

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

UNITED STATES OF AMERICA            )  
                                                  )  
                          Plaintiff,        )  
                                                  )  
                  v.                            )  
                                                  )  
CHRISTOPHER L. ELDER,                )  
                                                  )  
                          Defendant.      )

No. 08-00026-04-CR-W-FJG

**DEFENDANT ELDER’S MOTION IN LIMINE TO PRECLUDE  
TESTIMONY OF A HOUSTON POLICE DEPARTMENT OFFICER WHO IS  
PURPORTEDLY AN EXPERT ON THE QUESTION OF HOW PRESCRIPTION  
MEDICATION IS OBTAINED ILLEGALLY AND DISPENSED AS AN  
ILLEGAL CONTROLLED SUBSTANCE IN THE HOUSTON AREA ON  
GROUNDS OF RELEVANCY AND UNFAIR RULE 403, FREV, PREJUDICE**

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Defendant anticipates that the government will attempt to introduce evidence in the form of expert and fact based testimony from a Houston Police Officer, John Kowal. The government endorsed this witness on its witness list and further listed him as an expert apparently in the field of drug diversion. The nature of his expert testimony is merely supposition on the defendant’s part at this point because the government failed to specify the nature of the testimony as required by the Court’s pretrial order.<sup>1</sup> All the defense was provided with was a *Curriculum Vitae* which states in its entirety:

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<sup>1</sup> The government now has another “bite of this apple” because of the trial continuance and adjustment of filing dates. It is worthwhile to note that the government was warned in no uncertain terms that failure to comply with the requirement to notice up the substance of expert testimony would result in disallowance of that testimony.

Name: John Kowal

Address: 1200 Travis, Houston, Texas 77002  
Employer: City of Houston Police Department  
Title: Sr. Police Officer

Responsibilities: Investigation of the diversion of licit drugs for illicit purposes

Education: University of Illinois (Chicago), June 1982  
BA Criminal Justice

Training and Experience:

September 1982 to Present	Houston Police Department
September 1982 - January 1983 .	Houston Police Academy
January 1983 :.... December 1986	Central Patrol
December 1986 - October 1999	Narcotics Division (specialization of drug diversion)
October 1999 - January 2007	Assigned to Drug Enforcement Administration Tactical Diversion Squad
January 2007-	HIDTA Squad Diversion Investigations

Defendant will address the issue of expert qualifications of this witness and *Daubert*<sup>2</sup> issues in a follow up motion, if and when the government properly complies with this court's pretrial orders and provides the defense with the nature and substance of his expert testimony. This pleading assumes for the sake of argument that the officer can be qualified as an expert of sorts on drug diversion. Even if he is an expert, there is a serious question of relevancy and the highly prejudicial nature of such testimony outweighing any remote probative value it might have. Rule 403, FREv.

The indictment in this case contends in Count One that defendants Elder, Rostie, Martin, Solomon and Johnson conspired to dispense and possess with intent to distribute

and dispense controlled substances, that is various types of Schedule III, IV and V medications for other than legitimate medical purpose and not in the usual course of professional practice. The manner and means of the conspiracy allege that these medications were shipped from Missouri to Texas to defendant Solomon, a pharmacy owner.

There are no allegations in the indictment as to what happened to the medication once it was signed for in Texas, that is, whether the medication was sold by Solomon outright, retailed through his pharmacy or wholesaled to other pharmacies, hospitals or other entities or quite simply dispensed to the person whose name appeared on the prescription. The trail simply ends with receipt of the shipments in Houston. And the government has made no legitimate effort (based on discovery content) to answer this question of what happened to the medications upon their arrival in Houston.

It would appear that the government simply wants to fill in this gap in the story by calling a police officer who will provide highly subjective and speculative testimony as to what happened to these medications after they arrived in Houston without even the slightest bit of hard evidence, direct or circumstantial, to back up his suppositions. Using this as a bootstrap, the government can then argue that Doctor Elder is a street drug dealer in closing.

