

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

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

**DEFENDANT’S MOTION FOR RELEASE ON BAIL  
PENDING APPEAL IN THE EVENT DEFENDANT IS SENTENCED TO  
A TERM OF IMPRISONMENT WITH SUGGESTIONS IN SUPPORT**

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COMES NOW defendant Elder and moves the Court to release him on bail pending appeal of his conviction. As grounds, defendant submits:

Title 18 United States Code, Section 3143 (b)(1)(A) provides:

(b) Release or detention pending appeal by the defendant.-(1) Except as provided in paragraph (2), 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 question 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 of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

The government in its sentencing memorandum addressed this issue and essentially conceded that Section (b)(A) is not at issue. The government goes on to argue that the evidence of guilt is substantial and there are no errors, issues or other qualifying criteria under Section (b)(B) that justify bail for Doctor Elder pending appeal in the event of a sentence of incarceration.

Defendant filed numerous pretrial motions in this case, a sampling of which are listed below:

- Doc#22 – Motion to sever counts and defendants
- Doc#23 – Motion to strike surplusage
- Doc#50 – Motion to preclude handwriting expert testimony
- Doc#51 – Motion opposing submission of handwriting
- Doc#55 - Motion for notice of alibi and request for bill of particulars
- Doc#88 – Motion for issuance of a Rule(17)© subpoena
- Doc#93 - Motion to dismiss because of government misconduct
- Doc#96 – Motion to suppress search of South Texas Wellness Center

Doc#117 – Motion to preclude lay handwriting testimony

Doc#153 – 2nd Motion to dismiss because of government misconduct

Doc#182 – Motion for change of venue to Texas

Doc#201 – Motion for reconsideration of denial of severance

Doc#369 – Motion for new trial – sufficiency of the evidence

In *United States v. Marshall*, 78 F.3d 365 (8<sup>th</sup> Cir. 1996) the court explained the impact of the bail reform act of 1984 act vis a vis bond on appeal:

The Bail Reform Act of 1984 made it much more difficult for a convicted criminal defendant to obtain his release pending appeal. The Act's intent "was, bluntly, that fewer convicted persons remain at large while pursuing their appeals." *United States v. Powell*, 761 F.2d 1227, 1231 (8th Cir. 1985) (*en banc*). For crimes of the type committed by Marshall, release pending appeal now requires that the district court or this court find (A) by clear and convincing evidence that the defendant is unlikely to flee or pose a danger to others, and (B) that his appeal "raises a substantial question of law or fact" that is likely to result in reversal, new trial, or reduction to a sentence that would be served before disposition of the appeal. 18 U.S.C. § 3143(b)(1)(A) & (B).

. . . Marshall did not satisfy requirement (B) in his statement of position to this court; indeed, he did not even identify what issues he will raise on appeal. We require a showing that the appeal presents "a close question" - not "simply that reasonable judges could differ" - on a question "so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor."

Defendant submits that he has several issues for appeal that present very close questions and one in particular that is indeed so integral to the merits of conviction that it is very probable that a new trial will occur. Defendant believes that the repeated denials of severance and forced trial with co-defendant Solomon was highly prejudicial to his case, particularly in light of the money laundering charges and emphasis on financial gain, issues that were at best peripheral to Dr. Elder. Closely connected to this issue is the repeated denials for change of venue to Texas, the forum where this case should have been tried.

Defendant will also vigorously argue that he had an expectation of privacy in records seized from the South Texas Wellness Center and that the court erred in allowing this evidence to be admitted against him. This is an undecided question of first impression at the 8<sup>th</sup> Circuit, that is whether a doctor has rights, duties and obligations in connection with patient records after he leaves employment of a clinic.

There were also motions to dismiss because of government misconduct which involved allegations of government witness tampering and deliberate attempts to structure the content of DEA reports of interviews by ordering the agent to withhold writing reports which arguably would have contained exculpatory evidence. This occurred more than once.

The strongest issue and the one most likely to be addressed first by the Circuit which will result in a remand and order for new trial is that raised in defendant's motion for new trial and judgment of acquittal (Document # 369) in which he argues that the government failed entirely to establish by any credible evidence that the prescriptions were issued in violation of the national standard. This identical issue was the cornerstone of the appeal in

*United States v. Hurwitz*, 459 F.3d 463 (2006) which was reversed based on arguments similar to those raised by Dr. Elder in his motion.

In summary, defendant submits that he has real and substantial issues for appeal, several of which call for reversal and remand for new trial. These, and in particular the one raised in the motion for new trial, are “close questions” and issues that if ruled in defendant’s favor will result in a new trial. Defendant should be admitted to bail pending appeal. *United States v. Marshall, supra*.

WHEREFORE, if defendant is sentenced to a period of incarceration, he prays that the court will allow him to remain free on bail pending an appellate decision in his case.

/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 April 21, 2011

/s/  
JOHN R. OSGOOD