IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC04-2219

RUSH LIMBAUGH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC. AND IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

CASES **PAGE**

Florida Statutes

INTEREST OF AMERICAN CIVIL LIBERTIES UNION

The proper resolution of this appeal is a matter of substantial concern to the American Civil Liberties Union of Florida. The ACLU is a nationwide nonpartisan organization of nearly 400,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal constitutions. The ACLU of Florida is its state affiliate and has approximately 22,000 members in the State of Florida also dedicated to the principles of liberty and equality embodied in the United States Constitution and the Florida Constitution. The ACLU has a long standing interest in protecting the privacy rights of individuals and has participated in some of the most important constitutional cases before the courts dealing with such protections. *See, e.g.*: *Griswold v. Connecticut*, 381 U.S. 479 (1965)(striking down Connecticut law forbidding use of contraceptives); *Lawrence v. Texas*, 539 U.S. 558 (2003)(striking down Texas sodomy statute). In Florida, the ACLU has participated in cases dealing with the constitutionality of laws infringing upon the right to privacy guaranteed by the Florida Constitution as well. *North Florida Woman's Health and Counseling Services, Inc.*, 866 So. 2d 612 (Fla. 2003) (striking down Florida Parental Notice of Abortion Act). As *amicus*, the ACLU seeks to vindicate the right of every citizen of Florida to preserve their privacy in the contents of their medical records.

SUMMARY OF ARGUMENT

The constitutional right to privacy encompasses and protects the patient-physician relationship. Article I, Section 23 of Florida's constitution expressly grants the right to privacy to the citizens of Florida, as opposed to the implied privacy right the Bill of Rights creates. This Court has recognized Florida's privacy right when the issue of confidentiality has arisen in the medical arena. *North Florida Women's Health & Counseling v. State,* 866 So. 2d 612 (Fla. 2003); *In re T.W.,* 551 So. 2d 1186, 1191 (Fla. 1989); *Rasmussen v. South Florida Blood Services, Inc.,* 500 So. 2d 533 (Fla. 1987).

The Legislature created Chapters 395 and 456 to recognize or extend privacy protections over medical records, and outline a procedure for patient waiver and public disclosure. When reviewing those Chapters, this Court has consistently recognized the Legislature's intent to continue to protect a broad and express privilege of confidentiality of medical records. *State v. Johnson,* 814 So. 2d 390, 393 (Fla. 2002); *Acosta v. Richter,* 671 So. 2d 149 (Fla. 1996). This intent protects the express privilege at the same time it enunciates a clear procedure for a litigant, in either a criminal or civil setting, to obtain relevant medical records. The State of Florida violates the law and constitution when it obtains medical records *via* the use of a search warrant, rather than through the service of a subpoena with requisite notice to

the patient.

The Fourth District interpreted Florida Statutes Sections 395.3025(4) and 456.057(5)(a) as irrelevant to the inquiry of whether the State can execute a search warrant for seizing a patient's medical records. The majority misapprehends the nature of Florida's privacy laws and ignores well settled principles of statutory construction. Sections 395.3025 and 456.057 create the exclusive means for regulating the disclosure of patient medical records. To avoid that conclusion, the court below simply discounted those statutes. The subpoena statutes limit the search warrant statute because the subpoena statutes are more specific than the search warrant statute. *McKendry v. State,* 641 So. 2d 45, 46 (Fla. 1994). Furthermore, the subpoena statute was enacted after the search warrant statute. Under a second rule of statutory construction, the later statute dealing with a specific subject takes precedence over an earlier statute. *E.g. Anstead v. Cox Broadcasting Company*, 500 So. 2d 197, 201 (Fla. 1st DCA 1986).

Giving the State an option to execute a warrant or serve a subpoena is not only a misapprehension of the constitution and the law, it denies protection against the State from misusing the information found in medical records. The only protection the court afforded petitioner, and him alone, is the right to seek return of any seized property outside the scope of the warrant. This right is illusory since the warrants

authorized seizure of all medical records.

The fact that the standard of proof required for a warrant (probable cause) is greater than is required for a subpoena, does not mean that a warrant offers greater protection than that required for a subpoena. This is because the issues surrounding Sections 395.3025 and 456.057 are different than those sufficient to authorize a warrant. The warrant method of obtaining the medical records sidesteps judicial review of critical issues before disclosure.

ARGUMENT

FLORIDA STATUTES SECTIONS 395.025(4) AND 456.057(5)(a) CREATE A BROAD AND EXPRESS PRIVILEGE OF CONFIDENTIALITY FOR MEDICAL RECORDS AND PROVIDE THE EXCLUSIVE PROCEDURE FOR THE DISCLOSURE OF THOSE RECORDS

1. The Constitutional Right to Privacy Encompasses and Protects the Patient-Physician Relationship.

Florida's citizens enshrined the right to privacy within their constitution. Recognizing that the patient-physician relationship crucially depends on privacy and candor, the Legislature implemented the people's will, forbidding disclosure of patient medical records without first affording the patient notice and the opportunity to be heard. Ignoring both the people and their elected representatives, the courts below eviscerated patient privacy by authorizing any law enforcement officer to seize, read,

and selectively disclose patient medical records by obtaining an *ex parte* search warrant. *Limbaugh v. State*, 887 So.2d 387 (Fla. 4th DCA 2004). The ruling below violates the Florida constitution and violates Florida Statutes; it imperils the privacy of every Floridian and should be reversed.

Article I, Section 23 states:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Article I, Section 23 binds every branch of Florida's government; this Court repeatedly has emphasized its central role in Florida law. "It is this general right to privacy that protects against the public disclosure of private matters." *In re T.W.* 551 So. 2d 1186, 1191(Fla. 1989) (*citing Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977)). "This right of privacy has been described as 'the most comprehensive of rights and the right most valued by civilized man.'" *Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533 (Fla. 1987) (citations omitted) (upholding protective order on subpoena for identity of volunteer blood donors). "Article I, section 23, was intentionally phrased in strong terms." *Winfield v. Div. of Paramutual Wagering*, 477 So. 2d 544, 548 (Fla. 1985). Summarizing the importance that Floridians attach to their privacy, this Court stated:

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

Id. at 547.

The private relationship between a doctor and his or her patient is unique. Patients routinely reveal to physicians the most intimate facts of their lives, often disclosing matters never revealed even to a spouse. In seeking treatment for a urinary tract infection, patients may reveal details of extra-marital affairs and undergo testing for HIV and other sexually transmitted diseases. Their medical records may reveal treatment for depression and details of suicidal thoughts. Treatment for Hepatitis C may disclose past intravenous drug usage. The patient's medical history may disclose a prior abortion or the birth of a child out of wedlock. Compelled disclosure of such quintessentially private information can devastate an individual's personal, social, and professional life. Just the threat–or even the possibility–of such disclosure by law enforcement agents privy to this kind of information places in the hands of the State unconscionable power over the individual and chills the exercise of constitutional rights.

Although the common law has for generations protected the special status of the patient physician relationship, Article I Section 23 elevated that relationship to

constitutional status. Heeding the voters' will, the Legislature enacted a comprehensive statutory scheme to govern disclosure of patient medical records. Florida Statute Section 395.3025 proscribes disclosure of a patient's medical records in any civil or criminal action in the absence of notice and an opportunity for the patient to be heard; neither the legislature nor the voters have modified its provisions to exempt search warrants from its scope.[1]

This case presents the question of whether the Legislature meant what it said when it enacted section 395.3025. Disregarding the statute's plain text, the District Court of Appeal effectively rewrote it to exempt from it police and prosecutors who seek and obtain a search warrant. In concluding that the Legislature must have intended *sub silentio* to authorize *ex parte* seizure and disclosure of all patient medical records within the scope of a warrant, the court below improperly invaded the authority of the Legislature, violated canons of statutory construction, and damaged the privacy rights of every Floridian; its decision empowers law enforcement agents

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[1] The decision below inexplicably infers from the so called conformity amendment limiting the scope of Article I, § 12 to the scope of the fourth amendment an implicit exemption for search warrants from Section 395.3025. The reasoning in the court below is deeply flawed – the conformity amendment never purported to limit the power of the Legislature to enact legislative limits on searches and seizures; rather, it merely prohibited the courts from construing section 12 more broadly than the fourth amendment. Because the legislature has enacted positive law limiting disclosure of patient medical records, the conformity amendment is simply irrelevant.

to obtain and disclose medical records irrelevant to a legitimate law enforcement through an *ex parte* search warrant. *Limbaugh v. State*, 887 So.2d 387 (Fla. 4th DCA 2004).

