

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

UNITED STATES OF AMERICA : CRIMINAL INDICTMENT
: :
v. : NO. 3:07-CR-008-JTC
: :
PHIL ASTIN III :

**UNITED STATES' CONSOLIDATED RESPONSE TO DEFENDANT'S
MOTIONS TO SUPPRESS EVIDENCE OBTAINED
VIA SEARCH WARRANTS**

Comes now the United States of America, by David E. Nahmias, United States Attorney for the Northern District of Georgia, and John Horn, Assistant United States Attorney, and files this Consolidated Response to Defendant's Motions to Suppress Evidence Obtained Via Search Warrants. This pleading responds to: (1) Defendant's Motion to Suppress Evidence (From Search Warrant Dated 6/27/07) [Doc. No. 18]; (2) Defendant's Motion to Suppress Evidence (Obtained Via Two Search Warrants Dated 6/29/07) [Doc. No. 19]; (3) Defendant's Motion to Suppress Evidence Obtained Via Search Warrant Dated 7/9/07 [Doc. No. 27]; and (4) Defendant's Motion to Suppress Evidence Obtained Via Two Search Warrants Dated 7/6/07 (Search of Storage Facility) and 7/27/07 (Search of Boxes Located at Federal Building) [Doc. No. 28].

Defendant's Motions challenge six searches, all of which were executed pursuant to search warrants. First, on June 27, 2007, officers searched Defendant's office located at 702 Dixie Street, Carrollton, Georgia ("Defendant's Office") pursuant to a warrant issued by a Carroll County Superior Court judge. Next, on June 29, 2007, agents obtained federal warrants to execute a second search of Defendant's Office and a residence belonging to Defendant's mother located at 532 Cedar Street, Carrollton, Georgia ("the Residence"). The fourth search occurred on July 6, 2007, when agents executed a federal warrant at Storage Unit 30, which Defendant rented from Bypass Mini Storage on 826 Newnan Road in Carrollton (the "Storage Unit"). The fifth search occurred on July 9, 2007, when a federal magistrate judge authorized agents to search Defendant's Office a third time. The sixth and final search occurred when agents searched the boxes of documents obtained from the Storage Unit.

Because all the searches were executed pursuant to valid warrants, and because the agents also possessed a good faith belief that the warrants were valid, Defendant's Motions should be denied. This Consolidated Response will set forth the facts relating to each search and will address Defendant's Motions in sequence.

I. Facts

1. The June 27, 2007, Search Warrant for Defendant's Office (the "Carroll County Warrant")

On June 25, 2007, officers from the Fayette County, Georgia, Sheriff's Department responded to a request to check a residence owned by Chris Benoit in Fayetteville, Georgia. The officers searched the residence and found Benoit and his family dead, the result of a murder-suicide. The officers also found injectable steroids and other controlled substances that had been prescribed by Defendant, a physician who is a solo practitioner in Carrollton, Georgia. On June 27, 2007, relying upon the controlled substances found at the Benoit residence and other follow-up information, Fayette County drug investigator (and DEA Task Force Officer) Lamar Dyar obtained a warrant from a Carroll County Superior Court judge (the "Carroll County Warrant," attached as Ex. A), to search Defendant's Office.

In his affidavit submitted in support of the Carroll County Warrant (the "Dyar Aff.," also attached as Ex. A), TFO Dyar set forth the following facts:

- (1) TFO Dyar had worked on numerous narcotics investigations and had participated in many searches that led to the seizure of drugs, paraphernalia, documents, and other evidence. (Dyar Aff., at 1-2.)
- (2) Fayette County officers investigating the murder-suicide at the Benoit residence found evidence at the crime scene showing that Defendant had written prescriptions to Benoit for testosterone cypionate. TFO Dyar

determined that the prescriptions were filled at Jones Pharmacy in Fayetteville, Georgia. (Dyar Aff., at 2.)

- (3) Records from the Jones Pharmacy showed that, from May 2006 until May 2007, Defendant had prescribed “an excessive amount of testosterone cypionate” to Benoit. Specifically, the pharmacy filled seven prescriptions written by Defendant to Benoit, each for 10 ml. of testosterone cypionate with instructions to inject one milliliter per month. In other words, each prescription dispensed a 10-month supply of the drug, yet the pharmacy filled seven of these prescriptions in a 12-month period. TFO Dyar stated that the 70 ml. of testosterone cypionate dispensed by Defendant to Benoit during the 12-month period “would equal a dosage rate of 5.8 ml. per month which is in excess by 50% of Food and Drug Administration dosage guidelines.” (Dyar Aff., at 2.)

The Carroll County Warrant authorized several categories of items to be seized.

First, the warrant allowed the seizure of “[a]ny and all medical records pertaining to Christopher Michael Benoit ... dated from the first date of patient service to present date.” (Carroll County Warrant, at 1.) Second, the warrant authorized officers to seize “any and all records pertaining to the prescribing, administering, or dispensing of all controlled substances.” (Id.) Finally, the warrant authorized the seizure of “any pharmaceutical or clandestine controlled substances.” (Id.) The warrant then offered more specificity in describing the items that fit into these three categories:

- (a) Pharmaceuticals and clandestine controlled substances;
- (b) financial records;
- (c) address books and phone listings;
- (d) computers and other electronic storage equipment;
- (e) “any papers or records related to controlled substances such as books, receipts, ledgers, documentary business papers, appointment books,

- medical records, medical treatment logs pertaining to administering or dispensing of controlled substances, patient appointment logs,” and other records; and
- (f) customer records.

(Id., at 1.)

During the search, investigators seized: (1) seven patient files, (2) miscellaneous documents such as a controlled substance log and other documents relating to controlled substances, (3) an Apple computer, and (4) several bank statements.

2. The June 29, 2007, Search Warrants for Defendant’s Office and Residence (“Warrant 740” and “Warrant 739”)

On June 29, 2007, DEA Diversion Investigator Anissa Jones presented U.S. Magistrate Judge Linda T. Walker with an application for search warrants for a second search of Defendant’s Office (“Warrant 740,” attached as Ex. B) and Defendant’s Residence (“Warrant 739,” attached as Ex. C). Investigator Jones’s affidavit (the “First Jones Aff.,” also attached as Ex. B and Ex. C)¹ offered in support of the warrants sets forth the following information:

¹ The affidavit submitted in support of the Warrant 740 is identical (except for the place to be searched) to the affidavit for Warrant 739, and therefore this pleading refers to them interchangeably as the First Jones Affidavit. Investigator Jones is the affiant for both applications. The affidavits are attached as Exhibits B and C.

- (1). Investigator Jones had an extensive background in investigating cases involving the improper dispensing of prescription drugs. First, Investigator Jones had been investigating such cases for three and a half years, and she received 12 weeks of training in such cases when she was first employed by DEA. Furthermore, she consulted with experienced investigators about the facts of the present case when reaching the opinions and conclusions that are offered in the affidavit. (First Jones Aff. ¶ 1-2.)
- (2). Defendant was registered with the DEA as a Practitioner under the Controlled Substances Act to dispense Schedule II through Schedule V controlled substances. As such, Defendant was required to follow certain procedures in order to comply with the Controlled Substances Act. (Id., ¶ 12.)
- (3). On June 25, 2007, Chris Benoit was found dead in his home located in Fayetteville, Georgia. Investigator Jones knew that an earlier DEA investigation showed that Benoit was an excessive purchaser of injectable steroids, which are Schedule III controlled substances. During a search of Benoit's home on June 25, 2007, officers discovered injectable anabolic steroids and other pharmaceutical controlled substances. The detectives also found evidence that showed that Defendant had prescribed the steroids and the other controlled substances found in Benoit's home. DEA databases further confirmed that Defendant prescribed the drugs found in the home. Investigator Jones found the connection to Defendant to be suspicious because police officers in Carrollton, Georgia, and local pharmacies had identified Defendant as a "subject of concern for excessive and/or suspicious prescribing activity." Moreover, Defendant was the subject of disciplinary action by the Georgia State Board of Medical Examiners for "reasons related to competence or character." (Id., ¶¶ 13-14.)
- (4). Investigators obtained records maintained by the Jones Pharmacy in Fayetteville, Georgia, relating to Defendant's prescriptions to Benoit. Ralph Balchin, the pharmacist at Jones Pharmacy, reviewed the prescriptions and told investigators that Defendant prescribed, on

average, a 10-month supply of anabolic steroids to Benoit every three to four weeks for the past year. (Id., ¶¶ 13-14.)

- (5). On June 27, 2007, agents executed a state search warrant at Defendant's Office. The agents seized prescriptions written by Defendant for testosterone, Xanax, Adderall, Concerta, Hydrocodone, Oxycodone, and Soma (which Investigator Jones identified to be commonly abused prescription drugs) in quantities, dosages, and frequencies that are consistent with illegal prescription drug abuse. Even worse, the agents found patient files which showed that Defendant had issued multiple, undated prescriptions for controlled substances. The affidavit makes clear that federal law requires that a prescription for a controlled substance be dated and signed on the date it is issued. Defendant himself acknowledged to investigators while they conducted the search that he knew these prescriptions were illegal. (Id., ¶¶ 4, 15-16.)
- (6). While the agents were searching the office on June 27, 2007, Defendant arrived. The agents saw that he was carrying the medical file for Benoit, which he said he had brought from the Residence. (Id., ¶ 15.)
- (7). Dispensing records found at Defendant's Office showed that Defendant had administered injections and provided "take-home syringes" of Demerol to one of his staff members. (Id., ¶ 16.)
- (8). DEA investigators performed a preliminary review of Defendant's prescription writing activities and concluded that he dispensed approximately one million dosage units of various controlled substances in the two years preceding the date of the affidavit. Defendant also had written prescriptions for "significant quantities" of injectable anabolic steroids. Based on Investigator Jones's training and experience, she concluded that this activity represented an "excessive amount of prescriptions for a sole practitioner medical office in a rural location such as Carrollton." (Id., ¶ 17.)

At 1:50 p.m. on June 29, 2007, Magistrate Judge Walker signed the search warrants for Defendant's Office and the Residence. Warrants 740 and 739 authorized agents to seize, in pertinent part, the following items:

Any and all books, documents and records; including but not limited to the medical records of the listed patients; including medical tests, test results and physician notes, calendars, appointment books, sign-in sheets; prescriptions and prescription pads, insurance records, billing or payment information, receipts and receipt books;

Computers and computer generated documents reflecting patient information, medical records, billing or payment information, financial records, medical tests and results, appointments, or insurance records of the listed patients;

Address and/or telephone books and papers reflecting names, addresses, telephone numbers, pager numbers, fax numbers and/or telex numbers of co-conspirators, financial institutions and other individuals or businesses with whom a financial relationship exists; and

Any and all Federal order forms, records of inventory, invoices and other controlled substance records required to be kept under Title 21, United States Code and the Code of Federal Regulations.²

(Warrant 740.)

At approximately 5:30 p.m. on June 29, 2007, DEA agents and local police officers executed Warrant 740 and Warrant 739. From Defendant's Office, agents seized: (a) patient files; (b) miscellaneous business records, including sign-in sheets,

² The warrant also allowed the executing officers to seize any controlled substances and indicia of occupancy such as utility bills and lease agreements.

insurance documents, financial records, and other materials; (c) two Apple computers; and (d) some photographs. From the Residence, agents seized several miscellaneous documents, including a few blank sheets of paper consistent with those used for progress notes in Defendant's patient files, a prescription pad, and a concealed handgun permit.

3. The July 6, 2007, Warrant for the Storage Shed ("Warrant 771")

On July 6, 2007, Investigator Jones presented Magistrate Judge Walker with an application for a search warrant ("Warrant 771," attached as Ex. 1 to Defendant's Motion to Suppress) to search Storage Unit 30, which Defendant rented from Bypass Mini Storage on 826 Newnan Road in Carrollton (the "Storage Unit"). Investigator Jones's affidavit (the "Second Jones Aff," also attached as Ex. 1 to Defendant's Motion to Suppress) offered in support of the warrant sets forth the same information that is contained in the First Jones Affidavit, as already summarized earlier, with the following differences:

- (1). The Second Jones Affidavit omits the investigative facts relating to Chris Benoit, which are contained in paragraphs 13 and 14 of the First Jones Affidavit and summarized in items number 3 and 4 on pages 6 and 7 of this Response.
- (2). The Second Jones Affidavit provides additional details of improper prescriptions issued by Defendant that were discovered during the June 27, 2007, search of Defendant's Office. Specifically, for at least three patients Defendant issued multiple, undated prescriptions for the same

controlled substances on the same day. Issuing prescriptions in this manner not only violated federal law by itself, but also was consistent with prescription drug abuse because it allows patients to fill multiple prescriptions simultaneously. (Second Jones Aff., ¶¶ 13-14.)

- (3). Investigator Jones detailed dozens of prescriptions that Defendant issued to two patients, which occurred from November 2002 until June 2006. These prescriptions included Percocet, Lorcet, Valium, Xanax, Adderall, and other drugs that are commonly prescribed together in cases involving prescription drug abuse. For one patient, Defendant issued four undated prescriptions for Adderall, three undated prescriptions for Percocet, and one dated prescription for Lorcet (with three refills), all on the same day. The affidavit identified a total of 18 undated prescriptions, almost all of which were issued on the same date as other prescriptions for the same drug. Relying on her training and experience (as well as other experienced Diversion investigators with whom she consulted), Investigator Jones pointed out “the pattern of the prescriptions issued to these patients, including the specific drugs dispensed, the frequency of the prescriptions, the inclusion of refills in the prescriptions, and the quantities of tablets” and concluded that “the prescriptions ... are not consistent with a legitimate medical purpose, and instead are consistent with abuse of prescription drugs or the illegal distribution of prescription drugs by those who obtained the prescriptions.” (Id., ¶¶ 6-10, 15, 16, and 18.)
- (4). On July 6, 2007, a source of information who was associated with Defendant’s medical practice and who knew him personally for 10 years, told investigators that Defendant rented the Storage Unit. The source said that he/she had been to the Storage Unit and seen that Defendant stored patient records there. This source had no criminal record, provided the information voluntarily without any expectation of compensation or consideration from agents, presented a credible demeanor, and provided information that was corroborated by independent investigation. (Id., ¶ 20.)
- (5). Ruth Smith, the owner of the Bypass Mini Storage facility, told investigators that Defendant rented the Storage Unit under his name for

the last 10 years and identified the number of the unit rented by Defendant as Unit 30.

At 5:40 p.m. on July 6, 2007, Magistrate Judge Walker signed the search warrant for the Storage Unit. Warrant 771, issued for the Storage Unit, authorized agents to seize, in pertinent part, the same list of items specified for Warrants 739 and 740. (Warrant 771.)

At approximately 6:06 p.m. on July 6, 2007, DEA agents and local police officers executed Warrant 771 and seized 56 boxes of records relating to Defendant's patients. On July 27, 2007, Magistrate Judge Alan J. Baverman issued a second warrant for the 56 boxes ("Warrant 863," attached as Ex. 2 to Defendant's Motion to Suppress), authorizing the agents to seize any and all books, documents, and records, including but not limited to the medical records of patients, calendars, appointment books, sign-in sheets, prescriptions and prescription pads, insurance records, billing and patient information, receipts, and receipt books. The affidavit submitted in support of Warrant 863 is identical to the Second Jones Affidavit in terms of the facts establishing probable cause.

2. The July 9, 2007, Warrant for Defendant's Office ("Warrant 777")

On July 9, 2007, Investigator Jones presented Magistrate Judge Russell B. Vineyard with an application for a search warrant for a third search of Defendant's

Office ("Warrant 777," attached as Ex. 1 to Defendant's Motion to Suppress). Investigator Jones's affidavit (the "Third Jones Aff.," also attached as Ex. 1 to Defendant's Motion to Suppress) offered in support of Warrant 777 sets forth the same information that is contained in the Second Jones Affidavit, as already summarized earlier, with the following differences:

- (1). The Third Jones Affidavit referenced the second search of Defendant's Office on June 29, 2007, and explained that the agents seized some files for Defendant's patients but did not seize a number of files that were stored in the Office's "copy room," because a preliminary review of the files showed that they were not relevant to the investigation. (Third Jones Aff., ¶ 13.)
- (2). The same source of information mentioned in the Second Jones Affidavit told investigators that the files located in the "copy room" included patient files for inactive patients and deceased patients. (Id., ¶ 20.)
- (3). Investigator Jones stated that, in her training and experience, the files for patients who are no longer active patients, or who have died, may be relevant to the investigation of illegal prescriptions by Defendant. (Id., ¶ 21.)

At 3:50 p.m. on July 9, 2007, Magistrate Judge Vineyard signed Warrant 777.

The warrant authorized agents to seize any and all books, documents and records; including but not limited to the medical records of any active, inactive, or deceased patients; including medical tests, test results and physician notes, calendars, appointment books, sign-in sheets; prescriptions and prescription pads, insurance

records, billing or payment information, and receipts and receipt books. (Warrant 777.)

At approximately 10:35 a.m. on July 10, 2007, DEA agents and local police officers executed Warrant 777 and seized 68 boxes containing patient records, billing statements, and other records.

5. Defendant's Motions to Suppress

With respect to the Carroll County Warrant, Defendant argues that: (1) the warrant fails to identify the items to be seized with sufficient particularity; (2) the Dyar Affidavit fails to establish probable cause; and (3) the officers seized items beyond the scope of the warrant.

With respect to Warrants 740 and 739, Defendant argues that: (1) Investigator Jones intentionally included material misrepresentations in, and omissions from, the affidavit in violation of Franks v. Delaware, 438 U.S. 154 (1978); (2) the First Jones Affidavit fails to establish probable cause; (3) the agents exceeded the scope of the warrants when executing them; and (4) the First Jones Affidavit failed to establish a sufficient nexus to Defendant's Residence to justify issuing Warrant 739.

With respect to Warrants 771 and 863, Defendant raises the same challenges as summarized in the preceding paragraph, but adds arguments that the facts in the Second Jones Affidavit were stale and failed to demonstrate the veracity and

reliability of the confidential source who provided information about the Storage Unit.

With respect to Warrant 777, Defendant raises the same challenges that he presented concerning Warrants 771 and 863.

For the reasons set forth below, Defendants' Motions should be denied without an evidentiary hearing.

II. Argument

1. The Carroll County Warrant

A. The Warrant Defines the Items to Be Seized With Sufficient Particularity

The Fourth Amendment requires that warrants “particularly describe ... the persons or things to be seized.” U.S. Const. Amend IV. The particularity requirement thus prevents “general, exploratory rummaging in a person’s belongings.” Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). “Elaborate specificity is unnecessary,” and “[t]he standard ‘is one of practical accuracy rather than technical nicety.’” United States v. Betancourt, 734 F.2d 750, 754-55 (11th Cir. 1984) (quoting United States v. Johnson, 541 F.2d 1311, 1313 (8th Cir. 1976)). A description is “sufficiently particular when it enables the searcher to reasonably

ascertain and identify the things authorized to be seized.” United States v. Cook, 657 F.2d 730, 733 (5th Cir. 1981).

The dispositive Eleventh Circuit case governing the particularity of warrants issued for a physician’s office in a prescription drug distribution case is Betancourt. In that case, the search warrant allowed agents to seize “all financial records ... and patient records” showing the dates of patient visits, diagnostic tests and results, diagnoses, and medications prescribed. 734 F.2d at 755. The court concluded that “this description prevented a general search and was as specific as the circumstances and nature of the activity permitted.” Id.

Here, the search warrant authorized agents to seize “[a]ny and all medical records pertaining to Christopher Michael Benoit ... dated from the first date of patient service to present date.” (Carroll County Warrant, at 1.) Second, the warrant directed officers to seize “any and all records pertaining to the prescribing, administering, or dispensing of all controlled substances.” (Id.) Finally, the warrant authorized the seizure of “any pharmaceutical or clandestine controlled substances.” (Id.) The warrant then offered more specificity in describing the items that may fit into these three categories to include:

- (a) Pharmaceuticals and clandestine controlled substances;
- (b) financial records;
- (c) address books and phone listings;

- (d) computers and other electronic storage equipment;
- (e) “any papers or records related to controlled substances such as books, receipts, ledgers, documentary business papers, appointment books, medical records, medical treatment logs pertaining to administering or dispensing of controlled substances, patient appointment logs,” and other records; and
- (f) customer records.

(Id., at 1.)

The language of the search warrant is similar to the language approved in Betancourt. Instead of allowing a general search, the warrant directed the executing officers to seize records, including those that relate to the prescribing of controlled substances, financial records, and address books and phone listings. These are precisely the kinds of records that are relevant to an investigation of a physician suspected of illegally prescribing drugs, and the language is “as specific as the circumstances and nature of the activity permitted.” Betancourt, 734 F.2d at 755.

Defendant’s argument relies heavily upon case law that involves investigations of complex fraud. Courts recognize, however, that “[t]he determination as to whether a warrant is sufficiently particular is dictated, in part, by the circumstances and nature of the activity charged.” United States v. Abbell, 963 F. Supp. 1178, 1196 (S.D. Fla. 1997). The case most directly on point, therefore, is Betancourt. To the extent that the fraud cases are applicable, the recent decision in United States v. Maharaj, No. 07-80024-CR, 2007 WL 2254559 (S.D. Fla. Aug. 2, 2007) (unpublished), is

instructive. In Maharaj, a search warrant issued for a physician’s office in a billing fraud case authorized the seizure of “any/all patient records for both past and current patients,” including but not limited to patient correspondence, prescription and pharmaceutical records, billing records, appointment registers, sign-in sheets, super bills, lab records, telephone message books, banking and finance records, tax returns, address books, telephone toll records, corporate memoranda, credit card statements, personnel records, and all data stored on computers.” Id., at *12. The court thus reviewed language that is closely similar to the language used in the Carroll County Warrant, and found that “[t]he search warrants did not merely say ‘search the business,’ they set forth a laundry list of documents consistent with a ‘paperwork puzzle involving fraud’ that were subject to the search.” Id. (quoting United States v. Waugneux, 683 F.2d 1343, 1348-49 (11th Cir. 1982)).³

³ The evaluation of “pervasive” wrongdoing within a business to be searched referenced in United States v. Hooshmand, 931 F.2d 725 (11th Cir. 1991), is particularly inapplicable here, where the place to be searched was a solo practitioner’s medical office where Defendant was the only practitioner licensed to dispense controlled substances. Stated simply, the affidavit establishes probable cause to show that the only physician who works in the office is illegally dispensing prescriptions, and therefore all the patient and financial records in the office are potentially relevant to the investigation. The situation is far different from the cases cited by Defendant, which involved practices with multiple physicians or corporations with varied business enterprises. See Wuagneux, 683 F.2d at 1349 (“the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and ... a description of property will be acceptable if it is as specific as the circumstances and nature of the activity under investigation permit”).

Finally, the government observes that courts in this circuit have referred to the underlying affidavit to clarify and narrow the language identifying the items to be seized pursuant to a search warrant. See United States v. Maali, 346 F. Supp. 2d 1226, 1243 (M.D. Fla. 2004), aff'd, United States v. Khanani, — F.3d —, 2007 WL 2826968 (11th Cir. Oct. 2, 2007). In Maali, the court emphasized that the affidavit “explained the scheme and crimes under investigation, and even though that affidavit was not attached to the warrant, in this circuit such attachment is not required for successful incorporation of its terms into the warrant, at least where, as here, the affidavit was provided to the searchers.” Id. If necessary, the government will adduce evidence to the Court that the search of Defendant’s Office occurred with the warrant and Dyar Affidavit present on the scene for consultation by the agents who executed the warrant.

For all these reasons, the Court should conclude that the search warrant describes with sufficient particularity the items to be seized during the search.

B. TFA Dyar’s Affidavit Established Probable Cause

TFA Dyar’s affidavit supporting the Carroll County Warrant established probable cause to believe that Defendant was issuing illegal prescriptions, and that evidence relating to this conduct would be found at Defendant’s Office. The Fourth

Amendment's prohibition against unreasonable searches requires that the issuing judge “is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit ..., there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983); United States v. Miller, 24 F.3d 1357, 1361 (11th Cir. 1994). “Courts reviewing the legitimacy of search warrants should not interpret supporting affidavits in a hypertechnical manner; rather, a realistic and common sense approach should be employed so as to encourage recourse to the warrant process and to promote the high level of deference traditionally given to magistrates in their probable cause determinations.” Miller, 24 F.3d at 1361 (citations omitted).

Where, as here, a defendant challenges the magistrate’s determination that probable cause exists on the face of the affidavit, the reviewing court should not review the affidavit de novo for probable cause. Massachusetts v. Upton, 466 U.S. 727, 728 (1984). Rather, the reviewing court simply must “ensure that the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed.” Gates, 462 U.S. at 238 (citation omitted). Without succumbing to the status of a “rubber stamp,” the reviewing court should pay “great deference” to the issuing court’s determination of probable cause. Id. at 236 (citation omitted).

As summarized earlier, the Dyar Affidavit established that: (1) TFO Dyar had significant experience in investigating drug trafficking cases (Dyar Aff., at 1-2); (2) officers investigating a murder-suicide at the Benoit residence found evidence at the crime scene showing that Defendant had written prescriptions to Benoit for testosterone cypionate (Dyar Aff., at 2); (3) Defendant had prescribed “an excessive amount of testosterone cypionate” to Benoit for a year—specifically, Defendant wrote seven prescriptions to Benoit, each dispensing a 10-month supply of the drug in just a 12-month period. (Id.) TFO Dyar stated that the 70 ml. of testosterone cypionate dispensed by Defendant to Benoit during the 12-month period “would equal a dosage rate of 5.8 ml. per month which is in excess by 50% of Food and Drug Administration dosage guidelines.” (Id.)

The facts in TFA Dyar’s affidavit establish a substantial basis for the issuing judge to have concluded that probable cause existed to search Defendant’s Office. Defendant’s argument to the contrary is premised upon the novel proposition that TFA Dyar was obligated to seek expert medical guidance before presenting the affidavit to the reviewing judge. As discussed later in this Response, this argument is more accurately presented as a Franks claim. Regardless, the law imposes no such obligation when seeking a warrant, as probable cause does not depend upon eliminating other innocent, or even less incriminating, explanations for a suspicious

set of facts. See United States v. Gagnon, 373 F.3d 230, 236 (2d Cir. 2004) (“the fact that an innocent explanation may be consistent with the facts alleged does not negate probable cause”). See also United States v. Dickey-Bey, 393 F.3d 449, 454-55 (4th Cir. 2004) (even “seemingly innocent activity” may provide a basis for finding probable cause,” if the activity is deemed suspicious based on the experience of the officers who observe it) (quoting Porterfield v. Lott, 156 F.3d 563, 569 (4th Cir. 1998)); United States v. Sparks, 291 F.3d 683, 688 (10th Cir. 2002) (“Although Sparks’ actions could theoretically have been innocent, we believe a prudent, cautious and trained police officer more likely would have construed those actions” to be suspicious); United States v. Pena-Rodriguez, 110 F.3d 1120, 1131 (5th Cir. 1997) (same).

Moreover, the reviewing judge properly could rely upon TFA Dyar’s experience and training in drug investigations in crediting his opinions regarding the possible abuse of the steroids, without requiring the further expert opinions of an endocrinologist or other specialist. United States v. Robinson, 62 F.3d 1325, 1331 n.9 (11th Cir. 1995) (the opinions and conclusions of an experienced agent may properly be considered as a factor in the totality of the circumstances when evaluating whether probable cause exists); United States v. Jenkins, 901 F.2d 1075, 1081 (11th Cir. 1990) (same). To this end, the case is factually analogous to United States v.

Singh, 390 F.3d 168 (2d Cir. 2004). In Singh, a DEA Diversion investigator collected prescriptions from local pharmacies issued to patients of the medical practice under investigation. Id. at 180. The review led the investigator to conclude that, among other things, the controlled substances were being prescribed far in excess of the amounts recommended by the Physicians Desk Reference manual. Id. The court credited the investigator's conclusion, based upon her experience and training as a Diversion investigator. Here, TFO Dyar provided the reviewing judge with essentially the same analysis, as he consulted the FDA dosage guidelines and found that Defendant's prescriptions skyrocketed well beyond the recommended dosages.

For these reasons, the Court should conclude that the affidavit presented a substantial basis for the reviewing judge to conclude that probable cause justified issuing the warrant.

C. The Officers Did Not Seize Items Outside the Scope of the Warrant

When assessing this issue, courts examine whether the search and seizure was reasonable under all the circumstances. United States v. Schandl, 947 F.2d 462, 465 (11th Cir. 1991). Factors that a court may weigh when determining whether a search was reasonable include the scope of the warrant, the behavior of the searching agents,

the conditions under which the search was conducted, and the nature of the evidence being sought. Id.

Defendant's argument relating to the items seized is most curious, in that in the same breath that he argues that the warrant defined the items to be seized too broadly, he further posits that the agents were confined to seize the file of only one patient, Chris Benoit. In addition to being inconsistent, the argument makes no sense. Defendant cannot plausibly argue that the seven files seized by the officers do not fall within the definition of "records pertaining to the prescribing, administering, or dispensing of all controlled substances" or "medical records," which are expressly listed in the items to be seized.⁴

Defendant further faults the officers for seizing bank records, controlled substance logs, two computers, documents from two pharmaceutical companies, and miscellaneous paperwork. Each of these items falls within the list of items to be seized set forth in the warrant, including "financial records," "medical treatment logs pertaining to administering or dispensing of controlled substances," "computers and other electronic storage equipment," and "records pertaining to the prescribing, administering, or dispensing of all controlled substances."

⁴ In the event the Court wishes to review these patient files, all seven files include prescriptions that reflect the dispensing of controlled substances in a manner that is not consistent with legitimate medical purposes.

Accordingly, the Court should conclude that these items properly were seized pursuant to the Carroll County Warrant.

D. Even If the Warrant Is Invalid, Suppression Of The Evidence Is Not An Appropriate Remedy Because the Officers Had A Good Faith Basis To Execute The Search Warrant.

Suppression of the evidence is not an appropriate remedy if the officers conducting the search acted in “objectively reasonable reliance” on the warrant's validity. United States v. Leon, 468 U.S. 897, 922 (1984). Ordinarily, “a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search.” Leon, 468 U.S. at 922. “The purpose of the exclusionary rule is to deter unlawful police misconduct; therefore, when officers engage in ‘objectively reasonable law enforcement activity’ and have acted in good faith when obtaining a search warrant from a judge or magistrate, the Leon good faith exception applies.” United States v. Martin, 297 F.3d 1308, 1313 (11th Cir. 2002). Accordingly, “courts generally should not render inadmissible evidence obtained by police officers acting in reasonable reliance upon a search warrant that is ultimately found to be unsupported by probable cause.” Id.

