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2                   **IN THE UNITED STATES DISTRICT COURT**  
3                   **FOR THE WESTERN DISTRICT OF MISSOURI**  
                    **WESTERN DIVISION**

4 **UNITED STATES OF AMERICA,**            ) **Case No. 08-00026-02/05-CR-W-FJG**  
  )   
5                   **Plaintiff,**                ) **Kansas City, Missouri**  
  ) **September 24, 2008**  
6 **v.**                                        )   
  )   
7 **CYNTHIA MARTIN,**                    )   
8 **TROY R. SOLOMON,**                   )   
9 **CHRISTOPHER L. ELDER,**             )   
10 **DELMON L. JOHNSON,**               )   
  )   
                    **Defendants.**             )   
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11   **TRANSCRIPT OF HEARING ON DISCOVERY MOTIONS**  
12   **BEFORE THE HONORABLE SARAH W. HAYS**  
13   **UNITED STATES MAGISTRATE JUDGE**

14 **APPEARANCES:**

15 **For the Plaintiff:**                    **Rudolph R. Rhodes, IV, Esq.**  
16    **J. Curt Bohling, Esq.**  
  **AUSA**  
17    **400 E. 9<sup>th</sup> Street, Ste. 5510**  
  **Kansas City, MO 64106**  
  **(816) 426-3122**

18 **For Def. Martin:**                      **J.R. Hobbs, Esq.**  
19    **1000 Walnut, Ste. 1600**  
  **Kansas City, MO 64106**  
20    **(816) 221-0080**

21 **For Def. Solomon:**                    **W. Brian Gaddy, Esq.**  
22    **2345 Grand, Ste. 675**  
  **Kansas City, MO 64108**  
23    **(816) 221-8989**

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Chip Lewis, Esq.  
Mary Grace Ruden, Esq.  
2120 Welch  
Houston, TX 77019  
(713) 523-7878

Anthony L. Bannwart, Esq.  
7322 Southwest Freeway, Ste. 1510  
Houston, TX 77074  
(713) 807-0020

For Def. Elder:

John R. Osgood, Esq.  
740 NW Blue Parkway, Ste. 305  
Lee's Summit, MO 64086  
(816) 525-8200

For Def. Johnson:

Anthony L. Bannwart, Esq.  
7322 Southwest Freeway, Ste. 1510  
Houston, TX 77074  
(713) 807-0020

Court Audio Operator:

Ms. Dorothy Myers

Transcribed by:

Rapid Transcript  
Lissa C. Whittaker  
1001 West 65th Street  
Kansas City, MO 64113  
(816) 822-3653

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1 (Court in Session at 11:31 a.m.)

2 THE COURT: All right, good morning.

3 ALL: Good morning.

4 THE COURT: Well, we have quite a crew here, so let me  
5 see if I can have everybody state their appearance and we can  
6 figure out who's here and if we're missing everybody. Why don't  
7 we start with the people in the courtroom.

8 MR. RHODES: Rudolph Rhodes for the Government.

9 MR. BOHLING: And Curt Bohling.

10 THE COURT: All right. What about -- and the problem  
11 since we have people on the phone, whoever is speaking is going  
12 to have to talk into the microphone or come up to the podium.

13 MR. OSGOOD: John Osgood on behalf of Dr. Christopher  
14 Elder, who is present, Your Honor, in court.

15 MR. GADDY: Judge, Brian Gaddy, local counsel on behalf  
16 of Troy Solomon.

17 MR. HOBBS: Your Honor, J.R. Hobbs, appearing on behalf  
18 of Cindy Martin who appears in person.

19 THE COURT: All right. And then who do we have on the  
20 phone?

21 MR. BANNWART: Anthony Bannwart, in Houston, on behalf  
22 of Solomon and Johnson.

23 MS. RUDEN: And Mary Grace Ruden in Houston on behalf of  
24 Troy Solomon.

25 THE COURT: And is Mr. Solomon on the phone?

1 MS. RUDEN: He is, Your Honor. Troy, do you want to say  
2 something?

3 THE COURT: I'm sorry. Is he there?

4 MS. RUDEN: He is. Troy, can you hear us? He may be  
5 having trouble with the underlying call. Let me put this down  
6 and see if I can't fix that.

7 MR. SOLOMON: Hello.

8 THE COURT: Mr. Solomon? Hello.

9 MS. RUDEN: Troy?

10 THE COURT: Hello? Yes. Do we have Mr. Solomon on the  
11 line?

12 MS. RUDEN: I think we're moving phones for him.

13 THE COURT: All right. And maybe you can -- maybe it  
14 will help me to know who is where.

15 MS. RUDEN: Okay. He's going to come in the same room  
16 with me and put him on the phone with Mr. Bannwart, lead counsel  
17 here.

18 THE COURT: Okay. So are you -- I'm sorry, are the  
19 three of you together?

20 MR. BANNWART: No, we are not in the same room, Judge.

21 THE COURT: Are you in the same -- I'm just trying to  
22 figure out. Are you different towns? Are you in different --

23 MR. BANNWART: We're in the same city, Judge, but we are  
24 in different locations.

25 THE COURT: Okay. And so if you can just tell me who is

1 where, that would help me.

2 MR. BANNWART: Well, actually, Judge, because of the  
3 hurricane, I'm at my house.

4 THE COURT: I'm sorry. That's fine. But, Mr. Bannwart,  
5 you're in one location in Houston, is that correct?

6 MR. BANNWART: Yes, ma'am.

7 THE COURT: And Mr. Solomon, is he with you or is he  
8 somewhere else?

9 MR. BANNWART: He is somewhere else.

10 THE COURT: Okay. And then we have -- I'm sorry, I'm  
11 not sure I caught her name. Is it --

12 MR. BANNWART: Ms. Ruden.

13 THE COURT: Ruden.

14 MS. RUDEN: Okay. Can you hear me?

15 THE COURT: We can, and she's also at a different  
16 location?

17 MR. BANNWART: Yes.

18 THE COURT: Okay. So, we've got three of you at three  
19 different locations?

20 MS. RUDEN: Well, Troy and I are at the same office  
21 building. We'd just gone to different phones because it wasn't  
22 working on the one phone.

23 THE COURT: Okay. And let me ask this. I know everyone  
24 said they were there for Mr. Solomon and maybe I missed it. Are  
25 you there for Mr. Johnson as well?

1 MS. RUDEN: I believe only Mr. Bannwart is.

2 THE COURT: All right. Mr. Bannwart, you're there for  
3 Delmon Johnson as well?

4 MR. BANNWART: Yes, I am.

5 THE COURT: And is he somewhere by phone?

6 MR. BANNWART: He can be reached by phone and is  
7 supposed to be on the way over here, but unfortunately things are  
8 a little bit complicated down here right now.

9 THE COURT: Okay. Well, I mean, do you want us to go  
10 forward without him being present?

11 MR. BANNWART: Yes, ma'am. He's waiving his appearance  
12 for that purpose.

13 THE COURT: All right. But at some point he's going to  
14 be joining you wherever you're located.

15 MR. BANNWART: That is my hope, Judge.

16 THE COURT: All right. Is there anybody else that --  
17 I've been sitting here trying to look through the docket sheet.

18 As far as I know, we have everyone that needs to be present.

19 Okay. I just wanted to make sure. We're here today to talk

20 about discovery matters and scheduling matters and before we

21 start -- and anything else that the parties think would be

22 appropriate for us to address. Before we get started with the

23 specific discovery things, I just have a couple of scheduling

24 issues that I want to talk about. Mr. Elder had filed a Motion

25 to Suppress that Messrs. Johnson and Solomon have now joined in

1 and the Government has asked until September 26 to file an  
2 opposition. Will that date still work for you or do you need  
3 more time?

4 MR. RHODES: Given the fact that there is a new motion  
5 that has been filed --

6 THE COURT: Well, it's just a "me too" join in.

7 MR. RHODES: I know. Now I'll need to join in them as  
8 defendants to look at it from their angle as well. I would ask  
9 that seven more days be added to the response time.

10 THE COURT: October 3<sup>rd</sup>, will that --

11 MR. RHODES: Yes.

12 THE COURT: Okay. And when you say you need to look at  
13 it from their perspective, let me just make sure that I  
14 understand and I haven't studied the motions in any detail.

15 MR. RHODES: Yes.

16 THE COURT: If the motion deals with individualized  
17 inquiries, we normally wouldn't let them join in. But as I  
18 understood the gist of Mr. Osgood's motion, it was that the  
19 warrant itself was too broad and there was some just I won't say  
20 general, but issues that would go to anyone that was affected by  
21 the search warrant. So, I didn't really view -- I think there's  
22 one reference in there, the patient confidentiality files, which,  
23 you know, obviously might differ from the parties. But other  
24 than that, it looked to me, Mr. Osgood, like your motion was  
25 something that would apply to anybody involved.

1 MR. OSGOOD: That's true, 90 percent of one section did  
2 address the issue of omissions of favorable information about Dr.  
3 Elder that I thought fell under arguably *Franks*.

4 MR. RHODES: Uh-huh, yeah.

5 THE COURT: All right. Now, and just so the other  
6 parties know when you joined in something like that, unless you  
7 put something in specific to your client on that particular  
8 issue, that part of the motion will be addressed only as to Mr.  
9 Elder.

10 MR. BANNWART: That's fair, Judge.

11 THE COURT: All right. The Government now has until  
12 October 3<sup>rd</sup> to oppose. One date that I have suggested, because  
13 when I looked at the file, it doesn't look like we have a hearing  
14 date yet. Do the parties have their calendars with them and  
15 would they be available on October 21<sup>st</sup> for a hearing?

16 MR. OSGOOD: I am, Your Honor.

17 MR. RUDEN: Your Honor, Mary Graves Ruden for Troy  
18 Solomon. Chip Lewis and I are available on the 21<sup>st</sup>.

19 MR. GADDY: Your Honor, if my appearance is required as  
20 local, I am available on October 21<sup>st</sup>.

21 THE COURT: Okay. And I think that's up to you whether  
22 you want to come or not. I mean certainly normally we don't  
23 always make local counsel come. That's up to you. Mr. Bannwart,  
24 are you available?

25 MR. BANNWART: I am checking my calendar. That



1 deafening roar of silence is me checking my calendar, Judge.

2 THE COURT: All right.

3 MR. RHODES: Your Honor, if I may?

4 THE COURT: Yes.

5 MR. RHODES: Part of our response will be that the  
6 defendants do not have standing to challenge the search warrant.  
7 So, you may be able to decide this issue on the motions  
8 themselves without having a hearing.

9 THE COURT: All right. But to the extent we need to  
10 have a hearing, then I want to go ahead and set a date for it.

11 MR. RHODES: And in that event, I would need to bring up  
12 a witness from Houston to make sure that she's available, so if  
13 you can tentatively set it for the 21<sup>st</sup>, I'm -- not knowing her  
14 schedule.

15 THE COURT: Okay. And I think you'll just have to go  
16 ahead and find out her schedule and let us know because if you  
17 wait until after October 3<sup>rd</sup> when you file your opposition and we  
18 have a chance to look at it, but at least between October 3<sup>rd</sup> and  
19 October 21<sup>st</sup>, we'll have an opportunity to look at the standing  
20 issue and then let the parties know what we're thinking in that  
21 regard. All right.

22 MR. BANNWART: Judge, this is Anthony Bannwart. I have  
23 a trial setting that week but pending actually being set on that  
24 day, I'm available.

25 THE COURT: And I'm having a little bit of difficulty

1 hearing you. You say you have a trial that week.

2 MR. BANNWART: I am set for the two-week trial docket  
3 beginning that Monday the 20<sup>th</sup>, but unless it's actually set on  
4 Tuesday, I'm available.

5 THE COURT: All right.

6 MR. BANNWART: The 21<sup>st</sup>.

7 THE COURT: All right. Well, we're going to at least  
8 for the time being then leave it set beginning at 9:30 on the  
9 21<sup>st</sup> and if that changes, we'll let you know because of the  
10 standing issue, and likewise if any attorney that wants to be  
11 present has a problem come up, you'll need to let us know.  
12 Although on non-evidentiary matters, I'm happy to let parties  
13 appear by phone. Parties would need to be -- actual defendants  
14 would need to be here for the evidentiary hearing.

