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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS JOSEPH PETTERS,

Defendant.

OBJECTIONS TO PRETRIAL ORDER OF MAGISTRATE JUDGE

Pursuant to D. Minn. L.R. 72.2 and 28 U.S.C. § 636, Defendant Thomas Joseph Petters, by and through his undersigned attorneys, files these objections to the Magistrate Judge's Order regarding pretrial motions. [Docket No. 163.]

BACKGROUND

The defense filed a number of critical pretrial motions which have been given short shrift to a point of error. Our discovery motions include: motion for disclosure of suitability study regarding cooperating witnesses; motion for disclosure of cooperating-witness participation in witness security program ("WITSEC"); motion for discovery and inspection; motion for discovery of exculpatory material (Brady motion); and motion for early disclosure of Jencks Act material. Without discussion Magistrate Judge Boylan issued a nebulous Order on March 26, 2009.[1] We now file objections, seeking clarity as opposed to the Court's embrace of Government obfuscation.

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[1] The Order states that certain defense motions will be determined by Report and Recommendation on a later date.

I. Exculpatory Material (Brady Motion)

We filed a several motions implicating the largess of Brady: a motion for disclosure of informant suitability studies, a motion regarding cooperating witness participation in WITSEC, among others. A separate Brady motion listed detailed categories the case law holds we should receive. And we requested timely disclosure, as is Brady's due process directive.

The Government's response to these motions borders on disrespect of the law and their obligations imposed by it. While our motions were not opposed, neither were they met with agreement. The Government's response (endorsed by the Magistrate Judge) is near akin to an oozing bog—formless, inert, mushy and ultimately a sink hole where long-held principles are ignored. The Government would only promise to comply with Brady while practicing avoidance. The Magistrate Judge's Order eschews our requests and endorses the formless, the non-descript. Without standards, there is no law.

For Brady is not a toy land, a netherworld where long-held obligations are make-believe. A sand pit game where the rules permit vague promises of Brady compliance but require no specific disclosures. See Bennett L. Gershman, "Litigating Brady v. Maryland: Games Prosecutors Play," 57 Case W. Res. L. Rev. 531 (2007).

The pretrial Order lacks particularization and timing enforcement. It gives us nothing concrete, rather an odd scenography.

A. Particularized Categories of Brady

This Court should instead issue an order requiring disclosure of particular categories which constitute Brady. We so drafted our Brady motion and like motions

because we are familiar with the Government's tactic of vague promises and unchecked discretion. "If we have it, we'll give it to you, but we may not because it might not be helpful, but tell us what your defense is and then we'll say you have no defense." And so on. "If you catch us later, we'll just allege harmless error." And so forth.

The Government does not understand what Brady is. Their lawyers are on record (at the motions hearing) that they know of no exculpatory evidence. Is there not one single inconsistent statement? Is there not a transaction, anywhere, that one of their witnesses did without the aid of Mr. Petters? Is there not a single witness who had laudatory things to say about Mr. Petters?

Out of this odd silence, we come to two possible conclusions: either the prosecutors do not want to reveal Brady, or else they do not know how to identify it. The Magistrate's Order leaves them plausible deniability.

This Court's Order should at least track the Brady categories. We emphasize the following:

1. WITSEC

At least one of the Government's cooperating witnesses participates in WITSEC, Larry Reynolds. The Government implies he will not be called, but that is beside the point. Mr. Reynolds, acting at the behest of the Government, was a tunneling wound, a cancer infection of all the Petters companies. His presence there, and the Government's knowledge of it, is critical. The jury can only hear Mr. Reynolds' statements in light of the Government's joined deceit. Everything about the man is relevant—his past, his protections, his temptations, the Government's apparent carte blanche forgiveness.

The Magistrate Judge should have cited law supporting our motion. Federal prosecutors are absolutely required to make this disclosure. The case law is quite clear:

> [T]he defendant is entitled under Brady at least to the following information with respect to [a particular cooperating witness] or any other cooperating witnesses who may testify at trial:
>
> (1) the existence and substance of all promises of immunity, leniency or preferential treatment, including any written plea agreements and transcripts of plea proceedings;
>
> (2) relevant portions of presentence investigation reports (at least the statements of the cooperating witnesses, prior convictions and arrests and dispositions of prior charges, and any exculpatory or impeachment information); and
>
> (3) the existence and relevant portions of any witness protection or psychiatric reports and polygraph test results because such information may contain information that shows bias or motive or otherwise affects the credibility of the witness.

United States v. Edwards, 191 F. Supp. 2d 88, 90 (D.D.C. 2002) (emphasis added).

WITSEC information is hence categorical Brady, and must be disclosed.

2. Suitability Study

We also moved for disclosure of any suitability studies of cooperating witnesses. This, too, is categorical Brady. See United States v. Andreas, 23 F. Supp. 2d 835, 850 (N.D. Ill. 1998) ("The FBI suitability and taping guidelines are relevant because they show how far the investigation deviated from procedures which are intended to insure the integrity of evidence which is always relevant.").

The Government has not said whether such studies exist, but they undoubtedly do. The answer the Magistrate Judge accepts is that they may or may not. He doesn't decide the issue. This Court now must.

B. Timing of Brady Disclosures

We requested an order for disclosure of the Brady materials 60 days prior to trial. The Magistrate Judge likewise ignored this request, as did the Government.

Brady must be timely produced for its effective use. United States v. Olson, 697 F.2d 273, 275-276 (8th Cir. 1983). Early production ensures the effective administration of the criminal justice system. United States v. Blackwell, 954 F. Supp. 944, 968 (D.N.J. 1997).

As we said in our Brady motion, this complex case warrants early disclosure, at least 60 days prior to trial, with a continuing obligation attached for the duration.

II. Disclosures Re: Government's Case-In-Chief

We requested early disclosure of evidence for the Government's case-in-chief, pursuant to the following rule:

> At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

Fed. R. Crim. P. 12(b)(4)(B).

The Magistrate Judge ordered exhibit list exchange 30 days prior to trial. However, he did not specifically address our motion under the auspices of Rule 12. We request an order requiring disclosures 60 days before trial.

* * *

Our objections are filed to comply with our ethical obligation to represent Mr. Petters through the pretrial proceeding. We do not mean to signal continued work. Trial

preparation stopped as of March 13, 2009, when the Government gave notice of its intent to claw back fees paid to Mr. Petters' lawyers, ours and by implication everyone else who has represented him for the last twenty years. Without Court intervention, the Government's schadenfreude will have no limit.

Dated: March 31, 2009

s/ Jon M. Hopeman

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