

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 - - - - -

4 August Term, 2007

5 (Argued: October 18, 2007 Decided: September 17, 2008)

6 Docket Nos. 06-3280(L), 06-3396(CON)

7  
8 UNITED STATES OF AMERICA,

9 Appellant,

10 - v. -

11 LOUIS EPPOLITO and STEPHEN CARACAPPA,

12 Defendants-Appellees.

13  
14 Before: KEARSE, SACK, and HALL, Circuit Judges.

15 Appeals by the government from postverdict orders of the  
16 United States District Court for the Eastern District of New York,  
17 Jack B. Weinstein, Judge, dismissing indictment count that charged  
18 defendants with racketeering conspiracy, see 18 U.S.C. § 1962(d), as  
19 barred by statute of limitations, see id. § 3282(a). See 436  
20 F.Supp.2d 532 (2006).

21 Reversed.

22 MITRA HORMOZI, Assistant United States  
23 Attorney, Brooklyn, New York (Roslynn R.  
24 Mauskopf, United States Attorney for the  
25 Eastern District of New York, Barbara D.  
26 Underwood, Counsel to the United States  
27 Attorney, David C. James, Robert W. Henoach,  
28 Daniel Wenner, Assistant United States  
29 Attorneys, Brooklyn, New York, on the brief),  
30 for Appellant.

1 JOSEPH A. BONDY, New York, New York, for  
2 Defendant-Appellee Eppolito.

3 DANIEL NOBEL, New York, New York, for Defendant-  
4 Appellee Caracappa.

5 KEARSE, Circuit Judge:

6 The United States appeals from orders of the United States  
7 District Court for the Eastern District of New York, Jack B.  
8 Weinstein, Judge, entered following jury verdicts finding  
9 defendants Louis Eppolito and Stephen Caracappa guilty on all  
10 counts of a superseding indictment ("Indictment") that charged  
11 them with, inter alia, racketeering conspiracy in violation of the  
12 Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18  
13 U.S.C. § 1962(d). The district court granted each defendant a  
14 judgment of acquittal on the RICO conspiracy count pursuant to  
15 Fed. R. Crim. P. 29, ruling that there was insufficient evidence  
16 of that conspiracy's existence within five years of the  
17 commencement of this prosecution, and hence that the prosecution  
18 of defendants on that count is barred by the statute of  
19 limitations, see 18 U.S.C. § 3282(a). The court also ruled that  
20 unless its dismissal of the RICO conspiracy count were overturned  
21 on appeal, defendants should have a new trial on the other  
22 counts--which charged both defendants with distribution of and  
23 conspiracy to distribute narcotics, and charged Eppolito with  
24 attempted money laundering--because the evidence on the RICO  
25 conspiracy count may have unfairly affected the jury's

1 consideration of those counts. On appeal, the government contends  
2 principally that the evidence was sufficient to support the jury's  
3 finding that the conspiracy continued to exist within five years  
4 of the commencement of this prosecution, and that, in any event,  
5 defendants' conspiracy to conceal their associations, criminal  
6 conduct, and ongoing goals continued into the limitations period.  
7 Finding merit in the government's first contention, we reverse  
8 the orders of the district court and remand for reinstatement of  
9 the jury's verdicts and the imposition of sentences.

10

#### I. BACKGROUND

11 Louis Eppolito (sometimes referred to in the trial  
12 testimony as "Lou" or "Louie") and Stephen Caracappa (sometimes  
13 referred to in the testimony as "Steve") are former police  
14 detectives who were employed by the New York City Police  
15 Department ("NYPD") until the early 1990s. The present  
16 prosecution was commenced on March 9, 2005; the Indictment alleged  
17 that Eppolito and Caracappa, along with others, were leaders of a  
18 racketeering enterprise whose principal purpose was to generate  
19 money for its participants by assisting and protecting members and  
20 associates of organized crime families (collectively the "Mafia").  
21 It alleged that from approximately May 18, 1979, through March 9,  
22 2005, Eppolito and Caracappa conspired to conduct the affairs of  
23 the enterprise through a pattern of racketeering activity that

1 included bribery, obstruction of justice, witness tampering,  
2 narcotics trafficking, money laundering, kidnaping, and murder.

3 The evidence at trial included the testimony of law  
4 enforcement agents, former members or associates of organized  
5 crime families in the New York City area with respect to events in  
6 the 1980s and 1990s, and a government informant who secretly tape-  
7 recorded his conversations with Eppolito, Caracappa, and others in  
8 Las Vegas in 2004-2005. The jury found that Eppolito and  
9 Caracappa had committed all of the racketeering acts alleged  
10 against them in the Indictment and found them guilty on all of the  
11 counts in which they were charged. As we are reviewing a Rule 29  
12 judgment of acquittal, we describe the record in some detail,  
13 taking the evidence in the light most favorable to the government  
14 and in accordance with the jury's verdicts. We note also that  
15 Eppolito and Caracappa, while endorsing the district court's  
16 ruling that the evidence was insufficient to support the jury's  
17 finding that the RICO conspiracy continued to exist into the  
18 limitations period, have not challenged the sufficiency of the  
19 evidence on the RICO conspiracy count in any other respect.

20 A. Events in the New York Area

21 At the times pertinent to the Indictment, the New York  
22 City area Mafia consisted of five Organized Crime Families: the  
23 Bonanno, the Colombo, the Gambino, the Genovese, and the Lucchese.  
24 The government's key witness at trial was Burton Kaplan, a former  
25 associate of the Lucchese Crime Family who had been involved in,



1 inter alia, narcotics trafficking, sales of stolen goods and  
2 misbranded clothing, and attempts to negotiate stolen financial  
3 instruments. At the time of this trial, Kaplan had served roughly  
4 one-third of a 27-year sentence imposed on him for conspiracy to  
5 engage in narcotics trafficking. Pursuant to his cooperation  
6 agreement in connection with the present case, Kaplan had pleaded  
7 guilty to, inter alia, participating in the RICO conspiracy  
8 alleged in the present prosecution. At trial, Kaplan testified  
9 principally that Eppolito and Caracappa were a partnership that in  
10 1986-1993 provided various services to him as an associate of  
11 organized crime and, through him as an intermediary, to his close  
12 friend Anthony Casso, a Lucchese Crime Family member who in the  
13 late 1980s became its underboss, i.e., second in command.

14 In the early 1980s, Kaplan had been in prison with Frank  
15 ("Frankie") Santoro, Jr., who was loosely associated with the  
16 Gambino Crime Family. In late 1985 or early 1986, after both men  
17 had been released from prison, Santoro approached Kaplan and said  
18 that Santoro had a cousin who was a police detective, whom he  
19 identified as Eppolito, and that "Eppolito and his partner"--only  
20 later identified to Kaplan as Caracappa (Trial Transcript ("Tr.")  
21 426-27)--would, in exchange for money, provide Kaplan with law  
22 enforcement information and other types of assistance. At that  
23 time, Eppolito was an NYPD detective in the 63rd Precinct in  
24 Brooklyn; Caracappa, likewise an NYPD detective, was a member of a  
25 task force whose members included local detectives and agents of  
26 the Federal Bureau of Investigation ("FBI"). While Eppolito

1 generally had access only to information in his precinct,  
2 Caracappa's position with the task force gave him access to a  
3 great deal of information about both local and federal matters.  
4 Kaplan testified that Santoro, in offering the services of  
5 Eppolito and Caracappa, said Eppolito could

6 search around and find out if I had anything pending  
7 against me or if I was under any kind of surveillance  
8 and that . . . [Santoro's] cousin had a partner that  
9 had a prestigious job and between the two of them,  
10 they could help me and if I had any problems  
11 physically, they could help me.

12 (Tr. 515.)

13 Frankie approached me and said that his cousin was a  
14 detective and that if I wanted his cousin [could] get  
15 me information and could help me if I ever have a  
16 problem and could probably help me on ongoing  
17 investigations.

18 . . . .

19 . . . He offered to get me information on any  
20 investigation that was going on and if I had a  
21 serious problem in the street, he offered to do  
22 murders for me.

23 (Tr. 426, 427; see also id. at 516 ("He said that if I had any  
24 kind of serious problem, that--that he himself, his cousin and his  
25 cousin's partner were capable of doing a murder.").)

26 Kaplan initially rejected Santoro's offer, explaining that  
27 he "didn't want to do business with any cops" because it "possibly  
28 could come back and haunt [him] if one of them would later on in  
29 life become an informant." (Tr. 427-28.) Santoro assured Kaplan  
30 "that [Santoro] had done things with them previously and that they  
31 were good stand-up guys and that he would have no fear of  
32 anything, doing anything with them." (Tr. 517.) The term "stand

1 up," in the vernacular of organized crime, means refusing to give  
2 information to law enforcement agents, even if that refusal means  
3 receiving punishment and going to jail. (Tr. 748; see also id. at  
4 551-52 (conversely, to "go bad" means "become [an] informant[]").)

5 1. The Murder of Israel Greenwald

6 Notwithstanding his initial rejection of Santoro's offer  
7 of assistance from Eppolito and Caracappa, Kaplan soon had a  
8 change of heart. In early 1986, having learned that his  
9 participation in a scheme involving stolen Treasury bills was in  
10 danger of being exposed, Kaplan hired Santoro, Eppolito, and  
11 Caracappa to murder one of the other participants in the scheme,  
12 Israel Greenwald.

13 Santoro, Eppolito, and Caracappa carried out their mission  
14 by following Greenwald's car on a highway and turning on flashing  
15 lights on their car, thereby causing Greenwald to stop on the side  
16 of the road. They told Greenwald that he was a suspect in a  
17 hit-and-run and that they needed to take him to the police station  
18 for a lineup. They then drove Greenwald instead to the premises  
19 of an auto repair shop in Brooklyn, where Santoro shot and killed  
20 him. Kaplan paid Santoro \$30,000 for the murder; Santoro kept  
21 \$5,000, unbeknownst to Eppolito and Caracappa, and divided the  
22 remaining \$25,000 among himself, Eppolito, and Caracappa.

1           2.   The Murder of Jimmy Hydell

2           In mid-1986, there was an unsuccessful attempt on the life  
3 of Casso, who was then the acting underboss of the Lucchese Crime  
4 Family. The attack took place in the 63rd Precinct, to which  
5 Eppolito was assigned. Kaplan then for the first time revealed to  
6 Casso that Kaplan had a friend whose "cousin works in that  
7 precinct and that he's a good guy and that he could probably help  
8 us" to identify Casso's attackers. (Tr. 574.) Without disclosing  
9 to Casso either Santoro's identity or defendants' names, Kaplan  
10 told Casso that "[Santoro] and his cousin, [and] his cousin's  
11 partner" "had done something for [Kaplan] . . . and that [Casso  
12 and Kaplan] could trust them." (Id.) Casso asked Kaplan to see  
13 what the friend, the cousin, and the partner could find out.

14           Kaplan relayed the request to Santoro, who said he would  
15 speak to Eppolito. Santoro thereafter gave Kaplan a packet of  
16 information that had been collected by Eppolito and Caracappa.  
17 The packet contained, inter alia, crime scene reports listing  
18 Casso's attackers, including Gambino Crime Family associate Jimmy  
19 Hydell and Nicky Guido, and describing the cars that had been  
20 used, including the license plate numbers and the addresses of the  
21 registered owners.

22           When Santoro delivered the information packet, he  
23 declined Kaplan's offer of payment, saying that the information  
24 was "a gift from my cousin and his partner. This is just to show  
25 you the kind of things that they would do." (Tr. 575.) Santoro  
26 said, "my cousin and his partner won't take any money for



1 something where somebody close to us got hurt. We're not that  
2 kind of people." (Tr. 580-81.)

3 After Kaplan gave the information packet to Casso and  
4 described the methods that Santoro, Eppolito, and Caracappa had  
5 used with Greenwald, Casso had Kaplan offer Santoro, Eppolito, and  
6 Caracappa \$35,000 to kidnap Hydell and turn him over to Casso.  
7 They accepted the offer. They were cautioned not to kill Hydell,  
8 as Casso wanted to extract from Hydell information as to who had  
9 ordered or approved the attempt on Casso's life.

10 In mid-October 1986, Santoro, Eppolito, and Caracappa  
11 kidnaped Hydell and put him into the trunk of a car that had been  
12 provided by Casso. Santoro drove the car to a Toys "R" Us parking  
13 lot in which he had agreed to meet Kaplan and gave Kaplan the car  
14 keys; Eppolito and Caracappa had followed Santoro to the parking  
15 lot and remained at the entrance in order to provide protection.  
16 Casso, who was standing in the parking lot, asked Kaplan who the  
17 men were at the entrance; Kaplan recognized them as Eppolito and  
18 Caracappa, although they had not been formally introduced to him.  
19 Kaplan responded that they were his friend's cousin and the  
20 cousin's partner; Casso instructed that everyone should leave.  
21 Kaplan gave Casso the keys to the car in whose trunk Hydell had  
22 been placed, and Kaplan, Santoro, Eppolito, and Caracappa  
23 departed.

24 Casso took Hydell to a meeting of high-ranking members of  
25 the Lucchese and Gambino Crime Families and questioned him as to  
26 who had ordered the attempt on Casso's life. Hydell named three

1 members of the Gambino Crime Family, including Edward Lino, see  
2 Part I.A.8. below. Casso thereafter killed Hydell. Having  
3 offered to pay \$35,000 for the kidnaping of Hydell, Casso added a  
4 \$5,000 bonus. Kaplan delivered the \$40,000 to Santoro, who kept  
5 the bonus for himself and divided the remaining \$35,000 among  
6 himself, Eppolito, and Caracappa.

7 3. The Murder of "Nicky Guido"

8 After Hydell's kidnaping and murder, Casso instructed  
9 Kaplan to ask Santoro for the address and a photograph of Nicky  
10 Guido, who was mentioned in the packet of information on the  
11 attempted assassination of Casso. Santoro, after consulting  
12 Eppolito, reported to Kaplan that Eppolito would provide the  
13 information for \$4,000. Casso considered the request greedy,  
14 given that he had added an unsolicited \$5,000 bonus for the Hydell  
15 kidnaping; he refused to pay for the information on Guido,  
16 stating that he would get it another way. On December 25, 1986,  
17 Casso caused the murder of a man called Nicky Guido, but it was  
18 not the Nicky Guido referred to in the information packet.  
19 Santoro and Eppolito told Kaplan that Casso would have gotten the  
20 "right" Nicky Guido if Casso had been willing to pay \$4,000 for  
21 the information.

