Nos. 08-1846, 08-1985, 08-1986, 08-2102, 08-2103, 10-1094

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

EMADEDDIN Z. MUNTASSER and MUHAMED MUBAYYID,

Defendants-Appellants/Cross-Appellees

and

SAMIR AL-MONLA

Defendant-Cross-Appellee

ON APPEAL FROM THE JUDGMENTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

GOVERNMENT'S REPLY BRIEF IN APPEALS NOS. 08-1846, 08-1985, 08-2102, AND 10-1094

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This reply brief, filed in support of the government's appeal and cross-appeals, is addressed to those points raised in the defendants' responsive briefs that we believe warrant a response. With respect to those points not discussed herein, we rely upon our opening brief.

ARGUMENT

THE GOVERNMENT PROVED A NARROWER, INCLUDED CONSPIRACY, WHICH RESULTED IN A NONPREJUDICIAL VARIANCE FROM THE INDICTMENT

The conspiracy count (Count 2) alleged that defendants Muntasser, Mubayyid, and Al-Monla, as well as two unindicted co-conspirators, Mohammed Akra and Waseem Yassin, conspired to defraud the United States by impairing the IRS "in the ascertainment, assessment, and determination of whether Care International, Inc., qualified and should be designated as a §501(c)(3) organization in 1993 and should continue to be accorded status as [a] §501(c)(3) organization thereafter." The district court ruled that the count charged a single-object conspiracy (12/19/07 RT 4-5 [A1060-A1061]), and instructed the jury that in order to convict, the government was required to prove that the object of the conspiracy was to both obtain and maintain Care's tax-exempt status. (12/19/07 RT 174 [A1140].) The jury, having found each of the three defendants guilty on the conspiracy count, necessarily determined that all three defendants fraudulently conspired to both obtain and maintain Care's tax-exempt status. (Doc. 399:A2480].) The district court acquitted the defendants of the conspiracy based upon a determination that Muntasser acted alone when he fraudulently *obtained* Care's tax exempt status. The government has appealed that ruling, arguing (Br. 43-53) that the district court's post-verdict acquittal on the conspiracy count was erroneous, because the

government proved a narrower, included conspiracy to fraudulently *maintain* Care's tax-exempt status, which constituted a nonprejudicial variance from the indictment.

A. *The government preserved its variance argument*

In its opening brief, the government stated (Br. 43) that it had preserved its variance argument and supported that statement with citations to the record, including the following: 12/13/07 RT 42-43 [A1000] (prosecutor: "but even if you can't find that the conspiracy starts at the time of the filing of the 1023, I don't understand why evidence of a conspiracy at any time during the charge of conspiracy -- and the initial inception of the conspiracy there's a variance to a particular date, that is not fatal to the existence of the conspiracy"); Doc 385 at 11 [A2448] (gov't opposition to pre-verdict Rule 29 motion: "However, if the Court were to discount the jury's ability to [find a conspiracy to obtain tax-exempt status], then the proper remedy would be to allow the jury to find that the conspiracy involved the fraudulent maintenance of [Care's] tax-exempt status, which is also charged in the indictment. When the evidence of the charged conspiracy exists in the record, but the timing of the existence of that conspiracy differs from that alleged in the indictment, the result is a non-prejudicial variance. *See Dunn v. United States*, 442 U.S. 100, 105 (1979); *Kotteakos v. United States*, 328 U.S. 750, 766 (1946)"); 12/18/07 RT 102 (defense attorney Estrich: "In the *Dunn* case, the variance was that there were two dates cited," and "the Court said this was not a substantial variance"); 12/18/07 RT 103 [A1030] (the Court: "But

the variance -- I agree with the argument as far as it goes on variance. Isn't variance different than a conspiracy with dual objects? . . . Which is different from variance, and I agree. There's some leeway in variance, September to October"); Doc. 561 at 6-7 [A2535] (govt motion for reconsideration: "Even where there is a variance, moreover, it is fatal only if it is prejudicial, . . . and any variance in this case was not prejudicial.").

Without discussion of the above-listed citations to the record,[1] Muntasser asserts (Br. 38) that "the government waived [the variance argument] by not raising it below." As support for his assertion that the government did not raise the variance argument, Muntasser states (Br. 38) that the government did not "mention" variance in its post-verdict Rule 29 brief (Doc. 505) or in its written motion for reconsideration (Doc. 561).

In their post-verdict Rule 29 motion, the defendants did not challenge the variance argument discussed by the government in its response to the defendants' pre-verdict motion. Therefore, the absence of an express variance argument in the government's response to that particular motion does not bear the weight that the defendants seek to place on it. And, contrary to Muntasser's representation to this

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[1] For example, Muntasser states (Br. 33) that the government, in its written opposition to his pre-verdict Rule 29 motion (Doc. 385), argued that the conspiracy count charged multiple objects, citing page 10 of the government's memorandum. But Muntasser fails to address what the government states next in that memorandum, on page 11, wherein the government argued that "if the Court were to discount the jury's ability to [find evidence of a conspiracy to obtain tax-exempt status], then the proper remedy would be to allow the jury to find that the conspiracy involved the fraudulent maintenance of [Care's] tax-exempt status," which the government described as a "non-prejudicial variance." (Doc. 385 at 11 [A2448].)

Court, the government's written motion for reconsideration did "mention" the variance argument. In fact, the motion argued the point expressly. *See* Doc. 561 at 6-7 [A2535-A2536]. As the government stated in its concluding paragraph on the issue:

> Even if, moreover, Count Two is read to allege that the defendants defrauded the IRS in only [one] way -- by 'obtaining and maintaining' Care's tax exempt status -- and the government's evidence varied from that allegation, the variance was not prejudicial and therefore non-fatal.

Doc. 561 at 7 [A2536].

In sum, Muntasser's assertion (Br. 38) that the government did not raise a variance argument in the district court, and is raising it for the first time on appeal, is demonstratively incorrect. The government expressly raised its variance argument with respect to the conspiracy charge verbally during trial, in its written opposition to the defendants' pre-verdict Rule 29 motion, and in its post-verdict motion for reconsideration.

Al-Monla, in contrast to Muntasser, acknowledges that the government raised variance in the district court, but he contends (Br. 25) that "the government presented a date-variance argument" and "did not argue that permissible variance allowed it to prove only a portion of the object of the conspiracy charged." Al-Monla's contention does not withstand scrutiny. The government's argument to the district court that there was a non-prejudicial variance in the proof if the conspiracy did not start until after the filing of the Form 1023 (see pp. 2-3, *supra*) was an argument that there was a non-prejudicial variance if the conspiracy did not

start until after Care's tax-exempt status was obtained and was directed only toward maintaining that status. This characterization of the government's argument necessarily follows from the fact that the Form 1023 was the form through which Care obtained tax-exempt status. That the government's variance argument to the district court included the argument the government is making to this Court is further confirmed by the government's response to the defendants' pre-verdict Rule 29 motion, wherein the government argued that "if the Court were to discount the jury's ability to [find a conspiracy to obtain tax-exempt status], then the proper remedy would be to allow the jury to find that the conspiracy involved the fraudulent maintenance of [Care's] tax-exempt status." (Doc 385 at 11 [2448].)

In sum, the variance argument that the government is urging to this court was sufficiently raised below to preserve the argument for appeal.

B. *That the defendants conspired to fraudulently "maintain" Care's tax-exempt status was alleged in the indictment and presented to the jury*

Muntasser asserts (Br. 39) that even if the variance argument was preserved, it would violate due process for this Court to reinstate the jury's guilty verdicts based upon proof of a conspiracy to fraudulently maintain Care's tax-exempt status. He contends that to do so would improperly result in his being convicted on a basis neither set forth in the indictment nor presented to the jury at trial. In making this argument, Muntasser cites *Dunn v. United States*, 442 U.S. 100 (1979).

In *Dunn*, the defendant testified before a federal grand jury under a grant of immunity and implicated a fellow inmate in various drug-related offenses, with which the inmate was then charged. Subsequently, on September 30, 1976, Dunn

recanted his grand jury testimony while under oath in the office of the other inmate's attorney. During an October 21, 1976 court hearing, Dunn adopted the statements he had given in the attorney's office. Dunn was subsequently charged and convicted based upon an indictment charging that his testimony before the grand jury was inconsistent with statements made "on September 30, 1976 while under oath as a witness in a proceeding ancillary" to the grand jury investigation, in violation of 18 U.S.C. 1623. On appeal, the Tenth Circuit agreed with Dunn that the interview in the attorney's office was not an "ancillary proceeding" as contemplated by § 1623, but the court concluded that the October 21 court hearing at which Dunn adopted his September statement was a proceeding ancillary to a grand jury investigation. Acknowledging that the indictment specified the September 30 interview rather than the October 21 court hearing as the ancillary proceeding, the court of appeals construed that discrepancy as a nonprejudicial variance between the indictment and proof at trial.

The Supreme Court held that it was unnecessary to determine whether Dunn had been prejudiced by a variance between the indictment and the proof, because there had been no such variance, as both the indictment and the proof concerned Dunn's grand jury testimony and the September 30th interview. The Court found reversible error, however, in the circuit court's affirming the conviction based upon the inconsistencies between Dunn's grand jury testimony and his October 21st testimony, as the indictment did not reference the October testimony and the jury was instructed to rest its decision on Dunn's September statement. "To uphold a

conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial," the Court held, "offends the most basic notions of due process." 442 U.S. at 106.

Muntassser's contention that, as in *Dunn*, the government's theory on appeal was neither charged in the indictment nor presented to the jury is incorrect. The indictment here alleged that the defendants and unindicted coconspirators conspired to defraud the United States by impairing the IRS "in the ascertainment, assessment, and determination of whether Care International, Inc., qualified and should be designated as a §501(c)(3) organization in 1993 and should continue to be accorded status as [a] §501(c)(3) organization thereafter." The government's theory on appeal -- that the defendants and the unindicted coconspirators unlawfully conspired to maintain Care's tax-exempt status -- was accordingly charged in the indictment. Further, the jury was expressly instructed that, in order to convict, it must find that the defendants conspired not only to "obtain" Care's tax-exempt status but also to "maintain" Care's tax-exempt status. Thus, not only was conspiracy to maintain Care's tax exempt status presented to the jury, the jury, having convicted the defendants, found that the defendants conspired to maintain Care's tax-exempt status.

Muntasser asserts (Br. 40, 41) that this Court cannot use variance analysis to reinstate the jury's guilty verdicts because the government argued to the jury that the defendants conspired to both obtain and maintain Care's tax-exempt status, not that they conspired "solely" to maintain such status. In other words, Muntasser

contends that even if the government made its variance argument to the district court, the government can't make a variance argument to this Court because the government did not make a variance argument *to the jury*. But Muntasser cites no authority for the odd proposition that, to preserve the issue for appeal, the government was required to argue its variance theory to the jury in addition to the court. Muntasser also provides no authority for the proposition that to preserve its position that proof of a conspiracy to fraudulently maintain exempt status was sufficient to convict, the government was required to disobey the district court's rulings and argue contrary to the jury instructions.

C. *Proof that the object of the conspiracy was the fraudulent maintaining of Care's tax-exempt status established a narrower subset of the charged conspiracy and resulted in a non-prejudicial variance from the charged conspiracy*

Conflating and confusing the distinct theories of variance and constructive amendment, Muntasser argues (Br. 46) that variance cannot apply to a narrowing of the object of a conspiracy because to do so would alter an "essential element" of the charged offense. Muntasser's position is without merit.

The Supreme Court has interpreted the Grand Jury Clause of the Fifth Amendment to the Constitution to mean that "after an indictment has been returned[,] its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 215-16 (1960). In *United States v. Roshko*, 969 F.2d 1 (2d Cir. 1992), cited by Muntasser (Br. 46-47), an indictment charged that the defendant had conspired to defraud the United States "by seeking changes in the immigration status of an alien based on a sham marriage to

a United States citizen that was falsely represented to be genuine," which allegation was construed as charging that the object of the conspiracy was the fraudulent receipt of a green card by the husband, a conspiracy that ended upon the husband's receipt of the green card. 969 F.2d at 5. The jury, however, was allowed to convict the defendant based upon the uncharged contention that the wife's subsequent receipt of a green card was an object of the conspiracy. *Id*. The Second Circuit, stating that "[w]ithout question, the object of a conspiracy constitutes an essential element of the conspiracy offense," held that the broadening of the object of the conspiracy constituted an impermissible constructive amendment of the indictment. *Id*.

In stating that an indictment returned by a grand jury cannot be broadened, *Roshko* noted, in contrast, that "a court may narrow an indictment at trial without violating the grand jury clause where 'what was removed from the case was in no way essential to the offense on which the jury convicted,'" quoting *United States v. Miller*, 471 U.S. 130, 145 (1985). Muntasser, citing *Roshko*'s statement that "the object of a conspiracy constitutes an essential element of the conspiracy offense," but ignoring that *Rosheko* involved the *broadening* of the object of a charged conspiracy, asserts (Br. 46) that the object of a conspiracy cannot be narrowed because to do so would alter an "essential element" of the charged offense.

Muntasser's position is inconsistent with the Supreme Court's holding in *Miller*, which expressly rejected the proposition "that a narrowing of the indictment constitutes an amendment that renders the indictment void." *Miller*, 471 U.S. at

144. In *Miller*, a mail fraud count charged that the defendant had schemed to defraud an insurance company by consenting to a burglary in advance and by lying to the insurer about the value of his loss. 471 U.S. at 131-132. The trial evidence did not show that the defendant had advance knowledge of the burglary, but did prove that the defendant had lied about the value of the loss, which proof still made out a violation of § 1341, upon which the jury convicted. 471 U.S. at 132-133. The court of appeals vacated the conviction, opining that "[t]he grand jury may well have declined to indict Miller simply on the basis of his exaggeration of the amount of his claimed loss." *Id*. at 134. The Supreme Court reinstated the conviction, however, holding that because "[t]he facts proved at trial clearly conformed to one of the theories of the offense contained within [the] indictment," the difference between the indictment and the proof at trial constituted only a non-prejudicial variance. 471 U.S. at 134.

In its concluding paragraph, *Miller* stated that "[t]he variance complained of added nothing new to the grand jury's indictment and constituted no broadening," and that "what was removed from the case was in no way essential to the offense on which the jury convicted." 471 U.S. at 145. With respect to the latter condition, this Court has stated that "[s]o long as the statutory violation remains the same, the jury can convict even if the facts found are somewhat different than those charged -- so long as the difference does not cause unfair prejudice."[2] *United States v.*

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[2] We note that a conviction involving the sort of variance involved in *Miller* is similar to a conviction of a lesser included offense, which does not even

(continued...)

Twitty, 72 F.3d 228, 231 (1st Cir. 1995). In this case, there can be no bona fide dispute that the statutory violation remains the same whether the count charges a conspiracy to defraud the United States by fraudulently obtaining and maintaining Care's tax-exempt status or is narrowed to charge a conspiracy to defraud the United States by fraudulently maintaining Care's tax-exempt status. *See* 18 U.S.C. 371.

Munasser states (Br. 49) that the "maintaining" of Care's tax-exempt status is dependent upon the prior "obtaining" of Care's tax-exempt status, because "[w]ithout 'obtaining' there could be no 'maintaining.'" We agree. In fact, we cited that relationship in support of our argument that the variance in the proof did not prejudice the defendants.[3] *See* Govt. Br. 46 ("Evidence that Care's tax-exempt status was fraudulently obtained, moreover, would have been admissible if the

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[2](...continued)
require that the lesser offense whose elements are a subset of the charged offense be specifically charged in the indictment. *See* Fed. R. Crim. P. 31(c).

[3] Al-Monla states (Br. 26) that "[o]nly by charging a single conspiracy with the single object of fraudulently obtaining and maintaining [exempt] status could the government bring the charge within the statute of limitations period." The limitations period, however, was satisfied by the facts constituting the maintaining of exempt status. There accordingly was no prejudice to the defendants vis-a-vis the limitations period due to the conspiracy's not starting until after exempt status was obtained. Muntasser states (Br. 55) that had the conspiracy been charged solely as a conspiracy to maintain exempt status, "the government never would have been permitted to introduce voluminous inflammatory evidence pertaining to Care's formation in 1993." But even Muntasser agrees (Br. 49) that the "maintaining" of Care's tax-exempt status is dependent upon the prior "obtaining" of Care's tax-exempt status, because "[w]ithout 'obtaining' there could be no 'maintaining.'" The evidence concerning "Care's formation in 1993" thus would have been admissible even if the indictment had charged only a conspiracy to fraudulently maintain Care's exempt status.

indictment had charged only a conspiracy to maintain, because there would be no way to show that the "maintaining" was fraudulent if the "obtaining" was not fraudulent as well.") Muntasser argues, however, that the close relationship between "obtaining" and "maintaining" means that variance cannot apply. Muntasser asserts (Br. 49) that *United States v. DeCicco*, 439 F.3d 36, 46 (1st Cir. 2006), supports that peculiar proposition. It does not.

In *DeCicco*, the defendant argued that mail fraud charges were dependent upon an allegation that he caused a fire and that the government had broadened the basis for conviction by arguing to the jury that a conviction could rest upon the defendant's inflating an insurance claim, without a showing that the defendant caused the fire. 439 F.3d at 45. This Court held, however, that there had been no constructive amendment of the indictment, as the indictment alleged that the defendant perpetrated mail fraud in two "separate and distinct ways," one by causing the fire and one by submitting the inflated claim. *Id*. Muntasser cites (Br. 49) the court's "separate and distinct" language for the proposition that variance cannot apply here because the "obtaining" tax-exempt status and "maintaining" tax-exempt status are not "separate and distinct."

In making this argument, Muntasser confuses the pertinent question of whether the narrowed proof is "separate and distinct" from the charged facts in the sense that the narrowed proof is still sufficient to prove the charged statutory offense, see *Twitty*, 72 F.3d at 231, with the different question of factual relatedness. Contrary to Muntasser's position, *DeCicco* does not prohibit the government

from proving the same statutory offense through a narrower, related subset of facts. Indeed, factual relatedness between what was charged and what was proven reduces the possibility that the variance was prejudicial to a defendant.

Muntasser contends (Br. 50) that the government cannot rely on variance where the evidence proved "only part" of the charged conspiracy, citing *United States v. Smolar*, 557 F.2d 13 (1st Cir. 1977), in support. In *Smolar*, this Court held, in a securities fraud prosecution, that jury instructions that removed an allegation that a corporation's stock warrants had little value had "materially altered the theory of criminal liability" because it changed the theory of prosecution from "outright fraud" to "breach of fiduciary duty." *Smolar*, however, does not aid the defendants here. Proof that the aim of the conspiracy was to fraudulently maintain Care's tax-exempt status did not materially alter the theory of prosecution charged in the instant indictment. This is especially so given that, to prove that Care's tax-exempt status was fraudulently maintained, the government was still required to prove that Care's tax-exempt status was fraudulently obtained, albeit by Muntasser alone.

D. *There was sufficient evidence for the jury to conclude that the defendants conspired to fraudulently maintain Care's tax-exempt status*

The defendants argue that even if a conspiracy to fraudulently maintain Care's tax-exempt status would constitute a non-prejudicial variance, the government failed to prove such a conspiracy. Defendants are wrong on that point, as we demonstrate below.

1. *There was sufficient evidence that Muntasser conspired to fraudulently maintain Care's tax-exempt status*

Until 1993, Muntasser was the president of the Boston branch of Al-Kifah, a Pakistan-based organization that, as Muntasser himself wrote to potential donors, "served the cause of Jihad" by "actively support[ing] the Mujahideen in the front" as well as the "widows and orphans" of "martyrs." (11/15/07 RT 107-108 [A262]; 11/21/07 RT 49 [A.381]) Al-Kifah represented in its fund-raising materials that it was a tax-exempt entity and that donors could claim a tax deduction for their donations. (Exh. 40 [A1703]; 11/16/07 RT 149 [A319]; 11/26/07 RT 136; 12/12/07 RT 47 [A926]. But that was untrue; Al-Kifah was never granted tax-exempt status by the IRS. (11/15/07 RT 19-20 [A243-A244]; 11/26/07 RT 136 [A417]; 12/12/070 RT 47-48 [A926-A927].) Eventually, Muntasser set out to have the Boston office's activities taken over by a newly created tax-exempt entity, an effort that was rushed when Al-Kifah's New York office was linked to the February 1993 bombing of the World Trade Center.[4] (11/15/07 RT 109 [A262]; 11/14/07 RT 46-47 [A231-A232]; 11/21/07 RT 51-56 [A383-A388]; Exh. 2 [A1361].) In April 1993, days after that linkage was exposed, Muntasser incorporated Care International, Inc., which immediately continued the work formerly performed under the name of Al-Kifah. (Govt.Br. 10-12.) Muntasser served as Care's president from its incorporation in April 1993 through 1996, and

[4] Muntasser denies (Br. 7 n.3) that he created Care solely in reaction to the negative publicity received by Al-Kifah's New York office. We agree that Muntasser also had a tax purpose in creating Care.

he continued to be associated with Care at least through February 1997. (12/3/07 RT 171 [A593]; Exh. 27 [A1685].)

The trial evidence from which the jury could have reasonably concluded that Care, like Al-Kifah, urged young men to fight and focused its orphan and widow programs towards the families of dead fighters included numerous articles in newsletters that exhorted readers either to fight or to financially support those who were fighting;[5] the fact that shortly before transitioning from Al-Kifah into Care; the Boston office published a story describing how a Boston resident became "convinced of the duty of jihad," "left America and its trappings, and went to Afghanistan," where he "joined the mujahidin in Afghanistan" and died, in February 1993, as a "martyr" (Exh. 251A [A1979]); the testimony of Mohamad Tiba that the orphan program "focused on the children of the . . . martyrs and their

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[5] For example, an article, entitled "A Bedtime Story for your Child," stated that if a child was too young too fight, he should donate a portion of his allowance to help those who were fighting:

> And, my dear, if you are too young to help them by fighting with them to thwart the onslaught of their enemy, then how about praying for them in your salah, that Allah grant them victory? And how about donating to them a portion of your allowance? Don't think that a small amount of assistance will not be useful, for Allah may fill it with blessings for you, and save a Muslim's life with it. There will not be any difficulty in sending this money, for your uncles at Care International are capable of delivering it to them, inshaAllah.

(Exh. 448A [A2271].) *See also* Exhs. 234-250A; 252-266; 268-268A [A1816-A1973, A1985-A2125]; *see* Exh. 497 [A2311] (summary exhibit identifying references to "martyr," "mujahid," "mujahideen," and "jihad"); Exhibit 241 [A1876] ("If necessity confines you to be far away from the arena of *jihad*, then work behind the mujahideen, support them and arouse others to join them.").

families (11/29/07 RT 96-97 [A544]); a pledge card stating that an enclosed $500 check was "For Chechen Muslim Fighters" (Exh. 223 [A1812]); and numerous donor's checks, including a check from Muntasser (Exh. 327 [A2240]; Exh. 556 [A2377]), that expressly stated in the memo section that the funds were to be used for the "mujahideen," "martyrs," and "fighters." Other such evidence included Muntasser's representation to potential donors that Care "served the cause of Jihad" and "actively supported the Mujahideen in the front" (11/15/07 RT 107-108 [A260-A261]; 11/21/07 RT 48-49 [A380-A381]; Add 97 [A.1703]); and a letter from Care to an Afghan warlord pledging support in the cause of jihad (11/20/07 RT 28 [A360]; Exh. 66A [A1728]).[6]

Weeks after incorporating Care, Muntasser filed an application (Form 1023) with the IRS seeking recognition of tax-exempt status for Care. (Exh 2 [A1361].) That application was materially false in several respects. Question 5, for example, was falsely answered because the application failed to disclose that Care was an outgrowth of or successor to Al-Kifah. Question 3, for example, was falsely answered because the application failed to disclose that Care had solicited funds through publication of newsletters and the Zakat Calculation Guide.

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[6] Mubayyid states (Br. 7-8) that even if Care promoted itself to potential donors as supporting fighters and their families, the Forms 990 were not false because the government did not prove that Care followed through on those representations and actually supported fighters and their families with money. The jury, however, was not compelled to conclude that Care lied to its donors and could permissibly conclude that Care did as it represented.

Question 1 of the Form 1023 required Care to "[p]rovide a detailed narrative of all the activities of the organization -- past, present, and planned." A jury could reasonably conclude that question 1 required Care to disclose that it urged young men to fight and that its programs were focused towards supporting the families of dead fighters, both of which are non-charitable activities inconsistent with the tax-exempt status that Care was seeking. (12/7/07 RT 118-119 [A874].) A jury could also reasonably conclude, contrary to Mubayyid's position (Br. 2), that Care's statement that "Monthly contributions and donations will be solicited and collected to provide food, lodging, and education for orphans in disaster areas overseas, primarily in Bosnia, Afghanistan, and Kashmir" (Exh. 2 [A1362]), did not constitute disclosure of a program focused towards supporting fighters and the families of dead fighters. Given the Form 1023's obviously false representation that Care was not an outgrowth of or successor to Al-Kifah -- an entity that was the subject of adverse publicity at the time the Form 1023 was filed -- the jury was entitled to conclude that the other false statements on the Form 1023 were also intentional.[7]

For each year of its existence, Care was required to file a Form 990, which form is used by the IRS to determine whether an organization that has been granted

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[7] Whatever claim of ambiguity can be urged at the margin with respect to the definition of a "successor" organization does not help the defendants here, where the only material difference between Al-Kifah and Care was a name change and a fraudulent application for tax-exempt status. Indeed, when speaking internally among themselves, the individuals associated with Care referred to "Care" as "Maktab" the name by which Al-Kifah is known in Pakistan. (11/29/07 RT 74 [A536].)

tax-exempt status remains qualified for it. In Fall 1995, Muntasser caused an accountant to prepare the 1993 and 1994 Forms 990 on behalf of Care, which at that point had not filed any of the required Forms 990. (11/16/07 RT 55-57, 61 [A287-A293].) Waseem Yassin, who was Care's treasurer at the time, assisted an accountant with the preparation of the Forms 990, including providing a copy of the Form 1023. (11/29/07 RT 66 [A533]; Exh. 124 [A1759-1765].) Yassin, who worked with Muntasser both when the Boston office was known as Al-Kifah and when its name was changed to Care, was described in trial testimony as the "go-around guy," the person to whom others went when they wanted something done. (11/21/07 RT 40-45, 57-61 [A372-A377, A389-A393].) Not only was Yassin aware that Care was an outgrowth of or successor to Al-Kifah (11/21/07 RT 40 [A372]; 11/29/07 RT 68 [A535]), contrary to what was stated on the Form 1023, he also was involved in the decision making that determined where the donated funds were spent (12/10/07 RT 39 [A890]). Therefore, the jury could reasonably conclude that Yassin, like Muntasser, knew that Care exhorted young men to fight and that its programs were focused towards supporting the families of dead fighters.

Question 76 of the Form 990 asked the following question: "Did the organization engage in any activity not previously reported to the IRS? If yes, attach a detailed description of each activity." (Exhs. 9, 11, 12 [A1463].) The instructions for question 76 specifically directed the entity to disclose "new or modified activities not listed as current or planned in the organization's [Form 1023]

application for recognization for exemption or not yet reported to the IRS by a letter to its key district director or by an attachment to the organization's [Form 990] return for any earlier year." (Exh. 1123 [A2398].) Care's answering "no" to Question 76 on the Forms 990 was false because (1) Care's Form 1023 was false and truthful responses would have disclosed information that would have revealed that Care was engaged in non-charitable activities and (2) the Forms 990 required the disclosure of any material activity not previously reported to the IRS but such activity was not disclosed.

Muntasser asserts (Br. 24) that the answer to Form 1023's question 3, which stated that "fundraising [sic] efforts will commence" in the future (Exh. 2 [A1363]), constituted notice that Care had already published and would continue to publish the Al-Hussam newsletter. With that as a predicate, Muntasser argues that the response to Form 990's question 76 was not false because Care had already disclosed the existence of a newsletter. Muntasser's position is incorrect on two fronts. First, the jury was entitled to reject the defendants' position that a statement regarding future fund-raising constituted disclosure of a currently published newsletter that solicited donations for jihad.[8] Second, question 76 required not

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[8] Mubayyid argues (Br. 8) that even if Care did support the widows and orphans of fighters and failed to report that activity on the Form 1023, the Forms 990 were not false because that support was not a "new" activity that began during the calendar year covered by the Form 990. As we explained in our opening brief (at pp. 35-36), however, the disclosure required by question 76 was not limited to new activities begun during the reporting year. Rather, question 76 asked whether Care engaged in "any" activity not previously reported to the IRS, and the Form 990 instructions indicated that Care should report activities not reported on the

(continued...)

only the disclosure of the newsletters, but also the disclosure of the previously undisclosed *fact* that Care urged young men to fight and that Care's program was focused towards the families of dead fighters.[9] (Govt. Br. 15.) Accordingly, even if Care had disclosed information that revealed the existence of newsletters, Care's response to question 76 would still be false.[10]

Muntasser's and Yassin's joint participation in the preparation of the 1993 and 1994 Forms 990, combined with their joint knowledge of what was reported on the Form 1023 -- along with the fact that Care was organized for the specific purpose of obtaining tax-exempt status[11] -- constituted competent evidence that Muntasser and Yassin began to conspire with each other to fraudulently *maintain* Care's tax-exempt status no later than February 1996, when the 1993 and 1994 Forms 990 were filed.

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[8](...continued)
Form 1023 or previously filed Forms 990.

[9] Also improperly left undisclosed on the Forms 990 was Care's sales of books and videos that glorified the killing of people considered to be infidels. (11/21/07 RT 102-104 [A397-A399]; Exhs. 279, 450A, 466, 467, 468 [A2129, A.2274-A2275, A2277, 2285, 2293])

[10] Al-Monla asserts (Br. 5 n.3) that Care's support of "martyrs" was charitable because the definition of a "martyr" is not limited to dead fighters. Although the historical definition of "martyr" may not be limited to dead fighters, the record supports the conclusion that Care's use of the word referenced dead fighters, not persons who died from such things as the plague and intestinal disorders.

[11] The newsletter that Care published on June 11, 1993, (Exh. 267 [A2102]) stated that donations to Care were tax-deductible, despite the fact that as of June 11th, Care had not even submitted its application for tax-exempt status to the IRS.

Muntasser's assertions (Br. 51) that the record does not "identify any interactions" he had with his alleged coconspirators regarding the maintenance of Care's tax-exempt status, or "even to suggest when or how" the conspiracy began, are, as shown above, incorrect. Also incorrect is Muntasser's statement (Br. 52-53) that "because [he] alone filed the Form 1023, only he and not his alleged coconspirators could have had" knowledge of what information was omitted from the Form 1023 in 1993 and of a prior duty to have disclosed such information." Contrary to Muntasser's position, the jury could reasonably conclude that Yassin gained knowledge of what was omitted from the Form 1023, and what was required to be reported on the Form 990, when he assisted with the preparation of the 1993 and 1994 Form 990. With respect to Muntasser's statement that the conspiracy to maintain exempt status "presumably" started when Al-Monla and Mubayyid signed and filed Forms 990, and that he resigned as president of Care in 1996, nearly four years before Mr. Al-Monla filed a Form 990," Muntasser fails to acknowledge that the person with whom he first conspired to maintain exempt status need not be an indicted defendant. Here, there was sufficient evidence that Muntasser conspired with Yassin to fraudulently maintain Care's tax-exempt status no later than when the false 1993 and 1994 Forms 990 were filed in February 1996. (Exhs. 5 [A1382], 16)

2. *There was sufficient evidence that Al-Monla conspired to fraudulently maintain Care's tax-exempt status*

Al-Monla became associated with the Boston office of Al-Kifah through Mubayyid, his brother-in-law (12/10/07 RT 35 [A889]), around 1990 (12/10/07

RT 43 [A891]; Exh. 338 [A2246]), certified Care's 1993 articles of incorporation (Exh. 211 [A1802]), served as Care's president in 1996 and 1997, and was Care's treasurer in 1998 (Exh. 211 [A1802]; 11/20/07 RT 82-85 [A363-A366], 11/29/07 RT 66, 111 [A533, 546]). Al-Monla's association with Care overlapped with Muntasser's during the period 1993 through 1997, and with Mubayyid's during 1993-1994 and 1997-1998.

The trial evidence from which the jury could have reasonably concluded that Al-Monla, like Muntasser and Yassin, knew that Care urged young men to fight and that Care's programs were focused towards supporting families of dead fighters included not only the evidence identified with respect to Muntasser but also (1) Al-Monla's check to Care that expressly stated in the memo section that his donation was "For the mujahideen in Bosnia" (Exh. 375 [A2260] (check); 556 [A2378] (translation)) and (2) Al-Monla's statement to Jayoussi that "[w]e are in the rear lines [noise] or we finance the brothers who are picking apples" (Exh. 535A at p. 16 [A2355]), which were code words for the concept of "economic jihad," or financially supporting those who fight. (12/12/07 RT 120-121, 146-148 [A953-A954, A979-A981].)

Al-Monla was associated with Care when Muntasser filed the false 1993 and 1994 Forms 990 in February 1996 and the false 1995 Form 990 in September 1996. As treasurer, Al-Monla had control over Care's books and records, including the Form 1023 and earlier filed Forms 990. He assisted with the preparation of the 1997 Form 990 and signed the 1998 Form 990. (11/16/07 RT 59-60 [A291-A292];

Exh. 10 [A1512].) The jury could reasonably conclude that Al-Monla gained knowledge of what was omitted from the Form 1023, and that he joined the conspiracy to fraudulently maintain Care's tax-exempt status, no later than when he assisted with the preparation of the false Forms 990.

3. *There was sufficient evidence that Mubayyid conspired to fraudulently maintain Care's tax-exempt status*

Mubayyid was associated with the Boston office of Al-Kifah no later than 1990, when he introduced Al-Monla, his brother-in-law (12/10/07 RT 35 [A889]), to Al-Kifah. (12/10/07 RT 43 [A891].) Mubayyid worked for Care from mid-1993 to 1994, left the country for approximately three years, returned to Care in 1997, and was Care's treasurer from late 1998 until 2003. (11/27/07 RT 34 [A424]; 11/29/07 RT 173 [A553]; 12/6/07 RT 85-86 [A814-A815].) The trial evidence from which the jury could reasonably conclude that Mubayyid knew that Care urged young men to fight and that Care's programs were focused towards supporting the families of dead fighters included evidence that Mubayyid (1) maintained Care's website, which website contained articles urging young men to participate in jihad, including one captioned "Explicit evidence establishing that jihad is the highest ranked devotion" (Exh. 309 [A2223]); maintained on the website archived newsletters that promoted economic jihad (*see e.g.,* Exhibit 241 [A1876] ("If necessity confines you to be far away from the arena of *jihad*, then work behind the mujahideen, support them and arouse others to join them.")); (2) spoke with Mohammed Chehade, the head of Global Relief Foundation, regarding the destruction of Care's records after the execution of a search warrant (Exh. 540A

[A2366-A2369]; 12/5/07 RT 47-50 [A779-A782]); and (3) possessed at his residence an email from Azzam Publications, a London-based pro-jihad organization, asking Care to donate only to charities that will actually "pass the money onto the Mujahideen fighting groups" (Exh. 270 [A2126]; 11/27/07 RT 134-135 [A495]).

As treasurer, Mubayyid had custody and control over Care's records, including the Form 1023 and previously filed Form 990 (11/28/07 RT 23-25 [A512-A514]; Exh. 293 [A2182-A2190]), and he was among those who provided information to the accountant during the preparation of the Forms 990 (11/16/07 RT 59 [A291]; 12/6/97 RT 90-91, 97-99 [A819-A820, A222-A824]]). Mubayyid filed a Form 990 in November 2000 for tax year 1999, in July 2001 for tax year 2000, and in June 2002 for tax year 1997.[12] (Exhs 9, 11, 12 [A1464, A1525-1527, A1540-A1542].) The jury could reasonably conclude that Mubayyid gained knowledge of what was omitted from the Form 1023, and that he joined the conspiracy to fraudulently maintain Care's tax-exempt status, no later than when he assisted with the preparation of the false Forms 990.

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[12] The 1997 Form 990 filed by Mubayyid amended a Form 990 previously filed for that year. That the return filed by Mubayyid was an amended return did not alter Mubayyid's obligation to file a return that was truthful. *See United States v. Clayton*, 506 F.3d 405, 411-412 (5th Cir. 2007) (false amended return can provide liability for filing a false return). Accordingly, contrary to Mubayyid's suggestion (Br. 15) it is not a defense that the false statements in the amended return were also in the original return.

4. *Defendants are not entitled to a new trial on the conspiracy count due to alleged evidentiary errors*

Although Muntasser argues that his conviction under 18 U.S.C. 1001(a)(2) should be vacated due to alleged evidentiary errors if the conspiracy count is not reinstated (Br. 6), a position we refute in our opening brief (Govt. Br. 54-60), no defendant separately addresses in his responsive brief the government's argument (Govt. Br. 47-53) that, if this Court finds the variance to be non-prejudicial, the judgments of acquittal on the conspiracy count should be reversed and not merely vacated.

CONCLUSION

The Court should reverse the district court's post-verdict judgments of acquittal on the conspiracy counts, reinstate the conspiracy convictions, affirm the other convictions, and remand for resentencing. In the alternative, the Court should vacate the district court's post-verdict judgments of acquittal on the conspiracy counts, affirm the other convictions, and remand for a new trial on the conspiracy count. If the Court does not vacate or reverse the judgments of acquittal on the conspiracy count, the Court should affirm the judgments of convictions and sentences.

Respectfully submitted,

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/s/ Robert Lyons

S. ROBERT LYONS

Dated: April 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2010, I electronically filed the foregoing brief with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the CM/ECF participants, and that I additionally caused two copies of the foregoing brief, to be mailed, via the U.S. Postal Service, postage prepaid to:

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