STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Court File No: 62-CR-15-4175
C. A. File No. 2139124

State of Minnesota,

Plaintiff,

v.

The Archdiocese of Saint Paul and Minneapolis,
a Minnesota corporation,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTIONS TO STRIKE SURPLUSAGE and EXCLUDE EVIDENCE

INTRODUCTION

In two motions substantially identical except for their claimed legal bases, the Archdiocese seeks to strike allegations, and corresponding evidence that is relevant to the offenses charged. Plainly put, the Archdiocese is attempting to sanitize a Complaint that fairly lays out necessary background and context in a case that, all too sadly, is all too disappointing on its facts. But however disappointing, the facts are not unfairly prejudicial.

Further, seeking relief at this time is premature.

ARGUMENT

The Archdiocese is charged with three counts of contributing to the need for protection or services under Minn. Stat. § 260C.425, and three counts of contributing to the delinquency of a minor under Minn. Stat. § 260B.425. The evidence to prove these offenses, then, necessarily relates to Archdiocese words, actions and omissions and whether and how those encouraged, caused or contributed to the need for services for, or the delinquency of the victims. Evidence having relevance to establish the elements includes just the sort of evidence about which the Archdiocese is

complaining. This evidence has probative value in portraying the corporate failure in this case, including behavior, omissions and words of Archdiocese agents at the highest levels.

Motion to Strike Surplusage

The motion seeks to strike particular allegations relating to Wehmeyer's sexual orientation; his "bad behavior" involving, among other things, his alcohol problem; and allegations concerning what is best characterized *Spreigl* evidence.[1] The cited authority for the motion is Minn. R. Crim. P. 17.04 (Surplusage), Wright's *Federal Practice and Procedure* series at § 128 ("*Wright*"), and a dated case from New York.

The State was able to locate only two Minnesota cases that deal with Rule 17.04 in some respect. Neither is helpful. *See State v. Marciniak*, 97 Minn. 355, 357 (1906) (a complaint ending with the phrase, "against the peace and dignity of the state of Minnesota," was surplusage because these words were only required to conclude indictments); *State v. Matousek*, 287 Minn. 344, 352 (although State must prove every element of a crime, an indictment more specific than just the elements contains "merely surplusage").

Section 128 of *Wright*, though, cuts deeply against Defendant's position. It is aimed almost entirely at how federal courts proceed with changes to an indictment, recognizing a long history that federal courts not amend indictments.

In line with a caution against striking, "a motion to strike surplusage should be granted only if it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial." *Wright.* at 2 and n.37.[2] *See, e.g., United States v. Rezaq*, 134 F.3d 1121, 1134 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 834 (Oct. 5, 1998) (in air piracy prosecution, allegations that defendant shot

[1] The *Spreigl* issue is discussed in the section following.

[2] Minn. R. Ev. 401, of course, defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

passengers not surplusage because relevant to show seizure and control of aircraft). In short, "[t]he standard under Rule 7(d) has been strictly construed against striking surplusage." *United States v. Jordan*, 626 F.2d 928, 930 n.1 (D.C. Cir. 1980) (underscoring added).

Further, if the language being objected to is "information which the [State] hopes to properly prove at trial, it cannot be considered surplusage no matter how prejudicial it may be." *United States v. Hill*, 799 F. Supp. 86, 88-89 (D. Kan. 1992). Language should not be stricken if it pertains to matters to be proven at trial, and these need not be just essential elements of the crime if the language is "in a general sense relevant to the overall scheme charged." *United States v. Yeaman*, 987 F. Supp. 373, 376-77 (E.D. Pa. 1997).

The mere presence of surplusage does not require striking it. *United States v. Ross*, 210 F.3d 916, 923 (8th Cir. 2000). And an instruction that the charging instrument is not itself evidence will preclude unfair prejudice. *United States v. Figueroa*, 900 F.2d 1211, 1218 (8th Cir. 1990).

In view of the caution that should be exercised by a court, a strict standard against striking, and the salutary effect to be had by an appropriate instruction, the Archdiocese motion should be denied summarily.

Further, however, information in the Complaint and the supplemental facts being provided in the State's response to the Archdiocese Motion to Dismiss are relevant to showing and explaining what happened in this case and why the Archdiocese ignored repeated warning signs for years. These warning signs included Wehmeyer engaging in conduct as other offending priests known to the Archdiocese; his involvement with Archbishop Nienstedt beyond what is typical for priests; the implications this involvement had because the Archbishop has the sole authority to determine Archdiocese action or inaction; and Archdiocese action as to Wehmeyer specifically, including his career progression and all other terms and conditions of his employment.

The complained-about allegations also help show Archdiocese corporate values, priorities,

patterns and behavior, and motivations that encouraged, caused or contributed to the need for services for, or the delinquency of the victims. Most importantly, against the lengthy and complex milieu of this case, the complained-about language goes to answer at least two questions of ultimate importance to decide this case: "Why did this happen?" and "How did this happen?" As phrased by *Yeaman, supra*, the language in the complaint rises above what is minimally required and goes to show at least "in a general sense" facts and information "relevant to the overall" scheme, conduct and long-standing practice of the Archdiocese, as well as the background to, and context for what happened. As such, allegations relating to sexual orientation and substance abuse are relevant and not unfairly prejudicial and inflammatory.

The facts provided in the complaint are relevant to show the essential elements of the crime. The language accurately captures the unfortunate facts, circumstances and behaviors evidenced in this case. These are fairly stated in language drafted to avoid the lurid or sensational. The facts are what the facts are, notwithstanding that each party would very much wish they were different. But there is no legal basis to strike them.

Motion to Exclude Evidence

With similar motive, the Archdiocese's next effort is moving to exclude evidence relating to Wehmeyer's sexual orientation and his "bad behavior" at trial. This motion fails for the same reasons that the motion to strike fails.

Beyond sexual orientation and "bad behavior," the only remaining piece of the motion is to exclude evidence regarding "other priests and victims." *Motion* at 5. As each party recognizes, this essentially involves whether *Spreigl* evidence may be admitted. *Spreigl* issues would appear to be premature this far from trial and, for this reason, the State respectfully suggests decision be deferred, especially in view of the pending motion to dismiss. *Spreigl* determinations are not required to be resolved at the Omnibus Hearing. *State v. Sirek*, 374 N.W.2d 481, 484 (Minn. App.

1985), *rev. denied* (Minn. Nov. 26, 1985).

Additionally, although the State did include allegations in the Complaint about other child-abusing priests to show how the Archdiocese historically and inconsistently dealt with them, it is serving its *Spreigl* Notice under Rule 7.02 at this time, as contemplated in usual practice and the Rules:

> In felony and gross misdemeanor cases, the notice [of other offenses] must be given at or before the Omnibus Hearing under Rule 11, or as soon after that hearing as the other crime, wrong, act, or specific instance of conduct becomes known to the prosecutor.

Minn. R. Crim. P. 7.02, subd. 4(a) (West 2016).

CONCLUSION

As to those portions of both motions seeking to strike language, or exclude evidence relating to sexual orientation or "bad behavior," the State respectfully requests that these be denied. As to the motion to exclude evidence of other offenses, the State requests this be denied without prejudice with the understanding it may be later renewed.

Respectfully submitted,

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Dated: March 21, 2016

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