22 4. Eppolito and Caracappa Begin Dealing Directly With Kaplan  
23 and Are Put on Retainer

24 Although during the initial period of their association  
25 Kaplan had seen Eppolito and Caracappa on two or three occasions,

1 he had never been introduced to them, and he dealt with them only  
2 through Santoro. In September 1987, while in the company of  
3 someone Casso had targeted for assassination, Santoro was killed.  
4 Only then did Kaplan reveal to Casso that Santoro was the friend  
5 whose cousin was one of the police detectives who were providing  
6 them with information.

7 After Santoro's death, Eppolito sent Santoro's widow to  
8 one of Kaplan's stores to ask whether Kaplan would like to meet  
9 Eppolito directly. Thereafter, Eppolito and Kaplan met in the  
10 Santoro home, while Caracappa remained outside, watching the house  
11 from a car. Eppolito proposed that he and Caracappa would "give  
12 [Kaplan] everything that we get on every family, any bit of  
13 information we get about informants, about ongoing investigations,  
14 wiretaps, and imminent arrests" (Tr. 620) in exchange for a  
15 retainer of \$4,000 per month. "[M]urder contracts" were to cost  
16 extra. (Tr. 621.)

17 Kaplan relayed Eppolito's offer to Casso, who accepted it  
18 on the condition that Eppolito and Caracappa "work exclusively for  
19 us," i.e., the Lucchese Crime Family, and not give any information  
20 to members of other crime families. (Tr. 625-26.) For the next  
21 several years, Eppolito and Caracappa gave confidential law  
22 enforcement information to Kaplan, who relayed it to Casso; and  
23 Casso, through Kaplan, paid Eppolito and Caracappa \$4,000 per  
24 month.

25 When asked at trial what Casso did with the information  
26 received from Eppolito and Caracappa, Kaplan testified that



1 if it was information about somebody from a different  
2 family, then Casso would pass it to the different  
3 families. He'd pass some information to the Bonannos  
4 and he passed some information to the Genovese. If  
5 it was someone that had something to do with him and  
6 they were informants, Casso had them killed.

7 (Tr. 442; see also id. at 165, 665-66 (describing relay by Casso  
8 of such information to high-echelon members of the Colombo Crime  
9 Family).) Kaplan testified that Eppolito said he liked doing  
10 business with Kaplan and Casso "because when [Eppolito] gave us  
11 information people got taken care of that deserved it, and that in  
12 the past he gave information to other people and they never acted  
13 on it." (Tr. 657.)

14 Although Eppolito and Caracappa knew they were dealing,  
15 through Kaplan, with Casso, Kaplan never told Casso Eppolito's and  
16 Caracappa's names. Even in 1992, when Eppolito published an  
17 autobiography called Mafia Cop that contained photographs of  
18 himself and Caracappa, and Casso told Kaplan he recognized them as  
19 the men who had helped Santoro kidnap Hydell, Kaplan refused to  
20 confirm that the detectives on Casso's payroll were Eppolito and  
21 Caracappa.

22 After Santoro died, Kaplan initially communicated  
23 principally with Eppolito. The two had a falling-out, however,  
24 when Eppolito sought more money and insisted on meeting Casso, and  
25 Kaplan adamantly refused. Thereafter, Kaplan communicated  
26 principally with Caracappa.

27 Throughout, the methods used for communications between  
28 Kaplan and Eppolito and/or Caracappa were designed to avoid  
29 disclosure or suspicion of their association. Kaplan never used



1 his home telephone to contact Eppolito or Caracappa; he used pay  
2 phones or cell phones. He purchased cell phones sometimes in his  
3 own name, sometimes in the names of others; and at times he had  
4 other persons purchase cell phones for him. When calling each  
5 other on the telephone, Kaplan, Eppolito, and Caracappa did not  
6 use their own names but frequently used the code name "Marco."  
7 Kaplan's personal telephone book contained the real names of many  
8 members or associates of organized crime families; only Eppolito  
9 and Caracappa were given coded entries--the name "Marco."

10 Kaplan generally met Eppolito and/or Caracappa in private  
11 places, such as their homes late at night when no one was on the  
12 street, or at the homes of relatives; or at locations where it  
13 would be difficult to identify or overhear them, such as on the  
14 shoulder of a busy highway; or in out-of-the way places, such as a  
15 cemetery in Staten Island. Kaplan testified that "from the  
16 beginning of [his] relationship with Mr. Eppolito and Mr.  
17 Caracappa, . . . one of the goals of the relationship [was] to  
18 conceal the relationship." (Tr. 1144.)

19 5. The Murder of John "Otto" Heidel

20 Soon after Eppolito and Caracappa were placed on retainer,  
21 Casso asked Kaplan to have them find out whether Lucchese Crime  
22 Family associate John "Otto" Heidel was cooperating with the  
23 authorities. Eppolito enlisted the help of Caracappa and later  
24 reported to Kaplan that Heidel was, in fact, cooperating. Kaplan

1 gave the information to Casso; in October 1987, Casso had Heidel  
2 killed.

3           Thereafter, Eppolito gave Kaplan audio tapes that Eppolito  
4 said he had removed from Heidel's apartment while investigating  
5 the murder. He told Kaplan, "this will prove that I was right,  
6 that the guy was cooperating, and that he was taping people."  
7 (Tr. 651.) Kaplan gave the tapes to Casso, who subsequently  
8 informed Kaplan that the contents of the tapes confirmed that  
9 Heidel had been cooperating with the authorities by recording  
10 conversations.

11           6. The Murder of Anthony Dilapi

12           In the late 1980s, Lucchese Crime Family member Anthony  
13 Dilapi, who was on parole, was suspected of having become a  
14 government informant. And when summoned by Casso to account for  
15 gambling establishments that Dilapi controlled, Dilapi did not  
16 appear for the meeting but instead sold his establishments and  
17 left town. Casso asked Kaplan to have Eppolito and Caracappa try  
18 to locate Dilapi. Caracappa wrote to Dilapi's parole officer  
19 indicating that he needed to contact Dilapi as part of an ongoing  
20 police investigation, and he was ultimately able to give Kaplan an  
21 address for Dilapi in California. Kaplan relayed the information  
22 to Casso, who sent three men to kill Dilapi. Dilapi, however,  
23 recognized one of the men and escaped, moving to a new location.

24           At Casso's request, relayed by Kaplan, Caracappa then  
25 obtained and reported Dilapi's new address in Hollywood. In

1 February 1990, Casso had Dilapi killed in the garage of his new  
2 apartment building.

3 7. The Murder of Bruno Facciola

4 In August 1990, Eppolito, who had retired from NYPD in  
5 early 1990, reported to Kaplan that there were impending arrests  
6 in an investigation focusing on New York's jewelry district. As  
7 Bruno Facciola, a Lucchese Crime Family capo, was not to be  
8 indicted but would merely be named an unindicted coconspirator,  
9 Eppolito told Kaplan that Facciola was a government cooperator.  
10 Though Casso at that time was a fugitive, see Part I.A.11. below,  
11 Kaplan remained in communication with him and relayed Eppolito's  
12 information about Facciola. In August 1990, Casso had Facciola  
13 killed.

14 8. The Murder of Edward Lino

15 As discussed in Part I.A.2. above, Casso had interrogated  
16 his would-be assassin Jimmy Hydell and had been informed that one  
17 of the men who ordered the attempt on Casso's life was Edward  
18 ("Eddie") Lino. Beginning in 1987 or 1988, Casso sought to have  
19 Lino killed. Casso asked Kaplan to offer Eppolito and Caracappa  
20 \$65,000 to kill Lino.

21 Eppolito and Caracappa accepted the contract, eventually  
22 carried it out, and were paid \$70,000. Kaplan testified that he  
23 learned of their success in November 1990 when Eppolito told him,

24 I got good news. I said, what. He says, we got

1 Eddie Lino. I said, what do you mean you got him?  
2 He says, we killed him.

3 (Tr. 723.) When Kaplan asked how they had done it, Eppolito  
4 indicated that they had begun with the same ploy used on  
5 Greenwald and Hydell--i.e., following Lino on a highway and using  
6 flashing lights to have him stop on the side of the road. After  
7 Eppolito spoke briefly to Lino, Caracappa "shot [Lino] a number of  
8 times. [Kaplan asked] how come Steve shot him? [Eppolito] said,  
9 Steve is a much better shot." (Id.)

10 A few days later, in payment for the Lino killing, Kaplan  
11 relayed to Eppolito a box containing \$70,000 in \$100 bills. (See  
12 Tr. 724-25.)

13 9. Kaplan's Marijuana Distribution Business

14 In the mid-1980s and again beginning in 1991, Kaplan was  
15 engaged in marijuana trafficking. During those periods, the least  
16 he distributed in a given year was between 500 and 1,000 pounds.  
17 In his best year, he distributed 12,000 or 13,000 pounds of  
18 marijuana (see Tr. 443), for which his personal profit was  
19 "[p]robably a couple of million dollars" (id. at 832).

20 Kaplan had several discussions with Eppolito and Caracappa  
21 about his marijuana business during those years.

22 Both of them had asked me together and separately if  
23 I wanted them to help me in any way that they would--  
24 they would follow my truck in a car or surveil my  
25 warehouses and see if I had any heat on me, and  
26 any[ ]way that they could help me, they were willing  
27 to do it.

28 They said they don't want any money for it, it's  
29 just a friendship situation, and I told them I



1 appreciate it but we're doing certain things together  
2 and this has nothing to do with that, and I don't  
3 want to involve them in that business.

4 (Tr. 783.) Kaplan said it was not frugality that led him to  
5 decline their offer; "they offered to do it for nothing, out of  
6 friendship." (Id.)

7 10. The Attempted Murder of Herman Tabak

8 In 1991, Kaplan was also involved in a scheme involving  
9 stolen checks, collaborating with some of his co-participants in  
10 the earlier stolen Treasury bill scheme, see Part I.A.1. above.  
11 When cash was not forthcoming from the stolen checks as expected,  
12 one of Kaplan's collaborators said he thought one of the other  
13 participants, Herman Tabak, might be cooperating with the  
14 authorities. Kaplan then solicited Eppolito and Caracappa to kill  
15 Tabak.

16 Kaplan testified that Eppolito, after consulting with  
17 Caracappa,

18 came back to me and he told me that he would take  
19 care of it for me, and I told him good, go ahead and  
20 do it. And he says, I have one problem with this.  
21 He says, I don't have any place to put him. We don't  
22 have--we don't have a problem shooting him but of  
23 [sic] no place to put the body.

24 And I said, come over to my warehouse in Staten  
25 Island and I had another warehouse a block away and  
26 I took Louie over there and showed him. There was a  
27 garage pull up door there and I said just bring the  
28 body to me and pull into this garage and I'll take  
29 care of it from that point.

30 (Tr. 753.)

1           However, the attempt to kill Tabak failed. When Eppolito  
2 and Caracappa accosted him, telling him he was under arrest, Tabak  
3 escaped into the street, screaming that they were trying to kill  
4 him. Eppolito and Caracappa quickly departed. Thereafter, Kaplan  
5 abandoned the plan to kill Tabak, being persuaded that Tabak was  
6 sufficiently terrified that he would no longer consider  
7 cooperating with the government.

8           11. Other Obstructions of Justice

9           In addition to giving Kaplan and Casso information that  
10 obstructed justice by helping Casso to eliminate potential  
11 witnesses against members of organized crime, including the  
12 instances described above, Eppolito and Caracappa provided  
13 information designed to allow Casso and others to escape self-  
14 incrimination or arrest. For example, in the late 1980s, Eppolito  
15 informed Kaplan that a trailer in New Jersey, used by a Lucchese  
16 Crime Family member, had been bugged and that its telephone was  
17 tapped. Kaplan passed that information to Casso; Casso relayed it  
18 to the owner of the trailer, who promptly had the bugging and  
19 wire-tapping devices removed. Eppolito also told Kaplan of a bug  
20 in a New Jersey restaurant that was owned and frequented by  
21 members of the Genovese Crime Family. Casso passed that  
22 information to the owner of the restaurant, and the members  
23 "stopped talking . . . on the bug." (Tr. 664.)

24           In May 1990, Eppolito made an urgent call to Kaplan and  
25 arranged to meet him on the Long Island Expressway. Eppolito gave

1 Kaplan information, which he had received from Caracappa, that  
2 Casso and Lucchese Crime Family boss Victor Amuso, among others,  
3 were about to be arrested. Kaplan alerted Amuso and tried to  
4 reach Casso; Casso was away but was alerted by Amuso. By the next  
5 day, both Amuso and Casso had become fugitives, gone "on the lam."  
6 (Tr. 683-85.)

7 While Casso was a fugitive, Kaplan maintained contact with  
8 him, meeting with him a score of times and continuing to relay to  
9 him sensitive law enforcement information received from Eppolito  
10 and Caracappa and to relay from Casso \$4,000 a month to Eppolito  
11 and Caracappa. Casso was arrested in 1993.

12 12. Eppolito and Caracappa Retire from NYPD

13 In early 1990, Eppolito retired from NYPD. For a time, he  
14 remained in the New York area, and although he no longer had  
15 direct access to police files, he continued to participate in  
16 providing services to Kaplan and Casso. For example, in May 1990,  
17 he relayed to Kaplan information collected by Caracappa about the  
18 impending arrests of Casso and Amuso, see Part I.A.11. above; in  
19 August 1990, he advised Kaplan that Facciola was a government  
20 cooperator, see Part I.A.7. above; in November 1990, he tracked  
21 down and helped to kill Lino, see Part I.A.8. above; in 1991, he  
22 participated in the attempted murder of Tabak, see Part I.A.10.  
23 above.

24 In the early 1990s, Eppolito moved to Las Vegas. Kaplan



1 remained in contact with Caracappa, continuing to use the same  
2 covert methods of communicating with him.

3 Caracappa retired from NYPD in 1992. He remained in New  
4 York until, in the latter part of 1996, he too moved to Las Vegas.

5 13. Kaplan Becomes a Fugitive

6 As indicated above, Casso, having been warned of his  
7 impending arrest through information received from Eppolito and  
8 Caracappa, had become a fugitive in 1990; he was caught and  
9 arrested in 1993. In March 1994, Kaplan's attorney called Kaplan  
10 at his home in Brooklyn to alert him that Casso had probably  
11 begun to cooperate with the government. Within hours, Kaplan  
12 himself became a fugitive; he promptly left New York, and the next  
13 day he flew to the west coast, en route to Mexico.

14 Before leaving New York, however, Kaplan went to  
15 Caracappa's home to alert him:

16 I was very embarrassed and I told Steve, I said we  
17 got a real problem and I told him Anthony Casso went  
18 bad and that I am going on the lam and that I'm  
19 coming up to tell him because I would expect that  
20 there is going to be a lot of publicity in the next  
21 couple of weeks, but I wanted him to know that I was  
22 going on the lam because he's not going to see me,  
23 that I didn't go bad, and that he could rely on me  
24 and he said to me, do you need any money. Do you--do  
25 you need me to take care of your wife? He was very  
26 gracious, and I said no, Steve. Thank you very  
27 much. I have money. And he says well, if you ever  
28 do need money in the future, just let me know, like a  
29 good friend would, and he said, I'll take care of  
30 your wife.

31 And I said thank you very much. I said, but you  
32 know, there is someone else involved in this too.  
33 There's Louie. He's in Vegas already and I always  
34 felt Louie was a little flamboyant, and I said, can



1           you control Louie? Can you take care of the  
2           situation with him? He said, Louie's been my partner  
3           and I trust him and don't worry about it. I said  
4           okay.

5           (Tr. 768-69.)

6           Kaplan surmised to Caracappa that the government would not  
7           reach a cooperation agreement with someone who had killed as many  
8           people as Casso had unless Casso were willing to give information  
9           that was sensational. Kaplan expressed concern that Casso's  
10          cooperation would therefore focus on Eppolito and Caracappa.  
11          Kaplan knew that, despite his refusal to give Casso the  
12          detectives' names, Casso believed he knew who they were: He had  
13          told Kaplan that he had seen the pictures of Eppolito and  
14          Caracappa in Eppolito's book, Mafia Cop, and had recognized them  
15          as two of the men in the Toys "R" Us parking lot who had assisted  
16          in the Hydell kidnaping.

17          Kaplan's concern was, in general, prophetic. Following  
18          Casso's apparent decision to cooperate with the authorities, there  
19          was "a heavy, heavy amount of publicity" on the subject of police  
20          detectives accused of "serious, serious crimes." (Tr. 924.)  
21          Eppolito later told Kaplan that "the press," for a time, was  
22          "awful" and that Eppolito and Caracappa had retained attorneys.  
23          (Tr. 777.)

24          After alerting Caracappa, Kaplan fled to Mexico, where he  
25          remained for several months. He then returned to the United  
26          States to reside under an assumed name in Portland, Oregon. At  
27          the end of 1994, Kaplan moved to Las Vegas, where he remained  
28          until the summer of 1996. He then returned to New York, where he

1 was soon arrested on account of his marijuana trafficking  
2 business, see Part I.C. below.

3 B. Events in Las Vegas

4 After moving to Las Vegas in the early 1990s, Eppolito  
5 published his autobiography, Mafia Cop, in 1992. The book  
6 portrayed Eppolito as a man who had relatives in the Mafia, while  
7 he himself had rejected a life of crime and become a police  
8 detective. As indicated above, Eppolito included pictures of  
9 himself and Caracappa in the book, allowing Casso, who had never  
10 been told their names, to identify them.

11 1. Interactions Among Kaplan, Eppolito, and Caracappa

12 Kaplan, after his sojourn in Mexico, took up residence in  
13 Portland but visited Las Vegas several times to see a lady friend.  
14 During such a visit in August or September 1994, Kaplan had his  
15 friend place a call from a public telephone to Eppolito, who was  
16 listed in the telephone book, and arrange for Eppolito to meet  
17 Kaplan the next day at a local supermarket. This would be the  
18 first of several meetings between the two at that location.

19 Near the meeting time, Kaplan loitered around the slot  
20 machines in the market's vestibule until Eppolito arrived. The  
21 two then strolled around the supermarket, with Kaplan pushing a  
22 cart, discussing their respective situations and the publicity  
23 surrounding Casso's arrest and cooperation. Kaplan testified,  
24 "[t]his was the first time I had seen him since the problem

1 happened with Casso and I went on the lam, and I asked him what  
2 was going on, is he all right, is he under any pressure, is he  
3 getting any heat." (Tr. 777.) Eppolito responded that he had  
4 initially been bothered by the press, but that matters had  
5 improved.

6 Eppolito also told Kaplan that Caracappa would be moving  
7 to Las Vegas and was building a house diagonally across the  
8 street from Eppolito's house. Caracappa eventually moved to Las  
9 Vegas in the latter half of 1996 and indeed lived across the  
10 street from Eppolito. From the fall of 1994 until he moved to Las  
11 Vegas permanently, Caracappa visited Las Vegas several times and  
12 met with Eppolito and Kaplan, Kaplan having moved to Las Vegas at  
13 the end of 1994.

14 In November 1994, Kaplan offered to lend Eppolito money  
15 from Kaplan's narcotics trafficking business. Eppolito had  
16 inquired whether Kaplan could arrange for Eppolito to borrow  
17 \$75,000 from a loanshark, explaining that he had made a down  
18 payment on the construction of one house, had found another house  
19 he preferred, and had been unable to persuade the builder to  
20 return his money before a new buyer was found for the first house;  
21 thus, Eppolito needed a bridge loan. Eppolito said he was willing  
22 to pay the loanshark interest of \$750 a week. Kaplan, although a  
23 fugitive, had continued with his marijuana trafficking business,  
24 and he said that, rather than see Eppolito incur such an interest  
25 obligation, Kaplan would ask his marijuana supplier to agree to a  
26 delay in payment so that Kaplan could lend Eppolito the money. In



1 early 1995, Kaplan had cash delivered to him from New York and  
2 gave Eppolito \$65,000 in 13 envelopes containing \$100 bills. In  
3 1996, Eppolito repaid \$55,000, giving Kaplan \$30,000 or \$35,000 in  
4 cash "in an envelope that came from the bank" and "checks for the  
5 rest." (Tr. 802.) Kaplan forgave repayment of the remaining  
6 \$10,000.

7 In early 1996, Kaplan, knowing that Caracappa's wife sold  
8 a line of clothing through the QVC home-shopping television  
9 channel and was friendly with a woman who sold jewelry on QVC,  
10 sought Caracappa's help in attempting to get QVC to offer for sale  
11 a product in which a friend of Kaplan's had an interest.  
12 Caracappa mentioned that his wife's friend was going to serve as  
13 Caracappa's alibi for the killing of Eddie Lino by saying that she  
14 and her husband had dined with Caracappa and his wife that night.  
15 Caracappa arranged for Kaplan and Kaplan's friend to meet with a  
16 QVC executive.

17 After moving to Las Vegas, Caracappa opened a business  
18 that provided security services. He employed Eppolito in that  
19 business. Eppolito, in the meantime, was attempting to write and  
20 sell movie screenplays. He had a film production company, of  
21 which he was president and Caracappa was vice president.  
22 Caracappa read everything that Eppolito wrote.

23 2. Interactions of Eppolito and Caracappa With Stephen Corso

24 Stephen Corso, who testified at trial, was a New York  
25 accountant who had embezzled more than \$5 million from his



1 clients. Arrested without fanfare in 2002, he became a government  
2 cooperator, eventually posing as a Mafia associate. He moved to  
3 Las Vegas and began to frequent a restaurant that was a hangout  
4 for members of organized crime. There Corso met John Lombardozi,  
5 who described himself as an associate of the Gambino Crime Family;  
6 Lombardozi introduced Corso to John Mercaldi, who ran a  
7 prostitution business in Las Vegas and described himself as the  
8 right-hand man to Jerry Chili, the apparent successor to  
9 leadership of the Bonanno Crime Family. Corso subsequently had  
10 conversations with Chili, who told Corso to say he was "with Jerry  
11 from the Fulton Fish Market" (Tr. 1423). Mercaldi thereafter  
12 introduced Corso to others as "'with us'" and "'very good friends  
13 with Jerry.'" (Tr. 1425.) In the spring of 2003, Corso began  
14 wearing a wire to record his conversations with members of  
15 organized crime.

16 Mercaldi introduced Corso to Gambino Crime Family member  
17 Michael Dibari; Mercaldi and Dibari introduced Corso to John  
18 Frate. John Frate's father, to whom Corso was also introduced,  
19 was Mike Frate, who identified himself as the right-hand man to  
20 Joe Bonanno, the then-head of the Bonanno Crime Family. In  
21 October 2004, Dibari asked Corso to meet with Eppolito.

22 a. Funding for Eppolito's Script-Writing Ventures

23 Eppolito's name had not previously been mentioned by the  
24 authorities to Corso, who, by that time, had been wearing a wire  
25 for a year and a half. Dibari said he hoped Corso could help to

1 raise money for the production of a movie written by Eppolito;  
2 Corso consulted FBI Special Agent Kevin Sheehan. Sheehan  
3 instructed Corso to tell Dibari that Corso had no interest in  
4 meeting Eppolito because Eppolito was a cop.

5 A week or 10 days later, John Frate and Mike Frate  
6 arranged to meet with Corso. At that meeting, they handed him an  
7 envelope containing Eppolito's screenplay, called "Murder at  
8 Youngstown." Corso told the Frates that he was hesitant to meet  
9 with Eppolito because Eppolito was a cop. Corso testified that  
10 in response, "Mike Fr[ate] said that he understood my concern,"  
11 but that Corso "shouldn't worry" because "Lou was one of us  
12 . . . ." (Tr. 1565.)

13 Corso reported this meeting to Sheehan; a few days later,  
14 Sheehan gave approval for Corso to meet with Eppolito. Thereafter  
15 John Frate took Corso to meet Eppolito at Eppolito's home. Frate  
16 attended some of the ensuing meetings, as he "wanted to be a part  
17 of the whole process" "of funding the movie." (Tr. 1445.)  
18 During the next few months, Corso met with Eppolito more than 20  
19 times. As Corso continued to wear a wire, most of his  
20 conversations with Eppolito--and later with both Eppolito and  
21 Caracappa--were recorded; at least one of the meetings with  
22 Eppolito was held in Corso's "office," in which the FBI had  
23 installed recording equipment and hidden cameras.

24 An early meeting of Corso, Eppolito, and John Frate to  
25 discuss funding for "Murder at Youngstown"--for which Eppolito  
26 said he needed \$5 million--was attended by one of Corso's clients

1 who controlled a public company. The client suggested that his  
2 company could merge with Eppolito's film company and raise money  
3 through a public offering of stock. Eppolito was favorably  
4 disposed to that suggestion and said he would want some of his  
5 friends to receive stock in the offering; one of them was  
6 Caracappa.

7 Corso was introduced to Caracappa at the end of January  
8 2005. He attended several dinner meetings with Eppolito and  
9 Caracappa and noted that the relationship between Eppolito and  
10 Caracappa appeared to be very close. Corso testified that at one  
11 such meeting, Caracappa told Corso he trusted Corso, and that "if  
12 he didn't trust [Corso, Corso] wouldn't be there and . . .  
13 wouldn't be meeting with Lou." (Tr. 1637.)

14 Eppolito was also involved in other attempts to earn  
15 money. In addition to seeking \$5 million to fund "Murder at  
16 Youngstown," Eppolito told Corso he was willing to write a  
17 screenplay for or about anyone who would pay him \$75,000; when  
18 Eppolito sold the screenplay, he would pay the investor 50 percent  
19 of all profits. When Corso asked if Eppolito cared what a  
20 potential investor did for a living or where the money came from,  
21 Eppolito responded, "'[n]o, I don't give a fuck about nothing'"  
22 (Tr. 1621); and, without Corso's having made any mention of  
23 narcotics trafficking (see id. at 1621-22), Eppolito said that an  
24 investor could be "the biggest drug dealer . . . in the  
25 U.S. [, Eppolito] didn't care," so long as Eppolito did not have to  
26 transport the drugs (id. at 1621; see also id. at 1622 (Eppolito



1 said, "'[s]eventy-five comes in a fucking shoebox [i.e., in cash],  
2 that is fine with me, I don't care, I had people given [sic] me  
3 money before'"))).

4 In December 2004, Corso, on instructions from Sheehan,  
5 told Eppolito that Corso had lined up an investor who would send  
6 \$75,000 for Eppolito to write a script and to send the investor 50  
7 percent of whatever profit resulted from its sale. Corso told  
8 Eppolito that the money was narcotics proceeds from Florida;  
9 Eppolito indicated that did not care. Corso told Eppolito that  
10 the money might "be coming from somebody in the Mafia" (Tr. 1618);  
11 Eppolito indicated that he did not care. Eppolito said, "'I got  
12 people from the Gambino family that call me all of the time.  
13 [They say, y]ou know, Louie, we got money, you know[;] I says it's  
14 not a question about your money, it's you don't have enough to  
15 make the movie.'" (Tr. 1624.) Eppolito said Mike Frate "had  
16 given him \$25,000 in a cardboard box in cash for a partial  
17 investment in [a] \$75,000 script." (Tr. 1617-18.) Eppolito also  
18 said he would have no objection if an investor in such a script  
19 did not use his real name in signing their contract. "'He could  
20 sign it John Wayne' . . . . 'I don't care what name he uses.'" (Tr. 1627-28.)

22 Corso also told Eppolito that in order to avoid the filing  
23 of currency transaction reports, federally required for wire  
24 transfers of \$10,000 or more, the \$75,000 would be wired in  
25 installments of less than \$10,000. Eventually, wire transfers  
26 totaling \$14,000 were made to Eppolito's account. Although

1 Eppolito was initially unconcerned about the investment's  
2 fragmentation, he became irritated at the slow pace of its  
3 arrival, saying, "'[a]re they in Florida. Why didn't he send a  
4 guy with a car[.] I would have--I would have flown there and  
5 drove back.'" (Tr. 1640.)

6 b. The Supplying of Narcotics

7 Corso testified that at a dinner with Eppolito and  
8 Caracappa in mid-February 2005, he told them he was expecting a  
9 visit from four Hollywood clients, each of whom was interested in  
10 investing \$75,000 in Eppolito's film project, and that his clients  
11 wanted to purchase "'designer drugs'" (Tr. 1587), specifically  
12 ecstasy and crystal methamphetamine. Corso testified that  
13 Eppolito responded that "Tony," his son, could handle it; both  
14 Eppolito and Caracappa said that Guido Bravatti, a young  
15 associate of Caracappa's, could handle it. Later that night,  
16 Eppolito called Corso to give him Bravatti's telephone number.

17 On the following evening, Corso had dinner with Tony and  
18 Bravatti. Corso told them that his clients wanted an ounce of  
19 crystal methamphetamine and six to eight ecstasy pills; Bravatti  
20 said there would be no problem. Tony and Bravatti indicated that  
21 they wanted to do all they could to facilitate investments by  
22 Corso's clients in Eppolito's film project.

23 The next day, Tony and Bravatti made a partial delivery at  
24 Corso's office, saying that they had had some difficulty in  
25 obtaining what Corso requested. They handed him an envelope

1 containing somewhat less than the requested ounce of crystal  
2 methamphetamine, and Corso paid them proportionately. The  
3 parties stipulated at trial that that envelope had contained 25.4  
4 grams of 64-percent-pure methamphetamine.

5 Tony and Bravatti never delivered to Corso ecstasy or any  
6 additional methamphetamine. On March 3, 2005, Corso had dinner  
7 with Eppolito, who was quite upset and told Corso not to call Tony  
8 or Bravatti any more. Eppolito refused to tell Corso why he was  
9 upset but became more congenial during the dinner. Corso did not  
10 again attempt to reach Tony or Bravatti. On March 9, 2005,  
11 Eppolito and Caracappa were arrested.

12 C. Kaplan Eventually Decides To Cooperate

13 In the spring of 1996, one of Kaplan's New York attorneys  
14 had informed him that it no longer appeared that Casso would be a  
15 government witness. Kaplan returned to New York in the summer of  
16 1996. In September 1996, he was arrested and charged with  
17 narcotics trafficking. He testified that the authorities appeared  
18 to be more interested in having him identify Eppolito and  
19 Caracappa--though no names were mentioned--than in prosecuting him  
20 for his marijuana offenses:

21 When I was arrested, I was taken into DEA  
22 headquarters and when I walked into the room, when  
23 they brought me in, they had about fifteen to twenty  
24 people in there and there was high ranking members of  
25 the New York Police Department, inspectors, and there  
26 was FBI agents, and DEA people. . . . The police  
27 department said, listen, you could help yourself out  
28 here real quick. We're interested in two dirty  
29 cops. . . .



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

. . . .

. . . We are interested in two dirty cops and if you want to help yourself, you want to--if you help us, then tell us what you know about two dirty cops.

(Tr. 806-07.) Kaplan declined to make any statements. He was tried for and convicted of conspiracy to distribute marijuana; he was sentenced to 27 years in prison.

Both during his trial and after he was convicted, law enforcement agents made repeated efforts to persuade Kaplan to cooperate. Kaplan continued his silence for some eight years.

In the latter half of 2004, Kaplan--then 70-odd years of age--decided to cooperate with the government, including in the prosecution of Eppolito and Caracappa. At trial, he explained why:

I was in jail nine straight years. I was on the lam two and a half years before it. In that period of time I seen an awful lot of guys that I thought were standup guys go bad, turn and become informants.

. . . .

And after nine years, I felt that [Eppolito and Caracappa] were going to be indicted by the state on this case, . . . and I didn't think that they would stand up and I was tired of going to jail by myself, and I would be at the defense table now and Steve and Louie would be sitting up here.

(Tr. 454; see also id. at 813 ("I felt that one of them or both of them would make a deal and then I would be the defendant".))

D. The Jury's Verdicts

As indicated above, Count One of the Indictment charged Eppolito and Caracappa with participating in a RICO conspiracy

1 that began in May 1979 and ended in March 2005. Count Two  
2 charged Eppolito with money laundering in connection with his  
3 attempts in 2004-2005 to receive proceeds of narcotics  
4 trafficking; the two remaining counts charged Eppolito and  
5 Caracappa with distributing, possessing with intent to distribute,  
6 and conspiring with others to distribute five or more grams of  
7 methamphetamine. The racketeering acts alleged in Count One  
8 included the murders, attempted murders, kidnapings, and  
9 obstructions of justice between 1986 and 1991, described in Part  
10 I.A. above; Eppolito's conspiracy between 1994 and 1996 to engage  
11 in unlawful monetary transactions with respect to proceeds from  
12 Kaplan's narcotics trafficking business, described in Part I.B.1.  
13 above; Eppolito's attempted money laundering of narcotics proceeds  
14 in 2004-2005, described in Part I.B.2.a. above; and narcotics  
15 trafficking by Eppolito and Caracappa in 2005, described in Part  
16 I.B.2.b. above.

17 Prior to trial, Eppolito and Caracappa moved pursuant to  
18 Fed. R. Crim. P. 12(b) to dismiss the RICO conspiracy count on,  
19 inter alia, statute-of-limitations grounds. They argued that the  
20 Indictment failed to allege sufficiently that the supposed  
21 enterprise and pattern of racketeering activity continued past the  
22 termination of their employment with NYPD and/or their respective  
23 relocations to Las Vegas in the 1990s. As Eppolito and Caracappa  
24 were not indicted until March 9, 2005, they contended that no part  
25 of the alleged RICO conspiracy offense was committed within the  
26 five-year limitations period. The district court denied their

1 motion on the ground that the issue could not be decided on the  
2 face of the Indictment but would depend on the evidence presented  
3 at trial.

4 In its summation at trial, the government urged the jury  
5 to reject any suggestion by Eppolito or Caracappa that the RICO  
6 conspiracy ended when they retired from NYPD in the early 1990s,  
7 or when they moved to Las Vegas, or when Kaplan was arrested in  
8 1996. The Assistant United States Attorney argued that "the  
9 principal purpose[] of the enterprise was to make money," and  
10 defendants' ancillary purpose was to "conceal[] their involvement  
11 in the conspiracy," in order "to protect their ability to make  
12 money." (Tr. 2967.) He urged the jury not to

13 be fooled into thinking that the conspiracy ended  
14 when the defendants retired from the force. The  
15 evidence shows, ladies and gentlemen, that Eddie Lino  
16 was killed after Detective Eppolito retired from the  
17 force. The attempt on Herman Tabak's life came after  
18 Eppolito retired from the force. The money  
19 laundering activity that Eppolito engaged in with Mr.  
20 Kaplan in Las Vegas occurred after [Eppolito and  
21 Caracappa] had retired and, of course, the  
22 activities in 2004 and 2005 with Corso occurred after  
23 they left the police force.

24 (Tr. 2967-68.) Thus, the government argued that the RICO  
25 conspiracy had spanned the entire period alleged in the  
26 Indictment, as Eppolito and Caracappa "received money for each  
27 crime in New York and they broke the law for money in Las Vegas."

28 (Tr. 2967.)

29 In instructing the jury with respect to defendants'  
30 contention that the statute of limitations barred their



1 prosecution on the RICO conspiracy count, the district court  
2 stated as follows:

3 The statute of limitations is designed to bar  
4 conviction on racketeering crimes that ended five  
5 years or more before the prosecution began by  
6 indictment. The indictment here was handed down on  
7 March 9, 2005. In order to convict the defendant of  
8 racketeering conspiracy, you must find first that the  
9 charged enterprise continued to exist as of March 9,  
10 2000, five years before; that the single conspiracy  
11 charged in count one continued to exist as of March  
12 9, 2000; and that the defendant continued to be a  
13 member of the conspiracy as of March 9, 2000.

14 A racketeering conspiracy continues to exist  
15 until the purpose or objective of the conspiracy is  
16 either accomplished or abandoned.

17 Here the indictment alleges that the principal  
18 purpose of the enterprise was to generate money for  
19 its members and associates by means of various legal  
20 and illegal activities. If you find that one or both  
21 of the defendants were at one time engaged in a  
22 racketeering conspiracy involving the charged  
23 enterprise but that the enterprise was no longer in  
24 existence as of March 9, 2000, you must acquit the  
25 defendants of the conspiracy charged in count one of  
26 the indictment.

27 If you find that one or both of the defendants  
28 were engaged in a racketeering conspiracy but that  
29 the conspiracy was not ongoing as of March 9, 2000,  
30 you must acquit the defendants of the conspiracy  
31 charged in count one.

32 If you find that the conspiracy was still  
33 ongoing as of March 9, 2000 but that the particular  
34 defendant was no longer a member of the conspiracy as  
35 of that date, you must acquit that defendant of the  
36 conspiracy charged in count one of the indictment.

37 (Tr. 3268-70 (emphases added).)

38 The court also pointed out that while both Eppolito and  
39 Caracappa denied that there was a conspiracy and that they were  
40 members of a conspiracy as charged, "each of the defendants ha[s]  
41 raised a defense that even if the conspiracy charged existed, he

1 was not a member as of March 9, 2000 because he withdrew from the  
2 conspiracy prior to that date." (Tr. 3270.) The court instructed  
3 that the burden of proof on the defense of withdrawal was on the  
4 defendant asserting the defense:

5           Once a person joins a conspiracy of this type,  
6 that person remains a member until he withdraws from  
7 it. Any withdrawal must be complete and it must be  
8 done in good-faith. A person can withdraw from a  
9 conspiracy by taking some affirmative steps to  
10 terminate or abandon his participation in and  
11 efforts to promote the conspiracy. The defendant  
12 must have demonstrated some type of positive action  
13 which disavowed or defeated the purpose of the  
14 conspiracy.

15           By way of an example, a defendant may withdraw  
16 from the conspiracy by giving a timely warning to the  
17 proper law enforcement officials; by wholly depriving  
18 his prior efforts of effectiveness in the commission  
19 of the crime; by putting himself [in] a position  
20 where he could not participate in the conspiracy; by  
21 making appropriate efforts to prevent the commission  
22 of a crime connected with the conspiracy; or by doing  
23 acts which are inconsistent with the objects of the  
24 conspiracy and making reasonable efforts to  
25 communicate those acts to his coconspirators.

26           Now, on this issue of withdrawal, the defendant  
27 has the burden of proving whether he withdr[e]w from  
28 the conspiracy by a preponderance of the evidence.  
29 The burden is on him.

30 (Tr. 3270-71.) The court cautioned, however, that

31           [t]he fact that a defendant has raised this  
32 defense does not . . . relieve the government of its  
33 burden of proving that there was an agreement and  
34 that the defendant knowingly and voluntarily joined  
35 it and that it continued until at least March 9,  
36 2000.

37           Those are things the government must still prove  
38 beyond a reasonable doubt in order for you to convict  
39 the defendant of the crime of conspiracy.

40 (Tr. 3272.)



1           The court distributed to the jurors a verdict sheet that  
2 set out all of the issues the jury was to resolve. These  
3 included, as to each defendant and as to each specific  
4 racketeering act alleged against him, a question as to whether the  
5 government had proved that he agreed to participate in that act.  
6 With regard to the statute-of-limitations issue, a question was  
7 posed with respect to the continuation or ending of the alleged  
8 RICO conspiracy. After defense counsel objected to a question in  
9 the form, "Do you find that the conspiracy charged in Count One  
10 continued to March 9th, 2000" (Tr. 3334), the jury was asked:

11           Do you find that the conspiracy charged in Count One  
12           ended prior to March 9, 2000?

13           The jury found Eppolito and Caracappa guilty on all of the  
14 counts in which they were charged. Finding them guilty of the  
15 RICO conspiracy charged in Count One of the Indictment, the jury  
16 found that each defendant had agreed to participate in each of the  
17 racketeering acts alleged against him. As to whether it "f[ou]nd  
18 that the conspiracy charged in Count One ended prior to March 9,  
19 2000," the jury answered "No."

20 E. The District Court's Statute-of-Limitations-Based Order of  
21 Acquittal on the RICO Conspiracy Count

22           After the verdict, Eppolito and Caracappa made various  
23 motions to set aside the verdicts. To the extent pertinent to  
24 this appeal, Eppolito and Caracappa moved pursuant to Fed. R.  
25 Crim. P. 29 for judgments of acquittal on the RICO conspiracy  
26 count, arguing that the evidence at trial was insufficient to



1 establish that the charged enterprise continued to exist as late  
2 as March 9, 2000, or that the enterprise was conducted through a  
3 pattern of racketeering activity that continued to that date. In  
4 a Memorandum, Order and Judgment dated June 30, 2006, reported at  
5 436 F.Supp.2d 532 ("Eppolito I"), the court granted that motion.  
6 Its reasoning was as follows:

7 In the present case, the government proved  
8 beyond a reasonable doubt that the defendants  
9 conspired to conduct the affairs of an enterprise  
10 through a pattern of racketeering activity.  
11 Moreover, although it was not required by the charges  
12 in the indictment, the government proved that the  
13 defendants in fact engaged in a pattern of  
14 racketeering activity through their involvement in at  
15 least eight murders, two kidnapings, and various acts  
16 of bribery, tampering, retaliation, and obstruction  
17 of justice. The defendants, together with Frank  
18 Santoro, Jr. and Burton Kaplan, established a  
19 "subcontracting" arrangement with members of  
20 organized crime, represented primarily by co-  
21 conspirator Anthony Casso. Through this enterprise,  
22 the defendants exploited their positions as present  
23 or past officers of the New York City police  
24 department in order to supply confidential law  
25 enforcement information to Casso and to carry out  
26 murders and kidnapings under color of law. In  
27 exchange for their services, the defendants were  
28 highly compensated, receiving a retainer of 4,000  
29 dollars a month for years and an additional 25,000 to  
30 65,000 dollars per murder contract.

