

1 **UNITED STATES COURT OF APPEALS**

2
3 **FOR THE SECOND CIRCUIT**

4
5 August Term, 2007

6
7 (Argued: May 29, 2008 Decided: September 4, 2008)

8
9 Docket Nos. 06-1280-cr(L), 06-2683-cr(con),
10 06-2862-cr(con), 06-2878-cr(con), 06-2910-cr(con)

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13
14 UNITED STATES OF AMERICA,

15
16 Appellee,

17
18 - v.-

19
20 GIOVANNI RIGGI, MICHAEL SILVESTRI,
21 GIROLAMO PALERMO, also known as Jimmy
22 Palermo,

23
24 Defendants,

25
26 ANTHONY MANNARINO, also known as
27 Anthony Marshmallow, GIUSEPPE
28 SCHIFILLITI, also known as Pino
29 Schifilliti, PHILIP ABRAMO, LOUIS
30 CONSALVO, also known as johndoe8, also
31 known as Louie Eggs, also known as
32 Frank Scarabino, STEFANO VITABILE, also
33 known as Steve Vitabile,

34
35 Defendants-Appellants.

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37 - - - - -X

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39 Before: JACOBS, Chief Judge, CALABRESI and SACK,
40 Circuit Judges.

1 Appeals from judgments of conviction following a jury
2 trial in the United States District Court for the Southern
3 District of New York (Mukasey, J.). Because it was plain
4 error (in retrospect) to admit eight plea allocutions in
5 violation of Crawford v. Washington, 541 U.S. 36 (2004), we
6 vacate the convictions and remand for further proceedings.

7 ROLAND G. RIOPELLE, Sercarz &
8 Riopelle, LLP, New York, NY, for
9 Defendant-Appellant Guisepe
10 Schifilliti.

11
12 INGA L. PARSONS, Law Offices of
13 Inga L. Parsons, Marblehead, MA,
14 for Defendant-Appellant Philip
15 Abramo.

16
17 SANFORD TALKIN, Talkin,
18 Muccigrosso & Roberts, LLP, New
19 York, NY, for Defendant-
20 Appellant Stefano Vitabile.

21
22 JOHN M. HILLEBRECHT, Assistant
23 United States Attorney (Miriam
24 E. Rocah, Katherine Polk Failla,
25 Assistant United States
26 Attorneys, on the brief), for
27 Michael J. Garcia, United States
28 Attorney for the Southern
29 District of New York, New York,
30 NY, for Appellee.

31
32 DENNIS JACOBS, Chief Judge:

33 Stefano Vitabile, Philip Abramo, and Giuseppe
34 Schifilliti (collectively, "defendants") appeal from
35 judgments of conviction, entered following a three-week jury

1 trial in the United States District Court for the Southern
2 District of New York (Mukasey, J.), on charges arising out
3 of their involvement in the Decavalcante organized crime
4 family. The charges include racketeering and racketeering
5 conspiracy, murder and conspiracy to commit murder,
6 conspiracy to commit extortion in the construction industry,
7 conspiracy to make and to collect extortionate extensions of
8 credit, and conspiracy to commit securities fraud.
9 Defendants challenge their convictions on several grounds,
10 of which we reach two: (i) that the admission of eight plea
11 allocutions of non-testifying co-conspirators amounted to
12 plain error under the intervening authority of Crawford v.
13 Washington, 541 U.S. 36 (2004); and (ii) that the evidence
14 was insufficient to support the convictions on three counts.
15 We find merit in the Crawford claim, vacate the judgments
16 and remand the case for further proceedings.

18 **BACKGROUND**

19 These prosecutions arose out of a lengthy investigation
20 into organized crime, culminating in the October 2000
21 arrests of more than twenty persons (including Vitabile,
22 Abramo, and Schifilliti), and the filing of multiple
23 indictments. The case against the three defendants here

1 went to trial on a nine-count superseding indictment.
2 Counts One and Two alleged racketeering and racketeering
3 conspiracy under 18 U.S.C. § 1962(c) and (d). These two
4 counts encompassed, as predicate acts, twelve substantive
5 allegations, some of which were then also set forth as
6 separate offenses in Counts Three through Nine. After a
7 three-week trial held in Spring 2003, the jury found
8 defendants guilty of the first two counts (including that
9 the government had proven ten of the predicate acts), and,
10 among them, five of the remaining substantive counts.

11 12 **A. Trial**

13 We summarize the facts in the light most favorable to
14 the government, given the defendants' convictions. United
15 States v. Mapp, 170 F.3d 328, 331 (2d Cir. 1999). For the
16 period relevant to the indictment, the Decavalcante
17 organized crime family, like many mob families, was led by a
18 "boss," aided by an "underboss" and a "counselor" or
19 "consigliere." They supervised multiple crews of hoodlums,
20 each led by a captain and manned by soldiers (who have been
21 formally inducted as members of the family) and associates
22 (non-members). The family was run by an "administration"
23 made up of top leadership and the various captains.

1 Defendants are long-time members and leaders of the
2 Decavalcante family. Vitabile served as consigliere for
3 approximately 35 years; Abramo had been a captain since the
4 late 1980s; Schifilliti had been a captain since 1991. At
5 all relevant times, the three defendants were members of the
6 family's administration. Vitabile was also a member of the
7 "ruling panel," a group formed when a boss is imprisoned or
8 otherwise incapacitated.

9 The government's evidence at trial included testimony
10 from four cooperating witnesses, each of whom had known all
11 three defendants for decades and had run the various rackets
12 and served as enforcers side-by-side with them. They were
13 (in descending order of rank in mob hierarchy): (1) Vincent
14 Palermo (no relation to Girolamo Palermo, whose separate
15 appeal is also decided today), a long-time captain who was a
16 member of the family's ruling panel and became an acting
17 boss at one point; (2) Anthony Rotondo, a captain; (3)
18 Anthony Capo, a soldier; and (4) Victor DiChiara, an
19 associate. Of these cooperating witnesses, at least one--
20 and usually more than one--testified about defendants'
21 involvement in each of the charged crimes.

22 The government also presented testimony from expert
23 witnesses, law enforcement officers, and family members of

1 some mob victims; surveillance photographs and video; tape-
2 recorded conversations; documentary evidence; and the guilty
3 plea allocutions of eight non-testifying co-conspirators.
4 In order to assess the impact of the allocutions upon the
5 convictions, and to assess sufficiency of evidence, it is
6 necessary to summarize in some detail the evidence
7 supporting each of the proven predicate acts and substantive
8 counts. (The defendants named in the various charges are
9 specified in parentheses.)

10 1. *Conspiracy to murder and murder of Frederick Weiss*
11 (*Abramo*). Weiss, an associate of the Decavalcante Family,
12 was a defendant (along with some members of the Gambino
13 organized crime family) in a prosecution for illegal dumping
14 of garbage. The Gambino family suspected Weiss of
15 cooperating with the government, and asked the Decavalcante
16 family to kill him. Tr. 193-94. Abramo attended a series
17 of meetings in which the murder was planned. Tr. 200, 202-
18 03, 973-74, 976-80, 985, 992-93, 2105, 2115. Abramo cased
19 the area around Weiss's home (the proposed spot for the
20 murder), reported back to then-boss John Riggi about the
21 plan, and on the day of the murder, drove around the area
22 with underboss John D'Amato in case back-up or a diversion
23 would be needed. Tr. 979-80. Cooperating witness Palermo,

1 who was assigned to shoot Weiss, testified that while he was
2 waiting for Weiss to appear, he saw Abramo and D'Amato
3 driving around the neighborhood. Tr. 2120. As Weiss walked
4 from his house to his car parked in front, he was gunned
5 down by Palermo and another family member. Tr. 222, 2121.
6 When the shooters gave their report to Abramo and D'Amato,
7 Tr. 2122, Abramo or D'Amato replied, "We know. We heard the
8 shots." Tr. 998. Later that day, Abramo and D'Amato met at
9 a restaurant with Palermo and two other cooperating
10 witnesses to congratulate them. Tr. 2123.

11 2. *Conspiracy to murder and murder of Joseph Garofano*
12 *(Abramo)*. Garofano was one of the participants in the Weiss
13 hit. His fear that he might be arrested prompted concern in
14 the Decavalcante family that he might cooperate with the
15 government, Tr. 514-15, 996, 1017-18, 1021, so the family
16 leadership decided to kill him too. Again, Abramo
17 participated in planning meetings with other family members.
18 Tr. 1017-18, 1020-22, 2128-32. Cooperating witness Rotondo
19 testified about two meetings he attended with Abramo and
20 D'Amato within a week of the Weiss murder. Tr. 1019, 1032.
21 During those meetings, Abramo urged that Garofano be killed
22 (because "he saw everybody that was there at the [Weiss]
23 hit," Tr. 1021), assigned a soldier in his own crew to carry

1 out the murder, Tr. 1023, and helped to devise and implement
2 the plan by which the hit man would ambush his victim, Tr.
3 1032-36. On the day of the murder, Rotondo reported to
4 Abramo and warned him to avoid being spotted by Garofano.
5 Tr. 1036. Rotondo then drove Garofano to the site of the
6 hit, and stood guard while Garofano was shot to death. Tr.
7 1039-40.

8 3. *Conspiracy to murder Annunziata and Vastola*

9 (*Abramo*). Daniel Annunziata and Gaetano "Corky" Vastola,
10 members of the Decavalcante family, were targeted for
11 execution because: Annunziata had refused to allow the Weiss
12 murder to take place at the construction site of his new
13 home, Tr. 964, 980-87, 1052-58; and Vastola, Annunziata's
14 brother-in-law, backed him up and also threatened to "go to
15 war" with the Gambino family rather than kill Weiss at their
16 request, Tr. 209. On one occasion, Abramo and D'Amato met
17 with Annunziata and Vastola to try to get them to come
18 around, and ordered Capo and Palermo to keep watch outside
19 and kill Annunziata and Vastola if anything went wrong. Tr.
20 206.

21 Abramo and D'Amato subsequently ordered Capo and
22 Palermo to kill Annunziata and Vastola, Tr. 204, 980-81,
23 2111, but the intended victims got away, Tr. 2112. Abramo

1 attended several follow-up meetings, but the murders were
2 never carried out. Tr. 1052-58. Ultimately, Annunziata and
3 Vastola somehow made amends and were allowed back into the
4 Decavalcante family. Tr. 1057-58.

5 4. *Conspiracy to murder and murder of Louis LaRasso*
6 *(Vitabile, Abramo, and Schifilliti)*. LaRasso was a
7 Decavalcante captain who was deemed a threat to boss John
8 Riggi (who was then in jail) and acting boss John D'Amato.
9 Tr. 124, 322-23, 1066-68. At a mid-1991 meeting that
10 included all three defendants, the family administration
11 voted to kill LaRasso. Tr. 325-36, 1069-74, 2355, 2359.
12 The plan was for Schifilliti to lure LaRasso to meeting at
13 the home of one of Schifilliti's soldiers. Members of
14 Abramo's crew would kill him there, dispose of his body, and
15 leave his car at the airport. Tr. 326-27, 1074-76, 2359-61.

16 Mrs. LaRasso testified that her husband went missing on
17 November 11, 1991. Tr. 2669-71. LaRasso's car was found at
18 the airport. Tr. 2672-73. In mid-November, Abramo advised
19 Rotondo and Palermo that LaRasso had been killed. Tr. 1078-
20 79. Rotondo testified that he learned from other mob
21 members that Abramo was responsible for LaRasso's murder,
22 and that Schifilliti had been nauseated at the scene. Tr.
23 1079-82.

1 5. *Conspiracy to murder and murder of John D'Amato*
2 (*Vitabile*). Several family members, including cooperating
3 witnesses Capo, Rotondo and Palermo, wanted to get rid of
4 John D'Amato--his offenses were usurpation, Tr. 1101-02,
5 stealing from the family, Tr. 1096-97, 1101-02, 2155-56,
6 2177, and sex with men, Tr. 388-90, 1098-1100, 2157-58--but
7 they needed permission of someone in authority. Tr. 390-91,
8 1100-01, 2159. At a meeting in November 1991, Vitabile
9 authorized the murder and suggested how and where to dispose
10 of D'Amato's body. Tr. 1107-10, 2159-62. Shortly
11 thereafter, Capo (accompanied by DiChiara) shot D'Amato to
12 death in a car. Tr. 397-98, 1619-20. D'Amato's body was
13 never recovered.

14 6. *Conspiracy to murder Thomas Salvata (Vitabile)*.
15 Salvata, an associate on the crew of cooperating witness
16 Palermo, worked at Palermo's dancing establishment
17 ("Wiggles") and picked up loansharking money at a restaurant
18 in which Palermo had an interest. Tr. 2308-09, 2151. After
19 search warrants were executed at the restaurant--and one of
20 Palermo's loansharking books was confiscated--Palermo grew
21 suspicious that Salvata was cooperating with the government.
22 Tr. 2150-52. Palermo asked Vitabile to find "someone to dig
23 a hole for me so I could put Tommy [Salvata] in there." Tr.

1 2153. Vitabile put Palermo in touch with another
2 Decavalcante captain who was working on a construction
3 project. Id. The murder plans were postponed because of
4 the security arrangements at the construction project.
5 Palermo had second thoughts and called off the hit. Tr.
6 2154.

7 7. *Conspiracy to murder Frank D'Amato (Vitabile and*
8 *Schifilliti)*. Shortly after the murder of acting boss John
9 D'Amato, his brother Frank was released from prison. Those
10 involved in the murder--including Vitabile, Schifilliti,
11 Capo, Palermo and Rotondo--thought it prudent to kill Frank
12 before he took revenge. Tr. 410, 1128-29. The Decavalcante
13 family's administration--including Vitabile and Schifilliti--
14 -voted to authorize Capo (who was not present) to kill Frank
15 D'Amato. Tr. 424-27, 1131-37, 2180-86. Vitabile later told
16 Capo to kill Frank at the first opportunity. Tr. 427. The
17 murder never took place.

18 8. *Conspiracy to commit extortion in the construction*
19 *industry (Vitabile and Schifilliti)*. The Decavalcante
20 family controlled the Laborers International Union of North
21 America, Local 394, and the Asbestos Union, Local 1030. Tr.
22 262-63, 266, 271-76, 278-80, 1144, 1155, 1159, 1571, 2192,
23 2209. The family's control was used to extort kickbacks

1 from contractors who wanted to use non-union labor, and
2 bought labor peace in exchange for cash payments and "no
3 show" jobs. Tr. 267, 1156-58, 1573, 2201-04. Contractors
4 who resisted the family were subject to violent attacks,
5 strikes and picket lines, Tr. 863-64, and were assigned
6 particularly uncooperative union workers, Tr. 1158.
7 Uncooperative union officials were subjected to threats and
8 violence. Tr. 264-65, 284-89, 1574-79, 2198-99.

