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

UNITED STATES OF AMERICA,	**Case No. 08-00026-04-CR-W-FJG**
Plaintiff,	**Kansas City, Missouri**
	June 4, 2010
v.	
CHRISTOPHER ELDER,	
Defendant.	

TRANSCRIPT OF *DAUBERT* HEARING
BEFORE THE HONORABLE SARAH W. HAYS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	J. Curt Bohling, Esq. Rudolph R. Rhodes, IV, Esq. AUSA 400 E. Ninth St., Ste. 5510 Kansas City, MO 64106 (816) 426-3122
For the Defendant:	John Osgood, Esq. 740 NW Blue Pkwy, Ste. 350 Lee's Summit, MO 64086 (816) 525-8200
Court Audio Operator:	Ms. Bonnie J. Rowland
Transcribed by:	Rapid Transcript Lissa C. Whittaker 1001 West 65th Street Kansas City, MO 64113 (816) 822-3653

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

(Court in Session at 9:32 a.m.)

THE COURT: Good morning.

MR. BOHLING: Good morning, Judge.

MR. OSGOOD: Good morning.

THE COURT: All right. We're here on the case of *United States vs. Christopher Elder*, Case No. 08-26. If counsel would state their appearance, for the record.

MR. BOHLING: Curt Bohling and Rudolph Rhodes for the United States.

MR. OSGOOD: John Osgood on behalf of Dr. Elder, who is present, Your Honor.

THE COURT: All right. Before we get started, I just want to get a couple of preliminary matters. I think probably all parties were copied on some e-mails that I had back and forth with counsel for Mr. Solomon. And the dispute really was he claimed not to know that we had this proceeding set today. And, at least in my view, it was really, really clear since May 7th that we've had this set today, both of the proceeding this morning and the afternoon. So, ultimately how it was resolved is he indicated he would not participate, at least that was my understanding, in this morning's proceeding, and he asked to participate by phone this afternoon. He had pending Document No. 238, which was a request to join in and participate in your *Daubert* motion, Mr. Osgood. So, my view is that basically is moot since he had more than a month's notice -- well, a month's

notice roughly and chose not to be here today.

MR. OSGOOD: I'm just an interested observer in all this, Your Honor. I have no dog in the fight.

THE COURT: No. And I understand that.

MR. OSGOOD: Okay.

THE COURT: But -- so that was kind of the first point. And I do have the motion and the Government's response obviously on the *Daubert* issue. And let me just state for the record, while the Government indicates that, in their view, a *Daubert* hearing is unnecessary citing in part the *Kenyon* case. As the Court noted, in that case when the court's satisfied about the expert's education, training, experience and that the testimony is related to that, then you don't need to have a hearing. And I think the difficulty is at this point there seems to be a huge conflict in the briefing as to what the testimony would be and then there was just simply statements that the officer had extensive training and experience. So, unfortunately, it's the Court's view that just based on the pleadings in this case, it wasn't able to make that preliminary determination and hence, we're here for the hearing. Now, I know that the parties had had also some disputes about the designations. And I just want to make sure that I understand where we're headed. I have been provided with a copy of Mr. Kowal's *Curriculum Vitae*. Does the Government have then a copy of whatever expert designations you've given to Mr. Osgood? Do you have those with you?

MR. BOHLING: No, I don't have them with me, Your Honor.
MR. OSGOOD: I do, Your Honor.
THE COURT: Okay.
MR. BOHLING: They're filed in the record.
THE COURT: Okay. I just wanted to make sure we had those in front of us as we -- you know, those ought to be kind of guiding the testimony and making sure the testimony --
MR. BOHLING: Right.
THE COURT: -- is in accordance with those designations.
MR. BOHLING: All right.
MR. OSGOOD: Is that it?
MR. BOHLING: Okay. I'm sorry. Mr. Rhodes is actually getting it.
MR. RHODES: Yes.
MR. OSGOOD: And that was sort of taken right from the pleading.
MR. BOHLING: Okay. Okay. Yes. I -- yes. I think we're on the same page, Your Honor. Well, we have --
THE COURT: Because my understanding is then there had been an initial designation and then maybe a supplemental --
MR. RHODES: A supplemental was filed.
THE COURT: -- supplemental designation.
MR. RHODES: Yes.
THE COURT: And I wanted to make sure that I had both of those.

MR. OSGOOD: These are documents that I have, Your Honor.

THE COURT: All right. And would you like me to have copies of these made so we call have them?

MR. OSGOOD: If we'd all have a copy, yeah. That's what I've got.

THE COURT: Okay. Let me just --

(Off Record Talking)

MR. OSGOOD: There is a third document which was quoted in my pleading, which was just like five lines of his C.V. that I don't -- didn't print out.

THE COURT: Okay. But this is what you've been given by --

MR. OSGOOD: Supplemental, yes.

THE COURT: Okay.

MR. OSGOOD: Yeah.

THE COURT: All right. We'll get copies of those made hopefully here. We'll send an e-mail to somebody to come in and get these. All right. With that, does everyone have a plan? I assume, Mr. Bohling, you want to put your expert on to kind of outline his experience and opinions?

MR. BOHLING: Yes, Your Honor. That's --

THE COURT: Okay.

MR. BOHLING: We're ready to go.

THE COURT: All right.

MR. BOHLING: Are you ready to begin?

MR. OSGOOD: Yeah.

MR. BOHLING: The United States calls John Kowal.

THE COURT: All right. Come forward and be sworn.

JOHN KOWAL, GOVERNMENT'S WITNESS, SWORN

THE COURT: Have a seat there.

DIRECT EXAMINATION

BY MR. BOHLING:

Q. Good morning, sir.

A. Good morning.

Q. Would you please state your name and spell your last name?

A. John Kowal, K-O-W-A-L.

Q. How are you employed?

A. A Houston Police Officer.

Q. What is your current duty assignment with the Houston Police Department?

A. I'm currently assigned to the Houston Police Department Narcotics Division.

Q. What is your current job title?

A. I'm an investigator in a Drug Diversion Unit of the Narcotics Division.

Q. If you would take a look, you should have Government's Exhibit #1 with you.

A. Yes, sir.

Q. Can you identify that for the record, please?

A. Yes, sir.
Q. It's basically my bio and my training and experience in the Houston Police Department with the education and training that I've received.
MR. BOHLING: Your Honor, I would move Government's Exhibit #1 into evidence for purposes of the hearing.
MR. OSGOOD: No objection.
THE COURT: All right. Government Exhibit #1 will be admitted.
BY MR. BOHLING:
Q. Officer Kowal, where did you go to college?
A. I went to the University of Illinois at Chicago.
Q. Did you receive a degree?
A. Yes. I graduated with a Criminal Justice degree in June of 1982.
Q. After graduation, where did you go to work?
A. I went and I entered the Houston Police Academy in September of '82.
Q. So, you've been with the Houston Police Department from September 8, 1982, until the present?
A. That's correct.
Q. Can you please describe for us what your various job titles and postings have been within the department during that time?
A. I graduated from the Houston Police Academy in January of '83. And upon graduation, I was assigned to a patrol unit where

I was under the guidance, supervision and training of a Field Training Officer. After passing that, I stayed on a probationary period until one year, which would be September of '83. Once you're off probation in September of '83, you're eligible to basically ride by yourself at a patrol station. I was assigned to a night shift patrol station in the Central District until approximately of December of '86.

Q. And after -- in December of 1986, did you apply to become a member of a specialized division of the force?

A. Yes. In December of '86, I applied and was selected to the Houston Police Department Narcotics Division where I have been sentenced.

Q. And did you develop a sub-specialty within the Narcotics Division?

A. Yes, sir, I did. Once assigned to the Narcotics Division, again, you're assigned to basically a senior officer where you perform a variety of functions, whether they be administrative, street level type narcotic enforcement, which would be used to buy bust, street level buys. And then after that I was assigned to a -- after completing that, I was assigned to a Pharmaceutical Investigation Unit.

Q. What were your duties with the Pharmaceutical Investigation Unit?

A. We investigate the version of illicit drugs, namely pharmaceuticals for illicit purposes. That encompasses anything

and everybody that may have or is issued a medical license, a pharmacy license, a DEA or Texas Department of Public Safety Registration Number. It also may include theft of prescription drugs, fraudulent prescription cases and anything to do with pharmaceutical drugs.

Q. In October of 1999, did you receive an additional assignment?

A. Yes. In October of '99, again, I was selected and accepted into a Tactical Diversion Squad, a TDS, of the Drug Enforcement Administration based in the Houston office.

Q. What does the Tactical Diversion Squad do?

A. We did basically similar type of investigations, mostly of an upper level variety. I spent approximately -- I was -- I think approximately six or seven years in that particular unit at the -- based out of the Drug Enforcement office in Houston.

