

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Newport News Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 4:19cr84
	)	
	)	
OBINWANNE OKEKE,	)	
	)	
Defendant.	)	

RESPONSE OF THE UNITED STATES TO DEFENDANT’S MOTION TO DISMISS THE  
INDICTMENT

The United States of America, by and through its attorneys, G. Zachary Terwilliger, United States Attorney for the Eastern District of Virginia, and Brian J. Samuels, Assistant United States Attorney, and Matthew P. Mattis, Special Assistant United States Attorney, hereby respond to the Motion to Dismiss the Indictment filed by the Defendant Obinwanne Okeke (ECF 23). For the reasons stated herein, the United States respectfully requests that the Defendant’s motion be denied.

BACKGROUND

At approximately 9:30 pm on August 6, 2019 the defendant was arrested at Dulles International Airport pursuant to a sealed criminal complaint and arrest warrant. On September 9, 2019 the Grand Jury returned a two count indictment against the defendant (ECF 16). The indictment alleges that Mr. Okeke violated 18 U.S.C. §§1349 and 1343 (conspiracy to commit wire fraud) and 18 U.S.C. §1030(b) (conspiracy to commit computer fraud). A discovery order was entered and voluminous discovery has been produced on a rolling basis to defense counsel. By way of his motion, the defendant seeks for the Court to improperly view the indictment through

his eyes and dismiss. For reasons articulated below, this is inappropriate and the Government respectfully requests that the defendant's Motion to Dismiss the Indictment be denied.

#### DISCUSSION

In his motion to dismiss, the defendant contends that the indictment must be dismissed for lack of jurisdiction, regardless that jurisdiction is properly described in the indictment. Through a series of arguments, the defendant invites the Court to adopt his view of the facts and the case and examine, through his eyes, the evidence behind the charges. Such an exercise is improper at this pretrial stage where the indictment properly sets forth the crimes charged. Accordingly, the defendant's motion should be denied.

An indictment is sufficient if it, first, contains the elements of the charged offense and fairly informs a defendant of the charges against him, and second, enables him to plead double jeopardy in defense of future prosecutions for the same offense. *See, e.g., Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Rendelman*, 641 F.3d 36, 44 (4th Cir. 2011); *United States v. Quinn*, 359 F.3d 666, 672 (4th Cir. 2004) (citing *Hamling*); *United States v. Sutton*, 961 F.2d 476, 479 (4th Cir. 1992) (citing *Hamling*). "The requirement of notice derives from the defendant's Sixth Amendment right to be informed of the nature and cause of the accusation. The inclusion of all elements also derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present." *United States v. Hooker*, 841 F.2d 1225, 1230 (4th Cir. 1988).

Federal Rule of Criminal Procedure 7(c)(1) merely directs that an indictment "shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged." The indictment must include every essential element of the offense. *United States v. Perry*, 757 F.3d 166, 171 (4th Cir. 2014). In general, it is "sufficient that an indictment set forth

the offense in the words of the statute.” *Id.* (internal quotation marks omitted). In fact, the Fourth Circuit had upheld as sufficient indictments that did not allege specific acts in violation of cited statutes. *See e.g., United States v. American Waste Fibers Co.*, 809 F.2d 1044, 1046-47 (4th Cir. 1987); *United States v. Amend*, 791 F.2d 1120, 1125 (4th Cir. 1986).

Furthermore, if the indictment meets this standard, it “is valid on its face” and the Court may not “review the sufficiency of evidence supporting” the indictment because a valid “indictment returned by a legally constituted and unbiased grand jury” is “enough to call for trial of the charges on the merits.” *United States v. Wills*, 346 F.3d 476, 488-89 (4th Cir. 2003). When considering a defense motion to dismiss an indictment, the district court must accept as true the factual allegations as they are set forth in the indictment. *United States v. Bergrin*, 650 F.3d 257, 265 (3d Cir. 2011) (citing *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990)). The court “may not dismiss an indictment . . . on a determination of facts that should have been developed at trial.” *United States v. Engle*, 676 F.3d 405, 415 (4th Cir. 2012). An indictment “will ordinarily be held sufficient unless it is so defective that it cannot be said, by any reasonable construction, to the charge the offense.” *United States v. Hayes*, 574 F.3d 460, 472 (8th Cir. 2009).

Thus, all that is required at this stage is for the indictment to sufficiently plead the elements of the offenses charged. Motions to challenge the sufficiency of an indictment are limited to the allegations contained in the indictment, not on pretrial discovery that has been produced thus far. *Engle*, 676 F.3d at 415 (4th Cir. 2012). “A district court may dismiss an indictment under Rule 12 ‘where there is an infirmity of law in the prosecution; a court may not dismiss an indictment, however, on a determination of facts that should have been developed at trial.’” *Id.* (citing *United States v. Snipes*, 611 F.3d 855, 866 (11th Cir. 2010)); *see also Bergrin*, 650 F.3d at 265 (“A ruling on a motion to dismiss is not . . . a permissible vehicle for addressing the sufficiency of the

government's evidence.") (citations omitted); *United States v. DeLaurentis*, 230 F.3d 659, 660-661 (3d Cir. 2000) (same). Indeed, the "government is entitled to marshal and present its evidence at trial, and have its sufficiency tested by a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29." *DeLaurentis*, 230 F.3d at 661.

Applying this well-settled authority to the indictment in this case, this Court should reject the defendant's complaints about the indictment as he is adequately informed of the charges, which accurately set forth the essential elements of the crimes of Conspiracy to Commit Computer Fraud and Conspiracy to Commit Wire Fraud. Further, in sufficiently describing the charges, the indictment describes jurisdiction:

- "It was further part of the conspiracy and the scheme and artifice that the conspirators obtained and complied credentials of hundreds of victims, including victims in the Eastern District of Virginia." (ECF 16 ¶9);
- "It was further a part of the conspiracy and the scheme and artifice that the conspirators engaged in and caused wire communications affecting interstate and foreign commerce between the Eastern District of Virginia and locations outside of the Commonwealth of Virginia." (ECF 16 at ¶10);
- "On or about 2015 through 2019 [corrected in indictment], within the Eastern District of Virginia and elsewhere, OBINWANNE OKEKE..." (ECF 16 at ¶10);

Contrary to case law, the defendant contends that this description is inadequate. But an indictment is not a trial and the government is not required to set forth all of its evidence in the charging instrument. *See Sampson*, 371 U.S. at 78-79. The defendant's challenge to the indictment based on jurisdiction is improper.

Ignoring the allegations described above, the defendant asks the Court to ignore well-settled case law and to see the case through his eyes and accept that jurisdiction does not exist. The defendant offers no support for this argument other than his belief. The defendant then attacks this "straw man" argument by discussing when U.S. criminal statutes apply to foreign conduct.

However, the indictment never alleges that it is based strictly on foreign conduct. Instead, the indictment sets forth the contacts with the Eastern District of Virginia. Defendant's argument in support of his Motion to Dismiss the Indictment is improper and consequently should be denied.

CONCLUSION

Consistent with *Perry*, the indictment in this matter contains the elements of the offense charged, fairly informs the defendant of the charge, enables him to plead double jeopardy as a defense in a future prosecution for the same offense and finally the indictment includes every essential element of the offense. *See United States v. Perry*, 757 F.3d at 171 (citations omitted). Defendant's motion, on the other hand, improperly asks the Court to accept his viewing of the discovery and dismiss the indictment. This is improper.

Therefore, because the indictment comports with well-settled case law, the Government respectfully requests that Defendant's Motion to Dismiss the Indictment be denied.

Respectfully submitted,

G. ZACHARY TERWILLIGER  
UNITED STATES ATTORNEY

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CERTIFICATE OF SERVICE

I hereby certify that on the 24<sup>th</sup> day of January, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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