

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
CRIMINAL COURT DIVISION

State of Minnesota,

Court File No: 62-CR-15-4175

Plaintiff,

vs.

**DEFENDANT’S MEMORANDUM
SUPPORTING ITS
MOTION TO STRIKE
PREJUDICIAL SURPLUSAGE**

The Archdiocese of Saint Paul and Minneapolis,
a Minnesota Corporation
226 Summit Avenue
Saint Paul, MN 55102,

Defendant.

INTRODUCTION

The Archdiocese of Saint Paul and Minneapolis, a Minnesota corporation (the “Archdiocese Corporation”), is charged with encouraging, causing, or contributing to three juveniles’ (the “Victims”) delinquency and need for protection or services. All six of the charges are based upon the Archdiocese Corporation’s alleged failure to prevent a former priest, Curtis Wehmeyer (“Wehmeyer”), from sexually abusing the Victims.

Counts 1, 3, and 5 of the Gross Misdemeanor Criminal Complaint (“Complaint” or “Compl.”) assert that the Archdiocese Corporation “by act, word, or omission encouraged, caused or contributed to the need for protection or services” of the Victims. (Compl. 1-2.) The Complaint also alleges, in Counts 2, 4, and 6, that the Archdiocese Corporation “by act, word, or omission encouraged, caused or contributed to the delinquency or status as a juvenile offender” of each of the Victims. (*Id.*) Each of the counts rests upon the State’s central theory—that the

Archdiocese Corporation “by its acts, words and omissions in the handling of [Curtis] Wehmeyer contributed to the [Victims’] need for services” and to their delinquency. (Compl. 6.)

Despite these narrowly tailored charges, the State has used its Gross Misdemeanor Complaint to publicize its disapproval of decisions to ordain, assign and supervise priests dating as far back as 1985. The Complaint also makes factual assertions regarding Wehmeyer’s sexual identity and orientation in a manner that implies wrongdoing but are in fact wholly irrelevant to whether the Archdiocese Corporation committed a crime. Finally, the Complaint attempts to assign guilt to the Archdiocese Corporation by other conduct by Wehmeyer that has nothing to do with sexual abuse of minors. For the reasons set forth below, under Minnesota Rule of Criminal Procedure 17.04, significant passages of the Complaint should be stricken.

ARGUMENT

Minnesota Rule of Criminal Procedure 17.04 provides that “[t]he court on motion may strike surplusage from the charging document.” Neither Rule 17.04 nor Minnesota case law explicitly define “surplusage.” However, the Federal Rules of Criminal Procedure, on which Rule 17.04 was patterned,¹ defines surplusage as “immaterial or irrelevant allegations in an indictment or information, which may . . . be prejudicial.” *See* Fed. R. Crim. P. 7, Advisory Com. Notes (1944). Consistent with this, Minnesota case law suggests that relevance and prejudice are the key determinants in whether surplusage should be stricken from a charging document. *See State v. Schultz*, 136 N.W.2d 534, 537-38 (Minn. 1965) (surplusage may invalidate a conviction if it is prejudicial or misleading); *see also United States v. Figueroa*, 900 F.2d 1211, 1218 (8th Cir. 1990) (surplusage may be stricken if language is irrelevant to the charges made, or if it is inflammatory or prejudicial).

¹ *See* 8 Minn. Prac., Criminal Law and Procedure § 11:16.

Ultimately, the rule is intended “to protect the defendant from prejudicial allegations of irrelevant or immaterial facts.” C. Wright, *Federal Practice and Procedure* § 128. This is necessary because “prosecutors have been known to insert unnecessary allegations for ‘color’ or ‘background’ hoping that these will stimulate the interest of the jurors.” *Id.* When a criminal complaint contains prejudicial allegations that are irrelevant to the charges, those allegations should be stricken prior to trial in order to avoid unfair prejudice to the defendant. *See United States v. Verra*, 203 F. Supp. 87, 90 (S.D.N.Y. 1962) (rejecting argument that the decision whether to strike surplusage should be delayed until the conclusion of trial, because the allegations—concerning a prior conviction—would serve no purpose other than to inject unfair prejudice into the proceedings).

The language that the Archdiocese Corporation seeks to strike from the Complaint serves no purpose other than to focus the jury’s attention (as well as the Court and the public) on irrelevant issues and other purported potential offenses that were never charged. Because these allegations are potentially inflammatory and misleading, they should be stricken in order to preserve the integrity of this proceeding and to protect the Archdiocese Corporation from unfair prejudice.

I. ALLEGATIONS ABOUT WEHMEYER’S SEXUAL ORIENTATION ARE IRRELEVANT AND PREJUDICIAL.

The Complaint alleges the Archdiocese Corporation contributed to the need for protection and services by failing to prevent Curtis Wehmeyer’s sexual abuse of the Victims. (*See* Compl. 4-6.) The Complaint also alleges the Archdiocese Corporation contributed to the delinquency of the Victims by failing to prevent Curtis Wehmeyer’s provision of alcohol, marijuana, tobacco, and pornography to the Victims. (*Id.*)

The State asserts irrelevant allegations concerning Wehmeyer's sexual orientation. This is an attempt to circumvent its lack of evidence that the Archdiocese Corporation knew that Wehmeyer sexually abused any child prior to June 2012 when it reported the Victims' abuse to law enforcement or that the Archdiocese Corporation knew Wehmeyer had ever provided alcohol, tobacco, or pornography to a minor.

