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 ALTERNATE MOTION TO DISMISS COUNT EIGHT OF THE INDICTMENT

The United States, by and through undersigned counsel, files this opposition to Defendant Sterling's alternate motion to dismiss Count Eight of the Indictment [Docs. 59 & 60], which charges him with mail fraud. Defendant Sterling's principal argument is that the allegations in the Indictment concerning this count are deficient because they do not specifically allege that Defendant Sterling knew that Author A was writing a book such that Defendant Sterling could reasonably foresee the use of the mail to ship it. Contrary to Defendant Sterling's motion, Count Eight is sufficiently pled in the Indictment, and will be supported at trial with ample evidence. Whether the government meets its evidentiary burden on this matter is a question for the jury to decide at trial. Accordingly, the Court should deny the motion.

BACKGROUND

On December 22, 2010, a federal grand jury sitting in Alexandria, Virginia, in the Eastern District of Virginia, returned a ten-count Indictment against Defendant Sterling, including six counts of unauthorized disclosure of national defense information, in violation of Title 18, United States Code, Sections 793(d) and (e), and one count each of unlawful retention of national

defense information, in violation of Title 18, United States Code, Section 793(e), mail fraud, in violation of Title 18, United States Code, Section 1341, unauthorized conveyance of government property, in violation of Title 18, United States Code, Section 641, and obstruction of justice, in violation of Title 18, United States Code, Section 1512(c)(1). The Indictment alleges, in significant detail, that Defendant Sterling, a former CIA operations officer, engaged in a scheme to disclose classified information to an author, referred to as Author A, and to members of the public from on or about August 2000 to or about January 2006. See Indictment ¶ 5-54 (hereinafter "Ind. ¶").

Count Eight of the Indictment charges that Defendant Sterling, between on about December 24, 2005 and on or about January 4, 2006, having knowingly devised a scheme and artifice to defraud the CIA of money and property, for the purpose of executing, and attempting to execute said scheme and artifice to defraud, did knowingly cause to be delivered by the United States Postal Service or any private or commercial interstate carrier according to the direction thereon a shipment of Author A's published books, in violation of Title 18, United States Code, Sections 1341 and 2. See Ind. ¶ 69. Defendant Sterling argues that the allegations in the Indictment concerning Count Eight are deficient because they do not specifically allege that Defendant Sterling knew that Author A was writing a book such that he could reasonably foresee the use of the mail to ship it, and that as a result Count Eight must be dismissed. Neither the facts nor the law support such a result.

DISCUSSION

I. Applicable Standard of Review for a Motion to Dismiss

Motions to dismiss test whether the indictment sufficiently sets forth the charged offense against the defendant. See United States v. Sampson, 371 U.S. 75, 78-79 (1962); United States v. Brandon, 150 F. Supp. 2d 883, 884 (E.D.Va. 2001), aff'd, 298 F.3d 307 (4th Cir. 2002). An indictment must (1) "contain the elements of the offense charged," (2) "fairly inform the defendant of the charge," and (3) "enable the defense to plead double jeopardy as a defense in a future prosecution for the same offense." United States v. Kingrea, 573 F.3d 186, 191 (4th Cir. 2009) (citing United States v. Daniels, 973 F.2d 272, 274 (4th Cir. 1992)). Pursuant to Fed. R. Crim. P. 7(c)(1) , an indictment must contain "a plain, concise and definite written statement of the essential facts constituting the offense charged."

While "an indictment that fails to allege each essential element of the offense is plainly insufficient and must be dismissed," United States v. Cuong Gia Le, 310 F.Supp 2d. 763, 772 (E.D.Va. 2004), an indictment "adequately sets forth the elements of the offense if it tracks the language of the relevant criminal statute provided that that language fully, directly, and expressly, without any uncertainty or ambiguity, set[s] forth all the elements necessary to constitute the offence intended to be punished." Id. at 773 (citing Hamling v. United States, 418 U.S. 87 (1974)) (internal quotations omitted). See also United States v. Smith, 44 F.3d 1259, 1264 (4th Cir. 1995) ("The allegations of an offense are generally sufficient if stated in the words of the statute itself."). Where an indictment tracks the statutory language and specifies the nature of the criminal activity, it is sufficiently specific to withstand a motion to dismiss. United States v. Carr, 582 F.2d 242, 244 (2d Cir. 1978); Summers v. United States, 11 F.2d 583, 584 (4th Cir.

1926).

A motion to dismiss "is not the proper vehicle for contesting the sufficiency of the evidence." United States v. Johnson, 553 F.Supp. 2d 582, 616 (E.D.Va. 2008). Indeed, the indictment need not set forth with detail the government's evidence; nor need it enumerate "every possible legal and factual theory of defendants' guilt." See United States v. American Waste Fibers Co., 809 F.2d 1044, 1047 (4th Cir. 1987). See also United States v. Critzer, 951 F.2d 306, 307 (11th Cir. 1992) ("There is no summary judgment procedure in criminal cases. Nor do the rules provide for a pre-trial determination of sufficiency of the evidence. . . . The sufficiency of a criminal indictment is determined from its face. The indictment is sufficient if it charges in the language of the statute."). Therefore, dismissal is unwarranted if the elements of the offense are set forth in the indictment, even if it does not include all the essential facts and evidence. As one court held,

> where an indictment sets forth the offense elements and includes a brief statement of the facts and circumstances of the offense, but omits certain essential specifics of the offense, *dismissal is unwarranted*; instead, such an omission, if necessary, is typically and appropriately remedied by discovery or, in some instances, by requiring the government to file a bill of particulars.

Cuong Gia Le, 310 F.Supp 2d. at 773-74 (emphasis added).

II. The Allegations in Counts Eight Are Sufficient to Establish A Violation of Title 18, United States Code, Section 1341

Defendant Sterling argues that the Indictment does not adequately allege foreseeable use of the mails as an element of mail fraud because it does not explicitly allege that Defendant Sterling knew that Author A was writing as book. His argument fails.

First, Count Eight tracks the language of the relevant statute such that it adequately sets forth the elements of mail fraud, including the use of the mails. The language of 18 U.S.C. § 1341 provides in relevant part that:

> having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier . . . or knowingly causes to be delivered by mail or such carrier according to the direction thereon . . . any such matter or thing . . .

Mail fraud under 18 U.S.C. § 1341 has two essential elements: (1) the existence of a scheme to defraud and (2) the use of the mails in furtherance of the scheme. See United States v. Curry, 461 F.3d 452, 457 (4th Cir. 2006). Proof that use of the mails was reasonably foreseeable is sufficient to support a conviction for mail fraud. See United States v. Edwards, 188 F.3d 230, 234 (4th Cir. 1999).

Count Eight of the Indictment alleges that, between on or about December 24, 2005, and on or about January 5, 2006, Defendant Sterling:

> having knowingly devised a scheme and artifice to defraud the CIA of money and property, for the purpose of executing, and attempting to execute said scheme and artifice to defraud, *did knowingly cause to be delivered by the United States Postal Service or any private or commercial interstate carrier* according to the direction thereon a shipment of Author A's published books . . .

Ind. ¶ 69 (emphasis added).

As set forth above, Count Eight specifically alleges that Defendant Sterling knowingly caused the use of the mails; there is no question that the Indictment adequately sets forth that element of the offense charged. Therefore, dismissal of this count is plainly unwarranted. Defendant Sterling's repeated claims that the Indictment does not make such an allegation are simply wrong. See, e.g., Mem. [Doc. 60] at 3 ("The indictment fails to allege the second required element of mail fraud: that Mr. Sterling could reasonably foresee use of the mails to ship Author A's book.").

Of course, as stated above, an indictment must also contain "a plain, concise and definite written statement of the essential facts constituting the offense charged," Fed. R. Crim. P. 7(c)(1), such that it fairly informs the defendant of the charge against him. Even measured against these standards, the factual allegations in the Indictment are more than sufficient to provide notice to Defendant Sterling, even though the Indictment does not contain the specific words "Defendant Sterling knew that Author A was writing a book." Obviously, the Indictment alleges that Defendant Sterling knowingly caused the use of the mails, so it is implicit in that allegation that Defendant Sterling knew about Author A's book. Additional facts that support the allegation that Defendant Sterling knowingly caused the delivery of the book through the mails -- that Defendant Sterling intended for Author A to write about the information he disclosed to him and knew that he was doing so -- appear throughout the Indictment.[1] For example, the Indictment alleges that:

[1] Count Eight incorporates paragraphs 1-54 of the Indictment by reference. See Ind. ¶ 68.

- Defendant Sterling "caused and attempted to cause the publication of classified information" during a scheme that lasted from August 2000 until January 2006, the time the book was delivered. Ind. ¶ 18.
- Defendant Sterling deliberately chose to disclose the information to a member of the media, Author A. Ind. ¶ 19(f). There is no reason for such a choice except to cause Author A to communicate the information to others.
- The particular author in question, Author A, had already written two articles based on information provided to him by Defendant Sterling. See Ind. ¶¶ 23, 27.
- Defendant Sterling provided documents to Author A for his "use," which could only involve writing about them. Ind. ¶ 19(c).
- Defendant Sterling's motive in disclosing national defense information was to retaliate against the CIA. See Ind. ¶ 18. Such a scheme would make no sense if Defendant Sterling merely intended for his disclosures to be made to a single person, Author A, without further communication of the information to others.
- Defendant Sterling "characterized the classified information in a false and misleading manner as a means of inducing Author A to *write and publish a story* premised on the false and misleading information." Ind. ¶ 19(d) (emphasis added).

According to the Indictment, in May 2003, Author A's employer informed a senior United States government official that it would not publish Author A's proposed newspaper article based on the information provided by Defendant Sterling. See Ind. ¶ 43. As noted above, the Indictment alleges that the scheme through which Defendant Sterling "caused and attempted to

cause the publication of classified information" continued on until January 2006, when the book was delivered. Ind. ¶ 18. Additional allegations in the Indictment make it obvious that even after May 2003, Defendant Sterling continued to intend for Author A to write about the information he provided and knew he was doing so, up until the delivery of the book in January 2006. For example, the Indictment alleges that:

- Defendant Sterling continued to have email and phone contact with Author A after May 2003. See Ind. ¶¶ 44-51. Obviously, Author A's profession remained the same as beforehand, as did Defendant Sterling's alleged motive in disclosing the information to him as a member of the media: to *widely communicate* the classified information to retaliate against the CIA. Moreover, Defendant Sterling also provided Author A information, including classified operational details, that permitted Author A to travel to Country B to obtain more information about the classified program in November 2004. See Ind. ¶ 53.
- Author A specifically told Defendant Sterling on more than one occasion that he was trying to write about the information that Defendant Sterling had given him. For example, in May 2004, a year after Author A's employer had declined to publish his newspaper article, Author A emailed Defendant Sterling: "I want to call today. *I'm trying to write the story.* [Author A] I need your telephone number again." Ind. ¶ 46 (emphasis added).
- Not long afterward, in another email, Author A lamented his inability to communicate Defendant Sterling's story to the public as quickly as he apparently understood Defendant Sterling to want: "*I'm sorry if I failed you so far* but I really

enjoy talking to you and would like to continue. [Author A]." Ind. ¶ 48 (emphasis added).

- A few months before Author A submitted a book proposal to a national book publisher in September 2004, Author A sent Defendant Sterling an email in which he offered to send him something: "I can get it to you. Where can I send it?" Ind. ¶ 50. This email is consistent with a practice of sending a manuscript to a source for fact-checking.
- Defendant Sterling and Author A remained in telephone and email contact until November 20, 2005. See Ind. ¶ 54. Approximately one month later, Author A's book was delivered. See Ind. ¶ 55. The Indictment does not reflect that Defendant Sterling ever called or emailed Author A again, strongly suggesting that the purpose of Defendant Sterling's contacts with Author A had been completed.

Of course, the government will support the allegations in the Indictment that Defendant Sterling knowingly caused the use of the mails with additional evidence at trial that is not -- and need not be -- set forth in the Indictment. But, as noted above, a motion to dismiss is simply not the proper vehicle to contest the sufficiency of this evidence. Johnson, 553 F.Supp. 2d at 616. Whether the government meets its evidentiary burden on this matter is a question for the jury to decide at trial.

Finally, even if the Court were to find the Indictment factually deficient because it did not adequately support allegations in Count Eight, dismissal would not be the appropriate remedy. Because the elements of the offense are alleged, such a remedy would be for Defendant Sterling

to receive additional discovery as to the Government's evidence, a process that is well underway.

III. Defendant Sterling Has Not Been Deprived of his Rights Under the Fifth Amendment

Defendant Sterling also argues that he has been deprived of his Fifth Amendment rights due to the deficiency he alleges in Count Eight. See Mem. [Doc. 60] at 4. Indeed, an indictment must allege each element of the offense to insure that a defendant does not face punishment for a crime except "on a presentment or indictment of a Grand Jury" in violation of his Fifth Amendment rights. See United States v. Vinyard, 266 F.3d 320, 325 (4th Cir. 2001); United States v. Loayza, 107 F.3d 257, 260 (4th Cir. 1997). Defendant Sterling's Fifth Amendment rights remain inviolate in this regard. As set forth above, the Indictment specifically alleges the element of the offense that Defendant Sterling knowingly caused the use of the mails; and any suggestion that it does not is simply wrong. See Ind. ¶ 69. Moreover, as also set forth above, on the face of the Indictment it is plain that the Grand Jury had facts before it from which it could reach this conclusion. See Ind. ¶¶ 1-54. In any event, it is a "longstanding rule of law" that courts may not look behind grand jury indictments if "returned by a legally constituted and unbiased grand jury," as was the case here. Costello v. United States, 350 U.S. 359, 363 (1956).

Count Eight is more than sufficient. It tracks the statutory language. It sets forth the essential elements. And it pleads the essential facts necessary for the defendant to prepare a defense and plead double jeopardy in any future prosecution for the same offense.

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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