

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

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-04-CR-W-FJG
	)	
CHRISTOPHER L. ELDER,	)	
	)	
Defendant.	)	

**DEFENDANT ELDER’S MOTION TO SUPPRESS THE  
TESTIMONY OF WITNESS HEARN AS TO HER LAY IDENTIFICATION  
OF DEFENDANT’S PURPORTED HANDWRITING ON  
PHOTO COPIES OF PREVIOUSLY FAXED PRESCRIPTIONS  
ON DUE PROCESS GROUNDS THAT THE PROCEDURE  
USED BY THE DEA WAS UNCONSTITUTIONALLY SUGGESTIVE  
WITH SUGGESTIONS IN SUPPORT**

On August 23, 2008, defendant Elder filed a motion to dismiss charges against Doctor Elder because of government misconduct. That motion was responded to by the government on September 9, 2008 (doc. 113) and is pending a ruling from the court. (See Elder motion, Document #93). The gist of the motion on file is that Diane Hearn was informed that she should expect contact from a defense investigator and that she should not talk to the person and that she was so instructed by DEA. After the motion was on file, the very next day Hearn called the investigator back on her own initiative and stated she “misspoke” when she said DEA told her not to

discuss her interview and that it was her own idea to make that statement to the investigator. Defense Investigator Reeder's report of the follow-up interview places an entirely different spin on the two conversations and her exact words will be a point of significant contention at any hearing and supports the conclusion that she willfully lied in one of the two conversations, if not both.

Thus, the Court in its gatekeeper role has before it an admitted liar coming out of the gate, if her current version of her DEA conversations is to be believed. With respect to this motion, the Hearn DEA report states in relevant part:

2. On July 10, 2008, Diversion Investigator (DI) Judi Watterson and Special Agent (SA) Brendan Fitzpatrick traveled to Westfield Medical Clinic, 11618 Aldine Westfield, Houston, Texas 77093, and identified themselves with credentials to Diane Hearn, office manager of the clinic. Hearn acknowledged that she worked with ELDER and that ELDER wrote prescriptions while employed at Westfield Medical Clinic. The investigators asked Hearn if she could recognize ELDER's handwriting and Hearn responded that she could. The investigators provided Hearn with copies of ten prescriptions issued by ELDER (obtained from the search of THE MEDICINE SHOPPE #1067 on May 10, 2006) and asked her to review the handwriting and doctor's signature on the prescriptions (copies attached at Attachment 1) . Hearn stated that she recognized the handwriting and signature on the ten prescriptions as ELDER's writing and signature.

Defendant acknowledges that Rule 901(2), FREv, provides that a lay witness can authenticate handwriting as a non-expert. This, however, does not address the constitutional issue of whether some out-of-court procedure renders such

identification otherwise inadmissible because of constitutional due process considerations.

In *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the Supreme Court reviewed and distilled prior decisions involving suggestive identification procedures. Although *Neil* and the other cases discussed therein involved only visual identifications, the following quotation from *Neil* clearly indicates that suggestive identification procedures should apply to other situations:

“Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is ‘a very substantial likelihood of irreparable misidentification.’ *Simmons v. United States*, 390 U.S. [377] at 384 [88 S.Ct. [967] at 971, 19 L.Ed.2d 1247]. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of ‘irreparable’ it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant’s right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a showup without more does not violate due process.” 409 U.S. at 198, 93 S.Ct. at 381.

Because the possibility of "irreparable misidentification" is as great when the identification is from a display of photo copied previously faxed prescriptions as when it is from a photograph or a line-up, this court should apply the same due process analysis in this case.

Courts have stated there is no litmus paper test available to determine the constitutional adequacy of the identification procedures used in any given case. Rather, as stated in *Neil*, the "central question [is] whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." 409 U.S. at 199, 93 S.Ct. at 382. This is, in essence, the test used by in this Circuit in evaluating challenges to identification procedures. *United State v. Jackson*, 365 F.3d 649 (8<sup>th</sup> Cir. 2004).

