

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
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ROBERT M. NISSENBAUM : NO. 00-570

MEMORANDUM ORDER

On January 29, 2001, a jury found Nissenbaum guilty of 19 counts of mail fraud, in violation of 18 U.S.C. § 1341. He received a sentence of 21 months imprisonment, a term of supervised release of three years, restitution in the amount of \$140,600 and a special assessment of \$1,600. Defendant filed a timely appeal and, without objection by the government, was released on bail pending appeal.

On October 30, 2002, the Third Circuit Court of Appeals affirmed the judgment of conviction. Defendant subsequently moved for a hearing en banc which was denied. He then filed a motion with the Court of Appeals to stay the mandate so that he can petition the Supreme Court for certiorari on the question of "whether a private sector mail or wire fraud prosecution may be predicated on a theory of nondisclosure in the absence of a fiduciary or regulatory duty to disclose." The court granted his stay.

Now before the court is the Government's Motion for Revocation of Bail. The government argues that the court should revoke bail because the defendant has exhausted his appeals to

the Third Circuit and there is little chance the Supreme Court will grant certiorari to consider it.

The standard for release or detention of a convicted defendant pending appeal or a writ of certiorari requires that the defendant prove that he does not pose a danger to any other person or the community, does not pose a risk of flight, does not appeal solely for the purpose of delay, and does raise a substantial question of law or fact likely to result in a reversal, a new trial, or a sentence without a term of imprisonment. 18 U.S.C. § 3143(b). In the Third Circuit, a "substantial question under § 3143(b)(1)(B) is defined as a question that is "significant in addition to being novel, not governed by controlling precedent or fairly doubtful." United States v. Smith, 793 F.2d 85, 88 (3d Cir. 1986); United States v. Miller, 753 F.2d 19, 23 (1985).

It is undisputed that defendant is unlikely to flee in the interim nor does he pose a danger to the community. However, defendant fails to prove that his attempt to petition the Supreme Court for certiorari is likely to result in a new trial or no jail time. Moreover, the legal issue defendant attempts to raise in his petition is not an issue that arose in this case. In making his case for a hearing en banc, defendant appears to contend that he merely failed to disclose to his insurance company the true nature of his occupation and his second job at

the bookstore he owned. Rather, defendant's conduct goes well beyond mere nondisclosure when he deliberately misled his insurance company about the true nature of his legal practice as well as his second occupation. Accordingly, he could not successfully raise an appeal based on the theory of nondisclosure. Finally, defendant appears to be challenging an aspect of the jury instruction modeled on those that he submitted.¹ Accordingly, there is little chance the Supreme Court will grant certiorari to hear this case. Defendant has not presented a substantial question warranting continuing release on bail. See U.S. v. Sullivan, 631 F. Supp. 1539 (E.D. Pa. 1986)(court stayed the issuance of the mandate pending a petition for certiorari because the defendant's chance of obtaining review or reversal from the Supreme Court ran from "slim to none"); see also U.S. v. Cocivera, 1997 WL 9795, at *1 (E.D. Pa. Jan. 9, 1997)(refusing to grant bail while defendant attempted to appeal his conviction to the Third Circuit en banc).

ACCORDINGLY, this day of March, 2003, upon consideration of the government's Motion to Revoke Bail (Doc. #58) and the defendant's response thereto, **IT IS HEREBY ORDERED** that bail is revoked. **IT IS FURTHER ORDERED** that the defendant

¹The Third Circuit, in affirming the conviction, stated that "the District Court properly charged the jury on the elements of a fraudulent scheme; indeed, it did so along the lines suggested by Nissenbaum." U.S. v. Nissenbaum, 2002 WL 31424654, at *1 (3d Cir. Oct. 30, 2002).

shall report to the facility designated by the Bureau of Prisons no later than 2003. If no facility has been designated by that time, the defendant shall report at that time to the United States Marshal's office in the United States Courthouse, 601 Market Street, in Philadelphia.

BY THE COURT:

J. CURTIS JOYNER, J.