9 Capo testified to using a pipe to beat a union member
10 who was making trouble for one union official controlled by
11 the family. Tr. 264-65. Capo and DiChiara testified that
12 on a separate occasion, Schifilliti ordered them to bludgeon
13 a union official who was disobeying orders. Tr. 284-289,
14 1574-79. Palermo testified that he once delivered \$70,000
15 to Schifilliti, who explained to him that the payment was
16 for letting a company work non-union. Tr. 2202-05.

17 9. *Conspiracy to make and to collect extortionate*
18 *extensions of credit (Abramo and Schifilliti).* Abramo,
19 known as a "Shylock's Shylock," ran one of the most
20 successful loansharking operations in the Decavalcante
21 family. Tr. 1145. Rotondo testified as to details of the
22 operation, some of which he learned directly from Abramo,
23 including the names of Abramo crew members who worked the

1 racket and the transaction in which Abramo loaned money to
2 Frank D'Amato, who was setting up his own subsidiary
3 loansharking business. Tr. 1146-47. Rotondo also testified
4 about conversations with Palermo, who described how he took
5 care of Abramo's loansharking business when Abramo was
6 imprisoned in Florida. Tr. 1146-47. Palermo corroborated
7 this testimony, explaining how Abramo handed over the reins
8 of his loansharking business before he was surrendered to
9 law enforcement. Tr. 2237, 2251-52, 2266-72.

10 Palermo also supplied testimony about Schifilliti's
11 involvement in loansharking business. Schifilliti had
12 boasted to Palermo in the early 1990s that he had started
13 loansharking and "like[d] it." Tr. 2282. Schifilliti
14 solicited Palermo as a partner in the business and also as a
15 supplier of soldiers for collection purposes. Tr. 2282,
16 2037.

17 *10. Conspiracy to commit securities fraud (Abramo).*
18 Abramo ran Sovereign Equity Management Corporation, a boiler
19 room operation. Tr. 1717-1718, 2238-41. For the most part,
20 Sovereign brokers engaged in "cold calling . . . prospective
21 customers on the phone and try to sell them bogus stocks,
22 fake stocks." Tr. 348-49. A portion of the proceeds was
23 kicked up to family leadership. Tr. 351-52. Abramo's

1 associate Vincent DiChiara testified that Abramo: controlled
2 most aspects of the company (personnel, deals, customer
3 complaints) while carefully hiding his involvement, Tr. 343,
4 345, 1717-21, 1729, 1733-35, 1746, 1760-61; kept the two
5 sets of books, Tr. 1720-21; and instructed DiChiara on
6 precautions for avoiding law enforcement detection, Tr.
7 1771-72. DiChiara further testified that Abramo had
8 Sovereign carry out a fraudulent initial public offering of
9 common stock and warrants in a company called SC&T
10 International ("SCTI"), Tr. 1743-45; paid brokers illegally
11 high commissions (up to 35 percent) to motivate them to push
12 SCTI stock, Tr. 1968-70; and manipulated SCTI's stock price
13 by fabricating information, failing to deliver a
14 prospectus, refusing to let customers sell the stock at any
15 price, parking the stock, conducting unauthorized trades,
16 and writing fake tickets for phony transactions, Tr. 1745-
17 60, 1788.

18
19 To prove the existence of the multiple conspiracies
20 described above, the government relied, inter alia, on the
21 guilty pleas of co-conspirators, in the form of signed
22 stipulations that stated the date of the guilty plea, the
23 charge to which each co-conspirator pled, and the basic

1 relevant facts admitted in the allocution. In summary, the
2 stipulations stated:

- 3 (a) On June 28, 1993, John Riggi, Virgil Alessi and
4 Bartolomeo Nichola pled guilty to conspiring to
5 participate in the affairs of a racketeering
6 enterprise by plotting to murder Vastola. Tr.
7 2631-32.
- 8
9 (b) On May 22, 2001, Joseph Sclafani pled guilty to
10 conspiring to participate in a racketeering
11 enterprise by, inter alia: (i) conspiring to
12 murder Frank D'Amato, and (ii) extorting Barr
13 Industries, a construction contractor. Tr. 1436-
14 37.
- 15
16 (c) On January 18, 2002, James Gallo pled guilty to
17 conspiring to participate in a racketeering
18 enterprise by, inter alia: (i) conspiring to
19 murder Weiss, and (ii) conspiring to participate
20 in loansharking. Tr. 2684.
- 21
22 (d) On March 14, 2003, Charles Stango pled guilty to
23 conspiring to participate in a racketeering
24 enterprise by conspiring to commit construction
25 industry extortion. Tr. 1435.
- 26
27 (e) On April 21, 2003, Louis Consalvo pled guilty to
28 conspiring to commit securities fraud and
29 conspiring to murder LaRasso. Tr. 2011.
- 30
31 (f) On April 21, 2003, Gregory Rago pled guilty to
32 conspiring to murder LaRasso. Tr. 2683.

33 After each allocution was read, the trial court gave a
34 limiting instruction that the allocution could be considered
35 only to establish that a particular racketeering enterprise
36 or conspiracy existed, and that it could not be used to
37 prove that any defendant on trial was a participant; as to

1 each defendant's participation, the jury must look to other
2 evidence. See Tr. 1437-38, 2012, 2632-33, 2685-86. The
3 court repeated and elaborated on this instruction during its
4 final charge to the jury on the law (as set forth in the
5 margin¹).

¹ In the final charge to the jury, the court stated in connection with the plea allocutions:

You have also heard that others not called as witnesses pleaded guilty and made statements about their participation in certain crimes charged in the indictment. You may consider these statements as evidence and like any other evidence in the case, give the statements such weight as you believe appropriate. Please understand though, that you may consider those statements only on the following issues: One, whether the racketeering enterprise charged in counts one and two existed; Two, whether any conspiracy or scheme to defraud referred to in the guilty plea you are considering existed; and, Three, what the role was of the person who pleaded guilty in that enterprise, that scheme or that conspiracy. The question of whether any defendant on trial was a member of the enterprise, the racketeering conspiracy, the scheme to defraud, or any of the other conspiracies alleged in the indictment, and whether he participated in them, is an issue for which you will have to rely on other evidence. There is [no] evidence in these statements naming any other defendant or coconspirator. If you find based in part on these statements that [the] enterprise or the scheme to defraud or any of the conspiracies charged in the indictment existed, you must decide as a separate question whether the defendant you are considering was a part of each alleged conspiracy, based entirely on the other evidence in the case. There is nothing in these statements that answers those questions one way or the other.

Tr. 3342-43.

1 **B. Verdicts.** Vitabile was convicted on Count One
2 (racketeering) and Count Two (racketeering conspiracy), by
3 virtue of the following predicate acts: (i) conspiracy to
4 murder and murder of Louis LaRasso; (ii) conspiracy to
5 murder and murder of John D'Amato; (iii) conspiracy to
6 murder Thomas Salvata; (iv) conspiracy to murder Frank
7 D'Amato; and (v) conspiracy to commit extortion in the
8 construction injury. Vitabile was also convicted on Count
9 Four, conspiracy to murder Thomas Salvata, 18 U.S.C. §
10 1959(a)(5); Count Five, conspiracy to murder Frank D'Amato,
11 18 U.S.C. § 1959(a)(5); and Count Nine, conspiracy to commit
12 extortion in the construction industry, 18 U.S.C. §§ 1951
13 and 2. Vitabile was acquitted on Count Three, conspiracy to
14 murder Frank Scarabino.

