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

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| **UNITED STATES OF AMERICA** | * | |
| | * | |
| **v.** | * | **Criminal No. 10 CR 00181 RDB** |
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| **THOMAS ANDREWS DRAKE,** | * | |
| | * | |
| **Defendant.** | * | |
| | ****** | |

**GOVERNMENT'S RESPONSE TO**
**DEFENDANT'S MOTION FOR BILL OF PARTICULARS**

The United States of America, by and through William M. Welch II, Senior Litigation Counsel, and John P. Pearson, Trial Attorney, Public Integrity Section, Criminal Division, United States Department of Justice, respectfully responds to the defendant's *Motion for Bill of Particulars*, Dkt. 49. This motion should be denied because the indictment is not defective, the defendant has received full discovery, and the defendant knows better than anyone what documents he destroyed. Finally, this motion for a bill of particulars is nothing more than a series of civil interrogatory questions designed to elicit the government's theory of the case and proof in advance of trial.

## I. A Bill of Particulars Is Not Warranted Where the Indictment Alleges the Essential Elements of the Crime and Permits Defendants To Prepare a Defense and Plead Double Jeopardy

A defendant is not entitled to a bill of particulars as a matter of right. *Wong Tai v. United States*, 273 U.S. 77, 82 (1927). Rather, "a bill of particulars is a defendant's means of obtaining specific information about charges brought in a vague or broadly-worded indictment." *United*

*States v. Dunnigan*, 944 F.2d 178, 181 (4th Cir. 1991)(*citing United States v. Debrow*, 346 U.S. 374, 378 (1953), *rev'd on other grounds*, 507 U.S. 87 (1993).

As a general matter, an indictment is sufficient if it alleges the essential elements of the crime with which a defendant is charged in a manner that permits the defendant to prepare a defense and plead double jeopardy in any future prosecution for the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Quinn*, 359 F.3d 666, 672 (4th Cir. 2004). "While it is generally sufficient that the indictment describes the offense by using the unambiguous language of the statute, that general description `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.'" *Quinn*, 359 F.3d at 672-73 (citing *Hamling*, 418 U.S. at 117-18). *See also Russell v. United States*, 369 U.S. 749, 765 (1962) (noting that an indictment must "descend to the particulars" where the definition of an offense includes generic terms). "Thus, the indictment must also contain a 'statement of the *essential facts* constituting the offense charged.' " *Brandon,* 298 F.3d at 310 (quoting Fed.R.Crim.P. 7(c)(1))

"A bill of particulars, however, is not a proper tool for discovery." *United States v. Wessels,* 12 F.3d 746, 750 (8th Cir.1993). If the indictment fully complies with the requirements of the Fifth and Sixth Amendments and Fed. R. Crim. P. 7(c), then a bill of particulars may not be "used to provide detailed disclosure of the government's evidence in advance of trial." *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 405 (4th Cir. 1985); *United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996). *See Wessels*, 12 F.3d at 750. As another circuit has stated:

> . . . A bill of particulars, unlike discovery, is not intended to provide the defendant with the fruits of the government investigation. . . . Rather, it is intended to give the defendant only that minimum of information necessary to permit the defendant to conduct his *own* investigation.

*United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985) (citations omitted; emphasis in original); *United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir. 1980) (a bill of particulars "is not designed to compel the government to detailed exposition of its evidence or to explain the legal theories upon which it intends to rely at trial").

Even where an indictment may not include all of the necessary information, "access to [full] discovery further weakens the case for a bill of particulars here." *United States v. Urban*, 404 F.3d 754, 772 (3rd Cir. 2005). *See also United States v. Blanchard*, 542 F.3d 1133, 1140 (7th Cir. 2008)(holding that "[w]here the indictment fails to provide the full panoply of such information, a bill of particulars is nonetheless unnecessary if the information "is available through 'some other satisfactory form,' such as discovery."). Put another way, "extensive disclosure by the Government" renders a bill of particulars inappropriate. *United States v. SIGMA*, 624 F.2d 461, 466 (4th Cir. 1979).

Under these long-standing legal principles, the defendant's request for additional information through a list of civil interrogatory-like questions must be viewed as nothing more than a discovery tool designed to elicit the government's evidence in advance of trial. First, nowhere in the defendant's motion does the defendant ever allege that Counts Six and Seven are defective, nor could he. That is because Counts Six and Seven not only track the statutory language of 18 U.S.C. § 1519 and 18 U.S.C. § 1001 respectively, but also allege the essential elements of those charges. Therefore, the first justification for a bill of particulars does not exist

in this case.

Second, the defendant completely ignores the fact that Counts Six and Seven specifically incorporate by reference Paragraphs 1 through 14 of the Indictment. Count Six charges that "the grand jury realleges Paragraphs 1 through 14 as though fully set forth herein," and Count Seven charges that "the grand jury realleges Paragraphs 1 through 14 as though fully set forth herein." *Indictment*, Dkt. 1, ¶¶ 24, 26. Paragraph 14, as set forth below, alleges additional facts describing how and why the defendant obstructed justice:

> 14. In addition, between at least on or about April 24, 2006, and on or about November 28, 2007, defendant DRAKE *shredded certain classified and unclassified documents that he had removed from NSA, and similarly deleted certain classified and unclassified information on his home computer system, all of which were located in his personal residence at Glenwood, Maryland*. Defendant DRAKE did so in part to conceal his relationship with Reporter A and prevent the Federal Bureau of Investigation's discovery of evidence that would have linked defendant DRAKE to the retention of classified documents for the purpose of supplying information to Reporter A by the Federal Bureau of Investigation. Defendant DRAKE destroyed this evidence while knowing of the existence of an ongoing criminal investigation by the Federal Bureau of Investigation into the disclosure of classified information to the media and in relation to and contemplation of an investigation into alleged disclosures of classified information to Reporter A.

*Id*. at ¶14. (emphasis added). Nowhere in his motion does the defendant even mention the existence of Paragraph 14, let alone address how Paragraph 14, when considered in conjunction with the properly pled Counts Six and Seven, does not provide the defendant enough information about the nature of the charges in order to adequately prepare his defense. Put more simply, there is no explanation how Paragraph 14, for example, does not render Question 7(E) moot. *See Motion for Bill of Particulars*, Dkt. 49, pg. 4.

Third, the defendant has received full discovery in this case. The glaring absence of this fact in the defendant's motion is important because when full discovery has been provided, there is no need for a bill of particulars. In this particular case, the discovery has been early and extensive. For example,

> on September 3, 2010, the Government provided the grand jury testimony of the two testifying special agents and associated grand jury exhibits. In addition, the Government provided a Powerpoint presentation used during a reverse proffer with the defendant and his prior counsel earlier this year. Therefore, *the defendant effectively now has many, but not all, of the documents that the Government intends to introduce at trial and the prosecutive theory of the case*.

*Second Status Report*, Dkt. 23, pg. 1. The grand jury testimony of one of the special agents even discussed how the defendant's obstruction impacted the investigation, yet the defendant's motion contains no mention of this fact.[1]

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[1]As noted elsewhere in a separate filing, this grand jury testimony, which the government produced on September 3, 2010, contained the alleged *Brady* information that the government had purportedly withheld for ten months. More specifically, not only did the government present the Regular Meetings document with the "UNCLASSIFIED//FOR OFFICIAL USE ONLY" header and footer as a grand jury exhibit, but the summary witness also testified as follows:

> Q: Is it correct that an initial version of this document [Regular Meetings document] was done by someone other than a classification expert?
>
> A: Yes, it was put online as a resource for those attending these meetings.
>
> Q: And, initially, was it posted at the unclassified level?
>
> A: Correct, it was posted by a person who is not a classification advisory officer as unclassified.

Thus, the very same information that the defendant claimed had been withheld from him in fact had been given to the defendant on September 3, 2010. The grand jury obviously considered the information, agreed that the defendant knew that the document contained classified information, and found sufficient evidence to indict the defendant for its illegal retention.

Similarly, by late August 2010, the government had installed a viewing station within the defense SCIF that contained, among other things, the statements of the defendant in which he discussed his acts of obstruction; phone records; FOIA requests; personnel records of the defendant; the defendant's NSA emails; and approximately forty (40) FBI 302s and/or memoranda of interview memorializing witness interviews. The government has made all of the documents seized from his residence available for review. The defendant has not shown, or even attempted to show, how the discovery in this case, including the production of the FBI 302s memorializing the defendant's statements and the agents' handwritten notes underlying those FBI 302s, and the early production of potential *Jencks* Act materials, does not obviate the need for a bill of particulars.

Fourth, the real intent behind the defendant's bill of particulars is evident through the breadth of the civil-interrogatory-like questions propounded by the defendant. Question 7(A) requires the government to identify all of its case-in-chief exhibits *and* then specify whether or not each exhibit has been altered, destroyed, mutilated, concealed and/or covered up. The absurdity of the request becomes readily apparent when one considers that the request demands that the government identify all of its case-in-chief exhibits, and in the same breadth asks the government to specify whether the very same exhibits "have been destroyed, concealed and/or covered up." *See Motion for Bill of Particulars*, pg. 4. Moreover, the parties' agreement to exchange exhibits on April 8, 2011 resolves this question in any event. *See* Order, Dkt. 44.

Question 7(B) is similarly non-sensical. The indictment already provides a time frame during which the defendant altered, destroyed, mutilated, concealed and/or covered up documents. Moreover, to the extent that the document has been destroyed, concealed and/or

covered up, it is impossible for the government to identify if the document is classified or unclassified. The defendant knows best when and what documents he destroyed, mutilated, concealed and/or covered up. The breadth and scope of the questions reveal that the bill of particular is not designed to elicit facts necessary to prepare his defenses to the charges, but rather is simply a discovery tool, casting its net as wide and as far as possible, in order to obtain as much information about the government's evidence and theories as possible.

Finally, none of the cases cited by the defendant support his motion. For example, the Tenth Circuit in *United States v. Levine*, 983 F.2d 165, 167 (10th Cir. 1992), cited by the defendant for the proposition that the defendant is entitled to know the theory of the government's case, actually affirmed the district court's denial of a motion for a bill of particulars because the indictment was not defective and the defendant had full discovery. In *United States v. Chandler*, 753 F.2d 360, 362 (4th Cir. 1985), the defendant never moved for a bill of particulars, so the Fourth Circuit never ruled on the issue. In *United States v. Barnes*, 158 F.3d 662, 665 (2nd Cir. 1998), the Second Circuit also affirmed the district court's denial of a motion for a bill of particulars because, even though the indictment contained little detail, the government had provided full discovery from which the defendants could adequately prepare their defenses. Finally, in *United States v. Hart*, 70 F.3d 854, 860 and n.7 (6th Cir. 1995), the Sixth Circuit never ruled on the issue because the district court denied the defendant's motion for a bill of particulars, and the defendant never appealed that ruling.

In the final analysis, the defendant's motion essentially demands that the government lock in place a list of its exhibits and an opening statement regarding Counts Six and Seven weeks before trial. His request seeks a line item presentation of the government's evidence. The

indictment and the full discovery in this case, including the defendant's own statements, makes perfectly clear what the grand jury alleges that the defendant did. The law does not require the government to compartmentalize each and every act of the defendant in a bill of particulars.

Respectfully submitted this 11th day of March 2011.

For the United States:

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**CERTIFICATE OF SERVICE**

I hereby certify that I have caused an electronic copy of the *Government's Response to Defendant's Motion for Bill of Particulars* to be served via ECF upon James Wyda and Deborah Boardman, counsel for defendant Drake.

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