information is quite extensive and includes the full name, address, phone number, gender, and date of birth of the patient, as well as information about the prescriber, the medications prescribed, the pharmacy from which they were obtained, and the quantity. See e.g. Cal. *H&S Code section 11165(d)*, as amended by S.B. 809 and effective September 27, 2013.

At the time the Board conducted its initial search of CURES, no patients other than V.C. had authorized the release of medical records to the Board or had made any complaints against Dr. Lewis. S.E., Ex. 1, pp. 1092-1093. Moreover, the Board had not obtained any warrants nor issued any subpoenas for patient records prior to the Board's receipt of the CURES records. *Id*. On December 16, 2009 the Board obtained an additional 49 pages of CURES reports pertaining to Dr. Lewis' patients. S.E., Ex. 1 **[*15]** , pp. 88, 321-369, 1093-1095. This additional report was also obtained despite the absence of any patient complaints, or the issuance of any subpoenas. *Id*.

The Board's own investigator testified that it was ″a common practice during the course of an investigation to 'run' a CURES report on the physician.″ *Lewis I, supra, 226 Cal.App.4th at 939.* In other words, the Board routinely runs these CURES searches virtually every time it investigates a physician for any reason at all.

Based on the results of the CURES searches, the Board then sought and obtained the complete prescription records of all of Petitioner's patients from several pharmacies, purportedly pursuant to its general authority to audit pharmacies under *Cal. Bus. and Prof. Code section 4081*. These records occur as Exhibit ″II″ at the administrative hearing (S.E., Ex. 1, pp. 370-893), comprising over 500 pages. These records came from Board audits of March 3, 2011 of the CVS Pharmacy in Burbank, and of April 7, 2011 of the CVS pharmacy in Studio City. (S.E., Ex. 1. pp. 104-106, 1125). Exhibit ″II″ contains hundreds of pages of prescription records for patients other than the five **[*16]** patients at issue, as well as complete records for prescriptions for both controlled and non-controlled drugs, which are obtainable via standard pharmacy audit, but not via CURES.

The pharmacy audits were just as improper as the CURES search (and were arguably even more intrusive, in that they included all prescription records, including non-controlled substances), in that they were conducted for the express purpose of investigating physician prescription practices- and not as an administrative audit of a pharmacy- and were obtained without warrant, subpoena, or showing of good cause. [5]

With the information obtained from the CURES reports and the subsequent pharmacy audits, the Board improperly reviewed patient records for hundreds of Dr. Lewis' patients treated from 2005 to at least 2010. Based on a review of these CURES reports, the Board **[*17]** either issued subpoenas or requested authorizations for medical records with respect to the aforementioned five patients. S.E, Ex. 1, p. 88. As noted, the Board amended its Accusation twice with new allegations and charges related to these patients, alleging excessive prescription of controlled substances, inadequate record keeping, and other violations of the standard of care. S.E., Ex. 1. pp. 29-58, esp. pp. 35-38.

C. The administrative hearing

The administrative hearing was held in February, 2013. S.E., Ex. 1, p. 2. At the outset of the hearing, Dr. Lewis filed a motion to dismiss with respect to the allegations pertaining to patients W.G., M.U., D.L., D.S., and M.M., which was denied. *Id., pp. 975-977.*

As previously noted, the Board concluded that the only ″misconduct″ with respect to V.C. involved a few minor issues with documentation-specifically, Dr. Lewis had not documented some of the routine questions he had asked the patient in the course of his exam; he had not quantified the extent to which the patient's weight was excessive except for a reference to ″central obesity″; and he did not document that the patient was being treated **[*18]** by another physician for her headaches. S.E., Ex. 1, pp. 5-6 (Decision, Findings 11-13) and p. 9 (*Id*., Finding 28-d).