The decision below authorizes an abuse of state power vividly illustrated by the facts of this very case. The State does not dispute that during the course of its investigation of Mr. Limbaugh, high ranking officials in the State Attorney's Office (TR. 42-44)[2] leaked details of its investigation to ABC News, (TR. 37), USA Today (TR. 37-38) and the National Enquirer (TR. 38). Moreover, upon the execution of the search warrants, the affidavits supporting the warrants were filed in the clerk's office, revealing the evidence it had uncovered concerning Mr. Limbaugh (TR. 35-36). Disclosing such evidence in advance of filing charges is virtually unknown in criminal practice.[3]

Contrary to the argument advanced by the State that such conduct is irrelevant (TR. 39), the State's willingness to try its case in the media demonstrates why the safeguards found in Sections 395.3025 and 456.057 are so important and why the State cannot be trusted to protect the privacy rights of those it also seeks to prosecute

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[2] The transcript references are to the hearing before the Circuit Court.

[3] Judge May chided the State for filing the warrant applications with the clerk's office, thereby disclosing uncharged allegations publicly. *Limbaugh*, 887 So. 2d at 402 n. 16 (May, J., dissenting in part).

when it seizes medical records *ex parte*.

2. The Use of a Search Warrant to Obtain Medical Records Ignores the Legislature's Intent to Create a Broad Physician Patient Privilege Subject to Carefully Crafted Procedures for Disclosure

Reduced to its core, the decision below held that the State is free to seize and disclose as it sees fit patient medical records so long as those records fall within the scope of an *ex parte* search warrant. In so holding the Fourth District ignored the decisions of this Court recognizing a broad physician-patient privilege under Florida law.

In *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996), this Court held that in enacting Florida Statute Section 456.057(5)(a) the Florida Legislature created, "[A] broad and express privilege of confidentiality as to the medical records and the medical condition of a patient." The scope of the statute was clear and unambiguous, "The statute states in simple, direct language that medical records 'may not be furnished' and the medical condition of a patient 'may not be discussed' except upon written authorization of the patient." Other than the exceptions noted in provision itself, the statute was not limited in its application, "The obvious purpose of this first sentence is to prohibit disclosure of patient medical records and the patient's medical condition to anyone *except* the patient, the patient's legal representative, or other health care providers who are 'involved in the care or treatment of the patient,' except

upon a patient's written authorization." *Id.* at 154.[4]

Florida's physician-patient privilege is codified in Florida Statute Section 395.3025 as well. Both statutes proscribe disclosure of a patient's medical records in any civil or criminal action in the absence of notice and an opportunity for the patient to be heard. *State v. Johnson*, 814 So.2d 390, 393 (Fla. 2002). Plainly, then, it cannot be disputed that Florida law restricts access to medical records and prohibits any disclosure of a patient's medical condition by a treating physician except under limited circumstances. But rather than address the impact of Florida's physician-patient privilege, the Fourth District acted as if the privilege simply did not apply. Instead, the Court substituted its own interpretation of these provisions which is completely at odds with this Court's holding in *Acosta*. As we will see in this next section, not only did the Fourth District ignore the legislative analysis of this Court in *Acosta* it failed to follow well settled rules of statutory construction.

3. The Decision of the Fourth District Contradicts This Court's Interpretation of the Statutory Scheme and Violates Fundamental Canons of Statutory Construction

In holding that Florida Statutes Sections 395.025(4) and 456.057(5)(a) have no application to evidence obtained by way of a search warrant, the decision below

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[4] As the Fourth District observed below, Sections 456 and 397 are identical in substance, 887 So.2d at 393.

both misapprehends the nature of Florida's privacy laws and ignores well settled principles of statutory construction. We believe that this result unnecessarily jeopardizes the significant privacy rights that Floridians enjoy in their medical records and in their relationship with their physicians.