15 Abramo was convicted on Counts One and Two by virtue of
16 the following predicate acts: (i) conspiracy to murder and
17 murder of Frederick Weiss; (ii) conspiracy to murder and
18 murder of Joseph Garofano; (iii) conspiracy to murder Daniel
19 Annunziata and Corky Vastola; (iv) conspiracy to murder and
20 murder of Louis LaRasso; (v) conspiracy to make and to
21 collect extortionate extensions of credit; and (vi)
22 conspiracy to commit securities fraud. Abramo was also

1 convicted on Counts Seven and Eight, conspiracy to make and
2 to collect extortionate extensions of credit, 18 U.S.C. §§
3 892, 894. He was acquitted on Count Six, which charged the
4 financing of extortionate extensions of credit.

5 Schifilliti was convicted on Counts One and Two by
6 virtue of the following predicate acts: (i) conspiracy to
7 murder and murder of Louis LaRasso; (ii) conspiracy to
8 murder Frank D'Amato; (iii) conspiracy to commit extortion
9 in the construction industry; and (iv) conspiracy to make
10 and to collect extortionate extensions of credit.

11 Schifilliti was also convicted on Count Five, conspiracy to
12 murder Frank D'Amato; Counts Seven and Eight, conspiracy to
13 make and to collect extortionate extensions of credit; and
14 Count Nine, conspiracy to commit extortion in the
15 construction industry. Like Vitabile, Schifilliti was
16 acquitted on Count Three, conspiracy to murder Frank
17 Scarabino. Like Abramo, Schifilliti was acquitted on Count
18 Six, financing extortionate extensions of credit.

19 The government thus failed to prove Counts Three and
20 Six, as well as the predicate acts of conspiracy to murder
21 Frank Scarabino and conspiracy to murder two unidentified
22 John Does. For reasons discussed later, it is telling that
23 none of the acquitted counts and unproven predicate acts was
24 referred to in any of the eight plea allocutions.

1 Following the verdict, defendants moved for judgment of
2 acquittal or a new trial, and later supplemented those
3 motions to raise new grounds for overturning the
4 convictions, including (among others) that it was error to
5 admit the eight plea allocutions based on the intervening
6 Supreme Court decision in Crawford v. Washington, 541 U.S.
7 36 (2004). In March 2005, the district court ruled that the
8 admission of the allocutions was harmless error as to all
9 three defendants. The defendants were sentenced principally
10 to terms of life imprisonment. Judgments were entered
11 against Vitabile on July 12, 2006, against Abramo on June 9,
12 2006, and against Schifilliti on April 5, 2006.

13
14 **DISCUSSION**

15 **I.**

16 Crawford holds that the Confrontation Clause bars
17 “admission of testimonial statements of a witness who did
18 not appear at trial unless he was unavailable to testify,
19 and the defendant had had a prior opportunity for cross-
20 examination.” 541 U.S. at 53-54. It is thus constitutional
21 error to admit as substantive evidence a plea allocution by
22 a co-conspirator who does not testify at trial “unless the
23 co-conspirator is unavailable and there has been a prior

1 opportunity for cross-examination.” United States v.
2 McClain, 377 F.3d 219, 222 (2d Cir. 2004). The government
3 concedes that it was error to admit at defendants’ trial the
4 eight plea allocutions. Although defense counsel objected
5 to admission of the allocutions, they did not do so on
6 Confrontation Clause grounds, and so our review is for plain
7 error.² For the reasons set forth below, we conclude that
8 the admission of the allocutions was plain error, and we
9 vacate the convictions.³

² Abramo argues that his trial counsel’s single mention of cross-examination during a colloquy with the court about one of the eight pleas was sufficient to preserve the constitutional claim as to him. However, the remainder of the colloquy makes clear that Abramo’s counsel was arguing that the plea was not trustworthy, under our now-abrogated precedent that regularly approved the admission of an unavailable witness’s plea allocution to prove the existence and scope of a conspiracy so long as accompanied by particularized guarantees of trustworthiness. See Tr. 2006-08; see, e.g., United States v. Petrillo, 237 F.3d 119, 122-23 (2d Cir. 2000), abrogated by Crawford, 541 U.S. at 64. The objection failed to “put [the] trial court on notice that Confrontation Clause concerns [were] implicated.” United States v. Dukagjini, 326 F.3d 45, 60 (2d Cir. 2003).

³ “When the source of plain error is a supervening decision, we have employed a modified plain error standard” that shifts the burden to the government to prove that the error did not affect substantial rights. United States v. Lombardozi, 491 F.3d 61, 74 n.4 (2d Cir. 2007). We need not resolve whether this standard runs contrary to Johnson v. United States, 520 U.S. 461 (1997), and whether it applies to unpreserved Crawford errors, because defendants here prevail under ordinary plain error review. See United States v. Bruno, 383 F.3d 65, 79 n.8 (2d Cir. 2004).

1 Plain error is (1) error (2) that is plain, (3) that
2 affects substantial rights, and (4) that seriously affects
3 the fairness, integrity, or public reputation of judicial
4 proceedings. See Johnson v. United States, 520 U.S. 461,
5 467 (1997) (citing United States v. Olano, 507 U.S. 725, 732
6 (1993)). The admission of the eight allocutions here was
7 “so egregious and obvious” an error (albeit in retrospect)
8 that it clearly satisfies the first two conditions. United
9 States v. Thomas, 274 F.3d 655, 667 (2d Cir. 2001) (en banc)
10 (internal quotation marks omitted). The fourth condition is
11 also satisfied: the error seriously affected the fairness
12 and integrity of the proceedings because, as discussed in
13 further detail below, the plea allocutions “almost certainly
14 contributed to the jury’s verdict.” United States v.
15 Hardwick, 523 F.3d 94, 99 (2d Cir. 2008); see also United
16 States v. Bruno, 383 F.3d 65, 80 (2d Cir. 2004).

17 Our analysis comes down to the third prong of the plain
18 error test: whether the error affected substantial rights.
19 “An error affects a defendant’s substantial rights if it is
20 prejudicial and it affected the outcome of the district
21 court proceedings.” Thomas, 274 F.3d at 668 (internal
22 quotation marks omitted). Here, the plea allocutions
23 undoubtedly prejudiced the jury and influenced their
24 verdicts.

1 **A. The Allocutions**

2 The plea allocutions were introduced to prove the
3 existence of the following nine conspiracies:

4 (1) conspiracy to conduct the affairs of the
5 Decavalcante organized crime family through a pattern of
6 racketeering activity, charged against all three defendants
7 (guilty pleas of James Gallo, Joseph Sclafani and Charles
8 Stango);

9 (2) conspiracy to murder Louis LaRasso, charged against
10 all three defendants (guilty pleas of Louis Consalvo and
11 Gregory Rago);

12 (3) conspiracy to murder Gaetano Vastola, charged
13 against Abramo (guilty pleas of Virgil Alessi, Bartolomeo
14 Nichola and John Riggi);

15 (4) conspiracy to murder Weiss, charged against Abramo
16 (Gallo's plea);

17 (5) conspiracy to murder John D'Amato, charged against
18 Vitabile (Sclafani's plea);

19 (6) conspiracy to murder Frank D'Amato, charged against
20 Vitabile and Schifilliti (Sclafani's plea);

21 (7) conspiracy to commit construction industry
22 extortion, charged against Vitabile and Schifilliti
23 (Sclafani's and Stango's pleas);

1 (8) conspiracy to participate in loansharking, charged
2 against Abramo and Schifilliti (Gallo's plea); and

3 (9) conspiracy to commit securities fraud, charged
4 against Abramo (Consalvo's plea).

5 The government conceded that it offered these pleas to
6 corroborate the cooperating witnesses' testimony as to the
7 existence of the charged conspiracies. Tr. 2873.

8
9 **B. Substantive Impact**

10 The consequences of the erroneous admission of the plea
11 allocutions were manifold.

12 First, prejudice arose from the sheer number of plea
13 allocutions admitted to prove the multiple conspiracies in
14 this case. See United States v. Becker, 502 F.3d 122, 131
15 (2d Cir. 2007) ("[T]he sheer number of plea allocutions
16 admitted to prove the conspiracy in this case is
17 significant, and highlights the importance of such testimony
18 to the government's case."). Eight separate plea
19 allocutions, each confessing to participation in one or more
20 conspiracies, were offered to the jury. Their repetitive
21 nature suggested that the conspiracy was so widespread that
22 it would be plausible for the jury to assume that defendants
23 were participants simply by their long and close association

1 with the attestants. See id. While the number of pleas
2 alone would not suffice to establish a substantive impact on
3 the outcome of the trial, their admission in this case
4 cannot be described as merely cumulative. See, e.g., United
5 States v. Reifler, 446 F.3d 65, 88 (2d Cir. 2006). The
6 pleas described a wide and interlocking array of
7 conspiracies that in the aggregate bolstered the
8 government's depiction of defendants as the ringleaders of a
9 vast criminal network.

10 Second, many of the conspiracies were overlapping such
11 that evidence of one tended to support the existence of
12 another. For example, the conspiracy to murder Frederick
13 Weiss (evidenced by Gallo's plea) led to the conspiracies to
14 murder family members Daniel Annunziata and Gaetano Vastola
15 because of their refusal to assist in murdering Weiss
16 (evidenced by the pleas of Allesse, Nichola, and Riggi).
17 Similarly, the conspiracy to murder John D'Amato led to the
18 conspiracy to murder his brother Frank D'Amato out of
19 concern that he would exact revenge (both conspiracies
20 evidenced by Sclafani's binary plea). Plea allocutions
21 confirming the existence of one of the linked conspiracies
22 naturally reinforced the evidence of the others, creating an
23 echo chamber of implied guilt, and amplifying the
24 prejudicial effect of the pleas.

1 Third, the detailed content of the plea allocutions
2 corresponded to elements of the crimes charged against
3 defendants, potentially bolstering the government's proof in
4 those areas. See, e.g., Becker, 502 F.3d at 131 (finding
5 prejudice where "the content of the plea allocutions was
6 unusually far-reaching and detailed, and touched directly on
7 issues that were central to [the] defense"). For example,
8 in connection with his guilty plea of conspiracy to commit
9 construction industry extortion, Stango admitted to "using
10 the influence of the Decavalcante organized crime family,
11 [and making] threats of labor unrest and threats of possible
12 violence to obtain payments and jobs from construction
13 companies." Tr. 1435. Similarly, Sclafani's allocution
14 admitted to participating in the extortion of a company
15 called Barr Industries "by use of threats." Tr. 1437. To
16 establish extortion, the government was required to prove
17 the use of "actual or threatened force, violence, or fear."
18 18 U.S.C. § 1951(b)(2); see United States v. Zhou, 428 F.3d
19 361, 371 (2d Cir. 2005). In defending against these
20 extortion charges, Vitabile and Schifilliti attempted to
21 show that the unions' dealings with contractors conformed to
22 common, legitimate business practices. See, e.g., Tr. 729-
23 30. The Stango and Sclafani pleas undermined this defense

1 by suggesting that Decavalcante family members used threats
2 and violence routinely.

3 Other allocutions similarly contained detailed
4 information that invited the jury to make improper
5 assumptions regarding defendants' roles in the crimes
6 charged.⁴ See, e.g., Becker, 502 F.3d at 133.

8 **C. Limiting Instructions**

9 The government argues that the district court's
10 limiting instructions inoculated against the error. While

⁴ Examples include: Consalvo and Rago both admitted to participating in the conspiracy to murder LaRasso, and their allocutions provided details regarding the motive, timing and method for carrying out the conspiracy's object. The defense against this charge focused on inconsistencies in the cooperating witnesses' testimony as to whether the agreement to murder LaRasso was aborted, and which of several plans would be used in carrying out the hit. Thus, it was significant that the plea allocutions confirmed an agreement to murder LaRasso and the use of a gun in the course of it. Cf. Reifler, 446 F.3d at 90 (admission of plea allocutions was harmless error where, inter alia, they did not "indicate the methods" used by defendants).

Consalvo also admitted a conspiracy to commit securities fraud between January 1993 and March 1999, which was executed by making false statements in connection with a particular stock. The dates and fraud description in Consalvo's allocution correspond precisely with those in the indictment charging Abramo with similar offenses as to the same stock. As Abramo's defense centered on lack of knowledge of fraud, Consalvo's plea would have significantly prejudiced this defense by suggesting that other members of Abramo's crew had the necessary mental culpability for the offense. See, e.g., Hardwick, 523 F.3d at 99.

1 we ordinarily "presume that juries follow limiting
2 instructions," Id., 502 F.3d at 130, it is inappropriate to
3 do so "where the prejudicial spillover was so overwhelming,
4 they cannot be presumed to be effective," United States v.
5 McDermott, 245 F.3d 133, 140 (2d Cir. 2001). Under the
6 particular circumstances of the trial in this case, there
7 was an "overwhelming probability that the jury [was] unable
8 to follow the court's instructions." United States v.
9 Jones, 16 F.3d 487, 493 (2d Cir. 1994).

10 The prejudicial spillover of the plea allocutions is
11 manifest in the alignment of the verdicts. The jury
12 convicted on every substantive count supported by a plea
13 allocution; and where no plea allocution was offered in
14 support of a substantive count, the jury acquitted. Thus,
15 Vitabile and Schifilliti were acquitted of the conspiracy to
16 murder Frank Scarabino, and Abramo and Schifilliti were
17 acquitted of financing extortionate extensions of credit.

18 The same general pattern held for the predicate acts,
19 with but two exceptions: no plea allocution was offered in
20 support of the conspiracy to murder Garofano and the
21 conspiracy to murder Salvata--yet, the jury found them
22 proven. These exceptions, however, prove the rule, as they
23 involve predicate acts charged within the overarching

1 racketeering conspiracy corroborated by six plea
2 allocutions. In addition, both of these proven predicate
3 acts were offshoots of other conspiracies corroborated by
4 Gallo's plea allocation. The Garofano murder conspiracy was
5 an offshoot of the Weiss murder conspiracy, and the Salvata
6 murder conspiracy was an offshoot of the loansharking
7 conspiracy. The correlation between the verdicts and the
8 plea allocutions strongly suggests that the jury was
9 improperly influenced by the inadmissible evidence. Cf.
10 Reifler, 446 F.3d at 90 (noting that the "discerning nature
11 of the verdicts," which acquitted some defendants and
12 convicted others, "strongly indicate that the plea
13 allocutions [which did not distinguish among the defendants]
14 played no role in the convictions").

16 **D. Strength of Government's Case**

17 The government alternatively argues that because the
18 evidence of guilt was otherwise so overwhelming, the error
19 was harmless. "The erroneous admission of evidence is not
20 harmless unless the appellate court can conclude with fair
21 assurance that the evidence did not substantially influence
22 the jury." United States v. Jean-Baptiste, 166 F.3d 102,
23 108 (2d Cir. 1999). "In making this determination, we

1 consider principally whether the government's case against
2 the defendant[s] was strong; whether the evidence in
3 question bears on an issue that is plainly critical to the
4 jury's decision . . . ; whether the evidence was emphasized
5 in the government's presentation of its case and in its
6 arguments to the jury; and whether the case was close." Id.
7 at 108-09 (internal quotation marks and citations omitted).

8 Most of these factors favor defendants. The
9 government's case consisted primarily of cooperating witness
10 testimony, which, even viewed in the light most favorable to
11 the government, contained inconsistencies and
12 contradictions. The government anticipated the jury's
13 reluctance to rely solely on such testimony, promising in
14 its opening statement that "everything these witnesses tell
15 you will be corroborated by other evidence." Tr. 24. As
16 the government concedes, this corroboration included the
17 eight allocutions which "were offered as proof of the . . .
18 nine conspiracies" alleged in the indictment. Appellee's
19 Br. 72.

20 Although the government also offered physical evidence,
21 including photographs and video and audio tapes, as
22 corroboration, the government betrayed anxiety about the
23 persuasiveness of some of this evidence. Thus, the

1 government's opening "stress[ed]" to the jury that "[t]here
2 is no smoking gun on those [audio] tapes as to these three
3 defendants" because the cooperating witness who wore the
4 wire was "a low-level associate" who "simply was not in a
5 position to record these high-ranking members of the
6 family." Tr. 41. In this context, the jury could be
7 expected to give even greater weight to the plea
8 allocutions.

9 This prejudicial impact was reinforced by the
10 government's repeated references to the plea allocutions in
11 summation, attributing to them undue probative value and
12 significance. See Wray v. Johnson, 202 F.3d 515, 526 (2d
13 Cir. 2000) ("[W]here the prosecution has emphasized the
14 wrongly admitted evidence, it may well have been important
15 in the minds of the jurors."). In its main and rebuttal
16 summations combined, the government referred to the
17 allocutions eight times.

18 First, in providing an overview of the evidence, the
19 government reminded the jury that it "heard numerous
20 stipulations about guilty pleas that members and associates
21 of the Decavalcante family have entered in federal court,"
22 and urged the jury to "consider these guilty pleas as
23 evidence that certain of the conspiracies charged in this

1 indictment existed." Tr. 2873. The government then recited
2 details from four of those guilty pleas. Id.

3 Second, after reviewing the testimony of three
4 cooperating witnesses regarding the conspiracy to murder
5 Annunziata and Vastola, the government stated that this
6 testimony is corroborated by three plea allocutions:

7 [T]he testimony of all the cooperators
8 regarding the existence of the conspiracy
9 to kill Corky Vastola was corroborated by
10 the guilty plea stipulations that were
11 read to you. As you heard, the boss of
12 the family, John Riggi, Virgil Alessi and
13 Barry Nichola all pleaded guilty to their
14 roles in that conspiracy to murder Corky
15 Vastola.

16
17 Tr. 2899 (emphasis added). In short, the government was
18 asking the jury to rely on the plea allocutions to add
19 weight to the cooperating witnesses' testimony about
20 Abramo's participation in the Vastola murder conspiracy.

21 Third, the government reviewed the evidence against all
22 three defendants concerning the murder of Louis LaRasso,
23 including testimony about the participation of Louis
24 Consalvo and Gregory Rago, who were members of Abramo's
25 crew. The government urged the jury to conclude "[t]his
26 conspiracy existed" based in part on two plea allocutions:
27 "One way you know that this conspiracy to kill Louis LaRasso
28 existed was that, as you heard, Consalvo and Rago pleaded

1 guilty earlier . . . this year to their roles in this
2 indicted conspiracy." Tr. 2901. Implicit in this argument
3 was that Consalvo's and Rago's plea allocutions corroborated
4 the cooperating witnesses' testimony about participation in
5 that conspiracy by defendants.

6 Fourth, in arguing that "Philip Abramo and his
7 coconspirators engaged in manipulation of the price of SCTI
8 stock and otherwise engaged in securities fraud at
9 Sovereign," the government cited the testimony of
10 cooperating witness DiChiara. Tr. 2930. The government
11 then emphasized that DiChiara's testimony was corroborated
12 by a plea allocution:

13 [O]ne of the ways you know that DiChiara
14 did not make up his testimony about the
15 conspiracy to manipulate the price of
16 SCTI's stock at Sovereign, is that
17 Abramo's own brother-in-law, Louis
18 Consalvo, pleaded guilty to committing
19 securities fraud by making false
20 statements about SCTI's stock. That is
21 proof of the conspiracy.

22
23 Id. (emphasis added). The gist of this argument is that
24 DiChiara is telling the truth about the securities fraud
25 charge because Consalvo pled guilty to the same charge.
26 This reinforced DiChiara's extensive testimony on the
27 subject against Abramo.

28 Fifth, after defense counsel argued that the evidence
29 proved no more than that the cooperating witnesses

1 themselves were murderers (and not that defendants joined
2 any murder conspiracy), the government in rebuttal again
3 relied on plea allocutions. The government reminded the
4 jury that it "heard [guilty] pleas to murder conspiracies
5 from people from Phil Abramo's own crew, from Joey Sclafani,
6 from Jimmy Gallo," and argued that those pleas established
7 that the cooperating witnesses "were [not] the only violent
8 guys in the Decavalcante family." Tr. 3205.

9 Sixth, to counter defense arguments that talk about
10 killing certain victims was just "joking" or "rumors," the
11 government pointed to plea agreements that admitted
12 participation in murder conspiracies. Specifically, in
13 rebutting the defense claim that Sclafani was just joking
14 about killing Frank D'Amato, the government exclaimed,
15 "Joking? He pled guilty to it. Government Exhibit 58, you
16 heard the stipulation, he pled guilty to it." Tr. 3206.

17 The government continued in this vein:

18 The broader point is this, Victor
19 DiChiara is not telling you about rumors.
20 He is not repeating some kind of game of
21 telephone about conversations that people
22 had. He's telling you about
23 conversations he had with people who
24 conspired with him to murder Frank
25 D'Amato. One of the murder conspiracies
26 to which people pled guilty, including
27 the cooperators. And the idea that
28 Vitabile got charged with this because of
29 a misunderstood joke that got blown out
30 of proportion is ridiculous. . . . [Y]ou

1 then heard that Sclafani, among other
2 people, pled guilty to conspiring to kill
3 the guy.

4
5 Tr. 3207 (emphasis added). The government was plainly
6 asking the jury to infer that Sclafani's plea proves that
7 DiChiara is telling the truth about the murder conspiracies
8 and defendants' participation in them.

9 Seventh, as previously mentioned, the government
10 anticipated the jury's reluctance to rely on the audio tape
11 recordings because they did not provide a "smoking gun" as
12 to these defendants. See, e.g., Tr. 3240 ("Now, there's no
13 tape of these guys ordering murders."). In rebutting
14 defense arguments that the audio tapes failed to connect
15 defendants to extortion in the construction industry, the
16 government reprised testimony of cooperating witnesses on
17 that score, in particular Palermo's testimony that he
18 regularly delivered to Schifilliti cash payments from cement
19 companies. Tr. 3238. The government then reminded the jury
20 that the testimony and tapes were corroborated by Stango's
21 plea allocution:

22 The evidence of that is clear, but I
23 really bring it up because I want to
24 discuss something real quickly. Which I
25 don't think we mentioned earlier on this
26 conspiracy, conspiracy to extort
27 companies using unions etc., one of the
28 reasons you know that conspiracy exists
29 is because . . . Charlie Stango you may
30 remember you heard pled guilty to a

1 conspiracy, so you know the conspiracy
2 existed.

3
4 Tr. 3239 (emphasis added). The jury plausibly could
5 conclude from this argument that they were entitled to rely
6 on Stango's plea to corroborate Palermo's testimony about
7 construction industry extortion, and in particular
8 Schifilliti's role in the scheme.

9 Finally, the government's last words to the jury were
10 (again) to consider the plea allocutions as evidence of the
11 crimes charged against defendants, and not merely of
12 evidence of the existence of the conspiracies. The
13 government asked the jury to consider all of the proof of
14 "the murder of those four men and . . . the other crimes as
15 well," including:

16 the corroboration from the tapes, the
17 conversation of these defendants on tape
18 with Vinnie Palermo, . . . photographs
19 and videotapes[] in meetings with high-
20 ranking Gambino family members and
21 others, . . . that numerous people have
22 pled guilty to conspiracy to murder and
23 extort as charged here, . . . [and] the
24 consistent testimony of the corroborating
25 witnesses

26 Tr. 3251-52 (emphasis added).

27 The plea allocutions were woven throughout the
28 summation, and went beyond isolated, casual or merely
29 cumulative mention. Cf. United States v. Lombardozi, 491
30 F.3d 61, 77 (2d Cir. 2007) (single mention, in fifty-page

1 summation, of erroneously admitted allocution was harmless);
2 Reifler, 446 F.3d at 88 (one paragraph discussing allocution
3 in 110-page summation was harmless). Nor did the government
4 attempt to mitigate any prejudice or reinforce the limited
5 purpose of the evidence by reminding the jury of the court's
6 instructions. Rather, the import that the government
7 repeatedly assigned to the plea allocutions effectively
8 eroded the court's limiting instruction and exacerbated the
9 prejudicial effect. See Becker, 502 F.3d at 132. Given the
10 number and content of the plea allocutions, and the
11 corroborative value and repeated emphasis placed on them,
12 the constitutional error was not harmless.

13 We conclude that all four conditions for plain error
14 are satisfied here, and we exercise our discretion to notice
15 the error and vacate the judgments of conviction.

17 **II.**

18 Schifilliti argues that the evidence was insufficient
19 to convict him of the LaRasso murder and the loansharking
20 conspiracy; and Abramo argues that the evidence was
21 insufficient to convict him of the loansharking conspiracy
22 and the securities fraud conspiracy.

1 Defendants undertake a heavy burden in seeking to
2 reverse their convictions on grounds that the evidence was
3 insufficient. See United States v. Dhinsa, 243 F.3d 635,
4 648 (2d Cir. 2001). A conviction will be affirmed if,
5 viewing all the evidence in the light most favorable to the
6 prosecution, "any rational trier of fact could have found
7 the essential elements of the crime beyond a reasonable
8 doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). The
9 sufficiency test is applied "to the totality of the
10 government's case and not to each element, as each fact may
11 gain color from others." United States v. Guadagna, 183
12 F.3d 122, 130 (2d Cir. 1999). All issues of credibility,
13 including the credibility of a cooperating witness, must be
14 resolved in favor of the jury's verdict. See United States
15 v. Glenn, 312 F.3d 58, 64 (2d Cir. 2002). "In situations
16 where some government evidence was erroneously admitted, we
17 must make our determination concerning sufficiency taking
18 into consideration even the improperly admitted evidence."
19 United States v. Cruz, 363 F.3d 187, 197 (2d Cir. 2004)
20 (citing Lockhart v. Nelson, 488 U.S. 33, 39-40 (1988)).

21 Although we are vacating the convictions on Crawford
22 grounds, we must reach the sufficiency challenges because if
23 the evidence was insufficient, double jeopardy would bar

1 retrial. See United States v. Marcus, --- F.3d ---, ---
2 n.6, No. 07-4005-cr, 2008 WL 3474434, at *7 n.6 (2d Cir.
3 Aug. 14, 2008); see also United States v. Bruno, 383 F.3d
4 65, 90 n.20 (2d Cir. 2004) (observing that where evidence is
5 insufficient excluding the improperly admitted evidence, but
6 is sufficient including the improperly admitted evidence,
7 the remedy is retrial rather than acquittal). We conclude
8 that the totality of the evidence that was presented at
9 trial would be legally sufficient to satisfy the elements of
10 the convictions if all of that evidence had been properly
11 admitted.

13 **A. LaRasso Murder**

14 Schifilliti was convicted of both the conspiracy to
15 murder and the actual murder of Louis LaRasso. Schifilliti
16 argues that the evidence was insufficient to convict him of
17 the actual murder because LaRasso's body was never found and
18 the only evidence that Schifilliti was present at the murder
19 scene is highly attenuated.

20 First, there was evidence that LaRasso was killed and
21 did not just go underground: cooperating witnesses testified
22 about a Decavalcante administration meeting at which
23 LaRasso's death was ordered by all three defendants and the

1 other members of the ruling panel, Tr. 1069-74; Capo
2 testified that he discussed the plans and logistics of the
3 hit with Schifilliti, Tr. 327-28; Rotondo testified that
4 other co-conspirators reported that Schifilliti was present
5 (and was nauseated) at the murder scene, Tr. 1079-82;
6 LaRasso's family said he disappeared on November 11, 1991,
7 Tr. 2669-71; cooperating witnesses testified that at around
8 the same time they were told by Abramo and others that
9 Abramo and Schifilliti had "taken care" of LaRasso, Tr. 338;
10 and LaRasso's abandoned car was found at an airport--as
11 envisioned in the murder plan, Tr. 2672-73. It was entirely
12 reasonable for the jury to conclude that LaRasso was
13 murdered.

14 Schifilliti was placed at the scene of the murder by
15 Rotondo's testimony as to what another co-conspirator had
16 witnessed--attenuated evidence, as Schifilliti characterizes
17 it. But, in any event, it was unnecessary to prove
18 Schifilliti's presence at the murder scene in order to
19 convict him of the murder. The evidence established that
20 Schifilliti was one of the administration members who
21 "ordered" the hit; that order was a predicate for the
22 murder. Commanding or procuring a criminal act is
23 sufficient to impose criminal liability as a principal under

1 both 18 U.S.C. § 2 (whoever "aids, abets, counsels,
2 commands, induces or procures [the commission of an offense]
3 is punishable as a principal"), and under N.Y. Penal Law
4 § 20.00 (an aider and abettor is criminally liable as a
5 principal whenever he "solicits, requests, commands,
6 importunes, or intentionally aids such person to engage in"
7 criminal conduct with the requisite mens rea). The totality
8 of evidence is sufficient to support a jury finding that
9 Schifilliti commanded the murder, and that LaRasso was
10 murdered pursuant to that command.

11 12 **B. Loansharking Conspiracy**

13 Abramo and Schifilliti argue that the evidence was
14 insufficient to convict them of conspiring to make and
15 collect extortionate extensions of credit. In particular,
16 they contend that there was no evidence of any particular
17 extortionate loan, or of extortionate means used to collect
18 such a loan, or of a conspiracy between these two defendants
19 to commit the offense. The existence of the loansharking
20 conspiracy rested in large part on Gallo's improperly
21 admitted plea allocution, and on co-conspirators' statements
22 reported by the cooperating witnesses, some of which
23 defendants argue were also inadmissible. But for the

1 purpose of assessing the legal sufficiency of the evidence
2 to support a criminal conviction, we must weigh that
3 evidence as though it was properly admitted. See Cruz, 363
4 F.3d at 197. (Our ruling on sufficiency therefore does not
5 support any inference as to admissibility.)

