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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**Criminal Action No. 5:11cr00027**
v.	)	
	)	
CARLOS ENRIQUE MORALES-AGUILAR,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Before the court is defendant's **Motion to Strike Surplusage (Dkt. # 15)**, filed on October 31, 2011. Defendant moves the court, pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure, to strike surplusage from Count One of the Indictment. The court has been informed that the government does not oppose this motion.

I

Count One of the Indictment charges defendant with violating 8 U.S.C. § 1326(a) and (b)(2) and states that defendant, "an alien, was found in the United States after having been removed therefrom . . . *subsequent to a conviction for commission of an 'aggravated felony,' as defined in 8 U.S.C. § 1101(a)(43)*, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission . . . ." Indictment, Dkt. # 1 (emphasis added). Defendant claims that the phrase "subsequent to a conviction for commission of an 'aggravated felony' as defined in 8 U.S.C. § 1101(a)(43)" in the Indictment goes beyond alleging the elements of the charge and is unnecessary to the issue of defendant's guilt or innocence. Furthermore, because this allegation is prejudicial, defendant argues that it should be stricken from the Indictment.

II

Federal Rule of Criminal Procedure 7(c) states that "[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged," FED. R. CRIM. P. 7(c)(1), and Rule 7(d) provides that "[u]pon the defendant's motion, the court may strike surplusage from the indictment or information." FED. R. CRIM. P. 7(d). The Fourth Circuit Court of Appeals has held that "[t]he purpose of Rule 7(d) is to protect a defendant against prejudicial allegations that are neither relevant nor material to the charges made in an indictment, or not essential to the charge, or unnecessary, or inflammatory." United States v. Williams, 445 F.3d 724, 733 (4th Cir. 2006) (quoting United States v. Poore, 594 F.2d 39, 41 (4th Cir. 1979)). The Fourth Circuit has further held that a motion to strike surplusage "should only be granted if it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial." Williams, 445 F.3d at 733 (quoting United States v. Rezaq, 134 F.3d 1121, 1134 (D.C. Cir. 1998)).

Count One of the Indictment charges defendant with violating §1326(a) and (b)(2). Section 1326(a) discusses the reentry of removed aliens and describes the criminal violation as "any alien who . . . has been denied admission, excluded, deported, or removed . . . and thereafter . . . enters, attempts to enter, or is at any time found in, the United States, unless . . . the Attorney General has expressly consented to such alien's reapplying for admission . . . ." 8 U.S.C. § 1326(a)(1) and (2). The Fourth Circuit has held that to obtain a conviction under § 1326, "the government must show '(1) that the defendant is an alien who was previously arrested and deported, (2) that he re-entered the United States voluntarily, and (3) that he failed to secure the express permission of the Attorney General to return.'" United States v. Joya-Martinez, 947 F.2d 1141, 1143 (4th Cir. 1991) (quoting United States v. Espinoza-Leon, 873 F.2d 743, 746 (4th

Cir. 1989)). Section 1326(b)(2) describes the criminal penalties for the re-entry of certain removed aliens who have violated § 1326(a) and states that if an alien's previous "removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both . . . ." 8 U.S.C. § 1326(b)(2). The Supreme Court of the United States has held that this subsection "is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime." Almendarez-Torrez v. United States, 523 U.S. 224, 226 (1998).

III

In this case, Count One of the Indictment sufficiently alleges the three elements required to prove a violation of § 1326(a), that defendant is an alien who was previously removed from the United States, that he subsequently voluntarily re-entered the United States, and that he did not have the express consent of the Secretary of the Department of Homeland Security to reapply for admission. See Indictment, Dkt. # 1. The phrase "subsequent to a conviction for commission of an 'aggravated felony' as defined in 8 U.S.C. § 1101(a)(43)" is relevant to the applicable penalty provision described in § 1326(b)(2), but it is not an essential fact constituting the offense charged under § 1326(a). Moreover, defendant claims that this unnecessary allegation in the Indictment is prejudicial, and the court agrees. The Supreme Court has found that an indictment asserting a violation of § 1326(a) that contains an allegation of previous removal pursuant to a conviction for commission of an aggravated felony, as in the instant matter, "risks significant prejudice. . . . '[T]here can be no question that evidence of the . . . *nature* of the prior offense,' here, that it was 'aggravated' or serious, 'carries a risk of unfair prejudice to the defendant.'" Almendarez-Torres, 523 U.S. at 235 (emphasis in original) (quoting Old Chief v. United States, 519 U.S. 172, 185 (1997)).

Accordingly, **IT IS ORDERED** that defendant's unopposed **Motion to Strike Surplusage (Dkt. # 15)** is **GRANTED**, and the phrase "subsequent to a conviction for commission of an 'aggravated felony' as defined in 8 U.S.C. § 1101(a)(43)" shall be stricken from the Indictment. The Clerk is directed to send a copy of this Memorandum Opinion and accompanying Order to defendant and all counsel of record.

Entered: November 9, 2011

/s/ Michael F. Urbanski

Michael F. Urbanski
United States District Judge