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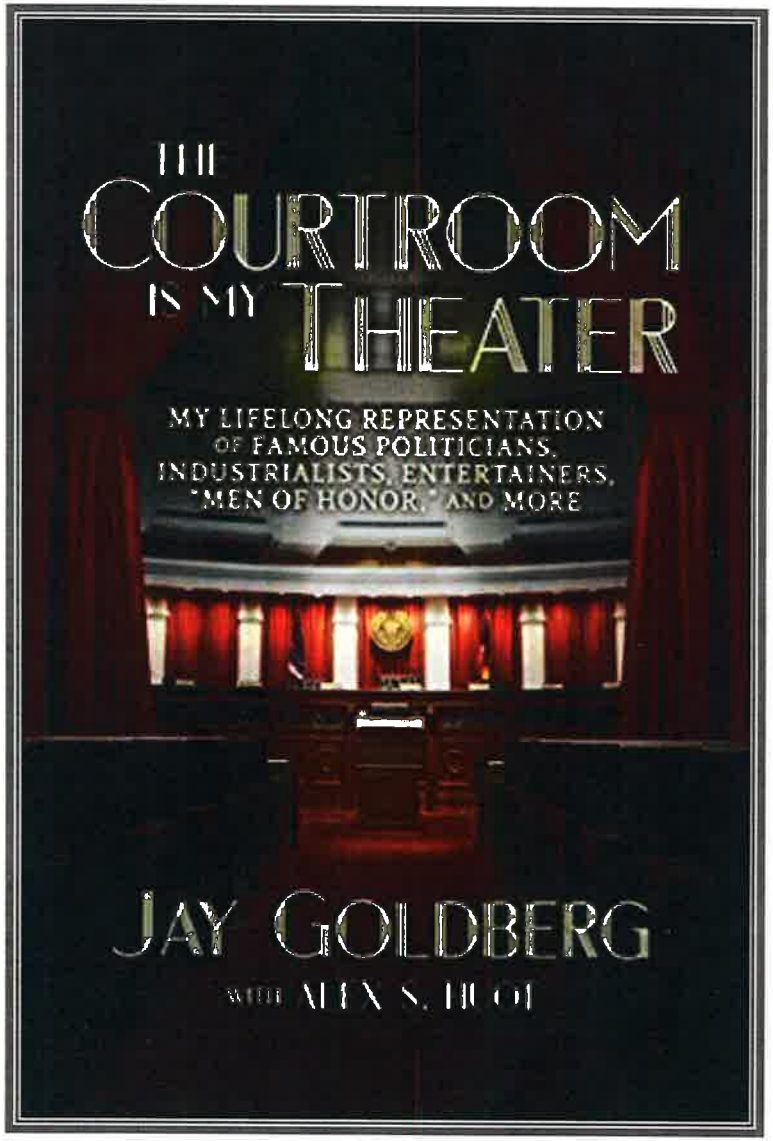

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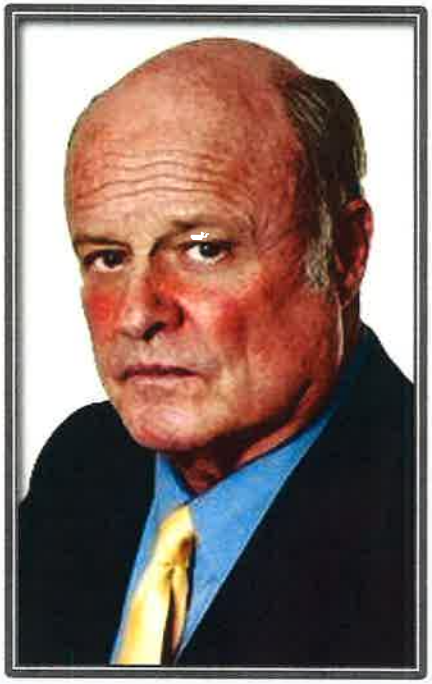

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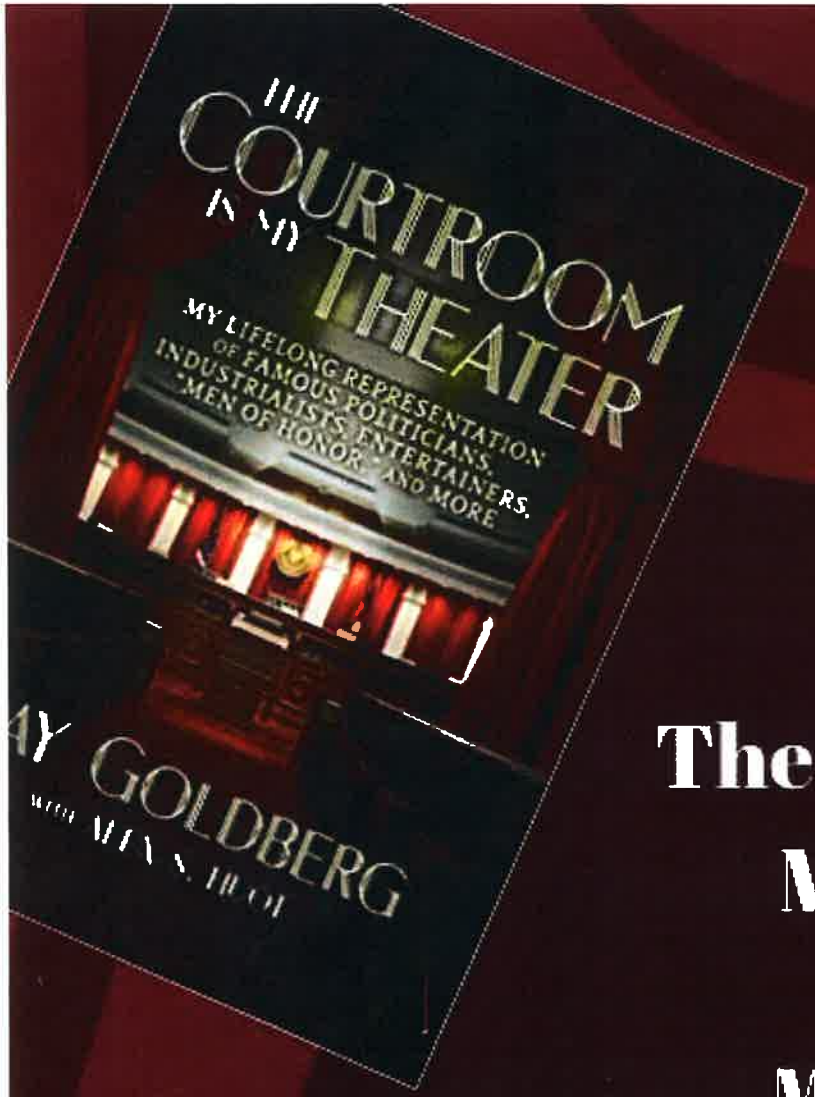


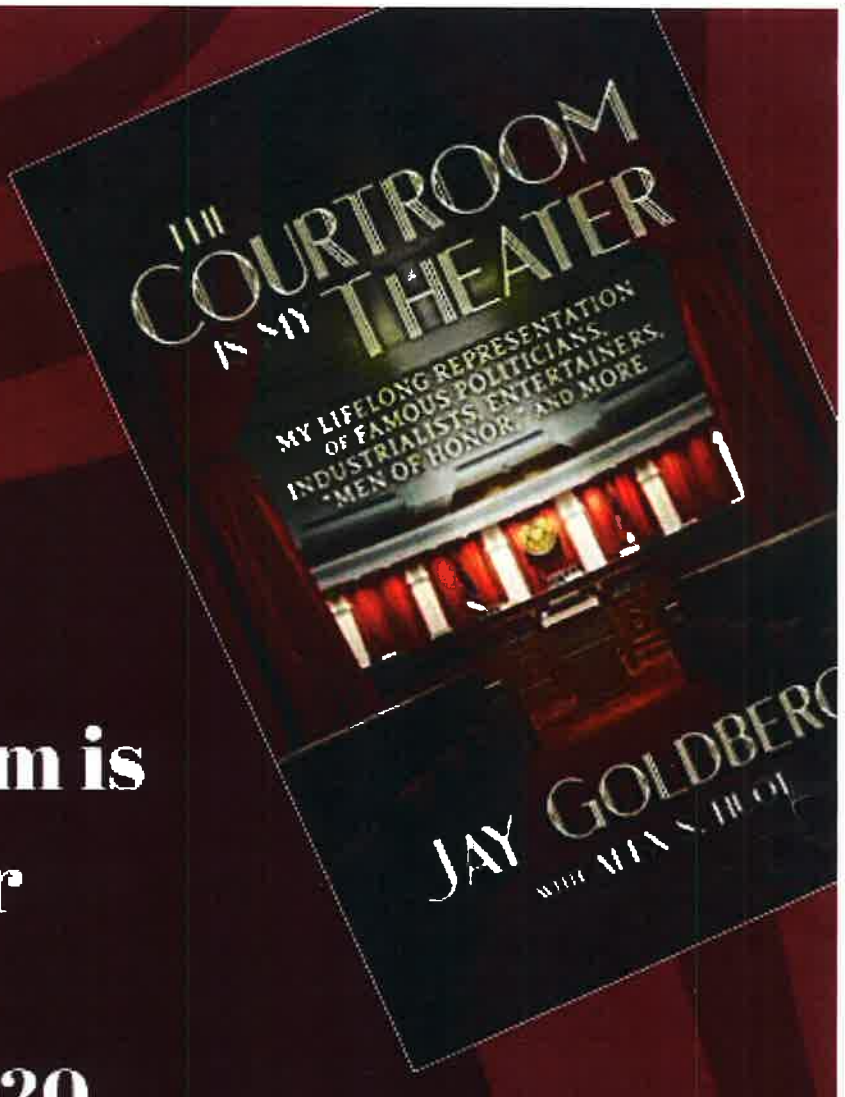


# The Courtroom is My Theater

## March 24, 2020

**Presented by:**

**Jay Goldberg**

**Law Offices of Jay Goldberg, P.C.**

# Analyzing the Doctrine of Constructive Amendment of an Indictment

# Some Cases to Note:

# The Trial Lawyers Need to Understand the Doctrine of Constructive Amendment of an Indictment and How the Failure to Do so May Result in the Conviction of Violation of a Defendants Fifth Amendment Rights.

The way to distinguish proof which amends the indictment, thus depriving a defendant of his Fifth Amendment rights with the variance which does not affect the indictment's validity. The Fifth Amendment guarantees defendant the right to be tried for only those offenses presented in the indictment returned by a grand jury. One must be careful to recognize when the evidence presented at trial proves a crime different from anyone charged in the indictment. Do the jury instructions broaden the scope of the indictment by permitting conviction for an uncharged offense? Jury instructions may cure an allegedly amended indictment by limiting the charges on which the defendant may be convicted. A variance occurs when the evidence at trial proves facts other than those alleged in the indictment. How does one distinguish an amendment from a variance? Fifth Amendment rights are at issue.

In 1988, Larry ran down the hall in the Emanuel Celler Federal Court House in Brooklyn, caught me, and told me that the then legendary Chief Judge Jack B. Weinstein, who had been at that time on the bench for 21 years, had erred in his charge to the jury, in his opinion in a rather simple case where the court had admitted evidence concerning a loan not connected to an upstate gambling club described in the indictment. Larry claimed that resulted in an amendment of the indictment in violation of the grand jury clause of the Fifth Amendment. The Fifth Amendment guarantees a trial in a capital case and other cases with infamous penalties. The conviction later reached the U.S. Court of Appeals for the Second Circuit in U.S. v. Zingaro, 858 F.2d 94 (2d Cir. 1988).

Before we analyze the doctrine of constructive amendment of an indictment, which calls for the reversal of a conviction if recognized by defense counsel and preserved and rejected at the trial level, it bears noting that many of the cases tried today are more complicated with much more proof offered by the prosecution than the criminal cases tried before the court in 1988. Counsel must be on the alert to recognize whether there could be a conviction on a set of facts or court instruction outside the terms of the indictment.

# Let's Explore:

## Zingaro

- The Government charged on count of RICO conspiracy, and two substantive counts of conducting an illegal business that operated in Yonkers, NY.

## Stirone v. U.S., 361 (1966)

- There a conviction was reversed precisely because the proof at trial established a basis to find the defendant guilty that was broader than the basis recited in the indictment.

The essence of the doctrine is that because the Fifth Amendment assures the defendant the right to be tried only for offenses returned by the grand jury, the prosecution cannot amend the indictment without reconvening the grand jury.

An indictment is considered amended when either the prosecution or the court alters the charging terms of it after it has been returned.

It should be noted that jury instructions may cure an alleged amendment to the indictment by limiting the charges on which the defendant may be convicted. This approach often limits the effectiveness of the claimed amendment, but of course, if the government does not press, the defense lawyer is not obligated to do so.

"Courts will often try to save a conviction at the trial or appellate level by holding that all that occurred was a variance."

That to say that the indictment remained unaltered

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But the evidence at trial proved facts other than those alleged in the indictment. Such as the case of U.S. v. Gabriel, 369 F.3d 682 (2d Cir. 2004)

**This occurs most often when a conspiracy alleges multiple members, but the proof at trial shows only a conspiracy with some members:**

- The defendant must cast his argument in terms of substantial prejudice, for courts are most likely to sustain a verdict on the basis of a variant.
- The defense lawyer would be well advised to argue that the "cat is out of the bag," that the court erred in allowing an abundance of proof…

The greater the volume of proof offered, the more likely it becomes a duty of the defense lawyer to examine the proof against the charges, and to be ready to argue when appropriate that prejudice has occurred. Counsel must be aware of the court's offer to give corrective jury instructions to mitigate possible prejudice from non-material variance.

**1 Fed. Prac. & Proc. Crim. § 128 (4th ed.)**

**Federal Practice and Procedure (Wright & Miller)** August 2019 Update
Federal Rules of Criminal Procedure
Chapter 4. Indictment and Information
Andrew D. Leipold[a0]

Rule 7. The Indictment and the Information

## § 128 Amendment of Indictments; Surplusage

Federal courts adhere to the historic rule that an indictment may not be amended.[1] The reason is clear. An indictment is an action of the grand jury, and the prosecutor or court may not change the charge that was approved by the grand jury. As Justice Miller wrote for the Court over a century ago:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.[2]

If applied correctly this rule can help preserve the grand jury's historic role, but like many rules, should not be applied unthinkingly. For example, some older cases decided before the adoption of the Criminal Rules took the view that an indictment could not be amended even with the consent of the defendant,[3] a misguided approach in light of the defendant's ability to waive indictment entirely in non-capital cases.[4] Moreover, Rule 7(d), which permits the court on defendant's motion to strike surplusage, rests in part on the theory that a defendant who makes such a motion waives his right not to have the indictment amended.[5] As a result, one court has said that where the government seeks to amend an indictment prior to trial, a defendant also can waive his right to have the amended indictment re-presented to a grand jury.[5.1]

The rule against amendments is designed to protect the substance of the grand jury's action, and does not bar a change that is "merely a matter of form."[6] Thus, amendments are typically allowed to correct a misnomer[7] or cure a clerical or typographical error.[8] Once again, some earlier cases took an unrealistic view of when a change was substantive,[9] but those cases have been justly criticized.[10]

Except for the correction of these minor flaws, the historical rule against amendments is applied rigorously by courts. Some decisions have applied the rule, for example, even when the offense charged is a misdemeanor, and the government could have proceeded by information rather than by indictment in the first instance.[11]

Because of the strength of the traditional rule, direct attempts to amend an indictment in any substantive way are rare. Instead, the most common challenge in this area is a claim of "constructive amendment," where the defendant alleges that because of the presentation of evidence at trial, the jury instructions, or both, the jury is allowed to convict on grounds other than those set forth in the indictment.[12] Although less common, a defendant may also claim that the crime to which he pled guilty was

  

different than the crime approved by the grand jury and alleged in the indictment.[12.50] Claims of an improper amendment have also been recognized where there is a difference between the allegations in the indictment and the facts underlying the sentence.[12.60] Allowing the case against the accused to shift in this manner after the indictment is returned raises the same concerns about undermining the grand jury's role as a direct amendment,[13] and if established is grounds for reversing the conviction although courts are not uniform on whether a constructive amendment requires per se reversal or may be considered harmless.[14] It appears, however, that a pre-judgment claim of a constructive amendment is not a collateral order that creates a right to an interlocutory appeal.[14.50] Examples of both successful[15] and unsuccessful[16] claims of constructive amendment are set forth in the footnotes. Whether there has been a constructive amendment or a variance is a legal question that is reviewed de novo.[16.50] A defendant who fails to properly object to the alleged constructive amendment will likely have to satisfy the standards of plain error review.[16.55] Courts will be particularly reluctant to grant relief where, for example, the defendant requested the jury instructions or otherwise contributed to the error that created the constructive amendment.[16.60]

Of course, the evidence at trial will frequently differ to some degree from the allegations in the indictment, and not every deviation amounts to a constructive amendment. Of course, the evidence at trial will frequently differ to some degree from the allegations in the indictment, and not every deviation amounts to a constructive amendment.[16.80] If the difference between the indictment and the evidence or jury instructions is not substantial, courts will typically characterize it as a "mere variance" rather than a constructive amendment.[17] A variance is grounds for reversal only if the defendant can show that he or she was prejudiced by the result.[18] The defendant bears the burden of showing prejudice,[19] although as at least one court has noted, this runs counter to the usual rule that the government bears the burden of showing that an error is harmless.[20] The distinction between a variance and a constructive amendment has been aptly described as "sketchy," and seems to be simply a difference in the degree of deviation between the evidence and the indictment, rather than a difference in kind.[21] The Fourth Circuit has also distinguished between constructive amendments, variances, and "indictment errors," which the court has defined as "the failure of an indictment to allege an element of a charged offense."[21.50] Cases where the court finds no constructive amendment but nonetheless reverses the conviction for an improper variance are rare, but do occasionally occur.[21.60]

Amendments to the indictment, constructive or otherwise, also should be distinguished from cases where the prosecution withdraws a portion of the indictment from the jury, a procedure that does not violate the traditional rule against amendments.[22] In United States v. Miller[23] the Supreme Court unanimously held that the government may permissibly narrow an indictment by reducing the charges or grounds alleged without running afoul of the Fifth Amendment, but it may not broaden those grounds.[24] Prior to Miller, an 1887 decision seemed to say that striking parts of an indictment invalidates the whole pleading even when the allegations dropped were unnecessary to an offense contained in the indictment, but this suggestion was not followed in later cases and was explicitly rejected in Miller.[25]

An improper amendment of one count does not taint other counts of the indictment, nor does it invalidate a judgment of conviction on those other counts.[26] An impermissible amendment also does not affect the validity of the conviction of defendants not concerned with the amendment, absent a showing of prejudice.[27] An erroneous amendment can be corrected by restoring the original language of the indictment.[28]

The presence of surplusage is not fatal to the validity of an indictment.[29] The court may strike surplusage without impermissibly amending an indictment,[30] and as discussed earlier, need not submit to the jury extraneous statements in the indictment not essential to the allegation of an offense.[31] Rule 7(d) provides an additional remedy, and permits the court on motion of a defendant to strike the surplusage. Although Rule 7(d) speaks only in terms of a defendant's motion, courts have recognized that prosecutors may also move to strike surplusage.[31.50]

  

The purpose of 7(d) is to protect the defendant against prejudicial allegations of irrelevant or immaterial facts.[31.60] Prosecutors have been known to insert unnecessary allegations for "color" or "background" hoping that these will stimulate the interest of the jurors.[32] The proper course for the defense is to move to strike the surplusage rather than to dismiss the indictment.[33] The motion is addressed to the discretion of the court,[34] which may reserve judgment on the motion until after the presentation of evidence at trial.[35] A motion to strike surplusage is a request to remove statements from the indictment or information; it is not the proper vehicle to seek a court order requiring the government to add information to the charging document.[35.50]

Words describing what is legally essential to the charge in the indictment cannot be stricken as surplusage.[36] Stated differently, 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.[37] Although courts have not applied a consistent test, several courts have said that the test is conjunctive—that is, the alleged surplusage is to be stricken only if the information in question is both irrelevant and prejudicial.[38] This does not necessarily mean that any evidence that would be admissible at trial is therefore appropriate in an indictment; the question, as one court has said, is "whether the material is 'unnecessary' in making out a prima facie pleading of the violation."[39] But no matter how framed, it is an exacting standard,[40] and courts are often slow to grant a motion to strike surplusage.[41] In particular, defendants are usually unsuccessful in their attempts to have aliases expunged from an indictment.[42] Some examples of cases where courts have granted motions to strike are set forth in the footnotes.[43]

If the government dismisses particular counts, or other surplusage is to be stricken, the best practice is for a written order to be prepared for the court's signature with specific dismissals from and deletions to the indictment.[44]

A prosecutor is generally free to seek a superseding indictment at any time prior to trial, providing that the new indictment was not obtained to harass the defendant or punish him for exercising some legal right.[45] A superseding indictment can be distinguished from a reindictment, with the former being issued without the original charge first being dismissed.[45.50] A superseding indictment is itself the action of the grand jury, and thus, the rule against amendments has no application.[46] Although normally a superseding indictment replaces the earlier indictment, it is possible in some settings to have both indictments valid at the same time, provided that jeopardy has not attached on the first one.[47]



Footnotes

a0 Edwin M. Adams Professor of Law, University of Illinois.

1 **Indictment may not be amended**

Stirone v. U.S., 1960, 80 S.Ct. 270, 361 U.S. 212, 4 L.Ed.2d 252.

U.S. v. Norris, 1930, 50 S.Ct. 424, 281 U.S. 619, 74 L.Ed. 1076.

Ex parte Bain, 1887, 7 S.Ct. 781, 121 U.S. 1, 30 L.Ed. 849.

United States v. Stegman, 873 F.3d 1215, 1223 (10th Cir. 2017).

U.S. v. Cooper, 714 F.3d 873, 877-878 (5th Cir. 2013), cert. denied, 134 S. Ct. 313 (2013).

U.S. v. Gonzales, C.A.5th, 2006, 436 F.3d 560, 577, certiorari denied 126 S.Ct. 2045, 164 L.Ed.2d 799.

U.S. v. Hartz, C.A.9th, 2006, 458 F.3d 1011, 1019–1020.

As a general rule, the government may not amend the indictment to seek a conviction on a charge different from that approved by the grand jury. U.S. v. Leichtnam, C.A.7th, 1991, 948 F.2d 370, 376.

Amendments that transform indictment from one that does not state an offense into one that does or that tend to increase defendant's burden at trial are prohibited. U.S. v. Milestone, C.A.3d, 1980, 626 F.2d 264, 269, certiorari denied 101 S.Ct. 319, 449 U.S. 920, 66 L.Ed.2d 148

A court may not amend an indictment by striking out words as surplusage that may have formed the basis for one or more of the grand jurors to vote to indict. U.S. v. Beeler, C.A.6th, 1978, 587 F.2d 340.

U.S. v. Hall, C.A.10th, 1976, 536 F.2d 313, 319, certiorari denied 97 S.Ct. 313, 429 U.S. 919, 50 L.Ed.2d 285.

U.S. v. Robinson, C.A.D.C.1973, 475 F.2d 376, 385, **citing Wright.**

U.S. v. Griffin, C.A.10th, 1972, 463 F.2d 177, 178, **citing Wright,** certiorari denied 93 S.Ct. 344, 409 U.S. 988, 34 L.Ed.2d 254.

"Amendment" of indictment occurs when charging terms of indictment are altered either literally or in effect by prosecutor or court after the grand jury has last passed upon them. Gaither v. U.S., C.A.D.C.1969, 413 F.2d 1061.

U.S. v. Dowdell, D.Mass.2006, 2006 WL 3531419.

U.S. v. Nitti, D.Puerto Rico, 1990, 733 F.Supp. 496.

State v. Koontz, 1979, 417 N.E.2d 1272, 1274, 65 Ohio App.2d 264, **citing Wright.**

2 **Reason for the rule**

Ex parte Bain, 1887, 7 S.Ct. 781, 786, 121 U.S. 1, 10, 30 L.Ed. 849.

Although another part of the Bain decision was rejected by the Supreme Court in U.S. v. Miller, 1985, 105 S.Ct. 1811, 471 U.S. 130, 85 L.Ed.2d 99, the Court quoted the paragraph from Bain set out in the text and said: "This aspect of *Bain* has been reaffirmed in a number of subsequent cases." 105 S.Ct. at 1818, 471 U.S. at 142–143.

**See also**

Russell v. U.S., 1962, 82 S.Ct. 1038, 1050–1051, 369 U.S. 749, 770– 771, 8 L.Ed.2d 240, relying on this proposition to support the conclusion that a bill of particulars cannot cure an invalid indictment.

"The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. [T]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." U.S. v. Gonzalez, 686 F.3d 122, 127 (2d Cir. 2012) (internal quotation marks and citations omitted).

U.S. v. Farr, 536 F.3d 1174, 1179-80 (10th Cir. 2008) (quoting Ex parte Bain).

The prohibition on amending the indictments comes from both the Fifth Amendment Grand Jury guarantee and the defendant's Sixth Amendment right to have notice of the charges against him. U.S. v. Bishop, C.A.10th, 2006, 469 F.3d 896, 902, certiorari denied 127 S.Ct. 2973.

"The Fifth Amendment allows criminal prosecutions only on the basis of an indictment and only a grand jury may amend an indictment." U.S. v. Gonzales, C.A.5th, 2006, 436 F.3d 560, 577, certiorari denied 126 S.Ct. 2045, 164 L.Ed.2d 799.

U.S. v. Reasor, C.A.5th, 2005, 418 F.3d 466, 474, **citing Wright.**

U.S. v. Duran, C.A.7th, 2005, 407 F.3d 828, 842.

"The purposes underlying the rule against amendments and constructive amendments include notice to the defendant of the charges he will face at trial, notice to the court so that it may determine if the alleged facts are sufficient in law to support a conviction, prevention of further prosecution for the same offense, and finally, of 'paramount importance,' the assurance that a group of citizens independent of prosecutors or law enforcement officials have reviewed the allegations and determined that the case is worthy of being presented to a jury for a determination of the defendant's guilt or innocence." U.S. v. Beeler, C.A.6th, 1978, 587 F.2d 340, 342.

The danger against which the rule guards does not exist when it is the grand jury, rather than the court or prosecutor, that makes the amendment. U.S. v. McGrath, C.A.2d, 1977, 558 F.2d 1102, certiorari denied 98 S.Ct. 1239, 434 U.S. 1064, 55 L.Ed.2d 765.

Amendment of indictment is bad because it deprives defendant of his right to be tried upon charge in indictment found by grand jury and subjected to its scrutiny. Gaither v. U.S., C.A.D.C.1969, 413 F.2d 1061.

3 **Even with defendant's consent**

U.S. v. Norris, 1930, 50 S.Ct. 424, 425, 281 U.S. 619, 623, 74 L.Ed. 1076.

Carney v. U.S., C.C.A.9th, 1947, 163 F.2d 784, 788–790, certiorari denied 68 S.Ct. 165, 332 U.S. 824, 92 L.Ed. 400.

Stewart v. U.S., C.C.A.9th, 1926, 12 F.2d 524.

Dodge v. U.S., C.C.A.2d, 1919, 258 Fed. 300, 305, 169 C.C.A. 316, certiorari denied 40 S.Ct. 10, 250 U.S. 660, 63 L.Ed. 1194.

  

Statements of this sort can occasionally be found in cases decided after the Criminal Rules were adopted, although they are typically dicta. See, e.g., Crosby v. U.S., C.A.D.C.1964, 339 F.2d 743, 745; Chow Bing Kew v. U.S., C.A.9th, 1957, 248 F.2d 466, 468–469, certiorari denied 78 S.Ct. 259, 355 U.S. 889, 2 L.Ed.2d 188.

**But cf.**

In U.S. v. Sazenski, C.A.8th, 1987, 833 F.2d 741, 744, certiorari denied 108 S.Ct. 1083, 485 U.S. 908, 99 L.Ed.2d 242, the court said that "the trial court generally has no power to amend an indictment even with the defendant's consent," at least as to matters of substance. The court recognized that this view may now longer be good law, 833 F.3d at 744, n.3 **citing Wright,** but found it unnecessary to reach the question. The Eighth Circuit would later cite Sazenski for this proposition without including the qualification "even with the defendant's consent." U.S. v. Mason, C.A.8th, 1989, 869 F.2d 414, 417, certiorari denied 109 S.Ct. 3219, 492 U.S. 907, 106 L.Ed.2d 569 ("Although the general rule is that a court may not amend an indictment, that rule is inapplicable when the change is one of form only.").

4 **Misguided approach**

Rule 7(b). See § 122 of this volume.

"Federal courts in the past did not permit indictments to be amended even with a defendant's consent. [citing cases] The basis for this rule, however, has been eroded by the advent of modern waiver principles, the enactment of the Federal Rules of Criminal Procedure, and most recently by the Supreme Court's decision in United States v. Cotton, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)." Short v. U.S. C.A.6th, 2006, 471 F.3d 686, 694.

The ability to waive indictment may be undermined by the ability of a defendant to waive indictment entirely, but the court found it unnecessary to resolve this question on the facts presented. U.S. v. Sazenski, C.A.8th, 1987, 833 F.2d 741, 744 n.3 **citing Wright,** certiorari denied 108 S.Ct. 1083, 485 U.S. 908, 99 L.Ed.2d 242

"[I]t has been held that even if the defendant consented to an amendment, jurisdiction could not be conferred on the court, … although this proposition is questionable today, since Fed.R.Crim.P. 7(b) permits a defendant to waive an indictment altogether in noncapital cases." U.S. v. Milestone, C.A.3d, 1980, 626 F.2d 264, 266–267, **quoting Wright,** certiorari denied 101 S.Ct. 319, 449 U.S. 920, 66 L.Ed.2d 148.

5 **Surplusage challenge as waiver**

The original Advisory Committee Note to Rule 7(d) says in part: "The authority of the court to strike such surplusage is to be limited to doing so on defendant's motion, in the light of the rule that the guaranty of indictment by a grand jury implies that an indictment may not be amended. Ex parte Bain, 7 S.Ct. 781, 121 U.S. 1, 30 L.Ed. 849. By making such a motion, the defendant would, however, waive his rights in this respect." 1944 Adoption Advisory Committee Note, Volume 3C, App. C.

"Rule 7(d) permits the court, on motion by the defendant, to strike portions of an indictment as surplusage. In so moving, the defendant is deemed to have waived his right to reindictment to the extent of eliminating such surplusage." Short v. U.S. C.A.6th, 2006, 471 F.3d 686, 694.

By moving under Rule 7(d) to strike surplusage a defendant waives his right not to have an indictment amended except by action of the grand jury. U.S. v. Johnson, M.D.Tenn.1984, 585 F.Supp. 80, 81 n.*, **citing Wright.**

**Other explanations**

Waiver is not the only basis on which the power to strike surplusage from an indictment can be based. It could also rest on the rule that the narrowing of an indictment is not an impermissible amendment and that a court can "drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it." U.S. v. Miller, 1985, 105 S.Ct. 1811, 1819, 471 U.S. 130, 144, 85 L.Ed.2d 99. See text below at notes 22–25.

5.1 **Can waive re-indictment**

Defendant was indicted for possessing 500 grams of cocaine, but as part of a plea agreement, the government, with the consent of the defendant, amended the indictment to increase the allegation of drug quantity. Defendant later argued that the right to have the amended indictment presented to a grand jury could not be waived, but the court of appeals disagreed, finding that "[i]n light of this modern shift in the procedural rules and recent caselaw, we conclude that a defendant may waive his right to reindictment by a grand jury." The court went on to caution that "[w]e confine this holding, however, to the present circumstance concerning a guilty plea to the amended indictment, and do not address the alternate scenario of a constructive amendment effected during the course of a trial." Short v. U.S. C.A.6th, 2006, 471 F.3d 686, 695, **citing Wright.**

  

6

**Protects substance not form**

"[A]n indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." Russell v. U.S., 1962, 82 S.Ct. 1038, 1050, 369 U.S. 749, 770, 8 L.Ed.2d 240 (citation omitted).

Amendment is not proper if matter is "neither trivial, useless, nor innocuous." Stirone v. U.S., 1960, 80 S.Ct. 270, 273, 361 U.S. 212, 217, 4 L.Ed.2d 252.

The rule against amending an indictment does not prohibit alterations that are merely a matter of form. The court noted that "we have defined an amendment of form as a change that does not mislead the defendant in any sense, does not subject the defendant to any added burdens, and does not otherwise prejudice the defendant." United States v. Stegman, 873 F.3d 1215, 1223 (10th Cir. 2017).

"[A]n indictment can be amended without further consideration by the grand jury when it is necessary to strike surplusage, or to correct the indictment's form, e.g., a misnomer, or a typographical error." U.S. v. Whitfield, 695 F.3d 288, 308 (4th Cir. 2012) (internal citations omitted), cert. denied, 133 S. Ct. 1461, 185 L. Ed. 2d 368 (2013).

An indictment may be modified where the change is merely a matter of form. U.S. v. Perez, 673 F.3d 667, 669-70 (7th Cir. 2012).

The prohibition on amending the indictment "does not extend to alterations that are merely a matter of form. Accordingly, we have allowed ministerial corrections of clerical errors in names, dates, and citations, so long as the change would not deprive the defendant of notice of the charges against him." U.S. v. Dowdell, 595 F.3d 50, 67-68 (1st Cir. 2010) (internal quotation marks and citations omitted).

An "amendment of form," which does not require resubmission of indictment to grand jury, occurs when defendant is not misled in any sense, is not subjected to any added burden and is not otherwise prejudiced. U.S. v. Kegler, C.A.D.C.1984, 724 F.2d 190.

U.S. v. Hall, C.A.10th, 1976, 536 F.2d 313, 319, **citing Wright,** certiorari denied 97 S.Ct. 313, 429 U.S. 919, 50 L.Ed.2d 285.

"[C]ourts have engrafted several exceptions and limitations on this 'no amendment rule,' foremost being that making corrections of typographical errors, or making changes that are 'merely a matter of form,' are not constitutionally impermissible." U.S. v. Dawson, C.A.9th, 1975, 516 F.2d 796, 801 (footnote omitted), certiorari denied 96 S.Ct. 104, 423 U.S. 855, 46 L.Ed.2d 80.

"While the rule is generally stated that an indictment cannot be 'amended,' it may be more precise to say that a change in the indictment which is substantial or material, and not merely one of form, is not permissible." U.S. v. Goldstein, C.A.3d, 1974, 502 F.2d 526, 528.

Where omission of year prevented indictment from charging offense within statute of limitations, defect was not one of form, and district court was without power to make amendment to conform to proof that offense occurred on November 9, 1968. U.S. v. Gammill, C.A.10th, 1970, 421 F.2d 185.

Marsh v. U.S., C.A.5th, 1965, 344 F.2d 317, 320–322.

7

**Misnomer**

There was no impermissible amendment to the indictment when the court allowed the government during trial to change the name of the company in question by dropping the word "Inc." from the name. The court found that there was no unfair surprise to the defendant and that the change did not subject defendant to any additional burdens. United States v. Stegman, 873 F.3d 1215, 1223-24 (10th Cir. 2017).

Amendment to indictment did not prejudice the accused and was proper where amendment simply conformed indictment to accused's preferred name, accused consented to the amendment, and where the amendment differed little from original "aka" and accused made no claim that another person existed under same name as in original "aka." U.S. v. Perez, C.A.9th, 1985, 776 F.2d 797.

Change of superseding indictment deleting the title "Rev." from one defendant's name and including the word "undisclosed" to describe relationship between defendants was trivial or innocuous, and, related back to date of original indictment; thus, superseding indictment was not barred by five-year statute of limitations. U.S. v. Snowden, C.A.4th, 1985, 770 F.2d 393, certiorari denied 106 S.Ct. 540, 474 U.S. 1011, 88 L.Ed.2d 470.

Amendment of an indictment in a bank robbery case to substitute the words "Federal Savings and Loan Insurance Corporation" for the words "Federal Deposit Insurance Corporation" was a permissible correction

of a misnomer. U.S. v. Johnson, C.A.11th, 1984, 741 F.2d 1338, 1341, certiorari denied 1985, 105 S.Ct. 2362, 471 U.S. 1117, 86 L.Ed.2d 262, **quoting Wright.**

Amending an indictment to show the correct official name of the commission by which defendant was employed was a permissible ministerial change. U.S. v. McGrath, C.A.2d, 1977, 558 F.2d 1102, 1105, **citing Wright,** certiorari denied 98 S.Ct. 1239, 434 U.S. 1064, 55 L.Ed.2d 765.

Amendment to indictment charging armed robbery by correcting a misdescription of the victim's name related to a matter of form and not of substance and did not change the nature of offense charged, and such amendment did not invade accused's constitutional rights. Dye v. Sacks, C.A.6th, 1960, 279 F.2d 834.

Misspelling of defendant's name was not fatal. U.S. v. Denny, C.A.7th, 1947, 165 F.2d 668, certiorari denied 68 S.Ct. 662, 333 U.S. 844, 92 L.Ed. 1127.

There was no fatal variance where the government was permitted to amend the indictment to replace the victim's name with his nickname. The defendant was on notice of the identify of the victim, and the amendment was sufficiently detailed to protect against a second prosecution for the same offense. U.S. v. Simmons, D.D.C.2006, 431 F.Supp.2d 38, 60–61.

Where, on defendant's motion to dismiss indictment for misnomer and on government's countermotion to amend indictment to reflect true name of defendant, defendant showed that name on indictment was not true name, motion to amend was allowed. U.S. v. Owens, D.Minn.1971, 334 F.Supp. 1030.

Indictment was defective where name of accused as shown in indictment was not true name or name that accused had been known by, but prosecuting attorneys were entitled to have indictment amended to show true name and indictment was not subject to dismissal. U.S. v. Campbell, E.D.Tenn.1964, 235 F.Supp. 94.

**But see**

Even if rule against judicial amendment of indictment applies only to amendments of substance and not to amendments of form, insertion of comma in name of corporate defendant constituted such amendment as would vitiate conviction as to that defendant, where change actually substituted a 1951 corporation for dissolved 1941 corporation. But amendment did not render indictment void as to other defendants, absent even a suggestion that they had been prejudiced by such change. U.S. v. Consolidated Laundries Corp., C.A.2d, 1961, 291 F.2d 563.

In prosecution of a Chinese for making a fraudulent statement as to citizenship to immigration investigator, the trial court cannot supply the omission of the name of the defendant in the indictment and thereby create jurisdiction in personam, nor can defendant in effect indict himself by treating the indictment as if he were named thereby. Chow Bing Kew v. U.S., C.A.9th, 1957, 248 F.2d 466, certiorari denied 78 S.Ct. 259, 355 U.S. 889, 2 L.Ed.2d 188.

8 **Clerical or typographical error**

Where the defendant had adequate notice of the overt act the government was alleging, the district court did not err in allowing the government to make a "clerical change" by amending the indictment to correct the date on which the act occurred. United States v. Berroa, 856 F.3d 141, 157-58 (1st Cir. 2017), cert. denied, 138 S. Ct. 488 (2017).

Prior to trial the government moved to change the indictment to allege that defendant had distributed "cocaine base" rather than simply "cocaine." The district court rejected the argument that this change constituted an impermissible amendment of the indictment, and the First Circuit affirmed. The appeals court noted that defendant was prosecuted under 21 U.S.C. § 841(a), which prohibits the distribution of any controlled substance, and thus the government was not obligated to specify any particular drug in the indictment. In addition, the court found that defendant was well aware that he was being prosecuted for distributing cocaine base, and that the changed wording in the indictment did not affect defendant's potential sentence. The court held that in these circumstances, the change in indictment simply went to the form and not the substance of the charges. U.S. v. Dowdell, 595 F.3d 50, 68-69 (1st Cir. 2010) (internal quotation marks and citations omitted).

The First Circuit went on to say, however, that "[w]e do not go so far as to hold in this case that a trial judge is necessarily permitted simply to swap any controlled substance under § 841(a) for any other controlled substance. 'Cocaine' and 'cocaine base' are inherently related in ways that other potential pairings are not. Had the difference been between cocaine and Vicodin, or cocaine and marijuana, it is possible the larger gap would weigh into our analysis." 595 F.3d at 69 n.16.

  

The government was permitted to amend to correct an erroneous date in the indictment on which an alleged meeting took place involving the defendant. The defendant was informed of the change on the day before trial, and did not claim to have been prejudiced by the amendment. And while the corrected date was several weeks later than the initial allegation, the indictment was worded to allege that the meeting took place "on or about" the erroneous date. "Given the broad wording of count one as offered by the grand jury, and the fact that the changed date fell before the date of the indictment itself and within the statute of limitations, we find that the district court did not err in granting the government's motion." U.S. v. Mitov, C.A.7th, 2006, 460 F.3d 901, 907.

Where the indictment alleged that defendant had possessed with intent to distribute drugs within 1,000 feet of "Garner" Elementary School, and the proof at trial was that the school in question was named "Garland," the trial court did not err in instructing the jury that the indictment contained a typographical error. There was no constructive amendment and no improper variance, as the discrepancy only went to the form of the indictment rather than the substance. The name of the school was not an element of the crime, and there is no evidence that defendant was prejudiced by the error. U.S. v. Landers, C.A.8th, 2005, 417 F.3d 958, 964, certiorari denied 2006, 126 S.Ct. 1881, 547 U.S. 1099, 164 L.Ed.2d 570.

Where the only change in the superseding indictment was the dates of the alleged acts, and where defendants were fully on notice that they were being prosecuted for their actions during the revised period, the superseding indictment would relate back to the original filing date for purposes of tolling the statute of limitations. U.S. v. Daniels, C.A.7th, 2004, 387 F.3d 636, 641–643, certiorari denied 125 S.Ct. 1610, 544 U.S. 911, 161 L. Ed.2d 288.

