

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 19-CR-151

FRANCISCO MARTINEZ,

Defendant.

ORDER ON DEFENDANT MARTINEZ’S PRETRIAL MOTIONS

On September 10, 2019, a grand jury sitting in the Eastern District of Wisconsin returned an eleven-count superseding indictment against eleven defendants. (Docket # 13.) Francisco Martinez is charged in Count One with conspiring to possess with intent to distribute and to distribute controlled substances, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(A). Martinez was arraigned on the charges and entered a plea of not guilty. This case has been designated as complex, and jury trial before the Honorable William C. Griesbach is currently scheduled for June 15, 2020.

Currently before me are Martinez’s two pretrial motions. First, Martinez seeks the disclosure of exculpatory and impeachment evidence as to all confidential informants and cooperating witnesses to be called as witnesses at trial no later than ninety (90) days before trial. (Docket # 111.) Second, Martinez seeks a bill of particulars in which the government identifies, among other information, the names and known aliases of unindicted co-conspirators. (Docket # 118.) The government opposes Martinez’s motion seeking disclosure of exculpatory and impeachment evidence in part. (Docket # 121.) The

government argues that disclosure thirty (30) days prior to trial is sufficient. (*Id.*) The government also opposes Martinez's motion for a bill of particulars. (Docket # 122.) For the reasons further explained below, both Martinez's motions are granted in part. The government must disclose exculpatory and impeachment information no later than sixty (60) days prior to trial, and provide the names of any unindicted co-conspirators no later than thirty (30) days prior to trial.

ANALYSIS

Motion for Disclosure of Exculpatory and Impeachment Information (Docket # 111)

Martinez moves for an order compelling the government to disclose exculpatory and impeachment information as to all individuals referenced in police reports who will be testifying at trial no later than ninety (90) days before trial. The government objects, arguing that it will disclose this information thirty (30) days prior to trial.

Under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, a defendant is entitled to "disclosure of information in the possession of the government that is favorable to the accused and material to guilt or punishment." *United States v. Carter*, 313 F. Supp. 2d 921, 923 (E.D. Wis. 2004). "This includes the right to disclosure of information concerning the credibility of key government witnesses." *Id.* (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Bastanipour*, 41 F.3d 1178, 1181 (7th Cir. 1994)). Thus, "[e]vidence is 'favorable' if it 'is either exculpatory in nature or tends to impeach a prosecution witness.'" *Id.* at 924 (quoting *United States v. Reyes*, 270 F.3d 1158, 1167 (7th Cir. 2001)).

Clearly Martinez is entitled to exculpatory and impeachment information regarding government witnesses pursuant to *Brady* and *Giglio*. The only question is whether Martinez is entitled to receive this information ninety (90) days or thirty (30) days prior to trial.

Martinez argues that he cannot adequately prepare his defense without investigating and examining the evidence against him, and the evidence is almost exclusively derived from the confidential informants and cooperating witnesses. (Docket # 111 at 2.) Martinez provides a lengthy sample outline of the information he argues that he needs to prepare effective cross-examination of the government witnesses. (*Id.* at 2–5.) He argues that he needs at least ninety (90) days prior to trial to effectively prepare. (*Id.* at 6.) The government states that it acknowledges its *Brady* and *Giglio* responsibilities in this case; however, it argues that thirty (30) days is more than a reasonable amount of time to assess the impeachment evidence and effectively use it at trial. (Docket # 121 at 1.)

Neither Martinez nor the government makes compelling arguments as to when the *Brady/Giglio* material should be disclosed. This is not a situation where Martinez does not know the identity of the witnesses—he seeks information regarding individuals referenced in the police reports. (Docket # 111 at 2.) It is unclear how many individuals are referenced in these police reports and how familiar Martinez is with these potential witnesses. The government, however, makes no compelling argument as to why the *Brady/Giglio* materials cannot be disclosed earlier, beyond its own assessment that thirty (30) days is sufficient. (Docket # 121 at 1.) Given this is a multi-defendant drug conspiracy spanning approximately two years and Martinez’s assertion that the evidence against him is almost exclusively derived from these potential witnesses, I find that Martinez is entitled to the *Brady/Giglio* materials regarding these witnesses no later than **sixty (60)** days prior to trial.¹

¹ As of the date of this Order, jury trial is still scheduled for June 15, 2020 (now less than 60 days away). Thus, this Order effectively requires immediate disclosure of this information. Given, however, the current state of affairs due to the Covid-19 pandemic, should the trial date change, the information must be disclosed 60 days before trial.

