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.	)	

COMES NOW the defendant, Christopher Elder, by and through his counsel, and hereby submits this Sentencing Memorandum in the above-referenced case, pursuant to Rule 32 of the Federal Rules of Criminal Procedure. Sentencing is presently scheduled for Tuesday, May 3, 2011, 2011, at 09:00 a.m.

Dr. Elder and undersigned counsel have thoroughly reviewed the Presentence Investigation Report ("PSR") and have discussed all issues with respect to sentencing in this case. This memorandum is respectfully filed to assist this Court in determining an appropriate sentence in this cause.

I. PROCEDURAL BACKGROUND

Dr. Elder was tried by jury in this Court with trial commencing on June 21, 2010 and concluding on June 30, 2010. Defendant was found guilty on Count One of conspiracy to distribute some amount of lortab, Lorcet and promethazine with codeine, which are low

level prescription controlled substances. He was also found guilty in substantive counts three through ten of aiding and abetting in the unlawful distribution of those same drugs.

Following the jury verdict, this Court ordered the preparation of a Presentence Investigation Report by the probation office. The PSR has been finalized in this matter. Defendant was allowed to remain free on a signature bond pending sentencing.

II. UNRESOLVED ISSUES WITH RESPECT TO PSR

The defendant previously submitted his comments and clarifications to the PSR. The Court must resolve one objection posed by the government which has been addressed by the government in its sentencing memorandum. The mere fact that a defendant chooses to testify in his own defense does not automatically trigger the two point enhancement for obstruction. Indeed, in *United States v. Brooks,* 174 F.3d 950 (8th Cir. 1999) undersigned counsel successfully argued this very point to the Eighth Circuit. The government must affirmatively prove such perjury at the sentencing hearing. The *Brooks* panel held:

> A district court may impose an enhancement under § 3C1.1 only where the defendant "willfully obstructed or impeded, . . . the administration of justice during the investigation, prosecution, or sentencing of the instant offense." *United States v. Eagle*, 133 F.3d 608, 611 (8th Cir. 1998) (quoting U.S.S.G. § 3C1.1). This section also encompasses committing or suborning perjury. See *United States v. Berndt*, 86 F.3d 803, 810 (8th Cir. 1996); *United States v. Gleason*, 25 F.3d 605, 608 (8th Cir. 1994); U.S.S.G. § 3C1.1, comment. (n. 3(b)). However, before imposing an enhancement under § 3C1.1, a district court "must review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice." *United States v. Dunnigan*, 507 U.S. 87, 95 (1993). Although not required, it is preferable for the district court to address each element of the alleged perjury in "a separate and clear finding." Id. Applying these principles to this case, the record makes plain that the district court did not make sufficient factual findings to justify imposition of this two-point enhancement.

The facts argued by the government to support this enhancement are contrary in large measure to the overall facts of the case and simply do not support this enhancement. Indeed, the Probation Officer, a tenured and experienced individual, did not see fit to recommend this enhancement after a thorough review of the case. It should not apply.

III. SENTENCE TO BE IMPOSED[1]

As the PSR indicates, Dr. Elder's total offense level is 22. He has a Criminal History category of I. As a result, he is facing an advisory sentencing range of 41 to 51 months. Although defendant exercised his constitutional right to trial by jury, he believes that the overall events and circumstances clearly indicate that this non-presumptive advisory sentencing range should also be tempered by the factors set forth under 18 U.S.C. § 3553(a) which when considered should result in a substantially lesser period of confinement.

Dr. Elder's friends and family have remained loyal and supportive as evidenced by the character letters written by them on his behalf. The letters show a side of Dr. Elder that the Court should also consider in imposing sentence. The letter from his mother is particularly moving and insightful.

APPLICATION OF 18 U.S.C. § 3553(a) FACTORS

Historically, particularly prior to 1986, but again as recently at 1996, the Supreme Court has recognized, "it has been uniform and constant in the federal judicial tradition for

[1] Most circuits agree that there is a three-step approach to sentencing. First, the guidelines are determined. Then, departures are considered, and finally, variances are analyzed. See, *United States v. Robertson*, 568 F.3d 1203, 1210 (10th Cir. 2009), *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006), c.f. *United States v. Johnson*, 427 F.3d 423 (7th Cir. 2006).

the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996).

