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

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | CR. NO. 2:10cr186-MHT |
| | ) | |
| MILTON E. McGREGOR, | ) | |
| RONALD E. GILLEY, | ) | |
| THOMAS E. COKER, | ) | |
| ROBERT B. GEDDIE, JR., | ) | |
| LARRY P. MEANS, | ) | |
| JAMES E. PREUITT, | ) | |
| QUINTON T. ROSS, JR., | ) | |
| HARRI ANNE H. SMITH, | ) | |
| JARRELL W. WALKER, JR., | ) | |
| and JOSEPH R. CROSBY | ) | |

**UNITED STATES' COMBINED OPPOSITION TO DEFENDANTS' MOTION TO STRIKE SURPLUSAGE**

The United States of America, through undersigned counsel, hereby opposes the motions to strike alleged surplusage filed by defendants Ronald Gilley and Thomas Coker. Dkt. Nos. 453 and 473. Defendants' attempt to rewrite the indictment returned by the grand jury by deleting the term "pro-gambling," but their motions, which are not supported by Fed. R. Crim. P. 7(d) or any other authority, should be denied.

Rule 7(d) provides that "[u]pon the defendant's motion, the court may strike surplusage from the indictment . . . ." The advisory committee notes on Rule 7(d) state that the rule: "introduces a means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial. The authority of the court to strike such surplusage is to be limited to doing so on defendant's motion, in light of the rule that the guaranty of indictment by a grand jury implies that an indictment may not be amended . . . ."

A motion to strike purported surplusage from an indictment is addressed to the sound discretion of the Court, *United States v. Huppert*, 917 F.2d 507, 511 (11th Cir. 1990). The Eleventh Circuit has held that "[a] motion to strike surplusage from an indictment should not be granted 'unless it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial.'" *United States v. Awan*, 966 F.2d 1415, 1426 (11th Cir. 1992) (quoting *Huppert*, 917 F.2d at 511)). This standard is "most exacting." *Huppert*, 917 F.2d at 511. Indeed, "[w]here information in an indictment is sufficiently relevant to the charged offense, the court should not strike it, no matter how prejudicial it may be." *United States v. Scarpa*, 913 F.2d 993, 1013 (2d Cir. 1990). Because the standard for striking alleged surplusage is so strict, courts rarely grant such motions. *E.g., United States v. Hedgepeth*, 434 F.3d 609, 611 (3d Cir. 2006).

Gilley and Coker fail to identify how the term "pro-gambling" – in the context of the rest of the Indictment – can be rationally characterized as "inflammatory." Both claim that "the Government's characterization is likely to mislead the jury into thinking that the mere passage of the bill itself provided for the operation and taxation of electronic bingo in Alabama without a vote of the people of Alabama." Gilley Mot. at 2 (emphasis in original). To the contrary, the Indictment expressly references a proposed public referendum as discussed in the motions. Indictment ¶ 21. Furthermore, the term "pro-gambling" is simply shorthand for legislation "that would be favorable to the business interests of individuals operating electronic bingo facilities, including MCGREGOR and GILLEY." Indictment ¶ 19. The term is not prejudicial in this context.

The allegation that the legislation is "pro-gambling" is also relevant to the case. The thrust of the government's case is that Gilley, Coker, and their coconspirators were so invested in

the proposed legislation (described in detail at ¶¶19-26) that they showered various legislators with benefits and promises of benefits. Again, "pro-gambling" in this context simply means beneficial to gambling facility operators. See Indictment ¶¶ 4-5. The government's proof at trial will include substantial evidence demonstrating the benefits of the proposed legislation to Gilley, as well as to Coker's client McGregor.

The Indictment might, of course, have characterized the legislation as "pro-electronic bingo" or "pro-gambling referendum" or something similar, but the formulation used in the Indictment is not the sort of prejudicial or irrelevant material which Rule 7(d) authorizes the court to strike. *See, e.g, United States v. Hill*, 799 F. Supp. 86, 88-89 (D. Kan. 1992) ("If the language is information which the government hopes to properly prove at trial, it cannot be considered surplusage no matter how prejudicial it may be"). Even where terms on their face appear prejudicial, courts have refused to strike them where they are relevant to prove a scheme to defraud. *See, e.g., United States v. Dellacroce*, 625 F. Supp. 1387, 1392 (E.D. N.Y. 1986) (refusing to strike from indictment terms such as "Gambino Crime Family," "boss," "capos" and "Old Man," because government represented that allegations were relevant to prove RICO charge). The term "pro-gambling" is not on its face prejudicial, and the government's proof will certainly include the relevant details of the legislation, including that a referendum was contemplated. That will be more than sufficient to address defendants' quibbles with the Indictment as drafted.

## CONCLUSION

For the foregoing reasons, the defendants' motions should be denied.

Respectfully submitted,

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Acting Under Authority of 28 U.S.C. § 515

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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