With respect to the other patients, the Board ultimately found that Dr. Lewis was not guilty of excessive prescribing of any medications; had committed primarily very minor record-keeping violations; and that no patients had been actually

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[5] The distinction between administrative pharmacy searches and investigative searches of physician-patient practice is discussed in detail at , *infra*.

harmed by any of these very minor violations. S.E., Ex. 1, pp. 22-23 (Decision, Legal Conclusions # 6-9). The Board expressly found that ″[t]he few instances in which more than the minimum dosages of medications were prescribed involved patients with documented need for the medications.″ S.E., Ex. 1, p. 23 (Id., Legal Conclusion # 9). Accordingly, the Board concluded that ″discipline in the lower range of the spectrum is appropriate.″ *Id*.

The Medical Board adopted the Decision as final, effective August 17, 2012. S.E., Ex. 1, p. 1. The Decision revoked Petitioner's medical license but stayed the revocation and placed him on probation for three years under various terms and conditions. S.E., Ex. 1, pp. 23-26 (Order).

D. Subsequent court proceedings

Dr. Lewis filed a Petition for Writ of [*19] Administrative Mandamus in the Superior Court of Los Angeles, on September 12, 2012. S.E., Ex. 3, pp. 1140-1174. The Petition alleged, *inter alia*, that the Board's Decision should be set aside with respect to the five patients added in the Amended Accusations- W.G., M.U., D.L., D.S., and M.M.- based on the overbroad, intrusive, and warrantless search of their prescription records, going as far back as 2005. S.E., Ex. 3. pp. 1141-1442.

In a written decision dated July 17, 2013, the trial court, the Honorable Joanne O'Donnell, denied the Petition. The court rejected the argument that the warrantless search of the CURES reports had violated the privacy rights of the patients or the physician. S.E., Ex. 9, pp. 1242-1246.

Dr. Lewis subsequently filed a Petition for Writ of Mandate in the Court of Appeal, which is the only authorized mode of appellate review. *Cal. Bus. & Prof. Code § 2337*; *Leone v. Medical Board (2000) 22 Cal.4th 660, 663-664, 670.* The Court of Appeal granted an alternative writ and an order to show cause. *Lewis I, supra, 226 Cal.App.4th at 940.*

After written and oral argument, the Court of Appeal issued its decision, [*20] denying the petition for writ of mandate. *Lewis I*. In its decision, the court assumed, without deciding, that the compelling state interest standard still applied to patient medical records, after *Hill*. *Id. at 953-954.* The court did not, however, consider whether ″less intrusive-alternatives″ were available, as required under that test. The court concluded that the State does not need any subpoena, warrant, or prior showing of good cause to search either the CURES database or to conduct a general pharmacy audit, with respect to a physician disciplinary investigation.

The Court of Appeal's decision was filed on May 29, 2014. This Petition for Review followed and is appropriate and timely pursuant to *Superior Court v. County of Mendocino (1996) 13 Cal.4th 45, 52, fn.5,* and California Rules of Court (″CRC″) Rules 8.500(e)(1), 8.25(b)(3).

LEGAL DISCUSSION

I.

THE 'COMPELLING INTEREST' STANDARD APPLIES TO THE STATE CONSTITUTIONAL PRIVACY RIGHT IN PATIENT MEDICAL RECORDS, INCLUDING PRESCRIPTION RECORDS

A.

The state constitutional privacy right applies to medical records, pursuant to *Gherardini* and related cases [*21]

The Court of Appeal in *Lewis I* acknowledged that the right to privacy set forth in article I, section 1 of the California Constitution applies to patient medical records, including prescription records. *Lewis I, supra, 226 Cal.App.4th at 946-947* (″Like medical records, prescription records contain identifying information and sensitive information related

to drugs used to treat a person's medical condition and also reveal medical decisions concerning the course of treatment… entitled to privacy from unauthorized public and bureaucratic snooping"). [6]

In reaching this conclusion, *Lewis I* cited the seminal case of *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal.App.3d 669* ("*Gherardini*"). In *Gherardini*, the Court of Appeal [*22] applied cases such as *White v. Davis (1975) 13 Cal.3d 757* and *People v. Privitera (1979) 23 Cal.3d 697* in holding that the state constitutional right to privacy applied to patient medical records. *Gherardini, supra, 93 Cal.App.3d at 677-678.*

B.

