

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
PRESERVATION OF TANGIBLE
EVIDENCE, ROUGH NOTES
AND LIKE MATERIALS**

Defendant Thomas Joseph Petters, by and through his undersigned attorneys, hereby moves the Court for an order requiring attorneys for the United States and any Government investigative agents to preserve tangible evidence, field notes, memoranda, or other recordings of facts and other information gathered during the investigation of the incidents which led to the indictment in the above-captioned matter, and to prevent the same from being destroyed.

This motion is based upon Rule 16, Federal Rules of Criminal Procedure, the Jencks Act, 18 U.S.C. § 3500, the United States Constitution, Brady v. Maryland, 375 U.S. 83 (1963) and its progeny.

The defense further bases this motion on the following grounds:

1. Rough notes and like materials may be deemed exculpatory evidence within the meaning of Brady and its progeny, and may also be deemed “statements” within the meaning of the Jencks Act, 18 U.S.C. § 3500. United States v. Harris, 543 F.2d 1247, 1252-1253 (9th Cir. 1976); United States v.

Harrison, 524 F.2d 421, 433 (D.C. Cir. 1975); United States v. Lujan, 530 F. Supp. 2d 1224, 1265 (D.N.M. 2008).

2. Courts require the Government to preserve rough notes and like materials pending a determination as to whether such materials must be disclosed to the defense under Brady and its progeny or under the Jencks Act. Lujan, 530 F. Supp. 2d at 1267; United States v. Cooper, 283 F. Supp. 2d 1215, 1238 (D. Kan. 2003); United States v. Floyd, 247 F. Supp. 2d 889, 899 (S.D. Ohio 2002).

3. Here, it is highly probable that the rough notes and like materials contain information which is favorable to the defense within the meaning of Brady and its progeny, or otherwise constitute statements within the meaning of the Jencks Act. The Government cannot be permitted to make this determination based upon its own discretion; this would constitute an unlawful usurpation of the judicial branch functions. Harrison, 524 F.2d at 428 & n.17.

4. Moreover, the defense is entitled to use rough notes and like materials for cross-examination. Preservation of rough notes and like materials is necessary to protect Mr. Petters' right to effective assistance of counsel under the Sixth Amendment.

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Dated: February 25, 2009

s/ Jon M. Hopeman

Jon M. Hopeman, MN #47065
Eric J. Riensche, MN #309126
Jessica M. Marsh, MN #388353
Felhaber, Larson, Fenlon & Vogt, P.A.
220 South Sixth Street, Suite 2200
Minneapolis, MN 55402-4504
Telephone: (612) 339-6321

Paul C. Engh, MN #134685
Engh Law Office
220 South Sixth Street, Suite 215
Minneapolis, MN 55402
Telephone: (612) 252-1100

Attorneys for Defendant Thomas J. Petters