

**UNITED STATES DISTRICT COURT
WESTERN DIVISION OF TEXAS
SAN ANTONIO DIVISION**

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	
v.)	NO. 5:13-CR-00655-XR
)	
MARCIANO MILLAN VASQUEZ)	
)	

**GOVERNMENT’S BRIEF AND RESPONSE TO
DEFENDANT’S MOTION TO STRIKE SURPLUSAGE FROM THE INDICTMENT**

Comes now the United States Attorney for the Western District of Texas and files this Response to the Defendant’s Motion to Strike Surplusage from the Indictment, and for cause, would respectfully show unto the Court the following:

I.

The Defendant complains of the language found in the first five paragraphs of the indictment that relate to the Ways, Manner and Means to accomplish the Conspiracy for Counts 1-9. The Defendant’s objections are that the paragraph consists of “irrelevant, inflammatory, and prejudicial conclusory allegations that are unrelated to this Defendant”. For the reasons stated infra, this is simply incorrect. The organization for which the Defendant worked is central to his prosecution as it is in similar cases. It is simply disingenuous for the Defense to assert to this court that the information contained in the complained of paragraphs in the indictment are not related to this Defendant; even more so after viewing the discovery in this case.

To be stricken, surplusage must be irrelevant, inflammatory **and** prejudicial. *United States v. Graves*, 5 F.3d 1546, 1550 (5th Cir. 1993); *United States v. Vogel*, 2010 WL 2465359 (5th Cir. 2010). If the charge is not materially broadened and the accused is not misled, then

surplusage should remain in the indictment. *United States v. Quintero*, 872 F.2d 107, 111 (5th Cir. 1989); *United States v. Trice*, 823 F.2d 80, 89 n.8 (5th Cir. 1987). This is a strict standard, and accordingly, surplusage is rarely stricken. *United States v. Bullock*, 451 F.2d 884, 888 (5th Cir. 1971); *Vogel* at 2. Additionally, when information in an indictment is relevant to the charged offense, it should not be stricken, regardless of how prejudicial it may be. *United States v. Scarpa*, 913F.2d 993, 1013 (2nd Cir. 1990); *Vogel* at 2. *See also United States v. Edwards*, 72 F.Supp.2d 664,667 (M.D.La. 1999)(holding that if the allegation is admissible and relevant to the charge, then regardless of how prejudicial, the court should not strike the language). The fact that information in the indictment does not constitute an element of the offense does not require that it be stricken. *United States v. Alexander*, 2008 WL 2130185 (W.D.La. 2008). A district court may strike language as surplusage *only* if it serves to inflame the jury, confuse the issues and blur the elements needed for conviction. *Bullock* at 888.

The Defendant does not really argue that the language in the indictment is not relevant, but rather that it is prejudicial. As the case law makes exceedingly clear, that is not the standard to strike language from an indictment. The language is relevant because it is indeed what this case is about. It is not inflammatory. It describes the origin and operations of the very conspiracy that the Government alleges that the Defendant joined. The fact that something is common knowledge, i.e. that the Zeta drug cartel is one of the most violent crime organizations in the world, does not make it inadmissible. To the contrary, this is a case about the Zetas and the leaders of the Zeta cartel. The Defendant is one of these leaders.

It should be pointed out that the language complained of by the defense is extremely mild in contrast to the evidence that will be introduced of the Defendant's crimes. The history and scope of the cartel itself is fairly tedious compared to the evidence that will be adduced regarding

multiple homicides committed by the Defendant and his co-conspirators. The language in the indictment is important because it provides context on the scope of the conspiracy and the motives of the conspirators. *United States v. Graves*, 5 F.3d 1546, 1550 (5th Cir. 1993). The Defendant is a Zeta and worked for and with Zetas. The evidence will be that over a lengthy period of time, the Defendant worked for Zetas, worked with Zetas, and for a protracted period of time was a leader in the Zeta organization. The evidence will establish that the Zetas are a hierarchy, and that the leaders of that organization, including this Defendant, gave orders to kill persons in the course of the conspiracy; and that the Defendant himself shot, dismembered, and burned bodies in furtherance of the conspiracy. The evidence will show that the intent of these murders was to not only enforce orders, but to also terrorize those who might resist. These are not concepts in the abstract, but rather the individual actions of Mr. Millan-Vasquez. Language relevant to prove motive should not be stricken as surplusage.

Finally, even though the Court should deny the Defendant's motion outright as without merit, the decision to strike surplusage is within the discretion of the court, and the court can reserve judgment on the motion until after the presentation of evidence at trial. See *United States v. Simpson*, 2011 WL 2880885 (N.D.Tx. 2011)(citing 1 *Wright & Miller*, §128 at 641-42). The 5th Circuit in *Simpson* noted that courts are often slow to grant motions to strike surplusage. *Id.*

WHEREFORE, premises considered, the Government respectfully prays that Defendant's Motion be denied.

Respectfully submitted,

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By

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CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of February, 2016, a copy of the foregoing motion was provided to Jaime Cavazos, Attorney for the Defendant.

_____/s/_____
RUSSELL D. LEACHMAN
Assistant U.S. Attorney

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**ORDER DENYING DEFENDANT’S MOTION TO STRIKE SURPLUSAGE
FROM THE INDICTMENT**

On this the ____ day of March, 2016, the Court came to consider the Defendant’s Motion to Strike Surplusage from the Indictment. After considering the Defendant’s Motion, the Government’s Response thereto, and the applicable authority, the Court is of the opinion that the Defendant’s Motion should be denied.

Accordingly, the Defendant’s Motion to Strike Surplusage from the Indictment is hereby DENIED.

Signed this _____ day of March, 2016.

Honorable XAVIER RODRIGUEZ
United States District Judge