(I.) Probable Cause

In this case, assuming for purposes of argument that the Court concludes that the affidavit fails to establish probable cause, the record nonetheless establishes that

the officers acted on a good faith belief that the warrant was valid and that the search was permitted. TFO Dyar presented his affidavit to a Superior Court judge, who reviewed the warrant application and then signed the warrant. The affidavit includes detailed facts relating to the illegal dispensing of prescription drugs by Defendant, and thus is not so devoid of investigative facts that the officers could not reasonably have relied on the warrant application. Given these circumstances, the officers had every reason to believe that the warrant was valid and that the search was properly authorized, and the search may be affirmed on this basis alone.

(ii.) Particularity

Eleventh Circuit law is abundantly clear that officers may rely in good faith upon a search warrant that fails to particularly describe the items to be seized. In United States v. Accardo, 749 F.2d 1477 (11th Cir. 1985), the court refused to hold as a matter of law that the good faith exception cannot apply to a search warrant that authorized agents to seize “all corporate records,” as this language is not so facially deficient the executing officers could not reasonably presume it to be valid. Id. at 1481. “This is not an instance in which ‘it is plainly evident that a magistrate or judge had no business issuing a warrant.’” Id. (quoting Massachusetts v. Sheppard, 104 S. Ct. 3424, 3429 n.7 (1984)). In the same case (on appeal after remand), the Eleventh Circuit affirmed a finding that the agents justifiably relied upon that

language and upheld the dismissal of the defendant's particularity challenge to the warrants. United States v. Norton, 867 F.2d 1354, 1360 (11th Cir. 1989); see also United States v. Travers, 233 F.3d 1327, 1330-31 (11th Cir. 2000) (in case where particularity problem presents a "close call," the good faith doctrine properly applies to deny defendant's suppression motion).

This principle was not changed in any way by the Supreme Court's ruling in Groh v. Ramirez, 540 U.S. 551 (2004), which dealt with the narrow question of whether a warrant that authorized the seizure of any instrumentalities of unspecified crimes against the United States was facially invalid. The Eleventh Circuit therefore continues to apply the good faith rule to particularity challenges, as long as the language goes beyond the "instrumentalities" language condemned in Groh. See United States v. Khanani, — F.3d —, 2007 WL 2826968, at *5 (11th Cir. Oct. 2, 2007); United States v. Haynes, No. 04-15944, 2005 WL 3542403, at **3 (11th Cir. Dec. 28, 2005) ("There is no doubt that '[t]he good faith exception may be applied to a search conducted pursuant to an overly broad warrant'" (quoting Travers, 233 F.3d at 1330) (unpublished)).

Here, the good faith doctrine should be applied as a matter of law based on the face of the warrant itself. As noted earlier, the description of items to be seized is significantly similar to descriptions that have been approved in published opinions

such as Betancourt and Maharaj. When an agent acts in a manner that already has been sanctioned in case law, the Court should conclude as a matter of law that the agent reasonably acted in good faith in doing so. For these reasons, the Court should deny Defendant's suppression motion even if the Court finds that the list of items to be seized was too broad.⁵

2. Warrants 740 and 739

A. Defendant's Franks Allegations Fail as a Matter of Law and Do Not Require a Hearing

Because Investigator Jones's affidavit accurately describes the information developed as of June 29, 2007, Defendant's Franks arguments fail as a matter of fact and law. Indeed, Defendant fails to identify a single inaccurate fact in, or material

⁵ The government notes that, in United States v. Burke, 718 F. Supp. 1130 (S.D.N.Y. 1989), the court applied the good faith doctrine to a warrant that allowed the seizure of "documents, books, ledgers, records, and objects, including but not limited to" a list of specific types of records. The court relied upon, among other things, an evidentiary record that showed that the warrant had been reviewed by an Assistant United States Attorney and several federal magistrate judges, the warrant was patterned after prior warrants used in successful investigations, and the affidavit effectively limited the seizure of items during the execution of the warrant. Id., at 1141-43. If necessary, the government can present the same evidence during an evidentiary hearing as ordered by the Court. See Order Dated Aug. 29, 2007 (instructing the government to advise the Court if an evidentiary hearing is necessary to resolve Defendant's suppression motions). For the reasons stated above, the government believes that Defendant's Motion can be resolved as a matter of law without a hearing, but makes this reservation in an abundance of caution.

omission from, the First Jones Affidavit. Accordingly, the Court should reject these arguments without a hearing.

A search warrant may be invalidated if the affiant made statements that are deliberately false or that demonstrate a reckless disregard for the truth. Franks v. Delaware, 438 U.S. at 171-72; United States v. Novaton, 271 F.3d 968, 986 (11th Cir. 2001). A defendant does not establish a Franks violation, however, by showing that the affidavit submitted in support of the warrant contains an error, or even several negligent errors. Accidental mistakes, or even negligent misrepresentations, are insufficient to establish a Franks violation. United States v. Wuagneux, 683 F.2d 1343, 1355 (11th Cir. 1982) (holding that even if affiant negligently misrepresented facts in affidavit, “such allegations of negligence or innocent mistake are insufficient”).

The Eleventh Circuit has not adopted a specific standard for a finding of reckless disregard in the Franks context. Kelly v. Curtis, 21 F.3d 1544, 1554 (11th Cir. 1994) (“the difference between ‘reckless’ and merely ‘negligent’ disregard for the truth is not crystal clear; we have not staked out a bright line”). At a minimum, a defendant must make a showing that an affiant must have held a serious doubt as to the accuracy of a fact in the affidavit. E.g., Wilson v. Russo, 212 F.3d 781, 788 (3^d Cir. 2000) (“In applying the reckless disregard test to assertions, we have

borrowed from the free speech arena and equated reckless disregard for the truth with a ‘high degree of awareness of [the statements’] probable falsity.’”) (quoting Lippay v. Christos, 996 F.2d 1490, 1501 (3d Cir.1993)); United States v. Clapp, 46 F.3d 795, 801 n.6 (8th Cir. 1995) (“The test for determining whether an affiant’s statements were made with reckless disregard for the truth is thus not simply whether the affiant acknowledged that what he reported was true, but whether, viewing all of the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.”).

To be entitled to a hearing on a Franks claim, a defendant must make “a substantial showing that a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit.” Franks, 438 U.S. at 155. A bare allegation is insufficient to justify a Franks hearing. Madiwale v. Savaiko, 117 F.3d 1321, 1326-27 (11th Cir. 1997); United States v. Mathison, 157 F.3d 541, 548 (8th Cir. 1998) (“A mere allegation standing alone, without an offer of proof in the form of a sworn affidavit or witness or some other reliable corroboration, is insufficient to make the difficult preliminary showing.”). Similarly, an offer of proof that simply establishes an accidental mistake or negligent misrepresentation does not rise to the standard required to order an evidentiary

hearing. United States v. Astroff, 578 F.2d 133, 136 (5th Cir. 1978) (“a Franks hearing to consider allegations of negligent misrepresentations was unnecessary”).

It also is unnecessary to hold a Franks hearing if, assuming for purposes of argument that the alleged misrepresentations in the affidavit were made intentionally or with reckless disregard for the truth, the remaining information in the affidavit (excluding the misrepresentations) is sufficient on its own to establish probable cause for a search. Franks, 438 U.S. at 171 (“if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content to support a finding of probable cause, no hearing is required”).

Defendant fails to identify a misstatement in or omission from Investigator Jones’s affidavit that supports a Franks claim. Defendant proposes the following problems with the affidavit: (1) Investigator Jones intentionally failed to seek an appropriate medical opinion—specifically, an expert endocrinologist’s views on the legitimate uses of testosterone cypionate—to offer hypothetical legitimate reasons why steroids were found in Benoit’s home; and (2) she intentionally misrepresented the suspicious inferences that she drew from the volume of Defendant’s prescriptions for controlled substances. Defendant finally raises, in the context of his Franks claims, various complaints with the attachment to the affidavit listing the items to be

seized but these allegations do not relate to the existence of probable cause and should be dismissed for that reason.

(I.) Investigator Jones Accurately Characterized the Facts Relating to Defendant's Prescriptions of Steroids to Benoit

Defendant first posits that Investigator Jones should have performed further medical research before submitting her affidavit. Defendant's Motion, however, does not accurately reproduce the facts that were included in the affidavit, and goes the further step of misstating the law defining an agent's obligations when presenting an affidavit. For example, Defendant faults Investigator Jones for failing "to fully inform Magistrate Judge Walker if there were legitimate medical uses for testosterone cypionate." In Defendant's view, if Magistrate Judge Walker had possessed this information, she would have questioned whether the facts in the affidavit relating to testosterone "even assert a crime." (Def.'s Mot., at 11.) The affidavit, however, unambiguously states that testosterone cypionate has a legitimate use if prescribed appropriately. (First Jones Aff., ¶ 10, "The original and primary use of testosterone is for the treatment of males who have little or no natural endogenous testosterone production – males with hypogonadism, a hormonal deficiency that alters the body's appearance. Appropriate use for this purpose is legitimate hormone replacement therapy, which maintains serum testosterone levels in the normal range.") In short,

the omission that forms the crux of Defendant's allegation of misleading the Magistrate Judge is not an omission at all, as Magistrate Judge Walker was well aware of the possible appropriate medical uses for the steroid prescribed by Defendant.

Indeed, the affidavit not only advises that testosterone has a legitimate use (as do all the other controlled substances at issue in this case, which similarly is acknowledged in the affidavit), it offers abundant facts to show why Defendant's excessive prescriptions of testosterone cypionate to Benoit are suspicious.⁶ First, Benoit was found dead in his home. (First Jones Aff., ¶¶ 13-14.) Second, DEA already possessed information that Benoit was an excessive purchaser of injectable steroids, and Defendant was identified as the source of steroids that were found in Benoit's home. (Id.) Third, Defendant already was known to law enforcement as a "subject of concern for excessive and/or suspicious prescribing activity." (Id., ¶ 14.) Finally, Defendant had, for the last year, issued a 10-month supply of anabolic

⁶ As discussed later, it is important to keep in mind that the affidavit contains an abundance of facts to support a finding of probable cause that are entirely independent of the facts relating to steroids and Benoit. Specifically, the patient files showed (and Defendant himself admitted) that Defendant wrote multiple, undated prescriptions to patients on the same date, which in and of themselves constitute violations of the Controlled Substances Act. The affidavit therefore establishes abundant probable cause of improper prescribing activities by Defendant even if the facts relating to Benoit and steroids are omitted from the equation.

steroids to Benoit every three to four weeks. (Id., ¶¶ 13-14.) Stated simply, Magistrate Judge Walker certainly was able to conclude that these facts raised a reasonable suspicion of illegal dispensing of steroids, even if, as a general matter, steroids have a legitimate medical use.