Specifically, there are approximately two dozen allegations in the Complaint to Wehmeyer's sexual orientation and possible homosexuality:

- "At the time of Wehmeyer's seminary admission in August of 1997, seminary officials were aware Wehmeyer had a history of abusing alcohol and marijuana, experimented with other drugs, *was promiscuous with men and women*, was on medication for low-level depression, and was in therapy." (Compl. 6);
- "Wehmeyer received a citation for loitering in Crosby Park in St. Paul on January 9, 2004. A police report indicates that a "Donald Dalbert Wehmeyer," DOB 9/28/1964, was *cited along with three other men for loitering in a back parking lot. The report indicates the parking lot is known to police as a location where men frequently seek anonymous sexual encounters with men.*" (Compl. 6-7);

The following references to the loitering citation should also be stricken from the Complaint: (1) ". . . A.D. spoke with A.O., the parish employee, who knew Wehmeyer had received a citation at Crosby Park"; (2) "During the meeting . . . A.O. informed Flynn of the Crosby Park citation"; (3) "McDonough characterized the incident like going out to a park cruising for sex." (Compl. 7, 8);

- "E. Wehmeyer approaches two younger-looking males about sex in Barnes and Noble Bookstore. On Thursday, May 13, 2004 at 10:30 p.m. at a Barnes and Noble Bookstore at Har Mar Mall in Roseville, MN, *Wehmeyer approached two younger-looking males about sex.* Wehmeyer first initiated conversation with C.K. and spoke of not being at the bookstore looking for books but looking for contacts. (C.K. reported that C.K. was also looking for business contacts.) After speaking for a few minutes, *Wehmeyer leaned in and told C.K. that he was "a veteran and had been doing this for a while now."* Wehmeyer then asked, "Are you fucking horny right now?" C.K. informed Wehmeyer that that was not the kind of contacts he was looking for. Wehmeyer then struck up a conversation with the second man, A.C. *Wehmeyer asked A.C. a series of questions that "seemed to be probing with regards to my views on homosexuality."* At one point, *Wehmeyer* led A.C. around a corner to another section of bookshelves, looked at the shelves, and *said to A.C. that it probably did not look good "for a priest and a young good-looking man to be standing in front of the gay book section."* A.C. reported feeling very uncomfortable during the course of the

conversation. Wehmeyer shared with A.C. that he was a priest, from St. Joseph's in West St. Paul, but that he was at the bookstore "incognito." A.C. told Wehmeyer that his girlfriend attended St. Joseph's parish in West St. Paul. Wehmeyer stopped, and immediately said that he needed to talk with C.K. to apologize because he had earlier told C.K. that he was an architect." (Compl. 7-8);

- "1. Defendant is alerted of Wehmeyer's misconduct. In late May 2004, P.M., whose sons attended youth programming at St. Joseph's, learned of what had happened at the bookstore and became concerned. P.M. contacted Fr. McDonough to report the bookstore incident. He expressed his concern that C.K. and A.C. could pass for high school students. P.M. had the two young men write statements about Wehmeyer's conduct and actions in the bookstore. He provided the statements to McDonough, and expressed concern that Wehmeyer was involved with the youth groups at St. Joseph's. At a meeting with McDonough on May 27, 2004, McDonough told P.M. that he would take care of the matter. McDonough told P.M. that he considered Wehmeyer's actions to be mere "thrill seeking, playing with fire, and a bit of a misunderstanding." McDonough characterized the incident like going out to a park cruising for sex. P.M. felt McDonough was dismissive of his concerns. P.M. then facilitated a meeting between McDonough and A.C. to discuss the incident and so McDonough could see how young A.C. looked. At this point, McDonough told P.M. and A.C. that Wehmeyer was going to be sent to St. Luke's Institute for assessment, that restrictions would be placed on him, and that there would be a full disclosure to the leadership at St. Joseph's. McDonough assured P.M. that Fr. Piche, Principal J.N., Director of Religious Education D.B., and Youth Minister G.B. would be informed of P.M.'s concerns. In a February 2015 interview, P.M. said that his motivation and concern was that the two men approached by Wehmeyer at the bookstore looked very similar in age to his two young sons, who were then 15 and 17 years old and involved with youth programming at St. Joseph's parish where Wehmeyer worked. (Compl. 8);

The following references to the bookstore incident should also be stricken from the Complaint: (1) "In response to the bookstore incident,"; (2) "McDonough provided St. Luke's a summary of the incident involving Wehmeyer"; (3) "At no point did McDonough relate P.M.'s concern that the men appeared young and could have been juveniles"; (4) "The report indicates that Wehmeyer acknowledged that Barnes and Noble was a place where people meet for sexual liaisons and that he engaged two young men in a conversation he admitted had "some sexual undertones to it"; (5) "On June 26, 2012, following Wehmeyer's arrest, P.M., the person who originally reported the 2004 Barnes and Noble bookstore incident, contacted Nienstedt to express his concern that Fr. McDonough had not done enough in regards to Wehmeyer. On June 28, 2012, Nienstedt sends a response to P.M. Nienstedt states that he is unable to explain how or why the Archdiocese did not respond appropriately to P.M.'s concerns." (Compl. 8-9, 24);

- Saint Luke Institute's assessment of Wehmeyer diagnosed him with "Sexual Disorder, Not Otherwise Specified: Unintegrated Sexuality" (Compl. 9);
- "Father Wehmeyer displayed considerable anxiety when talking about his sexual history He hinted at a considerable struggle maintaining his celibacy.... There appears to be a tension between his sexuality and celibacy. He will need to come to grips with his sexuality before he can adequately discern whether or not he can embrace celibacy." (Compl. 10);
- "McDonough stated Wehmeyer was getting into experimental behavior trying to figure out his sexuality" (Compl. 10);
- "J.N. reported, however, that the participants only discussed Wehmeyer's sexuality." (Compl. 10);
- "G. Defendant learns of another "bookstore incident" and confronts Wehmeyer. On February 22, 2005, Fr. McDonough received a report from Fr. C.R. about a bookstore incident that occurred while C.R. studied in Jerusalem with Wehmeyer during seminary. C.R. had heard of the 2004 Barnes and Noble incident and felt the Jerusalem incident was similar enough to the Barnes and Noble incident to report to McDonough. C.R. reported in an interview with the Ramsey County Attorney's Office that he did not believe the two incidents were coincidental and that he saw a pattern with Wehmeyer and this was a red flag. C.R. reported that while in Jerusalem, C.R. was walking down the street with Wehmeyer when they were approached *by two young Israeli men who began to taunt Wehmeyer because he was gay*. C.R. described the Israeli men as young. He said they could have been sixteen or they could have been twenty-two. The young men apparently knew Wehmeyer from a bookstore, where they had offered him a female prostitute. *When Wehmeyer showed no interest in a female prostitute, the young men then offered a male prostitute*. When C.R. questioned Wehmeyer about the encounter, Wehmeyer said the young men had misunderstood the conversation in the bookstore. McDonough thought C.R. 's report was important and described it in a memorandum to Archbishop Flynn as bearing "remarkable similarities to the situation at the book store last year." McDonough describes the young Israeli men as "two young men, adults [sic] but still young." McDonough stated that, if true, Wehmeyer "should be confronted immediately. McDonough suggested that Wehmeyer be removed from parochial work and asked to undergo intensive psychotherapy. Alternatively, McDonough advised simply removing Wehmeyer, putting him on reduced pay, and giving him time to get his life in order. McDonough asked Flynn how he would like him to proceed. Ultimately, McDonough confronted Wehmeyer about the incident. There is no evidence Wehmeyer ever completed additional psychotherapy or was removed from ministry because of this incident." (Compl. 11-12);

- “On July 28, 2006 one month after [Wehmeyer’s] appointment as parochial administrator, *a Ramsey County sheriff’s deputy reported to Fr. McDonough that Wehmeyer was seen and stopped in the parking lot of a park that police know is commonly used as a place where men seek sexual encounters with one another.* Wehmeyer offered the deputy “odd and inconsistent explanations” for why he was in the park, and eventually drove away. Later that evening, the Deputy saw Wehmeyer leaving a different area of the park, and even later, again saw him leaving a third area of the park. The following day, the same deputy saw Wehmeyer’s truck again leaving the parking lot at the same park. *The deputy told McDonough that he believed Wehmeyer was exhibiting behavior consistent with sexual addition.* The deputy said he wanted to put the Defendant on notice so Wehmeyer could get help.” (Compl. 16);
- “McDonough immediately called Wehmeyer, who initially denied the deputy's report. McDonough and Rourke then met with Wehmeyer on August 3, 2006. In a file memorandum, McDonough documents that he told Wehmeyer he was concerned about Wehmeyers’ cruising and lies . . . At the conclusion of the memo, as he had done in the past, McDonough concludes, *“I do not believe that Father Wehmeyer actually goes to these parks to pick up other men.* Rather, he likes to be around the environment where such things are happening, since it gives him some sort of thrill.” McDonough indicates, “[w]e will keep some pressure on him to “work his program” (quotes in original), and that, “No other steps appear to be called for currently.” (Compl. 16);
- “McDonough also wrote to Archbishop Flynn to describe the [park cruising] incident, classifying it as “similar to what caused us to intervene with him two years ago.” McDonough again characterized the incident as Wehmeyer “playing on the edge” and not doing anything “expressly illegal or immoral.” (Compl. 16);
- “In 2008, Wehmeyer went camping with Fr. M.M. During that trip *Wehmeyer told M.M. that he is same-sex attracted.*” (Compl. 16);
- “Prior to [Wehmeyer’s appointment as pastor of Blessed Heart Sacrament Church and St. Thomas the Apostle Church], Jennifer Haselberger, Chancellor for Canonical Affairs, warned Archbishop Nienstedt not to appoint Wehmeyer pastor. Haselberger wrote a memo to Nienstedt on April 28, 2009, indicating Wehmeyer had issues and had engaged in some risky behavior that led to the decision that he not be appointed pastor. Haselberger suggested Nienstedt review Wehmeyer's file before making a decision on the appointment. In an interview with the Ramsey County Attorney's Office on April 27, 2015, Haselberger reported she also attached a copy of Wehmeyer's 2004 St. Luke's assessment and either a memo regarding the 2004 Barnes and Noble bookstore incident or the report from the 2006 park cruising incident to her memo.” (Compl. 17);
- “*On September 29, 2009, Wehmeyer had once again been camping with Fr. M.M. M.M. reported that the previous night, while in Wehmeyer's camper,*

