IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**No. 1:19-cr-10043-STA**
	)	
LORAN KARLOSKY, M.D. *et al.*	)	

MOTION TO SUPPRESS UNCONSTITUTIONALLY AND IMPROPERLY SEIZED PATIENTS' MEDICAL RECORDS

Comes now the defendant, LORAN KARLOSKY, M.D., through counsel and pursuant to U.S. Const. amends. IV and V, Rules 12(b)(3) and 41(h) of the Federal Rules of Criminal Procedure; *Carpenter v. United States*, 138 S. Ct. 2206 (2018), *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), and the other authorities cited in the accompanying memorandum, and respectfully moves this Court to suppress the electronic business and medical records unconstitutionally and improperly seized from Downtown Medical Clinic. The government used a court order rather than a search warrant, the order did not limit the government's authority and instead purported to authorize the wholesale seizure of the clinic's records, and the clinic's records included the content of patient charts with private health information. Dr. Karlosky also moves for an evidentiary hearing on this motion and permission to amend this motion should additional information become available.

In further support, Dr. Karlosky would show:

1. The government first obtained the entirety of the patient records for Downtown Medical Clinic—the practice owned by Dr. Karlosky and Dr. Shires where nurse practitioner Mary Ann Bond provided patient care from 2013 to 2016—pursuant to a court order purportedly authorized by the Stored Communications Act, 18 U.S.C. § 2701(d).

2. Obtaining patient records by court order was improper for three main reasons.

First, the order relied on a provision of the SCA that did not allow the government to obtain content, only account identifying information. Second, the SCA only applies to certain service providers and the weight of available authority suggests Practice Fusion does not qualify as a covered entity. Third, most fundamentally, society and the Supreme Court have long recognized that medical records enjoy privacy protections, meaning that the government was required to obtain a search warrant.

3. As far as the defense can discern, each court that has allowed the government to access electronic medical records has assumed a search warrant is required. After all, medical records are fundamental examples of "papers and effects" in which society reasonably recognizes a privacy interest. *See McNiel v. Cooper*, 241 S.W.3d 886, 894-95 (Tenn. Ct. App. 2007) ("A patient's expectation that his or her medical records will remain private has constitutional, statutory, and decisional protection in Tennessee.") (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).

4. Opinions assuming a warrant is required to obtain electronic medical records are consistent with the Supreme Court's rejection of the government's use of a § 2703(d) court order rather than a Fourth Amendment-compliant search warrant to obtain records deserving privacy protections. *See Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018) (requiring warrant for records showing where cell phone was when used). Long before *Carpenter*, the Sixth Circuit concluded the SCA is unconstitutional insofar as § 2703(d) court orders are used to obtain the content of emails from internet service providers. *United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010).

5. In fact, in another Tennessee prosecution for alleged violations of the Controlled Substances Act by medical professionals, the government obtained a search warrant from the U.S.

District Court for the Eastern District of Tennessee. *See* Search and Seizure Warrant, *In the Matter of the Search of information associated with Dr. Henry Babenco/Lafollette Wellness Center that is stored electronically by premises controlled by Practice Fusion*, No. 3:19-MJ-2019 (Feb. 7, 2019), attached to the memorandum in support of this motion as Exhibit 3.

6. In this case, the government also used a trial subpoena to obtain Downtown Medical Clinic's business and patient records. That subpoena cannot cure the earlier, unconstitutional way the clinic records were obtained.

7. The Supreme Court has "never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." *Carpenter*, 138 S. Ct. at 2221.

8. A particularized warrant, supported by probable cause, was required to obtain any patient records, let alone all patient records. Here, the government did not minimize or particularize the records it seized from Practice Fusion.

9. Dr. Karlosky has standing based on his third-party interest in the privacy of his clinic's records and his personal connection to the seized materials as one of the supervising physicians of Ms. Bond to challenge the government's method of acquiring these materials.

10. Because the Practice Fusion records were obtained through an unconstitutional search and seizure, they should be excluded as evidence from trial.

11. An evidentiary hearing is necessary to develop a record concerning the manner in which the government obtained the Practice Fusion records.

12. In further support, Dr. Karlosky has filed a memorandum in support of this motion.

WHEREFORE, Dr. Karlosky moves to suppress all evidence seized because of the unconstitutional search and seizure described in the attached memorandum, for an evidentiary

hearing on this motion, and for permission to amend, should additional information become available. This motion is filed based on available information and undersigned counsel's efforts to comply with the Court's scheduling order. However, it remains counsel's position that it is unreasonable to expect adequate preparation for pretrial proceedings or the trial itself within the current schedule and that the constitutional protections afforded persons accused, and the essential requirements of the defense function, cannot be met without additional time to prepare. *See* (Motion to Continue, Doc. 157) (citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984)); (Supplement to Motion to Continue, Doc. 174); (Second Supplement to Motion to Continue, Doc. 177).

Respectfully submitted this 17th day of August 2021, by:

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CERTIFICATE OF SERVICE

I certify that on August 17, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

/s/Stephen Ross Johnson
STEPHEN ROSS JOHNSON