UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 3:12-CR-107
	)	
v.	)	JUDGES PHILLIPS/SHIRLEY
	)	
MICHAEL R. WALLI,	)	
MEGAN RICE, and	)	
GREG BOERTJE-OBED,	)	
	)	
Defendants.	)	

GOVERNMENT'S RESPONSE TO MOTION OF THE DEFENDANTS TO DISMISS FOR OVERBREADTH AND VAGUENESS, OR, IN THE ALTERNATIVE, FOR A BILL OF PARTICULARS

Comes now the United States of America, by and through the United States Attorney for the Eastern District of Tennessee, and files this response to the Motion of the Defendants to Dismiss for Overbreadth and Vagueness, or, in the Alternative, for a Bill of Particulars, and the Memorandum in Support. (Docs. 75 and 76.)

I. Count One of the Superseding Indictment is not overbroad or vague.

The defendants contend that Count One of the Superseding Indictment should be dismissed because the alleged indefiniteness of the term "national defense" makes 18 U.S.C. § 2155 overbroad and vague.

An otherwise constitutional statute "may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). "The crucial question" in such a case "is whether the [statute] sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Id.* at 114-15.

Generally, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "[O]rdinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others[.]'" *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008) (quoting *Hoffman Estates v. Flipside*, 455 U.S. 489, 494-95 (1982)). The Supreme Court has recently distinguished between statutes that are void for vagueness under the Due Process Clause and the problematic hypotheticals that can be imagined under virtually any statute:

> What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, [the Supreme Court has] struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"-wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.

Id. at 1846. To survive a vagueness challenge, a statute must give "relatively clear guidelines as to prohibited conduct." *Posters 'N' Things, Ltd. v. U.S.*, 511 U.S. 513, 525 (1994). Such "objective criteria" will "minimize the possibility of arbitrary enforcement and assist in defining the sphere of prohibited conduct under the statute." *Id.* at 526. "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954).

The inclusion of a scienter requirement in a statute typically serves to narrow its scope and to ensure that the statute will not be applied to innocent or accidental conduct. *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (observing that the inclusion of a scienter requirement decreases the likelihood that a person of common intelligence would not understand the conduct

prohibited). The Supreme Court had upheld the similar language "with intent or reason to believe" against a vagueness challenge because those words "require[] those prosecuted to have acted in bad faith. The sanctions apply only when the scienter is established." *Featherston*, 461 F.2d at 1121 (quoting *Gorin v. U.S.*, 312 U.S. 19, 28 (1941)). Thus, the court found "knowing or having reason to know" is "sufficiently definite to apprise men of common intelligence of its meaning and application." *Id.* at 1121-22.

The defendants in the instant case overlook the Supreme Court's decision in *Gorin v. U.S.*, 312 U.S. 19 (1941), which specifically addressed the term "national defense" in response to a vagueness challenge to the Espionage Act. *Id*. at 28. The Court defined "national defense" as "a generic concept of broad connotations, referring to the military and naval establishments and the *related activities of national preparedness.*" *Id.* at 28 (emphasis added) (internal quotation marks omitted). In *Gorin*, the court addressed whether the statute violated due process because of the indefiniteness of the meaning of national defense. *Id.* at 27-28.

> In affirming the above definition, the Court found "no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law," *id.* at 27, 61 S. Ct. 429, and expressed its "view that the use of the words 'national defense' has given them, as here employed, a well understood connotation."

United States v. Platte, 401 F.3d 1176, 1190 (10th Cir. 2005)(quoting *Gorin*, 312 U.S at 28). *See Jordan v. De George*, 341 U.S. 223, 231 n.15, (citing *Gorin* for the proposition that the phrase "connected with or related to the national defense" had "survived attack under the vagueness doctrine"). In *Platte*, the court relied upon *Gorin* in rejecting a vagueness challenge to 18 U.S.C. § 2155(a) even though *Gorin* addressed a different statute. *Id*. at 1190. The Court in *Platte* further stated, "Even if the boundary 'national defense' is uncertain, nuclear weapons are far from the boundary." *Id.* at 1190.

Although the defendants here cite *Platte* in their motion, they fail to acknowledge the importance of the decision. In *Platte,* the Court rejected a vagueness and overbreadth challenge after analyzing the term "national defense" in the same statute as the present case. *Id.* at 1190. The defendants claim that *Platte* is factually distinguishable but they do not show any substantive distinction between this case and *Platte*. The defendants state in their motion that, "*Platte* concerned what were clearly national defense premises." [Doc. 76, p. 5.] However, the fact that the defendants in *Platte* damaged property on a military base and the defendants here damaged property at the Y-12 National Security Complex is not a substantive distinction for purposes of a vagueness analysis. The Y-12 National Security Complex has been defined by statute as a "nuclear weapons production facility." *See* 50 U.S.C. § 2471. "Y-12 manufactures unique nuclear weapon components for the nation's long-term defense."[1] "Portions of every weapon in the U.S. nuclear stockpile were manufactured at Y-12."[2] Similar to what the Court said in *Platte*, even if the boundary of the definition of "national defense" is not certain, a facility that produces components for nuclear weapons clearly meets the definition. Accordingly, the Y-12 National Security Complex meets the definition of national-defense premises as set forth in 18 U.S.C. § 2151.

The government submits that 18 U.S.C. § 2155(a) could not be any clearer on what conduct is prohibited. It is directed only to those who injure, destroy or contaminate national defense premises with the intent to injure, interfere with, or obstruct the national defense of the United States. The prohibition of the statute is plain, simple and intelligible. It should be clear from the statutory language that § 2155(a) requires those prosecuted to have acted in bad faith. *See Gorin*, 312 U.S. at 28. This statute has no uncertainty that deprives a person of the ability to

[1] http://www.y12.doe.gov/missions/defenseprograms/manufacturing.php
[2] http://www.y12.doe.gov/missions/defenseprograms

predetermine whether a contemplated action is criminal under the law. The statute clearly does not criminalize those who lawfully exercise their First Amendment rights and protest against nuclear weapons, nor any other constitutionally protected activity. Thus, the defendants have failed to make a credible overbreadth and vagueness challenge to 18 U.S.C. § 2155 and this motion should be denied.

II. A Bill of Particulars is neither legally required nor otherwise appropriate.

The defendants argue that the statutory law on which Count One of the Superseding Indictment is based is overbroad and vague; therefore, if Count One is not dismissed, the United States should provide a bill of particulars as to that count. (Doc. 76 at 6.)

A bill of particulars is meant to be used as a tool to minimize surprise at the time of trial, to assist the defendant in obtaining information needed to prepare a defense, and to preclude a second prosecution for the same crime, when an indictment itself is too vague or indefinite for such purposes. *United States v. Salisbury*, 983 F.2d 1369, 1375 (6th Cir. 1993); *United States v. Birmley*, 529 F.2d 103, 108 (6th Cir. 1976). The filing of a bill of particulars therefore serves two purposes: (1) the defendant must be given adequate notice of the charges against him; and (2) the defendant is entitled to a factual basis from which to argue double jeopardy against later criminal charges. *United States v. Dempsey*, 733 F.2d 392, 394 (6th Cir. 1984).

A bill of particulars is not intended to be "a tool for the defense to obtain detailed disclosure of all evidence held by the government before trial." See *Salisbury*, 983 F.2d at 1375. It should not be used to obligate the government to expose its legal theory to the defendant. *Salisbury*, 983 F.2d at 1375; *United States v. Leonelli*, 428 F. Supp. 880 (S.D.N.Y. 1987). It is well-settled that a bill of particulars may not be used to discover evidentiary details from the United States or the legal theories upon which the United States will rely at trial. *See United*

States v. Gabriel, 715 F.2d 1447, 1449 (10th Cir. 1983) (citing *United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir. 1980), *cert. denied*, 449 U.S. 1015 (1980)); *United States v. Tennyson*, 88 F.R.D. 119, 120 (D.C. Tenn. 1980). A bill of particulars is not to be used to obtain detailed disclosure of all evidence held by the government before trial, or to discover all the overt acts that might be proven at trial. *See United States v. Phibbs*, 999 F.2d 1053, 1086 (6th Cir. 1993); *United States v. Bouquett*, 820 F.2d 165, 168 (6th Cir. 1987); *United States v. Largent*, 545 F.2d 1039, 1043-44 (6th Cir. 1976) (no error in denial of motion for bill of particulars seeking names of all government's witnesses), *cert. denied*, 429 U.S. 1098 (1977). The fact that information may be helpful to a defendant is not enough, provided that the indictment adequately notifies him of the charges. *United States v. Feola*, 651 F. Supp. 1068, 1132 (S.D.N.Y. 1987). "The rationale for restricting the use of the bill is to protect the government from forced disclosure of its evidence and its theory of the case, and to avoid 'freezing' the government's case as a result of the rule that evidence at trial must conform to the bill of particulars." *United States v. Raineri*, 91 F.R.D. 159, 160 (W.D. Wisc. 1980), *affirmed* 670 F.2d 702, *cert. denied*, 459 U.S. 1035 (1982). A defendant is not entitled to a bill of particulars with respect to information which is available through other sources. *United States v. Paulino*, 935 F.2d 739, 750 (6th Cir. 1991).

The defendants outline three specific particulars. (Doc. 76 at 7.) At the beginning of each listed particular, the defendants seek the identification of "each such building and/or item included in 'grounds' that the defendants are alleged to have" injured, destroyed, and contaminated and attempted to injure, destroy and contaminate. (*Id.*) The Superseding Indictment, together with the affidavit for the Complaint, and the discovery already provided make it clear that such "buildings and grounds" include the Highly Enriched Uranium Materials

Facility (HEUMF) building, the PIDAS security fences, the concrete barriers near the HEUMF, and the 229 perimeter boundary fence, all within the Y-12 National Security Complex. (*See* Doc. 1, Complaint at 2-3; Doc. 55, Superseding Indictment.) Therefore, the defendants have received adequate notice as to what "buildings and grounds" are alleged in the Superseding Indictment.

In each of the listed particulars, the defendants also seek information regarding "the nature of" any such injury, destruction and contamination. The United States has alleged that the defendants cut, painted, and defaced property of the Department of Energy in Count Three of the Superseding Indictment. (*Id.*) Additionally, the discovery that has been previously provided shows that the defendants cut and disabled security fences, painted concrete barriers and the walls of the HEUMF, splashed human blood onto the walls of the HEUMF, and other such acts of vandalism. The United States submits that the defendants have received adequate notice of the charges against them with regard to the nature of the alleged injury, destruction and contamination of national-defense premises.

Finally, with regard to the listed particulars, the defendants seek information regarding the "duration" of the injury and contamination as well as "the impact of" the injury, destruction and contamination on the national defense of the United States. (Doc. 76 at 7.) The United States asserts that it has already provided sufficient information with regard to Count One. Here, the defendants appear to be using their motion for a bill of particulars as a tool to impermissibly expand the scope of discovery and to discover the United States' theory of the case to which they are not entitled.

Similarly, the defendants attempt to "freeze" the United States into a theory of the case by requesting the Court to order the United States to outline the specific evidence it intends to

use to prove the defendants' intent to commit the charged crimes. (*Id.* at 7-8.) Such request is improper, as the defendants may not use a bill of particulars to discover the government's basis for finding that the defendant had the specified criminal intent. *See United States v. Piccolo*, 723 F.2d 1234, 1239 (6th Cir. 1983) (indictment charging conspiracy gives adequate notice of theory of criminality). The defendants have adequate notice of the theory of criminality set forth in Count One.

Each count of the Superseding Indictment in this case lists the specific statutory violation committed by the defendants, the statutory elements for the crimes alleged, the time period of the violations, and the location of the crimes. The United States has provided the defendants with all of the Rule 16 discovery that has been developed in this case, including any supplemental discovery developed as part of its ongoing discovery obligations. The Superseding Indictment contains the essential elements of the offenses charged, cites and tracks the language of the statutes the defendants violated, leaving no doubt as to the offenses with which the defendants have been charged. *See United States v. Sutherland*, 656 F.2d 1181, 1197 (5th Cir. 1981), *cert. denied*, 455 U.S. 949; *sub nom* 455 U.S. 991 (1981).

Accordingly, the United States submits that the charges against the defendants as set forth in the Superseding Indictment are specific enough to protect the double jeopardy rights of the defendants, and that both the discovery provided and the Superseding Indictment inform the defendants of the nature of the charges against them with sufficient precision to prepare for trial.

WHEREFORE the government respectfully requests this Honorable Court to deny the defendants' overbreadth and vagueness challenges, and to deny the defendants' alternative request for a bill of particulars.

Respectfully submitted this 31st day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2013, the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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