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In the

Supreme Court

of the

State of California

ALWIN CARL LEWIS,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

MEDICAL BOARD OF CALIFORNIA,

Real Party in Interest.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE · NO. B252032
SUPERIOR COURT OF LOS ANGELES · HON. JOANNE B. O'DONNELL · NO. BS139289

REPLY BRIEF ON THE MERITS

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REPLY BRIEF

INTRODUCTION

Petitioner Alwin Carl Lewis, M.D. ("Petitioner" or "Dr. Lewis") files this Reply Brief in response to the Answer Brief on the Merits ("Answer Brief" or "AB") filed by Real Party in Interest Medical Board of California ("Medical Board" or "Board").

A. Brief discussion of factual issues

Initially, Dr. Lewis disputes the Board's characterization at the outset of its brief of the misconduct that was found against him by the Administrative Law Judge and adopted by the Board. The Board states that Dr. Lewis "prescribed powerful drugs to two patients at excessive levels [and] failed for almost two years to monitor another patient for liver toxicity, which could have resulted from the interaction between the two drugs he prescribed." (AB 1). This characterization suggests that the found misconduct was much more serious than was actually the case.

Regarding the allegedly excessive prescribing, the Board is referring to Finding 52 with respect to patient W.G. (which itself refers to Findings 39, 46, and 50) and Finding 59 with respect to patient M.U. (which refers to Finding 55) in the administrative Decision which imposed discipline on Dr. Lewis' license. (AR 13, 15).[1] While it is true that there is language in those Findings referring to "excessive" prescriptions, the Board later elaborated on these observations in Finding 82, which stated:

> It was <u>not established</u> that [Dr. Lewis] engaged in repeated acts of clearly excessive prescribing, furnishing, dispensing, or

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[1] In his Opening Brief on the Merits, Dr. Lewis cited the appellate record as "S.E." for "Supporting Exhibits." Here, he adopts the alternative formulation of "AR" which was used by the Board in its Answer Brief.

> administering dangerous drugs to his patients. While [Dr. Lewis] did in some instances prescribe medications above standard dosages without documenting a reason for such excess, as set forth in factual findings numbers 39, 46, 50, 52, 55, and 59, those instances do not rise to the level of "repeated" or "clearly excessive" in light of the patients' conditions, their long-term relationship with [Dr. Lewis], and the relatively small number of instances given the total number of patient contacts.

(AR 20, Finding 82, underlining added).

The Board found that Dr. Lewis committed acts of simple negligence and unprofessional conduct as a result of these prescriptions, but not gross negligence or excessive prescribing. (AR 21, Legal Conclusions 2, 4, 5-7). The Board also noted that W.G. and M.U. were "long-term patients" and that Dr. Lewis "was familiar with their conditions and course of treatment," and also found, "The few instances in which more than the minimum dosages of medications were prescribed involved patients with documented need for the medications. There is no evidence that any patient was harmed...by his prescription of medication." (AR 22, Legal Conclusion 9). The Decision also suggested that the amount of medication prescribed may well have been justifiable if Dr. Lewis had simply provided more specific documentation. (*See e.g.* AR 15, Finding 59a: "A patient with these many prescriptions would require closer follow-

up and greater documentation of her condition").

Regarding the failure to monitor liver toxicity, the Board is referring to Finding 69 with respect to patient D.L. (AR 17). That patient had been prescribed Serzone and Zocor. Dr. Lewis had monitored that patient's liver function in 2004 and 2009, but the Board's expert opined that the time span between tests was too long, whereas Dr. Lewis' experts opined to the contrary. (AR 15, Findings 61-67). The Board found that Dr. Lewis "deviated from the standard of care" in failing to recommend or obtain liver function tests between October 2007 and August 2009. (AR 16, Finding 69). As with the aforementioned allegations of excessive prescribing, the Board ultimately found that Dr. Lewis' actions constituted simple negligence and unprofessional conduct, but not gross negligence or excessive prescribing, and that "[t]here was no evidence that any patient was harmed by... his failure to order more frequent liver function tests for one patient." (AR 22-23, Legal Conclusions 1, 2, 4-7, 5, 9).

In summary, none of these adverse Findings discussed was nearly as serious as the Board's brief discussion at the outset of its brief suggests. Dr. Lewis' characterization of the discipline in his Opening Brief was essentially accurate, in that, despite its extensive investigation of these five patients (who had been discovered via the CURES searches), "[t]he Board

largely, but not entirely, ruled in favor of Dr. Lewis with respect to these other patients, primarily finding only minor recordkeeping violations." (Opening Brief, "OB," p. 4).

On the whole, a careful reading of the Board's administrative Decision reveals that the Board considers Dr. Lewis to be a good and competent physician. (AR 1-26). Out of the literally hundreds of patients reviewed by the Board via its CURES search and pharmacy audits, the most the Board could come up with were a few relatively minor violations, primarily involving records, of patients that he knew well, and that caused no harm. (*See e.g.* AR 23, Legal Conclusion 9).

If *any* physician's records are scoured intently enough with sufficient determination, it is likely that at least some minor violations would be found. The Board's duty is not to punish physicians for any technical violation but rather to protect the public from physicians who deviate significantly from the standard of care. *See e.g. Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 786 (licensing statutes are nonpenal in nature). Imposing minimum protections for patient privacy would not unduly detract from that goal as demonstrated by the present case, where the absence of issues with prescribing practices was, for the most part, confirmed at the administrative hearing.

B. Summary of argument[2]

This Reply Brief addresses the arguments raised in the Board's Answer Brief, which are summarized at AB 2-4 and elaborated on at AB 16-47. As discussed herein, these arguments lack merit.

While the Board does not make the argument until relatively late in the Answer Brief (AB 3, 41), Dr. Lewis initially addresses the Board's contention that he has forfeited his right to challenge the CVS Pharmacy reports, obtained via the Board's general authority to audit pharmacies. (See OB 28-38). This issue bears early discussion because the pharmacy audits are pertinent to nearly all of the Board's arguments, as the privacy considerations raised by Petitioner apply with at least as much force, if not more, to the pharmacy audits than to the CURES reports. The Court of Appeal did not find that the issue had been forfeited on appeal but instead dealt with the issue very briefly and summarily. Dr. Lewis' failure to raise the issue at the administrative hearing was excusable because it was caused by confusing testimony of the Board's own investigator, who incorrectly testified initially that the document was another CURES report, and the Board should be estopped from arguing forfeiture. In any event, this Court

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[2] This section serves as a brief summary only. More detailed discussion of these issues with citations to the record occur in the Legal Discussion at pp. 16-39, *infra*.

has broad authority to consider issues of law and/or issues of great public interest, even if not raised below.

The Board's first contention in its Answer Brief is that Dr. Lewis lacks standing to pursue a claim for violation of the state constitutional right to privacy resulting from the CURES searches because "his interests do not align with those of his patients." (AB 2). To the contrary, Dr. Lewis (and physicians in general) must be able to assert their patients' privacy rights, as there is often no one else in a position to do so. Here, the CURES searches and pharmacy audits were performed before any of the patients were contacted, without their knowledge or consent. While it is true that some of the patients consented to release of medical records after the fact, none of those patients had complained to the Board about Dr. Lewis or volunteered to testify against him, and all of the other patients whose prescription records were examined-- who constitute the vast majority of those patients-- were never informed at all.

The Board next contends that, under the test set forth in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, the state constitutional right to privacy was not implicated because patients do not have a reasonable expectation of privacy as to CURES data on controlled substances, and the Board's examination of that data does not amount to a

serious invasion of the patients' right of privacy. (AB 2). In support of this argument, the Board relies on the fact that prescription drug information has historically been collected and that controlled substances are highly regulated. However, what the Board neglects to mention is that these historical practices have been of a much more limited scope in the past and that the present case also involves extensive inspection of prescription records of non-controlled substances via the pharmacy audits. Patients do have a reasonable expectation of privacy under these circumstances, and the invasions of privacy are potentially very serious, as they were in this case.

The Board argues that, even if the invasions of privacy herein implicated the patients' state constitutional privacy right, the Board's interest in that information is sufficient under *Hill* because of the need to "quickly ascertain whether that physician's negligence extends to his or her controlled substances prescribing practices, which present a special risk to patients." (AB 2-3). However, mere expediency should not be enough to justify the broad intrusive powers that the Board seeks.[3] Furthermore, the

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[3] As discussed in greater detail at pp. 13-16, *infra*, the Legislature has historically mandated a far more cautious approach to physician investigations, which suggests that the Legislature did not intend, pursuant to H&S Code section 11165, to grant the broad powers suggested.

argument does not help the Board with respect to the pharmacy audits, which broadly included non-controlled substances.

The Board contends that the Fourth Amendment issue was waived. (AB 3). That issue was, however, adequately raised at the administrative hearing; and, in any event, this Court has broad discretion to reach this issue because of its public importance. The Board also argues that Dr. Lewis cannot assert the Fourth Amendment because he does not have a "personal" right at stake. However, California law continues to permit Fourth Amendment rights to be vicariously asserted in non-criminal cases.

Finally, with regard to the application of the exclusionary rule (AB 3-4), the Board fails to persuasively distinguish *Dyson v. California State Personnel Bd.* (1989) 213 Cal.App.3d 711, cited in Petitioner's Opening Brief. Like the situation in *Dyson*, the present case is one in which the deterrent effect of the exclusionary rule is necessary to prevent the sort of pretextual searches that occurred here, particularly with respect to the pharmacy audits.

BACKGROUND

I. THE CURES SYSTEM IS MUCH MORE INTRUSIVE THAN THE HISTORICAL TRIPLICATE PROGRAM

The Board notes that "[t]he precursor to the modern CURES program dates back to 1939, when the State adopted its 'triplicate program'

to track the prescription and distribution of certain controlled substances." (AB 5). It is worth noting, however, that the triplicate program only applied to Schedule II medications, and did not apply to Schedule III or Schedule IV medications, unlike the current CURES system. *See e.g.* Stats.2003, c. 406 (S.B.151), § 11 ("Existing law provides ... that prescriptions for Schedule II controlled substances shall be prepared on triplicate prescription blanks issued by the Department of Justice"); *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1141, fn.1.

The present CURES system is significantly broader than the old triplicate system in that it also applies to Schedule III and Schedule IV medications. Cal. Health and Safety Code ("Cal. H&S Code") section 11165(a). Schedule II, III, and IV medications are specified in Cal. H&S Code sections 11055, 11056, and 11057, respectively.

