

Finally, the parties negotiated the final terms of the \$18 million contract and HP (with MSE as its subcontractor) successfully implemented the Seats program at DISD.

In sum, all bidders had adequate time and access to information to prepare bids, and DISD personnel other than Mr. Bohuchot chose HP as winner.

B. The E-Rate Contract

E-Rate is a program under which the federal government gives money for technology contracts to school districts that subsidize student lunches. Soon after HP and MSE began implementing Seats, DISD applied to participate.

Before accepting DISD, however, the government required it to obtain signed technology contracts. So in late-2002, DISD prepared five RFPs for its E-Rate program, broken down as required by the government into specific technology categories like web access, email, and cabling. The RFP-preparation process mirrored that used for Seats. On December 27, 2002, DISD broadcasted its official E-Rate RFPs on its website and gave companies a month to respond. (R.922.)

DISD received approximately 15 proposals, one of which was from a “consortium” of 13 companies formed specifically to bid on E-Rate RFPs. (R.950, 2916.) HP and MSE both were members of that consortium. (R.953-954, 2916.)

Though the Consortium was well qualified, HP submitted a “stand-alone” proposal to increase its chances. (R.85.)

Like Seats, the E-Rate proposals went through DISD’s standard review process. An evaluation committee scored the Consortium highest, the board of trustees approved it; and the Consortium successfully implemented the program. Mr. Bohuchot was not on the committee or board.

No witness at trial testified that MSE or any member of the Consortium received inside information on E-Rate. Mr. Goeters of HP was the only witness who addressed the subject and stated that he did not recall receiving any material information on E-Rate. (R.80.)

C. The Alleged Bribe

Spanning the timeframe above, MSE spent considerable time, money and effort entertaining its customers. They played golf, went to dinners and happy hours, attended sporting events, fished on MSE’s two sport-fishing boats (owned consecutively, not concurrently), and even used MSE’s frequent flyer miles—all at MSE’s expense. DISD was no exception, and it was undisputed at trial that Mr. Bohuchot enjoyed many of these perks.

But as explained in more detail in Issue II, each of the government’s witnesses—whether from DISD, MSE, HP, or some other company that did business with MSE—testified that they and others enjoyed the same perks. (R.40-

41, 1032-1038, 2091-2093, 2692.) They also agreed that MSE's entertainment of customers was consistent with industry-wide practice. (R.2091-2093.) Finally, they explained that even before the transactions in this case, Mr. Wong and Mr. Bohuchot were personal friends. (R.40-41, 2760-2761, 2798, 2809.) Nevertheless, the government contended that—as to Mr. Bohuchot only—these perks were a bribe.

The government's bribery theory, however, shifted throughout trial. Though the Indictment alleged one specific theory—that Mr. Wong bribed Mr. Bohuchot to give MSE inside information so that HP and the Consortium could submit superior bids—at trial the government urged (and the district court's jury instructions allowed) conviction upon different bases: In sum, that Mr. Wong bribed Mr. Bohuchot to manipulate the flow of information to the board of trustees; to select favorable evaluation committees; to influence or pressure the committees; to create favorable scoring matrixes or tamper with the scores; to improperly influence the contact negotiations; or to rush the RFP process.

As explained below, this shift is a “constructive amendment” warranting reversal.

SUMMARY OF THE ARGUMENT

ISSUE I: The government's proof and district court's instructions constructively amended the Indictment. The Indictment alleged that Mr. Wong bribed Mr. Bohuchot to give MSE early inside information so that HP and the Consortium could submit superior proposals for Seats and E-Rate. The jury instructions, however, allowed conviction on any number of different (and unindicted) theories the government presented at trial—that Mr. Wong bribed Mr. Bohuchot to manipulate the flow of information to the board; to select favorable evaluation committees; to influence or pressure the committees; to create favorable scoring matrixes or tamper with the scores; and to rush the RFP process.

Under *Stirone*, a constructive amendment to the Indictment occurred, and reversal is automatic.

ISSUE II: In a constructive amendment, this Court renders an acquittal rather than remand if the government failed to establish guilt beyond a reasonable doubt on the indicted allegation. The Court should do so here. The evidence showed that the information MSE received was immaterial, would not have given any company an advantage, and was of the type generally shared with any company that asked.

