

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA)
)
 v.) Cause No. 1:08-CR-37 WCL
)
JONATHAN N. DILLEY)

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

Comes now the United States of America by Anthony W. Geller, Assistant United States Attorney for the Northern District of Indiana, and files its Response to Defendant’s Motion for Bill of Particulars. Although titled as a motion requesting a bill of particulars, Jonathan N. Dilley (“Defendant” or “Dilley”) is essentially requesting, through a series of interrogatories, for an explanation regarding the existence of concurrent federal and state jurisdiction over his alleged criminal activity. The government responds that the Defendant is not entitled to a bill of particulars because the indictment identifies the elements of the crimes charged and informs the Defendant of the specific criminal conduct at issue.

Bill of Particulars

Rule 7(f) of the Federal Rules of Criminal Procedure allows, in conjunction with an indictment, for the filing of a bill of particulars, which is a more specific expression of the alleged illegal conduct. *United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991). The district court is vested with the sound discretion of whether to require a bill of particulars. *Id.* The standard is whether the indictment sufficiently sets forth the elements of the offense and apprises the defendant of the charges in order to enable him to prepare for trial. *United States v. Fassnacht*, 332 F.3d 440, 446 (7th Cir. 2003); *Canino*, 949 F.2d at 949 (citing *United States v. Kendall*, 665 F.2d 126, 134

(7th Cir. 1981)). “An indictment which includes each of the elements of the offense charged, the time and place of the accused’s conduct which constituted a violation, and a citation to the statute or statutes violated is sufficient to pass this test.” *Fassnacht*, 332 F.3d at 446.

For an indictment to be sufficient, it must state each of the elements of the crime charged, provide adequate notice of the nature of the charges so that the accused may prepare a defense, and allow the defendant to raise the judgment as a bar to future prosecutions for the same offense. *Fassnacht*, 332 F.3d at 444-45. The indictment need not provide “every factual nugget necessary for conviction,” and it only needs to “provide some means of pinning down the specific conduct at issue.” *Fassnacht*, 332 F.3d at 445 (citations omitted). The Seventh Circuit has cautioned against reviewing the indictment in a “hypertechnical manner,” and once the elements of the crime have been specified, an indictment need only provide enough factual information to enable the defendant to identify the conduct on which the government intends to base its case. *Fassnacht*, 332 F.3d at 445-46.

A bill of particulars is not required when information necessary for a defense can be obtained through some other satisfactory form, such as the discovery process. *Fassnacht*, 332 F.3d at 447 n.2; *United States v. Hernandez*, 330 F.3d 964, 975 (7th Cir. 2003); *Canino*, 949 F.2d at 949. Materials furnished in discovery may satisfy the need for any factual information necessary to pin down the conduct at issue, justifying the denial of a defendant’s request for a bill of particulars. *Fassnacht*, 332 F.3d at 447 n.2; *Hernandez*, 330 F.3d at 975; *Canino*, 949 F.2d at 949; *United States v. Glecier*, 923 F.2d 496, 501-02 (7th Cir. 1991).

The indictment in Dilley’s case charges three violations involving fictitious promissory notes and recites the elements of 18 U.S.C. § 514(a)(2), the date of the relevant incident, and the

occurrence of the conduct within the Northern District of Indiana. For the counts involving a presentment of a promissory note, Counts 1 and 2, the indictment specifies the entity to whom presentment was made and provides detailed information identifying the individual promissory notes, including the number, the date of the promissory note, the amount, and the payee. Although not supplying as much factual detail regarding the promissory notes for the sake of brevity and clarity, Count 3 nevertheless identifies the fictitious documents at issue by their unique note numbers.¹ The criminal statute is also cited in the indictment after each count. Finally, a defendant may always be convicted as an aider and abettor regardless of whether 18 U.S.C. § 2 is mentioned in the indictment. Seventh Circuit Pattern Jury Instructions, §5.06 (citations omitted).

In Dilley's case, the government has rather liberally provided a great deal of pre-trial discovery, sending Dilley approximately 151 pages of materials enclosed with a discovery letter dated May 15, 2008.² Among other things, these materials included copies of all the promissory notes charged as fictitious documents, copies of all documents associated with the promissory notes, memoranda of agents describing details of Dilley's contacts with the Internal Revenue Service ("IRS") and the Treasury Inspector General for Tax Administration ("TIGTA"), transcripts of multiple recorded conversations between the TIGTA case agent and Dilley, and an 11-page search warrant affidavit summarizing the criminal conduct occurring on or about June 11, August 21, and

¹The numbering system allegedly utilized by the Defendant appears to combine his initials ("JND"), the last four digits of his social security number ("6512"), and then a document number denoting a unique document in a series (similar to a series of check numbers starting with "1000").

²Please see attached Exhibit A for a copy of this letter. If the Court desires, the government can make available a copy of all the discovery materials provided to Dilley; however, because of the volume, the government did not include all of these materials as an exhibit.

September 6, 2007, as charged in the indictment. Finally, although copies have been supplied to Dilley, the discovery letter also made all tangible exhibits in the possession of the government available for inspection.

If the Defendant is asking for additional facts regarding the location of the criminal conduct alleged, then the discovery materials provide that information in great detail, especially considering the search warrant affidavit provided in discovery and filed in 1:08-MJ-35. The Defendant is therefore not entitled to a bill of particulars because the indictment clearly cites the elements of the offenses and informs the defendant of the specific documents alleged to be fictitious, thereby referencing the specific conduct at issue and enabling him to prepare for trial. Even if the Defendant's motion is construed as asking for more factual detail regarding the incident locations, the indictment and the discovery materials pin down what conduct is at issue and where it occurred.

Federal Jurisdiction

Even though entitled a "Motion for Bill of Particulars," most of the Defendant's interrogatories focus on his disagreement with the State of Indiana and the United States government having concurrent jurisdiction over certain criminal conduct as separate sovereignties. The following interrogatories appear to drive at this basic issue, albeit through several different means: 1, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 18. (Defendant's Motion at 12-14)

A bill of particulars is not required when information necessary for a defense can be obtained through some other satisfactory form. *Fassnacht*, 332 F.3d at 447 n.2; *Hernandez*, 330 F.3d at 975; *Canino*, 949 F.2d at 949. The jurisprudence of the United States Supreme Court regarding the concept of separate sovereignties began as early as 1820, and the history and evolution of the doctrine was detailed in *Abbate v. United States*, 359 U.S. 187, 190-95 (1959). If the Defendant

seeks to challenge the jurisdiction of the United States District Court for the Northern District of Indiana, the law is quite clear that a state statute and a federal statute may criminalize and punish separately the same conduct, meaning that the same act within the same territory may constitute an offense against both the state and federal governments. *Id.* at 192-95. The legal authority establishing federal jurisdiction is available to the Defendant through legal research, and a bill of particulars is not an appropriate mechanism to obtain this legal research.

Grand Jury Proceedings

In interrogatories 3 through 6, the Defendant appears to inquire about the sufficiency of the information presented to the grand jury. The government asserts that the Defendant is not entitled to challenge the sufficiency of the information presented to the grand jury and that this information is not available through a motion for bill of particulars.

Neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. *Costello v. United States*, 350 U.S. 359, 362 (1956). If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the defendant could always insist on a kind of preliminary trial, resulting in great delay while adding nothing to the assurance of a fair trial. *Id.* at 363-64. The Supreme Court's reluctance to examine the quality or sufficiency of the evidence presented to a grand jury extends even to indictments based entirely on hearsay and to indictments based on evidence unconstitutionally obtained. *United States v. Calandra*, 414 U.S. 338, 344-45 (1974); *Costello*, 350 U.S. at 363. An indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits. *Costello*, 350

U.S. at 363; *United States v. Malsom*, 779 F.2d 1228, 1241 (7th Cir. 1985); *United States v. Murphy*, 768 F.2d 1518, 1533 (7th Cir. 1985).

Although his interrogatories appear to be aimed more at the separate sovereignties issue mentioned above, the Defendant nevertheless is not entitled to challenge the sufficiency of the information presented to the grand jury. With this information adding nothing to specify the conduct alleged to be at issue in the indictment, the Defendant may not obtain this grand jury information through any means, including a bill of particulars.

Miscellaneous Issues

In interrogatories 2, 16, and 17, the Defendant asks miscellaneous questions that have nothing to do with informing him of what conduct is alleged to be illegal. Identifying the meaning of an abbreviation in the cause number, the authority for the United States Attorney's Office to prosecute cases in federal court, and any distinction between the plaintiff "United States of America" and the United States District Court do not assist in pinning down the conduct alleged in the indictment. The Defendant may obtain this legal information through other means; therefore, these issues are not appropriate for a bill of particulars.