Wehmeyer had placed his hand on M.M.'s knee. Wehmeyer later apologized for the incident . . . *When Wehmeyer left the campsite to go to a local Kwik Trip gas station, M.M. used the opportunity to leave. M.M. reported he left the campsite early because he was not same-sex attracted and due to Wehmeyer's behavior, he was concerned for his safety.*" (Compl. 17-18);

- "In the memo, Sirba outlines that Wehmeyer "has not been faithful to his program." Sirba mentions that Bishop Piche suggested that Sirba call McDonough because McDonough had worked with Wehmeyer on sexual boundary issues in the past. (Compl. 18);
- "In a May 9, 2011 memorandum, Fr. McDonough told Rourke that he recommends no workplace disclosure be made about Wehmeyer's history . . . Ignoring Wehmeyer's continued questionable behavior, McDonough states that Wehmeyer's only "troublesome behavior" is cruising parks and that Wehmeyer "engaged a man in a suggestive conversation in a *Borders* bookstore." . . . Again, McDonough minimizes Wehmeyer's behavior as "playing with fire" to obtain some stimulation rather than interest in an actual sexual encounter. McDonough reasons that such behavior would not show up in the workplace and says that he agrees with Wehmeyer, disclosure would only serve to "*out his sexual identity.*" (Compl. 22).

These allegations improperly suggest that Archdiocese Corporation knew Wehmeyer was committing criminal conduct with the minor Victims, because of indications of Wehmeyer's potential sexual orientation and sexual activity. However, without a link drawn between homosexuality and child molestation, the allegations are wholly irrelevant. Instead, the allegations, which are inconsistent with vows of celibacy, invite judgment by the Court and a jury on Wehmeyer's fitness for ministry, which is both improper and prohibited by the United States Constitution and the Minnesota Constitution. Active sexual conduct with adults may be inconsistent with religious vows of celibacy, but it is irrelevant to the crimes that have been charged. The risk of prejudice is significant because the conduct could be viewed as inconsistent with religious vows and fitness for ministry. Accordingly, the Archdiocese Corporation respectfully requests each of the foregoing allegations of homosexuality should be stricken from the Complaint pursuant to Rule 17.04.

II. ALLEGATIONS ABOUT WEHMEYER'S DRINKING, DRUG USE, AND GENERAL BAD BEHAVIOR HAVE NO RELATION TO WHETHER THE ARCHDIOCESE CORPORATION COMMITTED A CRIME.

In a continuing attempt to make this case about Wehmeyer's bad behavior and fitness for ministry rather than the Archdiocese Corporation's alleged contribution to the Victims' abuse, delinquency, and need for services, the Complaint alleges generally improper conduct by Wehmeyer, such as Wehmeyer's alleged history of alcohol and marijuana usage. Specifically, the Complaint alleges the following:

- “At the time of Wehmeyer's seminary admission in August of 1997, *seminary officials were aware Wehmeyer had a history of abusing alcohol and marijuana, experimented with other drugs*, was promiscuous with men and women, *was on medication for low-level depression, and was in therapy.*” (Compl. 6);
- “Among observations made in [Saint Luke Institute's] report: . . . *Father Wehmeyer received two DUI's*: one during his college years and another in 1990.” (Compl. 9);
- “In March 2015, during a call on the Global Tel Link monitoring system from the Lino Lakes Correctional Facility where Wehmeyer is incarcerated, Wehmeyer said at the time of his appointment Nienstedt knew a lot about him but chose not to be as concerned as he should have been. Wehmeyer said Nienstedt was aware he had been sent to St. Luke's *and had drinking problems.*” (Compl. 17);
- “Despite Defendant's 1993 policy that all Archdiocesan employees undergo a background check, Wehmeyer did not undergo a background check until February 6, 2009, fully eight years after he was ordained. The background check did not include a nationwide check of Wehmeyer's history and *therefore did not include the 1990 DUI Wehmeyer received in his home state of Michigan.*” (Compl. 17);
- “*Wehmeyer is arrested for DUI* after approaching high-school-aged persons to ask whether they want to party . . . The complainant stated *the male who approached the young people appeared intoxicated.* The sheriff's deputy made contact with Wehmeyer as Wehmeyer sat in his vehicle. *After admitting he had too many drinks to be driving, the deputy arrested Wehmeyer.* Wehmeyer called Fr. M.M. as M.M. drove home and asked M.M. to bail him out of jail. M.M. declined. *Wehmeyer ultimately pled guilty to Driving While Intoxicated in the Fourth Degree before the Fillmore County District Court on October 27, 2009.*” (Compl. 18);

