2020 WL 7778962 (C.A.3) (Appellate Brief)
United States Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA, Appellee,
v.
Joseph R. JOHNSON, Jr., Appellant.

No. 20-1449.
December 29, 2020.

Appeal from Amended Judgment in a Criminal Case Entered in the
United States District Court for the Eastern District of Pennsylvania,
at Criminal Number 19-00367-1, on March 6, 2020,
by Honorable Harvey Bartle, III

Brief for Appellant

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1 *STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case commenced with the prosecution of appellant, Joseph R. Johnson, Jr., for violations of the laws of the United States. District courts have original jurisdiction over such prosecutions pursuant to 18 U.S.C. § 3231. Upon conviction, Mr. Johnson was sentenced to 32 months' imprisonment and 3 years' supervised release. (App. 4-5). [1]

This is an appeal of the district court's amended judgment entered on March 6, 2020. (App. 20). A notice of appeal was timely filed on February 28, 2020. (App. 1). [2] This Court has jurisdiction under 28 U.S.C. § 1291, as an appeal from a final decision of a district court, and under 18 U.S.C. § 3742(a), as an appeal of a sentence imposed under the Sentencing Reform Act of 1984.

*2 *STATEMENT OF RELATED CASES AND PROCEEDINGS*

This case has not previously been before this Court. Counsel is aware of no other case or proceeding--completed, pending, or about to be presented in this Court or any other court or agency, state or federal--that is in any way related to this appeal.

*3 *STATEMENT OF THE ISSUES*

I. Whether the convictions must be vacated because the government's evidence was insufficient to prove the materiality element of 18 U.S.C. § 1001.

Preservation of Issue

Mr. Johnson preserved the issue by moving for a judgment of acquittal under Federal Rule of Criminal Procedure 29. (App. 681-82, 766). The government responded in writing, construing the Rule 29 motion as "arguing that the government's evidence was insufficient to sustain the convictions," (App. 803), and asserting, *inter alia*, that "the filing containing the false statement in this case was material, in that it not only had the capability of influencing judicial action, but in that Judge Robreno struck the pleading, it did influence judicial action," (App. 809). The district court denied the Rule 29 motion, finding that the evidence was sufficient to sustain the convictions. (App. 849-50, 860).

***4 II. Whether the district court constructively amended the indictment for false statements, 18 U.S.C. § 1001, by instructing the jury on "making or using" a false document, when the indictment charged "making" a false statement.**

Preservation of Issue

Mr. Johnson preserved the issue in his Objections to Proposed Government Points of Charge, arguing that the government's proposed jury instruction on false statements would enact a constructive amendment of the indictment. (App. 90). The district court overruled the objection by giving the objected-to instruction. (App. 749). Mr. Johnson also preserved the issue in his Motion for Arrest of Judgment. (App. 789). The government opposed the motion, (App. 830), which the district court denied on procedural grounds, (App. 862-64). Mr. Johnson raised the issue again during his sentencing allocution, (App. 886, 967), and in a *pro se* Motion to Reconsider, (App. 896), which the district court dismissed for lack of jurisdiction, (App. 910).

*5 *STATEMENT OF THE CASE*

A. Overview

In 2016, Joseph Johnson was consumed by the notion that entertainer Bill Cosby had been falsely accused of sexual misconduct. [3] Using a pseudonym, Mr. Johnson conducted obsessive internet searches, posted online commentary, and sent

emails to lawyers and the media, all in defense of Mr. Cosby. As part of this pattern of behavior, Mr. Johnson also closely followed the extensive civil litigation related to Mr. Cosby.

This criminal case arises from one such lawsuit, in which a victim of Mr. Cosby filed a civil suit for defamation. Mr. Johnson involved himself in the suit by filing a document in the docket that purported to expose the plaintiff for unpaid taxes. This filing was labelled a praecipe to attach an exhibit to the complaint, and falsely appeared to be filed by plaintiff's counsel who, of course, did not file it.

For making this filing in the name of plaintiff's counsel, Mr. Johnson was indicted on charges of false statements, 18 U.S.C. § 1001, and aggravated identity theft, 18 U.S.C. § 1028A. He proceeded to a jury trial where he was convicted of ***6** both counts. He was sentenced to 32 months' imprisonment and 3 years' supervised release. (App. 4-5).

