

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,)	CR. 08-50079
)	
Plaintiff,)	
)	ORDER DENYING
vs.)	DEFENDANT MARSHALL'S
)	MOTION FOR A BILL
JOHN GRAHAM, aka)	OF PARTICULARS
JOHN BOY PATTON, and)	
VINE RICHARD MARSHALL, aka)	
RICHARD VINE MARSHALL, aka)	
DICK MARSHALL,)	
)	
Defendants.)	

INTRODUCTION

Defendant Richard Marshall has filed a motion for a bill of particulars pursuant to Fed. R. Crim. P. 7(f). See Docket No. 184. The government resists the motion. This motion was referred to this magistrate judge for decision pursuant to 28 U.S.C. § 636(b)(1)(A).

FACTS

The facts, insofar as they bear on the pending motion, are as follows. Count one of the superseding indictment charges Mr. Graham and Mr. Marshall jointly with the unlawful killing and with aiding and abetting the killing of Annie Mae Aquash with a firearm, asserting that both defendants are

Indians and that Ms. Aquash is also an Indian, in violation of 18 U.S.C. §§ 2, 1111, and 1153.

Count two charges Mr. Graham alone with killing Annie Mae Aquash “willfully, deliberately, and maliciously, with premeditation and malice aforethought,” in violation of 18 U.S.C. §§ 2, 1111, and 1152. Count two alleges that Ms. Aquash is an Indian, but does not allege that Mr. Graham is an Indian.

Count three alleges that Mr. Graham killed, and aided and abetted other Indians in killing Ms. Aquash, in violation of 18 U.S.C. §§ 2, 1111, and 1153. The Indians Mr. Graham is alleged to have aided and abetted in count three are Fritz Arlo Looking Cloud, Theda Rose Clarke, and co-defendant Mr. Marshall. Count three does not allege that Mr. Graham is an Indian. Count three is currently the subject of a motion to dismiss by Mr. Graham.

The defendants are currently scheduled to be tried in a joint jury trial beginning May 12, 2009. The government’s theory of the case, as shown by numerous pleadings on various legal issues, is that Mr. Graham and Mr. Marshall acted on orders from decision-makers within the American Indian Movement (“AIM”), to murder Ms. Aquash due to the suspicion that she was a government informant working against AIM. The government alleges that Mr. Marshall provided the firearm and ammunition used to commit the murder and that Mr. Graham carried out the actual murder.

Mr. Marshall now moves for a bill of particulars. The government resists Mr. Marshall's motion, asserting that, between the details recited in the indictment, the voluminous discovery provided to Mr. Marshall, and pleadings filed by the government in this case, Mr. Marshall can adequately prepare his defense and not be prejudicially surprised at trial.

DISCUSSION

A. The Law Relating to a Bill of Particulars

Rule 7 of the Federal Rules of Criminal Procedure provides as follows with regard to a bill of particulars:

(f) Bill of Particulars. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires. See Fed. R. Crim. P. 7(f).

“A bill of particulars is a formal written statement by the prosecutor providing details of the charges against the defendant. Its functions are to give the defendant notice of the essential facts supporting the crimes alleged in the indictment or information, and also to avoid prejudicial surprise to the defense at trial.” 1 Charles A. Wright and Andrew D. Leipold, Fed. Practice & Procedure: Criminal, § 129, 656 (4th ed. 2008). See also United States v. Shepard, 462 F.3d 847, 860 (8th cir. 2006); United States v. Hernandez, 299 F.3d 984, 989-990 (8th Cir. 2002), cert. denied, 537 U.S. 1134 (2003). A bill of particulars can also serve to allow the defendant to plead his acquittal or

conviction in order to bar a subsequent prosecution for the same offense where the indictment is vague or indefinite. Hernandez, 299 F.3d at 990-991.

