UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs

Case No: 04-80372
Honorable Victoria A. Roberts

D-1 CARL MARLINGA
D-2 - RALPH R. ROBERTS
D-3 - JAMES A. BARCIA,

Defendants.
_____/

OPINION AND ORDER REGARDING MARLINGA'S MOTION TO STRIKE SURPLUSAGE FROM INDICTMENT

I. INTRODUCTION

This matter is before the Court on Defendant Carl Marlinga's Motion to Strike Surplusage from Indictment (Doc. #24). Defendant Ralph Roberts joins the motion. For the reasons stated, the motion is **GRANTED IN PART AND DENIED IN PART**.

II. BACKGROUND

Defendant Carl Marlinga ("Marlinga") is charged in all counts of a nine-count Indictment. The Indictment alleges that while running for election to the United States House of Representative in the 2000 Congressional race, Marlinga, the former Macomb County Prosecuting Attorney, participated in *quid pro quo* schemes to accept campaign contributions in exchange for prosecutorial assistance in two cases, *People v Jeffrey Moldowan* and *People v James Hulet.*

Defendant Ralph Roberts ("Roberts"), who is charged in three counts of the

Indictment (Counts One, Two and Seven), allegedly made campaign contributions to Marlinga in exchange for Marlinga's assistance in persuading the Michigan Supreme Court to grant Jeffrey Moldowan a new trial. Defendant James Barcia ("Barcia"), who is charged in two counts (Counts Five and Eight), allegedly acted as a conduit between Marlinga and James Hulet's attorney to funnel illegal contributions from Hulet's attorney to Marlinga.[1]

Marlinga requests that the Court strike surplusage from the Indictment. He contends that the 34-page Indictment includes improper argument regarding the Government's theory of the case and suggests the commission of offenses that were not charged. Marlinga says the challenged portions of the Indictment are not necessary to the definition and allegation of the offenses charged and, therefore, they are surplusage.

III. APPLICABLE LAW AND ANALYSIS

Federal Rules of Criminal Procedure (FRCrP) 7(c)(1) provides that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. . . ." On motion of the defendant, under FRCrP 7(d), the Court may strike surplusage from an indictment. A FRCrP 7(d) motion "is properly invoked when an indictment contains nonessential allegations that could prejudicially impress the jurors." *United States v Kemper,* 503 F.2d 327, 329 (6th Cir. 1974). Whether to grant such a motion is within the sound discretion of the trial court, but is only proper when the words stricken are not essential to the charge. *Id*.

[1]A more complete summary of the allegations in the Indictment can be found in the Court's Orders entered on February 28, 2005.

A court need not consider whether language the defendant seeks to strike is prejudicial when it is relevant information that the government plans to prove at trial. Quoting *United States v Climatemp, Inc.,* 482 F.Supp. 376, 391 (N.D. Ill. 1979), the Sixth Circuit has held that "if the language in the indictment is information which the government hopes to properly prove at trial, it cannot be considered surplusage no matter how prejudicial it may be (provided, of course, it is legally relevant)." *United States v Thomas,* 875 F.2d 559, 562 n.2 (1989), *cert. den.,* 493 U.S. 867 (1989); *United States v Moss,* 9 F.3d 543, 550 (6th Cir. 1993). The *Climatemp* court noted that the Advisory Committee note to FRCrP 7(d) describes surplusage as language that is immaterial and prejudicial. 482 F.Supp. at 391. The court further stated that "[t]he inclusion of clearly unnecessary language in an indictment that could serve only to inflame the jury, confuse the issues, and blur the elements necessary for conviction under the separate counts involved surely can be prejudicial." However, as indicated, the *Climatemp* court held that language in the indictment that the government hopes to prove, and which is relevant, is not surplusage even if prejudicial.

Marlinga requests that the Court strike as surplusage a portion of paragraph 1, and all of paragraphs 2 and 10 through 47 of the Indictment. In paragraph 1, he proposes that the Court omit language that he had a duty as a county prosecutor to "make all prosecutorial decisions based solely on the public good, and to render only fair and honest services, untainted by considerations of personal benefit or gain, or by conflicts of interest." The proposed omitted language in Paragraph 2 refers to Marlinga's candidacy from 1999 through May 7, 2000 for Justice of the Michigan Supreme Court, and the fact that he dropped out of the race prior to the date of the

election and sought reelection as county prosecutor. Paragraphs 10 through 47 set forth, in great detail, the alleged acts of Marlinga and other named and unnamed parties that give rise to the charges.

As a preliminary matter, the Court notes that Marlinga only made specific argument with respect to 2 of the 39 paragraphs that he wants redacted in whole or in part. He makes only a general assertion that the allegations in paragraphs 10 through 47 are argumentative, may prove confusing to the jury with regard to what must be proven, and that they are prejudicial to the extent they suggest that he engaged in uncharged misconduct. Marlinga does make specific objections to paragraphs 12 and 25, and concludes by generally asking the Court to eliminate additional paragraphs which include "unnecessary argument, insinuation, and inferential leaps which are no [sic] part of the elements of the charges against him, but which are an inextricable part of all of the nonessential allegations of the indictment - *i.e.,* everything except the charging language itself[.]" Def. br. at 7.

As Marlinga notes, the allegations in the Indictment are detailed and complex. Consequently, the Court cannot analyze the paragraphs that he wants omitted in one broad sweep. In fact, that such a course of action would be improper is made apparent by the fact that Marlinga only made specific objections to *portions* of paragraphs 12 and 25. Presumably, he concedes that the balance of the paragraphs do not contain objectionable language.

In order to perform a proper analysis, the Court must consider each paragraph at issue to determine whether all or a portion of the language is essential, relevant and prejudicial. *Kemper,* 503 F.2d at 329. However, because Marlinga failed to make

specific objections to each paragraph, the Court can only guess about the specific basis for each proposed omission, and whether the objection encompasses all or just a portion of each paragraph. The Court is not obligated or inclined to engage in such speculation. Therefore, the Court will only consider the specific objections raised with regard to paragraphs 12 and 25.

A. Paragraph 12

Marlinga objects to the last two sentences of paragraph 12, which follow quoted portions of taped conversations between Marlinga and Roberts:

> In the conversation quoted above, Defendants Marlinga and Roberts also discussed Defendant Marlinga's withdrawal from the race for Michigan Supreme Court, and his effort to seek reelection as Macomb County Prosecutor. (See Paragraph Two). Defendant Roberts offered to help Defendant Marlinga in his race for reelection; Defendant Marlinga thanked him.

Marlinga argues that this language implies that Roberts offered assistance in connection with campaigns other than the 2000 Congressional race as an inducement to secure Marlinga's assistance in the *Moldowan* matter, and that Marlinga may have agreed with his "thanks." The Government responds by arguing that the taped conversation is relevant because Marlinga and Roberts discuss *Moldowan* (for the first time). Therefore, it intends to introduce the tape at trial. The Government further contends that the fact that Roberts offered assistance with Marlinga's reelection, immediately prior to shifting the conversation to a request for Marlinga's assistance with *Moldowan*, is relevant to whether a *quid pro quo* was reached (presumably, regarding *Moldowan*) at a later time.

The Court grants Defendant's motion to strike the Paragraph 12 challenged

language. The proposed redacted language refers to Marlinga's plans to seek reelection as the Macomb County Prosecuting Attorney. Neither Marlinga nor Roberts is alleged to have engaged in any improprieties with regard to that campaign. The Government does not claim that it is an essential allegation, and there is no connection to any of the allegations or charges in the Indictment. And, as the Indictment only alleges that Marlinga accepted contributions from Roberts for his congressional race in exchange for assistance with *Moldowan,* the Government has not persuasively shown that Roberts' presumably lawful offer of assistance with a different campaign is relevant to whether a *quid pro quo* was reached in the *Moldowan* matter.

The Government states that it intends to introduce the taped conversation at trial. Under *Thomas*, the Government asserts that its stated intention precludes the Court from striking the Government's allegation from the Indictment. The Government is wrong. *Thomas* only insulates *relevant* allegations that the Government intends to prove at trial from a motion to strike. The Government failed to establish the relevance of the challenged language. Furthermore, in light of the fact that the Government's primary contention is that Marlinga accepted bribes from Roberts in an effort to seek election to Congress, jurors could infer from the challenged language that Marlinga and Roberts had similar intentions with regard to Marlinga's bid to be reelected as the Macomb County Prosecutor.

In sum, the Court finds that the portion of paragraph 12 that Defendant Marlinga wants omitted is not essential to the Government's allegations, it is not relevant, and it is potentially prejudicial. Therefore, the last two sentences of paragraph 12 are stricken as surplusage, and that portion of the tape will not be played to the jury at trial.

B. Paragraph 25

Marlinga objects to the last sentence of paragraph 25. Preceding the last sentence, the Government quotes a taped conversation between Marlinga and Roberts regarding media reports suggesting a *quid pro quo* between them. Marlinga is quoted as advising Roberts on how to respond to inquiries -- telling Roberts to say that he (Roberts) never asked Marlinga to do anything, but that they had conversations about the case:

> Look it, just say the same thing, that you ju-- just said to me, th th that basically, ah, you never asked me to, you know, do anything, uhm, that, uh, we did have conversations about the case in which you though that he was innocent and I thought he was guilty, and uh, you know, ya - we can't do anything other than tell the truth, so just tell the truth.

Indictment at ¶25. Following the quote, the Government alleges that Marlinga's statements to Roberts are false, because Roberts did ask Marlinga to "do something" about the case during their early conversations, and allegedly Marlinga expressed a willingness to do so. Immediately following these allegations, in the final sentence, the Government alleges that Marlinga's statement "constituted an attempt to cause Defendant Roberts to falsely tailor his public statements to fit with Marlinga's public statements." *Id*. Marlinga argues that the allegation in the final sentence implies a coverup and obstruction of justice, neither of which is charged.

The Government responds by arguing that paragraph 25 illuminates a false exculpatory statement by Marlinga, which is admissible as evidence of consciousness of guilt. If Marlinga's statement to Roberts were not included in the Indictment, the Government says Marlinga might argue that it was inadmissible at trial because he was

surprised by its introduction. And, because the Government intends to introduce the statement at trial, under *Thomas,* the Government contends that it is relevant and may not be stricken.

First, in its response the Government only defends its inclusion of Marlinga's actual statement in the Indictment. However, Marlinga does not object to the inclusion of the actual statement.[2] Marlinga also does not object to the Government's allegation at the conclusion of the quote that the statement was false in several respects. Rather, Marlinga's claim is that the Government's commentary in the final sentence regarding what is to be inferred from his statement suggests that he instigated an uncharged coverup and obstruction of justice. Therefore, the Government's contention that Marlinga's statement is a false exculpatory statement is not responsive to Marlinga's claim.

Second, the Government is mistaken in its assertion that, under *Thomas*, the challenged language is relevant and may not be stricken *because* the Government intends to introduce the tape containing the conversation at trial. As stated, the relevancy of the challenged language must be shown *before Thomas* applies. In this case, relevance depends, at least in part, on the extent to which the Government's statement is essential to the allegations. The Government makes no claim, and it does not appear, that the final sentence of paragraph 25 is essential to any of the allegations in the Indictment. Thus, the Government failed to show that its theory regarding what

[2]Marlinga does object to admission of the statement by implication, by omitting it from the redacted copy. But, for the reasons stated, the Court disregards any objections that were not expressly and specifically made.

should be inferred from Marlinga's statement is relevant, and *Thomas* does not apply.

Third, the Court finds that the challenged language is prejudicial. Immediately preceding the final sentence of paragraph 25, the Government alleges that Marlinga instructed Roberts to make false representations about their prior discussions. These allegations adequately convey the Government's contention that Marlinga made false exculpatory statements. The Government's further characterization of Marlinga's statements as "an attempt to cause Defendant Roberts to falsely tailor his public statements to fit with Marlinga's public statements," serves no apparent purpose except to preview the Government's intended argument at trial, and it may lead jurors to improperly infer that Marlinga engaged in uncharged offenses, *i.e.,* a coverup and obstruction of justice, to conceal the alleged *quid pro quo*. *See United States v Hubbard*, 474 F.Supp. 64, 82 (D.D.C. 1979)(striking phrases that might lead the jury to infer accusations of crimes beyond those actually charged); *United States v Zabawa,* 39 F.3d 279, 285 (10th Cir. 1994)(not an abuse of discretion for the district court to strike as inflammatory and prejudicial an allegation that there were 6,708 victims, though only 30 were identified in the indictment, since the allegation was not needed to establish the elements of the charged crimes and was not integral to the indictment as a whole).

The statement in Paragraph 25 of the Indictment, "Defendant's statement constituted an attempt to cause Defendant Roberts to falsely tailor his public statements to fit with Marlinga's public statements," will be stricken.

IV. CONCLUSION

For the reasons stated, Defendants Marlinga and (by joinder) Roberts' Motion to Strike Surplusage from Indictment is **GRANTED IN PART AND DENIED IN PART**.

Surplusage is stricken, as indicated above, from Paragraphs 12 and 25.

IT IS SO ORDERED.

/s/ Victoria A. Roberts
VICTORIA A. ROBERTS
UNITED STATES DISTRICT COURT

Dated: 3/2/05