But perhaps more importantly, the speed and ease by which the computerized CURES system may be searched raises more serious concerns about potential abuse than the triplicate system. Such concerns were raised in a concurring opinion in *Whalen v. Roe* (1976) 429 U.S. 589:

> What is more troubling about this scheme, however, is the central computer storage of the data thus collected. Obviously, as the State argues, collection and storage of data by the State that is in itself legitimate is not rendered unconstitutional simply because new

> technology makes the State's operations more efficient. However, as the example of the Fourth Amendment shows the Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it. The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.

Id. at 606-607 (Brennan, J., concurring; emphasis added).

Despite his concerns, Justice Brennan joined the majority opinion because *Whalen* did not, as the majority itself noted, "involve affirmative, unannounced, narrowly focused intrusions into individual privacy," but rather a challenge to the mere existence of such a computerized system. *Id.* at 604, fn.32. As a result, Justice Brennan noted that he could not say "that the statute's provisions for computer storage, on their face, amount to a deprivation of constitutionally protected privacy interests." *Id.* at 607 (Brennan, J., concurring).

Concerns about the pervasive nature of government snooping and increased surveillance and data collection were the driving force for the passage of the state constitutional privacy right, as this Court discussed in *People v. Privitera* (1979) 23 Cal.3d 697:

> [I]n *White v. Davis* (1975) 13 Cal.3d 757, 120 Cal.Rptr. 94, 533 P.2d 222, we observed "the

> moving force behind the new constitutional provision was a more focussed privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy." (*Id.* at p. 774.) As we further observed, "(t)he principal objectives of the newly adopted provision are set out in a statement drafted by the proponents of the provision and included in the state's election brochure," the beginning paragraphs of which we then quoted: " 'The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government 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. (P) At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.'" (13 Cal.3d at p. 774.)

Id. at 709 (emphasis added).

The quoted language indicates that the state constitutional right to privacy was specifically enacted to protect against unbridled government snooping into personal matters and highlighted the danger of computerization of records, which would allow for even greater intrusions upon personal privacy.

II. THE LEGISLATURE HAS PLACED LIMITATIONS ON MEDICAL BOARD INVESTIGATIONS OF PHYSICIANS

A. Screening via patient complaints

In addition, the California Legislature has traditionally provided for limitations on the Medical Board's investigative powers in order to ensure that such investigations are conducted in a fair and even-handed manner. As the Board itself notes, "Complaints related to quality of care generally are assessed by the Board's medical experts before they are assigned to an investigator. (Bus. & Prof. Code § 2220.08)." (AB 9, emphasis added). In the present case, the only patient complaint was from V.C., and that complaint did not raise any issues whatsoever regarding improper or abusive prescription of medications. (AR 81-84).

Nevertheless, based solely on V.C.'s complaint, the Board's investigator conducted a broad and invasive computerized CURES database search of all of Dr. Lewis' patients, followed by even more invasive pharmacy audits of all non-controlled prescriptions. (AR 1091). The investigator's motivations for doing so may very well not have been in good faith. The investigator's report states that Dr. Lewis had the temerity to refer to the investigator, Robin Hollis, as well as Board attorney Wendy Widlus and Board medical consultant Jill Klessig, M.D., as overweight, which may have led to the questionable and rather punitive request that he

be subject to an examination pursuant to Bus. & Prof. Code section 820 based on the belief that "he may be mentally or physically impaired" even though there was no evidence for such impairment. (AR 84, 87). These facts raise the specter of potential bias and abuse by Board investigators when dealing with individual physicians that they may find personally distasteful, which does not serve the public interest and diverts public resources away from cases that are more worthy of investigation.

In the present case, even though some of the patients consented to the release of their patient information, no patient (other than V.C., the sole complaining patient) testified on behalf of the Board, and at least one patient (W.G.) actually testified in favor of Dr. Lewis. (AR 924, 934: V.C. was the only patient who testified on behalf of the Board; AR 929: one or two patients were to testify for Dr. Lewis; AR 1024-1027: W.G. testified for Dr. Lewis and stated that his assessment of Dr. Lewis, on a scale of 1 to 10 with 10 being best, was "10 plus;" see also AR 13, Finding 49).

B. Other limitations on Board authority

The Legislature has placed the highest priority on investigation of complaints involving "[g]ross negligence, incompetence, or repeated negligent acts that involve death or serious bodily injury to one or more patients, such that the physician and surgeon represents a danger to the

public." Cal. Bus. & Prof. Code section 2220.05(a)(1). Investigations regarding excessive prescribing "without a good faith prior examination of the patient and medical reason therefor" are a lower priority (*id.*, subdiv. (a)(3)) and, as reflected in the Board's Decision, no such concerns were even involved in the present case, where all of Dr. Lewis' prescriptions were determined to have been made to long-standing patients with evaluated medical conditions which led to no harm. (AR 22, Legal Conclusion 9).

The authority that the Board seeks here is essentially the authority to freely examine the CURES database at any time, whether or not any complaints have been made or concerns raised, of any kind, regarding a physician's prescription of medications. The Board further seeks the authority to conduct supposedly routine pharmacy audits with regard to any such physician investigation. There is no indication that the Legislature intended to grant such broad authority. To the contrary, physician interests are expressly recognized by Health and Safety Code section 11165.1(a), which permits physicians to search the CURES database for treatment purposes, and by section 11165(e), which recognizes that physicians are "stakeholders" who may "assist, advise, and make recommendations on the establishment of rules and regulations necessary to ensure the proper

administration and enforcement of the CURES database."

