IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

14-cr-18-bbc

v.

BRIAN KEITH SMALL,

Defendant.

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On January 29, 2014, the grand jury returned an indictment charging defendant Brian Keith Small with two counts of knowingly attempting to file false liens against specified federal officials on account of their performance of official duties, in violation of 18 U.S.C. §§ 1525 and 2. Dkt. #2. Although defendant is represented by Reed Cornia, a member of the Criminal Justice Act panel, he personally prepared and filed a set of pretrial motions on July 7, 2014. Dkt. ##30-37 and 39. At an August 14, 2014 pretrial motion hearing, defendant explained that he did *not* want to represent himself at trial, but that he filed his own motions because he did not want his attorney to get into trouble with the court for filing the types of motions that defendant strongly believed needed to be filed. The magistrate judge assured defendant that in a prosecution against a defendant with strongly held political and jurisprudential views, the court would allow appointed counsel to adopt motions advocated by his client. Pretrial Mot. Hrg. Order, dkt. #42 at 1-2. On August 18,

2014, Mr. Cornia confirmed that he would adopt all of the pending motions filed by defendant. Dkt. #44. Thereafter, on September 8, 2014, the government filed a consolidated brief in opposition, dkt. #45, to which defendant did not reply.

On October 8, 2014, defendant signed and filed five more motions to dismiss, dkt. ##49-53, accompanied by a document titled "Memorandum on Judicial Notice." Dkt #54. These new motions are a nullity for two reasons. First, the motions are not signed by defendant's attorney, who is his representative in this court. Having expressly disavowed any intent to represent himself, defendant cannot now file motions on his own behalf. Second, under Fed. R. Crim. P. 16(e), the issues raised in the dismissal motions are waived because these motions were filed long after the pretrial motion deadline and without court permission.

I address defendant's timely filed motions by type, listed by court docket number:

1. Motion for bill of particulars, dkt. #30

Although ostensibly this motion seeks a bill of particulars, it is an omnibus request for various categories of information that have nothing to do with this case, notwithstanding defendant's views to the contrary. By way of example, defendant seeks all tax returns for the federal judge, federal prosecutors and federal agents who have worked on this case; all "counterfeit securities" issued in this case against defendant, including the summons, indictment, and court documents; "Any and all proof that Defendant, his body and his actions are financial securities to secure the 14th Amendment debt created by Congress";

and "all books and records from the Federal Reserve so as to be audited for this court matter."

"The test for whether a bill of particulars is necessary is 'whether the indictment sets forth the elements of the *offense charged* and sufficiently apprises the defendant of the *charges* to enable him to prepare for trial.'" United States v. Kendall, 665 F.2d 126, 134 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982) (quoting United States v. Roya, 574 F.2d 386, 391 (7th Cir. 1978)(emphasis in original)); see also United States v. Fassnacht, 332 F.3d 440, 446-47 (7th Cir. 2003). A defendant has no right to use a bill of particulars to force the government to reveal the details of how it plans to prove its case. United States v. Glecier, 923 F.2d 496, 502 (7th Cir. 1991) (citing Kendall, 665 F.2d at 135). "It is established that a defendant is not entitled to know all the *evidence* the government intends to produce, but only the *theory* of the government's case." Kendall, 665 F.2d at 135 (emphasis in original). It is appropriate for the court to look at post indictment discovery to determine whether a bill of particulars is required. Id. United States v. Canino, 949 F.2d 928, 949 (7th Cir. 1991).

Against this standard, none of defendant's requests are a basis for ordering the government to provide a bill of particulars.

2. Disclosure of grand jury records, dkt. #31

In this motion, defendant asserts a constitutional right to disclosure of five categories of documents, including grand jury records, logs, attendance records (to prove a quorum),

a "concurrence form" and records showing that the indictment was read in open court. Under Fed. R. Crim. P. 6(d) and 6(e)(2)(B), grand jury matters are presumptively secret. This strong presumption of secrecy is not overcome absent a compelling necessity. Even if a party shows a particularized need, the secrecy of the proceedings is lifted "discretely and limitedly." Matter of EyeCare Physicians of America, 100 F.3d 514, 518-19 (7th Cir. 1996); see also United States v. Puglia, 8 F.3d 478, 480 (7th Cir. 1993). In this instance, defendant has not attempted to make any showing at all.

Even so, virtually all of the material defendant seeks is available either directly or indirectly. For instance, Fed. R. Crim. P. 6 (a)(1) requires that a grand jury must have between 16 and 23 members; Rule 6(f) requires that at least 12 grand jurors concur in the proposed indictment, which then must be returned in open court, but need not be read. The indictment itself shows that the presiding grand juror and an authorized Assistant U.S. Attorney signed the indictment, which was returned on January 29, 2014. Dkt. #2. By counsel, defendant may ask the clerk of court to review the grand jury's voting record on defendant's indictment, to verify that at least 16 jurors were present and that 12 voted to indict. Further, the government says that it has turned over the transcripts of grand jury witness testimony and copies of grand jury exhibits. In short, there is nothing left for the court to order disclosed. This motion will be denied.

3. General discovery motions:

Disclosure of CIPA records, dkt. #32

Expanded discovery, dkt. #34

Open file discovery, dkt. #35

In these three motions, defendant has asked first for disclosure of all "Classified Information Procedure Act records from all government agencies that the U.S. Attorney's office would have or could have accessed regarding this case; eight categories of documents, including the nationality and citizenship of all prosecutors and judges involved in this case, as well as their oaths of office and "anti-bribery oaths"; and open-file discovery, including handwritten notes.

The government responds that it has four categories of discovery obligations in a criminal case: (1) evidence that must be disclosed under Fed. R. Crim. P. 16; (2) evidence that must be disclosed under Fed. R. Crim. P. 26.2; (3) exculpatory evidence and material that fits within the holdings of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny; and (4) impeaching evidence and material that fits within the holdings of Giglio v. United States, 405 U.S. 150 (1972), and its progeny. The government is responsible only for disclosing information within its control, United States v. Bhutani, 175 F.3d 572, 577 (7th Cir. 1999) and it is not obliged to furnish information that defendant can obtain himself from public records, Price v. Thurmer, 514 F.3d 729, 731-32 (7th Cir. 2008). Govt's Br. in Opp., dkt. # 45, at 3-4. The government says that it is aware of and has complied with all of its discovery and disclosure obligations in this prosecution; anything else that defendant has demanded in his discovery motions does not exist, is not within the government's possession or control or is not required to be disclosed. Id. at 5-6.

The government is correct. This is a narrow prosecution involving two discrete counts that essentially charge defendant with intentionally filing false liens against government officials on account of their positions in the government. The government accurately characterizes its discovery and disclosure obligations with regard to these charges and it asserts that it has complied with these obligations "through exhaustive and thorough discovery" which it will continue to provide throughout this case. Id. at 6. Defendant is not entitled to anything else in response to his three discovery motions, so they will be denied.

4. Discovery of financial records:

Government officials, dkt. #36

Judges, clerk, prosecutors, dkt. #37

In these motions, defendant cites 28 U.S.C. § 454 (judges shall not practice law) and § 455 (judicial disqualification), offers some general observations about the need for federal judges and prosecutors to recuse themselves from cases in which they have a financial interest or that might implicate their financial interests, then demands that all government officials assigned to this case produce certified copies of their financial statements and their tax returns for the last three years.

Defendant has cited no authority for the production of tax records and he has not identified evidence that would suggest any conflict of interest by any judge, court employee, prosecutor or other government employee involved in this case. The government asserts that none of the prosecutors involved in this case are classified at GS-15 or above on the General

Schedule, which means that they are not required to submit financial disclosure forms under 5 U.S.C. § 105. Govt's. Br. in Opp., dkt. #45, at 7. Both the magistrate judge and I submit financial disclosure reports to the Administrative Office of the United States Courts each year; if defendant wishes to obtain these reports, he may request them from the Administrative Office. There is no need, however, for this court to produce these records or any other records to defendant in response to his motion because no court officials or employees have any financial interest in this prosecution or any other possible conflict. If they did, they would recuse themselves without the need for these motions. To the extent that defendant does not trust court employees to do the right thing, he has not suggested any reason why anyone involved in this case needs to recuse himself or herself; defendant is simply fishing for financial information without any articulated reason to suspect that it will reveal a basis for disqualification. Cf. United States v. Diekemper, 604 F.3d 345, 352 (7th Cir. 2010) (a judge does not run afoul of § 455(b) absent "deep-seated favoritism or antagonism that would make fair judgment impossible.") Defendant has provided no basis for the court to grant either of these motions.

5. Dispositive Motions:

Challenge to jurisdiction, dkt. #33

Offer of proof and motion to dismiss, dkt. #39

In his motion to challenge jurisdiction, defendant seeks six categories of information establishing that this court has jurisdiction over him and the subject matter of this

prosecution. In his verified offer of proof and motion to dismiss, defendant claims structural error in this prosecution that requires dismissal. Apparently, the structural error defendant asserts is that this court is not neutral. To the extent that defendant's motions imply that there is a structural error because his appointed attorney initially would not file these motions, that concern has been allayed by Mr. Cornia's September 2, 2014 letter adopting all of defendant's motions as counsel's own. Dkt. #44.

A "structural error" is an error that renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. A finding of structural error is a categorical determination rather than a case-specific one. United States v. Harbin, 250 F.3d 532, 542 (7th Cir. 2001), citing Neder v. United States, 527 U.S. 1, 14 (1999) ("Under our cases, a constitutional error is either structural or it is not.") As discussed in the previous section, this court is not biased against defendant or for the government. Defendant has not proffered any general or specific facts that would suggest, let alone establish, that this court is biased against him or for the government. There is no structural error in this case that would prevent this court from trying this defendant on the charges returned by the grand jury against him.

As for jurisdiction, 18 U.S.C. § 3231 gives this district court jurisdiction over offenses against the laws of the United States. The indictment returned against defendant alleges that he violated a specified federal criminal statute within the Western District of the United States. This is enough to avoid dismissal. It will be the government's burden at trial to

establish by proof beyond a reasonable doubt that defendant actually violated this statute and that he did so within this judicial district.

ORDER

IT IS ORDERED that defendant's pretrial motions, dkt. ## 30-37, 39 and 49–53, are DENIED.

Entered this 17th day of October, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge