

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.) No. 08-00026-04-CR-W-FJG
)
CHRISTOPHER L. ELDER,)
)
 Defendant.)

**DEFENDANT ELDER'S MOTION TO STRIKE PARAGRAPHS
ONE THROUGH SEVEN FROM THE INDICTMENT
ON GROUNDS THAT THE PARAGRAPHS ARE
SURPLUSAGE AND A GENERIC STATEMENT OF
LAW THAT IN MORE PROPERLY ADDRESSED IN
JURY INSTRUCTIONS WITH SUGGESTIONS IN SUPPORT**

The first seven paragraphs of the indictment discuss certain provisions of the Code of Federal Regulations and provide a generic description of those provisions and also a description of brand names of certain drugs. The paragraphs contain vague terms such as "usual course of a physician's practice"; "usual course of . . . treatment"; "typically used"; "commonly referred to"; and, "commonly known [as]." No statements contained in these paragraphs constitute elements of the offense. The paragraphs will be confusing and potentially misleading, to the jury and are not properly drafted clear statements of the law. The information contained in these paragraphs should be addressed in jury instructions if applicable at all.

When an indictment includes all of the essential elements of an offense, but also treats other, superfluous matters, the

superfluous allegations may be disregarded and the indictment is still legally sufficient. See, e.g., Ford v. U.S., 273 U.S. 593 (1927); U.S. v. Miller, 471 U.S. 130 (1985); U.S. v. Norris, 34 F.3d 530, 532 (7th Cir. 1994); U.S. v. McIntosh, 23 F.3d 1454, 1457 (8th Cir. 1994) ("Allegations in the indictment that are not necessary to establish a violation of a statute are surplusage and may be disregarded if the remaining allegations are sufficient to charge a crime").

Because superfluous allegations are not part of the charged offense and may be disregarded, the government is not required to prove those allegations in order to obtain a conviction. See U.S. v. Rosenthal, 9 F.3d 1016, 1023 (2nd Cir. 1993).¹ All the government need do is prove "that the defendant is guilty of every element of the crime with which he is charged[.]" See U.S. v. Gaudin, 115 S.Ct. 2310, 2313 (1995). Thus, the government can plead information that is essentially prejudicial and inflammatory on its face and then hide behind the rule that it need not prove such allegations at trial because the information was not a required element of the crime.

In short, paring down an indictment so that it alleges just the essential elements of an offense does not expose a defendant to the risk of being convicted of any additional or different offenses. See, e.g., U.S. v. Helmsley, 941 F.2d 71, 91 - 92 (2nd

¹ ("[A]llegations in an indictment that go beyond the essential elements which are required for conviction do not increase the Government's burden").

Cir. 1991) (allegation in indictment that items of income omitted from tax returns were "substantial" was surplusage not essential to offense and could be dropped from indictment); Also see U.S. v. Bledsoe, 898 F.2d 430 (4th Cir. 1990).

WHEREFORE, defendant Elder moves the Court to strike paragraphs one through seven from the indictment on grounds that the paragraphs are prejudicial surplusage.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System on Sunday, March 23, 2008.

/s/
JOHN R. OSGOOD

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