

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CR NO. 3:04-CR-240-G
	§	
HOLY LAND FOUNDATION	§	
FOR RELIEF AND DEVELOPMENT,	§	
also known as the “HLF” (1)	§	ECF
SHUKRI ABU BAKER, (2)	§	
MOHAMMED EL-MEZAIN, (3)	§	
GHASSAN ELASHI, (4)	§	
MUFID ABDULQADER, (7)	§	
ABDULRAHMAN ODEH (8)	§	

GOVERNMENT’S RESPONSE TO DEFENDANTS’
JOINT MOTION FOR BILL OF PARTICULARS

The government files this response to the defendants’ Joint Motion for Bill of Particulars. The government objects to the defendants’ motion for bill of particulars.

The defendants seek information in three areas:

- 1) the identity of Palestinian families the defendants are alleged to have supported in an effort to support the terrorist organization Hamas;
- 2) clarification on the category or categories of families the defendants wrongfully targeted for assistance;
- 3) the identification of any unindicted co-conspirators the government intends to call as witnesses at trial.

The information requested by the defendants pertains to the allegations set out in Count 1 of the indictment in which the defendants are charged with conspiracy to provide

material support to a Foreign Terrorist Organization. The defendants have not questioned the sufficiency of the other counts of the superseding indictment.

APPLICABLE LAW

A defendant possesses no right to a bill of particulars and the decision on the motion lies within the discretion of the court, *United States v. Burgin*, 621 F.2d 1352 (5th Cir. 1980). The purpose of a bill of particulars is to minimize surprise by giving “sufficient notice of a charge for its defense.” *United States v. Carlock*, 806 F.2d 535, 550 (5th Cir.1986). A district court's decision to deny demanded particulars is a discretionary one which will not be reversed absent a showing of surprise and substantial prejudice. *Id.* A bill of particulars is not required if a defendant is otherwise provided, *inter alia*, with sufficient information to enable him to prepare his defense and avoid surprise. *See United States v. Levergne*, 805 F.2d 517, 521 (5th Cir.1986); *Marrero*, 904 F.2d at 258. While a defendant is “entitled to a plain concise statement of the essential facts constituting the offenses charged, the indictment need not provide him with the evidentiary details by which the government plans to establish his guilt.” *United States v. Lavergne*, 805 F.2d 517, 521 (5th Cir. 1986) (citation omitted). A bill of particulars cannot be required to compel revelation of the full theory of the case or all the evidentiary facts, see *United States v. Murray*, 527 F.2d 401, 411 (5th Cir. 1976).

In the first two requests in their motion, the defendants seek to require the government to identify the names or identities of the individuals or families that were the

recipients of aid from the HLF. As an initial matter, the government would advise the Court that most of the aid or support provided by the defendants to the various recipients was done through the zakat committee system. As such, the fact that such aid or support passed through an entity controlled by or operated for or on behalf of Hamas would be sufficient to establish the elements of a material support offense. As an additional matter, the government would advise that it is also a part of its theory of the case, as alleged in the indictment, that “[o]ne of the primary purposes of the Holy Land Foundation was to subsidize HAMAS’ vital recruitment and reward efforts in the West Bank and Gaza.” ¶ 21, Superseding indictment. The government expects its evidence to show that the HLF was created and operated as a fund-raising entity for the Islamic Resistance Movement, a/k/a HAMAS. All of its actions were done with a view toward this ultimate goal. As such, all of its support and aid to individuals and entities in the West Bank and Gaza was done in furtherance of this objective and as such, is a part of its support for Hamas. As a consequence, the specific identity of a particular individual or recipient is irrelevant to establish any element of the offense alleged. While the government expects to present evidence of the defendants’ aid to specific families of martyrs, prisoners and detainees, the government submits that it is not required to articulate the details of the evidence that it intends to present prior to trial. Such a description is not necessary to advise the defendants of the charges they face.

As a final matter, the government submits that the information sought in this request can be gathered from an examination of the materials which have been provided to the defendants in discovery. Included among the records provided to the defense are the records of the HLF itself. In its records, the HLF categorized the recipients of its aid into the various categories described in the indictment such as orphans, martyrs, deportees, etc. The identities of the recipients, the amount they received and any special reference to them is contained within the records of the HLF which are in the possession of the defendants. In addition, evidence which will be offered through the government's expert witnesses will also establish the identity of those persons aided by the HLF who were or are connected to Hamas. Those records have been provided to the defendants in discovery. The request by the defendants is an attempt to expand its discovery requests to an outline of the evidence to be presented by the government.

