IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
		CRIMINAL ACTION
vs.	**:**	
		NO. 04-94-1
WILLIAM HURST	**:**	

MEMORANDUM AND ORDER

Tucker, J. **November 30th, 2004**

Presently before this Court is William Hurst's Motion to Dismiss or Strike Superseding Indictment for Surplusage (Doc. 34), and the Government's response thereto (Doc. 36). For the reasons set forth below, Defendant's motion is granted in part and denied in part.

I. BACKGROUND

Defendant owned and operated an automobile repair and body shop business known as Hurst Collision Center. The Government alleges that from or about 1997 until on or about May 2000, Defendant conspired to use stolen motor vehicles for their parts in order to repair other damaged motor vehicles. Moreover, the Government alleges that Defendant conspired to unlawfully tamper, remove, alter, or obliterate vehicle identification numbers.

On February 25, 2004, the grand jury indicted Hurst for violation of 18 U.S.C. §371, charging that Hurst conspired and agreed to knowingly and intentionally unlawfully remove,

obliterate, tamper with, and alter vehicle identification numbers ("VIN") for motor vehicles and motor vehicle parts; and buy, receive, possess, and obtain control of, with intent to sell and otherwise dispose of motor vehicle partes, knowing that te VIN had been unlawfully removed. See Indictment, ¶ 8.

On October 6, 2004, the Government issued a superseding indictment, adding a notice of forfeiture and notice of additional factors. The "Notice of Additional Factors" provides:

THE GRAND JURY FURTHER CHARGES THAT:

1. In committing the offense charged in Count One of this indictment defendant William Hurst:

   a. Committed an offense in which the retail value of the motor vehicles or parts involved exceeded $120,000, as described in U.S.S.G. § 2F1.1(b)(1)(H).

   b. Committed an offense involving the receipt of stolen property, and the defendant was a person in the business of receiving and selling stolen property, as described in U.S.S.G. § 2B6.1(b)(2).

   c. Committed an offense involving an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, as described in U.S.S.G. § 2B6.1(b)(3).

Additionally, the Government used and defined the term "chop shop." See Superseding Indictment, ¶¶ 1, 5.

The instant motion asks the Court to either dismiss the superceding indictment or to strike

the "notice of additional factors" and "chop shop" language as surplusage.

II. STANDARD OF REVIEW

In considering a motion to dismiss an indictment or a portion of an indictment, the court accepts as true the well-pleaded factual allegations set forth in the indictment. United States v. Gambone, 125 F. Supp. 2d 128 (E.D. Pa. 2000)(citing United States v. Besmajian, 910 F.2d 1153, 1154 (3d Cir. 1990)). Under the Federal Rules of Criminal Procedure, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense. Fed. R. Crim.P 12 (b)(3)(B).

In the alternative, the court may strike surplusage from the indictment upon defendant's motion. Fed. R.Crim.P (7)(d). Rule (7)(d) is designed to protect a defendant against prejudicial allegations that are neither relevant nor material to the charges contained in the indictment. Language is properly included in an indictment if it pertains to matters that the government will prove at trial. United States v. Yeaman, 987 F.Supp. 373, 376 (E.D. Pa.1997) A motion to strike will not be granted unless it is plain that the complained of allegations contained in the indictment are not relevant to the charges made or contain prejudicial matters. These matters need not be essential elements of the offense if they are in the general sense relevant to the overall scheme charged. Id. (citing United States v. Wecker, 620 F. Supp. 1002, 1006 (D. Del. 1985)). Further, a motion to strike language is addressed to the sound discretion of the trial court. United States v. Gatto, 746 F. Supp. 432, 455 (D.N.J. 1990), *rev'd on other grounds*, 924 F.2d 491 (3d Cir. 1991)(citations omitted).

III. DISCUSSION

The crux of this matter arises from the Supreme Court's ruling in Blakely v. Washington. In Blakely, the Court held that Washington State's sentencing regime violated the Sixth Amendment right to a jury trial because it permitted the imposition of a higher sentence based on the sentencing judge's fact-finding not presented to a jury or admitted to by the defendant. 124 S.Ct. 2531(2004). Courts await the Supreme's Court's determination of the applicability of Blakely to the federal sentencing guidelines. As such, in the interim, this Court must determine whether the additional factors are permissible in the indicting instrument and the proper procedure for sentencing determinations.

Defendant first moves to dismiss the superseding indictment because (1) including the additional factors violates his due process rights under the Fifth Amendment (2) the additional factors are not offenses and (3) the court lacks subject matter jurisdiction.

Defendant alternatively moves to have the additional factors and "chop shop" language stricken as surplusage because the terms are highly prejudicial or renders the indictment duplicitous.

A. Motion to Dismiss Superseding Indictment

Defendant argues the additional factors are not indictable crimes and have no place in the indictment because the conduct as alleged is not statutorily defined by Congress. Defendant claims that his Fifth and Sixth amendment rights are violated because he did not have notice that the delineated additional factors constituted criminal offenses. Defendant further argues that this Court lacks subject matter jurisdiction since the additional factors are not offenses.

