IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3:12-CR-60
	)	
RICHARD R. BAUMGARTNER,	)	(GREER/SHIRLEY)
	)	
Defendant.	)	

MEMORANDUM AND ORDER

All pretrial motions in this case have been referred to the undersigned pursuant to 28 U.S.C. § 636(b) for disposition or report and recommendation regarding disposition by the District Court as may be appropriate. Defendant Baumgartner is charged in a seven-count Indictment [Doc. 3] with misprision of a felony on or about June 2009, October 30, 2009, November 10, 2009, February 8, 2010, May 2010, August 27, 2010, and October 2010. This case came before the Court on August 27, 2012, for a motion hearing on the following motions:

> (1) Motion for Early Disclosure of Federal Rule of Evidence 404(b)-Type Evidence [Doc. 27], filed August 6, 2012;
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> (2) Motion for Government to Prepare and Provide to the Defense Transcripts for Any Conversations it Plans to Introduce at Trial [Doc. 28], filed August 6, 2012;
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> (3) Motion for Federal Rule of Criminal Procedure 12(b)(4)(B) Designation [Doc. 29], filed August 6, 2012; and
>
> (4) Motion of Richard R. Baumgartner for Leave to File Additional Motions [Doc. 43], filed August 6, 2012.

Assistant United States Attorneys David P. Lewen, Jr., and Zachary C. Bolitho appeared on behalf

of the Government. Attorneys Donald A. Bosch and Ann C. Short appeared on behalf of the Defendant, who was also present. The Court heard the arguments of counsel and will now address each of these motions in turn.

I. ANALYSIS

The Defendant brings four non-dispositive, pretrial motions before the Court, requesting an earlier disclosure of 404(b) evidence and transcripts, notice of the Government's intent to use evidence at trial, and leave to file additional motions.

A. 404(b) Evidence

The Defendant moves [Doc. 27] the Court to order the Government to provide Federal Rule of Evidence 404(b)-type evidence on or before September 21, 2012. The Defendant contends that the present disclosure deadline of seven (7) days before trial leaves him inadequate time to file any objections to the evidence. In addition, the Defendant argues that pretrial hearings may be necessary to determine the admissibility of such evidence.

The Government responds [Doc. 36] that the scheduling order governs the timing of such notice and the Defendant has not shown a compelling need to warrant an earlier disclosure. Further, the Government argues that speculating about a large quantity of 404(b) evidence does not warrant an earlier disclosure. In his reply, the Defendant contends that the Government is not "going to lose some tactical advantage" by making an earlier disclosure, while an earlier disclosure will benefit both the Defendant and the Court. [Doc. 45].

At the August 27 hearing, Attorney Bosch stated that he could conceive of so many

inappropriate uses of 404(b)-type evidence, and until he knows what type of evidence will be used, he cannot prepare for proper objections. In response to the Court's questioning, AUSA Lewen stated that the case is straightforward and that he did not anticipate that the Government would seek to use much 404(b) evidence.

Rule 404(b) provides that upon a defendant's request, the government "shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed. R. Evid. 404(b). This Court's Order on Discovery and Scheduling [Doc. 7, para. I] states that "reasonable notice" under Rule 404(b) is deemed to be seven (7) calendar days before trial unless the Court notes otherwise. The Defendant must show a "compelling need for an earlier disclosure." United States v. Smith, No. 3:08-CR-111, 2009 WL 3584944, at *4 (E.D. Tenn. Oct. 22, 2009). "Mere[] speculat[ion] that there could be a lot of 404(b)" evidence is insufficient. Id.

The Court finds that the Defendant did not show a compelling need for an earlier disclosure. The Defendant argued that he needed additional time because he anticipated a great deal of 404(b)-type evidence. The Government stated it would not be using much 404(b) evidence. Beyond quantity, the Defendant has not articulated any reason for an earlier disclosure. Accordingly, because the Defendant did not show a compelling need for an earlier disclosure, the Defendant's Motion for Early Disclosure of Federal Rule of Evidence 404(b)-Type Evidence [**Doc. 27**] is **DENIED**.