This seems to be the very type of testimony and tactic that was so strongly

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<sup>2</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

condemned in the recent case of *United States v. Street*, \_\_\_ F.3d \_\_\_ (8th Cir. 2008)(No. 07-2600, December 1, 2008). In *Street* a Kansas City Drug Task Force Officer with qualifications similar to that of the officer the government would use in this case testified about the history and organization of American motorcycle gangs in general and specifically about the criminal tendencies of the motorcycle gang snitches. It was undisputed that Street was never a member of El Forasteros or any other motorcycle gang. The only connection was that an acquaintance, of Street's had been a former member of El Forasteros motorcycle gang.

In reversing Street's murder conviction, the court said "[w]e conclude that Cook's testimony about outlaw motorcycle gangs and El Forasteros was excessive, unduly prejudicial, and in great part completely irrelevant to the charged offenses. The district court thus abused its discretion in allowing this evidence. Moreover, we cannot conclude that the error was harmless." In the recent capital murder trial, *United States v. Eye*, 05-00344-01-CR-W-ODS, a case tried prior to the holding in *Street*, Judge Smith granted a motion *in limine* that precluded the government from introducing street gang affiliations of the two defendants, Eye and Sandstrom, which would have suggested the defendants were members of gangs that were generally known to harbor racial animus. Judge Smith also sustained objections to attempts by the Government to introduce photographs of racially charged graffiti on buildings located near the scene of the crime on grounds that such evidence was irrelevant and there was no proof of connection to the murder of the

victim.<sup>3</sup>

Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without that evidence." Fed.R.Evid. 401. Rule 403 provides that, ". . . relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Fed.R.Evid. 403. On appeal, the Circuit court generally gives considerable deference to a district court's application of the Rule 403 balancing test. See *United States v. Claxton*, 276 F.3d 420, 422-23 (8th Cir. 2002).

Defendant's counsel suggests that determining what happened to these drug shipments is not as difficult a task as it might seem based on his own many years of experience as an assistant federal prosecutor. Counsel knows that Police officers routinely arrest street dealers and seize pills from them on the street. Sometimes these individuals are arrested, charged and booked and sometimes they are simply relieved of the contraband and identity information obtained from them. In almost every instance an experienced officer will attempt to ascertain the source of the controlled substances and file a police report or at the very minimum an intelligence report for future reference and investigation. These intelligence reports are routinely referred to in drug prosecutions and DEA tracks them in the NADIS system. Indeed, if a street dealer or user has scheduled narcotics on him in a script bottle in a name other than his own it is most probable and

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<sup>3</sup> The defendants Eye and Sandstrom were charged with killing the victim solely and simply

highly likely that this too would become part of the intelligence gathering function of the police department and ultimately DEA.

Surprisingly, there is no indication that the Houston DEA or Police Department used this resource to attempt to determine if these Missouri prescriptions were in fact showing up on the Houston streets or other cities identified in the investigation e.g. several communities in the State of Louisiana near the Texas border. Or, conversely, if they did such investigation, the result was apparently a resounding “No.” The latter is of course something that is not indicated in the discovery.

Absent at least a minimum investigative effort to determine what happened to these medications after their delivery in Houston or, worse yet, exculpatory evidence that an effort was made with negative results, it seems highly unfair to allow a police officer from Houston to take the stand and speculate about what might or might not have happened to the drugs after their arrival in his city. Such testimony is simply irrelevant in this case in its present posture. *U.S. v. Street, supra*. And even assuming some minimum degree of relevancy, the prejudicial effect grossly outweighs any probative value it might otherwise have. To offer this testimony is simply an effort to poison the minds of the jury against Doctor Elder and suggest through rank speculation and biased opinion that he is nothing more than a well educated street drug dealer and part of a wide ranging conspiracy beyond what is charged in the indictment. Presenting this type of evidence to

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because of his race and presence in the neighborhood.

the jury will clearly deprive him of a constitutionally fair trial.

WHEREFORE, defendant moves the court to instruct the government to refrain from attempting to show disposition of these medications after their delivery to Houston through speculative testimony of this police officer or any other similar witness.

Respectfully submitted,

/s/

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

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 Friday, January 02, 2009.

/s/

JOHN R. OSGOOD

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