According to the Fourth District the operative effect of Sections 395 and 456 "lies only in the subdivisions limiting the use of subpoenas for medical records."887 So.2d at 394. This flies in the face of this Court's holding that these statutes create "a broad and express privilege of confidentiality as to medical records and the medical condition of a patient." *Acosta*, 671 So. 2d at 154. By their terms, the statutes create the exclusive means for regulating the disclosure of patient medical records; to avoid that conclusion, the court below simply rewrote the statutes.

The court's narrow interpretation of these statutes ignores fundamental canons of statutory construction. "It is a well-known principle of statutory construction that 'a specific statute covering a particular subject area controls over a statute covering the same and other subjects in more general terms.'" *Engineering Contractors Ass'n of South Florida, Inc. v. Broward County*, 789 So. 2d 445, 451 (Fla. 4th DCA 2001). For that reason, the Legislature's specific proscription on disclosure of medical records in the absence of notice and hearing supersedes and displaces its more general grant of authority to obtain evidence through *ex parte* warrants;"a specific statute

covering a particular subject area always controls over a statute covering the same and other subjects in more general terms." *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994).

The District Court's decision also "runs counter to the frequently-cited rule of statutory construction which recognizes that a later statute dealing with a specific subject takes precedence over an earlier statute covering the same subject in general terms." *Anstead v. Cox Broadcasting Company*, 500 So. 2d 197, 201 (Fla. 1st DCA 1986); *see, also, Tribune Co. v. School Board of Hillsborough County*, 367 So. 2d 627 (Fla.1979); *Brescher v. Associates Financial Services Co., Inc.*, 460 So. 2d 464 (Fla. 4th DCA 1984); *Strahl v. Strahl*, 431 So. 2d 729 (Fla. 3d DCA 1983); *Marston v. Gainesville Sun Publishing Co., Inc.*, 341 So. 2d 783 (Fla. 1st DCA 1976). Section 395.3025 is both more specific and more recent than the statutory authorization for the issuance of search warrants.[5] Accordingly, the courts should construe it as written, holding that the Legislature meant what it said when it required the State to proceed through subpoena after notice and a hearing in order to compel disclosure to the State of patient medical records. *State v. Johnson,* 814 So. 2d 390, 393 (Fla. 2002).

The flaw in the Court's analysis is also demonstrated by a plain reading of the

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[5] Fla Stat. § 933.07(1) (authority and procedure for obtaining search warrants), *original law ratified* (1923), *cf. with,* Fla Stat. § 395.3025, *originally ratified* (1982).

language of Sections 395.3025 and 456.057. The statutes require notice and an opportunity to be heard "in any civil or criminal action." Had the Legislature not sought to restrict the State's ability to obtain medical records in criminal investigations, the Legislature would not have included criminal actions within the purview of the statute. Plainly, where a patient's medical records are being sought, the law requires the State to use the procedures found in Sections 395.3025 and 456.057. There is simply no authority that allows the State to ignore the law in favor of more intrusive means. It is not disputed that the Florida Legislature has the power to provide the citizens of this State greater protection from governmental intrusions than that granted by the Fourth Amendment and Art. I, §12, Fla. Const. *State v. Langsford*, 816 So.2d 136 (Fla. 4th DCA 2002). The decision below ignores this fundamental principle through a tortured interpretation of the statutory scheme and a flawed application of the canons of statutory construction.

4. An *Ex Parte* Warrant Does Not Offer the Protections Demanded by the Florida Legislature

Notice and an opportunity to be heard are essential 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 711 (1988). A warrant issued in an *ex parte* proceeding provides no assurance that matters unrelated to a criminal investigation will not end

up in the hands of third parties or otherwise misused by state agents. A search warrant is the most intrusive means of obtaining evidence. It permits law enforcement officers access to all of the patient's records, not just those relevant to the State's investigation. Once the evidence is obtained by law enforcement officers, there is no judicial supervision over how long the information is kept, how the information is secured, or how it is used, discussed, or disclosed to others by those in its possession. A search warrant is a chainsaw in its breadth. When wielded by the State, it does not merely cut through a patient's privacy to obtain the information the State claims it needs, it destroys the patient's constitutionally protected right of privacy as well.[6]

