

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No.: 1:16-CR-143-LO
)	
MOHAMAD JAMAL KHWEIS,)	
)	
Defendant.)	Hearing: January 19, 2017 at 2:00 p.m.

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

The United States of America, by and through its undersigned attorneys, submits that defendant Mohamad Jamal Khweis’s motion for a bill of particulars is unsupported as a matter of law and under the particular factual circumstances of this case. The crux of the defendant’s grievance concerns the alleged sweeping nature of 18 U.S.C. § 2339B, the statute that criminalizes the provision of material support or resources to designated foreign terrorist organizations. In his motion, however, the defendant glosses over the fact that the government specifically referred to “personnel” and “services” in the charging language of the initial indictment, directly pointing him to the two statutory means of material support or resources that are consistent with his alleged criminal conduct. The references to “personnel” and “services,” in the initial indictment as well as in the superseding indictment, has the added benefit of being entirely consistent with the discovery the government provided months ago detailing the defendant’s criminal conduct under those two forms of material support or resources.

Further, the defendant argues that the government is required to identify in a bill of particulars the unindicted co-conspirator(s) with whom the defendant conspired. This assertion is incorrect, particularly in this instance, and should be swiftly rejected. As the Supreme Court and Fourth Circuit have recognized, “[a]t least two persons are required to constitute a

conspiracy, but the identity of the other member of the conspiracy is not needed, in as much as one person can be convicted of conspiring with persons whose names are unknown.” *Rogers v. United States*, 340 U.S. 367, 375 (1951); *United States v. American Waste Fiber Co., Inc.*, 809 F.2d 1044, 1046 (4th Cir. 1987) (same). The defendant knowingly conspired to provide material support or resources to the Islamic State of Iraq and the Levant (“ISIL”) with the agreement of other like-minded individuals, *i.e.*, the ISIL recruiters/facilities with whom the defendant stated he corresponded; the ISIL couriers and members with whom the defendant admitted smuggled him into ISIL-controlled territory in Syria and Iraq, the ISIL member to whom the defendant himself said he answered “yes” when asked if he would be a suicide bomber; the ISIL fighters with whom the defendant stated possessed firearms and with whom he resided and shared access to those firearms, and so on. The defendant admitted this conduct during *Mirandized* interviews in April 2016, and the FBI reports detailing the defendant’s admissions were produced to the defense approximately seven months ago in June 2016. The defendant’s counsel has the concomitant benefit of learning certain additional information that relates to the defendant’s instant request by reviewing the materials that the government has already disclosed in both unclassified and classified discovery.

As explained further below, the defendant’s motion misapprehends and overstates the purpose of a bill of particulars, which is not to be used as a means for discovery or to compel the government to disclose its theory of the case. Because the indictment and the discovery provided amply affords the defendant with notice of the charges against him, the defendant’s motion should be denied.

BACKGROUND

On or about March 14, 2016, Kurdish Peshmerga military forces detained the defendant

near Sinjar Mountain within Kurdish-controlled territory in Iraq. The defendant voluntarily submitted to Peshmerga authority upon traveling into Kurdish-controlled territory after leaving a *katiba* (an ISIL neighborhood) in the ISIL-controlled city of Tal Afar, located in northwestern Iraq. When detained by the Peshmerga, the defendant possessed his Virginia driver's license, three mobile phones, SIM/memory cards, two bank cards, and various denominations of United States dollars, Turkish Lira, and Iraqi Dinar. Subsequent to the defendant's detention by the Peshmerga, the defendant participated in *Mirandized* interviews with the FBI in April 2016 while he was in Kurdish custody. On or about December 16, 2015, the defendant departed the United States and eventually traveled to the Republic of Turkey, where he stated in *Mirandized* interviews that he relied upon multiple social media platforms programs to securely and privately communicate with ISIL. The defendant described traveling into Syria with four other ISIL recruits from countries other than the United States.

Shortly after arriving in ISIL-controlled territory, the defendant admitted that he stayed in an ISIL safe house in Raqqa, Syria with other ISIL recruits who were going through an intake process. At one point during the ISIL intake process, the defendant stated that he answered "yes" when asked if he would be a suicide bomber. An examination of the defendant's electronic media that he possessed when he was apprehended in Iraq includes, among other things, images of the World Trade Center burning on September 11, 2001; ISIL fighters; the black flag of ISIL, again with ISIL fighters; Abu Bakr al-Baghdadi; Anwar al-Awlaki, and images of ISIL members using and carrying different types of weapons. The defendant also admitted to providing money on multiple occasions to ISIL members to purchase food and other items, performing various services and administrative tasks for ISIL, and participating in ISIL-directed religious training in preparation for his service to ISIL. The defendant further admitted

that during his religious training, which lasted for nearly one month, clerics or an Imam concluded each lesson by stating, “may God destroy America.”

