

**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’S OBJECTIONS TO THE MAGISTRATE’S  
R&R RECOMMENDING DENIAL OF DEFENDANT’S MOTION TO  
SUPPRESS LAY HANDWRITING ON THE BASIS THAT IT WAS  
OBTAINED IN VIOLATION OF THE 5<sup>TH</sup> AMENDMENT DUE PROCESS  
CLAUSE WITH SUGGESTIONS IN SUPPORT**

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Defendant concedes that the Magistrate Judge has properly and fairly framed the legal issue before the Court and that the factual recitation in the R&R is a reasonably fair representation of the testimony presented at the hearing. Defendant argued in his motion and to the Court that the DEA had the capability, time, and expertise to show the witness a “handwriting lineup” but failed to do so and that the alternative procedure employed was unduly suggestive.

Defendant submits that it is indeed correct to look to *Neil v. Biggers*, 409 U.S. 188 (1972), the case cited in the R&R and relied on by defendant in his motion, and use it as a guidepost in determining whether the procedure employed was overly suggestive and whether something else could have been done that would ultimately ensure a fairer procedure at trial. The Magistrate suggests that because such identification is permissible and admissible at trial under Rules 701 and 901, and the government is not going to rely on the out-of-court identification that there is no issue. Defendant does not agree and submits that the totality of the circumstances call for suppression under *Neil v. Biggers*.

Not adequately addressed is the concern by defendant that in court this witness will be shown a number of copies of prescriptions that were sent by facsimile to Kansas City from someone other than Doctor Elder and that she will then be asked to opine as to the signature on these. Add to the mix the fact that it is impossible to determine whether these faxed documents were in fact faxed using an original in the fax machine as opposed to a copy which, if the latter, would mean they are, as a minimum, a copy of a copy which may also have been a forged or altered “cut and past” document.<sup>1</sup>

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<sup>1</sup> A little over a week ago defendant was provided with an additional 46 interviews of patients of Doctor Peter Okose. These patients obtained original prescriptions from the Doctor and had them filled at various locations in Texas. Not a single interviewee has heard of the Belton Pharmacy or authorized anyone in Texas to fax prescriptions to Missouri clearly suggesting that the faxes of prescriptions written in these patients’ names

If this were simply a matter of Hearn being show an original writing authored by Elder in Court the matter would be less troubling and obviously admissible testimony under the Federal Rules of Evidence. The problem here is that even forensic experts are hesitant to identify handwriting appearing on photo copies or faxes. Realizing that Hearn was going to be asked to identify documents of questionable reliability and authenticity, minimal due process required under these unique facts that the agents test her ability to identify Elder's handwriting through the use of a lineup procedure akin to photographic lineups, something they admittedly had the capability to do. By failing to do so, contrary to the Magistrate's conclusions, her in court testimony is irreparably tainted and the out-of-court identification should be suppressed and she should be disqualified from offering any such opinion at trial.

WHEREFORE, defendant files his objections and moves the District Court, after further review, to grant his original motion in full.

Respectfully submitted,

/s/

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were themselves **Note 1, Continued:** generated from unauthorized copies made by someone in Texas. Duplicate faxes of these Okose prescriptions were filled in Missouri and shipped back to Texas to the Texas Wellness Center (TWC), which is co-located in the same building as Ascensia Pharmacy. Dr. Elder worked part-time at TWC in 2004. These scripts were issued in 2005.

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#### 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, May 01, 2009.

/s/

JOHN R. OSGOOD