Sections 395 and 456 provide a mechanism to satisfy the State's interests without also placing in jeopardy the patient's relationships or livelihood. With notice to the affected party and an opportunity for the affected party to be heard, a court is in a position to determine what records are genuinely needed by the State and can either order that the physician only disclose those portions of those records which are relevant or can order that the patient's records be turned over to the court for *in camera* review and redaction if necessary. As to those records ordered produced to the

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[6] The Fourth District's decision in *State v. Viatical Services*, 741 So.2d 560 (Fla. 4th DCA 1999) is inapposite. As the Fourth District specifically noted, the patients in *Viatical* waived their right to privacy in their medical records when they sold their insurance policy to the company. No waiver of privacy rights is presented herein.

State, the court can issue protective orders over how the records are to be maintained and subject any improper disclosure to contempt. Finally, the court can insure that after the investigation is concluded, any records not already made public are returned or destroyed preserving the right of privacy to the fullest extent possible.

Thus while a criminal investigation may constitute a compelling state interest, that interest alone is not sufficient to compel the production of a particular record in the face of an objection. *See e.g. State v. Johnson, supra*, (before disclosure of medical records, State must demonstrate compelling need by showing a clear connection between illegal activity and each patient whose privacy has been invaded). As the Fifth District Court of Appeal has held:

> Without the intervention of an impartial magistrate to determine relevancy, the notice of hearing to the patient is meaningless. The court is relegated to being a rubber stamp for the state. The court must act as a shield to protect the patient's right to privacy by determining whether medical records are relevant to a pending criminal investigation. This role of the court is extremely important because personal and potentially embarrassing information contained in the medical records may be disclosed. This invasion of a patient's privacy can only occur after the court finds a compelling state interest and that the information is relevant. Florida's constitution has a very strict prohibition against government intrusion into the private lives of its citizens and, by implication, their medical records.

Hunter v. State, 639 So. 2d 72, 74 (Fla. 5th DCA 1994). *See also*: *State v. Cashner*, 819 So. 2d 227, 229 (Fla. 4th DCA 2002) (where patient objects to the issuance of investigatory subpoena for medical records, the "state has the burden and obligation

of demonstrating the relevancy of the records requested" at an "evidentiary hearing" before the subpoena may issue); *State v. Rutherford*, 707 So.2d 1129, 1131 (Fla. 4th DCA 1997)(en banc)(where there is an objection to disclosure of medical records, "state has the obligation and burden to demonstrate relevancy, via evidence," before a subpoena may issue).

5. The Statutory Scheme Governing Production of Medical Records Protects Against Misuse of the Information by State Agents

Sections 395 and 456 also serve to protect the balance of power between the individual and the State. As discussed above, once the State has obtained a patient's complete medical records through the use of a search warrant, there is no judicial supervision over how that evidence is used. Even where there is probable cause to believe that evidence of a crime is contained in some portion of those records, it may well be the other information found in those records which provides the State the ammunition it needs to coerce an individual into capitulating to law enforcement.

The court below could not have made our point more clearly; it held the minimal procedural safeguards the State extended to petitioner – holding the records under seal to afford petitioner the opportunity to challenge their use – "were not required." 887 So.2d at 396. Rather, the court held that in this and future cases, the State is free to review *all* seized records without notice any hearing to determine which of the seized records were relevant to its investigation. The only protection the

court afforded petitioner – the right to seek return of any seized property outside the scope of the warrant – is guaranteed by statute without regard to the character of the property, *see* Section 933.14(1), Florida Statutes, and is illusory since the warrant authorized the seizure of all medical records. Absent reversal, petitioner will be the first and last Florida citizen permitted any opportunity to be heard respecting the seizure of patient medical records; even if Limbaugh suffered no harm as a result of the State's action, the average citizen will never know whether he or she was so fortunate.

