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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

UNITED STATES OF AMERICA,            ) Case No. 08-00026-02/05-CR-W-FJG  
  )  
                  Plaintiff,            ) Kansas City, Missouri  
  ) October 21, 2008  
v.   )  
  )  
TROY R. SOLOMON,                     )  
CHRISTOPHER L. ELDER,                )  
DELMON L. JOHNSON,                    )  
  )  
                  Defendants.            )  
\_\_\_\_\_                                  )

TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE SARAH W. HAYS  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Court in Session at 9:40 a.m.)

2 THE COURT: All right. Good morning.

3 MR. RHODES: Good morning.

4 THE COURT: We're here on Case No. 08-26. If counsel  
5 would state their appearance for the record?

6 MR. RHODES: Rudolph Rhodes for the Government.

7 MR. BOHLING: And Curt Bohling.

8 MR. OSGOOD: John Osgood on behalf of Dr. Elders, who's  
9 present in court, Your Honor.

10 MR. BANNWART: Anthony Bannwart on behalf of Defendant  
11 Solomon and Defendant Johnson.

12 THE COURT: Now, who do we have on the phone?

13 MS. RUDEN: Mary Grace Ruden on the phone. I don't  
14 think we have Mr. Lewis on behalf of Troy Solomon.

15 THE COURT: All right. I know that they said they tried  
16 to reach him and couldn't reach Mr. Lewis, but we do have counsel  
17 here for Mr. Solomon, correct?

18 MR. BANNWART: Yes, Your Honor.

19 THE COURT: And are either Mr. Solomon or Mr. Johnson on  
20 the phone?

21 MR. BANNWART: Not to my knowledge, Your Honor.

22 MS. RUDEN: I do not have Mr. Solomon with me.

23 THE COURT: All right. And did you -- I mean give them  
24 the option of participating by phone today?

25 MS. RUDEN: Yes, Your Honor.

1 MR. BANNWART: Yes, Your Honor, they're waiving their  
2 appearance.

3 THE COURT: All right. Now, Ms. Ruden, can you hear  
4 people when they're not speaking directly into the microphone?

5 MS. RUDEN: Yes, ma'am.

6 THE COURT: All right. If you have any trouble  
7 hearing, why let us know.

8 MS. RUDEN: Thank you.

9 THE COURT: As I understand the issues that we were here  
10 to address today were twofold. One, was to talk about the  
11 standing issue which the Court wanted a chance to review before  
12 we determined whether we were going to set a full-blown  
13 suppression hearing on Mr. Elder's -- Dr. Elder's Motion to  
14 Suppress. And then the second was to make sure that the  
15 discovery was going smoothly and that there weren't any further  
16 problems. So, turning to the standing issue, does anyone want an  
17 opportunity to argue that issue further, to make any further  
18 comments? Let me ask this. Because Solomon and Johnson kind of  
19 did a "me too" join in on the motion to suppress issue, do you  
20 have any arguments to make on behalf of your clients as to why  
21 they would have standing to raise this suppression issue?

22 MR. BANNWART: Sure, Your Honor. At one time Mr.  
23 Solomon was a partial owner of South Texas Wellness Center.

24 THE COURT: Well, at one time, at what time?

25 MR. BANNWART: At the time that these reimbursements

1 took place.

2 MR. RHODES: I have no such information. This is the  
3 first time I've heard of it.

4 THE COURT: Well, who is it that you think owns South  
5 Texas Wellness Center?

6 MR. RHODES: Ada Johnson and Pleshette Johnson

7 THE COURT: All right. I'm sorry. Give me their names  
8 again.

9 MR. RHODES: Ada.

10 THE COURT: Okay. Ada.

11 MR. RHODES: A-D-A.

12 THE COURT: Okay.

13 MR. RHODES: And Pleshette, P-L-E-S-H-E-T-T-E, Johnson,  
14 and I believe it's her husband. And her husband's name has  
15 failed me right now. He's also an owner.

16 THE COURT: Who?

17 MR. RHODES: The owner's name, the husband of I believe  
18 it's Ada, may also be an owner of this business, but his first  
19 name has failed me at this time, Your Honor.

20 THE COURT: Feldman?

21 MR. BANNWART: Luther.

22 MR. RHODES: Huh?

23 MR. BANNWART: Luther.

24 MR. RHODES: Luther. Okay. Luther.

25 THE COURT: Well, have you put forth -- I mean, the

1 defendants have the burden of demonstrating standing. Any  
2 affidavits or anything in the record that would in any way  
3 suggest that in May, I believe it was of '06, when this search  
4 warrant was issued that your clients have some type of ownership  
5 interest?

6 MR. BANNWART: Your Honor, I have not put forth an  
7 affidavit. I have not verified it, but having done the corporate  
8 records myself, it is my understanding that it would be on file  
9 with the Secretary of State in the state of Texas.

10 THE COURT: And that is you're saying Mr. Solomon was a  
11 partial owner. What about Defendant Johnson?

12 MR. BANNWART: Defendant Johnson was nothing more than  
13 an employee at all times during this case.

14 THE COURT: He was an employee of South Texas Wellness  
15 Center?

16 MR. BANNWART: No, ma'am. He was an employee of  
17 Ascencia. I apologize --

18 THE COURT: He was an employee of what?

19 MR. BANNWART: Ascencia Nutritional Pharmacy.

20 THE COURT: Well, what's your argument as to why Johnson  
21 would have standing?

22 MR. BANNWART: There isn't one.

23 THE COURT: Well, I guess my concern, maybe this is why  
24 we're going to have to tell people they can't do "me too" briefs.  
25 There is absolutely nothing in the briefing to suggest that

1 either Johnson or Solomon have standing. And I mean, I think  
2 we've addressed the Johnson issue, that you're not even making  
3 that argument. But I mean you have sought to join in for Mr.  
4 Solomon. I mean, he clearly has to establish his own independent  
5 standing. And on the basis of the record right now, there would  
6 be no reason to even have a hearing as to Solomon because there's  
7 just nothing suggesting that he has standing.

