

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

UNITED STATES OF AMERICA : **CRIMINAL NO. 12-231 (RC)**
 :
 v. :
 :
JAMES F. HITSELBERGER, :
 :
 Defendant. :

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

The United States of America, by and through its undersigned attorneys, respectfully submits this opposition to defendants’ Joint Motion for a Bill of Particulars (the “Motion”). In support of its opposition, the United States relies on the following points and authorities, and such other points and authorities as may be cited at a hearing on this motion.

I. Procedural Background

The acts underlying the Superseding Indictment took place between February and April 2012. The defendant was charged by complaint in this matter on August 6, 2012, and subsequently indicted by the grand jury on October 26, 2012. He was charged with two counts of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e), for incidents alleged to have occurred on or about April 11, 2012, and March 8, 2012. On February 28, 2013, a superseding indictment was returned by the grand jury that charged the defendant with an additional count of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e), for an incident alleged to have occurred on or about February 13, 2012. The Superseding Indictment also charged three counts of unauthorized removal of a public record, in violation of 18 U.S.C. § 2071(a).

I. Argument

A. Legal Standard

It is within the court's discretion to determine whether the government should provide a defendant with a bill of particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure. See United States v. Trie, 21 F. Supp. 2d 7, 21 (D.D.C. 1998). When warranted, a bill of particulars is meant to "ensure that the charges brought against a defendant are stated with enough precision to allow the defendant to understand the charges, to prepare a defense, and perhaps also to be protected against retrial on the same charges." United States v. Butler, 822 F.2d 1191, 1993 (D.C. Cir. 1987); see also Trie, 21 F. Supp. at 21 (D.D.C. 1998) (noting that a court should grant a motion for a bill of particulars only when "necessary to prevent unfair surprise at trial") (citing United States v. Espy, 989 F. Supp. 17, 34 (D.D.C. 1997)).

"It is not the function of a bill of particulars to provide detailed disclosure of the government's evidence in advance of trial." United States v. Brodie, 326 F. Supp. 2d 83, 91 (D.D.C. 1994); see also United States v. Ramirez, 54 F. Supp. 2d 25, 29 (D.D.C. 1999) (a bill of particulars is "not a discovery tool;" rather, it provides "clarification of the indictment, not the government's proof of its case") (citations omitted). A bill of particulars is not intended as a vehicle for a "whole sale discovery of the government's evidence," United States v. Armocida, 515 F.2d 49, 54 (3d Cir. 1975), nor should it be used as a substitute for discovery, United States v. Lawson, 688 F. Supp. 314 (S.D. Ohio, 1987), or as a means of informing the defendant of every shred of evidence which the government intends to present. United States v. Nynex, 781 F. Supp. 19, 21-22 (D.D.C. 1991); United States v. United States Gypsum Co., 37 F. Supp. 398, 402 (D.D.C. 1941). Nor is it designed to force the government to reveal a theory of its case that the defendant could then use to limit the government's presentation of its case at trial. United

States v. Torres, 901 F.2d 205, 234 (2d Cir. 1990); United States v. Burgin, 621 F.2d 1352 (5th Cir.), cert. denied, 449 U.S. 1015 (1980). The defendant’s constitutional right underlying a bill of particulars is “to know the offense with which he is charged, not to know the details of how it will be proved.” United States v. Kendall, 665 F.2d 126, 135 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).

Furthermore, “[w]hen the indictment is sufficiently detailed, or the requested information is available in some other form [e.g., Rule 16 discovery], a bill of particulars is not required.” Brodie, 326 F. Supp. 2d 83, 91-92 (citing United States v. Butler, 822 F.2d 1191, 1993 (D.C. Cir. 1987)).

B. The Defendant Will Receive Expert Notice In Due Course Under Rule 16(G).

The Court should deny the defense motion because it is not timely. The government will provide notice of its expert testimony on this topic in due course under Federal Rule of Criminal Procedure 16(G). Rule 16(G) obligates the government to provide the defense “a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial.” The government is in the process of identifying which witnesses it will call at trial as experts in the national defense. The government will then work with those witnesses to prepare written summaries of their proposed testimony, to include further clarification of which portions of the four relevant documents constitute national defense information. Cf. Overton v. United States, 403 F.2d 444, 446 (5th Cir. 1968) (it is not the function of a bill of particulars to detail the government’s evidence in advance of trial); Brodie, 326 F. Supp. at 91 (a bill of particulars is not required when the requested information is available in some other form).

C. The Defense Will Receive Notice Of Which Material Constitutes National Defense Information In Due Course Pursuant To Section 10 of the Classified Information Procedures Act (CIPA).

The government is obliged to provide notice to the defense “within the time before trial specified by the court, of the portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense,” under § 10 of CIPA. 18 App. III, § 10. Because the evidence the defense seeks will be made available to it through “some other form, a bill of particulars is not required.” Brodie, 326 F. Supp. 2d at 91-92. The discovery of classified documents is not complete, and additional classified documents will further augment the defendant’s notice of the national defense information at issue in this case. It is not timely for a motion for a bill of particulars to be heard now, when the classified discovery and procedures under CIPA have not been completed.

A. Conclusion

For the foregoing reasons, the Court should deny the defendant’s motion for a bill of particulars.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 5th day of April 2013, a copy of the foregoing was served on counsel of record for the defendant, Ms. Mary Petras, via the Court's Electronic Filing System.

_____/s/_____
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