Q. In January 2007, did your assignment change again?

A. Yes. In January of 2007, the City of Houston, namely the police department and the political powers, noticed that there was an up-tick or a trend in drug diversion, the use of pharmaceutical drugs not only by middle-aged people, but filtering down to the middle school level, and they wanted a unit formed to address those concerns as far as why there were more overdose deaths, why there were more prescription drug driving-type accidents. So, they took five officers, one supervisory sergeant and a Drug Enforcement agent and based them out of the Houston Police Department to address local pharmaceutical issues

in the City of Houston.
Q. And you are -- you have served as one of those officers?
A. Yes, sir.
Q. And are you still in that assignment today?
A. Yes, sir.
Q. During your time in the Houston Police Department, how many arrests, in just diversion cases, have you made?
A. I would have to quantify it by hundreds of arrests over time.
Q. And have you been involved in search warrants in diversion cases alone, and how many over that time?
A. Numerous search and arrest warrants, and I'd have to still quantify it by hundreds.
Q. Have you been involved in the seizures of diverted pharmaceutical drugs during your time on the force?
A. The seizures have ranged from anything from a small amount of pills up to hundreds of pounds of prescription drugs that we seized on search and arrest warrants.
Q. How often are you involved in seizures in your job?
A. Almost daily.
Q. Have you received specialized training in the area of drug diversion as part of your duties with the Houston Police Department?
A. I have, sir. Within the Houston Police Department each year we're assigned to go to basically a 40-hour in-service training school, and then an additional 24 hours of in-service training

for specifically narcotic-related matters. Part of that training every year has to be what we call a legal update course on the legal trends or what the new narcotics laws are, specifically involved to pharmaceutical drugs. I've also attended a DEA-sponsored two-week academy in Quantico, Virginia. I've also attended a DEA state and local diversion school in Houston, Texas, sponsored by and provided by the Drug Enforcement Administration in Houston, Texas. I've attended numerous conferences and seminars, workshops put on by the National Association of Drug Diversion Investigators, known as NADDI.

Q. Have you attended any training put on by the Texas Department of Public safety?

A. I had also attended a school in Austin, Texas, where the Texas Department of Public Safety is located, in regard to diversion training.

Q. Do you have teaching duties that you partake in related to diversion and diversion issue?

A. I'm requested when -- when a request comes in to present at a local school, peer group, pharmacy group, medical group, I'm the one who's asked to go. And I've also for the last probably 15 years go to the University of Houston School of Pharmacy and do a two-hour block of instructions on the latest pharmacy trends, diversion trends in the Houston/Harris County area.

Q. Have you served as a contact resource for doctors in the Houston area?

A. Yes, sir. I'm also -- my name and contact phone numbers are supplied for the Harris County Medical Society. If there is an issue that one of their doctors, it's an organization of most doctors in the Houston/Harris County area. My name and contact phone numbers are listed with them. If they have a question in regard to any type of diversion, pharmaceutical diversion issues, I'm placed in contact with them.

Q. And what kind of issues are referred to you through that contact?

A. They may range from anything from fraudulent prescription cases, to cases involving theft by employees, to cases involving doctors may think one of their peers may be impaired and diverting drugs, anything.

Q. (Pausing). Sorry. During the course of your investigations, do you talk to people who are involved in the diversion of pharmaceutical narcotics?

A. Due to my job title and my instructions within that job, I do, on a constant daily basis, deal with people that are involved in drug diversion. Whether they would be loss prevention officers or major pharmaceutical companies or drug store chains, to doctors, to heads of hospitals, security officers for hospitals, doctors and their office managers. It's a constant on a daily basis.

Q. And what kind of cases do you investigate?

A. At the Houston Police Department, we investigate anything and

everything that a citizen of Houston may, number one, call in and complain about in regard to pharmaceutical drugs, whether it's a theft or loss, whether it's a pharmaceutical or whether it's a fraudulent prescription case, whether it might be an overdose case associated with drugs, whether it's a drug driving case where a person may be suspected of taking some type of pharmaceutical drugs and a death may occur from that, all the way up to proactive investigations where we may do regular narcotic investigative techniques. The use of confidential informants, the use of background record checks and things like that.

Q. Officer Kowal, could you define the term "diversion" for us or "drug diversion," specifically?

A. The way I define diversion is you take an illicit drug, which is a pharmaceutical controlled substance or dangerous drug that we're all basically aware of that comes from a pharmacy. And then what happens is, when a person takes that, not for their legitimate medical purpose or a purpose other than what it was intended for, whether they're -- and how they got that drug, whether it was diverted or taken away from the regular supply chain through illicit means, it may be fraudulent prescriptions, it may be theft, it may be doctors that have issued prescription for non-legitimate medical purposes.

Q. And so these drugs are actually sold on the street like other drugs that we would think of such as cocaine and heroin?

A. Right. Once the drugs are removed from their legitimate

medical needs, by, like I say, theft, fraudulent prescriptions, doctors' indiscriminate prescribing habits, they enter the illicit drug chain. It's like you would think of cocaine, marijuana or heroin. Even though they're inherently legal drugs to possess, once you get them for their unintended purposes, then they are bought and sold just like any other illicit commodity.

Q. Have you heard the term "source city"?

A. Yes, sir.

Q. What does that term mean?

A. Source city, when you think of a source city, you would think of an area, a geographical location where the supply of these drugs is rampant or very prevalent and usually shipped out to other locations within the country or geographical zone around that area.

Q. Is Houston known as a source city for diverted prescription drugs?

A. Yes, it is.

Q. And are there any reasons, that you're aware, of why that has occurred?

A. The reasons why Houston is a major source or supplier of diverted prescription drugs to the illicit market has a number of factors. Number one being Houston has one of the world's largest medical centers in the area. If you're familiar with St. Luke's Medical Center, the Heart Institute, the MD cancer center, this attracts a lot of doctors, nurses, physician's assistants all

over the country, all over the world, that come to employment for Houston. With that, are spinoffs of the pharmacies, the drug manufacturers, the wholesale that have to supply that chain. We have a large amount of people that are medical professionals living in the Houston/Harris County area.

Q. Is there also a factor that has to deal with the weather in Houston and the population of folks who live there because of the weather?

A. The population of Houston basically, you would consider it a warm weather climate. We have a large homeless or indigent population. Mixed in with that would be some mentally handicapped or challenged individuals that are basically left on the streets of Houston.

Q. And how does this population contribute to Houston being a source city for narcotic drugs?

A. Houston, in the Harris County area, one of the biggest things that have proliferated lately is the use of pain management clinics or wellness centers where a person would open up a clinic or a pain management center. They would get what we call recruiters, would go to downtown areas, underneath the bridge, the homeless shelters where you would typically see the homeless population. Recruit these people and take them to these pain management/wellness clinic centers where they would be given a little or no medical exam and then be issued a prescription for controlled substances.

Q. And once they're issued that prescription, what do they do with it?

A. Once the homeless, unemployed, mentally challenged population is recruited and taken to these clinics, then they are directed to a specific pharmacy to get those prescriptions filled. Whether they're getting a -- given a hard copy of a prescription like you would typically see from your doctor or whether that prescription is sent via fax to a specific pharmacy that corresponds with that pain clinic.

Q. Once the person actually receives the prescriptions, what happens to the prescription at that point?

A. The person would go to the directed pharmacy. It has to be a specific pharmacy, because not all pharmacies that you would think of, like your major chains, your CVS, Kroger's, Walgreens, your major food stores, will fill the prescriptions for these clinics. So, they will go -- the recruiter, what we would say, who usually gets about $5 to $10 a person to recruit these people, we'll provide the money for the persons to go into the directed pharmacy. Once they get their prescriptions filled, that particular population or the persons would come out and give their, what we call, quote/unquote, the bag, which would contain the controlled substances from the pharmacy to their recruiter. Those persons are usually paid a small amount of money, usually $20 to $25 for their time. And then usually given like a fast food meal.

Q. So, the person who actually went to the doctor and received the prescriptions actually keeps none of those medications and gives them all to the recruiter?
A. That's correct.
Q. Okay. And what happens? What does the recruiter do with those medications?
A. The recruiter will gather up whatever his number of persons that he had going to the clinic and the pharmacy that day, usually in groups of four to ten, to acquire all those prescription bags and he'll take them. He now is responsible for those to give them to the person that paid him to go do this today. And that's -- once they're given to that person, they're now what would be considered diverted to the illicit drug market.
Q. And if I could focus you back on the clinics that you were talking about. Typically do these clinics charge a fee for an examination?
A. The clinics that we're talking about that these persons go to usually charge a cash fee. And it's only cash. It's not credit card, it's not insurance usually, it's not Medicaid or Medicare. And it begins, a round number would be $75 to maybe $100 per person per visit.
Q. Now, in the cases of people who are recruited to go into the clinics, who pays that fee?
A. The person or what we would call usually patient, is provided money by his recruiter to pay for that, being that they're

homeless or employment, mentally challenged. They usually don't have their own money. The person provides it for them.

Q. And so the payments are then made in cash by all the patients seen by the clinic for pain management purposes?

A. Correct. The majority or all of the ones that we've worked on recently have been only cash and cash only, no credit card, no insurance is filed.

Q. Now, in addition to people who are recruited from the street to come in, are there other people who go into the pain clinics?

A. Due to the way that Houston is configured on the Gulf Coast with the area as far as major interstates going through, Interstate 10, namely, coming from Louisiana, due to Louisiana has a little bit stricter laws in regard to what we would call patient-doctor shopping, we get a large amount of people that would come from Louisiana to do the same thing.

Q. And are there people from other states who come into Houston that --

A. We have documented and we have pictures, videos of clinics where there is cars from Arkansas, Alabama, Mississippi, Tennessee, that will drive all night, usually in a group of four or five to a vehicle and come to these same -- similar type of clinics.

Q. Now, with regard to the major issue in Houston right now, in terms of diversion, what are the -- what are the drugs of concern?

A. The most popular drugs that are currently being diverted in Houston in regard to pharmaceuticals that are causing us the most problems and have taken over for regular drugs like cocaine, heroin or marijuana, are hydrocodone. Sold under the trade name of, you might think of Vicodin, Vicodin extra strength, Lortab, Lorcet. Second would be alprazolam, which you would know under the anti-anxiety drug of Xanax. And the third most popular one would be carisoprodol, which is also known as Soma. And also there's one more, it would be promethazine or Phenergan with codeine cough syrup. That's a controlled substance. That's the top four drugs diverted into Houston.

Q. And is there a name that's been applied to these combination of drugs?

A. In Houston, it's been well-document, both in video, TV, news reporting, newspaper reporting, reports done by local investigative journalists on local papers that it's known as the prescription cocktail.

Q. Are these drugs usually or is it typical that you'll find them on a prescription together?

A. These particular drugs, when the people go to these pain clinics, that is what they're always issued, a combination of those basically three to four drugs that I've just described.

Q. Now, you've described to us one method of diversion, which is people going to pain clinics and then providing the drugs back to a recruiter. Are there other methods for diverting

pharmaceutical drugs to the street that you've seen in your experience in Houston?

A. Yes, sir. There's a variety of methods that they use -- are for drug diversion. One would be theft like you would think of, just a regular theft from your retail outlets, whether it's a pharmacy or drug manufacturer or a wholesaler where there -- the business is burglarized and drugs are stolen. Along with that theft would be an employee theft or pilferage, where an employee of a pharmacy or a wholesaler or a supplier would steal drugs. You would also have fraudulent prescriptions, whether they would be a patient that maybe alters a prescription, a legitimate prescription that was issued by a doctor, which may include changing the quantity, say, from like a 10 to a 60. Adding refills, maybe the prescription was for no refills. They add refills. Or it may be as complicated as a fraudulent prescription ring where a group of individuals or maybe one person may compromise a doctor's DEA and DPS number, manufacture prescriptions, and they're in an illicit manner and basically recruit people to go pass those prescriptions. Another way would be that we have with young children is when they would basically steal or go through maybe a parent's or a home medical cabinet and get prescription drugs. But our biggest problem right now would be the indiscriminate prescribing of prescription drugs by doctors in the Houston area.

Q. Now, once these drugs are diverted to the street, can you

describe to us what the chain of distribution is for this kind of drug?

A. Like I said earlier, once the recruiter basically turns the drugs over to a person, and I would call that person a drug dealer, because that's all he is. He would sell those drugs. Now, you can do them just like you would any other drug, you can sell them in low quantity as much as four or five, 10 tablets to an individual person were they may range from, you know, $2 to $3, maybe $3.50 a tablet up to this person may be a major supplier, just like you would think of a major supplier of prescription drugs to a person in Louisiana where they would sell 1,000-count quantities of drugs, and we have arrested those type of, and done undercover investigations where we would purchase quantities of prescription drugs in that amount.

Q. So, the drug distribution chain would look very much like the drug distribution chain for cocaine or heroin or other illegal drugs?

A. Exactly similar in the sense that it's all going to be basically local. You have illicit commodity that's manufactured and approved by the United States. And then once it gets into the diverted chain or that illicit chain, then it's all usually done by local distributors or local criminals in Houston.

Q. You mentioned a price per pill. So, just for a typical hydrocodone tablet, how much would that fetch on the street?

A. In today's market, if you were just going to buy an

individual quantity of prescription drugs, and they're rampantly sold throughout Houston, you can -- if you're just going to buy, you know, say 4 to 10, 15 tablets for your own consumption, you can plan on spending $3, $3.50, maybe on the high side $4 per pill. Now, like any other commodity that's sold that we're used to dealing with like prescription -- like cocaine, heroin, the more you buy, the better break you're going to get. And they may go as low as $2.50, $2.75 a tablet or so.

Q. And how much was that price back in the 2004-2005 time frame?

A. In the 2004 to 2005 area, when the pain clinic or when the indiscriminate prescribing practices of doctors really took off, for the hydrocodone to Xanax, you were looking at about $2 to $3 a tablet.

Q. So, I take it the Xanax and Soma can also be sold on the street?

A. Yes, sir. They go along with it.

Q. Now, is there a particular -- is there a particular appeal on the street to prescription drugs that makes them somewhat different than more traditional illegal drugs like cocaine?

A. If you think of prescription drugs, inherently they are legal. We've all read the papers, local TV reports about movie stars, pro athletes, high-profile individuals, whether it was like the Governor of Florida's daughter years ago that got arrested for a prescription drug problem, what we don't know is it encompasses a vast majority of people, and it's one of our

biggest problems today, all the way from the middle age to the middle school people. The reason being is because people basically think that it's not illegal, number one, because it's manufactured and provided here in the country. You can get it through a legitimate means by prescriptions, so it doesn't have the same stigma that you would think of cocaine, methamphetamine or heroin, but it's used in the same manner, an illicit manner.

Q. Does the standardized production and packaging of these drugs help in their distribution on the street?

A. When you think about cocaine or heroin or methamphetamine, if you were going to buy it on the street or crack, you don't know what you're getting. You're hoping you're getting cocaine, methamphetamine or heroin. But when you buy prescription drugs, and that is one of the biggest lures of prescriptions drugs, is you know what you're buying. These drugs are particularly stamped. Say in the case of hydrocodone, the Watson brand, Watson 503, which would be considered a hydrocodone 10/650 milligram tablet or Watson 540, which is a 10/540 or a Dan, which is D-A-N, the manufacturer of Soma, 55/13. Every prescription controlled substance has to be stamped or imprinted with a number. So, when it's sold or when you take it, you know what you're getting. You know that that strength is going to be consistent because the manufacturers make it so. You know what that Xanax table, a 2 milligram Xanax tablet, you know what it's going to be all the time. You don't have to worry about whether

you got ripped off or whether that cocaine or heroin has been cut or diluted. You know what you're buying.

Q. When diverted pharmaceutical drugs are sold on the street, are those transaction usually in cash?

A. Yes, sir. Just like any other illicit transactions, they're done by cash.

MR. BOHLING: That's all the questions I have for Officer Kowal. Thank you.

THE COURT: All right. Thank you.

MR. OSGOOD: As a predicate matter, Your Honor, I am not clear in my mind what opinion he's going to offer that is relevant to this case. I mean, I can't quarrel, although I've got some cross-examination about the validity of what he's testified to here. He sounds like he's pretty well qualified to testify what he just testified to. I don't see the connection between his testimony, and this is what I discussed in my motion, and this case. I don't see any direct link. These prescriptions were filled here and sent by fax back to Ascensia. The trail ends there. I'm gleaning from his testimony they're trying to make a giant leap here to say all of this must have occurred in this case because they don't have any further trail.

THE COURT: Well, let me ask --

MR. OSGOOD: Now, that becomes very prejudicial.

THE COURT: Let me ask this question, Mr. Bohling. I mean, will you have evidence in this case that recruiters were

involved? I mean, there was a lot of testimony, if you'll recall, about how they recruit people and they pay them and how all of that works.

MR. BOHLING: Not directly. Our conspiracy is what would have fallen under the description that Officer Kowal gave of a falsified prescription conspiracy. And the -- and I understand the point that you're making. I think the clinics do figure into our evidence in a rather important way, because there are two clinics involved in this case that would pretty much fit the description that Officer Kowal has given. Actually more than two probably, ultimately. But two that are involved in a very important way. And we believe that for the jury to come -- understand the entire context of this case, it is important to understand the clinic system in Houston and how it's grown up and how it works.

THE COURT: And which two clinics will you be talking about that you've --

MR. BOHLING: South Texas Wellness Center, which is where Dr. Elder worked at the time of the beginning of the conspiracy. And then Dr. Okose's clinic. Do you remember the name?

MR. RHODES: Universal Medical.

MR. BOHLING: Universal Medical Clinic. That's our unindicted co-conspirator, Dr. Peter Okose, in that clinic.

THE COURT: And will you be offering testimony, not just

that these two clinics were involved, but that these two clinics used this method of recruiting people, cash payments, you know, that type of thing?

MR. BOHLING: Well, it's not that -- not directly as to recruiters, no. Yeah. Right? That's correct. And I see the Court's point. And we may need to -- it may be appropriate to cut down that part of the presentation or to eliminate it because it may not be directly relevant to the case. So, we presented it more out of just to give the Court a sense of what the whole picture is. And I still think it could be relevant at trial, and that's something we might bring up with Judge Gaitan. But I guess I would say this. I understand your point and I think that we would tell the Court and Mr. Osgood that our initial thought right now is we'll cut the presentation down so that Officer Kowal does not talk directly about the recruiters. And only if it became relevant in the evidence, and it probably won't, I don't think it will, would we seek to have that kind of testimony admitted.

MR. OSGOOD: See, what I fear most is the ultimate issue question of in your opinion Officer Kowal, based on your review of the investigative reports in this case, do you have an opinion as to whether or not these clinics were, in fact, engaged in this recruiter-type conspiracy and that these drugs were obviously put out on the street, because there's no other explanation for what happened to them.

THE COURT: Well, let me stop you right there. I mean, I guess that if you had specific opinions you were going to ask of this witness, I would expect you to do that in this proceeding, so we could address that concern.

MR. BOHLING: Indeed. And no. I've asked him pretty much what I would ask him at trial. I think that question creates an appellate issue.

MR. OSGOOD: I do too.

MR. BOHLING: And I'm very careful, as John knows from prior trials together, I'm very careful not to ask questions like that.

MR. OSGOOD: Okay.

MR. BOHLING: And the importance of his testimony is really informational. I think that the jury, and if I might address perhaps briefly Mr. Osgood's point, I believe our evidence does go much further than Mr. Osgood has indicated.

MR. OSGOOD: On the other defendants, I agree.

MR. BOHLING: Well, it is a conspiracy. What the evidence will be is that there are basically two sources of pharmaceutical drugs for diversion here. One is from the Medicine Shoppe in Belton and the other is from Peter Okose. While I guess there are two doctors and they go to the Medicine Shoppe. Back up. There are two clinics involved that are supposed, that ostensibly are supposed to be receiving the drugs from Missouri, South Texas Wellness Center and Dr. Okose's

clinic. We will have evidence in both cases that those drugs that came from Missouri to Texas did not go to patients.

THE COURT: I'm sorry, what?

MR. BOHLING: That those drugs did not go back to patients. We will have evidence that the prescriptions that are written are fraudulent. They're duplicative of real prescriptions that are written to real patients, but these prescriptions never went back to the patient. They're entirely duplicative. Some of them are written for dead people, people who were dead at the time the prescription was written. So, we will have evidence that all the prescriptions that went to Missouri essentially are fraudulent and do not represent any real doctor-patient relationship, and that their whole purpose from the beginning was to generate drugs purely for diversion purposes. We will have evidence that the drugs did not go back to either clinic, to any patient, either Peter Okose's clinic or Dr. Elder's clinic, and we will have evidence for Troy Solomon's part that he generated tremendous amounts of cash, I mean, hundreds of thousands to a million dollars during this time period that is unaccounted for, that is not from his legitimate business and is not on his tax return. So, we're going to show that basically that the cash coming back from the sales.

THE COURT: Well, let me ask you this. Is it your position that the prescriptions you're going to be talking about at trial are all prescriptions that you allege were faxed or

somehow sent to Missouri and then the drugs were filled at the Medicine Shoppe and returned to one of these two clinics?

MR. BOHLING: That's the main part of it. I think we're going to have some §404(b) potentially as to some other prescriptions from Dr. Okose.

THE COURT: Okay. But they --

MR. BOHLING: Because they were running two -- they were running a scheme with Dr. Okose at the same time where they were doing the same thing. They were filling fraudulent prescriptions in Houston once the A&P Pharmacy in Houston got established, which was a little later on in the conspiracy period.

THE COURT: But you're saying that would be §404(b)?

MR. BOHLING: Yes, ma'am.

THE COURT: All right.

MR. BOHLING: We did not indict him.

THE COURT: But focusing just for a minute on the allegations, you know, of this conspiracy, I guess one of my concerns would be -- and maybe I missed it, we'll have a transcript made of this proceeding. But when he talked about all the different ways in which prescription drugs get to the illicit chain in Houston, he really didn't talk about the idea of sending prescriptions out of state and having them filled. He's talking about, you know, how you get people to go into these pharmacies that are designated, that the recruiter will pay the cash and they'd go into these pharmacies.

MR. BOHLING: Right. No. But he did -- he did --

THE COURT: And I guess I'm just wondering what that has to do with this?

MR. BOHLING: I'm sorry. He did talk about fraudulent prescription schemes, and this is a fraudulent prescription scheme. It's a variation on a theme of a fraudulent prescription scheme, and it's not one -- it's probably, it may be unique, honestly. I don't know that -- and I think I've asked Officer Kowal, and I don't know that he's seen one quite like this before. But I think the important point here that's crucial to the jury's understanding of the evidence is essentially that there is a huge market for diverted pharmaceutical drugs in Houston. And then, of course, how much those drugs sell for on the street, how they're distributed. That's the piece that the jury will not understand without Officer Kowal's testimony. That's absolutely crucial. And I do think that the scheme that we have indicted falls very much into what Officer Kowal has described as a false prescription scheme. It's just of a bit of a variation on that theme, not one that you would usually see, I'll grant. It was quite ingenious, actually. But it certainly is within the number of that type of scheme.

MR. OSGOOD: And that, of course, I think, is my point. He talks about Houston being this big source city for drugs, and yet they come to Kansas City to get their drugs. If Houston is such a big source city, why didn't they get them there. And so

that's prejudicial to talk about all this Houston source city and all of this. They came from Kansas City and were shipped by FedEx back to this South Texas Wellness Center in which Dr. Elder was employed for a mere four months as a physician. The packages were actually signed for by employees of the South Texas Wellness Center. The doctor there that owns that center is a chiropractor and the packages were picked up by Mr. Solomon or Mr. Johnson and taken down the hallway. And Dr. Elder is going to deny that he ever received one of those packages or was on that end of the chain. The chain ends there with the exception of one witness, I believe, who will testify that on occasion she saw Mr. Johnson take a garbage bag with -- a ten-gallon garbage bag, I think, with items in it and would take them out in the evening in his car and put them in his car. The trail ends there. So, we've -- I have some questions that might amplify some of this, if I may, Your Honor.

THE COURT: Yes. And I do think, you know, we ought to keep our focus on though even --

MR. OSGOOD: Sure.

A: -- on the cross-examination to these issues that we've been talking about.

MR. OSGOOD: Yeah. I'll save my nasty cross-examination for the trial.

CROSS-EXAMINATION

BY MR. OSGOOD:

Q. Officer Kowal, you sound very well-qualified to me in terms of what you do. Let me ask you this. Do you have an Intelligence Unit with the Houston Police Department?
A. Yes. We have several research and analysis squads.
Q. All right. One of the things I would assume you do is you try to work back up the chain much like the ATF would work a gun case. You got a gun with a number on it, you go back and look and see where that gun has been over the course of time, right?
A. Correct.
Q. Now, you say that typically the runner, or what would you call the guy, the --
THE COURT: Recruiter.
BY MR. OSGOOD:
Q. The recruiter would gather up the prescription bags in the bottles themselves?
A. Correct.
Q. Have you arrested over these many hundreds of cases any recruiters in possession of those bags?
A. Yes, sir.
THE COURT: And let me just say, we've been having some sound issues.
MR. OSGOOD: Okay.
THE COURT: So, if you don't mind staying by a microphone, we would appreciate it.
MR. OSGOOD: Yes.

BY MR. OSGOOD:

Q. Have you arrested those recruiters? How many times do you think you've arrested recruiters with actual possession of those drug vials?

A. Numerous. We do it on a daily, weekly basis.

Q. Do those drug vials have patient names on them?

A. Most of the time what happens, they immediately scratch off the label that's put on by the pharmacy.

Q. Well, let me ask you this. Have you arrested recruiters who were in possession of drug vials, in undercover buys or stings, who had the bottles intact with physicians' names and patients' names on them?

A. Yes, sir.

Q. And does that go into an intelligence database of some kind?

A. No, not necessarily.

Q. You would not make a record of who the issuing physician was?

A. We would document it in our offense report as far as if we seize ten bottles, that the bottles were issued by a particular physician and distributed or dispensed from a specific pharmacy. But it does not go into a central database within the Houston Police Department.

Q. Then how do you distinguish between a legitimate pain management clinic, for example, that issued that prescription to a legitimate patient, versus an illicit pill mill that had issued it to one of these runners?

A. I don't quite understand your question. I think you might be asking what's the difference between a legitimate pain management clinic and a pill mill pain management clinic?
Q. Oh, I understand that from your testimony. My point is you catch someone with a bag full of these prescriptions, multiple prescriptions from multiple homeless people. You've got him. You've got the names of the doctors on there. Are you telling me you don't then make a record and share that as intelligence that we've got a potential pill mill here with Dr. Jones?
A. What we do is if the labels are still on the vials, because like I say, now we're talking about an illicit commodity.
Q. I'm confining it, sir --
A. What the first thing they want to do is take the labels off. If they are on there and I observe that a doctor's name is on there and a pharmacy name, and I have and continue to do forward that information to special investigative units as the Texas Board of Medical Examiners and the State Board of Pharmacy and we have done that on numerous investigations where the names are still on the bottles.
Q. All right. We're getting somewhere now. Then there is a -- there are multiple databases, it sounds like, of suspected or possible diversion physicians and diversion pharmacists?
MR. BOHLING: Objection.
THE WITNESS: I believe you asked me if there --
MR. OSGOOD: Yeah.

MR. BOHLING: I don't think there's a predicate for that question from my understanding of the answer.

THE COURT: Well, he can -- objection is -- that's an objection overruled.

THE WITNESS: I believe you asked me if there was one within the Houston Police Department and no, there is not within the Houston Police Department.

BY MR. OSGOOD:

Q. Well, who makes this objective decision to investigate Dr. Jones then when you get a bag full of pills, all issued by Dr. Jones, in the possession of one of your -- well, for some reason I have a mental block on what we're calling this guy.

THE COURT: Recruiters.

MR. OSGOOD: The recruiter.

THE WITNESS: The recruiters are just one part of the whole scheme of the diversion of pharmaceutical drugs. That's just one issue in Houston. The main objective or the main thing behind diversion of pharmaceutical drugs is it can't be done. Unless it's a theft or a burglary, it can't be done without a licensed doctor and it can't be done without a licensed pharmacy.

BY MR. OSGOOD:

Q. I agree. Precisely. So, one of it -- it would seem to me one of the primary investigative goals is to identify these doctors that you think are stepping over the line and these pharmacists that are stepping over the line, is that right?

A. That's correct.
Q. All right. Then somebody's got to collect that information and decide who to investigate and who not to investigate. Who does that?
A. We forward our information, not only to the Drug Enforcement Administration, we also forward it to the Texas State board of Medical Examiners if they hold a Texas State Board license. And then they make the determination through our investigation and reading our reports whether they want to proceed with some type of action against the doctors that we may have gotten on those bottles the names.
Q. Well, that's sort of the tail wagging the dog, isn't it? You don't make the independent decision at that point, that when you catch a guy red-handed with half a dozen pills issued by Dr. Jones, and the label un-scratched off, you don't open an investigation on Dr. Jones at that point?
A. I particular have done investigations on physicians that have prescribed indiscriminately. But what usually happens when you make that arrest, just like any other drug dealer on the street, word gets back to that clinic. The clinic closes and reopens in another location under a different name. And it's usually not there for an extended period of time if they know that an arrest has taken place.
Q. Okay. Well, let me ask you this. Did you have occasion in this case to check to see whether or not any recruiter had ever

been arrested with a bottle of pills issued by my client, Dr. Elder?

A. I never checked to see if anybody has ever been arrested in regard to Dr. Elder's prescription.

Q. What about Ascensia Pharmacy? The same question. Have you done that investigation or research to see whether or not Ascensia Pharmacy has put numerous prescriptions out on the street with the label Ascensia Pharmacy on it?

A. I was not directly involved with the investigation of the Ascensia Pharmacy. I did not do any investigation in regard to that case of who was arrested or who wasn't arrested or who was seized -- what drugs were seized or what were not seized.

Q. Did not the prosecutor in this case, Mr. Rhodes, send you the entire discovery in this case?

A. I reviewed several investigative reports of the pharmacy and the Indictment itself read that.

Q. My information from the prosecutor --

MR. OSGOOD: And please correct me, one of you, if I'm wrong.

BY MR. OSGOOD:

Q. -- is essentially the entire original investigative report plus three or four individual DEA statements involving this Pam and maybe Ms. Pam and a couple of employees at the pharmacy. They all actually.

A. I have received numerous reports of investigations and

statements. Now, I would have no knowledge if that's the whole package or the whole investigation or not.

Q. Did you read and study all of them?

A. I've read them, yes, sir.

Q. Then you have knowledge of the allegation in this case and the pharmacies involved and the doctors?

A. I'm aware of the doctors and the pharmacies involved in this particular case.

Q. Dr. Peter Okose, who is an unindicted co-conspirator here, who was now indicted in Houston. Have you investigated him?

A. Yes, sir.

Q. All right. Did you, in fact, participate or were you aware of the 46 patients that were interviewed at his clinic in March of '09?

A. I knew that Dr. Okose was investigated. I'm not familiar with an interview that took place in March of '09.

Q. All right. All right. I don't know whether those were part of your package or not. But were you aware that those 46 patients basically, I don't know what percentage of them, maybe a quarter of them, said that the typical activity of Dr. Okose's clinic was they would mill around outside and they would sell their pills to people or they would trade their pills or they would sell their prescriptions, and that they would even have this conversation inside of his clinic. Have you ever heard that?

MR. BOHLING: Objection. Several objections. One is, he's already testified he hasn't read those reports. The second is, this is getting awfully far afield for a *Daubert* hearing.

MR. OSGOOD: I'm going to tie it in in a minute.

MR. BOHLING: But my --

MR. OSGOOD: I'll clarify.

THE COURT: Since we're here without a jury, your objection is noted for the record, I'm going to let him proceed. And you may answer the question.

BY MR. OSGOOD:

Q. Let's say that that's a hypothetical. That these 46 reports indicate that conduct is going on. Isn't that *prima facie* evidence to you as an investigator that he's running a pill mill?

A. I know that from investigations, from citizen complaints, from my own observations that Dr. Okose's office, completely different, was operated in a manner where there was indiscriminate prescribing of controlled substance.

Q. It was a pill mill.

A. Yes, sir.

Q. All right. Now, and we need to digress just for a minute. You have no medical training, do you, sir?

A. No, sir.

Q. You hinted at the fact that some doctors over-prescribe medication. You do not have a legitimate expertise or training to make that decision, do you?

A. Today I don't recall even talking about what a doctor would over-prescribe or what he's a -- how he prescribes. I said indiscriminate prescribing.
Q. All right. Well, let's focus on that. You're not trained in the medical profession and you do not have qualifications to say how much time, for example, a physician should spend with a paraplegic, for example, to determine whether or not that person is in pain, do you?
A. I have no medical training other than first responder-type training.
Q. All right. Then I presume that we will not hear any testimony from you as to whether or not in a particular instance, let's say, Dr. Elder spent adequate time with a patient to determine his needs in terms of the strength of the prescription he was going to get. You're not qualified to do that, are you?
A. I can't speculate on what type of questions they would ask me at trial.
Q. Well, but you can admit to me, can you not, that you don't have the medical expertise to say what the proper type of examination should occur before a prescription is issued?
A. What I can tell you is that I have done numerous undercover investigations in regard to doctors where I have posed as a patient. And when I've gone into that doctor's office as an undercover officer/patient, I know that when I've received those prescriptions, very little or no medical exam has taken place.

And it was out of the usual course of medical practice that you or I would be considered going to one of our regular doctors.
Q. Well, there, you've just said it was out of the course of usual medical practice. How are you qualified to say what is usual or unusual medical practice? What medical training have you had that allows you to say that?
A. When we've gone to the classes that I've alluded to in the testimony earlier, whether it was a DEA two-week diversion school in Quantico, Virginia, or the most recent is, I think it was August of last year, where they would have legitimate pain management prescribers come in and talked about what they would consider the legitimate pain management, which is a legitimate field of practice. In the state of Texas, there is a act and a medical practice act known as the Intractable Pain Act, which would give a doctor the right to treat just pain alone.
Q. Are you aware that Dr. Elder is, in fact, a certified pain management specialist?
A. I don't know if he's certified or board certified. I'm not a -- board certified, AMA, I'm not aware of that.
Q. Did he, in fact, report a diversion case sometime shortly after he was indicted that you had occasion to go out and interview him and not even know that he was the defendant in this case?
A. As I described earlier in my duties, I respond to any and all calls in regard to the Houston Police Department where they may

get a call in regard to pharmaceutical drugs. A uniformed patrol officer, like the duties that I was assigned to first out of the police academy, received a call, I believe it was to his office where the doctor was reporting a fraudulent prescription problem. Once that officer completed his initial offense report and instigation, he was placed in contact with me for further investigation or instructions, knowing that I'm the person that handles those type of investigations.

Q. And you went over there and visited my client?

A. I went over to the pharmacy first.

Q. And I'm not accusing you of doing anything wrong, even though he was indicted, you didn't know that it was the same guy, did you, when you went over there?

A. At first I didn't even recognize the name of the doctor. All's I knew was a fraudulent prescription case. I was concentrating on the pharmacy itself. The pharmacy, I called them first and the pharmacist had reported that there was a fraudulent prescription case.

Q. And do you -- I don't know whether you remember or not, because maybe it wasn't a big thing to you. When you went in his office, did you see any patients in his office?

A. When I went into his office, I don't recall seeing patients.

Q. Maybe one patient in a wheelchair, a paraplegic?

A. I don't recall.

Q. All right. You didn't see numerous people hanging around

outside of his clinic, did you?
A. His clinic is within a strip center. They do business in Houston. There is a pharmacy just next door to it. There are other business -- there was traffic coming and going. There was patients, or not patients, but people out in front of his clinic, yes.
Q. Okay. But I mean, we didn't have the same scenario that we described at Dr. Okose's clinic. You weren't concerned about that, about it being a pill mill?
A. Not on that particular day when I went out there, it was not the same that I seen --
Q. Okay.
A. -- at other clinics --
Q. All right.
A. -- on that day.
Q. And did you, in fact, tell him that -- in your conversation with him about diversion that it was rare to find a pain management specialist involved in this kind of activity. It was usually physicians who didn't have any training in this who were taking advantage of the system?
A. Once I went and completed my investigation with the pharmacist, I went over to Dr. Elder's office. And then when I said, I'm Officer Kowal with the Houston Police Department, I introduced myself and gave him my business card, he immediately said, well, I know who you are. And I kind of stepped back for a

minute like, oh, really, and then I looked at his name and then he -- we started talking about that. At which time he asked me to step outside the clinic to talk more.

Q. Did you make that statement to him about that your experience was that pain management specialists aren't the source of the problem, it's these general practitioners and internists and what-not?

A. Dr. Elder initiated a conversation. My first response to him was, hey, you have a -- basically a case pending. You have an attorney. We probably shouldn't be talking about this. I just -- it's something that you need to report to your attorney in regard to this problem. He's the one who stated to me, hey, I'm not one of those pain doctors that you really -- that you regularly see in your investigations.

Q. Well, you had quite a bit of conversation with him before you put two and two together, didn't you?

A. No, sir. Because my first conversation, when I identified myself with my credentials and gave him my business card, his first immediate response was, I know exactly who you are, and I was kind of taken back by that. And then I looked at his name and then he said, yeah, I'm the one, and he had mentioned it to a diversion investigators in Houston that were handling his case. And that's when I asked him, I said, you have an attorney, don't you? And he said, yes. And I said, well, I don't specifically want to talk about the details or the facts of that case, I want

to just talk about the fraudulent prescription case we're investigating today.

Q. But you guys established a little rapport there. You gave him some information well beyond what you would normally expect, didn't you?

A. No, sir.

Q. You didn't --

A. He had asked me some questions in regard to pain management clinics. It's like their operation, their day-to-day operation, who is in them, and then he started talking about his particular credentials.

Q. Well, did you tell him during the course of the interview that you were going to testify before the grand jury on July 16th, 2009, to give testimony regarding a case involving a female that had failed multiple detoxification programs? And did you further tell him that this demand was made because she had recently given birth to a male infant and the father requested she attend his circumcision without being under the influence of narcotics? And did you further state to him that the female addict severed the penis of her infant son and would be giving testimony tomorrow at the grand jury regarding drug abuse in Houston? Did you tell him all that, sir?

A. We talked about -- I was asked that in a case in Houston there was a pending case, it was pretty horrific as far as what a person does under the influence of these drugs and that I was

asked to testify in regard to that case, not as an investigator, but similar to what we're doing here today as having knowledge of what these drugs and how they were acquired in Houston.

Q. And you told him all that before you found out who he was, didn't you?

A. No, sir.

Q. Okay. All right. Now, let me ask you this. Let's move on. Have you -- do you have any statistical analysis that compares, for example, the problem with the so-called Houston cocktail drugs in Houston vis-a-vis, let's say, Chicago, New York, Kansas City or any other city around the United States?

A. I could tell you that within Houston our statistical analysis states that the number of drug overdose from this prescription cocktail encompassing the three drugs we talked about has more people dying from the prescription drug overdoses than cocaine, methamphetamine and heroin combined in Harris County. In the years, three or four previous years, I think it was present in and around 68, 69 percent of the deaths due to drug overdoses. It's now up to about 79, 80 percent of the drug overdoses of the particular cocktail that's alleged that the doctor wrote.

Q. And how does that compare to the city of Chicago?

A. In pharmaceutical diversion cases, I have no idea what it would compare. Each area or geographic area of the country has its own specific problem in regard to pharmaceutical drugs, whether it's in Appalachia and it's Oxycontin, whether it's

Chicago and it's some type of cough syrup, or whether it's in Los Angeles and it's another designer-type drug.

Q. Well, you would have -- hear counterparts in all of the cities, wouldn't you?

A. I am not aware of what other diversion units are in those particular cities.

Q. My point is have there been comparative studies to say that Houston is any bigger problem than any other city in the United States with drug diversion?

A. I could say that, I know there have been studies that the number of drugs that are shipped to pharmacies within the Houston/Harris County Gulf Coast area is higher than those of the regular -- other pharmacies in other areas. It's the number one, what would you call, buyer of prescription drugs in the country.

Q. Do you have statistical data from pharmaceutical companies to back that up?

A. It has not only statistical data from the pharmaceutical companies that you could research and do, you could do it through the DEA as they're ordering reports, whether it's through ARCO system or suspicious ordering or excessive purchase reports.

Q. So, you have reports that say that Houston has a bigger problem than Chicago or New York or Los Angeles?

A. There are reports that say that Houston has -- orders more of -- these particular area orders more drugs than those areas, but I don't think they compare them to say why or where.

Q. So, there's no document that we could look at that says per capital and per citizen Houston buys more of these drugs than Chicago or Los Angeles or New York or Kansas City, for that matter?

A. There may be a document out there. I have not seen one. But all's I know is, like I say, from the ordering and from the reports that the area orders more hydrocodone, Xanax, Soma than other parts of the country per capita, per person.

Q. And this is just something you've heard in some of your sessions with these other groups?

A. I've seen it in reports as far as the statistical amount of prescription drugs ordered at these pharmacies.

MR. OSGOOD: May I have just a minute, Your Honor?

(Off Record Whispering)

MR. OSGOOD: I believe that's all I have, Your Honor.

THE COURT: All right. Mr. Bohling.

MR. BOHLING: Just very briefly.

REDIRECT EXAMINATION

BY MR. BOHLING:

Q. This case that you discussed with Dr. Okose, was that something that had been in the local press?

A. Yes, sir.

Q. Now --

THE COURT: I'm sorry. The case he discussed with who?

MR. BOHLING: Doctor -- I'm sorry, Dr. Elder. I

misspoke. Thank you.

BY MR. BOHLING:

Q. You understood me to mean Dr. Elder?

A. Yes. Dr. Elder. Yes, sir.

Q. Would you say that one difference between Houston and other cities in the region and across the country is the emergence of these clinics that you've described for us?

A. Yes, sir.

Q. Okay. And, in fact, I think you testified in your initial presentation that there -- you get a number of visitors, a large number of visitors from states like Louisiana, Alabama and Arkansas?

A. That's correct.

Q. Okay. And why does Houston attract people from those faraway locations?

A. Not only Houston, but the area of Texas, southeast Texas. Because Texas does not currently have what we call what a patient-doctor shopping law. Meaning that a patient can go to numerous doctors, prostitute the same illness without any using fraud or deception or some subterfuge, it's not against the law in the state of Texas currently to get multiple prescriptions for the same drug as opposed to other states or nearby states, as Louisiana does have a doctor shopping law.

Q. So, a single person could go to multiple clinics in the same day and receive prescriptions for the same medications?

A. Correct.
Q. And then get those filled, I presume, at different pharmacies?
A. That's correct.
Q. And is that a major problem in South Texas in terms of providing drugs that ultimately end up getting diverted?
A. Yes, sir, it is.
Q. Now, with regard to the clinics, the operation of the clinics, it's not the case that a doctor is the only person in Texas who is authorized to write a prescription, correct?
A. That's correct.
Q. Okay. Who else in Texas is authorized to write a prescription?
A. In the state of Texas, a physician's assistant, commonly referred to as a P.A., could have a DEA or Texas Department of Public Safety, DPS, controlled substance registration number and issue prescriptions. The same thing with a nurse practitioner, ANP, advanced nurse practitioner, has the same prescribing privileges for what the drugs that we describe in a cocktail, Schedules III through V.
Q. Is it common in the clinics and Houston and in South Texas for nurse practitioners and physician's assistants to be the people writing the prescriptions?
A. Very common.
Q. Okay. And if we look into the kind of the details of the

operations of these clinics, you were asked about basically the doctors and the relationship with the patients, would these clinics, do they typically see a large number of patients during the course of the day?

A. Yes, sir.

Q. Okay. And I know from your own undercover experience and your experience in talking to people involved in this, how long is usually spent with a single patient?

A. The single patient, just in my investigations, from my -- that may range from as little as approximately 30 seconds, where it has been up and to the most times spent at one of these clinics may be five minutes. And that includes sitting a chair, getting your blood pressure taken, if at all.

