

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

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

**GOVERNMENT’S RESPONSE TO DEFENDANT ELDER’S MOTION *IN LIMINE*  
REGARDING THE TESTIMONY BY A HOUSTON POLICE OFFICER**

The United States of America provides the following response to Defendant Christopher Elder’s Motion *in Limine* (Doc. 169), seeking to exclude the testimony of Houston Police Officer John Kowal.

**I. Procedural Background**

On February 6, 2008, a grand jury returned a multi-count indictment that charged Mary Lynn Rostie, Cynthia Martin, Troy Solomon, Christopher Elder, and Delmon Johnson as co-defendants in a conspiracy to distribute and possess with intent to distribute controlled substances. The Indictment alleges that defendant Elder wrote unlawful and invalid prescriptions for thousands of dosage units of Schedule III, IV and V controlled substances. Additionally, Count Two charges all defendants, except Elder, with conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). Counts Three through Six charge defendants Elder, Rostie, and Solomon with the illegitimate distribution of Schedule III and IV controlled substances and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Counts Seven through Ten charge defendants Elder, Rostie, Solomon, and Johnson, with the illegitimate

distribution of Schedule III, IV and V controlled substances and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

In his Motion *in Limine*, Defendant Christopher Elder (hereinafter “Elder”) seeks to exclude from trial the testimony of Houston Police Officer John Kowal. Elder argues that such evidence is inadmissible under Federal Rule of Evidence 403 because its probative value is outweighed by “the highly prejudicial nature of such testimony.” (Def. Elder’s Mot. *in Limine*, at 2.) Officer Kowal’s testimony is admissible under Rule 702 of the Federal Rules of Evidence because it is helpful in assisting the trier of fact to understand the evidence. The motion should be denied.

## **II. Factual Background**

The Government’s evidence at trial will demonstrate that the narcotic and other drugs obtained by Defendants Troy Solomon and Delmon Johnson, with the assistance of Defendant Elder and unindicted co-conspirator, Peter Okose, M.D., from The Medicine Shoppe pharmacy in Belton, Missouri, were obtained solely for the purpose of diversion and sale on the street. Viewed in this light, Officer Kowal’s testimony concerning the rampant abuse of prescription drugs in the Houston, Texas, area, and the nature of the street market for those drugs is highly relevant to the jury’s understanding of the evidence.

Over a fifteen-month period (approximately August 2004 through October 20, 2005) the Belton pharmacy filled an extremely large volume of prescriptions for generic Lorcet, Xanax and Promethazine with Codeine. Solomon had forged a supply connection with defendant Lynn Rostie, the Medicine Shoppe’s pharmacist and owner, through defendant Cynthia Martin, a Belton resident who knew both Solomon and Rostie. Solomon paid for the drugs by sending

large amounts of United States currency by United Parcel Service to Martin, who delivered the currency in person to Rostie.

The volume of The Medicine Shoppe's shipments to Houston were so great that during the relevant time period, The Medicine Shoppe was the number one seller of narcotics in the State of Missouri.

When the shipments began in August 2004, Solomon was preparing to open the Ascensia Nutritional Pharmacy (hereinafter "Ascensia") in Houston, but Ascensia had not yet opened. Elder worked at a clinic in the same building as Ascensia called South Texas Wellness Center (hereinafter "STWC"), owned and operated by Ada Johnson and her daughter, Pleshette Johnson. Elder and Solomon knew each other.

From August 2004 until the end of 2004, the boxes of prescription drugs mailed by Federal Express from The Medicine Shoppe were addressed to Elder at STWC. STWC staff signed for the packages. However, STWC did not dispense drugs to its patients. Instead, the boxes were picked up from STWC by Solomon and Johnson.

Solomon provided money to the Johnsons to pay operating expenses for STWC during this time period, but he did so by giving them cash payments that ultimately amounted to about \$25,000. No written agreement accompanied these payments. Solomon also paid for prescription pads for Elder from a supplier of Solomon's choice. Elder saw few patients at STWC and wrote few prescriptions during the day, but he sometimes kept the pads with numerous blank pages remaining and asked for a new pad from the Johnsons when he next saw patients.

The prescriptions written by Elder to be filled by The Medicine Shoppe did not correspond to actual patients at STWC, even though the prescription pad letterhead said “South Texas Wellness Center.” No record of those patients exists at STWC, and the narcotics provided by The Medicine Shoppe in fulfillment of Elder’s prescriptions were not provided by Dr. Elder to STWC patients.

In about January 2005, Elder left STWC. The prescriptions sent to Belton switched from Elder to Okose, and Solomon asked Rostie to mail the boxes of filled prescriptions to Ascensia rather than to STWC. In fact, Okose wrote thousands of prescriptions that went through Solomon’s hands. Some were filled in Belton, many more were filled by the Ascensia pharmacy. Ascensia had very little walk-in business, nonetheless, during this time period Ascensia was among the sales leaders for Hydrocodone for all pharmacies in the State of Texas.