Motion for Bill of Particulars (Docket # 118)

Martinez seeks a bill of particulars ordering the government to disclose the following information:

- (1) the names of unindicted co-conspirators, and known aliases used by those co-conspirators;
- (2) the times, places, and dates on which the conspiracy allegedly began;
- (3) the times, places, and dates on which the defendant and each alleged co-conspirator joined and where applicable, withdrew from, the conspiracy;
- (4) a description of any and all overt acts in furtherance of the alleged conspiracy and the times, places, and overt acts; the names of all participants in any overt acts, and a statement of each participant's activities, including which alleged co-conspirators performed which alleged overt acts and roles played by each participant in such acts;
- (5) the means used to accomplish the objectives of the conspiracy;
- (6) a description of defendant's alleged roles and overt acts in furtherance of the conspiracy, including whether he is an aider and abettor or a supervisor, manager, or organizer; and any other information or relief the Court deems necessary and proper to allow the Defendant to prepare for his defense;
- (7) the type of drugs Martinez was allegedly involved in distributing as well as the quantities of drugs.

(Docket # 118 at 1–3.)

Federal Rule of Criminal Procedure 7(f) authorizes the court to order the filing of a bill of particulars to fill in facts in the indictment so that the defendant can prepare an

adequate defense. *United States v. Kendall*, 665 F.2d 126, 134 (7th Cir. 1981). A bill of particulars is “a more specific expression of the activities the defendant is accused of having engaged in which are illegal.” *United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991). A bill of particulars is required only where the charges in the indictment are so general that they do not advise the defendant of the specific act of which she is accused. *See id.*

The test for determining whether a bill of particulars should be granted is similar to the test for determining the general sufficiency of the indictment, namely, “whether the indictment sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial.” *United States v. Fassnacht*, 332 F.3d 440, 446 (7th Cir. 2003) (quoting *Kendall*, 665 F.2d at 134); *Canino*, 949 F.2d at 949. An indictment which includes each of the elements of the offense charged, the time and place of the accused’s conduct which constituted a violation, and a citation to the statute or statutes violated is sufficient to pass this test. *Kendall*, 665 F.2d at 134. A bill of particulars is not required when a defendant can obtain the information necessary for his or her defense through “some other satisfactory form.” *Fassnacht*, 332 F.3d at 447 n.2 (quoting *Canino*, 949 F.2d at 949). The Seventh Circuit has held that the government’s “open file” policy is an adequate “satisfactory form” of information retrieval, making a bill of particulars unnecessary. *Canino*, 949 F.2d at 949.

As stated above, Martinez is charged in Count One of the superseding indictment, which states in relevant part:

Beginning in approximately May 2017, and continuing until on or about August 2, 2019, in the State and Eastern District of Wisconsin and elsewhere . . . FRANCISCO NMI MARTINEZ [and eight co-defendants] . . . knowingly and intentionally conspired with each other and with persons known and unknown to the grand jury, to distribute and possess with the intent to distribute controlled substances, in violation of Title 21, United

States Code, Section 841(a)(1) . . . The quantity of drugs involved in the conspiracy involved 1 kilogram or more of a mixture and substance containing heroin . . . 5 kilograms or more of a mixture and substance containing cocaine . . . 28 grams or more of a mixture and substance containing cocaine base, in the form of “crack” cocaine . . . in excess of 400 grams of a mixture and substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidiny] propenamide, also known as fentanyl . . . 50 grams or more of a mixture and substance containing marijuana . . . All in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(A).

(Docket # 13 at 1–2.)