ISSUE III: The prosecutor impermissibly commented on Mr. Wong's decision not to testify. During rebuttal closing the prosecutor argued that of those

who knew what happened on the Key West vacation, two government witnesses “talked to the jury” but Mr. Wong was just “sitting there” during trial. Such a comment on silence is *per se* prohibited. In this case, it was particularly effective: (1) the comment related to an important issue; (2) the comment was made immediately before the jury deliberated; and (3) the government did not produce overwhelming evidence of guilt.

ISSUE IV: The district court’s instructions erroneously lowered the burden of proof for the money laundering charge. The Indictment (following the statute) alleged an agreement to “intentionally” promote illegal activity; the instructions lessened the *mens rea* requirement to “knowingly.” “Knowing” promotion is not a crime.

ISSUE V: The district court erred when determining the “value” of the alleged bribe under the Sentencing Guidelines, specifically the value of Mr. Bohuchot using MSE’s sport-fishing boats. The court used MSE’s “total cost of ownership” for the boats—almost a million dollars of mortgage payments, insurance, maintenance, etc.—but the Guidelines define the “value” as the “gain” to the recipient. The value of using a boat is the rental value for the days used—which was less than the court’s “total cost of ownership” method.

ISSUE VI: The district court also erred in finding “multiple bribes” as a basis to increase Mr. Wong’s Guidelines range. Multiple “payments” are multiple

“bribes” only when they support multiple actions or favors. Here, Mr. Bohuchot received multiple benefits, but the evidence showed at most a single action in return—an early look at the Seats RFP.

ARGUMENT

ISSUE I: THE GOVERNMENT'S PROOF AND DISTRICT COURT'S JURY INSTRUCTIONS CONSTRUCTIVELY AMENDED THE INDICTMENT

A. The Essential Elements of Bribery Under 18 U.S.C. § 666

Title 18 U.S.C. § 666 applies to individuals working for or doing business with a state or local agency that receives more than \$10,000 of federal funding. 18 U.S.C. § 666(b). Individuals working for the agency may not “corruptly” accept anything of value “intending to be influenced or rewarded in connection with any [agency] business.” § 666(a)(1)(B). The statute likewise forbids one doing business with the agency from “corruptly” giving anything of value “with the intent to influence or reward [an individual working for the agency] in connection with any [agency] business.” § 666(a)(2).

It was undisputed at trial that DISD received more than \$10,000 from the federal government; Mr. Bohuchot worked for DISD; and through HP and the Consortium, MSE did business with DISD. Furthermore, it was undisputed that Mr. Wong gave Mr. Bohuchot things of value, *e.g.*, rounds of golf, tickets to sporting events, fishing trips on MSE’s sport-fishing boats, and frequent flyer miles to get to the boats.

But because Mr. Wong and Mr. Bohuchot were good friends years before the transactions at issue, and because MSE provided its other customers with

similar perks, the crux of the case became whether Mr. Wong acted “corruptly” and with the “intent to influence” Mr. Bohuchot “in connection with” DISD business. § 666(a)(1)(B) & (a)(2).

B. This Indictment’s Specific Bribery Allegation

The Indictment was very specific on this key issue. It alleged:

In an effort to ensure that MSE would receive payment as a result of the awarding of DISD contracts, Bohuchot would and did cause non-public information to be provided to Wong before the information was provided to competitors of MSE.

(R.E. 3 at 8.) The Indictment similarly alleged:

The receipt of non-public information relating to the upcoming contract before the information was provided to other vendors assisted MSE and [and HP] in submitting a winning bid proposal to DISD.

(R.E. 3 at 3, 8, 17-20.)

C. The Government Stuck to the Indictment’s Bribery Allegation During Its Opening Statement

The government started trial within the boundaries of the Indictment. During opening statement, the government mentioned no uncharged bribery theory and told the jury that it would prove the following:

[T]he evidence will show that Ruben Bohuchot told a number of vendors that [the Seats RFP] was coming up.

The evidence will also show to you that he selected only a very few to know greater details than everybody else. In fact, one of those people . . . was Frankie Wong, and they had many details about the upcoming Seat[s] Management program. Many conversations that other vendors didn’t have the privilege of having.

After months of these detailed conversations that other vendors did not get the benefit of, then the request for proposal or RFP was made public

In fact, the evidence will show that [four days prior to the official broadcast date] Ruben Bohuchot actually had a copy, a written copy of the upcoming RFP and that Frankie Wong saw that, a privilege no other vendors had. This evidence will be significant as it shows that MSE had an advantage. . . . How did they get the advantage? Things of value to Ruben Bohuchot.

(R.1677-1678.)

Regarding E-Rate, the government simply stated that the evidence would show “this same course of conduct continue[d].” (R.1679.) Summing up both contracts, the prosecutor explained:

Ruben Bohuchot gave MSE and Frankie Wong enough information so they had an advantage so they could acquire these contracts and Frankie Wong in turn would give Mr. Bohuchot things of value.

(R.1679-1680.)

But one by one during trial, the government’s witnesses debunked this charge, demonstrating that the information MSE allegedly received early was immaterial, did not help HP or the Consortium submit better proposals, or was of the type generally shared with competing companies. (The insufficiency of the evidence on the Indictment’s bribery allegation is discussed in Issue II.)

D. The Government Theories Multiply

Faced with such evidence—and with no witnesses supporting the early information allegation—the government switched theories in the middle of trial. And its theories multiplied like cell division. The government suggested that Mr. Wong bribed Mr. Bohuchot not to get early inside information, but for Mr. Bohuchot (1) to manipulate the flow of information to the board of trustees; and (2) to select favorable evaluation committees; then (3) to influence or pressure those committees; and (4) to create favorable scoring matrixes or perhaps tamper with the scores; and finally (5) to rush the proposal-review process.

1. *First Unindicted Bribery Allegation—Mr. Wong Bribed Mr. Bohuchot To Manipulate the Flow of Information to the Board of Trustees*

Though not in the Indictment, the government argued that Mr. Wong bribed Mr. Bohuchot to manipulate the flow of information to DISD’s board of trustees so that it would approve the HP and Consortium proposals.

First, the government called Larry Groppe, DISD’s deputy superintendent—and asked him *no questions* about whether MSE received early information. Instead, the government focused on the information Mr. Bohuchot gave to the board. After Mr. Groppe acknowledged that he approved the proposals, the government asked him: “Where did you get your information . . . ?” (R.1757.) Unsatisfied when Mr. Groppe said he got his information from “discussions amongst staff members,” the government asked more specifically:

“Did it predominantly come from Ruben Bohuchot?” (R.1757.) The government later asked Mr. Groppe the same question: “Where did you get your information . . . ?” (R.1759.) Again unsatisfied when he replied that he got his information from various sources, the government specifically asked: “Would it be fair to say that most of your information came from Ruben Bohuchot?” (R.1759-1760.)

The government emphasized this new theory by asking Mr. Groppe various iterations of the same questions regarding whether the board relied on the information from Mr. Bohuchot when deciding to approve the proposals: “Did you rely upon Ruben Bohuchot’s advice . . . ?”; “If the board had questions, would the board consult . . . Ruben Bohuchot?”; “Who was the point of contact for the board if they had questions . . . ?”; “Would the board ask or would the board rely on Mr. Bohuchot’s opinion?”; “Who would [board members] consult with when they had questions . . . ?”; “[W]ho would the board consult with?”; “If the board had questions about the Seat Management Contract or E-Rate, who would they consult?”; “[D]id the board rely on Mr. Bohuchot’s opinions . . . ?” (R.1845-1849.)

The government continued emphasizing this new theory when it cross examined Mr. Bohuchot: “Let’s talk about presenting . . . to the board. You actually do that; is that right?”; [Y]ou did present to the board; is that right?”; “Did you present . . . to the board?”; “And the board relied upon you . . . ?”; “You

presented that information to the board, right?"; "And the [board] relied upon your representations . . . correct?" (R.831-835.)

In closing argument, the government stressed this unindicted theory: "[T]he board approve[d] it *Who d[id] they get their information from? Ruben Bohuchot. . . . [W]ho do you think they are going to rely on? The chief technology officer. The board is going to rely on him.*" (R.3156 (emphasis added).) And then: "What did [Mr. Bohuchot] control here? . . . *He controlled the board of trustees.*" (R.3172 (emphasis added).)

The government also argued that Mr. Wong bribed Mr. Bohuchot for "his silence" regarding their friendship: "Why didn't [Mr. Bohuchot] to tell [the Board about their friendship]—because you see if he did, then MSE can't bid. They will never get a contract. *Part of what Mr. Bohuchot gave Frankie Wong was his silence. He gave him the preinformation and if that wasn't enough [Mr. Bohuchot] gave [Mr. Wong] silence so that they had a shot at something they never were entitled to have a shot at.*" (R.3156 (emphases added).)

2. *Second Unindicted Bribery Allegation—Mr. Wong Bribed Mr. Bohuchot To Select Favorable Evaluation Committees*

The government also argued that Mr. Wong bribed Mr. Bohuchot to stack the evaluation committees with people who favored MSE. The government called DISD associate superintendent Ronald Taylor to discuss "how a winner is selected" by the evaluation committee: "[W]ho chose the committee members?"

(R.1984.) Unsatisfied when Mr. Taylor stated that “the technology department” chose them, the government specifically asked: “Is that Mr. Bohuchot?” (R.1984.)

During its cross examination of Mr. Bohuchot, the government repeatedly asked him whether he picked the evaluation committee. (R.752-754.) When Mr. Bohuchot pointed out that Mr. Taylor also had input, the government attacked him: “So when Mr. Taylor said that technology, Mr. Bohuchot, selected the evaluation members, is he telling the truth or is he lying.” (R.754.)

During closing argument the government drove home the point: “[T]he responses are [given to] the evaluation team who Roland Taylor told you came from Mr. Bohuchot. *He chose that team who would evaluate it.*” (R.3155 (emphasis added).)

3. *Third Unindicted Bribery Allegation—Mr. Wong Bribed Mr. Bohuchot To Influence or Pressure the Evaluation Committees*

Next, the government argued that Mr. Wong bribed Mr. Bohuchot to influence or pressure the evaluation committees to give HP and the Consortium high scores. First, the government emphasized that some committee members worked under Mr. Bohuchot in the technology department. (R.3155.) Then, the government questioned Mr. Bohuchot about his “opportunity to influence members of the evaluation committees.” (R.755.) The government asked: “In fact, you made your preferences for MSE well known throughout the district didn’t you?”;

and more specifically “[I]n fact, you wore MSE shirts routinely and regularly, didn’t you? . . . And members of the technology department would see you wear your MSE shirts?” (R.755.)

The defense called two evaluation committee members to rebut this new and surprising allegation. After each member testified that Mr. Bohuchot never attempted to influence them, the government questioned their memories: “Is your memory about this sharp or fuzzy?”; “How is your memory about this event?” (R.2862, 2875.)

The government then argued in closing that Mr. Bohuchot “controlled” his department employees who sat on the committees, (R.3172), and:

“Many members of [the evaluation committee] reported ultimately to [Mr. Bohuchot] or were on his staff, if you *talk about pressure* when you know your boss wants something, what are you going to do? You are going to try to make your boss happy.”

(R.3155 (emphasis added).)

The prosecutor concluded by arguing that the defense had not *disproven* the government’s new theory: “The evaluation committee, [the defense] brought you two people from that committee, two out of six.” (R.3155.)

4. *Fourth Unindicted Bribery Allegation—Mr. Wong Bribed Mr. Bohuchot to Create Favorable Scoring Matrixes or Tamper With the Scores*

The government also argued that Mr. Wong bribed Mr. Bohuchot to create proposal scoring matrixes that favored HP and the Consortium. First, the

government showed that Mr. Bohuchot had input into the drafting of the RFP. The government then repeatedly asked its witnesses whether Mr. Bohuchot decided how many points would be assigned to each section. For example: “Where did that [point system] come from?” “[T]he technology department.” If a witness did not initially respond “Mr. Bohuchot,” the government led the witness: “From Mr. Bohuchot?” “Yes.” (R.1893.) And if a witness indicated Mr. Bohuchot did not pick the point allocation for a particular section, the government asked whether Mr. Bohuchot controlled the person who did. For example: “Who created this decision matrix?” “I believe it was Alan Gaw.” “Is he in the technology department?” “Yes.” “Does he work for Ruben Bohuchot?” “Yes[.]” (R.1996.)

Finally, the government argued in closing: “And [the evaluation committees] use the decision point matrix . . . to determine who gets what points. *Who created the decision matrixes in both contracts? Mr. Bohuchot did.*” (R.3161 (emphasis added).)¹

¹ The government also suggested that Mr. Wong may have bribed Mr. Bohuchot to tamper with the committees’ scores. The government showed committee member witnesses an exhibit representing Mr. Bohuchot’s summary of their scores, which Mr. Bohuchot later forwarded to the board of trustees. The government then implied that the scores could have been changed after submission: “The scores that you were just shown here on the screen, does that look like your *original* score? Is that the sheet that *you* turned in when *you* were done scoring?” When the witnesses explained that their original scores were handwritten and that the exhibit was a summary prepared by Mr. Bohuchot, the government specifically asked: “So if that is something that Mr. Bohuchot prepared, *did he ever show it to you?*” “No.” (R.2876 (emphases added).)

5. *Fifth Unindicted Bribery Allegation—Mr. Wong Bribed Mr. Bohuchot To Rush the Proposal-Review Process*

When it became clear that none of the government's witness thought MSE had any inside information on E-Rate, the government argued that Mr. Wong bribed Mr. Bohuchot to rush the E-Rate process to somehow favor MSE.

The government asked a witness who sat on the E-Rate evaluation committee: "Can we agree that you received your binders to review on a non-work day?" "Yes."; then "Can we agree that you received them in the afternoon on that date?" "Yes."; and finally "[T]he time you were given, was not enough time, was it?" "In my opinion [it] was very, very limited, yes, but I [did] what I was asked." (R.2890.)

The government then argued in closing: "Remember the committee members, six of them come in on a holiday. They get the joy of 30 different responses approximately that *they have to read and evaluate overnight*. And they use the decision point matrix which [Mr. Bohuchot] created So *in less than a day, they evaluate all of these responses and they come up with the Consortium* of which MSE is the leader." (R.3160 (emphases added).)

None of these allegations appeared in the Indictment. Mr. Wong had prepared to face the indicted charges; he then was surprised by new and changing theories.

E. The District Court's Instructions Failed to Limit the Jury to the Indictment's Bribery Allegation

The district court's instructions, however, merely tracked the statute's broad elements and permitted conviction if Mr. Wong and Mr. Bohuchot "corruptly" gave and accepted things of value with the "intent to influence" Mr. Bohuchot "in connection with" DISD business. (R.E. 6 at 13, 16.)

Defense counsel objected to the instructions as overly broad and not reflecting the charges. (R.2993.) Furthermore, "[i]n light of the evidence that ha[d] developed" at trial, counsel requested an additional instruction that the jury could convict only if it found that Mr. Wong gave things to Mr. Bohuchot with the intent to receive the "specific benefit" alleged in the Indictment. (R.2993.)

The district court denied the request and allowed the jury to convict based on any of the government's new bribery theories. Counsel for Mr. Wong did what he could during closing argument to point out that the government had switched theories mid-trial: "Now, why are they switching theories and switching horses? I guess because they want to throw one out there or ride one as long as they can until that one is debunked." (R.3119.) The jury accepted one of the government's bribery theories—though it is not at all clear which one—and convicted Mr. Wong.

F. A Constructive Amendment Occurred—Reversal Is Automatic

The government's evidence and district court's instructions constructively amended the Indictment. Under such circumstances, reversal is automatic.

The Fifth and Sixth Amendments require that a defendant be tried only upon charges set forth in the grand jury's indictment. *United States v. Adams*, 778 F.2d 1117, 1122 (5th Cir. 1985). The Fifth Amendment commands: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a grand jury"; and the Sixth Amendment gives every defendant the "right to be informed of the nature and cause of the accusation." *Id.* Only the grand jury can amend an indictment to broaden it. *United States v. Doucet*, 994 F.2d 169, 172 (5th Cir. 1993).

An impermissible amendment need not be explicit, but may be constructive. *Id.* An indictment can be constructively amended by the actions of either the prosecutor or district court, or both. *Id.* A prosecutor constructively amends the indictment by arguing or introducing evidence on a new theory of conviction; a court does so by instructing the jury that it may convict on a basis different from or broader than that charged in the indictment. *See id.* "Either way, the defendant is not apprised by the indictment of the particular theory he will have to counter at trial and the jury is permitted to convict on a basis broader than that charged in the grand jury's indictment." *Id.*

The Supreme Court's decision in *Stirone v. United States* is the starting point of every constructive amendment analysis. 361 U.S. 212 (1960). In *Stirone*, defendant was convicted of interfering with the movement of a commodity in

interstate commerce. *Id.* at 213. The statute applied to all commodities, but the indictment alleged that defendant interfered with sand. *Id.*

At trial the government introduced evidence that defendant interfered with sand *and steel*. *Id.* at 214. And the district court's instructions tracked the statute, effectively allowing conviction if defendant interfered with *sand or steel*. *Id.*

Because the indictment only alleged interference with sand, not steel, the Supreme Court reversed after unanimously finding that the district court's generalized instructions constructively amended the indictment:

The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charges made in the indictment the grand jury returned.

Id. at 216.

The Fifth Circuit has consistently applied *Stirone* to reverse convictions under similar circumstances:

- In *United States v. Salinas (Salinas I)*, defendants were convicted of misappropriating bank funds under a statute applicable to any "officer, director, agent, or employee" of a national bank. 601 F.2d 1279, 1287 (5th Cir. 1979). The indictment alleged that defendants were "directors"; the government introduced evidence that defendants "held offices"; and the district court's instructions tracked

the statute, allowing conviction if defendants were “officers, directors, agents, or employees.” *Id.* at 1287-89. This Court reversed: “[A] conviction obtained through a constructive judicial amendment of a grand jury’s indictment must be set aside even where there is sufficient evidence adduced by the government at trial to support a conviction based upon the allegations in the grand jury indictment.” *Id.* at 1290.

- In *Salinas II*, another defendant in the same case was indicted for aiding and abetting a specific bank officer in misappropriating bank funds. *United States v. Salinas*, 654 F.2d 319, 322 (5th Cir. 1981). At trial the government introduced evidence that defendant aided and abetted a *different* bank officer; and the district court’s instructions tracked the statute, allowing conviction if defendant aided and abetted a bank “officer, director, agent or employee.” *Id.* at 322-23. This Court reversed again: “By allowing the jury to convict if it found that the principle who [defendant] aided and abetted was an officer, director, agent or employee when the indictment charged him only with aiding and abetting a specific individual . . . the trial judge modified an essential element of the offence” *Id.* at 324.

- The defendant in *United States v. Adams* was convicted for using a false driver’s license. 778 F.2d 1117, 1118 (5th Cir. 1985). The statute did not require any particular type of falsity. *See id.* The indictment alleged that the name on the license was false; at trial the government introduced evidence that the name *and*

residence on the license were false; and the district court’s instructions permitted conviction if the *name or residence* was false. *Id.* at 1118-1119. The Fifth Circuit reversed: “Introduction of evidence concerning residence allowed conviction on a factual basis that effectively modified an essential element charged. As such, the indictment was constructively amended and reversal is automatic. . . . For all we know, the grand jury may have considered and rejected a charge [based] on false residence.” *Id.* at 1124-25.

- *United States v. Mize* involved convictions for bank fraud. 756 F.2d 353, 354-55 (5th Cir. 1985). The relevant statutes required that the defrauded bank be a “Federal Reserve Bank, member bank, national bank, or insured bank.” *Id.* at 355. The indictment alleged that defendant defrauded a “member bank”; at trial the government introduced evidence that the bank was an “insured bank”; and the district court’s instructions tracked the statute. *Id.* at 355-56. This Court reversed because the government’s introduction of a new basis for conviction and the district court’s generalized instructions constructively amended an essential element of the crime as charged in the indictment. *Id.* at 357 (reversing even though “Mize’s guilt was established beyond a reasonable doubt”).

- In *United States v. Doucet*, defendant was convicted for possessing an unregistered machine gun. 994 F.2d 169, 170 (5th Cir. 1993). The statute prohibited possession of an assembled or unassembled machine gun. *Id.* at 171.

The indictment alleged that Doucet possessed an *assembled* machine gun. *Id.* at 170. At trial, however, it became apparent that Doucet first possessed an *unassembled* machine gun and then gave it to his brother. *Id.* The government argued to the jury that it could convict if Doucet possessed an *assembled or unassembled* machine gun. *Id.* at 171. And the district court’s instructions included the statutory definition of machine gun, which covered both *assembled and unassembled* guns. *Id.*

This Court found a constructive amendment and reversed. *Id.* at 173. It compared the allegation in the indictment and the government’s opening statement to the government’s proof and closing argument:

“[T]he indictment charged Doucet with possession of an unregistered assembled machine gun. . . . Indeed, the government’s opening argument plainly indicated that the government would prove only that Doucet possessed the assembled machine gun. . . . Doucet accordingly prepared his defense to the charge that he had possessed an assembled automatic weapon.