The prescriptions written by Okose used real patient information from the thousands of patients seen at Okose’s clinic. However, Okose’s patients received their prescriptions in hand from Okose’s clinic and had them filled at pharmacies in the Houston area. The prescriptions written by Okose for The Medicine Shoppe and Ascensia never went to an actual patient.

Ascensia employees filled the Okose narcotic prescriptions and placed the filled prescriptions in bags on a shelf at Ascensia. At the end of the day, Delmon Johnson gathered the drugs from the shelf and placed them in another, larger, container, such as a garbage bag. He then placed the drugs in his car. Ostensibly, Delmon Johnson was delivering the drugs to the Okose clinic. In fact, the Okose clinic did not distribute drugs directly to patients.

The Government's evidence will also show that the large cash payments Solomon made to The Medicine Shoppe and to STWC cannot be accounted for by his known legitimate income during this period.

Officer Kowal is a highly experienced narcotics detective in Houston who now works cases involving prescription narcotics and related substances. He will explain that Houston has a rampant problem with the abuse of prescription drugs, and in particular Hydrocodone (sold under the trade names Lorcet and Lortab), Soma, and codeine-containing cough syrup, known together as a "Houston Cocktail." Houston is a source city for these substances, and abusers travel to Houston from Louisiana and other places to acquire these drugs. Medical clinics throughout the city provide these drugs to "patients" after cursory examinations and without regard to the "patient's" medical need for the drugs. Patients pay in cash for their clinic visits, and they typically visit multiple clinics to acquire drugs. These drugs are also sold on the street at a considerable profit from either their retail or wholesale cost.

### **III. Discussion**

The United States opposes the Motion *in Limine* to exclude the expert testimony of Police Officer John Kowal. "Federal Rule of Evidence 702 permits a district court to allow the testimony of a witness whose knowledge, skill, training, experience or education will assist a trier of fact in understanding an area involving specialized subject matter." *United States v. Solorio-Tafolla*, 324 F.3d 964, 966 (8th Cir. 2003) (quoting *United States v. Molina*, 172 F.3d 1048, 1056 (8th Cir. 1999)). "Such a witness is regarded as an expert under the rule." *United States v. Jeanetta*, 533 F.3d 651, 657 (8th Cir. 2008) (citation omitted).

The jury will come to this case with little or no knowledge of how the drug world works, especially how prescription controlled substances are part of the drug world. To understand this case, the jury needs to understand that there are substance abusers who abuse prescription controlled substances, much like they do street drugs. The jury needs to understand that there are reasons why substance abusers seek out willing doctors, instead of just using street drugs. The jury has a right to understand how prescription controlled substances can give a “high” to substance abusers in a manner just like street drugs. The jury also should understand that prescription drugs are not only abused by the “patients” who obtain them, but are also sold on the street. Further, the jury should understand the price of prescription drugs in drug trafficking. Accordingly, testimony about how and why prescription controlled substances are diverted to the illicit market, and the methods of operation for drug traffickers in the Houston metropolitan area, is directly relevant and admissible.

As demonstrated in the Factual Background section, the Government will present an extremely strong circumstantial case that the narcotic and other drugs obtained by the Houston defendants from The Medicine Shoppe were not provided to patients, but instead were distributed on the street. In this context, the expert testimony proffered by the United States will allow the jury to understand the evidence within its full and proper context.

The United States anticipates that such evidence will be admitted through Police Officer John Kowal, an experienced narcotics investigator. *See United States v. Buchanan*, 70 F.3d 818, 832 (5th Cir. 1996) (stating that an expert witness can express opinions or inferences); *see also United States v. Sanchez-Galvez*, 33 F.3d 829, 832 (7th Cir. 1994) (“Expert testimony provides the trier of fact with an opinion about the inferences which may be drawn from a complex set of

facts”). “The business of drug trafficking and the modus operandi of drug dealers are matters unfamiliar to jurors.” *United States v. Robertson*, 387 F.3d 702, 704 (8th Cir. 2004).

“The rule is well established that an experienced narcotics agent may testify about the significance of certain conduct or methods unique to the drug distribution business, as such testimony is often helpful in assisting the trier of fact understand the evidence.” *United States v. Washington*, 44 F.3d 1271, 1283 (5th Cir.), *cert. denied*, 115 S. Ct. 2011 (1995). Narcotics officers routinely testify on these issues. *See Jeanetta*, 533 F.3d at 657-58 (explaining a police officer may properly testify regarding the significance of various items seized as they related to the world of drug dealing); *Solorio-Tafolla*, 324 F.3d 965-66 (finding district court did not err in permitting a police detective to testify about various aspects of drug trafficking, including (1) the price of drugs in drug trafficking; (2) drug conspiracies and roles of the drug traffickers; and (3) how methamphetamine is manufactured). “In cases involving narcotics trafficking, courts have admitted a broad range of expert testimony concerning the ‘modus operandi’ of the drug trade.” *United States v. McGlory*, 968 F.2d 309, 345 (3d Cir. 1992). Law enforcement agents have also given expert testimony regarding illegal pharmaceutical drug trafficking. *See United States v. Seelig*, 622 F.2d 207, 213 (6th Cir. 1980) (allowing a DEA Compliance Officer to testify to the routine practices of pharmacists and about the “value” of prescription drugs).

