IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	Criminal No. 1:10CR485
v.	)	
	)	Hon. Leonie M. Brinkema
JEFFREY ALEXANDER STERLING,	)	
	)	Motion Hearing: April 8, 2011
Defendant.	)	
	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR A BILL OF PARTICULARS

The United States of America, by and through undersigned counsel, respectfully files this opposition to the defendant's Motion for a Bill of Particulars [Docs. 47 & 48]. The defendant's motion should be denied because the Indictment is not defective and pleads all of the essential facts necessary for the defendant to adequately prepare his defense and claim double jeopardy. In addition, aided by the classified discovery in this case, the defendant knows what national defense information is at issue in this case. Finally, the motion is not timely. The government expects the defendant to receive additional classified discovery in the near future that should further undercut any need for a bill of particulars.

DISCUSSION

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 a bill of particulars simply is not meritorious. First, nowhere in the defendant's motion does the defendant ever allege that Counts One through Seven are defective, nor could he. That is because Counts One through Seven not only track the statutory language of 18 U.S.C. § 793, 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 Indictment contains enough essential facts that permit the defendant to prepare a defense and plead double jeopardy in any future prosecution for the same offenses. For example, Counts One, Four and Six allege that the defendant disclosed national defense information, and each count specifically defines the national defense information at issue as "information about Classified Program No. 1 and Human Asset No. 1." *Indictment*, ¶¶ 55, 61 and 65. Paragraph 14 of the Indictment in turn describes the asset:

> Human Asset No. 1, a person known to the Grand Jury, moved to the United States in the early 1990s. Human Asset No. 1 agreed to work for the CIA and provided highly valued information to the CIA. Human Asset No. 1 later agreed to assist the CIA operationally in part to impede the progress of the weapons capabilities of certain countries and in return for monetary consideration.

Paragraph 15 describes Classified Program No. 1 as:

> a clandestine operational program of the CIA. The purpose of Classified Program No. 1, which had been authorized and approved at the appropriate levels of government in the late 1990s, was to impede the progress of the weapons capabilities of certain countries, including Country A.

Additional allegations in the Indictment both provide additional notice to the defendant as to the identities of Human Asset No. 1 and Classified Program No. 1, and make clear that these are matters about which the defendant was and is thoroughly familiar. For example, in Paragraph 16, the Indictment alleges the precise *year and a half* when the defendant was assigned to Human Asset No. 1 and Classified Program No. 1 -- "between on or about November 14, 1998 through on or about May 2000." *Id*. at ¶ 16. Moreover, in Paragraph 36, the Indictment alleges that in March 2003 the defendant met with staffers from the Senate Select Committee on Intelligence and discussed Human Asset No. 1 and Classified Program No. 1. *Id*. at ¶ 33. Since Counts One,

Four and Six specifically incorporate or incorporate by reference Paragraphs 1 through 54 of the Indictment, *see id*. at ¶¶ 60, 64, in light of the specificity with which the Indictment describes Human Asset No. 1 and Classified Program No. 1, it clearly informs the defendant of the nature of the national defense information at issue in those counts.

Similarly, Counts Two, Three, Five, and Seven allege that the defendant retained or disclosed national defense information, and specifically define the national defense information at issue in those counts as "namely a letter relating to Classified Program No. 1." *Id*. at 57, 59, 63, and 67. As noted above, Paragraph 15 defines Classified Program No. 1, and other counts describe with specificity the defendant's relationship to that program and certain actions he took with regard to that program. *Id*. at ¶¶ 16, 33. Since Counts Two, Three, Five and Seven also incorporate by reference Paragraphs 1 through 54 of the Indictment, *see id*. at ¶¶ 56, 58, 62, and 66, a fair reading of those counts clearly notifies the defendant of the nature of the national defense information at issue.

Of course, the analysis regarding the factual notice to the defendant for Counts One through Seven does not end there. Counsel for the defendant has received *one* classified briefing in connection with this case – a briefing regarding Classified Program No. 1 in order to gain access to the documents underlying the program. Following that briefing, the defendant has received classified discovery about Classified Program No. 1 and Human Asset No. 1.[1] To date, the classified discovery has included approximately forty key cables that outline Classified

[1]The defendant's discussion of the unclassified discovery produced to date is not germane to the issue. Clearly the government would not produce in unclassified discovery information about a classified program. In addition, as a point of clarification, the government has not subpoenaed the telephone records of any reporter in this particular investigation.

Program No. 1 and approximately forty classified FBI 302s of interviews regarding Classified Program No. 1 and Human Asset No. 1. Thus, there cannot be any genuine question regarding what Classified Program No. 1 is, or who Human Asset No. 1 is.[2]

Finally, the defendant's motion for a bill of particulars is premature. The discovery of classified documents is not complete, and additional classified documents will augment further the defendant's notice and knowledge of Classified Program No. and Human Asset No. 1. It is not timely for a motion for a bill of particulars to be heard now, when the classified discovery has not been completed.

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[2]To assist the defendant further, the government will produce a classified letter that specifies with a little more particularity where Classified Program No. 1 can be found in Author A's book and additional information regarding the letter relating to Classified Program No. 1 that the defendant is alleged to have disclosed.

CONCLUSION

WHEREFORE, the Government respectfully requests that the Court deny the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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