15 MR. BANNWART: Very well, Judge.

16 THE COURT: Now, a second issue that I have is Mr.  
17 Osgood filed a Motion to File Out of Time a Motion to Suppress  
18 Handwriting Identification. Any objection to my letting Mr.  
19 Osgood file that motion?

20 MR. RHODES: No, Your Honor.

21 THE COURT: All right. How soon do you want to file  
22 that?

23 MR. OSGOOD: I have it ready. I can file it this  
24 afternoon, Judge.

25 THE COURT: All right. Well, just in case you run into

1 technical difficulties or something, we'll give you up to three  
2 days to get it on file.

3 MR. OSGOOD: Very good.

4 THE COURT: How long do you need to respond, Mr. Rhodes?  
5 Do you want just the normal response time, which I think would be  
6 12 days?

7 MR. RHODES: Normal response time until we get a chance  
8 to review the motion, Your Honor, yes.

9 MR. OSGOOD: What it is about, Your Honor, is I'm making  
10 an argument under *Niles v. Bigger* that it's like a lineup that  
11 they should have shown other spreads to this woman and that it  
12 was overly suggestive they way they did it. That's the gist of  
13 the motion.

14 THE COURT: Right. I've taken a look at it.

15 MR. OSGOOD: Yes.

16 THE COURT: All right. So, we'll give the Government  
17 the normal response time. What we need to do then is also, as I  
18 understand it, set that down for a hearing, is that correct?  
19 You're seeking a hearing on that. I don't know that the --

20 MR. OSGOOD: I am, Your Honor.

21 THE COURT: -- Court can rule that without having a  
22 hearing.

23 MR. OSGOOD: I believe so.

24 THE COURT: All right. When do the parties want to set  
25 that down for hearing?

1 MR. OSGOOD: I would assume we could do that on the same  
2 day, Your Honor. It's not going to be long. It'd just be one  
3 witness. It's her, I would assume, and the agent maybe. I'm not  
4 trying to tell Mr. Rhodes how to practice law.

5 THE COURT: Well, I just wasn't sure how long your other  
6 hearing, the suppression hearing, would take?

7 MR. OSGOOD: I don't think the suppression hearing will  
8 take that long, Your Honor.

9 THE COURT: Let me ask the people on the phone. He's  
10 not speaking into the microphone. Are you able to hear him?

11 MS. RUDEN: I can't.

12 MR. BANNWART: I can, Judge.

13 THE COURT: All right. Is the Government opposed to  
14 trying to do that the same day?

15 MR. RHODES: Judge, we haven't had a chance to even look  
16 at the motion to give an adequate response. I'm assuming if we  
17 were to set one hearing for the morning and the second one for  
18 the afternoon, yes.

19 THE COURT: Afternoon. All right. Well, for the time  
20 being, when you look at it, if you think that can be done, then  
21 we will, you know, let us know. But otherwise, we'll start the  
22 one at 9:30 in the morning, and we'll start the Motion to  
23 Suppress on the handwriting identification at 1:30 that  
24 afternoon.

25 MR. OSGOOD: Your Honor, the witness that will be

1 germane to the Motion to Dismiss is also the same witness that  
2 would be involved in the handwriting identification. That's Ms.  
3 Hearne.

4 THE COURT: Right.

5 MR. OSGOOD: So, we could do both of those at the same  
6 time. That's very short. I filed a Motion to Dismiss. She  
7 claims that the person that she --

8 THE COURT: Well, let me just stop you right there. I  
9 mean, we can deal with it at the time, but let me raise this  
10 question. If you have her here and you get the information from  
11 her that you have sought by way of private investigator  
12 interviews, does that moot out your Document No. 93, which is  
13 your Motion to Dismiss? As I take your Motion to Dismiss, it was  
14 because supposedly when they dispute this, that somebody from the  
15 Government had told her not to speak to you.

16 MR. OSGOOD: Judge, that --

17 THE COURT: And then she called back supposedly and  
18 clarified. They left it up to her and she chooses not to speak  
19 to you.

20 MR. OSGOOD: And I have rebuttal for that from Mr.  
21 Reeder that would suggest that that may not be the facts, so, you  
22 know, but what is supported --

23 THE COURT: Yeah, but whatever the facts are, if you get  
24 to hear what she has to say in court, do you have any prejudice?  
25 Trial is not until January.

1 MR. OSGOOD: If they are instructing witnesses not to  
2 talk to me and that comes out in court, then I think my Motion to  
3 Dismiss is good and I'd want to pursue it for the record.

4 THE COURT: Right. Right. But I understood that your  
5 motion didn't speak to witnesses plural, but to one witness in  
6 particular.

7 MR. OSGOOD: This woman, but there are indications that  
8 other -- there have been other significant omissions from Reports  
9 of Interview based on my private investigation, and I might want  
10 to pursue it further.

11 THE COURT: All right. Well, the --

12 MR. OSGOOD: There's been exculpatory information left  
13 out of Reports of Interview by the DEA.

14 THE COURT: All right. But I don't know that that  
15 necessarily -- I agree that to the extent you have the witness  
16 here, Ms. Hearne, that speaks to both issues, you know, I'll  
17 certainly let you inquire briefly about that other issue. But to  
18 the extent your motion is really predicated not on what she has  
19 to say, but on an analysis of DEA reports, I don't know that  
20 that's the time to go into that that afternoon.

21 MR. OSGOOD: I agree. I agree. And again, as you say,  
22 she -- if she sticks to what she's said in follow up and doesn't  
23 want to talk to us and it's her decision, there's nothing I can  
24 do about it. I'm stuck.

25 THE COURT: Exactly.

1 MR. OSGOOD: I'm stuck.

2 THE COURT: And, therefore, I think that would then  
3 address that motion unless you have some other evidence you want  
4 to present.

5 MR. OSGOOD: And we can handle that very quickly as part  
6 of this handwriting motion, I think.

7 THE COURT: All right. So, we now have a briefing  
8 schedule for both the suppression issue, the handwriting issue,  
9 and we have a hearing date set to the extent one is necessary for  
10 both of those issues. Before we then start speaking about the  
11 specific discovery motions, is there anything else in terms of  
12 scheduling, motions that need to be heard, that anyone wants to  
13 speak to?

14 MR. OSGOOD: May I have just a minute, Your Hono? I  
15 think that obviously the Court's practice in the past has been to  
16 take any limines up with the District Judge and I assume  
17 that's --

18 THE COURT: We'll take a look at those. I mean to the  
19 extent there's something that's really more on the order of a  
20 motion to suppress, we'll have an opportunity to deal with that.  
21 But at least right now I really haven't focused on -- if it's  
22 something titled in limine, normally that would be for the  
23 District Judge.

24 MR. OSGOOD: The only other one would be the *Daubert*  
25 issue on the handwriting, and that would have to probably be on a

1 separate day because I can see that could be involved.

2 THE COURT: And I think at some point what the Court  
3 will do, and I'm just not there yet, is we'll look at all the  
4 limine issues and the expert issues and then I'll be speaking to  
5 the District Judge to find out --

6 MR. OSGOOD: Well, --

7 THE COURT: -- to find out if he wants us to have any  
8 hearings or when he wants to schedule those hearings with you.  
9 And so that is something that we will be addressing and perhaps  
10 by the 21<sup>st</sup> when I get everybody together, we can speak to that  
11 expert issue.

12 MR. BANNWART: Okay. Judge, would that also apply to  
13 the Bill of Particulars, motions to quash, and motions to  
14 dismiss?

15 THE COURT: Well, I view Bill of Particulars is a  
16 discovery matter and here in just a minute we're going to start  
17 talking about all of the discovery motions.

18 MR. BANNWART: Okay.

19 THE COURT: So, if we're done then with talking about  
20 scheduling issues, let us turn to the discovery motions. And let  
21 me just state that in a case with this many defendants and this  
22 many documents and issues, I was really concerned when I saw the  
23 discovery motions because we really don't want the parties filing  
24 needless motions. So, I intend to enter an order in this case, I  
25 normally don't enter this order in criminal cases, directing the



1 parties not to file any discovery motions until they have talked  
2 to the other side about what discovery it is they think they need  
3 and they're unable to resolve it through either a phone  
4 conference or an in-person meeting. Then you can get me on the  
5 phone. If all of that fails and we truly have an issue to brief,  
6 I'm happy to let you brief it. But I think there have been a lot  
7 of needless motions filed on discovery to date and, hopefully, we  
8 can go through those and maybe clear up any concerns the parties  
9 have about what discovery either has or has not been produced.  
10 The first motions that I'd like to turn to are Troy Solomon's  
11 Motion for Discovery and an identical motion filed by Mr. Delmon  
12 Johnson. Mr. Solomon's motion is Document No. 59, and Mr.  
13 Johnson's motion is Document No. 68. As I understand these  
14 motions, they seek all Rule 16 material. The Court has entered  
15 discovery orders in this matter that basically directed the  
16 turning over of Rule 16 material. That discovery order was filed  
17 on 4/30, and so, Mr. Bannwart, I think you filed these motions.  
18 What is it about the Court's previous orders that don't cover  
19 your request for Rule 16 material?

20 MR. BANNWART: I think the orders do, Judge, for the  
21 most part. However, one of my concerns is kind of the trickling  
22 of information that's coming out. For example, we're receiving  
23 information, Judge, now that relates back to stuff that happened  
24 in 2006. I'm not exactly sure why it is that this information  
25 isn't being provided to us more timely, but rather, you know, I

1 received a packet of information about interviews that happened  
2 two years ago, this week. I received a package a month ago. I  
3 received a package, you know, six weeks ago. I don't understand  
4 exactly the delay and why it is that we're not receiving this  
5 information in a prompt fashion.

6 THE COURT: Well, let me ask you this. When you say  
7 interviews, are you talking about interviews of your defendant or  
8 are you talking about witness interview of your defendant, or are  
9 you talking about witness interviews in general?

10 MR. BANNWART: Both.

11 THE COURT: All right. Well, because I think they're  
12 vastly different in terms of under what rule and why you're  
13 getting particular discovery. Well, let me ask the Government to  
14 address, has all discovery been provided? Will there still be  
15 documents trickling in or what's the status of the production?

16 MR. RHODES: Most of the discovery, almost all of it,  
17 has been provided to defense counsel. As we receive it, we are  
18 letting him know about it and we are providing free copies of  
19 that discovery. This situation is different in that there is an  
20 ongoing investigation going on in Houston, and some of the  
21 documents that we are getting are from Houston, which we are  
22 sharing with defense counsel if we feel that they are relevant to  
23 the case at hand.

24 MR. OSGOOD: If I may, Your Honor?

25 THE COURT: If you can get near a microphone. You're

1 welcome to come up here.

2 MR. OSGOOD: Oh, yes. John Osgood, for the parties in  
3 Texas. That's part of the problem and I agree with Mr. Bannwart.  
4 While I perfectly understand and agree with the Court that  
5 statements of third-party witnesses is not discloseable until  
6 prior to trial, if he wants to hold that back. We're getting  
7 documents that are physical hard evidence. I wrote and asked by  
8 e-mail two different times to get, for example, the floor plan  
9 which was an attachment to one of the DEA reports, which is the  
10 floor plan of the Texas Wellness Center. It took me four weeks  
11 to get that from Rhodes. Now, I don't know what the problem was,  
12 but that is -- has been characteristic of the disclosure in this  
13 case. And I also addressed with Mr. Rhodes whether or not there  
14 was, in fact, an investigation of a Dr. Okose in Houston, Texas.  
15 It now appears that he's just confirmed that. That was part of  
16 my motion for a Rule 16 -- I mean a --

17 THE COURT: 17(c).

18 MR. OSGOOD: -- Rule 17(c) pre-production. And I --

19 THE COURT: And I've got that on the list to talk about  
20 today.

21 MR. OSGOOD: Okay. But the point is I don't think it's  
22 -- I am concerned that Mr. Rhodes and the DEA are subjectively  
23 determining what is and is not discloseable to us when these  
24 cases are integrally tied together. They chose to indict Dr.  
25 Elder first. They, in fact, start investigating this Dr. Okose

1 first and they've interviewed witnesses down there. For example,  
2 a Mr. Lynch, the physician's assistant of Dr. Okose. Told him  
3 they wanted to interview him about Dr. Okose and then immediately  
4 started questioning him, and this was in June of this year,  
5 started questioning him about Dr. Elder. So, these things seem  
6 to be integrally linked to each other and the reports that we're  
7 getting, some bear the DEA number of the case in Texas, some bear  
8 the DEA number of this case. I think we're entitled to  
9 disclosure on all of those documents, certainly the fiscal  
10 evidence. For example, there's been a search of the Ascensia  
11 Pharmacy in Texas, I believe owned by Mr. -- or run by Mr. Parker  
12 and Mr. Solomon. We don't have the computer results of the  
13 forensic examination of the items seized in Texas on that yet,  
14 and that was done, again, two or three years ago. So, it does  
15 not seem that we're getting the stuff, as Mr. Bannwart says, in a  
16 very timely fashion and I don't know what the ultimate  
17 implication of that is, but and it's all under DEA control.  
18 Thank you.

