IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA v. JERRY BAPTISTE, *et al*.	Criminal Action No. 1:20-CR-296-JPB-CMS-13

DEFENDANT BAPTISTE'S MOTION FOR A BILL OF PARTICULARS

Defendant Jerry Baptiste ("Defendant"), through counsel, pursuant to the Rule 7(f) of the Federal Rules of Criminal Procedure respectfully moves this Court to order the Government to file a Bill of Particulars identifying the actual electronic communication(s) or transmission(s) that the Government intends to prove at trial as the execution of the bank fraud scheme charged in Count Ten, the execution of the wire fraud scheme charged in Count Eleven, and the making of a false statement to a financial institution charged in Count Thirty-Eight.

SECOND SUPERSEDING INDICTMENT

Count Ten alleges that on May 20, 2020, Defendant and at least six other individuals executed the alleged bank fraud scheme in violation of 18 U.S.C. § 1344 "by causing false IRS Form 941s and a false bank statement for Transportation Management Services Inc. to be transmitted to Financial Institution 1 and making false representations and certifications to Financial Institution 1

regarding Transportation Management Services Inc.'s payroll costs and the purpose of the applied-for PPP loan." (Doc. 290 at ¶ 95.)

Count Eleven alleges that on May 20, 2020, Defendant and at least six other individuals executed the alleged wire fraud scheme in violation of 18 U.S.C. § 1343 by "caus[ing] to be transmitted by means of a wire communication in interstate and foreign commerce certain writings, signs, signals and sounds, namely, a PPP Borrower Application Form containing false information related to Transportation Management Service's Inc.'s payroll obligations and the purposes of the applied-for PPP loan, and attaching falsified tax documentation for each quarter of 2019 and a falsified bank statement." (*Id.* at ¶ 97.)

Count Thirty-Eight alleges the May 20, 2020, making of a false statement to a financial institution in violation of 18 U.S.C. § 1014. Specifically, Count Thirty-Eight alleges that on May 20, 2020, Defendant at least 6 other individuals "knowingly made a false statement for the purpose of influencing the actions of the financial institutions identified below, the accounts of which were insured by the FDIC, in connection with PPP loan applications by the business identified below, in that the Defendants did the following . . . . . signed and initialed a PPP Borrower Application Form for Transportation Management Services, Inc. falsely certifying" the length of time that the business had been in existence, that the funds would be

use for permitted PPP purposes, and that the application and all supporting documents were true and correct." (*Id.* at ¶ 181.)

LEGAL STANDARDS

Rule 7 of the Federal Rules of Criminal Procedure requires only that an indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment is sufficient if it tracks the wording of the statute, so long as the language sets forth the essential elements of the crime. *See United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992).

A defendant "may still be entitled to additional detail from the government through a bill of particulars." *United States v. Pendergrass*, No. 1:17-CR-224-AT-CMS, 2020 WL 716747, at *1 (N.D. Ga. Jan. 22, 2020), *report and recommendation adopted*, 2020 WL 709283 (N.D. Ga. Feb. 12, 2020). "A district court should require the government to file a bill of particulars where it is necessary '(1) to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense; (2) to minimize surprise at trial; and (3) to enable the defendant to plead double jeopardy in the event of a later prosecution for the same offense.'" *Id.* (quoting *United States v. Warren*, 772 F.2d 827, 837 (11th Cir. 1985)). "A bill of particulars, properly viewed, supplements an indictment by providing the defendant with information *necessary* for trial

preparation." *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) (emphasis in original).

ARGUMENT AND AUTHORITY

The Counts alleged against Defendant allege the material that was wired or transmitted, but do not allege the actual transmission(s) or electronic communication(s) that the Government intends to prove at trial to establish Counts Ten, Eleven, and Thirty-Eight. Particularization of this information is necessary to the preparation of Defendant's defense and should be identified by the Government in a Bill of Particulars.

An actual communication, whether by electronic communication or transmission to a financial institution, is an essential element of each of the crimes at issue. An interstate wire communication is an essential element of the crime of wire fraud. *See* § 1343; *United States v. Estepa*, 998 F.3d 898, 908 (11th Cir. 2021) (to convict a defendant of wire fraud the government must prove "the use of the interstate ... wires in furtherance of" the scheme). Section 1014 requires proof that a false statement or report was "made" to a financial institution among other elements. *See* § 1014; *United States v. Williams*, 785 F. App'x 692, 699 (11th Cir. 2019). Similarly, bank fraud requires proof that false statements or representations were "made" to obtain property of a financial institution. *United States v. De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001). These essential elements should be

alleged in the indictment or in a bill of particulars. But while the SSI alleges the material that was wired or transmitted, it does not sufficiently allege the actual electronic communication(s) or transmission(s) of such material.