LEGAL DISCUSSION

I. DR. LEWIS HAS NOT FORFEITED HIS CHALLENGE TO THE PHARMACY AUDIT

Because many of Dr. Lewis' arguments, with respect to the CURES searches, apply with at least as much force, if not more so, to the results of the general pharmacy audit, Dr. Lewis initially addresses the Board's contention that he has forfeited his right to challenge the report resulting from that audit, even though that argument was not made until relatively late in the Answer Brief. (AB 41).

A. The issue was addressed by the Court of Appeal

The Court of Appeal did not find that this issue had been forfeited and, in fact, briefly addressed this issue in its opinion. *See e.g.* 172 Cal.Rptr.3d 491, 507 ("As a preliminary matter, there is a diminished expectation of privacy in the highly regulated area of prescription drugs, as a warrantless search of a patient's pharmacy records is statutorily authorized. (Bus. & Prof.Code, § 4081, subd. (a).) There is no greater right to privacy in controlled substances prescription records stored in CURES than the privacy rights in the same prescription records housed at CVS or Rite Aid Pharmacy.") However, this brief discussion failed to adequately address Dr. Lewis' concerns.

B. The Board should be estopped from asserting forfeiture based on the confusing testimony of the Board's investigator at the administrative hearing

The Board contends that, because the issue of the pharmacy audit was not raised "during the challenged administrative proceeding [, it] cannot serve as the basis for later writ relief. (*Supra*, 35.)" (AB 41). However, the reason the issue was not raised during the administrative proceeding is a direct result of the confusing testimony of the Board's investigator. Because the Board bears much of the fault for the confusion, it should be estopped from asserting forfeiture.

The administrative hearing in the present case occurred over eight days, on February 13, 14, 15, 16, 17, 21, 22, and 23, 2012. (AR 2). The pharmacy report (which is dated December 16, 2009, constitutes 523 pages, and occurs as Exhibit II to the hearing) was not identified until the last day of hearing on February 23, 2012, during the testimony of Board Investigator Robin Hollis. Ms. Hollis initially identified Exhibit II as "a second CURES report for Dr. Lewis." (AR 1093). Ms. Hollis then expressed some confusion about the nature of Exhibit II (AR 1094-1095) then confirmed that Exhibit II was obtained "online... [via] the CURES program." (AR 1096). With respect to the street addresses set forth in Exhibit II, Ms. Hollis speculated that they were somehow obtained from

the D.M.V. (AR 1097-1099).

Ms. Hollis subsequently went on to admit, toward the end of the hearing, that Exhibit II did, in fact, appear to contain prescription records for non-controlled substances (AR 1116, 1126) and "appears to be something generated from a pharmacy." (AR 1123). She then recalled ordering a "physician profile from C.V.S. Pharmacy" on November 1, 2010. (AR 1123). She further acknowledged that Exhibit II contained "all prescriptions filled at C.V.S. that were issued by Dr. Lewis during that three-year period." (AR 1124). She also admitted that she did not obtain any patient authorizations prior to requesting that information. (AR 1125).

Dr. Lewis had made his motion in limine at the administrative hearing objecting to the CURES reports on February 3, 2012, as reflected in the document attached to the Board's request for judicial notice. At that time, Dr. Lewis' counsel was not aware that Exhibit II was not, in fact, a CURES report; indeed, the declaration of his counsel in support of that motion stated, "Based on information and belief on December 16, 2009 the investigator on the case obtained a CURES report for Dr. Lewis which contained over 500 pages." (Declaration of Benjamin J. Fenton, p. 1, ¶ 5, attached to the Board's request for judicial notice filed on or about July 17, 2015). Dr. Lewis' counsel did not learn about the true nature of Exhibit II

until late on the last day of hearing on February 23, 2012, and, even then, only after confusing testimony by the investigator who initially testified that it was a CURES report. Under these circumstances, Dr. Lewis is not to blame for failing to raise a separate objection to the pharmacy report at the time he filed his motion in limine before the Board. The fact of the matter is that Dr. Lewis did object to that report (Exhibit II) in his motion in limine, even if it was incorrectly identified as a CURES report.

Despite this confusion, Dr. Lewis' petition for writ of mandate before the trial court did state, "In addition, the Board obtained, without authorization or notice, prescription records from various pharmacies for Dr. Lewis' patients." (AR 1141, ¶ 8). The petition went on to allege, "This conduct violated each of Dr. Lewis' right to privacy as protected by the California and U.S. Constitutions." (*Id.*, ¶ 9). Thus, the Board did receive notice at the trial court that Dr. Lewis intended to challenge the propriety of the pharmacy records. Nevertheless, Dr. Lewis admits that some confusion still persisted during the appeal, such that the issue of the pharmacy records was not squarely addressed until his reply brief.

Under these confusing circumstances, Dr. Lewis contends that the Board should be, as a matter of fairness, estopped from asserting forfeiture of the issue because it bears much of the responsibility for the confusion.

See e.g. City of Hollister v. Monterey Ins. Co. (2008) 165 Cal.App.4th 455, 487 ("The paradigmatic equitable estoppel arises where a prospective defendant induces a prospective plaintiff not to protect his rights, and when the plaintiff attempts to assert them, raises a defense that exploits the plaintiff's lapse.") Further, Dr. Lewis' original motion in limine at the administrative hearing did, in fact, challenge the propriety of Exhibit II.