On June 9, 2016, the defendant made his initial appearance in the Eastern District of Virginia on a criminal complaint that was filed on May 11, 2016 charging him with providing, and conspiring to provide, material support to a designated foreign terrorist organization, to wit: ISIL, in violation of 18 U.S.C. § 2339B. On November 2, 2016, the defendant was indicted with one count of conspiring to provide material support or resources to ISIL in violation of 18 U.S.C. § 2339B, and one count of providing material support or resources to ISIL, also in violation of 18 U.S.C. § 2339B. On January 5, 2017, the grand jury returned a superseding indictment against the defendant. The superseding indictment added Count Three, charging the defendant with using and carrying firearms during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). The defendant’s motion for a bill of particulars was filed before the superseding indictment was returned.

ARGUMENT

I. Legal Framework

An indictment fulfills the requirements of the Federal Rules of Criminal Procedure when it is a “plain, concise and definite written statement of the essential facts constituting the offense charged.” FED. R. CRIM. P. 7(c)(1); *United States v. Duncan*, 598 F.2d 839, 848 (4th Cir. 1979); *United States v. Brown*, 784 F. Supp. 322, 323 (E.D. Va. 1992). The function of a bill of particulars under Rule 7(f) is to provide any *essential* detail omitted from the indictment. *United States v. Anderson*, 481 F.2d 685, 690 (4th Cir. 1973). *See also, United States v. Danielczyk*, No. 1:11cr85, 2011 WL 2161794, at *19 (E.D. Va. May 26, 2011) (Cacheris, J.). If the indictment adequately details the charges then no bill of particulars is required. *United*

States v. Foggo, No. 1:08cr79, 2008 WL 2777009, at *9 (E.D. Va. July 14, 2008) (Cacheris, J.). Hence, the purpose of a bill of particulars is not to provide detailed disclosure of the government's evidence prior to trial, but rather to fairly inform a defendant of the charges so that the defendant may adequately prepare a defense, avoid or minimize surprise at trial, and plead in bar of another prosecution for the same offense. *Wong Tai v. United States*, 273 U.S. 77, 82-83 (1927); *United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996); *United States v. Dulin*, 410 F.2d 363, 364 (4th Cir. 1969).¹

The Fourth Circuit has held that “[t]o pass constitutional muster, an indictment must (1) indicate the elements of the offense and fairly inform the defendant of the exact charges and (2) enable the defendant to plead double jeopardy in subsequent prosecutions for the same offense.” *United States v. Williams*, 152 F.3d 294, 299 (4th Cir. 1998). A defendant is not entitled to have the government specify the details of its proof of acts or allegations set forth in the indictment, nor is he entitled to have the government furnish the precise manner in which the crimes charged were committed. *Foggo*, 2008 WL 200077009, at *11. A bill of particulars is *not* a means of obtaining generalized discovery, a “detailed exposition of [the government’s] evidence,” or an explanation of “the legal theories upon which it intends to rely at trial.” *United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir. 1980); *see also United States v. Anderson*, 481 F.2d 685, 690 (4th Cir. 1973) (“Ordinarily, the function of a bill of particulars is not to provide detailed disclosure of the government’s evidence in advance of trial but to supply any essential detail which may have been omitted from the indictment.” (internal quotation marks omitted)).

¹ A motion for a bill of particulars is addressed to the sound discretion of the court whose decision to deny a bill of particulars will be overturned only if it rises to the level of abuse of discretion. *Wong Tai*, 273 U.S. at 82; *United States v. Bales*, 813 F.2d 1289, 1294 (4th Cir. 1987); *United States v. Jackson*, 757 F.2d 1486, 1491 (4th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985). *See also Danielczyk*, 2011 WL 2161794, at *19.

II. A Bill of Particulars is Unnecessary Here for Several Reasons

Here, the defendant argues that the initial indictment returned in this case “provides no indication as to *what* alleged material support is at issue.” Def. Mot. at 3. The defendant further claims that a bill of particulars is necessary because the indictment “does not indicate who or what the personnel and services are alleged to be” and takes issue with the initial indictment using the phrase “including” rather than specifying what material support the government is relying on “out of twenty-one possibilities listed in the statute.” *Id.* at 4. These claims demonstrate a misunderstanding of the requirements of Rule 7, and perhaps also the elements of an 18 U.S.C. § 2339B charge. The indictment charges that the material support in question was provided to the designated foreign terrorist organization ISIL, which is the statutory element at issue: that element is pled when the government states the terrorist organization in question. Moreover, in the superseding indictment, the phrase “including, personnel and services” was removed from Counts One and Two and “to wit” was added in its place in order to specify that the defendant’s provision of material support to ISIL was in the form of, namely, “personnel and services.” Although the government believes that modification to the language of the initial indictment was unnecessary based on the strictures of Rule 7 and the case law cited above, the defendant’s request in this regard has now been rendered moot.