Mr. Johnson now appeals, raising two claims: (1) that the government's evidence was insufficient to prove the materiality element of the false statements offense, and (2) that the district court constructively amended the indictment. These claims implicate the false statements conviction directly. They also implicate the aggravated identity theft conviction because this is a compound offense, predicated here on the false statements conviction. (App. 24) (charging aggravated identity theft "during and in relation to the false statements charged in Count One of this Indictment").

B. Factual history

1. Mr. Johnson files a false praecipe in a Cosby-related lawsuit, purporting to expose the plaintiff for unpaid taxes.

In 2015, a victim of Mr. Cosby, Andrea Constand, filed a defamation lawsuit, *Constand v. Castor*, No. 2015-cv-05799, in the United States District Court for the Eastern District of Pennsylvania. (App. 350). Ms. Constand was represented in the lawsuit by plaintiff's counsel Dolores Troiani. (App. 350). Plaintiff's counsel filed a civil complaint to initiate the suit, but inadvertently omitted an exhibit from her electronic filing. (App. 355). The next day, October 27, 2015, counsel filed a document entitled "Praecipe to Attach Exhibit 'A' to Plaintiff's Complaint," along with the omitted exhibit and a certificate of service. ***7** (App. 355-56, 593). This filing was docketed, and no further action was taken on it by the court. [4]

On January 3, 2016, Mr. Johnson, using a pseudonym and the email address devoutplayerhater@yahoo.com, sent three emails to plaintiff's counsel Ms. Troiani, along with other lawyers and the media. (App. 361, 384-85). Two of these emails contained attachments, including a completed IRS referral form, used to report someone to the IRS for unpaid taxes. The referral form purported to expose plaintiff Ms. Constand for failing to report taxable income from Cosby-related civil settlements. (App. 371-73, 378). The emails also included supporting documentation for the IRS referral--three civil complaints filed by Ms. Constand. (App. 373-74, 378-79).

On February 1, 2016, an unknown person hand-delivered to the clerk's office a filing in the *Constand v. Castor* defamation lawsuit. [5] The document was ***8** entitled "Praecipe to Attach Exhibit 'A' to Plaintiff's Complaint," and was a photocopy of the legitimate praecipe filed earlier by plaintiff's counsel, along with a photocopy of her certificate of service. (App. 421-23, 911). Instead of the legitimate exhibit, this praecipe sought to attach the IRS referral form purporting to expose Ms. Constand for unpaid taxes, along with her addresses, and the three supporting civil complaints. (App. 418-19, 911).

Upon receiving the hand-delivery, a clerk scanned the false praecipe and uploaded it to the docket. (App. 392). Doing so generated an electronic notice, which was sent to the parties. (App. 398-99). Plaintiff's counsel Ms. Troiani received the

electronic notification, (App. 413), and quickly called the clerk's office to report that she had not filed the praecipe, (App. 425). As directed, Ms. Troiani reported the same thing to the chambers of the assigned judge, Judge Eduardo Robreno. (App. 425). Judge Robreno immediately entered an order striking the false praecipe from the docket. (App. 452, 598).

2. The government aims to establish materiality through the testimony of the presiding judge.

At trial, the government called Judge Robreno as a witness regarding the materiality element of the false statements offense, § 1001. (App. 98).[6] Judge ***9** Robreno testified about the civil docket generally, explaining that

a docket is the history of the case. Every action that has been taken either by the lawyers or by the court is recorded in the docket, so it's a memory of the case. So whenever I have a matter to be adjudicated or resolved in a particular case, I look at the docket to see what is the history of that and where it fits into the developments of that case.

(App. 448). The Judge further testified that "every time I look at the docket, I extract information. And then, based on that information, I take action." (App. 448).

Judge Robreno also testified about the false praecipe. He recalled that his deputy clerk told him there was "a paper of some sort" or "a paper in the docket" that plaintiff's counsel had not filed. (App. 451). In response, the Judge asked a member of his chambers staff to prepare an order striking the filing from the docket. (App. 452). The Judge entered the order deleting the filing. (App. 452). The order stated that "[t]his filing is fraudulent and was not filed by the attorney whose purported signature appears on the docket. The matter will be referred to ***10** the appropriate authority for further action." (App. 598). The Judge did not recall looking at the actual filing. (App. 454).

