

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA, *

V. * CR. NO: 2:10cr186-MHT

HARRI ANNE SMITH, *

DEFENDANTS. *

MOTION OF HARRI ANNE SMITH FOR ORDER
REQUIRING BILL OF PARTICULARS
ON EXTORTION CHARGES IN CERTAIN RESPECTS

Harri Anne Smith respectfully moves for an order requiring the Government to provide a bill of particulars regarding the extortion charges contained in Count 21 of the indictment.

Ms. Smith is entitled to fair notice of what the Government is committing itself to prove, as the premise for its attempts to convict her. *See, e.g., Russell v. United States*, 369 U.S. 749 (1962) ("It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, -- it must descend to particulars.'"), *quoting United States v. Cruikshank*, 92 U.S. 542, 558 (1876). "[E]very ingredient of which the offense is composed must be accurately and clearly alleged." *Cruikshank*, 92 U.S. at

558. (citation omitted). "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Russell*, 369 U.S. at 765.

This requirement of specificity-which has its roots in the Fifth and Sixth Amendments, see *Russell*, 369 U.S. at 760-61 - is not only for the benefit of the defendant, but also for the benefit of the court and of the public as a whole. The defendant gains, from the constitutionally-required specificity, by (among other things) knowing what allegations she is required to defend against, with enough specificity to allow her to meaningfully prepare for trial. *Russell*, 369 U.S. at 766. The court gains, by being able to determine whether the specific facts really would, if proved, constitute a violation of the statutes charged. *Russell*, 369 U.S. at 768 & n.15. And the public as a whole gains from this requirement of specificity, by ensuring that criminal charges are not brought unless grand jurors, who represent the community, have actually considered whether there is sufficient evidence on each element of a crime, rather than blindly following a prosecutor's reliance on vague generalities.

Russell, 369 U.S. at 770 (emphasizing that requirement of specificity in

indictment ensures that a defendant is not "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury").

As reflected in *Russell, supra*, one of the core concerns in this regard is to make sure that the Government is not leaving itself the opportunity to change its theories as it goes along during the course of the case. This is reflected in Eleventh Circuit precedent as well.

This trial clearly demonstrates the inherent danger in a multi-defendant conspiracy prosecution - that individuals who are not actually members of the group will be swept into the conspiratorial net. Because the government is permitted broad prosecutorial discretion to prove the conspiracy, the likelihood exists that those who associate with conspirators will be found guilty of a crime that they have not intended to commit, and part of a group that they never joined. See *Dennis v. United States*, 384 U.S. 855, 860, 16 L. Ed. 2d 973, 86 S. Ct. 1840 (1966).

This danger is compounded when the grand jury indicts on one theory of the illegal conduct, but the government prosecutes the case on an entirely different theory. This roaming theory of the prosecution can produce trial error of constitutional proportions. See *Russell v. United States*, 369 U.S. 749, 768, 8 L. Ed. 2d 240, 82 S. Ct. 1038 (1962) (ill-defined charges leave "the prosecution free to roam at large - to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal"). *United States v. Chandler*, 388 F.3d 796, 798 (11th Cir. 2004).

A bill of particulars would be a necessary step, or would at least be an appropriate step within the Court's discretion, to ensure that Smith receives proper notice of what this charge actually is in substance; and to ensure that the

Government does not modify its theory of this charge "on the fly" depending on how its evidence plays out at trial.

All of these things are necessary because the Government has framed Count 21 in vague ambiguity. In particular Count 21 states that "SMITH solicited and, directly and through others, pressured Gilley, under color of official right, to consent to provide at least \$400,000.00, in campaign contributions for the benefit of SMITH, which money was not due to SMITH." By pleading this, keeping things as vague and amorphous as it possibly can at this juncture, the Government is proceeding unfairly. The Count fails to define whom it is that SMITH supposedly used to pressure Gilley. It also fails to specify the manner in which SMITH allegedly applied pressure to Gilley in order to obtain the said political contributions as well as the times and places these acts supposedly occurred.

Is the Government (as one may fairly infer) merely trying to keep its options open, so that the Government can make whatever argument seems most likely to yield a strategic victory at each stage of the case? Or does the Government hope to keep things looser and more open than that, as implied by the vaguely stated nature of these charges that do not actually allege extortion?

For these reasons, the Court should require the Government to state

specifically and in detail separately as to each person used to allegedly pressure Gilley into making campaign contributions to Smith and the means, manner and times in which Smith allegedly pressured Gilley into making campaign contributions to Smith. By requiring answers to these questions, the Court would help to ensure that this case does not devolve into a "roaming theory of the prosecution," *see Chandler, supra*.

Defendant Harri Anne Smith further asks the Court to require the Government to demonstrate that the theory it is advancing now, is the same theory that it presented to the grand jury, *see Russell, supra*.

Done this the 2nd day of February, 2011.

s/ R. Martin Adams
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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 2nd day of February, 2011, electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to all counsel of record.

s/ R. Martin Adams

OF COUNSEL