- “On September 29, 2009, [Fr.] Sirba dated a memo to Archbishop Nienstedt indicating that *Wehmeyer had been picked up for DUI.*” (Compl. 18);
- “On September 30, 2009, *Sirba sent another memorandum to Nienstedt regarding Wehmeyer’s DUI.* In the memo, Sirba indicates that *Wehmeyer reported that this was Wehmeyer’s first DUI. It was not in fact Wehmeyer’s first DUI, as he had received a previous DUI in 1990.*” (Compl. 18);
- “On October 13, 2009, Nienstedt wrote in a memorandum that he had received a call from Wehmeyer in which *Wehmeyer apologized for the embarrassment he caused the church with his DUI.* Nienstedt concludes that Wehmeyer is repentant and concluded, “this has been a good lesson” for Wehmeyer.” (Compl. 19);
- “Beginning in January 2011, Defendant received reports from at least twelve persons, some of whom made more than one report, complaining of Wehmeyer's behavior. Bishop Piche outlined many of these complaints in a May 15, 2012 memo addressed to Archbishop Nienstedt. Complaints concerned *Wehmeyer’s uncontrolled anger, demeaning outbursts, mistreatment and verbal and emotional abuse of staff and parishioners.* One report concerned Wehmeyer allegedly embarrassing a second-grade girl when she forgot how to make her first confession.” (Compl. 22);
- “A parish trustee resigns and alerts Defendant of Wehmeyer's behavior. On March 30, 2012, Fr. Piche reports in a memo to Archbishop Nienstedt and Fr. Laird that he met with E.O., a parish trustee who resigned on March 1, 2012. During the meeting, E.O. related detailed accounts of phone conversations with Wehmeyer between February 27, 2012 and March 6, 2012 in which *Wehmeyer indicated he was smoking marijuana and drinking alcohol to excess. E.O. related that he had seen Wehmeyer intoxicated on a number of occasions, usually at the rectory alone. E.O. also advised that Wehmeyer had purchased a gun. E.O. reported Wehmeyer had shown the gun to him and another parishioner.* At the meeting, E.O. indicated that he resigned because he felt he might have been acting as an “enabler” for Wehmeyer.” (Compl. 23);
- “A memorandum from Bishop Piche dated March 30, 2012, stated that any intervention should be handled carefully as Wehmeyer shows signs of extreme paranoia and may be edging toward despair. *Piche notes in the memorandum that Wehmeyer has purchased a gun.*” (Compl. 23);
- “Six weeks later, on May 15, 2012, Piche writes a memorandum to Nienstedt indicating that Nienstedt had requested "concrete examples" of the behavior parishioners had been reporting about Wehmeyer. The memo outlines reports of Wehmeyer's erratic behavior dating back to February 2012, and again calls attention to E.O.’s *report of alcohol abuse and marijuana use.* Other complaints included a parishioner, J.B., reporting that he believed Wehmeyer was a sick man

and needed help and a report from another parishioner, R.D., from April 11, 2012 in which she says that *Wehmeyer's dependence on smoking and liquor* may be part of the problem.” (Compl. 23);

- “A May 30, 2012 memorandum authored by Nienstedt to the file of Curtis Wehmeyer indicates that Nienstedt *confronted Wehmeyer about the letters from parishioners concerning his behavior and his alcohol abuse. The memo indicates Wehmeyer denied abusing alcohol.* The memo also indicates Nienstedt had contacted Guest House in Rochester to inquire about their ability to deal *with anger management and alcohol addiction for Wehmeyer. Nienstedt tells Wehmeyer he should have had him do an alcohol evaluation when he received his DUI in 2009. Wehmeyer indicates he did, in fact, have an evaluation at that time and Nienstedt asks for a copy of the evaluation.* Nienstedt asks to attend a therapy session with Wehmeyer and his therapist to discuss issues that have been raised.” (Compl. 23);
- “On June 6, 2012, Nienstedt writes a memorandum to Piche and Laird reporting that he received *Wehmeyer's chemical health assessment from 2009. Wehmeyer reported that he completed the Alcohol/Drug Awareness program and found it very helpful. Wehmeyer is again referred for continuing counseling.* Relying on the 2009 assessment and Wehmeyer’s self-reporting, Nienstedt notes Wehmeyer is making progress.” (Compl. 23);
- “In an interview with Saint Paul Police on March 7, 2015, Laird indicated that he had expressed concerns to Nienstedt regarding the reports that *Wehmeyer was smoking marijuana and drinking excessively. Laird stated, he told Nienstedt Wehmeyer was not fit for ministry.* According to Laird, Nienstedt replied that Laird was biased.” (Compl. 23);
- “In March of 2012, the *Defendant is notified that Wehmeyer is consuming alcohol to the point of intoxication and using marijuana while on the grounds of Blessed Sacrament.*” (Compl. 29).

The State cannot convict the Archdiocese Corporation by associating it with Wehmeyer’s bad acts, or by proving that the Archdiocese Corporation should have known Wehmeyer was unfit to be a priest. Wehmeyer’s DUIs, possible alcoholism, gun ownership, drug usage, and assertions relating to his fitness for ministry have no bearing on whether the Archdiocese Corporation committed the crimes that have been charged. Alcoholism, drug use, gun ownership, and allegations relating to fitness for ministry are not precursors to child abuse. Similarly, there is no basis for the implication that because Wehmeyer had DUIs or used

marijuana in the past, the Archdiocese Corporation knew or intended that Wehmeyer would provide drugs and alcohol to the Victims. The gun allegations are even further afield as the State does not claim that Wehmeyer provided the Victims with guns or that he used a gun to aid in abusing the Victims. None of these issues make it any more or less likely that Archdiocese Corporation knew or intended that Wehmeyer did or would sexually abuse the Victims or cause them to become delinquents or to need protection or services. To the contrary, the assertions are irrelevant and invite improper judgments that violate Constitutional limits on the State's authority.

The complete irrelevance of these allegations is further illustrated by the timing of many allegations. The Complaint alleges that Wehmeyer provided beer, cigarettes, pornography, and marijuana to the Victims in the summers of 2009, 2010, and 2011. (Compl. 4-5.) Wehmeyer sexually abused the Victims during the same time frame. (*Id.*) Thus, according to the Complaint, the last instance of abuse and provision of illicit materials occurred in 2011. Nevertheless, much of Wehmeyer's alleged conduct occurred after Wehmeyer abused the Victims and provided them with illicit materials. Specifically, the Complaint alleges that in 2012 Wehmeyer purchased a gun, was smoking marijuana and drinking alcohol to excess, and that he mistreated and verbally and emotionally abused staff and parishioners. Again, the allegations reflect the State's apparent objective: to voice its disapproval of the Archdiocese Corporation's handling of Wehmeyer as a priest.

In addition to being irrelevant, the allegations listed above are also prejudicial and misleading. The allegations reflect an apparent intent to imply, and for the jury to conclude, that if Wehmeyer was not fit to be a priest, the Archdiocese Corporation must bear some criminal culpability for being associated with him. Allegations suggesting conviction by association are

improper and should be stricken. See *United States v. Roark*, 924 F.2d 1426, 1432-34 (8th Cir. 1991) (overturning conviction where entire focus of the trial was “guilty by association” rather than the guilt or innocence of the individual defendant); *United States v. B. Goedde & Co.*, 40 F. Supp. 523 (E.D. Ill. 1941) (striking from an indictment background allegations regarding undesirable community conditions, because “[d]efendants are responsible only for what they themselves have done”). Moreover, it is improper to include substantive charges or convictions, such as Wehmeyer’s DUI convictions, against an individual who is not a defendant. See *United States v. Poindexter*, 719 F.Supp. 6, 10 (D.D.C. 1989) (“[T]here is no warrant in federal criminal procedure for including in an indictment substantive charges against an individual who is not a defendant in the case to be tried.”). Excluding these improper side issues will prevent undue prejudice and will focus the trial and the jury on the heart of this dispute, an inquiry into the relationship between the Archdiocese Corporation’s acts, omissions, knowledge, and intent, and the Victim’s abuse prior to June 2012.

Accordingly, the Archdiocese Corporation respectfully requests the allegations listed above, and the associated invitation to find the Archdiocese Corporation guilty by association, be stricken under Rule 17.04 so as to avoid improper judgements in violation of the federal and state Constitutions.

III. ALLEGATIONS ABOUT OTHER PRIESTS AND VICTIMS ARE INFLAMMATORY AND IMPROPER.

Despite explicitly limiting its six criminal charges to the Archdiocese Corporation’s handling of Wehmeyer and Victim 1’s, Victim 2’s, and Victim 3’s abuse, the State devotes nearly a quarter of its Complaint to allegations about “multiple other similar situations involving other Archdiocesan priests.” (Compl. 29-38.) The State portrays these similar-situation allegations as “illustrations of how the Defendant has historically and inconsistently dealt with

child sexual abuse perpetrated by its priests” (Compl. 30.) The similar-situation accusations provide extensive detail regarding the alleged misdeeds of four priests other than Wehmeyer. However, the allegations against the other priests include mistreatment of adults, dating back several decades, occurred before the offenders were ordained, while the priests worked in other dioceses, and in other states and countries, including St. Louis, Michigan, West Virginia, New Ulm, and Rome, Italy. None of the allegations involve Victim 1, Victim 2, or Victim 3. None of the allegations involve Curtis Wehmeyer.

In part, the objectionable allegations include:

- “In the summer of 1998, [Joseph] Gallatin is engaged in an incident where he stroked the chest of a 17-year-old male while on a mission trip *in West Virginia*. This incident is similar to a previous incident known to the Defendant, where Gallatin *rubbed the chest of a college roommate*.” (Compl. 37);
- “Robert Clark was ordained in 1984 and became a pastor *in the Diocese of New Ulm*. During Clark’s ministry, there were multiple allegations of sexual abuse, including allegations by a fifteen-year-old female and *a twenty-one-year old male*. Clark was also arrested in Loring Park for *soliciting an undercover police officer posing as a male prostitute*.” (Compl. 32-33);
- “Throughout his ministry, Clark was accused of abuse *at least four times*.” (Compl. 33);
- “In 2001, while Clark is teaching at St. Agnes, a young woman made a complaint that Clark abused her when she was a minor student at the school. McDonough dismisses the credibility of the complaint on the basis that the young woman’s statements are not reliable. In a 2002 memorandum to the Clergy Review Board, McDonough indicates the complaint was never disclosed publicly. He writes that he urged the young woman to report to the civil authorities but there is no indication in the file that the incident was reported to police. At the time of the complaint, McDonough did his own investigation and concluded that the allegation is false. Regardless, Clark is no longer permitted to teach at St. Agnes. It is recommended that Clark distance himself from the school and instead serve as a full-time associate pastor at St. Agnes.” (Compl. 34);
- “Michael Keating *was ordained as a priest* in the Archdiocese of St. Paul and Minneapolis *in 2002*. In 2006, *he was accused of sexual abuse of a minor female in the 1990’s*. Keating is accused of rubbing the chest of a thirteen-year-old girl, putting his fingers in her mouth and rubbing her gums, and pulling her on top of him while both were clothed. These actions caused the victim to require in-patient psychiatric care and ongoing counseling. It appears the Defendant paid for the care in part. There are also

allegations of Keating having improper relationships with a minor while he studied in Rome, and another young woman who is a consecrated virgin living in Michigan.” (Compl. 34);

- “Fr. Kenneth LaVan served in ministry within the Archdiocese of St. Paul and Minneapolis for nearly forty years. During his time as a priest, there were allegations that *he sexually abused* two minor girls and *three adult women, including a vulnerable adult. The abuse spans between 1965 and 1985.* The first case of abuse was reported to the Defendant in 1985. Because of these allegations of abuse, the Defendant repeatedly sent LaVan for therapy during the 1980’s and nineties when his victims began coming forward. LaVan was not formally removed from ministry until 2013.” (Compl. 30).

Although the Complaint strongly implies that the Archdiocese Corporation somehow committed crimes through its handling of four other priests, the State did not include charges for such alleged crimes. The State does not allege that the other priests abused the Victims, or that the Archdiocese Corporation caused or contributed to the Victims’ delinquency or need for services through priests other than Wehmeyer. The State has not charged the Archdiocese Corporation with any crime in handling the allegations against any priest other than Wehmeyer. Nor are the allegations regarding the other priests relevant to the elements of the six charges brought in relation to the abuse of Victims 1, 2, and 3. The State’s contentions constitute an improper attempt to hold the Archdiocese Corporation criminally responsible for decades’ worth of alleged wrongful priest behavior that is unrelated to the charged offenses.

The allegations about “similar situations” are an attempt to have the jury use the Archdiocese Corporation’s alleged prior bad acts to prove ongoing action and inaction in conformity therewith. Allowing the State to allege and litigate these issues would constitute reversible error. *See State v. Dennison*, A03-799, 2004 WL 1775578, (Minn. Ct. App. Aug. 10, 2004) (overturning conviction for contributing to a child’s need for protection or services, a violation of Minn. Stat. § 260C.425, because the State introduced improper character evidence).

These “similar situation” allegations are prejudicial because they will likely confuse and mislead the jury. The allegations suggest that the Archdiocese Corporation has long contributed to abusive conduct and can be held liable for such conduct, despite the lack of any charges relating to the “similar situations.” The allegations would allow the jury to draw impermissible inferences that the Archdiocese Corporation was involved with additional, uncharged crimes, including the alleged crimes of the other four priests. *See, e.g., United States v. Hubbard*, 474 F.Supp. 64, 82 (D.D.C. 1979) (striking parts of an indictment that “may encourage the jury to draw inferences that the defendants are believed to be involved in activities not charged in the indictment”). The State portrays the allegations regarding the other four priests as merely “examples and illustrations” of the Archdiocese Corporation’s and other priests’ bad actions, implying that there are numerous other unidentified crimes and victims. (Compl. 30, 32-33 (alleging, without explaining, that “there were multiple allegations of abuse” and that a priest “was accused of abuse at least four times”)). Such allegations are legally improper. *See United States v. Augustine Medical, Inc.*, 2004 WL 502183 (D. Minn. 2004) (“[T]he reference to widespread Medicare abuse and fraud is inflammatory and beyond the scope of the offenses stated in the Indictment . . . [t]he mention of a large scale problem prompting the creation of a special task force may cause the jury to infer Defendants’ involvement in additional, uncharged crimes . . . [a]ccordingly, this language is unduly prejudicial to Defendants, as well as being unnecessary to the jury's understanding of the specific fraud charges.”); *see also United States v. Zabawa*, 39 F.3d 279, 285 (10th Cir. 1994) (district court did not abuse discretion in striking, as surplusage, allegation that alleged mail fraud had 6,708 unidentified victims); *United States v. Alsugair*, 256 F. Supp. 2d 306, 317-18 (D.N.J. 2003) (striking the phrase “and others” in conspiracy allegations on the ground that it “could prejudice the defendant by leading the jury to

believe that there exists a broader scope of illegal activity than is actually charged in the indictment”); *United States v. Manginen*, 565 F. Supp. 1024, 1025 (E.D. Va. 1983) (striking allegation that victims of alleged crime were “too numerous to mention”). Indeed, “[t]o expect the jury to assume that the inclusion of language indicative of additional misconduct has no real meaning and does not charge the defendant[] with additional crime merely because it is contained in [the indictment] . . . is to ascribe to a jury of laymen an ability to draw distinction that even lawyers have difficulty making.” *United States v. Whitehorn*, 710 F. Supp. 803, 819 (D.D.C. 1989), *rev'd on other grounds*, 888 F.2d 1406 (D.C. Cir. 1989). Accordingly, the allegations are irrelevant and unduly prejudicial and should be stricken.

Aside from being irrelevant and prejudicial, the allegations regarding “similar situations” should be stricken because they will necessitate numerous immaterial sub-trials within this trial, which will undoubtedly confuse the jury. For instance, if the Court finds that the allegations regarding Kenneth LaVan’s actions 50 years ago are somehow relevant to whether the Archdiocese Corporation caused or contributed to Wehmeyer’s Victims’ abuse, the trial would inevitably have to include testimony and evidence on issues as wide ranging as: (1) whether LaVan abused three adults and two minors; (2) whether the Archdiocese Corporation had knowledge of these events; (3) when the Archdiocese Corporation learned of these events; (4) what LeVan’s therapists told the Archdiocese Corporation; and (5) how the Archdiocese Corporation responded to the accusations. The allegations against each of the other three priests would necessitate similar testimony. Attempts to prove and disprove all of these claims will require scores of additional witnesses, days of additional trial time, and ultimately will have no bearing on whether or not the Archdiocese Corporation contributed to Victim 1’s, Victim 2’s,

and Victim 3's delinquency or need for protection. Accordingly, the irrelevant and prejudicial allegations regarding priests other than Wehmeyer should be stricken.

The Archdiocese Corporation is not on trial for how it handled the allegations against Kenneth LaVan, Robert Clark, Michael Keating, or Joseph Gallatin. Nor is it charged with contributing to their alleged victims' delinquency or need for protection and services. The Court should prevent the State's attempt to portray Victims 1, 2, and 3 as class representatives, through whom the jury could remedy the alleged mistreatment of numerous other unnamed victims. These allegations are irrelevant to whether the Archdiocese Corporation caused or contributed to the Victims' abuse, delinquency, or need for protection and will provide no assistance to the jury in understanding the six specific charges levied in this case.

As noted above, irrelevant allegations are designed to inflame the passions of a jury to lead them to conclude that the Archdiocese Corporation improperly manages priests. Not only are such judgments irrelevant to the charges, such judgments violate the limits imposed on the State by the United States Constitution and the Minnesota Constitution. Accordingly, the "similar situation" allegations set forth on pages 29-38 in the Complaint, which do not involve Victims 1, 2, or 3 or Wehmeyer, should be struck from the Complaint.

CONCLUSION

The State's allegations regarding Wehmeyer's sexual orientation and homosexuality are irrelevant and prejudicial. Allegations concerning Wehmeyer's other "bad conduct" and fitness for ministry are similarly irrelevant and invite prejudicial and unconstitutional judgments. In addition, old allegations regarding other priests unrelated to the charged offenses are likewise irrelevant and prejudicial. These allegations serve no purpose except to confuse and inflame the jury, draw the jury's attention away from deficiencies in the offenses actually charged, and invite unconstitutional determinations regarding fitness for ministry and management of priests.

The Archdiocese Corporation respectfully moves to strike the surplus allegations as set forth above pursuant to Rule 17.04 of the Rules of Criminal Procedure and consistent with the United States Constitution and the Minnesota Constitution.

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