

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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 04-219
BRUCE JARDINE	:	
ROBERT JARDIN	:	
a/k/a/ Robert Jardine	:	
and	:	
DENNIS JARDINE	:	

MEMORANDUM AND ORDER

SCHILLER, J.

October 8, 2004

Defendants Bruce Jardine, Robert Jardin, and Dennis Jardine are charged in a thirty-three count Indictment with offenses relating to rolling back odometers on used cars.¹ Presently before the Court is Robert Jardin’s motion to strike surplusage from the Third Superseding Indictment, which Bruce Jardine and Dennis Jardine have joined. For the reasons set forth below, Defendants’

¹Bruce Jardine, Robert Jardin, and Dennis Jardine are each charged with one count of conspiracy in violation of 18 U.S.C. § 371, six counts of transporting, with fraudulent intent, securities in interstate commerce that they knew to be falsely made, in violation of 18 U.S.C. § 2314 and § 2312, and six counts of knowingly and willfully giving false statements relating to the cumulative mileage registered on motor vehicle odometers in violation of 49 U.S.C. §§ 32705(a) and 32709(b) and 18 U.S.C. § 2. Bruce Jardine and Robert Jardin are also each charged with eight additional counts of transporting, with fraudulent intent, securities in interstate commerce that they knew to be falsely made, in violation of 18 U.S.C. § 2314 and § 2312, and with ten additional counts of knowingly and willfully giving false statements relating to the cumulative mileage registered on motor vehicle odometers in violation of 49 U.S.C. §§ 32705(a) and 32709(b) and 18 U.S.C. § 2. Finally, Bruce Jardine is also charged with one additional count of transporting, with fraudulent intent, a security in interstate commerce that he knew to be falsely made, in violation of 18 U.S.C. §§ 2314 and 2312, and with one additional count of knowingly and willfully giving a false statement relating to the cumulative mileage registered on a motor vehicle odometer in violation of 49 U.S.C. §§ 32705(a) and 32709(b) and 18 U.S.C. § 2.

motion is granted.

I. BACKGROUND

Defendants operated used car businesses under several different names. The Government alleges that beginning in April 1995, Defendants bought used cars, caused the odometers to be “rolled back” (*i.e.*, set to lower numbers), changed the titles and other ownership documents to correspond to the lower mileage numbers, and then resold the cars to unwitting buyers.

On April 15, 2004, the Government filed an Information against Robert Jardin, charging him with one count of conspiracy. On June 10, 2004, the Government filed a twenty-seven count Superseding Indictment against Robert Jardin and his brother Bruce Jardine. Then, on July 22, 2004, the Government filed a second Superseding Indictment, which was identical to the first except for the addition of a one-page “Notice of Additional Factors.”²

On September 9, 2004, the Government filed a “Third Superseding Indictment” adding a third brother, Dennis Jardine. This new document included six additional counts and retained the “Notice of Additional Factors” section. As it appears in the Third Superseding Indictment, the “Notice of Additional Factors” states:

THE GRAND JURY FURTHER CHARGES THAT:

1. In committing the offenses charged in [C]ounts [O]ne through [T]hirty³ of this Indictment, defendants BRUCE JARDINE and ROBERT JARDIN (except in counts 2 and 17, in which he is not charged and DENNIS JARDINE (except in counts 2 through 10 and 17 through 27, in which he is not charged)

²In the interim, on June 24, 2004, the Supreme Court decided *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004).

³It appears that the Government intended to say “Thirty-Three,” as there are thirty-three, not thirty, counts in the Third Superseding Indictment.

and their co-conspirators:

- a. Caused a loss and attempted to cause a loss to the buyers of the rolled-back vehicles in excess of \$800,000, as described in U.S.S.G. § 2F1.1.
 - b. Defrauded and attempted to defraud more than one victim, as described in U.S.S.G. § 2F1.1.
2. In committing the offense charged in Count One of this Indictment, defendant ROBERT JARDIN acted as an organizer, leader, manager[,] and supervisor of the criminal activity described.