6. The Court Erred in Confusing the Standard of Proof Required for Issuance of a Search Warrant and the Showing of Relevancy Required for Issuance of a Subpoena for Medical Records

In upholding the use of a warrant to obtain Limbaugh's medical records, the Fourth District confused the inquiry required for the issuance of a warrant and that required for the issuance of a subpoena for a patient's medical records. The fact that the standard of proof required for a warrant, probable cause, is greater than that required for a subpoena, does not mean that a warrant offers a greater or even an equivalent level of protection. This is because the issues involved in issuing a search warrant are simply not the same as those involved under Sections 395.3025 and 456.057. In the case of a warrant, a court must be satisfied that there is sufficient cause to believe evidence of a crime will be found at a certain location; in the case of a

subpoena for medical records, the court must determine what part, if any, of the contents of medical records must be disclosed to the State. No matter how much evidence the State has that a suspect has committed a crime and that some evidence of that crime is contained in his medical records, that does not relieve the court of its responsibility to afford the affected party an opportunity to be heard as to the scope of the material to be disclosed.[7]

7. THE FOURTH DISTRICT'S MINORITY'S OPINION RECOGNIZES THE CONSTITUTIONAL AND STATUTORY PRIVACY RIGHTS IN MEDICAL RECORDS BUT DOES NOT GO FAR ENOUGH.

The minority concurred in part and strongly dissented stating it would have granted the petition. *Id.* at 401. (May, J., dissenting in part). Even though the minority would have allowed the seizure of medical records, the minority would require a "pre-disclosure" hearing as a matter of right. *Id.*(May, J., dissenting in part). The distinction between seizure and disclosure makes intuitive sense, but has no basis in common law or statute. The minority cites to Hippocrates, the Florida Constitution, statutory and regulatory protections to recognize an implied right of a pre-disclosure hearing. *Id.* at

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[7] For example, in a case where the State can establish probable cause to believe that a suspect's medical records contain evidence that the suspect was engaged in insurance fraud, say through staging automobile accidents, no level of cause, be it probable cause or proof beyond a reasonable doubt, should permit the State access to records that reveal that the suspect carries a rare gene for a deadly inherited disease.

399. (May, J., dissenting in part). Allowing seizure without notice but not disclosure, is good in theory, but requires trust in the State. In this case, and perhaps other high profile cases in the future, it does not deserve that trust.

Contrary to the majority opinion below, the minority is not reading the medical subpoena statutes as limiting the search warrant statute. It is reading the medical subpoena statutes, regulations, and constitutional provisions, to provide a basis for modifying the search warrant statute to include a pre-disclosure hearing – a right not entrenched in the common law like suppression. Interpreting the various sources of law and fashioning a pre-disclosure remedy is *Solomonesque*. Judge May attempts to balance the rights of the State (to fight crime and fear of a pre-seizure destruction of evidence notice may risk) and the patient (privacy protections).

The minority's position is nonetheless incorrect because as a matter of pure statutory interpretation on Chapters 395 and 456 a subpoena is required in the criminal arena in order to obtain records from healthcare providers. Regarding the destruction of evidence if notice is given, this Court should recognize the doctors were not the target of the investigation in Limbaugh's case. We know this because it was not stated in any of the search warrant applications. We would have to accept that reputable healthcare facilities would be willing to destroy records to save a patient from criminal prosecution. In a civil lawsuit healthcare facilities must produce patient records when

subpoenaed, and the facility may be the target itself. The Legislature must be the branch which creates the special circumstances where a warrant may override the strictures of Chapters 395 and 425. Thus far, it has not. Courts should not look to create avenues of relief for the government when it violates its own state made laws.

CONCLUSION

Obtaining an individual's medical records is tantamount to forcing a physician to testify against his patient. Giving the State the ability to exercise such power *ex parte* advances the interests of law enforcement very little, but threatens to undermine fundamental civil liberty greatly. In this instance, the Florida Legislature has spoken clearly. It is only for this Court to listen.

Respectfully submitted,

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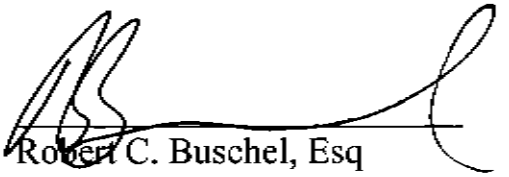
CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed to James L. Martz, Assistant State Attorney, 401 North Dixie Highway, West Palm Beach, FL 33401, and Roy Black, 201 South Biscayne Boulevard, Suite 1300, Miami, FL 33131, this 19th day of January 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief was prepared using Times New Roman style at 14 points.



Robert C. Buschel, Esq