8 MR. BANNWART: Understood, Your Honor. I mean, I can  
9 supplement that prior to a hearing. I understand we're trying  
10 to --

11 THE COURT: Well, I'm not going to have a hearing --

12 MR. BANNWART: Sure.

13 THE COURT: -- unless there's something to suggest  
14 there's standing. So --

15 MR. BANNWART: I --

16 THE COURT: -- in terms of it's your burden when you  
17 make a motion, and when you choose to join in as opposed to  
18 filing your own independent motion with facts attached through  
19 affidavits, you know, then the Court can look at that and say is  
20 there a reason to have a hearing. But I'm telling you on the  
21 basis of the present record, Solomon is not going to get a  
22 hearing unless there's something more in the record. And, you  
23 know, this is just prolonging this. The parties have had an  
24 extensive opportunity to already brief this.

25 MR. BANNWART: Understood, Your Honor, and I apologize

1 for that. I thought it was understood by all parties that he had  
2 an ownership interest in the business and I didn't even -- I  
3 didn't realize that was going to be an issue whether or not he  
4 had an ownership interest in South Texas Wellness. I mean, from  
5 my reading of the documents that have been produced to us, that's  
6 been an understanding for quite some time.

7 THE COURT: Well, he may have had an ownership interest,  
8 but -- and certainly that is not reflected in the material before  
9 the Court. Did he have a right to go on the premises? Did he  
10 have keys? Did he have access to these, you know, files? Did he  
11 have any right to possession and control of these records? Are  
12 you making that argument?

13 MR. BANNWART: No, Your Honor.

14 THE COURT: Well, are you saying he was like a silent  
15 partner or?

16 MR. BANNWART: Yes, Your Honor.

17 THE COURT: So, you're not claiming that he had a right  
18 to have any control over the records?

19 MR. BANNWART: He would have had a right to inspect the  
20 books and records and financial aspects of the dealings of South  
21 Texas Wellness Center.

22 THE COURT: A right to inspect the financial books and  
23 records?

24 MR. BANNWART: Yes, ma'am.

25 THE COURT: Would he have had any right to physician or



1 patient records?

2 MR. BANNWART: He's not a physician, so I don't think  
3 legally under HIPAA he would. Although as an owner, I'm not -- I  
4 have to admit I'm a bit unclear about whether or not he would or  
5 not.

6 THE COURT: I'm just curious. What's the Government's  
7 position on the standing issue as to Mr. Solomon?

8 MR. RHODES: Number one is there is no evidence that he  
9 owned the business even as a silent partner. And that that was  
10 clearly also stated here in our response as well as we said he  
11 didn't lease the premises. So, he was put on notice that he  
12 didn't have any ownership or that he leased this business and  
13 that he has no expectation of privacy. At this point we were  
14 just engaging in the hypothetical if he were the owner of that  
15 business.

16 THE COURT: Well, but I think what he's saying is he  
17 wants an opportunity to file something. I mean, although we've  
18 had, you know, the deadline for filing these motions, I think, is  
19 already long passed. Our whole point today was to say do we have  
20 anything we need to have a hearing about, and when you haven't  
21 put forth the evidence or argument that would let the Court  
22 evaluate that, I mean we're kind of back to square one and yet  
23 we're months down the road.

24 MR. BANNWART: I understand that, Your Honor, and I  
25 apologize for that. Again, I thought it was generally understood

1 among everybody, and that that would not -- his ownership  
2 interest wasn't even an issue. But apparently it is. I wasn't  
3 aware that the state -- or the Government was going to challenge  
4 that particular point of his ownership interest. In what I had  
5 read, it appears that they knew or were assuming that all along,  
6 but apparently --

7 THE COURT: Well, here's the problem. It's the Court  
8 who decides standing, not either side. And when you say you  
9 thought the Government understood, the Government has clearly  
10 raised standing as an issue and somehow the, you know,  
11 information has to be conveyed to the Court so I can make a  
12 decision as to whether there's even a necessity to go forward and  
13 address the search warrant issues. So, and right now as I  
14 understand it, maybe I've missed something, all you've done is  
15 join in Dr. Elder's motion.

16 MR. BANNWART: We've joined in Dr. Elder's motion again,  
17 Your Honor, because Mr. Solomon had an ownership interest in the  
18 business at the time. I believe, but I cannot represent with  
19 certainty, that the corporate records on file with the State of  
20 Texas would reflect that, but I would have to pull those  
21 independently, Your Honor.

22 THE COURT: Well, I guess right now what I'm interested  
23 in is the record before the Court. And when you joined in, did  
24 you make any indication in your join-in that we would have  
25 standing because of our ownership interest?

1 MR. BANNWART: To the extent that the Secretary of State  
2 for the State of Texas represents his corporate -- or ownership  
3 interest, I would ask that the Court take judicial notice. My  
4 problem is --

5 THE COURT: No, I'm not taking judicial notice of  
6 corporate records from Texas. I'm now looking at Document 115  
7 which says, "COMES NOW Defendants Troy Solomon and Delmon Johnson  
8 and file this motion adopting and joining the Motion to Suppress  
9 All Evidence Seized from South Texas Wellness Center with  
10 Suggestions in Support previously filed by Defendant Christopher  
11 Elder in the above-entitled and numbered case together with all  
12 exhibits and attachments thereto." That's all the information  
13 you gave the Court.

14 MR. BANNWART: Yes, ma'am.

15 THE COURT: All right. Well, how do you want to  
16 proceed?

17 MR. BANNWART: Your Honor, I would ask for an  
18 opportunity to supplement that with proper documentation, and I  
19 would only need a day.

20 THE COURT: I'll give you give five days in which to  
21 file something with argument and whatever evidence you want to  
22 put in to suggest that Mr. Solomon has standing, and I'll give  
23 the Government 12 days to respond. And on the basis of those  
24 pleadings, it will be determined whether Mr. Solomon gets a  
25 hearing on the suppression issue.

1 MR. BANNWART: Very well, Your Honor.

2 THE COURT: All right. Mr. Osgood.

3 MR. OSGOOD: Well, Your Honor, clearly, discovery does  
4 indicate and my motion indicates that Dr. Elder was an employee  
5 there. He terminated his employment. He was a part-time  
6 employee actually when he was an employee. He saw patients,  
7 prescribed medications for them, wrote prescriptions for them,  
8 and maintained medical records that are, in fact, the Texas  
9 Medical Board has since subpoenaed a bunch of his records from  
10 that facility, examined those and found them to be in order and  
11 properly documented and correct in all respects. Those were  
12 specific patients that were still in the files of South Texas in  
13 their possession. I filed a supplemental citation of authority,  
14 which I'm sure you looked at yesterday citing three Supreme Court  
15 cases that I think collectively give us standing when you put  
16 them all together. Obviously, *Jones* was the old, legitimately on  
17 the premises case, which has been overruled by *Rakas* and later  
18 affirmed in *Minnesota v. Carter*. Under *Rakas*, the court said the  
19 real focus is legitimate expectation of privacy in the items to  
20 be seized. Here we have very sensitive medical records protected  
21 by the HIPAA Act. Those can only be disclosed in one of -- or  
22 gotten rid of in one of two ways, as I understand it. Maybe  
23 three. I don't know. But for sure it would require Dr. Elder to  
24 transfer the records to another doctor with the consent of the  
25 patient or the patient himself to come in and say these are my

1 records, I want them back. Otherwise, those records must, under  
2 the federal law, be maintained indefinitely. Unlike legal  
3 records which we can destroy after ten years, I don't believe  
4 there's any provision you can ever destroy a medical record.  
5 Therefore, Dr. Elder, clearly as a physician with his license at  
6 stake, had, even though he was no longer employed there, had  
7 every reason to believe that his records were under lock and key  
8 in the filing cabinets and in the filing folders where they  
9 belonged and that they would be there indefinitely unless and  
10 until he transferred them or the patient came in and retrieved  
11 them, so.

12 THE COURT: Okay. Let's stop right there. I guess I  
13 don't understand your argument and I certainly haven't seen any  
14 evidence to suggest that when he's working for an employer, Texas  
15 -- South Texas Wellness Center and that employer will basically  
16 be the one maintaining the records that, you know, your doctor  
17 has some right to order their transfer after he leaves there.

18 MR. OSGOOD: Then --

19 THE COURT: I mean, that's contrary to his own  
20 affidavit. He put in an affidavit that's attached to Document  
21 129 saying that once he quit working there, "I didn't maintain  
22 control or possession of any records generated during my  
23 employment contract with the center." I mean, he seems to be  
24 saying the center is the one that has the records.

25 MR. OSGOOD: That was in response to could he physically

1 produce those for a grand jury. That did not mean he didn't have  
2 an expectation of privacy as the prescribing physician, and  
3 remember South Texas was run by these Johnson folks, Ada and  
4 Pleshette, and they are not pain doctors and they are not even  
5 physicians. They are, I believe, chiropractors. And they were  
6 not routinely prescribing this kind of medication. So, at best  
7 they were the custodians of these records which he had the  
8 primary interest in as the prescribing physician.

9 THE COURT: Well, aren't the records really the  
10 patients' records?

11 MR. OSGOOD: Pardon me?

12 THE COURT: Aren't the records really the patients'  
13 records?

14 MR. OSGOOD: They are. I concede that.

15 THE COURT: Isn't the patient who gets to control where  
16 they're moved and who transfers them and --

17 MR. OSGOOD: I would concede that but I would also  
18 suggest to the Court that if a doctor left the records out on a  
19 countertop and some other patient opened them up and read them,  
20 that the doctor would be subject to all kinds of disciplinary  
21 actions by the medical board. His license could be suspended or  
22 pulled. And so he has a clear interest in maintaining their  
23 privacy, and that's what this whole standing issue is about is  
24 the expectation of privacy over those records.

25 THE COURT: Well, after he left --

1 MR. OSGOOD: Not who had control.

2 THE COURT: Yeah. After he left there, if somebody at  
3 South Texas Wellness Center had left the patient records out for  
4 somebody to read, it wouldn't be Dr. Elder who'd be in trouble,  
5 it would be South Texas Wellness Center.

6 MR. OSGOOD: Not necessarily. He would have to answer  
7 to the Texas Medical Board as to why this happened and what are  
8 the circumstances, and just because you no longer work there, did  
9 you make some kind of an arrangement or did you have some  
10 expectation that they would be controlled the way they're  
11 supposed to be under HIPAA and other controlling legislation.  
12 Now, I concede there's no -- I couldn't find any Eighth Circuit  
13 cases dealing directly with this. I think the closest case to  
14 this is *O'Connor v. Ortega*, the '87 case of the Supreme Court  
15 where he was a state employee and was on suspension and the court  
16 in that case -- he didn't win -- but the court did acknowledge  
17 that he, even though he wasn't there as an employee, had some  
18 expectation of privacy in the filing cabinets and the files that  
19 he had created while he was there as a psychiatrist. I think  
20 collectively, those three cases, therefore, give us standing.

21 THE COURT: Well, just so I'm clear, on the basis of the  
22 present record, I mean since he was no longer employed there, he  
23 didn't have access to the premises?

24 MR. OSGOOD: No, not as far as I know.

25 THE COURT: And he didn't have any ownership interest in

1 the premises or the business?

2 MR. OSGOOD: No.

3 THE COURT: And he no longer had, you know, the key to  
4 the premises or I guess that would be access.

5 MR. OSGOOD: No, Your Honor.

6 THE COURT: And so your only argument is that because  
7 these are medical records, he somehow had responsibility for  
8 them?

9 MR. OSGOOD: That would be accurate, Your Honor. But  
10 not responsibility as much as a reasonable expectation of privacy  
11 over them, that they would be maintained and controlled properly,  
12 and that his privacy interests have been violated at this point.  
13 In fact, he could file a civil suit against, and that's what this  
14 *Ortega* was about. He could file a civil suit against them for  
15 disclosing that information because it places his license in  
16 jeopardy.

17 THE COURT: Okay.

18 MR. OSGOOD: That's all I've got, Your Honor.

19 THE COURT: All right. Anything the Government wants to  
20 say in response?

21 MR. RHODES: Just briefly, Your Honor. It is true the  
22 Supreme Court recognized that a worker may have a reasonable  
23 expectation of privacy in the desk and file cabinets located in  
24 his own private office. In *Ortega*, the only items found by the  
25 investigators were personal items. However, in this case the



1 computer was not in Elder's own private office. The items  
2 belonged to that -- the computer was in the receptionist area and  
3 that computer belongs to South Texas Wellness Center. It seems  
4 that the argument that Elder is making is is that his reasonable  
5 expectation of privacy extends throughout the entire office.  
6 Because of the nature of where that computer was in an area  
7 accessed to everyone, he does not have any type of ownership  
8 interest in that. As well as, according to his affidavit, as the  
9 Court has already stated, he said he worked for a temporary hire  
10 in South Texas Wellness Center and he did not maintain control or  
11 possession of any records generated during his employment  
12 contract with the South Texas Wellness Center. In his motion he  
13 says he only works part time. And the search warrant was  
14 executed at least ten months following his termination of  
15 employment. And in *Ortega* the person was still employed at the  
16 time. He was on paid administrative leave. Here, Dr. Elder was  
17 not still with the company. Therefore, these defendants have not  
18 met their burden and the Government asks that you find that they  
19 don't have standing to challenge the search warrant.

20 MR. OSGOOD: His argument is circular because Dr. Elder  
21 was, in fact, the target in the search warrant which we've  
22 alleged is defective on a number of grounds. All we've got to do  
23 is get over the threshold standing argument. Probably in the  
24 search warrant they should have, if they're after Dr. Elder's  
25 records, more specifically identified what filing cabinets and

1 what files they wanted to look in. They didn't do it. All I've  
2 got to do is get over the standing hump to come in and argue  
3 about why this search warrant was over broad and was defective  
4 and I almost cheered counsel's admitting that it was over broad.  
5 They went in and took everything when, in realty, according to  
6 their affidavit, they were looking for stuff on Dr. Elder. So,  
7 all I've got to do is show this threshold standing argument to  
8 come in and gripe about the search warrant, which is what I'm  
9 trying to do, and I think counsel has almost opened the door to  
10 my argument.

11 MR. RHODES: Not in the least, Your Honor. Attachment B  
12 clearly shows that the main target was Dr. Peter Okose. All the  
13 items requested were pertaining to Dr. Peter Okose. So, when he  
14 makes this argument that his guy was the main target, it is  
15 disingenuous. If anything, it says the records of ownership or  
16 control of South Texas Wellness Center, not that regarding with  
17 Dr. Elder. And the only item recovered from that computer wasn't  
18 even medical records. It was a list of the patients.

19 MR. OSGOOD: One of the things in the affidavit that  
20 they were looking for was 107 packages shipped supposedly to the  
21 attention of Dr. Elder at this address. I just -- you know, they  
22 were clearly looking for his stuff here and he has a right, I  
23 think, at this point to contest the entire validity of this  
24 search warrant.

25 MR. BANNWART: And, Your Honor, to that extent the

1 affidavit attached to their -- well, the affidavit in support of  
2 the search warrant says that there were 188 packages shipped to  
3 Mr. Solomon's attention. If that, in fact, was also what they  
4 were looking for and we won't concede that those packages were  
5 shipped to him, but if that's, in fact, what they were looking  
6 for, then they're alleging on the face of the affidavit that he  
7 had packages there with his name on them, that he would surely  
8 have some expectation of privacy.

9 THE COURT: All right. Well, --

10 MR. RHODES: Nothing.

11 THE COURT: -- here's the Court's position. I am not  
12 going to set a hearing on this motion until we've ruled the  
13 standing issue. It looks like it's fully briefed as to Dr. Elder  
14 and we're going to give Mr. Solomon the additional time to put  
15 something in, but when we get done ruling that, if we feel then  
16 there's a need for a hearing, we will set one. But on the basis  
17 of the Court's, you know, limited review of the briefing in the  
18 cases, I'm just very skeptical as to whether there's any standing  
19 here. And, therefore, I think that that clearly has to be dealt  
20 with in a legal fashion and we'll do that and give either side an  
21 opportunity to, you know, take that up to the District Judge  
22 before we make a decision about whether a hearing should be set.  
23 Turning to discovery issues, any problems, anything we need to  
24 talk about since the last time we were here to address discovery?

25 MR. OSGOOD: I've turned over a couple of thousand pages

1 of defense investigative work to counsel this morning. So, I  
2 believe I've complied with the reciprocal requirement at this  
3 point. I did call Mr. Rhodes about this continuing issue of the  
4 investigation of Dr. Okose in Texas. I don't know whether he was  
5 joking or not, but Mr. Rhodes told me that he could not produce  
6 statements of Ada and Pleshette Johnson because of the hurricane  
7 that went through there and scattered all their records and  
8 they're trying to reassemble their records and can't find them.  
9 That's almost as bad as the dog ate my homework. But  
10 nevertheless, I'm still waiting for the discovery on that related  
11 case down there, and Ada and Pleshette Johnson have always been,  
12 in my mind, key witnesses in this case, and it appears from the  
13 argument this morning that that's reaffirmed. So, I guess my  
14 question is when am I going to get the stuff from that  
15 investigation down there? We know they were continuing an  
16 investigation because they interviewed Mr. Lynch, who is the  
17 physician's assistant for Dr. Elder, and asked specific questions  
18 about Dr. Elder's practice and how he did things, as well as Dr.  
19 Okose. If you read the discovery we have to date, there is an  
20 absolute blending and commingling of the two cases and Dr. Okose  
21 is prominent in this case. One of the things that's interesting  
22 is in the grand jury itself, on the day that this was presented  
23 for indictment, the agent was asked why is Dr. Elder the only  
24 person on this indictment when you have this Dr. Botto and this  
25 Dr. Okose that are so prominent in this investigation. The

1 agent's response to that question by a grand juror was, well,  
2 we're handling Dr. Okose in Texas and we, for whatever reason,  
3 think Dr. Botto is credible. And the grand juror said, well,  
4 have you done his handwriting, and she said no, I just think he's  
5 credible. So, they didn't even do a handwriting comparison on  
6 him. And so --

7 THE COURT: Well, let's get back to -- I think the real  
8 issue is the --

9 MR. OSGOOD: Okay. But the point is I don't --

10 THE COURT: -- relevant -- all right. The issue is the  
11 relevant case and the issue about where the records are and what  
12 impact the hurricanes have had on pulling that together.

13 MR. RHODES: Yes. I was posed two questions by Mr.  
14 Osgood. Did I have a statement from Ada and Pleshette Johnson.  
15 I told him, no, I do not have such a statement. I did tell him  
16 that we were not able to look at the discovery in the Okose  
17 investigation because of Hurricane Ike. It caused flooding to  
18 the evidence vault at the Houston DEA Office. They are in the  
19 process of sorting out the boxes and they hope to be finished by  
20 the end of the month. Once that process is finished, then a  
21 review of the files will be done to see if there are any reports  
22 that pertain to this investigation, whether or not there are  
23 *Brady* material in that -- in those boxes as well. So, it was a  
24 merger of my response to him by Mr. Osgood, but, you know, he's  
25 right. Due to a hurricane, the boxes have been disheveled in the

1 evidence box, and they're in the process of sorting them out.

2 But once they are sorted, then we can review the boxes.

3 THE COURT: And are you saying -- I'm a little confused.  
4 Are you saying you have or you don't have statements from Ada and  
5 Pleshette Johnson?

6 MR. RHODES: Other than what has already been disclosed  
7 to defense counsel, there are no other statements.

8 THE COURT: But you have disclosed statements of those  
9 two --

10 MR. RHODES: Yes.

11 THE COURT: -- to defense counsel?

12 MR. RHODES: Yes. Yes.

13 THE COURT: But is it possible there could be other  
14 statements in these boxes?

15 MR. RHODES: It's possible and we will look for such  
16 statements.

17 THE COURT: Okay. Well, I mean I don't know what I can  
18 say, Mr. Osgood, other than it sounds like they're kind of  
19 dependent on when they get those boxes reorganized down there.

20 MR. OSGOOD: From my recollection of doing Mr. Rhodes'  
21 job, these reports are routinely sent, a copy to headquarters.  
22 So, it's quite easy for them to retrieve any reports written by  
23 any DEA agents in this case in Texas by simply going to  
24 headquarters and citing the case number and saying give us copies  
25 back of the reports that we sent to you at headquarters in

1 Washington, so.

2 THE COURT: Have you done that, Mr. Rhodes?

3 MR. RHODES: No, Your Honor. This was a division  
4 office. This is one of their main offices where evidence is kept  
5 in that region. There is no such -- he is probably quoting a  
6 practice from when he was a federal prosecutor and --

7 MR. OSGOOD: I --

8 MR. RHODES: -- he just carried it over.

9 THE COURT: All right. Are you saying that when a DEA  
10 or FBI agent goes out and interviews someone in a case, they  
11 don't send a copy of their report to Washington?

12 MR. RHODES: Yeah, I can't answer that definitively.  
13 What I was told was that is the main division office and as a  
14 division office, that's where the evidence is kept. As far as is  
15 there another --

16 THE COURT: Well, let me -- let me just ask this. When  
17 you have agents go out and prepare reports in cases, you know,  
18 where do they send those reports?

19 MR. RHODES: Well, they just -- they have them inside  
20 the computer. Some of the reports they retain in the computer,  
21 but what you're talking about are physical files that are being  
22 pulled as well, information, but we don't have access to the  
23 information. We will gain access to that information --

24 THE COURT: No, that wasn't my question. My question  
25 is, I take it in this case, in the case that's pending before the

1 Court, you've had agents that have gone out and done interviews  
2 and made reports?

3 MR. RHODES: Yes.

4 THE COURT: And they give you a copy of that report?

5 MR. RHODES: Yes.

6 THE COURT: And they keep a copy?

7 MR. RHODES: Yes.

8 THE COURT: And do they send a copy to somebody else?

9 MR. RHODES: They send one to their supervisor, but all  
10 the parties on that list of the protocol is I'd have no knowledge  
11 of that.

12 THE COURT: Well, all I'm suggesting is because we're  
13 trying to, you know, move this case along --

14 MR. OSGOOD: Distribution, Your Honor. They go right on  
15 the form. That's one of the ones from Texas.

16 THE COURT: And what are you referencing that says it  
17 goes to Washington?

18 MR. OSGOOD: Distribution, Your Honor.

19 THE COURT: And it says S-A-R-I.

20 MR. OSGOOD: Special Agent Regional Investigation, I  
21 believe is what that stands for.

22 THE COURT: All right. Then it says D-I-G.

23 MR. OSGOOD: That I'm not sure.

24 THE COURT: And then O-E-P.

25 MR. OSGOOD: I just know from years of doing this job



1 that everything that the field agents generate, a copy goes to  
2 Washington, unless they've changed it. I worked here 25 years  
3 and I know that to be a fact, that they can take that number and  
4 retrieve these reports from Washington.

5 THE COURT: Well, the reason, you know, if you've agreed  
6 to look through some reports and determine if there's either  
7 *Brady* or other relevant evidence to produce, we have no control  
8 over how long it's going to take them to reassemble documents  
9 that were in a flooded vault. And if there is a way to simply  
10 get these reports from Washington by giving them the case number,  
11 then it would seem to me you need to do that and not wait on  
12 Texas, because what I don't want to have happen is that this  
13 trial be delayed because, you know, there's relevant evidence out  
14 there, albeit from another investigation, that hasn't been  
15 produced because of circumstances, you know, beyond our control  
16 here.

17 MR. RHODES: We'll look into that, Your Honor.

18 THE COURT: All right. So, how long do you want -- do  
19 you want to report back to the Court in writing? Do you want to  
20 report back to the Court in a further telephone conference? But  
21 I want to follow up in terms of is it necessary to wait for the  
22 Houston office to reassemble their files, or is there a way for  
23 you to get pertinent information by providing the case number to  
24 Washington, D.C.?

25 MR. RHODES: Writing will suffice, Your Honor.

1 THE COURT: I'm sorry, what?

2 MR. RHODES: Writing. By writing -- by way of writing,  
3 Your Honor.

4 THE COURT: All right. And how long do you need to file  
5 something?

6 MR. RHODES: I would say five days, Your Honor, to begin  
7 the phone calls.

8 THE COURT: All right. Then let's do this. Today is  
9 the 21<sup>st</sup>. You need to file something by the 28<sup>th</sup> advising the  
10 court and opposing counsel whether you're able to get any of the  
11 information from this other related ongoing investigation through  
12 Washington, D.C. And when you see the written response, Mr.  
13 Osgood, if you're not satisfied, you can contact JoRita and we'll  
14 have either a phone conference or an in-person meeting, depending  
15 on what the parties' preference is.

16 MR. OSGOOD: Very well, Your Honor. The other thing  
17 that counsel for Mr. Solomon reminded me of, which I think is  
18 pertinent, is we presume that there are electronic copies by  
19 filed number and certainly that would be available for initial  
20 review by the office in Texas. I don't imagine that the  
21 hurricane scattered -- maybe it did, I don't know. Maybe there's  
22 electronic damage, but that's just another thought. The  
23 remaining issue on discovery, and I talked to Mr. Rhodes and he's  
24 agreed to do that, is I was operating under the assumption from  
25 the very beginning that there are no original scripts in the

1 possession of the Government. Had there been, I would assume  
2 they would have shown those to the handwriting expert and all  
3 they showed the handwriting expert, both of them, the one -- the  
4 first one and the second one, were Xeroxes. Mr. Rhodes thinks he  
5 now has some original scripts. So, I've asked to have the  
6 opportunity to actually physically review the evidence at the DEA  
7 and he tells me that he will make arrangements for that. I would  
8 assume that that should take place fairly soon. I don't want to  
9 delay that.

10 THE COURT: Now, when you say that you want an  
11 opportunity to review it, you, not an expert, or I mean the first  
12 step is --

13 MR. OSGOOD: No, just me right now.

14 THE COURT: All right. Right now.

15 MR. OSGOOD: Me, right now. I want to see any original  
16 scripts they've got. I don't believe there are any. I don't  
17 believe they exist.

18 MR. RHODES: Your Honor, I just want to add that the  
19 handwriting expert used original scripts.

20 THE COURT: Whose handwriting expert?

21 MR. RHODES: The Government's handwriting expert.

22 MR. OSGOOD: That's not accurate. The handwriting  
23 expert used faxed copies. At one point they went down to Texas  
24 with a grand jury subpoena and from an Okose -- or Osco Drug, I  
25 believe it was Osco Drug, obtained five or six original scripts

1 written by Dr. Elder in Texas which patients got filled in Texas.  
2 Those are the only original scripts that have been mentioned,  
3 produced, or shown in this case. The handwriting expert worked  
4 off of faxes, to my knowledge, because that's why he said I can  
5 only give a probable because I don't have the originals. That  
6 was the first guy. Then they showed more Xeroxed copies, or  
7 faxed copies, to the second handwriting expert and he said highly  
8 probable, but wouldn't give a definitive opinion because he  
9 didn't have originals. So, I don't know where Mr. Rhodes is  
10 getting the fact -- this idea that they were using originals.  
11 The only originals they had were the ones they subpoenaed in  
12 Texas later to show -- to compare to some of the scripts they had  
13 up there. I don't care about those originals. I want to know if  
14 they had questioned originals that they seized at The Medicine  
15 Shoppe in Belton. That's the issue. Questioned originals here  
16 in Kansas City. They don't exist as far as we know.

17 THE COURT: Are you saying you have originals from The  
18 Medicine Shoppe in Belton?

19 MR. RHODES: Yes, Your Honor. I'm saying, yes. Yes.

20 MR. OSGOOD: I want to see them.

21 MR. RHODES: You know, --

22 THE COURT: All right. And that's what you've just  
23 recently discovered?

24 MR. RHODES: No, I've always stated that there were  
25 original scripts and it was always in the reports.

1 MR. OSGOOD: It's --

2 MR. RHODES: There are some original scripts. I don't  
3 know why he keeps trying to -- he is doing a cursory review of  
4 some of these pleadings and just making assumptions, like he did  
5 in the telephone conversation.

6 MR. OSGOOD: I guess if they had originals they would  
7 have shown them to the handwriting expert here and they didn't do  
8 that.

9 THE COURT: Well, let me ask you that, Mr. Rhodes.

10 MR. RHODES: Yes.

11 THE COURT: I mean, although this is all kind of  
12 irrelevant to I mean if you've got them, they'll produce them for  
13 you, Mr. Osgood. Did your handwriting experts use originals?

14 MR. RHODES: Yes. He used some originals and some faxed  
15 copies.

16 THE COURT: All right. Well, the report will be clear  
17 as to what happened. But in any event, it sounds like there's  
18 really no discovery issue. You're going to be provided an  
19 opportunity to review these scripts, is that correct, Mr. Osgood?

20 MR. OSGOOD: Yes.

21 THE COURT: All right.

22 MR. OSGOOD: That's all I want.

23 THE COURT: Okay. Any other issues that we need to  
24 address?

25 MR. BOHLING: I have two matters, Your Honor. One is

1 just a status issue. One of our discovery questions was, as the  
2 Court may recall, there was a -- there was an imaged copy of the  
3 Southwest Texas Center hard drive at the DEA forensic lab in  
4 Virginia.

5 THE COURT: Yes.

6 MR. BOHLING: I have obtained a search warrant, a new  
7 search warrant, specifically for that imaged copy. The DEA is in  
8 the process of doing that re-examination for us. I am assured by  
9 counsel for DEA that that will be done quickly. I have a call  
10 into her today to get us an update on the status, which I will  
11 share with defense counsel. As soon as the return is done on  
12 that, it has not been confirmed to me by the AUSA in Virginia  
13 that the return has been done on that search warrant, but as soon  
14 as that is done, I will share the search warrant and related  
15 material with counsel and share the results of the report as soon  
16 as I receive that, which should be in the near future. My second  
17 point, if there's no questions about that. I believe we have a  
18 hearing set this afternoon --

19 THE COURT: Yes.

20 MR. BOHLING: -- on the handwriting identification.

21 THE COURT: Yes.

22 MR. BOHLING: The position that I've taken in our  
23 response is that that hearing is unnecessary. It's an  
24 imaginative argument by Mr. Osgood certainly, but we would -- I  
25 think the central fact here is something we would easily concede,

1 which is there was not a, I guess what one would call a  
2 handwriting lineup shown to the witness. I'm not aware of that  
3 ever happening in any case ever. I don't think such a thing  
4 exists. It's argued that this is simply an issue of  
5 authentication identification for the trial court judge and it's  
6 a yes, no, thumbs up, thumbs down. If the lay witness can say --  
7 if there's a foundation for the lay witness' ability to recognize  
8 someone's handwriting because of their familiarity in a non-  
9 litigation setting, then the evidence ought to be admissible. If  
10 there is not, then it is not. And I've suggested this in that  
11 context really becomes irrelevant. There's no such thing as a  
12 show-up or a lineup for handwriting. If a person is not  
13 sufficiently familiar with the handwriting, it simply doesn't  
14 come in at trial. So, I think the suggestion in this issue is a  
15 bit of a red herring. In that sense I think this is only an  
16 issue for the trial court. It's a few questions to establish  
17 foundation, we do it or we don't. I don't believe there is any  
18 predicate for having a pretrial hearing on suggestiveness because  
19 we'll concede that, if we can't establish a foundation for the  
20 person's familiarity with the handwriting, it doesn't come in.  
21 There's simply -- it's not a question of being able to say, well,  
22 the person saw the handwriting once and, therefore, they would  
23 have a chance to identify this in the same way you would identify  
24 a person. It doesn't work that way.

25 MR. OSGOOD: The Court has an obligation as the

1 gatekeeper to make two determinations. First, is it admissible,  
2 and, second, is it relevant. On admissibility, the Court can  
3 determine on any piece of evidence that it doesn't go to weight,  
4 it goes to due process considerations. I'll agree that I  
5 couldn't find any Eighth Circuit cases on this and I agree that  
6 this is a somewhat novel proposition, but there is nothing to say  
7 that the Court, as gatekeeper, cannot determine that there was a  
8 due process violation that rises to the level such that the  
9 evidence should be excluded and it doesn't come in and is not  
10 judged on weight. It's just excluded because of due process  
11 violations. If you take counsel's argument to it's logical  
12 extreme, indigent defendants wouldn't have the right to counsel  
13 because some lawyer raised a ridiculous argument. There would be  
14 no lineup issues in *Niles v. Bigger* because some lawyer raised a  
15 ridiculous point. I'll admit it's novel, but that doesn't mean  
16 that it isn't a legitimate issue and I raised it in good faith  
17 and I believe I'll be able to show at the hearing that this woman  
18 was herself under investigation. That she was scared to death of  
19 the DEA. That she had been -- she and her husband had been fined  
20 \$75,000 by the DEA for their own violations, and that they leaned  
21 on her and that she is the one that I filed the motion on also to  
22 dismiss on the grounds that she lied to Mr. Reeder, and Mr.  
23 Reeder will be here this afternoon to testify on credibility  
24 grounds and so there is all kinds of indications here that there  
25 were serious due process violations in that portion of this



1 investigation, and that's what I want to explore at the hearing  
2 and I think that it rises to the level such that the Court can  
3 say it's not a question of weight, it's a question of due  
4 process.

5 MR. BOHLING: Your Honor, Mr. Osgood has completely  
6 changed his argument. His motion was about suggestiveness and he  
7 didn't say one word about suggestiveness in his argument to the  
8 Court. His arguments are simply impeachment.

9 THE COURT: Well, I think he's saying, I assume, it says  
10 so suggestive, it leads to a due process violation.

11 MR. OSGOOD: Exactly. That's what *Niles v. Bigger* says.

12 MR. BOHLING: But that's --- we have to set the  
13 foundation that it's not possibly suggestive or it doesn't come  
14 in under 901. If we don't do that at trial, it's simply an  
15 authentication issue. I would concede that if there's any  
16 question about this lay witness' ability to recognize the  
17 handwriting based on her own familiarity with it, that it doesn't  
18 come in. I would never say that if there was a question of  
19 suggestiveness that it could come in. I'm conceding there was no  
20 lineup. There's nothing to litigate about. When we litigate  
21 about suggestiveness, we're litigating about the suggestiveness  
22 of a lineup, a photo lineup, a live lineup, and whether that was  
23 suggestive. There's nothing to litigate about here. I concede.  
24 We did not show this person a lineup. We have never in the  
25 history of the world as far as I know shown anybody a lineup of

1 handwriting. It simply doesn't happen and that's because it's a  
2 completely different issue. It has no -- it does not translate  
3 across from the law of identification of persons by  
4 identification of handwriting. We must show at trial that she  
5 has a substantial foundation for being able to recognize this  
6 handwriting based on her familiarity with it for purposes not for  
7 litigation. If we don't meet that burden, it does come in and  
8 the trial court decides that. It's not something that would be  
9 decided before we get to trial. It's a trial judge -- it's quite  
10 simply an evidence issue for the trial court. Okay.

11 THE COURT: Well, a lot of the things that --

12 MR. BOHLING: There's simply nothing to litigate about  
13 at this point.

14 THE COURT: Well, a lot of the things that we have  
15 hearings on are ultimately evidence decisions for the trial court  
16 and there's always a fine line, but the whole issue is that to  
17 the extent evidence is going to be necessary, you know, the trial  
18 judges prefer that we at least have the initial hearing. They'll  
19 certainly have an opportunity to read the transcript and make the  
20 ultimate call as opposed to, you know, taking a half day break to  
21 litigate issues. We'll look at the briefing again between now  
22 and 1:30.

23 MR. BOHLING: Okay.

24 THE COURT: But it's our position that we need to go  
25 forward at 1:30.

1 MR. BOHLING: I guess my bottom line point would be  
2 there's nothing -- there's no subject to this hearing. We did  
3 not show her a lineup so there's nothing that can be litigated to  
4 be suggestive or not suggestive.

5 THE COURT: Well, I think there could be many ways in  
6 which something could be suggestive even without there being a  
7 lineup. So, you know, as I said, we'll go back and take a look  
8 at the cases that you all have cited, but, you know, I didn't  
9 understand, you know, coming into this hearing today, you know,  
10 certainly you raised issues about would you be ready to go  
11 forward with the suppression hearing and you indicated, no, you  
12 wanted the standing issue ruled first. But there was no  
13 suggestion that going forward on the handwriting issue was going  
14 to be in any way difficult for either side. I mean --

15 MR. BOHLING: No, I'm not saying that, but we did raise  
16 the issue in our pleading that no hearing was necessary and I  
17 still believe that to be true. There's nothing to litigate  
18 about. There was not a lineup. So, there's nothing to say that  
19 it was suggested.

20 THE COURT: Well, what --

21 MR. BOHLING: That's what we litigate about and  
22 suggestiveness --

23 THE COURT: Let's go to what witnesses do the parties  
24 intend to call this afternoon at 1:30?

25 MR. BOHLING: Only my agent. Or the --

1 THE COURT: To talk about the circumstances under which  
2 the handwriting exemplar was obtained -- or handwriting  
3 identification was made?

4 MR. BOHLING: Well, the handwriting identification won't  
5 be made until we get to trial, that's what we're talking about.  
6 We have to show at trial that she can do that in the court.

7 THE COURT: What is it that you intend to show today is  
8 my question?

9 MR. BOHLING: I'm not sure because I'm not sure what  
10 we're litigating about. There's no lineup. There's nothing to  
11 suppress. It's the inquiry identification of the handwriting  
12 that Rule 901 deals with. So, I don't quite understand the  
13 motion, that's my problem. There's no --

14 THE COURT: Well, I wish you'd indicated, you know,  
15 before we have this set today.

16 MR. BOHLING: I did, Your Honor.

17 THE COURT: Certainly I didn't --

18 MR. BOHLING: It's right here. I indicated no hearing.

19 THE COURT: I understand that, but we had a whole  
20 discussion about what were the parties ready to go forward on  
21 hearings today and what did they need further argument on, and  
22 both sides agreed we needed to address standing and both sides  
23 agreed we'd be ready to go with the hearing on the --

24 MR. BOHLING: But that's a different issue --

25 THE COURT: -- motion with respect to the handwriting.

1 MR. BOHLING: -- conceptually. Being ready to go does  
2 not mean we need to have a hearing.

3 MR. OSGOOD: Your Honor, --

4 MR. BOHLING: We're ready to go, but we don't need to  
5 have the hearing.

6 THE COURT: Well, I was setting a hearing. I don't know  
7 -- and I was trying to find out from the parties what matters  
8 they wanted to have a hearing on and what matters they wanted to  
9 have further argument on.

10 MR. BOHLING: I know, but there's no reason to have a  
11 hearing. Legally there's nothing to have a hearing about.

12 MR. OSGOOD: Your Honor, this is -- he keeps analogizing  
13 it to a lineup, and I'll take that and run with it. At a lineup  
14 when the police conduct a lineup, and even if counsel is there  
15 present at the lineup, if the policeman is over there grabbing  
16 the witness and saying take a hard look at Number 3. You passed  
17 Number 3. Go back and look at Number 3 again. Don't you notice  
18 the way that Number 3 is holding their head and the way that  
19 they're looking. Clearly, you can have a violation, a due  
20 process violation, and make it overly suggestive by the facts.  
21 That's what we want to explore. I talked to counsel about this  
22 and I said he said he was not bringing Ms. Hearn up and I said I  
23 could live with that, as long as we have the agent here and I  
24 said Mr. Reeder will be here. So, I think the issue is clearly  
25 joined.

1 THE COURT: All right. And it sounds like we've got  
2 then the people that we're going to need --

3 MR. BOHLING: Right.

4 THE COURT: -- for purposes of the --

5 MR. BOHLING: For the hearing.

6 THE COURT: -- defendants' motion.

7 MR. BOHLING: But just to be clear, we are not trying to  
8 put in an out-of-court identification which is what all these  
9 cases talk about. This is an in-trial court identification where  
10 we have to make the 901 showing for the trial court judge. So,  
11 there's no subject for this litigation.

12 THE COURT: All right. We'll see everybody back at  
13 1:30, or those that are interested in the 1:30 proceeding. All  
14 right. We will be in recess.

15 MR. OSGOOD: Thank you, Your Honor.

16 (Court Adjourned at 10:30 a.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 27, 2008  
Date