On September 27, 2004, Robert Jardin moved to strike the “Notice of Additional Factors” as surplusage from the Third Superseding Indictment. Bruce and Dennis Jardine joined the motion on October 1, 2004, and October 5, 2004, respectively.

II. STANDARD OF REVIEW

Under Federal Rule of Criminal Procedure 7(d), upon defendant’s motion, a “court may strike surplusage from the indictment.” FED. R. CRIM. P. 7(d) (2004). The Advisory Committee’s Notes explain that Rule 7(d) “introduces a means of protecting the defendant against immaterial or irrelevant allegations in an indictment which may, however, be prejudicial.” FED. R. CRIM. P. 7 advisory committee’s note (d). Accordingly, the Third Circuit has recognized the “power of the district court to redact from an indictment . . . superfluous language which unfairly prejudices the accused.” *United States v. Vastola*, 899 F.2d 211, 231 n.25 (3d Cir. 1990) (citing *United States v. Moya-Gomez*, 860 F.2d 706, 763 (7th Cir.1988)), *vacated on other grounds*, 497 U.S. 1001 (1990). A motion to strike surplusage is addressed to the sound discretion of the district court. *See United States v. Collins*, 920 F.2d 619, 631 (10th Cir. 1990); *United States v. Alslugair*, 256 F. Supp. 2d 306, 317 (D. N.J. 2003). Beyond the “unfair prejudice” language in *Vastola*, however, the Third Circuit has not established a

clear test for courts to determine when language in an indictment is superfluous.

At least three courts in this district have followed an “irrelevant or prejudicial” standard. *See United States v. Cintron*, No. 03-675-02 (E.D. Pa. Aug. 19, 2004) (order denying motion to strike surplusage); *United States v. Schweitzer*, No. 03-0451-1, 2004 U.S. Dist. LEXIS 12233, at *9-10, 2004 WL 1535793, at *3 (E.D. Pa. Feb. 26, 2004); *United States v. Yeaman*, 987 F. Supp. 373, 376 (E.D. Pa. 1997) (holding motion to strike pursuant to FED. R. CRIM. P. 7(d) inappropriate “unless it is plain that the allegations in the indictment are not relevant to the charge made or contain prejudicial matter”). Other district courts in the Third Circuit and many other circuit courts, however, require that, to be stricken, indictment language must be both prejudicial *and* irrelevant to the offense charged. *See, e.g., United States v. Oakar*, 111 F.3d 146, 157 (D.C. Cir. 1997); *United States v. Huppert*, 917 F.2d 507, 511 (11th Cir. 1990); *United States v. Scarpa*, 913 F.2d 993, 1013 (2d Cir. 1990); *United States v. Bulei*, No. 98-267-1, 1998 U.S. Dist. LEXIS 13239, at *8, 1998 WL 544958, at *3 (E.D. Pa. Aug. 26, 1998); *United States v. Wecker*, 620 F. Supp. 1002, 1006 (D. Del. 1985); *United States v. Fischbach & Moore, Inc.*, 576 F. Supp. 1384, 1398 (W.D. Pa. 1983). Because the weight of circuit authority lies with this conjunctive test, this Court will proceed under the stricter standard.

III. DISCUSSION

The instant motion asks the Court to decide whether the Government can include information in the Indictment which is not an element of the offense charged, but which might potentially impact sentencing. An indictment must be a “plain, concise, and definite written statement of the essential facts constituting the offense charged.” FED. R. CRIM. P. 7(c)(1). Rule 7(c) implements the

protections of the Fifth and Sixth Amendments of the United States Constitution, which mandate that the accused must “be informed of the nature and cause of the accusation” and that no person may be “twice put in jeopardy of life or limb.” U.S. CONST. amends. V, VI. An indictment thus has two purposes: First, it enables the accused to prepare his defense by providing a description of the charge against him; and second, it allows the accused to avail himself of his conviction or acquittal as protection against a subsequent prosecution for the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Stansfield*, 171 F.3d 806, 811 (3d Cir. 1999).

An indictment must set forth each element of the crime that it charges. *Almendarez-Torrez v. United States*, 523 U.S. 224, 228 (1998). It is the sole province of Congress to define the elements of federal criminal offenses and establish minimum and maximum punishments for every crime, and the exclusive definition of federal criminal offenses resides in the federal criminal statutes. *Liparota v. United States*, 471 U.S. 419, 424 (1985) (“The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.”) The United States Sentencing Commission has promulgated Guidelines that dictate a sentencing range for each individual defendant within the minimum and maximum sentences set by statute. The United States Sentencing Commission’s Guidelines therefore set forth “sentencing factors” that may provide the basis for adjusting sentences. However, when Congress created the Sentencing Commission, it placed the Commission into the judicial branch, and therefore the Commission cannot create, define, or expand upon Congress’s definitions of the elements of federal crimes. *See Mistretta v. United States*, 488 U.S. 361 (1989). In fact, in the face of vigorous separation of powers challenges to the Guidelines’ constitutionality, the Supreme Court upheld the validity of the Guidelines expressly because the Sentencing Commission “does no more than”

determine “what sentence is appropriate to what criminal conduct under what circumstances.” *Id.* at 395. The guidelines do not, and constitutionally could not, define what criminal conduct *is*. *See id.* at 396 (holding power to “regulate the primary conduct of the public” and “establish[] minimum and maximum penalties for every crime” is the sole province of the legislative branch).⁴

In the instant case, Defendants are accused of conspiracy, interstate transportation of fraudulent securities, and knowingly giving false written statements to used car buyers. The Government’s Third Superseding Indictment also includes a section entitled “Notice of Additional Factors,” which accuses all Defendants of causing a loss of more than \$800,000 and of defrauding more than one victim, and accuses Robert Jardin of being the “ringleader” of the conspiracy. *See* Third Superseding Indictment at 24. These statements closely track the language of the Sentencing Guidelines.⁵ *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(H), § 2B1.1(b)(2)(A)(I)

⁴Justice Scalia dissented in *Mistretta* because he felt that the Sentencing Commission’s Guidelines “have the force and effect of laws.” 488 U.S. at 413 (Scalia, J., dissenting). Justice Scalia’s dissent differed with the majority only on the question of whether or not the Guidelines *did* make laws. Of course, Justice Scalia agreed with the majority on the larger question of whether or not the Commission legitimately *may* make laws: the answer is no.

⁵ The “Notice of Additional Factors” section cites to “U.S.S.G. § 2F1.1.” Third Superseding Indictment at 24. This section, however, was deleted by consolidation with § 2B1.1 effective November 1, 2001. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2003) (stating that “[c]onsolidation will provide similar treatment for similar offenses for which pecuniary harm is a major factor in determining the offense level”). Therefore, the language used by the Government, which exactly mirrored the language of § 2F1.1, no longer precisely tracks the language of the Guidelines. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(b)(1)(L) (2000) (providing 11 level increase in Base Offense Level for loss in excess of \$800,000) and U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(b)(2)(B) (2000) (providing 2 level increase in Base Offense Level for scheme to defraud more than one victim) *with* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(H) (2003) (providing 14 level increase in Base Offense Level for loss in excess of \$400,000) and U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2)(A)(I) (2003) (providing 2 level increase in Base Offense Level for offense involving between 10 and 50 victims). Nevertheless, the language in the “Notice of Additional Factors” section of the Third Superseding Indictment would, if found by a jury, serve as “Specific Offense

(2003). None of these factors, however, are elements of the criminal offenses that the Government has accused Defendants of violating. This Court must determine whether the language included in the “Notice of Additional Factors” is both irrelevant and prejudicial such that it should be struck as surplusage from the Third Superseding Indictment under Federal Rule of Criminal Procedure 7(d).

1. Relevance

The Government admits that it “traditionally would not seek to include these factors in the Indictment itself.” (Govt’s Opp’n to Def.’s Mot. to Strike at 3.) However, the Government argues that inclusion of such information is now proper because of the upheaval in the federal sentencing world wrought by *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004). In *Apprendi v. New Jersey*, the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. 466, 490 (2000). *Blakely* extended this reasoning to invalidate a Washington State sentencing scheme and held that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” 124 S.Ct at 2537 (emphasis in original). Although the *Blakely* Court took no position on the validity of the federal sentencing guidelines, *id.* at 2538 n.9, the Government is justifiably concerned that *Blakely*’s reasoning may be applied to the federal guidelines. If this occurs, any fact supporting a sentencing enhancement or upward departure will have to rest on a jury finding. Therefore, to insure against what the Government calls “the possibility of an unjustly low sentence in this case” in the event that *Blakely* is extended to the federal

Characteristics” and could increase Defendants’ Base Offense Levels. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(H) (2003).

guidelines, the Government has “elected, as a protective measure, to charge the pertinent enhancement factors” in the Indictment. (Govt’s Opp’n to Def.’s Mot. to Strike at 2.)

While this Court appreciates the Government’s concern, the “Notice of Additional Factors” is not essential to the offense charged, and therefore not relevant for purposes of the indictment, because the number of persons defrauded and the amount of losses sustained are not elements of the underlying crimes with which Defendants are charged. This information is relevant only for sentencing purposes. If Defendants are found guilty, this Court will take into account all relevant information, and, exercising its discretion, sentence appropriately. As the additional factors are “not criminal conduct defined by Congress,” they “have no place within the charging documents against the Defendants.” *United States v. Mutchler*, ___ F. Supp. 2d ___, 2004 WL 2004080 (S.D. Iowa, Sept. 9, 2004), at *4.

Other district courts in the Third Circuit have allowed the inclusion of language not essential to the offense charged because they found the challenged language relevant to the offense charged. For example, in *United States v. Bulei*, No. 98-267-1, 1998 U.S. Dist. LEXIS 13239, at *8, 1998 WL 544958, at *3 (E.D. Pa. Aug. 26, 1998), Defendant was accused of participating in an extensive fraud that included mailing solicitations disguised as bills and invoices. *Id.* The court refused to strike as surplusage certain postal regulations, finding that the regulations were “relevant to define the overall scheme.” *Id.* Similarly, in *United States v. Wecker*, 620 F. Supp. 1002, 1007 (D. Del. 1985), the court denied a Rule 7(d) motion to strike because it held that some of the challenged language was relevant to show “the purpose behind the alleged scheme,” and that other challenged language would be used by the Government “to establish the charge” (emphasis added). *Id.* Moreover, the court expressly held that the challenged terms “will not lead a jury to speculate as to the nature, extent, or

scope of the transactions involved in this case.” *Id.* By contrast, in the instant case, the information contained in the “Notice of Additional Factors” sheds no light on the manner or methods of Defendants’ allegedly fraudulent activity. *Cf. United States v. Scott-Emuakpor*, No. 99-CR-138, 2000 U.S. Dist. LEXIS 3118, at *29, 2000 WL 288443, at *10 (W.D. Mich. Jan. 25, 2000) (refusing to strike expert testimony detailing structure of fraudulent scheme because testimony “may be helpful to the trier of fact” in deciphering scheme). Rather, it merely tracks the language of the Sentencing Guidelines to, in the Government’s words, “protect against the possibility of an unjustly low sentence in this case.” (Govt’s Opp’n to Def.’s Mot. to Strike at 2.) Therefore, the “Notice of Additional Factors” is irrelevant to the offenses charged in the Indictment.