The government's evidence will show that the HLF was created by and it and its codefendants were functioning as a part of Hamas itself. As such, any aid provided by the defendants to the people of the Gaza Strip and the West Bank was done for the benefit and strengthening of Hamas. As alleged in the indictment, the principal goal of the "dawa" or social wing of Hamas was to curry favor with the Palestinian people with the aim of strengthening its grip in the Palestinian community. The government's evidence will show that the HLF was a part of that plan and operated accordingly.

In their third request, the defendants seek the identity of any unindicted co-

conspirators the government intends to call as witnesses at trial. The defendants cite the case of *United States v. Barrentine*, 591 F.2d 1069 (5th Cir. 1979) wherein the court stated that a bill of particulars was a proper procedure to discover the names of unindicted co-conspirators whom the government plans to call as witnesses. *Id.* at p. 1077. A careful reading of *Barrentine* shows, however, that the court did not find that the government is required to disclose the names of such unindicted co-conspirator witnesses whenever sought by the defendant. The court in *Barrentine* found that the government's failure to provide the names sought in that case was not prejudicial to the defendant and not reversible error. Likewise, in *United States v. Hughes*, 817 F.2d 268, (5th Cir. 1987), the court found that the failure to require the government to identify in a bill of particulars, the identity of any co-conspirator witnesses was not an abuse of discretion by the trial court. *Id.* at p. 272.

A panel of the Eleventh Circuit (part of the old Fifth Circuit) has held that information about co-conspirators is nothing more than discovery and not a proper function for a bill of particulars. *United States v. Anderson*, 799 F.2d 1438, 1442 (11th Cir. 1986). The court in *Anderson* cited to a prior Fifth Circuit case of *United States v. Pena*, 542 F.2d 292, 294 (5th Cir. 1976) wherein the court held that a defendant has no right to obtain a list of witnesses by simply calling his request a bill of particulars.

As stated above, the purpose of a bill of particulars is to inform the defendant of the charge against him and to minimize surprise at trial. As was pointed out by the court

in *United States v. Scrushy*, Not reported in F.Supp.2d, 2004 WL 483264 (N.D. Ala. 2004) “[T]here is a difference between being surprised by the charge and being surprised by the evidence supporting a charge. The function of a bill of particulars is to reduce surprise at the *charge*, that is, to enable the defendant to identify what he is alleged to have done in violation of law. It is not to eliminate surprise with respect to evidence offered in support of a charge that is clearly understood by the defendant. Rule 7 does not give a defendant the right to insist that he be made aware of all of the evidence the Government may use against him so that he literally is not “surprised” by anything at trial.” (Emphasis in original) FN 5 at p. 9, citing *United States v. Manieri*, 691 F.Supp. 1394, 1396 (S.D. Fla. 1988).

The defendants’ request for the names of any possible co-conspirator witnesses is clearly not necessary to enable the defendants to understand the charges against them but is rather a request for discovery. The government will file its witness and exhibit lists at the time designated by the Court and that is all that the defendants are entitled to with regard to the identity of any witness. This portion of the defendants’ motion for bill of particulars should be denied.

Conclusion

The Government requests that the Court deny the defendants’ motion for bill of particulars in its entirety.

Respectfully submitted,

RICHARD B. ROPER
United States Attorney

By: /s/ James T. Jacks
JAMES T. JACKS
Assistant United States Attorney
1100 Commerce St., Third Floor
Dallas, Texas 75242
214.659.8600
214.767.2846 (facsimile)
Texas State Bar No. 10449500
jim.jacks@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2006, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Linda Moreno
Law Office of Linda Moreno
P.O. Box 10985
Tampa, Fl. 33679

Joshua L Dratel
Law Office of Joshua L Dratel
14 Wall St, 28th Floor
New York, NY 10005

Nancy Hollander
Freedman Boyd Daniels Hollander &
Goldberg
20 First Plaza, Suite 700
Albuquerque, NM 87102

Marlo P Cadeddu
Law Office of Marlo P Cadeddu
3232 McKinney Ave, Suite 700
Dallas, TX 75204

John W. Boyd
Freedman Boyd Daniels Hollander &
Goldberg
20 First Plaza, Suite 700
Albuquerque, NM 87102

Greg Westfall
Westfall Platt & Cutrer
Mallick Tower
One Summit Ave, Suite 910
Fort Worth, TX 76102

/s/ James T. Jacks
JAMES T. JACKS
Assistant United States Attorney