No. 12-1461

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

TAREK MEHANNA ***APPELLANT***

VS.

UNITED STATES OF AMERICA ***APPELLEE***

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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT TAREK MEHANNA AND REVERSAL OF HIS CONVICTION

CONSENTED TO BY ALL PARTIES

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STATEMENT OF AMICUS CURIAE

Pursuant to Fed. R. App. P. 29(c)(4), the amicus curiae submits the following statements.

The amicus curiae is the National Association of Criminal Defense Lawyers (NACDL).

The NACDL, a non-profit corporation, is an organization of criminal defense lawyers whose mission is to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL's approximately 10,000 direct members in twenty-eight countries—and ninety state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The NACDL has a particular interest in this case because the decisions of the district court below were based on an inaccurate application of conspiracy law, and resulted in the appellant's erroneous conviction.

The amicus' interest is that of criminal defense attorneys and law professors who believe that the appellant's trial exceeded the already broad bounds of

modern criminal conspiracy law, both generally and in the post-9/11 era. Specifically, amicus believes that the district court misapplied First Circuit and United States Supreme Court conspiracy law. Moreover, these errors go not only to the heart of the substantive criminal law, but also the First Amendment's protection. From the scope of the indictment, through the court's evidentiary rulings, and finally, its instructions, the result was a prosecution that effectively criminalized unpopular thought and expression unmoored from criminal conduct.

Pursuant to Fed. R. App. P. 29(c)(5), the amicus and signatories submit the following statements. While Professor Steven R. Morrison represented the appellant in district court, that representation ended with the end of the trial. Counsel for the government was notified of this prior to consenting to this brief. No counsel for a party authored any part of this brief. No signatory to this brief contributed any money intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The appellant, Tarek Mehanna, was convicted of, *inter alia*, conspiracy to provide material support to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B; conspiracy to provide material support to terrorists, in violation of 18 U.S.C. § 2339A; conspiracy to kill in a foreign country, in violation of 18 U.S.C. § 956; and conspiracy to make false statements, in violation of 18 U.S.C. § 371. These counts were based on the facts set forth in the appellant's brief.

At stake in this prosecution are critical concerns about national security in the post 9/11 world, on the one hand, and the essential protections of the First Amendment and the limits of the substantive criminal law of conspiracy, on the other. Prosecutions brought earlier and earlier in the continuum from contemplation of crime to its completion increase the risk of false positives by convicting people who would not have violated the law at all, undermining traditional substantive criminal law principles. Likewise, they run the risk of criminalizing speech, using protected expression to prove nonexistent

conspiracies or criminalizing mere thought, uncoupled from action.[1]

Prosecutions that seek to link individuals who are not connected with any particular organization, who share a range of ideological goals, and a range of views about the propriety of using force to achieve them, what one scholar calls the "unaffiliated model" of conspiratorial liability,[2] tread on protected associational rights and may stretch conspiracy law beyond recognition. And where, as here, speech itself comprises substantial portions of counts one through four[3]–notably the appellant's translations of certain texts without direction from his alleged coconspirators, and where the evidence includes Internet chatter on websites with unknown or little-known participants-the dangers on both fronts, the substantive criminal law and the First Amendment, are multiplied.

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[1] THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 402 (1970) ("inchoate conduct frequently takes the form of expression . . . Consequently social regulations that reach back into inchoate conduct may raise serious First Amendment problems.").

[2] Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CA. L. REV. 425, 439 (2007).

[3] Although counts three through four involve a conspiracy to kill in a foreign country, the evidence adduced at trial to prove them was the same as that adduced to prove counts one and two, and relied largely on protected speech.

The trial of such charges is necessarily a minefield; even more than in the ordinary case, navigating between the needs of the government's case and the defendant's rights is difficult. Courts must make certain that the limits of substantive conspiracy law are carefully respected, First Amendment protected speech is specifically defined, and evidentiary rules (on prejudicial speech and coconspirator hearsay) are strictly followed. The appellant is not to be convicted merely because of what he thought, what he said, who he is, or in this Internet age, the websites he visited or the statements of others posted there.

