

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : Hon. Anne E. Thompson  
v. :  
ALBERT POET : Crim. No. 06-643 (AET)

---

MEMORANDUM OF LAW OF THE UNITED STATES IN OPPOSITION TO DEFENDANT  
ALBERT POET'S MOTION FOR BAIL PENDING APPEAL

---

CHRISTOPHER J. CHRISTIE  
United States Attorney  
970 Broad Street  
Newark, New Jersey 07102

On the Memorandum:

Eugenia A. P. Cowles  
James P. Lynch  
Assistant U.S. Attorneys  
Clark S. Fisher Federal Building & U.S. Courthouse  
402 East State Street, Room 430  
Trenton, NJ 08608

TABLE OF CONTENTS

PRELIMINARY STATEMENT . . . . . 1

ARGUMENT . . . . . 2

POET IS NOT ENTITLED TO BAIL PENDING APPEAL

A. Legal Standard . . . . . 2

B. Poet Is A Flight Risk . . . . . 3

C. Poet Has Failed To Show That A  
Substantial Question Exists Here  
That Warrants Release Pending Appeal . . . . . 4

CONCLUSION . . . . . 12

**PRELIMINARY STATEMENT**

On August 24, 2006, a grand jury sitting in Trenton, New Jersey indicted Manahawkin resident Albert Poet on 13 counts of mail fraud and one count of misbranding a drug while held for sale in connection with his scheme to defraud patients by substituting a cheaper, unapproved form of Botulinum Toxin Type A for the more expensive, FDA-approved BOTOX®. A jury trial was held from March 13, 2007 through March 20, 2007. During the course of the trial, the United States presented evidence demonstrating that from late 2003 through the end of 2004, Dr. Albert Poet treated patients with the substitute Botulinum Toxin without fully informing them that they were not receiving Allergan's FDA-approved BOTOX®, the only form of Botulinum Toxin Type A then approved for sale in interstate commerce in the United States.

On March 20, 2007, the jury returned its verdict finding Dr. Albert Poet guilty on all counts. On September 28, 2007, this Court sentenced Dr. Poet to 14 months' imprisonment on all counts to run consecutively. At that time, the Court ordered Dr. Poet to surrender to begin serving his sentence on or before November 12, 2007. On October 2, 2007, Poet filed his notice of appeal. On October 22, 2007, he filed the current motion for bail pending resolution of his appeal. The United States submits this memorandum of law in opposition to Poet's motion.

ARGUMENT

I. POET IS NOT ENTITLED TO BAIL PENDING APPEAL

A. Legal Standard.

Congress enacted the Bail Reform Act to create a presumption in favor of post-conviction detention. S. Rep. 98-2255, 98th Cong., 1st Sess. 27 (1983), reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3209-10; United States v. Miller, 753 F.2d 19, 22-23 (3d Cir. 1985). That presumption becomes even harder to overcome for a defendant who has been sentenced to a prison term. Compare 18 U.S.C. § 3143(a) with § 3143(b). A person found guilty of a federal offense and sentenced to a term of imprisonment "shall" be detained pending appeal absent specified exceptional circumstances. 18 U.S.C. § 3143(b)(1).

In order to be eligible for bail pending appeal, a convicted and sentenced defendant must establish:

(A) by clear and convincing evidence that the [defendant] 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 question 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 of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1). Poet has the burden of proving all these factors. Miller, 753 F.2d at 24; United States v. Messerlian, 793 F.2d 94, 95-96 (3d Cir. 1986). That burden is an extremely high one, as the United States Court of Appeals for the Third Circuit has recognized:

Once a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances. First and most important, the conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law, a presumption factually supported by the low rate of reversal of criminal convictions in the Federal system. Second, the decision to send a convicted person to jail and thereby reject all sentencing alternatives, by its very nature includes a determination by the sentencing judge that the defendant is dangerous to the person or property of others, and dangerous when sentenced, not a year later after the appeal is decided. Third, release of a criminal defendant into the community, even after conviction, destroys whatever deterrent effect remains in the criminal law.

Miller, 753 F.2d at 22 (emphasis added) (quoting H. Rep. No. 907, 91st Cong., 2d Sess. 186-187 (1970)).

**B. Poet Is A Flight Risk**

Here, Poet has not and cannot meet the stringent standard for bail pending appeal, and accordingly, his motion should be denied. As a threshold matter, Poet has failed to

prove by clear and convincing evidence that he is not a flight risk. As is more fully set forth below, there is no rational reason to believe that Poet's sentence will be reduced in this case based on his appeal. He therefore will continue to face significant jail time -- a strong incentive to flee.

While, as the defense notes, Poet has been compliant with the terms of his release thus far, his conviction and the ordered sentence alter the circumstances such that he can no longer believe that jail is unlikely. Additionally, as identified in the Presentence Investigation Report, Poet has extensive financial assets that could be used to facilitate flight. Particularly when facing a sentence that requires him to divest himself of funds to satisfy a fine and a restitution as well as to serve time in prison, Poet is far more likely to use his assets to flee than he was before his conviction. Nothing about his present circumstances rebuts the presumption in favor of post-conviction detention. See Miller, 753 F.2d at 22-23. Poet's flight risk alone warrants denial of his bail motion.

**C. Poet Has Failed To Show That A Substantial Question Of Law Or Fact Exists Here That Warrants Release Pending Appeal.**

Poet also seeks release pending appeal based on his supposition that on appeal he may prevail regarding his claims of error based on the Court's exclusion of irrelevant evidence pertaining to the legal status of Allergan's BOTOX® trademark,

and indirect evidence supposedly establishing state of mind, and the Court's limitation of Poet's cross-examination of Dr. Marc Walton. Contrary to Poet's contention, he has failed to demonstrate that his appeal will raise a "substantial question of law or fact" likely to result in a reversal, a new trial, or a sentence that does not include a term of imprisonment, or at least a reduced sentence that is shorter than the expected duration of the appellate process.

A "substantial question" is not simply an issue that is not frivolous. Miller, 753 F.2d at 23. Rather, the issue must be "fairly debatable" or "fairly doubtful." United States v. Smith, 793 F.2d 85, 88-89, 92 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987), quoting United States v. Handy, 761 F.2d 1279, 1282-83 & n.2 (9th Cir. 1985) (ruling that the two terms are "synonymous"); Messerlian, 793 F.2d at 96. A defendant must establish, first, that he is raising a question "which is either novel [or] which has not been decided by controlling precedent." Miller, 753 F.2d at 23. Second, he must show that it is a "significant question," that is, an issue on which reasonable judges could differ. Smith, 793 F.2d at 88-89, 92; Messerlian, 793 F.2d at 96.

Even if the question is "substantial," defendants must show that the issue is "so integral" and "sufficiently important to the merits that a contrary appellate ruling is likely to

require reversal or a new trial" on "all counts on which defendants have been sentenced to imprisonment." Miller, 753 F.2d at 23, 24. A defendant cannot make this showing if the question could "be considered harmless, to have no prejudicial effect, or to have been insufficiently preserved," or if he fails to show a substantial question as to all counts on which he has been sentenced to imprisonment. Id. Poet's claims simply do not meet this rigorous standard.

**1. The Court's Proper Exclusion of Irrelevant Trademark Evidence Does Not Raise a "Substantial Question" on Appeal.**

Poet first asserts that the Court improperly excluded evidence about the legal viability of Allergan's trademark for BOTOX®. Poet provides extensive argument on the legal standards applicable to a determination of whether or not Allergan's trademark remains viable. See Def. Br. at 13. As the Court determined during the pre- and post-trial motions in this case, however, evidence about whether or not the term "Botox" has legally become generic has no relevance as to whether or not Dr. Poet defrauded his clients when he used the term "Botox" in reference to the toxin with which he injected them. The only relevant issue could be Dr. Poet's own concept of the term—something not established by the excluded evidence and not offered into evidence at trial. Further, even if both the TRI toxin and Allergan's FDA approved drug were properly called

"Botox", the evidence still demonstrated that Dr. Poet failed to inform his patients that they were receiving an unapproved drug, from a vial marked "not for human use," that he could obtain more cheaply, while he charged them the Allergan BOTOX® price. Thus, the exclusion of evidence regarding the trademark status of BOTOX® cannot provide a "substantial question" on appeal as the question could "be considered harmless" and "to have no prejudicial effect." See Miller, 753 F.2d at 23, 24.

**2. The Court's Proper Exclusion of the Defense's Proposed Expert Testimony and Other Irrelevant Evidence does not Raise a "Substantial Question" on Appeal.**

Next, Poet questions the Court's exclusion of its proposed medical expert testimony, and "other evidence of Dr. Poet's state of mind." See Def. Br. at 16. Again, however, as this Court determined during the pre- and post-trial motions, the evidence Poet offered did not bear on his state of mind, but rather on broad areas of irrelevant evidence.

As the Third Circuit has stated, "[t]he trial court has wide discretion in determining whether expert testimony will be of help to the trier of fact." United States v. Leo, 941 F.2d 181, 196 (3d Cir. 1991); see United States v. Bennett, 161 F.3d 171, 182 (3d Cir. 1998). The Court must decide not only if the expert is qualified to offer the proposed testimony and if the proposed testimony is appropriate under Federal Rules of Evidence 701 and 702, but must also assess whether the proposed testimony

is relevant under Rule 403. Bennett, 161 F.3d at 182. "When a trial court engages in such a balancing process and articulates on the record the rationale for its conclusion, its conclusion should rarely be disturbed." United States v. Mathis, 264 F.3d 321, 338 (3d Cir. 2001).

During the sidebar proceeding on March 15, 2007, the Court heard a proffer from defense counsel of the proposed testimony of Dr. Gary Brody, as well as the government's objections to the areas of testimony outlined. After hearing from both sides, the Court advised that Dr. Brody's proposed testimony did not appear relevant, noting that he, a plastic surgeon from Maine, was not the appropriate witness to provide a summary of laws applying to the practice of medicine in New Jersey, and indicating that the other areas of proposed testimony were not relevant to Dr. Poet's good faith defense. Tr. 3/15/07 (Sidebar), at 9, l. 12-17. The Court further advised that one area of the proffered testimony, the notion of "compounding" medications, was not appropriate, as compounding did not appear to be the conduct at issue in this matter. Id. at l. 18-23.

The Court provided an explanation for its determination that the proffered testimony would be irrelevant; the Third Circuit is unlikely to disturb that determination. See Mathis, 264 F.3d at 338. Although defense counsel now suggests the Court erred by not allowing more limited testimony as to industry

"custom," Def. Br. at 16, that suggestion was not made at the time of the hearing. In fact, the defense counsel specifically asked the Court to address the testimony as a whole, suggesting that a ruling was sought to determine "whether or not we should actually spend the money and the time to have this witness travel from a great distance to be here." Id. at 2, 1.11-13. Where the question of whether partial testimony might be admissible was never raised, the exclusion of such testimony cannot possibly form the basis for reversal in the case. See United States v. Mitchell, 365 F.3d 215, 250-51 (3d Cir. 2004) ("[I]f the question was never asked. . . then it is hardly grounds for reversal that the District Court might have ruled incorrectly.")

Further, even if the Court had separated the proposed testimony as to state law issues from the remaining issues of the common use of non-FDA approved drugs, compounding, the use of the term "Botox" in the medical community, off-label uses of drugs, the meaning of the phrase "not for human use," and the sale of BOTOX® as a "medical procedure," the issues would have been irrelevant to the case at hand. As the Court noted, compounding simply did not apply to the facts of the case. Likewise, the "off-label" use of drugs refers only to non-indicated uses of FDA-approved drugs, not to the unapproved toxin at issue in this case. Whether or not non-FDA approved drugs were used or the term "Botox" was used broadly did not relate to whether, when Dr.

Poet gave his patients TRI's unapproved drug, he called it "Botox" and omitted key information about the drug with an intent to defraud patients. The proposed testimony simply did not provide the jury with any useful insight into either Dr. Poet's conduct or his intent when he provided his patients the unapproved TRI Toxin in the place of, and at the price of, BOTOX®. The testimony was properly excluded and its exclusion does not raise a "substantial issue" on appeal.

**3. The Court's Proper Limitation of the Cross-Examination of the Government's Expert Does Not Raise a "Substantial Issue" on appeal.**

Poet argues that the Court erred by limiting defense counsel's cross-examination of Dr. Marc Walton, the government's expert on the FDA approval process.<sup>1</sup> The Court's limitation of cross-examination, however, was an appropriate exercise of the Court's power to control the presentation of evidence pursuant to Federal Rule of Evidence 611. While defense counsel cites numerous cases reflecting the importance of cross-examination, he neglects the key principle reflected in each of those cases - that cross examination should be permitted where it is "effective," United States v. Riggi, 951 F.2d 1367, 1376 (3d Cir. 1991) (Def. Br. at 18), "appropriate," United States v. Chandler,

---

<sup>1</sup>Notably, while the Court suggested to defense counsel that he curtail his proposed cross-examination and excluded several lines of irrelevant questioning, defense counsel concluded his questioning independently, informing the Court that he had "no further questions." Tr. 3/14/07, at 57, 1.1.

326 F.3d 210, 222 (3d Cir. 2003), or at the very least relevant. A defendant's right to confront witnesses does not entitle a defendant to question a witness on matters not relevant to the case at hand.

Counsel argues, for instance, that Poet was improperly restricted from questioning Dr. Walton about materials "reasonably relied upon by experts in the particular field." Def. Br. at 3. In fact, counsel was not precluded from exploring the witness's background or knowledge. Instead, the Court restricted lines of questioning that would have required the witness to read previously unreviewed scientific articles in order to speculate on their authors' intent. See, e.g., Tr. 3/14/07, at 47, l. 5-7 (questioning curtailed only after witness testified that article in question did not appear to be the article referenced in his own work, and indicated he would need to read the article to comment upon it).<sup>2</sup>

Thus, because each of Poet's issues is meritless, as the Court determined in pre- and post-trial rulings in this case, Poet's appeal is not likely to result in a reversal, a new trial, a sentence that does not include a term of imprisonment, or a

---

<sup>2</sup>Notably, at the time the Court limited the testimony, the witness had already agreed with defense counsel on counsel's apparently central point, that some scholarly articles may have used the term "Botox" to refer to Botulinum Toxin Type A generally prior to Allergan's trademarking of the term in the early 1990's. See Tr. 3/14/07, at 47, l. 12-20.

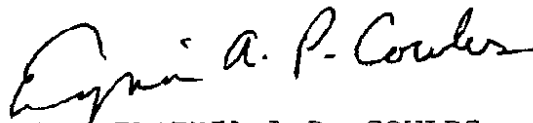
reduced sentence that is shorter than the expected duration of the appellate process. The ill fate of Poet's claims, therefore, further warrants denial of his present motion.

**CONCLUSION**

For the foregoing reasons, the Court should deny defendant Albert Poet's application for bail pending appeal in accordance with Title 18, United States Code, Section 3143(b).

Respectfully submitted,

CHRISTOPHER J. CHRISTIE  
United States Attorney



By: EUGENIA A.P. COWLES  
JAMES P. LYNCH  
Assistant U.S. Attorneys

Date: October 24, 2007  
Trenton, New Jersey

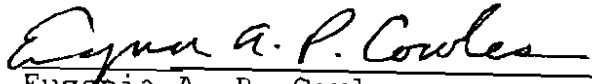
CERTIFICATE OF SERVICE

I, Eugenia A. P. Cowles, Assistant United States Attorney, do hereby certify that on this date, I served the foregoing Opposition to Defendant Albert Poet's Motion for Bail Pending Appeal as follows:

VIA FACSIMILE AND FIRST CLASS MAIL

Mr. Jerome A. Ballarotto, Esq.  
143 Whitehorse Avenue  
Trenton, New Jersey 08610  
Fax: (609) 581-9509

Dated: October 24, 2007

  
Eugenia A. P. Cowles  
Assistant United States Attorney



## FAX TRANSMISSION

### UNITED STATES ATTORNEY'S OFFICE

402 East State Street, ROOM 430

Trenton, New Jersey 08608

(609) 989-2190

Fax: (609) 989-2275 CRIMINAL DIVISION

Fax: (609) 989-2360 CIVIL DIVISION

Fax: (609) 656-2501 Civil Division

To: Jerome A. Bullarotto, Esq. Date: 10/24/07  
Fax #: (609) 581-9509 Pages: 17 including this cover sheet.  
From: Geni Cowles  
Subject: Poet

COMMENTS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\*\*\*\*\*  
This fax transmission is intended only for the use of the addressee and may contain privileged or confidential information that may not be disclosed under applicable law. If you received this transmission in error, please notify this office at telephone number (609) 989-2190 and return the original transmission to this office at the above address via United States Mail.  
\*\*\*\*\*