By the last day of trial, the direction of the government’s prosecution had changed. . . . The prosecutor thus invited the jury to convict Doucet of a crime for which he was never indicted: possession of the unassembled machine gun. That blatant invitation differed materially from what the original indictment called on the jury to do and seriously undercut the defense that Doucet had prepared in response to the original terms of the prosecution. It was, therefore, a constructive amendment to the indictment.

Id. The Court concluded by reminding the government that it cannot “lure” a defendant into constructing a defense against a theory the government later changes at trial—“[A]n indictment is not putty in the government’s hands.” *Id.*

- The defendant in *United States v. Nunez* was convicted of assaulting a federal officer. 180 F.3d 227, 230 (5th Cir. 1999). Although the statute did not require the use of a dangerous weapon, the grand jury alleged that Nunez used a gun. *Id.* The district court—following the statute and not the more specific indictment—instructed the jury that it could convict if Nunez assaulted the officer *irrespective of whether he used a gun.* *Id.* This Court reversed: “[T]hough the conviction arose from the same factual incident, the difference between the specific details of the indictment and the general jury instruction is too great to survive the requirements of the Fifth Amendment. . . . [A]llowing the jury to convict Nunez of [assault] without the use of a dangerous weapon is a conviction of an offense not charged in the indictment.” *Id.* at 232 (internal quotation marks omitted).

- In *United States v. Chambers*, defendant was convicted for being a felon in possession of ammunition that traveled in interstate commerce. 408 F.3d 237, 238 (5th Cir. 2005). The statute allowed conviction if either the ammunition itself or its components traveled in interstate commerce. *Id.* at 239. The indictment alleged that the ammunition itself traveled in interstate commerce; at trial the government

introduced evidence that the components of the ammunition traveled in interstate commerce; and the district court's instructions tracked the statute, requiring only that one or the other traveled. *Id.* at 239-40. The Fifth Circuit reversed: "The government thus proved an essential element of the . . . possession offense . . . on the basis of a set of facts different from the particular facts alleged in the indictment." *Id.* at 241.

- Finally, in *United States v. Hoover*, defendant was convicted of making a false statement to a federal agent. 467 F.3d 496, 498 (5th Cir. 2006). The indictment alleged that Hoover told a federal agent that "only one person had complained of 'double flooring' of vehicles." *Id.* at 500. The statute did not require the government to establish why Hoover knew his statement was false. *Id.* Nevertheless, the indictment specifically alleged that Hoover knew his statement was false because more than one person had complained to him about double flooring. *Id.* at 500. The district court, however, instructed the jury that it could convict if Hoover "stated that only one person had complained of double flooring of vehicles and that such statement was intentionally false." *Id.* at 500. This Court reversed: "[W]hen the government chooses to specifically charge the manner in which the defendant's statement is false, the government should be required to prove that it is untruthful for that reason." *Id.* at 502 (citing *Stirone*, 361 U.S. at 219).

- We find no Fifth Circuit case addressing constructive amendment of a bribery charge. But in *United States v. Choy*, the Ninth Circuit did and reversed. 309 F.3d 602, 607 (9th Cir. 2002). That indictment alleged that Choy corruptly gave “a thing of value (to wit, \$5,000) to any public official.” *Id.* At trial, however, the government introduced evidence that Choy gave the \$5,000 to a *private* citizen who then “indirectly conferred value . . . on [the] public official.” *Id.* The district court’s instructions followed the statute, which permitted conviction whether the thing of value was given *directly or indirectly* to the public official. *Id.* Reviewing for plain error, the Ninth Circuit found a constructive amendment and reversed: “This version of the purported bribe involves a set of facts distinctly different from that set forth in the indictment.” *Id.*

In each of these cases, the district court’s generalized instructions allowed conviction on a basis broader than or different from the *specific* allegation in the indictment. This Court reversed—regardless whether the instructions accurately stated the law or the government proved guilt beyond a reasonable doubt under the statute. As shown in the chart that follows, when the grand jury indicts on a specific fact or theory, that is the fact or theory that must be tried: