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

UNITED STATES OF AMERICA,

Plaintiff

v.

JOSE LUIS CASTILLO MADRIGAL,

Defendants

REPORT AND RECOMMENDATION

12-cr-62-bbc-04

REPORT

On May 30, 2012, the grand jury returned a two-count indictment charging defendant Jose Luis Castillo Madrigal and three codefendants with engaging in a cocaine trafficking conspiracy. *See* dkt. 10. (The indictment contained a second count charging two other defendants with distributing cocaine). Castillo filed a motion to dismiss the conspiracy charge against him (dkt. 47) and for a bill of particulars (dkt. 43).[1] On January 9, 2013, the grand jury returned a superseding indictment that added some new codefendants to the conspiracy charged in Count 1 and added a new marijuana trafficking conspiracy charge against Castillo and the same group of codefendants. *See* dkt. 84. At a telephonic status conference on January 15, 2013, Castillo, by counsel, orally moved to renew his two pending motions as to Count 1 of the superseding indictment, and for leave to apply his motions and supporting briefs to new Count 3. The government did not oppose this, so the court granted leave, which means that both conspiracy counts now are before the court on Castillo's motion to dismiss.

For the reasons stated below, I am recommending that this court deny both Castillo's motion to dismiss and his motion for a bill of particulars.

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[1] Castillo also filed a motion to identify the informants, dkt. 48, but withdrew it when the government promised to identify any informants it planned to call at trial. *See* dkt. 66.

I. Motion To Dismiss Counts 1 and 3 of the Superseding Indictment

Castillo argues that the elements-only conspiracy counts charged against him in Counts 1 and 3 of the superseding indictment are impermissibly vague, even under the lenient standard of F.R. Crim. Pro. 7(c)(1). Castillo acknowledges that "an indictment parroting the language of a federal criminal statute is often sufficient," dkt. 47 at 2, quoting *United States v. Resendiz-Ponce*, 549 U.S. 102, 109 (2007) and *Russell v. United States*, 369 U.S. 749 (1961), but asserts that this loose standard "is in conflict" with the tightened pleading standards in civil cases announced by the Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). From this precarious analytical perch, Castillo attempts to bootstrap higher still, arguing that F.R. Crim. P. 7(c)(1) imposes an even *tighter* pleading standard than F.R. Civ. P. 8(a)(2); therefore, contends Castillo, the charges against him must fall. What falls is Castillo's overstretched argument, which is chocked in choss.

As the government observes in its response, nothing in *Iqbal* or *Twombly* suggests that their holdings have any application to criminal proceedings. Every lower court confronted with this suggestion has rejected it. *See* Gov. Br. Opp., dkt. 70, at 2-3, *citing United States v. Homaune*, 2012 WL 4858987 (D. D.C., Oct. 15, 2012); *United States v. Diallo*, 2009 WL 4277163 (S.D.N.Y., 2009); *United States v. Northcutt*, 2008 WL 162753 (S.D. Fla. 2008); *see also United States v. Mensah*, 2012 WL 2466393 (N.D. Okla. 2012). As a result, now it is easier for a civil defendant to dismiss a terse complaint than for a criminal defendant to dismiss a terse indictment. This is a legally valid dichotomy unless and until the Supreme Court overrules or unambiguously narrows its holdings in *Resendiz-Ponce* and *United State v. Hamling*, 418 U.S. 87, 117 (1974)(an indictment is sufficient if it states the elements of the charged offenses, apprises the defendant of the charges and enables him to plead the judgment as a bar to future

prosecution for the same offense). *See also United States v. Dooley*, 578 F.3d 582, 589 (7th Cir. 2009).

Castillo acknowledges that the Supreme Court has admonished lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Castillo suggests that this process has to start somewhere, what better case than his? But there is no reason for this court to conclude that *Resendiz-Ponce* and *Hamling* no longer are good law. Terse, conclusory indictments are easily distinguishable from terse, conclusory civil complaints. Each true bill has been vetted and voted on by a grand jury that reviewed evidence from which it found probable cause that the defendant committed the charged offense. True, cynics view federal grand juries as rubber stamps for the prosecution, *see, e.g., Miller v. Brunsman*, 599 F.3d 517, 527 (6th Cir. 2010)(Martin, J., concurring); *United States v. Vierecki*, 51 F.3d 276 (Table) (7th Cir. 1995). Nonetheless this screening process surpasses *Twombly*'s threshold that a civil complaint's "factual allegations must be enough to raise a right to relief above the speculative level." 550 U.S. at 555; *see also id.* at 556 (declining to impose "a probability requirement at the pleading stage."); *cf. Iqbal*, 556 U.S. at 668-69 ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.")

Here, Count 1 and Count 3 of the superseding indictment each states the elements of the charged offense, apprises Castillo and his codefendants of the charge and enables them to plead the judgment as a bar to future prosecution for the same offense. This is enough to survive a dismissal motion. In previous cases this court has questioned the government's practice of returning elements-only indictments as opposed to speaking indictments, but this concern is pragmatic, not legal. The Court of Appeals for the Seventh Circuit has consistently held that an indictment charging a drug conspiracy under 21 U.S.C. § 846 suffices if it sets forth the

existence of a drug conspiracy, the operative time of the conspiracy, and the statute violated. The indictment does not even need to allege an overt act. *United States v. Singleton*, 588 F.3d 497, 499-500 (7th Cir. 2009); *see also United States v. White*, 610 F.3d 956, 958-59 (7th Cir. 2010) (indictment that tracks the words of statute to state elements of the crime generally is acceptable as long as there are enough particulars so that defendant is aware of the specific conduct at issue).

Finally, the government notes almost in passing that a defendant challenging the sufficiency of an indictment must demonstrate prejudice from its alleged deficiencies. *See United State v Dooley*, 578 F.3d at 589, *citing United States v. Castaldi*, 547 F.3d 699, 703 (7th Cir. 2008). Here, Castillo has not attempted to argue or to prove actual prejudice from the government's terse superseding indictment (although he lightly brushes the topic in his motion for a bill of particulars which I address below) .

In light of all this, defendants' invocation of *Twombly* and *Iqbal*, while creative, goes nowhere. There is no basis to dismiss the conspiracy counts in the superseding indictment.

II. Motion for a Bill of Particulars

As something of a corollary to his dismissal motion, Castillo has moved pursuant to F.R. Cr. P. 7(f) for a bill of particulars from the government (dkt. 43). Castillo asks the government to identify: (1) all acts (including time, date and persons present) committed by him that support the charged conspiracy; (2) the same information about acts by codefendants that could attributed to Castillo; (3) the dates when Castillo is alleged to have joined and then left the two conspiracies; and (4) "What Mr. Castillo agreed to do as a member of the conspiracy." Castillo asks for this information because he claims that the indictment does not adequately apprise him

of the nature of the conspiracy charges to enable him to prepare for trial: the charges do not describe any over acts committed by Castillo or any one else, nor do the charges *describe* any criminal agreement into which he or anyone else entered that supported the charged conspiracies.

Castillo acknowledges having received from the government "a mountain of recorded calls from wiretaps," 1168 pages of documents, several hours of recorded meetings and video surveillance, but he claims that this deluge of information fails to provide him with the information he needs to prepare a defense. Dkt. 43 at 2-3; *see also* Brief in Support, dkt. 64, at 4-5. Citing to a 14-year old district court decision from the District of Columbia, Castillo contends that the government should provide the names of all persons the government would claim at trial are his coconspirators, the approximate dates and locations of any meetings or conversations in which any defendant participated, the approximate date on which each defendant allegedly joined the conspiracy as well as the overt acts in which Castillo at least participated, if not all alleged coconspirators. The D.C. court disclosure of this information because "a bill of particulars is all the more important in a narcotics conspiracy case because the indictment itself provides so little detail." *See United States v. Ramirez*, 54 F.Supp.2d 25, 30 (D.D.C. 1999).

In the Seventh Circuit, a court's analysis of a defendant's request for a bill of particulars should be similar to its analysis of the defendant's challenge to the sufficiency of the indictment: "in both cases, the key question is whether the defendant was sufficiently apprised of the charges against him in order to enable adequate trial preparation." *United States v. Blanchard*, 542 F.3d 1133, 1140 (7th Cir. 2008), citations omitted. Information relevant to the preparation of a defense includes the elements of each charged offense, the time and place of the accused's

allegedly criminal conduct, and a citation to the statutes violated. When the indictment fails to provide the full panoply of such information, then a bill of particulars "is nonetheless unnecessary if the information is available through some other satisfactory form, such as discovery." *Id.* In *Blanchard*, the court found that a bill of particulars was not required because the defendant had had ample access to the information necessary to prepare his defense: although the indictment was "somewhat sparse," the defendant had been the beneficiary of extensive pretrial discovery, which was "more than sufficient" to enable the defendant to prepare for trial. *Id.* at 1140-41.

Blanchard is simply the latest case demonstrating this circuit's longstanding antipathy toward bills of particulars, which are essentially viewed as unnecessary whenever the indictment sets forth the elements of the offense charged, the time and place 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.[2]

In opposing Castillo's motion (dkt. 69), the government cites to most of the case law set forth above, then points to its "exceedingly thorough" post-indictment disclosures as adequate to apprise Castillo of the charges against him and to prepare an adequate defense. Looking at

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[2] "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. "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, 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).

the flipside of this same coin, the government is unsympathetic to what it views as Castillo's complaint that he has received too *much* discovery, which prevents him from discerning how he is alleged to have been involved in the charged conspiracies.

Actually, Castillo's concern is legitimate-this court routinely deals with similar complaints of "document dumps" in civil litigation–and it would resonate with this court if we were on a tighter schedule. But the government provided the bulk of its disclosures last June, including all of its evidence regarding the newly-charged marijuana trafficking conspiracy. *See* June 11, 2012 scheduling order (government to provide Rule 16 disclosures by June 15, 2012, with a continuing disclosure obligation throughout this case). Castillo and his attorney already have had over seven months already to cull through and pore over the government's disclosures and they likely will get several more months due to the delay caused by codefendant Rosalina Velazquez's competency issues. *See* January 17, 2013 order, dkt. 88.

So Castillo has received virtually all of the government's evidence and has been given an extraordinary amount of time to review it and analyze it. This obviates his claimed need for a bill of particulars. As the government notes, if Castillo actually is seeking to discern the government's theory of its case against him, then he is not entitled to learn this by means of a bill of particulars; in a related point, to the extent that Castillo might be claiming that he is entitled to more information because nothing in the government's evidence establishes the elements of the two conspiracy charges against him, this would be a jury question. The bottom line is that Castillo is not entitled to a bill of particulars in this case.

RECOMMENDATION

Pursuant to 42 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny the motion to dismiss Counts 1 and 3 of the superseding indictment and deny the motion for a bill of particulars.

Entered this 28th day of January, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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January 29, 2013

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Re: United States v. Jose Luis Castillo Madrigal
Case No. 12-cr-62-bbc-04

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before February 19, 2013, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by February 19, 2013, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**