The "compelling state interest" test with "the least intrusive manner" standard continues to apply to medical records after *Hill v. NCAA (1994) 7 Cal.4th 1*

Gherardini went on to apply the then-applicable standard of review, which was that a violation of the state constitutional right to privacy must be "justified by a compelling state interest", and that, "if state scrutiny is to be allowed, it must be by the least intrusive manner." *Gherardini, supra, 93 Cal.App.3d at 680.* The court concluded that there was a "compelling state interest" involved- the protection of the public from incompetent or unprofessional physicians- but also concluded that this right should only be infringed after a showing of good cause by the agency involved, with "an order drawn with narrow specificity." *Id. at 681.*

In *Lewis I*, the court [*23] noted that *Gherardini* pre-dated this Court's decision in *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1* ("*Hill*"). *Lewis I, supra, 226 Cal.App.4th at 953-954.* In *Hill*, this Court held that the "compelling state interest" standard applies to some, but not all, cases involving the state constitutional right to privacy, and that, in some contexts, a lesser degree of scrutiny is justified. *Hill, supra, 7 Cal.4th at 32-35.**Hill*, however, declined to set a "bright-line" rule for determining which standard applies. The Court instead indicated that, in situations involving heightened scrutiny (e.g. a "compelling state interest"), there must be a showing that the "least intrusive means" were employed, whereas in cases involving lesser scrutiny, such a showing might not be necessary:

> Confronted with a defense based on countervailing interests, plaintiff [asserting violation of the state constitutional privacy right] may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to defendant's conduct that would minimize the intrusion [*24] on privacy interests. [citations omitted]. For example, if intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged. On the other hand, if sensitive information is gathered and feasible safeguards are slipshod or nonexistent, or if defendant's legitimate objectives can be readily accomplished by alternative means having little or no impact on privacy interests, the prospect of actionable invasion of privacy is enhanced.

Id. at 38, emphasis added.

Hill involved a lawsuit by student-athletes from Stanford University against the National Collegiate Athletic Association (NCAA), a private entity, alleging a violation of the students' state constitutional right to privacy from the NCAA's requirement that student-athletes be subjected to urine-based drug-testing involving direct observation. *Hill, supra, 7 Cal.4th at 9.* The Court concluded that, in such a context involving the voluntary participation of athletes in the privileged realm of collegiate competition, a private entity was not required to establish a "compelling [*25] interest" in its drug testing requirements. *Id. at 46-47.* The Court also concluded that the plaintiffs, and not the defendants, had the burden of proving that "there are no less intrusive means available", such as "drug education and testing based on reasonable suspicion [as] feasible alternatives to random drug testing." *Id. at 49.*

In reaching these conclusions, *Hill* acknowledged various significant factors, including the fact that

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[6] The same conclusion was reached by Chiarottino, supra, 225 Cal.App.4th at 631 ("It is established that patients do have a right to privacy in their medical information under our state Constitution")

> The NCAA is a private organization, not a government agency. Judicial assessment of the relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action.
>
> First, the pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to the freedoms of the citizenry than actions by private persons.
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> …
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> Second, ″an individual generally has greater choice and alternatives in dealing with private actors than when dealing with the government.″
>
> …
>
> Third, private conduct, particularly the activities of voluntary associations of persons, carries its own [*26] mantle of constitutional protection in the form of freedom of association. …

Id. at 38-39 (emphasis added).

C.

The present case is distinguishable from *Hill* in that it involves involuntary intrusions into privacy rights by a powerful and unaccountable public entity

All of the factors cited in the previous quote militate the other way in the present case, which involves government action, not private action.

First, the State Medical Board, as a public entity, has broad and expansive authority to explore the prescription records of any patient in the State, to a far more intrusive extent than any private entity like the NCAA, and with respect to the entire population of the State. Indeed, the Board's own investigator testified that it was ″a common practice during the course of an investigation to 'run' a CURES report on the physician.″ *Lewis I, supra, 226 Cal.App.4th at 939.* In other words, the Board routinely runs these CURES searches virtually every time it investigates a physician for any reason at all.

Second, this situation is markedly different from that in *Hill*, which involved voluntary participation by [*27] student-athletes in the privileged world of collegiate competition, a realm that only a select few individuals are eligible for, which ″carries with it social norms that effectively diminish the athlete's reasonable expectation of personal privacy in his or her bodily condition, both internal and external″. *Hill, supra, 7 Cal.4th at 42.* In contrast, individual patients have no realistic ″choice″ regarding the submission of their prescription records to the State CURES database. This lack of a meaningful choice was accurately described by the U.S. District Court in Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Administration, F.Supp.2d , 2014 WL 562938 (D.Ore.2014) (*″OPDMP″*), where the court noted that ″patients and doctors are not voluntarily conveying information to the PDMP [an Oregon state prescription drug monitoring program similar to the California CURES program]. The submission of prescription information to the PDMP is required by law. The only way to avoid submission of prescription information to the PDMP is to forgo medical treatment or to leave the state, This is not a meaningful [*28] choice.″ *Id.* at *8, emphasis added.

Third, there are no countervailing ″freedom of association″ considerations applicable here, as there were to the NCAA, which is a private entity. The Medical Board is a public entity that has no such First Amendment ″freedom of association″ rights.

Accordingly, Petitioner contends that, in the present context-searches of patient prescription records by a state enforcement agency- a ″compelling public interest″ must be established which involves the ″least intrusive means″ available.

II.

THE COURT OF APPEAL FAILED TO ADDRESS THE AVAILABILITY OF 'LESS INTRUSIVE MEANS' AND SO MISAPPLIED THE COMPELLING INTEREST STANDARD IN THIS CASE

A.

Because the ″compelling interest″ standard applies in this case, a subpoena, warrant, or good cause standard is applicable

Hill rejected the argument made by the student-athletes that the NCAA should employ ″less intrusive means″ such as ″drug education and testing based on reasonable suspicion [as] feasible alternatives to random drug testing.″ *Hill, supra, 7 Cal.4th at 49.* This is precisely the argument being made in the present case: that the Medical Board **[*29]** should employ ″less intrusive means″ of monitoring controlled substance abuse, by limiting searches of the CURES databases (and subsequent searches conducted pursuant to the general pharmacy audit authority) to those involving ″good cause″, as established by warrant, subpoena, or similar legal mechanism. However, *Hill* declined to apply the ″less intrusive means″ standard precisely because the case did not involve either a ″clear invasion[] of central, autonomy-based privacy rights″ or ″the invasive conduct of government agencies rather than private, involuntary associations.″ *Id. at 49.* The Court in *Hill* expressly noted that there was ″no case imposing on a private organization, acting in a situation involving decreased expectations of privacy, the burden of justifying its conduct as the 'least offensive' possible under the circumstances. … we decline to impose it.″ *Id. at 50* (emphasis added).

As noted, the Courts of Appeal in both *Lewis I* and in *Chiarottino*, while failing to resolve whether the ″compelling interest″ standard applies, purported to find that, even if that test applied, it had not been met and that warrantless **[*30]** searches of CURES and prescription records were freely available to the State. *Lewis I, supra, 226 Cal.App.4th at 954:* ″we assume without deciding that the state must establish a compelling interest″; *Chiarottino, supra, 225 Cal.App.4th at 631:* ″Even assuming defendant has satisfied the three-prong prima facie elements under *Hill*, we concluded any invasion of his patients' privacy rights… is justified by a compelling competing interest.″

However, despite the assertion by the court in *Lewis I* that it was applying the ″compelling interest″ test, the court therein completely failed to discuss or consider whether ″less intrusive alternatives″ were feasible. Instead, the court merely stated, ″To impose a good cause requirement before accessing CURES data would necessarily involve litigating the privacy issue in advance. … This delay defeats the legislative purpose of CURES… If the privacy issue were litigated before accessing CURES, the prescribing physician under investigation could stall release of these records, which would prevent the state from exercising its police power to protect the public health.″ *Lewis I, supra, 226 Cal.App.4th at 955.* **[*31]** In other words, the Court of Appeal's rationale for finding that a ″good cause″ requirement was too restrictive was that it could ″stall release″ of records. This rationale is ludicrous. Mere expediency in obtaining the records can hardly justify the broad and intrusive authority that the Board seeks here.

The *Lewis I* court went on to assert as follows:

> The Board's access to CURES also should not be limited based upon the nature of the complaint lodged against the licensee-physician. From the patients' perspective, the privacy interest in their controlled substances prescription records is no different if the Board were investigating unprofessional conduct in their care and treatment or in improper prescription practices. Even if the Board is investigating the former, as was the case here, a physician's prescribing practices are directly related to medical care and treatment afforded to his patients. A complaint regarding the quality of care and treatment by a diet doctor, for example, might often reveal improper prescribing practices that could be deadly. Likewise, a complaint regarding the quality of care or treatment may be related to a physician's substance **[*32]** abuse problem that poses a threat to public health. Limits such as Lewis proposes would compromise the Board's paramount concern to protect public health.

Id. at 955 (emphasis added).

This rationale also makes no sense. Whether or not ″good cause″ exists to search the CURES database can be litigated on a case-by-case basis. In those situations where a credible suspicion exists of improper prescribing practices, such good cause would be readily shown. But the court is basically saying that mere fact that a patient complaint has been made, as in the present case, is sufficient to raise a ″generalized″ concern about potential ″substance abuse problems″ of a physician, thereby justifying unfettered access to prescription information. Allowing such unfettered searches whenever the State feels like it does not limit the State to the ″least intrusive means″; to the contrary, it enables the State to be as intrusive as it pleases without any concern for possible legal ramifications. [7]
[*33]

B.

The same ″good cause″ standard should apply to general pharmacy audits that are conducted for the express purpose of investigating physician practices rather than as administrative audits of pharmacists

Dr. Lewis acknowledges that there is some authority holding that the ″closely regulated business″ exception permits audits of pharmacists to be conducted without warrant. In *People v. Doss (1992) 4 Cal.App.4th 1585,* the court permitted a warrantless search of a pharmacy in a criminal action, over the objection of the pharmacist. *Id. at 1588-1589.* However, the application of the ″closely regulated business″ exception in the context of pharmacy audits in the administrative investigation of pharmacists does not and should not extend to Medical Board investigations of physician prescription practices in the context of the physician-patient relationship.

Doss held that pharmacies are closely regulated businesses in California. *Doss, supra, 4 Cal.App.4th at 1598.* However, that, alone, is insufficient to establish that warrantless searches of pharmacies are necessarily valid in all contexts. Even for [*34] closely regulated businesses, the requirements of *New York v. Burger, 482 U.S. 691 (1987)* (″*Burger*″) must still be met for a warrantless search to be valid.

In *Doss*, the Court held that the warrantless search therein was justified because ″state statutes authorize administrative inspections of pharmacies.″ *Id.* at 1598 (emphasis added). Accordingly, a pharmacist has no reasonable expectation of privacy with respect to such administrative searches that are conducted for purposes of verifying whether the pharmacist is complying with applicable law. *Doss* did not hold that warrantless pharmacy audits could be freely conducted in investigating physician-patient prescribing practice. That issue was not raised in *Doss* and so was never reached; no physician or patient therein objected on privacy grounds.

Unlike a physician or patient, a pharmacist does not have a reasonable expectation of privacy in prescription records with respect to administrative pharmacy inspections. There are several reasons. One is that pharmacists are on notice that their business records are subject to inspection at any time. *Cal. Bus. and Prof. Code section 4081* (formerly [*35] section 4232) provides, in pertinent part:

> All records of manufacture and of sale, acquisition, or disposition of dangerous drugs or dangerous devices shall be at all times during business hours open to inspection by authorized officers of the law, and shall be preserved for at least three years from the date of making. A current inventory shall be kept by every [entity] who maintains a stock of dangerous drugs or dangerous devices.

Id. at subdiv. (a).