19 MR. BANNWART: And I agree. You know I agree with, I  
20 believe that Mr. Osgood, had just said, and my concern is that  
21 they're using one case to hide stuff from the other case as well.

22 THE COURT: Well, you know, I understand that if they're  
23 kind of intertwined, it may be difficult but it would seem to me  
24 the only thing that ought to be coming in now are interviews that  
25 are being conducted in that other case if it's truly information

1 in the other case with that case number. And let me just ask  
2 this, Mr. Rhodes, is the investigative file and whatever file  
3 you're providing to these defendants in this particular case  
4 pending in the Western District of Missouri, has all of that  
5 material been produced?

6 MR. RHODES: Yes, Your Honor.

7 THE COURT: I mean, I don't know without maybe more  
8 specifics about what is coming in, it would seem to me that where  
9 we're left is Government is saying they've produced it to you.  
10 If you get ongoing discovery that you think is really not a  
11 result of this other investigation in Houston, but is a file from  
12 this case, I think you'll have to bring that to the Court's  
13 attention. But, you know, otherwise, I'm not sure what the Court  
14 can do at this point other than we've entered a discovery order.  
15 We've set forth all the Rule 16 material that needs to be  
16 provided. The time for providing that, except for, you know, any  
17 new material has, you know, kind of come and gone and it ought to  
18 be -- have been provided.

19 MR. BANNWART: Well, and our concern is, as Mr. Osgood  
20 pointed out, that some of this stuff relates back. I mean we're  
21 receiving stuff just now that happened, for example, the layout  
22 of South Texas Wellness, the search of the Ascensia Pharmacy, and  
23 these things happened two years ago or more, and I don't  
24 understand why we're just now receiving those.

25 THE COURT: All right. Mr. Rhodes, do you want to

1 address that? Is it your position that material isn't relevant  
2 to this case and is a result of the other investigation?

3 MR. RHODES: Those search warrants were sealed is one  
4 reason why we do not have access. We just unsealed one of the  
5 search warrants. Secondly, they had received reports about the  
6 search of the Ascensia Nutritional Pharmacy, as well as any  
7 information concerning those searches. The documents regarding  
8 the floor diagram, which we keep going back to, or the consent to  
9 search form, those were two documents that were left out when I  
10 asked for the file. And they had to go back and get that  
11 unsealed to get me those documents. That's why there was a  
12 delay.

13 THE COURT: All right. So, is everything unsealed in  
14 Texas now that would relate to this that needs to be provided to  
15 them?

16 MR. RHODES: That I cannot give you a definitive yes or  
17 no, Your Honor. I'd have to check with defense counsel -- I'm  
18 going to have to check with counsel in Houston for that.

19 MR. OSGOOD: I just checked on ECF Thursday, Your Honor,  
20 and that case is still sealed down there in Texas. I don't know  
21 what --

22 MR. BANNWART: And that's one of our problems.

23 THE COURT: Well, are the parties saying that there's  
24 information in that case? Are you using information from those  
25 search warrants or whatever is sealed down there, Mr. Rhodes, in

1 this case?

2 MR. RHODES: In the sealed case regarding the South  
3 Texas Wellness Center, the information that would be used has  
4 been disclosed to defense counsel. With regard to the matters  
5 that we have shared with defense counsel to date, those matters  
6 will be used. Any other matter that we come across that may be  
7 used at trial, will be disclosed to them.

8 THE COURT: Well, --

9 MR. BANNWART: That doesn't exactly answer the question  
10 which --

11 THE COURT: Yeah.

12 MR. BANNWART: -- I think is yes.

13 THE COURT: I don't think that does. I mean to the  
14 extent, and I'm not really -- because I'm not as familiar with  
15 the facts as the parties, you know, I'm not sure that I fully  
16 understand how this whatever is sealed in Texas relates to this  
17 case, but are those all the warrants and everything that was  
18 issued that you're moving to suppress? Is that what's under seal  
19 down there?

20 MR. OSGOOD: It was a search of the South Texas Wellness  
21 Center --

22 THE COURT: Okay.

23 MR. OSGOOD: -- where my client worked part-time as a  
24 physician and where prescriptions were sent from -- supposedly  
25 from --

1 THE COURT: From Belton.

2 MR. OSGOOD: -- here to there and it's integrally  
3 involved in this case and is a key component of the case. And  
4 there are numerous reports that deal with the South Texas  
5 Wellness Center. I would say it's more involved in this case  
6 than it is in the Okose matter.

7 THE COURT: Well, I guess my concern, Mr. Rhodes, is  
8 when you say, and any other matters you come across that you  
9 intend to use, you'll produce to them, I mean, I think the time  
10 for the Government to say we're using this file down there, we're  
11 using these documents, if that's the case, is now and you need to  
12 get them unsealed and produced. And, likewise, even you don't  
13 intend to use them in your case-in-chief, you're going to need to  
14 be reviewing, I would assume, that material for *Brady* and *Giglio*  
15 material. So, I guess what I'm interested in is, you know, is  
16 there something further that you intend to do down in Texas to  
17 get documents unsealed and produced in this case?

18 MR. RHODES: At this moment, no, Your Honor, unless  
19 there is -- here's the situation, Your Honor, is that the South  
20 Texas Wellness Center, what was seized was a computer. That was  
21 the seized matter. The information that may be on that computer,  
22 it's -- I mean it's broad reaching.

23 MR. OSGOOD: Thank you.

24 THE COURT: Well, do you intend to use any material from  
25 the computer in this case?



1 MR. RHODES: Yes, we will continue to use the patient  
2 list that was taken from that computer to see if there was an  
3 appointment calendar on that computer as far as --

4 THE COURT: When you say to see if there was an  
5 appointment calendar, I mean have you already looked to see? Do  
6 you know?

7 MR. BOHLING: Your Honor, I'm working on that issue.  
8 The search warrant in Texas was specific to the Okose case. So,  
9 we have to do another search warrant. We are in the process of  
10 doing that. I anticipate that will be done very soon. So we  
11 have the information, but we have some technical issues about  
12 getting, if you will. We're not free to just grab it off the  
13 computer. We have to do a second search and that's something  
14 that I'm actually working on right now, so.

15 THE COURT: So, really when you say that all discovery  
16 is produced, you don't really know that. You're going to do a  
17 second search warrant for a computer that's being held in Texas  
18 for use in this case?

19 MR. BOHLING: It's being held in Virginia actually.

20 THE COURT: All right.

21 MR. BOHLING: Yes.

22 THE COURT: It's being held in Virginia, but it was  
23 seized in Texas?

24 MR. BOHLING: Correct. That's right. And that's what  
25 we have to do.

1 MR. BANNWART: And, Judge, to be clear, we're saying  
2 South Texas Wellness. There may be other places, locations,  
3 warrants, that we don't even know about. That's just the one  
4 that we know about that they're using parts of.

5 MR. BOHLING: And I can't speak to that. I don't know  
6 the details of Houston investigation. But we can certainly check  
7 on that.

8 MR. RHODES: We can check on that.

9 MR. BOHLING: That's not a problem, but we will get the  
10 computer. We don't know until we can have somebody look whether  
11 there's information that's relevant. Obviously we'll provide it  
12 as soon as we get it to defense counsel.

13 MR. OSGOOD: Your Honor, --

14 THE COURT: Well, how quickly do you think you'll get  
15 the search warrant --

16 MR. BOHLING: This week.

17 THE COURT: -- served? All right. And then how quickly  
18 after that will you have someone look at the computer?

19 MR. BOHLING: I have an assurance from DEA that it will  
20 be done as soon as possible.

21 THE COURT: Well, I know, but what does it mean when DEA  
22 says as soon as possible?

23 MR. BOHLING: The information, I think, is readily  
24 accessible. I don't -- they didn't tell me, you know, in two  
25 days, three days, three weeks. I can certainly follow up with

1 them on that. I was told that it would be the highest priority  
2 and that they would look at it as soon as we got the warrant  
3 process done, that they would look at it for us. I understand  
4 that it needs to be done quickly and I will press them on it.

5 MR. OSGOOD: To put this is in perspective to give you  
6 some idea, Your Honor, the search of the pharmacy here in  
7 Missouri was in '06, the fall of '06, October. On January 22<sup>nd</sup>  
8 of '07, the DEA completed a 13-page report which was a guide on  
9 how to look at five CDs that are mirror CDs that were  
10 forensically examined by DEA. We did not get that,  
11 notwithstanding your discovery order, we got those five CDs and  
12 this report about two weeks ago. So, again, they've had it.  
13 They had it since January of '07, and we're just now getting the  
14 material. And another example. That's a 13-page report. I  
15 assume there's a similar forensic report out there on this other  
16 computer down there and they're holding it back.

17 THE COURT: All right. And you're talking about this  
18 was the report on a search out of Belton?

19 MR. OSGOOD: Yes, ma'am.

20 THE COURT: Okay. Now, that would seem to relate  
21 directly to this case as opposed to the Houston case.

22 MR. OSGOOD: And they've been sitting on that since  
23 January of '07.

24 MR. BOHLING: We provided it as soon as we could provide  
25 it. In fact, we didn't have it before in our custody, so.

1 THE COURT: Well, but where was it?

2 MR. BOHLING: You'll have to speak to that.

3 MR. RUDOLPH: I believe it was locked away at DEA here  
4 in Kansas City, but once we learned about it, we provided a copy  
5 of that to defense counsel as soon as possible.

6 THE COURT: Well, but I guess what I'm saying, I mean,  
7 this case was filed February of '08. I mean, I guess, I'm just  
8 trying to figure out why you would only learn two weeks ago of a  
9 report pertaining to five CDs from a search that I would assume  
10 is kind of at the heart of your case.

11 MR. RHODES: Well, I wouldn't say it was at the heart of  
12 the case. Once we located and knew about the five CDs that had  
13 not been disclosed, Your Honor, we provided it to them as soon as  
14 possible. And --

15 THE COURT: But, you see, I think that's a little bit  
16 different than your are saying to me that all of the discovery  
17 coming in now is just coming in because of investigation in  
18 Houston. I mean, we're talking now about five CDs and a report  
19 that was just provided two weeks ago that would appear to relate  
20 directly to this case as opposed to Houston.

21 MR. RHODES: I know. I don't have the exact date, but I  
22 know it was more than two weeks ago and --

23 MR. BOHLING: Six weeks, Your Honor. It's been a while.

24 MR. OSGOOD: Well, I'll give you six weeks. It was  
25 there in January.

1 MR. RHODES: I mean, but it was there --

2 THE COURT: But I entered my discovery order, though,  
3 the second discovery order, on April 30<sup>th</sup>. And if you were going  
4 to have a problem complying with -- I mean, in these cases I rely  
5 on the parties. If I tell you to turn stuff over within ten  
6 days, and normally I say that because by the time that discovery  
7 order has been filed, or is filed, the case has normally been  
8 here for, you know, a couple of months, and it's material that we  
9 would assume has been pulled either prior to the time you file  
10 the Indictment, or shortly thereafter. If the parties are going  
11 to have trouble, either side, complying with a deadline set by  
12 the Court, then this is the kind of discussion that I would have  
13 wanted to have with you all in May because it would have impacted  
14 on what's our trial setting. You know, when should Judge Gaitan  
15 set aside time for this trial. And now we're here almost in  
16 October and we're talking about, you know, discovery that's just  
17 been provided, you know, in the last month or six weeks.

18 MR. BOHLING: Your Honor, the agent informs me that part  
19 of the material that is now reflected on the CDs was actually  
20 provided much earlier in the case.