C. The issue is one of law and is of great public interest

In addition, even assuming that the issue of the pharmacy audits was not properly raised below, this Court has discretion to hear matters asserted in the first instance when such matters are issues of law and/or of great public interest. "A party may raise a new issue on appeal if that issue is purely a question of law on undisputed facts." *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1141. Here, the facts are undisputed.

The issue is also one of great public interest, and so may be raised in the first instance before this Court. *See e.g. Hale v. Morgan* (1978) 22 Cal.3d 388, 394 (constitutional issue of great public interest reviewable in the first instance); *In re S.B.* (2004) 32 Cal.4th 1287, 1293 ("application of the forfeiture rule is not automatic. [citations]. But the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [citations].")

Under similar circumstances, in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, this Court noted that "[o]ur power of decision, of course, extends to the entire case (Cal. Rules of Court, rule 29.2(a))..... The petition for review that we granted squarely raised the issue... It is an issue of law that does not turn on the facts of this case, it is a significant issue of widespread importance, and it is in the public interest to decide the issue at this time. ... delaying until some future case an announcement of our conclusion that a tort remedy should not be recognized in the circumstances present here would be extremely wasteful of the resources of both courts and parties..." *Id.* at 6.

Here, the issue was raised in the Petition for Review granted by the Court; is an issue of law; is of great public interest; and failure to address the issue would be highly inefficient, as this issue is very likely to arise again in the near future. Dr. Lewis respectfully requests that this Court reach the issue.

II. THE BOARD'S ARGUMENTS ABOUT THE STATE CONSTITUTIONAL RIGHT TO PRIVACY ARE NOT PERSUASIVE

The Board's first argues that the state constitutional right to privacy was not violated in the present case (AB 16-34), but these arguments are not persuasive, in that Dr. Lewis does have standing to assert his patients'

rights; the patients do have a reasonable expectation of privacy that was seriously impaired; and the Board's interests are not sufficient in this case to justify the CURES searches or the subsequent pharmacy audit.

A. Dr. Lewis does have standing to assert his patients' rights

The Board contends, as a threshold matter, that Dr. Lewis does not have standing to assert the state constitutional privacy right on behalf of his patients. (AB 16-19). The Board argues a somewhat novel interpretation of prior cases where physician standing has been recognized: that such standing should only be permitted if the physician's interests "align" with those of his or her patients. (AB 17-19). This "alignment" language, however, is not expressly set forth in any of the cited cases.

Even assuming that this interpretation of the case law is accurate, Dr. Lewis' interests do, in fact, align with those of his patients. As noted, none of Dr. Lewis' patients, other than V.C., had any complaints whatsoever about their treatment, and at least one (W.G.) actually testified on Dr. Lewis' behalf. (AR 924, 929, 934, 1024-1027). The Board's investigation of the records of those patients constituted needless meddling into positive and beneficial relationships between Dr. Lewis and these patients. Further, the many other patients whose prescription records, both controlled and non-controlled, were obtained as a result of the pharmacy

audit, were never notified at all about this intrusion and, as a practical matter (AR 1099, 1125), Dr. Lewis was the only individual in a position to assert their rights on their behalf.

The Board cites *Pating v. Board of Medical Quality Assurance* (1982) 30 Cal.App.3d 608, for the proposition that a physician who has "allegedly victimized his patients... should not be permitted to assert their privacy rights for his own protection." (AB 18, citing *Pating*, 130 Cal.App.3d at 621). *Pating*, however, is readily distinguishable. There, a physician, Dr. Pating, was accused of falsifying medical records to indicate surgical procedures that were never actually performed with respect to ten patients. *Id.* at 612. The patients' records were obtained after the investigator, John Butler, met with two former physician colleagues of Dr. Pating, who informed Butler that Dr. Pating had resigned from hospital staff "after it was learned that numerous patients of his had undergone surgery that was not needed and that operative reports made by Pating recited events that had not actually happened during surgery." *Id.* at 613. The physician colleagues also provided Butler with detailed case summaries relating to ten named patients. *Id.*

Eight of the ten patients appeared at the hearing and "unequivocally and expressly waived the physician-patient privilege and right to privacy,

and agreed to the introduction of medical records." *Id.* at 615. Further, the court expressly found that the Board investigator, Butler, "engaged in no deliberate misconduct in obtaining the medical records and... proceeded in good faith" based on the information he had received from Dr. Pating's physician colleagues. *Id.* at 625. Under these circumstances, the court held that the physician would not be permitted to assert privacy rights on behalf of these ten patients.

In the present case, there was no evidence, at all, of wrongdoing by Dr. Lewis with respect to the five patients at issue other than speculation based entirely on the CURES records; and the good faith of the investigator was questionable at best as discussed at pp. 13-14, *supra*. While some of the patients later consented to the release of their information, none testified on behalf of the Board, and one actually testified in favor of Dr. Lewis. (see p. 14, *supra*). Unlike *Pating*, the patients other than V.C. were happy with their treatment and their interests fully aligned with those of Dr. Lewis. The broad interpretation of *Pating* urged by the Board-- that a physician subject to investigation regarding patient practices should never be allowed to assert the privacy rights on behalf of those patients-- goes much too far, and the Court should decline to adopt it. The cases that recognize physician standing to assert patient

privacy rights are more persuasive. *See e.g. Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1145.