2. Prejudice

The Government cannot “elect” to include in an indictment information that is not essential to the offense charged if such information is prejudicial to Defendants. The information contained in the “Notice of Additional Factors” clearly does prejudice Defendants. First, the “Notice of Additional Factors” could confuse the jury by including information and allegations not based on the statutory language of the offenses charged. As the court said in *Mutchler*, “[t]here is no good reason to place in the charging language [non-statutory language] that burden[s] a jury with unnecessary complexity.” *Mutchler*, 2004 WL 2004080, at *4; *see also United States v. Spalding*, No. IP01-0152-CR-01, 2002 U.S. Dist. LEXIS 7789, at *15-16, 2002 WL 818129, at *5 (S.D. Ind. Apr. 24, 2002) (striking explanatory “background” section of Indictment against pharmacist because section “does not recite any of the essential elements of the charge and because the legal principles defined in these paragraphs may lead to confusion of issues”); *United States v. Lyle*, 677 F. Supp. 1370, 1381-82 (N.D. Ill. 1988) (striking language in indictment alleging violation not encompassed

by statute); *United States v. Mandel*, 415 F. Supp. 997, 1009 (D. Md. 1976) (striking as surplusage reference to Maryland Code of Ethics where indictment incorrectly implied that violation of Code by governor established alleged offense and therefore could confuse jurors on the issue).

Second, the jury may be influenced by the sentencing factors as opposed to focusing on the elements of the alleged crimes themselves. Prejudice would therefore result from the Government's insertion of extraneous details of Defendants' alleged crimes into the indictment. *See, e.g., United States v. Kemper*, 503 F.2d 327, 329 (6th Cir. 1974) (striking from indictment, as prejudicial, description of defendant's prior conviction); *United States v. Augustine Med., Inc.*, No. 03-321, 2004 U.S. Dist. LEXIS 3911, at *17-18, 2004 WL 502183, at *6 (D. Minn. Mar. 11, 2004) (striking Indictment's reference to general phenomenon of widespread Medicare abuse and fraud as "inflammatory and beyond the scope of the offenses stated in the Indictment"); *United States v. Alsugair*, 256 F. Supp. 2d 306, 317-18 (D. N.J. 2003) (striking language referring to uncharged conspiracies involving unnamed "others" because such "vagueness of language could certainly prejudice" defendant). Because the "Notice of Additional Factors" is not relevant and is prejudicial, this Court find that it should be stricken from the Third Superseding Indictment.

The Government urges that this Court to stay its hand until after the Supreme Court has decided *United States v. Booker* and *United States v. Fanfan*, which may adjudicate the constitutionality of the Sentencing Guidelines. (Govt's Opp'n to Def.'s Mot. to Strike at 1.) This argument is unpersuasive. If the Supreme Court decides that *Blakely* does not apply to the Guidelines, the additional information here will be unnecessary because sentencings imposed under the Guidelines will proceed as they have traditionally, and the Government admits that it "traditionally would not seek to include these factors in the Indictment itself." (Govt's Opp'n to Def.'s Mot. to

Strike at 3.) In the alternative, if the Supreme Court holds that *Blakely*'s reasoning does apply to the Guidelines, the Government states that "the guidelines as a whole are not severable and should not be employed except as a guide to the exercise of the court's discretion." (Govt's Opp'n to Def.'s Mot. to Strike at 2.) Thus, accepting *arguendo* the Government's view regarding severability, until a new sentencing scheme is devised, information like that included in the "Notice of Additional Factors" section of Defendant's indictment will be taken into consideration by the Court when it determines a sentence. In either scenario, the basic point remains: the "Notice of Additional Factors" does not represent "essential facts constituting the offense charged," and inclusion of that information in the Indictment is unnecessary.

In the alternative, the Government asks this Court to withhold submission of the "Notice of Additional Factors" section of the Indictment until after the jury has first determined guilt.⁶ (Govt's Opp'n to Def.'s Mot. to Strike at 5.) This scenario, the Government argues, would alleviate any prejudice to the Defendants "because the sentencing factors would be submitted to the jury only

