UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 11-CR-109

BINH J. NGUYEN,

Defendant.

BINH NGUYEN'S MOTION FOR A BILL OF PARTICULARS

Binh J. Nguyen, by his attorney Michael J. Fitzgerald, moves the Court for an order requiring the government to file a written bill of particulars identifying: (a) the persons with whom the government asserts that the defendant "conducted, financed, managed, supervised, directed or owned" all or part of the illegal gambling business alleged in Count 2 of the indictment; and (b) the names of any indicted and unindicted co-conspirators with respect to Count 2 of the indictment.

BACKGROUND

On March 17, 2011, the grand jury returned a four count indictment charging twenty-four defendants. The indictment includes a forfeiture provision.

Seventeen defendants are charged in Count 1 with conspiracy to distribute marijuana, contrary to 21 U.S.C. §841(a)(1), §841(b)(1)(A), §846, and 18 U.S.C. §2.

Thirteen defendants, including Binh Nguyen (hereinafter "Binh")[1] are charged in Count 2 with the offense commonly known as commercial gambling, contrary to 18 U.S.C. §1955.

One defendant, Quan Hoac, is charged in Count 3 with interstate travel to facilitate the distribution of marijuana, contrary to 21 U.S.C. §841(a)(1).

One defendant, Jimmy Ho, is charged in Count 4 with interstate travel to facilitate an illegal gambling business, contrary to 18 U.S.C. §1952(a)(3) and §2.

Binh is charged only in the commercial gambling count in Count 2 and is not charged in the drug conspiracy count set forth in Count 1. He seeks a narrow and specific bill of particulars – *not* a broad discovery request – in order to supplement the indictment and more clearly identify the parameters of the offense charged in Count 2.

ARGUMENT

Rule 7(f) of the Federal Rules of Criminal Procedure allows, in conjunction with the issuance of an indictment, for the filing of a bill of particulars – a more specific expression of the activities that the defendant is accused of having engaged in which are illegal. *United States v. Canino*, 949 F.2d 928, 948 (7th Cir. 1991). The purpose of a bill of particulars is to provide the defendant with sufficient information about the charges in order to prepare an adequate defense and to protect the defendant against double jeopardy. *United States v. Glecier*, 923 F.2d 496, 502 (7th Cir. 1991).

---

[1] Because the indictment charges eight defendants with the surname of Nguyen, the defendant will simply be referred to by his first name.

In determining whether a bill of particulars is required, the Court should consider whether the indictment sufficiently apprises the defendant of the charges in order to enable him to prepare for trial. *United States v. Kendall*, 665 F.2d 126, 134 (7th Cir. 1981). However, "a defendant has no right to discover, through a bill of particulars, the evidentiary details of the government's case." *United States v. Brock*, 863 F. Supp. 851, 867 (E.D. Wis. 1994) (*citing Glecier*, 923 F.2d at 501-02). A bill of particulars is not required when information necessary for a defendant's defense can be obtained through some other satisfactory form. *Canino*, 949 F.2d at 949 (citation omitted). The government's open file policy may constitute an adequate satisfactory form of information retrieval, making a bill of particulars unnecessary in some circumstances. *Id*. *See also, United States v. Balsiger*, 644 F. Supp. 2d 1101, 1111-1113 (E.D. Wis. 2009).

The information sought by the defendant in the form of a bill of particulars is not clearly set forth in the discovery that has been provided by the government. For the reasons outlined below, and pursuant to Fed. R. Crim. P. 7(f), the defendant makes the following specific requests:

A. The persons with whom Binh conducted, financed, managed, supervised, directed or owned the alleged illegal gambling business.

18 U.S.C. §1955 provides in relevant part:

> §1955. Prohibition of illegal gambling businesses.
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section –

(1) "illegal gambling business" means a gambling business which –

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

Thus, there are three elements of the offense which must be proven beyond a reasonable doubt to the jury:

First, the defendant and four or more other persons knowingly conducted, financed, managed, supervised, directed, or owned all or part of a gambling business;[2]

Second, the gambling business was conducted in, and violated the laws of, the state of Wisconsin; and

Third, the gambling business was in substantially continuous operation for more than thirty days, or had a gross revenue of $2,000 or more on any single day.

See Tenth Circuit Pattern Jury Instructions-Criminal, 2.72; Eighth Circuit Manual of Jury Instructions-Criminal, 6.18.1955; *see also United States v. Murray*, 928 F.2d 1242, 1245 (1st Cir. 1991).

---

[2] Although this element is set forth in the conjunctive in the indictment, it is stated in the disjunctive in the statute.

Thus Binh cannot be found guilty if he and only *three* other persons conducted, financed, managed, supervised, directed, or owned all or part of the alleged illegal gambling business. Similarly, one who participates in the illegal gambling business by merely placing wagers – even if those wagers are significant – is not, as a matter of law, involved in conducting the business. *United States v. Greco*, 619 F.2d 635, 638-39 (7th Cir. 1980).

In the present case, the indictment charges thirteen defendants in Count 2 with commercial gambling. The indictment is a bare-bones document, and merely recites the statutory language without any factual detail.

It is not clear from the indictment whether the government is alleging that Binh and all twelve of the other defendants jointly conducted the *same* illegal gambling business. Or, for example, is Binh alleged to have done so with only a smaller group of the other twelve defendants? In other words, does Count 2 charge two separate illegal gambling businesses? If so, is Binh charged with participating in both of them, or only one of them? Or is the government alleging that all thirteen defendants jointly conducted the same illegal gambling business?