B. Transcripts

The Defendant moves [Doc. 28] the Court to order the Government to provide copies

of transcripts for any recorded conversations that it intends to introduce at trial. The Defendant contends that early production of these transcripts is necessary to permit defense counsel to review their accuracy and to determine whether to request a hearing pursuant to United States v. Robinson, 707 F.2d 872 (6th Cir. 1983). At the August 27 hearing, defense counsel asked that the transcripts be provided thirty (30) days before trial.

The Government responds [Doc. 38] that it has already provided the Defendant with compact disks containing copies of all recorded conversations, as well as transcripts of two of the recordings[1] that it intends to use at trial. It argues that in asking for transcripts of any other recorded conversations that it intends to use at trial, the Defendant actually seeks an outline of the Government's proof. In response, the Government contends that Rule 16 of the Federal Rules of Criminal Procedure does not require the Government to provide an exhibit list pretrial. See United States v. Prince, 618 F.3d 551, 561-62 (6th Cir. 2010) (observing that "Rule 16 does not entitle a defendant to pretrial disclosure of the government's exhibit list"). Instead, the Government states that it will provide transcripts of the recordings that it will introduce in its case-in-chief "closer to trial" and once it has decided which conversations it will use. In his reply [Doc. 46], the Defendant cautions that receipt of the transcripts in insufficient time to review them and conduct any necessary Robinson hearing will endanger the October 23 trial date.

At the hearing, AUSA Bolitho stated that the transcripts were merely a listening aid for the jury and that the Government would produce them to the Defendant three (3) weeks before trial. He stated that the recorded conversations in this case were short and posed no realistic

[1]Although the motion states that the parties have "tentatively" agreed on the accuracy of these transcripts, at the hearing, the parties informed the Court that they now agree that these two transcripts are accurate.

Robinson issue. Attorney Bosch agreed that receiving the transcripts three (3) weeks before trial would be sufficient.

In Robinson, our appellate court held that when audio recordings are used at trial, those recordings "must be audible and sufficiently comprehensible for the jury to consider the contents" in addition to meeting the prerequisites of being "authentic, accurate and trustworthy." Id. at 876. Although the recording itself remains the actual evidence, the trial court has discretion to permit the jury to use a transcript of the recording while listening as the recording is played aloud. Id. at 876, 878. "[T]he preferred practice is not to submit transcripts to the jury unless the parties stipulate to their accuracy." Id. at 876. The Sixth Circuit has provided the following guidelines for the use of transcripts in the absence of a stipulation:

> [T]he transcriber should verify that he or she has listened to the tape and accurately transcribed its content. The court should also make an independent determination of accuracy by reading the transcript against the tape. Where . . . there are inaudible portions of the tape, the court should direct the deletion of the unreliable portion of the transcript. This, however, assumes that the court has predetermined that unintelligible portions of the tape do not render the whole recording untrustworthy. Finally, we find submission of two versions of the transcript prejudicial when the tape is significantly inaudible. Such a practice would undoubtedly inspire wholesale speculation by the parties and engender jury confusion. It would be entirely too difficult for the jury to read two separate transcripts while listening to the tape recording. Furthermore, this method is impractical in cases . . . where the defendant has asserted his fifth amendment right to remain silent.

Id. at 878-79. The above outlined process is what has come to be known as a Robinson hearing.

In this case, the parties have agreed that any transcripts of any recorded conversations that either party[2] intends to play at trial will be produced three weeks prior to trial. Although the Government stated that it is unlikely that the parties will require a Robinson hearing, any request for a Robinson hearing must be made by the deadline for filing motions *in limine*, which is presently scheduled for **October 5, 2012.** Accordingly, because the parties have agreed to a mutual production three (3) weeks prior to trial, the Defendant's Motion for Government to Prepare and Provide to The Defense Transcripts for Any Conversations it Plans to Introduce at Trial [**Doc. 28**] is **DENIED as moot**.

C. Notice of Intent to Use Evidence

The Defendant moves [Doc. 29] the Court to order the Government to provide notice of intent to use evidence, which he is entitled to discover under Rule 16, in its case-in-chief at trial. The Defendant contends that Federal Rule of Criminal Procedure 12(b)(4)(B) provides a mechanism for the defense to request such evidence. The Defendant states that in order to streamline this case for trial, the Government should provide a comprehensive list of evidence falling within Federal Rule 12(b)(4)(B), so he can promptly file additional necessary motions.

The Government responds [Doc. 39] that the Defendant's motion lacks merit and should be denied. The Government contends that the Defendant has had Rule 16 discovery material for several months and the Defendant's motion is merely an attempt to obtain more specific discovery outside the scope of Rule 16. In addition, the Government argues that the Defendant's

[2]Although defense counsel stated that the Defendant does not plan to introduce any recorded conversations at trial, the Court includes both parties in this deadline.

motion was moot when it was filed because the deadline for Rule 16 discovery motions has passed.

At the August 27 hearing, Attorney Bosch stated that he wanted a list of the evidence that the Government intends to rely on, so he will be able to determine whether there is any evidence that violates the Defendant's rights. Specifically, Attorney Bosch requested "a brief and pertinent designation" of all the evidence that has already been provided to the Defendant that the Government plans to use or rely upon. AUSA Bolitho argued that the Defendant wants the Government to designate what items might be subject to suppression and that is not its job. Rather, since the Defendant has been provided all 12(b)(4)(B) evidence already, the Defendant can go through the evidence and determine for himself if anything is subject to suppression.

Rule 12(b)(4)(B) of the Federal Rules of Criminal Procedure requires the government, upon request of the defendant, to give notice to the defendant of the government's intent to use certain evidence at trial. The rule is limited in scope. United States v. Bunch, No. 3:09-CR-127, 2009 WL 4784637, at *1 (E.D. Tenn. Dec. 8, 2009). By its own terms, it is limited to evidence that the defendant would be entitled to discover under Rule 16, Federal Rules of Criminal Procedure. It also explicitly limits disclosure to evidence the government intends to use in its case-in-chief. Fed. R. Crim. P. 12(b)(4)(B). Furthermore, this "provision contemplates motions filed in preparation for actual or potential motions to suppress evidence." United States v. Lanier, 578 F.2d 1246, 1254 (8th Cir. 1978), cert. denied, 439 U.S. 856 (1978).

Rule 12(b)(4)(B) is not designed nor intended to be used to obtain more specific discovery than that provided by Rule 16. See Lanier, 578 F.2d at 1254. Rather, Rule 12(b)(4)(B) is intended to facilitate the making of pretrial suppression motions by allowing the defendant to avoid filing a motion to suppress when the government does not intend to use the evidence. Thus, to the extent that a defendant does object to certain evidence, and/or plans to file a motion to suppress certain

evidence, the government, in response to a Rule 12(b)(4)(B) request, should give notice of whether it intends to use such evidence in its case-in-chief.[3]

The Government provided the Defendant Rule 16 discovery months ago. In addition, the Defendant has already filed several suppression motions, and the Government has informed the Defendant it does not intend to use that evidence in question in its case-in-chief. The Government is under no obligation to provide the Defendant a list or designation of evidence that it intends to use at trial or is potentially subject to suppression. See Lanier, 578 F.2d at 1254. Therefore, Defendant's Motion for Federal Rule of Criminal Procedure 12(b)(4)(B) Designation [**Doc. 29**] is **DENIED.**

D. Additional Motions

The Defendant asks [Doc. 43] the Court to permit him to file additional motions on issues raised by the Government's responses to his pretrial motions. In his motion, he suggests the following motions are necessary: A motion to clarify whether the Government will claim that the law of misprision of a felony applies more readily to public officers; a motion to determine how misprision will be charged to the jury; motions relating to the Defendant being a coconspirator in the alleged drug conspiracy; motions challenging potential 404(b) evidence once disclosed; and motions relating to the accuracy of transcripts or the admissibility of recorded conversations, once

