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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Eugene Division

UNITED STATES OF AMERICA,)	NO. CR 10-60066-HO
)	
Plaintiff,)	DEFENDANTS' <u>AMENDED</u> INITIAL
v.)	RESPONSE TO UNITED STATES'
)	MOTION FOR ORDER REQUIRING
STEVEN DWIGHT HAMMOND, and)	DEFENDANTS TO DISCLOSE
DWIGHT LINCOLN HAMMOND, JR.,)	NOTICE OF ALIBI DEFENSE
)	PURSUANT TO
Defendants.)	FED. R. CRIM. P. 12.1

Pursuant to Federal Rule of Criminal Procedure 12.1 and the Fifth and Sixth Amendments to the United States Constitution, defendant Steven Dwight Hammond, by and through his attorneys Lawrence H. Matasar and Lawrence Matasar, P.C., and defendant Dwight Lincoln Hammond, Jr., by and through his attorneys Marc D. Blackman and Ransom Blackman LLP, object to the United States' Motion for Order Requiring Defendants to Disclose Notice of Alibi Defense Pursuant to Fed. R. Crim. P. 12.1 on the grounds that said motion fails to state the time, date, and place of the alleged offense with sufficient specificity to require a response by defendants.

In support of this objection, the Court is respectfully referred to the Legal Discussion below.

Defendants reserve the right to supplement this initial response within 14 days of the government providing more specific disclosure of the time, date, and place of any alleged offense or overt act and/or any Court order directing them to respond to the

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government's Motion for Order Requiring Defendants to Disclose Notice of Alibi Defense Pursuant to Fed. R. Crim. P. 12.1.

Dated this 10th day of August, 2011.

Respectfully submitted,

RANSOM BLACKMAN LLP

LAWRENCE MATASAR, P.C.

/s/ MARC D. BLACKMAN

/s/ LAWRENCE H. MATASAR

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Dwight Lincoln Hammond, Jr.

Steven Dwight Hammond

POINTS AND AUTHORITIES

A. Factual Setting

Defendants are charged in a 19-count indictment with conspiracy, arson, and operating an aircraft in violation of Federal Aviation Administration regulations. 18 U.S.C. §844(f) defines "arson" as "maliciously damag[ing] or destroy[ing], or attempt[ing] to damage or destroy, [property] by means of fire." To prove a violation of 18 U.S.C. § 844(f)(1), the government must prove beyond a reasonable doubt the following elements: that defendant (1) maliciously (2) damaged or destroyed or attempted to damage or destroy (3) by means of fire or an explosive (4) any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the

United States, or any department or agency thereof, or any institution or organization receiving Federal financial assistance. *See, e.g. United States v. McKinnon*, 281 F. Supp.2d 1146, 1148 (N.D. Cal. 2003); *United States v. Gullett*, 75 F.3d 941 (4th Cir.), *cert. den.*, 519 U.S. 847 (1996).

The indictment arises out of eight separate fire episodes between August, 1982 and August, 2006, a 24-year period.¹ Most of these episodes encompass large geographical areas. *See* Exhibits 1 and 6 to government's Motion for Order Requiring Defendants to Disclose Notice of Alibi Defense Pursuant to Fed. R. Crim. P. 12.1. Most occurred coincident with significant dry-weather electrical storm activity that produced numerous lightning strikes. *See* Topo North America™ map appended hereto as Exhibit 101 showing 19 lightning strikes in the Krumbo Butte fire area on August 21, 2006 and Topo North America™ map appended hereto as Exhibit 102 showing at least 40 lightning strikes on August 21, 2006 in the Granddad fire area. Discovery also makes clear that lightning strikes ignite brush which can be carried substantial distances by wind, igniting additional fires [a phenomenon known as "spotting"]. *See* Jeff Stampfly FBAN Investigation Notes appended hereto as Exhibit 103 [calculating a maximum spotting distance of 3,000 feet in the area of the August 22, 2006 Krumbo Butte fire and just under one-half mile with a 90% ignition probability in the area of the August 23, 2006 Granddad fire]. The

¹ It appears from discovery that only the 2006 fires were contemporaneously investigated by persons claiming to be arson investigators.

conspiracy count and each of the substantive arson counts of the indictment allege that the defendants willfully and maliciously damaged and destroyed rangeland within these fire-episode areas by means of fire.

Defendants are cattle ranchers. They own private land and hold grazing permits from the Bureau of Land Management that allow them to graze their cattle on public lands in the Steens Mountain Cooperative Management and Protection Area. These lands are within or adjacent to the areas of the fires referenced in the indictment. Defendants do not believe the government will contest that defendants' cattle were in or adjacent to these areas at the times of the fires referenced in the indictment. Nor do they expect the government to contest that it is reasonable and expected that a rancher who becomes aware that fire is burning near his cattle will go to that area to do what he can to save them.

On July 20, 2011, the government filed a Motion for Order Requiring Defendants to Disclose Notice of Alibi Defense Pursuant to Fed. R. Crim. P. 12.1. This motion gives only indefinite notice of when and where fires alleged to constitute "arson" were allegedly set. For example, with respect to the Krumbo Butte fire, the Motion refers to "August 22, 2006, between 12:00 pm and 11:59 pm,"² "and "multiple fires that burned approximately 804 acres of public land...in the Krumbo Butte area of the Steens Mountain

² Defendants understand this to represent all 24 hours of August 22, 2006.

Cooperative Management and Protections Area.” Similarly, with respect to the Granddad fire, it refers to “August 23, 2006, between 6:00 am and 9:00 pm,” and “multiple fires...in the Bridge Creek Road area of the Steens Mountain Cooperative Management and Protections Area,” an area that encompasses approximately 25,000 acres. *See* Exhibits 1 and 6 to government’s Motion for Order Requiring Defendants to Disclose Notice of Alibi Defense Pursuant to Fed. R. Crim. P. 12.1. In light of the large areas encompassed by the fire episodes referenced in the indictment, the significant number of lightning-caused fires ignited in these areas over the broad time-frames referenced in the government’s motion, the probability that additional ignitions occurred in these areas during these time, and the legitimate reasons for defendants being in these areas once lightning and/or spotting activity had ignited fires around their cattle, the motion does not meet the specificity requirements of Fed. R. Crim. P. 12.1(a)(1) regarding the “time, date, and place of the alleged offense” and cannot require defendants to disclose notice of alibi defense under Fed. R. Crim. P. 12.1(a)(2).

B. Legal Discussion

1. Introduction

The indictment charges defendants with igniting numerous fires in areas in which they had cattle grazing at times of significant dry-weather electrical storm activity and spotting. But the government’s Motion for Order Requiring Defendants to Disclose

Notice of Alibi Defense Pursuant to Fed. R. Crim. P. 12.1 provides only broad times and places, covering as much as 24 hours and 804 acres [in the case of the Krumbo Butte fire] and as much as 18 hours and 25,000 acres [in the case of the Granddad fire]. It does not specify the time and location within these areas of any ignition claimed to represent “arson.” *See, e.g.* section of motion regarding “Count 1, Overt Acts 6, 6d, Counts 6 and 7 – Krumbo Butte Arson” [CR 34 at 7]: “On August 22, 2006, between 12:00 p.m. and 11:59 p.m., there were multiple fires that burned approximately 804 acres of public land owned by the United States in the Krumbo Butte area of the Steens Mountain Cooperative Management and Protections Area.”³ Such broad descriptions are insufficient to trigger immediate, specific defense discovery under Fed. R. Crim. P. 12.1(a)(1) and it would violate defendants’ rights to Due Process and their privileges against self-incrimination to require them to do so.

2. The Government’s Motion Fails to Satisfy the Notice Requirements of Fed. Rule Crim. P 12.1(a)(1)

Fed. Rule Crim. P 12.1 provides, in relevant part:

(a)(1) Government’s Request. An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.

³ According to the BLM, the Steens Mountain Cooperative Management and Protection Area consists of 428,156 acres. *See* <http://www.blm.gov/or/districts/burns/recreation/steens-mtn.php>.

As illustrated by Exhibits 101 and 102, the areas of the fires alleged in the indictment are substantial - the Krumbo Butte fire, for example, encompassed 804 acres; the Granddad fire, 25,000 acres. These exhibits also demonstrate that on August 21, 2006, approximately 19 lightning strikes were recorded in the Krumbo Butte area between 10:15:06 a.m. and 6:01:48 p.m. and that on August 21, 2006, over 40 lightning strikes were recorded in the Granddad area between 7:26:15 a.m. and 6:11:23 p.m. The defense further anticipates that the government will not dispute that fires ignited by lightning strikes produce additional fires through the process known as “spotting, and that ignitions as much as a half mile from a lightning strike can be caused by spotting.

Despite these facts, the government’s Motion for Order Requiring Defendants to Disclose Notice of Alibi Defense Pursuant to Fed. R. Crim. P. 12.1 gives only the vaguest notice of when and where ignitions claimed to constitute arson occurred. Nowhere in its motion does the government identify either the specific time or specific location of such an alleged event.

The government’s motion therefore fails to give the notice required by Rule 12.1(a)(1) to trigger any disclosure obligations on the part of defendants. As the Ninth Circuit observed in *United States v. Goodrich*, 493 F.2d 390 (9th Cir. 1974) [in which the indictment alleged that the offense occurred on June 3, defendant offered alibi

evidence for that date, but there was some evidence that the act might have occurred on June 2]:

Appellant cites ample state authority both old and new for the proposition that when an alibi defense is asserted[,] the time of the crime is extremely material, since any variance in time proved and the time the jury is allowed to find deprives the defendant of his alibi defense. *United States v. Goodrich, supra* at 393.⁴

Since this is the case, the Ninth Circuit has held that:

Under Rule 12.1(a) the Government inquires whether the defendant has an alibi defense, and if so the specific defense and witnesses he intends to call. The Government's reciprocal obligation under Rule 12.1(b) is to furnish the names of the witnesses which link the defendant to the scene of the crime. **If the Government does not take advantage of Rule 12.1 as to a particular time, date and place it cannot claim unfair surprise when the defense brings forth alibi witnesses at trial.** *United States v. Dupuy*, 760 F. 2d 1492, 1499 (9th Cir. 1985) [emphasis added].

See also United States. v. Bickman, 491 F. Supp. 277 (D.C. Pa. 1980)⁵ [defendants were not required to answer demands for alibi defenses for time periods amounting to

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⁴ The Court accepted defendant's premise, but affirmed his conviction, because on the record before it, it "was not persuaded that the jury could have concluded the overt act might have occurred on June 2. *United States v. Goodrich*, 493 F.2d at 394.

⁵ "The only fair reading that can be subscribed to the Rule [Rule 12.1] is that it was intended to be reciprocal in the sense that, while the defendant must respond to the Government's demand by stating 'the specific place or places at which the defendant claims to have been at the time of the alleged offense . . . ' (emphasis supplied), **the Government must also initially state with specificity the 'time, date and place at which the alleged offense was committed. . . .'**" *United States. v. Bickman*, 491 F. Supp. at 279 [emphasis added].

ten-and-a half and 11-and-a-half hours]; *United States v. Vela*, 673 F. 2d 86, 88-89 (5th Cir. 1982).⁶

Defendants acknowledge that some cases uphold somewhat general disclosures of time and place as sufficient under Rule 12.1. *See, e.g., United States v. Zayas*, 575 F.2d 56 (2d. Cir.), *cert. den.*, 439 U.S. 828, 99 S. Ct. 101, 58 L. Ed.2d 121 (1978) [implicitly approving a notice that identified a two-week period]. The facts of this case, however, render those cases inapposite. Here, unlike those cases, the evidence will demonstrate that on the dates of many of the alleged arson fires, there were numerous non-arson fires - fires caused by lightning and spotting - that would cause defendants to travel to the area to protect their cattle. Defendants would likely have been in many different locations during the length of time noted in the government's motion. Unless and until the government provides a notice of the specific physical location and specific time of a fire it claims to constitute arson, defendants cannot determine, let alone be compelled to disclose, information that may constitute alibi evidence.

⁶ “Many crimes, such as the conspiracy charged here, are accomplished over a long period of time. *Cf. United States v. Bickman*, 491 F. Supp. 277, 279 (E.D. Pa.1980) (citing as an example the continuing offense of holding stolen government property). In such cases, it would render the rule unworkable if the prosecution could not narrow its notice-of-alibi demand to a more limited interval.”

“Rather than render the rule useless in such situations, we recognize it to be permissible and consistent with the rule's purpose for the prosecution to seek notice-of-alibi with respect to **a discrete temporal aspect of the crime charged.**” *United States v. Vela*, 673 F. 2d at 88-89.

Page 10 - DEFENDANTS' AMENDED INITIAL RESPONSE TO UNITED STATES' MOTION FOR ORDER REQUIRING DEFENDANTS TO DISCLOSE NOTICE OF ALIBI DEFENSE PURSUANT TO FED. R. CRIM. P. 12.1

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In short, under the facts of this case, the Court must require the government to provide much greater specificity in its Rule 12.1 Motion before defendants can be required to respond to it.

3. Granting the Government's Motion Would Violate Defendants' Rights to Due Process

Under the circumstances of this case, to require the defendants to provide "alibi" information in response to a notice as vague as the government's would violate both their rights to Due Process and their privileges against self-incrimination. It is undisputed that defendants graze cattle in the areas of the alleged arsons. Defendants expect it to be undisputed that a rancher who becomes aware that fire is burning in an area in which his cattle are grazing is going to go to that area to do what he can to save his cattle. If the government is permitted to use Rule 12.1 to compel a defendant to disclose alibi evidence by vaguely asserting that an event occurred over a lengthy period in an area the defendant had a legitimate reason to be at later time during that period and then permitted to specify the time and place of the alleged "criminal act," the defendant will have been compelled, at the risk of being denied the right to present a defense, to disclose potentially incriminating evidence. This cannot be allowed. See, *e.g. Brooks v. Tennessee*, 406 U.S. 605, 607, 92 S. Ct. 1891, 1892 (1972) [statute that requires a defendant in criminal proceeding who desires to testify to do so before any other testimony for the defense is heard by the court trying the case constituted denial of due process in that it

deprived defendant of the guiding hand of counsel in deciding not only whether the defendant would testify but, if so, at what stage]. *Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed.2d 82 (1973) [statute that required defendant to provide names and addresses to the State, but imposed no reciprocal requirement on the State, violated due process]. As the Ninth Circuit noted in *United States v. Bahamonde*, 445 F.3d 1225 (9th Cir. 2006), the governing principle established by *Wardius* is that:

It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

In *Bahamonde*, the Ninth Circuit applied this principle to invalidate a Department of Homeland Security regulation that required a defendant to “state with specificity the testimony he expected from [a department agent] but the government was not required at any time to state what evidence it expected to offer in rebuttal, either from [the agent] or anyone else.” *United States v. Bahamonde*, *supra* at 1229. As the Supreme Court noted in *Wardius*, “[t]he State may not insist that trials be run as a ‘search for truth’ so far as defense witnesses are concerned, while maintaining ‘poker game’ secrecy for its own witnesses,” *Wardius v. Oregon*, 412 U.S. 475.

The government’s Motion for Order Requiring Defendants to Disclose Notice of Alibi Defense Pursuant to Fed. R. Crim. P. 12.1 involves the same flaw as the Oregon alibi statute at issue in *Wardius* and the regulation at issue in *Bahamonde*: it requires the

defendants to “show their hand” without requiring the government to show its. That is impermissible under the Due Process Clause of the Constitution.

CONCLUSION

The government’s Motion for Order Requiring Defendants to Disclose Notice of Alibi Defense Pursuant to Fed. R. Crim. P. 12.1 does not meet the requirements of the Rule that the government provide the defendants with “the time, date, and place of the alleged offense.” To compel defendants to respond to the government’s vague notice would violate their rights to Due Process and their privilege against self-incrimination. The Court should therefore conclude that the defendants have no obligation to respond to the government’s Motion for Order Requiring Defendants to Disclose Notice of Alibi Defense Pursuant to Fed. R. Crim. P. 12.1.

Defendants reserve the right to supplement this initial response within 14 days of the government providing more specific disclosure of the time, date, and place of any alleged offense or overt act and/or any Court order directing them to respond to the

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government's Motion for Order Requiring Defendants to Disclose Notice of Alibi
Defense Pursuant to Fed. R. Crim. P. 12.1.

Dated this 10th day of August, 2011.

Respectfully submitted,

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LAWRENCE MATASAR, P.C.

/s/ MARC D. BLACKMAN

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Of Attorneys for Defendant

Steven Dwight Hammond

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS' AMENDED INITIAL RESPONSE TO UNITED STATES' MOTION FOR ORDER REQUIRING DEFENDANTS TO DISCLOSE NOTICE OF ALIBI DEFENSE PURSUANT TO FED. R. CRIM. P. 12.1 on the following attorney:

Frank Papagni
Assistant United States Attorney
United States Attorney's Office
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by electronic file notice of a true copy on the 10th day of August, 2011.

RANSOM BLACKMAN LLP

/s/ MARC D. BLACKMAN

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