

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

UNITED STATES OF AMERICA :
 :
 v. : **12-CR-231 (RC)**
 :
JAMES HITSELBERGER :

**DEFENDANT’S MOTION FOR BILL OF PARTICULARS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Mr. James Hitselberger, the defendant, through undersigned counsel, respectfully moves this Honorable Court, pursuant to Federal Rule of Criminal Procedure 7(f) and the Fifth Amendment to the United States Constitution, to issue the attached proposed order requiring the government to issue a bill of particulars, identifying with particularity the “national defense information” at issue in Counts One, Two and Three of the superseding indictment. In support of this motion, counsel submits the following.

Factual Background

Mr. Hitselberger is charged in a six count superseding indictment with three counts of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e) and three counts of unauthorized removal of a public record, in violation of 18 U.S.C. § 2071(a). According to the indictment, Count One arose out of an incident that occurred on April 11, 2012, when Mr. Hitselberger allegedly unlawfully retained “documents and writings relating to the national defense.” Count One identifies the charged documents as “[a] Joint Special Operations Task Force (JSOTF) Situation Report (SITREP) dated April 11, 2012 (SITREP 104) and classified SECRET, and a Navy Central Command (NAVCENT) Regional Analysis dated April

9, 2012, and classified SECRET.” Count Two alleges that on March 8, 2012, Mr. Hitselberger unlawfully retained “documents and writings relating to the national defense,” identifying the charged document as “a Joint Special Operations Task Force (JSOTF) Situation Report (SITREP) dated March 8, 2012 (SITREP 72) and classified CONFIDENTIAL.” Count Three alleges that on February 13, 2012, Mr. Hitselberger unlawfully retained unlawfully retained “documents and writings relating to the national defense,” identifying the charged document as “a Bahrain Situation Update dated February 13, 2012, and classified SECRET.” Although the indictment refers to four specific documents, the indictment fails to identify with particularity the information within these documents that allegedly constitutes “national defense information.”

Argument

Rule 7(f) provides that the Court may direct the government to file a bill of particulars. A bill of particulars serves three main functions: “A bill of particulars can be used 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. Mejia*, 448 F.3d 436, 445 (D.C. Cir. 2006) (quoting *United States v. Butler*, 822 F.2d 1191, 1193 (D.C. Cir. 1987)); *see also United States v. Schembari*, 484 F.2d 931, 934-35 (4th Cir. 1973) (purpose of bill of particulars to allow defense to adequately prepare and avoid prejudicial surprise at trial). 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. Helm*, 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)).

Although, through a bill of particulars, a defendant is not entitled to learn all of the evidence the government intends to produce at trial, he 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 specifics 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 (2d 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).

The indictment here fails to provide sufficient information because it fails to state with particularity the information within the listed documents that allegedly constitutes “national defense information.” In order to prevail at trial on Counts One, Two or Three, the government must prove beyond a reasonable doubt that Mr. Hitselberger retained “national defense information.” See *United States v. Rosen*, 487 F.Supp.2d 703, 705 n. 1 (E.D. Va. 2007). The

term “national defense information” has been defined as information that is “closely held by the government and potentially damaging to national security if disclosed.” *Id.* Evidence that a document is classified -- as the government alleges the documents listed in the indictment were -- is not sufficient to prove “national defense information.” *Id.* Thus, even if the entire documents at issue here are classified and the government proves beyond a reasonable doubt that Mr. Hitselberger retained them, the government must establish that information within these documents constitutes national defense information. Unless Mr. Hitselberger knows what information within the documents the government alleges is national defense information, he cannot “understand the charges, [] prepare a defense, and perhaps also [] be protected against retrial on the same charges.” *Mejia*, 448 F.3d at 445.

Although the government has provided the defense with classified copies of the documents at issue, this is not sufficient notice. The documents are multi-page, single spaced reports containing a variety of information. Much (if not all) of the information contained in the documents is publicly available information and presumably the government does not intend to rely on such information to establish the “national defense information” element of the offense. However, defense counsel cannot be required to guess or presume to determine the government’s position with regard to the information that allegedly constitutes the charged offense. In order to prepare for trial without needlessly preparing to respond to irrelevant information or guessing at what the government deems relevant, defense counsel must be directed to the portions of the documents that the government claims constitute national defense information.¹

¹The disclosure of this information is required not only to satisfy the government’s obligations under Rule 7 and protect Mr. Hitselberger’s Fifth Amendment rights, but also is required by § 10 of the Classified Information Procedures Act. Section 10 provides: “In any

Conclusion

For the foregoing reasons, Mr. Hitselberger respectfully requests that this motion be granted and that the Court require the government to issue a bill of particulars, identifying with particularity the “national defense information” at issue in Counts One, Two and Three of the superseding indictment.

Respectfully submitted,

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/s/

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prosecution in which the United States must establish that material relates to the national defense . . . the *United States shall notify the defendant*, within the time before trial specified by the court, *of the portions of the material that it reasonably expects to rely upon to establish national defense . . . element of the offense.*” (Emphasis added.) The disclosure of this information is necessary for the defense to adequately investigate, make appropriate discovery requests for classified and non-classified materials, and prepare for trial. Until this information is disclosed, counsel will be unable to fully comply with these obligations.