Defendant persists that the affidavit should have presented the expert opinion of an endocrinologist on Benoit’s medical history,⁷ ostensibly to definitively resolve the possible medical justifications for the steroids prescribed to Benoit. First of all, the law imposes no such requirement when seeking a warrant. Notably, probable cause does not depend upon eliminating other innocent, or even less incriminating, explanations for a suspicious set of facts. See United States v. Gagnon, 373 F.3d 230, 236 (2d Cir. 2004) (“the fact that an innocent explanation may be consistent with the facts alleged does not negate probable cause”). See also United States v. Dickey-Bey, 393 F.3d 449, 454-55 (4th Cir. 2004) (even “seemingly innocent activity” may provide a basis for finding probable cause,” if the activity is deemed suspicious based on the experience of the officers who observe it) (quoting Porterfield v. Lott, 156 F.3d 563, 569 (4th Cir. 1998)); United States v. Sparks, 291 F.3d 683, 688 (10th Cir. 2002) (“Although Sparks’ actions could theoretically have been innocent, we believe a

⁷ In commenting on Benoit’s medical history, Defendant refers to facts that are not in the record, and also inaccurately characterizes these facts as well.

prudent, cautious and trained police officer more likely would have construed those actions” to be suspicious); United States v. Pena-Rodriguez, 110 F.3d 1120, 1131 (5th Cir. 1997) (same).

Moreover, Magistrate Judge Walker properly could rely upon Investigator Jones’s experience and training in prescription drug investigations in crediting her opinions regarding the possible abuse of the steroids, without requiring the further expert opinions of an endocrinologist. United States v. Robinson, 62 F.3d 1325, 1331 n.9 (11th Cir. 1995) (the opinions and conclusions of an experienced agent may properly be considered as a factor in the totality of the circumstances when evaluating whether probable cause exists); United States v. Jenkins, 901 F.2d 1075, 1081 (11th Cir. 1990) (same). To this end, the case is factually analogous to United States v. Singh, 390 F.2d 168 (2d Cir. 2004). In Singh, a DEA Diversion investigator collected prescriptions from local pharmacies issued to patients of the medical practice under investigation. Id. at 180. The review led the investigator to conclude that, among other things, the controlled substances were being prescribed far in excess of the amounts recommended by the Physicians Desk Reference manual. Id.

The court credited the investigator's conclusion, based upon her experience and training as a Diversion investigator.⁸

Second, even if an expert endocrinologist had concluded that Benoit had a medical condition that necessitated testosterone, the affidavit makes very clear that Benoit was receiving amounts of testosterone that well exceeded normal dosages. When the excessive dosages are considered along with the fact that Benoit already was suspected of abusing steroids and Defendant already was suspected of writing excessive prescriptions, the addition of an endocrinologist's opinion to the affidavit would not have affected the reasonable inferences that Defendant was illegally prescribing the steroids to Benoit. Madiwale, 117 F.3d at 1327 (“[E]ven a recklessly omitted critical fact does not compel the invalidation of the warrant if the omitted fact, when added to the facts set forth in the affidavit, still permits a finding of probable cause.”); United States v. Colkley, 899 F.2d 297 (4th Cir. 1990) (same).

Finally, the question underlying a Franks claim is whether Defendant has identified any evidence suggesting that Investigator Jones indeed knew or had reason

⁸ In fact, in Singh, the affidavit omitted the fact that a physician had reviewed nine patient files and concluded that the prescriptions issued to the nine patients were medically appropriate. 390 F.3d at 183-84. The court concluded that, even if this fact was included in the affidavit, probable cause would not be affected in light of the limited nature of the physician's analysis and the evidence inside the other patient files reviewed by the investigators. Id.

to suspect that the prescriptions were legitimate. There is no such evidence in the record. To the contrary, the facts set forth above are more than enough to show that Investigator Jones in fact suspected that the steroid prescriptions were excessive and improper, and that her suspicions were justifiable.

(ii.) Investigator Jones Accurately Described the Suspicious Volume of Dosage Units of Controlled Substances Prescribed by Defendant

Investigator Jones's affidavit states that Defendant prescribed approximately one million dosage units of controlled substances during the last two years and "this is an excessive amount of prescriptions for a sole practitioner medical office in a rural location such as Carrollton." (First Jones Aff., ¶ 17.) Defendant's Motion proposes, without any supporting evidence, that Investigator Jones exaggerated the significance of the volume of controlled substance prescriptions authored by Defendant. Specifically, Defendant claims he actively treated 2,500 patients during this two year period, leading to a mathematical hypothesis that the total number of prescriptions cannot be deemed excessive because it amounts to each patient receiving only one-half of one pill per day. Of course, there is no evidence that Defendant maintained this volume of patients during this period, which is insufficient to support a Franks claim. Madiwale, 117 F.3d at 1326-27 (bare allegation is insufficient to justify a Franks hearing).

Even if the Court entertains the notion that Defendant was actively treating 2,500 patients, the “simple mathematics” underlying Defendant’s argument would make a political pollster who is accustomed to statistical exaggeration blush. Defendant’s mathematics require the following assumptions:

- (1) Not one of Defendant’s purported 2,500 patients could be healthy. In other words, each and every patient in Defendant’s practice must have had an constant health problem.
- (2) Each and every patient’s health problem must have been a serious health problem that required the dispensing of a controlled substance, and could not have been remedied with penicillin, antibiotics, an ointment, or some other less serious medications.
- (3) The serious health problem held by each patient must have lasted the full duration of the two-year period. No patient could get better, no one could be cured. Not even one patient’s condition could improve such that they could be weaned off controlled substances, and no patient could try an alternative therapy such as physical therapy or over-the-counter medications.

Defendant’s mathematics exercise not only frustrates armchair mathematicians, but causes alarm bells to ring out at the Medical Board. Only a portion of any physician’s patients have a serious medical conditions requiring treatment with controlled substances, and while the duration of this treatment varies, common sense and general experience show that the treatment lasts weeks, not two years. Moreover, the affidavit makes clear that selected patients received large quantities of drugs (which further skews Defendant’s mathematical assumptions). The extremes

underlying Defendant's argument therefore do not exist, even in a suppression motion's unsupported hypotheticals. To the contrary, Investigator Jones's training and experience in investigating these kinds of cases allowed her to accurately evaluate the volume of controlled substances that one would expect a legitimate physician to dispense in a solo practice in Carrollton, Georgia.

For these reasons, Investigator Jones's affidavit accurately stated the facts and reached a reasonable conclusion relating to the volume of prescriptions issued by Defendant. Additionally, even if Defendant's argument had any merit, the facts underlying Defendant's argument do not modify the existence of probable cause established elsewhere in the affidavit, given the fact that Defendant himself admitted that his prescription writing practices violated the law. First Jones Aff., ¶¶ 15-16; see also Madiwale, 117 F.3d at 1327.

(iii.) Defendant's Other Franks Arguments

Defendant presents the novel theory that items in the list of things to be seized, which was attached as Exhibit A to Investigator Jones's affidavit, form the basis of a Franks claim. Specifically, Defendant posits that references to "listed patients," co-conspirators, and controlled substances that had been returned to the Subject Office were intended to mislead Magistrate Judge Walker into finding probable cause to issue the warrant. (Def.'s Mot., at 12.) Defendant's argument is misplaced, for the

list of items to be seized does not, in this case, affect the probable cause established by the facts set forth in the affidavit. Rather, the language referenced by Defendant identifies the items that the magistrate judge authorized the agents to seize, and constitutes a rather common example of such language that was entirely appropriate given the facts of this case.

B. Investigator Jones's Affidavit Establishes Probable Cause That Defendant Was Issuing Illegal Prescriptions

Special Agent Jones's affidavit supporting the search warrant of the Subject Residence contains abundant facts establishing probable cause to believe that Defendant was issuing illegal prescriptions, and that evidence relating to this conduct would be found at Defendant's Office.

The Fourth Amendment's prohibition against unreasonable searches requires, in pertinent part, that the issuing judge "is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit ..., there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983); United States v. Miller, 24 F.3d 1357, 1361 (11th Cir. 1994). "Courts reviewing the legitimacy of search warrants should not interpret supporting affidavits in a hypertechnical manner; rather, a realistic and common sense approach should be employed so as to encourage recourse

to the warrant process and to promote the high level of deference traditionally given to magistrates in their probable cause determinations.” Miller, 24 F.3d at 1361 (citations omitted).

Where, as here, a defendant challenges the magistrate’s determination that probable cause exists on the face of the affidavit, the reviewing court should not review the affidavit de novo for probable cause. Massachusetts v. Upton, 466 U.S. 727, 728 (1984). Rather, the reviewing court simply must “ensure that the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed.” Gates, 462 U.S. at 238 (citation omitted). Without succumbing to the status of a “rubber stamp,” the reviewing court should pay “great deference” to the issuing court’s determination of probable cause. Id. at 236 (citation omitted).

As summarized earlier, the affidavit establishes that: (1) Defendant knew that writing multiple, undated prescriptions to the same patient at the same time is illegal (First Jones Aff., ¶¶ 15-16); (2) Defendant nonetheless wrote multiple, undated prescriptions for controlled substances to several patients (id.); (3) Defendant had issued excessive prescriptions for steroids to Chris Benoit, who was already suspected to be an abuser of steroids and was found dead in his home (id., ¶¶ 13-14); (4) Defendant had taken the patient file for Benoit home with him and returned it after the death (id., ¶ 15); (5) Defendant already was suspected of excessive prescription

writing by local police and pharmacies (*id.*, ¶¶13-14); and (6) Defendant issued an excessive volume of prescriptions for controlled substances compared to what a legitimate solo practitioner would issue in a small town such as Carrollton (*id.*, ¶ 17).

Accordingly, the facts in Investigator Jones’s affidavit readily establish a substantial basis for Magistrate Judge Walker to have concluded that probable cause existed to search Defendant’s Office.

C. The Warrant Was Sufficiently Specific and the Executing Officers Seized Items Within the Scope of the Warrant

The search warrant issued by Magistrate Judge Walker comports with Eleventh Circuit case law governing the degree of particularity in identifying the items to be seized, and the executing officers did not impermissibly exceed the scope of the warrant when seizing items during the search.

(I.) The Warrant Defined With Sufficient Particularity the Items to Be Seized

The Fourth Amendment requires that warrants “particularly describe ... the persons or things to be seized.” U.S. Const. Amend IV. The particularity requirement thus prevents “general, exploratory rummaging in a person’s belongings.” Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). “Elaborate specificity is unnecessary,” and “[t]he standard ‘is one of practical accuracy rather

than technical nicety.” United States v. Betancourt, 734 F.2d 750, 754-55 (11th Cir. 1984) (quoting United States v. Johnson, 541 F.2d 1311, 1313 (8th Cir. 1976)). A description is “sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized.” United States v. Cook, 657 F.2d 730, 733 (5th Cir. 1981).

The dispositive Eleventh Circuit case governing the particularity of warrants issued for a physician’s office in a prescription drug distribution case is Betancourt. In that case, the search warrant allowed agents to seize “all financial records ... and patient records” showing the dates of patient visits, diagnostic tests and results, diagnoses, and medications prescribed. 734 F.2d at 755. The court concluded that “this description prevented a general search and was as specific as the circumstances and nature of the activity permitted.” Id.

Here, the search warrants authorized agents to seize, in pertinent part, the following items:

Any and all books, documents and records; including but not limited to the medical records of the listed patients; including medical tests, test results and physician notes, calendars, appointment books, sign-in sheets; prescriptions and prescription pads, insurance records, billing or payment information, receipts and receipt books;

Computers and computer generated documents reflecting patient information, medical records, billing or payment information, financial

records, medical tests and results, appointments, or insurance records of the listed patients;

Address and/or telephone books and papers reflecting names, addresses, telephone numbers, pager numbers, fax numbers and/or telex numbers of co-conspirators, financial institutions and other individuals or businesses with whom a financial relationship exists; and

Any and all Federal order forms, records of inventory, invoices and other controlled substance records required to be kept under Title 21, United States Code and the Code of Federal Regulations.

(Warrant 740 and Warrant 739.)

The warrants do not identify any “listed patients,” which is an obvious scrivener’s error. Nonetheless, even without this limitation, the language of the search warrants is analogous to the language approved in Betancourt. Instead of allowing a general search, the warrants direct the executing officers to seize records, including those that relate to Defendant’s patients and prescribing practices, financial and billing information, and documents relating to controlled substances that are required to be kept by law. These are precisely the kinds of records that are relevant to an investigation of a physician suspected of illegally prescribing drugs, and the language is “as specific as the circumstances and nature of the activity permitted.” Betancourt, 734 F.2d at 755.

Defendant’s argument relies heavily upon case law that involves investigations of complex financial fraud. Courts recognize, however, that “[t]he determination as

to whether a warrant is sufficiently particular is dictated, in part, by the circumstances and nature of the activity charged.” United States v. Abbell, 963 F. Supp. 1178, 1196 (S.D. Fla. 1997). The case most directly on point, therefore, is Betancourt. To the extent that the fraud cases are applicable, the recent decision in United States v. Maharaj, No. 07-80024-CR, 2007 WL 2254559 (S.D. Fla. Aug. 2, 2007), is instructive. In Maharaj, a search warrant issued for a physician’s office in a billing fraud case authorized the seizure of “any/all patient records for both past and current patients,” including but not limited to patient correspondence, prescription and pharmaceutical records, billing records, appointment registers, sign-in sheets, super bills, lab records, telephone message books, banking and finance records, tax returns, address books, telephone toll records, corporate memoranda, credit card statements, personnel records, and all data stored on computers.” Id., at *12. The court thus reviewed language that is closely similar to the language at issue in this case, and found that “[t]he search warrants did not merely say ‘search the business,’ they set forth a laundry list of documents consistent with a ‘paperwork puzzle involving fraud’ that were subject to the search.” Id. (quoting United States v. Waugneux, 683 F.2d 1343, 1348-49 (11th Cir. 1982)).

Similarly, Defendant’s citation of United States v. Martinelli, 454 F.3d 1300 (11th Cir. 2006), is inapposite. Martinelli counsels that, in some complex fraud cases,

a search warrant permissibly may authorize agents to cart away each and every business record in a corporate office if the supporting affidavit establishes a pervasive scheme to defraud that justifies the seizure. 454 F.2d at 1307-08. As stated earlier, this is a drug distribution case, so this authority is not applicable. Even so, Investigator Jones's affidavit fits well within the scope of this rule, as the affidavit established probable cause to believe that Defendant was engaged in large-scale, illegal dispensation of prescription drugs. Specifically, the warrant states that: (1) Investigator Jones believed that Defendant had prescribed steroids illegally to Benoit (First Jones Aff., ¶¶ 13-14); (2) Defendant already was a subject of concern for excessive and/or suspicious prescribing activity by local police and pharmacies (id.); (3) a state search warrant executed at Defendant's office yielded prescriptions written by Defendant for numerous controlled substances that were consistent, in terms of quantities, dosages, and frequencies of the prescriptions, with illegal prescription drug abuse (id., ¶¶ 15-16); (4) Defendant had dispensed Demerol and take-home syringes to a staff member (id., ¶ 16); (5) Defendant admitted that he knew that it is illegal to write multiple, undated prescriptions for the same drug to the same patient on the same day, yet he did so on multiple occasions (id., ¶¶ 15-16); and (6) Defendant had authorized approximately one million dosage units of controlled substances in two years, which Investigator Jones found to be excessive for a sole

practitioner in a rural location (id., ¶ 17). See Abbell, 963 F. Supp. at 1196-97 (concluding that affidavit to search crooked attorneys' offices showed pervasive illegal conduct based on two and three instances of wrongdoing described in the affidavit that allowed inference that attorneys engaged in similar activities). These facts establish a protracted, extensive, and excessive pattern of illegal prescribing activity by Defendant, which more than justifies the scope of the warrant.⁹

Finally, the government observes that courts in this circuit have referred to the underlying affidavit to clarify and narrow the language identifying the items to be seized pursuant to a search warrant. See United States v. Maali, 346 F. Supp. 2d 1226, 1243 (M.D. Fla. 2004), aff'd, United States v. Khanani, — F.3d —, 2007 WL 2826968 (11th Cir. Oct. 2, 2007). In Maali, the court emphasized that the affidavit

⁹ The evaluation of “pervasive” wrongdoing within a business to be searched referenced in United States v. Hooshmand, 931 F.2d 725 (11th Cir. 1991), is particularly inapplicable here, where the place to be searched was a solo practitioner’s medical office where Defendant was the only practitioner licensed to dispense controlled substances. Stated simply, the affidavit establishes probable cause to show that the only physician who works in the office is illegally dispensing prescriptions, and therefore all the patient and financial records in the office are potentially relevant to the investigation. The situation is far different from the cases cited by Defendant, which involved practices with multiple physicians or corporations with varied business enterprises. See Wuagneux, 683 F.2d at 1349 (“the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and ... a description of property will be acceptable if it is as specific as the circumstances and nature of the activity under investigation permit”).

“explained the scheme and crimes under investigation, and even though that affidavit was not attached to the warrant, in this circuit such attachment is not required for successful incorporation of its terms into the warrant, at least where, as here, the affidavit was provided to the searchers.” Id. If necessary, the government will adduce evidence to the Court that the search of Defendant’s Office was delayed until Investigator Jones’s affidavit was sent to the scene and consulted by the agents who executed the warrant.

For all these reasons, the Court should conclude that the search warrant describes with sufficient particularity the items to be seized during the search.

(ii.) The Officers Did Not Seize Items Outside the Scope of the Warrant

Defendant has raised no credible allegations that the officers seized any items outside the scope of the warrant. When assessing this issue, courts examine whether the search and seizure was reasonable under all the circumstances. United States v. Schandl, 947 F.2d 462, 465 (11th Cir. 1991). Factors that a court may weigh when determining whether a search was reasonable include the scope of the warrant, the behavior of the searching agents, the conditions under which the search was conducted, and the nature of the evidence being sought. Id.

When agents perform a search and identify property to be seized, agents “are required to interpret the warrant, but are not obliged to interpret it narrowly.” United States v. Hill, 19 F.3d 984, 987 (5th Cir. 1994) (quoting United States v. Stiver, 9 F.3d 298, 302-03 (3d Cir. 1993) (internal quotation marks omitted). A warrant need only specify the items to be seized with reasonable specificity, conferring upon the agents executing the search some measure of discretion in determining whether an item possesses evidentiary significance in the manner set forth in the warrant. “Thus, the question whether the evidence seized falls within the scope of the warrant ultimately turns on the substance of the item seized ‘and not the label assigned to it by the defendant.’” Hill, 19 F.3d at 987 (quoting United States v. Word, 806 F.2d 658, 661 (6th Cir. 1986)). When searching for documents, some perusal may be needed to determine their relevance, and removal of documents for subsequent review may be appropriate. United States v. Lambert, 887 F.2d 1568, 1572 (11th Cir. 1989); United States v. Waugneux, 683 F.2d 1343, 1353 (11th Cir. 1982).

Here, Defendant identifies no seized items that fall outside the scope of the warrant, and any such allegation would have no merit. The officers reasonably seized patient files and other records from Defendant’s office, even if the documents required further review to determine if the records related to Defendant’s illegal

conduct. Lambert, 887 F.2d at 1572. Defendant's arguments therefore must be dismissed.

D. The Affidavit Establishes a Sufficient Nexus to Defendant's Residence

In passing, Defendant's Motion proposes that Investigator Jones's affidavit failed to establish any nexus to Defendant's Residence. The Fourth Amendment requires that the affidavit establish a fair probability that evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 238 (1983). "[T]he nexus between the objects to be seized and the premises searched can be established from the particular circumstances involved and need not rest on direct observation." United States v. Lockett, 674 F.2d 843, 846 (11th Cir. 1982).

Here, Investigator Jones's affidavit describes how, on June 25, 2007, Chris Benoit, who was known to investigators as an excessive purchaser of steroids, was found dead in his home. (First Jones Aff., ¶ 14.) In Benoit's residence, investigators found steroids and other controlled substances that had been prescribed by Defendant. (Id.) When the officers executed a search warrant at Defendant's Office only days later, Defendant arrived carrying Benoit's patient file, which he said he had brought from his Residence. (Id., at ¶ 15.) Any reasonable investigator would find this suspicious, in that Defendant had taken home the records for a patient who was

abusing steroids and who had been found by police to dead in his home. Under such circumstances, the investigators properly inferred that additional files relating to Benoit or other patients to whom Defendant dispensed controlled substances might be found at the Residence. These facts therefore establish a strong probability that the investigators could find evidence of Defendant's illegal conduct at Defendant's residence, and this argument should be rejected.

E. Even if the Warrants Are Invalid, Suppression of the Evidence Is Not an Appropriate Remedy Because the Officers Had a Good Faith Basis to Execute the Warrants.

Suppression of the evidence is not an appropriate remedy if the officers conducting the search acted in "objectively reasonable reliance" on the warrant's validity. United States v. Leon, 468 U.S. 897, 922 (1984). Ordinarily, "a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." Leon, 468 U.S. at 922. "The purpose of the exclusionary rule is to deter unlawful police misconduct; therefore, when officers engage in 'objectively reasonable law enforcement activity' and have acted in good faith when obtaining a search warrant from a judge or magistrate, the Leon good faith exception applies." United States v. Martin, 297 F.3d 1308, 1313 (11th Cir. 2002). Accordingly, "courts generally should not render inadmissible

evidence obtained by police officers acting in reasonable reliance upon a search warrant that is ultimately found to be unsupported by probable cause.” Id.

(I.) Probable Cause

In this case, assuming for purposes of argument that the Court concludes that the affidavit fails to establish probable cause, the record nonetheless establishes that the officers acted on a good faith belief that the warrants were valid and that the searches were permitted. Investigator Jones presented the affidavit to Magistrate Judge Walker, who reviewed the warrant application and then signed the warrants. The affidavit includes abundant facts relating to the illegal dispensing of prescription drugs by Defendant, and thus is not so devoid of investigative facts that the officers could not reasonably have relied on the warrant applications. Given these circumstances, the officers had every reason to believe that the warrants were valid and that the searches were properly authorized, and the searches should be affirmed on this basis as well.

(ii.) Particularity

Eleventh Circuit law is abundantly clear that officers may rely in good faith upon a search warrant that fails to particularly describe the items to be seized. In United States v. Accardo, 749 F.2d 1477 (11th Cir. 1985), the court refused to hold as a matter of law that the good faith exception cannot apply to a search warrant that

authorized agents to seize “all corporate records,” as this language is not so facially deficient the executing officers could not reasonably presume it to be valid. Id. at 1481. “This is not an instance in which ‘it is plainly evident that a magistrate or judge had no business issuing a warrant.’” Id. (quoting Massachusetts v. Sheppard, 104 S. Ct. 3424, 3429 n.7 (1984)). In the same case (on appeal after remand), the Eleventh Circuit affirmed a finding that the agents justifiably relied upon that language and upheld the dismissal of the defendant’s particularity challenge to the warrants. United States v. Norton, 867 F.2d 1354, 1360 (11th Cir. 1989); see also United States v. Travers, 233 F.3d 1327, 1330-31 (11th Cir. 2000) (in case where particularity problem presents a “close call,” the good faith doctrine properly applies to deny defendant’s suppression motion).

This principle was not changed in any way by the Supreme Court’s ruling in Groh v. Ramirez, 540 U.S. 551 (2004), which dealt with the narrow question of whether a warrant that authorized the seizure of any instrumentalities of unspecified crimes against the United States was facially invalid. The Eleventh Circuit therefore continues to apply the good faith rule to particularity challenges, as long as the language goes beyond the “instrumentalities” language condemned in Groh. See United States v. Khanani, — F.3d —, 2007 WL 2826968, at *5 (11th Cir. Oct. 2, 2007); United States v. Haynes, No. 04-15944, 2005 WL 3542403, at **3 (11th Cir.

Dec. 28, 2005) (“There is no doubt that ‘[t]he good faith exception may be applied to a search conducted pursuant to an overly broad warrant’”) (quoting Travers, 233 F.3d at 1330) (unpublished).

Here, the good faith doctrine should be applied as a matter of law based on the face of the warrants themselves. As noted earlier, the description of items to be seized is significantly similar to descriptions that have been approved in published opinions such as Betancourt and Maharaj. When an agent acts in a manner that already has been sanctioned in case law, the Court should conclude as a matter of law that the agent reasonably acted in good faith in doing so. For these reasons, the Court should deny Defendant’s suppression motion on this ground.¹⁰

¹⁰ The government notes that, in United States v. Burke, 718 F. Supp. 1130 (S.D.N.Y. 1989), the court applied the good faith doctrine to a warrant that allowed the seizure of “documents, books, ledgers, records, and objects, including but not limited to” a list of specific types of records. The court relied upon, among other things, an evidentiary record that showed that the warrant had been reviewed by an Assistant United States Attorney and several federal magistrate judges, the warrant was patterned after prior warrants used in successful investigations, and the affidavit effectively limited the seizure of items during the execution of the warrant. Id., at 1141-43. If necessary, the government can present the same evidence during an evidentiary hearing as ordered by the Court. See Order Dated August 29, 2007 (instructing the government to advise the Court if an evidentiary hearing is necessary to resolve Defendant’s suppression motions). For the reasons stated above, the government believes that Defendant’s Motion can be resolved as a matter of law without a hearing, but makes this reservation in an abundance of caution.

3. Warrant 771 and Warrant 863

Defendant's Motion seeking suppression of Warrants 771 and 863 simply repeats the same arguments that Defendant offers in support of suppressing Warrants 740 and 739, with the addition of several points that are included without much elaboration or factual support. The government therefore will not repeat the same legal and factual discussion set forth earlier in this Response, and will provide supplemental authority and analysis only as necessary to respond to Defendant's new claims.

A. Investigator Jones' Second Affidavit Contains No Misrepresentations or Omissions to Support a Franks Argument

Because Defendant relies upon the same allegations and arguments as contained in his earlier Motion, the government relies upon and incorporates the summary of law and discussion set forth in Section II.2.A of this Response. It is nonetheless worth noting that some of Defendant's Franks arguments relating to the First Jones Affidavit do not apply to the Second Jones Affidavit, because the Second Jones Affidavit omits the paragraphs relating to Benoit's death and Defendant's prescriptions issued to Benoit. Regardless, Defendant's Franks arguments relating to the Second Jones Affidavit fail as a matter of fact and law, and should be dismissed without an evidentiary hearing.

B. Investigator Jones' Second Affidavit Establishes Probable Cause to Issue the Warrants

Although Defendant suggests that the Second Jones Affidavit fails to establish probable cause, Defendant's summary accusation also overlooks the fact that the Second Jones Affidavit is different from the First Jones Affidavit. Regardless, the facts set forth in the Second Jones Affidavit are more than sufficient to give the magistrate judges a substantial basis for a finding of probable cause. Specifically, the affidavit includes the same information that is contained in the First Jones Affidavit, as already summarized earlier, with the following differences:

- (1). The Second Jones Affidavit omits the investigative facts relating to Chris Benoit, which are contained in paragraphs 13 and 14 of the First Jones Affidavit and summarized in items number 3 and 4 on pages six and seven of this Response.
- (2). The Second Jones Affidavit provides additional details of improper prescriptions issued by Defendant that were discovered during the June 27, 2007, search of Defendant's Office. Specifically, for at least three patients Defendant issued multiple, undated prescriptions for the same controlled substances on the same day. Issuing prescriptions in this manner not only violated federal law by itself, but also was consistent with prescription drug abuse because it allows patients to fill multiple prescriptions simultaneously. (Second Jones Aff., ¶¶ 13-14.)
- (3). Investigator Jones detailed dozens of prescriptions that Defendant issued to two patients, which occurred from November 2002 until June 2006. These prescriptions included Percocet, Lorcet, Valium, Xanax, Adderall, and other drugs that are commonly prescribed together in cases involving prescription drug abuse. For one patient, Defendant issued four undated prescriptions for Adderall, three undated prescriptions for

Percocet, and one dated prescription for Lorcet (with three refills), all on the same day. The affidavit identified a total of 18 undated prescriptions, almost all of which were issued on the same date as other prescriptions for the same drug. Relying on her training and experience (as well as other experienced Diversion investigators with whom she consulted), Investigator Jones pointed out “the pattern of the prescriptions issued to these patients, including the specific drugs dispensed, the frequency of the prescriptions, the inclusion of refills in the prescriptions, and the quantities of tablets” and concluded that “the prescriptions ... are not consistent with a legitimate medical purpose, and instead are consistent with abuse of prescription drugs or the illegal distribution of prescription drugs by those who obtained the prescriptions.” (*Id.*, ¶¶ 6-10, 15, 16, and 18.)

- (4). On July 6, 2007, a source of information who was associated with Defendant’s medical practice and who knew him personally for 10 years, told investigators that Defendant rented the Storage Unit. The source said that he/she had been to the Storage Unit and seen that Defendant stored patient records there. This source had no criminal record, provided the information voluntarily without any expectation of compensation or consideration from agents, presented a credible demeanor, and provided information that was corroborated by independent investigation. (*Id.*, ¶ 20.)
- (5). Ruth Smith, the owner of the Bypass Mini Storage facility, told investigators that Defendant rented the Storage Unit under his name for the last 10 years and identified the number of the unit rented by Defendant as Unit 30.

These facts go well beyond a showing of probable cause that Defendant was illegally dispensing prescription drugs. Indeed, the Court could simply start and finish its evaluation of probable cause with Defendant’s own admission that he was

issuing illegal prescriptions for controlled substances. The Court therefore should dismiss Defendant's arguments relating to a lack of probable cause.

C. The Facts Set Forth in the Second Jones Affidavit Are Not Stale

Without any supporting discussion, Defendant argues that the facts in the Second Jones Affidavit were too stale to support a finding of probable cause. An affidavit "must reveal facts that make it likely that the items being sought are in that place when the warrant issues." United States v. Harris, 20 F.3d 445, 450 (11th Cir. 1994) (quoting United States v. Domme, 753 F.2d 950, 953 (11th Cir. 1985)). The information must be timely for probable cause to exist, for probable cause must exist at the time the magistrate judge issues the search warrant. Id. When examining the timeliness of information, courts do not consider the information to be stale if: (1) the facts suggest that the activity is of a protracted and continuous nature, and (2) the items to be seized were created for the purpose of preservation. United States v. Yusuf, 461 F.3d 374, 391-92 (3d Cir. 2007) (business records are more likely to be kept for a longer period of time due to general business practices); see also Harris, 20 F.3d at 450-51 (affidavit that referred to events that occurred two years before date of affidavit was not stale because the alleged criminal activity was protracted in nature); United States v. Reiner, — F.3d —, 2007 WL 2353168, at *3 (1st Cir. Aug. 20, 2007) (illegal activity operating under the guise of a legal and long-running

business is precisely the type of criminal enterprise that would most likely be unchanged over the course of several years).