Use of word "public" in original indictment that charged defendant with distributing crack cocaine near secondary school was mere clerical error that could be corrected by amendment without resubmitting case to grand jury. U.S. v. Bledsoe, C.A.4th, 1990, 898 F.2d 430, certiorari denied 111 S.Ct. 521, 498 U.S. 986, 112 L.Ed.2d 532.

Where it was apparent from face of indictment that use of "1972" rather than "1973" in conspiracy count was typographical error, it was not constitutionally impermissible to correct it. U.S. v. Akers, C.A.9th, 1976, 542 F.2d 770, certiorari denied 1977, 97 S.Ct. 1181, 430 U.S. 908, 51 L.Ed.2d 585.

In prosecution for firearms violations, trial court was not required to resubmit case to grand jury before amending indictment by changing serial number of one weapon and adding another weapon. U.S. v. Neff, C.A.8th, 1975, 525 F.2d 361.

It was permissible to correct serial numbers of counterfeit obligations referred to in an indictment where two digits in a ten-digit string had been transposed. U.S. v. Skelley, C.A.7th, 1974, 501 F.2d 447, certiorari denied 95 S.Ct. 629, 419 U.S. 1051, 42 L.Ed.2d 647.

Obvious typographical error in date of offense in the indictment could be corrected by changing July 21, 1967, to June 21, 1967. Stewart v. U.S., C.A.8th, 1968, 395 F.2d 484.

A typographical error in introductory clause of indictment reciting that grand jurors continued to sit by court order during February 1945 term, whereas grand jury was continued to February 1946 term, was not a fatal defect in absence of prejudice. Stillman v. United States, C.A.9th, 1949, 177 F.2d 607.

Subdivision (d) of this rule that court on motion of defendant may strike surplusage from indictment did not repeal existing law and did not prohibit amendment of indictment by government to correct typographical error. U.S. v. Denny, C.C.A.7th, 1947, 165 F.2d 668, certiorari denied 68 S.Ct. 662, 333 U.S. 844, 92 L.Ed. 1127.

In U.S. v. Dames, S.D.N.Y.2005, 380 F.Supp.2d 270, 271 n.1, the court permitted the government by letter to correct a typographical error in the indictment to clarify that defendant was charged under 18 U.S.C.A. § 924(j) rather than § 924(i). Defendant's later objection to the amendment was denied. U.S. v. Dames, S.D.N.Y.2005, 386 F.Supp.2d 523, 525–526.

Where trial was begun on December 6, 1971, so that it was patent that recital, in indictment, of December 14, 1971 as date of alleged murder rather than true date of December 14, 1970 was typographical error, trial court properly amended indictment to correct such error in the date of alleged murder. Wilkins v. Maryland, D.Md.1975, 402 F.Supp. 76, 84, **citing Wright,** affirmed C.A.4th, 538 F.2d 327, certiorari denied 97 S.Ct. 747, 429 U.S. 1044, 50 L.Ed.2d 757.

Indictment, which contained an obvious typographical error because the date of alleged crime as recited therein was after the day on which grand jury returned indictment, could be judicially amended by changing

the year in which crime was alleged to have been committed from 1967 to 1966, since this could not mislead or prejudice defendant in any way nor affect any substantive right. U.S. v. Stapleton, E.D.Tenn.1967, 271 F.Supp. 59.

Ostrowski v. State, Wyo.1983, 665 P.2d 471, 481, **citing Wright.**

**See also**

Following a mistrial of one of several defendants, the government redacted and then renumbered the indictment to eliminate references to other defendants who would not be present at the second trial. Defendant claimed that the alterations amounted to a constructive amendment, but the court of appeals disagreed. Eliminating the other defendants from the indictment did not broaden the basis or change the crimes of which defendant was accused, and renumbering the indictment was only a change of form, not substance. U.S. v. Perez, 673 F.3d 667, 669-70 (7th Cir. 2012).

**But see**

Midtrial amendment of indictment, changing one count to refer to tax year 1985 instead of 1984, was an amendment of substance and was impermissible, despite government's contention that the reference was merely a typographical error. U.S. v. Pina, C.A.10th, 1992, 974 F.2d 1241.

Prosecuting attorney would not be allowed to amend perjury allegation of grand jury indictment to change date alleged perjury occurred from Dec. 18, 1981, to Dec. 18, 1980, notwithstanding that discrepancy was claimed to have been product of "clerical error" in the form of a "typographical error," where no affidavit supporting such allegation of fact was submitted with motion and, defendant having been charged by grand jury with committing crime on or about Dec. 18, 1981, to allow amendment might handicap defendant in effort to avail herself of her conviction or acquittal against same prosecution for same charge. U.S. v. Randolph, E.D.Tenn.1982, 542 F.Supp. 11.

**Cf.**

The government claimed that when it amended the indictment to alleged that defendant possessed "5,000" grams of cocaine, rather than "500" grams as stated in the indictment, that this was merely correcting a typographical error. Although the court "doubt[ed]" that a change such as this, which materially increased the possible sentence, came within the exception for typographical errors, it found it unnecessary to evaluate the government's proffered justification. Short v. U.S., C.A.6th, 2006, 471 F.3d 686, 694.

9 **Unrealistic view**

In Chow Bing Kew v. U.S., C.A.9th, 1957, 248 F.2d 466, certiorari denied 78 S.Ct. 259, 355 U.S. 889, 2 L.Ed.2d 188, the indictment was in two counts against a single defendant. He was properly named in the first count but no name was inserted in the second count. Though the court recognized, at 468, that "undoubtedly it was intended" to insert the phrase "said defendant" in the second count, it ordered that count dismissed.

In Carney v. U.S., C.C.A.9th, 1947, 163 F.2d 784, certiorari denied 68 S.Ct. 165, 332 U.S. 824, 92 L.Ed. 400, the amendment charged defendant with having counterfeited "K-14h" gasoline ration coupons. In fact there never were any such coupons and by consent of counsel the court amended the indictment to refer to "A-14h" coupons. It thus corresponded with a second count in the indictment that charged a different offense with regard to "A-14h" coupons. The conviction on the first count was set aside. The court said, at 790: "It may well be that the grand jury intended to use the letter 'A' instead of 'K', but neither the trial court nor this court can speculate on the intent of the grand jury. Because it is probable that 'K' was inadvertently used instead of 'A' does not authorize any court to proceed under such assumption n."

10 **Cases criticized**

U.S. v. Dawson, C.A.9th, 1975, 516 F.2d 796, 802, **citing Wright,** certiorari denied 96 S.Ct. 104, 423 U.S. 855, 46 L.Ed.2d 80.

11 **Indictment for misdemeanor**

U.S. v. Goldstein, C.A.3d, 1974, 502 F.2d 526.

U.S. v. Fischetti, C.A.5th, 1971, 450 F.2d 34, certiorari denied 92 S.Ct. 1290, 405 U.S. 1016, 31 L.Ed.2d 478.

12 **Constructive amendment**

A constructive amendment occurs "when the evidence presented at trial, together with the jury instructions, *raises the possibility* that the defendant was convicted of an offense other than that charged in the indictment." United States v. Miller, 891 F.3d 1220, 1231 (10th Cir. 2018) (internal quotation marks and citations omitted), petition for certiorari filed (U.S. Jan. 3, 2019).

"There are two types of constructive amendment: first, where there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument, and, second, where the crime charged

[in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved." United States v. Davis, 854 F.3d 601, 603 (9th Cir. 2017) (internal quotation marks and citations omitted), for additional opinion, see, 687 Fed. Appx. 534 (9th Cir. 2017).

A constructive amendment occurs "when evidence, arguments, or the district court's jury instructions effectively amend[s] the indictment by broadening the possible bases for conviction from that which appeared in the indictment." U.S. v. Wright, 776 F.3d 134, 144 (3d Cir. 2015) (internal quotation marks and citations omitted).

"When a defendant is indicted for one crime but the jury is then instructed that it may convict him of a crime requiring proof of an additional element, we call that change a 'constructive amendment' of the indictment." U.S. v. Vizcarrondo-Casanova, 763 F.3d 89, 99, 95 Fed. R. Evid. Serv. 194 (1st Cir. 2014), cert. denied, 135 S. Ct. 307 (2014).

"We have found constructive amendment of an indictment where (1) there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument, or (2) the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved." U.S. v. Hui Hsiung, 758 F.3d 1074, 1093, 2014-2 Trade Cas. (CCH) ¶ 78824 (9th Cir. 2014) (internal quotation marks and citation omitted).

"A constructive amendment occurs when the essential elements of the offense as charged in the indictment are altered in such a manner-often through the evidence presented at trial or the jury instructions-that the jury is allowed to convict the defendant of an offense different from or in addition to the offenses charged in the indictment." U.S. v. Johnson, 719 F.3d 660, 668 (8th Cir. 2013) (internal quotation marks and citation omitted), cert. denied, 134 S. Ct. 705 (2013).

"A constructive amendment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon them." U.S. v. Celestin, 612 F.3d 14, 24 (1st Cir. 2010) (internal quotation marks and citation omitted).

U.S. v. Dowdell, 595 F.3d 50, 67 (1st Cir. 2010), **quoting Wright & Leipold.**

"An unconstitutional constructive amendment of a grand jury's indictment occurs when the evidence presented at trial, together with the jury instructions, so alter[s] [the indictment] as to charge a different offense from that found by the grand jury." U.S. v. Farr, 536 F.3d 1174, 1180 (10th Cir. 2008) (internal quotation marks and citations omitted).

"A constructive amendment occurs when the essential elements of the offense as charged in the indictment are altered in such a manner-often through the evidence presented at trial or the jury instructions-that the jury is allowed to convict the defendant of an offense different from or in addition to the offenses charged in the indictment. In reviewing an appeal based on a claim of constructive amendment, we consider whether the admission of evidence or the jury instructions created a substantial likelihood that the defendant was convicted of an uncharged offense." U.S. v. Starr, 533 F.3d 985, 997 (8th Cir. 2008) (internal quotation marks and citations omitted), cert. denied, 129 S. Ct. 746 (2008).

"An indictment is constructively amended when evidence, arguments, or the district court's jury instructions effectively amend[] the indictment by broadening the possible bases for conviction from that which appeared in the indictment." U.S. v. McKee, 506 F.3d 225, 229 (3d Cir. 2007).

U.S. v. Baugham, C.A.D.C.2006, 449 F.3d 167, 176, **citing Wright.**

"An indictment is constructively amended when, in the absence of a formal amendment, the evidence and jury instructions at trial modify essential terms of the charged offense in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." U.S. v. Daraio, C.A.3d, 2006, 445 F.3d 253, 259–260, certiorari denied 127 S.Ct. 932, 166 L.Ed.2d 702.

An amendment of an indictment can occur constructively when an action of either the judge or prosecutor allows the jury to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. U.S. v. Gonzales, C.A.5th, 2006, 436 F.3d 560, 577, certiorari denied 126 S.Ct. 2045, 164 L.Ed.2d 799.

A constructive amendment "occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon them." U.S. v. Gomez-Rosario, C.A.1st, 2005, 418 F.3d 90, 104 (internal quotation marks and citation omitted).

Constructive amendment of the indictment can occur "when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury." U.S. v. Jones, C.A.7th, 2005, 418 F.3d 726, 729 (internal quotation marks and citations omitted), certiorari denied 126 S.Ct. 817, 546 U.S. 1069, 163 L.Ed.2d 642.

A "[c]onstructive amendment occurs when the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." U.S. v. Rivera, C.A.2d, 2005, 415 F.3d 284, 287 (internal quotation marks and citation omitted).

A "constructive amendment" to the indictment, which is reversible error per se, occurs when the essential elements of the indicted offense are altered, either actually or in effect, after the grand jury issues the indictment. U.S. v. Johnston, C.A.8th, 2003, 353 F.3d 617, certiorari denied 124 S.Ct. 2403, 541 U.S. 1068, 158 L.Ed.2d 973.

**See also**

While acknowledging that "[ou]r constructive amendment jurisprudence has resulted in what we recently characterized as apparently 'divergent results,'" the Second Circuit observed that "[o]ne constant, however, is that we have consistently permitted significant flexibility in proof, provided that the defendant was given *notice* of the *core of criminality* to be proven at trial. [P]roof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment." U.S. v. Rigas, C.A.2d, 2007, 490 F.3d 208, 228 (emphasis in original, internal quotation marks and citations omitted). The court cautioned, however, that "even an amendment or a variance that does not alter an essential element may still deprive a defendant of an opportunity to meet the prosecutor's case." 490 F.3d at 228 (internal quotation marks and citation omitted).

The government would not be permitted to change its theory of the crime on appeal while seeking to uphold defendant's guilty plea. To permit the change would be to amend the indictment, which can only be done by a grand jury. U.S. v. Reasor, C.A.5th, 2005, 418 F.3d 466, 474–475.

12.50 **Crime in guilty plea**

"While a constructive amendment typically contemplates a jury trial, we have also recognized the challenge in the context of a guilty plea that, by its terms, amends the charges brought by the indictment." U.S. v. Bastian, 770 F.3d 212, 220 (2d Cir. 2014).

The indictment alleged that defendant had engaged in a RICO conspiracy and listed as a predicate act defendant's participation in a shooting. Defendant's guilty plea, however, also acknowledged his participation in a sexual assault committed in furtherance of the conspiracy, an allegation not contained in the indictment. On appeal, defendant argued that the difference between the indictment and the plea agreement amounted to a constructive amendment of the indictment, but the court of appeals disagreed. The RICO conspiracy count only required that defendant have agreed with others to conduct the affairs of the enterprise through racketeering activity, not that defendant himself have committed the crimes. Thus a plea agreement that acknowledged defendant's participation in the conspiracy itself did not improperly broaden the indictment. U.S. v. Tello, 687 F.3d 785 (7th Cir. 2012).

12.60 **Indictment and sentence**

"Constructive amendments typically arise from a mismatch between the indictment's description of the charged offense and some other variable. That variable may be the evidence offered in support of the charge, a jury instruction, or the sentence imposed." U.S. v. McIvery, 806 F.3d 645, 652 (1st Cir. 2015) (internal citations omitted).

13 **Prohibition on constructive amendments**

In determining whether there has been a constructive amendment of the indictment, the court will "compare the indictment with the district court proceedings to discern if those proceedings broadened the possible bases for conviction beyond those found in the operative charging document." United States v. Miller, 891 F.3d 1220, 1231 (10th Cir. 2018) (internal quotation marks and citations omitted), petition for certiorari filed (U.S. Jan. 3, 2019).

Constructive amendments "are forbidden so as to preserve the defendant's Fifth Amendment right to indictment by grand jury, to prevent re-prosecution for the same offense in violation of the Sixth Amendment, and to protect the defendant's Sixth Amendment right to be informed of the charges against him." U.S. v. Vizcarrondo-Casanova, 763 F.3d 89, 99, 95 Fed. R. Evid. Serv. 194 (1st Cir. 2014), cert. denied, 135 S. Ct. 307 (2014) (internal quotation marks and citation omitted).

Constructive amendments prevent the grand jury from reviewing the alleged offense, as well as create a risk of both double jeopardy and unfair surprise. U.S. v. Tello, 687 F.3d 785, 796 (7th Cir. 2012).

"Constructive amendments are forbidden by the Fifth Amendment, which guarantees defendants the right to be tried only on charges indicted by a grand jury." U.S. v. Celestin, 612 F.3d 14, 24 (1st Cir. 2010) (internal quotation marks and citation omitted).

U.S. v. Dowdell, 595 F.3d 50, 67 (1st Cir. 2010), **quoting Wright & Leipold**.

"The prohibition on constructive amendment exists to preserve the defendant's Fifth Amendment right to indictment by grand jury, to prevent re-prosecution for the same offense in violation of the [Fifth] Amendment, and to protect the defendant's Sixth Amendment right to be informed of the charges against him." U.S. v. Brandao, 539 F.3d 44, 57 (1st Cir. 2008).

"A constructive amendment to the indictment constitutes a *per se* violation of the fifth amendment's grand jury clause. A constructive amendment of the charges against a defendant deprives the defendant of his/her substantial right to be tried only on charges presented in an indictment returned by a grand jury." U.S. v. McKee, 506 F.3d 225, 229 (3d Cir. 2007) (internal quotation marks and citations omitted).

The trial evidence may not deviate from the indictment in ways that undermine the purposes of the indictment, which is to give notice to the accused and to prevent a later prosecution for the same offense. "The issue in determining whether an indictment has been constructively amended, then, is whether the deviation between the facts alleged in the indictment and the proof adduced at trial undercuts these constitutional requirements. If the indictment notifies the defendant of the 'core of criminality,' and the government's proof at trial does not modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury, then he has sufficient notice of the charge against which he must defend." U.S. v. Rigas, C.A.2d, 2007, 490 F.3d 208, 228 (internal quotation marks and citation omitted).

U.S. v. Bishop, C.A.10th, 2006, 469 F.3d 896, 902, certiorari denied 127 S.Ct. 2973.

"Constructive amendments are forbidden as they violate the guarantees of the Fifth Amendment." U.S. v. Alhalabi, C.A.7th, 2006, 443 F.3d 605, 614, certiorari denied 127 S.Ct. 299, 166 L.Ed.2d 154.

14 **Per se reversal**

A constructive amendment is per se prejudicial and requires a reversal of the conviction. U.S. v. Mize, 814 F.3d 401, 409 (6th Cir. 2016).

"A variance is harmless error if it does not prejudice a defendant's right to notice, while a constructive amendment is reversible error per se." U.S. v. Johnson, 719 F.3d 660, 668 (8th Cir. 2013) (internal quotation marks and citation omitted), cert. denied, 134 S. Ct. 705 (2013).

Where "a constructive amendment is found, the error is fatal and reversible per se." U.S. v. Whitfield, 695 F.3d 288, 307 (4th Cir. 2012) (internal quotation marks and citation omitted), cert. denied, 133 S. Ct. 1461, 185 L. Ed. 2d 368 (2013).

"A constructive amendment is considered prejudicial per se and grounds for reversal of a conviction." U.S. v. Celestin, 612 F.3d 14, 24 (1st Cir. 2010) (internal quotation marks and citation omitted).

Although the government alleged that defendant had adequate notice of the charges against him, "the prohibition on constructive amendments is grounded not just in the Sixth Amendment's notice requirement but also in the grand jury guarantee of the Fifth Amendment." The grand jury provision "provides a sufficient basis, standing alone, to compel reversal without any further showing of prejudice." U.S. v. Farr, 536 F.3d 1174, 1184 (10th Cir. 2008).

A constructive amendment is "fatal without regard to prejudice." U.S. v. Mueffelman, C.A.1st, 2006, 470 F.3d 33, 37.

U.S. v. Hartz, C.A.9th, 2006, 458 F.3d 1011, 1020.

Constructive amendment of an indictment is a per se violation of the Fifth Amendment. U.S. v. Dupre, C.A.2d, 2006, 462 F.3d 131, 140, certiorari denied 127 S.Ct. 1026, 166 L.Ed.2d 773.

A constructive amendment is per se reversible error. U.S. v. Narog, C.A.11th, 2004, 372 F.3d 1243, 1247.

A constructive amendment violates the Fifth Amendment right to be amended by a grand jury, is error per se, and must be corrected on appeal even when the defendant did not preserve the issue by objection. U.S. v. Randall, C.A.4th, 1999, 171 F.3d 195, 203.

The Third Circuit has concluded that while it will apply plain error analysis to a claim of constructive amendment, that analysis will "presume" prejudice." U.S. v. McKee, 506 F.3d 225, 229 (3d Cir. 2007). The noted the split in authority on this point in a footnote. 506 F.3d at 229 n.3.

A constructive amendment is per se prejudicial. U.S. v. Thomas, 274 F.3d 655, 670 (2d Cir. 2001) (en banc).

**But cf.**

The indictment alleged that defendant possessed two identified weapons, but the jury instructions permitted a conviction based on the possession of any weapon. Without reaching the merits of the constructive amendment argument, the appeals court found that defendant failed to satisfy the plain error standard, because the alleged error was not clear under current law. The court also said it "need not address whether a constructive amendment amounts to a per se error when the defendant fails to object at trial because, even if we assume that the district court erred, the error was not plain." U.S. v. Dortch, 696 F.3d 1104, 1112-1114 (11th Cir. 2012), cert. denied, 133 S. Ct. 993, 184 L. Ed. 2d 771 (2013).

The indictment specified a particular weapon allegedly possessed by the defendant, but the jury instructions permitted a conviction based on the possession of any weapon. The government conceded that the jury instruction impermissibly broadened the indictment. But defendant failed to object to the instruction, and the court of appeals found that the broadening did not constitute plain error where there was ample evidence that defendant possessed the specific weapon, and thus his substantial rights were not affected. U.S. v. Duran, C.A.7th, 2005, 407 F.3d 828, 842–844.

**See also**

"[O]nce a defendant on direct appeal establishes that a conviction was tainted by constructive amendment, we may redress that injury by vacating the conviction." U.S. v. Wright, 776 F.3d 134, 144 (3d Cir. 2015).

"It does not follow, however, from the fact that [defendant's] indictment was constructively amended that his conviction must be vacated or reversed. Because [defendant] did not challenge the constructive amendment at trial we review it only for plain error." U.S. v. Vizcarrondo-Casanova, 763 F.3d 89, 99-100, 95 Fed. R. Evid. Serv. 194 (1st Cir. 2014), cert. denied, 135 S. Ct. 307 (2014) (footnote omitted).

