

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	8:04CR317
)	
Plaintiff,)	
)	
v.)	ORDER
)	
DANIEL BENITEZ-HERNANDEZ,)	
)	
Defendant.)	

This matter is before the court on defendant's motion to dismiss or strike the indictment (Filing No. 25). Defendant urges the court to dismiss the indictment in its entirety or to strike the "additional factual findings" pled in the indictment. The indictment provides in Count I that:

On or about July 20, 2004, in the District of Nebraska, the defendant DANIEL BENITEZ-HERNANDEZ, did will fully and unlawfully transport and move aliens and attempt to transport and move aliens within the United States by means of transportation, in knowing and reckless disregard of the fact that said aliens had come to, entered, and remained in the United States in violation of law, in furtherance of such violation of law, in that the defendant, DANIEL BENITEZ-HERNANDEZ, did transport twelve (12) passengers in a passenger van.

In violation of Title 8, United States Code § 1324(a)(1)(A)(ii), 1324(a)(1)(B)(ii) & Title 18 United States Code, Section 2.

Filing No. 1. The indictment further alleges under the heading "Additional Factual Findings" that "the offense described in Count I above involved the intentional and reckless creation of a substantial risk of death and injury to the aliens being transported." *Id.* at 2.

The indictment was filed after the United States Supreme Court decided *Blakely v. Washington*, — U.S. —, 124 S. Ct. 2531 (June 24, 2004), in which the Supreme Court invalidated a sentence imposed under the State of Washington's sentencing regime. *Id.* at 2544. *Blakely* restates the Supreme Court's holding in *Apprendi v. New Jersey*, 530

U.S. 466, 477 (2000), that all facts used to increase a defendant's sentence beyond the statutory maximum must be charged in the indictment and proved to a jury beyond a reasonable doubt. See *id.* at 2537. 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." *Blakely*, 124 S. Ct. at 2537 (citations omitted).

This court has held that it will continue to sentence under the guidelines to the extent that factors increasing the "maximum," as it is defined in *Blakely*, are charged in the indictment and either admitted or submitted to a jury (or to the court if a jury is properly waived) under the standard of proof beyond a reasonable doubt. *United States v. Terrell*, No. 04-CR-24, 2004 WL 1661018 (D. Neb. July 22, 2004). The indictment herein is the result of the government's attempted compliance with *Blakely*. The additional allegations, if found by a jury beyond a reasonable doubt, would support a guideline sentencing enhancement.

Defendant challenges the indictment, contending the "additional factual finding" set out in the indictment is not a crime and that his prosecution for conduct that does not proscribe any criminal statute violates his Fifth and Sixth Amendment right to notice of conduct constituting a criminal offense and right to be informed of the nature and cause of the accusation against him. He further asserts that the Fifth Amendment Grand Jury Clause permits indictment only for infamous crimes, contending that sentencing enhancements promulgated by the Sentencing Commission are not crimes. Last, he contends that this court lacks jurisdiction over charges that do not constitute federal crimes.

The court finds defendant's contentions have no merit. The United States Sentencing Guidelines were promulgated pursuant to the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.*, and 29 U.S.C. § 991 *et seq.* *Mistretta v. United States*, 488 U.S. 361, 366 (1989) (discussing the Sentencing Reform Act of 1984 and its legislative history). In fulfilling its mandate, the Commission has the authority to promulgate, review, and revise binding guidelines to "establish a range of determinate sentences for categories of offenses and defendants according to various specified factors, among others." *Id.* at 368 (internal quotation marks omitted); see 28 U.S.C. §§ 994(a), (b), (c), and (o). Fulfilling its responsibilities, the Sentencing Commission promulgated the United States Sentencing Guidelines. *Stinson v. United States*, 508 U.S. 36, 41 (1993). Thus, the guidelines have the force of law. *Id.* at 38 (explaining that the guidelines and the commentary that interpreters them are authoritative unless in violation of the Constitution or a federal statute).

An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution. *United States v. White*, 241 F.3d 1015, 1021 (8th Cir. 2001). Usage of a particular word or phrase in the indictment is not required as long as a court can recognize a valid offense and the form of the allegation "substantially states the element[s]." *United States v. Mallen*, 843 F.2d 1096, 1102 (8th Cir. 2001). An indictment will only be found insufficient if an "essential element 'of substance' is omitted." *Id.* (citation omitted). However, although no particular words or phrases are necessarily required, "[i]t is well-established in this circuit that citation of the statute, without more, does

not cure the omission of an essential element of the charge because bare citation of the statute 'is of scant help in deciding whether the grand jury considered' the missing element in charging the defendant." *United States v. Olson*, 262 F.3d 795, 799 (8th Cir. 2001) (quoting *United States v. Camp*, 541 F.2d 737, 740 (8th Cir.1976)).

A fact that increases a sentence beyond the maximum authorized statutory sentence is the functional equivalent of an element of a greater offense. *Apprendi*, 530 U.S. at 494 n.19. "The dispositive question . . . 'is one not of form, but of effect.'" *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (quoting *Apprendi*, 530 U.S. at 494). *Blakely*, *Ring* and *Apprendi* all require "treating 'sentencing factors' that mandate enhancement of a sentence as 'elements.'" *United States v. Hammoud*, 381 F.3d 316, 368 n.4 (4th Cir. 2004) (Motz, J., dissenting). "In federal prosecutions, '[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury' alleging all the elements of the crime." *Harris v. United States*, 536 U.S. 545, 549 (2002) (quoting U.S. Const., amend. V) (emphasis added); *Jones v. United States*, 526 U.S. 227, 251 (1999) (holding provisions of carjacking statute that established higher penalties to be imposed when offense resulted in serious bodily injury or death set forth additional elements of the offense); cf. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding that recidivism that expands a penalty range need not be stated in a felony indictment).

The court finds no defect in the indictment. The government may seek to enhance defendant's sentence under the guidelines with proof beyond a reasonable doubt of the additional fact it alleges. That fact then becomes the functional equivalent of an element of the crime that carries the enhanced penalty. The court finds the indictment fairly apprises the defendant of the elements of the crime, as enhanced, and the nature of the

charge against him. Because the guideline provisions have the force of law, conduct that increases a penalty under the guidelines, together with proof of other essential elements, comprises an enhanced crime. Although reference to a guideline section would be helpful and appropriate, courts and practitioners have sufficient familiarity with the guidelines to ascertain the statutory source of the alleged enhancing fact. See Fed. R. Crim. P. 7(c)(3) (“unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment.”). Accordingly,

IT IS HEREBY ORDERED that defendant’s motion to dismiss (Filing No. 25) or to strike the indictment is denied.

Dated this 19th day of October, 2004.

BY THE COURT:

s/ Joseph F. Bataillon
United States District Judge