In contrast, the medical records of a physician are not ordinarily subject to such broad searches; rather, they may only be searched in the office of the physician, and only if a patient complaint is involved. *Cal. Bus. & Prof. Code section 2225(a)*.

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[7] The Court of Appeal in *Chiarottino* also failed to address the issue of ″less intrusive alternatives.″ Instead, the court therein merely noted that the Board did not ″investigate the records of individuals who were not [the physician's] patients, or that the Board improperly disclosed any CURES information to third parties.″ Chiarottino, supra, 225 Cal.App.4th at 636. This discussion fails to address the argument that the search of the patients' pharmacy records is inherently intrusive, regardless of whether the Board improperly discloses that information to third parties or not.

But perhaps more importantly, the purpose of administrative pharmacy inspections, which is to examine the extent to which pharmacists have complied with applicable law, does not implicate important informational privacy rights of the pharmacist. To the pharmacist, these records only pertain to products that he or she has distributed. This is in sharp contrast to the informational privacy rights of the patient, regarding the intimate details of his or [*36] her medical condition. The court concluded, ″Under both the statutory scheme and the circumstances of this case, defendant [pharmacist] had no reasonable expectation of privacy in the pharmacy records.″ *Doss, supra, 4 Cal.App.4th at 1598* (emphasis added).

Indeed, the only concern raised in *Doss* was the pharmacist's right to sell drugs as he saw fit. The evidence indicated that the pharmacist was basically selling controlled drugs without a valid prescription, to non-patients, and for his own personal profit:

> [O]ver a 15-month period, defendant, the owner of Medical Memorial Pharmacy, ordered and took possession of large quantities of certain controlled substances in high dosages. The drugs were of a type rarely prescribed by physicians but in high demand among the illegal street trade. At the end of the 15-month period, an audit of defendant's pharmacy revealed that none of the ordered drugs Were in stock; that there were no prescription forms to account for the legal distribution of any of the drugs as required by law; that defendant had no inventory of drugs in stock as required by the Drug Enforcement Administration; and that [*37] there had been no reported burglaries of defendant's pharmacy to account for the disappearance of the drugs.

Id. at 1589 (emphasis added).

The circumstances of *Doss* were simply different from the circumstances of the present case. The present case did not arise out of information that was actually obtained as part of a routine pharmacy audit. As discussed, Investigator Hollis did apparently order pharmacy records pursuant to *B&P Code section 4081*, but not for the purposes of an administrative investigation of a pharmacist, but rather for the purpose of investigating the propriety of Dr. Lewis' prescribing practices. Ms. Hollis even admitted that the ″more typical″ situation in which she would order such an audit would be in an investigation of pharmacies, not physicians. (S.E., Ex. 1, p. 1125).

Unlike CURES searches, a generalized pharmacy audit pursuant to *Cal. Bus. & Prof. Code section 4081* enables access to all prescription records, including prescriptions for non-controlled substances. A simple perusal of Exhibit ″II″ at the administrative hearing, which occurs at S.E., Ex. 1, pp. 370-893, reveals records of numerous prescriptions [*38] of non-controlled substances that were obtained pursuant to the generalized pharmacy audit.

This case is analogous to that of *People v. Coffman (1969) 2 Cal.App.3d 681,* in which the court held that a search pursuant to one statutory scheme could not be used as a ″ruse″ to justify a search for entirely different purposes.

In *Coffman*, a police officer attempted to justify an ordinary police search of a parolee, by the mere fact that a parole officer was present at the time of the search. The California courts have held that a parole officer may conduct searches of parolees, without regard to Fourth Amendment protections, for the ″purpose of maintaining the restraints and social safeguards accompanying the parolee's status.″ *Coffman, supra, 2 Cal.App.3d at 688.* The Court emphatically rejected the notion that the parole officer's presence validated a search by a police officer, where the purpose of the search had no relation to the individual's parolee status:

> The Attorney General cites five later appellate decisions … to support the contention that the parole officer's physical presence or his delegation of authority to the police [*39] validates the search without regard to its instigating source.
>
> The contention is inacceptable. … Parole status alone does not justify a search by peace officers other than parole agents. [citations] When a parole agent is justified in making a search, he may enlist the aid of the police. [citation] The parole agent's physical presence, even his nominal conduct of the physical acts of search, does not signalize validity. The purpose of the search, not the physical presence of a parole agent, is the vital element. …

> The parole agent was not engaged in administering his supervisorial function. He had not instigated the search nor evinced any official interest in it except in his role as a 'front' for the police. His presence was a ruse, calculated to supply color of legality to a warrantless entry of a private dwelling. The Fourth Amendment hardly lends itself to such totemism. The search was primarily aimed at ordinary law enforcement, not parole administration. Law enforcement searches are heartily to be encouraged, but by means sanctioned by the Constitution. Defendant was in jail and the Chico police had ample time and opportunity to secure the search [*40] warrant mandated by the Fourth Amendment. They chose the parole agent rather than a search warrant as their ticket of entry to the apartment. The search was illegal and its evidentiary products inadmissible. Evidence which awaited the police, which had been practically and legally obtainable through a search warrant, was now tainted by the pursuit of unconstitutional means. Such a taint is not temporary. An unconstitutional seizure places the articles permanently beyond the pale of admissibility.

Coffman, supra, 2 Cal.App.3d at 688-689 (emphasis added).

The court specifically noted the following caveat:

> This holding places no impediment upon cooperation between police and parole agencies. It does mean that when the search is instigated by the police for law enforcement purposes, Fourth Amendment principles must govern judicial use of the resulting evidence. [citations]

Coffman, supra, 2 Cal.App.3d at 689, fn.3 (emphasis added).

That caveat was affirmed in *People v. Burgener (1986) 41 Cal.3d 505, 536, fn.14,* where this Court held that *Coffman* was inapplicable to the extent that it [*41] could be read as always barring the admissibility of evidence, obtained as part of a parolee search, in an ordinary law enforcement case. Rather, the courts have made clear that the fruit of a parolee search that is initially conducted for the proper purposes- i.e. parole administration-could still be used by police officers in ordinary law enforcement cases:

> *Coffman* stands for the proposition that, absent a proper parole purpose, the parole agent's mere presence or authorization for the search is ineffective to validate the search. On the other hand, as we explained in *People v. Burgener (1986) 41 Cal.3d 505, 536,* neither police participation in the search nor the parolee's custodial status invalidates an otherwise proper parole supervision purpose.

People v. Johnson (1988) 47 Cal.3d 576, 594 (emphasis added).

Similarly, in a case involving what actually originates a legitimate, good faith administrative audit of a pharmacy, pursuant to either *B&P Code section 4081*, the mere fact that the fruit of such a search are used in a subsequent investigation of a physician's prescribing practices would not necessarily [*42] render the warrantless administrative search invalid. [8] Rather, it is the pretextual use of the statutes authorizing warrantless administrative audits of pharmacies, for the express purpose of investigating physician-patient prescribing practices, that is invalid. Such use is precisely what happened here, and reflects a deliberate attempt to circumvent the informational privacy rights of patients and physicians.

As noted in *Coffman*, the ruling was not intended to prevent investigators from acting on such information, obtained for valid purposes; thus, if the Board had, in fact, discovered information raising issues about a physician's prescription practices during the course of what began as a good faith administrative pharmacy audit, such information could presumably [*43] be used against the physician in a disciplinary action. But the opposite happened here: the pharmacy audit procedures were used for the express purpose of justifying an intrusive search, violative of patient informational privacy rights.

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[8] That is precisely what appeared to have happened, for example, in Wood v. Superior Court (1985) 166 Cal.App.3d 1138, 1141 (routine pharmacy audit uncovered potential problems with physician prescribing activities).

III.

