

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA

Plaintiff

vs.

Criminal No. 00-000

DEFENDANT

Defendant

MOTION REQUESTING A BILL OF PARTICULARS

HON. DANIEL R. DOMINGUEZ
DISTRICT JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

COMES NOW, the defendant and moves this Court for an Order granting him a Bill of Particulars specifying particularly the conduct(s), time(s) and parties involved in the agreement that the Indictment alleges against him.

This motion is based on the Memorandum of Law, attached hereto, and hereby incorporated by reference.

JOSEPH C. LAWS, JR.
Federal Public Defender

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MEMORANDUM OF LAW

TABLE OF AUTHORITIES

1. The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States;
2. Russell v. United States, 369 U.S. at 749, 82 S.Ct. at 1047(1989);
3. Berger v. United States, 295 U.S. at 78, 55 S.Ct. 629 (1935);
4. United States v. Marroquin, 136 F.3d 220 (1998);
5. United States v. Hallock, 941 F.2d 36, 40 (1st Cir.1991);
6. United States v. Leach, 427 F.2d 1107, 1110 (1st Cir.), cert. denied, 400 U.S. 829, 91 S.Ct. 95, 27 L.Ed.2d 59 (1970);
7. United States v. Tomasetta, 429 F.2d 978 (1st Cir.1970).

ISSUE PRESENTED

Is a Bill of Particulars necessary in the instant prosecution in order for the defendant to properly prepare his defense and to adequately secure the rights guaranteed to him by the United States Constitution and applicable case law?

In particular, is the Bill of Particulars requested in this case, necessary to assure the Defendant of the following constitutional rights:

1. The due process requirements of the Fifth and Fourteenth Amendment to the United States Constitution;
2. The Sixth Amendment rights of the United States Constitution insuring effective assistance of counsel, notice and compulsory process, and;
3. His Fifth Amendment rights against self incrimination and against double jeopardy?

STATEMENT OF FACTS

The Indictment filed against Mr. Defendant in this case alleges, in part, as follows:

“From or about the beginning of August 1998, and continuing until on or about August 4, 1998, in the District of Puerto Rico and within the jurisdiction of this Court, [lists the defendants] . . . , the defendants herein, did, knowingly and intentionally, combine, conspire, and agree with each other and with divers other persons to the grand jury known and unknown, to commit an offense against the United States, that is to knowingly and intentionally possess with intent to distribute a controlled substance, to wit: more than five (5) kilograms of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).” (Emphasis added).

The Indictment then goes on to list the object of the conspiracy, the manner and means used to accomplish the conspiracy, the overt acts in furtherance of the conspiracy and the allegations of the interactions of the defendants and others for a total of four counts. Defendant is mentioned no place else in this Indictment.

A copy of the Indictment is attached for the Court’s convenience.

Defendant has received discovery materials from the prosecution. It consists of three photographs whose captions or content do not reflect the defendant, and approximately one inch of photocopies of the front of checks. The defendant is not the payee or is otherwise mentioned in any of the checks.

ARGUMENT

An indictment is required to begin a prosecution, unless waived, as stated in Fifth Amendment of the Constitution of the United States. The indictment has not been waived in this case.

The Supreme Court has noted, that the purpose of an indictment is to inform the accused of the charges so that he may prepare a defense, and "in case any other proceedings are taken against him for a similar offense," to show accurately the extent of his acquittal or conviction. Russell v. United States, 369 U.S. at 749, 82 S.Ct. at 1047(1989); Berger v. United States, 295 U.S. at 78, 55 S.Ct. 629 (1935).

This Indictment does not give sufficient notice to the Defendant of what he is alleged to have done; he is therefore unable to prepare an adequate defense, prevent surprises at trial by the prosecution or to avail himself of double jeopardy protection.

The Constitution of the United States requires that an accused be informed of the "nature and cause of the accusation," please see, the Sixth Amendment to the Constitution. In the case against defendant the Indictment gives him notice of the cause against him, an agreement involving the sale of drugs, but not the nature of the acts that he is alleged to have performed in order to perpetuate the crime alleged against him, the dates that he is alleged to have performed them and with whom. It contains only a general averment as to agreement, as previously stated.

A Bill of Particulars is therefore necessary to provide adequate notice.

Otherwise, the Constitution of the United States is violated in the following respects:

1. Due process, as required by the Fifth and Fourteenth Amendment to the United States Constitution is not observed;
2. The effective assistance of counsel, notice to the defendant and compulsory

process are not protected as required by the Sixth Amendment of the United States Constitution;

3. He is not afforded his Fifth Amendment rights to remain silent or to the protection of the double jeopardy clause of the same document.