Here, the Second Jones Affidavit includes facts showing protracted and continuous dispensing of controlled substances in an illegal manner, both historically and recently. First, the affidavit identifies dozens of illegal prescriptions that Defendant wrote from 2003 until 2006, and also explains that Defendant wrote an excessive amount of prescriptions for controlled substances during the two years preceding the affidavit. (Second Jones Aff., ¶ 19.) In addition, Defendant himself admitted during an interview only weeks before the issuance of the warrant that he knew that he was issuing illegal prescriptions. (Id., ¶17.) Third, a source advised that he/she had personal knowledge that Defendant stored patient files in Defendant's Storage Shed and had seen them there him/herself, and the owner of the storage facility confirmed that Defendant had an active rental agreement for a unit at the facility. (Id., ¶ 20-21.) Finally, contrary to Defendant's unsupported assertions, the nature of a physician's office allows the magistrate judge to expect that Defendant would retain the medical and financial records relating to his patients. (Id., ¶¶ 2, 5 (describing the manner in which physicians are required by law to keep records relating to the dispensing of controlled substances, and the manner in which physicians retain medical and financial records as a matter of general practice).)

For all these reasons, Defendant's staleness arguments should be rejected.

D. The Magistrate Judges Properly Credited the Information Provided by the Confidential Source

When making the practical, common-sense evaluation of the facts included in an affidavit, a magistrate considering information from an informant examines the totality of the circumstances surrounding the informant's statements, including the veracity and basis of knowledge of the informant. United States v. Brundidge, 170 F.3d 1350, 1352-53 (11th Cir. 1999). Independent police corroboration is not a requirement for an informant to be deemed reliable. Id.

Here, the confidential source was someone who was associated with Defendant's medical practice and who knew him personally for 10 years. This source: (a) had no criminal record; (b) provided the information voluntarily without any expectation of compensation or consideration from agents; (c) presented a credible demeanor; and (d) provided specific and detailed information based on his/her own personal knowledge. (Second Jones Aff., ¶ 20.) Finally, the source's information was corroborated by independent investigation, as the owner of the storage facility confirmed the facts provided by the source. (Id., ¶¶ 20-21.)

For these reasons, Defendant's challenge to the reliability of the source fails and the Court should conclude that the magistrate properly relied upon the source's information when reviewing the Second Jones Affidavit.

E. Warrants 771 and 863 Are Sufficiently Particular

Defendant offers no arguments in support of this assertion, relying solely on the discussion in his other motions. Of course, it bears noting that the affidavit at issue is different, although the list of items to be seized is functionally the same. To the extent that the resolution of this issue bears on the specific language used in the warrant, the government relies upon and incorporates the legal authority and discussion set forth in Part II.2.C., earlier. The only additional point worth making is that, in the event the Court deems it necessary to rely on case law that evaluates the pervasive nature of the criminal activity, the Second Jones Affidavit passes this test as well. Specifically, the affidavit identifies dozens of illegal prescriptions written to three patients by Defendant during a three-year period, and also explains that Defendant had written excessive numbers of prescriptions for controlled substances during the two years before the search. These facts establish probable cause that Defendant's criminal conduct was prolonged, continuous, and widespread, thus justifying the breadth of the search.

F. Even if the Warrants Are Invalid, Suppression of the Evidence Is Not an Appropriate Remedy Because the Officers Had a Good Faith Basis to Execute the Warrants.

Defendant does not address this issue in his Motion. Nonetheless, for the same reasons set forth in Part II.2.E. of this Response, the Court should conclude that the evidence seized pursuant to these warrants is admissible because the officers possessed a good faith belief that they were executing lawful warrants, and deny Defendant's Motion on this basis irrespective of the validity of the warrants.

4. Warrant 777

Defendant's Motion seeking suppression of Warrant 777 again repeats the same arguments that Defendant offers in support of suppressing Warrants 740 and 739, with the addition of several points that are included without much elaboration or factual support. The government therefore will not repeat the same legal and factual discussion set forth earlier in this Response, and will provide supplemental authority and analysis only as necessary to respond to Defendant's new claims.

A. Investigator Jones' Third Affidavit Contains No Misrepresentations or Omissions to Support a Franks Argument

Because Defendant relies upon the same allegations and arguments as contained in his earlier Motion, the government relies upon and incorporates the summary of law and discussion set forth in Section II.2.A of this Response. It is

nonetheless worth noting that some of Defendant's Franks arguments relating to the First Jones Affidavit do not apply to the Third Jones Affidavit, because the Third Jones Affidavit omits the paragraphs relating to Benoit's death and Defendant's prescriptions issued to Benoit. Regardless, Defendant's Franks arguments relating to the Third Jones Affidavit fail as a matter of fact and law, and should be dismissed without an evidentiary hearing.

B. Investigator Jones' Third Affidavit Establishes Probable Cause to Issue the Warrants

Although Defendant suggests that the Third Jones Affidavit fails to establish probable cause, Defendant's summary accusation also overlooks the fact that the Third Jones Affidavit is different from the First Jones Affidavit. Regardless, the facts set forth in the Third Jones Affidavit are more than sufficient to give the magistrate judges a substantial basis for a finding of probable cause. Specifically, the affidavit includes the same information that is contained in the First and Second Jones Affidavits, as already summarized earlier, with the following differences:

- (1). The Third Jones Affidavit omits the investigative facts relating to Chris Benoit, which are contained in paragraphs 13 and 14 of the First Jones Affidavit and summarized in items number 3 and 4 on pages six and seven of this Response.
- (2). The Third Jones Affidavit referenced the second search of Defendant's Office on June 29, 2007, and explained that the agents seized some files for Defendant's patients but did not seize

a number of files that were stored in the Office’s “copy room,” because a preliminary review of the files showed that they were not relevant to the investigation. (Third Jones Aff., ¶ 13.)

- (3). The same source of information mentioned in the Second Jones Affidavit told investigators that the files located in the “copy room” included patient files for inactive patients and deceased patients. (Id., ¶ 20.)
- (4). Investigator Jones stated that, in her training and experience, the files for patients who are no longer active patients, or who have died, may be relevant to the investigation of illegal prescriptions by Defendant. (Id., ¶ 21.)

These facts go well beyond a showing of probable cause that Defendant was illegally dispensing prescription drugs. Here again, the Court could simply start and finish its evaluation of probable cause with Defendant’s own admission that he was issuing illegal prescriptions for controlled substances. The Court therefore should dismiss Defendant’s arguments relating to a lack of probable cause.

C. The Facts Set Forth in the Third Jones Affidavit Are Not Stale

Defendant repeats the same arguments regarding staleness that he raised in his challenge to Warrants 771 and 863, which are based upon the Second Jones Affidavit. Because the facts supporting probable cause in the Third Jones Affidavit are largely the same as those contained in the Second Jones Affidavit, the government relies upon and incorporates the summary of law and discussion set forth in Part II.3.C., earlier. As explained earlier, Defendant’s staleness arguments should be rejected.

D. Warrant 777 Is Sufficiently Particular

Defendant offers no arguments in support of this assertion, relying solely on the discussion in his other motions. Of course, it bears noting that the affidavit at issue is different, as is the list of the items to be seized. Warrant 777 authorized agents to seize any and all books, documents and records; including but not limited to the medical records of any active, inactive, or deceased patients; including medical tests, test results and physician notes, calendars, appointment books, sign-in sheets; prescriptions and prescription pads, insurance records, billing or payment information, and receipts and receipt books. (Warrant 777.)

To the extent that the resolution of this issue bears on the specific language used in the warrant, the government relies upon and incorporates the legal authority and discussion set forth in Part II.2.C., earlier. The only additional point worth making is that, as with Warrants 771 and 863, the Third Jones Affidavit contains abundant facts establishing the pervasive nature of Defendant's criminal conduct. Specifically, the affidavit identifies dozens of illegal prescriptions written to three patients by Defendant during a three-year period, and also explains that Defendant had written excessive numbers of prescriptions for controlled substances during the two years before the search. These facts establish probable cause that Defendant's

criminal conduct was prolonged, continuous, and widespread, thus justifying the breadth of the search.

E. Even if the Warrant Is Invalid, Suppression of the Evidence Is Not an Appropriate Remedy Because the Officers Had a Good Faith Basis to Execute the Warrants.

Defendant does not address this issue in his Motion. Nonetheless, for the same reasons set forth in Part II.2.E. of this Response, the Court should conclude that the evidence seized pursuant to Warrant 777 is admissible because the officers possessed a good faith belief that they were executing a lawful warrant, and deny Defendant's Motion on this basis irrespective of the validity of the warrants.

III. Conclusion

For all these reasons, the Court should, without the need of an evidentiary

hearing, deny Defendant's Motions and affirm the admissibility of the evidence obtained pursuant to the searches performed during this investigation.

Respectfully submitted this the 5th day of October, 2007.

DAVID E. NAHMIAS
UNITED STATES ATTORNEY

/s/ John Horn
JOHN HORN
ASSISTANT U.S. ATTORNEY
Georgia Bar No. 367210
600 U.S. Courthouse
75 Spring St., S.W.
Atlanta, GA 30303
404/581-6118
fax: 404-581-6171

CERTIFICATION PURSUANT TO LOCAL RULE 7.1(D)

The United States certifies that this Response has been formatted using Times
New Roman font in 14-point size.

/S/ John Horn
JOHN HORN
Assistant United States Attorney
Ga. Bar No. 367210

TMZ.com

CERTIFICATE OF SERVICE

I certify that, on October 5, 2007, I electronically filed this Consolidated Response to Defendants' Motions for Disclosure of Confidential Informants with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Natasha Perdew Silas, Esq.

This the 5th day of October, 2007.

/s/ John Horn
JOHN HORN
ASSISTANT UNITED STATES ATTORNEY
Georgia Bar No. 367210
600 U.S. Courthouse
75 Spring St., S.W.
Atlanta, GA 30303
404/581-6118
fax: 404-581-6171
Email: john.horn@usdoj.gov