

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Crim. No. 4-15-B-W
)
KENNETH H. MCLAY)
PATRICK JAMES MONAHAN,)
)
Defendants.)

RECOMMENDED DECISION

Kenneth McLay has filed a motion to strike portions of the Bill of Particulars and/or for dismissal of some or all of the indictment. (Docket No. 119.) Co-defendant Patrick Monahan has joined in the motion (Docket No. 121.) I now recommend that the court **DENY** both motions.

Background

On November 9, 2004, the Government indicted McLay and Monahan for alleged violations of 18 U.S.C. § 2252A(a)(5)(B) in a superseding indictment. The superseding indictment alleged possession of images containing child pornography that had been transported via the internet. The indictment further alleged that the images consisted of depictions of minors under the age of twelve years, ten or more compilations of images, and more than ten but fewer than one hundred and fifty total images.

On August 20, 2004, in response to the original indictment first returned in this case on February 12, 2004, I granted, without objection, the defendants' motion for a bill of particulars. (Docket No. 92.) The Government filed its Bill of Particulars on November 22, 2004, after the return of the superseding indictment, and provided a

lengthy list of computer file names. At the end of the list the Government stated the following:

The number of pornographic images harvested from the evidence seized from Defendants' residence far exceeds the number of images listed in this Bill of Particulars. The Government has not listed more of the images because the children depicted in the images have not been identified. As the list of identified minors increases, however, it is likely that more of the images recovered from Defendants' computer and disks will become actionable. The Government therefore reserves the right to introduce additional images with sufficient notice to Defendants.

(Bill of Particulars, Docket No. 116, at 4.) Upon receipt of this Bill of Particulars and after discussion with the AUSA assigned to this case, defense counsel became convinced that the grand jury had not examined all of the images alleged to constitute child pornography. According to the defense theory, defendants have a Fifth Amendment right to have all of the images upon which the Government intends to rely for its prosecution considered by the grand jury. The remedy sought is that this court review the grand jury transcripts and strike any images from the Bill of Particulars that were not presented to the grand jury. If the Court finds no images were presented to the grand jury, or that fewer than ten images were presented, it should dismiss the entire indictment or the appropriate portion thereof.

Discussion

The validity of an indictment does not turn on the sufficiency or competency of the evidence presented to the grand jury. Costello v. United States, 350 U.S. 359, 363 (1956). Except in rare circumstances, a facially valid indictment returned by a duly constituted grand jury "is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." Id. Provided the grand jury is unbiased and the indictment valid on its face, the indictment "is not subject to challenge on the ground that

the grand jury acted on the basis of inadequate or incompetent evidence." United States v. Calandra, 414 U.S. 338, 363 (1974).

The First Circuit has routinely applied the principles set forth in Costello and Calandra to prohibit challenges to a facially valid indictment. "As we have explained before, leaving indictments open to evidentiary challenges 'would [mean] that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury.'" United States v. Reyes-Echevarria, 345 F.3d 1, 5 (1st Cir. 2003) (quoting United States v. Maceo, 873 F.2d 1, 3 (1st Cir. 1989)).

Defendants respond to these well-established legal precedents with a two-pronged argument. First they rely upon Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), and United States v. Braniff Airways, Inc., 428 F. Supp. 579 (W.D. Tex. 1977), in support of the contention that dismissal of all or portions of the indictment/bill of particulars is warranted. Both cases are inapposite and neither supports the contention that an indictment should be analyzed for evidentiary sufficiency. Bank of Nova Scotia actually limits a federal court's authority to dismiss an indictment for alleged grand jury errors to those cases where the defendant can show an error rising to the level of actual prejudice or that the structural protections of the grand jury were "so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice without any particular assessment of prejudicial impact." 487 U.S. at 257. Likewise, the Braniff Airways case involved an attack upon the structural protections of the grand jury in that an unauthorized individual was present in the grand jury room not as a witness, but as an observer, and his participation was not recorded. 428 F. Supp. at 582-83.

Neither defendant has even attempted to make a showing of actual prejudice or a structural defect in the grand jury's actions or composition in this case. Absent one or the other, defendants have presented nothing more than an attack upon the evidentiary sufficiency of the Government's presentation.

The second prong of defendants' assault upon the indictment is based upon United States v. Brunette, 256 F.3d 14 (1st Cir. 2001), a case wherein the court recognized that a magistrate judge reviewing a search warrant affidavit submitted in support of a probable cause finding had an obligation to review the actual images of alleged child pornography before issuing a search warrant. Id. at 17-19. Comparing Brunette to the present situation is an apples-to-oranges comparison. An issuing magistrate judge's finding of probable cause is subject to *de novo* review by the court. Brunette simply established a structural protection that would facilitate *de novo* review; the reviewing court would be assured that the issuing magistrate judge had reviewed the same images it reviewed in making a probable cause determination. Id. By contrast, the grand jury's decision regarding an indictment is not subject to review for evidentiary sufficiency and thus a "reviewing" court has no reason to consider the quality of the evidence which supports the indictment.

Conclusion

Based upon the foregoing, I recommend that the court **DENY** defendants' motions. (Docket Nos. 119 and 121.)

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and

request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: March 8, 2005

Defendant

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Pending Counts

ACTIVITIES RE MATERIAL
CONSTITUTING/CONTAINING
CHILD PORNO IN VIOLATION
OF TITLE 18, SECTION
2252A(a)(5)(B) and 2
(1)

18:2252A.F - ACTIVITIES RE
MATERIAL
CONSTITUTING/CONTAINING
CHILD PORNO; POSSESSION
OF CHILD PORNOGRAPHY -
18:2252A(a)(5)(B) and 2
(1s)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

None

Disposition

Defendant

PATRICK JAMES MONAHAN
(2)

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Pending Counts

ACTIVITIES RE MATERIAL
CONSTITUTING/CONTAINING
CHILD PORNO
(1)

18:2252A.F - ACTIVITIES RE
MATERIAL
CONSTITUTING/CONTAINING
CHILD PORNO; POSSESSION
OF CHILD PORNOGRAPHY -
18:2252A(a)(5)(B) and 2
(1s)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

None

Disposition

Plaintiff

USA

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