21 MR. OSGOOD: That's not true. There were, for example,  
22 e-mails that are critical to this case and they're critical to me  
23 because of the absence of any e-mails between my client and any  
24 of these people. I've been through 50,000 pages over the last  
25 four or five days of material that were on these mirrored and CDs

1 and there is absolutely a virtual absence of anything about my  
2 client, something I needed to know a long time ago. And that's,  
3 I submit to you, Your Honor, why they didn't give it to me before  
4 just recently is they knew there wasn't anything on there.

5 MR. BOHLING: I don't understand that. If there's  
6 nothing relevant, --

7 MR. OSGOOD: Well, there were prescriptions on there  
8 that he did not --

9 MR. BOHLING: There's nothing.

10 THE COURT: Okay. Well, that's -- you know, whether  
11 there is or isn't information, I think what the Court is  
12 concerned about is what is the Government's plan to make sure  
13 that they, you know, speak to -- either speak to people, look at  
14 documents, or what is the plan for making sure that discovery  
15 that they have or currently have access to is provided to the  
16 defendants if it has not already been done so?

17 MR. BOHLING: The two categories of material that I am  
18 aware of that are still out there are anything that hasn't  
19 already been provided that has to do with the Houston  
20 investigation, and we will re-check in with the Houston  
21 prosecutor and make sure that we are aware of everything in that  
22 investigation and we'll do that quickly, and if there's anything  
23 that we need to be providing, we'll get it provided. The second  
24 category is the second warrant that we have to do for the hard  
25 drive from South Texas Wellness Center and that is something that

1 I am working on now, as I told the Court, and we will have that  
2 done, I would hope, by the end of next week. I can't commit to  
3 that, because I'm not the person who's actually working with the  
4 computer. But I will press DEA to try to have that information  
5 back to us no later than that.

6 THE COURT: Let me ask this --

7 MR. BANNWART: And our concern, Judge, is to get a date  
8 certain because, as you know, I mean our trial date would have  
9 been already fast approaching and yet there's information that's  
10 new that's still coming in. When is that going to end?

11 THE COURT: Well, I mean I think the one difficulty is  
12 to the extent there's an ongoing investigation somewhere else and  
13 that as material comes in that is newly gathered and produced to  
14 you, there's nothing the Court can do about that. But what I am  
15 interested in assuring is that for information that is somewhere  
16 out there, but just a question of reaching out to make sure that  
17 the Government has it or has reviewed the files and turned it  
18 over to you, I think we do need to try to set some kind of time  
19 limits on that. And that may -- those time limits may help you,  
20 Mr. Bohling, in terms of stressing to the DEA when you get the  
21 search warrant, how important it is for them to act promptly.  
22 So, I would like to set a target deadline for your office to  
23 reach out and review any material you think may be pertinent to  
24 the case and get that turned over to defense counsel.

25 MR. OSGOOD: One other issues on this --

1 THE COURT: Well, let's pick a --

2 MR. OSGOOD: I'm sorry.

3 THE COURT: Let's pick a date by which we think we can  
4 do that. I mean, is three weeks enough time, do you think?

5 MR. BOHLING: Yes. If there's any difficulty, I'll let  
6 the Court and the parties know immediately, but I think three  
7 weeks is reasonable.

8 THE COURT: Because one of the concerns that I have and  
9 maybe we don't need to know -- let me raise this issue. I mean,  
10 we're now saying three weeks and part of the information is  
11 information seized from the South Wellness Center -- South Texas  
12 Wellness Center, but that's the subject of our hearing on October  
13 21<sup>st</sup>, as I understand it. I mean, do you need to know what was  
14 seized before we have the hearing?

15 MR. OSGOOD: It goes to our issue of over breadth, Your  
16 Honor. I mean they seized the entire computer and apparently  
17 they've looked at it, the entire computer forensically for the  
18 other case, and now they're going to go back and try to get a  
19 search warrant.

20 MR. BANNWART: I was just thinking the same thing,  
21 Judge.

22 THE COURT: Well, it would just seem to me that -- and I  
23 hate to push things back -- but it would seem to me that you need  
24 to have that information before we have our hearing.

25 MR. OSGOOD: I would like a mirror image of the computer



1 that they've seized in the condition it is in now, Your Honor,  
2 because it goes directly to my breadth issue. Do you agree, Mr.  
3 Bannwart?

4 MR. BANNWART: Yes, I do.

5 MR. OSGOOD: And it exists, based on reports.

6 THE COURT: Well, are you planning on having a mirror --  
7 will your agents be looking at a mirror image and what's your  
8 position with respect to providing that to defense counsel?

9 MR. BOHLING: That's a complicated issue. It depends on  
10 whether there are patient records on there and other things. I  
11 would need to talk to DEA counsel because they're going to be  
12 involved in this decision. It's something where we have to  
13 coordinate with them. It's in their custody. So, I can't -- I  
14 think a motion should be filed and that we would then respond and  
15 that would give me -- I would be able to then see what their  
16 basis is and whether we would have any objections or possible  
17 protective order requests.

18 THE COURT: Well, let me back up. I mean, why do you  
19 think they need to file a motion? You're going to be looking at  
20 the entire computer.

21 MR. BOHLING: That's correct.

22 THE COURT: All right. And so, say, there's something  
23 on there that you think they should have like patient records. I  
24 mean, wouldn't you then be saying to them we're going to produce  
25 it for you except for this material?

1 MR. BOHLING: Well, I might produce it with a protective  
2 order if the patient records are relevant to the case. I'll  
3 produce material that's relevant within the terms of the warrant.

4 THE COURT: All right.

5 MR. BOHLING: I'm not quite clear what the purpose is of  
6 them having the mirror image. I mean, that's the question that I  
7 have.

8 THE COURT: Well, let me ask you this. Are --

9 MR. BOHLING: If I'm going to produce the material, I  
10 can only produce it within the terms of the warrant. I can't --  
11 so that becomes kind of a -- that's the whole problem here is  
12 that the original warrant is geared to one case and not to our  
13 case. And so the DEA took the position, and reasonably, that  
14 they wanted a second warrant. So, I guess I'm a little confused  
15 about what the purpose of -- unless there's some question about  
16 the forensic issue. That hasn't been raised, so.

17 THE COURT: Well, let me ask you this. Under the  
18 original warrant, did you have the computer for a certain period  
19 of time, make a mirror image, and then return the computer?

20 MR. BOHLING: They made it onsite, Your Honor.

21 THE COURT: All right. So, they never actually took --

22 MR. BOHLING: Absolutely correct. They never took the  
23 -- they did not take the computer because it was an ongoing  
24 business.

25 THE COURT: All right. And --

1 MR. OSGOOD: Your Honor, the affidavit in support goes  
2 directly to the activities of Dr. Elder, the basis for seizing  
3 that computer was supposed information they had about Dr. Elder  
4 and they even had the gall to say in the affidavit, we know more  
5 information, but we're -- we don't feel it necessary to put it in  
6 this affidavit.

7 THE COURT: Well, let me just say this. It would seem  
8 to me that probably what needs to happen is you need to see what  
9 information they're going to produce to you and then make a  
10 decision whether or not you're going to, you know, ask for more  
11 information. And I don't know if your intent is to give them an  
12 index saying here is the kind of material that was on the  
13 computer and here -- out of that material, here is what we're  
14 producing to you.

15 MR. BANNWART: The only concern I have there, Judge, is  
16 if we don't know what we're missing, there might be exculpatory  
17 evidence in that computer and we wouldn't know it's there because  
18 we haven't seen the whole thing.

19 MR. BOHLING: Well, maybe I can short-circuit this whole  
20 process.

21 THE COURT: Yeah.

22 MR. BOHLING: I mean, this seems to run a little bit  
23 counter to the whole notion of having the motion. If we're all  
24 going to agree that they have -- the clients have no objection to  
25 looking at the whole contents of the computer, I don't need to

1 get a warrant. But --

2 THE COURT: Well, I don't know that these clients can  
3 speak for South Texas Wellness Center.

4 MR. BOHLING: And that's a good point. So, you're  
5 right. You're absolutely right.

6 THE COURT: I mean, I don't think anyone here is --

7 MR. BOHLING: They can't speak for the -- and that's  
8 part of the problem here --

9 MR. OSGOOD: I need to see it to make my argument that  
10 it's over broad, Your Honor.

11 MR. BOHLING: But if it's -- and our argument is going  
12 to be his client has no standing to say that. So, that's  
13 obviously going to be what the lines are there. But it's just --

14 THE COURT: Well, let me ask you this. If the Court  
15 were to conclude that defendants don't have standing to raise  
16 this issue, would they still be entitled under Rule 16 to see the  
17 contents of the computer?

18 MR. BOHLING: They would be entitled to see the  
19 information on the computer that either the Government is going  
20 to use or that would be exculpatory.

21 THE COURT: Okay.

22 MR. BOHLING: The computer presumably has a lot of  
23 information that is in neither of those two categories, and is  
24 proprietary business information as to South Texas Wellness  
25 Center, or it might be completely unrelated patient records,

1 which would have their own privilege issues. And that's where I  
2 have a concern is I certainly wouldn't be comfortable providing  
3 all of that information when only probably a small portion of it  
4 would be Rule 16 information.

5 MR. OSGOOD: Then perhaps you can explain to me why he's  
6 given me thousands of pages of records about Dr. Okose, who is  
7 not a defendant in this case, who wrote prescriptions with all of  
8 his patient lists and the people he wrote prescriptions for,  
9 their names and addresses, and all the other HIPAA material that  
10 they've given us and now this making this ridiculous argument.

11 MR. BOHLING: Because Dr. Okose --

12 MR. BANNWART: Right. Now they're saying it's not  
13 relevant besides which who's going to decide whether or not it's  
14 exculpatory or relevant to this case? The Government? We're  
15 going to rely on them to decide that.

16 THE COURT: Well, that's the law and that certainly is  
17 the Supreme Court where they direct the burden be placed. That's  
18 a little bit different issue. I'm sorry, Mr. Bohling, you were  
19 saying?

20 MR. BOHLING: No, the answer on Dr. Okose is he is an  
21 unindicted co-conspirator.

22 THE COURT: I was going to ask you that. We've got the  
23 Motion for a Bill of Particulars. That's one of the things they  
24 ask about is unindicted co-conspirators.

25 MR. BOHLING: Right. So, --

1 THE COURT: Are there others besides Dr. Okose?

2 MR. BOHLING: No.

3 THE COURT: All right. Well, let me back up and just  
4 ask this question. I'm not sure that we're going to be ready to  
5 go forward with the hearing on October 21<sup>st</sup>. Should that be a  
6 date that we get everybody back on the phone to determine do you  
7 have all of your discovery so that we can go forward and set an  
8 actual date for the hearing?

9 MR. OSGOOD: I don't have any problem with that, Your  
10 Honor. I'm flexible on that.

11 MR. BOHLING: We're fine with that date, Your Honor.

12 MR. OSGOOD: Although, Your Honor, that would impact,  
13 I suppose, on our trial date.

14 THE COURT: Well, --

15 MR. OSGOOD: Flexible on it, too.

16 THE COURT: Here's what I think that you all ought to do  
17 because it looks like we have a number of issues. You need to,  
18 within the three weeks target deadline, get any remaining  
19 discovery to the defendants. If, when you get that information,  
20 Mr. Osgood, I mean, and the parties can certainly treat this  
21 discussion here today as leave to file any discovery motions  
22 pertaining to the computer of the South Texas Wellness Center.  
23 If you feel at that point you need to file a motion because  
24 you're not going to get what you need, you can do so. And on the  
25 21<sup>st</sup> then perhaps we would be in a position to talk about the

1 standing issue, our briefing schedule would still be in place,  
2 and the Court could let you all know what we're going to do about  
3 standing and whether the parties are satisfied with the discovery  
4 that's being produced or if we need to make some kind of ruling  
5 with respect to discovery.

6 MR. OSGOOD: That sounds good to me, Your Honor.

7 THE COURT: Now, my only concern about this is given  
8 what I suspect the parties' calendars look like in November and  
9 December, that's not going to give us a lot of time, but I think  
10 if we then on the 21<sup>st</sup> can pick a date either later that month or  
11 the very first part of November, we can still get the hearing in  
12 and a Report and Recommendation out.

13 MR. OSGOOD: Candidly, I've giving this case priority on  
14 my calendar and working around any other case -- I should say  
15 working other cases around this case.

16 MR. BANNWART: And I'll defer --

17 MR. OSGOOD: And I'll do that.

18 MR. BANNWART: And I'll defer to Mr. Osgood on that  
19 since he filed the primary motion.

20 THE COURT: All right. Now, with respect to your Rule  
21 16 Motion for Discovery, is there anything else that you had in  
22 mind because my concern about your motion is that it seems to be  
23 just boilerplate asking for Rule 16. I've already directed them  
24 to provide that. If you think you're not getting it, you need to  
25 set up a conference with the Court or file a motion addressing

1 specific items of evidence, but just a boilerplate, I want Rule  
2 16, I don't think is helpful at this point.

3 MR. OSGOOD: Well, today is the first time they've told  
4 us officially there's a separate investigation of Okose and the  
5 other information we've heard here today. When I wrote that  
6 motion, I was operating --

7 THE COURT: Well you didn't write this motion. This was  
8 written by Mr. Bannwart.

9 MR. BANNWART: This is my motion, John.

10 THE COURT: I'm talking about Documents Nos. --

11 MR. OSGOOD: Oh, I'm sorry, okay. You said 16.

12 THE COURT: -- 59 and 68.

13 MR. OSGOOD: I was thinking 17(c), I'm sorry.

14 THE COURT: No, we haven't gotten to 17(c) yet.

15 MR. OSGOOD: Okay. I'll sit down.

16 THE COURT: So I guess, Mr. Bannwart, what I'm saying is  
17 I think we've dealt with your discovery motion. If you have  
18 specific items of discovery that you think you're not getting  
19 under Rule 16, you need to set up a phone conference with the  
20 Court, but I'm going to treat motions 59 and 68 as being dealt  
21 with.

22 MR. BANNWART: Okay. Judge, I'm okay with that.

23 THE COURT: All right. Unless there's some other  
24 specific item of Rule 16 material that we need to address right  
25 now.



1 MR. OSGOOD: There is.

2 MR. BANNWART: John, as far as I know, I think we've  
3 addressed it.

4 MR. OSGOOD: I would like a copy. I have the mirror  
5 images of the five CDs of Ms. Rostie's shop. It's in jpeg  
6 format. I would not attempt to put this into evidence in a trial  
7 because I realize once I start monkeying with it, it's not going  
8 to be admissible. But I would like a copy of the original mirror  
9 of the computer so that I can reinstall it on a standalone  
10 computer and have access to the account software that they  
11 physically use and enter patient lists and that kind of thing,  
12 and also it's in Access and it's going to have forms on it and  
13 entry data forms and whatnot, none of which is on this mirrored  
14 image. They've done a forensic exam properly, it looks like, but  
15 I would also like a second set of disks that are the actual  
16 backups of the computers that I can reinstall on standalone  
17 computers and look at and I don't see a reason why I can't have  
18 that.

19 THE COURT: Have you talked to Mr. Bohling about that  
20 prior to today?

21 MR. OSGOOD: I haven't and this is the first time I've  
22 sprung that on him.

23 MR. BOHLING: I don't even know if it's available. I  
24 mean --

25 MR. OSGOOD: Well, it has to be.

1 MR. BOHLING: -- I can't speak to that issue. Well, it  
2 might be. I don't know.

3 THE COURT: Okay. Well, why don't you two do this so we  
4 don't get bogged down.

5 MR. BOHLING: Right.

6 MR. OSGOOD: We'll talk about it.

7 THE COURT: You talk about that, talk to your computer  
8 people, but I think what he's saying is he needs something other  
9 than in a jpeg format if that's possible so he can, you know,  
10 look at it further.

11 MR. BOHLING: Okay. I'll have to talk to Mr. Osgood to  
12 verify exactly what he needs.

13 MR. OSGOOD: Okay.

14 THE COURT: Why he wants that. All right. And that's  
15 the kind of thing you don't have to wait until October 21<sup>st</sup>. If  
16 you can't get that worked out, then set up a phone conference and  
17 if it's his request that nobody else is interested in, you don't  
18 have to get everybody else on the phone, just get us on the  
19 phone.

20 MR. OSGOOD: All right.

21 THE COURT: All right. So, the Court is treating  
22 Documents 59 and 68 as having been dealt with. We then have, let  
23 me turn to Documents 61 and 69 which are Solomon and Johnson's  
24 Motion for Early Production of Witness Statements. I've looked  
25 at the Government's response to that and I just want to make sure

1 that I understand where we're coming from. One of the things the  
2 Government says, obviously, is that Reports of Interview are not  
3 witness statements. But as I understand it, you've gone ahead  
4 and turned those over to the defendants anyway.

5 MR. RHODES: We have.

6 THE COURT: All right. And in terms of witness  
7 statements, I guess I should ask this question. Do you have what  
8 you would consider to be witness statements under the statute,  
9 under 18 U.S.C. 3500?

10 MR. BANNWART: I'm sorry, Judge, are you talking to me?

11 THE COURT: No, I'm talking to Mr. Rhodes.

12 MR. BANNWART: Okay.

13 MR. RHODES: Oh, you're talking to me.

14 THE COURT: Yeah. We'll get to the defendants here in a  
15 minute.

16 MR. RHODES: You're saying do I have it or did I provide  
17 it?

18 THE COURT: Well, both. I was asking the basic  
19 question, one, do you have any, and, two, have you provided  
20 those?

21 MR. RHODES: We have provided those documents to them.  
22 All of the witness statements except for any proffer statements  
23 and that's it.

24 THE COURT: All right. So, basically, right now they  
25 have all witness statements and all -- I don't think you've

1 called them 302s because I think that's the FBI number, but all  
2 of DEA reports of --

3 MR. RHODES: Six.

4 THE COURT: -- interview?

5 MR. RHODES: Yes, Your Honor.

6 THE COURT: All right. Mr. Bannwart, I mean, it  
7 appeared to me when I read their response, you've gotten more  
8 than your -- than I could force them to produce at this point in  
9 time under the rules and the statute. Is there something in  
10 particular that you're concerned about?

11 MR. BANNWART: Well, again, it goes back to this other  
12 investigation. Now, we did receive some stuff just, I guess, a  
13 few days ago that kind of rounded out. Again, it's more  
14 trickling of information. But there were, at the time that we  
15 filed this, many, many, many statements that we didn't have.

16 THE COURT: But since you filed it, have you received  
17 those?

18 MR. BANNWART: Whether I have them all now, I don't  
19 know.

20 THE COURT: I'm sorry. But since you filed this motion,  
21 have you received those?

22 MR. BANNWART: We've received a number of them, Judge.  
23 Whether or not we have all of them, I don't know because, like I  
24 said, I believe we received just a few more of them a few days  
25 ago.

1           THE COURT: Right. But I think what they're saying, at  
2 least as to witness statements or interviews, those would be  
3 things that are being done in this Houston case that they have no  
4 control over when those are being done.

5           MR. BANNWART: Well, in part right. I think that we've  
6 already kind of discussed all that and that's kind of been dealt  
7 with. I think what I was trying to deal with more in my motion  
8 is the actual witness statements. I understand that they don't  
9 have to produce those to us, Judge. The scope of this case is  
10 broadening immensely and there are going to be, and we don't know  
11 who, but it appears that, you know, it might have intertwined  
12 with this other investigation in Houston and there are going to  
13 be a number of -- I mean a lot of witnesses. Actually, you know,  
14 this goes back actually to our Motion to Transfer Venue of this  
15 case to Houston because almost all of these people are in  
16 Houston, Judge. But if these two cases are this intertwined and  
17 there are this many witnesses for us to have to sit there at  
18 trial and be handed a statement after they've testified, we're  
19 going to have to ask for a recess.

20           THE COURT: Yeah, well, I don't think anybody is saying  
21 that that's going to happen. At least I don't hear defense --  
22 Government counsel saying that.

23           MR. RHODES: Your Honor, these are provided --

24           THE COURT: What they're saying is that the witness  
25 statements they have thus far, other than proffer statements,

1 they've provided to you.

2 MR. BANNWART: They've provided us with the summaries.

3 MR. OSGOOD: What we have, Judge, are DEA reports where  
4 they go out and interview the witness.

5 THE COURT: Right. That --

6 MR. OSGOOD: No indication they've adopted it. No  
7 formal --

8 THE COURT: Right.

9 MR. OSGOOD: -- true Rule 16 -- I mean Rule --

10 THE COURT: True.

11 MS. OSGOOD: -- I mean 3500 -- or 3500, 18 U.S.C. 3500  
12 statements. We do not have any written statements of any witness  
13 whatsoever.

14 MR. BANNWART: Correct.

15 MR. OSGOOD: All we have are the DEA report summaries as  
16 to what they've purported to say.

17 THE COURT: Well, I guess that was my question to you,  
18 Mr. Rhodes, do you have any 3500 statements?

19 MR. RHODES: No, Your Honor. The only thing we've  
20 gotten are the reports that we've been giving them --

21 THE COURT: Okay.

22 MR. RHODES: -- that summarizes what the evidence is  
23 going to be.

24 THE COURT: And do you intend to send people out to get  
25 3500 statements before trial?

1 MR. RHODES: No, Your Honor. Not at this time, no.

2 THE COURT: All right. Well, it would seem to me that  
3 again you're getting more than you're really -- than the Court  
4 could order being provided to you and I don't know of anything  
5 the Court can really do further than what's already -- the  
6 Government has provided to you --

7 MR. BANNWART: And --

8 THE COURT: -- in Document 61 and 69.

9 MR. BANNWART: And that's fine. If they don't have  
10 them, Judge, then I guess it's moot.

11 THE COURT: All right. And I think what I hear the  
12 Government saying is if they did have a witness statement,  
13 they're not going to wait until after the witness has testified  
14 to produce it to you. They'd produce it to you in advance of  
15 trial.

16 MR. RHODES: That is correct, Your Honor.

17 MR. BANNWART: Well, so far all we've gotten is  
18 summaries, which was my concern.

19 THE COURT: All right. Now, this motion did raise one  
20 issue that I want to take up with the parties. When I entered my  
21 trial order in this case, I don't know that I understood the  
22 nature of the case or, you know, how many possible witnesses  
23 there might. And in more complex cases, I normally set a  
24 deadline for filing witness and exhibit lists much further in  
25 advance than in just, you know, a routine case. My trial order

1 directs the parties to file their witness and exhibit lists the  
2 Friday prior to the pretrial conference, which would only be  
3 normally about two weeks before trial. So, one question that I  
4 have for the parties is whether we need to bump that date back  
5 and maybe do some modifications to our trial order and have  
6 witness and exhibit lists turned over and exchanged, say, maybe  
7 about 30 days prior to trial so that if either side has problems  
8 with witnesses or exhibits or issues that we need to take up,  
9 we'd have plenty of time to get together on those issues.

10 MR. BANNWART: I'd be in favor of that, Judge.

11 MR. OSGOOD: No objection.

12 MR. RHODES: No objection, Your Honor.

13 THE COURT: All right. So, we will modify our  
14 scheduling order to require both sides to do that. And,  
15 obviously, you know, I think it should be clear, the Court's  
16 expectation for defendants would also be since the Government has  
17 indicated that if they have witness statements, they'll produce  
18 them ahead of time, just like they've produced these summaries  
19 ahead of time, that, likewise, if the defendants would have any  
20 witness statements or summaries of witness interviews, they need  
21 to turn those over to Government counsel.

22 MR. OSGOOD: On what date, Your Honor?

23 THE COURT: Well, I mean --

24 MR. BANNWART: Thirty days prior?

25 THE COURT: Well, the Government is not waiting until 30



1 days prior. I mean, it seems to me that --

2 MR. BANNWART: Oh.

3 THE COURT: -- if we're having reciprocal discovery,  
4 that when you get it and you're sure it's, you know, a witness  
5 you're going to use, you need to turn that over to the other  
6 side.

7 MR. OSGOOD: They're holding back the key statements.  
8 For example, I don't have a copy of the proffer that Defendant  
9 Martin gave to the Government. They won't give it to me. They  
10 said it's not mine to see at this point. I have about ten or  
11 twelve statements of witnesses that I've interviewed -- I should  
12 say that my investigator has interviewed, that I view it in the  
13 same category as a proffer by Ms. Martin, and I'm not giving it  
14 to them until I get those proffers from them, unless the Court  
15 orders me to. I don't mean to say I won't. If you order me to,  
16 I will, Your Honor, but I think it's fair that if they're holding  
17 back their gems, I want to hold back my eight or ten gems.

