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.	)	

MOTION TO DISMISS THE INDICTMENT AS TO DEFENDANT ELDER BECAUSE OF GOVERNMENT MISCONDUCT WITH SUGGESTIONS IN SUPPORT

COMES NOW defendant Elder and moves the court to dismiss the indictment against on him because of significant and highly prejudicial interference by DEA Agents of Defendant Elder's 5th and 6th Amendment rights to prepare and present a defense to the criminal charges in this case.

As this court is aware from previous motion practice, whether Doctor Elder was in fact the individual who wrote certain prescriptions that were faxed to Kansas City is a key component of the government's case. The government has an initial report from a local handwriting expert that Elder was "probably" the person who wrote the faxed prescriptions. That same expert conducted further examinations of

handwriting provide by Doctor Elder produced pursuant to an Order of this court (see doc #53). The results of that handwriting examination by the expert culminated in findings by him that it was "highly probable" that Elder was the author of the questioned fax prescriptions.

Defendant will call a defense expert in forensic document examinations, who is nationally recognized, secret service trained, and retired law enforcement who will testify that it is not possible to give any opinion relying of faxed documents and that this is a national standard recognized in the field. Apart from this questionable handwriting evidence, there is nothing in the discovery revealed to date to directly connect Doctor Elder to these alleged offenses that would support even submitting this matter to a jury for consideration.[1]

In apparent desperation and need to bolster this handwriting evidence, on July 22, 2008 Kansas City DEA agents Brendan Fitzpatrick and Judi Watterson traveled to Houston, Texas and interviewed a potential witness named Diane Hearn. According to the two-page DEA report, the agents provided her with copies of ten

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[1] Doctor Elder was a part time employed physician at a clinic in Texas where these prescriptions are alleged to have originated from. In fact, many were faxed from off site fax phone lines belonging to subscribers other than Elder. When the filled subscriptions were sent federal express back to Texas, they were receipted for by others and often sent to offices other than that utilized by Elder. Finally, a number of defense interviews to date have confirmed that no unindicted employee of the Belton pharmacy has ever spoken to Doctor Elder or heard others, including indicted co-defendants, make what would arguably be co-conspirator hearsay statements attributable to him. The case against him seems to hang by a very thin thread which the government realizes may be soon severed.

prescriptions alleged to have been issued by Elder which were seized from the Medicine Shoppe in Belton, Missouri during the search of that location on May 10, 2006. This means of course that she was show photographic copies of the original faxed copies that were being maintained as evidence in Kansas City.

According to the report, Ms. Hearn was first asked if she could recognize Doctor Elder's handwriting inasmuch as she had previously worked with him and when she said she could she was then shown the copies of copies referenced above. She then stated that she recognized the handwriting and signature on the ten prescriptions as Elder's. The statement was provided to defendant as part of supplemental discovery disclosed on August 14, 2008, along with other discovery which included the most recent handwriting examination results.

Subsequent to receipt of the supplemental discovery, counsel instructed his private investigator, Mark Reeder, to make contact with Ms. Hearn via telephone and discuss the interview with her to question her in more detail.[2] Ms. Hearn informed the investigator that: 1) she was not represent by an attorney; 2) she was informed by the DEA that a defense investigator would probably be contacting her in person or by

[2] Mr. Reeder has worked as an investigator for undersigned counsel on a contract basis for more that 12 years. Mr. Reeder most recently served as court appointed investigator in capital murder litigation in this court in which undersigned counsel was lead attorney. Mr. Reeder is recognized by this court as a qualified professional investigator acceptable to the Court and has never been sanctioned or disciplined by this court nor has his credibility been called into question by this court.

telephone to ask her about her interview and 3) that she should refuse to talk to the investigator or provide any information. Mr. Reeder attempted to explain to her that the defendant had a constitutional right to interview witnesses against the defendant; however, Ms. Hearn was adamant that she would not discuss anything because she was told not to and then hung up on Mr. Reeder mid-conversation.

A defendant has a right to interview his accusers and if the government deliberately interferes with that right it is government misconduct. See ***Louisell v. Director of Iowa Department of corrections***, 178 F.3d 1019 (8th Cir. 1999). In ***United States v. Bittner***, 728 F.2d 1038 (8th Cir. 1984) our Circuit, when confronted with similar defense claim, made it clear as to what the rules are. Based on these rules, it would appear the government has consciously crossed the line in this case:

> Although the prosecution and the defense have an equal right to interview witnesses in a criminal proceeding, the defendant's right of access is not violated when a witness chooses of her own volition not to be interviewed. See ***United States v. Scott***, 518 F.2d 261, 267-68 (6th Cir. 1975); ***United States v. Long***, 449 F.2d 288, 295 (8th Cir. 1971), cert. denied, 405 U.S. 974, 92 S.Ct. 1206, 31 L.Ed.2d 247 (1972). In this case, Brown merely exercised her right to refuse to speak with Bittner's attorney. Though the prosecution may not without justification interfere with a witness' free choice to speak with a defense attorney, see ***Kines v. Butterworth***, 669 F.2d 6, 9 (1st Cir. 1981), cert. denied, 456 U.S. 980, 102 S.Ct. 2250, 72 L.Ed.2d 856 (1982), it does not appear in this case that the prosecution impermissibly interfered with Brown's free choice. Rather, Agent Fennewald merely advised her of her right to decline interviews with Bittner's attorney. Contacts of this nature do not constitute an impermissible interference with the defendant's right of access to witnesses.

The government and its agents were and are well aware that defendant intends to vigorously attack the handwriting evidence in this case as demonstrated in the yet to be ruled motion requesting a ***Daubert*** hearing on the admissibility of such evidence (See doc. 50); ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*** 509 U.S. 579 (1993). It is worth noting that defendant filed his motion attacking handwriting on May 18, 2008, three days after the government requested that defendant provide additional handwriting exemplars and that the government then sought out witness Hern two months later on July 22, 2008, and instructed that she would be contacted by the defense and that she should not talk to any defense representative.

Finally, other DEA agents involved in this investigation have engaged in what appears to be a disturbing pattern of selective inclusion and exclusion of important information in the various DEA reports of interviews of both witnesses and defendants in this case. By way of example, on June 4, 2008, Agent Overton interviewed Lionel Lynch, a physician's assistant from Houston, Texas. Mr. Lynch provided significant exculpatory information about Doctor Elder and somewhat damaging inculpatory information about another unindicted individual in this case who will likely be a government witness. Mr. Lynch has since provided a statement to the defense investigator that the report of interview does not accurately reflect the overall true nature of the interview as evidenced by his contemporaneous notes made following the interview and his present independent recollections.

This leads defendant to conclude that these agents are taking a "win at all costs" approach which of course explains again why they are now instructing witnesses not to speak with defense investigators. This type of conduct by law enforcement personnel has been roundly condemned in this Circuit. See for analogy ***Steinkuehler v. Meschner***, 176 F.3d 441 (8th Cir. 1999) (Sheriff prevented deputy from testifying truthfully in murder case because he wanted to "win at all costs)." Sanctions against the government for depriving a defendant of access to an essential witness is appropriate where the defendant can show that there is a reasonable likelihood that the testimony will affect the trier of fact. See ***United States v. Valenzuela-Bernal***, 458 U.S. 858 (1982).

Defendant submits that the government is deliberately engaging in conduct designed to prevent defendant from mounting a strong defense to these charges and that such conduct warrants appropriate sanctions by this Court.

WHEREFORE, defendant Elder moves the Court to dismiss the indictment against him or, alternatively, set this matter for a show cause hearing to determine whether other less drastic sanctions can be put in place to ensure that defendant's right to prepare his defense is not infringed upon.

Respectfully submitted,

/s/
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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, August 22, 2008

/s/
JOHN R. OSGOOD