

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANÍBAL ACEVEDO VILÁ, et al.,

Defendants.

CRIMINAL NO. 08-00036 (PJB)

**DEFENDANT LUISA INCLAN BIRD'S MOTION TO STRIKE
PREJUDICIAL SURPLUSAGE FROM THE INDICTMENT¹ AND
INCORPORATED MEMORANDUM OF LAW**

Defendant, Luisa Inclan Bird, through undersigned counsel, hereby moves this Court pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure for an order striking irrelevant and prejudicial surplusage from the Superseding Indictment (the "Indictment"). In support of this motion, Ms. Luisa Inclan Bird relies on the following:

LEGAL STANDARD

Rule 7(d) of the Federal Rules of Criminal Procedure provides: "The court on motion of the defendant may strike surplusage from the indictment or information." Language in an indictment beyond that which is relevant to the elements of the statute charged is mere surplusage. United States v. Noveck, 271 U.S. 201, 203 (1926); United States v. Goodman, 605 F.2d 870, 886 (5th Cir. 1979); United States v. Greene, 497 F.2d 1068, 1086 (7th Cir. 1974), cert. denied, 420 U.S. 909 (1975). As the former Fifth Circuit Court of Appeals has recognized:

The inclusion of clearly unnecessary language in an indictment
that could serve only to inflame the jury, confuse the issues, and

¹ Co-Defendants Candido Negrón Mella, Ramon Vealsco Escardille, Ricardo Colon-Padilla and Jorge Velasco Mella have joined in the instant motion.

blur the elements necessary for conviction under the separate counts involved surely can be prejudicial.

United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971). A motion to strike surplusage is addressed to the discretion of the District Court, and should be granted where it is clear that the allegations contained therein are not germane to the charges made or contain inflammatory and prejudicial matter. United States v. Hedgepeth, 434 F.3d 609 (3d Cir. 2006); United States v. Fahey, 769 F.2d 829 (1st Cir. 1985); United States v. Winter, 663 F.2d 1120 (1st Cir. 1981). See generally United States v. Miller, 471 U.S. 130, 144 (1985). See also United States v. Bateman, 805 F.Supp. 1045 (D.N.H. 1992); United States v. Gambale, 610 F. Supp. 1515, 1543 (D. Mass 1985).

The appropriate procedure to be followed when prejudicial language is stricken from an indictment is for the prosecution to prepare a retyped, "clean" copy of the indictment giving no indication of any omission. This method is preferable to making a photostatic copy of the indictment with the deleted portions covered over, United States v. Wilner, 523 F.2d 68, 72 (2d Cir. 1975), because the latter procedure may suggest to the jury the existence of additional allegations against the defendants.

THE SURPLUSAGE

The indictment is replete with surplusage which is immaterial to the charges set out and highly prejudicial to Ms. Luisa Inclan Bird. Specifically, in the General Allegations section of the Indictment, Paragraphs 1-3, pages 34-35, the Government explains the duties and responsibilities of the following Government agencies: Puerto Rico Treasury Department, The Government Development Bank, and the State Electoral Commission for the Commonwealth of Puerto Rico. The allegations contained in these paragraphs are allegations and interpretations of law, not factual allegations. For instance, Paragraph 3 states that “[p]olitical parties and

candidates in Puerto Rico were required to file periodic reports with the Commission...” It is well established that issues of law are decided by the Court, not the jury and certainly not a party to an action. Sparf v. United States, 156 U.S. 51, 89 (1895) (“the judge decides the law”); see also Dennis v. United States, 341 U.S. 494, 515 (1951); United States v. Bennett, 469 F.2d 46, 51 (1st Cir. 2006). Clearly, a statement of what the law requires from a political party is a matter of law, which should be decided by a judge and not contained within an indictment. Similarly, in Paragraphs 10-13, pages 36-37 of the Indictment, the Government proceeds to explain and interpret the Commonwealth of Puerto Rico Law 4, as Amended by Law 115. Again, the law should only be interpreted by the Court and not the Government. This language is highly prejudicial, will confuse the jury, and implies that the Government’s interpretation of the law is accurate. More importantly, this language is unnecessary to a plain and concise statement of the charges in the Indictment and in no way explicates the alleged offense.

Additionally, the Indictment is replete with references to code names², such as Company A, Person A, Store A. These code names were devised by the Government for use in the Indictment and there is no allegation that any of the Defendants used these code names in carrying out the alleged conspiracy. The use of the code names in relation to charged activities makes these actions appear more surreptitious. Clearly, the jury will imply from the code names that the Defendants, including Ms. Luisa Inclan Bird, used code names to disguise their activities. This language is highly prejudicial and implies guilt, and is irrelevant for purposes of the indictment. More importantly, this language is unnecessary to establish the government’s prima facie case.

² See page 8, ¶ 5a; p. 13-14, ¶¶ 6-9 and 11; p. 17, ¶¶ 18-20; p. 20, ¶¶ 34-35; p. 23-24, ¶ 40; p. 24, ¶ 45; p. 32, ¶¶ 2-3; p. 33, ¶¶ 1-2; p. 36, ¶ 9; p. 39, ¶ 3(a-h); p. 48, ¶ 6; p. 51, ¶ 4a; and p. 51, ¶ 5.

The situation in United v. Vastola, 670 F. Supp. 1244 (D.N.J. 1987)³ is instructive. The indictment contained a narrative "preamble" which, similar to the false allegations made in this case, purported to describe the roles allegedly played by the various defendants in a RICO enterprise. The preamble in Vastola listed several non-RICO defendants in the same list as the RICO defendants, creating the inference that they were charged with RICO crimes when they were not. The preamble also contained other descriptions ("Boss of the Vastola Organization") that were not charged in the counts of the indictment. The court wrote:

The court is concerned that the jury's deliberations will be unduly influenced by the preamble (the jurors have a copy of the indictment while deliberating), yet the jury will not explicitly be required to evaluate the probativeness of this information. Since the information is not specifically confined within any particular count or counts, the court is concerned that the jury could refer to it and consider it in evaluating the counts to which it does not apply. . . .Anything in the indictment that allows the jury to infer involvement with uncharged crimes (whether the inference is based on the location of narrative descriptions or the content of such description) is improper. (Citations omitted.)

Id. at 1254-55. The court struck the entire preamble. The court found the language "irrelevant," "vague," and prejudicial, since it implied "guilt by association" and "insinuate[d]" that the defendants committed uncharged conduct. Id. The same analysis applies in the instant case. The Government simply included the references to code names to imply additional guilt. We urge the Court to strike all references to code names. We further urge the Court to strike paragraphs 1-3 and 10-13 of the general allegations section in their entirety because only the Court may be charged with deciding and interpreting the law.

³ This case has a substantial subsequent history based on grounds unrelated to those pertinent to this motion: United States v. Vastola, 570 F. Supp. 1244 (D.N.J. 1987), aff'd in part and rev'd in part, 899 F.2d 211 (3d Cir. 1990), vacated, 110 S. Ct. 3233, on remand, 915 F.2d 865 (3d Cir. 1990), cert. denied, 111 S. Ct. 1073 (1991), on remand, United States v. Vastola, 772 F. Supp. 1472, (D.N.J. 1991).

CONCLUSION

For the above reasons, undersigned counsel urges the Court to grant the instant motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been filed via electronic mail with the Clerk of the Court by using CM/ECF System which will send a notice of electronic filing to the following on this 8th day of July, 2008.

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