

January 21, 2008

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
U.S. Courthouse
601 Market Street, Room 21400
Philadelphia, PA 19106-1790

Re: United States v. Albert Poet, Appeal No. 07-3933

Dear Ms. Waldron:

Please accept this letter brief in lieu of a more formal reply to the Government's response to Dr. Poet's motion for bail pending appeal in this matter.

Essentially, the Government argues that since the District Court did not "think there was a substantial issue" (Gr at 2-3¹), then there is none. In addition, the Government suggests, as did the District Court, that Dr. Poet could not raise a good faith defense, which is based on his state of mind as to his intent, "unless Poet chose to testify on his own behalf at trial." (Gr at 8). In fact, the District Court stated, in denying a Defense request to call a medical expert to support his good faith defense, that:

The good faith defense as I see it has to come from the defendant himself. I don't see how somebody else can structure that.

Transcript of Sidebar, March 15, 2008 (attached as Exhibit 1), at 9:15-17.

It is precisely this thinking that infected the course of Dr Poet's trial and which deprived him of a fair hearing. Because the Court believed no good faith defense based on Dr. Poet's state of mind could be entered into the record unless Dr. Poet himself did it, the Court consistently refused to permit defense counsel to introduce state of mind evidence, contrary to Fed.R.Evid. 803(3). In fact, any evidence offered by defense counsel to show Dr. Poet's state of mind or good

¹Gr = Government's Response, dated January 11, 2008.

faith defense was barred by the District Court, including, but not limited to:

1. evidence that Dr. Poet himself was misled to believe the TRI Botulinum Toxin Type A was “in the FDA approval process” ;
2. evidence that the term “Botox” had entered the public domain as a generic term with a current meaning of a form of treatment, and not a specific drug;
3. evidence that Dr. Poet believed the TRI Botulinum Toxin A was a better drug giving greater results in his wrinkle treatments;
4. evidence that there was nothing illegal about Dr. Poet using a non-FDA approved drug in his wrinkle removing treatment; and
5. evidence that Dr. Poet, as a physician, could choose the drug used in his wrinkle removing treatment, including any non-FDA approved drug, without advising his patients of the drug he was using or the FDA status of it.

The right to call witnesses whose testimony is “material and favorable to the defense” is constitutionally fundamental. See United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). See also, Washington v. Texas, 388 U.S. 14, 17-19 (1967). Yet, Dr. Poet was deprived of this fundamental right.

While the defense was precluded from introducing any evidence as to Dr. Poet’s state of mind, the Government was permitted to introduce circumstantial evidence as to Dr. Poet’s intent, a primary element of the offense.

Mail Fraud is a ‘specific intent’ crime. Therefore, the Government was required to prove beyond a reasonable doubt that the defendant *intended* to defraud. U.S. v. Bakker, 925 F.2d 728, 738-39 (4th Cir. 1991); U.S. v. Marting-Trigona, 684 F.2d 485, 492 (7th Cir. 1982). Thus, good faith, or the absence of an intent to defraud, constitutes a complete defense to the charge of mail fraud. U.S. v. Young, 470 U.S. 1, 32 (1985); U.S. v. Marting-Trigona, *supra*; U.S. v. Alkins, *supra*.; U.S. v. Bissell, 954 F.Supp. 903, 927 (D.C.N.J. 1997).

Moreover, a defendant's defense of good intentions is entitled to weight in a determination of his guilt or innocence, albeit the jury is required to weigh his actions and conduct against his professed innocence and good faith. U.S. v. Freeman, 167 F.2d 786, 790 (7th Cir. 1948), cert. den. 335 U.S. 817 (1948). However, this cannot happen if the defendant, as happened here for Dr. Poet, is barred from introducing any evidence of his good faith.

The Government was permitted to close on the theory that Dr. Poet breached his duty of care to his patients when Dr. Poet was consistently barred from offering any evidence of his good faith care for his patients. This, among other issues, resulted in a lopsided, and fundamentally unfair trial weighted heavily in favor of the Government.

Our system of Justice permits a defendant not to testify if he so chooses. Rock v. Arkansas, 483 U.S. 44, 51-52 (1987). This is in recognition that the burden of proof is on the Government. The fact that Dr. Poet chose not to testify should not have been used as a basis to deprive him of a defense. Indeed, choosing not to testify is his right and exercising that right should not have been held against him. Griffin v. California, 380 U.S. 609, 614 (1965)(criminal defendant must not pay any court-imposed price for the exercise of his right not to testify in his own defense). See also U.S. v. Flores, 454 F.3d 149, 160 (3rd. Cir. 2006).

In sum, the deprivation of Dr. Poet's Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial were abridged by the trial court and this is a substantial question presented on appeal.

Among other substantial issues that will be addressed in Dr. Poet's merit brief on appeal are:

1. The Government violated the terms of the Proffer Agreement and thereby prejudiced the Defendant when it introduced the proffer statement in a pretrial motion.
2. Refusal to permit the defense to offer a medical expert to testify on relevant permissible practices of physicians and the generic nature of the term "botox", while permitting

the Government to close on Dr. Poet's standard of care deprived Dr. Poet of a good faith defense

3. Refusal by the Court to permit any testimony as to the generic nature of the term "Botox" deprived Dr. Poet of a good faith defense.

4. Limiting the defense examination of the Government expert coupled with the trial court's insistent intrusions into the testimony and statements denigrating the defense examination before the jury were prejudicial and deprived Dr. Poet of a good faith defense.

5. Refusal to grant Dr. Poet's pretrial motion to dismiss counts 1-3 of the Indictment on grounds that Congressional intent in fraud cases involving drugs must be prosecuted under the FDA Act was error.

6. Refusal to grant Dr Poet's pretrial motion to dismiss the Indictment based on the perjured testimony of a key Government witness was error.

CONCLUSION

For the foregoing reasons, Dr. Poet's request for bail pending appeal should be granted.

Respectfully submitted,

Jerome A. Ballarotto, Esq.

JAB/jwk
cc: George S. Leone, Chief of Appeals
Glenn J. Moramarco, AUSA