

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 - - - - -

4 August Term, 2009

5 (Argued: June 14, 2010

Decided: May 3, 2011)

6 Docket Nos. 08-5266-cr(L), 09-0992-cr, 09-1076-cr

7 _____
8 UNITED STATES OF AMERICA,

9 Appellee,

10 - v. -
11

12 ALPHONSE T. PERSICO, also known as Kid, also known as
13 Allie Boy, and JOHN J. DeROSS, also known as Jackie,

14 Defendants-Appellants.
15 _____

16 Before: JACOBS, Chief Judge, KEARSE and LEVAL, Circuit Judges.

17 Appeals from judgments of the United States District Court
18 for the Eastern District of New York, Joanna Seybert, Judge,
19 convicting defendants of murder in aid of racketeering, witness
20 tampering, and conspiracy to commit witness tampering, 18 U.S.C.
21 §§ 1959(a)(1), 1512(b)(1) & (b)(2)(A), and 371, and sentencing
22 them to life imprisonment.

23 Affirmed.

1 JOHN DAVID BURETTA, JEFFREY GOLDBERG, Assistant
2 United States Attorneys, Brooklyn, New York
3 (Benton J. Campbell, United States Attorney
4 for the Eastern District of New York, Peter
5 A. Norling, Elizabeth Geddes, James Gatta,
6 Assistant United States Attorneys,
7 Brooklyn, New York, on the brief), for
8 Appellee.

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10 Marmur, Stillman, Friedman & Shechtman, New
11 York, New York, on the brief), for
12 Defendant-Appellant Persico.

13 ROBERT P. LaRUSSO, Mineola, New York (LaRusso &
14 Conway, Mineola, New York, on the brief),
15 for Defendant-Appellant DeRoss.

16 KEARSE, Circuit Judge:

17 Defendants Alphonse T. Persico ("Persico") and John J.
18 DeRoss appeal from judgments entered in the United States District
19 Court for the Eastern District of New York following a jury trial
20 before Joanna Seybert, Judge, convicting them of the murder in May
21 1999 of William ("Bill," "Billy," or "Wild Bill") Cutolo Sr.
22 ("Cutolo") in aid of racketeering, in violation of 18 U.S.C.
23 § 1959(a)(1) (Count One), witness tampering, in violation of 18
24 U.S.C. §§ 1512(b)(1) and (b)(2)(A) (Count Six), and conspiracy to
25 commit witness tampering, in violation of 18 U.S.C. § 371 (Count
26 Five), and sentencing them principally to life imprisonment. On
27 appeal, defendants contend, inter alia, that they should have been
28 granted a new trial after the posttrial discovery of Cutolo's
29 body; that there were prejudicial errors in the admission of
30 certain testimony by Cutolo's widow; that the evidence was
31 insufficient to support their convictions on the witness-tampering

1 counts; and that the government improperly withheld information
2 that was material to the defense; DeRoss also contends that the
3 admission of certain testimony by Cutolo's daughter was unduly
4 prejudicial and that the evidence was insufficient to support his
5 conviction on the murder count. Finding no basis for reversal, we
6 affirm the judgments of conviction.

7

I. BACKGROUND

8 The present prosecution grew out of a struggle for power
9 within the Colombo Crime Family (or "Colombo Family"), one of five
10 organized crime families (collectively "La Cosa Nostra" or the
11 "Mafia") in the New York City area. The indictment alleged that
12 the Colombo Family constituted a RICO enterprise, see 18 U.S.C.
13 § 1961(4), whose purposes included the enrichment of its members
14 and associates through illegal activities and through the
15 concealment of those activities, their participants, and the
16 locations of their proceeds. It alleged that Persico, who was
17 also known as "Kid," "Allie," or "Allie Boy," was at various times
18 a soldier, a captain, and the acting boss--or leader--of the
19 Colombo Family; and that DeRoss, who was also known as "Jackie,"
20 was at various times a soldier, a captain, and the acting
21 underboss--or second in command--of that family. At the trial
22 leading to defendants' convictions on the above charges--a prior
23 trial had ended in a hung jury--the government's evidence included
24 tape-recorded conversations, telephone records, and testimony by

1 numerous Federal Bureau of Investigation ("FBI") agents, Cutolo's
2 wife and his daughter, and several former members or associates of
3 organized crime. The evidence as to Cutolo's murder was
4 circumstantial; there was no eyewitness testimony, and as of the
5 time of trial his body had not been found.

6 The evidence at trial, taken in the light most favorable
7 to the government, showed the following.

8 A. The Colombo Family War and the Ascensions of Persico and Cutolo

9 Each of the five organized crime families was typically
10 run by a boss, assisted by an underboss and a consigliere, or
11 advisor; below that administrative trio were the family's
12 captains, or capos, who supervised the "soldiers," i.e., those who
13 had been made "members" of the family by formal induction. The
14 soldiers, in turn, managed participants in or contributors to
15 family enterprises who were not "made members" and were called
16 "associates." (Trial Transcript ("Tr.") 1139-42.) Crime family
17 protocols were stringent. Members and associates of a family were
18 not allowed to speak to members of other crime families or to
19 higher-ranking members of their own family without a formal
20 introduction. (See, e.g., Tr. 1414-16.) Members involved in
21 disputes were expected to discuss matters civilly (have a "sit-
22 down"), with at least the appearance of mutual respect. (See,
23 e.g., id. at 1148, 1200-01, 1910.) And no family member--
24 especially no underboss, a member of the family's administration--
25 could be killed without permission from the boss. (See, e.g., id.

1 at 1275 (made member), 1827 (underboss), 1756 ("Nobody can kill
2 the underboss without . . . exposing yourself to get killed
3 yourself."); see also id. at 2994 (no "boss" could be killed
4 without permission of the La Cosa Nostra ruling body, the
5 "Commission").) Salvatore Vitale, a member of the Bonanno Crime
6 Family (or "Bonanno Family") for some 30 years, testified that by
7 the time he became that family's underboss he had been involved in
8 11 murders; in each instance he had the permission of the Bonanno
9 Family's boss to commit the murder. (See, e.g., id. at 2863,
10 2874.) Michael DiLeonardo, a former captain in the Gambino Crime
11 Family (or "Gambino Family"), testified that various Mafia rules
12 were often broken, but the rule against killing a made member
13 without permission was broken less frequently, as the punishment
14 would be death. (See, e.g., id. at 1754-56; see also id.
15 at 1744-49 (killing of the new Gambino Family underboss in 1986
16 was authorized by the Commission after the unauthorized killings
17 in 1985 of Gambino boss Paul Castellano and his underboss).)

18 In the early 1990s, the boss of the Colombo Crime Family
19 was Persico's father, Carmine Persico, who was serving a lengthy
20 term of imprisonment. Persico and DeRoss, who were captains, were
21 also in prison, but for much shorter terms. Victor Orena was the
22 family's acting boss, a position to which Persico aspired. A
23 bloody war was sparked when someone tried to kill Orena,
24 motivated by the fact that Persico would soon be released from
25 prison and the belief that Orena would refuse to step down as
26 acting boss. (See, e.g., id. at 1271-76, 1732, 2881-85.) In the

1 intra-family war, there were about a dozen killings (see id.
2 at 1278); Cutolo was a member of the faction supporting Orena (see
3 id. at 1276). The war ended in 1992 or 1993 because so many
4 family members had been killed or arrested; but there remained two
5 factions, and the Commission would not allow the Colombo Family to
6 induct new members until the family got itself in order. (See,
7 e.g., id. at 1282, 1820, 2886-87.) DeRoss, Cutolo, and several
8 others got together and decided to attempt a reconciliation,
9 operating with Persico as their captain. (See id. at 1282-85.)
10 In about 1998, the Commission decided to back the Persico faction
11 (see id. at 2891-92); Persico became the family's acting boss, and
12 Cutolo became the acting underboss (see, e.g., id. at 1421).

13 Cutolo, by all accounts, was difficult to deal with:
14 intransigent in negotiations with other crime families and harsh
15 with members and associates of his own crime family. (See, e.g.,
16 Tr. 1790-91, 1288-89, 2231-37, 2277-78, 2283-89.) DiLeonardo, as
17 a captain in the Gambino Crime Family, served as that family's
18 liaison with the Colombo Family. (See id. at 1729.) He was
19 friendly with DeRoss, whose grandchildren played football on a
20 team with DiLeonardo's son, and was even more friendly with
21 Persico. (See id. at 2106-07, 1797-98.) DiLeonardo testified
22 that, in his liaison capacity, he met with Cutolo dozens of times
23 (see id. at 1732), and he viewed Cutolo as having aspirations to
24 become the boss of the Colombo Family (see, e.g., id. at 1821
25 ("You could see him coming like a train"; he "had a lot of
26 momentum behind him. He wasn't about to sit still. . . . He was

1 all about Cosa Nostra, and he wanted to wear the main hat, the
2 main.")). DiLeonardo was concerned that Cutolo might kill
3 Persico. (See, e.g., id. at 1822 (Cutolo "was a threat to Allie";
4 "he would have killed him. I know he would have killed Allie in
5 time.")) DiLeonardo thus warned Persico, "Bill has boss
6 mentality"; Persico understood what that meant. (Id.)

7 Joseph Campanella was a Colombo soldier who had grown up
8 with Cutolo and socialized with Cutolo and Cutolo's three adult
9 children. (See Tr. 1262-63.) When Campanella became a made
10 member of the Colombo Family, Cutolo was his captain (see id.
11 at 1275); during the Colombo Family war, Campanella was one of
12 Cutolo's bodyguards (see id. at 1277); and during a 13-month
13 period when Cutolo was in jail, Campanella ran Cutolo's crew of
14 soldiers and associates (see id. at 1283); but once Cutolo became
15 the Colombo underboss, Cutolo became "distant" (id. at 1288).
16 There was also controversy over Campanella's owing Cutolo some
17 \$300,000, which Cutolo had advanced several years earlier for
18 loansharking activity. (See id. at 1288, 1346.) In early 1999,
19 Campanella bought himself a Mercedes automobile; DeRoss told
20 Campanella that Cutolo was annoyed that Campanella would be
21 spending substantial sums on himself, rather than repaying any of
22 his debt to Cutolo, and that Cutolo was threatening to break the
23 windows in Campanella's car. Campanella told DeRoss he was "very,
24 very offended" by Cutolo's threat. (Id. at 1288-89.)

25 In mid-April 1999, Campanella and DeRoss were to attend an
26 unrelated sit-down and were discussing what they would say.

1 Campanella testified that during their preparations for that
2 meeting "Jack DeRoss asked me how I feel about killing Wild Bill,"
3 and "[h]e was serious." (Id. at 1291-92.) DeRoss never joked
4 with Campanella about killing anyone. (See id. at 1629.)
5 Campanella declined; he testified that he was upset with Cutolo
6 but did not want to kill him. (See id. at 1292.)

