

22-6642

No. _____

In The
Supreme Court of the United States

Leihinahina Sullivan - Petitioner

VS.

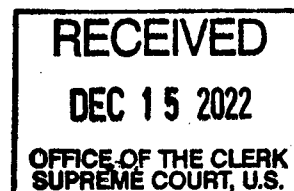
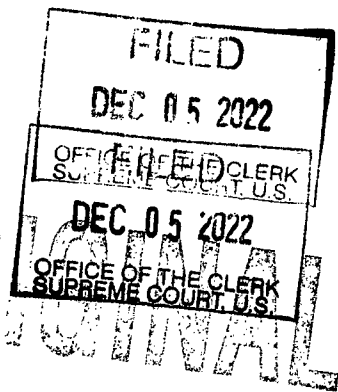
Federal Bureau of Prisons; United States
Attorney, District of Hawaii, Defendants - Appellees,
and Estelle Derr, Warden, in her Official Capacity;
Rebecca A. Perlmutter, Assistant United States Attorney
in her Official Capacity; Bureau of Prisons Honolulu
Federal Detention Center; Kenji Price, in his Official
Capacity; Timothy Rodrigues, Employee; John Does, 1-100,
Respondent(s)

On Petition For A Writ of Certiorari To

United States Court of Appeals For The Ninth Circuit

Petition For Writ of Certiorari

Leihinahina Sullivan
% FDC Honolulu #09779122
PO Box 30080
Honolulu, Hawaii 96820



Questions Presented

- (1) Did Respondents violate the Privacy Act of 1974, 5 U.S.C. § 552 a(b), and my rights under the Fourth and Fourteenth Amendments, when I was pretrial detained at a Bureau of Prisons ("BOP") facility, not convicted of any crime, when Honolulu Federal Detention Center employee released 177-pages of my medical and psychiatric records to United States Attorneys District of Hawaii employee Rebecca Ann Perlmutter without first obtaining informed consent from me or a judicial order?
- (2) Did Respondents violate my right to personal privacy when releasing 177-pages of my medical and psychiatric records from Bureau of Prisons to United States Attorneys District of Hawaii which disclosed personal matters and my interest in independence in making certain kinds of important decisions, which those medical and psychiatric records were used to continue to pretrial detain me, an impermissible invasion of privacy?
- (3) Whether pretrial detainees have a constitutional right to keep medical & psychiatric records private, a continued viability of right to privacy recognized in Whalen v. Roe, 429 U.S. 589, 599, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977) and Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977)?

List of Parties

All parties appear in the caption of the case on the cover page.

Related Cases

Leihinahina Sullivan v. Federal Bureau
of Prisons, et. al

USAP 9th Cir. No. 21-16527

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In The
Supreme Court of The United States
Petition For Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to
review the judgment below.

Opinions Below

For Cases from federal courts:

The opinion of the United States court of appeals appears
at Appendix A to the petition and is reported at
Leihinahina Sullivan v. Federal Bureau of Prisons, et. al

United States Court of Appeals For The Ninth Circuit
2022 U.S. App. LEXIS 28670
No. 21-16527
October 13, 2022, Submitted, San Francisco, CA

The opinion of the United States Federal District Court For
The District of Hawaii appears at Appendix B to the
Petition and is reported at Leihinahina Sullivan v. Federal
Bureau of Prisons, et. al, United States District Court For The
District of Hawaii, 2021 U.S. Dist. LEXIS 149662 Civ. No. 20-00269
August 10, 2021 Decided / Filed

Jurisdiction

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was October 17, 2022.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 23, 2022, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

- (1) Privacy Act of 1974, 5 U.S.C. § 552(a)
- (2) Fourth Amendment of the United States Constitution
- (3) Fourteenth Amendment of the United States Constitution
- (4) 28 U.S.C. § 1251

Statement of Case

Pretrial detainees have a constitutional right to keep medical and psychiatric records private, a continued viability of right to privacy recognized in Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed. 2d 64 (1977) and Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed. 2d 867 (1977).

There is no dispute that on May, 2021 the Bureau of Prison ("BOP") transmitted my medical and psychiatric records to the United States Attorney's Office for the District of Hawaii, without informed consent, or my consent, which deprived me of my rights to a fair trial in CR 17-104. I claimed that it violated (1) The Privacy Rights Act § 552a(b) and (g)(1)(D) based on the BOP's disclosure of my medical and psychiatric records to the U.S. Attorney's Office ("Count I") 177 pages and (2) violation of my Fourth and Fourteenth Amendment rights for the same conduct ("Count II"). I requested actual damages, pursuant to 552a(g)(4)(A); reasonable attorneys' fees and costs; monetary damages for Count II, and any other appropriate relief.

In my Motion, I argued that Respondents violated my rights under the Privacy Act, the Fourth Amendment, and the Fourteenth Amendment because the disclosure did not fall under any exception to the Privacy Act's prohibition on disclosure of confidential medical and psychiatric information. I also sought an injunction for Respondents to cease sharing my medical and psychiatric information without first obtaining a subpoena, court order, or informed consent.

Respondents argue the BOP is entitled to summary judgment because the BOP was authorized to share my medical information under the need to know exception and the routine use exception to the Privacy Act. They also argue the U.S. Attorney's Office is entitled to summary judgment because Plaintiff cannot establish damages or a willful violation of the Privacy Act, and that claims are barred by sovereign immunity, and that my injunctive relief be denied.

I am proceeding pro se, and therefore my filings are to be liberally construed. See Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed. 2d 1081 (2007) (per curiam) (citation omitted).

Direct Concise Argument

I. Section 552a(b) provides in relevant part:

No agency shall disclose any record which is contained in system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be -

(1) to those officers and employees of the agency which maintains the

record who have need for the record in the performance of their duties;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section.

"A successful claim under the Privacy Act requires a showing (1) the agency disclosed information contained within a system of records; (2) the disclosure was improper; (3) the disclosure was intentional or willful; and (4) the plaintiff was adversely affected by the disclosure." Tungjunyatham v. Johanns, 500 F. App'x 686, 689 (9th Cir. 2012) (citing Swenson v. U.S. Postal Service, 890 F.2d 1075, 1077 (9th Cir. 1989)).

With respect to recourse, the Privacy Act provides that:

whenever any agency

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection. Section 552a(g)(4).

Further,

(1) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of -

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court. Section 552a(g)(4).

There is no dispute that the BOP transmitted my medical and psychiatric records to the U.S. Attorney's office. As a threshold issue, the U.S. District Court for the District of Hawaii claims I waived whatever privacy interest I had in my medical and psychiatric when I filed a motion to be released on bail arguing my need to prepare for trial, untimely discovery, and the risk of exacerbation of my asthma, depression, and anxiety justified my request as a pro se defendant to home confinement during the outbreak of COVID.

The District Court for the District of Hawaii and the United States Court of Appeals For The Ninth Circuit both cited to Seaton v. Mayberg, 610 F.3d 530, 534-35 (9th Cir. 2010) holding that prisoners do not have a constitutionally protected expectation of privacy in prison treatment records when the [government] has a legitimate penological interest in access to them, "at least in part because "[p]risoners need access to prisoners' medical records to protect prison staff and

other prisoners from communicable diseases and violence, and to manage rehabilitative efforts." They reasoned that BOP and the U.S. Attorney's Office need for my medical records falls under the need to manage rehabilitative efforts, in the sense they were required to respond to my claim that my declining health, among other factors, required my release to home confinement. First, I am a pretrial detainee and there was no rehabilitative efforts as in Seaton, he was a sex offender convicted and seeking to be released to the community after years of sex treatment while serving his sentence. Therefore, informed consent or a judicial order should have been sought as I am a pretrial detainee not yet convicted of a crime. (See Bell v. Wolfish, 99 S.Ct. 1861 (1979) pretrial detainees retain constitutional rights protection under the Fourteenth Amendment, the protection of the due process clause against additional deprivation of life, liberty, or property without due process of law).

A. The Need-to-Know Exception Does Not Apply in My Case

As BOP and U.S. Attorneys Are Not of the Same Agency And Medical & Psychiatric Records Are Such That It Is A Fundamental or Implicit Right of Personal Privacy Under The Constitution (Roe v. Wade, to the Right of Privacy Its Origin in the Fourteenth Amendment's Concept of Personal Liberty) Id. 410 U.S. 113, 152, 35 L. Ed 2d 147, 93 S.Ct. 705 (1973)

BOP and United States Attorneys are two separate agencies under the Department of Justice, therefore informed consent or a judicial order should have been obtained, and the Need-to-Know Exception does not apply.

B. Routine Use Exception Does Not Apply § 552a(b)(3) As My Medical & Psychiatric Records Was Not Being Used To Provide Care For Me Rather To Continue to Pretrial-Detain Me Which Is Not Compatible With the Purpose For Which It Was Collected

In the context of § 552(b)(3) "routine use" is defined in § 552a(a)(7), which states, "the term 'routine use' means, with respect to disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." See § 552a(a)(7). Keeping a pretrial detainee incarcerated is not why medical and psychiatric records are collected, it is to provide care, therefore, not compatible with the purpose for which it was collected. Informed consent or a judicial order should have been obtained, and routine use exception does not apply.

II. Constitutional Rights

I alleged violations of the Fourth and Fourteenth Amendments in Count II of my Second Amended Complaint.

A. Fourth Amendment Right of Privacy

The United States Supreme Court has not made it clear whether the Fourth Amendment protects informational privacy in medical and psychiatric records. "[A] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Roe v. Wade, 410 U.S. 113, 152, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). In Roe v. Wade, the Supreme Court placed the origins of that right in the fourteenth amendment's concept of personal liberty. Id. at 153; Whalen v. Roe, 429 U.S. 589, 598-99 n. 23, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977) (Court in Roe v. Wade determined that despite earlier opinions placing right to privacy in penumbra of other fundamental rights, the right is founded in fourteenth amendment concept of personal liberty). In Whalen v. Roe the Supreme Court of the United States has indicated that the right of privacy also encompasses an "interest in avoiding disclosure of personal matters," Whalen, *supra*, 429 U.S. at 599. Zones of privacy are created as well by specific constitutional guarantees, such as those of the first, fourth, and fifth amendments. See Paul v. Davis, 424 U.S. 693, 712-713, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976) (citing Palko v. Connecticut, 302 U.S. 319, 325, 82 L. Ed. 288, 58 S. Ct. 149); Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 2844, 92 L. Ed. 2d 140 (1986) (cases indicate that zones of privacy may be created by specific guarantees; other privacy cases deal generally with substantive aspects of the fourteenth amendment); cf. Griswold v. Connecticut, 381 U.S. 479, 483-84, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965) (right of privacy in one's associations is a zone of privacy created by first amendment, other guarantees create other zones of privacy); Katz v. United States, 389 U.S. 347, 350 & n. 5, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). Remaining unclear is the relationship of these zones of privacy, created by specific guarantees of the Bill of Rights, to the right of privacy found, in Roe v. Wade, to have its origin in the fourteenth amendment's concept of personal liberty. Cf. Griswold v. Connecticut, *supra*, 381 U.S. at 484-85 (in finding that statute prohibiting use of contraceptives violated constitution, Court relies on zone of privacy created by several constitutional guarantees, citing to first, third, fourth, fifth, and ninth amendments); DeMasi v. Weiss, 669 F.2d 114, 120 (3d Cir. 1982) (right of privacy has been developed on case-by-case basis, finding source in implicit notions behind first, fourth, fifth, ninth, and fourteenth amendments, and the fundamental concept of liberty); Gerety, Redefining Privacy, 12 Harv. C.R.-C.L.L. Rev. 223, 239-40 n. 25 (1977) (privacy cases after Griswold have not settled question of constitutional derivation of right of privacy); Note, On Privacy:

Constitutional Protection for Personal Liberty, 48 N.Y.U. L. Rev. 670, 698 (1973) (opinion in Roe v. Wade suggests that Court is willing to use concepts underlying certain of first nine amendments as one standard by which to determine whether a personal interest is to be given privacy protection); Smith, Constitutional Privacy in Psychotherapy, 49 Geo. L. Rev. 1, 17 (1980) (Justices in Griswold did not agree whether right of privacy emanated from penumbras of several guarantees or was specifically derived from ninth or fourteenth amendments).

In my case the information that was shared between BOP and United States Attorneys Office for the District of Hawaii was my confidential medical and psychiatric records, which the District of Hawaii United States Attorneys read all 177 pages in order to continue to have me pretrial incarcerated, which they claimed was relevant to my hearing for bail. Under the Fourth Amendment of the United States Constitution the United States Attorney's office should have obtained informed consent or a judicial order before accessing my medical & psychiatric records, as relevance is not the standard test that gives anyone carte blanc in accessing medical and psychiatric records of any individual. Therefore, the Fourth Amendment applies in my case.

B. Fourteenth Amendment

To establish a Fourteenth Amendment Due Process Claim, "a plaintiff must, as a threshold matter show a government deprivation of life, liberty, or property." Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1988) (citation omitted). "The Due Process Clause takes effect only if there is a deprivation of a protected interest." Id. at 874 (emphasis in original). In my case I had no say in the United States District Attorneys Office for the District of Hawaii accessing my medical and psychiatric records from BOP, it was only after they accessed and read all of my 177-pages of my records that I found out what the BOP and Attorneys Office for the District of Hawaii did. So therefore, there was no waiver to my right to privacy in my medical & psychiatric records as I filed this lawsuit after the damage was done. For the same reasons as stated with respect to my Fourth & Fourteenth Amendment claims I never waived any constitutional privacy rights that existed in my medical & psychiatric records maintained by the BOP as the medical & psychiatric records was released without any informed consent or judicial order. Because there are genuine issues of material fact, respondents were not entitled to judgment.

III. Injunctive Relief

My preliminary injunction should have been granted as sharing pretrial detainees medical & psychiatric records without informed consent or judicial order continues to occur a violation of Fourth & Fourteenth Amendment to the United States Constitution.

Reasons For Granting the Petition

The disputable facts are if BOP and the United States Attorneys Office for the District of Hawaii are one of the same agency as defined in the Privacy Act of 1974, 5 U.S.C. § 552a(b). The Constitutional issue is if the Fourth and Fourteenth Amendments protect medical & psychiatric records of individuals not yet convicted of a crime, and if those medical & psychiatric records can be obtained without informed consent or judicial order. Did respondents violate my right to privacy in disclosing personal matters and my interest in independence in making certain kinds of important decisions, which the 177 pages of medical & psychiatric records were used to continue to pretrial detain me, an impermissible invasion of privacy. Whether pretrial detainees have a constitutional right to keep medical & psychiatric records private, a continued viability of a right to privacy recognized in Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L Ed 2d 64 (1977) and Nixon v. Administrator of General Services, this Court should respectfully hold that I did maintain a Fourth & Fourteenth Amendment Right to keep my medical & psychiatric records private and respondents should have attained informed consent or a judicial order.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Sehwa hua a Keene Sullivan

Dated: December 2, 2022