[3]The Court notes that the government is not required to wait for the defendant's request before notifying the defendant of evidence it intends to use in its case-in-chief. See Fed. R. Crim. P. 12(b)(4)(A). In cases involving evidence, which likely or typically implicates a suppression issue (e.g., evidence obtained in searches, confessions, the defendant's statements, the defendant's criminal record, expert evidence, intercepted communications, etc.), the government is encouraged to take the initiative to disclose its intent to use such evidence in its case-in-chief pursuant to 12(b)(4)(A) before a 12(b)(4)(B) request is made.

the Government discloses those it will use at trial. During the August 27 hearing, defense counsel also questioned whether the Defendant needed to file a motion alleging that the misprision statute, as charged herein, violates the Commerce Clause, a matter the Defendant first raised in his reply [Doc. 52] to the Government's response to his motion to dismiss the Indictment for failure to state an offense.

The Government opposes [Doc. 44] the Defendant's request to file additional unspecified motions. It contends that the Defendant has had ample time to discern and file any pretrial motions and has filed eleven pretrial motions. The Government argues that reopening of the motion deadline at this juncture would jeopardize the October 23 trial date.

At the hearing, Attorney Bosch stated that the Defendant had learned at the hearing that the Government intended to show that he was part of the alleged drug conspiracy. He argued that this revelation changes the complexion of the misprision case and would require additional motions. He requested two to three weeks to review the matter and file any additional motions. AUSA Lewen contended that the Government's position that the Defendant was a participant in the underlying drug conspiracy does not change anything with regard to the motion practice in this case.

The Court declines to reopen the motion deadline. First, the majority of the issues that the Defendant mentioned in his motion or at the hearing have either already been raised in one of his existing motions (i.e., the issues relating to the elements of misprision of a felony, the Commerce Clause issue,[4] and the potential for hearings on accuracy of transcripts and recordings)

[4]The Defendant presents his Commerce Clause argument on pages nine through fifteen of his reply [Doc. 52] to the Government's Response to his Motion to Dismiss Counts 1 Through 7 for Failure to Allege an Offense. At the hearing, the Court asked the Government if it wanted to file a response to this argument. AUSA Lewen stated that he was satisfied with his oral response and needed no additional time.

or are properly the subject of a motion *in limine* for the District Court (i.e., specific 404(b) objections, jury instructions, and the admissibility of coconspirator statements), the deadline for which is October 5, 2012. Moreover and more importantly, the Defendant has not shown good cause to reopen the motion-filing deadline to file unspecified motions. The Defendant's Motion for Leave to File Additional Motions [**Doc. 43**] is **DENIED**.

If the Defendant determines that an additional motion or motions are necessary, he must file a motion for leave to file the requested motion, stating why he could not file the motion by the August 6 deadline and why the motion is necessary. The Defendant must also attach a copy of the motion that he is seeking to file. At the August 27 hearing, the Court advised the parties that any such motions for leave should be filed very soon in order to preserve the current trial date. Also, time is of the essence for the Government to respond to a motion for leave, should one be filed, because the Court intends to rule promptly.

II. CONCLUSION

After reviewing the parties briefs and arguments and the relevant case law, the Court rules as follows:

> (1) The Motion for Early Disclosure of Federal Rules of Evidence 404(b)-Type Evidence [**Doc. 27**] is **DENIED**;
>
> (2) The Motion for Government to Prepare and Provide to the Defense Transcripts for Any Conversations it Plans to Introduce at Trial [**Doc. 28**] is **DENIED as moot**;
>
> (3) The Motion for Federal Rule of Criminal Procedure 12(b)(4)(B) Designation [**Doc. 29**] is **DENIED**; and
>
> (4) The Motion of Richard R. Baumgartner for Leave to File Additional Motions [**Doc. 43**] is **DENIED**.

IT IS SO ORDERED.

ENTER:

s/ C. Clifford Shirley, Jr.
United States Magistrate Judge