A Bill of Particulars is a proper pre trial request to the Court. United States v. Marroquin, 136 F.3d 220 (1998). "Bills of particulars are designed to provide sufficient additional detail to enable an accused to mount an adequate defense, avoid double jeopardy, and prevent surprise at trial." United States v. Hallock, 941 F.2d 36, 40 (1st Cir.1991); United States v. Leach, 427 F.2d 1107, 1110 (1st Cir.), cert. denied, 400 U.S. 829, 91 S.Ct. 95, 27 L.Ed.2d 59 (1970). If the indictment is vague and a Bill of Particulars is not provided the defendant will no be able to prepare his defense.

In this case the only allegation, contained in the indictment against Mr. Defendant, is that he agreed with the other defendants and with ". . . divers other persons to the Grand jury known and unknown . . ." to possess and distribute cocaine. If the only thing being alleged against the defendant is an agreement then it certainly cannot be much of a burden for the government to state when the agreement took place, where it took place, and between whom.

The discovery provided to the defense in this case does nothing to alleviate the problem. It consists, as previously stated, of photographs and copies of checks that do not, by their content, involve the defendant in any way.

If more particularity is not provided, a number of defenses that may otherwise be present, may be unavailable to the defense. For example, if this Court granted the defendant's request, the defendant may be able to show that on that date the agreement is alleged to have taken place, he was elsewhere or the persons he is

alleged to have been with were elsewhere. By not providing that information, the entire line of defense is precluded to the defendant. He cannot, prior to trial, prepare an alibi defense because there is no information of where, when and with whom he is alleged to have conspired.

Furthermore, he cannot compel the appearance of necessary witnesses in court, because, of course, he does not have the requisite information that would enable him to determine what witnesses he will need. In other words, the pre trial preparation of the case is severely compromised.

The defendant's right to be represented by counsel is curtailed; counsel simply cannot do adequate pretrial preparation. In short, the attorney's constitutional function of providing an adequate defense for the client is compromised.

Again, the defendant's right against self incrimination may be compromised. If the information relative to the charge is not specific he cannot know when he can assert his right against self incrimination and when that right will not lie.

The requested information is also necessary to complete the investigation of the case. Otherwise, investigating the case for the defense becomes a practical impossibility. Instead of concentrating on the people that the government claims were involved with the defendant on the days and/or times that are pertinent, all persons, all days and all times must be investigated, i.e., the defendant must investigate . . . "divers other persons . . . known and unknown . . ." How can that be done in a reasonable manner? There are not adequate resources nor is there adequate time to do it.

Defendant argues that the Indictment in this case is similar to that found in United States v. Tomasetta, 429 F.2d 978 (1st Cir.1970). In that case the First Circuit found the indictment impermissibly vague because it failed to specify the name of the

victim, the means of the alleged extortion, or the precise location. The Court noted that . . . "while no single factor was determinative, the three omissions, taken together, made it difficult for the defendant to determine exactly what conduct of his had given rise to a charge of extortion."

The Tomasetta case is similar to the instant case. Without a bill of particulars the defendant will have no way of knowing, through the averments in the Indictment, which of potentially several contacts that he had on the dates in question are alleged by the government to give rise to the allegations that are the subject of the criminal charges against him.

The defendant in this case does not argue that the Indictment is too vague to sustain a charge. He does argue that with an indictment that lacks this degree of specificity he needs additional information to formulate a defense and to be afforded his full array of constitutional rights.

Again, if more specific information is not provided, as to exactly which agreement, which persons, what date(s) or what time(s) the Indictment discusses relative to his criminal conduct, the defendant would have no way to assert a double jeopardy claim.

A subsequent prosecution could be started with exactly the same language as this Indictment, allegedly referring to a different agreement between this defendant the same persons or other persons and the defendant would have no way of differentiating for the Court, that the new prosecution is the same, or for that matter is different, from the instant one. This would defeat his constitutional right to contest the prosecution on the grounds of double jeopardy.

CONCLUSION

In order to preserve the defendant's constitutional rights, as outlined in the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the pertinent case law, as well as, on the basis of fundamental fairness, the Court should require the government to produce a Bill of Particulars specifying the place(s), time(s) and parties involved in the agreement that this Indictment alleges against the defendant.

ADDENDUM

A copy of the Indictment in this case is included for the Court's convenience.

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