⁶The Government argues that in *United States v. Henry*, 282 F.3d 242 (3d Cir. 2002), the Third Circuit "authorized" conviction of a jury "for sentencing factors." (Govt's Opp'n to Def.'s Mot. to Strike at 5.) In *Henry*, the defendant pled guilty to an indictment charging him with possession with intent to distribute five grams or more of cocaine base, but never admitted to possessing cocaine (it appeared that he possessed marijuana instead) and disputed the quantity of drugs with which he was charged. *Henry*, 282 F.3d at 244. The instant case is easily distinguishable from the situation presented by *Henry*. First and foremost, that case came to the circuit "in a novel procedural posture": *Apprendi* was decided *between* Defendant's guilty plea and his sentencing. *Henry*, 282 F.3d at 243. Therefore, the court permitted a reconvening of the jury to find, beyond a reasonable doubt, the identity and quantity of drugs. These facts were, post-*Apprendi*, indisputably elements of the offense charged, whereas pre-*Apprendi* they could have been, and were in *Henry*, found by the judge by a preponderance of the evidence. The Third Circuit gave no hint in *Henry* that bifurcation of a jury's role in criminal trials – one for guilt, one for sentencing – was to become this Circuit's ordinary mode of operation. Second, the *Henry* court was faced with a final decision of the Supreme Court, with which it had to conform a sentence. *Id.* No such final decision exists here.

during the sentencing phase and not during the finding of guilt phase.” (*Id.*) This position, however, contradicts the argument made by the United States in its brief to the Supreme Court in *Booker* and *Fanfan*. There, the Solicitor General cautioned the Supreme Court against “attempting to reconceptualize the Guidelines as elements of federal crimes and to inject jury factfinding into a system clearly intended to channel *judicial* sentencing discretion.” (Br. for United States, *United States v. Booker & United States v. Fanfan*, Nos. 04-104 and 04-105, at 13 (emphasis in original).)

The United States asserted that:

[A]dministering the Guidelines through a series of jury verdicts on sentence-enhancing facts [] would produce a system radically different from the one designed by Congress and the Sentencing Commission. Grafting jury-trial procedures onto the Guidelines would create a hybrid system that would not function in the manner intended by its creators (and in some cases could not function at all); would require extensive judicial lawmaking to implement; and would undermine a key premise of *Mistretta* and raise serious constitutional questions about whether the Sentencing Commission can effectively define offense elements that govern the primary conduct of citizens.

Id.

In sum, this Court will not countenance the Government’s attempt to leave irrelevant and prejudicial information in the Indictment “as a protective measure” “in anticipation” of *pending* Supreme Court cases, on the assumption that *Booker* and *Fanfan* will be decided in a certain way. It has been said that “the wheels of justice grind slowly,” but the Government would prefer a dead stop.

IV. CONCLUSION

For the reasons set forth above, Defendants’ motion is granted. An appropriate Order follows. Finally, this Court notes that the Government has conducted its prosecution of this case in a piecemeal fashion. As set forth above, the charging instruments have included an Information

against Robert Jardin, an Indictment against Robert Jardin and Bruce Jardine, a Superseding Indictment against those two, a second Superseding Indictment to incorporate the “Notice of Additional Factors,” and now a Third Superseding Indictment adding Dennis Jardine. All the while, though, the Government knew of all three Jardine brothers, and knew at least the broad outlines of their involvement in the alleged crimes.

This kind of inefficiency seemingly is the result of bureaucratic case management by officials in Washington, D.C. Perhaps these problems could have been avoided if the United States Attorney’s office in the Eastern District of Pennsylvania was given appropriate authority. The Government is admonished that such confusion and indecisiveness is to be avoided.

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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 04-219
BRUCE JARDINE	:	
ROBERT JARDIN	:	
a/k/a/ Robert Jardine	:	
and	:	
DENNIS JARDINE	:	

ORDER

AND NOW, this 8th day of **October, 2004**, upon consideration of Defendants Robert Jardin, Bruce Jardine, and Dennis Jardine’s combined Motion to Strike Surplusage from the Third Superseding Indictment and the response thereto, it is hereby **ORDERED** that:

1. Defendants Robert Jardin, Bruce Jardine, and Dennis Jardine’s combined Motion to Strike Surplusage from the Third Superseding Indictment (Document Nos. 36, 38, and 43) is **GRANTED**.
2. All language under the heading “Notice of Additional Factors” shall be struck from the Third Superseding Indictment.

BY THE COURT:

Berle M. Schiller, J.