The Fourth Circuit has concluded that a constructive amendment is per se grounds for reversal, even if the defendant failed to preserve the objection in the district court. U.S. v. Robinson, 627 F.3d 941, 958 (4th Cir. 2010).

The First Circuit has observed that courts of appeals have "often described constructive amendments as 'prejudicial per se,'" but noted that this was "always in dicta." The court concluded: "[w]e agree with those circuits that apply the standard prejudice evaluation to constructive amendment claims on plain error review and do not presume prejudice." U.S. v. Brandao, 539 F.3d 44, 59, 60 (1st Cir. 2008). In its opinion the First Circuit discussed the various circuit views in some detail. 539 F.3d at 56-61.

14.50 **Interlocutory appeal**

The claim of a constructive amendment is "not so fundamental as to implicate a defendant's right not to be tried," and thus does not provide the basis for interlocutory review. A defendant's claim of constructive amendment can be adequately addressed on direct post-conviction review. U.S. v. Wright, 776 F.3d 134, 145 (3d Cir. 2015).

U.S. v. Asher, 96 F.3d 270, 273 (7th Cir. 1996).

**See also**

An interlocutory appeal was not proper where the challenges went to the means of obtaining the indictment, rather than the existence of the indictment itself. U.S. v. Tucker, 745 F.3d 1054, 1063, 1069 (10th Cir. 2014) (internal citations omitted).

15 **Constructive amendment found**

Where indictment charged interference with interstate importation of sand, admission of evidence and charge that would permit jury to convict if they found interference with interstate exportation of steel amounted to an amendment of the indictment, and was not permissible. Stirone v. U.S., 1960, 80 S.Ct. 270, 361 U.S. 212, 4 L.Ed.2d 252.

Where the indictment charged defendant with making a particular false statement, but the evidence at trial, the prosecutor's closing argument, and the non-specific jury instructions allowed the jury to convict on the basis of a different allegedly false statement, the indictment had been constructively amended. United States v. Miller, 891 F.3d 1220, 1232-35 (10th Cir. 2018), petition for certiorari filed (U.S. Jan. 3, 2019).

Defendant was charged with attempted sex trafficking of a minor, in violation of 18 U.S.C. § 1591(a), and the indictment alleged that defendant knew or was reckless to the fact that victim was underage. At trial

and in the jury instructions, however, the jurors were told that defendant could be convicted if he had had a "reasonable opportunity to observe" the victim. The court of appeals concluded that this constituted a constructive amendment and reversed the conviction. United States v. Davis, 854 F.3d 601, 604-605 (9th Cir. 2017), for additional opinion, see, 687 Fed. Appx. 534 (9th Cir. 2017).

Where the indictment only charged defendants with the basic offense under 18 U.S.C. § 241 and § 242, but the jury was instructed on the "bodily injury and death resulting forms of the crime," the indictment was constructively amended. "To indict a person for the form of the offense resulting in a lesser maximum sentence and then convict him of the enhanced offense with a higher maximum sentence is to constructively amend the indictment." U.S. v. Vizcarrondo-Casanova, 763 F.3d 89, 99, 95 Fed. R. Evid. Serv. 194 (1st Cir. 2014), cert. denied, 135 S. Ct. 307 (2014). On the facts, however, the court found that the error failed to satisfy the plain error standard.

Defendant was charged under 18 U.S.C.A. § 2113(e) when he forced another to accompany him while he was attempting to avoid capture for a bank robbery, and the other person subsequently died. The statute provided three alternative ways of committing the crime, but the indictment alleged only the first two. At trial the jury was instructed that it could convict if it found that the third, uncharged, alternative was satisfied, and the court of appeals agreed that this constituted a constructive amendment. By allowing the jury to consider an uncharged alternative, the district court "broaden[ed] the possible bases for conviction beyond those presented to the grand jury." U.S. v. Whitfield, 695 F.3d 288, 306-307 (4th Cir. 2012) (internal quotation marks and citation omitted), cert. denied, 133 S. Ct. 1461, 185 L. Ed. 2d 368 (2013).

Defendant was indicted for violating 18 § 924(c), which the court noted "contains two separate offenses: one for possession of a firearm 'in furtherance of' a drug trafficking crime, and one for using or carrying a firearm 'during and in relation to' a drug trafficking crime." The court said that "'use' . . . is a higher standard of conduct than 'possession,' but 'in furtherance of' is a higher standard of participation than 'during and in relation to.'" The appeals court found that where the district court's instructions and the verdict form improperly mixed the two standards, the indictment was constructively amended, and that under the plain error test the resulting conviction must be reversed. U.S. v. Hunter, 558 F.3d 495, 501-03 (6th Cir. 2009), cert. denied, 130 S. Ct. 312 (2009).

Where the indictment charged defendant with conspiracy to commit murder but the jury instructions were for the substantive crime of murder, both parties and the district court agreed that the indictment had been constructively amended. U.S. v. Brandao, 539 F.3d 44, 56-57 (1st Cir. 2008).

Where the defendant was charged under 26 U.S.C.A. § 7201 with having failed to pay the quarterly employment tax "owing by her," but where at trial the government attempted to prove that defendant violated the statute by failing to pay a trust fund penalty assessed against her personally, and where the government in effect instructed the jury that it could convict on either theory, the indictment was constructively amended and the conviction was reversed. U.S. v. Farr, 536 F.3d 1174 (10th Cir. 2008).

Where the jury instructions gave specific examples of the types of conduct that could form the basis of a conviction, and those types of conduct were not charged in the indictment, the jury instructions constructively amended the indictment and reversal was required. U.S. v. McKee, 506 F.3d 225, 231 (3d Cir. 2007).

The indictment alleged that defendant possessed a certain type of ammunition "in and affecting commerce," an element of the offense charged. At trial, however, the government failed to present evidence that the ammunition itself had been transported in interstate commerce, showing only that some of the component parts of the bullets had moved interstate. Because the showing at trial was not alleged in the indictment, the court of appeals found that there had been a constructive amendment and reversed the conviction. U.S. v. Chambers, C.A.5th, 2005, 408 F.3d 237.

The indictment alleged that defendant had possessed and distributed a certain chemical having reasonable cause to believe that it would be used to manufacture a controlled substance, "that is, methamphetamine." In giving the jury a supplemental instruction, the judge said that defendant need not have reasonable cause to believe that the chemical would be used to manufacture methamphetamine specifically; it was sufficient if the defendant believed that it would be used to manufacture "some" controlled substance. The Eleventh Circuit held that because the manufacture of a specific drug was alleged in the indictment, the court's instruction constructively amended the indictment. The court rejected the government's argument that the specification of methamphetamine was surplusage. U.S. v. Narog, C.A.11th, 2004, 372 F.3d 1243.

Defendant was indicted for disposing of a firearm to a person he had reasonable cause to know "is" an unlawful drug user, in violation of 18 U.S.C.A. § 922(d)(3). When the trial court instructed the jury that it could convict if the defendant disposed of the firearm to a third party having reasonable cause to believe there was a "risk" that the third party "would" unlawfully use drugs, this constructively amended the indictment. By permitting a conviction on the basis of potential future drug use by the gun recipient, the jury instructions modified an essential element of the crime charged in the indictment. U.S. v. Collins, C.A.8th, 2003, 350 F.3d 773.

Where an indictment charged defendants with using and carrying a firearm during and in relation to a drug-trafficking crime, specifically, distribution of a narcotic-controlled substance, and aiding and abetting such, proof and argument on the predicate offense of possession with intent to distribute, and jury instructions thereon, modified the predicate offense, an essential element of the crime, and thus constituted impermissible constructive amendment of the indictment. U.S. v. Randall, C.A.4th, 1999, 171 F.3d 195.

Although it was a mistake of the prosecution to include "willfulness" as an element of a money-laundering offense in an indictment, redactment of the indictment from "knowingly and willfully" to simply "knowingly" after defendant put on a defense based upon good faith impermissible broadened the indictment and was therefore prejudicial error. U.S. v. Cancelliere, C.A.11th, 1995, 69 F.3d 1116, 1120–1122.

Where indictment charged the defendant with one subsection of a statute, yet the district court instructed the jury on an entirely different subsection, the charge constituted a constructive amendment to the indictment requiring reversal. U.S. v. Floresca, C.A.4th, 1994, 38 F.3d 706, 710 (en banc).

Trial court impermissibly broadened scope of indictment charging defendant with use of a firearm during and in furtherance of a trafficking offense by instructing jury and permitting prosecutor to argue that conviction on firearms count could be based on coconspirator liability theory. U.S. v. Pedigo, C.A.7th, 1993, 12 F.3d 618.

Instruction to the jury that they could convict defendant on a count in which she was not named was an impermissible amendment of the indictment. U.S. v. Weinstein, C.A.11th, 1985, 762 F.2d 1522, 1539, **citing Wright,** certiorari denied 106 S.Ct. 1519, 475 U.S. 1110, 89 L.Ed.2d 917.

Defendants, who were charged under a statute prohibiting payoffs for referring medical patients, could not be convicted on proof that they had taken payoffs for referring medical services. U.S. v. Stewart Clinical Laboratory, Inc., C.A.9th, 1981, 652 F.2d 804.

Where defendants were indicted for conspiring to make and construct unregistered destructive device but government failed to present any proof that defendants made or constructed destructive device and district court instructed jury to disregard that portion of indictment and then instructed jury they could convict defendants if they found that defendants had conspired to possess constructive device, there was plain error in the impermissible modification of indictment in charge to jury. U.S. v. Jones, C.A.6th, 1981, 647 F.2d 696, certiorari denied 102 S.Ct. 399, 454 U.S. 898, 70 L.Ed.2d 214.

Where indictment charged that defendant, a county commissioner, had received payments from the manager of a refuse-collecting company from January of 1973 through November of 1975, introduction at trial of evidence that he had also received a large payment shortly before voting in favor of a proposed landfill had the effect of impermissibly amending the indictment and created a fatal variance. U.S. v. Beeler, C.A.6th, 1978, 587 F.2d 340.

Where grand-jury indictment charging defendant with making false declarations before grand jury investigating payola specifically charged that defendant's testimony was untruthful when he denied receiving payments from specified individual for playing of records, the introduction of testimony to effect that defendant had also received payments from a different individual for playing of records on radio station amounted to a constructive amendment of indictment and constituted reversible error. U.S. v. Crocker, C.A.3d, 1977, 568 F.2d 1049.

Where defendant was indicted for premeditated murder, but tried for both premeditated murder and felony-murder, an impermissible constructive amendment of the indictment had been made. Watson v. Jago, C.A.6th, 1977, 558 F.2d 330.

An indictment charging defendant with the misdemeanor of willfully failing to timely make a federal income-tax return due on or before April 15, 1966, could not be amended to conform with proof at trial that, because of a request for an extension, the defendant had no legal duty to file his return until May 7, 1966. U.S. v. Goldstein, C.A.3d, 1974, 502 F.2d 526.

  

Government may not prove commission of offenses on dates other than those listed in indictment on strength of bill of particulars since to do so would be tantamount to permitting indictment to be amended by bill. U.S. v. Critchley, C.A.3d, 1965, 353 F.2d 358, 362.

16

**No constructive amendment**

The court of appeals found that no constructive amendment had occurred when the district court's jury instructions redacted the names of four of the five alleged co-conspirators, and where the evidence presented at trial linked defendant only to one co-conspirator. The names of the co-conspirators were not an essential element of the crime charged, as the government was not required to prove the names to obtain a conviction. United States v. Dove, 884 F.3d 138, 147-50 (2d Cir. 2018).

Defendant was charged with healthcare fraud that resulted in death, 18 U.S.C. § 1347, and he argued that the indictment was constructively amended because it allowed the jury to convict based on facts that were not part of the fraudulent requests for payment. The court of appeals found that defendant was misinterpreting the statute, that the deaths had to result from the entire scheme to defraud and not just the request for payment, and that therefore there was no constructive amendment. United States v. Chikvashvili, 859 F.3d 285, 291-92 (4th Cir. 2017), cert. denied, 138 S. Ct. 566 (2017).

The Ninth Circuit rejected defendant's argument that the indictment alleging a violation of the Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C.§ 6a, was constructively amended by the jury instructions. Defendant claimed that the instructions permitted the jury to convict based on either an import trade or domestic effects theory, while prior to trial the prosecutor had only sought to rely on the import trade theory. The court concluded that there had been no constructive amendment because the allegations in the indictment had necessarily supported the domestic effects claim. U.S. v. Hui Hsiung, 758 F.3d 1074, 1093, 2014-2 Trade Cas. (CCH) ¶ 78824 (9th Cir. 2014).

Although the government presented evidence at trial that defendant had conspired with individuals not named in the indictment, there was no constructive amendment. The identity of the coconspirators is not an essential element of the charge of conspiracy, and thus, there was no substantial likelihood that defendant was convicted of a charge other than the one specified in the indictment. U.S. v. Johnson, 719 F.3d 660, 668 (8th Cir. 2013), cert. denied, 134 S. Ct. 705 (2013).

Where the caption of the counts in the indictment clarified any ambiguity about the scope of the charge against defendant, and where the jury instructions properly tracked the allegations, there was no broadening of the charge and thus no constructive amendment. U.S. v. Cooper, 714 F.3d 873, 878 (5th Cir. 2013), cert. denied, 134 S. Ct. 313 (2013).

"[W]hen the Government charges in the conjunctive, and the statute is worded in the disjunctive, the district court can instruct the jury in the disjunctive" without constructively amending the indictment. U.S. v. Robinson, 627 F.3d 941, 958 (4th Cir. 2010).

There was no constructive amendment where the indictment alleged that defendant possessed counterfeit "and" forged securities, while the jury instructions permitted conviction if defendant possessed counterfeit "or" forged securities. There was sufficient evidence that defendant committed any of the acts charged, and thus the jury instructions did not constitute plain error. U.S. v. Vampire Nation, C.A.3d, 2006, 451 F.3d 189, 204, certiorari denied 127 S.Ct. 424, 166 L.Ed.2d 300.

There was no constructive amendment created by the evidence where there was no "complex of facts presented at trial distinctly different from those in the indictment." U.S. v. Casch, C.A.9th, 2006, 448 F.3d 1115, 1117 (internal quotation marks and citation omitted).

It does not constitute a constructive amendment for the court to instruct the jury on aiding and abetting when this was not alleged in the indictment. Aiding and abetting is not a separate crime, it is a "recognized varient of the underlying offense" that was properly set forth in the indictment. U.S. v. Alexander, C.A.10th, 2006, 447 F.3d 1290, 1297–1299, certiorari denied 127 S.Ct. 315, 166 L.Ed.2d 236.

Where the judge orally instructed the jury on the proper legal standard and gave the jury a copy of the instructions, and where both the prosecutor and defense counsel frequently repeated the correct standard, the fact that the verdict form set forth an erroneous legal standard did not constitute plain error that required reversal. U.S. v. Arreola, C.A.9th, 2006, 446 F.3d 926, 934–935.

Although there was a significant amount of evidence presented at trial of defendant's prior tax non-compliance beyond what was charged in the indictment, the jury instructions were sufficient to ensure that

defendant would be convicted, if at all, of the crime specified in the indictment. U.S. v. Daraio, C.A.3d, 2006, 445 F.3d 253, 260, certiorari denied 127 S.Ct. 932, 166 L.Ed.2d 702.

Where the general language of the indictment was sufficient to encompass the acts shown by the evidence, and where the defendants had sufficient notice that their conduct was included in the charge, there was no constructive amendment of the indictment. U.S. v. Skelly, C.A.2d, 2006, 442 F.3d 94, 99.

Sentencing factors alleged in the indictment that were unnecessary to the crime charged were mere surplusage and would be disregarded. The sentencing allegations were contained in the same count as the essential elements of the offense, and did not, as defendant claimed, allege a separate common law crime. U.S. v. Peters, C.A.7th, 2006, 435 F.3d 746, 752–753.

The indictment alleged that defendant "used, carried, brandished, and discharged a firearm" while the jury instructions permitted conviction if defendant "used or carried a firearm," and that " '[u]se' may include brandishing, displaying, making reference to a firearm in the defendant's possession, or firing a firearm." Defendant argued that replacing the conjunctive "and" in the indictment with the disjunctive "or" in the jury instructions amounted to a constructive amendment, but the court of appeals disagreed. Both circuit precedent and logic showed that the individual acts in the jury instructions were subsumed in the conjunctive language of the indictment, and thus did not impermissibly broaden the indictment. U.S. v. Jones, C.A.7th, 2005, 418 F.3d 726, 730, certiorari denied 126 S.Ct. 817, 546 U.S. 1069, 163 L.Ed.2d 642.

The indictment alleged that defendant conspired to distribute more than 100 grams of heroin, but the special verdict form permitted the jury to find that the defendant conspired to distribute fewer than 100 grams. When the jury returned such a finding defendant argued that the indictment had been constructively amended because it allowed the jury to find that defendant participated in a conspiracy not alleged in the indictment, one that involved a smaller amount of drugs. The court of appeals rejected this "creative" argument, finding that the jury had been instructed to convict only if defendant was involved in the conspiracy specified in the indictment, and noting that a specific quantity of drugs was not an element of the crime. U.S. v. Gomez-Rosario, C.A.1st, 2005, 418 F.3d 90, 104–105.

Although the indictment alleged a conspiracy to launder the proceeds of "narcotics trafficking," and the court instructed the jury regarding the proceeds of trafficking in "controlled substances," the discrepancy did not create a constructive amendment. Defendants were correct that "narcotics" were only a subset of "controlled substances," but the indictment itself made clear that the term "narcotic trafficking" was being used in the colloquial sense, not it the manner defined by the statute. U.S. v. Ansaldi, C.A.2d, 2004, 372 F.3d 118, 126–127, certiorari denied 125 S.Ct. 364, 543 U.S. 949, 160 L.Ed.2d 266.

Where a government witness made only a single reference to defendant's alleged drug involvement during a time not charged in the indictment, there was no constructive amendment or impermissible variance. The rest of the evidence focused on the crime charged, and the judge instructed the jury not to consider the improper testimony. U.S. v. Johnston, C.A.8th, 2003, 353 F.3d 617, 623–624 (per curiam), certiorari denied 124 S.Ct. 2403, 541 U.S. 1068, 158 L.Ed.2d 973.

Defendant was charged with conspiracy to commit securities fraud, and he argued that the government had constructively amended the indictment by presenting evidence of the sale of non-stolen warrants, whereas the indictment only alleged the sale of stolen warrants. The court of appeals rejected the claim, noting that while the sales of non-stolen warrants "were not specifically pleaded in the indictment, they are plainly within the charged core of criminality and constitute a permissible alternative basis" for proving that the conspiracy occurred within the statute of limitations period. U.S. v. Salmonese, C.A.2d, 2003, 352 F.3d 608, 621.

Where the indictment simply alleged that defendant possessed the firearm, there was no constructive amendment regardless whether the prosecutor argued at trial for actual or constructive possession. U.S. v. Bryant, C.A.8th, 2003, 349 F.3d 1093, 1097–1098.

The indictment alleged that defendant attempted to possess approximately five kilograms of cocaine. In a special verdict, the jury found that defendant was responsible for more than 500 grams but less than five kilograms. The court of appeals held that allowing the jury to convict for the lower amount of drugs did not constructively amend the indictment. Defendant was convicted of the same crime for which he was indicted, and thus there was no "broaden[ing] of the bases for conviction beyond those presented to the grand jury." U.S. v. Patterson, C.A.7th, 2003, 348 F.3d 218, 227–228 (internal quotation marks and citation omitted).

District court did not constructively amend indictment by permitting prosecution to proceed on defrauding-the-government theory in seeking felony penalty for offense of introduction of misbranded steroids into

interstate commerce, where indictment did not specify defrauded party. U.S. v. Arlen, C.A.5th, 1991, 947 F.2d 139, certiorari denied 112 S.Ct. 1480, 503 U.S. 939, 117 L.Ed.2d 623.

Deletion of words "federal grand jury" from originally returned indictment did not constitute an amendment of the indictment. U.S. v. Mumford, C.A.4th, 1980, 630 F.2d 1023, certiorari denied 101 S.Ct. 1759, 450 U.S. 1041, 68 L.Ed.2d 238.

Since defendants were not confronted with prosecution for an additional or different crime, and had been given fair notice by the indictment, differences between the proof and the indictment were not a constructive amendment of the indictment but only a nonprejudicial variance. U.S. v. Fruehauf Corp., C.A.6th, 1978, 577 F.2d 1038, certiorari denied 99 S.Ct. 349, 439 U.S. 953, 58 L.Ed.2d 344.

16.50 **Reviewed de novo**

United States v. Dove, 884 F.3d 138, 146, 149 (2d Cir. 2018).

United States v. Davis, 854 F.3d 601, 603 (9th Cir. 2017), for additional opinion, see, 687 Fed. Appx. 534 (9th Cir. 2017).

U.S. v. Mize, 814 F.3d 401, 408 (6th Cir. 2016).

U.S. v. Webster, 797 F.3d 531, 534 (8th Cir. 2015).

U.S. v. Fields, 763 F.3d 443, 467, 95 Fed. R. Evid. Serv. 56 (6th Cir. 2014).

U.S. v. Villarreal, 707 F.3d 942, 962 (8th Cir. 2013).

U.S. v. Whitfield, 695 F.3d 288, 306 (4th Cir. 2012), cert. denied, 133 S. Ct. 1461, 185 L. Ed. 2d 368 (2013).

16.55 **Plain error**

United States v. Miller, 891 F.3d 1220, 1231 (10th Cir. 2018), petition for certiorari filed (U.S. Jan. 3, 2019).

"Forfeited errors are normally reviewed only for plain error, and forfeited constructive amendment claims are no exception." U.S. v. McIvery, 806 F.3d 645, 652 (1st Cir. 2015) (internal citations omitted).

U.S. v. Bastian, 770 F.3d 212, 219 (2d Cir. 2014).

**See also**

A claim of variance between the indictment and the evidence at trial is subject to plain error review where it is not properly preserved at trial. U.S. v. Gallegos, 784 F.3d 1356, 1362 (10th Cir. 2015).

**But compare**

Although only one of the three defendants properly raised a claim of constructive amendment and variance in the court of appeals, a divided Sixth Circuit exercised its discretion and considered the issue with respect to all three defendants. The court noted that the claim went to the validity of all three convictions, the issue had been fully briefed by the party who preserved the claim, and that to reverse as to one defendant while affirming the convictions of the other two would result in a miscarriage of justice. U.S. v. Mize, 814 F.3d 401, 408 (6th Cir. 2016). The court noted, however, that while it would consider the claim, and would apply de novo review for both the party who preserved the issue and the party who objected and trial but failed to raise the issue on appeal, it would apply plain error review for the defendant who neither objected nor raised the issue.

16.60 **Defendant contributed**

"[T]his Court has refused to reverse on the grounds of constructive amendment where, for example, the defendants themselves requested the court to issue instructions amending their indictments—sometimes over the objections of the prosecution itself." U.S. v. Bastian, 770 F.3d 212, 218 (2d Cir. 2014) (citing cases). On the facts, however, the court found that there had been no invited error by the defense.

16.80 **Not every deviation**

"Not every divergence from the terms of an indictment, however, qualifies as a constructive amendment. We have consistently permitted significant flexibility in proof adduced at trial to support a defendant's conviction, provided that the defendant was given notice of the core of criminality to be proven against him. So long as the indictment identifies the essence of [the] crime against which the defendant must defend himself, discrepancies in the particulars of how a defendant effected the crime do not constructively amend the indictment." U.S. v. Bastian, 770 F.3d 212, 220 (2d Cir. 2014) (internal quotation marks, citations, and emphasis omitted).

17 **Variance and constructive amendment distinguished**

"A variance arises when the evidence presented proves facts that are materially different from those alleged in the indictment. The basic difference between a constructive amendment and a variance is this: a constructive amendment changes the charge, while the evidence remains the same; a variance changes the evidence,

while the charge remains the same." U.S. v. Johnson, 719 F.3d 660, 668 (8th Cir. 2013) (internal quotation marks and citation omitted), cert. denied, 134 S. Ct. 705 (2013).

U.S. v. Whitfield, 695 F.3d 288, 308 (4th Cir. 2012), cert. denied, 133 S. Ct. 1461, 185 L. Ed. 2d 368 (2013).

"A constructive amendment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon them. A variance occurs when the charging terms remain unchanged but when the facts proved at trial are different from those alleged in the indictment." U.S. v. Dowdell, 595 F.3d 50, 57 n.4 (1st Cir. 2010) (internal quotation marks and citation omitted).

U.S. v. Starr, 533 F.3d 985, 997 (8th Cir. 2008), cert. denied, 129 S. Ct. 746 (2008).

U.S. v. McKee, 506 F.3d 225, 229 (3d Cir. 2007).

"[T]o merit reversal, the difference between the indictment and the jury instruction must allow[ ] the defendant to be convicted of a separate crime from the one for which he was indicted. Otherwise, he will have to show how the variance in the language between the jury charge and the indictment so severely prejudiced his defense that it requires reversal under harmless error review. If, however, "it is clear that this could not have been the case, the trial court's refusal to restrict the jury charge to the words of the indictment is merely another of the flaws in the trial that mar its perfection but do not prejudice the defendant." U.S. v. Dentler, C.A.5th, 2007, 492 F.3d 306, 3312 (internal quotation marks and citations omitted).

"This circuit recognizes two types of variances. A constructive amendment, which is reversible per se, occurs when the district court's instructions and the proof offered at trial broaden the indictment. A simple variance arises when the evidence adduced at trial establishes facts different from those alleged in the indictment, and triggers harmless error analysis. The defendant bears the burden of proof both to show that a variance occurred and that it was fatal." U.S. v. Sells, C.A.10th, 2007, 477 F.3d 1226, 1237 (citations omitted).

"The distinction between constructive amendments and variances, while perhaps murky, can be important because a variance is permissible unless prejudice is shown by the defendant, while a constructive amendment is fatal without regard to prejudice." U.S. v. Baker, 544 F. Supp. 2d 522, 537 (E.D. La. 2008).

"A variance occur[s] when the charging terms of an indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment. Constructive amendments, in contrast, are variances occurring when an indictment's terms are effectively altered by the presentation of evidence and jury instructions that so modify essential elements of the offense charged that there is a substantial likelihood the defendant [was] convicted of an offense other than that charged in the indictment." U.S. v. Hynes, C.A.6th, 2006, 467 F.3d 951, 961–962 (internal quotation marks and citations omitted).

"A constructive amendment (fatal without regard to prejudice) occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed on them, but a variance, which is permissible unless prejudice is shown by the defendant, occurs when the charging terms remain unchanged but when the facts proved at trial are different from those alleged in the indictment." U.S. v. Mueffelman, C.A.1st, 2006, 470 F.3d 33, 37 (internal quotation marks and footnote omitted).

"A constructive amendment of an indictment occurs when either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment. By contrast, [a] variance occurs when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment." U.S. v. Dupre, C.A.2d, 2006, 462 F.3d 131, 140, certiorari denied 127 S.Ct. 1026, 166 L.Ed.2d 773 (internal quotation marks and citations omitted).

"[A]n *amendment* … occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them. A variance, on the other hand, occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." U.S. v. Hartz, C.A.9th, 2006, 458 F.3d 1011, 1020 (internal quotation marks and citations omitted).

"There are two types of variations between the charges in an indictment and the evidence at trial: (1) amendments of the indictment when its charging terms are altered; and (2) variances, where the charging terms of the indictment are not changed but when the evidence at the trial proves facts materially different from those alleged in the indictment." U.S. v. Daraio, C.A.3d, 2006, 445 F.3d 253, 259, certiorari denied 127 S.Ct. 932, 166 L.Ed.2d 702.

U.S. v. Chambers, C.A.5th, 2005, 408 F.3d 237, 241.

A constructive amendment "occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment. A variance occurs when the facts proved at trial deviate from the facts contained in the indictment but the essential elements of the offense are the same." U.S. v. Narog, C.A.11th, 2004, 372 F.3d 1243, 1247 (quotation marks and citations omitted).

U.S. v. Johnston, C.A.8th, 2003, 353 F.3d 617, 623 (per curiam), certiorari denied 124 S.Ct. 2403, 541 U.S. 1068, 158 L.Ed.2d 973.

Michael v. State, Alaska 1991, 805 P.2d 371, 372, **citing Wright.**

**Cf.**

The Tenth Circuit has used the terms "variance" and "constructive amendment" in a similar manner, although the case in question is analyzed as one of constructive amendment. See U.S. v. Crockett, C.A.10th, 2006, 435 F.3d 1305, 1315 ("If the district court's instructions and the proof at trial broaden the indictment, the variance constitutes a constructive amendment, violates the Fifth Amendment, and is reversible per se.").

In a conspiracy case, "[t]he inclusion of some overt acts in an indictment does not bar proof of other acts, and proof of other acts in furtherance of the same conspiracy does not constitute a variance." U.S. v. Sdoulam, C.A.8th, 2005, 398 F.3d 981, 992.

**See also**

"A variance occurs when the crime charged remains unaltered, but the evidence adduced at trial proves different facts than those alleged in the indictment." U.S. v. Dellosantos, 649 F.3d 109, 116 (1st Cir. 2011) (internal quotation marks and citations omitted).

A variance also can occur when the evidence at trial differs from the contents of the bill of particulars. U.S. v. Kaplan, C.A.2d, 2007, 490 F.3d 110, 129. On the facts presented, the court found no evidence that defendant was prejudiced by any difference in the proof.

18 **Variance requires prejudice**

"[R]eversal is only warranted for a variance if the defendant shows both: (1) the existence of a variance, and (2) that 'substantial prejudice' occurred at trial as a result." United States v. Dove, 884 F.3d 138, 149 (2d Cir. 2018).

"A variance raises constitutional concerns only if it deprives a defendant of the notice and double jeopardy protections of an indictment, Where the defendant has notice of the 'core of criminality' to be proven at trial, we have permitted 'significant flexibility' in proof without finding prejudice." United States v. Lee, 833 F.3d 56, 71 (2d Cir. 2016) (internal quotation marks and citations omitted), cert. denied, 137 S. Ct. 2212, 198 L. Ed. 2d 660 (2017).

A variance requires reversal only if the defendant can show that a substantial right was affected. "A defendant's substantial rights are affected only when the defendant shows prejudice to his ability to defend himself at trial, to the general fairness of the trial, or to the indictment's sufficiency to bar subsequent prosecutions." U.S. v. Mize, 814 F.3d 401, 409 (6th Cir. 2016) (internal quotation marks and citation omitted).

"A variance arises when the terms of the indictment are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. If an indictment charges one conspiracy, but the evidence can reasonably be construed only as supporting a finding of multiple conspiracies, the resulting variance between the indictment and the proof is reversible error, if the appellant can show that he was prejudiced thereby." U.S. v. Fields, 763 F.3d 443, 467, 95 Fed. R. Evid. Serv. 56 (6th Cir. 2014).

"A variance alone, however, does not necessitate disturbing a conviction; rather, [a] variance is grounds for reversal only if it is prejudicial...Put differently, so long as the statutory violation remains the same [as that alleged in the indictment], the jury can convict even if the facts are somewhat different than charged —so long as the difference does not cause unfair prejudice." U.S. v. Dellosantos, 649 F.3d 109, 116 (1st Cir. 2011) (internal quotation marks and citations omitted). On the facts, the court found that the indictment alleged a single conspiracy to distribute both cocaine and marijuana, but the evidence at trial showed only that defendants had participated in a different conspiracy to distribute cocaine. The court concluded that defendants were deprived of adequate notice of the charges, and thus were prejudiced by the variance. 649 F.3d at 124-25

"A variance between the indictment and the proof is only reversible error … if it is prejudicial — that is, if it affects the substantial rights of the accused. Such a variance can prejudice a defendant's Sixth

  

Amendment right to notice of the charges against him if he could not have anticipated from the allegations in the indictment what the evidence would be at trial." U.S. v. Bowling, 619 F.3d 1175, 1182 (10th Cir. 2010) (internal quotation marks and citations omitted).

"A variance between the allegations of an indictment and the proof at trial is fatal if it either surprises the defendant at trial and hinders the preparation of his defense, or … exposes him to the danger of a second prosecution for the same offense. Such a variance warrants a reversal on appeal, however, only if the appellant shows that the variance infringed his 'substantial rights' and thereby resulted in actual prejudice." U.S. v. Kellam, 568 F.3d 125, 133 (4th Cir. 2009), cert. denied, 2009 WL 3414784 (U.S. 2009) (internal quotation marks and citations omitted).

"A variance is grounds for reversal only if it is prejudicial, that is, if it affects the defendant's substantial rights." U.S. v. Mangual-Santiago, 562 F.3d 411, 421 (1st Cir. 2009) (internal quotation marks and citation omitted), cert. denied, 130 S. Ct. 293 (2009). In particular, "[a] variance between a charged single conspiracy and evidence of separate conspiracies at trial is prejudicial if the defendant was convicted based on evidence pertaining to a separate conspiracy of which he was not involved." 562 F.3d at 423.

"A variation between the evidence at trial and the indictment generally does not rise to the level of an unconstitutional constructive amendment if it does not raise the possibility that the defendant was convicted of an offense other than that charged in the indictment." U.S. v. Farr, 536 F.3d 1174, 1181 (10th Cir. 2008).

A variance between the indictment and proof is only grounds for reversal if the defendant's substantial rights are affected. Prejudice can be shown if the defendant "could not have anticipated from the allegations in the indictment what the evidence would be at trial," or if there was prejudicial spillover effect from evidence introduced against other parties that did not involve defendant. U.S. v. Carnagie, 533 F.3d 1231, 1240-41 (10th Cir. 2008) (internal quotation marks and citations omitted).

Defendant must show prejudice from a variance. "The defendant's substantial rights are infringed when: (1) the defendant could not reasonably have anticipated from the indictment the evidence to be presented against him; (2) the indictment is so vague that there is a possibility of subsequent prosecution for the same offense; or (3) the defendant was prejudiced by a 'spillover' of evidence from one conspiracy to another." U.S. v. Hyles, 521 F.3d 946, 957 (8th Cir. 2008) (internal quotation marks and citations omitted), cert. denied, 2009 WL 56265 (U.S. 2009).

"A defendant alleging variance must show 'substantial prejudice' to warrant reversal." U.S. v. Rigas, C.A.2d, 2007, 490 F.3d 208, 226 (citation omitted)

Defendant alleged that there was a variance between the indictment that alleged a single conspiracy and the trial evidence which showed two agreements. The court disagreed with this reading of the indictment, and in any event, said that "[t]his court will reverse only if we find the evidence adduced at trial does not support a finding of a single conspiracy, and it determines the defendants were prejudiced by the variance. Prejudice is established upon a showing: (1) the evidence relating to the other conspiracies had prejudicial spillover effects as to the conspiracy charged, (2) the indictment provided insufficient notice of what evidence would be provided against the defendant at trial, or (3) the indictment was so vague as to risk subsequent prosecution for the same conduct." U.S. v. Cain, C.A.8th, 2007, 487 F.3d 1108, 1113 (internal quotation marks and citations omitted).

Although there was no prejudice found on the facts presented, "[a] variance may affect the substantial rights of the accused, however, if it is more likely than not that the jury imputed the evidence to the defendant in determining guilt." U.S. v. Sells, C.A.10th, 2007, 477 F.3d 1226, 1238.

U.S. v. Kennard, C.A.11th, 2006, 472 F.3d 851, certiorari denied 127 S.Ct. 3004.

U.S. v. Hynes, C.A.6th, 2006, 467 F.3d 951, 962.

"We decide whether a variance between an indictment and the proof at trial is prejudicial, and thus 'fatal to the prosecution,' by determining whether the variance infringes on the 'substantial rights' that indictments exist to protect—to inform an accused of the charges against him so that he may prepare his defense and to avoid double jeopardy." U.S. v. Dupre, C.A.2d, 2006, 462 F.3d 131, 140, certiorari denied 127 S.Ct. 1026, 166 L.Ed.2d 773 (internal quotation marks and citations omitted).

U.S. v. Hartz, C.A.9th, 2006, 458 F.3d 1011, 1020.

"A variance does not prejudice a defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, [or] (2) if the variance is not such that it will present a danger that the defendant may be prosecuted a

second time for the same offense." U.S. v. Daraio, C.A.3d, 2006, 445 F.3d 253, 262, certiorari denied 127 S.Ct. 932, 166 L.Ed.2d 702 (internal quotation marks and citation omitted).

A defendant must show that the variance had a "substantial and injurious effect or influence in determining the jury's verdict." U.S. v. Baugham, C.A.D.C.2006, 449 F.3d 167, 174, certiorari denied 127 S.Ct. 428, 166 L.Ed.2d 293, quoting Kotteakos v. U.S., 1946, 66 S.Ct. 1239, 328 U.S. 750, 776, 90 L.Ed. 1557.

U.S. v. DeCicco, C.A.1st, 2006, 439 F.3d 36.

**See also**

Defendant claimed that there was a fatal variance between the indictment, which alleged a single conspiracy, and the evidence, which showed multiple conspiracies. She argued that the variance prejudiced her because of the "spillover" in evidence between the single large conspiracy and the smaller one she claimed to be involved in. "To determine whether a variance prejudiced the defendant in the context of an alleged conspiracy, we focus on the possibility of jury confusion and the strength of the evidence proving the defendant's involvement in the smaller conspiracy. In assessing the possibility of jury confusion, we consider, among other things, the number of defendants tried together and the number of separate conspiracies proved. We also look to the complexity of the evidence and the jury's ability to distinguish the evidence against one defendant from the evidence against his or her co-defendants." The court found that even assuming the variance, the prejudice was not sufficient to satisfy the plain error test. U.S. v. Gallegos, 784 F.3d 1356, 1362 (10th Cir. 2015) (citation omitted).

Describing a fatal variance as a "theory or error often raised but seldom seen," the Sixth Circuit has stated that "[I]n the context of a conspiracy, a variance requires reversal only if (1) the indictment alleged one conspiracy, but the evidence can reasonably be construed only as supporting a finding of multiple conspiracies, and (2) the variance prejudiced the defendant." U.S. v. Williams, 612 F.3d 417, 422 (6th Cir. 2010), cert. denied, 2010 WL 4053469 (U.S. 2010). On the facts, the court found that there was no variance between the indictment and the evidence.

"A variance arises when the facts proved at trial differ from those alleged in the indictment. In a conspiracy case, we treat a defendant's variance claim as a challenge to the sufficiency of the evidence supporting the jury's finding that the defendant was a member of the charged conspiracy. To succeed, Longstreet must establish that (1) the evidence at trial was insufficient to support the jury's finding that he belonged to a single conspiracy, and (2) he was prejudiced by the variance." U.S. v. Longstreet, 567 F.3d 911, 918 (7th Cir. 2009), cert. denied, 2009 WL 3345529 (U.S. 2009) (internal citations omitted). On the facts, the court found no variance, as a reasonable jury could have found that defendant belonged to a single large conspiracy.

In the context of a alleged variance between the indictment's claim of a single conspiracy and the evidence that may have shown multiple agreements, the Fifth Circuit has observed that "when the indictment alleges the conspiracy count as a single conspiracy, but the government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights." U.S. v. Lewis, C.A.5th, 2007, 476 F.3d 369, 384, certiorari denied 127 S.Ct. 2893 (internal quotation marks and citation omitted).

"A variance does not prejudice a defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, [or] (2) if the variance is not such that it will present a danger that the defendant may be prosecuted a second time for the same offense." U.S. v. Daraio, C.A.3d, 2006, 445 F.3d 253, 262, certiorari denied 127 S.Ct. 932, 166 L.Ed.2d 702 (internal quotation marks and citation omitted).

"Prejudice occurs only when the variance creates a substantial likelihood that the defendant may have been convicted of an offense other than that charged by the grand jury." U.S. v. Wittig, D.Kan.2006, 425 F.Supp.2d 1196, 1208.

19 **Defendant bears burden**

United States v. Dove, 884 F.3d 138, 149 (2d Cir. 2018).

"The threshold question in fatal-variance analysis is whether sufficient evidence supported the charged conspiracy. Put another way, [defendant] Thomas must convince us that viewing the evidence in a light most favorable to the government, no rational juror could have found the single conspiracy alleged in the indictment. This is a nearly insurmountable hurdle for most defendants, and Thomas is no exception." U.S. v. Thomas, 520 F.3d 729, 733 (7th Cir. 2008) (citations omitted).

U.S. v. Lewis, C.A.5th, 2007, 476 F.3d 369, 384, certiorari denied 127 S.Ct. 2893, 167 L.Ed.2d 1164.

Cases on this point from nearly every circuit with criminal jurisdiction are set forth in U.S. v. Baugham, C.A.D.C.2006, 449 F.3d 167, 177.

**Cf.**

"We review de novo the question of whether a variance was prejudicial." U.S. v. Carnagie, 533 F.3d 1231, 1240 (10th Cir. 2008).

20 **Counter to usual rule**

U.S. v. Baugham, C.A.D.C.2006, 449 F.3d 167, 177. The D.C. Circuit hypothesized that the defendant might be required to bear the burden of showing prejudice, despite the normal operation of the harmless error rule, because it "might be that the prejudice from a variance is an element of the violation itself, in the same way that the Supreme Court conceives of prejudice as an element of the violation of the right to effective assistance of counsel." 449 F.3d at 177 (citation omitted). The court recognized that this theory was inconsistent with some Supreme Court case law, and ultimately found it unnecessary on the facts to resolve this "apparent anomaly."

21 **Difference in degree**

U.S. v. Farr, 536 F.3d 1174, 1181 (10th Cir. 2008), **quoting Wright**.

In U.S. v. Hynes, C.A.6th, 2006, 467 F.3d 951, 962, the court noted that variances and constructive amendments are "closely related," and that the distinctions are "sketchy."

