

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES)	
)	
v.)	Case No. 1:22-cr-134
)	
SAHADY)	
_____)	

DEFENDANT’S MOTION FOR A BILL OF PARTICULARS

Defendant Mark Sahady moves for a bill of particulars, in accordance with Rules 7(f) of the Federal Rules of Criminal Procedure. A bill of particulars will adequately apprise Defendant of the scope of the Government’s allegations and allow the Defendant to prepare his defense, avoid unfair and prejudicial surprise at trial, and sufficiently protect him against double jeopardy concerns.

RELIEF REQUESTED

Defendant requests that the Court order the Government to specify in the form of a bill of particulars the act or acts the Government intends to prove constituted a violation of 18 U.S.C. § 1512(c)(2) on January 6, 2021.

INTRODUCTION

Defendant was arrested on or about January 18, 2021, but was first indicted on a felony charge on April 5, 2023, more than two years after his arrest, pursuant to a document filed as a “Third” Superseding Indictment (the “Indictment”) but was in fact the only indictment filed against Defendant. COUNT ONE of the Indictment charges Defendant with violating 18 U.S.C. § 1512(c)(2) (hereinafter “Section 1512”). The entirety of Count One reads as follows:

On or about January 6, 2021, within the District of Columbia, MARK SAHADY attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress’s

certification of the Electoral College vote as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. §§ 15-18.

Dkt. 65. No statement of facts was included or filed concurrently with the Indictment. Defendant is entitled to a bill of particulars from the Government identifying the act or acts that allegedly constituted the crime of corruptly obstructing, influencing, and/or impeding an official proceeding. For the reasons set forth below, the Court should order the Government to specify, in the form of a bill of particulars, the act or acts which the Government intends to prove constituted Defendant's knowing and intentional violation of 18 U.S.C. § 1512(c)(2).

ARGUMENTS AND AUTHORITIES

Although an indictment need include only a plain, concise, and definite written statement of the essential facts constituting the offense charged, a court may direct the government to file a bill of particulars clarifying an indictment's allegations. Fed. R. Crim. P. 7(c)(1), (f).¹ “A bill of particulars can be used to ensure that the charges brought against a defendant are stated with

¹ The “plain, concise” statement of the “essential facts” constituting the offense charged must set forth sufficient information to apprise the Defendant of the charges against him in order to satisfy Constitutional due process commands. *See Hamling v. United States*, 418 U.S. 87, 117-18 (1974) (“Undoubtedly, the language of the statute may be used in the general description of an offence, ***but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.***”) (emphasis added); *see also United States v. United States Savings & Loan League*, 9 F.R.D. 450, 452 (D.D.C. 1949) (charge must be set forth with “such particularity as will reasonably indicate the exact offense which the accused is alleged to have committed and which will enable him intelligently to prepare his defense and, if found guilty, to plead his conviction in a subsequent prosecution for the same offense”). Reliance on the words of a statute, without more, does ***not*** satisfy the Constitution if the words standing alone do not provide sufficient notice of the charges against the Defendant. *See* Dkt. 88 at 7. Here, as Defendant has shown, the Indictment is constitutionally infirm and the felony charges against Defendant must be dismissed. Dkt. 88; Dkt. 90. *See also Savings & Loan League* 764 F.Supp.2d 173 (the indictment must clearly designate “the specific criminal act for which the accused must answer”). The present motion for a Bill of Particulars is being filed to preserve Defendant's rights in the event the Court is nonetheless persuaded by the Government's argument that the Indictment is not fatally flawed, in which case due process still requires that the Government identify in some other manner the specific conduct that allegedly violates 18 U.S.C. § 1512(c)(2).

enough precision to allow the defendant to understand the charges, to prepare a defense, and perhaps also to be protected against retrial on the same charges.” *United States v. Butler*, 822 F.2d 1191, 1193 (D.C. Cir. 1987). But it “is not a discovery tool or a devise [sic] for allowing the defense to preview the government's theories or evidence.” *United States v. Ramirez*, 54 F.Supp.2d 25, 29 (D.D.C. 1999). A bill of particulars “properly includes clarification of the indictment, not the government's proof of its case.” *United States v. Martinez*, 764 F.Supp.2d 166, 173 (D.D.C. 2011) (cleaned up).

Here, Defendant does not seek to elicit information about how the Government will make its case or its trial strategy, but rather seeks information specifying which specific act or acts he committed that the Government alleges were in violation of Section 1512. *See State of Georgia v. Pennsylvania R.R. Co.*, 65 S. Ct. 1560 (1945); *United States v. Michel*, No. CR 19-148-1 (CKK), 2019 WL 5797669, at *17 (D.D.C. Nov. 6, 2019) (bill of particulars appropriate where Defendant requires specific information to investigate charges, build his defense and avoid unfair surprise at trial); *United States v. Ramirez*, 54 F. Supp. 2d 25, 30 (D.D.C. 1999) (bill of particulars required for disclosure of dates and locations of conversations constituting criminal acts not already identified in the indictment); *United States v. Espy*, 989 F. Supp. 17, 34 (D.D.C. 1997), *aff'd in part, rev'd in part on other grounds*, 145 F.3d 1369 (D.C. Cir. 1998) (granting defendant's motion for a bill of particulars to the extent that it seeks from the government disclosure of the conduct, date, place and substance of each official act referred to in the indictment) .

Count One alleges that Defendant violated Section 1512(c)(2) but gives no details. Further, it was not accompanied by a statement of facts. The first charging document filed on February 19, 2021, Dkt.9, was an Information that did not include any felony charges, and was supported by a Statement of Facts, Dkt. 1-1, filed on January 18, 2021. The Statement of Facts is devoid of any

facts that support a felony charge. The content of the Statement of Facts is almost entirely a generic narrative of the events of January 6 and social media posts that show that Sahady was present in Washington, D.C. on January 6. The only sentence in the Statement of Facts that supports any crime is on page 4, “One such photograph shows Sahady and Known Person 1 standing together in the Capitol building during the invasion” accompanied by a photograph of Sahady in the Capitol. No case supports the proposition that merely being present inside the Capitol on January 6, without more, constitutes conduct that “corruptly influenced or obstructed” an official proceeding. The Court should not make new law by permitting conviction under Section 1512(c)(2) based on the mere presence inside the Capitol.

The second charging document filed March 22, 2022, a “Superseding Information,” Dkt. 37, is identical to the first information, and was not accompanied by a statement of facts. The third charging document filed exactly one year later on March 22, 2023, a “Second Superseding Information,” Dkt. 57, only added one misdemeanor count. It was also not accompanied by a statement of facts. The fourth charging document filed a few days later on April 5, 2023, the “Third Superseding Indictment,” Dkt. 65, is the first indictment and charged Sahady for the first time with a violation of 18 U.S.C. § 1512(c)(2). The Indictment was not accompanied by a statement of facts.

The Government noted in its brief that “the Indictment was partially filed in response to *new evidence*, and that new evidence’s effect on the government’s view of pre-existing evidence. *This new material*, which arose through - and in tandem with - typical document review, witness interviews, and strategic assessments that accompany trial preparation, *was presented to the grand jury* to complement the plethora of other evidence in this case.” Dkt. 73 at 20. (emphasis added). As noted, other than the “new material” allegedly presented to the grand jury, the “plethora” of evidence consisted of a photograph of Sahady inside the Capitol building. But fatally to the

[REDACTED]

[REDACTED] None of this is “new evidence,” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] did not vary or add to this pre-existing evidence in *any* way.

² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Though the Government is not required to provide the Grand Jury with exculpatory evidence, the Government is not permitted to deliberately mislead the Grand Jury.

I agree with the Government that the prosecutor is not required to place all exculpatory evidence before the grand jury. A grand jury proceeding is an ex parte investigatory proceeding to determine whether there is probable cause to believe a violation of the criminal laws has occurred, not a trial. Requiring the prosecutor to ferret out and present all evidence that could be used at trial to create a reasonable doubt as to the defendant's guilt would be inconsistent with the purpose of the grand jury proceeding and would place significant burdens on the investigation. *But that does not mean that the prosecutor may mislead the grand jury into believing that there is probable cause to indict by withholding clear evidence to the contrary. I thus agree with the Department of Justice that, "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person."* U.S. Dept. of Justice, United States Attorneys' Manual ¶ 9-11.233, p. 88 (1988).

United States v. Williams, 504 U.S. 36, 69-70 (1992) (emphasis added).

Presenting “old” and misleading evidence for the first time to the Grand Jury – after two superseding misdemeanor informations were returned while the Government was in possession of material [REDACTED] – cannot transform such material into “new” evidence. The Government’s representation to this Court to the contrary is false.

Moreover, if the Government’s new theory, developed after it had considered the evidence for over two years, is that [REDACTED] provide sufficient evidence of a felony, the Government does not specify which element [REDACTED] supports the new charge against Sahady. As in *Ramirez* and *Espy*, the Government should disclose what specific conversation creates criminal liability and what specific acts constitute the corrupt influencing or obstruction of an official proceeding.

Indeed, the Government itself still does not appear to know what act constitutes the felony charged. [REDACTED]

The Government's conduct here is wholly inappropriate. The Government cannot, after two years, suddenly decide that it needs additional evidence for existing or new charges, [REDACTED]

[REDACTED] Such conduct violates Constitutional speedy trial concerns and strongly suggests that the Government is vindictively and selectively pursuing Sahady because he rejected an earlier plea offer.

A bill of particulars serves three important functions: (1) to ensure that the charges brought against a defendant are stated with enough precision to allow the defendant to understand the charges, (2) to aid the Defendant in preparing his defense, and (3) to be protect the Defendant against double jeopardy. *United States v. Butler*, 822 F.2d 1191, 1193 (D.C. Cir. 1987). Here, Sahady does not understand what act he is accused of doing that violated Section 1512(c)(2), and accordingly, he does not understand the charge against him, and he cannot prepare his defense against it, as an ordinary person would not have an intuitive understanding of what is at issue at

trial. As Sahady has shown in detail, these flaws are fatal to the indictment itself, which must be dismissed under long-standing criminal practice enshrined by the United States Supreme Court. *See* Dkt. 88; Dkt. 90. However, even if the Court considers that January 6 cases constitute a jurisprudential exception to the normal rules of criminal procedure, the Government's failure to identify in any charging document or formal statement of facts the specific conduct that allegedly establishes a violation of Section 1512(c)(2) requires a Bill of Particulars.

Moreover, because it is unclear which act he is being tried for, Sahady has legitimate double jeopardy concerns. If the Government can keep evidence in its pocket for two years and then use that old evidence for a new felony charge, the Defendant has no idea what other charges it may choose to bring at some later date based on the evidence in the Government's discovery.³ As the Court is well aware, hundreds of January 6 defendants have been charged with violating 18 U.S.C. § 231(a)(3) for obstructing a law enforcement officer during a civil disorder. The Government's lack of specific facts vaguely suggests that Sahady's very presence in the Capitol combined with certain text messages [REDACTED] violates Section 1512(c)(2). If that is the Government's position, it should clearly state which specific messages constitute the basis for a felony charge.

But if the Government can combine Sahady's presence in the Capitol with previously disclosed but never used evidence, and without specifying what evidence constitutes a basis for the violation of Section 1512(c)(2), it could use other unspecified evidence from the discovery produced and present *that* as a basis for a charge under 18 U.S.C. § 231(a)(3), leaving Sahady

³ [REDACTED]

There also appears to be a genuinely vindictive and selective prosecution of Sahady where the Government is scouring evidence that has been in its possession for two years to support new charges.

exposed to subsequent prosecution for the same body of facts that allegedly constitutes a violation of 18 U.S.C. § 1512(c)(2). Sahady seeks a Bill of Particulars prior to his trial to compel the Government to bring forth in one statement of facts with precision the specific “acts” performed by Sahady that constitute the crime of “corruptly influencing or obstructing” an official proceeding and any specific conversations the Government believes support a felony charge so that Sahady may prepare his defense on *that* set of facts and protect himself from the very real possibility of double jeopardy.

CONCLUSION

For the reasons set forth above, the Court should order the Government to provide a bill of particulars setting forth the specific act or acts that allegedly violated 18 U.S.C. § 1512(c)(2).

Dated: October 27, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being served on opposing counsel via email on

October 27, 2023

/s/ Jonathan Gross