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

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. MCGREGOR	)	

UNITED STATES' OPPOSITION TO DEFENDANT MCGREGOR'S MOTION FOR A BILL OF PARTICULARS

The United States of America, through undersigned counsel, hereby opposes defendant McGregor's motion for a bill of particulars as to the honest services fraud charges alleged in the Indictment.

ARGUMENT

Defendant McGregor asserts that a bill of particulars is necessary to adequately prepare his defense to the honest services mail and wire fraud scheme charged in Counts 22 through 33 of the Indictment. Because he has more than sufficient notice to defend his conduct at trial, the motion should be denied.

"An indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Woodruff, 296 F.3d 1041, 1046 (11th Cir. 2002). If an indictment does not meet these minimal criteria, a defendant may seek a bill of particulars pursuant to Federal Rule of Criminal Procedure 7(f).

As a general matter, however, "[a] defendant possesses no right to a bill of particulars . . . ."

United States v. Burgin, 621 F.2d 1352, 1359 (5th Cir. 1980). The purpose of a bill of particulars is merely to cure any deficiencies in an indictment by

> informing a defendant of the nature of the charges against him so that he will have sufficient detail to prepare for this defense, to avoid or minimize the danger of surprise at trial, and to enable him to plead double jeopardy in the event of a subsequent prosecution for the same offense.

United States v. Murray, 527 F.2d 401, 411 (5th Cir. 1976) (internal quotation marks omitted). It is not designed "to provide detailed disclosure before trial of the Government's evidence." United States v. Sheriff, 546 F.2d 604, 606 (5th Cir. 1977); see also United States v. Colson, 662 F.2d 1389, 1391 (11th Cir. 1981) ("[G]eneralized discovery is not a proper purpose in seeking a bill of particulars."); United States v. Davis, 582 F.2d 947, 951 (5th Cir. 1978); United States v. Kilrain, 566 F.2d 979, 985 (5th Cir. 1978).

Defendant McGregor has been provided with more than ample detail to prepare his defense to the honest services charges in the Indictment. Not only do the allegations contained in Counts 23 through 33 track the statutory language of the relevant mail and wire fraud statutes, see Indict. ¶¶ 234-236, they also specify a discreet period of the scheme (February 2009 through August 2010) and notify the defendants that their alleged scheme was devised to "deprive the State of Alabama, the Legislature, the Legislative Reference Service, and the citizens of Alabama of their right to the honest services of elected members and employees of the Legislature through bribery and concealment of material information," id. ¶ 234.

The grand jury went even further, however, delineating the purposes of the bribery scheme, the manner and means in which it was executed, and the acts that occurred in furtherance of the scheme. To that end, the honest services fraud charges incorporate 188 specific and detailed

allegations regarding how the bribery scheme was carried out, and by whom. id. ¶ 233. Although paragraphs 1 through 26 of the Indictment are general background allegations, the allegations contained in paragraphs 29 through 190 provide precise descriptions of defendant McGregor's conduct, as well as that of his co-defendants, establishing the bribery conspiracy charge alleged in Count 1. This sort of express incorporation is permitted by Rule 7's very language: "A count may incorporate by reference an allegation made in another count." Fed. R. Crim. P 7(c)(1). Nevertheless, the bulk of defendant McGregor's argument—constructed largely from multiple rhetorical questions and hypothetical statements, Mot. at 5, 7-9—ignores this wholly proper incorporation.

The allegations incorporated by reference as part of the honest services bribery scheme make clear that the factual contours of the alleged scheme are co-extensive with the charged conspiracy.[1] As such, the Indictment provides ample notice to defendant McGregor of the specific allegations upon which the grand jury based its decision to charge him (and his co-defendants) with committing honest services mail and wire fraud through bribery. See Indict. ¶¶ 29-31 (describing purposes of conspiracy and, by incorporation, honest services fraud scheme); id. ¶¶ 31-37 (manner and means of conspiracy and, by incorporation, honest services fraud scheme); id. ¶¶ 39-190 (overt acts in further of conspiracy and, by incorporation, honest services fraud scheme). In light of this significant detail—amounting to thirty-three pages of particularized factual allegations—defendant McGregor can hardly claim that he has no idea what crime he is alleged to have committed in Counts 23

[1] Although many of the factual allegations overlap, the conspiracy and honest services charges are not the same crime, each requiring proof of unique legal elements. Compare 18 U.S.C. § 1341 (mail fraud) & 1343 (wire fraud), with 18 U.S.C. § 371 (conspiracy); see also United States v. Funt, 896 F.2d 1288, 1294 n.4 (11th Cir. 1990).

through 33. With respect to these charges—and all charges—the Indictment provides far more detail than is required and easily meets the Supreme Court's dictate that an indictment provide sufficient notice of the conduct charged.

