



1 Judge KEARSE dissents in a separate opinion.

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1 DENNIS JACOBS, Circuit Judge:

2 Three employees of General Electric Company ("GE")  
3 conducted a multi-year scheme to fix below-market rates on  
4 interest paid by GE to municipalities. When municipalities  
5 receive proceeds of tax-exempt bond issues, they invest  
6 those proceeds (with GE and others) until such time as the  
7 funds become needed for the underlying capital projects. To  
8 prevent abuse of municipal bonds for pure arbitrage, the  
9 Internal Revenue Code and Treasury regulations require a  
10 municipality to rebate to the Treasury any excess over the  
11 municipal bond rate. To guarantee a market rate of interest  
12 on these investments, municipalities are required to use  
13 competitive bidding. The conspiracy between GE employees  
14 and brokers depressed the interest rate on the guaranteed  
15 investment contracts paid by unindicted co-conspirator GE;  
16 each instance cheated either the municipalities or the  
17 Treasury (or both).

18 Steven Goldberg, Peter Grimm, and Dominick Carollo  
19 (collectively, "Defendants") were tried and convicted in the  
20 United States District Court for the Southern District of  
21 New York (Baer, J.) of violating the general federal  
22 conspiracy statute, 18 U.S.C. § 371. Goldberg was sentenced

1 principally to four years in prison, Grimm and Carollo to  
2 three. They appeal the judgments of conviction on the  
3 ground (inter alia) that the indictment is barred by the  
4 applicable statutes of limitations. The district court held  
5 that the statute of limitations continued to run during the  
6 period when GE paid the (depressed) interest to the  
7 municipalities, and that the interest payments could  
8 constitute overt acts. We conclude that those payments do  
9 not constitute overt acts in furtherance of the conspiracy.

10  
11 **I**

12 Under the Internal Revenue Code ("Tax Code"), interest  
13 payments on qualifying municipal bonds are exempt from  
14 federal income tax. See I.R.C. § 103(a). Often, municipal  
15 issuers ("issuers") do not expend the proceeds immediately  
16 because the projects financed by the issue may take years to  
17 construct. To generate additional revenue before the funds  
18 are depleted, an issuer may invest in a guaranteed  
19 investment agreement or contract ("GIC") provided by a  
20 financial institution with a high credit rating  
21 ("provider"). GICs typically require periodic interest  
22 payments. Although GICs have a fixed maturity date, the

1 issuer can usually draw down the principal--and thus  
2 terminate the GIC--at any time.<sup>1</sup>

3 To prevent arbitrage, the Tax Code limits the return  
4 that issuers can generate through GICs. See I.R.C. § 148.  
5 In general, any return in excess of the interest on the  
6 bonds must be paid to the Treasury. I.R.C. § 148(f). An  
7 issuer thereby lacks incentive to maximize interest on a GIC  
8 above a rate that equals or exceeds the interest rate paid  
9 on the bonds, and the arbitrage opportunities for a provider  
10 are obvious.

11 To prevent such abuses, Treasury regulations require  
12 issuers to determine for each GIC the fair market value,  
13 calculated as a function of the market interest rate, on the  
14 date of purchase. Treas. Reg. § 1.148-5(d). Market value  
15 is not easily determinable, however, because GICs are not  
16 regularly traded. So the Treasury regulations require as a  
17 safe harbor a competitive bidding process that, if followed,  
18 establishes the fair market value of the GIC for tax  
19 purposes. Treas. Reg. § 1.148-5(d)(6)(iii). Issuers hire  
20 third party brokers to solicit closed bids from at least

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<sup>1</sup> There are sometimes limitations on the number of withdrawals that the issuer can make in a given period, but there is no limit on the size of withdrawals, so long as the funds are used for the underlying capital projects.

1 three providers; each provider offers an interest rate  
2 without knowing the rates offered by the other bidders; and  
3 the winning bidder certifies in writing that it had no prior  
4 opportunity to review the bids of other providers.

5 In 1999, Carollo, Goldberg, and Grimm worked for the  
6 unit of GE that served as a GIC provider. In 2001, Goldberg  
7 left GE and took a position at another provider, Financial  
8 Security Assurance, Inc. ("FSA"). Between August 1999 and  
9 May 2004, the Defendants (on behalf of their employers GE  
10 and FSA) agreed to pay kickbacks to three brokers--Chambers,  
11 Dunhill, Rubin & Co. ("CDR"); Investment Management Advisory  
12 Group, Inc. ("IMAGE"); and UBS PaineWebber, Inc. ("UBS")--  
13 and the brokers obliged by rigging the bidding process in  
14 several ways. In some instances, the broker told a  
15 Defendant what others were bidding, which allowed the  
16 Defendant to lower an initial bid if it significantly  
17 exceeded the second-place bid, or to raise the bid to a  
18 level just high enough to win the contract.<sup>2</sup> In another  
19 case, a broker agreed to keep competitive bidders off the  
20 bid list, which allowed the Defendant to prevail with a low

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<sup>2</sup> While this second practice of raising a bid does not, at first blush, appear to hurt the municipality, in practice it does - the corrupt bidder can intentionally bid low, knowing that the bid can later be raised if need be.

1 bid. And sometimes a broker would rig an auction by asking  
2 certain providers to submit intentionally losing bids.  
3 Depending on the fraudulent bid rate, the municipal bond  
4 rate, and the market interest rate, each deal defrauded the  
5 municipality, the Treasury, or both.

6 On July 27, 2010, a federal grand jury returned an  
7 indictment ("Initial Indictment") charging Carollo,  
8 Goldberg, and Grimm with ten conspiracies. A superseding  
9 indictment narrowed the charges. Six counts charged a two-  
10 object conspiracy in violation of 18 U.S.C. § 371 to defraud  
11 (i) the issuers of money and property through the use of an  
12 interstate wire, in violation of 18 U.S.C. § 1343, and (ii)  
13 the United States. Count Seven charged Carollo and Goldberg  
14 with a substantive wire fraud scheme in violation of 18  
15 U.S.C. § 1343.

16 Defendants moved to dismiss the Superseding Indictment,  
17 arguing that the conspiracy and fraud charges were barred by  
18 the statute of limitations. In an August 2011 order, the  
19 district court dismissed the wire fraud charge because the  
20 government had not alleged any activity within the five-year  
21 limitations period, but declined to dismiss the conspiracy  
22 charges, holding that the alleged conspiracies continued as

1 long as unindicted co-conspirators GE and FSA made interest  
2 payments on the GICs. United States v. Carollo, et al., No.  
3 10-cr-654 (HB), 2013 WL 3875322 at \*2-3 (S.D.N.Y. Aug. 25,  
4 2011).

5 After a three-week trial and three days of  
6 deliberations, a jury convicted Goldberg on four counts,  
7 Grimm on three counts, and Carollo on two counts. The  
8 district court denied Defendants' post-verdict motions,  
9 reiterating that the "conspiracy lasts . . . so long as the  
10 conspirators obtain an economic benefit through artificially  
11 suppressed payments." United States v. Carollo, et al., No.  
12 10-cr-654 (HB), ECF No. 285 at 11 (S.D.N.Y. Nov. 20, 2012).

## 14 II

15 The applicable statutes of limitations are: five years  
16 for general conspiracy, see 18 U.S.C. § 3282(a), and six  
17 years for conspiracy to defraud the United States by  
18 violating the internal revenue laws, see 26 U.S.C. §  
19 6531(1).<sup>3</sup> The Initial Indictment was returned on July 27,

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<sup>3</sup> "[A] conspiracy charge require[s] (a) an agreement between two or more persons to commit [] fraud and (b) an overt act by at least one of the participants in furtherance of that agreement. See 18 U.S.C. § 371." United States v. Archer, 671 F.3d 149, 154 n.1 (2d Cir. 2011).



1 2010. To satisfy the statute of limitations for general  
2 conspiracy, the government must establish that a conspirator  
3 knowingly committed at least one overt act in furtherance  
4 after July 27, 2005; to satisfy the statute of limitations  
5 for a fraud on the United States, the government must  
6 establish at least one overt act in furtherance after July  
7 27, 2004. See United States v. Salmonese, 352 F.3d 608, 614  
8 (2d Cir. 2003) (citing Grunewald v. United States, 353 U.S.  
9 391, 396-97 (1957)).

10 Of the fifty-five overt acts alleged in the Superseding  
11 Indictment, the only ones that involved conduct after July  
12 27, 2004 were the periodic interest payments made by  
13 providers to issuers pursuant to the GICs: "On numerous  
14 occasions, [provider] . . . made payments to municipal  
15 issuers via interstate wire transfer at artificially  
16 determined or suppressed rates." Superseding Indictment ¶¶  
17 22(f) (Count One); 30(f) (Count Two); 38(f) (Count Three);  
18 47(f) (Count Four); 57(f) (Count Five); 64(f) (Count Six).<sup>4</sup>

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<sup>4</sup> Six other alleged overt acts (one per count) referenced specific interest payments. Superseding Indictment ¶¶ 22(g)(iii) (Count One) ("Beginning in approximately July 2004, Provider B made scheduled interest payments via interstate wire transfer to the state housing agency at a rate GRIMM caused to be artificially determined and suppressed, which payments continued until approximately November 1, 2005"); 30(g)(iii) (Count Two) ("Provider B has

1 The Defendants argue that such interest payments cannot  
2 serve as overt acts because the routine payments were  
3 scheduled to continue for years (if not decades) after the  
4 GICs were awarded and after all concerted conduct had ended.  
5 We review this legal claim de novo. Salmonese, 352 F.3d at  
6 614.

7 "[T]he crucial question in determining whether the  
8 statute of limitations has run is the scope of the  
9 conspiratorial agreement, for it is that which determines

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made scheduled interest payments via interstate wire transmissions to the state housing and finance association at artificially determined and suppressed rates, including a payment of approximately \$55,652.43 on or about June 30, 2006."); 38(g)(iii) (Count Three) ("Beginning in approximately late 2000, via interstate wire transfer, Provider B made semi-annual interest payments to a state environmental improvement and energy authority at rates that were artificially determined and suppressed, including a payment on one of the funds of approximately \$35,361.20 on or about June 30, 2006."); 47(g)(iii) (Count Four) ("Provider B made scheduled payments via interstate wire transfer to a state educational assistance foundation at artificially determined and suppressed rates, including a payment of approximately \$43,442.04 on or about November 1, 2006."); 57(g)(iv) (Count Five) ("Beginning approximately in May 2003, Provider A made semi-annual interest payments via interstate wire to the municipal port facility at a rate that was artificially determined, which payments continued until at least October 2006."); 64(g)(iii) (Count Six) ("On or about April 14, 2006, Provider A made, via interstate wire transfer, a payment of principal and interest of approximately \$2,761,041.96 to a state educational facilities authority, which payment was artificially determined and suppressed.").

1 both the duration of the conspiracy, and whether the act  
2 relied on as an overt act may properly be regarded as in  
3 furtherance of the conspiracy.'" Id. (quoting Grunewald,  
4 353 U.S. at 397). Here, the alleged purposes of the  
5 conspiracies were (1) to "deprive municipal issuers of money  
6 by causing them to award investment agreements and other  
7 municipal finance contracts at artificially determined or  
8 suppressed rates, and to deprive the municipal issuers of  
9 the property right to control their assets by causing them  
10 to make economic decisions based on false and misleading  
11 information"; and (2) to "defraud the United States . . .  
12 and the IRS by impeding . . . [the] collection of revenue  
13 due . . . from municipal issuers." Superseding Indictment  
14 ¶¶ 19-20.