The government subsequently relied on Judge Robreno's testimony in summation, arguing the materiality element of § 1001. Specifically, the government argued:

You know, in fact, that it was material, because it had to be capable of influencing the judicial branch. And that it was, because Judge Robreno, in fact, testified that, yeah. You know, I look at the docket. I look at the entries on the dockets. That's how I make my decisions, based on the entries on the docket. I consider those things, and in this case, there was an entry on the docket. There was a filing. It was a false filing. He took action in Filing Number 7 on February 2, 2016, and, in fact, struck it from the record.

So he took action. So not only was it capable of influencing his decision, but it did. So it was, in fact, material.

(App. 703).

C. The indictment charged "making" false statements, while the jury instructions charged "making or using" a false document.

As is relevant to the constructive amendment claim, count 1 of the indictment charged Mr. Johnson with making false statements under 18 U.S.C. § 1001. The false statements statute, § 1001, applies in relevant part where a defendant,

***11** in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry[.]

18 U.S.C. § 1001(a).

While the indictment did not specify a subsection of § 1001, the government used the language of subsection (a)(2), charging Mr. Johnson with "making" false statements. Specifically, the indictment alleged that Mr. Johnson

knowingly and willfully *made, and aided and abetted the knowing and willful making of, materially false, fictitious, and fraudulent statements and representations*, in that defendant Joseph R. Johnson, Jr., in a fraudulent filing in a civil case . . . falsely represented and aided and abetted the false representation that the fraudulent filing had been made by the plaintiff's counsel D.T., when, as the defendant then knew, D.T. had not made the fraudulent filing, but rather the fraudulent filing was made by and at the direction of the defendant.

In violation of Title 18, United States Code, Sections 1001 and 2.

(App. 22-23) (emphasis added). The government's trial memorandum was consistent, acknowledging that it "must prove beyond a reasonable doubt that . . . ***12** the defendant made a false, fictitious, or fraudulent statement or representation." (App. 102).

Proposing points for charge, however, the government requested a jury instruction on a different theory--that Mr. Johnson could be convicted of "making or using" a false document, in the language of subsection (a)(3). (App. 56). [7] Mr. Johnson objected to this instruction, but the district court disagreed. (App. 90). The court instructed the jury that it could convict Mr. Johnson for "making or using" a false document, which it described as the first element of the § 1001 offense:

One, that the Defendant *made or used a false document*. Two, the document contained a statement that was false. Three, that the statement was material. Four, that the Defendant acted knowingly and willfully. And five, that the document pertained to a matter within the jurisdiction of the judicial branch of the United States . . . .

(App. 749) (emphasis added). The jury convicted, and this timely appeal followed.

***13** *SUMMARY OF THE ARGUMENT*

I.

The government's evidence was insufficient to establish the materiality element of the false statements offense, 18 U.S.C. § 1001. The government's only evidence that the false praecipe was material consisted of two points, neither of which is sufficient.

First, the government presented evidence that the false praecipe was on the docket, which the presiding judge generally consults when making decisions. This evidence is far too general, and fails to establish that the false praecipe could have influenced a judicial decision.

Second, the government presented evidence that the presiding judge struck the false praecipe from the docket. This evidence describes the judge's reaction to the false praecipe. But this is not the legal standard, which instead asks the jury to assess materiality in light of the antecedent " 'decision . . . the [judge was] trying to make.' " *United States v. Gaudin*, 515 U.S. 506, 512 (1995). And for good reason. The judge's reaction--striking the false praecipe from the docket--cannot establish materiality because it merely reflects that the statement was false. If striking a false filing were *per se* sufficient, it would read the materiality element out of § 1001.

***14** Nor can the government advance any other theory of materiality on appeal, as it is limited to the evidence presented to the jury. On the record presented, Mr. Johnson's false statements conviction must be vacated. So too, the Court must vacate the conviction for aggravated identity theft, which rests on the invalid conviction for false statements. (App. 24).

II.

The district court constructively amended the indictment for false statements, 18 U.S.C. § 1001. In the indictment, the government charged Mr. Johnson with violating § 1001 by "making" false statements. (App. 22). In contrast, the district court instructed the jury that it could convict Mr. Johnson for "making or using" a false document. (App. 749). The latter is a broader theory of guilt, both because of the use of multiple verbs, and on their plain meaning. While "to make" refers to creating, composing, or causing something to exist, the verb "to use" does not require that the defendant originate anything. Rather "to use" may mean to employ, apply to one's purposes, put into service, avail, or utilize. Instructing the jury on this broader theory of guilt--not charged in the indictment--infringed on Mr. Johnson's constitutional rights under the Grand Jury Clause, and requires that the false statements conviction be vacated. The aggravated identity theft conviction must also be vacated, as it is predicated on the conviction for false statements. (App. 24).