As described above, Rule 7 does not entitle the defendant to disclosures of the government’s theory of the case or the details of its proof. The superseding indictment in the instant case supplies, in accordance with Rule 7(c)(1), all the essential facts constituting the offenses charged, along with sufficient additional facts to allow the indictment to be used as proof to bar any subsequent prosecution for the same offenses. The defendant has been informed of how he violated the statute; what his motion seeks is additional detail about the

evidence the government plans to present to prove the violation. The following list outlines the extraordinary steps the government has taken to explain its theory of the case and the evidence.

- A binder of “key” documents, organized in chronological order for ease of reference purposes, that includes, among other things, inculpatory photographs and other materials obtained from the defendant’s electronic devices, email accounts, and/or social media accounts.
- Reports summarizing the defendant’s statements to U.S. law enforcement officials following his capture in Iraq;
- Extracted data and reports regarding the content contained on the defendant’s electronic media that were seized from his person when he was captured in Iraq;
- Copies of all search warrant materials and returns in connection with this case;
- Statements that the defendant made to other individuals that could be used by the government at trial to demonstrate how the defendant conspired to provide, and/or provided, material support or resources to ISIL in the form of personnel (*i.e.*, himself) and services to the terrorist organization;
- Multiple in-person meetings and discussions with the defendant’s counsel during which the government explained the evidence against him. The government also provided the defendant’s counsel with supporting case law and jury instructions from recent trials involving 18 U.S.C. § 2339B (including alleged conduct relating to ISIL) that were delivered by federal courts nationwide; and
- Classified discovery that the government has made available to the defendant’s counsel since July 2016, both at the United States Attorney’s Office for the Eastern District of Virginia and if he or she so chooses, within the confines of

the defense team's assigned Sensitive Compartmented Information Facility ("SCIF") with the assistance of the Classified Information Security Officer.

Consistent with the limited function of a bill of particulars, courts routinely deny requests for bills of particular "when the information requested is provided to the defendant in some other form." *United States v. Marrero*, 904 F.2d 251, 258 (5th Cir. 1990); *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999) ("[A] bill of particulars is not necessary where the government has made sufficient disclosures concerning its evidence and witnesses by other means."). "A defendant is not entitled to an unnecessary bill of particulars, where the underlying objectives of a Rule 7 motion are fully satisfied by informal and formal discovery." *United States v. Ahmad*, No. 1:14-cr-164, 2014 WL 2766121, at *8 (E.D. Va. June 18, 2014) (internal quotation marks and alterations omitted); *see also United States v. Soc'y of Indep. Gasoline Marketers of Am.*, 624 F.2d 461, 466 (4th Cir. 1980) (finding denial of bill of particulars not improper in light of discovery provided by the government). Given that the government has clearly provided in discovery the very information the defendant seeks, the defendant's request for a bill of particulars should be flatly denied.

The defendant has also requested that the government identify all co-conspirators. It is well-settled that the government is not required to identify the names of unindicted co-conspirators. *United States v. Paiva*, 892 F.2d 148, 155 (1st Cir. 1989); *United States v. Torres*, 901 F.2d 205, 233–34 (2d Cir. 1990); *Wilkins v. United States*, 376 F.2d 552, 562–63 (5th Cir. 1967); *United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991); *United States v. DiCesare*, 765 F.2d 890, 897–98 (9th Cir.), *amended on other grounds*, 777 F.2d 543 (9th Cir. 1985); *United States v. Davis*, 679 F.2d 845, 851 (11th Cir. 1982) (it is the conspiracy agreement rather than identity of those agreeing that is the essential elements of the offense); *see also United States v.*

Gotti, 784 F. Supp 1017, 1017–19 (E.D.N.Y. 1992) (defendant not entitled to this information either through bill of particulars or as discovery); *United States v. Lobue*, 751 F. Supp. 748, 756 (N.D. Ill. 1990) (defendants do not need names of unindicted persons to understand the charges against them).

A defendant may be indicted and convicted with the names of his co-conspirators remaining unknown, so long as the government's evidence establishes an agreement between two or more persons, which is the prerequisite to obtaining a conspiracy conviction. *Rey*, 923 F.2d at 1222 (citing *Rogers v. United States*, 340 U.S. 367, 375 (1951) and *United States v. Piccolo*, 723 F.2d 1234, 1238-39 (6th Cir. 1983)); see also *United States v. Stitt*, 250 F.3d 878, 887-88 (4th Cir. 2001) (under conspiracy law at least two persons required to constitute the conspiracy but a defendant can be convicted of conspiring with persons whose names are unknown); *United States v. Nason*, 9 F.3d 155, 159 (1st Cir. 1993) (same). “It is the grand jury's statement of the ‘existence of the conspiracy agreement rather than the identity of those who agree’ which places the defendant on notice of the charge he must be prepared to meet.” *Rey*, 923 F.2d at 1222 (citing *Piccolo*, 723 F.2d at 1239, quoting *United States v. Davis*, 679 F.2d 845, 851 (11th Cir. 1982)). Here, given his own admissions during *Mirandized* interviews with the FBI and the discovery provided to date, the defendant clearly understands the charges at hand in order to defend himself. The superseding indictment coupled with the discovery provided to date, particularly the FBI reports summarizing the defendant’s *Mirandized* statements which were provided to the defendant in June 2016, clearly satisfy the defendant’s request.