Officer Kowal’s testimony as an expert on drug trafficking will assist the trier of fact in understanding the business of prescription drug trafficking. “An individual can qualify as an expert by possessing knowledge gained from practical experience.” *United States v. Jordan*, 236 F.3d 953, 955 (8th Cir. 2001) (citation omitted). Officer Kowal worked in the Narcotics Division of the Houston Police Department for over 12 years, worked another 7-plus years

assigned to the Drug Enforcement Administration Tactical Diversion Squad, and worked a year assigned to HIDTA Squad Diversion Investigations. That is over 20 years of experience, training, and knowledge in the field of narcotics trafficking, thus satisfying the requirements as an expert under Rule 702 of the Federal Rules of Evidence.

Elder's reliance on *United States v. Street*, Nos. 07-2600, 08-2109, 2008 WL 5047643 (8th Cir. 2008), is misplaced. In that case, Street was charged by a three-count indictment with aiding and abetting the intentional killing of Douglas C. Weil in furtherance of a drug trafficking crime, aiding and abetting the intentional killing of Weil while possessing a firearm in relation to a drug trafficking offense, and aiding and abetting the killing of Weil. Street was found guilty of aiding and abetting the intentional killing of Weil in furtherance of a drug trafficking crime. *Id.* at \*1. At trial, the Government introduced evidence relating to Street's association with an outlaw motorcycle gang known as "El Forasteros." The jury heard evidence about the violent nature of the gangs, their tradition of misogynistic attitudes, brutal hazing practices, and El Forasteros' hostility towards snitches. *Id.* at \*10-\*12. However, Street was not, in fact, a member of El Forasteros nor ever had been. *Id.* at \*11.

In reversing the criminal conviction, the Eighth Circuit noted that "allowing such motorcycle gang evidence is reversible error." *Id.* at \*12. The Court went on to conclude that the gang expert's testimony "about outlaw motorcycle gangs and El Forasteros was excessive, unduly prejudicial, and in great part completely irrelevant to the charged offenses." *Id.* at \*13. The Court held it was not harmless error partly because the evidence of Street's guilt was a *swearing match* between Street and the government witnesses, and partly because a government



witness testified that Street had admitted to him that Street had taken a polygraph test and failed. *Id.* at 13-14.

*Street* is readily distinguishable from the instant case. In the present case, of course, the Government does not intend to offer evidence of gang affiliation.<sup>1</sup> Accordingly, the expert testimony in *Street* is in no way “the very type of testimony” being sought to be admitted in this case.

In the present case, by contrast, Elder and his co-conspirators stand accused of conspiracy to distribute and possession with the intent to distribute prescription drugs. The evidence at trial will show that Elder was involved in a prescription drug ring. The Indictment alleges that Elder wrote unlawful and invalid prescriptions for Schedule III, IV, and V drugs. Co-conspirator Solomon obtained the unlawful and invalid prescriptions from Elder and would send them to Co-conspirator Rostie at The Medicine Shoppe in Belton, Missouri. Co-conspirator Rostie filled Elder’s prescriptions and shipped numerous packages containing the filled prescription drugs to South Texas Wellness Center in Houston, Texas, addressed to Elder. The evidence will further show that numerous packages containing cash were sent *via* United Parcel Service from Houston, Texas, to Co-conspirator Martin, who resided in Belton, Missouri. Thus, that Elder knowingly

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<sup>1</sup>The other case relied on by Elder – *United States v. Eye*, 05-00344-01-CR-W-ODS – does not advance his argument. Elder stated that “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.” (Def. Elder’s Mot. *in Limine*, at 4.) In that case, the Government was not opposed to Judge Smith sustaining the motion *in limine* because the Government did not intend to present evidence regarding the gang affiliation of either defendant. The issue was moot.

tied himself to this criminal conduct is directly relevant, however damaging it may be to his position.

Elder's attorney informs this Court that "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." (Def. Elder's Mot. *in Limine*, at 5.) Officer Kowal's testimony is not intended to assist him. Rather, Officer Kowal's testimony will assist the trier of fact.

#### **IV. Conclusion**

For the foregoing reasons, Defendant Elder's Motion *in Limine* to exclude the expert testimony of Houston Police Officer John Kowal (Doc. 169) should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on January 28, 2009, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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