UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITES STATES OF AMERICA

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant.

_______________________________________/

DEFENDANT'S REPLY IN SUPPORT OF
HIS MOTION FOR A BILL OF PARTICULARS

The Defendant Eric Dean Sheppard, by and through his undersigned counsel, submits his Reply in support of his Motion for a Bill of Particulars. [ECF No. 37].

INTRODUCTION

The Government's Opposition to the Defendant's Bill of Particulars is based on a wrong premise— that the defense is seeking: (1) evidence pre-trial it is not entitled to; and (2) the government's theory of the case. The defense is not seeking either. It is seeking essential information necessary to prepare a defense. Specifically, Defendant seeks for the Government to identify the alleged misrepresentation(s) that resulted in the charges in the Indictment. The Government submits that it has provided over 11,000 pages of discovery and what the defense needs is within those 11,000 pages. The defense should not be required to conduct a fishing expedition, nor should the defense have to rely on its own assumptions and speculations to guess what exactly in the 11,000 pages formed the basis of the charges. Defendant seeks information that is necessary for the preparation of his defense and to minimize surprise at trial, and therefore, this Court should compel the Government to produce it.

A BILL OF PARTICULARS IS NECESSARY
TO PROTECT MR. SHEPPARD'S CONSTITUTIONAL RIGHTS

In its Response, the Government advances three main objections to the requested Bill of Particulars: (1) the defense is using a bill of particulars as an improper discovery device, where the defense is asking the Government to reveal its theory of the case[1]; (2) that the Indictment is sufficient to inform the Defendant of the charges; and (3) that what the defense needs is within the 11,000 pages of discovery the Government produced. The Government's arguments fail because the defense is not asking the Government to reveal its theory, nor is the defense asking to view the evidence the government intends to prove at trial— the defense is merely seeking basic information necessary for the preparation of his defense and to avoid surprise at trial.

The Indictment <u>is insufficient</u> to inform the defense of the basis for the charges in the Indictment. The Government contends that the Indictment generally describes the types of misrepresentations made, which puts the Defendant on notice of the misrepresentations contained in each of the EIDL and PPP loan applications and that "the Defendant simply needs to review the loan applications and files [] to obtain the details." [ECF No. 38, Response at 8-9]. As to the diversion of proceeds and name of the accomplices, the Government argues that the Defendant can look at the bank documents produced in discovery to determine whether the EIDL loan money was used for a permitted or unpermitted purpose, and that the names of the unidentified accomplices are also somewhere in the loan application files in discovery. [ECF No. 38, Response at 11, 13]. The problem with the Government's assertions here is that first, the Indictment is completely insufficient and <u>does not inform the Defendant of what misrepresentations for each loan</u>

[1] "Notwithstanding, even if in providing those details in a bill of particulars, the government's evidence or theories are somehow disclosed, the bill of particulars still might be proper." *Elso v. United States*, No. 03-20272-CR, 2010 WL 8675397, at *30 (S.D. Fla. Dec. 17, 2010).

application are the basis of each count.[2] Second, the Government is essentially telling the defense to "Go Fish!" in the 11,000 pages of discovery to locate what misrepresentations the Government relied on in obtaining the Indictment and which will have to be defended at trial. This burden should not be placed on the defense and the defense should not have to rely on its own assumptions and speculations on a requisite element of the offense.[3] The potential prejudice to the Defendant here is immeasurable, whereas there is no prejudice, and very little burden, to the Government to disclose the misrepresentations that are the basis of the charges. Doing so would not be disclosing the Government's theory of the case, it would be advising the Defendant what he is charged with so that he can properly defend against it.

Further, the Government argues that it is not required to tell the defense of the misrepresentations because the evidence is based on the Defendant's own statements, and therefore he cannot claim unfair surprise at trial. *Bickers*, a case the Government relies on, explains: "opposition to a bill of particulars is not properly made out by a claim that the defendant knows what he did, and therefore, has all the information necessary." *United States v. Bickers*, No. 1:18-CR-98-SCJ-LTW, 2019 WL 7559292, at *7 (N.D. Ga. Sept. 17, 2019) (quoting *United States v. Moore*, 57 F.R.D. 640, 643 (N.D. Ga. 1972)) (internal quotations omitted); *See also Elso v. United States*, No. 03-20272-CR, 2010 WL 8675397, at *30 (S.D. Fla. Dec. 17, 2010) (citing same). Thus,

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[2] The Indictment alleges that "[t]hese false and fraudulent PPP loan and EIDL applications included, *among other things*, falsified tax returns that purported to substantiate nonexistent business profits, and misrepresentations about the borrowing entities' revenues, monthly payroll, and number of employees." [ECF No. 1, Indictment at 5-6 (¶ 5); ECF No. 38, Response at 2].

[3] **"[W]here an indictment fails to set forth specific facts in support of requisite elements of the charged offense, and the information is essential to the defense, failure to grant a request for a bill of particulars may constitute reversible error."** *United States v. Masino*, No. 3:16CR17-MCR, 2017 WL 6028374, at *1 (N.D. Fla. Nov. 29, 2017) (citing *United States v. Cole*, 755 F.2d 748, 760 (11th Cir. 1985)). (emphasis added).

the Government cannot place the burden on the defense to figure out the basis of the charge because the defendant allegedly made the misrepresentations. This is inapposite to the purpose of a bill of particulars which is to inform the defendant of the charges against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same office.

In its Response, the Government relies mainly on two cases, *Bickers* and *Palacios*,[4] to support their objections. Both are easily distinguishable. In *Bickers*, **unlike here**, the defendant sought information it was not entitled to pre-trial by asking the Government questions that went to their theory of the case.[5] *Bickers*, at *5, 8-9. The court in *Bickers* held that a bill of particulars was not necessary because the Indictment was "very exhaustive" and the "amount of detail in the Indictment together with the voluminous discovery produced by the Government," provided sufficient information about the nature of the charges. *Id*. Here, <u>unlike in *Bickers*</u>, Defendant is not asking the Government to reveal information he is not entitled to. Defendant is not asking the Government to detail or explain how the statements are false or divulge the Government's theory. Further, unlike in *Bickers*, the Indictment here is not extremely detailed or "very exhaustive" as to the basis for each count. Indeed, the Indictment is insufficient to enable Defendant to prepare for trial and avoid unfair surprise.

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[4] *United States v. Palacio*, No. 21-20301-CR, 2021 WL 4066894 (S.D. Fla. Sept. 7, 2021).

[5] The defendant in *Bickers* specifically asked the Government: (1) what information the Government used to conclude that Defendant had any agency or authority with the City to influence or cause the award of contracts outside of her position and/or scope of employment; (2) in what way did Defendant represent Mitchell and Richards businesses to obtain City contracts; (3) how is it that Defendant's financial disclosure statement made retrospectively was made in furtherance of a conspiracy; (4) how did the filing of these financial disclosure statements further the conspiracy; and (5) how did filing false disclosure statements with the City cause the electronic transmission of her salary to be paid. *Bickers*, at *8.

The Government's reliance on *Palacio* is equally misplaced. In *Palacio*, unlike here, the defendant moved for a bill of particulars as to the conspiracy count. Unlike in the case at bar, in *Palacio*, the Indictment did provide "detailed allegations" and the Government did advise the defendant of specific false statements. Unlike here, the defendant in *Palacio* asked the Government to provide information the defense was not entitled to: specific details on the materially false statements, to whom they were made, and the victims' names. *United States v. Palacio*, No. 21-20301-CR, 2021 WL 4066894, at *1-2 (S.D. Fla. Sept. 7, 2021). Defendant here is not seeking information he is not entitled to; <u>he is merely seeking the misrepresentations that are the basis and element of the wire fraud counts.</u>

<u>CONCLUSION</u>

The Government claims the defense is seeking information that it is not entitled to. As described above, that is not the case, and this Court should compel the Government to provide a bill of particulars to enable the Defendant to prepare a proper defense and avoid surprise at trial. District courts have broad discretion in deciding whether a bill of particulars should be granted, and this Court should exercise that discretion in favor of the defense to ensure the Defendant is informed of the charges against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution. *Palacio*, No. 21-20301-CR, 2021 WL 4066894, at *2.

WHEREFORE, Defendant, Eric Dean Sheppard, respectfully requests that this Court direct the Government to provide a Bill of Particulars, and for such other and further relief as may be just and proper.

Dated: December 29, 2022

Respectfully submitted,

NELSON MULLINS
One Biscayne Tower, 21st Floor
2 S. Biscayne Boulevard
Miami, FL 33131
Telephone: 305.373.9400
Facsimile: 305.995.6449

By: /s/ Jayne C. Weintraub
Jon A. Sale
Florida Bar No. 246387
Jayne C. Weintraub
Florida Bar No. 320382
Jonathan Etra
Florida Bar No. 686905
Mark F. Raymond
Florida Bar No. 373397
Christopher Cavallo
Florida Bar No. 0092305

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 29, 2022, the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

/s/ Jayne C. Weintraub
Jayne C. Weintraub