III. The Defendant is Not Entitled to a Bill of Particulars Regarding Count Three

Should the defendant seek to file another motion seeking a bill of particulars regarding Count Three of the superseding indictment, any such motion would similarly be unsupported by

the law and facts surrounding this case. First, the government provided notice in writing to the defendant's counsel on July 25, 2016 of its intention to seek an indictment that would include a firearms charge under 18 U.S.C. § 924(c). On or about that time, the government also informally notified the defendant's counsel that the firearms charge, if approved, would be premised upon a *Pinkerton* theory of co-conspirator liability pursuant to the Supreme Court's decision in *Pinkerton v. United States*, 328 U.S. 640 (1946).² To the extent the defendant is unaware of those discussions and/or the defendant's counsel does not recall those discussions, the government hereby provides notice of the same through this filing.

Many of the statements supporting the government's theory of Count Three are contained in the FBI reports summarizing the defendant's April 2016 *Mirandized* interviews while he was in Iraq, as well as the evidence found on the defendant's electronic media, both of which, as noted above, have already been disclosed to the defense. For example, in June 2016, the defendant's counsel learned through the government's initial discovery production in this case that the defendant admitted during *Mirandized* interviews that he possessed firearms while residing in ISIL safe houses, but claimed that the possession was for benign purposes, such as moving a firearm out of the way so that he could sit on a couch.

In connection with the same initial discovery production made in June 2016, the

² “The *Pinkerton v. United States*, 328 U.S. 640 (1946) doctrine provides that a defendant is ‘liable for substantive offenses committed by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy.’ . . . In short, ‘so long as the partnership in crime continues, the partners act for each other in carrying it forward.’ *Pinkerton*, 328 U.S. at 646.” *United States v. Blackman*, 746 F.3d 137, 141 (4th Cir. 2014) (internal citations omitted). See *United States v. Wilson*, 135 F.3d 291, 304-05 (4th Cir. 1998) (Defendant may be convicted of a charge for using or carrying firearm during and in relation to drug trafficking offense on basis of co-conspirator's use of gun if use was in furtherance of conspiracy and was reasonably foreseeable to defendant); *United States v. Phan*, 121 F.3d 149, 152-53 (4th Cir. 1998) (Under *Pinkerton* doctrine, defendant charged with conspiracy is liable for overt acts of every other conspirator done in furtherance of conspiracy).

defendant's counsel learned that the defendant made several admissions concerning the role of firearms in the ISIL conspiracy that he knowingly joined in Syria and Iraq, including, but not limited to: (1) the defendant frequently viewed ISIL "military" videos before he traveled to ISIL-controlled territory, to include, those that contained footage of ISIL fighters fighting the group's various enemies in Syria and Iraq, as well as videos of ISIL conducting terrorist operations; (2) the defendant was aware before he traveled to ISIL-controlled territory that ISIL is a terrorist group and that they conducted terrorist attacks against countries that "helped" ISIL's opponents. He was also aware before he left the United States that ISIL conducted attacks outside of Syria and Iraq, to include Europe, and specifically referenced the November 2015 terrorist attacks in Paris, France; (3) the defendant understood that military/weapons training was a possibility in his progression through the ISIL ranks; (4) the defendant thought he was destined for military training because he didn't have any skills to offer ISIL; (5) firearms were openly present in every ISIL safe house in which the defendant resided; (6) the defendant resided with ISIL fighters who came from and left for the battlefield; (7) some of the ISIL trainees with whom the defendant resided underwent sniper training; and (8) the defendant's electronic media that was seized from his person when he was apprehended in Iraq contained images of ISIL fighters possessing, using and carrying weapons.

CONCLUSION

In light of the extensive discovery provided in this case, and because the superseding indictment specifies the "personnel" and "services" provisions of material support, there will be no unfair surprise and the defendant can more than adequately prepare his defense. The indictment is legally sufficient. The United States is simply not required to reveal the details of its evidence or the precise manner in which it will attempt to prove the charges alleged in the

I hereby certify that on January 10, 2017, I electronically filed the foregoing Government's Response in Opposition to Defendant's Motion for a Bill of Particulars, with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record.

_____/s/_____
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