"[T]he line between a constructive amendment and a variance is at times difficult to draw," U.S. v. Hartz, C.A.9th, 2006, 458 F.3d 1011, 1020 (internal quotation marks and citations omitted).

"The line between a constructive amendment and a variance is at times difficult to draw." U.S. v. Daraio, C.A.3d, 2006, 445 F.3d 253, 261, certiorari denied 127 S.Ct. 932, 166 L.Ed.2d 702 (internal quotation marks and citation omitted).

U.S. v. Baker, 544 F. Supp. 2d 522, 537 (E.D. La. 2008), **quoting Wright**.

**But cf.**

"An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them. A variance occurs when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment." United States v. Davis, 854 F.3d 601, 605 (9th Cir. 2017) (internal quotation marks and citations omitted), for additional opinion, see, 687 Fed. Appx. 534 (9th Cir. 2017).

**But see**

While recognizing that "Our precedent recognizes that the difference between [a constructive amendment and a variance] is 'shadowy,'" the court of appeals said that "a constructive amendment requires a showing that the important functions of an indictment were undermined by both the evidence presented *and* the jury instructions." U.S. v. Mize, 814 F.3d 401, 409 (6th Cir. 2016) (emphasis in original, internal quotation marks and citation omitted). On the facts, the court found that the deviations from the indictment were created by the proof and trial, not by the jury instructions, and so there was not constructive amendment. There was, however, an improper variance.

21.50 **Indictment errors**

U.S. v. Higgs, 353 F.3d 281, 306 (4th Cir. 2003). An indictment error does not necessarily lead to a finding of a constructive amendment, although the court would later recognize that "the distinction between a constructive amendment and a Higgs-type indictment error may be nuanced." U.S. v. Whitfield, 695 F.3d 288, 308 (4th Cir. 2012), cert. denied, 133 S. Ct. 1461, 185 L. Ed. 2d 368 (2013).

21.60 **Variance without amendment**

Although the court of appeals rejected the claim that there had been a constructive amendment, it found an impermissible variance where the government introduced evidence of a second conspiracy at trial that was not alleged in the indictment. The court found that defendants were prejudiced by the additional evidence, and that the test for plain error review was satisfied. U.S. v. Mize, 814 F.3d 401 (6th Cir. 2016).

22 **May withdraw part of indictment**

U.S. v. Miller, 1985, 105 S.Ct. 1811, 471 U.S. 130, 85 L.Ed.2d 99, described in the text below.

Ford v. U.S., 1927, 47 S.Ct. 531, 534, 273 U.S. 593, 602, 71 L. Ed. 793.

Salinger v. U.S., 1926, 47 S.Ct. 173, 175, 272 U.S. 542, 548–549, 71 L.Ed. 398.

  

There is no constructive amendment when the government removes a factual allegation from the indictment where that allegation does not affect an essential element of the crime. United States v. Dove, 884 F.3d 138, 147 (2d Cir. 2018).

Where the courts clarifying instructions to the jury had the effect of eliminating a possible basis for the jury to convict, rather than removing an element of the charge, the indictment was not constructively amended. "It is well-established that a court may narrow[] the indictment's charges without adding any new offenses, and that where an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment." U.S. v. Celestin, 612 F.3d 14, 25 (1st Cir. 2010) (internal quotation marks and citation omitted).

Defendant was charged as both a principal and an accomplice in a drug conspiracy. Prior to trial the court granted a government motion to dismiss a codefendant from one of the counts, and defendant argued that this impermissibly amended the indictment. The court of appeals disagreed, finding that the dismissal of the codefendant did not broaden the charges against defendant, did not surprise her in preparing her case, and did not put defendant at risk for being tried twice for the same offense. When "the evidence does not add anything new or constitute a broadening of the charges, then minor discrepancies between the Government's charges and the facts proved at trial generally are permissible." U.S. v. Kellam, 568 F.3d 125, 133-35 (4th Cir. 2009), cert. denied, 2009 WL 3414784 (U.S. 2009) (internal quotation marks and citation omitted).

Where the jury instructions required a more demanding finding that the defendant "carried" a firearm, while the indictment only alleged that defendant "possessed" one, there was no constructive amendment. "[T]he instructions only narrowed the grounds for conviction and did not expand the bases on which McGilberry could be convicted. [A]n instruction which does not *broaden* the possible bases of conviction beyond what is embraced by the indictment does not constitute a constructive amendment, at least not a reversible one." U.S. v. McGilberry, C.A.5th, 2007, 480 F.3d 326, 332 (internal quotation marks and citation omitted).

The district court properly omitted inaccurate language from the jury instruction that was contained in the indictment. The allegation in the indictment was not relevant to the charge at issue, and did not broaden the charges against the defendant. U.S. v. Brooks, C.A.10th, 2006, 438 F.3d 1231, 1237.

Defendant's grand jury rights were not violated when the court granted the government's motion during trial to alter the indictment to narrow the time frame of the alleged conspiracy. The change narrowed, rather than broadened, the scope of the indictment, and therefore was permissible. U.S. v. Grenoble, C.A.6th, 2005, 413 F.3d 569, 577 & n.6.

An indictment used originally to charge defendants with wire fraud and conspiracy to violate the Arms Export Control Act and commit wire fraud, which became defective following a decision precluding use of intangible nonproperty rights as basis of fraud charges, could be cured by redaction of the material relating to the intangible nonproperty-rights fraud charge, and did not require a new presentation to the grand jury. U.S. v. Smith, C.A.2d, 1990, 918 F.2d 1032, certiorari denied 111 S.Ct. 1086, 498 U.S. 1125, 112 L.Ed.2d 1191.

Although subparagraph of mail-fraud-conspiracy count pertaining to violation of city's intangible rights did not charge an offense, that did not render entire indictment invalid, where count also alleged independent charges involving property deprivations. U.S. v. Ochs, C.A.1st, 1988, 842 F.2d 515.

U.S. v. Hughes, C.A.5th, 1985, 766 F.2d 875, 879 n.15, **citing Wright.**

U.S. v. Wellington, C.A.9th, 1985, 754 F.2d 1457, 1462, **quoting Wright,** certiorari denied 106 S.Ct. 593, 474 U.S. 1032, 88 L.Ed.2d 573.

U.S. v. Diaz, C.A.11th, 1982, 690 F.2d 1352, 1356, **citing Wright.**

In prosecution of pharmacist for allegedly conspiring with physician to violate drug laws, district court's omission of references to second pharmacist when indictment was read to jury at outset of trial was appropriate, since district court excised nothing but surplusage from the indictment in that defendant could have been found guilty of two-person conspiracy with physician despite indictment's charge of three-person conspiracy that included second pharmacist. U.S. v. Coward, C.A.4th, 1982, 669 F.2d 180, certiorari denied 102 S.Ct. 2014, 456 U.S. 946, 72 L.Ed.2d 470.

U.S. v. Conlon, C.A.D.C.1981, 661 F.2d 235, certiorari denied 102 S.Ct. 1015, 454 U.S. 1149, 71 L.Ed.2d 304.

U.S. v. Burns, C.A.10th, 1980, 624 F.2d 95, 104–105, **quoting Wright,** certiorari denied 101 S.Ct. 361, 449 U.S. 954, 66 L.Ed.2d 219.

  

U.S. v. Carter, C.A.5th, 1978, 566 F.2d 1265, 1272, **citing Wright,** certiorari denied 98 S.Ct. 3069, 436 U.S. 956, 57 L.Ed.2d 1121.

Indictment may not be amended; however, it is not amendment of indictment to withdraw portion of it from jury's consideration, usually because of prosecution's inability to prove that part, and to submit case to jury on what remains, provided the indictment still charges offense and same offense originally contemplated by indictment as returned. U.S. v. Prior, C.A.5th, 1977, 546 F.2d 1254.

Trial court's striking of one of the 11 overt acts alleged in count of indictment charging conspiracy to violate narcotics laws did not deprive defendant of his right to trial upon indictment of grand jury, in view of fact that the striking was merely a clearing out of surplusage and was trivial, overt act stricken was not an essential element of crime charged, and defendant was not prejudiced. U.S. v. Burnett, C.A.8th, 1976, 582 F.2d 436. U.S. v. Hall, C.A.10th, 1976, 536 F.2d 313, 319, **citing Wright,** certiorari denied 97 S.Ct. 313, 429 U.S. 919, 50 L.Ed.2d 285.

Where wording deleted from indictment charging defendant, a practicing podiatrist, with submitting false claims for services not actually rendered to patients who were beneficiaries of social security program, was surplusage, deletion was favorable to defendant, and defendant in fact consented to modifications of indictment, such modifications did not affect defendant's substantive rights so as to constitute prohibited amendment. U.S. v. Holt, C.A.4th, 1975, 529 F.2d 981, 983, **citing Wright.**

United States v. Dawson, C.A.9th, 1975, 516 F.2d 796, 801, **quoting Wright,** certiorari denied 96 S.Ct. 104, 423 U.S. 855, 46 L.Ed.2d 80.

U.S. v. Greene, C.A.7th, 1974, 497 F.2d 1068, certiorari denied 95 S.Ct. 829, 420 U.S. 909, 42 L.Ed.2d 839.

U.S. v. Musgrave, C.A.5th, 1973, 483 F.2d 327, 338, **citing Wright,** certiorari denied 94 S.Ct. 447, 414 U.S. 1023, 38 L.Ed.2d 315.

United States v. Griffin, C.A.10th, 1972, 463 F.2d 177, 178, **citing Wright,** certiorari denied 93 S.Ct. 344, 409 U.S. 988, 34 L.Ed.2d 254.

U.S. v. Auerbach, C.A.5th, 1970, 423 F.2d 676, **citing Wright,** certiorari denied 90 S.Ct. 2195, 399 U.S. 905, 26 L.Ed.2d 560.

The general rule against amending an indictment "does not prevent the government from seeking to narrow the charges in the indictment by dropping certain counts, proving a more limited conspiracy than the one charged or substituting a lesser included offense." U.S. v. Hawpetoss, E.D.Wisc.2005, 388 F.Supp.2d 952, 957.

23 **Miller case**

1985, 105 S.Ct. 1811, 471 U.S. 130, 85 L.Ed.2d 99.

24 **May narrow but not broaden**

105 S.Ct. at 1815–1817, 471 U.S. at 135–140.

As an example of an impermissible broadening, the Court cited Stirone v. U.S., 1960, 80 S.Ct. 270, 361 U.S. 212, 4 L.Ed.2d 252. As examples of permissible narrowing, the Court cited Ford v. U.S., 1927, 47 S.Ct. 531, 273 U.S. 593, 71 L.Ed. 793, and Salinger v. U.S., 1926, 47 S.Ct. 173, 272 U.S. 542, 71 L.Ed. 398.

25 **Explicitly rejected**

105 S.Ct. at 1815–1820, 471 U.S. at 135–145. The case that had been read too broadly is Ex parte Bain, 1887, 7 S.Ct. 781, 121 U.S. 1, 30 L.Ed. 849. The Court in Miller said: "Rejecting this aspect of Bain is hardly a radical step, however, given that in the years since Bain has largely ignored this element of the case. Moreover, in rejecting this proposition's continued validity, we do not limit Bain's more general proposition concerning the impermissibility of actual additions to the offense alleged in an indictment, a proposition we have repeatedly reaffirmed." 105 S.Ct. at 1819, 471 U.S. at 144.

26 **Other counts not affected**

U.S. v. Weinstein, C.A.11th, 1985, 762 F.2d 1522, 1539, **quoting Wright,** certiorari denied 106 S.Ct. 1519, 475 U.S. 1110, 89 L.Ed.2d 917.

Chow Bing Kew v. U.S., C.A.9th, 1957, 248 F.2d 466, certiorari denied 78 S.Ct. 259, 355 U.S. 889, 2 L.Ed.2d 188.

Carney v. U.S., C.A.9th, 1947, 163 F.2d 784, certiorari denied 68 S.Ct. 165, 332 U.S. 824, 92 L.Ed. 400.

27 **Other defendants**

Erroneous amendment permitting change of name of corporate defendant did not make indictment void as to other defendants. U.S. v. Consolidated Laundries Corp., C.A.2d, 1961, 291 F.2d 563.

28 **Original language restored**

Where the phrase "causing a licensed firearms dealer" was inadvertently stricken from indictment charging defendants with causing a licensed firearms dealer to knowingly make false entries in records which are required to be kept, and although it was not until after jury was sworn and two days of testimony were taken that government sought to amend indictment and reinstate omitted phrase, trial court properly permitted government to amend indictment and to reopen its case to offer testimony that defendants had in fact caused a licensed firearms dealer to make false entries in the required records. U.S. v. Horton, C.A.8th, 1977, 562 F.2d 529.

Heald v. U.S., C.A.10th, 1949, 177 F.2d 781.

29 **Surplusage not fatal**

"The inclusion in the indictment of the phrase 'commonly known as crack' is surplusage, which does not vitiate the indictment and may be ignored." U.S. v. Ramos, C.A.4th, 2006, 462 F.3d 329, 332, certiorari denied 27 S.Ct. 697, 166 L.Ed.2d 537.

"A court does not err in ignoring irrelevancies in or striking surplusage from an indictment." U.S. v. Grenoble, C.A.6th, 2005, 413 F.3d 569, 577 (footnote omitted).

"We have repeatedly held that language that describes elements beyond what is required under the statute is surplusage and need not be proved at trial." Bargas v. Burns, C.A.9th, 1999, 179 F.3d 1207, 1216, n.6, certiorari denied, 2000, 120 S.Ct. 1686, 529 U.S. 1073, 146 L.Ed.2d 493.

"When an indictment includes all of the essential elements of an offense, but also treats other superfluous matters, the superfluous allegations may be disregarded and the indictment is proper." U.S. v. Wells, C.A.8th, 1997, 127 F.3d 739, 743.

U.S. v. Carlson, C.A.1st, 1977, 561 F.2d 105, 108, **citing Wright,** certiorari denied 98 S.Ct. 529, 434 U.S. 973, 54 L.Ed.2d 464.

U.S. v. Hand, C.A.5th, 1974, 497 F.2d 929, 934, **citing Wright,** adopted by court en banc C.A.5th, 1975, 516 F.2d 472, 477, certiorari denied 96 S.Ct. 1427, 424 U.S. 953, 47 L.Ed.2d 359.

U.S. v. Marshall, C.A.D.C.1972, 471 F.2d 1051.

Where evidence did not fail to support charge that defendant failed to report for induction on July 7, 1970 because he appeared on July 8 on crutches and indictment charged him with failing to report for induction on July 7, 1970 and "continuing to the date of the filing of the indictment" on October 6, 1970, the quoted phrase was surplusage and gravamen of charge was that defendant willfully and knowingly failed to appear for induction on July 7, 1970. U.S. v. Archer, C.A.10th, 1972, 455 F.2d 193, certiorari denied 93 S.Ct. 135, 409 U.S. 856, 34 L.Ed.2d 100.

Where all matters set forth in indictment prior to the eighth paragraph thereof were descriptive and the eighth paragraph used language of the statute in charging that the accused and others confederated and conspired together, the descriptive material might be subject to a motion to strike, but the surplusage was not fatal to validity of indictment. U.S. v. Root, C.A.9th, 1966, 366 F.2d 377, 381, certiorari denied 87 S.Ct. 861, 386 U.S. 912, 17 L.Ed.2d 784.

Count charging that defendants conspired to defraud United States of and concerning its governmental functions in administration of immigration laws properly alleged crime of conspiracy and unnecessary words in count with respect to committing certain offenses against United States must be considered as surplusage. U.S. v. Vazquez, C.A.3d, 1963, 319 F.2d 381, 384.

Bary v. U.S., C.A.10th, 1961, 292 F.2d 53.

Where indictment charged defendant with conspiracy to commit mail fraud and conspiracy to conceal assets in contemplation of bankruptcy, but where indictment failed to adequately charge a violation of mail fraud statute, the presence of the surplusage did not render entire indictment defective, and defective portion of indictment should be merely ignored, with defendant answering to those charges which were well pleaded. U.S. v. Strauss, C.A.5th, 1960, 283 F.2d 155, 159.

**Cf.**

If surplusage in indictment is unproved by prosecution and has effect of misleading defendant as to actual offense against which he is defending, indictment is incurably invalidated. U.S. v. LeMay, D.Mont.1971, 330 F.Supp. 628.

30 **Striking surplusage not improper amendment**

Trial court's acceptance of codefendant's altered indictment, from which defendant's name had been deleted as mere surplusage, did not prejudicially mislead defendant, who was still able to prepare an adequate defense

and could not reasonably have been under the impression that charges against her had been dropped. U.S. v. Wylie, C.A.5th, 1990, 919 F.2d 969.

Where indictment originally charged that revenue officer received bribe with intent to affect his decision and that of internal revenue agent, deletion of reference to agent in count was not amendment to indictment and was, at most, only removal of surplusage on motion of defendant; thus, modification of indictment did not require resubmission to grand jury. U.S. v. Milestone, C.A.3d, 1980, 626 F.2d 264, certiorari denied 101 S.Ct. 319, 449 U.S. 920, 66 L.Ed.2d 148.

31 **Need not be submitted**

See the cases cited in note 22 of this section.

**See also**

"This court treat[s] the allegation of additional facts beyond those which comprise the elements of the crime as 'mere surplusage.'" When an indictment contains suplusage, the information "may be disregarded provided it neither broadens the indictment nor misleads the accused." United States v. Grant, 850 F.3d 209, 215 (5th Cir. 2017) (internal quotation marks and citations omitted), cert. denied, 138 S. Ct. 257, 199 L. Ed. 2d 166 (2017).

31.50 **Prosecutor's motion**

U.S. v. Miller, 471 U.S. 130, 144, 105 S. Ct. 1811, 1819, 85 L. Ed. 2d 99 (1985).

Provided that it did not broaden the indictment, the prosecutor may move to strike surplusage. U.S. v. Augustin, 661 F.3d 1105, 1116 (11th Cir. 2011), cert. denied, 132 S. Ct. 2447, 182 L. Ed. 2d 1072 (2012).

31.60 **Purpose of Rule 7(d)**

United States v. Berroa, 856 F.3d 141, 157 (1st Cir. 2017), cert. denied, 138 S. Ct. 488 (2017).

32 **Color or background**

"The purpose of a motion to strike under Fed. R. Crim. P. 7(d) is to protect a defendant against prejudicial or inflammatory allegations that are neither relevant nor material to the charges." U.S. v. Laurienti, 611 F.3d 530, 546-547 (9th Cir. 2010) (internal quotation marks and citation omitted).

U.S. v. Markham, 2013 WL 705113, *5 (N.D. Tex. 2013), **quoting Wright & Leipold**.

Terms in the indictment such as "tax haven," "phony," and "concoct" would not be stricken as surplusage. "While defendants doubtless wish that the government had employed less colorful and prejudicial language, these terms are relevant to the conspiracy of which they stand accused. Such relevant language may not be stricken, no matter how prejudicial it may be." U.S. v. Stein, S.D.N.Y.2006, 429 F.Supp.2d 633, 647 (internal quotation marks and footnote omitted).

"[W]hile Rule 7(c)(1) provides that an indictment 'need not contain a formal introduction,' it does not prohibit a background section. Moreover, the [Second Circuit] has affirmed that background paragraphs need not be stricken from an indictment where they are relevant to the crimes charged." U.S. v. Sattar, S.D.N.Y.2004, 314 F.Supp.2d 279, 320 (citations omitted).

U.S. v. Johnson, E.D.La.1999, 1999 WL 551332, **quoting Wright.**

U.S. v. Brighton Bldg. & Maintenance Co., N.D.Ill.1977, 435 F.Supp. 222, 231, **quoting Wright.**

33 **Motion to strike**

U.S. v. Hughes, C.A.5th, 1985, 766 F.2d 875, 879, **citing Wright.**

Dranow v. U.S., C.A.8th, 1962, 307 F.2d 545.

U.S. v. Goodman, C.A.5th, 1960, 285 F.2d 378, certiorari denied 81 S.Ct. 1651, 366 U.S. 930, 6 L.Ed.2d 389.

U.S. v. Markham, 2013 WL 705113, *5 (N.D. Tex. 2013), **citing Wright & Leipold**.

U.S. v. Watt, D.D.C.1995, 911 F.Supp. 538, 554, **citing Wright.**

U.S. v. Rezaq, D.D.C.1995, 908 F.Supp. 6, 8, **citing Wright.**

U.S. v. Ahmad, M.D.Pa.1971, 329 F.Supp. 292.

State v. Albano, 1984, 688 P.2d 1152, 1156, 67 Haw. 398, **citing Wright.**

34 **Discretion of court**

U.S. v. Morales, 813 F.3d 1058, 1066 (8th Cir. 2016).

"We review a district court's decision on a motion to strike surplusage from an indictment for an abuse of discretion." U.S. v. Augustin, 661 F.3d 1105, 1115 (11th Cir. 2011), cert. denied, 132 S. Ct. 2447, 182 L. Ed. 2d 1072 (2012).

"Denial of a motion to strike surplusage is reviewed for an abuse of discretion." U.S. v. Laurienti, 611 F.3d 530, 546 (9th Cir. 2010) (internal quotation marks and citation omitted).

U.S. v. Schuler, C.A.10th, 2006, 458 F.3d 1148, 1153.

Courts of appeal review a district judge's denial of a motion to strike surplusage for abuse of discretion. U.S. v. Hedgepeth, C.A.3d, 2006, 434 F.3d 609, 611, certiorari denied 126 S.Ct. 2055, 164 L.Ed.2d 807, **citing Wright.**

U.S. v. Rezaq, C.A.D.C.1998, 134 F.3d 1121, 1134, **quoting Wright,** certiorari denied 119 S.Ct. 90, 525 U.S. 834, 142 L.Ed.2d 71

Dranow v. U.S., C.A.8th, 1962, 307 F.2d 545, 558.

U.S. v. Courtney, C.A.2d, 1958, 257 F.2d 944, certiorari denied 79 S.Ct. 316, 358 U.S. 929, 3 L.Ed.2d 303.

U.S. v. Montgomery, 10 F. Supp. 3d 801 (W.D. Tenn. 2014).

U.S. v. Toliver, W.D.Va.1997, 972 F.Supp. 1030, 1042, **citing Wright.**

U.S. v. Bateman, D.N.H.1992, 805 F.Supp. 1045.

U.S. v. Gressett, D.Kan.1991, 773 F.Supp. 270.

U.S. v. Brighton Bldg. & Maintenance Co., N.D.Ill.1977, 435 F.Supp. 222.

**Abuse of discretion**

U.S. v. Oakar, C.A.D.C.1997, 111 F.3d 146, 157.

Although it is discretionary with the court whether to strike surplusage, the appellate court can reverse for abuse of that discretion. U.S. v. Poore, C.A.4th, 1979, 594 F.2d 39.

35 **Reserve judgment**

Because allegations should not be stricken as surplusage unless it is clear that they are not relevant and are inflammatory and prejudicial, it is proper to reserve ruling on a motion to strike until the trial court has heard evidence that will establish the relevance of the allegedly surplus language. U.S. v. Awan, C.A.11th, 1992, 966 F.2d 1415, 1426, **citing Wright.**

U.S. v. Markham, 2013 WL 705113, *3 n.2 (N.D. Tex. 2013), **quoting Wright & Leipold.**

U.S. v. Sattar, S.D.N.Y.2004, 314 F.Supp.2d 279, 320–321.

U.S. v. Toliver, W.D.Va.1997, 972 F.Supp. 1030, 1042.

U.S. v. McVeigh, D.Colo.1996, 940 F.Supp. 1571, 1584.

35.50 **Not to add**

Defendant asked the court to dismiss the superseding indictment pursuant to Rule 7(d), arguing that when the government deleted the names of co-defendants in the superseding indictment, it made defendant appear more culpable than she actually was. The court of appeals rejected the claim, noting: "Rule 7(d) is not the right vehicle for [defendant] to challenge the superseding indictment because Rule 7(d) only authorizes the striking of surplusage from an indictment, but does not authorize a district court to include additional language. Rule 7(d)'s purpose is to limit the inclusion of irrelevant or inflammatory facts, not to ensure a complete factual account of the alleged crime." U.S. v. Morales, 813 F.3d 1058, 1066 (8th Cir. 2016).

36 **Essential elements**

U.S. v. Oakar, C.A.D.C.1997, 111 F.3d 146, 157, **citing Wright.**

In a tax-evasion case, the allegation that defendant failed to pay income taxes was an essential element of the charge and could not be stricken. U.S. v. Collins, C.A.10th, 1990, 920 F.2d 619, 631, **citing Wright,** certiorari denied 111 S.Ct. 2022, 500 U.S. 920, 114 L.Ed.2d 108.

U.S. v. Behenna, C.A.4th, 1977, 552 F.2d 573, 576, **quoting Wright.**

U.S. v. Root, C.A.9th, 1966, 366 F.2d 377, 381, certiorari denied 87 S.Ct. 861, 386 U.S. 912, 17 L.Ed.2d 784.

Defendant charged with knowing possession of a firearm by convicted felon was not entitled to have court strike as surplusage reference in indictment to specific crime of which he was convicted. U.S. v. Ailsworth, D.Kan.1994, 873 F.Supp. 1450.

"A motion to strike surplusage should be granted only if the disputed allegations are clearly not relevant to the charge and are inflammatory and prejudicial." U.S. v. Chaverra-Cardona, N.D.Ill.1987, 667 F.Supp. 609, 611, **citing Wright.**

Electrical contractors, charged with bid rigging, were not entitled to order directing government to strike from indictment, as irrelevant and prejudicial, statements relating to size of the contractors and statements relating to amount of sales of the various defendant contractors, which matter allegedly was inserted to show that interstate commerce was affected. U.S. v. Fischbach and Moore, Inc., W.D.Pa.1983, 576 F.Supp. 1384.

Allegedly prejudicial surplusage would not be stricken from indictment, where words complained of appeared to be either relevant, or if irrelevant, then innocuous, and, with respect to two instances in which feared prejudice was specified, the repetitious description of "false, fictitious and fraudulent" invoices or documentation and allegedly inflammatory description of transactions as "sham[s]," government's argument

that such descriptions were not only relevant, but were, in fact the gist of the case, was entirely convincing. U.S. v. Sciandra, S.D.N.Y.1982, 529 F.Supp. 320.

Allegations referring to "skimming" and "looting," included in an indictment charging defendants with participating in a pattern of racketeering activity, might be prejudicial to defendants, but could not be stricken as surplusage in view of the relevance of proof admitted under these allegations to the underlying charge. U.S. v. DePalma, S.D.N.Y.1978, 461 F.Supp. 778, 797, **citing Wright.**

U.S. v. Rosenson, E.D.La.1968, 291 F.Supp. 867, affirmed C.A.5th, 1969, 417 F.2d 629, certiorari denied 90 S.Ct. 992, 397 U.S. 962, 25 L.Ed.2d 253.

The language in the indictment describing the type of gun was surplusage rather than an element of the offense. U.S. v. Hartz, 458 F.3d 1011, 1021 (9th Cir. 2006).

37 **Inflammatory and prejudicial**

"When allegedly prejudicial surplusage is shown to the jury and then challenged on appeal, this court will not invalidate a conviction unless it is convinced that the allegedly excessive language was irrelevant, inflammatory and prejudicial." United States v. Grant, 850 F.3d 209, 216 (5th Cir. 2017) (internal quotation marks and citations omitted), cert. denied, 138 S. Ct. 257, 199 L. Ed. 2d 166 (2017).

A motion to strike surplusage "should be granted only where it is clear [that] the allegations contained therein are not relevant to the charge made or contain inflammatory and prejudicial matter." U.S. v. Morales, 813 F.3d 1058, 1066 (8th Cir. 2016) (internal quotation marks and citations omitted).

U.S. v. Schuler, C.A.10th, 2006, 458 F.3d 1148, 1153.

Defendant was charged under a statute that refers to "50 grams" of methamphetamines and "500 grams" of a mixture containing methamphetamine. Defendant moved to strike as surplusage a reference in the indictment to 2,609 grams of mixture containing 1,519 grams of the drug, arguing that reference to a number higher than the statutory level was irrelevant and prejudicial. The district court denied the motion and the court of appeals affirmed. The quantity of drugs was relevant to showing defendant's intent to distribute, and was neither inflammatory nor prejudicial. U.S. v. Michel-Galaviz, C.A.8th, 2005, 415 F.3d 946.

In a prosecution for air piracy, allegations of defendant's shooting passengers was relevant to establishing that defendant seized and maintained control over the aircraft through force and intimidation; the allegations were not surplusage. U.S. v. Rezaq, C.A.D.C.1998, 134 F.3d 1121, 1134, **quoting Wright,** certiorari denied 119 S.Ct. 90, 525 U.S. 834, 142 L.Ed.2d 71.

U.S. v. Scarpa, C.A.2d, 1990, 913 F.2d 993, 1013.

Alleged surplusage in indictment charging mail and wire fraud in connection with sales in precious metals market, particularly with respect to use of words "numerous," "among other things," "investors," and "guarantee," was not shown to have been inflammatory or prejudicial. U.S. v. Fahey, C.A.1st 1985, 769 F.2d 829.

U.S. v. Kemper, C.A.6th, 1974, 503 F.2d 327, 329, **citing Wright,** certiorari denied 95 S.Ct. 810, 419 U.S. 1124, 42 L.Ed.2d 824.

U.S. v. Bullock, C.A.5th, 1971, 451 F.2d 884, 888, **citing Wright.**

United States v. Apodaca, 2017 WL 3575655, at 21 (D.D.C. 2017), **quoting Wright & Leipold.**

U.S. v. Montgomery, 10 F. Supp. 3d 801 (W.D. Tenn. 2014), **quoting Wright & Leipold.**

U.S. v. Pleasant, E.D.Va.2000, 125 F.Supp.2d 173, 184, **citing Wright.**

In an indictment charging a racketeering scheme to make money and maintain control of commercial garbage customer paragraphs relating to La Cosa Nostra were not surplusage. The interrelationship between the criminal organization and La Cosa Nostra represented the milieu within which the fraudulent scheme and the concomitant mail-fraud and money-laundering counts of the indictment developed. U.S. v. Hickey, E.D.N.Y.1998, 16 F.Supp.2d 223, 234–236, **citing Wright.**

In prosecution under Racketeer Influenced and Corrupt Organizations (RICO) statute, references in the indictment to "Monya's Brigada" and defendant's alleged alias would not be stricken a surplusage, where Government asserted that the term "Monya's Brigada" was relevant because it identified the RICO "enterprise" in which the defendant was alleged to have been involved, and that alias would be used in the Government's proof at trial. U.S. v. Elson, S.D.N.Y.1997, 968 F.Supp. 900.

References in indictment concerning existence of prior weapons charge, defendant's presence in jail for such charge, and codefendant's statement that he "shoots people" were not "surplusage" and thus, defendant's motion to strike surplusage would be denied; language defendant sought to strike from indictment was

  

relevant to overall scheme charged in indictment, government would attempt to prove matters contained in the challenged language at trial, and jury instruction stating that indictment was not evidence and afforded no inference of guilt protected against improper reliance by jury on indictment. U.S. v. Giampa, D.N.J.1995, 904 F.Supp. 235, 271–272.

Phrases "crack" and "crack cocaine" were not surplusage in an indictment charging drug offenses. The terminology was relevant and would potentially aid the jury in understanding the crimes charged and the evidence as it would be presented. U.S. v. Smith, D.Kan.1996, 941 F.Supp. 985.

Use of words "by various means, including, among other things" in the means portion of defendant's indictment for federal tax evasion did not constitute prejudicial surplusage and would not be stricken, as the words did not infer that defendant was accused of crimes not charged in the indictment. U.S. v. Washington, S.D.N.Y.1996, 947 F.Supp. 87.

U.S. v. Jackson, D.Kan.1994, 850 F.Supp. 1481, 1506, **citing Wright.**

Fact that references, in indictment charging conspiracy to make extortionate extensions of credit, to organized crime family, to its structure, and that one defendant was member and other defendant was associate of family did not form basis for substantive, predicate, or overt act in furtherance of alleged conspiracies did not compel striking of references from indictment. U.S. v. Desantis, E.D.N.Y.1992, 802 F.Supp. 794, 799, **quoting Wright.**

U.S. v. Romero, S.D.N.Y.1992, 788 F.Supp. 798, 800, **citing Wright.**

"Bribes" and "bribery" as used in superseding indictment to connote quid pro quo established between defendants, trust fund, portfolio managers for mutual fund, and research analyst were not surplusage in indictment charging racketeering, racketeering conspiracy, and securities fraud conspiracy. U.S. v. Eisenberg, D.N.J.1991, 773 F.Supp. 662.

In prosecution for bank fraud and conspiracy to defraud United States in which government contended it would demonstrate at trial that defendants accomplished their fraud through concealment of their transactions, court would not strike from indictment as surplusage words "concealment," "concealed," and "concealing." U.S. v. Gressett, D.Kan.1991, 773 F.Supp. 270.

U.S. v. Andrews, N.D.Ill.1990, 749 F.Supp. 1517, 1518–1519, **citing Wright.**

Defendants charged with Racketeer Influenced and Corrupt Organizations Act (RICO) violations were not entitled to deletion of reference in preamble of indictment to LaCosa Nostra, Mafia and Genovese crime family; evidence that defendant was Capo in that family would be relevant to show structure of criminal enterprise alleged in indictment. U.S. v. Gatto, D.N.J.1990, 746 F.Supp. 432, 455–456.

Use of term "hackers" in indictment charging scheme to steal telephone company's "911" computer text file was not unduly prejudicial where hackers were defined, consistent with dictionary definition, as "individuals involved with the unauthorized access of computer systems by various means." U.S. v. Riggs, N.D.Ill.1990, 739 F.Supp. 414.

There was nothing irrelevant or unduly prejudicial about indictment's excessive use of terms, "racketeer" and "extortionate collection of credit," that were lifted directly from face of various statutes under which defendants were indicted, and, thus, defendants were not entitled to striking of those terms from indictment. U.S. v. Giovanelli, S.D.N.Y.1989, 747 F.Supp. 875.

References, in indictment arising out of Iran-contra affair, to defendant's original codefendants and to press reports about shipments to Iran would not be stricken as irrelevant descriptive recitals; references to codefendants were relevant to obstruction of Congress and false statements charges, and press report references were necessary to understanding of background of congressional inquiries into activities of defendant with respect thereto. U.S. v. Poindexter, D.D.C.1989, 725 F.Supp. 13.

References, in RICO conspiracy indictment, describing "crime family" and roles played by "boss," "underboss," "capos" and "crews" of that organization, would not be stricken as unfairly prejudicial surplusage because RICO enterprise was said to be organized crime family and, to prove its case, Government could properly present evidence of identity of enterprise and roles within it played by defendants. U.S. v. Santoro, E.D.N.Y.1986, 647 F.Supp. 153, reversed C.A.2d, 1988, 845 F.2d 1151.

References to "laundering" of money, to narcotics, and to defendants' wiring of money to foreign country, did not constitute improper surplusage and were not prejudicial in indictment charging defendants with conspiracy and substantive violations in connection with alleged scheme to evade federal statutes governing reporting of certain large currency transactions to Internal Revenue Service, even though laundering money

is not crime, and even though defendants were not charged with narcotics offenses or with violating requirements governing reporting of foreign transactions, where laundering was defined in indictment and defendants were not charged with crime of laundering, where irrelevant references to narcotics would be excluded from trial, and where wiring of money to foreign country was relevant to offenses charged. U.S. v. Richter, N.D.Ill.1985, 610 F.Supp. 480.

That an allegation of an indictment may be false does not render it surplusage so as to permit it to be stricken before trial. U.S. v. Johnson, M.D.Tenn.1984, 585 F.Supp. 80.

Inclusion of clearly unnecessary language in an indictment that could serve only to inflame the jury, confuse the issues, and blur the elements necessary for conviction under the separate counts involved surely could be prejudicial surplusage; however, if language in the indictment is information that government hopes to properly prove at trial, it cannot be considered surplusage no matter how prejudicial it may be, provided, it is legally relevant. U.S. v. Climatemp, Inc., N.D.Ill.1979, 482 F.Supp. 376.

Where, if the prescriptions written by defendants were massive amounts, it was some indication of how the prescriptions were issued for purposes other than legitimate medical purposes and where, if elavil was routinely issued in connection with those prescriptions, it thus was part and parcel of illegal prescriptions, any prejudice to defendants from the use of the terms "massive amount" and "elavil" in the indictment was outweighed by the relevance which those terms played in the government's case, so that language would not be stricken from the indictment. U.S. v. Krasnoff, S.D.N.Y.1979, 480 F.Supp. 723.

"[T]he determinative question is not the extent of the potential prejudice, but rather the relevance of the allegation to the crime charged in the Indictment." U.S. v. DePalma, S.D.N.Y.1978, 461 F.Supp. 778, 797 n.26.

Introduction that accompanied indictment charging defendants with conspiring to use a facility in interstate commerce, that is, a telephone, with intent to carry on an unlawful activity, i.e., bribery, would not be stricken as surplusage where it served merely to clarify remainder of indictment and in no way contained any matter inflammatory or prejudicial to defendants. U.S. v. Archer, S.D.N.Y.1972, 355 F.Supp. 981, judgment reversed C.A.2d, 1973, 486 F.2d 670.

"But if evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language, it may not be stricken." U.S. v. Chas. Pfizer & Co., S.D.N.Y.1963, 217 F.Supp. 199, 201.

38 **Conjunctive test**

The motion to remove surplusage was properly denied where the information, even if prejudicial, was relevant to defendant's motive and thus was not "unfair." United States v. Berroa, 856 F.3d 141, 157 (1st Cir. 2017), cert. denied, 138 S. Ct. 488 (2017).

Even if the inclusion of the word "unlawful" in an allegation about a scheme to defraud was prejudicial, the district properly denied the motion to strike the word as surplusage where it was relevant to the crime alleged. U.S. v. Laurienti, 611 F.3d 530, 547 (9th Cir. 2010).

"Logic demands the conjunctive standard: information that is prejudicial, yet relevant to the indictment, must be included for any future conviction to stand and information that is irrelevant need not be struck if there is no evidence that the defendant was prejudiced by its inclusion." U.S. v. Hedgepeth, C.A.3d, 2006, 434 F.3d 609, 612–613, certiorari denied 126 S.Ct. 2055, 164 L.Ed.2d 807, **citing Wright.** On the facts, since the indictment was not shown or read to the jury, there could be no prejudice, from the alleged surplusage.

"A motion to strike surplusage will be granted only when the challenged language is both (1) irrelevant to the crime charged and (2) inflammatory and prejudicial." U.S. v. Stein, S.D.N.Y.2006, 429 F.Supp.2d 633, 646.

"[T]here are two distinct prerequisites for striking superfluous language in an indictment: (1) irrelevance and (2) prejudice to the defendant." U.S. v. Quinn, D.D.C.2005, 401 F.Supp.2d 80, 97.

Motions to strike surplusage should only be granted if the language in question is "(1) not relevant to the charges; (2) inflammatory; and (3) prejudicial. … [A] defendant seeking to strike surplusage must satisfy a conjunctive test." U.S. v. Cooper, W.D.W.Va.2005, 384 F.Supp.2d 958, 959, **citing Wright** (internal quotation marks and further citations omitted).

39 **Necessary to pleading**

U.S. v. Cooper, W.D.W.Va.2005, 384 F.Supp.2d 958, 960.

40 **Exacting standard**

U.S. v. Huppert, C.A.11th, 1990, 917 F.2d 507, 511, **citing Wright.**

Where the defendant in a RICO case often used a racist term in the context of his business dealings, such language would not be stricken as surplus age because it was relevant to the charge against the defendant.

The standard for striking such language is so "strict" and "exacting" that such motions are "rarely granted."
U.S. v. Edwards, M.D.La.1999, 72 F.Supp.2d 664, **citing Wright.**
U.S. v. Watt, D.D.C.1995, 911 F.Supp. 538, 554, **quoting Wright.**
U.S. v. Rezaq, D.D.C.1995, 908 F.Supp. 6, 8, **citing Wright.**
U.S. v. Jimenez, S.D.N.Y.1993, 824 F.Supp. 351, 369, **citing Wright.**
U.S. v. Poindexter, D.D.C.1989, 725 F.Supp. 13, 35, **citing Wright.**
U.S. v. Chaverra-Cardona, N.D.Ill.1987, 667 F.Supp. 609, 611, **quoting Wright.**
U.S. v. Wecker, D.Del.1985, 620 F.Supp. 1002, 1006.
U.S. v. Gambale, D.Mass.1985, 610 F.Supp. 1515, 1543, **citing Wright.**
U.S. v. Fischbach and Moore, Inc., W.D.Pa.1983, 576 F.Supp. 1384, 1398, **quoting Wright.**
U.S. v. DePalma, S.D.N.Y.1978, 461 F.Supp. 778, 797, **citing Wright.**

41 **Motions rarely granted**

"Motions to strike surplusage are rarely granted." U.S. v. Hedgepeth, C.A.3d, 2006, 434 F.3d 609, 611, certiorari denied 126 S.Ct. 2055, 164 L.Ed.2d 807.
"[The standard under Rule 7(d) has been strictly construed against striking surplusage." U.S. v. Jordan, C.A.D.C.1980, 626 F.2d 928, 930 n.1.
U.S. v. Prejean, E.D.La.2006, 429 F.Supp.2d 783, 796.
"[I]t has long been the policy of courts within the Southern District to refrain from tampering with indictments." U.S. v. Stein, S.D.N.Y.2006, 429 F.Supp.2d 633, 646 (internal quotation marks and footnote with citations omitted).