The Supreme Court decision in *Neil* and the decision in *Jackson* enumerate a number of factors to be considered in evaluating the "totality of the circumstances" of a specific case. Although not all of the factors mentioned in these cases apply to the identification of a photo copy of a previously faxed medical prescription, the general approach and the policy considerations seem to be essentially the same. When dealing with individual identification of persons, these cases call for a broad two-part analysis, the first part focusing on the necessity for the photographic identification and the second on the particular circumstances surrounding the identification.

The necessity for the use of a particular identification procedure is a function of the law enforcement problem facing the law enforcement authorities in each case. In a true emergency, the necessity for a particular identification may be more apt to be approved. See e.g., *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) (defendant taken to the hospital room of a dying victim).

As to the first question, there was no emergency that required the government agents to rush down to Texas from Kansas City and display what they believed was Elder's handwriting to Hearn to obtain her lay opinion. This was done no doubt in 2007 after the government learned that Elder was going to attack this as a significant flaw in the government's case against him. While timing might have been important to the government to some extent, they certainly had ample time to prepare a proper "photo spread" of the handwriting such as used in a photo lineup. They had similar questioned scripts in their possession written by Doctors Okose, Botto, and Lechin. These could have been placed in an array along with those they believed were Elder's to display to the witness.

This court must therefore determine whether the identification procedures used here was overly suggestive and whether conduct of the DEA agents tended to focus attention on Elder as the only suspect. Defendant submits that the DEA report indicates that the procedure used was undeniably suggestive. By asking first if she could identify Elder's hand writing on prescriptions and then showing the copies to

her of only the Elder questioned documents the DEA firmly implanted the suggestion in Hearn's mind that the handwriting was Elder's to the exclusion of all others. As noted above, the preferable procedure would have been to simply show her the scripts with the Doctor's name masked and ask her whether she could identify the hand writing as that of anyone she knew. But, candidly, the issue is not whether a better procedure was available, but whether the procedure used, under all the circumstances, was constitutionally defective and a violation of the 5<sup>th</sup> Amendment due process clause.

Defendant submits it was, particularly in light of the response Hearn provided to the defense investigator when an attempt was made to interview her and her subsequent phone call to the investigator where she in essence admitted she had lied the day before. She is clearly a biased witness who is willing to go to extremes to assist the government. Additionally, upon information and belief, Hearn and her physician husband for whom she worked were both the subject of DEA investigation for various acts committed by Doctor Hearn which resulted in disciplinary action against him, suspension of his license, and ultimate retirement and fines paid to the Government. Defendant believes he will be able to demonstrate at the hearing that Ms. Hearn, prior to this incident, has expressed personal fear of the DEA and the DEA's perceived power over her. Under the totality of the circumstances, her

identification of Elder's handwriting on the photo copies of the faxed questioned prescriptions should be disallowed at trial.<sup>1</sup>

WHEREFORE, defendant moves the Court for an order suppressing the testimony of Hearn for the reasons set forth above or alternatively to set the matter for hearing to determine whether the procedures employed were constitutionally defective.

/s/  
John R. Osgood  
Attorney at Law, #23896  
Commercial Fed Bnk- Suite 305  
740 NW Blue Parkway  
Lee's Summit, MO 64086

**Osgood Law Office**  
<http://www.juris99.com/index.htm>

Office Phone: (816) 525-8200  
Fax: 525-7580

#### CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System on September 7, 2008.

/s/  
JOHN R. OSGOOD

Document re-posted by Osgood Law Office, Lees Summit, MO [www.juris99.com](http://www.juris99.com)  
For all documents filed in this case goto: [www.juris99.com/texas](http://www.juris99.com/texas)

---

<sup>1</sup> The court should also recall that the government's own handwriting expert who was first consulted was only willing to say that Elder was "probably" the one who wrote the scripts. A second expert has now termed it highly probable. No expert has stated he is in fact the one who wrote the scripts.