6 Cooperating witnesses admitted to personal
7 participation in "loansharking," and testified extensively
8 about the Decavalcante family's involvement in
9 "loansharking" and "shylocking." See, e.g., Tr. 156-57,
10 1275, 1590, 1932. It was explained that "shylocking is the
11 same thing as loan sharking." Tr. 2565. Cooperating
12 witness Palermo defined loansharking as lending money at
13 high interest rates, and using violence or the threat of
14 violence to ensure repayment. Tr. 1976-77. Asked what
15 happens "if a loan shark customer fails to pay back the
16 money he borrowed," Palermo explained, "you extend it for a
17 while and then if nothing happens, he winds up with a
18 beating." Tr. 1977. Palermo described a particular debtor
19 who was "having difficulty keeping up with his payments,"
20 and was consequently "afraid for his life" and "thought the
21 wise guys to whom he owed the money were going to hurt or
22 kill him." Id. Similarly, Rotondo defined loansharking as
23 "len[ding] money to others at usurious rates . . . with the

1 understanding that something would happen to them if they
2 didn't pay it back." Tr. 930. Capo testified that the
3 means of collecting such loans were "[t]hreats of
4 intimidation, reputation, I would try to know my customers
5 to make sure they . . . understood my position in organized
6 crime or association with it." Tr. 158. See 18 U.S.C. §
7 891(7) (defining "loansharking" to include an extension of
8 credit where "the debtor reasonably believed that . . . the
9 creditor had a reputation for the use of extortionate means
10 to collect . . . or to punish the nonrepayment thereof").

11 Specifically as to Abramo, cooperating witnesses
12 testified that he was the "Shylock's Shylock," Tr. 1145, and
13 offered details about Abramo's "loan shark book" and "loan
14 shark pickups," Tr. 1146, 1147. They described Abramo's
15 partners in the loanshark business, the crew members who
16 served as enforcers, his arrangements for delivery of
17 loanshark payments, and his measures for dealing with
18 problem debtors. Tr. 1145-47, 2237, 2251-52. As to
19 Schifilliti, cooperating witness Palermo testified that the
20 defendant discussed details about his loansharking business
21 and on one occasion asked Palermo to lend two crew members
22 to make a collection on a loan. Tr. 2282, 2037. Palermo
23 further testified about a conversation with one of those

1 crew members who explained that, in order to collect money
2 from the debtor, he had to "strong-arm[] the guy, [get] very
3 nasty with the guy." Tr. 2222-23.

4 The evidence thus established that these defendants
5 engaged in loansharking and conspired with several other
6 co-conspirators to run their loansharking operations. It
7 was unnecessary to link Abramo's and Schifilliti's
8 operations in order to convict them both of the loansharking
9 offense. The combination of the admissible and inadmissible
10 evidence was sufficient to support a conviction.

11

12 **C. Conspiracy to Commit Securities Fraud**

13 Abramo argues that the securities fraud conviction
14 cannot stand because it was based almost entirely on the
15 uncorroborated testimony of cooperating witness DiChiara.
16 However, "a conviction may be supported only by the
17 uncorroborated testimony of a single accomplice . . . if
18 that testimony is not incredible on its face and is capable
19 of establishing guilt beyond a reasonable doubt. Any lack
20 of corroboration goes merely to the weight of the evidence,
21 not to its sufficiency." United States v. Parker, 903 F.2d
22 91, 97 (2d Cir. 1990) (internal citation omitted)).
23 DiChiara testified, based on daily face-to-face interaction

1 with Abramo and with other co-conspirators in the stock
2 fraud, that: Sovereign was not a legitimate brokerage;
3 Abramo controlled Sovereign and was actively involved in its
4 fraudulent activities and in measures to avoid law
5 enforcement detection; and the stock offering for the
6 company known as SCTI was a scam designed and implemented by
7 Abramo. The jury was entitled to believe DiChiara.

8 In any event, other cooperating witness testimony
9 corroborated DiChiara's description of Abramo's securities
10 fraud schemes. Capo, the captain to whom DiChiara reported,
11 testified that Abramo told him directly that Sovereign was
12 "his," but that he kept his office separate for legal
13 reasons. Tr. 345. Capo also testified that DiChiara had
14 "put it on record" with Capo that DiChiara was working with
15 Abramo at Sovereign, which Capo reported up the Decavalcante
16 family chain of command. Tr. 351. Capo recalled DiChiara's
17 descriptions of his activities at Sovereign, including
18 "sell[ing] bogus stocks, fake stocks." Tr. 348.

19 Palermo testified about conversations with one of
20 Abramo's partners in the SCTI fraud who explained how money
21 realized from the stock fraud had to be hidden. Tr. 2248.
22 Abramo confirmed to Palermo that DiChiara was working for
23 him at Sovereign, and bragged to Palermo about the success
24 of Sovereign's "pump and dump" schemes. Tr. 2238-43. Other

1 Abramo crew members, including Louis Consalvo, told Palermo
2 about their roles in enforcing Abramo's control over the
3 brokers at Sovereign, including in one case hitting an
4 employee over the head with a telephone. Tr. 2243. Rotondo
5 described Abramo as "the original pump and dump guy on Wall
6 Street." Tr. 1148.

7 Abramo argues in the alternative that the government
8 failed to adduce sufficient evidence of a nexus with
9 interstate commerce, the jurisdictional element of the
10 offense. As this Court has previously observed, it is easy
11 for prosecutors to overlook this simple but essential
12 element of a federal offense:

13 [F]ederal prosecutors must devote the
14 minimal effort necessary to establish
15 federal jurisdiction over the acts of the
16 accused. There is nothing more crucial,
17 yet so strikingly obvious, as the need to
18 prove the jurisdictional element of a
19 crime. Sadly, we are forced to continue
20 reversing convictions, as long as
21 prosecutors remain lax in the simpler
22 aspects of their jobs.

23 United States v. Leslie, 103 F.3d 1093, 1103 (2d Cir. 1997).

24 Abramo characterizes the evidence relating to
25 Sovereign's activities as having been cabined within its
26 Wall Street offices, and points out (for example) that no
27 evidence was adduced of any telephone calls made or mail
28 sent out-of-state from that office. Abramo accuses the

1 government of relying, for its interstate nexus, solely on
2 the supposition that of the 100 to 150 Sovereign brokers,
3 one or another must surely have called one or more customers
4 outside New York State.

5 The government's evidence here is thin but sufficient.
6 It was able to show an interstate nexus from the following
7 evidence in the trial record: (a) Sovereign used, in
8 connection with the SCTI scam, foreign nominee accounts held
9 in offshore companies controlled by Abramo and his co-
10 conspirators; (b) an Abramo partner who played a major role
11 in the SCTI scheme was stationed in Sovereign's office in
12 Boca Raton, Florida; (c) trading information about SCTI was
13 accessible electronically from other states (and, in fact, a
14 defense expert testified about accessing the information
15 from New Jersey); and (d) the SCTI scheme was national in
16 scope, making it reasonable to infer that its implementation
17 necessitated the use of interstate or international mail and
18 wire facilities.

19 Because trial error otherwise requires vacatur of the
20 convictions, we express no opinion as to whether the
21 evidence of the LaRasso murder, loansharking and securities
22 fraud charges would be sufficient without the improperly
23 admitted evidence. Cf., United States v. Hardwick, 523 F.3d

1 94, 102 & n.7 (2d Cir. 2008). In assessing the sufficiency
2 of evidence, we have not used the word "ample." Nor do we
3 reach defendants' remaining arguments challenging (i) the
4 admission of co-conspirators' statements; (ii) the
5 government's failure to disclose certain Brady materials;
6 and (iii) the life sentence of one of the defendants.

7

8

CONCLUSION

9 For the foregoing reasons, the judgments of the
10 district court are vacated and remanded for further
11 proceedings consistent with this opinion.