

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 06-CR-119

ELADIO SANCHEZ-LOZANO,

Defendant.

**MOTION FOR BILL OF PARTICULARS, OR IN
THE ALTERNATIVE TO DISMISS INDICTMENT**

Eladio Sanchez-Lozano, by his attorney Michael J. Fitzgerald, pursuant to Fed. R. Crim. P. 7(f), moves the Court for a bill of particulars, as set forth below.

In the alternative, pursuant to Fed. R. Crim. P. 7(c)(1), the defendant moves to dismiss the indictment because it does not sufficiently set forth the elements of the offense, nor does it provide adequate notice to the defendant of the nature of the charges against him. *United States v. Spears*, 965 F.2d 262, 279 (7th Cir. 1992); *United States v. Sloan*, 939 F.2d 499, 501 (7th Cir. 1991); *United States v. Yoon*, 128 F.3d 515, 522 (7th Cir. 1997). *See also United States v. Ramsey*, 406 F.3d 426, 429 (7th Cir. 2005); *United States v. Sandoval*, 347 F.3d 627, 633 (7th Cir. 2003).

I. BACKGROUND

The defendant is charged in a two count indictment. The indictment was returned by the grand jury on May 16, 2006.

Count 1 alleges that, from February 7, 2004 to January 10, 2005, the defendant conducted a money transmitting business that was not licensed in the State of Wisconsin, where such operation is punishable as a misdemeanor or felony. The indictment alleges that this conduct occurred in violation of 18 U.S.C. §1960(a) and §1960(b)(1)(A). The indictment does not identify the State of Wisconsin criminal offense that underlies this allegation.

Count 2 alleges that the defendant, again from February 7, 2004 to January 10, 2005, conducted a money transmitting business and failed to comply with the money transmitting business registration requirements under 31 U.S.C. §5330, “and regulations proscribed under such section.” The indictment alleges that this conduct occurred in violation of 18 U.S.C. §1960(a) and §1960(b)(1)(B). The indictment does not specify the “proscribed regulations” that the defendant violated, if any.

The indictment contains a forfeiture provision. The government seeks criminal forfeiture, under 18 U.S.C. §853, of certain real property located in Milwaukee and in Texas.

The indictment simply tracks the statutory language of 18 U.S.C. §1960. It contains no factual allegations. Yet even in tracking the statutory language, the indictment omits reference to certain other statutory and regulatory provisions that constitute essential definitional elements of the charged offenses. As such, the indictment fails to adequately apprise the defendant of the nature of the charges against him.

The problem can be remedied with a bill of particulars. Failing that, the indictment should be dismissed as inadequate under Fed. R. Crim. P. 7(c)(1), as well as the defendant's Fifth Amendment due process right to be informed of the nature of the allegations against him.

The defendant will set forth below each request for particularization, and the basis for the request.

II. COUNT 1

A. Identify the Applicable State Statute.

As noted, the offense charged in Count 1 requires that the defendant failed to obtain a license for a money transmitting business, and that the failure to do so is punishable as a misdemeanor or a felony in the state of Wisconsin. The indictment does not identify the applicable Wisconsin statute in question, and the defendant should not be left to guess as to what it is.

B. Identify the Manner and Means by Which the Defendant Obtained Fees or Other Consideration to Transmit Money or Sell Checks, Such That a License was Required Under Chapter 217 of the Wisconsin Statutes.

The defendant can locate no provision in the Wisconsin Criminal Code, Chapters 939 to 973, that would prohibit the conducting of a money transmitting business without a license.

Chapter 217 of the Wisconsin Statutes is entitled: "Seller of Checks." Wis. Stat. §217.03(1) provides that no person shall, *as a service or for a fee or other consideration,*

engage in the business as a seller of checks without first securing a license to do so (emphasis added).

Wis. Stat. §217.02(9) defines “seller of checks” as a person who, *as a service or for a fee or other consideration*, engages in the business of selling and issuing checks, or the receiving of money for transmission, or the transmission of money, or the transmission of money to foreign countries (emphasis added).

Wis. Stats. §217.16 provides that any violation of Chapter 217 is punishable by a fine of \$500, or six months jail, or both. This, presumably, is the statute referred to in Count 1 of the indictment -- but the government should specify that in the bill.

Assuming the indictment refers to Chapter 217, the offense requires that the defendant sold checks, or transmitted money, or received money for transmission, *for a fee or other consideration*. That is, one who simply transmits his own money to a foreign country -- not as a service to another or for a fee -- does not need a license under Wisconsin law.

Counsel has received discovery pursuant to the open file policy. The discovery does not specify how, and in what manner the defendant, in the State of Wisconsin, received a fee or other consideration to transmit money, or sell checks.

If this is in fact the offense that the government and the grand jury intended to charge in Count 1, the government should so specify in a bill of particulars. The defendant is not asking for a detailed outline of the theory of the government’s case. Rather, the defendant

is requesting a basic factual statement by the government -- as one would normally see in an indictment -- as to the manner and means by which his conduct violated Wis. Stat. §217.02(9) as a “seller of checks.”

III. COUNT 2

A. Identify the Manner and Means by Which the Defendant Transferred Funds “On Behalf of the Public.”

18 U.S.C. §1960(b)(2) provides that the term “money transmitting” includes transferring funds *on behalf of the public* by any and all means, including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier (emphasis added).

The federal definition of “money transmitting” appears to incorporate a concept similar to that embodied in the Chapter 217 definition in the Wisconsin Statutes. That is, the “money transmitter” must be acting on behalf of some other person -- “the public” -- in order for a license to be required (however, there is no requirement in the federal law that the money transmitter do so for a fee or other consideration).