In order to obtain a bill of particulars, a defendant must demonstrate that the document is necessary to adequately prepare his case or to avoid prejudicial surprise at trial. 1 Fed. Practice & Procedure: Criminal, § 129 at 658. Whether a motion for a bill of particulars should be granted depends on how complex the crime charged is, how much discovery has been provided by the government, how clear the indictment is, and other sources of information otherwise available to a defendant to inform himself of the nature of the government's case against him. Id. at 659; United States v. Rodriguez, 380 F. Supp. 2d 1041, 1057 (D.N.D. 2005). Whether to grant a motion for a bill of particulars is entrusted to the trial court's discretion. Id. at 660. A bill of particulars is not a discovery device and will not be granted if the prosecution has provided the desired information through pretrial discovery or in some other acceptable manner. Id. at 663-664; United States v. Wessels, 12 F.3d 746, 750 (8th Cir. 1993); United States v. Hester, 917 F.2d 1083, 1084 (8th Cir. 1990).

In United States v. Adcock, 558 F.2d 397, 400-401 (8th Cir. 1977), the defendant was part of a bribery scheme involving the distribution of liquor. He was charged with violation of income tax laws for failing to declare the income he received as bribes and for filing false tax returns that omitted that income.

Id. The Eighth Circuit affirmed the district court’s denial of defendant’s request for a bill of particulars because the government “had informed the defendant of the sources of unreported income, both during the prosecution and pre-prosecution years” and the indictment in the case “set forth in factual terms the elements of the offenses charged.” Id. at 405-406. The Eighth Circuit concluded that the information provided was sufficient to allow the defendant to prepare for trial and to defend against double-jeopardy. Id.

In an Eighth Circuit case involving charges of kidnapping, the district court’s denial of the defendant’s request for a bill of particulars was affirmed on appeal where the indictment informed the defendant of the time and place of the wrongdoing, the acts alleged to have resulted in a violation of the laws of the United States, . . . the manner in which the act occurred”, gave the names of the persons who were alleged to have been kidnapped, alleged the city and state from which they were taken, and the city and state to which they were brought. See United States v. Key, 717 F.2d 1206, 1210 (8th Cir. 1983).

In a bribery case involving obtaining mortgages, the district court denied defendants’ motion for a bill of particulars in most respects, but granted the defendants’ motion to obtain the names of those who paid money to the defendants, as alleged in the overt acts. United States v. McCarthy, 292 F. Supp. 937, 940-941 (S.D.N.Y. 1968).

Likewise, in United States v. Dean, 266 F. Supp. 159, 160 (D.C.N.Y. 1966), the court in a bribery case granted the defendants' motion for a bill of particulars as to four categories of information: (1) the approximate date and time of day when the defendant received the bribe; (2) the person who gave the defendant the bribe; (3) the place where the defendant received the bribe; and (4) whether the payment was made by cash or check or both.

In a more recent bribery case, the government was not required to provide a bill of particulars where the detailed indictment and the discovery provided by the government together sufficiently apprised the defendants of the transmissions and transfers of funds, including dates, times, and amounts of such transfers, which formed the basis of the charges against the defendants. United States v. Chalmers, 410 F. Supp. 2d 278, 284-286 (S.D.N.Y. 2006).

The district court in United States v. Giffen, 379 F. Supp. 2d 337, 346-347 (S.D.N.Y. 2004), also denied a motion for a bill of particulars where the indictment was detailed, alleging a series of acts, identifying some co-conspirators, and describing the alleged bribing scheme, including specific dates, locations, and monetary amounts. Together with the discovery the government had provided, the court held that the defendants were sufficiently apprised of the charges against them so as to enable them to adequately prepare for trial and to avoid unfair surprise. Id.

In United States v. Fleming, 8 F.3d 1264 (8th Cir. 1993), the district court denied the defendant's motion for a bill of particulars. Id. at 1265. The defendant had been charged with being a felon in possession of a firearm on October 12, but there were two separate times on the same day (one early in the morning, the other in the afternoon) during which witnesses alleged having seen Fleming with a gun. Id. Fleming asserted that it was error for the district court to have denied his motion for the bill of particulars where the indictment did not indicate which factual incident was being charged and whether he was being accused of having the same gun in both incidents. Id. The Eighth Circuit affirmed the district court's ruling, characterizing the defendant's appeal on this issue as "specious" because the defendant clearly understood through testimony offered at an evidentiary hearing prior to trial what the basis of the government's charge against him was. Id. at 1265-1266. Thus, although the indictment itself may not have provided the defendant with the necessary clarification, other information provided by the government to the defendant made clear the basis of the government's allegations. Id.

