

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

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

**GOVERNMENT’S SENTENCING MEMORANDUM**

The United States of America, by and through its undersigned counsel, hereby submits this memorandum for the benefit of the Court and the parties in preparation for the sentencing hearing regarding the above-captioned case.

**Summary of the Government’s Sentencing Position**

Pursuant to the rationale and authority outlined in this memorandum, the Government suggests that defendant Christopher L. Elder’s advisory guidelines sentencing range is 51 - 63 months based upon a total offense level of 24 and criminal history category I. The Government believes that the Presentence Investigation Report, which determined that the total offense level is 22, accurately assessed the base offense level and properly accounted for the applicable enhancements and adjustments that should be applied in this case, with one exception. The Government filed an objection to the findings in the Presentence Investigation Report, arguing that Elder should receive a additional 2-level obstruction of justice enhancement for committing perjury during the course of his testimony at trial. *See* U.S.S.G. § 3C1.1, Application Note 4(b).

## Procedural Background

On February 6, 2008, a federal grand jury in the Western District of Missouri returned a 24-count indictment charging defendant Christopher Elder (“Elder”) and four other defendants with crimes related to the illegal distribution of controlled substances by The Medicine Shoppe pharmacy in Belton, Missouri to defendant Solomon in Houston, Texas. Count One charged all five named defendants with conspiring to distribute controlled substances. Counts Three through Ten charged certain defendants, including Elder, with substantive counts of illegal distribution and dispensation of Schedule III, IV, and V controlled substances. Two defendants, Mary Lynn Rostie and Cynthia S. Martin, pleaded guilty. The case proceeded to trial beginning June 21, 2010.

On June 30, 2010, a federal jury convicted Elder of conspiracy to distribute and dispense controlled substances and eight counts of aiding and abetting unlawful distribution and dispensing of controlled substances. The sentencing hearing is scheduled for May 3, 2011.

## Discussion

### **I. The Court should impose a two-level enhancement to defendant Elder’s Sentencing Guideline range for obstruction of justice for Elder’s perjured testimony at trial.**

Elder should receive a two-level obstruction-of-justice enhancement for committing perjury during the course of his testimony at trial. *See* U.S.S.G. § 3C1.1, Application Note 4(b). Sentencing Guideline § 3C1.1 states in full: “If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the [defendant’s] offense level by 2 levels.” United States Sentencing Commission, *Guidelines Manual*, § 3C1.1 (Nov. 2003). “A

defendant who commits perjury is subject to this enhancement.” *United States v. Simms*, 285 F.3d 1098, 1100 (8<sup>th</sup> Cir. 2002) (internal quotations and citations omitted). “A defendant commits perjury, if under oath, he or she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” *Id.* (Internal quotations, brackets, and citations omitted).

In his trial testimony, Elder stated that he had, in fact, written all of the 544 original prescriptions recovered from the records of The Medicine Shoppe in Belton, Missouri, which contained his signature and handwriting, and that he had treated each of those patients during the course of his employment at South Texas Wellness Center (“STWC”) in Houston, Texas. (Tr. 1309-1310, 1313, 1323, 1368.) Elder claimed that he had no knowledge of how the prescriptions ended up at The Medicine Shoppe. (Tr. 1318, 1336.) The statement that he had written the prescriptions is true, however, Elder did not treat a single one of the 544 patients named in the prescriptions. As Elder well knew, the prescriptions were false and fraudulent ones written out based on stolen identity information.

As became clear during the course of his examination at trial, Elder has articulated completely contradictory and irreconcilable positions during the course of the investigation and trial. Initially, Elder maintained that the 544 prescriptions were forgeries, not written by him, and that he had never treated the patients named on them. Consistent with this position, Elder deliberately and obviously attempted to disguise his handwriting when ordered by the court to provide handwriting samples, by writing very slowly in block letters. (Tr. 732-35; 907-09;

Government Exhibits 130, 1054.)<sup>1</sup> Furthermore, in a letter to the Texas Medical Board composed in 2008, Elder denied having any knowledge of ever treating the patients named in the government's indictment. (Tr. 1361-64; Government Exhibit 1121.)

