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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 08-00026-03-CR-W-FJG
	)	
TROY R. SOLOMON,	)	
	)	
Defendant.	)	

GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America, by and through its undersigned counsel, respectfully 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 will suggest that the defendant's advisory guidelines sentencing range is 78 - 97 months based upon a total offense level of 28 and criminal history category I. The Government has filed objections to the findings in the presentence investigation report ("PSR"), arguing that Solomon should receive a four-level adjustment for his role in the offense as an organizer under U.S.S.G. § 3B1.1(a), and a two-level upward adjustment for obstruction of justice under U.S.S.G. § 3C1.1.

Procedural Background

On June 30, 2010, a federal jury convicted defendant Troy Solomon ("Solomon") of conspiracy to distribute and dispense controlled substances, conspiracy to commit money

laundering, and ten counts of aiding and abetting unlawful distribution and dispensing of controlled substances. The sentencing is set for May 16, 2011.

Discussion

I. Solomon Should Be Assessed a Four-Level Adjustment for His Role as an Organizer and Leader Under U.S.S.G. § 3B1.1(a).

Solomon should receive a four-level adjustment for being an organizer and the leader of a criminal activity that involved five or more participants or was otherwise extensive.

Section 3B1.1(a) provides that "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels." A participant is defined as "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1, cmt. n. 1. The definition of "otherwise extensive" states that "all persons involved during the course of the entire offense are to be considered," including, for example, the unknowing services of others. U.S.S.G. § 3B1.1, cmt. n. 3.

"A leadership role is determined by the nature of defendant's role in the offense, the recruitment of accomplices, the degree of participation in planning or organizing the offense." *United States v. Williams*, 605 F.3d 556, 570 (8th Cir. 2010)(internal quotation and citation omitted). A district court may also look to a defendant's "decision-making authority . . . and the degree of control and authority that the defendant exercised over others." *Id*.

The evidence at trial demonstrated beyond question that Solomon was both an organizer and leader of the charged conspiracies. Solomon initiated the scheme by contacting co-defendant Cynthia Martin ("Martin") and subsequently convincing co-defendant Mary Lynn Rostie

("Rostie") to fill the Houston prescriptions. (Tr. 360-364.) Thus, Solomon was the one who recruited accomplices. Solomon told Rostie where to send the prescription drugs. (Tr. 258.) Solomon mailed the cash payments for the prescription drugs to Martin and directed her to deliver the cash to Rostie on his behalf. (Tr. 258-259, 364-366.) Solomon directed Martin on how to obtain a fee from Rostie for helping to broker the drug transactions with him. (Tr. 260-261, 366.) Solomon was in constant contact with Martin, Rostie, and Jill Gerstner (assistant manager and pharmacy technician at The Medicine Shoppe), to keep the drug shipments to Houston going. (Tr. 248-255, 263.) Solomon sent prescriptions and cash payments to Martin, who, in turn, provided it to The Medicine Shoppe. (Tr. 149, 364-367.) Solomon would tell Martin when to expect the next envelope containing money for payment of the prescription drugs. (Tr. 370.) Solomon instructed Martin not to deposit more than $10,000 in cash at a bank because it would raise a "big flag." (Tr. 370-371.) Thus, Solomon exercised decision making authority.

Ms. Gerstner's primary duty was to fill the prescriptions from Houston. (Tr. 150.) On average, the pharmacy filled 200-250 prescriptions at one time. (Tr. 151.) Solomon sent the FAX sheets with patient names and addresses, refill orders, and other information to Rostie at The Medicine Shoppe. Ms. Gerstner communicated frequently with Solomon *via* telephone and fax. (Tr. 163-164, 168-181.) However, when Ms. Gerstner was busy, Rostie would talk to him. (Tr. 140.) Ms. Gerstner would inform Solomon about the number of prescriptions filled, the number of prescriptions being shipped, and the amount owed for the filled prescriptions. (Tr. 163-164.) Solomon was the only person in Houston with whom she communicated about the prescriptions. (Tr. 164.)

Donna Kerste testified that while working at The Medicine Shoppe she helped Jill Gerstner fill the prescriptions from Texas. (Tr. 138, 147.) Ms. Kerste stated that the only person she knew who called The Medicine Shoppe was "Troy." (Tr. 140.).

In total, the evidence demonstrated that Solomon was the driving force behind the plan to obtain by fraud controlled substances from The Medicine Shoppe for resale on the streets of Houston.

At least five people were involved in Solomon's enterprise, including Solomon, co-defendant Dr. Christopher Elder, Martin, Rostie, unindicted co-conspirator Dr. Peter Okose, Gerstner, Kerste, and without a doubt Delmon Johnson, who was initially charged in this matter, but the charges were subsequently dismissed. Delmon Johnson signed for the receipt of 69 packages. (Tr. 1030; PSR ¶ 11.) Solomon instructed Delmon Johnson to pick up the packages from South Texas Wellness Center and bring then to Ascensia Nutritional Pharmacy ("ANP "). (Tr. 1030-31.) Solomon told Delmon Johnson where to place packages in ANP's office. (Tr. 1031.) Solomon directed Delmon Johnson to place those packages in his car. (Tr. 1031.) .

As to the second clause of the enhancement, it is sufficient that the criminal activity be "otherwise extensive" to support the enhancement's application, as an alternative to the five person requirement. *United States v. Senty-Haugen*, 449 F.3d 862, 864 (8th Cir. 2006). Solomon's criminal activity was "otherwise extensive." The conspiracy generated over two million dosage units of controlled substances, involved the extensive use of interstate mail carriers, and involved a complex and far ranging scheme to appropriate patient identity information. (PSR ¶ 10-11.) Solomon's drug operation involved an entire pharmacy, making The Medicine Shoppe the highest purchaser of hydrocodone in the State of Missouri in 2005.

(Tr. 606.) By comparison, the Eighth Circuit found the tax scheme in *Senty-Haugen* to be otherwise extensive where 29 fraudulent income tax returns were filed resulting in approximately $71,000 of loss. *Id.*

For these reasons, Solomon organized and led the conspiracy to distribute controlled substances.

II. Solomon Should Be Assessed a Two-Level Adjustment for Obstruction of Justice Under U.S.S.G. § 3C1.1.

Solomon should receive a two-level obstruction of justice enhancement for threatening, intimidating, or otherwise unlawfully influencing witnesses in this case, and for committing perjury during the course of his testimony at trial. *See* U.S.S.G. § 3C1.1, cmt. n. 4(a) & n. 4 (b). The standard of proof is the preponderance of the evidence. *United States v. O'Dell*, 204 F.3d 829, 836 (8th Cir. 2000)(citation omitted).

A. Solomon Obstructed or Impeded the Administration of Justice

Section 3C1.1 of the Sentencing Guidelines provides for such an adjustment if:

> (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (I) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense . . . .

U.S.S.G. § 3C1.1; *see also United States v. Sandoval-Sianuqui*, 632 F.3d 438, 441-42 (8th Cir. 2011). Application Note 4 to U.S.S.G. § 3C1.1. provides examples of the types of conduct to which this adjustment applies, which includes "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." U.S.S.G. § 3C1.1, cmt. n. 4(a).

Solomon had contact with two witnesses in the case, Cynthia Martin and Pleshette Johnson, in an attempt to intimidate them and influence their testimony. Martin was a co-defendant in the case who had pleaded guilty and agreed to cooperate with the government. On April 14, 2009, Martin testified at an evidentiary hearing on a pretrial motion.[1] Before Martin's first proffer interview with the government in July 2006, Solomon and another man called "the Judge," called Martin. (Evid. Hr'g Tr. 56.) Both Solomon and the Judge told Martin to say that she had only made an introduction (of Solomon to pharmacist Lynn Rostie) and that was all. (Evid. Hr'g Tr. 57-58.) By implication, Solomon was telling Martin not to tell the government about receiving the cash shipments from Solomon in the United Parcel Service ("UPS") packages, and, in fact, Martin did not tell the government about the money shipments during the first proffer session. (Evid. Hr'g Tr. 59.) In addition, right before Martin's plea hearing Solomon called her on three different occasions and told her that "you don't want to do this." (Evid. Hr'g. Tr. 66-67.)

At that same evidentiary hearing, Pleshette Johnson also testified. Ms. Johnson is a chiropractor who co-owned South Texas Wellness Center ("STWC"), the clinic where defendant Elder worked in 2004. (Evid. Hr'g Tr. 5-6, 8.) Solomon paid approximately $25,000 in cash to Pleshette Johnson and her mother, Ada Johnson, in 2004 and 2005, for them to use in their business. (Evid. Hr'g Tr. 8-9.) Solomon's pharmacy was located on the same floor and in the same building as STWC. (Evid. Hr'g Tr. 11.) In 2009, Pleshette Johnson and Solomon were riding together in an elevator in their building in Houston. (Evid. Hr'g Tr. 47.) Solomon told

[1]Mr. Chip Lewis was present at that hearing at which he represented defendant Solomon. A copy of the transcript will be provided to the Courtroom Deputy for the Court's convenience.

Pleshette Johnson that he knew everything they were saying to the Government. (Evid. Hr'g Tr. 47.) He said that he wished Pleshette and Ada had not mentioned the money he had given them, and that maybe they could go back and "say it a certain way." (Evid. Hr'g Tr. 48.) He suggested that because Ada was older maybe she didn't remember the way things had transpired. (Evid. Hr'g Tr. 48.)

B. Solomon Committed Perjury During His Testimony

It is clear in retrospect that Solomon's intention in these contacts was to facilitate his own perjurious testimony at trial. That is, his conduct also included "committing, suborning, or attempting to suborn perjury," which qualifies him as well for the two-level adjustment for obstruction of justice. U.S.S.G. § 3C1.1, cmt. n. 4 (b). "A defendant commits perjury if, under oath, 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." *O'Dell*, 204 F.3d at 836 (internal marks and citations omitted). The word *material* is defined as "evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1 cmt. n. 6.

Solomon testified that he relied upon the advice of his business partner, Philip Parker, and acted at Parker's direction. (Tr. 1087, 1089, 1095, 1119.) Specifically, he said that Parker would come over to Solomon's house late at night to use the FAX machine (to send the FAX transmissions to The Medicine Shoppe in Missouri). (Tr. 1094, 1132, 1134.) Solomon also testified that Parker gave Solomon the UPS envelopes to send to Cindy Martin and that Solomon was unaware of their contents. (Tr. 1095-1097.) This testimony was not the result of confusion or faulty memory.

Indeed, Solomon's testimony is completely at odds with the facts of the case and is internally inconsistent. Solomon recruited Cindy Martin into the scheme and communicated with her constantly about the money shipments; Martin had no contact whatsoever with Parker. (Tr. 360-364, 366, 369-371, 408.) Solomon, not Parker, had almost daily contact with Lynn Rostie and Jill Gerstner at The Medicine Shoppe concerning the prescriptions and ensuing drug shipments and payments. (Tr. 245, 248, 249.) The FAX sheets reflected that they were sent from Solomon's home at all times of day, not just in the late evening when Solomon claimed Parker would come over. (Tr. 1128-1142.) And Solomon continued to send money shipments and accept drug shipments through October 2005, well after Solomon claims to have become suspicious of Parker and dismissed him from the Ascensia Nutritional Pharmacy. The notion that Solomon was unaware that the envelopes did not contain money was patently incredible. In short, Solomon's testimony at trial was intentionally false concerning material matters with the willful intent to provide false testimony.

In sum, Solomon's testimony was obvious perjury with regard to virtually every statement he made.

III. Solomon Should Not Be Granted a Downward Departure

Solomon requests this Court to vary downward from the applicable guideline range to probation, based on his cooperation in an unrelated case in another district.

"Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense," a district court may depart from the guidelines. U.S.S.G. § 5K1.1; *United States v. Perez*, 526 F.3d 1135, 1138 (8th Cir. 2008). "The government has no duty to make a substantial assistance

motion unless it has entered into a plea agreement with the defendant that creates such a duty." *Id*.

Solomon did not enter into a plea agreement with the Government in this district. Thus, no duty to make a motion was created. Solomon's mere assertion of assistance in another district has no bearing on his case in this district.

Solomon's conduct in this case demands a significant sentence of incarceration. Solomon was responsible for pushing more than a million dosage units of prescription drugs onto the streets of Houston. He made The Medicine Shoppe, a small retail pharmacy in Belton, the highest purchaser of hydrocodone in the entire state of Missouri. Solomon shipped more than 30 UPS packages containing cash to Martin. (Tr. 463.) Moreover, at the same time, Solomon conspired to divert drugs from the Medicine Shoppe, the trial evidence demonstrated that he was using his own pharmacy in Houston, the Ascencia Nutritional Pharmacy, to divert massive numbers of dosage units of hydrocodone and other controlled substances to the street by filling fraudulent prescriptions written by Dr. Okose and other doctors. In short, Solomon is a major narcotics trafficker and his sentence should reflect that fact.

In addition, Solomon alleged cooperation in Houston involves a minor matter which has nothing to do with Solomon's own proven wrongdoing. Solomon is not taking any responsibility for his own conduct, and appears to have no remorse whatsoever for it. Solomon's rather blatant perjury in his trial testimony demonstrates his complete contempt for the justice system and his bleak prospects for rehabilitation.

IV. Solomon Should be sentenced at the top of Guidelines.

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.*

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 this case, the Government is recommending a sentence of imprisonment at the high end of the advisory guidelines range. As described above, Solomon directed a wide ranging conspiracy to divert controlled substances that involved both the Medicine Shoppe in Belton, Missouri, and Solomon's own ANP Pharmacy in Houston. As a direct result of his conduct, millions of dosage units were diverted. Solomon suborned perjury in potential government witnesses and attempted to intimidate those witnesses. Solomon perjured himself at trial. By his conduct, Solomon has demonstrated the need for a sentence at the top of the Guideline range.

V. Solomon Should Be Taken into Custody Immediately

The Government believes that under the applicable statute, the defendant should be ordered into custody following imposition of sentence. The relevant statue 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-prong 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.

Solomon'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 he could pursue an appeal likely to result in either a reversal, a new trial, or a non-imprisonment sentence.

Solomon bears the burden of establishing that he is entitled to release pending appeal. *See United States v. Powell*, 761 F.2d 1227, 1232 (8th Cir. 1985). The Eighth Circuit Court of Appeals has interpreted § 3143(b)(1)(B) to mean the following:

> We hold that a defendant who wishes to be released on bail after the imposition of a sentence including a term of imprisonment must first show that the question presented by the appeal is substantial, in the sense that it is a close question or one that could go either way. It is not sufficient to show simply that reasonable judges could differ (presumably every judge who writes a dissenting opinion is still 'reasonable') or that the issue is fairly debatable or not frivolous. On the other hand, the defendant does not have to show that it is likely or probable that he or she will prevail on the issue on appeal. If this part of the test is satisfied, the defendant must then show that the substantial question he or she seeks to present is 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. In deciding whether this part of the burden has been satisfied, the court or judge to whom application for bail is made must assume that the substantial question presented will go the other way on appeal and then assess the impact of such assumed error on the conviction. This standard will, we think, carry out the manifest purpose of Congress to reduce substantially the numbers of convicted persons released on bail pending appeal, without eliminating such release entirely or limiting it to a negligible number of appellants.

Id. at 1233-34.

Solomon has failed to show that he has raised a "substantial question," that is, "a close question or one that could go either way." *See id*; § 3143(b)(1)(B). As a result, the Government respectfully requests that the Court follow the command of 18 U.S.C. § 3143(b)(1) and order the defendant 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 29, 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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