42 **Aliases**

In view of references to particular defendant in tape-recorded conversations, and in view of name under which he was known to codefendant and name which he had tattooed on his leg, there was no error in use of alias in indictment. U.S. v. Taylor, C.A.5th, 1977, 554 F.2d 200.
Where aliases were extensively used in intercepted conversations and there was ample testimony to identify defendants with the various aliases, it was not error to deny motion to strike the aliases, as against contention that use thereof in the indictment invaded the jury's province of identification of the voices on tape recordings of intercepted conversations. U.S. v. Alfonso, C.A.5th, 1977, 552 F.2d 605, certiorari denied 98 S.Ct. 179, 434 U.S. 857, 54 L.Ed.2d 129.
In light of testimony by witnesses and by defendant himself that he was referred to by others as "Danny," the use of nickname in indictment further identified defendant, who sought to strike such word therefrom, and did not constitute prejudicial error even if nickname were considered an alias. U.S. v. Escobedo, C.A.7th, 1970, 430 F.2d 14, certiorari denied 91 S.Ct. 1632, 402 U.S. 951, 29 L.Ed.2d 122.
Listing of number of aliases consisting of combinations of name of defendant plus one nickname in lieu of his given name, in indictment, with complete absence of proof of any use of aliases, while not to be commended, was not prejudicial error in view of admonishments to jury that no inference adverse to defendant was to be drawn therefrom. Doelle v. U.S., C.A.5th, 1962, 309 F.2d 396.
A motion to have an alias removed from the superseding indictment was denied; defendant "cites no authority for this request." U.S. v. Howard, N.D.N.Y.2005, 400 F.Supp.2d 457, 483.
U.S. v. Wright, D.Kan.2001, 2001 WL 523394 *10, **citing Wright.**
U.S. v. Elson, S.D.N.Y.1997, 968 F.Supp. 900, 909.
U.S. v. Murgas, N.D.N.Y.1997, 967 F.Supp. 695, 710.
U.S. v. Ruggiero, S.D.N.Y.1993, 824 F.Supp. 379, 398, **citing Wright,** affirmed C.A.2d, 1995, 44 F.3d 1102.
U.S. v. Gatto, D.N.J.1990, 746 F.Supp. 432, 457.
Failure of defendant's lawyer to move to strike defendant's nickname from the indictment did not show ineffective assistance of counsel, since defendants are usually unsuccessful in attempts to have aliases expunged, and counsel are not required to make baseless arguments. Murzyn v. U.S., N.D.Ind.1984, 578 F.Supp. 254, 257, **quoting Wright.**
In prosecution for conspiracy to evade taxes, conspiracy to evade payment of taxes and other alleged offenses, aliases included in indictment were relevant, and thus, defendants were not entitled to have them stricken as surplusage, where it was alleged in the indictment that, as part of scheme to evade payment of taxes, various bank accounts were opened in fictitious names. U.S. v. Ostrer, S.D.N.Y.1979, 481 F.Supp. 407.

  

Defendant identified in indictment by two different names with the symbol "a/k/a" before the second name was not entitled to have that designation stricken from caption on ground that it produced a prejudicial effect against him. U.S. v. Machi, E.D.Wis.1971, 324 F.Supp. 153.

Where relevant, use of alias in indictment is permissible, and pretrial motion to strike should not be granted; if, however, United States fails to offer proof relating to alias, motion may be renewed, alias struck, and appropriate precautionary instruction given to jury. U.S. v. Addonizio, D.N.J.1970, 313 F.Supp. 486, affirmed C.A.3d, 1971, 451 F.2d 49, certiorari denied 92 S.Ct. 949, 405 U.S. 936, 30 L.Ed.2d 812.

Defendants' request that aliases pertaining to them be struck from indictment was denied where government stated that it would prove use of those aliases and show their use in context of indictment. U.S. v. Johnson, N.D.Ill.1969, 298 F.Supp. 58.

Pretrial motion, in conspiracy prosecution, to have defendants' asserted aliases stricken from caption and body of indictment on theory that they would put defendants in opprobrious light was premature but if government proved that aliases were integral part of conspiracy, defendants had no just cause for complaint. U.S. v. Melekh, N.D.Ill.1961, 193 F.Supp. 586.

Indictment should not be dismissed because of use by government of aliases therein in referring to defendant, if there is no indication before court on motion to dismiss indictment that the aliases set forth in indictment will not be proved at trial of the case. U.S. v. Valenti, W.D.Pa.1947, 74 F.Supp. 718.

**Aliases stricken**

Government failed to show that alleged aliases were relevant, and thus, defendant was entitled to have three aliases stricken from caption and body of indictment that charged him with conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute; government had failed to show that aliases were used in connection with acts charged in indictment or to show that aliases were so materially different from defendant's real name as to support reasonable inference that defendant was trying to conceal his identity. U.S. v. Ramos, D.Kan.1993, 839 F.Supp. 781.

Defendant's motion to strike references in indictment to his "aliases" would be granted, as government apparently acquiesced in the request by interposing no objection to the granting of the motion. U.S. v. Curry, N.D.Ill.1967, 278 F.Supp. 508.

Where defendant seemed to be identified by name under which he was indicted, the defendant's motion to strike out as surplusage the list of aliases should be granted. U.S. v. Helwig, W.D.Pa.1947, 7 F.R.D. 187.

**See also**

"Where the use of an alias is important to the government's case, its submission to the jury as part of the indictment is permissible. But this practice has been discouraged where the alias is irrelevant." U.S. v. McFarlane, C.A.1st, 2007, 491 F.3d 53, 61 (citation omitted). On the facts before it the court of appeals found that the inclusion of aliases in the indictment that was submitted to the trial jury, even assuming it was erroneous, did not constitute plain error because there was no reasonable probability that it affected defendant's substantial rights.

Only when proof of an alias is relevant to identifying defendant should a court allow its inclusion in indictment and its subsequent introduction at trial. U.S. v. Wilkerson, C.A.6th, 1972, 456 F.2d 57, certiorari denied 92 S.Ct. 2506, 2507, 408 U.S. 926, 33 L.Ed.2d 337. In this case the failure to strike the aliases was held to be harmless error.

Efforts to dismiss the indictment for the allegedly prejudicial use of aliases are discussed in § 123, at footnote 17.50.

43 **Surplusage stricken**

Because of uncertainty over the status of the Federal Sentencing Guidelines, the prosecutor included in the indictment allegations that related only to sentencing. After the Supreme Court clarified the Guidelines' status, defendant argued that it was prejudicial for the sentencing allegations to be set forth in the indictment. Viewing the allegations as potential surplusage, the court of appeals rejected the argument, finding that the jury would have been entitled to hear the information regardless, and thus defendant was not prejudiced. U.S. v. Sherman, C.A.8th, 2006, 440 F.3d 982, 986.

Reference in the indictment to particular events that "included, but were not limited to, the following" should have been treated as surplusage. U.S. v. Freeman, C.A.5th, 1980, 619 F.2d 1112, certiorari denied 101 S.Ct. 1348, 450 U.S. 910, 67 L.Ed.2d 334.

District court abused its discretion in refusing to strike the nature of defendant's prior felony conviction from an indictment for possession of a firearm by a previously convicted felon, where defendant had stipulated to

  

the prior conviction so that it was no longer a necessary element of the offense, and jury would be prejudiced by hearing the nature of the prior offense, which would not otherwise be admissible. U.S. v. Poore, C.A.4th, 1979, 594 F.2d 39.

Where indictment charged conspiracy to commit "following and other offenses" and commission of "following and other overt acts" and defendants sought bill of particulars, court's striking words "and other" in each instance was not prohibited amendment of indictment but merely permissible striking of surplusage. Marsh v. U.S., C.A.5th, 1965, 344 F.2d 317, 320–322.

Two statements in the indictment regarding Iran's support for international terrorism and the threat this poses to the United States were stricken as surplusage where defendants were accused of trading with a country subject to an embargo without government approval. Removal of the language did not impair the government's case, but significantly lessened the risk of unfair prejudice. U.S. v. Quinn, D.D.C.2005, 401 F.Supp.2d 80, 98–100.

The preamble to the indictment would be stricken as surplusage. Defendant was accused of violating the Clean Water Act, and the preamble contained a discussion of defendant's prior difficult dealings with environmental and health agencies. The district court found this information unnecessary and potentially prejudicial. U.S. v. Cooper, W.D.W.Va.2005, 384 F.Supp.2d 958, 959–961.

U.S. v. El-Silimy, D.Me.2005, 228 F.R.D. 52, **citing Wright.**

Terms "among other things," "among others," "among," "at least," "including," "included, but not limited to," "in part," and "various" could indicate to jury that defendant was charged with offenses and conduct in addition to those actually listed in indictment, and thus, terms would be stricken from indictment. U.S. v. Poindexter, D.D.C.1989, 725 F.Supp. 13.

There is no warrant in federal criminal procedure for including in indictment substantive charges against individual who is not defendant in case to be tried. U.S. v. Poindexter, D.D.C.1989, 719 F.Supp. 6.

Language of indictment, charging defendant with various offenses designed to impede criminal proceedings against him, which set forth the nature of those criminal proceedings, such as by reference to defendant's conspiracy to export 20 tons of plastic explosives and defendant's conspiracy to murder a member of the Libyan Revolutionary Council who had defected to Egypt, was surplusage and would be stricken, as was language alleging that defendant, at the time of the offenses in question, was incarcerated in lieu of $20,000,000 bail and while serving a 15-year sentence. U.S. v. Wilson, S.D.N.Y.1983, 565 F.Supp. 1416.

In prosecution for violations of the Racketeer Influenced and Corrupt Organizations Act, and mail fraud, defendants were entitled to motion to strike one paragraph from indictment as that paragraph, as surplusage, could have been potentially prejudicial to defendants, the paragraph overstated both scope and result of alleged fraud, and, by so doing, might possibly have inflamed sentiments of jury. U.S. v. Lavin, N.D.Ill.1981, 504 F.Supp. 1356.

Words employed in indictment, namely, "infiltrate," "burglary," "cover up," "covertly," "bogus," "illegally," and "operatives," were subject to being stricken from indictment as prejudicial and unnecessarily loaded. U.S. v. Hubbard, D.D.C.1979, 474 F.Supp. 64.

The use of such terms in an indictment as "at least" and "among other things" served no useful purpose and suggested to the jury that defendant was accused of crimes not charged in the indictment, and those terms were stricken as surplusage. U.S. v. Brighton Bldg. & Maintenance Co., N.D.Ill.1977, 435 F.Supp. 222, 230–231.

Reference to a state code of ethics in an indictment of the state's governor for mail fraud had a prejudicial potential for confusing jurors as to the law and was stricken as surplusage. U.S. v. Mandel, D.Md.1976, 415 F.Supp. 997.

In indictment charging securities fraud, the inclusion of charge of unlawful pledge of stock was not only surplusage but was also highly prejudicial so that allegations pertaining to pledge transaction would be stricken since the unlawful pledge of the stock did not constitute any fraud upon purchasers of other corporation's stock. U.S. v. Saporta, E.D.N.Y.1967, 270 F.Supp. 183.

**See also**

An element of defendant's crime was that he have previously been convicted of a felony, and the indictment listed twelve prior felony convictions. After the defendant stipulated to the prior convictions, the court removed the list before providing the indictment to the jury. The district court refused a request, however, to change the indictment reference from prior "convictions" to the singular "conviction." The court of appeals

  

found that this was error, concluding that the district court should have struck the prejudicial information from the indictment. On the facts, however, the court found that the error was harmless. United States v. Green, 873 F.3d 846, 856-57 (11th Cir. 2017), cert. denied, 138 S. Ct. 2620, 201 L. Ed. 2d 1031 (2018).

**Cf.**

Rule 7(d) applies to surplusage in an indictment, and does not provide a basis for striking language from motions and briefs filed by the government. U.S. v. Molesworth, D.Idaho 2005, 383 F.Supp.2d 1251, 1255.

44 **Specific changes**

Physical deletion of irrelevant allegations in indictment, accomplished by making photostatic copy of indictment with deleted portion covered, was improper; preferable course was to prepare retyped "clean" version of indictment, omitting language to be disregarded without any indication of its omission; however, such procedure did not constitute prejudicial error, where trial judge advised jury that he was physically deleting portion of indictment and only 23 words were actually deleted. U.S. v. Wilner, C.A.2d, 1975, 523 F.2d 68.

See also U.S. v. Cirami, C.A.2d, 1975, 510 F.2d 69, certiorari denied 95 S.Ct. 1952, 421 U.S. 964, 44 L.Ed.2d 451.

Haggard v. U.S., C.A.8th, 1966, 369 F.2d 968, 971 n.1, certiorari denied 87 S.Ct. 1379, 386 U.S. 1023, 18 L.Ed.2d 461.

Entry of nolle prosequi as to counts left prosecution just as though no such counts had ever been inserted in the indictment. U.S. v. Sperling, S.D.N.Y.1982, 530 F.Supp. 672, affirmed C.A.2d, 692 F.2d 223, certiorari denied 103 S.Ct. 3111, 462 U.S. 1131, 77 L.Ed.2d 1366.

45 **May not be vindictive**

U.S. v. Barner, C.A.11th, 2006, 441 F.3d 1310, 1315. In Barner, the prosecutor had obtained a fifth superseding indictment that added new counts after the defendant had withdrawn his guilty pleas and successfully challenged some counts in the earlier indictments. The Eleventh Circuit concluded that while the superseding indictment did not create a presumption of vindictiveness, a remand was required to determine if the prosecutor acted with actual vindictiveness.

"A prosecutor may seek a superseding indictment at any time prior to a trial on the merits, … so long as the purpose is not to harass the defendant. As a general rule, if a prosecutor has probable cause to believe that a defendant committed a crime, the courts have no authority to interfere with a prosecutor's decision to prosecute. A superseding indictment adding new charges that increases the potential penalty would violate due process if the prosecutor obtained the new charges out of vindictiveness. In this context, vindictiveness means the desire to punish a person for exercising his rights. We have explained that a prosecutor's charging decision does not impose an improper 'penalty' on a defendant unless it results from the defendant's exercise of a protected legal right, as opposed to the prosecutor's normal assessment of the social interests to be vindicated by the prosecution." United States v. Davis, 854 F.3d 1276, 1291 (11th Cir. 2017), cert. denied, 138 S. Ct. 379, 199 L. Ed. 2d 278 (2017).

"As a general matter, a superseding indictment is potentially vindictive only if it 'add[s] additional charges or substitute[s] more severe charges based on the same conduct charged less heavily in the first indictment.' … . [A] prosecutor who adds on extra charges after the exercise of a procedural right is arguably acting less vindictively than a prosecutor who substitutes a more severe charge for a less severe one. In the first situation, a prosecutor might well have made an honest mistake, but in the second situation, the prosecutor will have already exercised his discretion, and the probability that the prosecutor acted vindictively is higher." On the facts, the court of appeals found that where the initial charge carried a 10 year term, but after the defendant filed a successful motion to suppress, the government filed a superseding indictment alleging a more serious offense, the district court did not abuse its discretion in applying a presumption of vindictiveness and dismissing the superseding indictment. U.S. v. LaDeau, 734 F.3d 561, 570 (6th Cir. 2013) (internal quotation marks and citations omitted).

Although the government mistakenly believed that defendant was currently under indictment when it obtained a superseding indictment, the claim that the prosecutor acted vindictively was rejected where there was no evidence "that the government sought the superseding indictment for the purpose of harassing, irritating, or annoying defendant," and where the government took prompt steps to correct the error. U.S. v. Lain, 640 F.3d 1134, 1139 (10th Cir. 2011).

Absent evidence of prejudice to the defendant or prosecutorial vindictiveness, neither of which were present on the facts presented, the well established rule is that the government is free to file a superseding indictment

at any time prior to trial. U.S. v. Begay, 602 F.3d 1150, 1154-1155 (10th Cir. 2010), cert. denied, 131 S. Ct. 272 (2010).

"[T]here is nothing inherently vindictive about adding a charge by superseding indictment if the government has evidence the defendant committed the crime. That the additional count makes it easier for the government to argue for the admission of "other acts" evidence does not make the prosecution of the additional count vindictive." U.S. v. Thomas, 520 F.3d 729, 735 (7th Cir. 2008) (citation omitted).

**See also**

The government originally filed a nine-count indictment, but after defendant provided an alibi for some of the counts the prosecutor obtained a superseding indictment that dropped six of the original charges. The district court granted the government's motion to preclude defendant from raising the dropped charges at trial, and the court of appeals affirmed. Evidence regarding the prosecutor's decision to drop charges was potentially misleading and was thus properly excluded. U.S. v. Reed, 641 F.3d 992, 993-94 (8th Cir. 2011).

Defendant alleged that the second superseding indictment violated the doctrine of specialty, which prohibits one country from prosecuting an extradited defendant for any crime other than that which the surrendering country agreed to extradite. Defendant was extradited from Mexico on charges of conspiracy to maim, and after his return to the United States a second superseding indictment was returned charging him with conspiracy to kidnap and attempted kidnapping. The court rejected the argument that the new charges violated the doctrine of specialty, finding that the new charges were subsequently approved by the Mexican government, and that the original Mexican extradition order was only intended to prevent removal of defendant if he faced charges for which he could receive a life sentence. U.S. v. Iribe, 564 F.3d 1155, 1159-60 (9th Cir. 2009).

45.50 **Reindictment compared**

U.S. v. Thomas, 726 F.3d 1086, 1089 (9th Cir. 2013).

46 **Superseding indictments**

The superseding indictment relates back to the original indictment for statute of limitations purposes as long as the superseding indictment does not "broaden or substantially amend the original charges." United States v. Farias, 836 F.3d 1315, 1324 (11th Cir. 2016), cert. denied, 138 S. Ct. 68, 199 L. Ed. 2d 21 (2017).

Where a superseding indictment contains new charges, ones that were not required by the Double Jeopardy Clause to be joined to the original indictment, the Speedy Trial Act clock starts anew on the new charges. U.S. v. Thomas, 726 F.3d 1086, 1089 (9th Cir. 2013).

"[T]he issuance of a superseding indictment following a [deadlocked jury] mistrial does not create a colorable double jeopardy claim, because the issuance of a superseding indictment does not nullify the original indictment, and because the issuance of a superseding indictment does not terminate the original jeopardy." U.S. v. Flores-Perez, 646 F.3d 667, 672 (9th Cir. 2011).

It did not violate the Speedy Trial Act, 18 U.S.C.A. § 3161(c)(2), to begin defendant's trial one day after his initial appearance on a superseding indictment. The minimum 30 day trial preparation period required by the Act begins on the day defendant first appears through counsel, regardless of the date of the indictment. U.S. v. Flores-Sanchez, C.A.9th, 2007, 477 F.3d 1089, 1091–1093, certiorari denied 127 S.Ct. 3025.

Although the superseding indictment alleged new overt acts in furtherance of a conspiracy, it nonetheless related back to the original indictment for statute of limitations purposes. The additional overt acts did not broaden or substantially amend the conspiracy charges in the original indictment. "In determining whether a superseding indictment materially broadens or amends the original charges, we will consider whether the additional pleadings allege violations of a different statute, contain different elements, rely on different evidence, or expose the defendant to a potentially greater sentence." U.S. v. Salmonese, C.A.2d, 2003, 352 F.3d 608, 622–624.

On an issue of first impression for the Sixth Circuit, the court concluded that, as long as the superseding indictment does not broaden the original indictment, the superseding indictment relates back to the filing of the original indictment, even if the superseding indictment is filed outside of the statute of limitations. Notice to the defendants of the charges so that they can adequately prepare their defense is the touchstone in determining whether a superseding indictment has broadened the original indictment. U.S. v. Smith, C.A.6th, 1999, 197 F.3d 225.

Superseding indictment related back to filing date of original indictment for limitations purposes where only differences between indictments as they affected defendant neither materially broadened nor substantially amended charges against him. U.S. v. O'Bryant, C.A.1st, 1993, 998 F.2d 21.

Superseding indictment filed while first indictment is validly pending is not barred by statute of limitations unless it broadens or substantially amends charges in first indictment. U.S. v. Davis, C.A.10th, 1992, 953 F.2d 1482, certiorari denied 112 S.Ct. 2286, 504 U.S. 945, 119 L.Ed.2d 210.

Superseding indictment, returned before defendant had been arraigned on first indictment, did not nullify first indictment, upon which defendant could be tried when court determined that superseding indictment was untimely. U.S. v. Bowen, C.A.10th, 1991, 946 F.2d 734.

Absent prejudice to defendant, a superseding indictment may be filed at any time before trial. U.S. v. Wilks, C.A.10th, 1980, 629 F.2d 669.

Azania v. Superintendent, Ind. State Prison, 2015 WL 685896, *6 (N.D. Ind. 2015), **quoting Wright & Leipold**.

47 **Two indictments valid**

The district court dismissed the indictment, and on the same day as the government moved for reconsideration of the order, the grand jury returned a superseding indictment on the same crime. Although the government claimed that the superseding indictment cured the deficiency of the original indictment, it nevertheless appealed the district court's dismissal of that first indictment. Defendant argued that the superseding indictment mooted the appeal, but the 5th Circuit disagreed, noting that "two indictments may be outstanding at the same time for the same offense if jeopardy has not attached to the first indictment." On the facts, the court found the appeal was not moot because the government indicated that if the original dismissal were reversed, it might proceed with yet another superseding indictment that includes parts of the two earlier ones. U.S. v. Rainey, 757 F.3d 234, 240 (5th Cir. 2014) (internal quotation marks and citation omitted).

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