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 ELDER'S OBJECTION TO SOLOMON'S REQUEST FOR CONTINUANCE AND MOTION TO SEVER SOLOMON AND GRANT HIS REQUEST FOR CHANGE OF VENUE TO TEXAS WITH SUGGESTIONS IN SUPPORT

Defendant Elder is prepared for trial for the June setting and objects to any further continuance and requests that his and Defendant Johnson's cases be severed from the Solomon case. As grounds defendant offers the following:

As correctly pointed out by Solomon's counsel in his motion, it appears that the conspiracy count on Mr. Solomon encompasses or overlaps the same time period as covered in the Missouri case. And it appears that the theory of prosecution is identical or at least very similar.

The Missouri prosecutors have openly acknowledged that Dr. Okose is an un-indicted coconspirator in this Missouri case. Defendant Elder has been

provided with volumes of discovery, a great deal of which is Okose specific. The last batch of discovery reflecting investigation in March and April of 2009 involves some 43 witnesses who will testify that Okose was operating a clinic where "patients" could obtain scripts with little or no examination and scripts and drugs were being openly bartered for in the doctor's office and the parking lot outside. Many or most of the scripts were allegedly filled at Mr. Solomon's pharmacy, a criminal accusation he also labors under in this Missouri case.

If Mr. Solomon's case is disposed of in Texas it would appear to trigger a clear 5th Amendment double jeopardy claim good against any prosecution in Missouri insofar as the basic conspiracy in concerned. This would be true in the event of acquittal and equally true in terms punishment under the sentencing guidelines in the event of a plea, albeit the money laundering is not included in the Texas indictment.[1] See ***Blockburger v. United States***, 284 U.S. 299 (1932);

[1] For the first time now it appears that Mr. Solomon may be in a frame of mind to attempt to negotiate a settlement which would involved either a Rule 20 transfer and/or a dismissal of one of the two indictments.

Bullington v. Missouri, 451 U.S. 430 (1981); But See ***Monge v. California***, 524 U.s. 721 (1998).[2]

Mr. Lewis's argument on behalf of Mr. Solomon is persuasive and defendant Elder believes it makes sense, both in terms of judicial economy and basic fairness to sever Mr. Solomon's case and transfer his case to Houston, Texas where he can deal with the local AUSA, Mr. Burns, in that jurisdiction. Based on a comprehensive review of the discovery, it seems that AUSA Burns is fully informed as to the theory of prosecution in Missouri, has shared discovery in the cases, and is fully capable of taking the reins in Texas and trying Mr. Solomon and his Texas co-defendants on all the Texas charges including any surviving Missouri money laundering charges. Also, additional evidence he might want to present concerning the Medicine shop portion of this case is available to him and would only serve to strengthen his Texas prosecution.

Such a severance and transfer would in no way harm or prejudice the government's case in Missouri insofar as Dr. Elder or Mr. Johnson is concerned

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[2] ***Witte v. United States***, 515 U.S. 389 (1995) holds that it is not double jeopardy where relevant conduct from case one is considered in case two. Here Mr. Solomon would be sentenced for the same basic conspiracy in two different jurisdictions which is of course classic double jeopardy. Also see ***U.S. v. Watts***. 519 U.S. 148 (2005) (no double jeopardy where sentence is imposed for acquitted conduct).

and would indeed potentially shorten the Missouri case and result in a potential raw dollar cost savings to the Untied States, a consideration often sited by the courts when called upon to rule on severance motions. ***U.S. v. Little Dog***, 398 F.3d 1032 (8th Cir. 2005). See also ***United States v. Moeckly***, 769 F.2d 453, 465 (8th Cir. 1985) (holding that the district court properly denied severance because the same proof of the smuggling conspiracies would have been required in separate trials).

The United States has already consciously made a decision to spend the money and dedicate the resources necessary for two separate trials where one trial charging all these defendants would have made immensely more sense. ***Little Dog***, points out that "[t]o avoid prejudice, the district court can always grant severance." ***I.d.*** Doctor Elder should not now be subjected to further delays because the government has seen fit to indict Mr. Solomon in two different districts for essentially the same conduct. As cogently pointed out by Solomon's able counsel, delay necessarily builds in more cost for a defendant clothed with a presumption of innocence. Significant delay can also affect the memory and recollections of key witnesses.

Defendant concedes that the 8th Circuit law on statutory speedy trial charges all defendants with excluded time based on a motion filed by any defendant in the case. ***U.S. Shepard***, 462 F.3d 847 (8th Cir. 2006). Notwithstanding this, defendant submits that further delay in this case with respect to defendant Elder may well be knocking on the door of a constitutional violation under ***Barker v. Wingo,*** 407 U.S. 514 (1972) and the 6th Amendment. The court addressed this in ***Shepard*****:**

> As to the separate Sixth Amendment speedy trial claim, we have stated that "[i]t would be unusual to find the Sixth Amendment has been violated when the Speedy Trial Act has not." ***United States v. Titlbach,*** 339 F.3d 692, 699 (8th Cir.2003). The Sixth Amendment right "attaches at the time of arrest or indictment, whichever comes first, and continues until the trial commences." ***United States v. Perez-Perez***, 337 F.3d 990, 995 (8th Cir.2003), ***cert. denied***, 540 U.S. 927, 124 S.Ct. 336, 157 L.Ed.2d 230 (2003). We consider a four-factor ***ad hoc*** balancing test when evaluating a Sixth Amendment claim for pretrial delay, considering such factors as: "[1][l]ength of delay, [2] the reason for the delay, [3] the defendant's assertion of his [speedy trial] right, and [4] prejudice to the defendant." ***Barker v. Wingo***, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); ***Titl-bach***, 339 F.3d at 699. "A delay approaching a year may meet the threshold for presumptively prejudicial delay requiring application of the ***Barker*** factors." ***Titl-bach***, 339 F.3d at 699.

The prudent thing do at this point in light of the new indictment in Texas and its suspect timing with regard to Mr. Solomon would seem to be to simply transfer the Solomon case, as requested by his counsel, to

Texas and proceed with trial on Doctor Elder and Mr. Johnson here in Missouri.

WHEREFORE, defendant moves the Court to enter an Order severing Mr. Solomon's case from that of the defendant and his co-defendant Johnson, Order the trial to proceed on the scheduled date, and further Order that all pending charges in the indictment against Mr. Solomon be transferred to Texas for further disposition.

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 Tuesday, May 11, 2010.

/s/
JOHN R. OSGOOD