**U.S. Department of Justice**

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November 18, 2020

Hon. Gray H. Miller
United States Courthouse
515 Rusk Avenue, Room 9010C
Houston, Texas 77002-2605

Re: United States v. Jose Luis De Jongh Atencio, 4:20-cr-00305 (S.D. Tex.)

Dear Judge Miller:

We write in response to Defendant Jose Luis De Jongh Atencio's November 13, 2020, letter to the Court requesting a bill of particulars and corresponding request for a hearing. Defendant's letter, though styled as a request for a bill of particulars, is, in fact, a bid to compel a preview of a portion of the government's case-in-chief. *See* Def.'s Letter ¶ 2. As case law in this Circuit makes clear, however, the government is not required to provide the details of its case and evidence for a defendant's private evaluation prior to trial. Defendant's request should be denied.

The allegations against Defendant are spelled out in a twenty-plus page indictment, which describes the money laundering conspiracy in which Defendant participated, and the details of the specific money laundering transactions charged by the grand jury. Indictment, ECF No. 1. The indictment has been supplemented by extensive discovery, including dozens of interview reports of witnesses interviewed by the government during the course of its investigation. Many of the documents provided in discovery were disclosed as a courtesy and were outside the scope of Rule 16, *Brady v. Maryland*, 373 U.S. 83 (1963), and other authorities. Nonetheless, Defendant claims that he does not "understand the allegation that Citgo was an instrumentality of Venezuela." Def.'s Letter ¶ 4.

"The sufficiency of an indictment is judged by whether (1) each count contains the essential elements of the offense charged, (2) the elements are described with particularity, without any uncertainty or ambiguity, and (3) the charge is specific enough to protect the defendant against a subsequent prosecution for the same offense." *United States v. Lavergne*, 805 F.2d 517, 521 (5th Cir. 1986) (citing *United States v. Gordon*, 780 F.2d 1165, 1171-72 (5th Cir. 1986)). Significantly, "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 evidentiary details by which the government plans to establish his guilt.'" *Id.* (quoting *Gordon*, 780 F.2d at 1171-1172).

Moreover, "[a] defendant should not use the Bill of Particulars to 'obtain a detailed disclosure

of the government's evidence prior to trial.'" *United States v. Davis*, 2014 WL 6679199, *3 (S.D. Tex. Nov. 25, 2014) (Miller, J.). "Generally, the fact that the requested information may be *useful* to the defendant does not, alone, establish the need for a bill of particulars." *Id.* (citing *United States v. Strawberry*, 892 F.Supp. 519, 526 (S.D.N.Y. 1995)) (emphasis in original). Nor can the Defendant use a bill of particulars to compel the government "to explain the legal theories upon which it intends to rely at trial." *United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir. 1980) (internal citations omitted). Defendant's request for a bill of particulars should be denied pursuant to the standard for such a motion articulated in this Circuit.

Despite Defendant's claims to the contrary, his letter evinces a sophisticated understanding of the allegations against him. Defendant is charged with conspiring to launder money and five counts of substantive money laundering. The specified unlawful activity at issue is "bribery of a foreign official, a felony violation of the [Foreign Corrupt Practices Act ("FCPA")], Title 15, United States Code, Sections 78dd-2 and 78dd-3." Indictment ¶ 54. The FCPA defines a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof." 15 U.S.C. §§ 78dd-2(h)(2)(A) and 78dd-3(f)(2)(A). Here, the foreign official alleged to have received bribes was Defendant. As made clear by his letter, Defendant understands the allegations in the indictment, which provides details of the scheme through which Defendant, a foreign official who held multiple positions at Citgo Petroleum Corporation ("Citgo"), accepted and laundered millions of dollars in bribes.

In his letter, Defendant acknowledges his employment at Citgo, concedes that he accepted payments from vendors and conducted the financial transactions at issue, and notes that he "does not intend to dispute the *conduct* alleged in this Indictment." Def.'s Letter ¶ 2 (emphasis in original). According to Defendant, the disputed issue at trial will be whether Citgo was an "instrumentality" of the Venezuelan government, as alleged in the Indictment. *See* Indictment ¶¶ 2-3; Def.'s Letter ¶ 3. The term "instrumentality" is not defined in the FCPA. Rather, courts typically instruct juries with respect to the factors outlined in *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014), to determine whether an entity is an instrumentality of a foreign government. *See e.g.*, Jury Instructions at 59-62, *United States v. Mark Lambert*, No. 18-cr-012 (D. Md. Nov. 14, 2019), ECF No. 152 (relevant pages attached as Ex. 1). In *Esquenazi*, the Eleventh Circuit held that an instrumentality "is an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." *Esquenazi*, 752 F.3d at 925. The *Esquenazi* court went on to explain that "what constitutes control and what constitutes a function the government treats as its own are fact-bound questions." *Id.* The *Esquenazi* court also provided a non-exhaustive list of "some factors that may be relevant to deciding the issue," including "whether the government has a majority interest in the entity." *Id.*

Defendant's letter shows that he has ably connected the dots. He understands that the government intends to prove that Citgo was "owned and controlled by, and performed functions of, the Venezuelan government, and was an 'instrumentality' of a foreign government" as that term is used in the FCPA. Indictment ¶ 2; Def.'s Letter ¶ 3. Defendant has identified, in the discovery provided by the government, materials that show that Citgo is a wholly-owned subsidiary of PDVSA, Def.'s Letter 4, that is, that the Venezuelan government has a majority interest in the entity. *See Esquenazi*, 752 F.3d at 925.

Defendant's reliance on *Davis* for the proposition that a bill of particulars may be appropriate when then discovery is voluminous is inapposite here. In *Davis*, the defendant had not been provided

information identifying the fraudulent medical claims in a health care fraud case, and this Court determined that "if the [discovery] materials are voluminous, then documents alone are not a substitute for disclosure of the alleged fraudulent transactions." *Davis*, 2014 WL 6679199, *4. In stark contrast, here, the government identified for Defendant at the outset of discovery (and prior to arraignment) the most relevant documents underlying the conduct alleged in the indictment—including file names that linked the individual documents to the specific paragraphs, and therefore the transactions or communications, they supported. *See* Ex. 2 (August 5, 2020 email from S. Edwards to D. Ball and A. Wolf). Unlike in *Davis*, Defendant here has the information underlying the conduct with which he has been charged. What Defendant seeks through his request for a bill of particulars is an explanation of the exact evidence the government intends to prove a particular aspect of its case at trial.

Defendant understands the allegations against him. What Defendant may not yet have—and the government is not required to provide months before trial—is a precise roadmap of the evidence, witnesses, and documents with which the government intends to *prove* its case at trial, including the specific details regarding how the government will establish that Citgo was an instrumentality of the Venezuelan government. The government will comply with the Court's scheduling order and provide Defendant with a witness list and exhibit list on or before fourteen days prior to trial. ECF No. 27. Furthermore, as trial approaches, the government will continue to comply with all of its Rule 16 and other discovery obligations, and all of the other pretrial deadlines set forth in this Court's scheduling order. Accordingly, Defendant's request for a preview of the government's case-in-chief should be denied.

Sincerely,

*/s/ Sarah E. Edwards*
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