IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN A. RADERMACHER,
ROBERT G. SMITH,
NICOLAS J. ACOSTA,
JORGE N. BARRAGON, and
FLORENTINO CASTILLO

Defendants.

ORDER

05-CR-039-C

The five defendants captioned above have filed motions for bills of particulars and three of them–Smith, Acosta and Barragon–have filed motions for severance. *See* dkts. 73, 75, 89, 112, 113, 121, 149 and 150. For the reasons stated below I am denying all of these motions.

Bills of Particulars

Pursuant to F. R. Crim. Pro. 7(f), Radermacher has requested particulars "as to the circumstances of the [charge] in the indictment relating to John R. Radermacher," including the identities of persons allegedly acting in concert with him, the nature of any uncharged overt acts, conduct alleged to be relevant to any sentencing upon conviction, dates and places of Radermacher's alleged actions and alleged participation in the conspiracy. *See* dkt. 121.

Robert Smith has requested a bill of particulars disclosing "the specific information that ties him into the conspiracy alleged in the indictment," including the date on which Smith entered the conspiracy, the location at which he entered it, any overt acts, including dates, that Smith took in furtherance of a conspiracy, any statements he made in furtherance of or showing that he joined the conspiracy, and "specific references to facts that support the government's allegations of conspiracy as opposed to references that merely support discrete, isolated and individual drug transactions." *See* dkt. 113.

Nicolas Acosta has requested a bill of particulars identifying all others known and unknown to the grand jury who allegedly participated in the charged conspiracy, the places and dates on which Acosta allegedly conspired with others or allegedly possessed or distributed cocaine or cocaine base, as well as any dates on which he allegedly assisted others in furtherance of the alleged conspiracy. Acosta also seeks the identities of individuals who claim to have bought cocaine or cocaine base from him and the circumstances under which the alleged transactions took place. *See* dkt. 149.

Jorge Barragon has requested a bill of particulars "citing specifically by Bates No. which items of evidence are being offered as to each specific defendant." *See* dkt. 73.

Florentino Castillo has requested particulars "as to the circumstances of the charge in the indictment relating to Florentino Castillo" including the identities of persons allegedly acting in concert with him, the nature of any uncharged overt acts, conduct alleged to be relevant to any sentencing upon conviction, and the dates and places of his alleged actions and participation in the conspiracy. *See* dkt. 89.

In support of their overlapping requests for bills, the defendants have filed separate briefs that share a common and predictable concern: when the alleged conspiracy is this large and when this much evidence is disclosed, it is difficult for individual defendants–particularly those who arguably are fringe players–to discern and digest the information that allegedly incriminates him and against which he must defend at trial. As is common in these prosecutions, the defendants and their attorneys are unhappy about what they perceive as the vagueness both of the government's conspiracy charge and of the evidence it will use against them to prove the charge.

Predictably, the government opposes providing any bills; perhaps equally predictably, this court will not require any. A bill of particulars under Rule 7(f) is not designed to provide a defendant with a detailed disclosure of the government's witnesses, legal theories or evidentiary detail. *See Wong Tai v. United States*, 273 U.S. 77, 82 (1927).[1] The Court of Appeals for the Seventh Circuit disfavors bills of particulars, deeming them unnecessary whenever the indictment sets forth the elements of the offense charged, the time and place

[1] The Court of Appeals for the Seventh Circuit has hewn to this policy for the last quarter-century. "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). The defendant has no right, under the guise of 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. As the court states in *Kendall*, "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." 665 F.2d at 135, emphasis in original, subquote and citations omitted. 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)(a bill of particulars is not necessary where the information is available in some other satisfactory form). When the grand jury returns a "speaking" indictment, there is less need for a bill of particulars, *United States v. Andrus*, 775 F.2d at 843; *United States v. Glecier*, 923 F.2d at 502.

of the accused's conduct which constituted a violation, and a citation to the statutes violated. *United States v. Fassnacht*, 332 F.3d 440, 446-47 (7th Cir. 2003). Because every valid indictment contains this information, it is difficult to envisage a circumstance in which a defendant in this circuit would be entitled to a bill.

Even so, this court can exercise–and occasionally has exercised–its discretion to order bills when confronted with the trifecta of a squinched indictment in a sprawling case, white squalls of discovery, and squeaky-tight deadlines. But this particular case does not present any of these obstacles.

First, the grand jury returned a speaking indictment that, while not exactly *War and Peace*, is measurably more voluble than the government's usual squib of a drug conspiracy charge. More important is the scope of pretrial discovery: from April through August the government sedulously disseminated its evidence, including grand jury transcripts for about 40 witnesses and interview reports for about 39 more witnesses, which together "form the vast bulk of the government's evidence on the charges in the indictment." *See* dkt. 141 at 4. Finally, this case has moved significantly more slowly than anyone expected, allowing defendants significantly more time than is customary to review and digest the government's myriad disclosures. Indeed, after the defendants filed their motions, they received a three-month windfall when the court postponed trial from September to December. This has given even the fringe players ample opportunity to ferret out whatever small portions of the evidence are directly applicable to them.

A bill of particulars is a blunt tool that neither this court nor the Seventh Circuit favors. Notwithstanding the defendants' generic complaints to the contrary, in this case, no bills of particulars are necessary.

Severance

Defendants Smith, Acosta and Barragon each wants to be tried alone. Smith claims that he is alleged to have played a relatively minor role in the conspiracy, so that the evidence introduced against the other co-defendants will spill over unfairly and cause the jury to convict him "because of his mere association and connection with the co-defendants." *See* dkt. 112. Indeed, Smith claims in his reply brief that "spillover" hardly captures the magnitude of the "evidentiary 'flood' or 'torrent'" he faces at trial as a bit player in a big production. *See* dkt. 143.

Acosta raises three potential concerns: (1) Co-defendants might assert antagonistic, or mutually exclusive defenses; (2) There might be unfair spillover from the proof against the co-defendants, leading to guilt by association; and (3) He will be unable to call co-defendants as witnesses on his behalf in the event they might be able to exculpate him. *See* dkt. 150.

Barragon fears prejudice from: (1) A potential disparity in the evidence between defendants and charges; (2) A potential of being found guilty by association; (3) A potential for cumulation of evidence of various crimes charged; (4) A potential for use of evidence of one crime charged to infer criminal disposition on the part of defendant. *See* dkt. 75. In his

brief, Barragon also raises the possibility of a *Bruton* violation[2], although he offers no specifics. *See* dkt. 76 at 2-3.

Severance motions brought pursuant to F.R. Crim. Pro. 14 are tough to win in a conspiracy case. The joint trial of alleged coconspirators has been the default position in this circuit for at least 40 years. *See, e.g., United States v. Blassingame*, 197 F.3d 271, 286 (7th Cir. 1999); *United States v. Echeles*, 352 F.2d 892, 896 (7th Cir. 1965). As noted in *Blassingame*, strong interests militate toward the joint trial of defendants in a conspiracy prosecution, including reducing the waste of judicial and prosecutorial time, reducing the burdens on witnesses' time from testifying at multiple trials, and reducing the chance that each defendant will attempt to create reasonable doubt by blaming an absent coconspirator. *Id.*

In all but the most unusual circumstances, the economies of a single trial outweigh the danger of possible prejudice to the least culpable defendant, or perhaps to all defendants from "the sheer confusion of a multi-defendant trial." *Id.* Notwithstanding the potential for confusion in a multi-defendant conspiracy trial, not even an alleged fringe player is entitled to severance unless he establishes that he actually is unable to obtain a fair trial while joined to the others. *See id*. This is because a properly-instructed jury is presumed capable of sorting through the evidence and considering each defendant separately. *United States v. Moore*, 363 F.3d 631, 642 (7th Cir. 2004); *United States v. Souffront*, 338 F.3d 809, 831 (7th

[2] *Bruton v. United States*, 391 U.S. 123 (1968)

Cir. 2003). Mere speculation to the contrary cannot rebut these presumptions. *United States v. Lopez*, 6 F.3d 1281, 1286 (7th Cir. 1993).

Smith fears, as the self-proclaimed little guy in the big case–a title to which co-defendant Barragon also lays claim, *see* dkt 76 at 1–that he will be washed away in the storm-swell of evidence admitted against the co-defendants.[3] But the jury will know that it only may convict Smith–or Barragon, or Acosta, *et al.*–if it determines from his own words and acts that he knowingly joined the conspiracy with an intention of furthering its ends; that mere association with conspirators doesn't prove membership in a conspiracy; and that each defendant must receive separate consideration from every other defendant. This is sufficient to protect each small-fry defendant's rights. In any event and as a practical matter, even if this court were to sever the self-anointed little people, much of the evidence they deem irrelevant and prejudicial to them still would be admitted at their trials to prove the existence of the charged conspiracy.

Next, Acosta and Barragon offer nothing but speculation that they might confront a mutually antagonistic defense at trial, or conversely, that a co-defendant might exculpate them if each is tried separately. Merely claiming a mutually antagonistic defense is not enough to obtain severance; indeed, even *establishing* that mutually antagonistic defenses will be presented at trial is not enough to obtain severance: a defendant must show that a joint

[3] Some conspiracy trial defendants *want* to be the shrimp among the sharks because it increases the chance of being overlooked and acquitted during deliberations. *See United States v. Thornton*, 197 F.3d 241, 255 (7th Cir. 1999). It is not this court's place, however, to kibbitz the defendants on trial strategy.

trial will compromise one of his specific trial rights, or that a joint trial will prevent the jury from making a reliable judgment about guilt or innocence. *United States v. Souffront*, 338 F.3d at 831; *United States v. McClurge*, 311 F.3d 866, 871 (7th Cir. 2002). Neither Barragon nor Acosta has done this. Therefore, neither defendant may obtain severance on this ground.

Next, when a defendant requests severance on a claim that a codefendant will exculpate him at a separate trial, the court must consider: (1) Whether the co-defendant's testimony would be genuinely exculpatory; (2) Whether the codefendant would in fact testify; and (3) Whether the testimony would bear on defendant's case. *United States v. Magana*, 118 F.3d 1173, 1190 (7th Cir. 1997). It's not clear what factor (3) adds to factor (1), but no matter: neither Barragon nor Acosta has not made any showing that any of his co-defendants has any exculpatory testimony to offer, or that they would be willing to provide it if they had it.[4] This is not a basis to grant severance.

Finally, although Barragon raised the specter of a *Bruton* violation, he has not pointed to any post-conspiracy, out-of-court co-defendant statements that might be introduced in potential violation of the Confrontation Clause. If such statements exist and are offered at trial, then the court will ensure that the government keeps it promise to redact them properly. *See, e.g., United States v. Sutton*, 337 F.3d 792, 797-98 (7th Cir. 2003). This is sufficient to avoid the need for severance.

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[4] We don't even get to the question of trial order, *see Mack v. Peters*, 80 F.3d 230, 235-56 (7th Cir. 1996), because no co-defendant has made even a conditional offer to offer exculpatory testimony.

In sum, the presumption favoring the joint trial of all of the alleged coconspirators in this case remains unrebutted. All three motions for severance will be denied.

ORDER

Pursuant to 28 U.S.C. § 636(b)(1)(A) and for the reasons stated above, it is ORDERED that all pending motions for bills of particulars and for severance are DENIED.

Entered this 10th day of November, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge