

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

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U.S. DISTRICT COURT
N.D. OF ALABAMA



UNITED STATES OF AMERICA,

v.

RICHARD M. SCRUSHY,

Defendant.

CR-03-BE-0530-S

RICHARD M. SCRUSHY'S MOTION TO STRIKE SURPLUSAGE

(Authorities Included)

Defendant Richard M. Scrushy, through his undersigned counsel, moves for an order striking surplusage from the Indictment Pursuant to Federal Rule Criminal Procedure 7(d). This motion is based upon the authorities herein, the pleadings and papers on file in this action, and upon such other evidence and argument as may be presented at the hearing on this motion.

INTRODUCTION

On November 4, 2003, a grand jury issued a 38-page, 85-count Indictment alleging, inter alia, a substantive conspiracy violation, 20 counts of mail fraud, 18 counts of wire fraud, 22 counts of securities fraud, 6 counts of false statements, 3 counts of false certification and false certification attempt, 20 counts of money laundering, and 15 counts for forfeiture. The government has peppered its eighty five-count Indictment with superfluous language that constitutes immaterial, irrelevant and inflammatory allegations that are highly prejudicial to Mr. Scrushy. This prejudicial rhetoric is unnecessary and does not constitute elements of the offenses purported to be charged in the Indictment. The government's citation to alleged events

that have nothing to do with the crimes charged are designed to misleadingly imply to the jury that Mr. Scrusby is somehow guilty because of events irrelevant to the charges.

If the superfluous allegations contained in the Indictment are allowed to stand, Mr. Scrusby will be denied a fair trial by an unbiased jury. Mr. Scrusby respectfully requests this Court order the government to delete the prejudicial surplusage contained in the Indictment or insure that the present Indictment is neither given nor read to the petit jury.

ARGUMENT

I. THE COURT SHOULD USE ITS BROAD DISCRETION TO STRIKE SURPLUSAGE FROM THE INDICTMENT.

Rule 7(d) of the Federal Rules of Criminal Procedure provides that “[t]he court on motion of the defendant may strike surplusage from the indictment” Where an indictment contains prejudicial surplusage, the appropriate remedy is to strike the surplusage. See United States v. Goodman, 285 F.2d 378, 379 (5th Cir. 1960); United States v. Hood, 200 F.2d 639, 642 (5th Cir. 1953). And, where the government asserts facts that are irrelevant or immaterial, particularly when those facts might prove prejudicial, the defendant may compel their deletion. United States v. Bissell, 866 F.2d 1343, 1355-56 (11th Cir. 1989); United States v. Hughes, 766 F.2d 875, 879 (5th Cir. 1985). An assertion that is not one of the elements of the charged offense is surplusage. Hughes, 766 F.2d at 879.

Nor is it appropriate for the government to include unnecessary language in the Indictment as background information. “The proper course is to move to strike” unnecessary allegations that prosecutors attempt to insert for “color” or “background” hoping to “stimulate the interest of the jurors.” C. Wright, *Federal Practice and Procedure: Criminal* § 127 (2003). “The 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” and should be stricken. United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971).

A. Allegations Relating To Claims Not Alleged In The Indictment Are Prejudicial and Irrelevant To The Charges In The Indictment And Should Be Stricken As Surplusage.

The Indictment states that “Richard M. Scrusy was the highest ranking corporate officer responsible for the overall management of the company, and he owed a fiduciary duty to render honest services to HealthSouth, its shareholders, and its Board of Directors.” Indictment, p. 2, ¶ 2. Duties Mr. Scrusy may have owed to HealthSouth are not elements of the allegations in this Indictment. A breach of duty is a civil offense, which carries a much lesser burden of proof for the claimant than the criminal allegations alleged in the Indictment. None of the counts in the Indictment have as an element deprivation of honest services.

This allegation is, therefore, clearly extraneous to the charges in the Indictment. A jury can not be expected to disregard an extraneous allegation that eludes to a lower level of culpability required for finding Mr. Scrusy guilty of more serious criminal charges. Because this allegation is not an element of the offense charged and is designed to inflame and confuse the jury. As such, the last sentence of paragraph 2 in Count 1 is irrelevant and prejudicial and should be stricken as surplusage. Goodman, 285 F.2d at 379; Hood, 200 F.2d at 642; Hughes, 766 F.2d at 879.

B. Allegations Relating To SEC Rules And Regulations Are Surplusage And Should Be Stricken.

In Count I, the Indictment refers in broad terms to SEC regulations. The Indictment alleges that SEC regulations protect the investing public by requiring that companies accurately record and disclose financial information. Indictment, p. 3, ¶¶ 9-11. The Indictment alleges that HealthSouth was required to register its securities with the SEC and file periodic reports.

Indictment, pp. 3-4, ¶¶ 11-12. It alleges HealthSouth was required to make and keep accurate books and records. Indictment, p. 3, ¶ 10. These types of allegations, focusing on SEC rules and regulations, as opposed to those focusing on the specific laws relating to the alleged SEC violations in the Indictment, may confuse the jury into thinking that if Mr. Scrushy violated an SEC regulation, he is guilty of the violating the SEC criminal charges alleged in the Indictment. They also impliedly lower the bar of proof needed from reasonable doubt to whatever a mere SEC rule violation would entail. United States v. Christo, 614 F.2d 486, 492 (5th Cir. 1980) (reversing conviction of defendant where government included language regarding banking regulation as surplusage to counts alleging criminal bank fraud). This removes a fundamental constitutional protection from the criminal process. United States v. Gaudin, 515 U.S. 506, 510-11 (1995) (stating the that Fifth Amendment due process clause and the Sixth Amendment right to a jury trial “require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged beyond a reasonable doubt”). “To the extent that [a regulatory reference] appears in the indictment it is surplusage and should be stricken.” Christo, 614 F.2d at 492, fn.7.

Because these superfluous paragraphs serve only to “confuse the issues, and blur the elements necessary for conviction” and, as such, are prejudicial, they should be stricken as surplusage. Bullock, 451 F.2d at 888. The allegations contained in paragraphs 9-12 are not elements of an alleged crime, are irrelevant to the criminal charges in the Indictment, and Mr. Scrushy should be allowed to “compel their deletion.” Hughes, 766 F.2d at 875.

C. Allegations Relating To Accounting Principles and Practices Are Surplusage And Should Be Stricken.

As with the allegations relating to SEC rules and regulations, allegations relating to accounting principles and practices are not elements of any of the offenses charged and will only

serve to confuse the jury. The Indictment alleges that HealthSouth produced financial statements, including both an Income Statement and a Balance Sheet. Indictment, p. 4, ¶ 14. The Indictment proceeds to explain what Income Statements and Balance Sheets reported and typically report. *Id.* These allegations may confuse the jury into believing that if HealthSouth violated Generally Accepted Accounting Procedures (“GAAP”), that Mr. Scrusby is guilty of one of the substantive criminal offenses charged within the Indictment.

Also, within the section entitled “Accounting Principles and Practices,” the Indictment alleges that “[a]s is customary in the healthcare industry, HealthSouth billed ‘third party payors,’ such as insurance companies, Medicare, and Medicaid, for healthcare services at amounts greater than it expected to collect.” Indictment, p. 4, ¶ 15. Mr. Scrusby is not being accused of defrauding insurance companies, or the Medicare and Medicaid programs. This allegation serves only to inflame and prejudice the jury into thinking that Mr. Scrusby over billed insurance companies. This allegation is not an element of any offense charged, but it merely superfluous rhetoric that should be stricken as immaterial and prejudicial.

D. As An Alternative To Providing A Bill Of Particulars Specifying “Elsewhere,” The Court May Order It Stricken As Surplusage.

The Indictment repeatedly refers to Mr. Scrusby as having committed the alleged acts “within Jefferson County in the Northern District of Alabama, *and elsewhere. . .*” Indictment, p. 6, ¶ 21; p. 11, ¶ unnumbered; p. 20, ¶¶ 3, 4, 3; p. 22, ¶¶ 3, 4; p. 24, ¶ 3; p. 25, ¶ 4, p. 26, ¶¶ 3, 4; p. 27, ¶ 2; p. 29, ¶¶ 2, 2; p. 30, ¶ 2; p. 31, ¶ 1. In order to prevent surprise at trial and to allow Mr. Scrusby to effectively prepare his defense, the government should either be required to

specify where else the alleged acts were committed,¹ or in the alternative, the Court may strike such language as surplusage.

A district court may strike terms such as “and other” from an indictment rather than require a bill of particulars for such phrases. Marsh v. United States, 344 F.2d 317, 322 (5th Cir. 1965). Similarly, courts should strike language such as “including but not limited to” as surplusage. United States v. Freeman, 619 F.2d 1112, 1118 (5th Cir. 1980). Like “and other” and “including but limited to,” in this Indictment, the government uses “elsewhere” as a catchall phrase. If the government wishes to allege that Mr. Scrusby committed violations “elsewhere” then it should be required to present the locations in a bill of particulars. Otherwise, all uses of the term “elsewhere” should be stricken, so that Mr. Scrusby can prepare for trial without prejudice arising from allegations of violations being committed in other locations for the first time at trial.

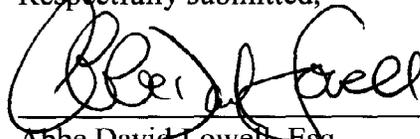
CONCLUSION

The government has filed enough serious charges that it should not have to litter the Indictment with extraneous non-charges that could prejudice Mr. Scrusby’s right to a fair trial. To prevent that possibility and for the foregoing reasons, Mr. Scrusby’s Motion to Strike Surplusage should be granted.

¹ In his motion for a Bill of Particulars filed simultaneously with this motion to strike surplusage, Mr. Scrusby has requested the Court to order the government to specify as to where each above-enumerated “elsewhere” refers and also to particularize other general allegations in the charges.

Dated: January 26, 2004

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Abbe David Lowell", written over a horizontal line.

Abbe David Lowell, Esq.
Thomas V. Sjoblom, Esq.
Chadbourne & Parke, LLP
1200 New Hampshire, Ave. NW
Washington, D.C. 20036
(202) 974-5600

A handwritten signature in black ink, appearing to read "Arthur W. Leach", written over a horizontal line.

Arthur W. Leach, Esq.
c/o Thomas, Means, Gillis & Seay
1035 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 328-7915

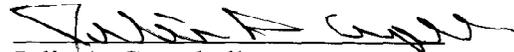
Attorneys for Defendant
Richard M. Scrushy

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2004, a copy of the foregoing Richard M. Scrushy's Motion to Strike Surplusage was served by facsimile and overnight mail to:

Alice Martin, Esquire
United States Attorney for the
Northern District of Alabama
U.S. Department of Justice
1801 4th Avenue North
Birmingham, Alabama 35203

Richard C. Smith, Esquire
Deputy Chief
Fraud Section
U.S. Department of Justice
10th and Constitution Avenue, N.W.
Washington, D.C. 20530


Julie A. Campbell
Chadbourne & Parke, LLP
1200 New Hampshire, Ave. NW
Washington, D.C. 20036
(202) 974-5600