

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITES STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant.

/

**DEFENDANT'S MOTION TO STRIKE
SURPLUSAGE FROM THE SUPERSEDING INDICTMENT**

The Defendant Eric Dean Sheppard, by and through his undersigned counsel, pursuant to Fed. R. Crim. P. 7(d), submits this Motion to Strike Surplusage from the Superseding Indictment and in support states:

BACKGROUND

The Superseding Indictment charges Mr. Sheppard with nine counts of Wire Fraud related to certain government loan applications and five counts of Aggravated Identify Theft. [D.E. 60]. The Government contends that Mr. Sheppard submitted false and fraudulent PPP loan and EIDL applications on behalf of three companies and that Mr. Sheppard forged signatures of other persons on certain documents submitted in support of the different loan applications. *Id.* The Superseding Indictment goes well beyond the charged offenses. It is not just a speaking indictment, it is a screaming indictment of testimonial evidence not relevant to the crime charged. It reads like the Government's opening statement, rather than a charging document. In this District unlike many others, the jury will receive a copy of the Superseding Indictment when it retires to deliberate.

Therefore, it is especially important here— that the surplusage, which is completely inflammatory and prejudicial, should be stricken.

ARGUMENT

Under Federal Rule of Criminal Procedure 7(d), “[u]pon the defendant’s motion, the court may strike surplusage from the indictment . . .”. A motion to strike surplusage from an indictment should be granted when it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial. *United States v. Saintvil*, 22-10004, 2023 WL 3644976, at *5 (11th Cir. May 25, 2023) (citing *United States v. Awan*, 966 F.2d 1415, 1426 (11th Cir. 1992)). “An allegation which does not affect the charge and need not be proved may be rejected as mere surplusage.” *United States v. Northcutt*, 07-60220-CR, 2008 WL 162753, at *6 (S.D. Fla. Jan. 16, 2008) (citing *U.S. v. Noveck*, 271 U.S. 201, 203 (1926)). “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.” *Id.* (citing *United States v. Bullock*, 451 F.2d 884, 888 (5th Cir. 1971)); *see also* *United States v. Martin*, 8:17-CR-301-T-24AAS, 2018 WL 3617314, at *3 (M.D. Fla. Mar. 23, 2018) (striking certain aliases from the indictment as they were irrelevant, served no purpose, and were prejudicial).

An indictment is supposed to set forth the elements of the offense charged and sufficiently apprise the defendant of the charges to enable him to prepare for trial. *United States v. Deason*, 965 F.3d 1252, 1264 (11th Cir. 2020) (“An indictment is valid only if it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet.”). It is not a tool for the Government to incorporate argument and testimony irrelevant to the charges in order to gain a tactical advantage at trial. As such, as argued in more

detail below, the irrelevant, inflammatory and prejudicial testimonial allegations related to the loan applications, bank processors, and accomplices should be stricken.

1. Irrelevant information about the Applications Should be Stricken.

The Government included surplusage about the loan applications which is irrelevant, inflammatory, and prejudicial in the Superseding Indictment. Specifically, Mr. Sheppard seeks to strike the following from the Superseding Indictment:

Page 2, Paragraph 3, “Because independent contractors were able to apply for PPP loans on their own, employers’ payroll calculations and number of employees were based on wages paid to W-2 employees, not payments to independent contractors”; “typically, businesses would supply document showing the amount of payroll taxes reported to the IRS.” These statements are irrelevant to the charges, and testimonial in nature. What businesses would “typically” supply is irrelevant, as it was not required, is not an element of the offense, and will only confuse the jury into believing Mr. Sheppard is guilty because he didn’t do what a business “typically” did. Furthermore, it only puts an onus on the Defendant to explain this away.

Page 2, Paragraph 4, which discusses processing the loan applications is completely irrelevant to the charged offenses. It is not an element of the offenses and will only mislead and confuse the jury. The Defense submits that what the loan process was supposed to be and what it was are two different things. Again, these paragraphs are purely testimonial, and irrelevant to the elements charged. This is a charging document, not a closing argument.

Page 2, Paragraph 5, which discusses loan forgiveness is completely irrelevant and will only seek to confuse the jury as Mr. Sheppard did not seek loan forgiveness on the charged loans. As such, the statements are unnecessary and irrelevant to the charges and will only prejudice Mr. Sheppard.

Page 3, Paragraph 7 – information that needed to be provided on the loan application “such as the number of employees and gross revenues and costs of goods sold for the 12-month period preceding January 31, 2020.” The number of employees, gross revenues, and costs of goods sold was not the **only** information requested on the EIDL loan applications, businesses were required to submit more than that. The Government is cherry picking certain requirements that are completely prejudicial and inflammatory to Mr. Sheppard.

Page 3, Paragraph 8 – “which processed the applications with support from a government contractor. The amount of the loan, if the application was approved, was determined **based, in part,** on the information provided in the application concerning the number of employees, gross revenues, and costs of goods sold.” (Emphasis supplied). These statements are irrelevant to the offenses as it is not required to prove the charges. Further, the statements are prejudicial and inflammatory as this information is not known by the applicant. Additionally, as implied there were other variables that were used to determine the amount of the loan, which is not included in the Indictment. As such, the jury will be misled by the Government’s arguments masked in the charging document.

In sum, the inclusion of clearly unnecessary and inflammatory language in an indictment that could serve only to confuse the issues and blur the elements necessary for conviction is surely prejudicial. As demonstrated above, these allegations are completely unnecessary to the charges, testimonial, and will blur the elements for conviction and influence the jury to charge Mr. Sheppard on irrelevant facts.

2. All References to Mr. Sheppard’s Alleged Accomplices Should be Stricken.

The Government did not charge Mr. Sheppard with a conspiracy, nor did it charge any other “accomplice.” Notwithstanding, the Superseding Indictment references Mr. Sheppard’s

“accomplices” four different times. [See D.E. 60, page 5-6, paragraphs 3, 4, 9]. Mr. Sheppard’s alleged accomplices are completely irrelevant as the information serves no real purpose but to inflame the jury and prejudice Mr. Sheppard.

WHEREFORE, Defendant, Eric Dean Sheppard, respectfully requests that this Court strike surplusage from the Superseding Indictment, including the irrelevant, prejudicial and inflammatory information of the loan applications, and Mr. Sheppard’s alleges accomplices, and for such other and further relief as may be just and proper.

MEET AND CONFER CERTIFICATION

The defense conferred with the Government who opposes relief requested herein.

Dated: October 5, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 5, 2023 the foregoing document was filed via the Court’s CM/ECF system to all counsel of record.

/s/ Jayne C. Weintraub
Jayne C. Weintraub