B. The patients do have a reasonable expectation of privacy in their prescription records and the Board's intrusion was serious

The Board contends that patients do not have a reasonable expectation in privacy with respect to records of controlled substances and their use in investigations of possible physician misconduct, and that, in any event, the intrusion that took place in the present case was not 'serious.' (AB 20-25). The Board contends that "the long history of government regulation and the established and widespread practice of reporting to state regulatory agencies demonstrate that patients have no reasonable expectation of privacy that CURES information will be shielded from the Board." (AB 20). The Board cites to *Whalen v. Roe* (1976) 429 U.S. 589 for this proposition.

However, as noted (*supra* at pp. 10-11), *Whalen* only addressed the propriety of the existence of a computerized database, and not of any individualized searches of that database. *Id.* at 604, fn.32. As also discussed (*supra* at pp. 9-12), the old triplicate system only applied to Schedule II drugs and not to Schedule III and Schedule IV drugs. But perhaps most tellingly, the Board's argument fails completely with respect

to the CVS pharmacy audit, because the argument applies only to the [allegedly] "significantly diminished expectation of privacy in controlled substance prescription records." (AB 22, emphasis added).

With respect to the CVS pharmacy report, the Board contends that those records were voluntarily provided by the pharmacy. (AB 42). The record is ambiguous as to whether these records were voluntarily produced by the pharmacy. (AR 104-105, referring to "patient profiles" from CVS pharmacy as well as "a pharmacy audit of CVS pharmacy.") In any event, given the Board's broad authority to conduct such audits at will pursuant to Bus. & Prof. Code section 4081, the alleged "voluntariness" of the pharmacy's compliance is suspect at best, and, as discussed in Petitioner's Opening Brief, such broad pharmacy audits are justifiable as part of routine administrative audits of pharmacies, and not as a pretext for individualized investigation into alleged physician misconduct. (OB 34-38). The pharmacy, which itself has no privacy interest in the prescription records and whose interests do not "align" with those of the patients in any way, has no incentive whatsoever to assert the patients' interests on their behalf, unlike a treating physician like Dr. Lewis.

The Board further contends that prescription records, in general, are entitled to substantially less protection than complete medical records.

(AB 22-23). However, while it is true that prescription records alone are not as detailed as full medical records, considerable private information is still contained in prescription records-- for both controlled substances and non-controlled substances. As a simple example, medications pertaining to treatment of venereal disease or HIV are highly sensitive and private, not to mention medications that provide obvious insight into numerous other patient medical conditions. With respect to HIV status, the Legislature has recognized a privacy right. *See e.g.* Cal. H&S Code 120975; *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1140 ("There can be no doubt that disclosure of HIV positive status may under appropriate circumstances be entitled to protection under article 1, section 1. The condition is ordinarily associated either with sexual preference or intravenous drug uses. It ought not to be, but quite commonly is, viewed with mistrust or opprobrium.")

When making requests for release of patient records, the Board is required to narrowly tailor its request to those records that "are 'relevant and material' to the subject under inquiry." *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1148; *see also Bearman v. Superior Court* (2004) 117 Cal.App.4th 463, 468-469. When investigating claims of improper prescribing, for example, the Board "has no cognizable interest in viewing the records of patients whose prescriptions were properly issued. ... That

means that the scope of the administrative warrants must be carefully tailored..." *Id.* at 1148-1149. Here, there was no indication that the requests made to the patients were so narrowly tailored; rather, blanket requests were made for the entirety of those patient records..

Even with respect to the patient releases obtained, there is considerable reason to believe that these were not made in an informed manner, as patients, unrepresented by legal counsel, will typically not fully appreciate the significance of such requests and will tend to assume that the Board must have some legitimate suspicion of wrongdoing (when, in fact, it had none, in this case). The fact that the patients, here, were actually satisfied with their treatment by Dr. Lewis and did not testify against him (with the exception of the sole complaining witness, V.C.) indicates the patients' lack of appreciation of the intrusive nature of the Board's actions herein. The intrusion is all the more offensive with respect to the CVS Pharmacy report, which pertained to <u>all</u> prescriptions for all of Dr. Lewis' patients, most of whom never consented to, or were even aware of, the Board's intrusion.

It is not the case that Dr. Lewis' theory is that "a constitutional claim would lie any time a state agency provided personal information about a citizen to another agency acting within the scope of its jurisdiction unless

the agency obtained a warrant or subpoena." (AB 24-25). Dr. Lewis' theory is a narrow one pertaining to patient medical history or current medical condition, which are recognized as particularly sensitive information, as opposed to mere contact information. *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 372.

As this Court recognized in *Hill*, the purpose of the state constitutional privacy right is to "prevent[] government and business interests from collecting and stockpiling unnecessary information about us and or misusing information gathered for one purpose in order to serve other purposes or to embarrass us." *Hill, supra*, 7 Cal.4th at 27 (emphasis added). The improper use of the personal information in particularized investigations is the misuse objected to here.

C. The Board's interests in expediency do not outweigh the patients' privacy interest

The Board next contends that, even if *Hill* applies to the present case, the Board would still prevail because of the Board's interests in expediency of investigations of controlled substances. (AB 25-34). However, expediency is not and should not be sufficient ground to run roughshod over privacy rights.

