

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
No. 08-CR-364 (RHK/AJB)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS JOSEPH PETTERS,

Defendant.

**DEFENDANT'S MOTION FOR
EARLY DISCLOSURE OF
JENCKS ACT MATERIAL**

Defendant Thomas Joseph Petters, by and through his undersigned attorneys, hereby moves the Court for an order requiring the Government to disclose all of the information hereinafter described, within the possession, custody or control of the Government, or the existence of which is known or by the exercise of due diligence could become known to the Government. The following are hereby requested:

1. All statements and reports in the possession of the United States which were made by Government witnesses or prospective Government witnesses and which relate to the subject matter about which those witnesses may testify. 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2.

2. Statements of any alleged co-conspirator or informant particularly if the statement contains exculpatory material, if it is alleged that the declarant could bind a defendant, or if the statement is purportedly admissible under the co-conspirator exception to the hearsay rule.

This motion is based upon Fed. R. Crim. P. 26.2, the Jencks Act, 18 U.S.C. § 3500, Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. The defense further bases this motion on the following:

1. The Jencks Act contemplates “not only the furnishing of the statement of a witness but a reasonable opportunity to examine it and prepare for its use in the trial.” United States v. Holmes, 722 F.2d 37, 40 (4th Cir. 1983). It has been held: “[I]n cases where there are many statements or where the bulk of witness statements is large, the government will agree, or it may even be ordered, to deliver material at an earlier time so as to avoid lengthy delays before the beginning of cross-examination.” Id.

2. “[S]ound trial management . . . dictate[s] that Jencks Act material should be transmitted prior to trial, especially in complex cases, so that those abhorrent lengthy pauses at trial to examine documents can be avoided.” United States v. Percevault, 490 F.2d 126, 132 (2d Cir. 1974). The interests of due process, effective assistance of counsel, and fair and efficient conduct of a criminal trial overshadow the time restrictions of the Jencks Act. United States v. Narciso, 446 F. Supp. 252, 271 (E.D. Mich. 1977); see also United States v. Mocerri, 359 F. Supp. 431, 439 (N.D. Ohio 1973) (if denial of pretrial discovery prejudices defendant’s fair trial, the application of the Jencks Act to those facts could be unconstitutional).

3. AUSAs in this district frequently disclose Jencks Act material early—a practice which is both prudent and encouraged by the federal bench. E.g., United States v. Winningham, 953 F. Supp. 1068, 1071 & n.4 (D. Minn.

1996).

4. Moreover, courts may and do order early disclosure of Jencks Act statements consisting of Brady material, e.g., United States v. Grant, 256 F. Supp. 2d 236, 244 (D. Del. 2003), that could be admissible under the co-conspirator exception to the hearsay rule, e.g., United States v. Murgas, 967 F. Supp. 695, 713 (N.D.N.Y. 1997), or that could bind a defendant, e.g., United States v. Chalmers, 410 F. Supp. 2d 278, 292 (S.D.N.Y. 2006).

Here, we find a very complex case with over a million pages of documents and potentially dozens of witnesses. [Fisher Decl., passim.] Early disclosure of Jencks Act statements is necessary in the interests of due process, effective assistance of counsel, and the fair and efficient conduct of trial. The Court may wish to review the Jencks material in camera to determine its volume and the extent to which it contains Brady material, which should be produced at the earliest possible time. See United States v. Lujan, 530 F. Supp. 2d 1224, 1254 (D.N.M. 2008).

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Dated: February 25, 2009

s/ Jon M. Hopeman

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