This is an essential element of the offense, and the government should be required to specify how the defendant allegedly acted “on behalf of the public” under 18 U.S.C. §1960(b)(2). Again, the answer is not provided in the discovery materials that have been made available to date.

B. Identify the Manner and Means by Which the Defendant Failed to Comply with the Money Transmitting Business Registration Requirements of 31 U.S.C. §5330, “Or Regulations Proscribed Under Such Section.”

Count 2 alleges that the defendant’s conduct violated 18 U.S.C. §1960(b)(1)(B), and the indictment simply tracks its language. This provision, however, refers to another statute, 31 U.S.C. §5330, and also “regulations proscribed under such section” in defining what constitutes an “unlicensed money transmitting business.” *See* 18 U.S.C. §1960(b)(1)(B).

The indictment fails to specify which “business regulation requirements” of 31 U.S.C. §5330 the defendant allegedly violated, or what proscribed regulations he violated, if any.

It is essential that this definitional element of the offense charged in Count 2 be defined with greater precision.

For example, 31 U.S.C. §5330(d)(1) provides a definition of a “money transmitting business.” That definition *is different than* the definition of “money transmitting” found in 18 U.S.C. §1960(b)(2). Among other things, the concept of acting “on behalf of the public,” which is found in §1960, is not mentioned at all in 31 U.S.C. §5330(d)(1).

31 U.S.C. §5330(d)(2) introduces the concept of a “money transmittal service” (as opposed to a business) to the regulatory requirements. A “money transmittal service” is not referred to at all in 18 U.S.C. §1960.¹ Absent clarification by the government in a bill of particulars as to what he is charged with, the defendant is faced with an offense in Count 2

¹ To add to the incongruity between the two statutes, 31 U.S.C. §5330(e) provides that a violation of that section’s registration requirements constitutes a civil penalty, not a crime.

that incorporates two different statutory definitions of “money transmitting” for the exact same proscribed conduct.

The problem becomes more acute when one considers the possibility that the defendant’s conduct charged in Count 2 did not violate the provisions of 31 U.S.C. §5330 at all, but rather some unspecified regulation “proscribed under such section.”

The defendant should not have to wade through the Federal Register and guess what he is charged with, or try to figure out which provision of two related but different federal statutes he allegedly violated. When a federal criminal statute such as 18 U.S.C. §1960 specifically incorporates other statutes and federal regulations as part of the proscribed conduct, the defendant is entitled to notice as to the statutes and regulations that he allegedly violated, and the conduct that constituted the violation.

C. Identify Any Order, Rule or Regulation Promulgated by the Secretary of the Treasury that would have Required the Defendant, During the Time Frame Covered in Count 2, to File a Report Under 31 U.S.C. §5313.

As noted, 18 U.S.C. §1960 refers to and incorporates another statute, 31 U.S.C. §5330, in defining the criminal offense of operating an unlicensed money transmitting business. 31 U.S.C. §5330, in turn, refers to and incorporates yet *another* federal statute, 18 U.S.C. §5313, into that definitional equation.

One of the elements of a money transmitting business under 31 U.S.C. §5330(d)(1) is that the money transmitting business “is required to file reports under section 5313.” *See* 31 U.S.C. §5330(d)(1)(B).

31 U.S.C. §5313 is titled “Reports on domestic coins and currency transactions.” Generally, the statute pertains to the requirements for a domestic financial institution to file a report in a manner designated by the Secretary of the Treasury when the domestic financial institution is involved in a transaction for the payment, receipt or transfer of U.S. coins or currency (or other monetary instruments the Secretary designates), in an amount determined by the Secretary. *See* 31 U.S.C. §5313(a).

It is undisputed in this case that the defendant did not operate a “domestic financial institution.” The statute, however, also applies to “any other person in the transaction the Secretary may proscribe.” *See* 31 U.S.C. §5313(a). Such a person, in a transaction covered by the statute, must file “a report” with the Secretary. *Id.*

The indictment does not tell the defendant whether he is a person designated by the Secretary of the Treasury to file a report for such a transaction. The indictment cites no rule, order or regulatory provision of the Secretary of the Treasury addressing whether the defendant falls within the category of persons required to file these reports.

This is important. If the rules, orders or regulations promulgated by the Secretary of the Treasury did not require the defendant to file a report contemplated in 31 U.S.C. §5313, then the defendant did not operate a money transmitting business under 31 U.S.C. §5330(d)(1)(B). If the defendant did not operate a money transmitting business under 31 U.S.C. §5330(d)(1)(B), then the defendant could not have violated 18 U.S.C.

§1960(b)(1)(B) for operating an *unlicensed* money transmitting business -- because he wasn't operating a money transmitting business in the first place.

Conversely, if the defendant's conduct violated such a rule, order or regulatory provision set forth by the Secretary of the Treasury, it is not too much to ask that the government say so in the charging document.

The defendant cannot begin to understand this case, and prepare a defense to it, without this basic information. Nor can the defendant imagine how the Court at trial could decide a Rule 29 motion, make evidentiary rulings, or draft jury instructions in an intelligent fashion, without further clarification in a bill of particulars as to the statutory and regulatory provisions that constitute the offense charged in Count 2.

IV. CONCLUSION

A bare bones indictment may be adequate for the garden variety federal case. This is not such a case. It is factually and legally complex. The indictment charges offenses under Title 18 that refer to and incorporate other federal statutes, other state statutes, and even unspecified federal regulations, rules and orders of an administrative body.

This request does not seek evidentiary detail or further "discovery." It seeks something more basic and fundamental -- notice of the applicable statutory and regulatory provisions that constitute the charged offenses, and a brief description of the manner and means by which the defendant allegedly committed those offenses.

In the alternative, the defendant moves to dismiss the indictment because it fails to provide him with adequate notice as to what he is charged with, and deprives him of any meaningful ability to prepare a defense.