The trial in this case was not so controlled, nor the proof so limited. Indeed, the time-worn tools for managing conspiracy prosecutions — rules for the admission of coconspirator hearsay, rules restricting inflammatory evidence, and instructions defining the limits of First Amendment speech and the evidence — were not followed.

The indictment alleges a conspiracy (even multiple conspiracies) between the appellant and ten individuals (identified by name or initials), and specific overt acts, including the appellant's trip to Yemen in 2004 and his translation of certain texts in 2005-2006. But it also alleges a conspiracy with unnamed coconspirators, taking place "elsewhere" than the United States (Yemen, United

Kingdom, United Arab Emirates, Pakistan, Iraq, and Somalia) over the course of a nine-year period. Given the scope of the charges, the appellant's motion for a bill of particulars was hardly perfunctory or unprecedented. It was made not only to get notice of the breadth of the conspiracy, but also to protect the appellant's rights under the Double Jeopardy clause.[4] The court denied the motion. Dkt. 111; Dkt. 143.[5]

The next line of defense, beyond the bill of particulars, is an evidentiary one, at which the court carefully controls the trial proof. Although the indictment named (either specifically or through initials) at most ten coconspirators,[6] the court permitted the government to introduce statements of countless unindicted coconspirators—a veritable who's who of international terrorism. The court did so without specific findings under United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977),

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[4] United States v. Bin Laden, 92 F.Supp.2d 225 (S.D.N.Y. 2000) (the embassy bombing case in which the court granted the motion, applying a liberal standard for motions for bills of particulars in complex conspiracy cases with voluminous discovery.).

[5] References to "Dkt. __" denote citations to the trial docket and numbered entry. This format will be used throughout this brief.

[6] The indictment does not set forth who exactly was in the conspiracy, but is does mention the following people, some of whose names were assigned letters to hide their identity: Ahmad Abousamra, Abdulmajid, K, D, N, Daniel Maldonado, J (known as "Abu Omar"), S, A, and ABA.

or Fed. R. Evid. 801(d)(2)(E), outlining which statements were made "during the course of" and "in the furtherance of" any conspiracy of which the appellant was a part.

Had the district court applied the Petrozziello test rigorously, it would have found that no broad conspiracy existed between appellant and the unindicted coconspirators, and that, at best, there were multiple conspiracies in which the appellant was not involved. Admitting the statements of these myriad coconspirators not only violated Petrozziello, but also the substantive limits on conspiracy prosecutions this Court set forth in United States v. Dellosantos, 649 F.3d 109 (1st Cir. 2011) (evidence of one conspiracy may not be used to prove the defendant's participation in a separate conspiracy).

Second, the government provided notice of this evidence not in the indictment or a bill of particulars, but in a discovery letter three years after the initial indictment and only months before trial. Letter from counsel for the government to counsel for the appellant (3/7/11). The letter listed thirty-eight unindicted coconspirators from the leadership of al Qaeda, to participants in a United Kingdom website whom the appellant had never met, described as "coconspirators for some or all of the charged offenses," without further explanation. Id.

While the coconspirator exception surely covers unindicted coconspirators, and while such information may be provided through discovery, the sheer amount of this evidence and its provocative character was stunning. Not only did it violate Fed. R. Evid. 801(d)(2)(E), it also effected an unconstitutional variance between the indictment and proof. The "tail" of coconspirator hearsay introduced at trial wagged the "dog" of the allegations in the indictment, under a minimal "preponderance standard," with perfunctory Petrozziello findings, and in the heat of the trial.

In addition, rather than clarifying the relationship between protected speech and advocacy and conspiracy, as United States v. Spock, 416 F.2d 165 (1st Cir. 1969), and Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010), require, the court did the opposite. The court told the jury, "You need not worry about the scope or effect of the guarantee of free speech contained in the First Amendment to our Constitution." Tr. 12-16-11, p. 24.[7]

The court compounded these errors by admitting extraordinarily prejudicial evidence: The appellant's own inflammatory speech, grotesque multiple videos of the twin

[7] The citation Tr. ____, p. __, refers to the date and page number of the designated trial transcript. This citation form will be used throughout this brief.

towers burning on 9/11, of beheadings, of violence done to American servicemen.

