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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TRANSFER OF VENUE

THOMAS JOSEPH PETTERS,

Defendant.

> *Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. [We have] insisted that no one be punished for a crime without a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.*
>
> —*Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)*

BACKGROUND

This case began as a secret federal investigation but morphed, quickly, into public spectacle.[1]

On Wednesday, September 24, 2008, federal law enforcement agents descended deeply upon Petters Group Worldwide ("PGW") and Petters Company, Inc. ("PCI") at 4400 Baker Road in Minnetonka. A separate grouping pawed through Mr. Petters' private residence that same day. These events were widely reported in the Twin Cities

[1] This memorandum is accompanied by an appendix of selected materials, cited as "Appx." We have separately submitted a disc containing television broadcast clips, cited as "TV Disc." Finally, we have submitted a more complete and voluminous collection of news articles and like materials.

news media. [Appx. B-1, B-2, C-1, D-1.] Mr. Petters thus became a headline, the story of the year, a transfixed name used to sell advertising.

By Friday, September 26, 2008, the Government did the inexplicable, an unsealing. Unlike any other case in recent memory, the search warrant affidavit was released to the public, this even though the investigation was in its infancy. [Appx. B-3, B-4, C-2, D-3; TV Disc at 0:00 to 2:21.] The affidavit was provided to reporters with no care that the privacy of the innocent, Mr. Petters, be protected. Ever again. If the defense were to take a confidential affidavit and give it to the media, we'd be accused of obstruction of justice. There will be no like charges here, of course, because the Government is impervious to fault, entirely perfect.

The affidavit contained, in great detail, allegations that Mr. Petters had engaged in a multi-billion dollar fraud scheme through PCI. That he had done so in order to raise money "for his other business ventures and to support his extravagant lifestyle." That a cooperating witness, wearing a recording device, had cooed into Mr. Petters' ear, hoping he in turn would confess to crimes that he did not commit, and that she would be rewarded with a pass at prison time, a walk into the sunlight, avoiding the long shadow of future harm. All of this was widely reported. [Appx. B-3, B-4, C-2, D-3; TV Disc at 0:00 to 2:21.]

Soon began a cycle of daily dispatches. On one day, Mr. Petters' "global" investors had sued him and his business entities. On another Mr. Petters resigned from his companies. On another Teen Challenge was at financial risk, a charity that had received millions by virtue of Mr. Petters' well known generosity. Then ministers and

nonprofits sued Mr. Petters for fraud. On yet another day Sun Country Airlines faced fiscal jeopardy, the possibility of Minnesota job losses, bankruptcy protection an eventual option. Yet another day brought news of a Petters warehouse store closing. All of this against the backdrop of a financial crisis causing rising unemployment and deep public anxiety. Mr. Petters caused layoffs at Teen Challenge, the stories said; he caused Sun Country employees to take wage reductions. [Appx. B-5, B-6, B-7, B-9, B-15, B-17, B-31, B-36, C-3, C-5, C-7, D-4, D-7; TV Disc at 4:21 to 4:40, 8:30 to 15:06, 21:33 to 24:10.]

Federal agents arrested Mr. Petters at his home on October 3, 2008, and charged him with the fraud that had already been leaked through disclosure of the affidavit. These events were, too, widely disseminated. Here is Mr. Petters' home, the camera announced. This is his new uniform chortled the anchor at 5:00, at 6:00 and 10:00 p.m., expressing a concern masked by preen. [Appx. B-8, C-6, C-8, D-6; TV Disc at 2:24 to 8:30.]

The reports said that Larry Reynolds, Michael Catain, and Robert White had been charged. Frank Vennes, described unhappily as an "ex-felon," was implicated. Then White, Catain, Deanna Coleman pleaded guilty, and collectively blamed Mr. Petters for their crimes. Then Larry Reynolds joined the chorus. The Petters ship was listing, it couldn't possibly be righted, the captain was gone, or so the story line went. [Appx. B-11, B-13, B-18, B-19, B-20, B-21, B-22, B-23, B-24, B-29, C-9, C-11, C-16, D-10, D-11; TV Disc at 2:24 to 8:30.]