18 THE COURT: Well, when is it you plan to produce the  
19 proffer information?

20 MR. RHODES: We'll produce it within two weeks, Your  
21 Honor.

22 THE COURT: All right. It seems like once you get that,  
23 then you need to reciprocate and turn over your --

24 MR. OSGOOD: I will give them everything I have at that  
25 point.

1 THE COURT: All right.

2 MR. BANNWART: I'm sorry, Judge, I didn't catch that.

3 THE COURT: I think he said within two weeks.

4 MR. BANNWART: Of today?

5 THE COURT: Yes.

6 MR. BANNWART: Okay.

7 THE COURT: And, again, I think that's kind of the  
8 modification of what the Court was requiring. So we'll, you  
9 know, show the trial order amended in that regard as well. All  
10 right. In the Court's view, that really takes care of Documents  
11 61 and 69.

12 MR. BANNWART: Agreed, Judge.

13 THE COURT: All right. Then we have Document 60 and 67  
14 filed by Solomon and Johnson, Motion for Discovery and Inspection  
15 Concerning the Government's Use of Informants, Operatives and  
16 Cooperating Witnesses. And as I understood the Government's  
17 response that was they had no such individuals.

18 MR. BANNWART: Well, Judge, my response to that would be  
19 -- well this is for the first time today they've identified Dr.  
20 Okose as the unindicted co-conspirator, but the Indictment also  
21 refers to a Dr. B, and I don't know who that is.

22 THE COURT: Doctor who?

23 MR. BANNWART: B, the letter B.

24 THE COURT: Can you spell his last name?

25 MR. OSGOOD: I believe it's Botto, Your Honor. B-O-T-T-

1 O is who I believe it is. They've just got the letter B in the  
2 indictment. I believe it's Dr. Juan Botto.

3 MR. BANNWART: And, I'm sorry, I don't know who that was  
4 that was speaking. I couldn't tell.

5 THE COURT: All right. That was Mr. Osgood.

6 MR. BANNWART: Okay. And I didn't want to make that  
7 assumption. It refers to a Dr. B and an unindicted co-  
8 conspirator. I don't know if they're the same people and I don't  
9 know who those people are.

10 THE COURT: Well, is the Government's position that this  
11 Dr. B is an informant or a cooperating individual?

12 MR. RHODES: No, he is not an informant, nor is he a  
13 cooperating individual. He is Dr. Juan Botto.

14 MR. BANNWART: Okay.

15 THE COURT: All right. But I'm back to in response to  
16 these two motions, the Government indicated they didn't have  
17 anyone that fit within that category and so there is nothing to  
18 produce. Is everyone satisfied with that response?

19 MR. BANNWART: If Dr. B is Dr. Botto, and the unindicted  
20 co-conspirator refers solely to Dr. Okose, then I'm fine with  
21 that, Judge.

22 THE COURT: All right. And I think they've already said  
23 because I think I asked them earlier if there were any other  
24 unindicted co-conspirators and they said no, other than Dr.  
25 Okose.

1 MR. OSGOOD: My examination of the discovery shows  
2 little distinction between the activities of Dr. Botto, his  
3 partner, a Dr. Lechin, and don't hold me to the spelling on that,  
4 L-E-C-H-I-N, something like that, and Dr. Okose and Dr. Elder.  
5 So, I do believe that there may well be exculpatory information  
6 in there that deals with Dr. Botto. We've tried to interview him  
7 and he's been out-of-pocket for quite some time to my  
8 investigator.

9 MR. BANNWART: Yeah, he's been noticeably absent.

10 THE COURT: All right. I guess I'm unclear as to what  
11 you're saying in response to, you know, whether there may be  
12 other people out there that you want to interview, the issue is  
13 is there anyone else that you take issue -- that takes issue, or  
14 anyone that takes issue with the Government's response to your  
15 Documents 60 and 67.

16 MR. OSGOOD: I would like for them to affirmatively  
17 check with Texas to be sure that they haven't cut some kind of  
18 deal with Dr. Botto at some point in time. His license is not  
19 suspended. He's practicing, and he was on scripts sent up here  
20 to the Medicine Shoppe just like everybody else. He's in this up  
21 to his ears as far as I can tell from their own reports. So,  
22 I've got to believe there's some kind of deal with him somewhere  
23 by somebody.

24 MR. BOHLING: No, Your Honor, there's -- we'll be glad  
25 -- I can ask them but we have a different theory about Dr. Botto,

1 that would put him in a completely different category from the  
2 defendants. I know Mr. Osgood disagrees with it. I'm sure that  
3 will be a point at trial, but our theory -- our -- we do not see  
4 Dr. Botto as being criminally involved.

5 THE COURT: All right. And it's Mr. Bannwart's motion.  
6 Anything else before the Court treats those two motions as having  
7 been dealt with?

8 MR. BANNWART: No, ma'am.

9 THE COURT: All right. So, 60 and 67 the Court is going  
10 to view as having been resolved. Then we have Document 62 and 70  
11 which is Defendants' Solomon and Johnson's Motion to Discover  
12 Evidence Favorable to the Defendant. And the Court's position  
13 here is that it is up to Government counsel to review all of  
14 their materials under their ongoing obligations to produce *Brady*  
15 and *Giglio* material. Only if there is specific information that  
16 you believe has not been provided, Mr. Bannwart, would the Court  
17 be in a position to then have a hearing and address specific  
18 information. But I think the law is very, very clear that the  
19 initial burden and responsibility falls on the Government.

20 MR. BANNWART: Right, Judge. And again this is another  
21 one of those things that kind of overlapped and we discussed it a  
22 little bit with the South Texas Wellness stuff but I think the  
23 Court has made its position pretty clear.

24 THE COURT: All right. So any -- I mean is there  
25 anything today that we need to address that's some kind of

1 material that one side or the other thinks is favorable and not  
2 being provided?

3 MR. BANNWART: Judge, there were -- well, it's hard to  
4 say because we haven't gotten it, but the South Texas Wellness  
5 stuff, any of the FedEx information and any of the UPS  
6 information that hasn't been provided, and any of the other  
7 carriers that they've subpoenaed, telephone carriers, things like  
8 that.

9 THE COURT: All right. And when you talk about the UPS  
10 and FedEx information, is that the information that you were  
11 asking for in your Bill of Particulars, Mr. Osgood, where you  
12 talk about you want to know on what dates things were delivered  
13 and who signed for them?

14 MR. OSGOOD: Yes, and I've found some of that in this  
15 most recent examination of the five CDs that they -- or DVDs that  
16 they sent me. There's more out there, I think, but we're getting  
17 there. Now, the other thing --

18 THE COURT: Well, let me just stop you right there  
19 before we move on to -- so, Mr. Rhodes, Mr. Bohling, then with  
20 respect to FedEx or UPS information on these phone records, is  
21 that material that you're going to be providing?

22 MR. RHODES: Yes, Your Honor. I mean, we have been  
23 providing them all the information to date, the FedEx. They can  
24 look up on the information already in the discovery.

25 MR. OSGOOD: It's been trickling in and I think we've

1 got it all now. I assume we have it all now.

2 THE COURT: All right. Well, did they issue subpoenas  
3 to these agencies to get that material?

4 MR. OSGOOD: They did, Your Honor.

5 THE COURT: Okay. And so the results of your subpoenas,  
6 Mr. Rhodes, have been turned over to them?

7 MR. RHODES: Yes.

8 THE COURT: All right.

9 MR. OSGOOD: I'm satisfied that that's a moot issue at  
10 this point. The other thing about discovery and -- or  
11 exculpatory and discovery that we haven't addressed is I presume  
12 that this quantity of drugs, if they were, in fact, shipped as  
13 they allege in their Indictment to Texas, went out on the street  
14 somewhere, Your Honor. I don't think they contend that they went  
15 to patients. If they went to patients, obviously there's no  
16 crime. If they went out on the street, I'm concerned that in  
17 this other investigation they've interviewed people, caught  
18 people distributing drugs who maybe have said this came from so  
19 and so or so and so, and that would be information I would feel  
20 is exculpatory to my client, certainly, and I'd like to know if  
21 that exists in that Texas case because I think it's directly  
22 exculpatory if the stuff is coming back to Texas and going out  
23 the backdoor some way and getting out on the street and they've  
24 caught people with it and they're attributing the source to  
25 somebody at the South Texas Wellness Center or somewhere else, I

1 want to know about that. That's exculpatory.

2 MR. BANNWART: Right. That was one of the things that I  
3 was referencing too, Judge.

4 THE COURT: And do you agree, Mr. Rhodes, that if that  
5 material existed, it would be exculpatory? Assuming they've said  
6 I got it from the South Texas Wellness Center and I got it from  
7 "X" at South Texas Wellness Center and it's not one of these  
8 defendants.

9 MR. BOHLING: If I could address that, Your Honor. No,  
10 I wouldn't agree with that because I wouldn't expect that Dr.  
11 Okose or someone in his position would be standing at the back  
12 door. I assume there would be intermediaries. So, I think it  
13 would require further analysis of the facts to know whether it  
14 was exculpatory, inculpatory, or neither. It's certainly not *per*  
15 *se* exculpatory in any way, shape or form. Our theory -- I mean I  
16 would think that would have --

17 THE COURT: Well, I understand what your theory is, but  
18 the issue is not does it meet your theory. It's that --

19 MR. BOHLING: Right.

20 THE COURT: -- would the defendants be able to use it in  
21 such a way that it might potentially be --

22 MR. BOHLING: No, I understand that.

23 THE COURT: -- exculpatory.

24 MR. BOHLING: I don't see it as being exculpatory simply  
25 on that fact. I am not aware that any such information exists.



1 Again, I'd be happy to check with Houston, because that would be  
2 helpful to us as well, on that specific point and see if there's  
3 anything that they are free to tell us from their investigation  
4 about that. It may be privilege --

5 THE COURT: Well, to the extent you either obtain  
6 information or have the ability to obtain information just  
7 described saying that particular people were caught with drugs  
8 and said we got them from, you know, "X" or "Y" at the South  
9 Texas Wellness Center, someone other than one of these  
10 defendants, then I think that information needs to be turned over  
11 to them.

12 MR. BOHLING: That's -- I would --

13 MR. BANNWART: And, Judge, that would also go back -- I  
14 hate to retrace our steps, but that would also go back to witness  
15 statements because there's been no one provided -- (clearing  
16 throat) excuse me -- to us that allegedly distributed any of  
17 these drugs.

18 MR. BOHLING: That's true.

19 THE COURT: Right. Well, let me just say this. I mean,  
20 the Court really cannot direct that witness statements be  
21 produced at this point in time. I think that is up to the  
22 Government whether they produce that or not. But I will say that  
23 even if it is Jencks Act material under 3500, and, therefore, the  
24 Court cannot order that it be produced now, any Jencks Act  
25 material must be reviewed for *Brady* because this Court's view is

1 that *Brady* trumps any statutory or rule requirement of production  
2 and while you might not get the whole statement then, if there is  
3 anything out there that is *Brady*, that part of the statement  
4 would have to be immediately produced.

5 MR. BOHLING: Oh, the Government completely concurs in  
6 that view. There's no issue about that.

7 THE COURT: Well, not everyone in your office concurs in  
8 that view, so.

9 MR. BOHLING: Okay. Well, the Government as is sitting  
10 at this table. I'll modify it there. And I want to make clear  
11 that we -- the nature of the material we're discussing, we don't  
12 have at this moment. I will be happy to inquire as to whether it  
13 exists, but we haven't -- we don't have it. I mean it doesn't --  
14 we don't -- it doesn't exist in our possession right now. If it  
15 exists in Houston, I would be more than happy to follow up and --

16 MR. OSGOOD: Well, that's a two part question. If it  
17 exists and they won't turn it over, we need to know that, too,  
18 Your Honor.

19 THE COURT: Right.

20 MR. BANNWART: Right. And then that goes even further.  
21 If they don't have any information relating to the distribution  
22 of any of these narcotics, then how exactly do we have a case?

23 MR. BOHLING: Well, that's a different question. I  
24 mean, our evidence will be that the patients that these drugs  
25 were supposedly to be for don't exist, or were not patients at

1 the South Texas Wellness Center.