The Board contends that Dr. Lewis' opening brief incorrectly stated the applicable standard in this case as one requiring a "compelling interest"

with the "least intrusive means" of protecting the public. (AB 25-28). The Board instead contends that the applicable test is a general balancing test that does not require the "least intrusive means" of protecting the patients' privacy interest. (*Id.*) Dr. Lewis maintains that his reading of the case law was a reasonable one, but that, even if the general balancing test that the Board asserts is applicable, Dr. Lewis would still prevail.

With respect to controlled medications, the Board essentially argues that it should be given free reign to search the CURES database at will, regardless of whether it has any cause to do so, in order to protect the public health and safety against possible misuse of controlled substances. (AB 29-34). Dr. Lewis contends, in response, that mere expediency of investigation should not be a sufficient justification to totally ignore patient privacy rights. Dr. Lewis' proposed alternative-- that the Board be able to justify such a search with some sort of prior showing of reasonable suspicion or good cause-- would not unduly curtail the Board's ability to investigate legitimate concerns about physician prescription practices. To the contrary, it would help ensure that Board investigations were based on legitimate quality of care concerns, and not a result of bad faith, arbitrariness, or spite, which may very well have been the case here.

The concerns about expediency are somewhat exaggerated.

Obtaining a court order to obtain records based on affidavits is not an unduly onerous requirement and would delay matters by probably no more than weeks at the most. Alternatively, a more expedited system might involve obtaining a 'warrant' analogous to those obtained in criminal proceedings, which requires a measure of judicial oversight and leaves a paper trail that can be subject to later challenge if not justified. Further, the Board has the authority to impose interim suspensions under Government Code section 11529 if there is evidence of imminent danger to the public.

The fact that the Administrative Law Judge largely found in favor of Dr. Lewis belies the Board's contention that "[i]n this case... it was through review of CURES reports that Lewis' deviation from the standard of care in his prescribing practices was detected." (AB 32). Rather, the events that unfolded in the present case are an example of the sort of abuse that can result if the Board's unfettered discretion is not constrained by the courts.

This consideration is even more applicable to the pharmacy records, which extended to non-controlled medications. The Board's brief fails to seriously address the fact that the pretextual pharmacy audit in the present case amounted to a serious violation of the limitations placed on

"inventory" or administrative searches by the U.S. Supreme Court. (OB 34-39; AB 43). The various asserted concerns about the public interest in regulating controlled substances are far less compelling with respect to the pretextual use of general pharmacy audits, which include all non-controlled prescriptions as well.

III. DR. LEWIS' FOURTH AMENDMENT CHALLENGES HAVE NOT BEEN FORFEITED, CAN BE ASSERTED VICARIOUSLY, AND DO HAVE MERIT

The Board contends that Dr. Lewis' Fourth Amendment claim has been forfeited by failure to raise the claim at the administrative level, that the claim cannot be made vicariously, and that it does not have merit. (AB 34-40). However, these arguments fail.

A. Dr. Lewis did not forfeit the Fourth Amendment claim

The Board concedes that, at the administrative level, Dr. Lewis referred to "violations of fundamental privacy provisions guaranteed under state and federal law," but contends that his "passing reference" to federal law without citation to legal authority was not sufficient to preserve his Fourth Amendment claim. (AR 35).

There are several reasons to reject the Board's argument. First, Dr. Lewis' reference to the privacy provisions under the federal constitution was not a "passing" one, but plainly put the Board on notice that he was

relying not only on the state constitution, but on the federal constitution as well. Indeed, the Board admits that, in the search and seizure context, the same basic scope of protections are provided by both the state constitutional right of privacy and the Fourth Amendment of the U.S. Constitution. (AB 40, fn. 14, citing *People v. Crowson* (1983) 33 Cal.3d 623, 629). The close relationship between the two privacy rights (state constitutional privacy right, and federal Fourth Amendment right) is such that Dr. Lewis' citation to authority pertaining to the state constitutional right, taken together with his direct reference to the federal law, is sufficient to preserve the issue.

The cases cited by the Board are not to the contrary. Thus, in *People v. Stanley* (1995) 10 Cal.4th 764, this Court criticized a criminal defendant's very general reference "to the statement of facts contained in his opening brief, apparently assuming this court will construct a theory supportive of his innocence and inconsistent with the prosecution's version of the evidence." *Id.* at 793. Under such circumstances, it was completely understandable that the Court would dismiss the argument. Similarly, in *Ochoa v. Pacific Gas & Elec. Co.* (1998) 61 Cal.App.4th 1480, the court declined to address an issue that was fleetingly alluded to "within a single brief paragraph... unsupported by pertinent or cognizable legal authority."

Id. at 1488, fn. 3. Here, Dr. Lewis cited numerous authorities regarding the state constitutional right to privacy which are necessarily, by extension, applicable to the federal right as well. (cf. AB 40, fn. 14).

B. Dr. Lewis may assert a Fourth Amendment claim on behalf of his patients

The Board then cites *Rakas v. Illinois* (1978) 439 U.S. 128, for the proposition that an individual may not assert a third party's Fourth Amendment rights "vicariously," thereby barring Dr. Lewis from raising the Fourth Amendment issue in this case. (AB 35-37).

While it is true that *Rakas* held that, for purposes of federal law, Fourth Amendment rights are "personal" to the individual, it is also true that California courts have historically applied Fourth Amendment rights more broadly than the federal courts, as already discussed at length in Petitioner's Opening Brief (OB 41-43).

In re Lance W. (1985) 37 Cal.3d 873, 890, noted that, by enacting Proposition 8, the people of the State of California eliminated the common law vicarious liability rule only with respect to criminal proceedings, and made the exclusionary rule in California criminal proceedings coextensive with, and not in excess of, the Fourth Amendment. However, the Court expressly noted that Proposition 8 was limited only to criminal cases; and

that, to the extent that the exclusionary rule might apply to non-criminal cases, the vicarious exclusionary rule still had force. *Id.* at 893.

The Board contends that "*Lance W.* explained that the exclusionary rule generally does *not* apply in civil matters. (*Lance W.*, *supra*, at pp. 892-893). (AR 37, italics in original). However, *Lance W.* did note that California precedent "has extended the rule ... to proceedings so closely identified with the aims of criminal prosecution as to be deemed 'quasi-criminal," and that the primary purpose of the rule is "deterrent in nature." *Id.* at 892. As discussed in the Opening Brief (OB 43-47) and further herein at section IV. at pp. 37-39, *infra*, the present case does involve deterrence and pretext considerations sufficiently direct as to justify the application of the exclusionary rule in this case.

C. The Board's actions were not consistent with the Fourth Amendment

The Board argues that, even if Dr. Lewis were permitted to assert his patients' Fourth Amendment rights on their behalf, the CURES and pharmacy searches herein complied with the requirements of the Fourth Amendment. (AB 37-40).

In support of this argument, the Board primarily relies on the "closely regulated business exception" set forth in such as *New York v. Burger* (1987) 482 U.S. 691 (AB 38-39). This argument was already

adequately disposed of, for the most part, in Petitioner's Opening Brief. (OB 29-30, 35-37).

The Board also attempts to distinguish *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Administration* (D.Ore. 2014) 998 F.Supp.2d 957 (*Oregon PDMP*). (AB 39-40). Contrary to the Board's discussion, *Oregon PDMP* correctly noted that the applicability of the Fourth Amendment to "affirmative, unannounced, narrowly focused intrusions into individual privacy" was an unanswered question in *Whalen v. Roe* (1976) 429 U.S. 589, 604, fn.32 (see also discussion at pp. 10-11, *supra*). *Oregon PDMP*, *supra*, 998 F.Supp.2d at 964.

The district court noted:

> [T]he PDMP's records are "more inherently personal or private than bank records," and are entitled to and treated with a heightened expectation of privacy. [citations]. Secondly, patients and doctors are not voluntarily conveying information to the PDMP. 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 choice.

Id. at 967 (emphasis added).

Nor is it a meaningful distinction that the Oregon statute expressly required a court order for law enforcement agencies to obtain data from the

PDMP, whereas the California statute contains no such requirement. That requirement was not relied on by the court in concluding that the patients had a reasonable expectation of privacy in their prescription records, under the Fourth Amendment:

> It is clear from the record that each of the patient intervener has a subjective expectation of privacy in his prescription information, as would nearly any person who has used prescription drugs. Each has a medical condition treated by a Schedule II-IV drag and each considers that information private. Doctor James Roe also has a subjective expectation of privacy in his prescribing information. See Decl. Dr. James Roe (describing his duty of confidentiality to his patients and how law enforcement has made doctors, including himself, reluctant to prescribe schedule II-IV drugs where medically indicated). By reviewing doctors' prescribing information, the DEA inserts itself into a decision that should ordinarily be left to the doctor and his or her patient. Because each of the individual intervener has a subjective expectation of privacy, the question becomes whether intervener' subjective expectations of privacy are expectations that society is prepared to recognize as reasonable.

Id. at 964 (emphasis added).

IV. DR. LEWIS IS ENTITLED TO SUPPRESSION

Finally, the Board argues that Dr. Lewis is not entitled to suppression of the CURES reports or the pharmacy report under either the

state constitutional right to privacy or the federal Fourth Amendment. (AB 43-47). However, the Board fails to address the serious issues regarding potential abuse, and the need for deterrence, raised by the pretextual nature of the search in the present case.

As Dr. Lewis discussed in his Opening Brief, this case is analogous to that of *Dyson v. California State Personnel Bd.* (1989) 213 Cal.App.3d 711, where the exclusionary rule was applied to an administrative proceeding, for the precise reason that the key concern of deterrence of unfettered abuse of authority would be furthered. (OB 43-47).

Illinois v. Krull (1987) 480 U.S. 340, cited by the Board (AB 44), does not affect the outcome of this case. In *Krull*, the police officer therein acted in "objectively reasonable reliance upon a search warrant issued by a neutral magistrate." *Id.* at 342. The U.S. Supreme Court noted that "[t]he application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant." *Id.* at 348. In other words, the paramount consideration is the deterrent effect on potentially abusive conduct.

Here, there was manifestly abusive conduct with respect to the CVS

data presents a closer issue, Dr. Lewis contends that exclusion is applicable in this case, where there was no compelling reason whatsoever to investigate Dr. Lewis' controlled substance prescribing records.

CONCLUSION

Based on the foregoing, the Opening Brief, and the appellate record in this case, Dr. Lewis respectfully requests that the decision of the Court of Appeal be reversed.

Dated: September 22, 2015

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By: 

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Dated: September 22, 2015

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