In United States v. Lupino, 171 F. Supp. 648 (D. Minn. 1958), the defendant was charged with being a fugitive felon for fleeing to South Carolina to avoid prosecution for murder and kidnapping in Hennepin County, Minnesota. Id. at 648-649. At a hearing, the government attorney supplied the location of the alleged murder and the identity of the murder victim. Id. at

650. Stating that it was not necessary for the government to provide “all of the facts which the defendant wants, or which he may think desirable,” the court denied the defendant’s motion because he had been provided with all the information necessary to be apprised of the essential facts in support of the crime with which he was charged. Id.

B. Application of the Law to Mr. Marshall’s Motion

1. Timeliness

Rule 7(f) provides that motions for a bill of particulars shall be made within 10 days of the defendant’s arraignment or anytime thereafter if the court permits. Mr. Marshall’s motion for a bill of particulars was not made within the 10-day time frame set forth in Rule 7(f). However, Rule 7(f) itself gives the court discretion to allow motions to be made outside the 10-day time period. Noteably, unlike many other rules setting forth time frames during which a motion shall be made, Rule 7(f) does not require the moving party to demonstrate “good cause” or “excusable neglect” before a motion outside the 10-day period may be entertained by the court. Furthermore, the court notes that this case involves the disclosure of thousands of pages of documents, most of which did not reach Mr. Marshall within 10 days of his arraignment, as evidenced by motions to extend the deadlines in this case by both parties. Therefore, the court hereby grants Mr. Marshall permission to make his motion outside the 10 days set forth in Rule 7(f).

2. Merits

The superseding indictment in this case is certainly “bare bones.” In count one, both defendants are alleged to have killed and to have aided and abetted the unlawful killing of Annie Mae Aquash by shooting her with a firearm with premeditation and malice aforethought on December 12, 1975. Count one alleges that Graham, Marshall, and Aquash are all Indians. The indictment does not allege which of the defendants had the gun, or whether both had a firearm, and which one “pulled the trigger” or if both did. Counts two and three charge only co-defendant John Graham.

If the indictment were all the information that the government had provided to Mr. Marshall, his motion for a bill of particulars might be well-placed. However, mountains of other information has been provided.

By Mr. Marshall’s own estimation, he has been the recipient of over 5,000 pages of documents in discovery in this case. See Docket 143. In addition, the parties have thoroughly briefed the severance of trials of the two defendants, several theories for dismissal of the indictment, the potential of an alibi defense, and numerous evidentiary issues anticipated to be presented at trial. These documents filed by the government spell out in great detail the basis of the government’s prosecution against Mr. Marshall. In addition, in response to the current motion, the government again reiterated its factual basis and theory for the prosecution of Mr. Marshall.

Mr. Marshall seeks in his motion a statement of the date and location where Mr. Marshall is alleged to have committed some act that aided and abetted the murder of Ms. Aquash. As is evident from the government's discovery and pleadings, the government alleges that Mr. Marshall provided a firearm and ammunition to Mr. Graham, through Theda Clark, that Graham then is alleged to have used to kill Ms. Aquash. Mr. Marshall is alleged to have provided these items at his own home at approximately 11:30 p.m. the night before Ms. Aquash's murder. The names of the persons Mr. Marshall is alleged to have aided and abetted is provided in the indictment itself: Arlo Looking Cloud, Theda Clark, and co-defendant Graham.

The information that the government has provided is clearly sufficient to allow Mr. Marshall to defend himself at trial and to protect himself from a subsequent prosecution for the same crime. See 1 Fed. Practice & Procedure: Criminal, § 129, at 656; Shepard, 462 F.3d at 860; Hernandez, 299 F.3d at 989-990. It does not matter that the information was provided through vehicles outside the indictment itself, so long as it was provided. 1 Fed. Practice & Procedure: Criminal, § 129, at 663-664; Wessels, 12 F.3d at 750; Fleming, 8 F.3d at 1265-1266; Hester, 917 F.2d at 1084; Lupino, 171 F. Supp. at 648-650. Accordingly, the court denies Mr. Marshall's motion for a bill of particulars.

CONCLUSION

Based on the foregoing discussion, it is hereby ORDERED that Mr. Marshall's motion for a bill of particulars [Docket 184] is denied.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated March 13, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE