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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA .	Criminal No. 06-643
	.
	.
v.	402 East State Street
	Trenton, New Jersey 08608
ALBERT POET,	.
	.
Defendant.	January 26, 2007
.....	10:14 a.m

TRANSCRIPT OF HEARING  
BEFORE HONORABLE ANNE E. THOMPSON  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Government:	Assistant U.S. Attorney By: EUGENIA COWLES, ESQ. JAMES LYNCH, ESQ. 401 Market Street Camden, NJ 08101
For the Defendant:	Cooper Levenson April Niedelman & Wagenheim By: WILLIAM J. HUGHES, JR., ESQ. 1125 Atlantic Avenue Atlantic City, New Jersey 08401
For the Defendant:	By: JEROME A. BALLAROTTO, ESQ. 143 Whitehorse Avenue Trenton, NJ 08690

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1 MR. BALLAROTTO: Thank you, Your Honor.

2 THE COURT: All right, Ms. Cowles?

3 MS. COWLES: Thank you, Your Honor. Your Honor, our  
4 argument is very simple. It's essentially that the proffer  
5 agreement is a binding contract between the parties. It sets  
6 forth very specific terms and conditions under which the  
7 statements that defendant, Albert Poet, made to the Government  
8 during that meeting in February of 2005 could be used by the  
9 Government during any trial in this case.

10 The Government's position essentially is that the  
11 proffer agreement is enforceable and that --

12 THE COURT: Yes, and the reason it's enforceable and  
13 the way it's enforceable is specifically what and how?

14 MS. COWLES: Your Honor, it is enforceable primarily  
15 as a contract between the parties. There is case law cited in  
16 the brief that explains that several courts have examined  
17 similar agreements and concluded that as with any contract  
18 where the intent of the parties is clear and unambiguous from  
19 the terms of the document, the parties should be held to that  
20 at a later time.

21 THE COURT: And this would give you the opportunity  
22 to do what with Mr. -- with Dr. Poet's statement?

23 MS. COWLES: Your Honor, this would simply allow the  
24 Government to introduce Dr. Poet's statements into evidence if  
25 during the course of the trial, the defense took a position

1 contrary to any of the statements made during that proffer  
2 session. And that might be through argument, through the  
3 testimony of the defense's own witnesses, through cross  
4 examination of Government witnesses, or through the  
5 presentation of evidence. Only if the defense took a position  
6 contrary to what was stated during the proffer conversation,  
7 would the Government under the terms of the agreement be  
8 entitled to present evidence of those statements.

9 THE COURT: So, it's broader than just if the  
10 defendant takes the stand.

11 MS. COWLES: Yes, Your Honor, it is -- it is broader  
12 by the very terms of the agreement. And I believe that Judge  
13 Simandle in Camden examining the very same agreement recently  
14 found that in fact the language of the agreement was  
15 intentionally broad to ensure any that position taken contrary  
16 to what was stated during the proffer session could be  
17 countered by introduction of those very statements.

18 Your Honor, if I may, courts have further, in  
19 reviewing these agreements, found that this in no way infringes  
20 on the defendant's right to present a vigorous defense of his  
21 case. The defense is always allowed to hold the Government to  
22 its burden of proof, to challenge sufficient evidence to meet  
23 the elements of the crime, and to present any position that  
24 would be consistent with that that was presented during the  
25 proffer.

1           As one Court commented, in fact the defense can take  
2 any position it chooses. An order from the Court saying that  
3 the agreement would be enforced simply provides the defense  
4 with notice that should it take a position that is inconsistent  
5 with the prior statements, the Government would be allowed to  
6 introduce the defendant's own words to provide a full picture  
7 of the situation for the jury and the Court.

8           THE COURT: Thank you.

9           MS. COWLES: Thank you, Your Honor.

10           THE COURT: Do you have anything to say in response  
11 to this before Mr. Hughes gets up here? Mr. Hughes has taken  
12 -- I'm trying to -- I'm searching for the word to use. Mr.  
13 Hughes has taken the broadest possible position as to what he's  
14 entitled to present to the Court as a pre-trial motion. And he  
15 had given me Food and Drug Administration materials, lots and  
16 lots and lots of other kinds of matter which are not  
17 traditionally presented to a court in a criminal case pre-trial  
18 motion. He has, I dare say, I have not seen such voluminous  
19 files in a criminal case unless it were an anti-trust case or  
20 something of that sort. What do you have to say about the  
21 approach that Mr. Hughes has taken with regard to his pre-trial  
22 motion?

23           MS. COWLES: Well, Your Honor, while we would never  
24 question the defense's right to raise points that they consider  
25 essential to be resolved before trial in their motions, I

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1 MR. HUGHES: You would, Your Honor. You have to make  
2 that decision --

3 THE COURT: Well, I think that's --

4 MR. HUGHES: -- prior --

5 THE COURT: That's understood. And I'm not going to  
6 pre-try their case.

7 MR. HUGHES: No, I understand that. But to say  
8 -- but in that sense, this motion is a non-motion. No  
9 arguments have been made before a jury, no witness has been  
10 questioned. So, therefore the issue of whether or not this  
11 contract can be enforced has come up. Quite simply, the issue  
12 is not ripe for determination. And when that issue comes up,  
13 if that issue comes up, what is going to be required is a fact  
14 hearing to determine whether or not an argument has been made  
15 or whether or not a witness has been questioned contrary to the  
16 -- to Dr. Poet's statements in his proffer session.

17 THE COURT: Oh, no, Mr. Hughes, we're not going about  
18 it that way. I think she's brought the motion to sort of cut  
19 you off at the pass and to let it be known that there was this  
20 proffer and disagreement.

21 Now, when -- the judge is going to have to study the  
22 proffer and make sure I have more than just a casual  
23 acquaintance which is what I have now. And so that when I hear  
24 objections during the course of the trial, I would be in a  
25 position to rule on them.

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1 MR. HUGHES: Okay.

2 THE COURT: But we're not going to stop the trial as  
3 we go along to have a little determination at each point as to  
4 whether or not this evidence, or this presentation of  
5 statements, or whatever would be admissible because it's in  
6 contrast to what was stated by Dr. Poet at the proffer session.

7 MR. HUGHES: I understand, Your Honor. But in order  
8 to make that determination and if that issue were to come up,  
9 what Your Honor would probably do is Your Honor would probably  
10 go to the interview report of Special Agent Hess, and look at  
11 that and determine from that whether or not the condition  
12 precedent has been met.

13 What I'm going to suggest to you, to Your Honor, is  
14 that there is a second version of what happened at that proffer  
15 agreement. We have a witness who is not Dr. Poet who was there  
16 at that proffer session and who might be able to shed light on  
17 what information is not contained within that, and which might  
18 -- so -- which might cause the Court to determine that the  
19 conditions precedent have not been triggered. That's an  
20 important point.

21 THE COURT: Well, Mr. Hughes, you know what they say  
22 about a contract that's signed. You look within the four  
23 corners of the contract. You don't look to see what people  
24 have to say who were standing around.

25 MR. HUGHES: No, I understand that, Your Honor, but