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

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

GOVERNMENT'S RESPONSE TO MOTION OF DEFENDANT TO RECONSIDER ORDER DENYING RELEASE ON BAIL PENDING APPEAL

The United States of America, by and through its undersigned counsel, hereby responds to the defendant Christopher L. Elder's motion (Doc. No. 465) for reconsideration of the order denying his request for release pending appeal. Because defendant Elder still has not shown his appeal will raise a substantial question under 18 U.S.C. § 3143(b)(1)(B), his motion to reconsider should be denied.

I. STATUS OF THE CASE

On June 30, 2010, a federal jury convicted defendant Christopher Elder ("Elder") of conspiracy to distribute and dispense controlled substances and eight counts of aiding and abetting unlawful distribution and dispensing of controlled substances. Elder was permitted to remain on bond pending sentencing.

Following the trial, Elder filed a motion for judgment of acquittal, or, in the alternative, motion for new trial. (Doc. No. 369). The Government filed its response. (Doc. No. 382). Then, Elder filed a reply. (Doc. No. 385). This Court, having reviewed those pleadings and the record, denied the motion for the reasons given in the Government's response. (Doc. No. 385). Then, in

his motion for release pending appeal, Elder argued that he had an array of issues from which he will seek an appeal, the "strongest" of which was the issue regarding sufficiency of the evidence. That issue was addressed by the Government in its response to Elder's motion for new trial. (Doc. No. 382). On May 3, 2011, the Court sentenced Elder to 15 months' imprisonment on each count, to be served concurrently. (Doc. No. 437). This Court then denied Elder's motion for bond pending appeal, ordering him to self-surrender on July 25, 2011. (Doc. No. 437).

II. APPLICABLE LAW

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-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.

With regard to the second part of the test, it 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, a sentence that does not include a term of imprisonment, or a reduced sentence to a term of imprisonment less than the total time already served plus the expected duration of the appeal process.

Elder 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.

III. ELDER HAS FAILED TO SHOW HE WILL RAISE A SUBSTANTIAL QUESTION OF LAW OR FACT

A. Sufficiency of the Evidence

Elder's appeal in this case will not raise a substantial issue of law or fact. On appeal, Elder is expected to renew his argument that the evidence was insufficient to support his convictions on several counts, including Counts Seven through Ten, which concerned deceased individuals. The government's evidence at trial established that the prescriptions written by Elder in this case and filled by the Medicine Shoppe Pharmacy in Belton, Missouri, had no relationship whatsoever to the care or treatment of any patient. The over 500 prescriptions written by Elder while at South Texas Wellness Center (STWC) were written for people who were not patients at STWC and had never been examined by Elder. As noted, several of them had died well before the date of the prescription. Trial witness Dolores Cooks testified that even though Elder had written a prescription in her name, she had never been a patient of SWTC and had no idea who Elder was. Of course, no files existed for any of these patients at STWC, because they were never treated there.

Moreover, on his first days on the job in February 2005 at the Westfield Clinic, Elder photocopied the original prescriptions he wrote for patients and provided the photocopies to codefendant Troy Solomon to FAX to the Medicine Shoppe. The actual patients filled the original prescriptions at the pharmacy in Houston adjoining the Westfield Clinic. Again, the jury could make no conclusion other than that there was no legitimate medical reason to provide the photocopies to the Medicine Shoppe.

The cases cited by the government in its response to Elder's motion for a new trial make clear that the jury could legitimately conclude from this evidence alone that "the national

standard of care" was not met when there was either no actual doctor-patient relationship, or the prescriptions were surreptitious duplicates made solely for the purpose of double filling a prescription to generate drugs for diversion, although, as detailed in the new trial motion response, Dr. Morgan provided additional testimony that was directly relevant on this question. Elder has not shown 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). Indeed, the standard of care argument is patently frivolous on its face; there can be no standard of care issue where, as here, a doctor writes out prescriptions based on a list of stolen identities.

B. Severance

In addition, in his motion to reconsider Elder renews his argument that the counts against him should have been severed.[1] Rule 8(a) of the Federal Rules of Criminal Procedure addresses joinder of *counts*, while Rule 8(b) addresses joinder of *defendants*.

Rule 8(b) permits the joinder of defendants "if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. All defendants need not be charged in each count." Fed. R. Crim. P. 8(b). Nor is it necessary that every defendant have participated in each offense. *United States v. Darden*, 70 F.3d 1507, 1527 (8th Cir. 1995), *cert. denied*, 517 U.S. 1149, 116 S. Ct. 1449 (1996). Rule 8 is interpreted liberally in favor of joining the trial of multiple defendants. *United States v. Warfield*, 97 F.3d 1014, 1018-19 (8th Cir. 1996); *Darden*, 70 F.3d at 1526.

"In general, persons charged in a conspiracy or jointly indicted on similar evidence from the same or related events should be tried together." *United States v. Ruiz*, 446 F.3d 762, 772

[1] The Magistrate Court addressed this issue previously. (*See* Doc. Nos. 199 & 243.)

(8th Cir. 2006). Courts generally have defined a single conspiracy for the purposes of Rule 8 as "acts or transactions that are pursuant to a common plan or common scheme . . . " *United States v. Jones*, 880 F.2d 55, 61 (8th Cir. 1989) (quoting *United States v. Velasquez*, 772 F.2d 1348, 1353 (7th Cir. 1985), *cert. denied*, 475 U.S. 1021, 106 S. Ct. 1211 (1986)). A "common scheme" may consist of subsidiary schemes bound together by one common goal. *United States v. Massa*, 740 F.2d 629, 644 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985). A single conspiracy does not become multiple conspiracies "simply because the ambitious scope of the scheme demand[s] subsidiary action." *Id.* at 637. Defendants can enter the conspiracy at different times and perform different functions. *United States v. Baker*, 855 F.2d 1353, 1357 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 2072 (1989). Joinder is proper where the indictment reflects a sequence of connected events, with the defendants involved "at various points in the continuum." *United States v. Rimell*, 21 F.3d 281, 289 (8th Cir. 1994). The criminal objective or "common goal" that makes a conspiracy *singular* can be general, such as selling large quantities of drugs, *Baker*, 855 F.2d at 1357, or defrauding the United States through the execution of a health care fraud scheme. *United States v. Liveoak*, 377 F.3d 859, 865 (8th Cir. 2004). In summary, the Eighth Circuit holds that minor players in big, complex, multi-tiered conspiracies can be joined at trial with co-conspirators, large and small, so long as they share a broad common goal, such as the sale of illegal drugs.

Furthermore, in the Eighth Circuit, a relatively low evidentiary threshold will establish the existence of a conspiracy, and the evidence required to bring minor players within the conspiratorial fold is no more substantial. A fraudulent scheme and conspiracy may be – and usually are – established by circumstantial evidence. *Miller v. United States*, 410 F.2d 1290,

1294 (8th Cir. 1969). Where a conspiracy has been established, a defendant can be connected to it by "but slight evidence." *Id.* (citing *Isaacs v. United States*, 301 F.2d 706, 725 (8th Cir. 1962), *cert. denied*, 371 U.S. 818, 83 S. Ct. 32). The Eighth Circuit has recognized that a conspiracy is not necessarily born full grown and often expands by successive stages. *Miller*, 410 F.2d at 1294.

In the present case, all defendants were charged with conspiracy to distribute controlled substances. Multiple defendants entered the conspiracy at different times and performed different functions relating to a larger scheme. The defendants participated in a scheme to distribute and dispense drugs. The scheme involved Elder who wrote invalid prescriptions for his co-defendants. Defendant Mary Lynn Rostie's role was to fill the invalid prescriptions and then ship them to Defendant Solomon, who distributed the prescription drugs in Texas. Proceeds from the sales of these controlled substances were sent to Defendant Cynthia Martin, who in turn provided a portion of the proceeds to Defendant Rostie. That is, defendant Solomon functioned as financial links in the continuum of the broader conspiracy when he shipped the cash proceeds by a private common carrier to Defendant Martin, who in turn paid Defendant Rostie. As the coordinator of these various links, Defendant Solomon was involved at every point along the continuum of the conspiracy. The broader goal of the conspiracy was to achieve financial gain through a sprawling – but singular – scheme.

Elder argues that he was not even charged in the money laundering conspiracy in Count Two. *Motion for Reconsideration*, at 2. He suggests there was no connection between the drug distribution conspiracy charged in Count One and the money laundering conspiracy charged in Count Two. *Motion for Reconsideration*, at 2. First, Count Two named defendants Rostie,

Martin, and Solomon, all of whom were named as co-conspirators in Count One along with Elder, as members the conspiracy to commit money laundering. Elder completely overlooks and ignores that he was named in the indictment as a co-conspirator and that defendant Solomon acted as his agent. *See* Indictment, ¶¶10 and 11. Count Two specifically alleged that illegal proceeds were from the sale of hydrocodone, alprazolam, and promethazine with codeine, which are the prescription drugs written by Elder. Although the indictment did not specifically incorporate by reference the allegations in Count One, the challenged count sets forth the drug conspiracy statute under which Elder is charged – 21 U.S.C. § 846. Thus, the two counts were factually and logically connected.

In *Liveoak*, the Eighth Circuit held that a common purpose to defraud the United States is more than sufficient to bind co-defendants together for trial – even where the specific offenses charged were superficially unrelated. *Liveoak*, 377 F.3d at 865. The indictment in this case charged *all* defendants with conspiracy, only that the conspiracy in this case is to distribute and dispense controlled substances. This was the "glue" that bound the defendants together for the purposes of joinder in the instant case.

The fact that Elder could have been viewed as a minor player did not qualify him for severance, because all the defendants were charged with participating in a single overarching conspiracy to distribute a controlled substances. Defendants Rostie, Martin, Solomon, and Elder all "enter[ed] the conspiracy at different times and perform[ed] different functions," *Baker*, 855 F.2d at 1357, but all functioned as part of a common scheme to distribute controlled substances. Elder created the means by which controlled substances could be transferred by writing invalid prescriptions. Defendant Solomon delivered the invalid prescriptions to defendant Rostie, who

filled the prescriptions. Elder essentially argues that because he was not charged in the money laundering conspiracy, he did not participate in a joint conspiracy and should not have been tried with defendant Solomon. But this is a misreading of Rule 8. Rule 8 allows for joint trials of complex conspiracies in which conspirators operate independently of co-conspirators, carrying out "subsidiary schemes" in furtherance of a broad overall goal. In just this way, the varying strands of the conspiracies charged in this case – delivery and use of illegal proceeds – are simply "subsidiary schemes," part of a conspiracy complex enough to require subsidiary action. The existence of such "subsidiary schemes" does not justify severance where a common scheme to distribute controlled substances is charged.

Where such an overarching conspiratorial purpose exists, the superficial attenuation between the co-defendants' specific offenses was not grounds for severance based on a claim of misjoinder. Based on firm Eighth Circuit precedent, Elder was not entitled to severance based on misjoinder.

Further, in each of the substantive charges against Elder, aiding and abetting under 18 U.S.C. § 2 was alleged. This is additional evidence that the scheme was common to all the defendants.

Accordingly, Elder's motion to reconsider the order denying his motion for release pending appeal should be denied .

IV. CONCLUSION

For the foregoing reasons, because defendant Elder has failed again to meet his burden of proof that this case presents a substantial issue of law or fact likely to result in a reversal of the convictions or a new trial, his Motion to Reconsider should be denied.

Respectfully submitted,

Beth Phillips
United States Attorney

By ***/s/ Rudolph R. Rhodes, IV***
Rudolph R. Rhodes, IV
Assistant United States Attorney

Charles Evans Whittaker Courthouse
400 East 9th Street, Room 5510
Kansas City, Missouri 64106
Telephone: (816) 426-4278

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on July 11, 2011, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

Dennis Owens
Attorney at Law
1111 Main Street
Kansas City, Missouri 64105

/s/ Rudolph R. Rhodes, IV
Rudolph R. Rhodes IV
Assistant United States Attorney