WHETHER FOURTH AMENDMENT RIGHTS APPLY TO A PHYSICIAN IN HIS OR HER MEDICAL RECORDS IS AN UNRESOLVED QUESTION

One additional important issue is whether Petitioner is permitted to assert Fourth Amendment rights under the federal constitution, against unlawful searches and seizures, with respect to the medical records of his patients. The court in *Lewis I* strongly implied that, if such rights did apply, no balancing test of any sort is required based on the U.S. Supreme Court's ruling in *Whalen v. Roe, 429 U.S. 589, 604, fn.32 (1977)* and that the warrantless, subpoenaless searches would then be *per se* unconstitutional, without any need to delve into the nature of the public interest involved, or the existence of less intrusive alternatives.

In *Gherardini*, the Court of Appeal applied the Fourth Amendment rights of the federal constitution to a physician on behalf of his patients, pursuant to the ″vicarious [*44] exclusionary rule″ which then applied in California. *Gherardini, supra, 93 Cal.App.3d at 675-676, 681* (1979 case citing the vicarious exclusionary rule and using it to apply *Katz v. United States, 389 U.S. 347, 1967,* and the Fourth Amendment of the federal constitution). The court in *Lewis I*, however, noted that the ″vicarious exclusionary rule″, which used to be the rule in California, had been abrogated in 1982 by state constitutional amendment. *Lewis I, supra, 226 Cal.App.4th at 941, fn.5,* citing *In re Lance W. (1985) 37 Cal.3d 873, 890,* which discussed the 1982 amendment via Proposition 8, adding article I, section 28(d) to the California Constitution.

The court in *Lewis I* went on to expressly distinguish two cases cited by Petitioner, on the ground that those cases involved Fourth Amendment rights under the federal constitution: (1) *State v. Skinner, 10 So.3d 1212 (La. 2009):* ″Absent from Lewis' discussion of *Skinner* is a distinction critical here, that is, a balancing test was inapplicable to the court's Fourth Amendment analysis of the intrusion into individual privacy during [*45] the course of a criminal investigation″ (*Lewis I, supra, 226 Cal.App.4th at 952,* citing Skinner, 10 So.3d at 1218, and *Whalen v. Roe, 429 U.S. 589, 604, fn.32 (1977);* and (2) Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Administration, F.Supp.2d , 2014 WL 562938 (D.Ore.2014) (″*OPDMP*″), as involving a ″Fourth Amendment issue″ (*Lewis I, supra, 226 Cal.App.4th at 952, fn.16;* see also *OPDMP* at *6, fn.3: A balancing test pursuant to *Whalen* ″is inapplicable in the context of the Fourth Amendment.″

Lewis I, therefore, acknowledged that, if Fourth Amendment rights applied, no ″balancing″ would be required pursuant to *Whalen v. Roe*, and good cause would be required to be shown via warrant or subpoena. However, the court rather conclusorily stated that ″Lewis has no reasonable expectation of privacy in his prescribing practices of controlled substances.″ *Lewis I, supra, 226 Cal.App.4th at 942, fn.6,* noting only that controlled substances are ″highly regulated″ by the state.

However, there is authority to [*46] the contrary that holds that a physician does, indeed, have a personal privacy interest, and not just a vicarious one, in his or her prescribing practices. In *Wood v. Superior Court (1985) 166 Cal.App.3d 1138, 1145,* the court held that a physician whose patient prescription records are at issue has ″*first* party standing″ [emphasis in original] and not merely ″third party standing″ because the physician's interests are ″coincident with″, and are ″also implicated.″ Further, *De La Cruz v. Quackenbush (2000) 80 Cal.App.4th 775* held that, even for closely regulated businesses, Fourth Amendment rights still apply.

Petitioner contends that there is an open question whether a physician has direct, personal Fourth Amendment privacy interests in his or her prescription records, such that *Lewis I* itself suggests that no ″balancing″ is required and that a warrant or subpoena showing good cause would indeed be required.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Petition for Review be granted.

Dated: July 8, 2014

FENTON LAW GROUP, LLP

By: /s/ Benjamin J. Fenton
BENJAMIN J. FENTON
Attorneys [*47] for Petitioner, Alwin Carl Lewis, M.D.

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Dated: July 8, 2014

Respectfully submitted:

By: /s/ Benjamin J. Fenton
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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