Binh is entitled to know the answer because, if for no other reason, this is an element of the offense. Moreover, the identity of the persons with whom Binh allegedly conducted the illegal gambling business will help the defense prepare for trial, as well as assist the court by avoiding confusion in evidentiary rulings and jury instructions.

Another consideration is that an indictment may not be "constructively amended" during the trial process. Constructive amendments occur where the offense proven at trial differs from the one alleged in the indictment, *see, e.g.*, *United States Remsza*, 77 F.3d 1039, 1043 (7th Cir. 1996), or where the facts adduced at trial establish a different substantive offense than the one brought by the grand jury. *See, e.g., United States v. Kuna*, 760 F.2d 813, 817 (7th Cir. 1985). The constructive amendment may not change an essential or material element of the offense or prejudice the defendant. *United States v. Spaeni*, 60 F.3d 313, 315 (7th Cir. 1995). It occurs, for instance, where the government broadens the bases for conviction alleged in the indictment. *United States v. Baker*, 227 F.3d 955, 960 (7th Cir. 2000).

An example of a constructive amendment is *Stirone v. United States*, 361 U.S. 212 (1960); *see also United States v. Jefferson*, 334 F.3d 670, 673 n.2 (7th Cir. 2003). In *Stirone*, the defendant was indicted for obstructing interstate shipments of sand but at trial the government showed he obstructed steel shipments. The jury was instructed it could convict as to either. The Supreme Court considered this a constructive amendment and reversed the conviction. *Stirone*, 361 U.S. at 217.

In *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991), the Seventh Circuit held that there was an improper constructive amendment where the government had charged use and possession of a firearm, "to wit: a Mossberg rifle," but at trial adduced proof of the Mossberg rifle along with two other weapons. The government's proof broadened the

indictment and violated the defendant's rights. *Id*. at 380-81. Similarly, in *United States v. Willoughby*, 27 F.3d 263 (7th Cir. 1994), the Seventh Circuit held it improper to charge the defendant with using and carrying a firearm in relation to a drug trafficking crime, "to wit: the distribution of cocaine," but then tried to prove that he used or carried the weapon in connection with the offense of possession with intent to distribute. The court observed that the words "to wit" tended to narrow the charge and made what followed an essential element. *Id*. at 266. *See also United States v. Bradley*, 381 F.3d 641, 646 (7th Cir. 2004) (government had to prove the specific drug trafficking crime that followed "to wit" in 18 U.S.C. §924(c) prosecution); *United States v. Ramirez*, 182 F.3d 544, 547-48 (7th Cir. 1999) (proving that the defendant carried the gun in relation to another drug offense constituted an impermissible constructive amendment); *United States v. Pigee*, 197 F.3d 879, 887 (7th Cir. 1999) (conviction reversed because jury instruction expanded bases upon which defendant could be convicted for maintaining a drug house).

In other words, the government may not start the case by alleging that Binh and four other of the defendants conducted an illegal gambling business, and then at trial change its theory and allege that Binh and four different persons named in Count 2 conducted an illegal gambling business. Binh's requested bill of particulars will prevent that from happening.

Nor is this an onerous request. The government has chosen to file an indictment that, by simply tracking the language of the statute, is minimally sufficient. It is not unreasonable

to ask the government to identify the persons involved in the illegal gambling business with Binh, especially since this is an element of the offense.

For these reasons, Binh Nguyen respectfully requests that the government be required to supplement the indictment with a written bill of particulars identifying the persons with whom Binh conducted, directed, financed, managed, supervised, directed, or owned the alleged illegal gambling business in Count 2 of the indictment.

B. Indicted and unindicted co-conspirators.

Count 2 is not charged as a conspiracy. However, at trial the government may seek to admit statements made by the defendants, and/or persons not indicted, on the evidentiary theory that a conspiracy existed, the declarant was a member of the conspiracy, and the statements were made in furtherance of the conspiracy. *See* F.R. Evid. 801(d)(2)(E); *United States v. Prieto*, 549 F.3d 513, 524 (7th Cir. 2008) (government need not charge conspiracy to utilize Rule 801(d)(2)(E) at trial).

In this district the government is typically not required to make a *Santiago* proffer prior to trial and establish a basis for admission for co-conspirator statements. *See, e.g., United States v. Santiago*, 582 F.2d 1128, 1131 (7th Cir. 1978); *United States v. Stephanson*, 53 F.3d 836, 842 (7th Cir. 1995) ("This court has directed that district courts make a ruling on the admissibility of co-conspirator statements pursuant to Rule 104(a) before they are admitted at trial").

On the other hand, in this district a request for a bill of particulars with respect to the identity of indicted and unindicted co-conspirators is typically granted to help clarify the scope of the conspiracy. *See, e.g., United States v. Knowles*, 2 F. Supp. 2d 1135, 1141 (E.D. Wis. 1998). Because co-conspirator statements are potentially admissible at trial, providing the names will assist the defendant in preparing motions in limine in advance of trial and/or entering objections at trial. Accordingly, Binh Nguyen's request for a bill of particulars in this regard should be granted.

CONCLUSION

Binh Nguyen's motion for a bill of particulars does not seek discovery or evidentiary detail from the government, but rather specific information which is necessary to supplement the minimally adequate indictment. Accordingly, the motion should be granted.