To begin, Martinez requests that the government identify the names of unindicted co-conspirators. (Docket # 118 at 1.) Martinez argues that without this information, he cannot determine which individuals’ statements may fall within the Fed. R. Evid. 801 exception to the hearsay rule. The practice in this District is to require the government to identify unindicted co-conspirators so that the defendant can determinate if statements in discovery might be admissible as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). *See United States v. Blas*, No. 90-CR-162, 1990 WL 265179, at *16 (E.D. Wis. Dec. 4, 1990) (“[T]he defendant is entitled to the names of the unindicted co-conspirators as well, for purposes of the admission of co-conspirator hearsay.”); *see also United States v. Buske*, No. 09-CR-0065, 2010 WL 3023366, at *8 (E.D. Wis. Apr. 30, 2010), report and recommendation adopted, No. 09-CR-65, 2010 WL 3023364 (E.D. Wis. July 29, 2010) (the government agreed to provide defendant with the names of unindicted co-conspirators not less than thirty days prior to trial); *United States v. Laux*, No. 14-CR-229, 2015 WL 1885953, at *7 (E.D. Wis. Apr. 24, 2015), report and recommendation adopted, No. 14-CR-229, 2015 WL 4477007 (E.D. Wis. July 22, 2015) (ordering the government to promptly disclose to defendant any co-conspirator it identifies any time between the date of the order and the time of trial). Thus, the disclosure of unindicted co-conspirators is not dependent on the

number of defendants or the complexity of the case. Rather, the disclosure is required to ensure that the defendant can determine pretrial whether statements in discovery might be admissible under Fed. R. Evid. 801(d)(2)(E). Martinez does not propose a time frame in which the government should disclose this information, but I find thirty (30) days to be sufficient. Thus, the government is ordered to provide the names of any unindicted co-conspirators no later than **thirty (30) days** prior to trial.

As to the remainder of the information Martinez requests, a bill of particulars is not appropriate. In large part, Martinez's requests "read like interrogatories whereby [Martinez] ask[s] the court to order the government to disclose how it intends to prove its case. It is well-established that this is not a proper use of a bill of particulars." See *United States v. Arms*, No. 14-CR-78, 2015 WL 3513991, at *11 (E.D. Wis. June 3, 2015), report and recommendation adopted, No. 14-CR-78, 2015 WL 5022640 (E.D. Wis. Aug. 24, 2015). The indictment tracks the statutory language and contains all the elements of the offenses. Martinez does not contend that the government has not complied with its open-file policy. While Martinez may prefer the government to articulate its case against him in greater detail, it is well established that a defendant is "not entitled to know all the evidence the government intends to produce, but only the theory of the government's case." *Kendall*, 665 F.2d at 135 (internal quotation and citation omitted). Nor does a defendant have a right to know the details of how the government will prove its case. *Id.* ("The defendant's constitutional right is to know the offense with which he is charged, not to know the details of how it will be proved."). The indictment and discovery materials provide Martinez with sufficient information to apprise him of the charges and enable him to prepare his defense at

trial. For these reasons, Martinez's motion for a bill of particulars is granted in part and denied in part.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for disclosure of *Brady/Giglio* materials (Docket # 111) is **GRANTED IN PART AND DENIED IN PART**. The government is ordered to disclose the *Brady/Giglio* materials as to all individuals referenced in police reports who will be testifying at trial no later than **sixty (60) days** before trial;

IT IS FURTHER ORDERED that the defendant's motion for a bill of particulars (Docket # 118) is **GRANTED IN PART AND DENIED IN PART**. The government is ordered to disclose the identity of any unindicted co-conspirators no later than **thirty (30) days** before trial.

Your attention is directed to General L.R. 72(c), 28 U.S.C. § 636(b)(1)(B) and Federal Rules of Criminal Procedure 59(b), or Federal Rules of Civil Procedure 72(b) if applicable, whereby written objections to any recommendation or order herein, or part thereof, may be filed within fourteen days of the date of service of this recommendation or order. Objections are to be filed in accordance with the Eastern District of Wisconsin's electronic case filing procedures. Courtesy paper copies of any objections shall be sent directly to the chambers of the district judge assigned to the case. Failure to file a timely objection with the district court shall result in a waiver of a party's right to appeal. If no response or reply will be filed, please notify the Court in writing.

Dated at Milwaukee, Wisconsin this 22nd day of April, 2020.

BY THE COURT

s/Nancy Joseph
NANCY JOSEPH
United States Magistrate Judge