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10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 GARY KOVALL, et al.,

17 Defendants.

No. CR 12-441A-MWF

GOVERNMENT'S OPPOSITION TO  
DEFENDANT HESLOP'S MOTION IN  
LIMINE NO. 1 TO PRECLUDE EVIDENCE  
CONSTRUCTIVELY AMENDING THE  
INDICTMENT

Hearing Date: February 18, 2014  
Hearing Time: 3:00 p.m.

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20 Plaintiff United States of America, by and through its counsel  
21 of record, the United States Attorney for the Central District of  
22 California and Assistant United States Attorneys Brandon D. Fox and  
23 Meghan A. Blanco, hereby files its Opposition to defendant David Alan  
24 Heslop's Motion in Limine No. 1 to Preclude Evidence Constructively  
25 Amending the Indictment.

26 This Opposition is based upon the attached memorandum of points  
27 and authorities, the files and records in this case, and such further  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Defendant David Alan Heslop seeks to have the Court exclude any  
4 evidence and statements that constructively amend the First  
5 Superseding Indictment. Heslop's motion is not well-founded, is  
6 premature, and is hypothetical. It should be denied.

7 **II. STATEMENT OF FACTS**

8 **A. THE INDICTMENT**

9 Defendant Heslop, along with his codefendants Gary Kovall, Paul  
10 Bardos, and Peggy Shambaugh, are charged in the First Superseding  
11 Indictment (the "indictment") with conspiracy to commit bribery and  
12 with committing bribery. The indictment alleges that Heslop and  
13 Bardos made illicit payments to Kovall through Shambaugh in  
14 connection with transactions of the Twenty-Nine Palms Band of Mission  
15 Indians (the "Tribe"). The transactions at issue are: (1)  
16 construction-related contracts awarded by the Tribe; and (2) the  
17 Tribe's purchase of 47-acres of real estate.

18 1. The Defendants

19 According to the indictment: (a) Kovall acted as the general  
20 counsel for the Tribe; (b) Heslop was an advisor to the Tribe and was  
21 an officer of Echo Trail Holdings, a company set up by the Tribe at  
22 Kovall's advice to purchase real estate for the Tribe; (c) Bardos  
23 performed construction work for the Tribe as a general contractor and  
24 oversaw other construction projects on behalf of the Tribe; and (d)  
25 Shambaugh was a real estate agent who was in a romantic relationship  
26 with Kovall.

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1           2.    Construction-Related Contracts

2           The indictment alleges that Kovall and Heslop introduced Bardos  
3 to the Tribe to act as its "owner's representative" in connection  
4 with construction work planned by the Tribe. (Indictment at ¶ 6.)  
5 Thereafter, Kovall steered certain Tribe construction projects and  
6 oversight work to Bardos. (Id. at ¶ 10(c).) In exchange for these  
7 contracts, Bardos allegedly provided money to Heslop, who acted as a  
8 middle-man and paid kickbacks to Kovall through Shambaugh. (Id. at  
9 ¶ 10(e).)

10           3.    Purchase of 47-Acres of Real Estate

11           The indictment alleges that Heslop illegally obtained \$10,000  
12 from Shambaugh intending to be influenced and rewarded in connection  
13 with the purchase of a 47-acre parcel of land for \$31.7 million on  
14 behalf of the Tribe and the awarding of a commission payment to  
15 Shambaugh. (Id. at ¶ 27, 29.) At the time, Heslop was acting as an  
16 agent of the Tribe through his duties with a company called Echo  
17 Trail Holdings, LLC, a shell company set up to purchase real estate  
18 on behalf of the Tribe. (Id. at ¶ 5.)

19 **III. ARGUMENT**

20           Heslop asks this Court to preclude the government from offering  
21 any evidence that is not specifically alleged in the indictment. As  
22 Heslop has twice filed motions to dismiss alleging that the  
23 indictment was insufficient in its allegations, the instant motion,  
24 in essence, is Heslop's third attempt to evade the standards of  
25 Federal Rule of Criminal Procedure 7(c)(1).

26           Under Rule 7(c)(1), an indictment must be a "plain, concise, and  
27 definite written statement of the essential facts constituting the  
28 offense charged." As this Court has ruled, the indictment contains

1 sufficient allegations to put the defendants on notice of the charges  
2 against them and to adequately prepare a defense. (R. 115). As this  
3 is all that is required, it would circumvent Rule 7(c)(1) to limit  
4 the government's proof to only those facts alleged in the indictment  
5 and nothing more. Using defendant's logic, it would be impossible  
6 for the government to prove its case if the indictment merely set  
7 forth the elements of the charged offense. Yet these type of  
8 indictments can be sufficient under Rule 7(c)(1). United States v.  
9 Woodruff, 50 F.3d 673, 676 (9th Cir. 1995).

10       Instead, "[t]he government need not recite all of its evidence  
11 in the indictment, nor is it limited at trial to the overt acts  
12 listed in the indictment." United States v. Fornia-Castillo, 408  
13 F.3d 52, 67 (1st Cir. 2005) (quoting United States v. Innamorati, 996  
14 F.2d 456, 477 (1st Cir. 1993)); United States v. Bradstreet, 135 F.3d  
15 46, 53 (1st Cir. 1998) (rejecting constructive amendment and  
16 prejudicial variance argument based on introduction of transactions  
17 not alleged in the indictment); United States v. Jensen, 690 F. Supp.  
18 2d 901 (D. Alaska 2010); United States v. Cephias, 937 F.2d 816, 823  
19 (2d Cir. 1991) ("government need not particularize all of its  
20 evidence" in an indictment); Culp v. United States, 131 F.2d 93, 100  
21 (8th Cir. 1942) ("The Government was, of course, not required to  
22 plead all of its evidence in the indictment."). That the indictment  
23 provides more specificity than necessary is not a reason to narrowly  
24 limit the proof to the allegations in the indictment. See United  
25 States v. Fernandez, 559 F.3d 303, 328 (5th Cir. 2009) (denying  
26 constructive amendment argument that focused on manner and means  
27 allegation because that allegation "is not essential" to an  
28 indictment); United States v. Silber, No. 09-20223, 2010 WL 1131489,

1 at \*3 (E.D. Mich. March 23, 2010) (government's proof not confined to  
2 means alleged in conspiracy because "the Indictment need not be that  
3 detailed"); United States v. Clark, No. 05-80810, 2006 WL 2033981, at  
4 \*1 (E.D. Mich. July 18, 2006) ("[T]he 'Manner and Means' section is  
5 an optional part of the indictment.").

6 Heslop frames this as a "constructive amendment" or "prejudicial  
7 variance" issue. Such arguments are premature. United States v.  
8 Vondette, 248 F. Supp. 2d 149, 163 (E.D.N.Y. 2001). Constructive  
9 amendments occur "when the government's presentation of evidence and  
10 the district court's jury instructions combine to modify essential  
11 elements of the offense charged to the point that there is a  
12 substantial likelihood that the defendant has been convicted of an  
13 offense other than the one charged by the grand jury." United States  
14 v. Veбелиunas, 76 F.3d 1283, 1290 (2d Cir. 1996). A variance arises  
15 "when the evidence adduced at trial establishes facts different from  
16 those alleged in an indictment." Dunn v. United States, 442 U.S.  
17 100, 105 (1979). As district courts routinely recognize, these  
18 arguments cannot be raised before the government has presented its  
19 proof. United States v. Ring, 628 F. Supp. 2d 195, 219 (D.D.C. 2009)  
20 (Defendant's "concern for potential variance between the indictment's  
21 allegations of conspiracy and the government's evidence of conspiracy  
22 is premature."); United States v. Diallo, No. 09 CR 858, 2009 WL  
23 4277163, at \*3 (S.D.N.Y. Nov. 24, 2009) (constructive amendment  
24 argument involves "a review of evidence presented at trial" and is  
25 "premature" before then); United States v. Thomas, 545 F. Supp. 2d  
26 1018, 1023-1024 (N.D. Cal. 2008) (constructive amendment argument not  
27 ripe until after evidence presented to jury at trial, when limiting  
28 instruction might be appropriate); United States v. Scott, No. CR.

