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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA

3:16-CR-00051-BR-8

v.

PETER SANTILLI,

Defendant.

**GOVERNMENT’S RESPONSE TO
DEFENDANT SANTILLI’S MOTION TO
DISMISS COUNT 1 – CONDUCT IS
CONSTITUTIONALLY PROTECTED
(#479)**

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, and through Ethan D. Knight, Geoffrey A. Barrow, and Craig J. Gabriel, Assistant United States Attorneys, hereby responds to defendant’s Motion to Dismiss Count 1 – Conduct Is Constitutionally Protected (ECF No. 479), filed by defendant Santilli.

Defendant seeks to dismiss Count 1 of the Superseding Indictment charging him with Conspiring to Impede Officers of the United States in violation of 18 U.S.C. § 372.

Defendant’s Motion is based upon his claim that the evidence against his underlying Count 1 is “all constitutionally protected by the First Amendment.” (Def.’s Mot. 1). Defendant relies

upon Federal Rule of Criminal Procedure 12(b) to file his Motion, which provides that “a party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.”

Defendant’s Motion is premature and should be denied. While defendant accepts the factual allegations against him in the Complaint and the Indictment for purposes of this Motion (Def.’s Mot. 5), the facts before the Court are incomplete. Defendant is asking this Court to make an evidentiary determination based upon a limited number of facts, many of which are not in the record and which will be later submitted to the jury. Because the Indictment against defendant is legally sufficient, the Court should not consider defendant’s claims and his Motion should be denied as premature.

I. Factual Background

Defendant is charged with a single count of Conspiring to Impede Officers of the United States in connection with his involvement in the armed occupation of the Malheur National Wildlife Refuge. Defendant claims that his involvement in the occupation was limited to his role as a member of the “press” and therefore the allegations against him are predicated on conduct otherwise protected by the First Amendment of the United States Constitution. In support of his Motion, defendant relies upon factual information contained in the Complaint and Indictment. (Def.’s Mot. 3; Def.’s Ex. A). The government does not dispute these facts, however they are not complete—as in any case, the government’s evidence is not set forth in its entirety in the Complaint and Indictment. The government will present its case and additional evidence at trial.

II. Argument

A. Defendant May Not Challenge the Sufficiency of the Evidence Prior to Trial

The Ninth Circuit has rejected the notion that a trial court may examine whether there is sufficient evidence to support a charge pretrial. The Court “should not consider evidence not appearing on the face of the indictment,” and it cannot grant a criminal defendant summary judgment. *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996). “Instead, ‘the proper procedure for raising a challenge to the sufficiency of the government’s evidence to support a finding [of an element of the offense] is by a motion for judgment of acquittal under Rule 29 and not by a pretrial motion to dismiss.’” *United States v. Nukida*, 8 F.3d 665, 670 (9th Cir. 1993) (quoting *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1048-49 (11th Cir. 1987)) (stating further that the “unavailability of Rule 12 in determination of general issues of guilt or innocence . . . helps ensure that the respective provinces of the judge and jury are respected . . . and that the facts are fully developed before disposition of the case”); *see also United States v. Calandra*, 414 U.S. 338, 345 (1974) (“[A]n indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence”); *United States v. Lunstedt*, 997 F.2d 665, 667 (9th Cir. 1993) (affirming denial of pretrial motion to dismiss based on factual insufficiency, where “[a] factual determination on the conspicuousness of the warning was essential to the defense. Thus, the district court could not make such a determination by granting the pretrial motion to dismiss.”).

Defendant urges this Court to dismiss his Indictment because it is based upon the government’s impermissible reliance on constitutionally protected speech. Defendant is

seeking an evidentiary ruling from the Court that is not permitted by Rule 12(b). At this stage, the law requires nothing more than an allegation that defendant has committed a crime.

Second, the law simply does not permit this Court to determine pretrial the evidence the government will rely upon at trial. The rules governing motions to dismiss for failure to state an offense do not permit this Court to look beyond the Indictment's four corners. Defendant may raise all of these issues with a post-trial motion under Rule 29, but his pretrial effort to do so must be denied.

Defendant also sets forth the manner in which otherwise protected speech can be used as evidence against a person charged with a crime under circumstances. (Def.'s Mot. 6-10). The government does not disagree with much of what defendant has characterized as the law regarding the evidentiary use of otherwise protected speech. However, defendant's analysis underscores the most obvious reason (apart from controlling legal authority) the Court should reject his Motion: He is asking the Court to conduct a substantive factual analysis without all the facts.¹

B. The Indictment Is Legally Sufficient

To the extent defendant's Motion could be construed as a challenge to the sufficiency of the Indictment, the government does not dispute that defendant may raise such a challenge. For example, in *United States v. Ezeta*, 752 F.3d 1182 (9th Cir. 2014), the parties disagreed about

¹ In denying defendant's Motion, this Court would not foreclose on a "First Amendment" defense to the charge if the evidence supported it. The Ninth Circuit has upheld the use of jury instructions permitting a First Amendment defense after the presentation of evidence. *See United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985) (reversing district court's denial of defendant's request for jury instruction raising First Amendment defense in case where defendant was charged with aiding and abetting and counseling violations of tax laws).

whether the crime charged included, as an element, a requirement that a defendant actually “obtain” federal funds, or whether a defendant could be guilty of the charge because he “controlled the funds.” In this case, for purposes of this Motion, by contrast, there is no dispute about the legal requirements of Count 1.

The Indictment in defendant’s case is legally sufficient. Federal Rule of Criminal Procedure 7(c) states that an indictment “must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.” “[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” *United States v. Bailey*, 444 U.S. 394, 414 (1980) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). When this Court examines an indictment to determine if it satisfies Rule 7, it is “bound by the four corners of the indictment.” *United States v. Lyle*, 742 F.3d 434, 436 (9th Cir. 2014) (quoting *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002)). Most importantly to the Court’s consideration of defendant’s Motion, a pretrial motion to dismiss may only be decided if the issues raised are “entirely segregable from the evidence to be presented at trial.” *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986). “The indictment either states an offense or it doesn’t.” *Boren*, 278 F.3d at 914.

Defendant conflates the sufficiency of the Indictment with the sufficiency of the evidence as it relates to the First Amendment in an effort to seek a ruling from this Court. These are two

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distinct issues, the latter of which may not be resolved at this stage. While defendant attempts to characterize his claim as an issue of law that this Court may decide pretrial, it is not.

III. Conclusion

For the reasons stated above, defendant's Motion should be denied.

Dated this 11th day of May 2016.

Respectfully submitted,

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s/ Ethan D. Knight

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