Apparently realizing that his initial denial that he had written the prescriptions was an unsustainable position, Elder changed his position at trial, suddenly admitting that he had written the prescriptions and, therefore, that he had treated the patients named on them. That Elder wrote the prescriptions is obvious and undeniable. But the assertion that he had treated the patients was simply perjury. No STWC medical records or charts for any of these patients could be located, (Tr. 502-04; 729-30.) which is not possible given the number of patients involved if they had actually been seen at STWC. Two of the patients had died before their supposed date of examination by Elder. (Tr. 752-757.) Another person named in a prescription testified at trial that she had never been a patient at STWC, had never seen or heard of Elder, and was not taking the drugs prescribed for her at that time. (Tr. 1376-80; Government's Exhibits 37.13.) Address information was incorrect (often pointing to non-existent addresses) on a number of the prescriptions; in one case, the address of a house owned by co-defendant Troy Solomon was used. (Tr. 720-21; 725-29; Government Exhibits 37.66, 1185.)

Sheets of patient name and address information for the Elder prescriptions were faxed from Solomon's home FAX machine to The Medicine Shoppe in Belton, Missouri. (Government Exhibits, 40, 43, 45, 49, 51.) Solomon mailed stacks of photocopied driver's licenses to The Medicine Shoppe. (Government Exhibit 1186.) The sheets were organized by drug.

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<sup>1</sup>All referenced Government Exhibits have been electronically filed as attachments to this pleading.

Government Exhibit 47, a FAX sent September 30, 2004, has each patient name entry with a notation for “LC” (for Lorcet) or “LT” (for Lortab). Government Exhibit 49, a FAX sent October 19, 2004, is even more organized, with pages one and two devoted to Lorcet, pages three and five devoted to Lortab, and page four entirely consisting of Promethazine with Codeine. Government Exhibit 51, a FAX sent October 26, 2004, follows the same pattern. The organization of these sheets suggests that the names were provided to Elder by Solomon in order to write phony prescriptions to obtain specific drugs at specific times. For example, the first set of prescriptions from Elder, filled about August 17, 2004, contained 15 prescriptions for cough syrup with codeine, and the names for these prescriptions are grouped together on the sheets sent to Missouri. The next six sets of prescriptions contain none for codeine cough syrup, but then the last two sets, filled October 19, 2004, and October 26, 2004, suddenly contain 14 and 26 such prescriptions, respectively. Such a pattern cannot have resulted from actual prescribing based upon the examination of real patients, which would have produced a random distribution of such prescriptions. Moreover, Elder told Drug Enforcement Administration investigators that he did not prescribe cough syrup with codeine to any patients. (Tr. 699-700.) In addition, the sheets sent from Solomon to The Medicine Shoppe contained different handwriting, some appearing to be Solomon's but other handwriting clearly not Solomon's or Elder's.<sup>2</sup> This pattern suggests that Solomon procured patient identity information from a variety of sources, then providing the names to Elder for the writing of the false prescriptions in those names.

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<sup>2</sup>Cindy Martin identified Government Exhibit 1185, as an envelope which contained pictures mailed to her by Troy Solomon and which had the 5833 Sunforest address associated with Solomon as the return address. (Tr. 356-57.) A comparison with, for example, Government Exhibit 47 without question reveals the same handwriting on each document.

On February 1, 2005, Elder began work at the Westfield clinic in the north part of Houston, over 30 miles away from the building that housed South Texas Wellness Center and Ascensia Nutritional Pharmacy. (Tr. 649, 655-56.) On that day, he prescribed Lortab or vicodin for 41 of the 43 patients for whom he wrote prescriptions. (Tr. 1335; Government Exhibits 261-310.) Elder wrote prescriptions for 45 more patients on February 2, 2005. (Government Exhibits 311-357.) At Elder's request, Westfield staff photocopied these prescriptions and gave Elder a copy. (Tr. 653-54.) On February 3, 2005, Solomon faxed photocopies of all of these prescriptions to The Medicine Shoppe in Missouri. Solomon also faxed a list written in Elder's handwriting containing the address information corresponding to the Westfield patients. (Tr. 153, 702, 705-06, 1331-49; Government Exhibits 52, 1048.) The original prescriptions were all filled by the patients at C&G pharmacy, which was located in the same building as Westfield. (Tr. 641, 736-40.) Solomon and Elder had contact by telephone around the time the FAXs were sent to Missouri. (Tr. 1164-67; Government Exhibit 605.235.) Beyond question, Elder deliberately and knowingly provided the Westfield prescription photocopies and corresponding patient information to defendant Solomon.

In summary, Elder committed perjury when he testified that he had actually treated patients at STWC whose names were placed on 544 prescriptions sent to The Medicine Shoppe in Belton, Missouri, to be filled for controlled substances. In fact, Elder wrote out the prescriptions using stolen patient identity information taken from sources other than STWC.

## **II. A Sentence at the Top of the Guidelines is a Reasonable Sentence.**

Following *United States v. Booker*, 543 U.S. 220 (2005), the Eighth Circuit observed that “the district court has flexibility to vary from the advisory guideline range ‘to individualize

sentences where necessary,’ and to tailor the sentence in light of statutory concerns other than the advisory guidelines.” *United States v. Maloney*, 466 F.3d 663, 668 (8th Cir. 2006) (quoting *Booker*, 543 U.S. at 245-46). In *Gall v. United States*, 128 S.Ct. 586 (2007), the United States Supreme Court reiterated the proper procedures for district courts’ sentencing decisions. The Court explained that, “[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” *Id.*, at 590. The sentencing court then should “consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.” *Id.*

Title 18, United States Code, Section 3553(a) provides, in pertinent part, as follows:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed –
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines....

\* \* \*

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct....

In the present case, the Government contends that the appropriate Guidelines range is 51 to 63 months. The Government recommends a sentence at the top of the Guidelines range. During the course of the conspiracy from August 2004 to October 2005, two million dosage units of hydrocodone were generated, that is, sent from Missouri to Texas. More than 330,000 dosage units of Alprazolam (or brand name Xanax) and 449 gallons of promethazine with codeine were generated from The Medicine Shoppe.

The government plans to call Houston Police Officer John Kowal at sentencing to explain the seriousness of the prescription drug abuse issue in south Texas. Officer Kowal will explain that Houston, Texas, has a rampant problem with the abuse of prescription drugs, and in particular hydrocodone (sold under the trade names, such as Lorcet and Lortab), Soma (a sleeping aid), and codeine-containing cough syrup, known together as a "Houston Cocktail." Houston is a source city for these substances, and abusers travel to Houston from Louisiana and other places to acquire these drugs. Medical clinics throughout the city provide these drugs to "patients" after cursory examinations and without regard to the "patient's" medical need for the drugs. Patients pay in cash for their clinic visits, and they typically visit multiple clinics to acquire drugs. On occasion, third parties gather groups of people to visit clinics and acquire drugs, with the third party paying for the office visit and the prescription in exchange for of the



drugs acquired. Fraudulent prescription rings, like the one prosecuted in this case, are also seen. Prescription hydrocodone, soma, and cough syrup are routinely diverted and sold on the street at a considerable mark-up from the prescription retail price. These drugs are highly dangerous when abused, and the explosion in their use in Houston has led to a corresponding increase in overdose deaths.

This illegal operation began with the 544 original prescriptions fraudulently written by Elder using patient information harvested from identity theft. It is clear from the trial testimony that participation of Elder, a licensed and practicing physician, was key to the viability and ultimate success of the scheme. Elder abused the trust placed in him through his medical license, and by his action allowed powerful narcotic drugs to be diverted to the street to cause untold harm. A sentence at the top of the sentencing guidelines would promote respect for the law and protect the public from Elder's likely future criminal acts.

### **III. Elder Should Be Taken into Custody Immediately**

The Government believes that under the applicable statute, Elder should be ordered into custody following imposition of sentence. The relevant statute provides as follows:

(1) . . . the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial questions of law or fact likely to result in—

- (i) reversal,
- (ii) an order for a new trial,
- (iii) a sentence that does not include a term of imprisonment, or
- (iv) a reduced sentence to a term or imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

18 U.S.C. § 3143(b)(1)(A) & (B).

In other words, there is a two-part test for release pending appeal. The first part of the test requires this Court to detain the defendant unless this Court finds, by clear and convincing evidence, that the defendant is not likely to flee or present a danger if released. The second part of the test requires the Court to detain the defendant unless the Court finds that an appeal would raise substantial questions of law or fact likely to result in either reversal, an order for a new trial, or a sentence that does not include a term of imprisonment.

Elder's experience on pre-trial release may well support a judicial finding in his favor on the first half of the two-part test. However, the Government respectfully suggests there is no basis for a judicial finding that this defendant could pursue an appeal likely to result in either a reversal, a new trial, or a non-imprisonment sentence. As a result, the Government respectfully requests that the Court follow the command of 18 U.S.C. § 3143(b)(1) and order Elder into custody immediately following imposition of sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on April 18, 2011, to the Electronic Filing System (CM/ECF) of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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