At the same time, it was reported that the assets of Mr. Petters and others had been frozen and placed under the control of a court-appointed receiver, who himself has made impecunious statements to the press about the losses, the cause, but has made no mention of due process, the importance of trial, the jury, of waiting for the defense to respond. It was reported that Mr. Petters concealed assets from the receiver. Led by the Government's search warrant affidavit, the newspapers announced with indignation Mr. Petters' "lavish" lifestyle. [Appx. B-10, B-25, B-28, B-30, B-33, B-35, C-15, C-17, D-14.]

The FBI continued on, opining to the media that Mr. Petters had $10 million in gambling losses—an allegation which is demonstrably false. There has been no apology. [Appx. B-10.]

A detention hearing was held on October 7 and 8, 2008. An FBI agent testified that Mr. Petters had made plans to flee the District of Minnesota. More inflammatory, the FBI agent testified that Mr. Petters admitted to the alleged fraudulent scheme. There were, the Agent said, recordings of admission (the substance of which we dispute). In that context, news outlets began publishing a photograph of Mr. Petters in jail-issued orange, looking away from the camera, the selected perp image contrary to the presumption of innocence in tone and fact. It was reported that Mr. Petters lost this and subsequent bids for release. [Appx. B-12, B-16, B-24, B-32, C-8, C-9, C-12, D-8, D-9, D-10, D-12; TV Disc at 2:22 to 8:30, 15:08 to 21:08.]

Mr. Petters became a punching bag swinging to and fro; before his first counter, the first cross-examination, the fight was over. The coverage was everywhere, a virus, and media interest remaining intense.

The Minneapolis-St. Paul Business Journal called the "Petters scandal" the "Top Business Story in 2008." It blamed Mr. Petters for damages to Sun Country, Polaroid, hedge funds, and more. [Appx. E-1.]

Twin Cities Business, writing this month, urged its readers to visit tcbmag.com, "where three times as many readers are drawn to news stories about Petters than to stories on any other topic." [Appx. F-1.]

The St. Cloud Times readers voted Mr. Petters' indictment the news story of the year.

We invite the Government to view what it has spawned by visiting the Star Tribune website, where space is reserved for "Special Report: The Tom Petters Fraud Case." Hundreds of articles are collected, each toxic and birthed by the Government. Most of the articles in the newsprint copy of the Star Tribune were placed on the front page, with Mr. Petters featured in his orange suit.

Repetition is ordinarily the great teacher, the tonic of acceptance. Not here. Not for us. Not before the trial occurs.

We need not cite only the "factual" articles. The published opinion pieces, blogged or otherwise, have been far more inflammatory, outrageous. The public comments that appear on the Star Tribune web site have been consistently over-the-top. But even the professional staff have gone well beyond the bounds of propriety.

One Star Tribune columnist has gone so far as to call for Mr. Petters' head on a stake, an embarrassment to the craft of reporting, of clarity, of putting one accurate sentence before the next. [Appx. B-14.]

Another wrote: "I've been in journalism more than 25 years, and I never witnessed so much outright fraud, from Tom Petters' astonishing multibillion dollar Ponzi scheme to the scores of straw buyers of houses that have no owners . . . . One of our key goals for 2009 is . . . to spend more time muckraking." [Appx. B-37.]

An editorial in Twin Cities Business this month: "Of all the ironies of 2008, few were as stark as the revelation that Tom Petters, the operator of the biggest criminal conspiracy in Minnesota history, had endowed a chair in 'ethics development' at Miami University . . . ." [Appx. F-1.]

The Court may say, well, there is such a thing as a First Amendment. But that question masks fault. The Government is mostly to blame. It has issued inflammatory press releases, soon devoured by the news media. [Appx. G-1, G-2, G-3, G-4.] Here is the distinguished Assistant, in quotable form:

> Your Honor, Mr. Petters is a con man. He's over a $3 billion con man, and it is not surprising that he hides his secrets from those whom he loves. And that's what we heard here a little bit this afternoon.
>
> The possible penalty that he faces as a result of executing this fraud scheme is substantial, and the Government believes that the advisory guideline range on this case is life in prison. It is perhaps the largest fraud case that we have seen here in this state and district and one of the largest in the country. And Mr. Petters, through overwhelming and compelling evidence, is the person responsible for executing that scheme. We're trying to figure out the number of victims.

