IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL ACTION**
v.	:	**NO. 06-392**
	:	
ALBERT KOFSKY	:	
	:	

DuBOIS, J. **AUGUST 28, 2007**

T A B L E O F C O N T E N T S

M E M O R A N D U M

I. INTRODUCTION

Defendant, Dr. Albert Kofsky, is charged in a 476-count Second Superseding Indictment in connection with the distribution of prescription diet pills, phentermine and phendimetrazine, though his medical practice. Specifically, defendant is charged with the following counts: making false statements to obtain controlled substances (Counts One and Two); possession with intent to distribute controlled substances and/or distribution of controlled substances (Counts Three through Ten); possession with intent to distribute controlled substances (Counts Eleven through Three Hundred Seventy); mail fraud (Counts Three Hundred Seventy-One through Three Hundred Eighty-Eight); use of proceeds to promote illegal activity (Counts Three Hundred Eighty-Nine through Four Hundred Sixty-Two); use of proceeds to make purchases in excess of $10,000 (Counts Four Hundred Sixty-Three through Four Hundred Seventy-Four); aggravated structuring (Count Four Hundred Seventy-Five); and obstruction (Count Four Hundred Seventy-Six). In addition, defendant is charged with aiding and abetting (Counts One and Two and Counts Five through Four Hundred Seventy-Six).

Presently before the Court are three Motions to Suppress filed by defendant. In the first Motion to Suppress, defendant moves to suppress evidence seized during simultaneous searches of defendant's residence, medical office, two safety deposit boxes, and Saab automobile on April 13, 2006. In the second Motion to Suppress, defendant moves to suppress defendant's statements made to Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) agents during the search of defendant's residence on April 13, 2006. In the third Motion to Suppress, defendant moves to suppress evidence seized during a second search of defendant's medical office on July 13, 2006.

The Court held an evidentiary hearing on defendant's Motions to Suppress on July 11 and 12,

2007, at which the government presented six witnesses: FBI Supervisory Special Agent Joseph R. Stone, Investigator William Hausmann, FBI Special Agent Barbara Verica, FBI Special Agent Jennifer Ngo, DEA Diversion Investigator Scott Davis, and FBI Special Agent David Bole. The Court held a continued evidentiary hearing on August 1, 2007, at which the government presented five witnesses: FBI Special Agent Shannon Clark, DEA Investigator Davis, FBI Special Agent Annette Vogts, FBI Special Agent Eileen Piccolo, and DEA Diversion Investigator James Corbett.[1] Oral argument on the Motions to Suppress was held on August 2, 2007.

For the reasons set forth below, defendant's Motion to Suppress Evidence Seized April 13, 2006 is granted as to the statements of patients obtained at Dr. Kofsky's office on April 13, 2006, and is denied in all other respects. Defendant's Motion to Suppress Statement Obtained by Government Interrogation is denied. Defendant's Motion to Suppress Evidence Seized July 13, 2006 is denied.

II. FACTUAL BACKGROUND

A. Search Warrants Executed on April 13, 2006

At issues in defendant's first Motion to Dismiss are five search warrants issued by United States Magistrate Judge Thomas J. Rueter on April 7, 2006 and executed simultaneously on April 13, 2006. The search warrants authorized the searches of defendant's residence on Boucher Drive in Huntington Valley, Pennsylvania; defendant's medical offices on Birch Road in Philadelphia, Pennsylvania; safe deposit box 117 at First Trust Bank in Philadelphia; a safe deposit box "rented by Albert Kofsky and/or RE:02-F0207 National Safe Deposit Box Corporation" in Jenkintown,

[1] The five case agents were permitted to remain in the evidentiary hearings to assist government counsel and were not sequestered. Those case agents are: Special Agent Ngo, Investigator Davis, Special Agent Vogts, Special Agent Piccolo, and Investigator Corbett. Tr. 7/11/07 at 35-36.

Pennsylvania; and a Saab sport utility vehicle (SUV).

Each of the search warrants issued by the Magistrate Judge included the same exhaustive list of twenty-six "Items to Be Seized." That list included the following:

> 1. All controlled substances, including without limitation, Phentermine, Phendimentrazine and Bontril.
>
> 2. All patient charts, logs and/or profiles for any person under the medical care of Albert Kofsky. . . .
>
> 7. All billings, claim statements and records for patient visits, and payments made to Albert Kofsky or his agents . . . .
>
> 10. All financial records relating to the distribution of controlled substances or the provision of medical services by Albert Kofsky . . . .
>
> 15. All cash, checks, credit card payment devises and receipts.
>
> 16. All financial records, documents and materials of relating to the personal finances of Albert Kofsky, including records, documents and material relating to any financial or pecuniary account in which he has a right, title or interest. . . .
>
> 26. All other documents and things related to the distribution of controlled substances by Kofsky or his agents, identification of people, businesses or other entities to whom such distributions were made, the nature and amounts of payments received by Kofsky or his agents for such distributions and the disposition of funds received for such distributions.

Def.'s Mot. Suppress Evidence Seized April 13, 2006, Ex. 1 ¶¶ 1, 2, 7, 10, 15, 16, 26. Notably, the list of items to be seized did not include any time limitations.

B. The Ngo Affidavit

The five search warrants executed on April 13, 2006 were issued on the basis of warrant applications, each of which included a fifteen page Affidavit submitted by FBI Special Agent Ngo (the "Ngo Affidavit").

1. Evidence in the Ngo Affidavit Regarding Dr. Kofsky's Medical Practice

The Ngo Affidavit stated, by way of introduction, that Dr. Kofsky "is registered with D.E.A. to dispense to patients Schedule III and Schedule IV controlled substances . . . when they are for a legitimate medical purpose in the course of a professional medical practice." Ngo Affidavit ¶ 3. Continuing, the Ngo Affidavit recited that Dr. Kofsky was distributing controlled substances *outside* of professional medical norms. The evidence presented included: (1) records from Dr. Kofsky's wholesale pill distributor; (2) three surveillance operations at Dr. Kofsky's office; (3) three undercover visits to Dr. Kofsky's office; and (4) reports of two unidentified doctors consulted by the government. The Court summarizes each area of evidence in turn.

a. Records from Dr. Kofsky's Wholesaler

The Ngo Affidavit states that agents "identified one wholesaler from whom Kofsky has bought diet pills since March 1999." Id. ¶ 10.[2] A "sample" of the purchase records from this wholesaler from the years 1999 and 2002 through 2006[3] demonstrates that Dr. Kofsky purchased between 11,000 to 16,000 pills per week, with one purchase of 32,000 pills the week of June 29, 2004. Id. ¶ 12. As to the years 2000 and 2001, the Ngo Affidavit states that "[w]hile our investigation shows from the amounts of money that Kofsky paid, that Kofsky to make [sic] substantial weekly purchases of diet pills during this period, we do not yet have the information which permits us to identify quantities and types of pills purchased." Id. ¶ 12 n.1.

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[2] The Ngo Affidavit did not identify the wholesale supplier. It was identified during the evidentiary hearing as Wesley Pharmacal. Tr. 7/12/07 at 103.

[3] The records for 2006 extend only through March; in April 2006 the warrants were issued. Ngo Affidavit ¶ 12.

b. Surveillance of Dr. Kofsky's Office

The Ngo Affidavit describes three days in 2005 and 2006 during which agents conducted surveillance outside Dr. Kofsky's medical office during posted office hours. Id. ¶¶ 15, 21, 22. During the surveillance operations, agents "counted how many people came and went and for what period of time each stayed." Id. ¶ 15. On Thursday, July 14, 2005, the surveillance agents observed that "[t]he average time between entry and exit for most people was about 3 minutes." Id. On Thursday, December 1, 2005, agents observed that "[p]eople came and went at a rate of fifteen people per hour," an average of one person every four minutes. Id. ¶ 21. On March 22, 2006, a Wednesday, the surveillance agents observed that "patients continued to visit Kofsky's Birch Street office, although at a less frequent rate than during previous surveillance." Id. ¶ 22.

c. Undercover Visits to Dr. Kofsky's Office

The Ngo Affidavit describes three undercover visits to Dr. Kofsky's office in 2005 in some detail, as follows:

> On Wednesday, September 28, 2005, an F.B.I. special agent acting in an undercover capacity went into Kofksy's Birch Street office and posed as a someone [sic] who wanted diet pills. Kofsky directed the agent to a small room in which a person Kofsky called "Betty" took the agent's name, address, and goal weight. Betty gave the agent pro form advice about diet and nutrition. She weighed the agent. Then another woman, whom the agent heard called "Donna" entered the room to take the agent's blood pressure.
>
> Donna then offered the agent acting in an undercover capacity a choice of six pills to purchase . . . . The agent purchased what Donna told him/her was a two-week supply of 37.5 mg. Phentermine, 28 pills, for $63. That equals $2.25 a pill. There was no additional fee for the doctor's visit.
>
> On Tuesday, October 4, 2005, six days later, the same FBI special agent returned to Kofsky's office, in an undercover capacity. Betty weighed the agent and Donna took his/her blood pressure. The agent asked Donna for two "packs" of pills this time. Donna told him/her that would not be a problem. The agent bought 56 pills of

> Phentermine (37.5 mg) for $126, which again equals $2.25 a pill. There was no additional fee for the doctor's visit.
>
> On Tuesday, November 1, 2005, the FBI special agent returned to Kofsky's office. The agent was accompanied by a D.E.A. Task Force officer also acting in an under cover [sic] capacity. The agents were taken together into the same room. The D.E.A. Task Force officer gave his/her name, address and goal weight and Betty gave him/her the same pro forma talk about nutrition and weight. Betty weighed the D.E.A. task force officer. Donna weighed the FBI special agent and took the D.E.A. task force officer's blood pressure. No one took the F.B.I. agent's blood pressure. The two law enforcement officers were then asked how many packs of pills each wanted to purchase. The FBI agent purchased three packs of Phentermine 37.5 mg, 84 pills (a six-week supply), for $189. The D.E.A. task force officer purchased two packs of Phentermine 37.5 mg, 56 pills (a four week supply), for $126.
>
> All undercover purchases were in cash. Kofsky was present in the office on each of the days that agents acting in an undercover capacity bought diet pills from his staff. Kofsky did not examine or interview either agent. His only contact with them was to greet one of them on one occasion and to direct them to a room.

Ngo Affidavit ¶¶ 16-20.

d. Consultation with Weight Loss Doctors

The Ngo Affidavit further states that agents "consulted two physicians who specialize in obesity and weight loss about the prescribing and dispensing of controlled substances" for weight loss in ordinary medical practice. Id. ¶ 24. Both of the physicians told the agents that "for a follow-up visit, it is standard for a patient to have his blood pressure taken, his pulse, his weight by the doctor or a nurse and for the doctor and the patient to discuss his diet, medicines and any problems. This process takes between 10 and 12 minutes per patient." Id. ¶ 28. In addition, the agents

> asked the second doctor we consulted to consider a situation in which a doctor dispenses on average 11,000 Phentermine 37.5 mg. tablets a week and 3,000 Phendimetrazine tablets a week. The second doctor replied, "There's something wrong." When he was told of the number of people entering a doctor's office during the period of our surveillance on July 14, 2005, the doctor said, in part: "I can't do that. That's impossible if you're taking blood pressure [and the other steps that he described as part of the ordinary and usual bariatric practice]."

Id. ¶ 27 (brackets in original). On the basis of their consultation with the two doctors and a review of the "Physician's Desk Reference," the Ngo Affidavit stated that "the quantity of pills ordered by Kofsky cannot be explained by his distribution of them in a legitimate medical practice." Id. ¶ 29.

2. Evidence in the Ngo Affidavit Regarding Cash Deposits

The Ngo Affidavit sets forth additional evidence regarding Dr. Kofsky's cash receipts and deposits. This evidence was based upon bank records from M&T Bank and Citizen's Bank and the purchase records from Dr. Kofsky's wholesale pill distributor.

The M&T Bank records date from "at least to 2000" to December 2004. Ngo Affidavit ¶ 36. Those records "show that once a week (generally, on the same day that he receives the supply of pills from the wholesale pharmacological supplier we have identified), Kofsky made deposits of checks and what appear to be structured amounts of cash, typically in amounts in excess of $9,000 but under the currency transaction reporting requirement of $10,000." Id. ¶ 36. The Citizen's Bank records date from April 2005 until September 2005. Id. ¶¶ 37-38. The Ngo Affidavit summarizes only the records from one month, July 2005, during which agents observed a "pattern of deposits" similar to that "observed in our review of Kofsky's deposits at M & T Bank." Id. ¶ 39.

The Ngo Affidavit further sets forth an analysis of Dr. Kofsky's income "on the basis of his purchases of diet pills from the identified wholesaler and our knowledge of the prices he charged in 2005 to our undercover agent." Id. ¶ 40. The agents concluded that "in 2004, he appeared to declare approximately $450,000 less than he should have generated on the basis of his costs with supplier and his charges for the pills he distributes; in 2003, it appears that he should have generated an additional approximately $250,000 or more in sales." Id.

3. Evidence in the Ngo Affidavit Regarding Dr. Kofsky's Residence

As to Dr. Kofsky's residence, the Ngo Affidavit states that he is authorized by DEA "to maintain and store controlled substances at his office and at his home at 78 Boucher Drive, Huntingdon Valley, Pennsylvania." Ngo Affidavit ¶ 5. Dr. Kofsky "must maintain full records regarding the acquisition and dispensing and distribution of all controlled substances at (at least) one of these of these [sic] locations." Id. ¶ 46.

The Affidavit also briefly describes why Dr. Kofsky is allowed to store controlled substances in his home. This authority dates to a DEA investigation in 1994, as follows:

> In the course of a D.E.A. investigation in 1994 triggered by a pharmacy's report to D.E.A. that Kofsky was buying unusual quantities of controlled substances, Kofsky told D.E.A. that he keeps his controlled substance records at his home and that each day he removes controlled substances to and stores them in his home. Kofsky followed this practice after his office had been burglarized . . . .

Id. ¶ 35. In a "follow-up inspection" by DEA in 1997, "Kofsky reported that he continued to store all his controlled substances at his home and that he takes home his dispensing stock every night. He said, as well, that he keeps 'most' of his records at his home, including 'perpetual' records for his controlled substances." Id.

4. Evidence in the Ngo Affidavit Regarding Safe Deposit Boxes

The Ngo Affidavit sets forth minimal information regarding the two safe deposit boxes searched on April 13, 2006. Specifically, it states that:

> As of September 10, 2005, Kofsky banks at Firstrust Bank. He appears to be a signatory on five active accounts at that bank as well as a lessor of a safety deposit box: number 117.
>
> Even though he maintains this Firstrust safe deposit box . . . bank records show that in February 2005, Kofsky paid for a safe deposit box at a private facility in Jenkintown, Pennsylvania, known as "First National Safe Deposit Corporation." This private facility is not near Kofsky's home or office or any reasonable route between them. By the amount of

Kofsky's payment, we believe that he has rented a 10 inch by 10 inch safe deposit box. Ngo Affidavit ¶¶ 41-42.

5. Evidence in the Ngo Affidavit Regarding Saab Automobile

The Ngo Affidavit also sets forth minimal information regarding the Saab automobile searched on April 13, 2006. In full, the Ngo Affidavit states:

> Kofsky's car, a Mercedes Benz, Pennsylvania license plate number DWC9605 was parked in the vicinity of his office throughout the periods of surveillance conducted on Thursday July 14, 2005 and on Thursday December 1, 2005. On March 22, 2006 and April 6, 2006, Kofsky was seen at his office driving a SAAB SUV, Pennsylvania license plate number GHR1174.

Ngo Affidavit ¶ 23.

C. Information *Not* Included in the Search Warrant Applications

At the evidentiary hearings on July 11 and 12, 2006 and August 1, 2006, government agents testified extensively regarding the evidence in the Ngo Affidavit. The following testimony reflects information that was not included in the Affidavit.[4]

1. Quantitative Information Regarding the March 22, 2006 Surveillance Operation at Dr. Kofsky's Office

The Ngo Affidavit states that during the March 22, 2006 surveillance of Dr. Kofsky's office, agents observed people visiting the office "at a less frequent rate than during previous surveillance." Ngo Affidavit ¶ 22. In contrast to surveillances of July 14, 2005 and December 1, 2005, the Affidavit does not quantify the number of people who visited the office per hour on that date. See Tr. 7/12/07 at

[4] Although the Court did not rule explicitly whether a Franks hearing was warranted, it actually conducted such a hearing, and both counsel agreed. Tr. 8/2/07 at 63, 84; Franks v. Delaware, 438 U.S. 154, 155 (1978) (holding that defendant has the right to challenge the truthfulness of factual statements made in an affidavit of probable cause after making a "substantial preliminary showing").

167. At the evidentiary hearing, Agent Ngo explained that the Ngo Affidavit did not include quantitative information for the March 22, 2006 surveillance because a detailed FBI 302 report of the March 22, 2006 surveillance was not issued until May 16, 2006, after the execution of the search warrants. Id. at 116-17, 168, 195, 206. That FBI 302 Report states that agents conducted surveillance of patients between 2:00 p.m. and 4:50 p.m. During that time they recorded the license plates of seventeen cars arriving at Dr. Kofsky's office, the equivalent of one car every ten minutes. Gov't Ex. 16 at 1-2.

2. Length of the Undercover Visits to Dr. Kofsky's Office

The Ngo Affidavit describes the three undercover visits to Dr. Kofsky's office, but does not state the length of those visits. See Tr. 8/1/07 at 111. Agent Vogts, the FBI special agent who conducted the undercover visits, testified as to the length of the visits during the evidentiary hearing on August 1, 2007. During her first visit, Agent Vogts spent approximately twenty minutes with Dr. Kofsky's employees–approximately ten minutes with Betty, who gave her nutrition advice, and approximately ten minutes with Donna, who took her blood pressure, asked about medical conditions, and talked about the various diet pills. Id. at 112-13. During her second visit, which was much shorter, Agent Vogts spent approximately two minutes with Betty and two minutes with Donna. Id. at 115. During the third visit, Agent Vogts was joined by a DEA agent posing as a new patient. Id. at 117. Agent Vogts recalled that Dr. Kofsky's employees "spent about 20 minutes with her [the DEA agent], because she was posing as a new patient." Id. Agent Vogts concluded that the first and third visits took twenty minutes because they involved agents posing as new patients. Id. at 114, 117-18, 139-41.

3. Representations of Undercover Agents to Dr. Kofsky's Staff

The Ngo Affidavit states that during undercover visits to Dr. Kofsky's office, an undercover

agent "posed as a someone [sic] who wanted diet pills." Ngo Affidavit ¶ 16. At the evidentiary hearing, Agents Ngo and Vogts explained the representations of the undercover agents more precisely. The agents did not "go in there saying, I'm here to buy diet pills." Tr. 8/1/07 at 118. Rather, they claimed to be people who were overweight and wanted to lose weight. Tr. 7/12/07 at 199; Tr. 8/1/07 at 109.

4. Description of People Observed During the Undercover Visits

The Ngo Affidavit does not include any information regarding the weight of patients observed during the three undercover visits to Dr. Kofsky's office. However, there is evidence that some of the patients observed were overweight. After one undercover visit, Agent Vogts, who had conducted the visit, met with Agent Ngo with a tape recorder still running. Tr. 7/12/07 at 188; Tr. 8/1/07 at 116. Agent Vogts remarked on the tape that "[s]ome of these people are huge." Tr. 7/12/07 at 188; Tr. 8/1/07 at 116.

5. Outcome of the DEA Investigations in 1994 and 1997

The Ngo Affidavit states that the DEA investigated Dr. Kofsky in 1994 and 1997, but does not state that the investigations were closed with no action taken against Dr. Kofsky. Ngo Affidavit ¶ 35; Tr. 8/1/07 at 36, 56. Investigator Davis testified regarding these DEA investigations in some detail.

As to the 1994 investigation, Investigator Davis stated that the investigation was begun when "Dixon-Shane, which is a drug wholesaler, submitted what we call an excessive purchase report that a pharmacy, in this case Shelly's No. 5, received a total of 50,000 phentermine tablets during" a two month period. Tr. 8/1/07 at 20. DEA investigators learned from Shelly's No. 5 that it was purchasing the phentermine tablets for Dr. Kofsky. Id. at 22, 51.

Continued investigation revealed a problem unrelated to the quantity of pills purchased.

Specifically, the DEA learned that Dr. Kofsky was transferring diet pills from his office to his home, as the result of a break-in at his office, which was reported to the police. Id. The DEA advised Dr. Kofsky "to file for a registration" to lawfully store pills at his house. Id. at 23. Dr. Kofsky did so, and on August 26, 1994, the DEA granted him permission to store controlled substances at home. Id. at 32-33; see also id. at 228. Upon granting Dr. Kofsky permission to store pills at home, the 1994 investigation was closed. Id. at 23; see also Tr. 7/12/07 at 159. There was no action taken with respect to the excessive purchase report.

As to the 1997 investigation, Investigator Davis explained that the DEA conducted "follow-up" regarding the "letter that our special agent had sent Dr. Kofsky granting him permission to transfer the drugs or store the drugs at his home." Tr. 8/1/07 at 24. During this follow-up investigation, DEA agents observed "that he was transferring it, that he had security on his office site, as well as his home site" and "reviewed a few patient records just to see how he maintains his records." Id. at 24, 36. The agents observed that Dr. Kofsky kept his diet patient records on large index cards. Id. at 35. "[A]t that point no audit was done, and then they basically left the premise[s]." Id. at 24, 36.

6. References to Patient Interviews in the Ngo Affidavit

The Ngo Affidavit states that "[our] evidence is derived in part from undercover activities and from reports from people to whom Kofsky has sold diet pills in the past." Ngo Affidavit ¶ 10. The Affidavit does not provide any detail as to the number or circumstances of the patient interviews. At the evidentiary hearing, Agent Ngo explained that these patient interviews occurred in November 1998, after a patient's mother called DEA to report that Dr. Kofsky was illegally dispensing diet pills to her daughter. Tr. 8/1/07 at 25, 142. Thereafter, agents spoke to the patient and her husband by telephone. Tr. 7/12/07 at 183-84. The agents learned that "they were purchasing diet pills from Dr. Kofsky and . . .

the husband of the individual was purchasing them for his wife." Id. at 183. DEA and the Pennsylvania Attorney General's Bureau of Narcotic Investigations (B&I) investigated the incident. Tr. 8/1/07 at 25-26. An agent from B&I attempted to "set up an appointment to see if they could illegally obtain the drugs, but at that time they were notified that Dr. Kofsky was not accepting any new patients." Id. at 26-27. In October 1999, the DEA and B&I closed their cases with no action taken against Dr. Kofsky. Id.

7. Sources of the Evidence Regarding the Safe Deposit Boxes

The Ngo Affidavit states that "bank records show that in February 2005, Kofsky paid for a safe deposit box at a private facility in Jenkintown, Pennsylvania, known as 'First National Safe Deposit Corporation.' . . . By the amount of Kofsky's payment, we believe that he has rented a 10 inch by 10 inch safe deposit box." Ngo Affidavit ¶ 42. At the evidentiary hearing, Special Agent Ngo testified in more detail as to this evidence. Specifically, she stated that the agents "knew of the First National safe deposit box because of a check that we saw" after subpoenaing bank account records for Dr. Kofsky. Tr. 7/12/07 at 106-07. The check, dated February 3, 2005, was drawn on a Citizens Bank account of Sandra Kofsky and Albert Kofsky and is signed by Dr. Kofsky. Id. at 107, 142; Tr. 8/1/07 at 149. It shows that Dr. Kofsky paid $325 to "First National Safe Deposit Corp." for "# 02-F0207." Tr. 7/12/07 at 107, 142. After obtaining this check from Citizens Bank, agents called First National and asked "simply what the rates were for the boxes." Id. at 109. "[T]he representative from First National told us that there was a particular size of a box that was, corresponded to an annual fee of $325." Id.

The agents had no other information about the First National safe deposit box before the April 13, 2006 search. Tr. 8/1/07 at 148-49. However, during the April 13, 2006 search of the box, agents subpoenaed the First National Safe Deposit Corporation. Tr. 7/12/07 at 145-46. As a result, they

obtained a copy of a rental agreement in the names of Sandra and Albert Kofsky. Id. at 146. They also obtained access records, which established that no one had entered the box since April 7, 2000. Id.

As to the safe deposit box at First Trust Bank, the Ngo Affidavit states that Dr. Kofsky "appears to be a signatory on five active accounts at that bank as well as a lessor of a safety deposit box: number 117." Ngo Affidavit ¶ 41. At the evidentiary hearing, Special Agent Ngo testified that agents knew of the existence of box 117 "from information that we had received from the main headquarters of First Trust Bank, telling us what Dr. Kofsky's interests were at that bank." Tr. 7/12/07 at 136. Specifically, in response to a subpoena, First Trust Bank provided the agents with a copy of a lease for box 117, which stated that the box was opened on September 10, 2005 in the names of Dr. and Mrs. Kofsky, with one of their sons as deputy on the box. Id. at 141. In addition, the agents received a Record of Vault Visitation. The visitation record states that the box was visited only once, on September 15, 2005, by Mrs. Kofsky, accompanied by one person, who was unnamed on the visitation record. Tr. 8/1/07 at 164.

During the search of box 117 on April 13, 2006, agents obtained additional documents from officers of the First Trust branch. Tr. 8/1/07 at 12. Among the documents received was an updated Record of Vault Visitation for box 117. Id.; see also Tr. 7/12/07 at 207. The visitation record states that the box was visited three times, including the visit listed on the visitation record previously received. Tr. 7/12/07 at 142; Tr. 8/1/07 at 165. In all three of the listed visits, the person accessing the safe deposit box was Mrs. Kofsky, accompanied by one person who was unnamed. Tr. 7/12/07 at 142, 192; Tr. 8/1/07 at 165.

8. Evidence Regarding Dr. Kofsky's Medical Records

The Ngo Affidavit states that Dr. Kofsky is authorized by DEA "to maintain and store controlled

substances at his office and at his home." Ngo Affidavit ¶ 5. Accordingly, he "must maintain full records regarding the acquisition and dispensing and distribution of all controlled substances at (at least) one of these of these [sic] locations." Id. ¶ 46. The Ngo Affidavit does not state that during the 1997 investigation, the DEA learned that Dr. Kofsky kept his diet patient records on large index cards. Tr. 8/1/07 at 24, 35-36.

D. The April 13, 2006 Search of Defendant's Residence and Defendant's Statements to Government Agents During the Search

1. The April 13, 2006 Search of Defendant's Residence

On April 13, 2006, pursuant to a warrant, agents from the FBI, DEA, and Internal Revenue Service (IRS) searched Dr. Kofsky's residence between 7:30 a.m. and 1:30 p.m. Tr. 7/11/07 at 58. Twenty-three agents participated in the search. Tr. 7/12/07 at 36. They wore wind-breakers or vests with agency initials, and all but three of the agents were armed. Tr. 7/12/07 at 36-37; Tr. 7/11/07 at 96-97.

Special Agent Bole was the first agent to enter defendant's residence, along with Special Agent Ron Manning. Tr. 7/12/07 at 75. Upon Agent Bole's knock, Dr. Kofsky opened the door. Id. at 85. Agent Bole identified himself as an FBI agent, stated that the agents were there to execute a search warrant, and asked Dr. Kofsky to open the door, which he did. Id. Agent Bole entered the foyer, where he "grabbed" Dr. Kofsky by putting his hands on Dr. Kofsky's left and right arms, and physically moved him to the side of the door so that other agents could enter. Id. at 76, 86. Agent Bole then "asked Dr. Kofsky to sit down on a bench" in the foyer. Id. at 76, 78. At that time he explained that the agents had a warrant "to search his residence relative to his medical practice and the illegal distribution of controlled substances out of that medical practice." Id. at 78. Agent Bole required Dr. Kofsky to

remain seated on the bench for approximately five to ten minutes. Id. at 78, 85-86, 90. During that time, while the agents secured the residence, according to Agent Bole, Dr. Kofsky "was not free to go." Id. at 88-89. However, there is no evidence that Agent Bole told Dr. Kofsky that he was being detained.

Thereafter, Agent Bole turned Dr. Kofsky over to other agents, whom he recalled included Supervisory Special Agent Stone. Id. at 91. Agent Stone testified that when he entered the home, Dr. Kofsky was in the landing of steps leading to the living room and kitchen. Tr. 7/11/07 at 44. Agent Stone spoke to Dr. Kofsky at that time and explained "that we, the FBI, the IRS, the DEA were there pursuant to a federal search warrant." Id. at 43-44. Agent Stone also told Dr. Kofsky that "at no time was he ever under arrest and he was free to go, if he chose. On the other hand, if he wanted to stay for the search he was more than welcome to stay for the search but at no time would he be placed under arrest." Id. at 44. Agent Ngo and Investigator Davis both overheard this conversation. Tr. 7/12/07 at 17, 59.[5]

Around this time, Dr. Kofsky asked the agents if he could to check on his wife, who was in the bedroom when the agents arrived. Tr. 7/12/07 at 18; Tr. 8/1/07 at 63. The agents "allowed him to go upstairs," accompanied by an agent, "to make sure that his wife was okay." Tr. 7/12/07 at 18, 39; see also Tr. 8/1/07 at 64-65.

Generally, during the course of the search, Dr. Kofsky was permitted to move throughout the house and was never handcuffed. Tr. 7/11/07 at 58-59; Tr. 7/12/007 at 31. For example, Agent Stone recalled that Dr. Kofsky went to the basement and turned on the air-conditioner for the agents in that area of the house. Tr. 7/11/07 at 59. However, agents accompanied him at all times "to protect the

[5] Agent Stone did not tell Dr. Kofsky that a restraining order had been issued against some of his assets. Tr. 7/11/07 at 104-05.

integrity of the search" and for safety reasons. Tr. 7/12/07 at 27, 30-31, 39-40, 70. Dr. Kofsky was not read his Miranda rights during the search. Id. at 30, 62.

2. April 13, 2006 Statements of Defendant to Agent Ngo and Investigator Davis

After Dr. Kofsky checked on his wife, Agent Ngo and Inspector Davis directed him to the kitchen. Tr. 7/11/07 at 105. They asked Dr. Kofsky if he would speak with them, and Dr. Kofsky agreed to do so. Tr. 7/12/07 at 18-19, 60. It was part of the search plan that Agent Ngo and Inspector Davis would interview Dr. Kofsky, if he was willing to speak with them. Id. at 40, 58.

Dr. Kofsky was then scratching his head, which was noticeably bleeding. Tr. 7/12/07 at 19, 60; Tr. 7/11/07 at 46. He obtained a paper towel and sat down at the kitchen table where he used the paper towel to stop the bleeding. Tr. 7/12/07 at 19, 60-61; Tr. 7/11/07 at 47. After the bleeding was addressed, Agent Ngo and Inspector Davis interviewed defendant. Tr. 7/12/07 at 19, 52; 7/11/07 at 47.

The three sat at the kitchen table during the interview, and there was nothing between Dr. Kofsky and the exit from the kitchen to the dining room. Tr. 7/12/07 at 20. At the start of the interview, Dr. Kofsky asked whether he was under arrest or whether he was going to be under arrest. Id. at 20-21. Agent Ngo told him that he would not be arrested that day and that he was free to leave. Id. at 21, 68.

Dr. Kofsky's interview lasted approximately two hours, with some interruptions. Id. at 23, 62. Dr. Kofsky was "[v]ery calm, responsive" during the interview and spoke in a "normal tone of voice." Id. at 26, 64. Agent Ngo produced an eight page, single-spaced FBI 302 Report that, *inter alia*, summarizes defendant's statements during the interview. The content of those statements is not presently at issue.

"[R]oughly in the middle of the interview," Dr. Kofsky asked whether he needed to speak to an

attorney. Id. at 25. Agent Ngo told him that "we can't give him any legal advice but he is free to call an attorney at any point in time." Id. at 25, 64. Agent Stone testified that he heard this exchange, but recalled that it occurred before the interview started. Tr. 7/11/07 at 103-04. Towards the end of the interview, Dr. Kofsky again said that he wanted to speak with an attorney. Tr. 7/12/07 at 36, 65. At that time, the agents stopped the interview and Dr. Kofsky called a friend who is a lawyer. Id. at 27. Agent Ngo explained that they stopped the interview "out of respect for Dr. Kofsky . . . essentially as a courtesy." Id. at 31-32.

3. April 13, 2006 Statements of Defendant to Agent Bole

Agent Bole spoke to Dr. Kofsky during the few minutes Dr. Kofsky was detained on the bench in the foyer at the start of the search. Agent Bole stated that he did not Mirandize Dr. Kofsky because he "wasn't asking [Dr. Kofsky] any questions," other than whether there were any other people in the house. Tr. 7/12/07 at 79, 84. Although Agent Bole made no notes of the incident, he recalled at the evidentiary hearing that Dr. Kofsky said "something in regards to he had previously been investigated or looked at by the DEA and he wasn't a drug dealer." Id. at 79.

4. April 13, 2006 Statements of Defendant to Agent Stone

During the April 13, 2006 search of Dr. Kofsky's residence, agents discovered four blue plastic containers between the "frame wall" of the finished basement and the basement's "original stone wall." Tr. 7/11/07 at 51. The agents opened the boxes, which contained more than one million dollars in cash. Id. at 112.

After agents discovered the blue boxes of cash in the basement, Agent Stone approached Dr. Kofsky in the kitchen where he was being interviewed by Agent Ngo and Investigator Davis. Id. at 52, 110. Agent Stone asked Dr. Kofsky whether "there was anything hidden in the house that I should

know about and that way we can limit any potential damage to the house." Id. at 53. Dr. Kofsky replied that there was not. Id. Thereafter, Agent Stone returned to the kitchen with one of the blue boxes. Id. at 54, 110. Agent Stone asked Dr. Kofsky about the box. Id. at 56. In response, Dr. Kofsky said the cash in the box "represented his life savings." Id. Agent Stone then asked Dr. Kofsky why did not tell him about the blue boxes in the basement, and Dr. Kofsky responded that he forgot. Id. at 57; see also Tr. 7/12/07 at 63.

5. April 13, 2006 Statements of Defendant to Agent Vogts

Agent Vogts participated in the search of the April 13, 2006 residence by, *inter alia*, interviewing Mrs. Kofsky. Tr. 8/1/07 at 65, 88. At some point during the day, Dr. Kofsky made a statement to Agent Vogts: "He was coming out of the bathroom, and he–I was just standing there and he said to me that the money, the cash that was found between the walls was money he had gotten from his mother, and he was concerned about the interest on that money if we took it." Id. at 67. Agent Vogts "told him to talk to his attorney about that concern." Id. At the instruction of Agent Stone, Agent Vogts recorded the statement at the bottom of the FBI 302 Report of her interview with Mrs. Kofsky. Id. at 67, 89.

E. April 13, 2006 Search of Defendant's Medical Office

On April 13, 2006, simultaneous with the search of defendant's home, FBI agents and DEA diversion investigators searched defendant's medical office. Tr. 8/1/07 at 190. Prior to the search, agents approached Donna Henon, Dr. Kofsky's office assistant, at her home. Id. at 177, 212. Ms. Henon then went to the office and opened the door for the agents with her key. Id. at 177-78, 192. Pursuant to the search plan, agents interviewed Ms. Henon in the office. Id. at 178, 192-93, 208.

During the April 13, 2006 search, agents seized diet pills. Tr. 8/1/07 at 193-94. In addition,

they seized all of the medical files in Dr. Kofsky's office. Agent Vogts, the agent responsible for reviewing these files, explained that there were three types of files seized. Id. at 78. First, there were large index cards for diet patients, stored in three shoe-box sized boxes. Id. at 78, 126. Second, there were large index cards for medical patients, stored in an index card filing cabinet. Id. at 78, 126. Third, there were colored folders for medical patients, stored in six boxes and three tubs. Id. at 79, 125.[6] The agents did not open the colored folders during the search. Id. at 217. They later learned that some of the colored folders contained diet cards or medical cards, but most did not. Id. at 79, 83, 127.

The April 13, 2006 search took place during office hours. Id. at 209. In fact, the morning chosen for the search, Thursday morning, was the only morning of the week in which Dr. Kofsky saw patients. Id. at 209, 211. The search plan provided that agents would interview patients arriving at Dr. Kofsky's office who were willing to speak with them. Id. at 175, 208. As the search was proceeding, two diversion investigators "stationed right outside the front door" interviewed some arriving patients. Tr. 8/1/07 at 176, 192, 222. The investigators used a prepared interview form, which contained spaces for biographical information, remarks, and the answers to questions about, *inter alia*, the patients' purchases of diet pills from Dr. Kofsky. Id. at 175-76, 208-09.

F. April 13, 2006 Search of Safe Deposit Boxes

On April 13, 2006, government agents also searched safe deposit boxes at First Trust Bank and First National Safe Deposit Corporation. FBI Special Agent Clark participated in the search of the safe deposit box 117 at First Trust Bank. Tr. 8/1/07 at 5. In the box, agents found "silver foil wrapped packages" containing $50,000 in cash. Id. at 8. Agents also found two envelopes labeled "Important

[6] Agent Vogts estimated that there were between 800 and 1,000 folders, but stated that they had not been counted. Tr. 8/1/07 at 127.

Papers, Will and Policies, and Home Papers" and "Important Papers, Will and Policies, Home Papers and Office." Id. at 10. The agents seized the cash and the envelopes. Id.

There was no testimony regarding the search of the First National Safe Deposit Corporation safe deposit box. The property receipt for that safe deposit box demonstrates that the agents seized hundreds of thousands of dollars in cash during their search. Def.'s Mot. Suppress Evidence Seized April 13, 2006, Ex. 12.

G. April 13, 2006 Search of Defendant's Saab Automobile

On April 13, 2006, government agents also searched Dr. Kofsky's Saab SUV, which was parked at his residence. Tr. 7/12/07 at 151. From the car, agents seized documents regarding an account with Clayton Self Storage. Id. at 152.

H. The Second Search of Defendant's Medical Office on July 13, 2006

On July 7, 2006, United States Magistrate Judge M. Faith Angell issued a second search warrant for defendant's medical office. Prior to the execution of that warrant, the government filed an amended application for a search warrant (the "amended application"). On July 12, 2006, Magistrate Judge Angell issued another warrant to search Dr. Kofsky's medical office. The property to be seized in the search was: (1) "[a]ny and all remaining customer or patient records, maintained on index cards or otherwise, including that of the late Janet Donahue" and (2) a paper shredder.

1. The Amended Search Warrant Application

The amended application was based on an Affidavit of FBI Special Agent Piccolo (the "Piccolo Affidavit"). It stated that Dr. Kofsky directed one of his employees to shred records of diet pill customers using a paper shredder kept in the office. Piccolo Affidavit ¶¶ 10, 14. The Piccolo Affidavit further stated that government agents learned from the searches of April 13, 2006 and from witness

interviews that the index card for diet patient Janet Donahue was left behind at defendant's medical office. Id. ¶¶ 10, 11. Although they did not state this in the Affidavit, the agents believed that because the diet card for Janet Donahue had been left behind there was "maybe something else that was missed." Tr. 8/1/07 at 101, 179-80.

The amended application, as filed with the Clerk of Court, did not include the Ngo Affidavit. Id. at 160. However, at the evidentiary hearing on August 1, 2007, Agent Piccolo testified that "to the best of [her] knowledge" the Ngo Affidavit was attached to the amended application when it was submitted and signed by Magistrate Judge Angell. Id. at 160-61, 169.

2. The July 13, 2006 Search of Defendant's Office

On July 13, 2006, government agents searched defendant's medical office for the second time. Prior to the search, they asked Donna Henon, Dr. Kofsky's former office assistant to come to the office and open the door. Tr. 8/1/07 at 96. Agent Vogts arrived at the office at 7:30 a.m. and was joined by three other agents. Id. at 69. At 8:00, Ms. Henon arrived. Id. She used a key to unlock the door for the agents. Id. At the time Ms. Henon was no longer employed by Dr. Kofsky and the office was closed. Id. at 96.

Agent Vogts asked Ms. Henon to sit in a chair in the waiting area. Id. at 69. Other agents searched the office, but could not find the paper shredder or the diet card for Janet Donahue. Id. at 71. In response, Ms. Henon "volunteered to show [them] where those two items were the last time she had seen them." Id. Agent Vogts "walked back" into the office with Ms. Henon, who went into two rooms to show the agents where the shredder and diet card had been the last time she saw them. Id. The objects were no longer there. Agent Vogts then walked Ms. Henon back to the waiting area, where Ms. Henon remained until the end of the search. Id. at 72.

Also during the search, Agent Vogts called defense counsel "as a courtesy" to let him know that they were re-searching Dr. Kofsky's office. Id. at 69. While she was dialing, Ms. Henon asked Agent Vogts whether she could have a "paint-by-number" painting that was hanging on the wall of the office. Id. at 70. Agent Vogts relayed the request to defense counsel, who responded that the agents could not take anything other than what was called for under the search warrant. Id. at 70, 102. It appears from the property receipt that the agents did not take the painting. See Def.'s Mot. Suppress Evidence Seized July 13, 2006, Ex. 1. The agents seized only one document during the search, a blue medical file for patient Florence Slaughter. Tr. 8/1/07 at 73, 100. That file was not a diet card, and was on a clipboard. Id. at 180.

III. STANDARD OF REVIEW

"On a motion to suppress, the government bears the burden of showing that each individual act constituting a search or seizure under the Fourth Amendment was reasonable." United States v. Ritter, 416 F.3d 256, 261 (3d Cir. 2005); see also United States v. Coward, 296 F.3d 176, 180 (3d Cir. 2002). The applicable burden is proof by a preponderance of the evidence. United States v. Matlock, 415 U.S. 164, 178 n.14 (1974).

Where a defendant seeks to suppress a statement under Miranda, the government bears the burden of establishing by a preponderance of the evidence that the statement was not the product of custodial interrogation conducted in the absence of Miranda warnings. Colorado v. Connelly, 479 U.S. 157, 168 (1986). Where a defendant challenges the voluntariness of a statement under the Due Process Clause of the Fifth and Fourteenth Amendments, "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." Lego v. Twomey, 404 U.S. 477, 489 (1972); see also United States v. Jacobs, 431 F.3d 99, 108 (3d Cir. 2005) (same).

IV. DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED APRIL 13, 2006

In his first Motion to Suppress, defendant moves to suppress evidence seized during the April 13, 2006 searches of his residence, medical office, safety deposit boxes, and Saab SUV. Defendant raises five overarching arguments in support of the Motion: (1) that the warrants executed on April 13, 2006 were invalid "general warrants"; (2) that the warrants did not specify the criminal activity or statute violated; (3) that there was no probable cause to issue the warrants; (4) that there were material omissions in the Ngo Affidavit which implicated Franks v. Delaware; and (5) that the agents unlawfully and in bad faith expanded the scope of the April 13, 2006 searches. The Court addresses each issue in turn.

A. The Search Warrants Executed on April 13, 2006 Were Not General Warrants Under the Fourth Amendment

1. Legal Standard: The Prohibition Against General Warrants

The Fourth Amendment provides that: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. Under the Fourth Amendment, general warrants are prohibited. Andresen v. Maryland, 427 U.S. 463, 480 (1976); Marron v. United States, 275 U.S. 192, 195 (1927). "A general warrant is a warrant that authorizes 'a general, exploratory rummaging in a person's belongings.'" United States v. Christine, 687 F.2d 749, 758 (3d Cir. 1982) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971)). Their prohibition "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Andresen, 427 U.S. at 480 (citations omitted). "[E]xamples of general warrants are those authorizing searches for and seizures of

such vague categories of items as 'smuggled goods,' 'obscene materials,' 'books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas,' 'illegally obtained films,' and 'stolen property.'" Christine, 687 F.2d at 753 (citations omitted); see also United States v. Cochran, 806 F. Supp. 560, 564-55 (E.D. Pa. 1992). "[T]he only remedy for a general warrant is to suppress all evidence obtained thereby." United States v. Yusuf, 461 F.3d 374, 393 n.19 (3d Cir. 2006); see also Christine, 687 F.2d at 758.

2. The List of Items to Be Seized Did Not Render the Warrants Executed on April 13, 2006 General Warrants

In the first Motion to Suppress, defendant argues that the five warrants executed on April 13, 2006 were unconstitutional "general warrants" in violation of the Fourth Amendment. In support of this argument, defendant asserts that the twenty-six categories of evidence to be seized were "[t]oo [a]ll-[i]nclusive" to satisfy the Fourth Amendment. The Court disagrees.

The five warrants at issue contained identical lists of twenty-six "Items to Be Seized." This list of items described "in both specific and inclusive generic terms what is to be seized." Christine, 687 F.2d at 753. Indeed, the Third Circuit has held that warrants authorizing the seizure of similar items are permissible. Specifically, the court has held that a warrant authorizing the seizure of "[a]ll drugs, drug paraphernalia, cash money, [and] weapons" is not "constitutionally infirm." United States v. Williams, 3 F.3d 69, 71 n.1 (3d Cir. 1993). Likewise, the Third Circuit ruled that the seizure of "all folders . . . all checks . . . all general ledgers (and) all correspondence" is valid under the Fourth Amendment. Christine, 687 F.2d at 753. Under this authority, the list of items to be seized in this case was constitutionally permissible.

In reaching this conclusion, the Court recognizes that the list of items to be seized was

extensive, and included "[a]ll controlled substances," "[a]ll patient charts, logs and/or profiles," and "[a]ll financial records, documents and materials of relating to the personal finances of Albert Kofsky," without time limitations. Def.'s Mot. Suppress Evidence Seized April 13, 2006, Ex. 1 ¶¶ 1, 2, 16. However, the fact that the warrants at issue authorized the seizure of a long list of items does not make them unconstitutional general warrants. See United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents, 307 F.3d 137, 149 (3d Cir. 2002) ("Although the scope of the warrant was certainly extensive, the warrant was not general."); see also United States v. Conley, 4 F.3d 1200, 1208 (3d Cir. 1993) ("[U]se of the word 'all', in and of itself, does not render a warrant a general warrant."). In short, the list of items to be seized was descriptive and did not "vest the executing officers with unbridled discretion to conduct an exploratory rummaging" through defendant's belongings. Christine, 687 F.2d at 753.

B. The Failure to Specify the Alleged Criminal Activity Is Not Fatal

The search warrants executed on April 13, 2006 did not describe the alleged criminal activity on their face, or in either of the two incorporated attachments (descriptions of the premises to be searched and items to be seized).[7] In the first Motion to Suppress, defendant argues that this "failure to specify the crime, in the warrant itself or by incorporation, is fatal." Def.'s Mem. Law Supp. at 8. The Court disagrees with this characterization of the law.

[7] The list of items to be seized describes some of the items as related to "the distribution of controlled substances." See Gov't Ex. 1, Attach. B ¶¶ 3, 4, 7-10, 12-14, 26. The government argues that in this way the warrants describe the alleged crimes. Gov't Consolidated Resp. at 42. The Court disagrees and does not rest its holding on this argument. At most, the references to "distribution of controlled substances" is a *partial* description of the alleged criminal activity later charged in this case. Moreover, the distribution of controlled substances was not a per se crime as to Dr. Kofsky, who was authorized by the DEA to possess and distribute controlled substances through his medical practice.

The Fourth Amendment "specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized.'" United States v. Grubbs, 547 U.S. 90, 126 S.Ct. 1494, 1500 (2006). Accordingly, there is no per se requirement that a search warrant describe the criminal activity alleged. United States v. Slaey, 433 F. Supp. 2d 494, 495 n.1 (E.D. Pa. 2006). Rather, a description of alleged criminal activity in a search warrant is relevant to the question whether the warrant is a general warrant under the Fourth Amendment. Specifically, a description of the criminal activity alleged serves to limit the discretion of the agents performing the search, and in this way may support the position that a search warrant is not a general warrant.[8] See United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995) ("The government could have made the warrant more particular. Most obviously, the warrant could have specified the suspected criminal conduct."); see also United States v. Bridges, 344 F.3d 1010, 1018 (9th Cir. 2003); United States v. Bianco, 998 F.2d 1112, 1116 (2d Cir. 1993), cert. denied 511 U.S. 1069 (1994); United States v. George, 975 F.2d 72, 76 (2d Cir. 1992).

In this case, the search warrants executed on April 13, 2006 did not describe the alleged criminal activity. This was not a fatal omission. As stated above, the agents conducting the searches on that date were guided by a list of items to be seized that described "in both specific and inclusive generic terms what is to be seized." Christine, 687 F.2d at 753. Reference to the alleged criminal activity was not necessary to limit their discretion.

[8] Defense counsel made this very point during oral argument. See Tr. 8/2/07 at 60 (arguing that "the whole purpose [of including a statutory citation in a search warrant] is to allow you to distinguish innocent from guilty records by reference to the statute").

C. There Was Probable Cause to Issue the Search Warrants

1. Legal Standard: Probable Cause and the Leon Good Faith Exception

Under the Fourth Amendment, "'[a]n otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based.'" Christine, 687 F.2d at 753 (quoting 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 4.6, at 97 (1978)). An overly broad warrant can be cured by redaction, that is, by "striking from a warrant those severable phrases and clauses that are invalid for lack of probable cause or generality and preserving those severable phrases and clauses that satisfy the Fourth Amendment." Christine, 687 F.2d at 754. In this analysis, "[e]ach part of the search authorized by the warrant is examined separately to determine whether it is impermissibly general or unsupported by probable cause. Materials seized under the authority of those parts of the warrant struck for invalidity must be suppressed, but the court need not suppress materials seized pursuant to the valid portions of the warrant." Id.

Probable cause exists when, under the totality of the circumstances, "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).

> [P]robable cause can be, and often is, inferred by considering the type of crime, the nature of the items sought, the suspect's opportunity for concealment and normal inferences about where a criminal might hide the fruits of his crime. . . . A court is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense.

United States v. Hodge, 246 F.3d 301, 305-06 (3d Cir. 2001) (citations omitted).

A district court exercises only a "deferential review" of the initial probable cause determination made by the magistrate judge. Gates, 462 U.S. at 236; Hodge, 246 F.3d at 305. "[T]he duty of a

reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." Gates, 462 U.S. at 238-39 (citation omitted); see also Hodge, 246 F.3d at 305. "In making this determination, the Court confines itself 'to the facts that were before the magistrate judge, i.e., the affidavit, and [does] not consider information from other portions of the record.'" Hodge, 246 F.3d at 305 (quoting United States v. Jones, 994 F.2d 1051, 1055 (3d Cir. 1993)).

Further, the Supreme Court set forth a good faith exception to the warrant requirement in United States v. Leon, 468 U.S. 897 (1984). The Leon good faith exception provides that suppression of evidence "is inappropriate when an officer executes a search in objectively reasonable reliance on a warrant's authority." United States v. Williams, 3 F.3d 69, 74 (3d Cir. 1993). The question before a reviewing court is "'whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.'" United States v. Loy, 191 F.3d 360, 367 (3d Cir. 1999) (quoting Leon, 468 U.S. at 922 n.23).

That an officer executes a search pursuant to a search warrant typically "suffices to prove that an officer conducted a search in good faith and justifies application of the good faith exception." Hodge, 246 F.3d at 308. However, the Third Circuit has recognized four situations in which an officer's reliance on a warrant would not be reasonable and would not trigger the exception:

> (1) when the magistrate judge issued the warrant in reliance on a deliberately or recklessly false affidavit;
> (2) when the magistrate judge abandoned his judicial role and failed to perform his neutral and detached function;
> (3) when the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" or
> (4) when the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized.

Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents, 307 F.3d at 146

(quoting Williams, 3 F.3d at 74 n.4).

2. There Was Probable Cause to Issue the Warrants Executed on April 13, 2006

In the first Motion to Suppress, defendant argues that there was not probable cause to issue the warrants executed on April 13, 2006, in six respects: (1) the Ngo Affidavit did not refer to any purchase records from before March 1999, and did not refer to any detailed records from before 2002; (2) there was no probable cause to seize patient records for non-diet patients; (3) the Ngo Affidavit did not refer to any bank deposit records from before 2000; (4) there was no probable cause to search the home for cash; (5) there was no probable cause to search either of the safe deposit boxes; (5) there was no probable cause to search the Saab SUV; and (6) there was no probable cause to seize medications from Dr. Kofsky's residence. The Court addresses each argument in turn.

a. Probable Cause to Seize All Patient Records

In the first Motion to Suppress, defendant argues that the warrants executed on April 13, 2006 were deficient because they authorized the seizure of "all patient charts, logs and/or profiles for any person under the medical care of Albert Kofsky." Def.'s Mot. Suppress Evidence Seized April 13, 2006, Ex. 1 ¶ 2. Specifically, defendant objects to (1) the seizure of all patient records without regard to time and (2) the seizure of files for all patients, including non-diet medical patients. Def.'s Mem. Law Supp. at 12.[9]

[9] Defendant further argues that warrants for the seizure of medical records in particular "must be narrowly crafted," in light of patient privacy concerns. Def.'s Mem. Law Supp. at 13. Although the Court recognizes the "heightened sensitivity to the seizure of individual medical records because of privacy issues" these concerns "do not warrant granting a motion to suppress an otherwise valid search." United States v. Comite, 2006 WL 3360282, *17 (E.D. Pa. Nov. 17, 2006).

i. Seizure of Medical Records Irrespective of Time

As to the seizure of medical records irrespective of time, the Court concludes that no Fourth Amendment violation occurred. This conclusion is based on two common sense determinations, which the Magistrate Judge was entitled to make. See Gates, 462 U.S. at 231. First, the Magistrate Judge was entitled to find that individual medical records contain entries from multiple points in time. The Fourth Amendment does not "prohibit seizure of an item, such as a single ledger, merely because it happens to contain other information not covered by the terms of the warrant." Christine, 687 F.2d at 760 (citing United States v. Beusch, 596 F.2d 871, 876-77 (9th Cir. 1979)). Accordingly, the government was not required to dismantle and seize portions of individual medical records that contained *some* entries from after 1999.[10]

Second, the Magistrate Judge was entitled to find that the alleged scheme was complex and ongoing.

> The affidavit clearly supported the fact that a broad range of documents would be entailed in sorting out the details of this sophisticated scheme. The fact that the warrant authorized a search for a large amount of documents and records does not necessarily render the search invalid so long as there exists a sufficient nexus between the evidence to be seized and the alleged offenses.

United States v. American Investors of Pittsburgh, Inc., 879 F.2d 1087, 1106 (3d Cir. 1989). Given the complex nature of the alleged scheme, "we cannot say that the categories overdescribed the extent of the evidence sought to be seized." Id.; see also United States v. Lievertz, 247 F. Supp. 2d 1052, 1062

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[10] In response to defendant's Motion, the government argues that there was evidence in the Ngo Affidavit that Dr. Kofsky's "drug trafficking offenses went back to 1994"–namely, the 1994 DEA investigation of Dr. Kofsky. Gov't Resp. at 4; Tr. 8/2/07 at 88. The Court finds that the references in the Ngo Affidavit to the 1994 DEA investigation were insufficient to establish drug trafficking offenses dating back to 1994. Rather, the Court finds that the wholesale purchase records evince drug trafficking offenses beginning in 1999. However, for the reasons stated in this Section, the seizure of files containing entries made before 1999 was permissible.

(S.D. Ind. 2002) ("It would be impossible for the government to determine how many of Lievertz's patients were involved in this alleged scheme to overprescribe and distribute controlled substances if the government were unable to search all of Lievertz's medical records . . . .").

ii. Seizure of Non-Diet Medical Records

The Court further concludes that the seizure of all medical records, including the records of "non-diet" medical patients, did not violate the Fourth Amendment. As a preliminary matter, the Court finds there was insufficient evidence to establish that the government knew defendant maintained separate "diet" and "non-diet" patient records when it applied for the first search warrant for defendant's medical office. The fact that in 1997 DEA agents "reviewed a few patient records just to see how he maintains his records" is insufficient to establish knowledge on the part of the government. Tr. 8/1/07 at 24, 36. Cf. Def.'s Omnibus Reply at 35 (asserting that the government knew "that Dr. Kofsky had been practicing medicine for decades" and that he had non-diet medical patients for whom he kept files).[11] Under the circumstances, it was not possible for the government to describe the medical records to be seized specifically as diet patient index cards. See Christine, 687 F.2d at 760 (holding that "the use of generic classifications in a warrant is acceptable when a more precise description is not feasible"); 2 LaFave, Search and Seizure, § 4.6(a) (4th ed. 2004) ("A more general type of description will be sufficient when the nature of the objects to be seized are such that they cannot be expected to have more specific characteristics."); see also Comite, 2006 WL 3360282 at *16 (holding that search of all patient records was permissible because "a more precisely enumerated list of items was not feasible"). The issuance of a more specific search warrant for only "diet" patient medical

[11] Indeed, the evidence presented at the evidentiary hearing establishes that some of Dr. Kofsky's medical files contained diet patient cards and that some medical prescriptions were recorded on index cards. Tr. 8/1/07 at 79, 83, 127.

records was not required by the Fourth Amendment because such a limitation was not feasible.

Thus, the Court concludes that the Magistrate Judge had a substantial basis for concluding that there was probable cause to seize all medical records in Dr. Kofsky's office. Gates, 462 U.S. at 238-39. Moreover, the agents were objectively reasonable in relying on the search warrant under the Leon good faith exception.

b. Probable Cause to Seize Financial Records

In the first Motion to Suppress, defendant argues the warrants executed on April 13, 2006 were deficient because they authorized the seizure of all personal financial records without time limitation. The Court disagrees.

The Third Circuit has "repeatedly stated that the government is to be given more flexibility regarding the items to be searched when the criminal activity deals with complex financial transactions." Yusuf, 461 F.3d at 395; see also American Investors of Pittsburgh, Inc., 879 F.2d at 1106. Complex financial schemes that take place over many years, as is alleged here, "can be uncovered only by exacting scrutiny of intricate financial records." Christine, 687 F.2d at 760.

The Ngo Affidavit stated that Dr. Kofsky purchased substantial numbers of diet pills on a weekly basis in at least the years 1999 and 2002 through 2006. Ngo Affidavit ¶¶ 10, 12. The Affidavit further stated that Dr. Kofsky made regular deposits of checks and what appear to be structured amounts of cash at M&T Bank between 2000 and 2004 and at Citizen's Bank in 2005. Id. ¶¶ 36-38. The Magistrate Judge could reasonably infer that the government needed extensive financial records to piece together the history of structured deposits. Yusuf, 461 F.3d at 395. Thus, there is a substantial basis to conclude that probable cause existed for the search and seizure of Dr. Kofsky's personal financial records. Gates, 462 U.S. at 238-39. Moreover, even if such probable cause were lacking, the agents

were objectively reasonable in relying on the search warrant under Leon.

c. Probable Cause to Search the House for Cash

In the first Motion to Suppress, defendant further argues that there was no probable cause to search the house for cash. The Court rejects this argument.

The Third Circuit has repeatedly held that direct evidence linking a crime to the location to be searched is not required to establish probable cause. United States v. Burton, 288 F.3d 91, 103 (3d Cir. 2002); United States v. Whitner, 219 F.3d 289, 297 (3d Cir. 2000).

> While ideally every affidavit would contain direct evidence linking the place to be searched to the crime, it is well established that direct evidence is not required for the issuance of a search warrant. Instead, probable cause can be, and often is, inferred by 'considering the type of crime, the nature of the items sought, the suspect's opportunity for concealment and normal inferences about where a criminal might hide stolen property.'

Whitner, 219 F.3d at 297 (quoting United States v. Jones, 994 F.2d 1051, 1054 (3d Cir. 1993)); see also United States v. Singh, 390 F.3d 168, 182 (2d Cir. 2004) ("A showing of nexus does not require direct evidence and may be based on reasonable inference from the facts presented based on common sense and experience.") (citation omitted).

In this case, the Ngo Affidavit stated that "in 2004, [Dr. Kofsky] appeared to declare approximately $450,000 less than he should have generated on the basis of his costs with suppliers and his charges for the pills he distributes; in 2003, it appears that he should have generated an additional approximately $250,000 or more in sales." Ngo Affidavit ¶ 40. The Affidavit further stated that Dr. Kofsky made regular cash deposits between 2000 and 2005, id. ¶¶ 36-38, and that Dr. Kofsky was known to store controlled substances and records related to his medical practice in his home. Id. ¶¶ 5, 35, 46. On the basis of this evidence, the Magistrate Judge could reasonably infer that Dr. Kofsky was in possession of cash and that he kept or stored cash in his home. Whitner, 219 F.3d at 297. Thus,

there is a substantial basis to conclude that probable cause existed to search Dr. Kofsky's residence for cash. Gates, 462 U.S. at 238-39. Moreover, the agents were objectively reasonable in relying on the search warrant under the Leon good faith exception.

d. Probable Cause to Search the Safe Deposit Boxes

In the first Motion to Suppress, defendant argues that there was no probable cause to search the safe deposit boxes, and in particular, no probable cause to believe that each of the twenty-six items to be seized would be found in the safe deposit boxes. Def.'s Mem. Law Supp. at 22. The Court disagrees.

As to the safe deposit box at First Trust Bank, the Ngo Affidavit stated that Dr. Kofsky "appears to be . . . a lessor of a safety deposit box: number 117." Ngo Affidavit ¶ 41. As to the safe deposit box at First National Safe Deposit Corporation, the Ngo Affidavit stated that "Kofsky paid for a safe deposit box at" the facility and that "[b]y the amount of Kofsky's payment, we believe that he has rented a 10 inch by 10 inch safe deposit box." Id. ¶ 42. The Ngo Affidavit further stated that Dr. Kofsky appeared to declare substantially less in income in 2003 and 2004. Id. ¶ 40. Based on this evidence, the Magistrate Judge was permitted to make a common sense determination that Dr. Kofsky stored valuable items such as records, cash or controlled substances in the safe deposit boxes. See Whitner, 219 F.3d at 297; Singh, 390 F.3d at 182. Accordingly, there was a "substantial basis" to conclude that probable cause existed to search the boxes. Gates, 462 U.S. at 238-39. Moreover, even if the search warrants were defective, suppression is inappropriate because the agents executed the search in "objectively reasonable reliance" on the warrant. Leon, 468 U.S. at 922.[12]

[12] The warrant for the First National Safe Deposit Corporation box authorized the search of "Safe Deposit Box rented by Albert Kofsky and/or RE: 02-F0207." Def.'s Mot. Suppress Evidence Seized April 13, 2006, Ex. 5 at 1. Defendant argues that this is "imprecise at best, and not an accurate or sufficient description of the box actually numbered F-2-7, rented in the name of Sandra Kofsky, with Albert Kofsky only as a co-tenant." Def.'s Mem. Law Supp. at 25. As

e. Probable Cause to Search the Saab

In the first Motion to Suppress, defendant argues that there was no probable cause to search the Saab SUV, and specifically that there "was no reason given in the affidavit . . . to suggest why those items [to be seized] would be found in the" vehicle. Def.'s Mem. Law Supp. at 26. The Court disagrees.

The Ngo Affidavit stated that Dr. Kofsky was seen at his office driving the Saab SUV on March 22, 2006 and April 6, 2006. Ngo Affidavit ¶ 23. The Affidavit further stated that Dr. Kofsky was authorized to store controlled substances in his office and residence and that he told DEA in 1997 that "he takes home his dispensing stock every night" and that he keeps "'perpetual' records for his controlled substances" in his home. Id. ¶¶ 5, 23. Based on this evidence, the Magistrate Judge was entitled to make a common sense determination that Dr. Kofsky transported the items listed in the search warrant application, including controlled substances and records, between his home and office. See Singh, 390 F.3d at 182. Thus, the Court concludes that the Magistrate Judge had a substantial basis to conclude that probable cause existed as to the search warrant issued for the Saab. Gates, 462 U.S. at 238-39. Moreover, suppression is inappropriate because the agents executed the search in "objectively reasonable reliance" on the warrant. Leon, 468 U.S. at 922.

f. Probable Cause to Seize Controlled Substances from Dr. Kofsky's Home

In the first Motion to Suppress, defendant argues that there was no probable cause to seize controlled substances from his home, because the FBI knew that Dr. Kofsky was licensed by the DEA

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stated at the evidentiary hearing, the Court concludes that the difference in numbering between "02-F0207" and "F-2-7" is immaterial. Tr. 7/12/07 at 147. See, e.g., United States v. Slotcavage, 1997 WL 431002, *5 (E.D. Pa. Jul. 16, 1997) (holding that description made clear the place to be searched despite typos).

to store controlled substances there. Def.'s Mem. Law Supp. at 27. The Court rejects this argument. Based on all of the evidence presented in the Ngo Affidavit–including purchase records, surveillance of Dr. Kofsky's office, and undercover visits–the Magistrate Judge had a substantial basis to conclude that controlled substances would be found in the residence and that those controlled substances were evidence of a crime. Gates, 462 U.S. at 238-39.

D. There Were No Material Omissions in the Ngo Affidavit

1. Legal Standard: Franks v. Delaware

In Franks v. Delaware, 438 U.S. 154, 155 (1978), the Supreme Court held that "a criminal defendant has the right to challenge the truthfulness of factual statements made in an affidavit of probable cause supporting a warrant subsequent to the ex parte issuance of the warrant." Yusuf, 461 F.3d at 383. At a Franks hearing, it is defendant's burden to prove by a preponderance of the evidence that: "(1) that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) that such statements or omissions were material, or necessary, to the probable cause determination." Id. To determine materiality, a reviewing court excises false statements from the affidavit and supplies omitted information. Id. at 384. If, after this redaction takes place, "the defendant is able to ultimately meet this burden, 'the Fourth Amendment requires that . . . the fruits of the search [must be] excluded to the same extent as if probable case was lacking on the face of the affidavit.'" Id. (citations omitted).

2. No Franks Violation Occurred

In the first Motion to Suppress, defendant asserts that there were numerous material omissions from the Ngo Affidavit. These alleged omissions, which are described in Section II(C) supra, are: (1) the omission of qualitative information regarding the March 22, 2006 surveillance of Dr. Kofsky's

office; (2) the omission of information regarding the length of the undercover visits; (3) the characterization of the undercover agents as posing as "someone who wanted diet pills"; (4) the omission of the fact that Agent Vogts observed some "huge" people during her undercover visits; (5) the omission of the fact that the DEA investigations in 1994 and 1997 were closed with no action taken against Dr. Kofsky; (6) the omission of the fact that the patient interviews took place in 1998 and did not result in action against Dr. Kofsky; (7) the omission of information regarding visits to the safe deposit boxes; and (8) the omission of the fact that DEA agents learned in 1997 that Dr. Kofsky kept diet patient records on index cards.

The Court concludes that after supplying all of the alleged omitted information, probable cause remains under Franks. The quantitative information regarding the March 22, 2006 surveillance is not material because the Magistrate Judge knew that patients were visiting Dr. Kofsky's office "at a less frequent rate than during previous surveillance." Ngo Affidavit ¶ 22. The alleged omissions regarding the undercover visits–as to the length of the visits, the representations of the undercover agents, and the "huge" people observed–are not material because the inclusion of the information does not change the value of the undercover visits in the probable cause determination. See Ngo Affidavit ¶¶ 16-20; see also United States v. Sugar, 606 F. Supp. 1134, 1150-51 (S.D.N.Y. 1985) ("The fact that one individual, an undercover DEA agent, was unsuccessful in her attempt to obtain phendimetrazine from defendants does not detract from the apparent wrongdoings at Sugar's offices."). The fact that the 1994 and 1997 DEA investigations ended without action against Dr. Kofsky is not material, because the references to those investigations established only that Dr. Kofsky kept controlled substances and medical records in his office and home. The alleged omissions regarding the patient interviews is immaterial because those interviews were mentioned only briefly and were not essential to the probable cause

determination. Ngo Affidavit ¶ 10. The alleged omissions regarding visits to the safe deposit boxes is immaterial because both safe deposit boxes were visited within scope of the alleged scheme. Tr. 8/1/07 at 146, 164-65. The fact that the First National safe deposit box was last visited in 2000, was not material to the Magistrate's determination that there was probable cause to conclude that the items listed in the search warrant application would be found in that safe deposit box. See Tr. 7/12/07 at 146.[13] The alleged omissions regarding the fact that the DEA learned that Dr. Kofsky kept diet patient records on index cards is immaterial, because the DEA reviewed only some of Dr. Kofsky's records, and conducted that review in 1997, almost ten years before the issuance of the search warrants. Tr. 8/1/07 at 24, 36.

E. The Searches Exceeded the Scope of the Warrants in Part

In the first Motion to Suppress, defendant further argues that the agents unlawfully and in bad faith expanded the scope of the searches of his residence and office. Specifically, he argues that: (1) agents seized items during the April 13, 2006 searches that were outside the scope of the search warrant; and (2) the agents interviewed patients during the April 13, 2006 search of the medical office using a prepared interview sheet, although the search warrant "did not contain any language authorizing the agents to extend their intrusion by interrogating patients." Def.'s Mem. Law Supp. at 34. The Court addresses each argument in turn.

1. The Seizure of the Rolex and Jaguar Car Was Permissible

Under the Fourth Amendment, a search pursuant to a warrant is limited to the scope of the warrant. "As to what is to be taken, nothing is left to the discretion of the officer executing the

[13] The First Trust Bank safe deposit box was visited on September 15, 2005. Tr. 8/1/07 at 164.

warrant." Andresen, 427 U.S. at 480 (citations omitted). "If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." Horton v. California, 496 U.S. 128, 140 (1990).

In this case, the Court concludes that the seizure of two items emphasized by defendant, a Rolex watch[14] and Jaguar car, were permissible under the Fourth Amendment because the agents had probable cause to believe the property was subject to restraint. See United States v. Salmon, 944 F.2d 1106, 1119 (3d Cir. 1991), cert. denied, 502 U.S. 1110 (1992) ("[L]aw enforcement officers may seize a vehicle without a warrant if they have probable cause to believe that the vehicle is subject to forfeiture.") (citation omitted); United States v. Berry, 2002 WL 818872, *3 (E.D. Pa. Apr. 29, 2002).[15] Defendant has not identified any other items seized outside the scope of the warrant that were not returned.[16] The record shows that the agents attempted to stay within the boundaries of the warrant and that the seizure of some personal documents was prompted largely by practical considerations and time constraints.

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[14] Special Agent Verica located the Rolex watch in a safe in Dr. Kofsky's home during the April 13, 2006 search. Tr. 7/11/07 at 130. With the watch was an appraisal for the watch dated December 2, 2000. Id. at 65-67, 77, 134. Mrs. Kofsky told Agent Verica that she gave the Rolex to Dr. Kofsky as a gift. Id. at 78, 135.

[15] The Court does not rule at this time on defendant's pending Motion to Strike Forfeiture Notices. The Court will rule on that Motion in due course.

[16] Defendant states that some personal family items were returned to him after the searches. Def.'s Mem. Law Supp. at 32. In addition, he has "put $35,000 of his unfrozen funds into a frozen account to satisfy government and obtain the return of his watch and his wife's Jaguar car." Id. at 32 n.24.

2. The Patient Interviews Exceeded the Scope of the Warrant

Defendant argues that the agents exceeded the scope of the warrant by interviewing patients during the search of his office on April 13, 2006. The Court agrees and concludes that statements obtained by government agents during the April 13, 2006 searches must be suppressed.

The Supreme Court has held that while not every police action during the execution of a search warrant "must be explicitly authorized by the text of the warrant . . . the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion." Wilson v. Layne, 526 U.S. 603, 611 (1999) (citing Arizona v. Hicks, 480 U.S. 321, 325 (1987)); see also Maryland v. Garrison, 480 U.S. 79, 87 (1987) ("[T]he purposes justifying a police search strictly limit the permissible extent of the search"). Intrusions that "further the law enforcement objectives of the police in a general sense" are "not the same as furthering the purposes of the search." Wilson, 526 U.S. at 612. "Were such generalized 'law enforcement objectives' themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down." Id.

Although few courts have considered whether pre-planned interviews conducted during the execution of a search warrant violate the Fourth Amendment, the law set forth in Wilson guides this Court's inquiry.[17] The government argues that the police intrusion, pre-planned interviews of patients

[17] The Fourth Circuit addressed similar issues in United States v. Photogrammetric Data Services, Inc., 259 F.3d 229 (4th Cir. 2001), cert. denied 535 U.S. 926 (2002), overruled on other grounds by Crawford v. Washington, 541 U.S. 36 (2004). In Photogrammetric Data Services appellants argued that "by detaining and interviewing PDS employees, the agents acted in 'flagrant disregard' of the scope of the search warrant, which authorized only the seizure of certain documentary and computer records." Id. at 228. The Fourth Circuit held that the employee interviews did not constitute "flagrant disregard" for the search warrant, and as such, wholesale suppression of documentary evidence covered by the terms of the warrant was not warranted. Id. at 240. Because no statements obtained from the employees were admitted at

arriving at Dr. Kofsky's office during office hours, was "in aid of evidence" and therefore lawful. Gov't Resp. at 46. The Court disagrees. The collection of evidence from Dr. Kofsky's patients may have been "in aid of evidence," but this is "not the same as furthering the purposes of the search." Wilson, 526 U.S. at 612. Specifically, the search warrant executed on April 13, 2006 authorized the search of Dr. Kofsky's office for certain items, including controlled substances, medical files, and financial records. The search warrant in no way authorized the additional intrusion of patient interviews on Dr. Kofsky's property. Tr. 8/1/07 at 176, 192, 222. Accordingly, the patient statements obtained during the search of Dr. Kofsky's office on April 13, 2006 must be suppressed.[18]

Thus, for the reasons stated above, defendant's first Motion to Suppress is granted as to the statements of patients obtained at Dr. Kofsky's office on April 13, 2006. Defendant's first Motion to Suppress is denied in all other respects.

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trial, the Fourth Circuit did not reach the question whether those statements should have been suppressed. Id. at 239-40.

[18] Defendant argues that the appropriate remedy is "the suppression of any testimony from the patients interviewed during the search." Def.'s Mem. Law Supp. at 34. The Court concludes that suppression of all testimony of patients interviewed is not warranted on the present state of the record. See United States v. Ceccolini, 435 U.S. 268, 267–80 (1978) (setting forth factors to be considered in ruling whether witness testimony is "fruits" of an unlawful search); see also United States v. Schaefer, 691 F.2d 639, 644 (3d Cir. 1982) (same). The Court's holding is without prejudice to defendant's right to file an additional motion to suppress witness testimony if such a motion is warranted by the facts and Wong Sun, 371 U.S. 471.

The Court further notes that the government did not argue or present evidence of "inevitable discovery" in this case. Accordingly, the Court does not apply that doctrine to the patient interviews at issue. See United States v. Vasquez De Reyes, 149 F.3d 192, 195 (3d Cir. 1998) ("It is the government's burden to show that the evidence at issue would have been acquired through lawful means, a burden that can be met if the government establishes that the police, following routine procedures, would inevitably have uncovered the evidence."). Moreover, the Court notes that the "inevitable discovery doctrine has generally been applied in the context of acquiring physical evidence, such as drugs or weapons." Id. at 195.

V. DEFENDANT'S MOTION TO SUPPRESS STATEMENTS OF APRIL 13, 2006

In the second Motion to Suppress, defendant moves to suppress the statements made to FBI and DEA agents during the execution of a federal search warrant at his residence on April 13, 2006. Specifically, defendant raises three arguments: (1) that the April 13, 2006 search of Dr. Kofsky's home was illegal and his statements are fruits of the illegal search; (2) that government agents illegally failed to give him Miranda warnings, and continued to question him after he requested counsel; and (3) that his statements were so involuntary as to violate due process. As to defendant's first argument, the Court concluded in Section IV above that the search of Dr. Kofsky's residence was legal. Accordingly, the statements are not the fruits of an illegal search under Wong Sun v. United States, 371 U.S. 471 (1963). The Court addresses defendant's remaining arguments in turn.

A. Defendant Was Not Subject to Custodial Interrogation

1. Legal Standard: Probable Cause

In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the Supreme Court held that the prosecution cannot use statements "stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." See also Dickerson v. United States, 530 U.S. 428 (2000) (reaffirming Miranda). These safeguards include certain rights that an accused must be informed of, and must waive, before interrogation can commence:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation.

Miranda, 384 U.S. at 479. Only if there is a knowing, voluntary, and intelligent waiver of the rights expressed in the warnings can police question a suspect without counsel being present and introduce at

trial any statements made during the interrogation. Id.

The Supreme Court explained in Miranda that custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. In Yarborough v. Alvarado, 541 U.S. 652 (2004), the Supreme Court described the meaning of "custody" under Miranda as follows:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt that he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a . . . restraint on freedom of movement of the degree associated with a formal arrest.

United States v. Jacobs, 431 F.3d 99, 104-05 (3d Cir. 2005) (quoting Yarborough, 541 U.S. at 663) (citation omitted). Among the factors relevant to this inquiry are:

> (1) whether the officers told the suspect he was under arrest or free to leave; (2) the location or physical surroundings of the interrogation; (3) the length of the interrogation; (4) whether the officers used coercive tactics such as hostile tones of voice, the display of weapons, or physical restraint of the suspect's movement; and (5) whether the suspect voluntarily submitted to questioning.

United States v. Willaman, 437 F.3d 354, 359-60 (3d Cir. 2006), cert. denied, 126 S.Ct. 2902 (2006).[19]

In Rhode Island v. Innis, 446 U.S. 291, 301 (1980), the Supreme Court held that "interrogation" under Miranda consists of direct questioning by law enforcement officers or its "functional equivalent." United States v. Brownlee, 454 F.3d 131, 146 (3d Cir. 2006). "That is to say, the term 'interrogation' under Miranda refers . . . to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an

[19] Among other factors, courts may also consider "the information known by the officer concerning the suspect's culpability" and "whether the officer revealed his or her belief that the suspect was guilty." Jacobs, 431 F.3d at 105.

incriminating response from the suspect." Id. (quoting Innis, 446 U.S. at 301). However, "since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." Innis, 446 U.S. at 301-02 (emphasis in original).

2. Defendant Was Not Subject to Custodial Interrogation

During the search of his residence on April 13, 2006, Dr. Kofsky made a lengthy statement to Agent Ngo and Investigator Davis, the interviewing agents. He also spoke to Agents Stone, Bole, and Vogts. It is undisputed that Dr. Kofsky was not read his Miranda rights on that date. Tr. 7/12/07 at 30, 62. The Court construes defendant's second Motion to Suppress as challenging each of these statements under Miranda and considers each statement in turn.

a. Defendant Was Not In Custody During the Interview

In the second Motion to Suppress, defendant argues that his April 13, 2006 statements to Agent Ngo and Investigator Davis were made during a custodial interrogation, in violation of Miranda. The government responds that Miranda warnings were unnecessary because defendant was not in "custody" during the interview with Agent Ngo and Investigator Davis. The Court agrees with the government.[20]

The facts as presented at the evidentiary hearings demonstrate that a reasonable person in Dr. Kofsky's position would have felt free "to terminate the interrogation and leave." Yarborough, 541 U.S. at 663. Five factors support this conclusion. First, the agents told Dr. Kofsky that he was not under arrest and was free to leave the house if he chose. Specifically, at the start of the interview, Agent

[20] The Court does not reach the question whether the interview was an "interrogation" under Miranda and Innis.

Ngo told Dr. Kofsky that he would not be arrested that day and that he was free to leave. Tr. 7/12/07 at 21, 68.[21] Second, the interview took place in the kitchen of Dr. Kofsky's home, with nothing between Dr. Kofsky and the exit to the dining room, and not in a more coercive setting, such as a police station. Id. at 20;Cf. Jacobs, 431 F.3d at 105 ("[A]ll 'station house' interrogations should be scrutinized with extreme care for any taint of psychological compulsion or intimidation because such pressure is most apt to exist while a defendant is interviewed at a police station.") (quoting Steigler v. Anderson, 496 F.2d 793, 799 (3d Cir. 1974)).[22] Third, there is no evidence of "coercive tactics such as hostile tones of voice, the display of weapons, or physical restraint of the suspect's movement," during the interview. Willaman, 437 F.3d at 359-60. Fourth, Dr. Kofsky voluntarily agreed to speak to the agents, and indeed, volunteered that he was "sure this is all a mixup" before the interview began. Tr. 7/12/07 at 21. Fifth, Dr. Kofsky was permitted to move throughout the house during the search, and, for example, was permitted to go upstairs to check on Mrs. Kofsky. Tr. 7/11/07 at 58-59; Tr. 7/12/07 at 18, 31, 39; Tr. 8/1/07 at 64-65.

Defendant argues, and the Court recognizes, that there were three coercive aspects to the April 13, 2006 searches. First, the search was conducted by twenty-three agents, most of whom were armed, and who wore agency wind-breakers or vests with agency initials. Tr. 7/12/07 at 36-37, 58; Tr. 7/11/07

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[21] Before Dr. Kofsky went into the kitchen, Agent Stone also told him that he was free to leave. Tr. 7/11/07 at 44. The Court does not rely on this statement because shortly thereafter Dr. Kofsky asked whether he was under arrest or whether he was going to be under arrest. Tr. 7/12/07 at 20-21. This suggests that Dr. Kofsky did not understand the assurances of Agent Stone.

[22] The Court "recognize[s] that it is not dispositive that the questioning took place in [Dr. Kofsky']s home." See United States v. Vidal, 85 Fed. App'x 858, 862 n.2 (3d Cir. 2004) (citing Orozco v. Texas, 394 U.S. 324, 326-27 (1969)). "Nevertheless, the location clearly made it less likely, given the other circumstances, that a reasonable person in [his] position would have felt he was unable to end the questioning." Id.

at 96. Second, Agent Bole physically restrained and then detained Dr. Kofsky in the foyer of his home for five to ten minutes at the start of the search. Tr. 7/12/07 at 76-89.[23] Third, agents accompanied him at all times "to protect the integrity of the search" and for safety reasons. Tr. 7/12/07 at 27, 30-31, 39-40, 70. Having considered this evidence, the Court concludes that under the totality of the circumstances these coercive aspects of the search did not convert the interview of Dr. Kofsky into a custodial interrogation. The presence of armed and uniformed agents and a brief detention during a protective sweep are characteristics of many searches and do not create a custodial interrogation per se. United States v. Drayton, 536 U.S. 194, 204-05 (2002). Moreover, although Agent Bole testified that Dr. Kofsky was not free to go during the protective sweep of the residence, he did not handcuff Dr. Kofsky, display any weapons, or state that Dr. Kofsky was not free to leave after the protective sweep.

Under the circumstances, the Court concludes that Dr. Kofsky was not "in custody" during the interview, and that Agent Ngo and Investigator Davis were not required to Mirandize him. Accordingly, the Court also rejects defendant's argument that the agents failed to stop questioning him after he requested counsel. See, e.g., United States v. McNaughton, 848 F. Supp. 1195, 1200 (E.D. Pa. 1994) (holding that where defendant was not subject to custodial interrogation, agent did not violate the Fifth Amendment by contacting defendant for questioning after defendant refused to answer questions without a lawyer present).

b. Defendant Was Not Interrogated by Agent Bole

During the evidentiary hearing, defense counsel stated, and the Court agreed, that the second

[23] Defendant also points out that Dr. Kofsky scratched his head and was bleeding at the start of the interview. Def.'s Mot. Suppress Statement at 2. However, Agent Ngo and Inspector Davis did not begin the interview until after the bleeding was addressed, and Dr. Kofsky was using a paper towel to blot the blood. Tr. 7/12/07 at 19, 52, 60-61; Tr. 7/11/07 at 47.

Motion to Suppress also encompasses defendant's statement to Agent Bole, the first agent to enter defendant's residence. Tr. 7/12/07 at 80.[24] Although Agent Bole made no notes of the incident, he recalled at the evidentiary hearing that Dr. Kofsky said "something in regards to he had previously been investigated or looked at by the DEA and he wasn't a drug dealer." Id. at 79, 83-84. However, Agent Bole did not "interrogate" Dr. Kofsky. He recalled asking Dr. Kofsky only one question–whether there were any other people present in the house. Id. at 84. There is no evidence that Agent Bole took any other actions likely to elicit an incriminating response from Dr. Kofsky. Innis, 446 U.S. at 301. Under these circumstances, Agent Bole was not required to Mirandize defendant.[25]

c. Defendant Was Not in Custody When He Spoke to Agent Stone

Agent Stone spoke to Dr. Kofsky twice in the kitchen, while Dr. Kofsky was being interviewed by Agent Ngo and Investigator Davis. Specifically, Agent Stone asked Dr. Kofsky questions about the blue boxes of cash found in the basement. Tr. 7/12/07 at 53, 56. For the reasons stated above, Dr. Kofsky was not in custody during this incident and no Miranda violation occurred.

d. Defendant Was Not Interrogated by Agent Vogts

Agent Vogts also spoke to Dr. Kofsky after the discovery of the blue boxes in the basement.

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[24] In addition, defendant moved to suppress the statement made to Agent Bole on the ground that the statement was not disclosed until the Monday before the July 12, 2007 evidentiary hearing. Tr. 7/12/07 at 79. The government responded that they learned of the statement "this week and immediately notified counsel." Id. The Court concludes that this prompt disclosure satisfied Federal Rule of Criminal Procedure 16. See Fed. R. Crim. P. 16(c) ("A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if: (1) the evidence or material is subject to discovery or inspection under this rule; and (2) the other party previously requested, or the court ordered, its production.").

[25] Although Agent Bole testified that Dr. Kofsky was "was not free to go" during their brief interaction, the Court need not determine whether Dr. Kofsky was "in custody" under the Fifth Amendment at that time. Tr. 7/12/07 at 88-89.

She testified that she was "just standing there" and Dr. Kofsky volunteered to her "that the money, the cash that was found between the walls was money he had gotten from his mother, and he was concerned about the interest on that money if we took it." Tr. 8/1/07 at 67. There is no evidence that Agent Vogts asked Dr. Kofsky any questions or took any actions likely to elicit an incriminating response. Innis, 446 U.S. at 301. Accordingly, Agent Vogts did not "interrogate" Dr. Kofsky, and she was not required to Mirandize him. Moreover, there is no evidence that Dr. Kofsky was in custody during his conversation with Agent Vogts. See supra section V(A)(2)(a).

B. Defendant's Statements Were Not Involuntary

1. Legal Standard: Due Process

Under the Due Process Clause, "[s]tatements made to a law enforcement officer are inadmissable into evidence if the statements are 'involuntary.'" Jacobs, 431 F.3d at 108; see also Dickerson, 530 U.S. at 434 ("We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily."). "A statement is given voluntarily if, when viewed in the totality of the circumstances, it is the product of an essentially free and unconstrained choice by its maker." Id. "A necessary predicate to a finding of involuntariness is coercive police activity. Further, there must be some causal connection between the police conduct and the confession." Id. (citation omitted). The voluntariness inquiry "is often said to depend on whether 'the defendant's will was overborne,' a question that logically can depend on 'the characteristics of the accused.'" Yarborough, 541 U.S. at 667-68 (citations omitted). Accordingly, a court may consider "the suspect's age, education, and intelligence, as well as a suspect's prior experience with law enforcement." Id. at 668 (citation omitted).

2. Discussion

The record demonstrates that Dr. Kofsky's statements to government agents during the execution of the April 13, 2006 search of his residence were voluntary. Defendant is seventy-four years old, is highly educated, and has practiced medicine for thirty-seven years. Tr. 7/11/07 at 4. As stated above, he was told that he was free to leave his home by Agents Ngo before the start of the interview. Tr. 7/12/07 at 21, 68. After choosing to stay, he was free to move about the house. Tr. 7/11/07 at 58-59; Tr. 7/12/007 at 31. Indeed, the record reflects that Dr. Kofsky went upstairs to check on his wife, Tr. 7/12/07 at 18, 39; Tr. 8/1/07 at 64-65; used the bathroom, Tr. 8/1/07 at 67; and turned on the air-conditioning in the basement; Tr. 7/11/07 at 59. Although Dr. Kofsky scratched his head at the start of the search, the Agents "got him . . . calmed down" before the interview began. Id. at 26. After that point, Dr. Kofsky was "calm" and "responsive" and spoke in a "normal tone of voice." Tr. 7/12/07 at 23, 26, 62, 64. Nor is there any evidence of coercive police activity during the interview, including the tone or content of the questioning. Under the totality of the circumstances, the Court concludes that defendant's statements were freely and voluntarily made. See Jacobs, 431 F.3d at 112.

Thus, for the reasons stated above, defendant's second Motion to Suppress is denied.

VI. DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED JULY 13, 2006

In the third Motion to Suppress, defendant moves to suppress the evidence seized during the second search of defendant's medical office on July 13, 2006. That evidence consists only of the Florence Slaughter medical file.[26] Defendant argues (1) that the amended warrant application was

[26] In its Response to defendant's Motion, the government states that it "does not know whether it will move to introduce this file into evidence. The government asked the court to defer ruling on this matter until the motions in limine are filed, so as to obviate any unnecessary use of the court's time." Gov't Resp. at 48. Because this Motion is related to the two other Motions to Suppress, the Court chooses to rule on the Motion at this time.

incomplete; (2) that the resulting warrant was overbroad and otherwise deficient; and (3) that the participation of Donna Henon in the search violated 18 U.S.C. § 3105 and the Fourth Amendment. The Court addresses each issue in turn.

A. The Amended Application Was Complete

Defendant argues that the amended application was incomplete because it did not include the Ngo Affidavit. There is no dispute that the amended application, as filed with the Clerk of Court, did not contain the Ngo Affidavit. Tr. 8/1/07 at 160; Resp. at 51. However, Agent Piccolo testified that the Ngo Affidavit was attached to the amended application when it was signed by Magistrate Judge Angell. Tr. 8/1/07 at 160-61, 169. The Court credits this testimony and rejects defendant's argument.

B. The Warrant Was Not Deficient

Defendant further argues that the search warrant executed on July 13, 2006 was overbroad because there was no probable cause to seize "[a]ny and all remaining customer or patient records, maintained on index cards or otherwise." The Court disagrees. The Piccolo Affidavit stated that the government had seized thousands of medical records during the April 13, 2006 search. Piccolo Affidavit ¶ 8. It further stated that the diet card for patient Janet Donahue was not seized. Piccolo Affidavit ¶¶ 10-11. Under the circumstances, the Magistrate Judge was entitled to make the common sense determination that if one patient record was left behind, others could have been missed also. Gates, 462 U.S. at 231. Thus, there was a substantial basis to determine that probable cause existed for "all remaining customer or patient records." In the alternative, the agents were entitled to rely on the warrant under the Leon good faith exception.[27]

[27] In addition, defendant argues that the warrant was "overbroad, . . . failed to contain any statutory citation or time limitations, and had material omissions." These arguments are substantially the same as arguments made in defendant's first Motion to Suppress and are

C. The Participation of Donna Henon in the Search Was Permissible

The participation of third parties in the execution of search warrants is governed by both the Fourth Amendment and 18 U.S.C. § 3105. Under the Fourth Amendment, "[t]he general touchstone of reasonableness which governs Fourth Amendment analysis . . . governs the method of execution of the warrant." See United States v. Ramirez, 523 U.S. 65, 71 (1998) (citation omitted). The Amendment "require[s] that police actions in execution of a warrant be related to the objectives of the authorized intrusion." Wilson, 526 U.S. at 611-12 (citing Arizona v. Hicks, 480 U.S. 321, 321 (1987)). Under 18 U.S.C. § 3105, "[a] search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

In this case, Donna Henon participated in the search of Dr. Kofsky's office in two ways: she locked and unlocked the door, and after the agents could not find the objects they were looking for she "volunteered to show [them] where those two items were the last time she had seen them," but did not find them there. Tr. 8/1/07 at 71-72. These activities were "related to the objectives" of the search. Wilson, 526 U.S. at 611-12. Moreover, the Supreme Court has long held that comparable assistance is reasonable. See id. at 611-12 ("Where the police enter a home under the authority of a warrant to search for stolen property, the presence of third parties for the purpose of identifying the stolen property has long been approved by this Court and our common-law tradition."); see also United States v. La Monte, 455 F. Supp. 952, 968 (E.D. Pa. 1978) (upholding entry of unoccupied building pursuant a search warrant using key provided by employee). The Court concludes that the participation of Donna Henon in the July 13, 2006 search was reasonable under the Fourth Amendment and 18 U.S.C. §

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rejected for the reasons stated in Section IV above.

3105.[28]

Thus, for the reasons stated above, defendant's third Motion to Suppress is denied.

VII. CONCLUSION

For the foregoing reasons, Defendant Albert Kofsky's Motion to Suppress Evidence Seized April 13, 2006 is granted as to the statements of patients obtained at Dr. Kofsky's office on April 13, 2006, and is denied in all other respects; Defendant Albert Kofsky's Motion to Suppress Statement Obtained by Government Interrogation is denied; and Defendant Albert Kofsky's Motion to Suppress Evidence Seized July 13, 2006 is denied.

An appropriate Order follows.

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[28] The Court notes that during the search, Ms. Henon asked whether she could have a "paint-by-number" painting that was hanging on the wall to return to the artist, a patient of Dr. Kofsky's. Tr. 8/1/07 at 70. If Ms. Henon had participated in the search for the purpose of retrieving the painting, her participation would have been unreasonable. See Wilson, 526 U.S. at 614 (holding that the Fourth Amendment bars media ride-alongs during the execution of a search warrant where the presence of the media does not aid in the execution of the warrant). However, this was not the purpose of her participation, and she did not leave with the painting.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL ACTION**
v.	:	**NO. 06-392**
	:	
ALBERT KOFSKY	:	
	:	

O R D E R

AND NOW, this 28th day of August, 2007, upon consideration of Defendant Albert Kofsky's Motion to Suppress Evidence Seized April 13, 2006 (Document No. 32, filed December 14, 2006); Defendant Albert Kofsky's Motion to Suppress Statement Obtained by Government Interrogation (Document No. 45, filed January 2, 2007); Defendant Albert Kofsky's Motion to Suppress Evidence Seized July 13, 2006 (Document No. 46, filed January 2, 2007); the United States' Response in Opposition to Defendant Kofsky's Motions to Suppress Statement Obtained by Government Interrogation (Document No. 65, filed March 19, 2007); the United States' Consolidated Response in Opposition to Defendant Kofsky's Motions to Suppress Evidence and For a Franks Hearing (Document No. 68, filed March 21, 2007); and Defendant Albert Kofsky's Omnibus Reply to Responses to his Pretrial Motions (Document No. 70, filed April 4, 2007), following a hearing on July 11, 2007 and July 12, 2007, a continued hearing on August 1, 2007, and oral argument on August 2, 2007, for the reasons set forth in the attached Memorandum, **IT IS ORDERED**, as follows:

1. Defendant Albert Kofsky's Motion to Suppress Evidence Seized April 13, 2006 is **GRANTED IN PART AND DENIED IN PART**, as follows:

   a. Defendant Albert Kofsky's Motion to Suppress Evidence Seized April 13, 2006 is **GRANTED** as to the statements of patients obtained at Dr. Kofsky's office on April 13, 2006;

b. Defendant Albert Kofsky's Motion to Suppress Evidence Seized April 13, 2006 is **DENIED** in all other respects;

2. Defendant Albert Kofsky's Motion to Suppress Statement Obtained by Government Interrogation is **DENIED**; and

3. Defendant Albert Kofsky's Motion to Suppress Evidence Seized July 13, 2006 is **DENIED**.

BY THE COURT:

/s/ JAN E. DUBOIS, J.

JAN E. DUBOIS, J.