Identification of the precise transmission(s) or electronic communication(s) is necessary for Defendant to prepare to address one of the essential elements of each of the crimes at issue. For example, the bare allegations in the SSI do not provide Defendant with sufficient information to prepare to test whether the wire at issue traveled in interstate commerce – indeed, the bare allegation does not allege that the material traveled from any one particular place to any another. Similarly, the SSI does not allege sufficient information for Defendant to prepare to contest the making of the actual false statement at issue – again, the bare allegation does allege any information showing that the statement was actually made, i.e., by who, how, and to who it was actually made. So too with the bank fraud count, in which the SSI alleges the transmission of alleged false material to a financial institution, but nothing sufficient to be prepared to meet at trial regarding the actual transmission itself. For each of these, the SSI simply alleges the statutory language, which is insufficient here.

Based on these bare allegations, Defendant cannot prepare to contest at trial whether the wire actually traveled in interstate commerce, or whether the alleged false documents and statement was transmitted or made to a financial institution

(as opposed to some other entity). As another example, to the extent that the Government relies on the actual transmission(s) or electronic communication(s) to establish venue, Defendant has no ability to assess whether venue has been properly laid in this case.[1] Defendant cannot tell from the SSI whether the Government intends to prove one, two, or three separate wires or transmissions at trial for each of the counts at issue. Defendant should not be forced to guess or speculate based on the similar date allegation for all three.

The issue raised here is all the more important because of the multiple entities involve in the making of the Transportation Management Services ("TMS") loan alleged in the counts against Defendant. The SSI alleges that the TMS loan involved a financial institution, Cross River Bank, but that another entity, Blue Vine, which was not a financial institution, acted as "a service provider" and "review[ed]" loan applications. (Doc. 290 at ¶ 35.) Yet another entity, the U.S. Small Business Administration, was also involved in some unspecified fashion in the making of the TMS loan. (*Id.* at ¶ 22.) Although the SSI does not allege details about that involvement, the Government produced the TMS loan application and related documents in discovery only from the SBA, not from Cross River Bank or Blue Vine. The Court should require the Government to

[1] One can scrutinize the SSI in vain for any factual allegations supporting venue for the charges against Defendant beyond the repetitive bald allegation "In the Northern District of Georgia and elsewhere."

particularize the specific wire(s) and transmission(s) that it intends to prove so that Defendant can prepare for trial and not have to guess the specific wire(s), transmission(s), and entities at issue.

Courts have required particularization of indictments that fail to allege the information requested here. In *United States v. Kernell*, No. 3:08-CR-142, 2010 WL 1408438, at *4 (E.D. Tenn. Apr. 2, 2010), the Court found that "particularization of the electronic transmissions that form the basis of Count 2 [a wire fraud count] is appropriate so that the Defendant can prepare to defend this count at trial." Similarly, in *United States v. Reale*, No. S4 96 CR. 1069 (DAB), 1997 WL 580778, at *14 (S.D.N.Y. Sept. 17, 1997) the court granted the defendants "request for a Bill of Particulars identifying the specific mailings and wire transfers and the approximate dates alleged in Counts Nine through Eleven on which they occurred." In *United States v. Dorfman*, 335 F. Supp. 675, 680 (S.D.N.Y. 1971), addressing a request to particularize wire fraud counts, the court concluded that "[t]he use of telephonic communication is a jurisdictional element in these counts. If the defendant can successfully move against these counts for jurisdictional deficiency, he should be given the means to do so." *See also United States v. Crisona*, 271 F. Supp. 150, 156 (S.D.N.Y. 1967) (ordering the government to provide a bill of particulars "[w]ith respect to each count alleging the transmittal of a telephone call, telegram, or letter in furtherance of the alleged

scheme to defraud, the identity of the person or persons who made the telephone call or sent the telegram and letter, the identity of the person or persons, or the number to which, the telephone call was made, [and] the identity of the addressee of the telegram or letter.").

CONCLUSION

For all of the foregoing reasons, the Court should order the Government to file a Bill of Particulars identifying the specific wiring(s) and transmission(s) alleged in Counts Ten, Eleven, and Thirty-Eight that the Government intends to prove at trial.

Respectfully submitted this 14th day of March, 2022.

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LOCAL RULE 7.1D CERTIFICATE

The undersigned hereby certifies that the foregoing has been formatted in Times New Roman font, 14 point type, which complies with the font size and point requirements of Local Rule 5.1C.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which automatically serves notification of such filing to all counsel of record, including:

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This 14th day of March, 2022.

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