> There are numerous hedge funds, but behind those hedge funds are possibly hundreds or thousands of individual citizens who have put their life savings, perhaps, in his hands.
>
> So in considering whether detention is appropriate in this case, you can consider the possible sanction that he faces. And it is perhaps the second most severe sanction available to any court under the law, and that's life in prison. And that creates a huge motive to flee.
>
> * * *
>
> We have given you just a very small snapshot of Mr. Petters' responsibility in this fraud scheme. It is blatant. It was longstanding for 14 years. It was arrogant. It was deceitful. The evidence is overwhelming.
>
> Just based on the recordings and the documents that have been seized, now numerous witnesses are corroborating that evidence and they are all pointing the finger at Mr. Petters. And he himself made that admission to Special Agent Eileen Rice. The evidence in this case is overwhelming.

[10/7/2008 Tr. at 92-94.]

The smugness offends, but it worked. Mr. Petters was detained. The newspaper smelled the blood in the prosecutor's words: "an unshaven Tom Petters listened Tuesday as federal prosecutors labeled him an arrogant con man . . . ." [Appx. B-12.] Its readers, prospective jurors all, filled its website with this:

> "I hope this puke gets life!! He's lived the high life for two decades. F'ing people over."
>
> "Mugshot. Look up Petters! Take a little pride in yourself now you crook!"
>
> "He's guilty of something and will be given credit for time served."
>
> "I am thinking his chance of being found innocent on this is slim."
>
> "Really, it was divine greed and willful ignorance. I hope we have to build another prison to hold all the scumbags guilty in this mess."

"I wonder how Petters is enjoying the jailhouse cuisine."

And this is only one day.

ARGUMENT

I. Legal Standard Re: Transfer of Venue

Over one century ago, Justice Holmes cogently observed: "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. Colorado, 205 U.S. 454, 462 (1907). Mr. Petters is entitled to a "fair[] [trial] in a public tribunal free of prejudice, passion, excitement, and tyrannical power." Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

Rule 21(a), Federal Rules of Criminal Procedure, provides:

> Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

The rule suggests a large and discretionary standard.

A. Constitutional Rights

Mr. Petters has a Fifth Amendment right to due process. And under the Sixth Amendment, he has a right to a fair trial. Adverse pretrial publicity implicates both. United States v. Houlihan, 926 F. Supp. 14, 15 (D. Mass. 1996).

The Eighth Circuit employs a "two-tiered analysis" with respect to pretrial publicity. United States v. Allee, 299 F.3d 996, 1000 (8th Cir. 2002). The first tier requires a court to determine whether pretrial publicity is so extensive and corrupting so

that a presumption of unfairness is justified. Id. The second concerns whether prejudice exists based upon information garnered during the jury-selection process. Id. Since neither the Court nor the defense has had the opportunity to examine jury-selection information, only the former tier is at issue now. See, e.g., United States v. Saya, 980 F. Supp. 1157, 1158 (D. Haw. 1997).

B. Supervisory Authority

"Guided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." United States v. Hasting, 461 U.S. 499, 505 (1983). One purpose for supervisory authority is "to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury." Id. Supervisory authority ensures not only that justice is done, but also the public perception that it has been. See id.

To that end, the Supreme Court has used its supervisory authority to counteract prejudicial pretrial publicity with prudential solutions. Marshall v. United States, 360 U.S. 310, 312-313 (1959). "In addition to the constitutional issues, cases construing the supervisory authority of the federal courts suggest that the threshold for unacceptable prejudicial publicity triggering a change in venue may well be lower than under the constitutional standard." Houlihan, 926 F. Supp. at 16 n.3. Courts have transferred cases for trial on the basis of this lower standard. E.g., United States v. Moody, 762 F. Supp. 1485, 1490 (N.D. Ga. 1991) (Judge Devitt granted change of venue from Georgia to Minnesota for a defendant charged with a well-publicized murder of a federal judge).

II. Venue Must Be Transferred To Protect Mr. Petters' Constitutional Rights and To Preserve Just and Fair Trials in Federal Courts

Whether viewed through the lens of constitutional rights or supervisory authority, transfer to another judicial district is warranted. We do not, of course, ask for a different Judge. Our concern is pretrial publicity. A change of venue is the only means by which a fair trial may be reasonably assured, and by which the appearance of a fair trial may be assured. This isn't just about Mr. Petters, the Government's notions of convenience.

Courts have declined to announce an omnibus test for determining what constitutes unfair pretrial publicity. The test is *sui generis*, and *ad hoc*. Professor Wright has noted:

> Four factors, it is said, are important in determining whether to grant relief in cases where it is claimed that pretrial publication has made prejudice inevitable. First, it is necessary that the publicity be recent, widespread and highly damaging to the defendants. Second, it is an important consideration whether the government was responsible for the publication of the objectionable material, or if it emanated from independent sources. This factor is especially significant in regard to the third factor, the inconvenience to the government and the administration of justice of a change of venue or continuance. Last, it must be considered whether a substantially better panel can be sworn at another time or place.

2 Charles Alan Wright et al., Federal Practice & Procedure § 342 (3d ed. 2008); see also e.g., Saya, 980 F. Supp. at 1159 (employing the four factors with approval).

A. Recent, Widespread, and Highly Damaging Publicity

Since September, 2008, Mr. Petters has been subject to an unabated deluge. The salient points, made repeatedly:

- Mr. Petters' associates have pleaded guilty to the alleged scheme and have pointed the finger at Mr. Petters as the mastermind.

- Mr. Petters supposedly admitted to the alleged scheme, and according to the Government these "admissions" have been recorded by a Government informant.

- Mr. Petters supposedly admitted to the alleged scheme during an interrogation by a federal agent.

- Mr. Petters is supposedly responsible for much of Minnesota's economic troubles all during a time of economic crisis in the State.

- Mr. Petters is supposedly a defrauder of Minnesota charities and ministers.

- If the Government's rhetoric—parroted by the news media—is to be believed, Mr. Petters is supposedly a "con man" at the center of $3.5 billion fraud, all the while leading a lavish lifestyle in his mansion.

- The predominant public image of Mr. Petters is of a jail-issued orange uniform.

The public picture of Mr. Petters, in short, is of a man whose conviction is assured, the trial a mere formality. The adverse publicity pervades the State.

There is a striking resemblance to United States v. Abrahams, 453 F. Supp. 749, 751 (D. Mass. 1978), where the news media "flamboyantly discuss[ed] the defendant's alleged behavior as 'con man,' swindler, and imposter." The media spoke as if these and other claims were givens, even prior to trial. It was repeatedly reported that the defendant had prior convictions, had failed to make court appearances resulting in denial of bail, had committed frauds resulting in the financial collapse of the largest commodity-options firm in the country creating the need for a receivership, and led a "luxurious lifestyle funded by his ill-gotten gains." Id. at 752. The court found transfer of venue a necessity. Id. at 754.

This case presents a far more compelling case. Here, we find all of the prejudicial publicity of Abrahams, plus soaring rhetoric by the Government, premature release of a search warrant affidavit, and supposed admissions by Mr. Petters (which are disputed by Mr. Petters, but the Government pays that detail no mind).

It will be said that the Court should first quiz the jury pool about media coverage and bias. But the courts have long recognized that media coverage may enter the subconscious of prospective jurors, destroying their collective objectivity, and with it the defendant's hope for a fair trial. Irvin v. Dowd, 366 U.S. 717, 727 (1961) ("The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man."); see also Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (reversing conviction where defendant's confession was repeatedly publicized in community); United States v. Maad, 75 Fed. Appx. 599, 601 (9th Cir. 2003) (reversing conviction where local adverse publicity was intense and noting that "[p]rejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudice and inflammatory media publicity about the crime"); Nevers v. Killinger, 990 F. Supp. 844, 864 (E.D. Mich. 1997) ("The community was so permeated with hostility toward petitioner that his trial was nothing more than a hollow formality."), aff'd, 169 F.3d 352 (6th Cir. 1999).

The social science research is in accord.

> Overall, these studies reveal that evidence or information casting doubt on the character of the defendant, such as reports about prior convictions and confessions or reports implicating the defendant in other crimes, is one of the principal vehicles through which pretrial publicity exerts its effects. Jurors who have heard about prior bad acts by a party or who have reason

> to question the character of a party are more likely to convict or find fault with that party.

