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 TO DISMISS COUNT NINE OF THE INDICTMENT

The United States, by and through undersigned counsel, files this opposition to Defendant Sterling's motion to dismiss Count Nine of the Indictment [Docs. 55 & 56], which charges him with unauthorized conveyance of government property worth more than $1,000, to wit, information concerning a highly classified government program. Defendant Sterling's principal argument is that the allegations in the Indictment concerning the value of the property at issue are in some way insufficient. Contrary to Defendant Sterling's argument, Count Nine 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 Nine of the Indictment charges Defendant Sterling with the unauthorized conveyance of government property, to wit, information about Classified Program No. 1, having a value of more than $1,000, in violation of Title 18, United States Code, Section 641. See Ind. ¶ 71. Defendant Sterling argues that the allegations in the Indictment concerning the value of the property at issue in Count Nine are in some way insufficient such that Count Nine 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 Count Nine Are Sufficient to Establish A Violation of Title 18, United States Code, Section 641

Defendant Sterling appears to conflate two distinct arguments: that (1) the Indictment does not adequately allege the value of the property as an element of the offense, and (2) the Indictment is otherwise deficient regarding the facts it sets forth about value of the property, because it is not 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 him of the offense. Both of these arguments fail.

First, Count Nine of the Indictment tracks the language of the statute such that it adequately sets forth all the elements of the offense, including the value of the property at issue. The language of 18 U.S.C. § 641 provides in relevant part that:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record,

> voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof [shall be guilty of an offense].

The penalty portion of the statute establishes that the offense is a felony if the value of the property exceeds $1,000. Id. Therefore, in order to sustain a conviction under 18 U.S.C.§ 641, the government must prove beyond a reasonable doubt that the defendant, without authority, knowingly conveyed property belonging to the government. See United States v. Yokum, 417 F.2d 253, 255 (4th Cir. 1969). The government need also allege and prove that the value of the property was over $1,000 to demonstrate that the offense was a felony.

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

> did knowingly cause to be conveyed without authority property of the United States, namely classified information about Classified Program No. 1, *having a value of more than $1,000.00* and having come into defendant STERLING's possession by virtue of his employment with the CIA, to any member of the general public not entitled to receive said information, including foreign adversaries, through the publication, distribution and delivery of Author A's book for retail sale in the Eastern District of Virginia.

Ind. ¶ 71 (emphasis added). As set forth above, the Indictment specifically alleges that the value of the information is more than $1,000; 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. 56] at 2 ("nowhere in the Indictment is there a single allegation purporting to value the classified information at greater than $1,000").

Second, to the extent that Defendant Sterling argues that the Indictment is otherwise deficient regarding the value of the property because it does not fairly inform him of the essential facts concerning its value, his argument fails as well. Essential facts are set forth in the Indictment that support the allegation that the information at issue is worth more than $1,000. Most obviously, the information is alleged to be *classified* information whose disclosure could reasonably be expected to damage the national security of the United States.[1] For example, the Indictment alleges that:

- The classified information at issue concerns "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." Ind. ¶ 15.
- Classified information is information that, if disclosed without proper authorization, reasonably could be expected to cause various degrees of damage to the national security, including exceptionally grave damage. See Ind. ¶ 2.

As such, classified information is by its very nature extremely valuable. Indeed, the Fourth Circuit, in the context of a prosecution under Section 641, has recognized this value. See United States v. Caso, 935 F.2d 1288, 1991 WL 101559, at *4 (4th Cir. 1991) (unpublished) ("It is hard to imagine 'any record' more valuable to the United States than its classified documents."). Moreover, the Circuit has upheld a felony conviction under Section 641 for the theft of classified

[1] Count Nine incorporates by reference paragraphs 1-54 of the Indictment. See Ind. ¶ 70.

information in a case in which the information at issue was identified in the indictment merely as classified photographs and documents, without apparent significant further elaboration. See United States v. Morison, 844 F.2d 1057, 1076 (4th Cir. 1988).[2]

Of course, the government will support the allegations in the Indictment concerning the value of the property 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.[3]

Indeed, none of the cases cited by Defendant Sterling support the notion that the Indictment is deficient concerning the value of the property at issue in Count Nine. In fact, in none of those cases was a count alleging a violation of section 641 dismissed on this basis. For example, United States v. Wilson, 284 F.2d 408 (4th Cir. 1960), see Mem. [Doc. 56] at 4-5, concerns the sufficiency of the evidence for a conviction under section 641, rather than a motion to dismiss an indictment.

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[2] The property in Morison was identified in the indictment as "three photographs, each classified 'Secret,' said photographs being the property of the Naval Intelligence Support Center and having a value greater than $100," as well as "portions of Two Naval Intelligence Support Center Weekly Wires," classified "Secret" and the "property of the Naval Intelligence Support Center." 844 F.2d at 1076.

[3] In any event, there is no genuine issue concerning Defendant Sterling's *notice* concerning the nature and value of the information relating to Classified Program No. 1. According to the Indictment, Defendant Sterling is alleged to have worked on Classified Program No. 1 for almost a year and a half, such that he would be intimately familiar with it. See Ind. ¶ 16.

Therefore, Count Nine 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.

Finally, even if the Court were to find the Indictment factually deficient because it did not adequately support the allegation that the classified information was worth more than $1,000, 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 discovery as to the nature and value of the information concerning Classified Program No. 1, a process that is well underway. In fact, even if the Court found the Indictment deficient in this regard, dismissal of Count Nine would be error, because of the possibility that Defendant Sterling could be convicted on the lesser-included offense of conveying government property worth less than $1,000. See United States v. Ciongoli, 358 F.2d 439, 441 (3d Cir. 1966) (reversing trial court's dismissal of an indictment charging a felony violation of section 641 because, among other reasons, "the possibility of conviction and punishment for concealing property worth less than $100 under the present indictment was in itself a sufficient reason for denying the motion to dismiss").

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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