

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

UNITED STATES OF AMERICA)	Criminal No. 1:10CR485
)	
)	
)	Hon. Leonie M. Brinkema
v.)	
)	
JEFFREY ALEXANDER STERLING)	
)	
Defendant.)	

**JEFFREY STERLING’S ALTERNATE MOTION
TO DISMISS COUNT EIGHT OF THE INDICTMENT**

Defendant Jeffrey Sterling, for the reasons set forth in his supporting memorandum of law, respectfully moves this Court for an order dismissing Count Eight of the Indictment.

Dated: February 24, 2011

Respectfully submitted,
JEFFREY A. STERLING

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2011, 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 all counsel of record.

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**MEMORANDUM IN SUPPORT OF DEFENDANT JEFFREY STERLING’S
ALTERNATE MOTION TO DISMISS COUNT EIGHT OF THE INDICTMENT**

Defendant Jeffrey Sterling respectfully moves this Court to dismiss Count Eight of the Indictment, which charges Mr. Sterling with mail fraud, in violation of 18 U.S.C. § 1341.¹ *See* Indictment [DE 1] at ¶ 69. The Indictment fails to allege that Mr. Sterling was cognizant of Author A’s intent to publish a book, and accordingly, it necessarily fails to allege that Mr. Sterling could reasonably foresee the use of the mail to ship Author A’s published book. Thus, the Indictment does not allege an essential element of mail fraud, and Count Eight must be dismissed.

BACKGROUND

On December 22, 2010, Mr. Sterling was indicted for, *inter alia*, one count of Mail Fraud, under 18 U.S.C. § 1341 (Count Eight). *Id.* at ¶ 69. The Indictment alleges that Mr. Sterling, through his work at the CIA, lawfully possessed information about “Classified Program No. 1[,]” a “clandestine operational program of the CIA” (*id.* at ¶¶ 15-16) and “Human Asset

¹ Count Eight should also be dismissed for the separate reasons set forth in Mr. Sterling’s Motion to Dismiss Count Eight of the Indictment, filed herewith, specifically that the Indictment fails adequately to plead the essential elements of the charged offense, a scheme to defraud the CIA of money or property.

No. 1,” a person who worked for the CIA and “provided highly valued information to the CIA” (*id.* at ¶¶ 14, 16). The Indictment also alleges that Mr. Sterling was in unauthorized possession of a letter related to Classified Program No. 1. *Id.* at ¶ 57.

The Indictment alleges that Mr. Sterling disclosed classified information about Human Asset No. 1 and Classified Program No. 1 to Author A. *Id.* at ¶¶ 23, 26, 39-42, 52. The Indictment further alleges that Author A used this classified information while writing a book that was ultimately published (*id.* at ¶¶ 44-54). However, the Indictment, at no point, alleges that Mr. Sterling was aware of Author A’s intent to write a book during any of his communications with Author A. *See id.* at ¶¶ 19, 23, 26-27, 34, 37-38, 44-51, 54.

Nonetheless, Count Eight of the Indictment purports to charge that Mr. Sterling, having knowingly devised a scheme to defraud the CIA and for the purpose of executing this scheme, “did knowingly cause to be delivered . . . a shipment of Author A’s published books for sale at a commercial retail bookstore in the Eastern District of Virginia.” *Id.* at ¶ 69. There is no foundation for this charge in the Indictment. Accordingly, Count Eight must be dismissed.

ARGUMENT

I. The Indictment Must Adequately Allege the Elements of the Charged Offense.

“A valid indictment must: (1) allege the essential facts constituting the offense; (2) allege each element of the offense, so that fair notice is provided; and (3) be sufficiently distinctive that a verdict will bar a second prosecution for the same offense.” *United States v. Bolden*, 325 F.3d 471, 490 (4th Cir. 2003) (citing *United States v. Smith*, 44 F.3d 1259, 1263 (4th Cir. 1995)). If the indictment does not include every essential element of an offense, it is invalid. *United States v. Darby*, 37 F.3d 1059, 1063 (4th Cir. 1994). While “an indictment is sufficient if it alleges an offense in the words of the statute . . . the words used in the indictment [must] ‘fully, directly,

and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence.” *United States v. Brandon*, 298 F.3d 307, 310 (4th Cir. 2002) (internal citations omitted); *see also* Fed. R. Crim. P. 7(c)(1) (the indictment must contain a definite statement of the essential facts constituting the offense charged).

II. The Indictment Fails to Allege An Essential Element of Mail Fraud: the Knowing Use of the Mail for the Purpose of Executing a Fraudulent Scheme.

“[M]ail fraud requires two elements -- (1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts).” *Carter v. United States*, 530 U.S. 255, 261 (2000); *see also Foster v. Wintergreen Real Estate Co.*, 363 Fed. Appx. 269, 273 (4th Cir. 2010) (“The elements of mail fraud are: (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme.”) ((internal quotations omitted). “[P]roof that use of the mails was, objectively, reasonably foreseeable is sufficient to support a conviction for conspiracy to commit mail fraud.” *United States v. Edwards*, 188 F.3d 230, 234 (4th Cir. 1999). The Indictment fails to allege the second required element of mail fraud: that Mr. Sterling could reasonably foresee use of the mails to ship Author A’s book.

The Indictment generally alleges that Mr. Sterling communicated with Author A. *See generally* DE 1. The Indictment also alleges that Mr. Sterling was aware of Author A’s intent to publish a newspaper article about the CIA. *See, e.g., id.* at ¶¶ 23, 27, 39-42. However, the Indictment does not contain a single allegation that Mr. Sterling was cognizant of Author A’s intent to publish a book about the CIA, using information that Mr. Sterling allegedly provided.²

² *See* Mr. Sterling’s Motion to Dismiss Counts One and Two, filed herewith.

Accordingly, because the Indictment fails to allege that Mr. Sterling was aware of Author A's book, Mr. Sterling likewise had no reason to foresee that the mails would be used to ship the book. Thus, the Indictment fails to allege the essential facts of one of the elements of mail fraud.

III. The Failure of the Indictment Adequately to Plead an Essential Element of Mail Fraud Deprived Mr. Sterling of His Rights Under the Fifth Amendment.

The Indictment contains no allegations that Mr. Sterling ever knew that Author A intended to write a book, and thus, its allegation that Mr. Sterling knowingly caused the shipment of that book is unfounded. As such, a serious concern exists that the grand jury did not have before it the facts that it would have needed to conclude that the essential elements of mail fraud were met when it indicted Mr. Sterling on Count Eight.

The Supreme Court has held that an indictment must completely and clearly define the charges because:

to allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Russell v. United States v. Russell, 369 U.S. 749, 770 (1962). The Fifth Amendment "requires that the grand jury have considered and found all elements to be present" before issuing an indictment. *United States v. Hooker*, 841 F.2d 1225, 1230 (4th Cir. 1988). Where, as here, the Indictment utterly fails to allege that Mr. Sterling ever knew that: 1) Author A intended to write a book using information provided by Mr. Sterling; 2) Author A did, in fact, write the book; and 3) the book was chosen for publication, a serious doubt exists that the grand jury had any of these facts before it when indicting Mr. Sterling. Thus, not only does the Indictment fail to allege an essential element of the offense of mail fraud, but the very real possibility exists that the grand

jury itself never properly considered this element before bringing the charge in Count Eight against Mr. Sterling. Accordingly, Count Eight must be dismissed.

CONCLUSION

For the foregoing reasons, Mr. Sterling respectfully requests the Court grant his Motion to Dismiss Count Eight of the Indictment.

Dated: February 24, 2011

Respectfully submitted,

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