7 Giovanni Floridia (aka "John the Barber") testified that
8 he became associated with the Colombo Family in the mid-1990s when
9 he began loansharking with money loaned to him by Tommy and Richie
10 Cappa, who were Colombo associates. (See Tr. 2226-30.) Floridia
11 had not yet met Cutolo, and he first incurred Cutolo's wrath in
12 1997 when he told one of his borrowers, as he had been instructed
13 to do by Richie Cappa, that the borrowed money had come from
14 Cutolo. (See id. at 2231-32.) Cutolo was enraged--apparently
15 because his name was being used and he was not receiving
16 payments--and threatened to split Floridia's head open if Floridia
17 used Cutolo's name again. (See id. at 2232.) Thereafter, Cutolo
18 summoned Floridia and asked how much money he had out "on the
19 street"; although the amount was approximately \$300,000, Floridia
20 responded, again as directed by Richie Cappa, that the amount was
21 \$80,000-\$100,000; Cutolo instructed Floridia to come to Cutolo's
22 club on Wednesday nights, as did others working for Cutolo, and
23 make payments directly. (Id. at 2233-35; 2294-95.) Thereafter,
24 Floridia was "on record with" Cutolo (id. at 2296), i.e.,
25 officially a member of Cutolo's crew.

1 By the spring of 1999, Cutolo discovered that Floridia had
2 lied about how much money he had loaned out. Cutolo summoned
3 Floridia to a meeting and berated him. Cutolo essentially
4 confiscated \$50,000 that Floridia was expecting to receive from a
5 robbery in which he had recently participated and "tax[ed]" him an
6 additional \$25,000 for having lied about how much money he had on
7 the street. (Id. at 2280-84.) When Floridia failed to pay the
8 \$25,000, Cutolo had Floridia assaulted. (See id. at 2286-87.)

9 Floridia, furious, complained about Cutolo to his friend
10 John Cerbone (aka "Johnny Brains" (Tr. 2238)), a Colombo
11 associate, and to Colombo soldier Vincent ("Chickie") DeMartino
12 (see id. at 2287-88). Cerbone had introduced Floridia to
13 DeMartino and told him that DeMartino was "a killer in the
14 family." (Id. at 2276.) Floridia testified that DeMartino, after
15 hearing his complaints about Cutolo, said "Listen, don't worry
16 about it. This guy is not going to be around much longer. I'm
17 going to call Jackie"--i.e., DeRoss--"and I want you to tell him
18 exactly what happened. And you're going to meet him and tell him
19 exactly what happened." (Id. at 2288.) Floridia understood
20 "[t]his guy," who was "not going to be around much longer," to
21 mean Cutolo. (Id. at 2289.)

22 Thereafter, Cerbone told Floridia where and when to meet
23 DeRoss. (See id. at 2289-90.) At that meeting, DeRoss told
24 Floridia to continue with what he was doing and to "[s]tick with
25 Chickie." (Id. at 2291.) DeRoss said, "Don't worry about it.
26 Things are going to change." (Id.) Floridia's understanding of

1 DeRoss's statement--especially in light of DeMartino's earlier
2 statement that Cutolo would not be around much longer--was "that
3 they were going to whack Billy." (Id.) Florida testified that
4 DeRoss's demeanor was serious. (See id. at 2292.) Some two weeks
5 later, on May 26, 1999, Cutolo disappeared. (See id.)

6 B. The Events and Aftermath of May 26, 1999

7 On May 25, Persico and Cutolo paged each other several
8 times, and they later spoke by telephone. (See id. at 4223;
9 Government Exhibit ("GX") 70C.) Betty Anne Fox, Cutolo's
10 girlfriend of some 20 years (see Tr. 4588-89), testified that
11 Cutolo was upset that night, telling her that he could not spend
12 time with her the next day as planned because he had had to
13 reschedule a planned appointment from the 25th to the 26th (see
14 id. at 4571-72).

15 On Wednesday May 26, Cutolo went to the Manhattan office
16 of the union of which he was an officer; Wednesday was his usual
17 day there, but he remained a shorter time than usual. (See id.
18 at 394, 3709-10.) Marguerite Cutolo ("Peggy Cutolo" or "Peggy"),
19 Cutolo's wife of some 30 years (see id. at 553), paged Cutolo
20 around midday, and testified, over defendants' objections, that
21 when he called back he told her he had to go "to Brooklyn" to
22 meet "The Kid," by whom she understood him to mean "Allie Boy
23 Persico" (id. at 567). As discussed in greater detail in Part
24 II.A.2. below, Peggy testified that Cutolo had told her he
25 habitually met with Persico at 92nd Street and Shore Road (or

1 "92nd and Shore") in Brooklyn, near an overpass where they could
2 avoid surveillance by the FBI (see id. at 567-68).

3 In the early afternoon of May 26, Cutolo proceeded to
4 drive to Brooklyn; but because he was having problems with his
5 car, he drove it to a repair shop. At his request, the mechanic
6 accompanied Cutolo to 92nd Street and Shore Road and left him
7 there at about 3:15, taking the car back to the shop to be
8 repaired. (See id. at 214-18.) Cutolo said he would come for his
9 car around 5:30; he did not. (See id. at 215, 223.) Cutolo's
10 family and friends never saw or heard from him again.

11 On Wednesday nights, Cutolo normally went to his club,
12 where members of his crew would assemble and spend the evening.
13 If he could not be there, he normally called to let them know.
14 (See Tr. 1431.) On the evening of Wednesday May 26, his crew
15 became concerned when Cutolo neither came nor called. Cutolo's
16 son, William Cutolo Jr. ("Cutolo Jr."), tried unsuccessfully to
17 reach him by telephone. (See id. at 1432.) Cutolo Jr. called his
18 mother, who became anxious (see id. at 568-69); she had tried to
19 reach Cutolo by telephone that afternoon, without success (see id.
20 at 293-94). Peggy Cutolo continued to try to call or page her
21 husband all the following day. (See, e.g., id. at 294-95, 569,
22 800-01.)

23 Early on the morning of May 27, Cutolo Jr., "practically
24 crying" (id. at 594), went to his parents' house and told his
25 mother, "nobody knows where daddy is. Nobody, nobody heard from
26 him. Nobody even beeped him. He never got called--nobody called,

1 he--he wasn't there" (id. at 569). Campanella and other members
2 of Cutolo's crew arrived at Cutolo's home in the late morning of
3 May 27. (See id. at 1294-95.) Peggy Cutolo was distraught;
4 Campanella himself was devastated because he knew "Bill ain't
5 never coming home" (id. at 1295; see id. at 372, 595 (Campanella
6 was "in tears," "crying like a baby"))).

7 DeRoss, according to Peggy Cutolo, had arrived at the
8 Cutolo home on May 27 at 5 or 6 a.m.--barely eight hours after
9 Cutolo could be considered missing. (See Tr. 794, 570.) DeRoss
10 demanded "the records and the papers," which Peggy understood to
11 refer to the Colombo Family "books of all the money that was out"
12 in loansharked loans. (Id. at 569-70.) She testified, "There
13 wasn't a tear in his eye. . . . I knew at that point that my
14 husband was dead." (Id. at 570.)

15 DeRoss went to Cutolo's house again a day or two later,
16 and returned every few days thereafter (see id. at 595-96, 598),
17 insisting that there must be books and records. Barbara Jean
18 Cardinale, Cutolo's daughter, who had moved, with her husband and
19 two young daughters, into her parents' home in order to take care
20 of her mother after her father's disappearance (see id. at 323),
21 testified that DeRoss's tone in demanding the records implied that
22 "he was entitled to them" (id. at 300). DeRoss searched Cutolo's
23 office, the bedrooms, and the attic, going through drawers,
24 cabinets, and bookshelves, looking behind and under furniture, and
25 knocking on walls to locate secret panels. (See id. at 300-01,
26 598-99.) Peggy Cutolo knew there were records, as well as money--

1 \$1.65 million, as it turned out, see Part II.D.1. below--hidden in
2 a vent above the stove and in tubing in the attic, but she
3 repeatedly stonewalled DeRoss. (See, e.g., id. at 596, 649-50.)

4 In none of his conversations with the Cutolos after May 26
5 did DeRoss mention any effort to locate Cutolo. (See id. at 301.)
6 On one occasion, DeRoss suggested that Cutolo might have gone "on
7 the lam"; but Peggy Cutolo knew that if Cutolo had simply
8 absconded or gone into hiding, he would have "taken what was
9 there," and he had taken nothing. (Id. at 597-98.)

10 Cardinale testified, over objection, that it was her
11 belief--which she communicated to others (see id. at 305-07,
12 423-26)--that Vincent DeMartino had "carried out the order to kill
13 [her] father" (id. at 307). When word of her statements reached
14 DeRoss, he summoned her to meet with him and said "that I
15 shouldn't be talking like that. I have kids here and to think
16 about everybody else before I talk like that." (Id. at 308.) In
17 addition, as discussed in greater detail in Parts II.A.3. and B.2.
18 below, DeRoss thereafter--in a recorded conversation--warned
19 Cardinale, Cutolo Jr., and Peggy Cutolo against making statements
20 about what they believed had happened to Cutolo, especially
21 statements to "the law" (GX 67B at 6). DeRoss told them, inter
22 alia, "Worry about your family" (id. at 8); "You got little, you
23 got kids here" (id. at 5). "You understand what I'm telling you
24 babe? You've been, you've been around this life." (Id. at 6.)
25 Cardinale, who had known since the age of 14 that her father was
26 connected to organized crime and had overheard many of Cutolo's

1 organized-crime-related conversations (see Tr. 286, 288-89),
2 testified that she understood DeRoss to be threatening the safety
3 of her family (see id. at 324-28, 328-31).

4 C. Evidence that Cutolo Was Dead

5 Because Cutolo's body had not been found at the time of
6 trial, the defendants argued that "there is no evidence that Billy
7 Cutolo's dead" (Tr. 111). To show that Persico and DeRoss knew
8 that Cutolo was in fact dead, and not merely on the lam, the
9 government introduced, inter alia, evidence that a crime family
10 would normally conduct an investigation into the death or
11 unexplained disappearance of a family member--and especially of a
12 boss or underboss (see id. at 1747-48, 2894-95)--and that there
13 was no semblance of any investigation by the Colombo Family into
14 the disappearance of Cutolo. Vitale, who in 1999 was the Bonanno
15 Family underboss, testified that no one from the Colombo Family
16 ever made inquiry of him or told him they were investigating
17 Cutolo's disappearance (see id. at 2894); and DiLeonardo, the
18 liaison from the Gambino Family, testified that he never heard
19 that the Colombo leaders were undertaking any such investigation
20 (see id. at 1828). Instead, DeRoss, a captain, had promptly gone
21 to his superior's house and demanded the crime family's books and
22 records. DeRoss had also proceeded to summon the members of
23 Cutolo's crew and interrogate them as to the current state of
24 family business (see, e.g., id. at 1295-99)--a normal crime family
25 practice when a family member is known to have died (see id.

1 at 2118-20). And DeRoss was shortly introduced as the new
2 underboss. (See, e.g., id. at 2107-08.)

3 In addition, the government presented evidence of
4 statements made by Persico and DeRoss to Colombo members or
5 associates, and to members of other crime families, indicating
6 that Persico and DeRoss had ordered and arranged Cutolo's death.
7 It also introduced a document found in Persico's apartment in
8 October 1999, which bore the notation that \$50,000 was paid to
9 DeMartino one month after Cutolo's disappearance (see Tr. 3469;
10 GX 59), and evidence of statements about Cutolo's disappearance
11 made by DeMartino, who the government contended had been involved
12 in carrying out the order to kill Cutolo. There was testimony as
13 to several such statements.

14 About a week after Cutolo disappeared, DiLeonardo was to
15 have had a meeting with him; when DiLeonardo arrived for the
16 scheduled meeting, however, only Persico and DeRoss were there.
17 (See Tr. 1823-24.) When DiLeonardo asked where Cutolo was,
18 DeRoss, with Persico standing behind him, said, "[Haven't you]
19 heard, he [has been] missing for a week. . . . [Y]ou will be
20 dealing with us now and everything will be eas[ier]." (Id.
21 at 1824-25.) Both Persico and DeRoss seemed undisturbed, and
22 DiLeonardo understood DeRoss to be telling him that Cutolo was
23 dead. (See id. at 1825-26.)

24 Some two weeks after Cutolo's disappearance, Campanella
25 went to DeRoss's home to discuss DeRoss's treatment of a member of
26 Campanella's crew. In the course of their conversation,

1 Campanella asked DeRoss what else was going on. Campanella
2 testified that DeRoss "said Billy is gone" (id. at 1474); "Jackie
3 just told me the situation with Wild Bill, that Bill had to go, he
4 was getting too powerful. If . . . Allie Boy went away on a gun
5 charge, Bill would have took over the family" (id. at 1299). It
6 was known that Persico had been arrested a few months earlier on
7 gun possession charges and that he would be sent back to prison
8 within a year. (See, e.g., id. at 1476-77, 2029, 3668-69, 3921.)
9 Campanella testified that DeRoss said Cutolo "would have never
10 gave the family back to Allie Boy. And that Bill had to go. He
11 was too powerful." (Id. at 1299.)

12 A week after that, Campanella had a meeting with both
13 DeRoss and Persico. DeRoss, with Persico sitting beside him,
14 told Campanella, "we'll lie no more. Bill is gone. And he says
15 it would be family business as usual." (Id. at 1301-02.)
16 Despite the reference to business as usual, and despite the fact
17 loansharked money was normally viewed as belonging to the crime
18 family (see, e.g., id. at 1969-70), Campanella's \$300,000 debt to
19 Cutolo was canceled: Campanella testified, DeRoss "told me that
20 the money that I owed Bill was to be squashed, and not to pay it
21 back" (id.).

22 In the latter part of 1999, Vitale, as the Bonanno
23 Family's underboss, and Joseph Massino, its boss, met with Persico
24 at Persico's request. (See Tr. 2865, 2895-2900.) At that
25 meeting, Persico spoke of Cutolo and said, "he can't take what's
26 not his." (Id. at 2867.) It would have been protocol, if Cutolo

1 had been alive, for him as underboss to attend the meeting; when
2 Persico said "he can't take what's not his," Vitale "believed Wild
3 Bill was dead." (Id. at 2869; see id. at 2866.) Vitale
4 testified, "we would never say 'I killed that individual' or 'I
5 chopped him up.' We would use a gesture or a motion or we knew
6 what he was talking about." (Id. at 2900.)

7 Floridaia, who had been told some two weeks before Cutolo's
8 disappearance that Cutolo would soon be gone, received word that
9 Cutolo was dead from several Colombo members or associates.
10 First, Floridaia testified that on the morning after Cutolo's
11 disappearance, Cerbone "told me, Listen, Billy's gone." (Id.
12 at 2295.) When Floridaia asked what he meant, Cerbone said, "He's
13 gone, that's it. If anybody comes around, don't talk to nobody.
14 Don't give them all the answers. We'll get in touch with you."
15 (Id. at 2296.) Floridaia testified that at that point "I know they
16 killed Billy." (Id.)

17 Floridaia thereafter was "on record with" DeMartino rather
18 than Cutolo. (Tr. 2296.) DeMartino, with whom Floridaia became
19 quite friendly and spent most of his days (see id. at 2298-99)--
20 until DeMartino threatened to kill him (see id. at 2309)--
21 repeatedly made statements to Floridaia about Cutolo's
22 disappearance. DeMartino had once been a good friend of Cutolo
23 (see id. at 305) but had gone to prison; when he was released in
24 or around 1997, Cutolo banned him from Cutolo's club, ostensibly
25 because DeMartino could be observed associating with known
26 criminals and thus violating the terms of his supervised release

1 (see id. at 2276-77); Cutolo also told everyone in the family to
2 stay away from DeMartino (see id. at 2277). DeMartino was angered
3 because of that treatment--and because Cutolo did not allow him to
4 earn money as part of Cutolo's crew and instead told him to get a
5 real job. (See id. at 305, 2277, 2297.) DeMartino told Floridaia
6 that "the reason why Billy is not around is because, you know, he
7 didn't know how to treat his guys. He robbed them. He got them
8 playing against each other. And that's why he's gone." (Id.
9 at 2297.) DeMartino said "he deserved" what he got, and
10 "[t]hey're never going to find him." (Id.) Floridaia understood
11 "he" and "him" to refer to Cutolo. (Id. at 2297-98.)

12 Finally, in 2004, when Floridaia was in the Metropolitan
13 Detention Center in Brooklyn in connection with charges that he
14 and DeMartino had attempted to kill Campanella in 2001, Floridaia
15 spent much of his time with DeRoss, who was then the only other
16 Colombo member or associate incarcerated at that facility. (See
17 id. at 2351-53.) DeRoss had originally been Cutolo's captain (see
18 id. at 2355-56); he had proposed Cutolo for membership in the
19 Colombo Family (see id. at 559). DeRoss had then gone to prison
20 for some eight years; when he was released he thought the
21 relationship between himself and Cutolo should be the same, and he
22 had resented being Cutolo's subordinate. (See id. at 559-61,
23 2356-57.) Floridaia testified that, in their prison chats, DeRoss
24 "would tell me he brought Billy into the family. . . . [A]nd he
25 took him out of the family." (Id. at 2356-57.) Floridaia

1 understood that by "took [Cutolo] out," DeRoss meant "he killed
2 him." (Id. at 2357; see, e.g., id. at 2224.)

3 The government suggested that DeMartino's statements to
4 Florida that "[t]hey're never going to find" Cutolo adverted to a
5 disposal of Cutolo's body at sea. On May 26, Cutolo had been
6 dropped off at 92nd Street and Shore Road at 3:15 p.m. Telephone
7 records were introduced showing that 20 minutes later Persico
8 received a call from a pay telephone near DeMartino's place of
9 business (see Tr. 4221, 4224-25), and that less than an hour after
10 that, Persico placed a call to a local marina that kept no records
11 as to boats' comings and goings (see id. at 4220, 5374). In its
12 main and rebuttal summations, the government argued that that
13 marina would be a "[p]retty good place for Persico's minions to
14 take a dead body," to "take it out to sea" (id. at 5561; see id.
15 at 5947 ("the perfect place to take Cutolo's dead body"); id.
16 at 5949 ("It's not a coincidence that while Cutolo is in the
17 process of being taken to be murdered, Persico's checking on the
18 marina.")).

19 D. The Verdict and the Posttrial Motions

20 The jury found Persico and DeRoss guilty on the three
21 counts indicated above, i.e., murder of Cutolo in aid of
22 racketeering, witness tampering with respect to Peggy Cutolo,
23 Cutolo Jr., and Cardinale (collectively "the Cutolos"), and
24 conspiracy to tamper with the testimony of the Cutolos. Persico
25 and DeRoss had also been charged in the indictment with one count

1 of conspiring to murder Campanella in 2001 and with two counts of
2 firearms violations in connection with the attempt on Campanella's
3 life. The jury acquitted Persico and DeRoss on the latter three
4 charges.

5 After the jury returned its verdicts, Persico and DeRoss
6 moved pursuant to Fed. R. Crim. P. 29(c) for judgments of
7 acquittal, contending that the government had failed to present
8 sufficient evidence as to one or more elements of each of the
9 counts on which they were convicted. As to the murder count, they
10 argued that there was insufficient evidence to prove (a) that
11 Cutolo was in fact dead, (b) that Cutolo died as a result of
12 murder, or (c) if Cutolo was murdered, that Persico or DeRoss
13 murdered him or commanded, procured, or caused his murder. As to
14 the witness tampering counts, they argued that the evidence was
15 insufficient to show any intent to influence or interfere with any
16 potential testimony of any member of the Cutolo family in an
17 official proceeding.

18 In addition, Persico and DeRoss moved pursuant to Fed. R.
19 Crim. P. 33 for a new trial on various grounds. In their original
20 motion, pointing to testimony by Peggy Cutolo that she had
21 informed the government of finding the \$1.65 million in cash
22 stashed away by Cutolo and had been allowed to keep the money,
23 defendants contended principally that either that testimony was
24 perjurious and the government had violated its obligations under
25 Giglio v. United States, 405 U.S. 150 (1972), or the government
26 had violated its obligations under Giglio and Brady v. Maryland,

1 373 U.S. 83 (1963), by failing to disclose to the defense that
2 Peggy had been allowed to keep that money. In response, the
3 government submitted the affidavit of a former Assistant United
4 States Attorney ("AUSA"), subsequently supported by documentation,
5 stating that the AUSA became aware in late 2000 or early 2001
6 that Peggy had told the FBI that she was in possession of a large
7 amount of cash found in the Cutolo home after Cutolo disappeared,
8 and that later in 2001 the government decided not to seek
9 forfeiture of, or taxes on, that money.

10 Before the district court had ruled on either set of
11 motions, Cutolo's body was found, buried in Farmingdale, New York.
12 The government informed the court of the discovery and reported
13 that the local medical examiner had "identified the cause of death
14 as homicide." (Letter from AUSA John Buretta et al. to Judge
15 Seybert dated October 7, 2008.) Persico and DeRoss immediately
16 augmented their new-trial motions, arguing that "this new evidence
17 directly contradicts the theory on which the government proceeded
18 at trial," to wit, that "Persico had Cutolo's body put on a boat
19 and taken out to sea and that Mr. Persico made a telephone call to
20 a marina on the date of Cutolo's disappearance to arrange such
21 disposal." (Letter from Sarita Kedia [counsel for Persico] and
22 Robert LaRusso [counsel for DeRoss] to Judge Seybert dated October
23 7, 2008, at 1 (emphasis omitted).)

24 In a Memorandum and Order dated November 24, 2008
25 ("District Court 2008 Order"), the district court denied both sets
26 of motions. With respect to the motions for acquittal, the court

1 concluded that the evidence was sufficient, largely citing
2 evidence described above and in Parts II.B. and C. below. See
3 District Court 2008 Order at 5-10, 13-17.

4 The district court also denied defendants' new-trial
5 motions. It reasoned that although the discovery of Cutolo's body
6 contradicted the government's theory as to the disposal of
7 Cutolo's body, "the whereabouts of Cutolo, Sr.'s body [wa]s
8 immaterial," id. at 25. The court pointed out that

9 Defendants' convictions were not based on the theory
10 that Persico or DeRoss pulled the trigger or that
11 either Defendant was even present at Cutolo's
12 murder. The newly discovered evidence regarding the
13 burial location does not, therefore, contradict the
14 Government's theory of the actual murder. The
15 Government presented more than sufficient evidence to
16 establish that the Defendants ordered Cutolo, Sr.'s
17 death.

18 Id.

19 Finally, the district court concluded that Persico and
20 DeRoss were not entitled to a new trial on the theory that Peggy
21 Cutolo had committed perjury or that the government had violated
22 its Brady obligation. It saw no basis for a finding of perjury,
23 given the former AUSA's affidavit indicating that Peggy's
24 testimony--that she had disclosed to the government, and had been
25 allowed to keep, the \$1.65 million--was true. See id. at 29-32.
26 The court rejected the Brady branch of the motion principally on
27 the grounds (a) that although the government should have disclosed
28 those facts earlier, "there was no suppression" given that the
29 information was disclosed on the fourth day of an eight-week
30 trial, id. at 37, affording defendants ample time to use the

1 information, and (b) that defendants could not show prejudice, as
2 "there was virtually no probability that disclosure of this
3 information at an earlier time would have changed the outcome of
4 this case," id. at 40.

5 II. DISCUSSION

6 On appeal, Persico and DeRoss contend principally (a) that
7 the district court erred in allowing Peggy Cutolo to testify that
8 Cutolo had told her he routinely met with Persico at 92nd Street
9 and Shore Road; (b) that the evidence was insufficient to support
10 their convictions on the witness-tampering counts; (c) that they
11 should have been granted a new trial following the discovery of
12 Cutolo's body, which contradicted the government's theory that his
13 body had been disposed of at sea; and (d) that the government's
14 failure to disclose sooner that Peggy Cutolo had been allowed to
15 keep Cutolo's \$1.65 million stash violated its Brady obligation.
16 Persico also contends that it was error to allow Peggy Cutolo to
17 testify that Cutolo said he was going to meet Persico on May 26;
18 DeRoss contends that the evidence was insufficient to support his
19 conviction on the murder count and that it was error to allow
20 Cardinale to testify about suspecting that DeMartino had carried
21 out the order to kill her father; and both defendants contend that
22 they were denied the constitutional right to compulsory process.
23 We find all of defendants' arguments unpersuasive.

1 A. The Evidentiary Challenges

2 At trial, Peggy Cutolo was allowed to testify with respect
3 to conversations with Cutolo, in part, as follows:

4 Q. When your husband left your home on May 26,
5 1999, was that the last time that you saw your
6 husband?

7 A. It was the last time I saw my husband.

8

9 Q. Did there come a time later that day that
10 you spoke with him on the telephone?

11 A. Yes.

12 Q. Approximately what time was that?

13 A. About 12 o'clock.

14

15 Q. And when you spoke with your husband on the
16 telephone, what was his mood?

17 A. Very abrupt and fast. He says my
18 appointment was canceled. I have to run back to
19 Brooklyn.

20 Q. And did he tell you who he was going to
21 meet?

22 A. The Kid.

23 Q. And when your husband told you on May 26,
24 1999 that he was going to meet The Kid, who did you
25 understand him to mean?

26 A. Allie Boy Persico.

27 Q. To your knowledge was there a particular
28 location that your husband would meet Alphonse
29 Persico?

30 A. 92nd Street and Shore Road.

31 Q. How do you know that?

32 A. My husband told me.

1 Q. What, if anything, did your husband describe
2 to you about why he would meet Alphonse Persico at
3 92nd Street and Shore Road?

4 A. So they wouldn't be seen, because he had to
5 go down like a couple of steps or stones, I don't
6 know, and there is an overpass where you can talk
7 where they wouldn't be seen.

8 Q. And when your husband told you that you
9 couldn't be seen from that spot, what did you
10 understand him to mean?

11 A. From the FBI.

12 (Tr. 566-68 (emphases added).) Peggy testified that Cutolo had
13 told her many times that he met with Persico at 92nd and Shore;
14 that location, so far as she knew, was their habitual meeting
15 place. (See id. at 1057-60.)

16 Over defendants' objections, the district court allowed
17 this testimony on the grounds that Cutolo's statement that he was
18 going to Brooklyn to meet with Persico was admissible under Fed.
19 R. Evid. 803(3) as a statement of Cutolo's intent, and that
20 statements by Cutolo that he habitually met with Persico at 92nd
21 Street and Shore Road were admissible either as hearsay falling
22 within the exception for statements against penal interest, as
23 provided by Fed. R. Evid. 804(b)(3), or as nonhearsay statements
24 in furtherance of a conspiracy, within the scope of Fed. R. Evid.
25 801(d)(2)(E). The trial court's decision to admit evidence is
26 reviewed for abuse of discretion. See, e.g., United States v.
27 Quinones, 511 F.3d 289, 307, 311-12 (2d Cir. 2007) (Rule 803(3)),
28 cert. denied, 129 S. Ct. 252 (2008); United States v. Williams,
29 506 F.3d 151, 155 (2d Cir. 2007) (Rule 804(b)(3)), cert. denied,
30 552 U.S. 1223 (2008).

1 1. Peggy Cutolo's Testimony that Cutolo Said He Had To Go
2 to Brooklyn To Meet The Kid

3 Rule 803 of the Federal Rules of Evidence provides in
4 pertinent part that

5 [a] statement of the declarant's then existing state
6 of mind, emotion, sensation, or physical condition
7 (such as intent, plan, motive, design, mental
8 feeling, pain, and bodily health), but not including
9 a statement of memory or belief to prove the fact
10 remembered or believed unless it relates to the
11 execution, revocation, identification, or terms of
12 declarant's will

13 is "not excluded by the hearsay rule." Fed. R. Evid. 803(3)
14 (emphases added). This exception reflects the decision of the
15 Supreme Court in Mutual Life Insurance Co. v. Hillmon, 145 U.S.
16 285, 299-300 (1892) ("Hillmon"), which ruled admissible the
17 evidence that a missing person had stated his intention to go on a
18 trip with Hillmon because such a statement is

19 evidence that, shortly before the time when other
20 evidence tended to show that he went away, he had the
21 intention of going, and of going with Hillmon, which
22 made it more probable both that he did go and that he
23 went with Hillmon than if there had been no proof of
24 such intention.

25 Hillmon, 145 U.S. at 296. Thus, "[i]f relevant," a declarant's
26 statement of his intent "may be introduced to prove that the
27 declarant thereafter acted in accordance with the stated intent."
28 United States v. Best, 219 F.3d 192, 198 (2d Cir. 2000), cert.
29 denied, 532 U.S. 1007 (2001). The Advisory Committee Notes on the
30 adoption of Rule 803(3), however, state that "the Committee
31 intends that the Rule be construed to limit the doctrine of . . .
32 Hillmon . . . so as to render statements of intent by a declarant

1 admissible only to prove his future conduct, not the future
2 conduct of another person." Fed. R. Evid. 803 Advisory Committee
3 Note (1974) (emphases added).

4 Persico relies on this limitation and on this Court's
5 decision in United States v. Delvecchio, 816 F.2d 859 (2d Cir.
6 1987) ("Delvecchio"), to argue that Cutolo's statement could not
7 properly be admitted against Persico "[a]bsent independent
8 evidence that Persico met Cutolo at the Shore Road location"
9 (Persico brief on appeal at 40 (emphasis added); see id. at 37,
10 38). His reliance is misplaced.

11 In Delvecchio, an agent testified that an informant had
12 told him the informant intended to meet with Delvecchio on a
13 certain date. When a meeting took place on that date, however,
14 the surveilling law enforcement agent could not determine whether
15 the person meeting with the informant was in fact Delvecchio. We
16 ruled that the statement of the informant, the declarant, that he
17 intended to meet with Delvecchio was not admissible to show that
18 Delvecchio in fact met with him because there was no "independent
19 evidence" that Delvecchio did so. 816 F.2d at 863.

20 Our holding in Delvecchio does not support Persico's
21 argument. In that case--unlike the present case--the declarant's
22 statement was offered "to prove [the nondeclarant's] attendance"
23 at the meeting. Id. at 862 (emphases added). The point we made
24 in Delvecchio was that, while a declarant's statement of
25 intention to do something with another person is admissible as
26 evidence that the declarant acted in accordance with his stated

1 intention, it is not admissible under Rule 803(3) to show that the
2 third person also acted in accordance with an intention attributed
3 to him by the declarant. In contrast, Cutolo's statement in the
4 present case was in no way offered to show that in fact "Persico
5 met Cutolo at the Shore Road location" (Persico brief on appeal at
6 40); rather, that statement was properly admitted to show Cutolo's
7 intent to meet Persico there and to support an inference that
8 Cutolo acted in furtherance of that intent, from which the jury
9 could reasonably infer that Cutolo had communicated to Persico
10 that Cutolo would be at Shore Road expecting to meet Persico
11 there.

12 Cutolo's statement that he was going to Brooklyn on the
13 afternoon of May 26 to meet with Persico made it more probable
14 that Cutolo went to Brooklyn with the expectation of meeting there
15 with Persico, than if he had made no such statement. Under
16 803(3), the jury could draw the inference that Cutolo acted in
17 furtherance of his stated intent to go meet Persico. From this
18 evidence and other evidence that Persico and Cutolo habitually
19 conducted their meetings under the Shore Road overpass where they
20 would not be observed, see Part II.A.2. below--together with the
21 evidence that Cutolo went to that place that very afternoon--the
22 jury could have inferred that Cutolo communicated to Persico (or
23 to Persico's people) that Cutolo would be there expecting to meet
24 Persico.

25 Such an inference would fit with the theory advanced by
26 the government that Persico, engaging in a Mafia practice of

1 "luring" persons who were to be killed, had lured Cutolo to 92nd
2 and Shore so that Persico could arrange for his murder. John
3 Carillo, an investigator for the United States Attorney's Office
4 for the Southern District of New York, explained that the La Cosa
5 Nostra common practice of "luring" was meant "to make somebody
6 comfortable. You don't want them to know that they are going to
7 be killed, you want to make them as comfortable as possible so
8 that they don't see it coming" (Tr. 1146). Vitale, the former
9 Bonanno Family underboss, gave examples. He testified that

10 [t]here was a situation in May of '81 where three
11 captains were trying to take the family and Mr.
12 Rastelli [former boss of the Bonanno Family] and Mr.
13 Massino decided to kill the three captains so they
14 fabricated saying there was going to be an
15 administration meeting. When there is an
16 administration meeting, all the captains must attend.

17 When they walked in, they were shot to death,
18 all three of them.

19 (Id. at 2875; see id. at 2871.) Vitale also described how two
20 members of the Bonanno Family were killed for having allowed
21 "Donnie Brasco," an undercover FBI agent, to infiltrate the
22 family. One member was "lured to his death" by the boss and the
23 consigliere, who summoned him by stating that they wanted an
24 explanation; the other member was killed by his own cousins, who
25 were used "to lure him in," giving him a "false sense of hope."

26 (Id. at 2877.) Vitale testified that all 11 of the murders in
27 which he had participated had involved "luring the victim[s] to
28 their death, lying to them about where they were going." (Tr.
29 2874.)

1 The jury could infer that the reason DeRoss had asked
2 Campanella whether he would be willing to participate in killing
3 Cutolo was that Campanella, despite his \$300,000 dispute with
4 Cutolo, was still friendly with Cutolo and his children, and
5 Cutolo would be off guard while Campanella lured him to his death.
6 The jury could also infer that after Campanella declined, Persico
7 decided simply to summon Cutolo to 92nd and Shore for an
8 ostensibly routine meeting on the afternoon of May 26. (See,
9 e.g., Persico brief on appeal at 39 (acknowledging that the
10 government's theory was that Cutolo was "lured" to 92nd and
11 Shore).) Persico himself did not need to be there to ensure
12 Cutolo's arrival at or disappearance from that location.

13 Finally, there was considerable other evidence that
14 Persico had solicited Cutolo's attendance under the Shore Road
15 overpass on May 26. First, the telephone records showed that,
16 after many attempts to connect with each other, Cutolo and Persico
17 had spoken for about two minutes on the telephone on May 25.
18 Second, that night, Cutolo told Fox he could not spend May 26 with
19 her as planned because he had had to schedule an appointment for
20 the 26th, a matter about which he was unhappy; it could be
21 inferred that the only person who could force an unwanted schedule
22 change on Cutolo, the family's obdurate underboss, was Persico,
23 the boss. Third, on the afternoon of May 26, Cutolo in fact went
24 to 92nd Street and Shore Road in Brooklyn, obviously planning to
25 meet someone; he was dropped off there at 3:15 and said he would
26 pick up his car from the repair shop at 5:30. Finally, Peggy

1 Cutolo permissibly testified, as discussed in Part II.A.2. below,
2 that 92nd and Shore was the habitual meeting place for Cutolo and
3 Persico.

4 In sum, under Rule 803(3), Cutolo's statement of his own
5 intent to go to Brooklyn to meet Persico was not excluded by the
6 hearsay rule. We see no abuse of the trial court's discretion in
7 admitting Cutolo's statement expressing his own intention to go to
8 Brooklyn to meet "The Kid."

9 2. Cutolo's Statements that He Routinely Met Persico at
10 92nd Street and Shore Road

11 Rule 804 of the Federal Rules of Evidence, as it read at
12 the time of the trial in this case, provided, in pertinent part,
13 that "if the declarant is unavailable as a witness,"

14 [a] statement which . . . at the time of its making
15 . . . so far tended to subject the declarant to civil
16 or criminal liability . . . that a reasonable person
17 in the declarant's position would not have made the
18 statement unless believing it to be true

19 is "not excluded by the hearsay rule." Fed. R. Evid. 804(b)(3)
20 (1974). "A statement will satisfy Rule 804(b)(3)'s requirement
21 that it 'tended' to subject the declarant to criminal liability if
22 it would be probative in a trial against the declarant." United
23 States v. Garris, 616 F.2d 626, 630 (2d Cir.), cert. denied, 447
24 U.S. 926 (1980). "The Rule does not require that the declarant be
25 aware that the incriminating statement subjects him to immediate
26 criminal prosecution." United States v. Lang, 589 F.2d 92, 97 (2d
27 Cir. 1978). Nor does the fact that the statement was made to the
28 declarant's spouse provide a basis for ruling that it is not

1 within this hearsay exception. See, e.g., United States v.
2 Katsougrakis, 715 F.2d 769, 777-78 (2d Cir. 1983), cert. denied,
3 464 U.S. 1040 (1984).

4 The statements by Cutolo that he routinely met with
5 Persico at 92nd and Shore, and that they met at that spot because
6 it enabled them to evade surveillance by the FBI, fit within this
7 exception. While those statements would not have been sufficient,
8 standing alone, to convict Cutolo of any crime, they would have
9 been probative in a criminal trial against Cutolo to show his
10 membership in the Colombo Crime Family and to support an
11 inference that criminal messages were passed when he and Persico
12 met at that spot. We see no abuse of discretion in the district
13 court's ruling that, on this basis, Peggy Cutolo's testimony that
14 Cutolo had told her many times that he met Persico at 92nd and
15 Shore was not excluded by the hearsay rule. Accordingly, we need
16 not address the court's alternative ruling that the statements
17 were nonhearsay as statements in furtherance of a conspiracy.

18 3. The Testimony of Cardinale

19 Cardinale was allowed to testify at trial that, after
20 Cutolo's disappearance, she told Colombo associate Michael Spataro
21 and others that she believed DeMartino had carried out the order
22 to kill her father. DeRoss argued that this testimony should be
23 excluded both on the ground that it was based solely on hearsay
24 statements by Cardinale herself and on the ground that it would be
25 unduly prejudicial, see Fed. R. Evid. 802, 403. On appeal, he

1 pursues his Rule 403 objection, arguing that the government used
2 Cardinale's belief to argue, in summation, that DeMartino had in
3 fact carried out orders by Persico and DeRoss to kill Cutolo. We
4 see no error in the admission of this testimony.

5 Defendants were charged not only with murder in aid of
6 racketeering, but also with tampering with, and conspiring to
7 tamper with, the testimony of Cardinale, Peggy Cutolo, and Cutolo
8 Jr. The government sought to prove that word of Cardinale's
9 belief reached DeRoss, and that that was part of the impetus for
10 DeRoss's threatening to harm Cardinale's family if she or Peggy or
11 Cutolo Jr. made such statements to law enforcement officials, see
12 Part II.B.2. below. The district court allowed the testimony on
13 the ground that Cardinale's testimony as to her statements was
14 nonhearsay under Fed. R. Evid. 801, as it was offered simply for
15 "the fact that she made these accusations" and was admissible
16 because "[t]he rest of the testimony doesn't make any particular
17 sense unless you have the chronology [of] how it occurred that Mr.
18 DeRoss became aware of it" (Tr. 280; see id. at 281). The court
19 concluded that the probative value of the evidence outweighed its
20 potential for unfair prejudice.

21 After Cardinale testified that she had told Spataro she
22 thought DeMartino carried out the order to kill her father, the
23 district court gave the jury a limiting instruction. The court
24 instructed that "[t]his evidence may not be considered as truth of
25 the matter asserted. It is being used solely as background
26 evidence, background information," and that the evidence, "at

1 th[at] point in time," was being "admi[tted] only . . . against
2 . . . DeRoss, and not Alphonse Persico. The statement can be
3 considered against Alphonse Persico if and when the government
4 establishes that a conspiracy existed." (Id. at 307.)

5 We see no error in the court's ruling or its handling of
6 this evidence.

7 Nor are we persuaded that undue prejudice was created
8 thereafter through arguments by the government "explain[ing] for
9 the first time during summations" (DeRoss brief on appeal at 57)
10 the theory that DeMartino had actually performed the killing.
11 There was an evidentiary basis for such a theory, even if it later
12 turned out--as learned after trial--that DeMartino was involved
13 only in the planning of the murder and did not himself pull the
14 trigger. There was evidence, discussed in Parts I.A. and C.
15 above, that DeMartino harbored a grudge against Cutolo. And there
16 was testimony from Florida that DeMartino was inordinately happy
17 that Cutolo was gone, stating that Cutolo had gotten what "he
18 deserved" (Tr. 2297); documentary evidence that a month after
19 Cutolo was murdered Persico paid DeMartino \$50,000 (see GX 59);
20 and evidence that while DeMartino "from the beginning" had been
21 feared, "it was even more so" after Cutolo's disappearance (Tr.
22 2299). In any event, what was important for the charges against
23 Persico and DeRoss was proof that they had ordered and arranged
24 the murder, not the identification of precisely which of the
25 Colombo family members had carried out their instructions. And,

1 as shown in Parts I.A., B., and C. above and discussed in Parts
2 II.B.1. and II.C. below, evidence as to the former was abundant.

3 B. The Sufficiency Challenges

4 On appeal, defendants pursue arguments made in their Rule
5 29 motions for acquittal in the district court. DeRoss contends
6 that the evidence was insufficient to support his conviction of
7 murder in aid of racketeering. Both Persico and DeRoss contend
8 that the evidence was insufficient to support their convictions on
9 the two witness tampering counts. We find no merit in any of
10 their contentions.

11 Under Rule 29, "the court on the defendant's motion must
12 enter a judgment of acquittal of any offense for which the
13 evidence is insufficient to sustain a conviction." Fed. R. Crim.
14 P. 29(a). The test for sufficiency is whether, as to a given
15 count, a "rational trier of fact could have found the defendant
16 guilty beyond a reasonable doubt." United States v. Jackson, 335
17 F.3d 170, 180 (2d Cir. 2003) ("Jackson"). The district court

18 must make that determination with the evidence
19 against a particular defendant viewed in a light that
20 is most favorable to the government, and with all
21 reasonable inferences resolved in favor of the
22 government. The jury may reach its verdict based
23 upon inferences drawn from circumstantial evidence,
24 and the evidence must be viewed in conjunction, not
25 in isolation.

26 United States v. Eppolito, 543 F.3d 25, 45 (2d Cir. 2008)
27 ("Eppolito") (internal quotation marks, brackets, and ellipses
28 omitted), cert. denied, 129 S. Ct. 1027 (2009).

1 "Our mandate on appeal reflects the same standard, as we
2 review the grant or denial of a judgment of acquittal under Rule
3 29 de novo," id., considering the evidence as a whole rather than
4 piecemeal, see, e.g., id.; United States v. Guadagna, 183 F.3d
5 122, 130 (2d Cir. 1999), and viewing the evidence in the light
6 most favorable to the government, see, e.g., Eppolito, 543 F.3d
7 at 45; United States v. Pizzonia, 577 F.3d 455, 462 (2d Cir.
8 2009), cert. denied, 130 S. Ct. 1088 (2010).

9 Viewing the evidence in the light most favorable
10 to the government means "'crediting every inference
11 that the jury might have drawn in favor of the
12 government,'" United States v. Temple, 447 F.3d
13 at 136-37 (quoting United States v. Walker, 191 F.3d
14 326, 333 (2d Cir.1999)), and recognizing that the
15 government's evidence need not exclude every other
16 possible hypothesis, see, e.g., United States v.
17 Espaillet, 380 F.3d [713,] 718 [(2d Cir. 2004)];
18 United States v. Martinez, 54 F.3d 1040, 1043 (2d
19 Cir.), cert. denied, 516 U.S. 1001 (1995); United
20 States v. Ragosta, 970 F.2d 1085, 1090 (2d Cir.),
21 cert. denied, 506 U.S. 1002 (1992). As "it is the
22 task of the jury, not the court, to choose among
23 competing inferences that can be drawn from the
24 evidence," United States v. Jackson, 335 F.3d at 180,
25 when there are such competing inferences, we must
26 defer "to the jury's choice," United States v.
27 Morrison, 153 F.3d 34, 49 (2d Cir.1998).

28 Eppolito, 543 F.3d at 45. Where there are conflicts in the
29 testimony, we must defer to the jury's resolution of the weight of
30 the evidence and the credibility of the witnesses. See, e.g.,
31 United States v. Coté, 544 F.3d 88, 99 (2d Cir. 2008) ("[t]he
32 court must give full play to the right of the jury to determine
33 credibility"); United States v. Morrison, 153 F.3d at 49; United
34 States v. Stratton, 779 F.2d 820, 828 (2d Cir. 1985), cert.
35 denied, 476 U.S. 1162 (1986). The conviction must be upheld if

1 "any rational trier of fact could have found the essential
2 elements of the crime beyond a reasonable doubt." Jackson v.
3 Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). These
4 standards apply whether the evidence being reviewed is direct or
5 circumstantial. See Glasser v. United States, 315 U.S. 60, 80
6 (1942).

7 With these principles in mind, we turn to defendants'
8 various sufficiency challenges.

9 1. DeRoss's Challenge to the Murder Count

10 Count One charged defendants with murder in aid of
11 racketeering, or aiding and abetting such a murder, in violation
12 of 18 U.S.C. §§ 1959(a)(1) and 2. Section 2 provides, in
13 pertinent part, that whoever "aids, abets, . . . commands, induces
14 or procures" the commission of a federal offense, or "willfully
15 causes an act to be done which if directly performed by him"
16 would be a federal offense, "is punishable as a principal."
17 18 U.S.C. § 2(a) and (b). Section 1959(a) provides, in pertinent
18 part, that

19 [w]hoever, . . . for the purpose of . . .
20 maintaining or increasing position in an enterprise
21 engaged in racketeering activity, murders . . . any
22 individual in violation of the laws of any State or
23 the United States, or attempts or conspires so to do,
24 shall be punished--

25 (1) for murder, by death or life imprisonment,
26 or a fine under this title, or both

27 18 U.S.C. § 1959(a)(1). To convict a defendant of such a murder,
28 the government must prove beyond a reasonable doubt (1) that the

1 organization was a RICO enterprise, (2) that the enterprise was
2 engaged in racketeering activity as defined in RICO, (3) that the
3 defendant in question had a position in the enterprise, (4) that
4 that defendant committed or aided and abetted the murder, and (5)
5 that his general purpose in so doing was to maintain or increase
6 his position in the enterprise. See generally United States v.
7 Rahman, 189 F.3d 88, 126 (2d Cir.), cert. denied, 528 U.S. 982
8 (1999); United States v. Concepcion, 983 F.2d 369, 381 (2d Cir.
9 1992), cert. denied, 510 U.S. 856 (1993). "Liability for aiding
10 and abetting can be established by showing . . . that the
11 defendant 'consciously assisted the commission of the specific
12 crime in some active way.'" United States v. Ogando, 547 F.3d
13 102, 107 (2d Cir. 2008) (quoting United States v. Medina, 32 F.3d
14 40, 45 (2d Cir. 1994)).

15 DeRoss challenges the sufficiency of the evidence only as
16 to the fourth element of the murder-in-aid-of-racketeering count,
17 contending that there was no evidence that he aided, abetted, or
18 committed any voluntary act to bring about the disappearance or
19 murder of Cutolo. (See DeRoss brief on appeal at 42.) This
20 contention is meritless. As set out in detail in Parts I.A., B.,
21 and C. above, the evidence against DeRoss included the following:

22 (1) DeRoss harbored anger at Cutolo resulting from
23 their reversal of positions in the Colombo Family hierarchy,
24 with DeRoss originally having been Cutolo's captain, and
25 Cutolo becoming the family's underboss and superior to
26 DeRoss in 1998;

27 (2) in mid-April 1999, DeRoss asked Campanella, with
28 seriousness, how Campanella would feel about killing Cutolo;

1 (3) in mid-May 1999, DeRoss met with Floridaia and, with
2 seriousness, told him not to worry about his troubles with
3 Cutolo because "[t]hings are going to change";

4 (4) on the afternoon of May 26, 1999, Cutolo
5 disappeared;

6 (5) at 5 a.m. on May 27, barely eight hours after
7 Cutolo could be considered missing, DeRoss arrived at
8 Cutolo's home demanding--in tones implying that he had the
9 right to them--the books and records maintained by Cutolo,
10 who was above him in the Colombo Family hierarchy;

11 (6) one week after Cutolo's disappearance, DeRoss, with
12 Persico standing right behind him, told DiLeonardo, the
13 Gambino Crime Family captain who was the liaison with the
14 Colombo Family, that Cutolo had been missing for a week and
15 that DiLeonardo would be dealing with Persico and DeRoss
16 instead of Cutolo from then on, thereby informing DiLeonardo
17 in Mafia-speak that Cutolo was dead;

18 (7) two weeks after Cutolo's disappearance, DeRoss told
19 Campanella that Cutolo was gone because he was "getting too
20 powerful"; that if Persico went back to jail as expected,
21 "Bill would have took over the family" and "would have never
22 gave the family back to Allie Boy"; that, therefore, "Bill
23 had to go";

24 (8) three weeks after Cutolo's disappearance, having
25 unsuccessfully solicited Campanella's help in killing
26 Cutolo, DeRoss, with Persico beside him, said "Bill is gone"
27 and attempted to buy Campanella's allegiance and silence by
28 canceling Campanella's \$300,000 debt;

29 (9) shortly after Cutolo disappeared, DeRoss became the
30 Colombo Family's new underboss; and

31 (10) in 2004, when DeRoss and Floridaia were
32 incarcerated and spending their days together in the
33 Metropolitan Detention Center, DeRoss admitted his
34 orchestration of Cutolo's murder, saying "he brought Billy
35 into the family. . . . [A]nd he took him out of the
36 family."

37 In sum, the evidence easily permitted the jury to find
38 that DeRoss attempted to get Campanella to help kill Cutolo; that
39 shortly before Cutolo disappeared, DeRoss reassured Floridaia that
40 Cutolo would soon be dead; that DeRoss knew Cutolo was dead on May

1 26, allowing DeRoss with impunity to invade Cutolo's home
2 at 5 a.m. on May 27 demanding the Colombo Family books and
3 records; that DeRoss told others that Cutolo was dead and said
4 that Persico had needed to have Cutolo killed; and that when
5 DeRoss was in jail with Floridaia, DeRoss said he had killed
6 Cutolo. The evidence was ample to permit the jury to find that
7 DeRoss participated in the planning and orchestration of Cutolo's
8 murder.

9 2. The Witness Tampering Counts

10 Counts Six and Five charged Persico and DeRoss with
11 witness tampering and conspiracy to commit witness tampering,
12 respectively, in violation of 18 U.S.C. §§ 1512(b)(1) & (b)(2)(A)
13 and 18 U.S.C. § 371, in connection with DeRoss's meeting with
14 Peggy Cutolo, Cardinale, and Cutolo Jr. to dissuade them from
15 testifying to what they really believed had happened to Cutolo.
16 Section 1512, as it read at the time of trial, made it unlawful,
17 in pertinent part, to

18 knowingly use[] intimidation or . . . threaten[]
19 . . . another person, or attempt[] to do so, . . .
20 with intent to--

21 (1) influence . . . or prevent the
22 testimony of any person in an official
23 proceeding; [or]

24 (2) cause or induce any person to--

25 (A) withhold testimony . . . from an
26 official proceeding

27 18 U.S.C. §§ 1512(b)(1) & (b)(2)(A) (2000). In order to establish
28 a violation of § 1512, the government must prove a "nexus" between

1 the defendant's conduct and a particular official proceeding.
2 Arthur Andersen LLP v. United States, 544 U.S. 696, 707-08 (2005);
3 see, e.g., United States v. Kaplan, 490 F.3d 110, 125 (2d Cir.
4 2007) ("persuader must believe that his actions are likely to
5 affect a particular, existing or foreseeable proceeding"); cf.
6 United States v. Aquilar, 515 U.S. 593, 598-600 (1995) (finding
7 "nexus" element in 18 U.S.C. § 1503, which prohibits, inter alia,
8 obstructing or influencing "the due administration of justice," or
9 "endeavor[ing]" to do so, "corruptly or by threats or force").
10 The "official proceeding" referred to in § 1512 "need not be
11 pending or about to be instituted at the time of the offense,"
12 18 U.S.C. § 1512(e)(1) (2000), and "the testimony . . . need not
13 be admissible in evidence," id. § 1512(e)(2) (2000).

14 Persico and DeRoss contend that there was no evidence that
15 DeRoss exerted pressure on Cutolo family members to lie or that he
16 intended to interfere with any witness's testimony in an official
17 proceeding. Persico also contends that there was insufficient
18 evidence to show that he was involved in any of the conduct
19 attributed to DeRoss. We are unpersuaded.

20 In October 1999, Persico was arrested for violation of his
21 bail conditions (see Tr. 3946, 3949), and it is undisputed that
22 "[a]s early as October of '99" the government "made it clear they
23 were looking at Mr. Persico as a target" of its investigation into
24 Cutolo's disappearance (id. at 3684, 3676-77 (testimony and
25 statement of Persico's attorneys)). Thus, it was plainly
26 foreseeable that there would be a grand jury proceeding at which

1 Peggy Cutolo, Cardinale, and/or Cutolo Jr. might be called to
2 testify. And indeed, it was foreseen, for in March 2000, DeRoss
3 met with the Cutolos for a conversation (which Cutolo Jr. secretly
4 tape-recorded) and told the Cutolos that the government "may be
5 trying to build a case" against Persico (GX 67B at 7). Cardinale
6 understood that they were talking about a future "case against
7 Allie for [her] father's disappearance." (Tr. 327-28.) In that
8 conversation, it was clear that DeRoss was meeting with the
9 Cutolos on behalf of Persico; DeRoss said he had come to tell them
10 that "the other fella would like to send an investigator" to talk
11 to them (GX 67B at 4), and he stated that "the investigator is
12 Allie's investigator" (id. at 6). When Peggy Cutolo expressed her
13 reluctance, and Cutolo Jr. said he did not want his mother to have
14 to reopen the emotional wounds, DeRoss indicated that Persico
15 would not be happy if they refused to talk to the investigator.
16 (See GX 67B at 4 ("if you tell the [investigator] no, people may
17 get bad feelings"); id. at 6 ("I don't know how personally he'll
18 react."); id. at 8 ("I don't want him to get any idea.")) And
19 after having secured a commitment that the Cutolos would speak
20 with Persico's investigator, DeRoss said, "I'll get back to him
21 today. And uh, tell him you'll be too happy to help. That's my
22 words to him." (Id. at 15.) There can be no serious question
23 that the evidence was sufficient to permit the jury to infer that
24 DeRoss was speaking to the Cutolos on orders from Persico.

25 In his attempts to persuade the Cutolos to speak to
26 Persico's investigator, DeRoss also indicated that the Cutolos

1 should not speak candidly in any government investigation. For
2 example, when Cardinale envisioned to DeRoss the possibility that
3 her mother might be overcome by emotion and let her "true
4 feelings" come out, DeRoss's response was that there would be no
5 harm if that happened only in the meeting with the investigator:
6 "the investigator is Allie's investigator, she's not the law."
7 (GX 67B at 6 (emphasis added).) Thus, when DeRoss told the
8 Cutolos "Don't show your feelings. What you got in your heart,
9 what you got in your stomach" (GX 67B at 5 (emphasis added)),
10 those instructions were easily understood by the Cutolos to mean
11 that if they "talk[ed] to the police about what [they] actually
12 thought, that could hurt [Allie]" (Tr. 326). In urging them to
13 cooperate with Persico, DeRoss pointed out that he, DeRoss, was
14 "in a position" to prevent Peggy Cutolo from getting "hurt"
15 (GX 67B at 6; see Tr. 326-27)--a statement that plainly implied to
16 the Cutolos that he was also in a position to do precisely the
17 opposite. And in addition to mentioning the possibility of harm
18 to Peggy, DeRoss also pointed to that prospect for Cutolo Jr. (see
19 GX 67B at 5; Tr. 324-25), for Cardinale's husband (see GX 67B
20 at 5-6; Tr. 325-26), and for Cardinale's young daughters (see
21 GX 67B at 5 ("You got little, you got kids here")). "Worry about
22 your family," he said (id. at 8); "You understand what I'm telling
23 you babe? You've been, you've been around this life" (id. at 6).

24 The Cutolos did understand. Peggy Cutolo testified that
25 she knew that DeRoss was explicitly threatening her and her
26 children and that he was telling her to "[k]eep [her] mouth shut."

1 (Tr. 632.) And Cardinale testified that she believed that if the
2 Cutolos told anyone "what we really felt, that it would be taken
3 out on my husband or my brother, even my kids." (Id. at 331.)

4 In sum, the evidence was sufficient for the jury to find
5 that Persico had been informed by the government that he was the
6 target of an investigation into the disappearance of Cutolo; that
7 a grand jury proceeding on that matter was thus foreseeable to
8 Persico and DeRoss; that Persico sent DeRoss to visit the Cutolos;
9 that DeRoss told the Cutolos that the government might be trying
10 to build a case against Persico; that DeRoss told the Cutolos not
11 to tell anyone acting for the government what they really believed
12 had happened to Cutolo; and that DeRoss threatened harm to Peggy
13 Cutolo, Cutolo Jr., Cardinale, Cardinale's husband, and their
14 young daughters if the Cutolos spoke candidly to anyone conducting
15 an official investigation. While DeRoss did from time to time
16 utter the words "[t]ell the truth" (e.g., GX 67B at 11), his other
17 recorded statements and the testimony of Peggy Cutolo and
18 Cardinale provided sufficient evidence for the jury to conclude
19 that the Cutolos reasonably understood DeRoss to mean that,
20 insofar as any government inquiry was concerned, they should not
21 tell the truth.

22 C. The New-Trial Motions Based on the Discovery of Cutolo's Body

23 Persico and DeRoss pursue their contention that they are
24 entitled to a new trial based on the government's posttrial
25 discovery of Cutolo's buried body, and its new information that

1 DeMartino, while involved in planning Cutolo's murder, was not the
2 actual shooter. Persico argues that the government's case against
3 him was weak, shored up only by the summation "theory that
4 Vincent 'Chickie' DeMartino had killed Cutolo at Persico's behest
5 and dumped Cutolo's body in the ocean." (Persico brief on appeal
6 at 24; see id. at 25-26.) DeRoss argues that "[h]ad the jury been
7 informed that DeMartino was not the shooter and that the evidence
8 demonstrated the involvement of three other individuals from
9 another Colombo crew, the jury would have certainly acquitted
10 DeRoss because the government's entire theory was that DeRoss
11 carried out the order by directing DeMartino to murder Cutolo."
12 (DeRoss brief on appeal at 38.) We reject all of defendants'
13 contentions.

14 The Federal Rules of Criminal Procedure allow the district
15 court, upon the defendant's motion, to "grant a new trial if the
16 interest of justice so requires." Fed. R. Crim. P. 33(a). Our
17 standard for the grant of such a motion requires that

18 (1) the evidence be newly discovered after trial; (2)
19 facts are alleged from which the court can infer due
20 diligence on the part of the movant to obtain the
21 evidence; (3) the evidence is material; (4) the
22 evidence is not merely cumulative or impeaching; and
23 (5) the evidence would likely result in an acquittal.

24 United States v. Owen, 500 F.3d 83, 87-88 (2d Cir. 2007) ("Owen"),
25 cert. denied, 552 U.S. 1237 (2008). "The 'ultimate test' is
26 'whether letting a guilty verdict stand would be a manifest
27 injustice There must be a real concern that an innocent
28 person may have been convicted.'" United States v. Canova, 412

1 F.3d 331, 349 (2d Cir. 2005) (quoting United States v. Ferguson,
2 246 F.3d 129, 134 (2d Cir. 2001)).

3 "The motion is not favored," United States v. Gilbert, 668
4 F.2d 94, 96 (2d Cir. 1981), cert. denied, 456 U.S. 946 (1982), and
5 the denial of such a motion will not be reversed except for abuse
6 of discretion, see, e.g., United States v. Mayo, 14 F.3d 128, 132
7 (2d Cir. 1994); United States v. Siddiqi, 959 F.2d 1167, 1173 (2d
8 Cir. 1992); United States v. Parker, 903 F.2d 91, 103 (2d Cir.),
9 cert. denied, 498 U.S. 872 (1990).

10 The district court denied defendants' discovery-of-the-
11 body new-trial motions principally on the ground that they failed
12 to establish the third and fifth requirements of the Owen
13 standard, i.e., that the new evidence be material and that it be
14 likely to result in an acquittal. The court noted that the
15 government had not contended that either Persico or DeRoss
16 actually pulled the trigger or that either was even present at
17 Cutolo's murder, and it saw no contradiction between the
18 government's theory of the murder, i.e., that Persico and DeRoss
19 ordered and arranged for others to execute Cutolo, and the
20 discovery of Cutolo's body, which the coroner had determined
21 evidenced a homicide. See District Court 2008 Order at 25. As
22 the court stated in denying defendants' motions for
23 reconsideration, "the shooter's identity and the burial site
24 location are relevant, but neither are exculpatory, nor do they
25 serve to impeach the credibility of any of the government's key
26 witnesses." Memorandum and Order dated February 17, 2009, at 6.

1 We agree. Although Persico and DeRoss argue that the
2 discovery of Cutolo's body undercut the government's "entire
3 theory" at trial (e.g., DeRoss brief on appeal at 38), that
4 discovery in fact undercut only the theory advanced in summations
5 as to how Cutolo's dead body had been concealed. Nothing about
6 the discovery of the body undercuts the government's contention
7 that the murder was ordered and arranged by Persico and DeRoss.

8 Persico, although not challenging the legal sufficiency of
9 the evidence to support the jury's verdict against him on the
10 murder count, contends that the discovery of Cutolo's body
11 warranted the granting of his motion for a new trial because the
12 government's case against him was unpersuasive without the
13 suggestion that he had called the marina to arrange for Cutolo's
14 burial at sea. Persico argues that the case against him was
15 "stitched together" and "quite thin," "prov[ing] little more than
16 that he may have learned that Cutolo was dead and apparently was
17 not saddened by the news." (Persico brief on appeal at 20-21.)
18 Persico's characterizations do not do justice to the record. As
19 described in Parts I.A., B., and C. above, the record included
20 evidence that:

21 (1) in the Colombo Family war centering on whether the
22 new boss would be Orena or Persico, in which a dozen people
23 were killed, Cutolo had supported Orena;

24 (2) Persico was aware in 1999 that Cutolo himself
25 wanted to become the family's boss--and might try to kill
26 Persico to achieve that goal--giving Persico motive to kill
27 Cutolo;

28 (3) Persico needed to have Cutolo killed because
29 Persico was about to go to jail on the gun charge and Cutolo

1 had gotten so powerful that he would have taken, and refused
2 to yield, control of the family;

3 (4) Cutolo expected to meet Persico on May 26 at 92nd
4 and Shore, but Persico never showed up;

5 (5) Cutolo disappeared from 92nd and Shore on May 26
6 and was killed;

7 (6) after May 26, Persico never tried to reach Cutolo
8 again;

9 (7) an underboss cannot be killed without permission
10 from the family's boss;

11 (8) after underboss Cutolo's disappearance, Persico
12 launched no investigation in search of an explanation;

13 (9) Persico was present for and silently endorsed
14 DeRoss's statements to DiLeonardo and Campanella shortly
15 after May 26 indicating that Cutolo had been killed; and

16 (10) Persico himself told the boss and underboss of the
17 Bonanno Crime Family that Cutolo was gone because he had
18 tried to "take what[wa]s not his," i.e., control of the
19 Colombo Crime Family.

20 In sum, there was solid evidence, taken as a whole, that
21 Persico had a strong motive to have Cutolo killed; that Persico
22 made or endorsed statements telling important members of other
23 crime families that Cutolo had been killed; and that Persico lured
24 Cutolo to a secluded location from which he could be kidnaped to
25 be killed. In light of this evidence and the evidence against
26 DeRoss discussed in Part II.B.1. above, we see no likelihood that
27 innocent men have been convicted, no injustice in the guilty
28 verdicts, and no error or abuse of discretion in the district
29 court's conclusion that the discovery of Cutolo's body did not
30 warrant the granting of a new trial.

1 D. Other Arguments in Support of a New Trial

2 In support of their arguments for a new trial, Persico and
3 DeRoss advance other contentions that do not require extended
4 discussion. Principally, they contend that the government
5 violated its Brady obligations, and that they were denied the
6 right to compulsory process by the high cost of producing a
7 witness they wished to have testify for the defense.

8 1. The Alleged Brady Violation

9 At trial, Cardinale testified on cross-examination that
10 after her father's disappearance, her mother found "[a] little
11 over a million dollars" hidden in the vents of their home and that
12 that money was not turned over to the government. (Tr. 410.)
13 Peggy Cutolo testified that she had found \$1.65 million, that she
14 had disclosed that fact to the government, and that the government
15 had not required her to forfeit the money or to pay taxes on it.
16 (See id. at 624, 696-98.) Defendants contend that the government
17 violated its Brady obligation to disclose this impeachment
18 evidence because it made no "formal disclosure" of these facts
19 until after trial. (Persico brief on appeal at 44.) They contend
20 that without a formal disclosure, they "had every reason to
21 believe that [Peggy's] testimony was false"--and that the
22 corroborative testimony of an FBI agent was also false (id.)--and
23 hence they were deprived of the opportunity to argue to the jury
24 that the government's allowing Peggy to keep \$1.65 million made
25 all of her testimony unworthy of belief.

1 It is well established that the government has an
2 obligation under the Due Process Clause to disclose to the
3 defendant evidence that is material. See, e.g., Brady, 373 U.S.
4 at 87. Evidence is material, however, only "if there is a
5 reasonable probability that, had the evidence been disclosed to
6 the defense, the result of the proceeding would have been
7 different." Strickler v. Greene, 527 U.S. 263, 280 (1999)
8 (internal quotation marks omitted); Kyles v. Whitley, 514 U.S.
9 419, 433 (1995) (internal quotation marks omitted).

10 These principles apply both to information going to the
11 heart of the defendant's guilt or innocence and to information
12 that might well alter the jury's evaluation of the credibility of
13 a significant prosecution witness. See, e.g., Giglio, 405 U.S.
14 at 154; Napue v. Illinois, 360 U.S. 264, 269 (1959). However,
15 where the undisclosed evidence merely furnishes an additional
16 basis on which to challenge a witness whose credibility has
17 already been shown to be questionable or is subject to extensive
18 attack by reason of other evidence, the undisclosed evidence may
19 properly be viewed as cumulative, and hence not material, and not
20 worthy of a new trial. See, e.g., United States v. Avellino, 136
21 F.3d 249, 257, reh'g denied, 136 F.3d 262 (2d Cir. 1998); United
22 States v. Helmsley, 985 F.2d 1202, 1210 (2d Cir. 1993); United
23 States v. Petrillo, 821 F.2d 85, 90 (2d Cir. 1987).

24 In sum, undisclosed impeachment evidence is not material
25 in the Brady sense when, although "possibly useful to the

1 defense," it is "not likely to have changed the verdict." Giglio,
2 405 U.S. at 154 (internal quotation marks omitted).

3 The district court, in rejecting defendants' posttrial
4 motions for a new trial on the ground of the alleged Brady
5 violation, found, inter alia, that, for several reasons, the
6 timing of the disclosure did not cause defendants any prejudice.
7 The court noted that the facts were disclosed on the fourth day of
8 a trial that continued for some six or seven weeks thereafter, and
9 it concluded that "the Defendants had more than ample time to
10 assimilate the evidence and to effectively use it at trial."
11 District Court 2008 Order at 40. We agree.

12 Cardinale was the second of the government's 31 trial
13 witnesses (the first being the mechanic who left Cutolo at 92nd
14 and Shore on May 26); Cardinale's revelations as to the large sum
15 of money found and retained came during her cross-examination by
16 the defense. The third witness at trial was Peggy Cutolo, who had
17 actually found and been allowed to keep the money. The government
18 brought out during its direct examination of Peggy that she had
19 found \$1.65 million, that she had disclosed that fact to the
20 government, and that she had been allowed to keep the money. (See
21 Tr. 624.) Thus, the government affirmatively elicited from
22 Peggy the information that defendants wish they had used in
23 arguments attacking her credibility. As the district court noted,
24 the relevant testimony was given early in the trial. After that
25 point, it cannot be said that the Brady material was undisclosed;
26 and the defense had another six weeks to use it. Defendants'

1 complaint that there was no "formal disclosure" until after the
2 trial provides no basis for a new trial.

3 Later in the trial, FBI Special Agent Gary J. Pontecorvo
4 was called as a witness for the defense; he testified that the
5 Cutolos had advised him in early 2001 that they were in possession
6 of some \$1.6 million in cash, which Pontecorvo assumed had been
7 amassed from Cutolo's illegal activities. (See id. at 5292-94.)
8 Pontecorvo testified that, after being so advised, he promptly
9 informed the United States Attorney's Office ("USAO"); thereafter
10 Peggy Cutolo or her attorney dealt directly with the USAO with
11 regard to those funds, to determine whether some or all had to be
12 forfeited or whether she would have to pay taxes on it (see id.
13 at 5294-96). Although defendants argue here that "[t]hroughout
14 the trial, the defense labored under the misimpression that Mrs.
15 Cutolo and Agent Pontecorvo were testifying falsely" (Persico
16 brief on appeal at 45), they made that assumption at their peril.
17 Nothing in the Constitution gives defendants the right to assume
18 that the government has deliberately elicited or countenanced
19 false testimony and then to seek a new trial on the basis that
20 they did not know the testimony was true.

21 The district court also concluded that the evidence that
22 Peggy Cutolo was allowed to keep the \$1.65 million was
23 "immaterial," given that defendants possessed--and used--other
24 grounds to attack her credibility. Those grounds included Peggy's
25 manifest antipathy toward Persico and DeRoss because she believed
26 they had ordered her husband's death, and her internally

1 inconsistent testimony as to precisely where she found the money.
2 Indeed, while Persico argues that belated disclosure of the
3 information that Peggy found and was allowed to keep \$1.65 million
4 "significantly impaired defense counsel's ability to impeach the
5 credibility of the key prosecution witness" (Persico brief on
6 appeal at 48), he also acknowledges that even without impeachment
7 on the basis of the retained money, "Mrs. Cutolo was anything but
8 a credible witness. As the trial court noted, her testimony
9 varied 'from one day to the next . . . on very critical things'"
10 (id. at 23 (quoting Tr. 5488)).

11 The district court further noted that "the testimony of
12 Peggy Cutolo and Cardinale was only a small portion of the
13 evidence that led to Defendants' convictions," and it concluded
14 that the evidence as to the money Peggy found and was allowed to
15 keep "most certainly would not have damaged the credibility of the
16 virtual parade of other witnesses that testified against the
17 Defendants, nor invalidated the circumstantial evidence on which
18 the jury most certainly relied." District Court 2008 Order
19 at 40-41. The court concluded that "there was virtually no
20 probability that disclosure of this information at an earlier time
21 would have changed the outcome of this case." Id. at 40.

22 Our review of the record persuades us that the conclusions
23 of the district court were correct and that defendants'
24 contentions that they should be granted a new trial on account of
25 the alleged Brady violation were properly rejected.

1 2. Persico's Request for the Production of Massino

2 After Vitale testified that Persico told him and Massino,
3 in discussing Cutolo in the latter part of 1999, that "a person
4 can't take what's not his" (Tr. 2866), thereby informing them that
5 Cutolo had been killed because of his desire to usurp Persico's
6 position as boss of the Colombo Family, Persico informed the
7 government that he wished to call Massino as a witness. Massino
8 was then in the Witness Security Program, and Persico was informed
9 that the cost of transporting Massino--which Persico was expected
10 to pay--would be some \$40,000 (see Persico brief on appeal at 48).
11 In light of the expense, Persico's counsel suggested that she be
12 allowed to question Massino by video conferencing, a suggestion
13 that the government rejected for reasons of security; after
14 objecting that the expense was prohibitive, Persico decided not to
15 call Massino. (See Tr. 3739, 3915-16, 4281.) On appeal, Persico,
16 joined by DeRoss, contends that the requirement that Persico pay
17 "an exorbitant price to bring a witness to court (a price he
18 declined to pay) unduly burdened his compulsory process rights."
19 (Persico brief on appeal at 48.) Given the present record, we
20 disagree.

21 A defendant in a criminal trial has a Sixth Amendment
22 "right . . . to have compulsory process for obtaining witnesses in
23 his favor." U.S. Const. amend VI. To establish a violation of
24 that right, the "defendant must demonstrate that he was deprived
25 of the opportunity to present a witness who would have provided
26 testimony that was 'both material and favorable to his defense.'"

1 Howard v. Walker, 406 F.3d 114, 132 (2d Cir. 2005) (quoting United
2 States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)). To meet
3 this standard, the defendant need not "render a detailed
4 description of [the] lost testimony," Valenzuela-Bernal, 458 U.S.
5 at 873; but he must make a "plausible showing" that the testimony
6 would have been material and favorable, id. "In addition, he must
7 show that 'there is a reasonable likelihood that the testimony
8 could have affected the judgment of the trier of fact.'" United
9 States v. Ginsberg, 758 F.2d 823, 831 (2d Cir. 1985) (quoting
10 Valenzuela-Bernal, 458 U.S. at 874).

11 Generally, "financially able criminal defendants must bear
12 the cost of bringing their own witnesses to the trial." United
13 States v. Garmany, 762 F.2d 929, 934 (11th Cir. 1985), cert.
14 denied, 474 U.S. 1062 (1986). However, a defendant can have the
15 government bear the cost if he persuades the court that he is
16 unable to pay and shows "the necessity of the witness's presence
17 for an adequate defense." Fed. R. Crim. P. 17(b).

18 Nothing in the present case supports the contention that
19 these defendants were deprived of the right to compulsory process.
20 First, the reason the cost of having Massino brought to the trial
21 was so high was that Persico waited until late in the trial to
22 inform the government that he wanted to call Massino as a witness.
23 Defendants had been notified in mid-October 2007--weeks before the
24 trial began--that Vitale would be called as a government witness
25 and would "testify to a conversation in which 'Persico advised
26 [him] that Persico had killed Cutolo because Cutolo had attempted

1 to take over the crime family from Persico'" (Persico brief on
2 appeal at 48-49 (quoting a government memorandum to the district
3 court dated October 19, 2007)). The government, by letter dated
4 October 17, 2007, had asked that Persico inform the government "by
5 October 26, 2007" of "any cooperating witnesses the defense may
6 call," pointing out that "the United States Marshal Service
7 requires significant advance notice for production of such
8 witnesses." Persico did not inform the government of his desire
9 to call Massino until more than six weeks later, on November 30.
10 The district court noted that the high cost of bringing Massino to
11 the trial involved first-class air travel for Massino and four or
12 five marshals "because there was no advance notice." (Tr. 3916.)

13 Second, at no point has Persico suggested that he lacked
14 the ability to pay the cost of bringing Massino to the trial. Had
15 Persico been unable to pay, he could have applied to the district
16 court for relief under Rule 17(b); he did not.

17 Finally, Persico has not made any showing that Massino's
18 testimony would have been material or favorable to his defense.
19 He supposes that because the government itself did not call
20 Massino to testify, Massino likely did not recall the Persico
21 conversation, described by Vitale, indicating that Persico had had
22 Cutolo killed; and he argues that Massino's testimony that he had
23 no such recollection "would have gone far to demonstrate that no
24 such conversation had occurred" (Persico brief on appeal at 54).
25 This argument piles speculation upon supposition and falls far
26 short of providing a basis for a new trial.

1

CONCLUSION

2 We have considered all of defendants' arguments on these
3 appeals--including their contentions that testimony by some
4 witnesses was incredible as a matter of law--and have found them
5 to be without merit. The judgments of the district court are
6 affirmed.