

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 07-10234-MLB
)	
STEPHEN J. SCHNEIDER,)	
and)	
LINDA K. SCHNEIDER, a/k/a)	
LINDA K. ATTERBURY,)	
d/b/a SCHNEIDER MEDICAL CLINIC,)	
)	
Defendants.)	
_____)	

**GOVERNMENT’S RESPONSE IN OPPOSITION TO DEFENDANTS’
JOINT MOTION TO SUPPRESS**

The United States of America, by and through Assistant United States Attorney Tanya J. Treadway, hereby submits its Response in Opposition to Defendants’ Joint Motion to Suppress (Doc. 99). The Court should summarily deny defendants’ motion, which has no basis in fact or in law.

FACTUAL BACKGROUND

Magistrate Bostwick issued three search and seizure warrants for the Schneider Medical Clinic. Magistrate Bostwick issued the first warrant in September 2005, Case No. 05-M-6124-01-DWB. The Application and Affidavit for this warrant indicated that the criminal violations being investigated were 18 U.S.C. §§ 1341, 1347, and 21 U.S.C.

§ 841(a)(1).¹ The Affiant was Postal Inspector James S. Hamilton. Mr. Hamilton's Affidavit set forth the facts related to the drug distribution investigation,² and the fraud investigation.³ The government has been unable to find a reference in this Affidavit to 21 C.F.R. § 1306.04.

Magistrate Bostwick issued the second warrant in September 2005, and this warrant was a limited warrant related to social security violations, 42 U.S.C. §§ 408(a)(6), 408(a)(7)(A), and unlawful employment and entry of an alien, 13 U.S.C. §§ 1324, 1325.⁴ The Affiant was Bruce McKimens, with the Social Security Administration. This Affidavit also contains no reference to 21 C.F.R. § 1306.04.

Magistrate Bostwick issued the third warrant in March 2006, Case No. 06-M-6037-01-DWB. The Application and Affidavit were authored by HHS-OIG Special Agent Andrew Stewart and referred to the anti-kickback statute, 42 U.S.C. § 1320a-7b, drug distribution, 21 U.S.C. § 841(a)(1), and the health care and mail fraud statutes, 18 U.S.C. §§ 1347, 1341.⁵ Again, the government can find no reference to 21 C.F.R. § 1306.04 in this Affidavit.

¹ See Application; Affidavit at pp. 2, 31. Due to the fact that the Affidavits contain patient names, they remain under seal as to the public. Additionally, due to their length, the government has not attached them under seal.

² See Affidavit at pp. 3-18.

³ See id. at pp. 18-22.

⁴ See Case No. 05-M-6126-01-DWB.

⁵ See Application; Affidavit at pp. 1, 16, 40.

DISCUSSION

The defendants claim that the evidence seized should be suppressed because (1) the Affidavit fails to provide any fact that defendants had submitted fraudulent documents to Medicare/Medicaid participants; and (2) there was no criminal conduct on which to base the search because the Affidavit referred to a federal regulation instead of the criminal code. Neither claim makes any sense. Moreover, the government finds it difficult to respond intelligently to the defendants' motion, since it does not refer to any Affidavit with particularity.

Probable cause exists to issue a warrant if the judge finds, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place."⁶ "A reviewing court is to interpret search warrant affidavits in a common sense and realistic fashion."⁷ Additionally, reviewing courts give "great deference" to the issuing magistrate's determination of probable cause.⁸ The Court's duty is to ensure that the issuing magistrate had a "substantial basis" for concluding that the affidavit in support of the search warrant established probable cause.⁹ The test is whether the facts presented in the affidavit would "warrant a man of reasonable caution" to believe that evidence of a crime will be found at the place to be

⁶ Illinois v. Gates, 462 U.S. 213, 236 (1983).

⁷ United States v. Ventresca, 380 U.S. 102, 108 (1965).

⁸ United States v. Finnigin, 113 F.3d 1182, 1185, (10th Cir. 1997).

⁹ United States v. Nolan, 199 F.3d 1180, 1182 (10th Cir. 1999) (citing Gates, 462 U.S. at 236).

searched.¹⁰ Thus, only a probability and not a prima facie showing is the standard for probable cause.¹¹ Given these standards and the facts of the instant case, the Court should uphold the magistrate's determination that the warrants were supported by probable cause.

As to the defendants' first complaint, health care fraud does not require the submission of fraudulent documents to Medicare or Medicaid participants. Rather, health care fraud usually arises from the submission of fraudulent claims to a health care benefit program, such as Medicare or Medicaid. Since participants in those health care benefit programs (commonly referred to as beneficiaries) typically pay part of any medical bill (commonly referred to as a co-payment), the participants/beneficiaries can also be victims of a health care fraud scheme.

The Hamilton and Stewart Affidavits contain sufficient information to establish probable cause that the defendants were submitting false claims to health care benefit programs. Both Affidavits discuss the upcoding of office visits (billing for a higher reimbursing service than provided) and the upcoding of the provider (submitting claims as though a physician provided services, when, in fact, a lesser provider, paid at a lesser rate, provided the services). Both forms of upcoding were found during program reviews of the defendants' claims, as compared to their records, and witnesses gave information corroborating that both forms of upcoding were occurring.

¹⁰ Id. (citing Texas v. Brown, 460 U.S. 730, 742 (1983)).

¹¹ Id. (citing Gates, 462 U.S. at 235).

As to the defendants' second complaint, none of the three affidavits have any reference to the code of federal regulations, which appears to be the basis of this complaint. Therefore, the government has no response.

CONCLUSION

The defendants have not made any factual or legal arguments meriting the drastic relief they request – suppression of all evidence seized in three different searches. The Court should summarily deny their inscrutable motion.

Respectfully submitted,

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United States Attorney

s/ Tanya J. Treadway

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following individuals:

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