1 07-30112, 2008 WL 1733193, at \*4 (D.S.D. April 14, 2008) (district  
2 court "in no position to determine, or even appropriately address"  
3 issue pretrial); United States v. Davidson, No. 2:05-CR-0440-RLH-LRL,  
4 2007 WL 1792523, at \*3 (D. Nev. June 19, 2007) (defendant's argument  
5 that there is a variance between pleading and proof was premature);  
6 Vondette, 248 F. Supp. at 163.

7         Instead, a constructive amendment argument can be raised only  
8 after the evidence has been presented, the government has argued at  
9 trial, and the court has instructed a jury in such a way that allows  
10 it to convict on a theory that is not alleged in the indictment. See  
11 Stirone v. United States, 361 U.S. 212, 217-19 (1960) (constructive  
12 amendment occurred when district court amended indictment through its  
13 instructions); United States v. Dipentino, 242 F.3d 1090, 1094-96  
14 (9th Cir. 2001) (constructive amendment through jury instructions);  
15 United States v. Shipsey, 190 F.3d 1081, 1085-87 (9th Cir. 1999)  
16 (jury instructions and government's closing argument suggested  
17 defendant could be convicted on completely different theory than  
18 alleged in indictment). Similarly, whether a variance occurs and  
19 whether it is prejudicial must be analyzed in light of the proof at  
20 trial. United States v. Patel, No. 94 CR 651-2, 1994 WL 685074, at  
21 \*1 (N.D. Ill. Dec. 5, 1994).

22         Heslop does not refer to any specific witness statements,  
23 documents, or other evidence that he seeks to bar. He claims,  
24 however, that this argument is "not hypothetical" because the  
25 government purportedly "has already amended the scope of the  
26 conspiracy." (R. 179 at 6:28-7-1.) Heslop points to the  
27 government's opposition to his motion to dismiss in which the  
28 government argued that "the Tribe entered into agreements with

1 Bardos, at the advice of Kovall **and Heslop.**" (R. 179 at 7:1-2)  
2 (emphasis in original). The government's assertion that Kovall and  
3 Heslop advised the Tribe to contract with Bardos was entirely proper,  
4 as it is, in fact, alleged in the indictment. The indictment says  
5 that he and Kovall "persuaded the Tribe to contract with defendant  
6 BARDOS to act as the Tribe's 'owner's representative.'" (R. 63 at  
7 4:9-12.) Indeed, this is something that Heslop himself recognizes in  
8 his Motion. (R. 179 at 2:20-23.)

9 Defendant again argues that the government should be precluded  
10 from offering any evidence "that the improper payments were made in  
11 connection with any entity other than the Tribal government itself,  
12 or that payments were made to Bardos by any entity other than 'the  
13 Tribe.'" (R. 179 at 7:19-22.) This is a re-hashing of defendant's  
14 motion to dismiss in which he claims that the transactions were not  
15 those of the Tribe. (See R. 160 at 12-17). The government's proof  
16 will include evidence that the Tribe authorized these transactions,  
17 that the contracts affected land owned by the Tribe, that the Tribe  
18 (along with its related entities) entered into loan agreements that  
19 funded these contracts, that all profits from its related entities  
20 flowed to the Tribe, and that the 47-acre purchase was made on behalf  
21 of the Tribe so that the land could become part of the Tribe's  
22 reservation. That the transactions may have also involved other  
23 affiliated entities does not foreclose the argument and evidence that  
24 these were Tribal transactions.

#### 25 **IV. CONCLUSION**

26 For the foregoing reasons, the government respectfully requests  
27 that this Court deny defendant Heslop's Motion in Limine No. 1 to  
28 Preclude Evidence Constructively Amending the Indictment.