2 THE COURT: All right.

3 MR. BOHLING: But that's -- which I think is more than  
4 sufficient for our case. I understand the issue and, in general,  
5 as I said before, we will check with the Houston investigators  
6 and the U.S. Attorney's Office and within the three-week time  
7 frame to insure that, if we have material that needs to be  
8 provided to these defendants, it will be provided.

9 THE COURT: All right. In the Court's view that deals  
10 with Documents 62 and 70 which is the Motion for Discovery of  
11 Favorable Evidence.

12 Mr. BANNWART: Based on our conversation, I think so,  
13 Judge.

14 THE COURT: All right. Now, turning to the Request for  
15 a Bill of Particular. Mr. Osgood, are you indicating that the  
16 information you were seeking about receipts and delivery  
17 documents you now have?

18 MR. OSGOOD: I believe I do, Your Honor.

19 THE COURT: All right. So your Motion for a Bill of  
20 Particulars which is Document 55 is basically moot at this point?

21 MR. OSGOOD: I would agree.

22 THE COURT: All right. Then that takes us to the Motion  
23 for a Bill of Particulars filed by Mr. Solomon, Document 58. And  
24 did you file a similar one, Mr. Bannwart, for Mr. Johnson?

25 MR. BANNWART: Yes, ma'am.

1 THE COURT: I think that was Document 63.

2 MR. BANNWART: Yes.

3 THE COURT: All right. The Court's view, based on the,  
4 you know, responses thus far, and the information is that the  
5 bulk of the information you're seeking in that Bill of  
6 Particulars is evidentiary detail. The one item that I would  
7 have required they answer for you is who the unindicted co-  
8 conspirators are. I think they've told us that it's Dr. Okose  
9 and as I understand it, Mr. Rhodes, you would say today there are  
10 no other unindicted co-conspirators?

11 MR. RHODES: That is correct, Your Honor. There are no  
12 other unindicted co-conspirators.

13 THE COURT: All right.

14 MR. OSGOOD: Could we ask specifically what the status  
15 of Pleshette Johnson and Aida Johnson are?

16 THE COURT: And who -- what's the first name?

17 MR. OSGOOD: Pleshette Johnson.

18 THE COURT: Can you spell that?

19 MR. OSGOOD: P-L-E-S-H-E-T-T-E, I believe, Your Honor.

20 THE COURT: Okay. Pleshette Johnson.

21 MR. OSGOOD: And Aida Johnson. They were integral, key  
22 employees of the South Texas Wellness Center and they actually  
23 accepted some of these packages, I believe, themselves.

24 THE COURT: All right. Is it the Government's view that  
25 they are unindicted co-conspirators?

1 MR. BOHLING: No, Your Honor.

2 THE COURT: All right.

3 MR. BOHLING: Their status -- Mr. Osgood can ask. We  
4 don't have an answer for him at this time.

5 MR. OSGOOD: Uh-huh.

6 MR. RHODES: When we have relevant information provided,  
7 we'll provide it.

8 THE COURT: All right. All right. Mr. Bannwart, any --  
9 is there -- I mean is there anything that you want to argue is  
10 not evidentiary detail that you're going to get through what I  
11 view is pretty much open file discovery in this case. Are there  
12 any specific requests that you want to talk about here today?

13 MR. BANNWART: It's a pretty long Bill of Particulars,  
14 Judge.

15 THE COURT: Right. Because you were really seeking  
16 evidentiary detail.

17 MR. BANNWART: Well, mine is just evidentiary detail,  
18 Judge, because as I alluded to just a few moments ago, part of  
19 our issue with this is they've alleged a conspiracy to distribute  
20 but no distribution. And I don't think that that's evidentiary  
21 detail. If you're going to say that -- and he just, I'm not sure  
22 if it was Mr. Rhodes, just did speak to their theory on  
23 distribution, but if you're going to allege a conspiracy to  
24 distribute, I'd like some information about -- and you need to  
25 allege some information about distribution, and there hasn't been

1 any. I mean essentially the entire Indictment alleges that a  
2 doctor wrote a prescription, a pharmacy filled them and then  
3 packages were sent back and forth, and none of that is illegal.  
4 What was illegal about that? And they've failed to produce any  
5 detail with regard to what is illegal in the allegations of the  
6 Indictment, especially as it pertains to my client, and  
7 especially as it pertains to Mr. Johnson, who did nothing more  
8 than sign for packages as an employee of Ascensia Pharmacy. And  
9 if you're going to allege that my client distributed or conspired  
10 to distribute or committed money laundering signing for a package  
11 from a pharmacy when he works for a pharmacy, doesn't amount to a  
12 crime. And if you're going to allege that in an Indictment, then  
13 I need some particulars about why you think that is a crime.  
14 And, likewise, I need some particulars if you're going to allege  
15 that we conspired to distribute controlled substances, then I  
16 need some details about how it is exactly. I don't mean  
17 discovery, evidentiary details. I think you need to allege how  
18 it is exactly that there was a distribution in this case. And  
19 there's absolutely no reference at all in the Indictment to  
20 distribution and I need to know what are you going to allege  
21 regarding distribution so that we can go and investigate the  
22 facts surrounding that.

23 MR. BOHLING: Your Honor, that strikes me as a legal  
24 issue, not really a good Bill of Particulars. I think we have a  
25 different view of how the evidence will prove the charge, and

1 we've provided to defense counsel voluminous evidence in support  
2 of our theory. If counsel wants to file a motion, it certainly  
3 can, or perhaps it's a trial motion at the end of our case. But  
4 I think we have a fundamentally different view of how this case  
5 can and will be proved. But that's a different issue.

6 THE COURT: Well, here's the problem that I have, Mr.  
7 Bannwart, with the argument you're making right now. When I  
8 looked at your Bill of Particulars from page 2 through page 9,  
9 it's just a listing of information that you want. And if you had  
10 wanted to make that particular argument, then, you know, I think  
11 the Government could have responded to that. But the way you  
12 chose to do it, I mean, your Motion for a Bill of Particulars  
13 seeks, you know, patient names and names of people whose initials  
14 you have and all kinds of other factual details. So, if you want  
15 to file something that, you know, makes the argument, cites the  
16 cases why that's not a legal theory, but the heart of what you  
17 need to know, you are certainly free to do that, but on the basis  
18 of your pending Motion for a Bill of Particulars, given all of  
19 the evidence that is before you, and given how it was put  
20 together, you know, other than providing the unindicted co-  
21 conspirator's name, which they've done for you, --

22 MR. BANNWART: Well, --

23 THE COURT: -- I'm not going to make them provide  
24 anything else in response to the pending Bill of Particulars,  
25 Documents 58 and 63.

1 MR. BANNWART: And, Judge, let me just say two things.  
2 First of all, please understand that these motions were filed  
3 three months ago before we had a lot of this information. But  
4 also with regard to that, as with the unindicted co-conspirators  
5 and the persons known and unknown, and I'm not sure if those are  
6 the same people, and I would like some verification to that, the  
7 Indictment alleges persons or prescriptions by initials and it's  
8 virtually impossible for us without more particular information  
9 to identify who HH or NP or persons of that nature are. For all  
10 we know, they're made-up people, and I don't think a discovery  
11 motion is going to get us there.

12 THE COURT: Well, in the discovery you've been provided,  
13 do you have, for example, in Count Seven where it talks about  
14 Patient HH, a date of 9/14 of '04, and it gives a prescription  
15 number. Do you have that prescription? Can you go to your  
16 discovery and look it up and see who the patient is?

17 MR. BANNWART: I'm not -- you know what, I'd have to  
18 check, Judge, because I'm not -- I can't remember, and, John, you  
19 may know better than me, whether or not those images were  
20 provided to us.

21 MR. OSGOOD: We have 17,000 pages of documents, Your  
22 Honor, on the first turnover. I took the 17,000 which was in PDF  
23 format as all one large file without an index. I laboriously  
24 broke those out into the interviews with the attachments to them  
25 and they are separate documents. So, we have the prescriptions



1 written by Dr. Elder, Dr. Botto, Dr. Okose, and I'm presuming  
2 among those prescriptions, obviously, there is going to be some  
3 patient with the name. But matching those patient names in that  
4 amount of documents to specific letters, is a laborious task and  
5 it would be a lot easier for the Government to simply tell us the  
6 name. If they've given us the prescription, what's the harm in  
7 requiring them to tell us the name?

8 MR. BOHLING: Your Honor, I don't think we have any  
9 objection to that. The purpose of the initials was to protect  
10 the privacy of the patient.

11 THE COURT: Right. Well, --

12 MR. BOHLING: I don't think I have any problem with --

13 THE COURT: Yeah.

14 MR. BOHLING: -- detailing the names in a private  
15 correspondence with counsel.

16 THE COURT: Well, and not only that, but I guess what I  
17 would say to defense counsel is, before you file these things, if  
18 you are having trouble indexing, finding documents, get with  
19 defense -- get with Government counsel, find out if they've got  
20 an index they'll share with you. Find out if you can sit down  
21 with their agent and find out how this material is kept. I mean,  
22 rather than filing motions, I mean, there is some responsibility  
23 incumbent on everyone to sit down and it is only if they say  
24 we're not going to help you figure out even where this stuff is  
25 that you need to file something and come back to the Court.

1 MR. BANNWART: Sure, Judge, and that's why I didn't --

2 THE COURT: And really come back to the Court before you  
3 file something.

4 MR. BANNWART: Sure, Judge, and that's why I pointed out  
5 and I asked the Court's you know leniency in that these were  
6 filed many months ago before --

7 THE COURT: Right. But that's why the Court is saying  
8 that Document 58 and 63 are denied other than what has been  
9 provided here with, certainly, out prejudice to your right to  
10 refile something if you either can't find it, can't get an index,  
11 can't figure out how it's, you know, documented in the evidence  
12 that you have and you feel that there's something out there that  
13 is really, really essential. But if that's the case, then limit  
14 it to what's really, really essential and not provide me eight  
15 pages of specifics that you want to have.

16 MR. OSGOOD: Your Honor, --

17 MR. BANNWART: Sure, Judge. And the only other thing  
18 that I would ask is where it identifies persons known and  
19 unknown, that all those persons that are known at least, and I'm  
20 guessing we're just talking about Dr. Botto and Dr. Okose now if  
21 there -- unless there are others, and if there are others that  
22 those be identified to us.

23 THE COURT: Do you have any trouble doing that? I  
24 assume you're talking about in the conspiracy count?

25 MR. BANNWART: Yes.

1 MR. RHODES: We have no problem identifying anybody who  
2 may be a part of the conspiracy to them.

3 THE COURT: All right. Well, Count One specifically  
4 talks about on page 5 of the document "defendants conspired with  
5 each other and other persons known and unknown." And so what  
6 they're just wanting to make sure is that they know everybody  
7 that you think falls in that category and you're saying you'll  
8 provide that to them.

9 MR. RHODES: Yes.

10 THE COURT: All right.

11 MR. OSGOOD: Your Honor, can I back up a minute? On my  
12 Bill of Particulars, the second item I asked for was whether or  
13 not there were any -- and when I said it was moot, I'd forgot  
14 about this. I asked were there any show-ups of photos of my  
15 client or other persons to any of these UPS employees to see if  
16 they recognized persons they turned packages over to. I'm  
17 presuming since we haven't seen that in any discovery, that  
18 doesn't exist, but I'd like an affirmative response from the  
19 Government on it. I think it is --

20 THE COURT: I think it's a discovery issue. It's not a  
21 Bill of --

22 MR. RHODES: Right. Right.

23 THE COURT: -- Particulars issue, but --

24 MR. RHODES: If we had such information, we would have  
25 provided it to him. So, that information just does not exist.

1 THE COURT: All right.

2 MR. OSGOOD: Okay. At the time, again I didn't have the  
3 discovery when I wrote the motion.

4 THE COURT: All right. So, for the time being, that, I  
5 think, deals with, Mr. Bannwart, all of the motions that you  
6 filed that I would call discovery motions.

7 MR. BANNWART: I'm sorry, Judge, what was the question?

8 THE COURT: I said in my view our discussion now has  
9 dealt with all of the motions that you have filed that deal with  
10 discovery matters.

11 MR. BANNWART: I think so, Judge.

12 THE COURT: I understand you have a number of other  
13 motions out there, your Motion for Change of Venue, Motion to  
14 Severe, Motion to Quash.