With the United States Sentencing Guidelines now rendered "advisory only," per *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007), a district court has had restored to it substantial discretion in fashioning a sentence appropriate to the individual circumstances of the defendant and the unique facts of the offense. While the Court must consider the guideline range in each given case, "the Guidelines are not the only consideration." *Gall v. United States*, 128 S. Ct. 586, 597 (2007). See *Kimbrough*, 128 S. Ct. at 564 ("the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence").

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court determined that district courts must consider all of the sentencing factors under 18 U.S.C. §3553(a)(1)-(7) without giving mandatory weight to the sentencing guidelines. The Sentencing Reform Act instructs a Court to impose a sentence "sufficient, but not greater than necessary," to comply with the stated purposes of punishment. 18 U.S.C. § 3553(a). Title 18 U.S.C. § 3553(a) states, in pertinent part, as follows:

> (a) Factors to be considered in imposing a sentence.--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;
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> (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care, or others correctional treatment in the most effective manner;
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> (3) the kinds of sentences available;
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> (4) the kinds of sentence and the sentencing range established for...
>
> (5) any pertinent policy statement...
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victim of the offense.

In addition, a district court "may not presume that the Guidelines range is reasonable," and instead "must make an individualized assessment based on the facts presented." *Gall*, 128 S. Ct. at 597. Moreover, the Supreme Court has specifically ruled that, in balancing the §3553(a) factors, a judge may determine that, "in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing." *Kimbrough*, 128 S. Ct. at 564. See *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (a district court may consider arguments that "the Guidelines sentence itself fails properly to reflect §3553(a) considerations, or [that] the case warrants a different sentence regardless"). A district court may now vary from the applicable guideline range "based

solely on policy considerations, including disagreements with the Guidelines." *Kimbrough*, 128 S. Ct. at 570.

In a case from this very Circuit, the court recently held that, if a court ultimately concludes after considering the 3553(a) factors that a non-guidelines sentence is appropriate, the court's sentence is entitled to highly deferential review by the appellate court only for a clear abuse of discretion. See *United States v. Burns*, 577 F.3d 887, 894-95 (8th Cir. 2009).

Under 18 U.S.C. §3582(a), imposition of a term of imprisonment is subject to the following limitations:

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining- the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable**,** *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation*. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall. Consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

Emphasis added.

A) 18 USC §3553(a)

1. Nature and Circumstances of the Offense and History and Characteristics of the Defendant

As described in the Offense Conduct section of the presentence report, Dr. Elder's alleged illegal conduct was related to his involvement in writing original prescriptions which were then sent to defendant Rostie at her pharmacy to be filled and returned to Texas

to defendant Solomon or others. These originals were then refilled in large numbers notwithstanding Dr. Elder's belief that they were all one-time prescriptions. The refills were done by fax from the basement of co-defendant Solomon's home. This conduct occurred over a period of time. Even taking everything that the government alleges as true, such conduct is highly aberrational from Doctor Elder's background, and it is extremely unlikely that he will ever re-offend. Indeed, given the shortage of medical professionals, there is a substantial likelihood that the Texas Medical Board will at some future point re-issue him a license to practice medicine after all of this is behind him.

The personal and professional history section of the presentence report and the letters presented to this Court, and, in particular, the biographical information that follows, document that Dr. Elder is highly motivated individual who has heretofore been quite capable of conforming to rules and regulations. One does not become a medical doctor by exhibiting non-conforming behavior. In balance, his history and characteristics justify less than a guideline sentence.

Doctor Elder was born in Georgetown, South Carolina in 1971 and moved to New Haven, Connecticut at the age of 8. It was at this very early age that he dreamed of becoming a medical doctor. He learned from his father that for a black man this would be a nearly impossible endeavor and therefore he knew that he had his work cut out for him.

He attended James Hillhouse High School where he began to lay the foundation to make his dream come true. During his high school years, instead of hanging out with friends and being a typical teenager he spent the majority of his time studying and preparing

himself for the future. His early dedication in high school paid off when he graduated 15th out of a class of 236.

In preparation for a scientific career after high school, he then went on to perform clinical research at the Yale University School of Medicine in the Department of Hematology. Specifically, Dr. Elder worked on genetic studies pertaining to sickle cell anemia which is genetically pervasive in people of African or Mediterranean descent. Dr. Elder subsequently graduated from the University of Virginia in Charlottesville, Virginia where he earned his Bachelor's degree in Biology.

In 1999 he received his Medical Doctorate from the Medical College of Pennsylvania in Philadelphia. As a result of earning his Medical Doctorate, his former high school dedicated a wing of the school in his honor for his commitment and perseverance -- he was the first African American graduate of Hillhouse High to receive a Medical Doctorate in 30 years. After medical school Dr. Elder then went on to attend the Baylor College of Medicine in Houston, Texas where he was awarded a certification in December of 2003. In 2005 he completed and received his full board certification in Physical Medicine and Rehabilitation at the Mayo Clinic in Rochester, Minnesota.

Dr. Elder has always been an upstanding citizen, despite all of the obstacles placed before him, and it should be noted that up until the age of 38 when he was indicted, tried and convicted, he had no prior interaction with law enforcement of any type. At the onset of the indictment Dr. Elder was cooperative with DEA agents by submitting to two interviews without legal counsel and also offering handwriting samples. He even

volunteered to appear before the Grand Jury fully aware that he would not be entitled to legal representation.

His educational background, moral character, and high esteem for integrity have always been important to him. He is an individual who has always tried to give back to the community of which he was raised because he had once experienced and understands the plight of being socioeconomically disadvantaged.

To this end, following his graduation from the University of Virginia he was a representative of "Literacy volunteers of America" which is an organization whose primary objective is to teach inter-city citizens how to read and write. Also after completion of residency and securing gainful employment, he established a scholarship fund in his name at James Hillhouse High School to prepare minorities for scientific and mathematical oriented careers.

After becoming a medical doctor he chose to continue to service underprivileged people by opting to not practice medicine in suburbia where he had very lucrative offers because of his qualifications; instead he chose to practice in low income areas. Unfortunately he was ill equipped to deal with the unscrupulous characters that he ultimately fell in league with that resulted in this conviction.

Dr. Elder hopes that the court will look mercifully upon him given the nature of the government's absence of proof of monetary gain. He has already been subjected to harsh punishment no least of which has been being unemployed for over eight months as a result of his license suspension after the trial.

He has further been punished in that this entire persecution has taken a physical, emotional, and psychological toll on him and his family. He and his wife are anticipating the birth of their first child in July of 2011 but he does not feel that he can be jovial during this festive time because he is concerned regarding the decision of the court and the ability to financially support his family.

The stigma associated with being a convicted felon in and of itself is obviously tremendous punishment for a once well-respected double board certified physician. His reputation as an upstanding physician has been tarnished and damaged beyond obvious repair. He has been reported to the National Data Practitioner Bank and been stripped of Medicare and Medicaid privileges. And, he of course faces potential huge joint and several restitution obligations. For all the foregoing reasons, the court should grant a variance.

2. Need for the Sentence Imposed to Promote Certain Statutory Objectives

A sentence of incarceration is not always necessary in order to satisfy the sentencing mandates. It is the goal of sentencing to prevent unnecessary incarceration and to limit prison sentences to those individuals who pose the greatest risk to society. Most criminologists agree that when determining punishment, the least restrictive (punitive) sentence necessary to achieve defined social purposes should be imposed. Dr. Elder must be punished for those offenses for which he has been found guilty by the jury. However, it is imperative that a punishment be given which is proportional to the social harm committed, as determined by the Court, to serve the goals of sentencing. And the mere fact that he chose to exercise his right to trial by jury does not in and of itself suggest that he is unworthy of these important considerations.

(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

As suggested, a review of the criminological literature reveals that to the extent that criminal sanctions do have a general deterrent effect, the certainty (how certain an offender will be detected) of punishment has a far greater deterrent effect than the severity of the sanction.

Title 18 USC §3553(a)(2)(B)'s directive that the sentence imposed afford adequate deterrence to criminal conduct does not require a lengthy term of imprisonment. The fact that Dr. Elder was investigated, prosecuted, and ultimately convicted for his part in these unfortunate events should be sufficient to deter other potential offenders and in particular, medical professionals. . In addition, for individuals such as Dr. Elder, the potential loss of a medical license and the substantial livelihood that brings as a result of their actions has a significant deterrent effect, perhaps as strong as any formal punishment meted out by the criminal justice system. Dr. Elder recognizes that his involvement in this case is serious and it is a stain on his otherwise heretofore unblemished record. This he will have to live with.

(C) To Protect the Public from Further Crimes of the Defendant

Dr. Elder's alleged behavior in this matter is certainly uncharacteristic of the way he had conducted himself personally and professionally throughout his entire life up to, and since, the instant offense. Dr. Elder has no prior criminal history. His first alleged act of criminal conduct occurred at around age 36. He is now almost 40 years old. The defendant presents low risk of recidivism.

As pointed in the sentencing memorandum filed on behalf of co-defendant Martin in this case which this court found persuasive:

> Defendants "over the age of 40...exhibit markedly lower rates of recidivism in comparison to younger defendants. "Recidivism rates decline relatively consistently as age increases, from 35.5% under age 21 to 9.5% over 50." See *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate*, at 12, 28 (2004). Many courts have recognized this factor in sentencing. *United States v. Lucania*, 379 F.Supp.2d 288, 297 (E.D.N.Y. 2005) ("Post-*Booker* courts have noted that recidivism is markedly lower for older defendants."). *United States v. Carmona-Rodriguez* 2005 WL 840464, *4 (S.D.N.Y. April 11, 2005) (unpub.) (Whise 55 year old woman pled guilty to distribution of drugs sentence of 30 months (below guideline range) proper in part "in view of the low probability that Carmona-Rodriguez will recidivate."

(D) To Provide the Defendant with Needed Educational or Vocational Training, Medical Care, or Other Correctional Treatment in the Most Effective Manner

Dr. Elder is highly educated. He has been either a student or otherwise gainfully employed throughout his adult life. Dr. Elder suffers from no mental health disorders or substance abuse issues and does not require any treatment in this regard. In short, this sentencing factor simply does not apply to Dr. Elder. In fact, the information provided with regard to this factor can be considered a sentencing mitigation factor. He will continue to be a productive member of society and, as noted above, he will no doubt eventually be re-licensed as a physician and continue to provide medical help to those in need, albeit, likely in a discipline other than "pain management."

3. The Kinds of Sentences Available

18 U.S.C. §3553(a)(3) requires the Court to consider "the kinds of sentences available" in a given case. Here, the Court has available many forms of punishment other than lengthy imprisonment which will permit it to craft an appropriate sentence for Dr. Elder ranging from outright probation, to home detention, community confinement, fines, and community service or a short period of confinement with a longer period of supervised release. Indeed, employing some combination of these types of sentences will allow the Court to both punish Dr. Elder sufficiently, and allow him the opportunity to pay any restitution or fines and rebuild his life with the goal of re-entry into the medical field.

With the Guidelines now advisory and with the enhanced sentencing discretion mandated by *Gall*, the Court is now able to use the availability of such sentences to further calibrate a sentence so that it is no "greater than necessary" to accomplish the statutory purposes. As a result, in Dr. Elder's case, where there are mitigating factors, the availability of these alternatives under the law weighs in favor of the Court's use of them and against the imposition of a lengthy prison sentence. Indeed, courts have used this power in recent years to employ home detention or community confinement to address unique circumstances, even where the applicable guideline range would formerly have prohibited anything but imprisonment. See, e.g., *Coughlin*, 2008 U.S. Dist. Lexis 11263 at *14-36 (where applicable guideline range was 27 to 33 months, court imposed sentence of probation, 27 months home detention and community service based on finding that defendant's poor health would be worsened by imprisonment); *United States v. Woghin*, 04 CR 847 (ILG) (E.D.N.Y. Feb. 6, 2007) (unpublished memorandum and order)(court

sentenced corporate executive convicted of a multi-million dollar corporate fraud to 24 months split sentence, with half to be served in home confinement).

4-5. The Sentencing Guidelines Provisions

While the Court must consider the applicable guideline range and Sentencing Commission policy statements pursuant to 18 U.S.C. §3553(a)(4) and (5), it is respectfully suggested that any sentence within this range would be "greater than necessary" to serve the purposes of sentencing in this case. There are mitigating factors regarding Dr. Elder's offense and his personal circumstances which are plainly not accounted for in the sterile arithmetic of the computation of the applicable guideline range.

In *Gall*, the Supreme Court ruled that, under the law, a district court "may not presume that the Guidelines range is reasonable." 128 S. Ct. at 597. Indeed, this is a case which warrants a non-guideline sentence.

Each of the relevant sentencing considerations can be satisfied without imposing an advisory guideline sentence. The felony conviction alone serves as a general and specific deterrent. There is no credible evidence that he is a candidate for recidivism.

Again to quote from co-defendant Martin's sentencing memorandum:

> An excellent analysis of the impact of the federal guidelines appears in *The Champion* (Sept./Oct. 2006) in an article styled, "The Continuing Struggle for Just, Effective, and Constitutional Sentence after *United States v. Booker*: Why and How the Guidelines Do Not Comply with § 3553(a)," by Amy Baron-Evans.
>
> As an initial observation, Ms. Baron-Evans opines that "the guidelines 'place[s] undue weight on the amount of loss involved in the fraud,' which in many cases 'is a kind of accident' and thus 'a relatively weak indicator of the moral seriousness of the offense or the need for deterrence." She cites the following authorities in support: *United States*

> *v. Emmenegger*, 329 F.Supp. 2d 416, 427-28 (S.D.N.Y. 2004) and *United States v. Adelson*, WL 2008727 *3 (S.D.N.Y. July 20, 2006).
>
> She also points out that the Sentencing Commission has increased the punishment for economic crimes nearly annually, especially from 1987 to 1995, resulting in an "unplanned upward drift." *Id*. at 36. As an example, it is further noted that, "In the Economic Crimes Package of 2001, it lowered sentences for some low-loss offenders but significantly raised sentences for most mid to high loss offenders." Id. At 36.
>
> Of particular significance to the case at bar is the research showing that the deterrence prong of 18 U.S.C. § 3553 is not necessarily satisfied with a custody sentence particularly in a white-collar case. Ms. Baron-Evans further concludes:
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> > The initial Commission increased sentences for economic crimes above past practice to provide a 'short but definite period of confinement for a larger proportion of these 'white collar cases' is the belief that this would ensure proportionate punishment and achieve deterrence.' A deterrence researchers advised the Commission that certainty is more important to deterrence than severity. Other research has shown that lengthy terms of incarceration have little deterrent effect on white collar offenders, presumably the most rational group of offenders.
>
> She cites The Fifteen Year Report at 56, Hofer & Allenbaugh, *supra* note 50, at 61 n. 192; Sally S. Simpson, Corporate Crime Law and Social Control, 6, 9, 35 (Cambridge University Press 2002); and David Weisburd, et al., *Specific Deterrence is a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology, 587 (1995) in support of this contention concerning deterrence.

Dr. Elder sincerely regrets having ever becoming involved with Mr. Solomon and the Johnsons and their clinic. His conviction and the resultant stigma has placed emotional strain on his family, which he deeply regrets. His conduct has also affected other individuals and family members, which he also regrets. A sentence consistent with the

suggestions herein would serve all of the goals of punishment established by the Sentencing Reform Act.

IV. CONCLUSION

WHEREFORE based on the foregoing, Dr. Elder respectfully requests that this Honorable Court impose a sentence consistent with the suggestions contained in this Memorandum and grant him a variance from the otherwise applicable guidelines.

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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 Monday, April 18, 2011
/s/
JOHN R. OSGOOD