Even if there had been a core conspiracy here, the court's rulings made it impossible for a jury to fairly try it. No jury could disentangle the protected speech from the unprotected, the relevant and admissible evidence from that which was cumulative and inflammatory, or the relevant coconspirator statements from the irrelevant and inadmissible. While any one of these errors is sufficient to reverse this conviction, the combination produced a trial that was fatal to the appellant's rights and stretched conspiracy law to its breaking point.

ARGUMENT

I. Limiting the Application of Conspiracy Law

A. Conspiracy on a Continuum

"[C]onspiracy is a continuum," United States v. Barnes, 244 F.3d 172, 176 (1st Cir. 2001),[8] which can range from wholly innocent agreements, to suspicious conversations, to actual but abandoned conspiracies, and finally to dangerous combinations that achieve their target crimes. The instant case lies on the far inchoate end of the conspiracy continuum. Indeed, if this conviction is affirmed, it would move conspiracy law to ever earlier stages of inchoateness, undermining the traditional precepts of substantive criminal law, as well as the protections for First Amendment speech and thought. See United States v. Soto-Beníquez, 356 F.3d 1, 19 (1st Cir. 2004) (coconspirators need not know each other, but must still be connected in some way).[9]

To the government, there was nothing inchoate about the appellant's 2004 trip to Yemen; it was a central

[8] See also Robert M. Chesney, *Terrorism, Preventive Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 684 (2009) (mentioning that conspiracy encompasses "the continuum between inclination and action.").

[9] See also Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, Part Two*, 61 COLUM. L. REV. 957, 967-68 (1961).

conspiratorial "act." To the defense, it was at best equivocal. When given the opportunity, the appellant did not choose to participate in anti-American hostilities, opting instead for home and pharmacy school, while his traveling companion went to Jordan and Iraq. The government also argued that a second "act" taken by the defendant years later was somehow part of the same conspiracy, namely, translating a publicly available text and video, itself a First Amendment protected act, on his own, and not under anyone's direction or control.

Whatever the probative value of the Yemen trip, or the translations, it was overwhelmed by evidence of third party coconspirator statements, ranging from those of Osama bin Laden himself to diverse participants who interacted on a United Kingdom website, weighing in on a variety of topics. These statements were admitted without specific findings under Petrozziello as to whether they met the requirements of Rule 801(d)(2)(E).

Petrozziello findings were especially critical here. The government argued for the admission of this evidence by characterizing the relevant conspiracy at an extraordinary level of generality: These disparate individuals were supposedly part of a single movement to commit murder and mayhem against the United States, across multiple

jurisdictions, with no difference in their goals or in the extent to which they would resort to force to achieve them, and with the appellant's (sometimes sophomoric) statements suggesting that he had somehow agreed. That view of a monolithic "global jihad movement" has been contested in general,[10] and was expressly contested in the case at bar. Tr. 10-13-11, pp. 11-12; Tr. 12-15-11, pp. 48-50.

In any case, Rule 801(d)(2)(E) surely requires more: identification of a specific conspiracy, not some diffuse network, a determination of whether the defendant was a member and whether statements at issue are "in furtherance" of it. As one scholar notes, "courts must proceed with caution when considering the viability of such charges . . . lest the floodgates open to an essentially uncabined form of conspiracy liability."[11]

In this case, the floodgates opened. To the coconspirator evidence, the government added even more unpopular speech and conduct protected by the First Amendment, including violent videos that the appellant traded with others and speech celebrating aspects of al Qaeda and its leaders, all sealed by twenty-eight searing images of the burning twin towers.

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[10] Chesney, *supra* note 2, at 469-70.
[11] Id. at 474.

B. First Circuit Case Law Cabining Conspiracy Law

In two decisions, this Court has limited the breadth of conspiracy prosecutions at the far inchoate side of the continuum, limitations not respected in the court below.

i. The Failure to Apply United States v. Petrozziello and United States v. Dellosantos

a. United States v. Petrozziello

The coconspirator exception to the hearsay rule in Fed. R. Evid. 801(d)(2)(E) permits coconspirator statements to be admitted against a defendant for their truth, which is typically extraordinarily powerful. This Court's decision in United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977), requires that the trial court determine whether the government has proven by a preponderance of the evidence "that a conspiracy embracing both the declarant and the defendant existed, and that the declarant uttered the statement during and in furtherance of the conspiracy." United States v. Sepulveda, 15 F.3d 1161, 1180 (1st Cir. 1993) (citing Bourjaily v. United States, 483 U.S. 171, 175-76 (1987)). The government must also introduce "extrinsic proof of the declarant's involvement in the conspiracy." Id. at 1182. As to all issues, the government bears the burden of proof. United States v. Flemmi, 402 F.3d 79, 94 (1st Cir. 2005).

