The Constitution Guarantees Doctor-Patient Confidentiality in Criminal Cases

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Medical testimony and medical records are sometimes useful in proving a crime. Fraudulent invoices from crooked doctors are used to prove Medicare fraud. Bullets are removed surgically and used to place the accused at the scene of an incident. Toxicology reports in treatment records are used to prove drug possession and DUI.

Allowing police and prosecutors any access to a criminal suspect’s private medical information is bad public policy and violates state and federal guarantees against compelled self-incrimination. With the coming centralization of medical records and biometric national ID/health care cards, this issue must be revisited and resolved in favor of patient privacy and civil rights.

Suppression of medical secrets from use as trial evidence is an insufficient remedy: the initial disclosure of this very private information to police is wrong and must be stopped. Support for this argument is found in both the Fourth Amendment guarantee against unreasonable search and seizure, and the Fifth Amendment guarantee against compelled self-incrimination.

Privacy and Medical Data: The Fourth Amendment

The first thing a health care provider does is get a history from the patient: “Tell me what happened.” It is considered one of the most important parts of treating and diagnosing an illness or injury. At this point in her treatment, a patient must feel free to share every important detail with her doctor, regardless of how embarrassing or inculpatory it is. A careful doctor will always make a written record of what the patient has to say about the cause of the problem.

If patients are to receive effective care, the confidentiality of this conversation must never be compromised by allowing a search of the doctor’s records. The Supreme Court of Georgia explained this policy in 2000: “Permitting the State unlimited access to medical records for the purposes of prosecuting the patient would have the highly oppressive effect of chilling the decision of any and all Georgians to seek medical treatment.”

This chilling effect could be deadly: imagine a patient who has just overdosed on heroin, but who is afraid to tell the doctor what he took for fear of going to jail.

In Doe v. State, Justice Banke, in dissent, commented on the unreasonableness of a police search for medical evidence: “What could be more outrageous than the prospect of law enforcement officers rummaging through the confines of a legitimately

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1 King v. State, 272 Ga. 792 (2000);
run hospital in an attempt to locate a blood, urine or tissue sample left behind by a suspect who was once treated there?"

It should be unconstitutional for police to search for medical records. Patient privacy protections abound in our law and culture. The federal Health Insurance Portability and Accountability Act (HIPAA), 42 USC 210 et seq., prohibits release of medical records without consent. Federal administrative law suggests that the standard for allowing law enforcement to obtain private medical records, after a hearing, should be good cause, consisting of a medical emergency, “an extremely serious crime,” or “the need to avert a substantial risk of death or serious bodily harm.”

State health care and professional regulations prohibit the disclosure of medical, mental health, and substance abuse treatment records without the patient’s consent or a court order. O.C.G.A. § 24-9-47 strongly prohibits the disclosure of AIDS confidential information by any person to any other person, providing that no person or legal entity shall “be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity.”

The weight of academic opinion also favors legal protection of patient privacy. “The virtues of physician-patient confidentiality can be traced as far back as the fourth century through the Hippocratic Oath. . . . the United States Supreme Court observed that the Constitution protects individuals’ rights to ‘avoid disclosure of personal matters’ relating to medical information. . . . [M]edical information is ‘precisely the sort [of information] intended to be protected by penumbras of privacy.” Doctors who take the Hippocratic Oath swear that “All that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal.”

On the other hand, there is no testimonial Doctor-Patient privilege in Georgia, and scant authority preventing the initial disclosure of private medical information via police search warrant or subpoena. It is far from settled law in Georgia that the disclosure of private medical information to law enforcement without the patient’s consent is unconstitutional. In fact, the Georgia Supreme Court, in King v State, ruled that, “[b]ecause existing search warrant procedures provide adequate protections for an accused's privacy rights under the Georgia Constitution, we hold that the State does not

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4 O.C.G.A. §§ 24-9-40, 37-3-1, and 37-7-1
7 Oddly, we have a Veterinarian Privilege prohibiting the disclosure of your dog’s medical records without your consent. O.C.G.A. 24-9-29
8 On February 8, 2010, the author and William Healan, III argued that seizure of a defendant’s hospital blood alcohol test via search warrant is prohibited by OCGA 17-5-21(a)(5) (private papers exemption). The specific question was certified from an adverse Court of Appeals ruling. At the time of this writing, no opinion had issued. See Brogdon v. State, #S09G2058 (2009)
violate a defendant’s right to privacy and due process in obtaining a search warrant for personal medical records without notice or a hearing.⁹

Compelled Admissions in Medical Data: The Fifth Amendment

Until 1967, a search warrant was illegal if it sought “mere evidence.”¹⁰ The reason for this rule was that it was considered unfair to take evidence from a man’s home and use it against him in court.

The “mere evidence rule” was enforced for the first 191 years of our nation’s history. In *Warden v. Hayden*, however, the court ruled that evidence of a crime, including a weapon and clothing connecting the suspect to the scene, could be seized during an otherwise lawful search of the suspect’s home. The issue below was whether the government had a superior property interest in the items, justifying the seizure under previous law. The court abandoned the comparison of property rights approach and changed the balancing test to “law enforcement interests vs. privacy rights.” The items were held to be seizable even though they were “mere evidence,” due to the government’s strong interest in law enforcement. In so ruling, however, the court left open the possibility that some categories of evidence could never be seized lawfully: “This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.”¹¹

Confidential medical records fit into this category, and should be beyond the scope of any police search warrant or subpoena. The reason is that we are each compelled to disclose incriminating information to our health care providers that we normally would remain silent about. Compelled admissions and confessions are inadmissible. A search that seeks involuntarily provided, self-incriminating evidence is per se unreasonable.

Georgia law extends this protection to “evidence” rather than just testimony.¹² The proper rule would thus keep all of a defendant’s medical records out of evidence as well as keeping her doctor from testifying against her at trial.

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⁹ *King v State*, 276 Ga. 126 (2003), citing a Montana case and a Pennsylvania case. It is important to note that the search warrant in King was “narrowly drafted” to seek “only the medical records related to the hospital's treatment of King on the night of his accident.” These warrants are frequently overbroad. Also, the King court noted that the search warrant affidavit was legally sufficient to establish probable cause. Affidavits must show, using facts, that a fair probability exists that the items sought will be found at the specific location given. Police officers rarely possess the expertise necessary to establish that a given medical test will be found in a given patient’s file. A search warrant is a permission slip to seize an item already known to exist at a given location; it is not a discovery tool.

¹⁰ *Warden v Hayden*, 387 US 294 (1967)

¹¹ *Hayden*, supra, 387 U.S. at 303.

¹² OCGA 24-9-20(a) states that “No person who is charged in any criminal proceeding . . . shall be compellable to give evidence for or against himself.”
Not every relationship is confidential and deserves constitutional protection. The key is compulsion. A person shares his secrets with an attorney because he must do so to defend himself in court. A patient tells his doctor to conduct blood tests, and shares with his doctor every detail of her behavior (lawful or otherwise) because she must do so to recover from a painful or debilitating injury or illness. A penitent sinner confesses to his priest or minister in order to save his soul from perdition, believing it his sacred duty.

It is no coincidence that these three historically revered confidential relationships are frequently made privileged by state law (Georgia recognizes attorney-client and priest-penitent privilege, but not doctor-patient privilege). These are culturally valuable relationships which sometimes require a person to share incriminating secrets. Those secrets, once known, must be treated as if the defendant had kept them to himself - which he has the constitutional right to do. A waiver of Fifth Amendment rights cannot be inferred in these situations.

Conclusion

A citizen being treated for an injury or illness has the right to remain silent about possible criminal behavior. Breaking that silence out of necessity, in order to receive proper medical care, is not a voluntary waiver of rights against self-incrimination. Seizing documents containing inculpatory information provided in order to obtain medical treatment is an unreasonable violation of privacy rights. No one should have to refuse medical treatment to avoid going to jail.

The State should be prevented from obtaining a DUI suspect’s private medical records in order to peek at a blood alcohol test administered as part of routine treatment, or a defendant’s private psychiatric records in order to gain information about an alleged crime. Existing statutory safeguards surrounding the issuance of search warrants and subpoenas are insufficient to protect the initial disclosure of medical secrets. A constitutional-level protection of medical privacy against police inspection can be argued, and would be preferable.