Q. And that's for a new patient?

A. Yes, sir.

Q. Are the prescriptions typically identical to each other for each patient seen during the day?

A. After our post investigations when we do the prescription analysis, we would see that the prescriptions are written for the same drugs, for the same quantities, for the same milligram strength over and over and over again.

Q. Okay. And have you received training discussing that issue, the fact that the prescriptions are identical to each other?

A. Yes.

Q. And what was the substance of the training?

A. The substance of the training is how to identify maybe an indiscriminate prescriber or an illegitimate pain clinic or a wellness center would be -- that would be the first tip-off, would be that all the prescriptions are basically the same. People go in there whether the complaints are different or not, the prescriptions are all issued in the same manner for the same drugs, irregardless of what the patient complaint may be.

Q. And is that something that would typify a legitimate pain management practice? A legitimate practice, would they have the same prescription for every patient?

A. No, sir, it wouldn't.

Q. Okay. Now, really without regard to whether the prescription is written within the course of a proper medical relationship or not, the issue in Houston is that the tremendous diversion of pharmaceuticals to -- for street sale, correct? Or that is part of the issue?

A. That's our issue in Houston today, yes.

Q. Right. And so once the pharmaceutical drug is diverted, it really doesn't matter at that point whether it was properly issued in the first instance?

A. Correct. The ultimate consumer would not care how it got there as long as he got it.

Q. Because the ultimate consumer is often not the person to whom the medication was prescribed.

A. Most probably not even the patient. It's not even close. We

don't even know how that drug got there. You're correct.
Q. And so at that point it becomes just like any other street narcotic. It's illegal to sell and to possess.
A. Exactly. It's illegal to sell, illegal to possess. The only difference being, like I said earlier, it can't be done without the benefit of an indiscriminate prescriber or pharmacy with a controlled substance DEA registration number. It's not imported from Mexico or Colombia like we would usually see with the illicit commodities.
Q. Okay. And it would be fair to say that there is a -- that diverted prescription drugs are the number one drug abuse in the Houston area today?
A. According to statistics from the Harris County Medical Examiner's Office, which basically Houston encompasses 99 percent of, that is our biggest problem today due to drug overdose, drugged driving and deaths from drugs, overdose prescription drugs. Yes, you would be correct.

MR. BOHLING: That's all I have. Thank you.

RECROSS EXAMINATION

BY MR. OSGOOD:
Q. You said you studied the case file in this case. Would you agree with me that the allegation here is that these are bogus prescriptions faxed in max numbers from Mr. Solomon's basement to Kansas City and filled and shipped back to the pharmacy?
A. I've --

Q. It had nothing to do with patient -- the amount of time the patients were spent, because these were non-existent patients, aren't they?
A. I've read several reports of instigation of this case. I wouldn't say I studied the case file. I don't know if it was the whole case file or not. I could not testify in regard to how the prescriptions --
Q. Well, you've been in here during the prosecutor's discussion and my discussion with the Court and heard that the facts are that these are fraudulent prescriptions. There are no examinations involved. So, to the extent that you're opining about how much time a doctor should spend with a patient really doesn't have anything to do with this case, does it?
A. Yes, sir, it does. I think that's the reason I'm here today.
Q. Well, no time was spent with any of these patients, would you agree with me, if they're fraudulent prescriptions and the patients don't exist and they're in alphabetical order. That's my point.
A. I don't know if that's the whole gist of the Indictment or if it's just part of it.
Q. Okay. Now, let me ask you this. It's my understanding that the Department of Public Safety in Texas has, in fact, had a program in effect for over a year now that requires -- that has a monitoring program?
A. That's correct.

Q. Okay. So, who's monitoring it?
A. Just recently they've established a prescription drug monitoring program. I think they refer to an acronym of PMP.
Q. Now, Dr. Elder is a certified pain management specialist. Are you suggesting it would be improper for him if he has a patient who is wheelchair bound, who is suffering from a terminal illness and is on a strong medication that he sees once every week or two weeks to spend a small amount of time before reissuing a pain killer to that person?
A. I don't think --
MR. BOHLING: I object to that question. That's --
MR. OSGOOD: Well, my point is he's not qualified to answer that question.
MR. BOHLING: I just --
THE COURT: Well, let's hear what his objection is.
MR. BOHLING: Well, it's irrelevant to anything in the hearing. I'm not seeing what --
MR. OSGOOD: Thank you. It's irrelevant to the trial. That's my point.
MR. BOHLING: Well, John's asking the question. We're not going to ask him that question. So, I don't get it.
MR. OSGOOD: Well, I asked the question because I want to defuse this idea that he's going to be able to testify at the trial about how much time somebody spends with a patient. That's not an issue in this case and he shouldn't be allowed to testify

to that.

MR. BOHLING: I agree to that. I was only asking those questions --

MR. OSGOOD: Okay. Thank you.

MR. BOHLING: -- to clarify from John's cross-examination.

MR. OSGOOD: I'll withdraw the question.

THE COURT: All right.

MR. BOHLING: He's right. He's absolutely right in how he characterizes the Indictment. We have no issue with that. I simply wanted the Court to understand the full extent of what the issue was that John was exploring on cross-examination.

THE COURT: Well, let me ask you this question so I don't maybe have to ask the witness this question. As I understand his testimony, when he's just now talking about pill mills, he talks about clinics that see large numbers of patients for a very short period of time, anywhere from 30 seconds to a maximum of five minutes, and clinics that write the same drug prescription, the same quantities for every patient.

MR. BOHLING: Right. And we --

THE COURT: I mean, he just testified to that.

MR. BOHLING: Correct.

THE COURT: Is there any evidence in this case that South Texas Wellness Center and this defendant or any of the other defendants were falling into that category, seeing large

numbers of patients for a very short period of time or prescribing the same drugs for all of the patients?

MR. BOHLING: Yes. Dr. Okose's clinic definitely falls into that pattern. As Mr. Osgood pointed out --

MR. OSGOOD: I concede that.

MR. BOHLING: -- and at South Texas, actually I would say went into that a little bit after Dr. Elder's time. I'll even concede that. There's not going to be evidence that, well, there will be some evidence of people coming over from South Texas, but they didn't do a volume business until a little bit later. There's a second physician who's not indicted, but who's prescriptions do show up to a minor extent. His name is Robert Wilkerson.

THE COURT: But he's not involved in this case.

MR. RHODES: Dr. Elder's prescriptions as well, same drug, same amount, those being charged in the case, so.

MR. RHODES: There will be evidence on that regarding the defendant.

MR. BOHLING: Right. I was going to say that.

MR. OSGOOD: (Inaudible).

MR. BOHLING: The prescriptions that went to Belton, Missouri, do have this feature. They are for the same drug, the same amount. They look like they are basically all copied after each other.

MR. OSGOOD: And we agree with that. And we contend

those are forgeries and cut and pastes. They actually seized a number of -- seized. They went to the pharmacies that Dr. Elder's patients were going to in Houston and looked at those patients. They were not in alphabetical order. They were legitimate patients. They were patients with serious medical issues such as wheelchair bound, back injuries and other types of injuries. And those patients were all real people. They were issued real medication and that's where they got their so-called original scripts to use to compare to these ones up here that were being faxed. There is no indication whatsoever that Dr. Elder was doing anything other than proper examination of these people. And he didn't see that many patients at a time. He saw four, five, ten a day and he was working there part-time, and he left in January of '05. And then Dr. Okose developed all this relationship and that's when he took over and a lot of his nonsense was going on.

THE COURT: Well, let me just stop you right there. When you say that Dr. Okose's clinic fits into this pill mill and he's an unindicted co-conspirator, I mean, is his information Rule 403(b) or does it actually factor into the conspiracy charge?

MR. BOHLING: Well, in my view it factors into the conspiracy charge.

THE COURT: And if you'll just explain to me how.

MR. BOHLING: Okay. Well, because this all goes back to

the central player here, which is Troy Solomon and Ascensia Nutritional Pharmacy. Essentially, what happened here is that Mr. Solomon forged this relationship with the Belton Pharmacy before his pharmacy in Texas opened up. So, he did not have an active open pharmacy at the time of the first shipments from Missouri to Texas. He was in the process of opening the pharmacy. So essentially, he's getting prescriptions for these drugs sent to him in advance of even having a pharmacy open. He then opened his pharmacy, continues to receives the drugs form Missouri and then sends both, as we've discussed, prescriptions from Dr. Elder, and I think the main issue there, and we're all going to agree on this, is whether Dr. Elder actually wrote those prescriptions or not. That seems to be the issue at trial. And then prescriptions later on, coming primarily or exclusively from Dr. Okose. Once Dr. Okose gets involved, the Ascensia Nutritional Pharmacy is opened for business, and they also doing the same thing with Dr. Okose's prescriptions in Houston. So, essentially they're doing, they're getting drugs both from Missouri and a tremendous amount of drugs, by the way, and they are generating a tremendous amount of drugs that we believe we'd be able to prove is for diversion by filling false Okose prescriptions at A&P in Houston. So, it's really all part of the same idea, is that they're filling these prescriptions once they have their pharmacy open, they're doing some of them there locally. But I think, since it's during the conspiracy period

and since it's with Dr. Okose, it's simply intertwining evidence of the entire enterprise, if you will, the entire criminal enterprise. And I think it's clearly admissible for that reason.