It is only after the statements have been conditionally admitted that the court makes a final determination whether the requirements of the Rule have been met and the statements admitted for their truth. See United States v. Portela, 167 F.3d 687, 702-03 (1st Cir. 1999); Petrozziello, 548 F.2d 20 (1st Cir. 1977). To be sure, the risk of prejudice in allowing coconspirator hearsay in *de bene* is substantial; by the time of a Petrozziello hearing, bells have been rung for the jury that cannot be unrung.[12]

Petrozziello findings are critical for two reasons. First, they allow this Court to effectively review the decision. United States v. Machor, 879 F.2d 945, 951 (1st Cir. 1989). They also enable the parties to hone their arguments in light of the specifics of the proof.

While Petrozziello rulings may be perfunctory in simple cases, more complex cases – like the instant one – demand a more fulsome treatment. Explicit findings allow this Court "to protect the integrity of the trial in borderline situations where the prosecution may or may not be able to muster sufficient proof of the existence, scope,

[12] This Court has, in fact, found that declaring a mistrial is an appropriate remedy where a curative instruction after a Petrozziello finding is insufficient to address any prejudice. United States v. Ciampaglia, 628 F.2d 632, 638 (1st Cir. 1980).

shape, and duration of an alleged conspiracy." United States v. Figueroa, 818 F.2d 1020, 1026 (1st Cir. 1987).

It is difficult to imagine a case in which detailed Petrozziello findings are more necessary than the instant one. There were three categories of coconspirator statements: the first were the statements made by those coconspirators who were arguably involved in the Yemen trip, to which the defendant did not object.[13] The second were the extraordinary statements made by Osama bin Laden, Ayman al-Zawahiri, and Abu Musab al-Zarqawi, the most recognized and most infamous leaders of al Qaeda. The third were the statements made by other unindicted coconspirators, whose names counsel learned of only in discovery. The defendant moved to exclude the evidence in categories two and three. Tr. 12-15-11, p. 48. (The appellant had raised the issue pretrial as well. Tr. 10-13-11, pp. 10-14.).

The court made a Petrozziello ruling only as to five individuals of the many in the broad unindicted coconspirator category (category three), which included Waseem Mughal, Younis Tsouli, Tariq al Dour, Ahmad Rashad,

[13] They were Abousamra, Aboubakr, Abu Zahrah, Pippin, Masood and Spaulding.

and Omar Hammami.[14] But the statement, "I would make the necessary Petrozziello finding that they were coconspirators," Tr. 12-15-11, p. 55, is all the court said. With those few words, the court legitimized the introduction of postings on a poplular website and conversations between individuals — not with the appellant— all under the umbrella of Rule 801(d)(2)(E).

The issues were far more complex. For example, there was no evidence that the appellant met Mughal, Tsouli, or al Dour, who lived in the United Kingdom and were never mentioned in the indictment. Nor was there evidence their words furthered any conspiracy with which the appellant was charged, rather than separate conspiracies of their own. The appellant's connection to them was especially problematic - through the popular Tibyan website, to which numbers of people contributed, discussing numbers of issues. It was, in effect, an electronic bulletin board. While the government claimed that there was "coordination" between Tibyan and al Qaeda, Tr. 12-5-11, p. 47, and that Tibyan was al Qaeda's "steno pool," Tr. 11-9-11, p. 74, it offered no evidence to that effect. An indirect request to translate a text, allegedly from al Qaeda, was made to the

[14] Only Ahmad Rashad may have been one of the coconspirators mentioned in the indictment. The others were not named therein.

website, but the appellant never translated the requested text. Tr. 11-9-11, pp. 73-74. Indeed, he was expelled for his dissent from Tibyan's hardline views. Tr. 11-15-11, pp. 124-125. While these distinctions were critical, the court did not address them.

The court also admitted publicly available statements made by bin Laden, Zarqawi, and Zawahiri. There was no evidence of ties between the appellant and any member of al Qaeda, and surely no agreement, implicit or explicit. Rather, the government alleged that an agreement could be inferred from his comments supporting their work and from the videos and images on the defendant's computer, images that were readily available online, and automatically downloaded when a website was visited, without a person's knowledge or intervention. See Tr. 12-15-11, p. 50. From this foundation, the government built an extraordinary edifice, introducing evidence of al Qaeda's savage acts – the beheadings of Wall Street Journal reporter Daniel Pearl and American contractor Nicholas Berg, attacks on American servicemen, and the 9/11 attack itself.

When, at the conclusion of the evidence, the appellant objected under Petrozziello, the court could not even recall what the status of this evidence was. The government argued that they could come in *either* for their truth or

not. Tr. 12-15-11, p. 50. Although the record is not clear, the court seemed to have concluded that this extraordinarily inflammatory evidence had been admitted for a non-hearsay purpose but refused to clarify the matter further.

The government insisted — and the court agreed — that the court should not give an instruction identifying particular statements from these individuals and directing the jury not to use them for their truth.[15] All the court said was, "evidence that a person said, 'I'm unhappy,' for example, under this limitation could be used to consider the fact that the person said she was unhappy but not necessarily to prove the fact that she was, in fact unhappy. So it's the event of the saying rather than the truth of the assertion. And I remind you of that limitation." Tr. 12-16-11, pp. 156-57.

Had the court made specific Petrozziello findings, it would have had to address the dearth of evidence that the appellant was involved in the vast conspiracy that the government alleged, or even in the multiple combinations

[15] The government argued: "[i]t makes no sense to give a curative instruction saying that, 'By the way, these three leaders of al Qa'ida, you shouldn't accept what they're saying for the truth of the matter. You should only consider it for the evidentiary value." Tr. 12-15-11, p. 51. The court agreed.

set forth above. In addition, the court would have observed that almost all of the evidence consisted of the very statements it had conditionally admitted, statements that were subject to the Petrozziello ruling. Determining the existence of a conspiracy at a Petrozziello hearing requires corroborating evidence beyond these statements. Portela, 167 F.3d at 703.

In the end, with the introduction of the alleged coconspirators' statements, jurors were permitted to situate the appellant in an ill-defined jihad movement, with many tentacles, spread over many continents, and conclude that he must be guilty of whatever crimes it committed, precisely the kind of uncabined conspiratorial liability Petrozziello was designed to prevent.

b. United States v. Dellosantos

In United States v. Dellosantos, this Court sought to address the difficulty of discerning a defendant's criminality when multiple individuals in multiple conspiracies coexist. The concern in Dellosantos, as here, was evidentiary spillover, in which evidence of one conspiracy is erroneously used to prove the defendant's participation in a separate conspiracy. 649 F.3d 109, 125 (1st Cir. 2011).

As this Court noted, the conspiratorial agreement is "not supplied by mere knowledge of an illegal activity . . . let alone by mere association with other conspirators or mere presence at the scene of the conspiratorial deeds." Id. at 115. It is "essential to determine what kind of agreement or understanding existed as to each defendant." Id. Three factors determine whether there was one or multiple conspiracies: (1) the existence of a common goal, (2) interdependence among participants, and (3) overlap among the participants. Id. at 117.

In the instant case, the application of these factors shows not just that there were multiple conspiracies, but that there was no conspiracy at all, or none of which the appellant was a part. The government alleged conspiracies in the United States, Yemen, and other places that counted among their participants young named males in the Boston area, and others unnamed operating "elsewhere". Although not mentioned in the indictment, the court admitted coconspirator hearsay from people in the United Kingdom, those who went to Somalia to fight, al Qaeda militants in the Middle East, including its top leadership, Osama bin Laden, Ayman al-Zawahiri, and Abu Musab al-Zarkawi, and others. The appellant had never met or communicated with any of those in the Middle East, had only a few general

online conversations with individuals in the United Kingdom, rejected fighting in Somalia, and rejected the violent tendencies of the people he knew in Boston.

Indeed, there is no evidence that the appellant shared a common goal with anyone else, even the coconspirators named in the indictment. One, Kareem Abu Abuzahrah, seemed intent on assaulting a shopping mall, which the appellant thought was "stupid and impractical." Tr. 11-22-11, p. 113. While the appellant easily could have joined a second, Ahmad Abousamra, in Iraq to pursue his alleged desire to kill United States nationals, he returned home to his pharmacy studies. See United States v. Escobar-Figueroa, 454 F.3d 40, 48 (1st Cir. 2006) ("A jury's finding of a single conspiracy will be supported if the evidence demonstrates that all of the alleged co-conspirators directed their efforts towards the accomplishment of a common goal or overall plan.").

The lack of common goal also raises the "spillover concern." United States v. Trainor, 477 F.3d 24, 37 n.21 (1st Cir. 2007) ("the spillover concern is addressed to whether incriminating evidence against co-defendants who were involved in separate conspiracies affected the jury's consideration of the evidence against the defendant"); see also Kotteakos v. United States, 328 U.S. 750, 774 (1946)

("The dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place.").

Nor was there interdependence, defined as where "the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme." Portela, 167 F.3d at 695. The three alleged coconspirators acted and were able to act wholly *independently* of each other. Abuzahrah's goal of attacking a shopping mall was not thwarted by the appellant's rejection, and Abousamra achieved his dream of getting all the way to Fallujah, without the appellant's help.

Finally, overlap is "satisfied by the pervasive involvement of a single 'core conspirator,' a hub character." Id. In the instant case, the appellant and the alleged coconspirators were equals, pursuing their own goals as each best saw fit. As friends do, they spent time together, hardly enough to impose criminal conspiratorial liability.

c. Variance Between the Indictment and the Proof

With alternative theories of liability admitted at trial, and coconspirator hearsay overwhelming the allegations of the indictment, the appellant moved for a

dismissal on the grounds of variance between the indictment and the proof. See e.g. United States v. Glenn, 828 F.2d 855, 858 (1st Cir. 1987). The court denied the motion.

A variance occurs when the facts proved at trial differ materially from those alleged in the indictment. United States v. Tormos-Vega, 959 F.2d 1103, 1115 (1st Cir. 1992). The indictment included ten coconspirators (by name or initial), largely based in Boston; the discovery letter listed another thirty-eight unindicted coconspirators, whose activities went far beyond the case as charged. While coconspirator hearsay includes some statements of unindicted coconspirators, whose identity may be provided in discovery, in this case the balance was dramatically tipped. In effect, the "tail" of unindicted coconspirator hearsay, wagged the "dog" of the case as charged.

For example, based on the indictment, the appellant claimed that he had no knowledge that the government would allege a conspiracy involving people in the United Kingdom on a "steno pool" theory. According to this theory, the appellant conspired with members of Tibyan Publications in the United Kingdom, the "steno pool," to translate documents. Tr. 11-9-11, p. 74. Allegedly, al Qaeda would contact Tibyan for the translations it needed. Since the appellant translated a document — not the one allegedly

requested — and published it in part through Tibyan, the government argued that he was in a conspiracy *with all of the other participants on the web site*. This was so despite the fact that he performed the translation independently, was kicked off of Tibyan for espousing moderate views, and never had any connection to al Qaeda or knowledge that Tibyan was — as the government alleged but did not prove — an al Qaeda affiliated website.

The indictment never mentioned Tibyan or the UK-based individuals. There was no allegation of a "steno pool" relationship between Tibyan and al Qaeda, or its functional equivalent. This was a characterization made by the government for the first time at trial.

Indeed, the "steno pool" theory may well go beyond a variance to comprise a constructive amendment. A constructive amendment occurs where the crime charged in the indictment has been altered "either literally or in effect" after the grand jury passed upon it. United States v. Bunchan, 626 F.3d 29, 32 (1st Cir. 2010). While the difference between constructive amendment and variance is "a matter of degree," United States v. Mubayyid, 658 F.3d 35, 50 (1st Cir. 2011), the consequences are substantial. Constructive amendments violate a defendant's Fifth Amendment right to indictment by grand jury, his Sixth

Amendment right to be informed of the charges against him, and the Sixth Amendment's protection against re-prosecution for the same crime. United States v. Brandao, 539 F.3d 44, 57 (1st Cir. 2008).

A bill of particulars might have rendered any variance or constructive amendment issue moot. See United States v. Hallock, 941 F.2d 36, 40 (1st Cir. 1991). In denying the appellant's motion for a bill of particulars, the court erroneously found that the "text of the indictment itself" provided adequate notice, along with the detention proffer and "voluminous discovery". It did not.

II. The First Amendment and Conspiracy Law

In addition to evidentiary issues arising from Petrozziello and Dellosantos, the case raised critical First Amendment concerns, addressed more fully in the amicus brief of the American Civil Liberties Union (ACLU). We note, as Professor Thomas Emerson stated, to the extent that conspiracy "reaches far back into inchoate conduct . . . [it] has serious implications for the system of freedom of expression." THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 409 (1970); see also Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872, 872 (1970) ("courts and commentators have paid surprisingly little attention to the effect of conspiracy law itself on First Amendment rights."). Prosecutions that

reach closer to a crime's contemplation than its completion risk criminalizing speech, not action. Prosecutions that seek to link individuals who are not organizationally connected, who share a range of ideological goals and opinions about the propriety of using force to achieve them, not only stretch conspiracy law, but also important associational rights. This is particularly so where the indictment itself involves protected speech, notably the appellant's translations.

We defer generally to the ACLU's amicus brief in connection with these issues, and their analysis of the application of Holder v. Humanitarian Law Project, 130 S.Ct 2705(2010) and United States v. Spock, 416 F.2d 165 (1st Cir. 1969). Indeed, this Court's decision in Spock speaks directly to the care with which a court must deal in admitting third party coconspirator statements in a conspiracy that includes protected and arguably unprotected speech. It was improper, this Court held in dicta, for the government, "adopting the rules applicable to a conspiracy having purely illegal purposes," to have introduced such evidence, adding, "[t]he specific intent of one defendant in a case such as this is not ascertained by reference to the conduct or statements of another even though he has knowledge thereof." Spock, 416 F.2d at 173. And this Court

added, "[t]he metastatic rules of ordinary conspiracy are at direct variance with the principle of *strictissimi juris*." Id.

Metastasis is precisely what occurred in the case at bar, with the ravings of third parties, known and unknown to the appellant, deluging the jury.

III. Errors in the Application of Conspiracy and First Amendment Law were Compounded by the Admission of Inflammatory Evidence.

The district court in the instant case was constrained by the rules in Dellosantos and Petrozziello, both of which operate to determine the scope of any conspiracy of which the appellant was a part, determine whether other conspiracies operated of which the appellant was not a member, permit the admission of coconspirators' statements only to the extent of the appellant's participation in any conspiracy, and protect the appellant's First Amendment rights to speak and associate with others.

The district court ignored these critical constraints. Compounding the error, the court allowed the introduction of evidence that, if it was relevant at all, was highly prejudicial. Perhaps nothing made this clearer than the admission of twenty-eight photographs of the burning World Trade Center just before the jury received the case. See

Tr. 12-16-11, p. 93. The court's errors resulted in the appellant's wrongful conviction.

CONCLUSION

Conspiracy prosecutions in general, and this one in particular, required the district court to carefully navigate the shoals of the government's proof, on the one hand, and the appellant's rights to a fair trial, on the other. This Court's decisions in Petrozziello and Dellosantos impose critical constraints that require the court to carefully address the admissibility of highly prejudicial coconspirator statements and determine the scope of the conspiracy of which the defendant is alleged to be a part. Where the trial court does not do so—where, for example, evidence as inflammatory as bin Laden's statements are admitted without clear limitation—the conviction must be reversed.

Respectfully,

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Dated: December 26, 2012

CERTIFICATE OF SERVICE/COMPLIANCE

I hereby certify that on December 26, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify that this brief and its appendix have been scanned for viruses and both are virus free. I further certify the full text of this brief was prepared in Microsoft Word, font Courier New, size 12, and that this brief contains 6,952 total words.

Nancy Gertner

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