The government contends that, traditionally, the Notice of Additional Factors would not be included in the indictment, however, in light of Blakely, the Government has taken this added measure to protect against an unjustly low sentence. By charging these factors, the Government seeks to have a jury determination to protect against the possible impact of adverse appellate decisions.

Both the Defendant's and Government's arguments are well-taken. However, the Supreme Court has yet to rule on the United States v. Booker and United States v. Fanfan, which seeks to clarify the proper role of the judge and jury in sentencing determinations. Given the legal posture of federal sentencing, the Third Circuit has not provided guidance as to this particular issue. Nevertheless, we consider an indictment sufficient if, when considered in its entirety, it adequately informs the defendant of the charges against him such that he may prepare a defense. United States v. Stansfield, 171 F.3d 806 (3d Cir. 1999); United States v. Turley, 891 F.2d 57 (3d Cir. 1989).

In this case, even though the superseding indictment includes "additional factors" for the jury's consideration upon sentencing, the court declines to find that this warrants a dismissal of the superseding indictment. The purpose of an indictment is to put the defendant on notice of charges alleged against him. Defendant has been duly notified of the charges against him and the factors which may impact his sentencing if he were to be convicted. Therefore, this Court will not dismiss the superseding indictment.

B. Motion to Strike Surplusage

Having concluded that dismissal of the superseding indictment is unwarranted, we turn to Hurst's request to have the "additional factors" and "chop shop" language stricken from the superceding indictment. As aforementioned, the Court must determine whether the language contained in the indictment is relevant or prejudicial.

1. Relevance

Defendant contends that the inclusion of the additional factors serves only to confuse the nature of the actual offense and to prejudice the jury. The Government insists that the additional factors are pertinent to the defendant's sentence.

Language that is not essential elements of the offense charged is permissible if it is, in a general sense, relevant to the overall scheme charged. United States v. Bulei, 1998 U.S. Dist. LEXIS 13239 (E.D. Pa.1998)(citing Yeaman, 987 F. Supp. at 376; Caruso, 948 F. Supp. at 392; United States v. Giampa, 904 F. Supp. 235, 271-72 (D.N.J. 1995); United States v. Wecker, 620 F. Supp. 1002, 1006 (D.Del. 1985). Additionally, if the language is information which the government hopes to prove at trial, it cannot be considered surplusage no matter how prejudicial it may be. Yeaman at 377. Here, the Defendant has been charged with conspiring to use stolen car parts and obliterating the vehicle identification numbers in furtherance of his conduct. Having reviewed the indictment, this Court finds that the notice of additional factors, which references the value of the motor vehicle parts, the receipt of stolen property, and the organization of the alleged scheme, is relevant to the evidence the government will present at trial. Therefore, the notice of additional factors will not be stricken as surplusage from the superseding indictment.

2. Prejudice

Defendant further argues that the additional factors are prejudicial because the government need not prove the allegations to obtain a conviction. The government acknowledges that such factors would not be traditionally included in the indictment. The government further proposes to withhold the additional factors from the jury until guilt has been determined; this, in turn, would alleviate any prejudice.

Generally, language that is inflammatory or prejudicial may be stricken from an indictment. In this case, the Defendant seeks to have the additional factors and the term "chop shop" stricken as prejudicial. This Court maintains that the notice of additional factors is relevant and not prejudicial, and thus, will not be stricken. Nevertheless, to protect against any confusion of the actual offense charged and the sentencing factors, this Court accepts the government's proposal to withhold the notice of additional factors from the jury until guilt has been determined. Consequently, this Court denies Defendant's request to strike the notice of additional factors as surplusage.

This Court finds, however, that the use of the term "chop shop," invoked to describe the alleged conduct, is not necessary to convey the nature of the offense charged. It should be noted that Defendant is charged with one count of conspiracy, in violation of 18 U.S.C. §371, based on allegations that he altered or removed motor vehicle identification numbers and trafficked in certain motor vehicles or motor vehicle parts. Defendant has not been charged under 18 U.S.C. §2322, which defines the criminal violation of operating a chop shop. To that end, the language "chop shop" should be stricken from the superseding indictment in paragraph one (1); and paragraph five (5) should be completely deleted from the superseding indictment.

Therefore, Defendant's request to have the term "chop shop" stricken as surplusage is granted.

In sum, it must be kept in mind that an indictment does no more than charge a defendant with an act or acts in violation of the law. An indictment has no probative value, nor is it any proof of the offense charged. The burden rests with the government to prove beyond a reasonable doubt at the time of the trial, the offense charged within the indictment. United States v. Ahmad, 329 F.Supp. 292, 297 (citing Tot v. United States, 319 U.S. 463 (1943)).

IV. CONCLUSION

For the reasons set forth above, Defendant's motion is granted in part and denied in part. Furthermore, this Court elects to bifurcate the guilt and sentencing phases of the trial. The sentencing factors–"notice of additional factors"- will not be submitted to the jury until the sentencing phase of trial.

An appropriate order will be entered in accordance with this memorandum opinion.