31 It is unclear precisely when this conspiracy  
32 came to an end. It could be seen as having ended  
33 when defendant Caracappa retired from the police  
34 department in 1992, or when Casso, the defendants'  
35 primary "client," was arrested in 1993. It may have  
36 lasted until Kaplan moved back to New York and was  
37 arrested in 1996. Up until that point, some remnant  
38 of the original enterprise arguably remained, and  
39 there was a possible--although minuscule--threat of  
40 continued racketeering activity connected to that  
41 enterprise.

42 But once Anthony Casso and Burton Kaplan had  
43 both been arrested, once the two defendants had both  
44 retired from the police force and re-established

1 themselves on the opposite side of the country, the  
2 conspiracy that began in New York in the 1980s had  
3 come to a definite close. The defendants no longer  
4 had access to confidential law enforcement  
5 information and were no longer in contact with their  
6 old associates in the Lucchese crime family. Their  
7 enterprise had effectively been put out of business  
8 by their own retirements and their compatriots'  
9 arrests. . . .

10 The government's inclusion of the four Nevada  
11 acts does not serve to lengthen the life of this  
12 conspiracy to within the five-year statute of  
13 limitations. The government maintains that the jury  
14 could have determined that these four acts were  
15 evidence of a continuing business venture on the part  
16 of the defendants--a sort of "mom and pop" general  
17 store of crime--through which they sold members of  
18 organized crime whatever services they were in a  
19 position to provide from 1986 until their arrests in  
20 2005. This theory was not supported by the evidence  
21 at trial.

22 While the 1994-1996 monetary transaction  
23 involved two members of the earlier racketeering  
24 conspiracy--namely, Burton Kaplan and defendant  
25 Eppolito--this act was essentially a personal loan  
26 from Kaplan to Eppolito, unconnected to the original  
27 enterprise or to any other enterprise with which the  
28 defendants had been associated. . . . The proceeds  
29 for this loan came from Kaplan's marijuana  
30 trafficking business, in which neither of the  
31 defendants had ever participated. Kaplan himself  
32 explicitly testified that, while the defendants had  
33 on occasion volunteered their "law enforcement"  
34 services in aid of this business, he had turned them  
35 down because it "had nothing to do with" the other  
36 crimes he was committing with them during the late  
37 1980s and early 1990s. Eppolito's agreement to take  
38 marijuana proceeds from Kaplan was in no way a sale  
39 of his or Caracappa's "services" to Kaplan. Rather,  
40 it was a favor performed by Kaplan for Eppolito,  
41 tinged, as favors between criminals often are, by an  
42 acceptance of complicity on the part of the one  
43 receiving the favor.

44 As for the 2004-2005 money laundering and  
45 narcotics charges, these crimes are also most  
46 accurately characterized as singular, "sporadic" acts  
47 of criminality--precisely the sort of criminal  
48 activity not covered by the laws against  
49 racketeering. . . . Drawing every inference in favor



1 of the government, . . . these acts could at best be  
2 seen as having been performed in furtherance of a  
3 new enterprise, unconnected to the original one and  
4 conducted through an entirely different type of  
5 activity. . . .

6 After Eppolito retired from the New York City  
7 police department and moved to Las Vegas, he  
8 attempted a transition from the world of law  
9 enforcement to the world of entertainment. In  
10 pursuit of this goal, Eppolito established an  
11 ostensibly legitimate enterprise, "DeAntone  
12 Productions," and began seeking investors in his  
13 screenplays, many of which were about the world of  
14 organized crime. According to documents admitted by  
15 the government, Eppolito was the president of this  
16 company and Caracappa a vice president.

17 The final three racketeering acts were committed  
18 as a result of Eppolito's attempts to find investors  
19 for a particular film project: the money laundering  
20 grew out of Eppolito's agreement to accept funds from  
21 an investor described by government informant Steven  
22 Corso as a "mob guy in Florida involved in a drug  
23 deal," and the narcotics charges arose from both  
24 defendants' arguable willingness to help Corso obtain  
25 drugs that would keep prospective investors happy.  
26 None of these acts displayed the sort of fee-for-  
27 services arrangement typified by the New York acts  
28 and alleged by the government to be the essence of  
29 the defendants' continuing enterprise.

30 The government's attempts to rely on the nexus  
31 of organized crime to connect the New York and Nevada  
32 acts are unavailing, considering the significant  
33 differences between them. That Eppolito tangentially  
34 relied on his knowledge of, and prior association  
35 with, organized crime in his attempts to find  
36 investors for his new screenwriting endeavor is not  
37 surprising, nor is it in and of itself evidence that  
38 this enterprise was the same as the original one. A  
39 retired contractor who opens a delicatessen in his  
40 retirement may encourage his old employees and  
41 clients to buy their lunches at his new store, and  
42 time on job sites may have taught him what brand of  
43 pastrami those customers will prefer; that does not  
44 mean that he remains in the construction business.

45 Eppolito I, 436 F.Supp.2d at 571-73 ("at best" emphasized in  
46 original) (other emphases ours).



1 The court also rejected the government's alternative  
2 contention that prosecution of the RICO conspiracy count was  
3 timely because the members of the enterprise had agreed to  
4 maintain secrecy about the existence of the enterprise, their  
5 participation in it, and their prior crimes, and that that  
6 agreement continued until the date of their arrests. See id. at  
7 573.

8 Having concluded that judgments of acquittal should be  
9 entered in favor of each defendant on the RICO conspiracy count,  
10 the court also opined that, given the "overwhelming evidence" on  
11 that count that Eppolito and Caracappa were "heinous criminals  
12 . . . guilty . . . of the most despicable crimes of violence and  
13 treachery," id. at 576, that evidence may have unfairly affected  
14 the jury's consideration of the other three counts of the  
15 Indictment. Accordingly, the court ruled that if its dismissal of  
16 the RICO conspiracy count were not overturned on appeal, Eppolito  
17 and Caracappa would be given a new trial on those other counts.

18 II. DISCUSSION

19 On appeal, the government contends that the district court  
20 erred in entering judgments of acquittal on the RICO conspiracy  
21 count, arguing that the verdicts finding Eppolito and Caracappa  
22 guilty on that count may be upheld on either of two bases. First,  
23 it argues that the evidence was sufficient to support findings  
24 that the RICO enterprise whose purpose was to gain money for its

1 participants by providing services to members and associates of  
2 organized crime--and defendants' conspiracy to conduct that  
3 services enterprise through a pattern of racketeering activity--  
4 continued well past March 8, 2000. Second, the government  
5 contends that part of the RICO conspiracy, from its inception, was  
6 an actual agreement to conceal the existence of the enterprise and  
7 its racketeering activity, designed both to hide the participants'  
8 past crimes and to permit them to engage in further crimes. It  
9 argues that there was sufficient evidence to permit the jury to  
10 find that such an agreement existed and to find that it did not  
11 end before Eppolito and Caracappa were arrested.

12 In light of the principles governing our standard of  
13 review and the general principles governing conspiracy crimes,  
14 statutes of limitations, and the RICO elements of enterprise and  
15 pattern of racketeering activity, we find merit in the  
16 government's first contention and need not address the second.

17 A. The Standard of Review

18 Rule 29 of the Federal Rules of Criminal Procedure  
19 provides that "the court on the defendant's motion must enter a  
20 judgment of acquittal of any offense for which the evidence is  
21 insufficient to sustain a conviction." Fed. R. Crim. P. 29(a).  
22 The test for sufficiency, as noted by the district court here, is  
23 "whether a rational jury could conclude beyond a reasonable doubt  
24 that a defendant is guilty of the crime charged." Eppolito I, 436  
25 F.Supp.2d at 568. The court must make that determination with

1 "the evidence against a particular defendant . . . viewed in a  
2 light that is most favorable to the government, . . . and [with]  
3 all reasonable inferences . . . resolved in favor of the  
4 government. . . . The jury may reach its verdict based upon  
5 inferences drawn from circumstantial evidence, and the evidence  
6 must be viewed in conjunction, not in isolation." Id.

7 Our mandate on appeal reflects the same standard, as we  
8 review the grant or denial of a judgment of acquittal under Rule  
9 29 de novo. See, e.g., United States v. Temple, 447 F.3d 130, 136  
10 (2d Cir.), cert. denied, 127 S. Ct. 495 (2006). We may properly  
11 affirm a judgment of acquittal under Rule 29 only if we conclude,  
12 considering all of the evidence, direct and circumstantial, that  
13 "no rational trier of fact could have found the defendant guilty  
14 beyond a reasonable doubt." United States v. Jackson, 335 F.3d  
15 170, 180 (2d Cir. 2003). We must reverse a district court's post-  
16 conviction Rule 29 judgment of acquittal if, "'after viewing the  
17 evidence in the light most favorable to the prosecution, any  
18 rational trier of fact could have found the essential elements of  
19 the crime beyond a reasonable doubt.'" United States v.  
20 Espaillet, 380 F.3d 713, 718 (2d Cir. 2004) (quoting Jackson v.  
21 Virginia, 443 U.S. 307, 319 (1979) (emphasis in Jackson)); see,  
22 e.g., United States v. Scop, 846 F.2d 135, 138-39 (2d Cir.)  
23 (applying same standard to review of claims of "insufficient  
24 evidence of overt acts in furtherance of the conspiracy within the  
25 five-year period prior to the indictment"), outcome altered on  
26 rehearing on other grounds, 856 F.2d 5 (2d Cir. 1988).



1           Viewing the evidence in the light most favorable to the  
2 government means "'crediting every inference that the jury might  
3 have drawn in favor of the government,'" United States v. Temple,  
4 447 F.3d at 136-37 (quoting United States v. Walker, 191 F.3d  
5 326, 333 (2d Cir. 1999)), and recognizing that the government's  
6 evidence need not exclude every other possible hypothesis, see,  
7 e.g., United States v. Espaillet, 380 F.3d at 718; United States  
8 v. Martinez, 54 F.3d 1040, 1043 (2d Cir.), cert. denied, 516 U.S.  
9 1001 (1995); United States v. Ragosta, 970 F.2d 1085, 1090 (2d  
10 Cir.), cert. denied, 506 U.S. 1002 (1992). As "it is the task of  
11 the jury, not the court, to choose among competing inferences that  
12 can be drawn from the evidence," United States v. Jackson, 335  
13 F.3d at 180, when there are such competing inferences, we must  
14 defer "to the jury's choice," United States v. Morrison, 153 F.3d  
15 34, 49 (2d Cir. 1998). "The ultimate question is not whether we  
16 believe the evidence adduced at trial established [the pertinent  
17 fact], but whether any rational trier of fact could so find."  
18 United States v. Payton, 159 F.3d 49, 56 (2d Cir. 1998) (emphases  
19 in original). This

20           traditional deference accorded to a jury's verdict  
21 "is especially important when reviewing a conviction  
22 for conspiracy . . . because a conspiracy by its very  
23 nature is a secretive operation, and it is a rare  
24 case where all aspects of a conspiracy can be laid  
25 bare in court with the precision of a surgeon's  
26 scalpel."

27 United States v. Jackson, 335 F.3d at 180 (quoting United States  
28 v. Pitre, 960 F.2d 1112, 1121 (2d Cir. 1992)).

1 B. Statutes of Limitations

2 To the extent pertinent here, § 3282 of Title 18, which  
3 governs the time within which most noncapital federal offenses may  
4 be prosecuted, provides that

5 no person shall be prosecuted, tried, or punished for  
6 any offense, not capital, unless the indictment is  
7 found or the information is instituted within five  
8 years next after such offense shall have been  
9 committed.

10 18 U.S.C. § 3282(a). Statutes of limitations are statutes of  
11 repose. Those applicable to criminal prosecutions are principally

12 designed to protect individuals from having to defend  
13 themselves against charges when the basic facts may  
14 have become obscured by the passage of time and to  
15 minimize the danger of official punishment because of  
16 acts in the far-distant past.

17 Toussie v. United States, 397 U.S. 112, 114-15 (1970).

18 "[S]tatutes of limitations normally begin to run when the crime  
19 is complete." Id. at 115 (quoting Pendergast v. United States,  
20 317 U.S. 412, 418 (1943)).

21 The time at which a crime is "complete" depends largely on  
22 the nature of the crime. Some crimes are "instantaneous"; others  
23 are "continuing." Toussie, 397 U.S. at 122; United States v.  
24 Kissel, 218 U.S. 601, 608-09 (1910). "A 'continuing offense' is,  
25 in general, one that involves a prolonged course of conduct; its  
26 commission is not complete until the conduct has run its course."  
27 United States v. Rivera-Ventura, 72 F.3d 277, 281 (2d Cir. 1995);  
28 see generally United States v. Beech-Nut Nutrition Corp., 871 F.2d  
29 1181, 1190 (2d Cir.) ("Beech-Nut") (noting that possession of  
30 drugs with intent to distribute is a continuing crime, whereas

1 receipt of stolen goods is a noncontinuing crime), cert. denied,  
2 493 U.S. 933 (1989).

3           Though some conduct, even before it is concluded, may  
4 fit the statutory definition of a crime, thereby  
5 permitting institution of a prosecution before the  
6 offense is complete, see, e.g., United States v.  
7 Cores, 356 U.S. [405, 408-09 (1958)], the limitations  
8 period for a continuing offense does not begin until  
9 the offense is complete, see, e.g., Toussie, 397 U.S.  
10 at 115 . . . .

11 United States v. Rivera-Ventura, 72 F.3d at 281.

12           There is, of course, an apparent "tension between the  
13 purpose of a statute of limitations and the continuing offense  
14 doctrine . . . ; the latter, for all practical purposes, extends  
15 the statute beyond its stated term." Toussie, 397 U.S. at 115  
16 (internal quotation marks omitted). Nonetheless, such an  
17 extension is required where "the explicit language of the  
18 substantive criminal statute [at issue] compels [the] conclusion"  
19 that Congress intended the offense in question to be construed as  
20 a continuing one, as where "the nature of the crime involved is  
21 such that Congress must assuredly have intended that it be treated  
22 as a continuing one," id., or where the statutory language  
23 describing the offense "contemplates a prolonged course of  
24 conduct," id. at 120.

25           Conspiracy is generally a continuing crime. See, e.g.,  
26 Toussie, 397 U.S. at 122; Kissel, 218 U.S. at 607-08. "It is in  
27 the nature of a conspiracy that each day's acts bring a renewed  
28 threat of the substantive evil Congress sought to prevent."  
29 Toussie, 397 U.S. at 122. As conspiratorial conduct constitutes a  
30 continuing crime, a conspiracy offense "is not complete until the



1 purposes of the conspiracy have been accomplished or abandoned,"  
2 United States v. Rastelli, 870 F.2d 822, 838 (2d Cir.), cert.  
3 denied, 493 U.S. 982 (1989); see, e.g., United States v. Spero,  
4 331 F.3d 57, 61 (2d Cir.) ("Spero"), cert. denied, 540 U.S. 819  
5 (2003). "[T]he crucial question in determining whether the  
6 statute of limitations has run is the scope of the conspiratorial  
7 agreement . . . ." Grunewald v. United States, 353 U.S. 391, 397  
8 (1957).

9 C. General Conspiracy Principles

10 The essence of the crime of conspiracy, of course, "is  
11 the agreement . . . to commit one or more unlawful acts." United  
12 States v. Jones, 482 F.3d 60, 72 (2d Cir. 2006) ("Jones") (quoting  
13 Braverman v. United States, 317 U.S. 49, 53 (1942)), cert. denied,  
14 127 S. Ct. 1306 (2007). Where there is an agreement to commit an  
15 unlawful act, "[t]hat agreement is 'a distinct evil,' which 'may  
16 exist and be punished whether or not the substantive crime  
17 ensues." United States v. Jimenez Recio, 537 U.S. 270, 274  
18 (2003) (quoting Salinas v. United States, 522 U.S. 52, 65 (1997))  
19 (emphasis ours). "Where, as here, the indictment contains a  
20 conspiracy charge, 'uncharged acts may be admissible as direct  
21 evidence of the conspiracy itself.'" United States v. Miller, 116  
22 F.3d 641, 682 (2d Cir. 1997) (quoting United States v. Thai, 29  
23 F.3d 785, 812 (2d Cir.), cert. denied, 513 U.S. 977 (1994)), cert.  
24 denied, 524 U.S. 905 (1998).

1           "'[I]n order to prove a single conspiracy,'" rather than  
2 multiple conspiracies, "'the government must show that each  
3 alleged member agreed to participate in what he knew to be a  
4 collective venture directed toward a common goal.'" United States  
5 v. Berger, 224 F.3d 107, 114 (2d Cir. 2000) ("Berger") (quoting  
6 United States v. Maldonado-Rivera, 922 F.2d 934, 963 (2d Cir.  
7 1990) ("Maldonado-Rivera")); see, e.g., United States v. Martino,  
8 664 F.2d 860, 876 (1981), cert. denied, 458 U.S. 1110 (1982).  
9 "'The coconspirators need not have agreed on the details of the  
10 conspiracy, so long as they agreed on the essential nature of the  
11 plan.'" Berger, 224 F.3d at 114 (quoting Maldonado-Rivera, 922  
12 F.2d at 963). Indeed, in order for a single conspiracy to be  
13 found, it is not necessary that the conspirators even know the  
14 identities of all the other conspirators. See, e.g., Blumenthal  
15 v. United States, 332 U.S. 539, 557 (1947); Jones, 482 F.3d at 72;  
16 United States v. Gleason, 616 F.2d 2, 16 (2d Cir. 1979), cert.  
17 denied, 444 U.S. 1082 (1980). Where an alleged conspiracy  
18 "encompass[es] members who neither know one another's identities  
19 . . . nor specifically know of one another's involvement," United  
20 States v. Sureff, 15 F.3d 225, 230 (2d Cir. 1994), it is  
21 permissible for the jury to find that there was a single  
22 conspiracy so long as a reasonable juror could conclude "beyond a  
23 reasonable doubt '(1) that the scope of the criminal enterprise  
24 proven fits the pattern of the single conspiracy alleged in the  
25 indictment, and (2) that the defendant participated in the alleged  
26 enterprise with a consciousness of its general nature and

1 extent.'" United States v. Rosa, 11 F.3d 315, 340 (2d Cir. 1993)  
2 (quoting Beech-Nut, 871 F.2d at 1192), cert. denied, 511 U.S. 1042  
3 (1994).

4 Nor need the goals of all the participants be congruent  
5 for a single conspiracy to exist, so long as the participants  
6 agree on the "essential nature" of the enterprise and "their goals  
7 are not at cross purposes." Beech-Nut, 871 F.2d at 1192 (internal  
8 quotation marks omitted); see, e.g., United States v. Heinemann,  
9 801 F.2d 86, 92 & n.1 (2d Cir. 1986), cert. denied, 479 U.S. 1094  
10 (1987). In an ordinary bribery conspiracy, for example, the goals  
11 of the participants are not congruent, for the goal of the payer  
12 of the bribe is to influence an action or decision by the bribe's  
13 recipient; the goal of the bribe's recipient is to obtain money.

14 Further, "[c]hanges in membership, differences in time  
15 periods, and/or shifting emphases in the location of operations do  
16 not necessarily require a finding of more than one conspiracy."  
17 Jones, 482 F.3d at 72; see, e.g., United States v. Martino, 664  
18 F.2d at 876-77; United States v. Vila, 599 F.2d 21, 24 (2d Cir.),  
19 cert. denied, 444 U.S. 837 (1979). "[C]hanges in membership do  
20 not necessarily convert a single conspiracy into multiple  
21 conspiracies, . . . especially where the activity of a single  
22 person was 'central to the involvement of all.'" United States v.  
23 Langford, 990 F.2d 65, 70 (2d Cir. 1993) (quoting United States v.  
24 Moten, 564 F.2d 620, 625 (2d Cir.), cert. denied, 434 U.S. 942  
25 (1977)). And "'a single conspiracy is not transformed into  
26 multiple conspiracies merely by virtue of the fact that it may



1 involve two or more phases or spheres of operation, so long as  
2 there is sufficient proof of mutual dependence and assistance.'" Berger, 224 F.3d at 114-15 (quoting Maldonado-Rivera, 922 F.2d at  
3 963); see, e.g., United States v. Williams, 205 F.3d 23, 33 (2d  
4 Cir.) (single conspiracy not transformed into multiple  
5 conspiracies "simply by lapse of time, change in membership, or a  
6 shifting emphasis in its locale of operations") (internal  
7 quotation marks omitted), cert. denied, 531 U.S. 885 (2000);  
8 United States v. Tramunti, 513 F.2d 1087, 1106 (2d Cir.), cert.  
9 denied, 423 U.S. 832 (1975).

11 Where a conspiracy statute, such as 18 U.S.C. § 1962(d),  
12 does not require proof of an overt act and the indictment alleges  
13 a "conspiracy [that] contemplates a continuity of purpose and a  
14 continued performance of acts," Spero, 331 F.3d at 60 (internal  
15 quotation marks omitted), and the government has introduced  
16 sufficient evidence to show that such a conspiracy existed, the  
17 conspiracy "is presumed to exist until there has been an  
18 affirmative showing that it has been terminated," id. (emphasis in  
19 Spero) (internal quotation marks omitted); see id. at 60-61.  
20 "[A] RICO conspiracy continues until the objectives of the  
21 conspiracy are either accomplished or abandoned." Id. at 61  
22 (internal quotation marks omitted); see, e.g., United States v.  
23 Rastelli, 870 F.2d at 838; United States v. Persico, 832 F.2d 705,  
24 713 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988). Thus,  
25 "the statute of limitations for a RICO conspiracy does not begin  
26 to run until the objectives of the conspiracy have been either

1 achieved or abandoned." United States v. Eisen, 974 F.2d 246, 264  
2 (2d Cir. 1992) ("Eisen"), cert. denied, 507 U.S. 1029 (1993); see,  
3 e.g., United States v. Persico, 832 F.2d at 713.

4           Where the government has presented sufficient evidence to  
5 show a conspiracy that has continuing purposes or goals, the  
6 burden is on the defendant to prove that the conspiracy was  
7 terminated or that he took affirmative steps to withdraw. See,  
8 e.g., Spero, 331 F.3d at 60-61; United States v. Flaharty, 295  
9 F.3d 182, 192 (2d Cir.), cert. denied, 537 U.S. 936 (2002); United  
10 States v. James, 609 F.2d 36, 41 (2d Cir. 1979), cert. denied, 445  
11 U.S. 905 (1980). To show that the conspiracy was terminated, the  
12 defendant "need[s] to present evidence from which the jury could  
13 . . . f[i]nd that the goals of the conspiracy were accomplished in  
14 some final manner." Spero, 331 F.3d at 61 (emphasis added). For  
15 a defendant to show that he withdrew from the conspiracy, proof  
16 merely that he ceased conspiratorial activity is not enough. See,  
17 e.g., Eisen, 974 F.2d at 268. He must also show that he performed  
18 "some act that affirmatively established that he disavowed his  
19 criminal association with the conspiracy," id. (internal quotation  
20 marks omitted), "'either the making of a clean breast to the  
21 authorities, or communication of the abandonment in a manner  
22 reasonably calculated to reach co-conspirators,'" Berger, 224 F.3d  
23 at 118 (quoting United States v. Borelli, 336 F.2d 376, 388 (2d  
24 Cir. 1964), cert. denied, 379 U.S. 960 (1965)). And "the  
25 defendant must not take any subsequent acts to promote the

1 conspiracy" or "receive any additional benefits from the  
2 conspiracy." Berger, 224 F.3d at 118.

3 D. The RICO Enterprise and Pattern Requirements

4 To the extent pertinent to this case, the normative  
5 sections of RICO provide as follows:

6 (c) It shall be unlawful for any person employed  
7 by or associated with any enterprise engaged in, or  
8 the activities of which affect, interstate or foreign  
9 commerce, to conduct or participate, directly or  
10 indirectly, in the conduct of such enterprise's  
11 affairs through a pattern of racketeering activity  
12 . . . .

13 (d) It shall be unlawful for any person to  
14 conspire to violate any of the provisions of  
15 subsection . . . (c) of this section.

16 18 U.S.C. §§ 1962(c), (d) (emphases added). RICO defines  
17 "enterprise" to "include[] any individual, partnership,  
18 corporation, association, or other legal entity, and any union or  
19 group of individuals associated in fact although not a legal  
20 entity." Id. § 1961(4). The existence of an enterprise may be  
21 "proved by evidence of an ongoing organization, formal or  
22 informal, and by evidence that the various associates function as  
23 a continuing unit." United States v. Turkette, 452 U.S. 576, 583  
24 (1981). An "individuals associated in fact" enterprise, 18 U.S.C.  
25 § 1961(4), may continue to exist even though it undergoes changes  
26 in membership. See, e.g., United States v. Coonan, 938 F.2d 1553,  
27 1560-61 (2d Cir. 1991), cert. denied, 503 U.S. 941 (1992).



1           The RICO statute defines "'racketeering activity'" to  
2 include crimes such as murder, kidnaping, bribery, and controlled  
3 substance offenses that are felonies under state law; drug  
4 trafficking crimes that are felonies under federal law; and other  
5 federal crimes such as obstructing a criminal investigation,  
6 retaliating against a witness, money laundering, and engaging in  
7 monetary transactions in property derived from specified unlawful  
8 activity. 18 U.S.C. §§ 1961(1)(A), (B), (D).

9           As discussed below, a "pattern of racketeering activity is  
10 . . . a series of criminal acts as defined by the statute."  
11 Turkette, 452 U.S. at 583. The evidence used to establish the  
12 enterprise and the pattern "may in particular cases coalesce,"  
13 id.; and "evidence of prior uncharged crimes and other bad acts  
14 that were committed by defendants[]" may be "relevant . . . to  
15 prove the existence, organization and nature of the RICO  
16 enterprise, and a pattern of racketeering activity by each  
17 defendant[]," United States v. Diaz, 176 F.3d 52, 79 (2d Cir.),  
18 cert. denied, 528 U.S. 875 (1999).

19           RICO provides that a "'pattern of racketeering activity'  
20 requires at least two acts of racketeering activity, one of which  
21 occurred after the effective date of this chapter [i.e., October  
22 15, 1970] and the last of which occurred within ten years  
23 (excluding any period of imprisonment) after the commission of a  
24 prior act of racketeering activity." 18 U.S.C. § 1961(5). The  
25 Supreme Court in H.J. Inc. v. Northwestern Bell Telephone Co.,  
26 492 U.S. 229 (1989), noted that this provision "does not so much

1 define a pattern of racketeering activity as state a minimum  
2 necessary condition for the existence of such a pattern," and that  
3 it "places an outer limit on the concept of a pattern of  
4 racketeering activity that is broad indeed." Id. at 237. The  
5 Court noted that the dictionary definition of "'pattern' is an  
6 'arrangement or order of things or activity,'" id. at 238  
7 (quoting 11 Oxford English Dictionary 357 (2d ed. 1989)) (emphasis  
8 ours), and it pointed out that

9 the mere fact that there are a number of predicates  
10 is no guarantee that they fall into any arrangement  
11 or order. It is not the number of predicates but the  
12 relationship that they bear to each other or to some  
13 external organizing principle that renders them  
14 "ordered" or "arranged." The text of RICO  
15 conspicuously fails anywhere to identify, however,  
16 forms of relationship or external principles to be  
17 used in determining whether racketeering activity  
18 falls into a pattern for purposes of the Act.

19 H.J. Inc., 492 U.S. at 238 (emphasis added). The Court concluded  
20 that

21 [i]t is reasonable to infer, from this absence  
22 of any textual identification of sorts of pattern  
23 that would satisfy § 1962's requirement, in  
24 combination with the very relaxed limits to the  
25 pattern concept fixed in § 1961(5), that Congress  
26 intended to take a flexible approach, and envisaged  
27 that a pattern might be demonstrated by reference to  
28 a range of different ordering principles or  
29 relationships between predicates, within the  
30 expansive bounds set.

31 Id. (emphasis added).

32 Looking to RICO's legislative history, the Court found  
33 discussions showing that Congress used the term "pattern" in order  
34 to exclude activity that was "isolated" or "sporadic" and to  
35 require instead "the showing of a relationship between the

1 predicates, . . . and of the threat of continuing activity." Id.  
2 at 239 (internal quotation marks omitted). "'It is this factor of  
3 continuity plus relationship which combines to produce a  
4 pattern.'" Id. (quoting Report of the Senate Judiciary Committee,  
5 S. Rep. No. 91-617, 91st Cong., 1st Sess. (Dec. 18, 1969), at 158)  
6 (emphasis in H.J. Inc.). The Court concluded that "RICO's  
7 legislative history reveals Congress' intent that to prove a  
8 pattern of racketeering activity a plaintiff or prosecutor must  
9 show that the racketeering predicates are related, and that they  
10 amount to or pose a threat of continued criminal activity." H.J.  
11 Inc., 492 U.S. at 239 (emphasis in original).

12 As to relatedness, the H.J. Inc. Court noted that in  
13 another part of the legislation that included RICO, Congress had  
14 stated that "[c]riminal conduct forms a pattern if it embraces  
15 criminal acts that have the same or similar purposes, results,  
16 participants, victims, or methods of commission, or otherwise are  
17 interrelated by distinguishing characteristics and are not  
18 isolated events." Id. at 240 (internal quotation marks omitted).  
19 The Court concluded that there was no reason to suppose that  
20 Congress had intended any more constrained a notion as to what  
21 relationships between RICO predicate acts would suffice to show a  
22 pattern of racketeering activity. See id.

23 As to the continuity component of the RICO pattern  
24 element, the Court noted that while continuity and relatedness are  
25 concepts that are analytically separate, proof of the two "will  
26 often overlap." Id. at 239. The Court noted that "the threat of



1 continuity is sufficiently established where the predicates can be  
2 attributed to a defendant operating as part of a long-term  
3 association that exists for criminal purposes." Id. at 242-43  
4 (emphasis added). But because continuity or its threat may be  
5 proven "in a variety of ways," it is "difficult to formulate in  
6 the abstract any general test for continuity." Id. at 241  
7 (emphasis added). With no general abstract test for continuity,  
8 and with "the uncertainty inherent in RICO's pattern component,"  
9 the Court observed that "[t]here is no obviously 'correct' level  
10 of generality for courts to use in describing the criminal  
11 activity alleged in RICO litigation." Id. at 241 n.3.

12 E. Evidence as to the Continuation of the "Services" Enterprise

13 In the present case, the determinations as to whether an  
14 enterprise conducted by Eppolito and Caracappa continued to exist  
15 into the limitations period, and as to whether the early acts and  
16 the later acts were part of the same pattern of racketeering  
17 activity, depend on the level of generality at which the  
18 racketeering enterprise is defined. Our principal difficulty with  
19 the district court's statute-of-limitations-based acquittal as a  
20 matter of law is that the court's views of the enterprise, its  
21 purposes, its location, and its duration were more restricted than  
22 what was alleged in the Indictment and than what the jury could  
23 infer from the evidence at trial.

24 To begin with, the district court stated that the  
25 enterprise "consisted of" Eppolito, Caracappa, Santoro, Kaplan,

1 and Casso (and unnamed others), Eppolito I, 436 F.Supp.2d at 539,  
2 and was a "'subcontracting'" arrangement that Kaplan, Santoro,  
3 Eppolito, and Caracappa had "with members of organized crime,  
4 represented primarily by co-conspirator Anthony Casso," id. at  
5 571. The court stated that in "this enterprise," Eppolito and  
6 Caracappa "exploited their positions as present or past officers  
7 of the New York City police department in order to supply  
8 confidential law enforcement information to Casso and to carry out  
9 murders and kidnappings under color of law." Id. (emphasis  
10 added). The court ruled that, although perhaps ending even  
11 earlier, "this conspiracy" came to a "definite close" when  
12 Eppolito and Caracappa retired from NYPD and moved to Las Vegas,  
13 "no longer had access to confidential law enforcement  
14 information[,] and were no longer in contact with their old  
15 associates in the Lucchese crime family." Id. This view was at  
16 odds with the generality with which the enterprise was alleged in  
17 the Indictment.

18 The Indictment loosely alleged that the RICO "enterprise"  
19 comprised "a criminal organization" and "its members and  
20 associates," that its leaders included Eppolito and Caracappa, and  
21 that its members and associates "[a]t various times" included  
22 Santoro, Kaplan, and Casso, as well as unnamed others.  
23 (Indictment ¶¶ 1, 2, 6.) The district court's view that, as a  
24 matter of law, the RICO enterprise and the RICO conspiracy must  
25 have ceased to exist no later than when both Casso and Kaplan were  
26 in prison failed to recognize that Eppolito and Caracappa

1 themselves could constitute a RICO enterprise as defined by 18  
2 U.S.C. § 1961(4) and interpreted by the Supreme Court in Turkette,  
3 see Part II.D. above. There was evidence that Eppolito and  
4 Caracappa referred to themselves as partners, that they were  
5 associated in fact, and that they functioned as a continuing unit.  
6 For example, while they were employed by NYPD in the 1980s, they  
7 collaborated to provide confidential law enforcement information  
8 to Kaplan and Casso. During both the period in which both  
9 Eppolito and Caracappa were police detectives and the period  
10 following Eppolito's retirement from NYPD in early 1990, Eppolito  
11 and Caracappa committed kidnappings and murders together. In Las  
12 Vegas in the 1990s, Eppolito started a film production company in  
13 which Caracappa was vice president. Caracappa started a security  
14 business in which he employed Eppolito. When Corso inquired about  
15 a source for designer drugs for clients who might be willing to  
16 invest in Eppolito's film, Eppolito called Corso to give him the  
17 telephone number of an associate of Caracappa. When Eppolito and  
18 Caracappa met with Corso in 2005, Caracappa said he trusted Corso  
19 and that if Caracappa didn't trust him, Corso would not be doing  
20 business with Eppolito.

21 On this record, we cannot conclude that the association of  
22 Eppolito and Caracappa as partners in providing services to  
23 members and associates of organized crime had ceased to exist  
24 before March 9, 2000, as a matter of law. That issue was within  
25 the province of the jury to decide as a question of fact, and the  
26 record provided ample evidence to permit the jury to find that



1 that enterprise continued to exist well into the five-year period  
2 that preceded the commencement of this prosecution.

3 Further, the goals of the enterprise as alleged in the  
4 Indictment were considerably more general than the goal described  
5 by the district court in its opinion. The Indictment alleged that

6 [t]he principal purpose of the Enterprise was to  
7 generate money for its members and associates. This  
8 purpose was implemented by members and associates of  
9 the Enterprise through various legal and illegal  
10 activities, including murder, attempted murder,  
11 assault, kidnaping, criminal facilitation, bribery,  
12 obstruction of justice, extortion, fraud, money  
13 laundering, tax evasion and narcotics trafficking.

14 (Indictment ¶ 3 (emphases added).) Thus, although the Indictment  
15 also alleged that the purposes of the enterprise included the  
16 purchase and sale of confidential law enforcement information, it  
17 in no way suggested that the enterprise's purpose was limited to  
18 that activity. And despite the more restrictive view stated in  
19 the district court opinion, i.e., that the RICO enterprise was  
20 based solely on the access of Eppolito and Caracappa to official  
21 law enforcement information and their conduct "under color of  
22 law," Eppolito I, 436 F.Supp.2d at 571, the jury was not required  
23 to adopt that view.

24 The jury could well have inferred that Eppolito and  
25 Caracappa sometimes sold their services to Kaplan and/or Casso in  
26 New York as "hit" men in instances that did not require their  
27 access to law enforcement information and did not call upon their  
28 NYPD connections. For example, our attention has not been called  
29 to any evidence to show that Eppolito and Caracappa used law  
30 enforcement information in connection with the killing of Eddie

1 Lino; and for that mission, Casso provided the guns. Similarly,  
2 in Kaplan's testimony describing his hiring of Eppolito and  
3 Caracappa to kill Greenwald and Tabak, there was no suggestion  
4 that Eppolito and Caracappa were called upon to use any law  
5 enforcement information. Kaplan testified that he obtained  
6 Tabak's home and work addresses and the make of Tabak's car from  
7 another coconspirator. (See Tr. 749-50.)

8 Further, there was evidence that defendants' retirements  
9 from NYPD did not end their association with each other or with  
10 Kaplan. Eppolito retired from NYPD in 1990 and, as summarized in  
11 Part I.A.12. above, continued to collaborate with Caracappa in  
12 providing services to Kaplan. And after Caracappa retired from  
13 NYPD in 1992 and went to work for a new employer who provided him  
14 with a beeper, Caracappa gave his beeper number to Kaplan. Kaplan  
15 retained that number (or an updated number) for several years  
16 thereafter. Thus, in both his 1993 and 1996 telephone books  
17 Kaplan had Caracappa's beeper number; it was listed under the code  
18 name "Marco." And, as discussed below, Kaplan testified that in  
19 1994-1996, he still considered himself a possible "future money  
20 earner for" Eppolito and Caracappa (Tr. 914-15). In sum, the jury  
21 was not required to find that the enterprise alleged in the  
22 Indictment was dependent on defendants' access to confidential  
23 law enforcement information or that the enterprise ended with  
24 defendants' retirements from NYPD.

25 Moreover, although the district court viewed Eppolito and  
26 Caracappa as providing services solely to members and associates

1 of the Lucchese Crime Family, the Indictment was not so limited;  
2 it alleged that the members and associates of the enterprise  
3 sought "[e]nrich[ment] . . . through assisting La Cosa Nostra  
4 ('LCN'), a nationwide criminal organization" (Indictment ¶ 4(a)  
5 (emphasis added)). Nor was defendants' offer of their services so  
6 limited. When Eppolito proposed that he and Caracappa be put on  
7 retainer, he said they would "give [Kaplan] everything that we get  
8 on every family." (Tr. 620 (emphasis added).) And indeed,  
9 although Eppolito and Caracappa were being paid their \$4,000-a-  
10 month retainer by Casso, and Casso insisted that in return they  
11 work only for him, Eppolito and Caracappa in fact provided  
12 information that was designed to and did assist all of the crime  
13 families. For example, Eppolito and Caracappa alerted Kaplan that  
14 there was a listening device in a restaurant owned and frequented  
15 by members of the Genovese Crime Family and that various members  
16 of the Genovese or Colombo families had become government  
17 informants. Kaplan testified that when information provided by  
18 Eppolito and Caracappa concerned someone from a crime family other  
19 than the Lucchese, "Casso would pass it to the different families.  
20 He'd pass some information to the Bonannos and he passed some  
21 information to the Genovese." (Tr. 442; see also id. at 665-66  
22 (describing Casso's relaying such information to the Colombo Crime  
23 Family).)

24 In addition, there was evidence that Eppolito and  
25 Caracappa had previously worked with members of organized crime  
26 other than Kaplan and Casso. Santoro, who himself was loosely



1 affiliated with the Gambino Crime Family, indicated as much when  
2 he first approached Kaplan to offer the services of Eppolito and  
3 Caracappa, "assur[ing]" Kaplan that "[Santoro] had done things  
4 with [Eppolito and Caracappa] previously and that they were good  
5 stand-up guys" (Tr. 517). And Eppolito himself indicated that he  
6 had such a past history when he told Kaplan that he liked doing  
7 business with Kaplan and Casso, "because when [Eppolito] gave  
8 [Kaplan and Casso] information people got taken care of that  
9 deserved it, and that in the past he gave information to other  
10 people and they never acted on it." (Tr. 657.)

11 Further, in contrast to the district court's view that  
12 defendants' relocation to Las Vegas marked the end of the  
13 enterprise through which Eppolito and Caracappa sought to earn  
14 money by providing services to members and associates of organized  
15 crime, the jury could have found otherwise based on, inter alia,  
16 Kaplan's testimony in response to cross-examination by Caracappa's  
17 attorney:

18 Q . . . [B]y the time you were in Las Vegas  
19 with Caracappa and Eppolito, you sure were not a  
20 future money earner for them.

21 A I disagree with you there. There was never  
22 no break in the friendship. There was just a break  
23 in doing business with Casso.

24 . . . .

25 There could have been some possible earners.  
26 It's the same reason I went to Steve and tried to do  
27 the QVC deal. I had the connections. Steve knew  
28 that.

29 (Tr. 914-15 (emphases added).)

1           The jury could also have found that Eppolito continued to  
2 pursue the principal goal of the enterprise in Las Vegas by,  
3 inter alia, offering services in the nature of money laundering,  
4 i.e., accepting "investments" of money generated by criminal  
5 activities such as drug trafficking, and obscuring its source by  
6 returning to the "investors" money that would come from the sale  
7 of film scripts. Although the district court characterized the  
8 organized crime connection to Eppolito's Las Vegas film endeavors  
9 as "tangential[]," Eppolito I, 436 F.Supp.2d at 572-73, the jury  
10 was hardly required to adopt such a view. Eppolito told Corso  
11 that "the Gambino crime family had always offered him money for  
12 script[s] or for movies, . . . they always come to him and said  
13 Lou, I can give you money for this or that." (Tr. 1618; see also  
14 id. at 1624 ("Eppolito says: 'Listen to me, I got people from the  
15 Gambino family that call me all of the time[, saying,] You know,  
16 Louie, we got money, you know . . . .'").) Further, from the  
17 evidence viewed in the light most favorable to the government, it  
18 was clear that Eppolito had members of organized crime working to  
19 help him find others to invest in his film project. Corso was  
20 approached by members of two crime families seeking funding for  
21 Eppolito's film: first Dibari, a member of the Gambino family,  
22 and then John and Mike Frate, members of the Bonanno family;  
23 Eppolito had even given the Frates a copy of his script. John  
24 Frate was "to be a part of the whole process" "of funding the  
25 movie." (Tr. 1445.) And when Corso (who had been introduced as  
26 an associate of the heir-apparent to the Bonanno Crime Family)

1 told the Frates that he did not want to meet with Eppolito because  
2 Eppolito was a cop, "Mike Fr[ate] said that he understood  
3 [Corso's] concern" but that Corso "shouldn't worry" because "Lou  
4 was one of us . . . ." (Tr. 1565 (emphasis added)).

5 As discussed in Part II.C. above, a conspiracy does not  
6 end or divide into multiple conspiracies merely because there has  
7 been some change in membership or locale. Viewing the evidence as  
8 a whole, the jury was entitled to take into account the testimony  
9 that various information provided to Kaplan and Casso by Eppolito  
10 and Caracappa as NYPD detectives was given to all the New York  
11 area crime families; the testimony that Eppolito and Caracappa had  
12 provided services to other members of organized crime in the past;  
13 the testimony that Caracappa was given an opportunity in 1996 to  
14 earn money by arranging a meeting between QVC executives and one  
15 of Kaplan's "connections"; and the testimony and audio tapes  
16 indicating that in Las Vegas in 2004-2005, Eppolito sought to earn  
17 money from members of organized crime by offering a money-  
18 laundering service and indeed was inundated with requests for that  
19 service. This record did not permit the conclusion as a matter of  
20 law that the retirements of Eppolito and Caracappa and the  
21 imprisonment of Casso and Kaplan either put the  
22 Eppolito/Caracappa services-to-organized-crime enterprise out of  
23 business or put an end to the Eppolito/Caracappa conspiracy to  
24 conduct that enterprise through a pattern of racketeering  
25 activity.



1           We note that by redefining the enterprise strictly as one  
2 limited to the use by Eppolito and Caracappa of their positions as  
3 police detectives and the selling of confidential law enforcement  
4 information to Kaplan and Casso, the district court relieved  
5 Eppolito and Caracappa of their burden of showing that the RICO  
6 conspiracy alleged in the Indictment had come to an end or of  
7 showing withdrawal from the conspiracy. Given the evidence of the  
8 defendants' conduct in Las Vegas, including Eppolito's avidly  
9 seeking large sums of money from drug dealers and members of the  
10 Mafia for scripts he would agree to write, his manifest impatience  
11 in 2005 at the slow arrival of money from Corso's supposed Mafia  
12 drug dealer in Florida, and the ready response of Eppolito and  
13 Caracappa in 2005 to the request for narcotics to induce Corso's  
14 clients to provide money for Eppolito's film, the jury was easily  
15 entitled to find that neither Eppolito nor Caracappa had carried  
16 his burden of showing that he had withdrawn from the conspiracy or  
17 that the principal purpose of the enterprise as alleged in the  
18 Indictment, i.e., earning money through providing assistance to  
19 members and associates of organized crime, had been either  
20 accomplished or abandoned.

21           We also reject the district court's view that as a matter  
22 of law, because of the different types of racketeering activity,  
23 the enterprise that began in the 1980s and continued into the  
24 early 1990s could not be considered the same enterprise that  
25 engaged in the Las Vegas conduct that included Eppolito's mid-  
26 1990s monetary transactions involving proceeds from Kaplan's

1 narcotics trafficking business, Eppolito's 2004-2005 attempted  
2 money laundering of narcotics trafficking proceeds obtained  
3 through Corso, and Eppolito's and Caracappa's 2005 participation  
4 in narcotics distribution offenses. The district court reasoned  
5 that these mid-1990s and 2004-2005 acts were "sporadic" and  
6 "unconnected to the original" enterprise, Eppolito I, 436  
7 F.Supp.2d at 572, in part because the court regarded the later  
8 acts of narcotics trafficking and laundering of the proceeds of  
9 narcotics trafficking as "type[s] of activity" that were "entirely  
10 different" from the racketeering acts performed in the 1980s and  
11 early 1990s, id. But the jury, which was accurately instructed  
12 that "the indictment allege[d] that the principal purpose of the  
13 enterprise was to generate money for its members and associates by  
14 means of various legal and illegal activities" (Tr. 3269 (emphasis  
15 added)), could have inferred from the evidence that the conduct in  
16 question was sufficiently similar in purpose, when viewed at the  
17 level of generality alleged in the Indictment, to show that the  
18 enterprise that began in New York continued to exist in Las Vegas.

19 For example, Kaplan testified that he had been involved in  
20 narcotics trafficking during the period in which Eppolito and  
21 Caracappa were working for Kaplan and Casso in New York, and that  
22 although Eppolito and Caracappa had not actually participated in  
23 that business, they had repeatedly offered to do so. The district  
24 court described those offers as proffers of "'law enforcement'  
25 services," Eppolito I, 436 F.Supp.2d at 572; but according to  
26 Kaplan's testimony, the offers were not so restricted. First,

1 Kaplan testified that Eppolito and Caracappa had offered to assist  
2 him in his narcotics trafficking business not only by surveilling  
3 his warehouses to make sure that he was not being investigated,  
4 which of course would have been a law-enforcement-related service,  
5 but also by following him when he went to meet associates. (See  
6 Tr. 783.) The jury was entitled to view the latter as an offer of  
7 protection services unrelated to defendants' official positions.  
8 Second, the offers to assist in Kaplan's narcotics trafficking  
9 business were not limited to those two types of service but were  
10 open-ended: Kaplan testified that Eppolito and Caracappa offered  
11 to "help me in any way"; they said, "any[ ]way that they could  
12 help me, they were willing to do it." (Id. (emphases added).)

13           Although Kaplan also testified that Eppolito and Caracappa  
14 offered these narcotics-trafficking-related services out of  
15 friendship and for free, and on its face such an offer might seem  
16 to be beyond the enterprise goal of earning money for such  
17 services, the jury was not required to view that offer in  
18 isolation and take it at face value. Rather, the jury could  
19 assess the offer of free services against the background of  
20 defendants' actions with respect to the first task that they  
21 performed for Casso, i.e., obtaining information as to who had  
22 made the attempt on Casso's life. Eppolito and Caracappa  
23 assembled that information, and Santoro delivered the packet to  
24 Kaplan stating that it was a gift and an act of friendship for  
25 which they would not accept payment. But when Casso asked for an  
26 address for and picture of Nicky Guido, who was mentioned in the



1 packet, Santoro, Eppolito, and Caracappa demanded payment of  
2 \$4,000. The jury, assessing the evidence as a whole, rather than  
3 piecemeal, was entitled to view the offers by Eppolito and  
4 Caracappa of free services for Kaplan's marijuana business as,  
5 like the original "gift" to Casso, a loss-leader that would  
6 doubtless be followed by requests for payment for their services.

7 Finally, although the district court emphasized that  
8 Kaplan had rejected defendants' offers to assist in his narcotics  
9 trafficking business, the facts that Eppolito and Caracappa did  
10 not actually participate in that business and that Kaplan viewed  
11 that business as unrelated to his other activities with Casso,  
12 were not material here. Count One charged Eppolito and Caracappa  
13 not with the substantive crime of conducting the enterprise that  
14 provided services to members of organized crime but rather with  
15 conspiring to do so; it was permissible for the jury to find that  
16 precisely such a conspiracy was reflected in their open-ended  
17 offer of assistance to Kaplan for his narcotics trafficking  
18 operation.

19 In sum, we conclude that given the level of generality at  
20 which the Indictment alleged the principal purpose of the RICO  
21 enterprise, the evidence, viewed as a whole and in the light most  
22 favorable to the government, does not permit a conclusion that the  
23 enterprise ceased to exist prior to March 9, 2000, as a matter of  
24 law.

1 F. Evidence of a RICO Pattern

2 As indicated in Part II.D. above, the government was  
3 required to prove not only the existence of the enterprise, but  
4 also agreement to participate in a "pattern of racketeering  
5 activity." To show such a pattern, the government was required  
6 to "show that the racketeering predicates [we]re related, and that  
7 they amount[ed] to or pose[d] a threat of continued criminal  
8 activity." H.J. Inc., 492 U.S. at 239 (emphasis omitted). To  
9 prove relatedness, the government may show either that the  
10 individual predicate acts were directly related to each other or  
11 that they were related to the enterprise in a way that made them  
12 "indirectly connected to each other." United States v. Locascio,  
13 6 F.3d 924, 943 (2d Cir. 1993) (emphasis in original), cert.  
14 denied, 511 U.S. 1070 (1994); see, e.g., United States v.  
15 Indelicato, 865 F.2d 1370, 1383 (2d Cir.) (en banc) ("two  
16 racketeering acts that are not directly related to each other may  
17 nevertheless be related indirectly because each is related to the  
18 RICO enterprise"), cert. denied, 491 U.S. 907 (1989).

19 The H.J. Inc. Court inferred that Congress intended that  
20 the relatedness of RICO predicate acts could be shown by proof  
21 that they "have the same or similar purposes, results,  
22 participants, victims, or methods of commission, or otherwise are  
23 interrelated by distinguishing characteristics and are not  
24 isolated events." 492 U.S. at 240 (internal quotation marks  
25 omitted) (emphases added). Thus, "the concept of a pattern of  
26 racketeering activity . . . is broad indeed": the list of

1 specific possible similarities is illustrative rather than  
2 definitive; the examples are stated in the disjunctive; and the  
3 residual clause--"otherwise . . . interrelated by distinguishing  
4 characteristics"--is open to "a range of different ordering  
5 principles." Id. at 237, 238. As the H.J. Inc. Court said,  
6 "[t]here is no obviously 'correct' level of generality for courts  
7 to use in describing the criminal activity alleged in RICO  
8 litigation." Id. at 241 n.3.

9 Variations in the types of acts performed could of course  
10 persuade a factfinder that the racketeering acts are not related.  
11 But where there are other similarities, such as in participants or  
12 purpose, variations in the nature of the racketeering acts do not  
13 mean that there is no RICO pattern as a matter of law. As the  
14 Seventh Circuit noted in United States v. Masters, 924 F.2d 1362  
15 (7th Cir.), cert. denied, 500 U.S. 919 (1991), "[a] criminal  
16 enterprise is more, not less, dangerous if it is versatile,  
17 flexible, diverse in its objectives and capabilities.  
18 Versatility, flexibility, and diversity are not inconsistent with  
19 pattern." Id. at 1367. Where the government presents evidence  
20 from which it could permissibly be inferred that the criminal acts  
21 have some rational common denominator or fit into a particular  
22 order or arrangement, the question of whether the acts are related  
23 is one of fact for the jury.

24 In the present case, the evidence was ample to allow the  
25 jury to find that the persons offering or performing the  
26 racketeering acts always included Eppolito and usually included



1 both Eppolito and Caracappa; that the recipients of these services  
2 were members or associates of organized crime; and that the  
3 principal purpose of the enterprise was to earn money for Eppolito  
4 and Caracappa through providing those services. Although the  
5 nature of the services that were performed or attempted varied  
6 widely, that was simply because a broad array was offered. For  
7 example, the very first proffer to Kaplan of the services of  
8 Eppolito and Caracappa was (a) for the furnishing of confidential  
9 law enforcement information, and (b) for the commission of  
10 murders. (See Tr. 426-27, 515-16.) Plainly, these two are  
11 disparate types of services. In addition, as discussed in the  
12 preceding section, Eppolito and Caracappa repeatedly offered to  
13 provide Kaplan with, inter alia, security services for his  
14 narcotics trafficking business--i.e., yet a third type of  
15 assistance--and they offered to help him in that business in  
16 "any[ ]way that they could" (Tr. 783), a broad offer indeed. The  
17 jury was entitled to view the offers of Eppolito and Caracappa to  
18 provide assistance to members and associates of organized crime as  
19 general and open-ended--as was alleged in the Indictment--and thus  
20 as encompassing defendants' conduct in Las Vegas, which included  
21 Eppolito's offers and attempts to launder the proceeds of  
22 narcotics trafficking and other organized crime activities, and  
23 Eppolito's and Caracappa's involvement in narcotics trafficking in  
24 order to induce would-be investors to give them money for a film  
25 in whose funding members of organized crime were integrally  
26 involved.

1           The district court's narrow focus on the agreement of  
2 Eppolito and Caracappa to provide confidential law enforcement  
3 information as the be-all and end-all of the enterprise and of the  
4 conspiratorial agreement was thus inconsistent with the  
5 allegations of the Indictment and disregarded or discounted the  
6 above evidence. The weighing of the evidence, however, was within  
7 the province of the jury as finder of fact. Where a given  
8 partnership has offered a variety of services to a defined  
9 category of customers, it is not entitled to a ruling that as a  
10 matter of law its services do not constitute a pattern simply  
11 because the offered services were varied.

12           Finally, as to the need to prove continuity or the threat  
13 of continuity, the H.J. Inc. Court noted that the government may  
14 meet that burden "in a variety of ways, thus making it difficult  
15 to formulate in the abstract any general test for continuity."  
16 492 U.S. at 241 (emphasis added). The Court also noted, however,  
17 that proof of continuity and relatedness "will often overlap,"  
18 id. at 239, and that "the threat of continuity is sufficiently  
19 established where the predicates can be attributed to a defendant  
20 operating as part of a long-term association that exists for  
21 criminal purposes," id. at 242-43 (emphasis added). Plainly, the  
22 evidence described above was sufficient to permit the jury to find  
23 that Eppolito and Caracappa operated as part of just such an  
24 association. The fact that there was a gap of some eight years  
25 between proven racketeering acts did not as a matter of law  
26 preclude a finding of pattern or continuity, for Congress

1 expressly defined pattern to include two or more acts of  
2 racketeering activity within a period (excluding any period of  
3 imprisonment) of 10 years. See 18 U.S.C. § 1961(5).

4 In sum, we conclude that Eppolito and Caracappa were not  
5 entitled to acquittal on the RICO conspiracy count on the theory  
6 that either their "services" enterprise or their conspiracy to  
7 conduct that enterprise through a pattern of racketeering activity  
8 had ended before March 9, 2000.

9

#### CONCLUSION

10 We have considered all of the arguments of Eppolito and  
11 Caracappa in opposition to the government's appeal and, for the  
12 reasons stated above, have found them to be without merit. The  
13 judgments of acquittal ordered by the district court are reversed,  
14 and the matter is remanded for reinstatement of the jury's  
15 verdicts and the imposition of sentences.