Further, "a defendant is not entitled to a bill of particulars 'with respect to information which is already available through other sources.'" United States v. Martell, 906 F.2d 555, 558 (11th Cir. 1990) (quoting United States v. Rosenthal, 793 F.2d 1214, 1227 (11th Cir.), modified on other grounds, 801 F.2d 378 (11th Cir. 1986)). Notwithstanding the detailed factual roadmap contained in the Indictment, the United States has also provided defendant McGregor with substantial and detailed discovery in this matter, comprising, among other things, business and bank records, e-mail communications, and audio recordings. Cf. United States v. Williams, 679 F.2d 504, 510 (5th Cir. 1982) (finding no error in government's failure to provide a bill of particulars where "the government did provide the defense with a raft of discovery documents").

In addition, on January 7, 2011, the government provided to all defendants a detailed breakdown of a subset of the documentary evidence from which the United States is likely to develop its case-in-chief. For each item and category of evidence the government provided, it also identified which defendant(s) those items and categories implicated. Previously, the United States also provided a list of the recordings that would form the core of its audio presentation at trial. Defendant McGregor and his co-defendants are therefore well aware of the focus of the government's case as it pertains to the crimes with which they have been charged, including honest services mail and wire fraud in Counts 23 through 33, and, as a result, they cannot plausibly claim an inability to prepare their defense. As such, defendant McGregor's claim that the honest services scheme alleged in these counts is an "undifferentiated lump," Mot. at 4, entitling him to a bill of

particulars, is both hyperbolic and plain wrong.

Ignoring both the high level of specificity contained in the Indictment and the discovery provided to him, defendant McGregor focuses on individual wire fraud counts, claiming that the United States is obligated to provide a detailed description—in the form of a bill of particulars—as to how each mailing or wiring established his involvement in the scheme to defraud. Mot. at 6-10. He cites no law in support of his position because there is none.

On the contrary, the law is clear that "[t]he transmission itself need not be essential to the success of the scheme to defraud," United States v. Hasson, 333 F.3d 1264, 1273 (11th Cir. 2003), and a wire transmission is "for the purpose of executing" the fraudulent scheme if it is merely "incident to an essential part of the scheme" or "a step in the plot." Schmuck v. United States, 489 U.S. 705, 710-11 (1989). As such, that a particular count is predicated on an otherwise innocuous or innocent mailing or wiring is irrelevant to whether such a transmission is in furtherance of a charged scheme: "[t]o violate the wire fraud statute, it is not necessary that the transmitted information include any misrepresentation." Hasson, 333 F.3d at 1273; Eleventh Cir. Pattern Jury Instructions § 50.3 ("[The government] doesn't have to prove that the material transmitted by interstate [wire] . . . was itself false or fraudulent . . . ."). As a result, the fact that an individual telephone call predicating a wire count does not contain specific discussions of bribery is of no moment. The Indictment's detailed factual recitation, establishing the scope of the alleged honest services scheme, makes apparent that all of the charged mailings and wirings (involving payments to defendants Crosby and Smith, as well as discussions regarding votes on the allegedly corrupted legislation) were at the very least necessary steps in the fraud.

Similarly, although defendant McGregor actually was a party to nine of the eleven charged

mailings and wirings, he is no less liable for the conduct of his alleged co-schemers, including mail and wire transmissions to which they were parties. In United States v. Ward, 486 F.3d 1212 (11th Cir. 2007), the Eleventh Circuit recently reiterated in the mail fraud[2] context:

> For nearly as long as mail fraud has been a federal crime, it has been the law in this Circuit, and in the former Fifth Circuit, that a defendant may be convicted of mail fraud without personally committing each and every element of mail fraud, so long as the defendant knowingly and willfully joined the criminal scheme, and a co-schemer used the mails for the purpose of executing the scheme.

Id. at 1222 (footnote omitted); see also United States v. Munoz, 403 F.3d 1357, 1369 (11th Cir. 2006) ("[S]o long as one participant in a fraudulent scheme causes a use of the mails in execution of the fraud, all other knowing participants in the scheme are legally liable for the use of the mails."); Funt, 896 F.2d at 1294 (rejecting claim that defendant must have specific knowledge of mailing to sustain mail fraud conviction). Likewise, to establish wire fraud, "[i]t is sufficient for the purposes of the Section 1343 that the wire transmission be the foreseeable result of the fraudulent scheme." United States v. Hewes, 729 F.2d 1302, 1324 (11th Cir. 1984) (upholding conviction of wire fraud despite "[t]he mere fact that [the defendant's] role in the scheme may have ended prior to the time the transmissions occurred").

Just as it was foreseeable for defendant McGregor to use the mails for the purpose of sending his alleged bribe payments to defendant Crosby, see Indict. ¶ 235 (Counts 23-25, 27), it was foreseeable that defendant Gilley would use the mail to send illicit payments to defendant Smith, id. (Count 26). And the possibility that defendant Gilley would communicate with defendant Smith via

[2] The mail and wire fraud statutes are "given a similar construction and are subject to the same substantive analysis." Belt v. United States, 868 F.2d 1208, 1211 (11th Cir. 1989).

interstate wire[3] regarding the need to secure votes in support of the bill they are alleged to have corrupted, id. ¶ 236 (Count 33), was equally foreseeable to defendant McGregor, who is alleged to have done the same thing, id. (Counts 28-32).[4] At bottom, all of the mailings and wirings identified in Counts 23 through 33 occurred during the period of the alleged scheme to defraud, and all of them are incident to the overarching honest services bribery scheme that defendant McGregor and his co-defendants are accused of executing in connection with pro-gambling legislation pending before the Alabama legislature. The United States has provided defendant McGregor with the evidence supporting each mailing and wiring, and if he wishes to argue at trial that he is not liable for particular counts, he is more than capable of doing so.

Finally, defendant McGregor expends a significant amount of energy arguing that the government should articulate the exact legal theory it expects to pursue to support the honest services mail and wire fraud charges. Mot. at 4, 9. This argument, much like his argument with respect to the individual mailings and wirings, is misplaced. The purpose of a bill of particulars is to put the defendant on notice of the charges against him so that he can prepare a defense—it is not a means

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[3] The government is not required to prove that defendant McGregor or his co-schemers actually intended that the scheme would involve the use of interstate communication. See United States v. Ross, 131 F.3d 970, 986 (11th Cir. 1997) ("Where one does an act with knowledge that the use of the [interstate wires] will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the [interstate wires] to be used." (internal quotation marks omitted) (alterations in original)).

[4] Defendant McGregor argues that the United States must prove that he actually bribed a public official in order to establish honest services mail or wire fraud. Mot. at 8. Again, that is not the law. See, e.g., United States v. Williams, 527 F.3d 1235, 1245 (11th Cir. 2008) ("The government merely needs to show that the accused intended to defraud his victim and that his or her communications were reasonably calculated to deceive persons of ordinary prudence and comprehension." (internal quotation marks omitted)); United States v. Ross, 131 F.3d 970, 986 (11th Cir. 1997) ("Punishment under the wire fraud statute is not limited to successful schemes.").

to compel the government "to explain the legal theories upon which it intends to rely at trial." Burgin, 621 F.2d at 1359; United States v. Gabriel, 715 F.2d 1447, 1449 (10th Cir. 1983); Kempe v. United States, 151 F.2d 680, 685 (8th Cir. 1945); Rose v. United States, 149 F.2d 755, 758 (9th Cir. 1945). The Court has issued a scheduling order, pursuant to which the parties will submit proposed jury instructions by March 28, 2011, regarding the charges contained in the Indictment. Ultimately, the Court will consider the impact of the Supreme Court's decision in Skilling v. United States, 130 S. Ct. 2896 (2010), on the law of honest services and instruct the jury accordingly. Defendant McGregor's demand for a detailed description of the government's legal theory as it applies to the honest services charges, Counts 22 through 33, is therefore premature and improperly couched in his request for a bill of particulars to which he is not entitled.

In light of the detailed allegations contained in the Indictment and the significant discovery provided to him, defendant McGregor is "adequately informed of the charges against him and [is] accorded the opportunity to plan his defense accordingly." Martell, 906 F.2d at 558. Defendant McGregor seeks an unnecessary and unwarranted recitation of the government's evidence and theory of the case, despite having received everything to which he is entitled—and far more. The Court should deny his motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on counsel of record through the Court's electronic filing system this 28th day of January, 2011.

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