

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNITED STATES OF AMERICA

*

v.

*

Criminal No. 1:10-cr-0181-RDB

THOMAS ANDREWS DRAKE

*

MOTION FOR BILL OF PARTICULARS

The defendant, Thomas Drake, through his attorneys, hereby moves this Honorable Court, pursuant to Federal Rule of Criminal Procedure 7(f) and the Fifth Amendment to the United States Constitution, to issue an order authorizing a Bill of Particulars in regard to Counts Six and Seven of the Indictment in this case, so that Mr. Drake may be sufficiently apprised of the offenses therein alleged. As grounds for this request, he states the following:

OFFENSES CHARGED IN COUNT SIX AND COUNT SEVEN

1. In Count Six of the Indictment in this case, the government alleges that Thomas Drake committed a litany of acts constituting obstruction of justice in violation of 18 U.S.C. § 1519. The government claims in Count Six that, “[f]rom at least on or about April 24, 2006, and continuing through on or about November 28, 2007, in the District of Maryland,” Mr. Drake

knowingly altered, destroyed, mutilated, concealed and covered up records, documents and tangible objects, namely, classified and unclassified documents, including emails and handwritten notes, with the intent to impede, obstruct and influence the investigation of a matter within the jurisdiction of the Federal Bureau of Investigation, and in relation to and contemplation of such matter, that is, an investigation into alleged disclosures of classified information to the media and to Reporter A.

2. In Count Seven of the Indictment, the government alleges that, on November 28, 2007, in the District of Maryland, Mr. Drake violated 18 U.S.C. § 1001(a)(2) by knowingly and willfully making a materially false, fictitious, and fraudulent statement and representation in a matter

within the jurisdiction of the Federal Bureau of Investigation, United States Department of Justice. The government claims in Count Seven that Mr. Drake violated § 1001(a)(2) by “falsely stating to special agents of the Federal Bureau of Investigation that he never gave Reporter A classified information.”

ARGUMENT

3. Mr. Drake seeks additional information regarding the acts alleged in Count Six and Count Seven of the Indictment. This information is necessary so that Mr. Drake may adequately prepare a defense to the offenses charged in these two counts. Although Mr. Drake recognizes that he is not entitled to discover the manner in which the prosecution intends to prove the acts it accuses him of committing in Counts Six and Seven, he is entitled to learn what those alleged acts are.

4. The function of a bill of particulars is to provide the defendant with sufficient information about the nature of the charged offense so that he may adequately prepare a defense and avoid prejudicial surprise at trial. *See United States v. Schembari*, 484 F.2d 931, 934-35 (4th Cir. 1973); *see also United States v. Duncan*, 598 F.2d 839, 848 (4th Cir. 1979) (“[T]he facts alleged should be sufficiently detailed to apprise the defendant of the charge against him so that he may prepare his defense. This latter function . . . may often be satisfied through the use of a bill of particulars. . . .”) (footnote omitted). A bill of particulars “amplifies the indictment by providing missing or additional information so that the defendant can effectively prepare for trial.” *United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996). *See also United States v. Hess*, 124 U.S. 483, 487 (1888) (“Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is

charged.”); *United States v. Helmel*, 769 F.2d 1306, 1322 (8th Cir. 1985) (“‘It is generally sufficient that an indictment set forth the offense in the words of the statute itself . . .’ as long as the elements of the offense are delineated and the general statement is accompanied by the specific facts constituting the offense.”) (*quoting Hamling v. United States*, 418 U.S. 87, 117-18 (1974)); *United States v. Addonizio*, 451 F.2d 49, 63-64 (3rd Cir. 1971) (purpose of bill of particulars is to inform defendant of nature of charges so that he or she may adequately prepare defense, to avoid surprise during trial, and to protect defendant against a second prosecution for an inadequately described offense; bill of particulars should fulfill this function “when the indictment itself is too vague and indefinite for such purposes”) (quotation omitted).

5. A defendant is not entitled to know all the evidence the government intends to produce at trial, but is entitled to learn “the theory of the government’s case[.]” *United States v. Levine*, 983 F.2d 165, 167 (10th Cir. 1992) (quotation omitted). Accordingly, a bill of particulars may be necessary “to clarify the specific factual theory (or theories) upon which the government” intends to proceed. *United States v. Chandler*, 753 F.2d 360, 362 (4th Cir. 1985); *see also United States v. Barnes*, 158 F.3d 662, 665 (2nd Cir. 1998) (where bill of particulars is “necessary to give the defendant enough information about the charge to prepare his defense, ‘it will be required even if the effect is disclosure of evidence or of theories’”) (*quoting* 1 Charles Alan Wright, *Federal Practice and Procedure* § 129 (1982)); *United States v. Hart*, 70 F.3d 854, 860 (6th Cir. 1995) (noting that district court instructed government to specify its “theory of proof” regarding charged counts).

6. Based on these principles, a bill of particulars is necessary in regard to Count Six, to provide the defense team with certain essential information about the alleged offense. As noted above, the government in Count Six states that “[f]rom at least on or about April 24, 2006, and

continuing through on or about November 28, 2007,” Thomas Drake “knowingly altered, destroyed, mutilated, concealed and covered up records, documents and tangible objects, namely, classified and unclassified documents, including emails and handwritten notes,” with the intent to impede, obstruct and influence an FBI investigation into alleged disclosures of classified information to the media and to Reporter A.

7. Count Six sets forth an offense that allegedly took place over the course of an open-ended time period exceeding 19 months, and which involved a multitude of unspecified acts and documents. So that Mr. Drake may adequately prepare a defense to this very broad charge, it is necessary that the government, in a bill of particulars:

(A) Identify every document, including e-mails and handwritten notes, about which the prosecution intends to introduce evidence, and specify whether the document was altered, destroyed, mutilated, concealed, and/or covered up.

(B) For each document identified under Count Six, identify the date or time period each document was allegedly altered, destroyed, mutilated, concealed, and/or covered up, and identify whether the prosecution alleges the document was classified or unclassified.

(C) Identify which acts Mr. Drake allegedly took with respect to the investigation into disclosures to the media.

(D) Identify which acts Mr. Drake allegedly took with respect to the investigation into disclosures to Reporter A.

(E) Identify the prosecution’s theory as to how the investigation(s) was impeded, obstructed, or influenced.

8. A bill of particulars is also necessary in regard to the allegation in Count Seven that,

on November 28, 2007, Mr. Drake violated 18 U.S.C. § 1001(a)(2) by “falsely stating to special agents of the Federal Bureau of Investigation that he never gave Reporter A classified information.”

9. In order that Mr. Drake may adequately prepare his defense to this charge, it is necessary that the government identify in a bill of particulars which classified documents it alleges he gave to Reporter A. Without such information, it is impossible for the defense to adequately determine the allegedly false nature of any statement Mr. Drake made to FBI agents on the date identified in Count Seven.

WHEREFORE, for these reasons and any others that may be developed at a hearing on this motion, Thomas Drake requests that this Honorable Court order the government to furnish the defense with a Bill of Particulars containing the requested information regarding Counts Six and Seven of the Indictment in this case.

Respectfully submitted,

/s/

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