THE COURT: And are you claiming that any of Dr. Elder's prescriptions were filled? I mean, where are you claiming his prescriptions were filled?

MR. BOHLING: Dr. Elder's prescriptions were filled -- well, as far as important to the conspiracy, in Missouri. There were patients who eventually probably had Elder prescriptions filled at A&P, but we're not alleging that. By the time the false Okose scripts were coming into A&P to be filled, Dr. Elder was, indeed, out of the picture. I would agree with that.

THE COURT: So, are you really saying, I mean, are there two time periods for this conspiracy? A time period in which things were being filled in Missouri and then a time period when the filling was primarily out of Houston, although they may have been getting drugs from --

MR. BOHLING: No. They're overlapping. Our conspiracy starts in, what, about August of 2004?

MR. RHODES: August.

MR. BOHLING: And that is just Missouri prescriptions. And then as we get into the early part of 2005, that's when Dr. Elder leaves South Texas Wellness Center and Dr. Okose's prescriptions are the ones primarily filled. Those are filled in both Missouri and continue to be so until October of 2005. And

then in that same time period between January and October of 2005, there are false Okose prescriptions that are being filled in-house at A&P.

THE COURT: I'm sorry, false --

MR. BOHLING: There are false or fraudulent Okose prescriptions that are being filled by A&P in Houston at the same time they're still sending false prescriptions to the Belton Pharmacy in Belton, Missouri.

THE COURT: So, August of --

MR. BOHLING: So, they overlap.

THE COURT: August --

MR. BOHLING: It's all one piece.

THE COURT: August of '04 to early of '05, the prescriptions are all being filled in Missouri.

MR. BOHLING: Correct, basically.

THE COURT: Early of '05 through October of '05?

MR. BOHLING: They're filled both places.

THE COURT: And then after October of '05?

MR. BOHLING: After October of '05 is when the Missouri activity ceases and that's the cut-off point for our conspiracy.

THE COURT: Okay.

MR. BOHLING: I believe --

THE COURT: Your conspiracy is only through October of '05?

MR. BOHLING: Right. Now, it may be, and I'm fairly

confident, that the Okose prescriptions continue to be filled locally for some period of time after that.

THE COURT: But that's not part of this case?

MR. BOHLING: No. And would not be part of our evidence probably. You know, I don't account for --

THE COURT: And the January '05 -- I'm just saying January because you said early '05.

MR. BOHLING: Right. That's correct.

THE COURT: But early '05 through October of '05, where they're being filled in both places, are those prescriptions coming from South Texas Wellness Center or from the other --

MR. BOHLING: The other. From Universal Medical Clinic from Dr. Okose.

THE COURT: So, as to South Texas Wellness Center, those prescriptions at issue were all filled in Missouri between '04 and early '05?

MR. BOHLING: With one exception. I believe there was a Dr. Robert Wilkerson who was the next doctor at South Texas. I do believe we see some of his -- a handful of his prescriptions in that time period. Not to the same extent as the other two.

THE COURT: And when you say in that time period, what time period --

MR. BOHLING: January '05 to October of '05. My -- is that correct, John?

MR. OSGOOD: Well, it was Dr. Botto also.

MR. BOHLING: Right.

THE COURT: I'm sorry. Doctor?

MR. BOHLING: And Dr. Juan Botto.

THE COURT: Give me those names again.

MR. BOHLING: Dr. Robert Wilkerson.

THE COURT: Okay.

MR. BOHLING: He was a physician at South Texas Wellness Center. Dr. Juan Botto, B-O-T-T-O.

MR. OSGOOD: And Dr. Lichen, however you pronounce it. He was a partner of Dr. Botto's. His showed up.

THE COURT: Shows up as being filled locally.

MR. OSGOOD: No, no, no.

MR. BOHLING: Okay.

THE COURT: As being filled.

MR. OSGOOD: Sent to Missouri.

THE COURT: All right.

MR. BOHLING: Dr. Lichen was listed on the prescription pad. Dr. Botto had had some prescription pads that were stolen and he was in practice with this other doctor at that time. And those are the prescription pads that ended up in the Missouri pharmacy.

THE COURT: Okay. But none of those individuals are really part of this conspiracy?

MR. BOHLING: We have talked to Dr. Botto and we believe that he is a very reputable physician there and had nothing, no

knowledge or connection to any of the people in this case. So, it appears that he simply had a prescription pad that was stolen and used in the course of this conspiracy.

MR. OSGOOD: Your expert, in his last analysis, said that he had the same opinion about Botto's handwriting as he had about my client's.

MR. BOHLING: That would be incorrect.

MR. OSGOOD: Okay. The other point, Your Honor, is there were other prescriptions faxed by Mr. Solomon well after Dr. Elder left employment at South Texas as a part-time physician. So, the activity didn't cease with him leaving South Texas. They continued to fax prescriptions with his name on them after he was gone. And they continued to ship packages with his name on them back to South Texas after he was gone.

THE COURT: All right. We need to get you off the stand, but I just have one additional question.

EXAMINATION BY THE COURT:

Q. In some of your last testimony, I wrote down that I thought you said that this drug diversion cannot be done without a pharmacy or a doctor with a number. Do you recall that general testimony?

A. Yes, ma'am.

Q. And what percentage of drug diversions that you're familiar with are the result of theft, of either the drugs or the doctor's prescription pads, but don't involve either the involvement of

the pharmacy or the doctor. If you -- do you understand that question?

A. Yes, ma'am.

Q. All right.

A. Theft would be whether it is from a pharmacy, from employee pilferage or whether it was from a distributor or a wholesaler.

Q. Or taking the prescription pads, just theft in general.

A. Theft, in general. Well, in this particular case it would be a part of drug diversion. I don't know if I could put a percentage of what percent of those are --

Q. I'm not talking about this case. I'm talking about in your training and experience --

A. Uh-huh.

Q. -- based on all of this analysis of, you know, pill mills versus doctors indiscriminately writing, versus the thefts that we've talked about of either the drugs or the prescriptions, you know, what percentage do you think of this drug problem is caused by theft as opposed to these --

A. A very small percentage. I would say most of our investigations now are similar to the kind that are in the Indictment. And I would say that's in the high 90 percent is done on those, and the other would be just a small single digit percentage as far as maybe theft or employee pilferage.

MR. OSGOOD: I have one follow-up question, if I may.

THE COURT: Yes.

FURTHER RECROSS EXAMINATION

BY MR. OSGOOD:

Q. Have you had any cases where the pharmacist himself has actually defrauded the physician and abused the physician's trust by taking the physician's legitimate prescriptions and xeroxing them or cut and pasting them and using them in a fashion that occurred in this case?

A. Are you asking that a pharmacist may have generated prescriptions without a doctor's knowledge?

Q. Yes.

A. I have investigated cases like that.

Q. And would you agree with me that the evidence in this case is plausible that if they were all faxed from the basement of the pharmacist in this case to Missouri, that it could be done without the doctor's knowledge and would not require the doctor to be in this claim at all?

A. I would not agree with that.

Q. Why would the doctor have to be involved in the equation?

A. Just due to the volume of the prescriptions that over time I would think that he would be aware of what was going on.

Q. Because the pharmacist would call him for refills or the pharmacist would contact him to ask hm about items on the prescription. Does that trigger it?

A. That would be one aspect of triggering it.

Q. But if the pharmacist was involved with it and never called

him or had some conversations with him, then it can operate solely and exclusively between the two pharmacies, couldn't it? They've got -- they cut and past them and fax them up here, they fill them and they go back to the pharmacist and the doctor never knows about it. Have you had cases like that?

A. I had cases like that.

Q. Thank you, sir.

THE COURT: All right. Just one other question, I have.

BY THE COURT:

Q. You've talked about the drug diversion problem, diversion of pharmaceutical drugs in Houston. And maybe I -- this may have been asked, and I may just not understand your answer, how does that problem in Houston compare to, say, drug diversion of pharmaceuticals in Kansas City?

A. I know that in Houston we work closely with other states in the Gulf Coast area, Louisiana, Mississippi, Alabama, even prescriptions going to Arkansas or Oklahoma. I don't know what the particular drug of choice or prescription problem would be in Kansas City at this time.

THE COURT: All right. Anything further anyone wants to ask?

MR. BOHLING: No, Your Honor. Thank you.

MR. OSGOOD: No, Your Honor.

THE COURT: All right. Thank you very much. All right. Anything else that anyone wants to say about this particular

testimony?

MR. OSGOOD: I think we've beat it to death, Your Honor.

THE COURT: All right. Then we'll be back at 1:30 for pretrial conference.

MR. BOHLING: Thank you, Your Honor.

MR. OSGOOD: Thank you.

(Court Adjourned at 11:06 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 — June 8, 2010
Signature of transcriber — Date