15 MR. BANNWART: Sure.

16 THE COURT: But any other discovery motions you think  
17 we've overlooked?

18 MR. BANNWART: No motions that have been overlooked,  
19 Judge, discovery motions.

20 THE COURT: All right. That takes us to Mr. Osgood's  
21 request for a Rule 17(c) subpoena. And normally -- and the  
22 reason that I haven't addressed this, here is what I normally do  
23 when you submit a Rule 17(c) subpoena request. If you submit all  
24 of the potential orders and things that go with it, we normally  
25 go ahead and issue that and then leave it up to the party

1 recipient to file any objections. But I did not issue it in this  
2 case because I don't think I was given all of the orders that go  
3 with it, but, more significantly, I really felt like this was  
4 incredibly over-broad, and the reason that I say that is you talk  
5 about all investigative files pertaining to Dr. Peter Okose and  
6 he could have been investigated for any number of reasons,  
7 including medical malpractice. Whether or not down the road that  
8 would be relevant to credibility issues if he were testifying, is  
9 a whole different issue than where I thought you were going with  
10 why you wanted the initial Rule 17(c) subpoena.

11 MR. OSGOOD: I agree with you. It was the people at the  
12 medical board that gave me that language and told me to put it in  
13 there.

14 THE COURT: Well, I think you need --

15 MR. OSGOOD: What I want is the investigative file for  
16 this case from them.

17 THE COURT: Yeah. Well you need -- it's up to you to  
18 word it --

19 MR. BANNWART: In the other case.

20 THE COURT: It's up to you to word that --

21 MR. OSGOOD: I will do so.

22 THE COURT: -- and then to provide me with the requisite  
23 information and --

24 MR. OSGOOD: I will do so.

25 THE COURT: -- then anybody that wants to file a motion

1 to quash once it's issued, can do so.

2 MR. OSGOOD: Very good. Also I was concerned -- I made  
3 it only because of the two cases that we've had in this Court  
4 that I think you've probable familiarized yourself with, so that  
5 was part of my rationale. But I'll get you an order, Your Honor,  
6 that addresses what you just talked about.

7 THE COURT: All right. Are there any other discovery  
8 issues that the parties think we need to address today?

9 MR. BANNWART: Judge, I just want to be clear on that  
10 Rule 17 subpoena, is that going to cover the other investigation  
11 as well?

12 MR. OSGOOD: It --

13 THE COURT: Well, --

14 MR. OSGOOD: If I understand the way that the Texas  
15 Medical Board works is they have their public sanctions and  
16 information which would address what you've talked about, Your  
17 Honor, his previous problems or anything. There are the public  
18 orders that are published on the website by the Texas Medical  
19 Board. They have an investigative arm and they have what they  
20 call an investigative file done by an investigator on their staff  
21 that actually investigated the alleged misconduct by Dr. Okose in  
22 this case, pulled his right to write these types of  
23 prescriptions, and that file exists as a closed, separate file  
24 and will only be disclosed upon receipt of a subpoena issued by  
25 the Court. So, that's what I'm going to focus on and it concerns

1 his activities in this case and I guess the so-called related  
2 case, but it directly bears in my mind on issues that will be  
3 paramount to our defense and part of their prosecution.

4 THE COURT: Yeah, well, you just need to find a better  
5 way to describe what you're asking for.

6 MR. OSGOOD: Yeah, I will describe it.

7 MR. BANNWART: Right.

8 THE COURT: All right. Is there anything further?

9 MR. BANNWART: I don't believe so. Mary, can you think  
10 of anything?

11 MS. RUDEN: Not at this time.

12 THE COURT: What about from the attorneys here?

13 MR. OSGOOD: I have nothing. Oral argument now, Your  
14 Honor.

15 MR. HOBBS: Judge, I don't want to be out of order, but  
16 I just respectfully point out to the Court for it's processing  
17 that Defendant Martin filed a Motion to Dismiss for Failure to  
18 State an Offense as to Counts Two and Twenty-One through Twenty-  
19 Four. I think that's Document 57. The document filed a  
20 response, Document 79, and then the defendant filed a reply,  
21 which I think is Document 88. It's my understanding that  
22 Defendant Solomon, and perhaps Defendant Johnson, filed a similar  
23 motion and I just wanted to respectfully advise the Court that I  
24 believe the briefing is before the Court. If the Court wants  
25 argument, we're prepared to present it now or at some suitable

1 time. If the Court wants to take it on the pleadings, that's  
2 fine. But one thing that is significant about this issue is it  
3 goes to the heart of several counts and would have an effect on  
4 the further processing of the case. And so we've also cited, in  
5 our view, a similar opinion that this court had issued a ruling  
6 and our reply in a case called *United States v. Mid-Continent*  
7 *Specialists*, a Report and Recommendation on June 27<sup>th</sup> in support  
8 of our position. So, I just wanted to point that out.

9 THE COURT: All right. And I appreciate that. You  
10 know, anytime there are motions are pending that would  
11 significantly impact on the processing of the case as opposed to  
12 just getting rid of the case altogether, we like to know about  
13 those so that we can put those at the top of the list. I had not  
14 anticipated scheduling argument on those motions unless the  
15 parties were requesting that we do so. And the only reason that  
16 I wanted to take up the discovery motions here is that because,  
17 as has been noted, frequently the status of discovery changes  
18 significantly after the motions are filed and rather than  
19 spending a lot of time issuing written opinions on those motions,  
20 basically other than a follow-up order, what's been said here  
21 today on the record -- and we will order a transcript -- will  
22 basically be the rulings on these motions.

23 MR. OSGOOD: And my Motion on Severance and Joinder, of  
24 course, are kind of somewhat related to his because my argument  
25 is my client is mis-joined because of the very thing that Mr.



1 Hobbs says is not an offense any more. So, it --

2 MR. BANNWART: Yeah. And just for the record, I'd join  
3 with Mr. Hobbs and I'd like a hearing date on that too, if the  
4 Court is willing.

5 THE COURT: Well, I don't know. I didn't -- I don't  
6 know that I viewed Mr. Hobbs as requesting a hearing date. I  
7 mean, he just said if we needed oral argument, he'd be happy to  
8 do so today or at another date. And normally, for example, in  
9 the *Mid-Continent* case that you mentioned, we didn't have oral  
10 argument on that particular motion in that case. Normally, on  
11 things we issue by Report and Recommendation, we simply, unless  
12 we have a question that needs to be answered, we rule it on the  
13 basis of the written record.

14 MR. BANNWART: Okay.

15 THE COURT: So, unless someone specifically thinks we  
16 need oral argument to clarify something, I wasn't planning on any  
17 of the case dispositive motions setting oral argument.

18 MR. HOBBS: And I'm not requesting it, Judge. I'm just  
19 saying we're available --

20 THE COURT: Right.

21 MR. HOBBS: I just bring it to your attention because it  
22 goes to the heart of some key points and, therefore, it goes to  
23 the heart of the further processing, jury instructions, narrowing  
24 the issues, --

25 THE COURT: Right.

1 MR. HOBBS: -- and then goes to Mr. Osgood's related  
2 issue on severance.

3 THE COURT: All right.

4 MR. OSGOOD: And I don't want oral argument on any of my  
5 motions.

6 MR. RHODES: We just have one separate issue, Your  
7 Honor, we'd --

8 THE COURT: All right.

9 MR. RHODES: -- like to raise at this time. There was a  
10 filing this morning by Mr. Bannwart where he stated that he is  
11 the lead counsel for Troy Solomon.

12 THE COURT: Yes.

13 MR. RHODES: The Government is confused as to who to  
14 deal with, either Chip Lewis in one pleading he said he's the  
15 lead counsel, and it's reaching a point where we're starting to  
16 see duplicate filings on the same issue. So, we need  
17 clarification of who exactly do we need to deal with with regard  
18 to Troy Solomon?

19 MR. BANNWART: I filed the designation of lead counsel  
20 basically last night, so this morning, so it will be through me,  
21 Rudy.

22 THE COURT: All right. So, Mr. Bannwart, you're lead  
23 counsel for Troy Solomon. Who is lead counsel for Delmon  
24 Johnson?

25 MR. BANNWART: I am as well, Judge.

1 THE COURT: All right. And so if the Government needs  
2 to get in touch with whoever speaks for these two defendants,  
3 they need to get in touch with you?

4 MR. BANNWART: Yes, ma'am.

5 THE COURT: All right. Anything else?

6 MR. GADDY: Judge, as a matter of housekeeping, Mr.  
7 Hobbs is correct that we filed a Motion to Dismiss. It's  
8 Document No. 98. I don't think that we filed a motion for leave  
9 to file that under the Court's previous scheduling order, so I'd  
10 orally move at this time for leave to allow Document 98 to be  
11 filed on the Santos money laundering issue on behalf of Troy  
12 Solomon.

13 MR. RHODES: That's the point, Your Honor. That motion  
14 filed by Mr. Bannwart incorporated the filing of Ms. Martin in  
15 its response or in its motion. So we're having duplicate filings  
16 on the same issue.

17 MR. GADDY: It did not incorporate. Document No. 98 is  
18 a standalone motion, Judge.

19 THE COURT: Right. Right. And you've already filed it?

20 MR. GADDY: Yes, ma'am.

21 THE COURT: All right. We'll deem 98 timely filed.  
22 Now, I don't know, I don't have it here in front of me. I think  
23 that in the order continuing this case from the original trial  
24 setting to the January trial setting, I don't know that we  
25 extended the deadline for filing pretrial motions and I'm not

1 talking about motions in limine, but just pretrial filings. But  
2 on the basis of the discovery that you have to date, is there  
3 anyone that thinks they'll be additional motions that need to be  
4 filed?

5 MR. OSGOOD: Judge, is there an order -- I don't think  
6 there's an order setting the January trial date at this point.

7 THE COURT: Yeah. We haven't signed it yet, but I'm  
8 just saying --

9 MR. OSGOOD: Oh, okay.

10 THE COURT: -- we -- that somebody had asked that it be  
11 continued and it's being continued, and what I'm saying is I  
12 guess in the order that has been prepared, we have simply  
13 continued the trial date. I haven't given anyone a new date for  
14 filing pretrial motions. And so my question is, based on the  
15 present status of discovery, is there anything out there that the  
16 parties are going to need an opportunity to file?

17 MR. BANNWART: Yes. Well, Judge, I think it will depend  
18 on what's produced by the Government in that three-week span that  
19 you've given.

20 THE COURT: Right. And that's what I'm saying. Based  
21 on what you have right now, is there anything else out there that  
22 somebody knows today is going to need to be filed so we need to  
23 talk about it. Obviously, we can't predict what's going to have  
24 to be filed if you get new discovery. I'm not asking for anyone  
25 to speculate about that.

1 MR. OSGOOD: In my spare time I'm doing in limines. I  
2 assume you don't mean those.

3 THE COURT: I don't mean in limines.

4 MR. OSGOOD: Okay.

5 THE COURT: I'm talking about, you know, pretrial  
6 motions.

7 MR. OSGOOD: I have none.

8 MR. BOHLING: Your Honor, I anticipate, since I've  
9 already said, not typical, but as I've already indicated there's  
10 going to be a new warrant in this case.

11 THE COURT: Yes.

12 MR. BOHLING: I would anticipate there will be a new  
13 motion as to that warrant, I suppose will track the existing  
14 motion pretty much.

15 MR. OSGOOD: Well, hopefully you'd write the new one  
16 better than you did the other one.

17 MR. BOHLING: I write great motions, Your Honor.

18 MR. BANNWART: Well, that -- yeah, and that's kind of  
19 what I was referring to.

20 MR. BOHLING: They haven't seen it. I mean it doesn't  
21 exist yet as such.

22 THE COURT: Right.

23 MR. BOHLING: So, I would anticipate --

24 THE COURT: Right. I'm only talking about based on what  
25 we know right now.

1 MR. BOHLING: I would anticipate that they may like to  
2 have the opportunity to file something on that new motion which I  
3 -- or that new warrant which I will have for them in the very  
4 near future.

5 THE COURT: All right.

6 MR. HOBBS: Objection. This is for a search warrant  
7 (inaudible).

8 THE COURT: All right. If there's nothing else, then  
9 we'll be in recess.

10 (Court Adjourned at 1:11 p.m.)

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceeding in the above-entitled matter.

/s/ Lissa C. Whittaker  
Signature of transcriber

October 10, 2008  
Date