15** ***ARGUMENT

I. The convictions must be vacated because the government's evidence was insufficient to prove the materiality element of 18 U.S.C. § 1001.

Standard of Review

The Court exercises plenary review over the denial of a motion for judgment of acquittal. *See United States v. Rowe*, 919 F.3d 752, 758 (3d Cir. 2019). The evidence is viewed in the light most favorable to the government to determine whether any rational trier of fact could have found each element proven beyond a reasonable doubt. *See id*. at 758-59; *see also Travillion v. Superintendent*, No. 18-1282, 2020 WL 7349235, *5 (3d Cir. Dec. 15, 2020) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Discussion

The government's evidence was insufficient to establish the materiality element of the false statements offense, 18 U.S.C. § 1001. The government's only evidence that the false praecipe was material consisted of two points: (1) that the filing was on the docket, which the presiding judge generally consults when making decisions, and (2) that the presiding judge struck the false praecipe from the docket. The first argument fails as overly general. The second fails because striking the document says nothing about the materiality of the false statement-- ***16** only that it was false. In other words, it is not as though a false, immaterial statement would have remained on the docket. Material does not mean "prompting some action." A false statement must be material to the antecedent " 'decision . . . the [judge was] trying to make.' " *Gaudin*, 515 U.S. at 512. Nor can the government advance any other theory on appeal, as it is limited to the evidence actually presented to the jury. On the record presented, the false statements conviction must be vacated. The conviction for aggravated identity theft must also be vacated as it is a compound offense predicated on the false statements conviction. (App. 24); *see also United States v. Camick*, 796 F.3d 1206, 1219 (10th Cir. 2015) (reversing aggravated identity theft convictions following the reversal of predicate counts).

A. Legal Standard: The false statement must be material.

Section 1001 is one of over a hundred federal statutes that criminalize false statements. *See United States v. Wells*, 519 U.S. 482, 505 (1997) (Stevens, J., dissenting). Among these many statutes, § 1001 stands out as the archetypical offense that requires materiality. *See Kungys v. United States*, 485 U.S. 759, 769-70 (1988).

To be material, it is well-settled that a "statement must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Gaudin*, 515 U.S. at 509 ***17** (alteration in original) (quoting *Kungys*, 485 U.S. at 770); *see also Neder v. United States*, 527 U.S. 1, 16 (1999) (same). [8] The materiality inquiry is "a mixed question of law and fact." *Gaudin*, 515 U.S. at 512 (citation omitted). Specifically, it requires the jury to answer "two subsidiary questions of purely historical fact: (a) 'what statement was made?' and (b) 'what decision was the agency trying to make?' The ultimate question: (c) 'whether the statement was material to the decision,' requires applying the legal standard of materiality (quoted above) to these historical facts." *Id*. at 512. The materiality standard does not require that the statement actually influence the decision-maker, but rather that it be capable of doing so. *See United States v. McBane*, 433 F.3d 344, 350 (3d Cir. 2005).

B. The government failed to introduce sufficient evidence that the false praecipe was material.

At Mr. Johnson's jury trial, the government failed to introduce sufficient evidence that the false praecipe to attach an exhibit was material. The testimony that the government elicited is insufficient, and new evidence never presented to the jury cannot be marshaled on appeal.

***18 1. The false statement is not material simply because it was on the docket.**

At Mr. Johnson's jury trial, the government presented testimony that the false praecipe was on the docket, which the presiding judge generally reviews when deciding issues in a civil case. (App. 448). In summation, the government argued that this testimony established materiality, noting that the presiding judge testified that "I look at the docket. I look at the entries on the dockets. That's how I make my decisions, based on the entries on the docket. I consider those things, and in this case, there was an entry on the docket." (App. 703).

This evidence is far too general. To establish materiality, it is not enough that a false statement is part of a body of paperwork within the purview of the decision-maker. While this may make the false statement relevant to the decision-maker, " 'relevance' and 'materiality' are not synonymous." *United States v. Rigas*, 490 F.3d 208, 234 (2d Cir. 2007). "To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made." *Id*. (quoting *Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. 1956)). To establish materiality, the government must introduce evidence that the particular false statement could reasonably influence a decision.

Illustrative is *United States v. Finn*, in which the Tenth Circuit reversed a false statements conviction for insufficient evidence of materiality. *See United* ***19** *States v. Finn*, 375 F.3d 1033, 1040 (10th Cir. 2004). In *Finn*, the defendant was charged with making false statements to the Department of Housing and Urban Development (HUD) after he altered a receipt and submitted a false expenditure form. *See id*. at 1036-37. At trial, the government presented evidence that HUD had audited the defendant's office, and that its jurisdiction encompassed the falsified documents. *See id*. at 1040. The Court rejected this evidence as insufficient. As the Tenth Circuit explained, it was not enough that HUD could have reviewed the false documents in the course of its audit. Rather, the government was required to present evidence "address[ing] the purpose or use of case expenditure forms from the agency's perspective (other than to explain that the numbers on the forms were used to 'balance' the district's 'books')." *Id*. As the government failed to introduce any such evidence, the conviction could not stand. *See id*.

The Seventh Circuit reached the same conclusion in *United States v. Kwiat*, reversing a false statements conviction for insufficient evidence of materiality. *See United States v. Kwiat*, 817 F.2d 440, 446 (7th Cir. 1987). In *Kwiat*, the defendant was charged with making false statements to the FDIC after he lied on real estate closing forms about the size of a broker's commission. *See id*. at 444-45. At trial, the government introduced evidence that the FDIC sometimes looked at closing forms of this type to obtain information. *See id*. at 445. This alone, however, was ***20** insufficient to establish materiality. As the Seventh Circuit held, it was not enough to present evidence in general terms; the testimony had to explain how these particular

false statements related to any particular decision of the FDIC. *See id*. As the government failed to present any such evidence, the conviction was reversed.

In Mr. Johnson's case the evidence is akin to the overly-general testimony rejected in *Finn* and *Kwiat*. The government elicited testimony that the presiding judge generally reviews the docket when making decisions in a civil case. (App. 448). The government, however, never asked the presiding judge to explain how the particular statement here--the false claim that plaintiff's counsel had filed the praecipe to attach an exhibit--if believed, would have influenced any decision in the litigation. On this record, the testimony is insufficient to establish materiality.

2. The false praecipe is not material simply because it was deleted from the docket.

The government's only other evidence of materiality is that the false praecipe to attach an exhibit was deleted from the docket. (App. 452-53). The government argued this point in summation, asserting that the judge "struck it from the record. So he took action. So not only was it capable of influencing his decision, but it did. So it was, in fact, material." (App. 703).

***21** The government is mistaken in its interpretation of materiality. The cited evidence describes the judge's reaction to the false praecipe. But it is not as though a false, immaterial statement would have remained on the docket. A false statement that is immaterial, cannot become material because it is struck. *Cf. Kungys*, 485 U.S. at 775 ("[A] misrepresentation that, in and of itself, is utterly immaterial both in the visa proceeding and in the naturalization proceeding, [cannot] become[] material simply because it is repeated in both.") (emphasis omitted). This would improperly redefine materiality as "prompting some action." This is not the legal standard, which instead asks the jury to assess materiality in light of the antecedent " 'decision . . . the [judge was] trying to make.' " *Gaudin*, 515 U.S. at 512.

And for good reason. The judge's reaction to the false statement--striking the false praecipe--cannot establish materiality because it merely reflects that the statement was false. As the judge's order stated, "[t]his filing is fraudulent and was not filed by the attorney whose purported signature appears on the docket. The matter will be referred to the appropriate authority for further action." (App. 598). This says nothing about the statement's materiality. Indeed, if striking a false filing were *per se* sufficient, it would read the materiality element out of § 1001.

***22** The Second Circuit made an analogous point in *United States v. Litvak*, reversing several counts of false statements for insufficient evidence of materiality. *See United States v. Litvak*, 808 F.3d 160, 174 (2d Cir. 2015). In *Litvak*, the defendant was a bond trader charged with making false statements to the Treasury Department while trading residential mortgage-backed securities. *Id*. at 171. The government argued, *inter alia*, that the false statements were material because there was evidence that the "Treasury actually referred the matter to [the special inspector general] for investigation." *Id*. at 173 (alteration in original). The Second Circuit rejected this argument. As the Court explained, "every prosecution for making a false statement undoubtedly involves 'decisions' by the government to refer for investigation, investigate, and prosecute the defendant for making the false statement at issue." *Id*. As such, "the materiality element would be rendered meaningless" if such evidence were sufficient. *Id*.

The same is so in Mr. Johnson's case. The false praecipe was struck from the docket because it was fraudulent. (App. 598). But "falsity and materiality [are] *separate* requirements of misrepresentation." *Kungys*, 485 U.S. at 781 (emphasis in original). If striking the document were sufficient to establish materiality, this would render the element meaningless.

Indeed, the government's interpretation of materiality cannot be correct because it would render material any filing that falsely purported to be filed by ***23** counsel, no matter how irrelevant, trivial, or benign its contents. For example, the government's logic would apply to a well-meaning legal secretary who uses an attorney's login credentials to docket motivational quotes, which she also shares on Facebook and by email. The judge could strike the filing as fraudulent, but that would not mean it had a tendency to influence any decision the judge was trying to make. *See Gaudin*, 515 U.S. at 512.

3. The government is bound by the evidence introduced at trial.

The government, having presented insufficient evidence at trial, is bound by this record on appeal. As the Second Circuit put it in *Litvak*, "speculation is not permitted; rather . . . the government must have adduced evidence of an actual decision of the [decision-maker] that was reasonably capable of being influenced." *Litvak*, 808 F.3d at 172 (emphasis omitted). Indeed, numerous Courts of Appeals have held the same in the identical context.

For example, in *United States v. Ismail*, the Fourth Circuit reversed a conviction for false statements, while holding that the government was bound by the trial record. *See United States v. Ismail*, 97 F.3d 50, 62 (4th Cir. 1996). In *Ismail*, the defendant was charged with making false statements to the FDIC after he gave a false name and social security number to an FDIC-insured bank. The government failed to introduce evidence of materiality. On appeal, the Court acknowledged that "[p]roviding a false name or social security number certainly ***24** could, in a given situation, be material." *Id*. at 60. However, no such evidence was presented to the jury. *See id*. Nor could the government salvage the conviction by citing a banking statute, since it "never proffered the statute as evidence to the district court." *Id*. at 61.

The Second Circuit reached the same conclusion in *United States v. Rigas*, reversing one count of false statements, and holding that it would "not consider in the first instance arguments regarding materiality that were not presented to the jury." *Rigas*, 490 F.3d at 231 n.29. In *Rigas*, the defendants were charged with bank fraud for falsifying leverage ratios (the ratio of debt to annual operating cash flow). On appeal, the Second Circuit considered whether the false leverage ratios were material, and reached a mixed holding. On one count, the Court affirmed the conviction because the false leverage ratio affected the bank's interest rate. *See id*. at 236. On another count the Court reversed, explaining that the false leverage ratio did not affect the interest rate, and the government's other arguments on materiality had never been presented to the jury. *See id*. at 235 & n.38, 236.

In Mr. Johnson's case, the government is likewise bound by the evidentiary record it made at trial. On this record, the evidence is insufficient. The convictions must be reversed, and the case remanded for the entry of a judgment of acquittal. *See, e.g.*, *United States v. Castro*, 704 F.3d 125, 144 (3d Cir. 2013).

***25 II. The district court constructively amended the indictment for false statements, 18 U.S.C. § 1001, by instructing the jury on "making or using" a false document, when the indictment charged "making" a false statement.**

Standard of Review

The Court exercises plenary review over a claim that an indictment was constructively amended. *See United States v. Centeno*, 793 F.3d 378, 389 n.10 (3d Cir. 2015). Constructive amendments are reversible error for which a defendant need not show prejudice. *See id.*; *see also United States v. Syme*, 276 F.3d 131, 136 (3d Cir. 2002).

Discussion

The district court constructively amended the indictment for false statements, 18 U.S.C. § 1001, by broadening the basis of conviction. In the indictment, the government charged Mr. Johnson with violating § 1001 by "making" false statements. (App. 22). At trial, however, the jury was instructed that it could convict Mr. Johnson for "making or using" a false document. (App. 749). This broadening of the indictment infringed on Mr. Johnson's constitutional rights under the Grand Jury Clause, and requires that the false statements ***26** conviction be vacated.[9] The Court must also vacate the conviction for aggravated identity theft, which rests on the infirm false statements conviction. (App. 24).

A. Legal Standard: The Grand Jury Clause prohibits constructive amendments.

The Grand Jury Clause of the Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. "Because of this constitutional guarantee, a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Centeno*, 793 F.3d at 389 (quoting *United States v. Vosburgh*, 602 F.3d 512, 531 (3d Cir. 2010)). This rule gives rise to "the general prohibition against constructive amendments." *Id*. (quoting *Vosburgh*, 602 F.3d at 531)). An "indictment is constructively amended when evidence, arguments, or the district court's jury instructions effectively amends the indictment by broadening the possible bases for conviction from that which appeared in the indictment." *Id*. at 390 (quoting *United States v. McKee*, 506 F.3d 225, 229 (3d Cir. 2007)).

***27 B. The district court constructively amended the indictment.**

The false statements statute, § 1001, applies to three categories of behavior--where a defendant knowingly and willfully
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry[.]

18 U.S.C. § 1001(a). Notably, subsection (a)(2) applies only where a defendant "makes" a false statement, while section (a)(3) applies where defendant "makes or uses" a false document. In this way, subsection (a)(3) is "broader than subsection (a)(2) because it applies to using statements as well as making them." *United States v. Gonzalez*, 540 F. App'x 967, 974 (11th Cir. 2014) (not precedential).

In Mr. Johnson's case, count one of the indictment charged him with "making" false statements, in the language of subsection (a)(2). (App. 22). Specifically, the government alleged that Mr. Johnson "made, and aided and abetted the knowing and willful making of, materially false, fictitious, and fraudulent statements and representations." (App. 22). The government repeated this theory in its trial memorandum, which provided that it "must prove beyond a ***28** reasonable doubt that . . . the defendant made a false, fictitious, or fraudulent statement or representation." (App. 102).

Yet when proposing points for charge, the government requested an instruction on a different theory--that Mr. Johnson could be convicted for "making or using" a false document. (App. 56). Over objection, the district court agreed. (App. 90). It instructed the jury that it could convict Mr. Johnson for "making or using" a false document, which it described as the first essential element of the offense:

> One, that the Defendant *made or used a false document*. Two, the document contained a statement that was false. Three, that the statement was material. Four, that the Defendant acted knowingly and willfully. And five, that the document pertained to a matter within the jurisdiction of the judicial branch of the United States . . . .

(App. 749) (emphasis added).

The district court's jury instruction caused a constructive amendment of the indictment, in that it modified the essential elements charged by the grand jury. *See Centeno*, 793 F.3d at 390. The district court broadened the conduct that the jury could find from "making" a false statement, (App. 22-23), to "making or using" a false document, (App. 749). This was impermissible, as the

government was bound by its charging decision. *Cf. United States v. Kozlowski*, 647 F. Supp. 2d 1045, 1048 (W.D. Wisc. 2009) (holding under § 1001 that where "the government chose to charge defendant with 'using' and not 'making' . . . it had to ***29** prove that defendant 'used' his driver's log in this district."). Appellate panels have found the same in analogous circumstances.

For example, in *United States v. Madden*, the Eleventh Circuit reversed a conviction under 18 U.S.C. § 924(c) for constructive amendment. *See United States v. Madden*, 733 F.3d 1314, 1316 (11th Cir. 2013). In *Madden*, the indictment charged the defendant with possessing a firearm "in furtherance of" drug trafficking. The district court, however, instructed the jury that it could convict the defendant for possessing a firearm "during and in relation to" drug trafficking. This instruction broadened the possible basis of conviction in violation of the defendant's grand jury rights. *See id*. at 1318-19.

A panel of this Court has held the same. In *United States v. Jenkins*, the panel vacated a defendant's § 924(c) conviction for constructive amendment where the indictment charged "in furtherance of" but the district court instructed on the broader language, "during and in relation to." *See United States v. Jenkins*, 347 F. App'x 793, 795 (3d Cir. 2009) (not precedential).

Similarly, the Fifth Circuit recently decided *United States v. Phea*, granting a § 2255 habeas motion on the basis of a constructive amendment. *See United States v. Phea*, 953 F.3d 838 (5th Cir. 2020) (per curiam). *Phea* was a case involving the prostitution of a minor. The indictment charged the defendant with "knowing" the victim was a minor. The jury instructions, however, provided that ***30** the jury could convict the defendant for either "knowing" the victim was a minor or for having a "reasonable opportunity to observe" her. By providing both options in the jury instructions, the district court constructively amended the indictment. *See id*. at 842.

In Mr. Johnson's case, as in *Madden*, *Jenkins*, and *Phea*, the district court constructively amended the indictment. While the indictment charged "making" a false statement, the court instructed the jury that it could convict for "making or using" a false document. In this way, the district court broadened the possible bases of conviction--since "making or using" is self-evidently broader than "making" alone. *See Gonzalez*, 540 F. App'x at 974. Indeed, it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant," a canon necessitating that "using" carries its own independent weight. *Kungys*, 485 U.S. at 778.

On the plain meaning of the terms, moreover, requiring that one "make" a false statement is a narrower route to conviction than requiring that one "use" a false document. The verb "to make" refers to creating, composing, or causing something to exist. *See SEC v. Tambone*, 597 F.3d 436, 443 (1st Cir. 2010) (en banc). This is a "significantly different (and narrower) verb" than "to use." *Id*. (distinguishing the terms under 17 C.F.R. § 240.10b-5(b), prohibiting the making of false statements in buying or selling securities). The verb "to use" does not ***31** require that a defendant originate anything; rather, it may mean to employ, apply to one's purposes, put into service, avail, or utilize. *See Watson v. United States*, 552 U.S. 74, 79 n.7 (2007). For example, the verb "to use" (but not "to make") would apply where a defendant passes along the writing of another.

In this way, Mr. Johnson was deprived of his constitutional grand jury rights. His conviction for false statements must be vacated, along with the conviction for aggravated identity theft, which rests on it, and the case remanded for further proceedings.

CONCLUSION

For the foregoing reasons, Mr. Johnson's convictions should be reversed and the matter remanded for entry of judgment of acquittal. In the alternative, the district court's judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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Footnotes

1 "App." followed by a number denotes the relevant page of the joint appendix. Volume I of the appendix is bound with this brief pursuant to Local Appellate Rule 32.2(c). Volumes II through IV are bound separately, and Volume IV (App. 911-988) has been submitted under seal with an accompanying motion filed this date. The Presentence Investigation Report (PSR) has been filed under seal, pursuant to Local Appellate Rule 30.3(c).

2 A notice of appeal filed after a court announces the judgment, but before entry of the judgment on the docket, "is treated as filed on the date of and after the entry." Fed. R. App. P. 4(b)(2). Mr. Johnson also filed a *pro se* amended notice of appeal on March 13, 2020. (App. 10).

3 All references to the factual history of this case refer to the government's evidence at trial. Mr. Johnson has and does maintain his innocence.

4 Ms. Troiani explained to the jury that "praecipe" literally "means demand, but we were--we actually say, please, include this in our filing." (App. 355).

5 Mr. Johnson was not in Philadelphia when the delivery was made. Rather, the government alleged that he aided and abetted an unknown person who made the hand-delivery. The government presented extensive evidence linking the filing back to Mr. Johnson, but this evidence is not at issue on appeal. In short, Mr. Johnson's fingerprints were found on tape used to seal the envelope containing the false praecipe. Mr. Johnson was linked to the devoutplayerhater @yahoo.com email account through a chain of records (from Yahoo, to Verizon, to IKANO d/b/a DLS Extreme). Mr. Johnson also used his work computer to access the docket for the *Constand v. Castor* lawsuit, and to obsessively conduct internet searches regarding Mr. Cosby.

6 Mr. Johnson moved in limine to preclude the testimony of Judge Robreno. (App. 82). In response, the government asserted that Judge Robreno's testimony was relevant to materiality, explaining: "As the judicial decision maker in the civil case in which the false statement was filed, he is in the best position to determine whether the false statement did, or was capable of affecting judicial action. Within the context of this case, judicial non-decision making court personnel are not in a position to make this determination." (App. 98). The district court permitted the testimony, but did not rule on the written motion, which it deemed terminated after trial. (App. 763).

7 The Third Circuit does not have a pattern jury instruction for § 1001. The government requested Sixth Circuit pattern instruction § 13.03, which applies to making or using a false document under § 1001(a)(3). (App. 57) (citing Sixth Circuit Pattern Criminal Jury Instructions § 13.03 (July 1, 2019)). The government did *not* request Sixth Circuit pattern instruction § 13.02, which applies to making false statements under § 1001(a)(2). *See* Sixth Circuit Pattern Criminal Jury Instructions § 13.02 (July 1, 2019).

8 In 1996, Congress amended the false statements statute, but these amendments did not affect the materiality element, which was required under both pre- and post-amendment texts. *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459 (1996).

9 The district court's jury instruction also deviated from the indictment in that it referred to a "false document," (App. 749), as opposed to a false "statement," (App. 22).

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