



**U.S. Department of Justice**

*United States Attorney  
District of New Jersey*

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January 11, 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 response to defendant's motion for bail pending appeal in the above-captioned matter. The United States opposes Poet's application for bail.

### **FACTS AND PROCEDURAL HISTORY**

Appellant Albert Poet, a licensed physician, was found guilty by a jury in the District of New Jersey of twelve counts of mail fraud and one count of misbranding a drug. Poet defrauded his patients by using an unapproved form of Botulinum Toxin Type A (also referred to as "Triton" or "TRI"), rather than BOTOX<sup>®</sup>, which was the only FDA-approved drug for treating human wrinkles. Poet had his patients sign consent

forms prior to receiving their skin treatments, and those consent forms indicated that they would be receiving BOTOX® treatments. Poet did not inform his patients that he was instead giving them TRI, which was not approved by the FDA for human use. The TRI that Poet gave his patients was clearly labeled, on every vial, “for research purposes only, not for human use.” PSR ¶ 30.<sup>1</sup>

On September 28, 2007, the Honorable Anne E. Thompson, U.S.D.J., sentenced Poet to a 14-month term of imprisonment. The District Court did not immediately remand Poet, but instead granted him until November 12, 2007, to report to prison. Prior to his reporting date, on October 22, 2007, Poet filed a motion before the District Court for bail pending appeal. The Government opposed the motion, and the District Court denied bail pending appeal. The District Court agreed with Poet that he was not a flight risk, but found that there were no substantial issues for appeal.

In denying bail pending appeal, Judge Thompson told defense counsel that she was “sympathetic, quite frankly, with your client and with this case, but I don’t see it. I don’t see your defense.” Exh. C, page 26. The District Court stated that although “I would like to be able to grant” the application for bail pending appeal,

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<sup>1</sup> “PSR” refers to the defendant’s Pre-Sentence Report. “Exh.” refers to the exhibits attached to defendant’s motion for bail pending appeal before this Court.

“I don’t see how I can.” Id. at 27. The Court concluded, despite its sympathy for the defendant, “I don’t think that there’s a substantial issue here.” Id. at 27. The Court continued, “I can give you additional time for surrender if you need it, or if there’s any reason that you would like to have additional time, I would give it to you. But, I do not see how I can, in good faith, say to you that I think that there’s a substantial issue for appeal.” Id. at 27. Judge Thompson informed defense counsel that she was willing to grant Poet an additional six months before reporting to prison. Id. at 27 (“If you need time to wrap up, you need six months, I’ll give it to you. That’s all – that’s the most I can do for you”). Poet took the Court up on its offer, and his reporting date was delayed until March 12, 2008.

### **ARGUMENT**

The District Court here properly denied Poet bailing pending appeal because, as the Court found, there simply are no substantial issues for appeal here. Contrary to Poet’s conclusory allegation, the District Court did not deny him the right to introduce or elicit any evidence of his intent. Poet Memorandum at 2. Rather, the District Court properly held that individual instances of proffered defense evidence constituted inadmissible hearsay. Those discretionary rulings were doubtless correct.

## The Legal Standard

Congress enacted the Bail Reform Act to create a presumption in favor of post-conviction detention. S. Rep. 98-22555, 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 after a defendant 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 safety of any 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); see Fed. R. App. P. 9(c). Defendant 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).

The presumption against release has strong basis in policy as well as in law.

As this Court 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 (quoting H. Rep. No. 907, 91st Cong., 2d Sess. 186-187 (1970)).

Because “[t]he district court is in a better position to evaluate, in the first instance,” whether a defendant meets the rigorous standard for bail pending appeal, Miller, 753 F.2d at 24, that determination should be made initially by the District Court. Fed. R. App. P. 9(b) & 1994 Advisory Committee Notes (allowing

only “review of a district-court order regarding release”); United States v. Hochevar, 214 F.3d 342, 343-44 (2d Cir. 2000). Here, the District Court rejected defendant’s motion for bail pending appeal both orally and in its order dated October 29, 2007. See Exh. C. Although review of the district court's disposition of a release or detention order is de novo, the appellate court is required to “give the reasons articulated by trial judges respectful consideration.” United States v. Carbone, 793 F.2d 559, 560 (3d Cir. 1986), quoting United States v. Delker, 757 F.2d 1390, 1400 (3d Cir. 1985).

The District Court properly found that Poet has not met his burden of demonstrating that his appeal raises a “substantial question” of law or fact “likely to result” in reversal, a new trial, or a reduced term of imprisonment which would be less than the duration of the appeal process. 18 U.S.C. § 3143(b)(1)(B). 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), 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,” or result in a reduced term of imprisonment which would be less than the duration of the appeal process. 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.

This Court has made clear, moreover, that “[t]he district court is in a better position to evaluate, in the first instance, whether [an] issue is indeed substantial, as defined above, and whether it is so integral to the entire case against defendant[] that an appellate decision ... is likely to require reversal or a new trial on all counts on which defendant has been sentenced to imprisonment.” Miller, 753 F.2d at 24. Accordingly, when it “independently determine[s]” whether a defendant has shown entitlement to bail pending appeal, this Court must accord

the district court “respectful consideration” and “some deference.” Smith, 793 F.2d at 87.

### **The Issues On Appeal**

The overarching theme of Poet’s memorandum in support of bail pending appeal is his claim that the District Court prohibited him from raising a good faith defense. Poet suggests that “[i]t was simply not his intent to mislead anyone,” and he in fact “believed he was acting in the best interest of his patients and according to the highest standards of his profession,” when he supplied them with a different drug, not approved for human use. Poet Memorandum at 6. As the District Court recognized, however, this good faith defense, which is based on Poet’s individual state of mind, would be a very difficult one to raise unless Poet chose to testify on his own behalf at trial. However, Poet chose not to testify and instead attempted to raise this defense through inadmissible hearsay and other irrelevant evidence. This, the District Court properly refused to permit.

#### **A. The District Court Did Not Abuse Its Discretion In Excluding Irrelevant Trademark Protection Evidence.**

The District Court properly refused to allow Poet to present evidence that “BOTOX®” had lost its trademark protection and that it had become a generic term for any wrinkle treatment. This was not a patent or trademark case; it was a fraud

case. Poet had his patients sign medical disclosure forms which indicated that they were receiving FDA-approved BOTOX<sup>®</sup> treatments, and which listed the possible medical complications arising specifically from FDA-approved BOTOX<sup>®</sup> treatments. Poet's patients were not asked to sign medical releases for TRI, or any other new investigational drug. Moreover, BOTOX<sup>®</sup> can hardly be a generic name for a group of treatments approved for human use, since it is the *only* approved drug for such use in the United States. This is not a substantial issue for appeal.

**B. The District Court Did Not Abuse Its Discretion In Excluding Hearsay Evidence.**

The District Court properly refused to permit Poet's counsel, on cross-examination, to elicit testimony that *Poet told another person* that the TRI *medical director told Poet* that TRI was in the PDA pipeline for approval. This testimony contains two levels of hearsay, and it was properly excluded. The first level of hearsay occurs because the statement was made by the TRI medical director to Poet. Poet claims that the statement was not coming in for the truth of the matter because the drug was not actually in the FDA approval pipeline. He wanted it admitted essentially as a verbal act, which could provide circumstantial evidence that he believed it. However, this overcomes only the first level hearsay problem.

As the District Court properly recognized, there was a second level of hearsay, because Poet sought to admit the statement through another witness, rather than himself, and Poet's statement was being offered for its truth, even if the medical director's statement was not. Exh. F, pages 6-7. Poet's statement that "the medical director told me . . ." was hearsay without regard to what the medical director stated. Because Poet did not testify, the Government was unable to cross-examine the declarant about whether the statement truly was made, or whether it was made under circumstances that would lead a reasonable person to place any faith in the statement. The statement was hearsay, and it was properly excluded.<sup>2</sup>

**C. The District Court Did Not Abuse Its Discretion In Limiting Poet's Cross-Examination In Several Instances.**

Poet also cites in his memorandum what he claims are three instances where the District Court refused to permit him, during cross-examination, to elicit testimony of his knowledge and intent. Poet Memorandum at 12-13. However, Poet does not explain how the excluded questions would have done so. The District Court sustained, on relevance grounds, the Government's objection to the question, "Are you familiar with a product called MT201?" *Id.* at 12. There is no indication what this has to do with Poet's state of mind when prescribing TRI

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<sup>2</sup> In any event, similar testimony was elicited through another witness. Exh. G, page 131.

instead of BOTOX<sup>®</sup>. For the second instance, Poet does not even cite the question to which the Government objected, only his statement to the Court that “it goes to state of mind.” *Id.* The question sought to elicit the statement discussed above concerning the medical director’s statement to Poet, which the District Court had already properly ruled was inadmissible hearsay. Exh. G, pages 131-32. The third excluded question related to whether TRI was as effective as BOTOX<sup>®</sup>, and the District Court properly ruled that the comparative effectiveness of the two drugs was not at issue in the case. Poet Memorandum at 13. The District Court properly precluded Poet from raising a “no harm, no foul” defense, Exh. E, pages 22-23, as the issue was whether Poet made fraudulent misrepresentations to his patients, not whether they suffered medical harm.

**D. The District Court Did Not Abuse Its Discretion In Excluding Poet’s Proposed Expert.**

Poet also claims that the District Court erred in excluding a proffered expert medical witness, Dr. Gary Brody, from testifying concerning the custom and practice in the industry. Poet Memorandum at 16. After hearing Poet’s proffer during a sidebar conference, the District Court ruled that Brody’s proposed testimony did not appear relevant, noting that he, as a plastic surgeon from Maine, was not the appropriate witness to summarize the law applicable to the practice of

medicine in New Jersey, and indicating that the other areas of proposed testimony were not relevant to Poet's good faith defense. Additionally, the Court noted that proposed testimony concerning the "compounding" of medications was not relevant, as the conduct at issue in this case did not involve "compounding."

The District Court has substantial discretion when deciding to admit or exclude expert testimony. United States v. Bennett, 161 F.3d 171, 182 (3d Cir. 1998); United States v. Leo, 941 F.3d 181, 196 (3d Cir. 1991). "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). Here, the District Court properly concluded that the bulk of Brody's proposed testimony was irrelevant, a holding which Poet essentially concedes by now limiting his argument to a claim that the Court should have permitted Brody to testify concerning industry practices. However, at the time, Poet specifically asked the Court to address Brody's 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." As to the subject of industry practices, Poet's argument to this Court here does not provide sufficient specificity to permit the Court to reach

any conclusion concerning whether the evidence was properly excluded or what affect such exclusion may have had on the outcome of the trial.<sup>3</sup>

**E. The District Court Did Not Improperly Limit Cross-Examination Of The Government's Expert.**

Finally, Poet argues that the District Court improperly limited his cross-examination of the Government's expert. However, the District Court made it clear that it was limiting the defense cross-examination of the witness because the Court found that the cross-examination was not particularly relevant. Exh. F, page 2. Poet has not demonstrated what relevant lines of cross-examination he was prohibited from pursuing with this, or any, witness. This is not a substantial issue for appeal.

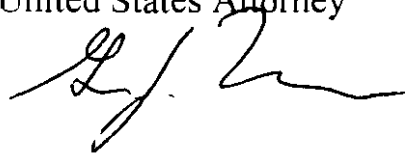
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<sup>3</sup> United States v. Leo, 941 F.2d 181, 196-97 (3d Cir. 1991), which is cited by Poet, does not suggest that the District Court erred here. In Leo, this Court upheld a District Court's decision to admit expert testimony of custom and practices in the defense procurement industry. That, of course, does not imply that a refusal to allow the testimony would have been an abuse of discretion. Certainly in this case it is unclear what industry practice testimony would have been helpful to Poet. One doubts that the expert witness would have supported a physician's treatment of patients with drugs not approved for human use, especially when falsely disclosing to the patients that they were being given an FDA-approved drug.

In sum, the District Court properly denied bail pending appeal, finding that Poet has no substantial issue for appeal. For all the foregoing reasons, this Court should deny defendant's application for bail pending appeal.

Respectfully submitted,

CHRISTOPHER J. CHRISTIE  
United States Attorney

A handwritten signature in black ink, appearing to read 'G. J. Moramarco', written over the printed name of the signatory.

By: GLENN J. MORAMARCO  
Assistant U.S. Attorney

cc: Jerome A. Ballarotto, Esq.

**CERTIFICATION OF SERVICE**

I hereby certify that I caused a copy of the attached response to be served on Jeome Ballarotto, Esq., counsel for appellant, on January 14, 2008, at the following address:

Jerome Ballarotto, Esq.  
143 White Horse Avenue  
Trenton, NJ 08610

  
Glenn V. Moramarco, AUSA