Christina A. Studebaker & Steven D. Penrod, "Pretrial Publicity," 3 Psychology, Public Policy & Law 428, 437 (1997). Moreover, the social science research has established that once exposed to such information, a juror may not consciously recall it nor feel that it creates bias; yet the exposure caused bias nonetheless. Id. at 442. In a blow to the paradigm of law that our rules offer protection always, the research suggests that the standard courtroom tools—jury selection procedures, presentation of evidence, and jury instructions—may well be ineffective against a tide of negative publicity. Id. at 444-445. Hence our motion.

B. Responsibility of Government for Publicity

We challenge the Government to acknowledge its role in creating Mr. Petters' false image. What the Court should do is find out why, when the search warrant was initially sealed, it was released two days later. Who authorized that, should be the first question at the Motions hearing. We hope it's asked. It should be. The Government is made up of leakers.

Remember that the unsealing of the affidavit set in motion the media frenzy. The Government has given no explanation as to why the affidavit was sealed and then so quickly unsealed, other than a calculated move to ruin Mr. Petters and destroy his standing in the community. On top of it all, the Government released inflammatory press releases. [Appx. G-1, G-2, G-3, G-4.]

Sadly, the Government violated its own internal regulations.

(b) Guidelines to criminal actions.

(1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, ***nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.***

(3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

(i) The defendant's name, age, residence, employment, marital status, and similar background information.

(ii) The substance or text of the charge, such as a complaint, indictment, or information.

(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

(iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

(4) Personnel of the Department shall not disseminate any information concerning a defendant's prior criminal record.

(5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

(***6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:***

> ***(i) Observations about a defendant's character.***
> ***(ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.***
> ***(iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.***
> ***(iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.***
> ***(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.***
> ***(vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense.***
>
> (7) Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody. ***Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby.***

28 C.F.R. § 50.2 (emphases added).

The Government has repeatedly violated these guidelines: releasing the contents of its unsealed affidavit; its inflammatory press releases; its argumentative rhetoric and declarations of victory; and its allowance of jail officials to distribute the much-publicized photo of Mr. Petters in his jail-issued orange uniform, looking away from the camera in an unflattering pose.

The Government will scoff, but it was well aware that its actions would destroy Mr. Petters and his businesses. Yet it thrust its investigation into the public sphere anyway, with no regard for (or possibly because of) the consequent negative publicity. The Government must accept that it has played a large role in creating this toxic environment.

C. Availability of Appropriate Alternative Venue

A series of simple database searches reveals that there exist many forums where an unbiased (or at least less biased) jury pool may exist. For example, a search of newspaper websites using the keyword "Petters" reveals the following published stories:

Minneapolis Star Tribune	***Duluth News Tribune***	***Fargo Forum***	***Des Moines Register***	***Milwaukee Journal Sentinel***
200+	18	8	0	0

This suggests at least two conclusions. First, it reinforces the notion that Mr. Petters cannot receive a fair trial in Minnesota due to the overwhelming amount of negative pretrial publicity.[2] Second, that nearby judicial districts are appropriate venues for this matter.

D. Convenience Re: Administration of Justice

The Southern District of Iowa or the Eastern District of Wisconsin, for example, would be prudentially appropriate venues for trial with due regard for the convenience of the Court and the administration of justice. Moreover, both venues are not so far away from the Twin Cities that court officials and the lawyers could not travel to them by automobile. Or, alternatively, both locations are accessible via direct flights from the Minneapolis-St. Paul International Airport.

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[2] Initially, one might be lulled into the notion that the trial could simply be moved to Duluth or some other venue outside the Twin Cities. However, the Star Tribune has a significant statewide circulation, and a high statewide Internet-version readership. Moreover, many Minnesotans outside the metropolitan area obtain their news and information from statewide sources, such as television broadcasts and radio broadcasts (e.g., Minnesota Public Radio), and both have extensively covered Mr. Petters' plight. [Appx. A-1, A-2, A-3.] In short, merely moving the trial outside the metropolitan area is dubious, whereas we can be confident that another district will yield an unbiased jury pool.

CONCLUSION

For all of these reasons, the Court should order that venue be transferred to another district for trial.

Dated: February 25, 2009

s/ Jon M. Hopeman

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