15 In United States v. Salmonese, we held that a  
16 conspirator's receipt of anticipated profits from the sale  
17 of stripped warrants constituted an "overt act in  
18 furtherance of an economically-motivated conspiracy." 352  
19 F.3d at 616. We explained that, "where a conspiracy's  
20 purpose is economic enrichment, the jointly undertaken  
21 scheme continues through the conspirators' receipt of 'their  
22 anticipated economic benefits.'" Id. at 615 (citing United

1 States v. Mennuti, 679 F.2d 1032, 1035 (2d Cir. 1982)). The  
2 government relies on that passage to support its view that  
3 each successive payment of interest by an unindicted co-  
4 conspirator is another overt act. Salmonese gets the  
5 government only so far.

6 Salmonese followed the analysis set out in United  
7 States v. Doherty, 867 F.2d 47 (1st Cir. 1989), and that  
8 analysis defeats the government's argument in the  
9 circumstances of the current appeal. In Doherty, police  
10 officers conspired to obtain copies of promotional exams,  
11 and thereby increased their salary payments, which continued  
12 for years after they were increased by means of the fraud.  
13 Doherty nevertheless held that the continuing receipt of the  
14 ill-gotten salaries did not constitute overt acts, and  
15 therefore did not re-start the limitations period.  
16 Following Doherty, Salmonese reasoned that a conspiracy ends  
17 notwithstanding the receipt of anticipated profits "'where  
18 [] the payoff merely consists of a lengthy, indefinite  
19 series of ordinary, typically noncriminal, unilateral  
20 actions . . . and there is no evidence that any concerted  
21 activity posing the special societal dangers of conspiracy  
22 is still taking place.'" Salmonese, 352 F.3d at 616 (citing

1 Doherty, 867 F.2d at 61) (emphasis in original).  
2 Conversely, "'payoffs' could reasonably be viewed as part of  
3 a conspiracy where their receipt 'consists of one action, or  
4 a handful of actions, taking place over a limited period of  
5 time, or where some evidence exists that the special dangers  
6 attendant to conspiracies . . . remain present until the  
7 payoff is received.'" Id. (citing Doherty, 867 F.2d at 61).

8 In Salmonese, the sales of the stripped warrants were  
9 counted as overt acts because they were completed within ten  
10 weeks of the public offering and were "hardly 'indefinite'  
11 in number or 'lengthy' in duration." Id. That analysis  
12 here commands the opposite result.

13 Doherty and Salmonese list features to describe serial  
14 payments that do not constitute overt acts: lengthy,  
15 indefinite, ordinary, typically noncriminal and unilateral.  
16 The list is descriptive rather than exclusive; but  
17 generally, overt acts have ended when the conspiracy has  
18 completed its influence on an otherwise legitimate course of  
19 common dealing that remains ongoing for a prolonged time,  
20 without measures of concealment, adjustment or any other  
21 corrupt intervention by any conspirator.

22

1           The GIC payments here fit that description in every  
2 particular. Payments of interest on a GIC are ordinary  
3 commercial obligations, made pursuant to a common form of  
4 commercial arrangement; they are noncriminal in themselves;  
5 they are made unilaterally by a single person or entity; and  
6 they are made indefinitely, over a long time, typically up  
7 to 20 years or more. Some are still being paid. And since  
8 the government adduced no evidence of overt acts after July  
9 27, 2004 other than the interest payments, "there is no  
10 evidence that any concerted activity posing the special  
11 societal dangers of conspiracy is still taking place."  
12 Salmonese, 352 F.3d at 616 (citing Doherty, 867 F.2d at 61).

13           The government argues that the interest payments are  
14 not "indefinite" because each GIC has a maturity date and  
15 prescribes the number of payments to be made. The  
16 government's position must be that a conspiracy continues so  
17 long as a stream of anticipated payments contains an element  
18 of profit. But that proves too much. A conspiracy to  
19 corrupt the rent payable on a 99-year ground lease would,  
20 under the government's theory, prolong the overt acts until  
21 long after any conspirator or co-conspirator was left to  
22 profit, or to plot.

1 "Indefinite" cannot mean "without end." Even in  
2 Doherty, the salary payments lasted only as long as the  
3 officers' employment. Payments can be "indefinite" either  
4 in the sense that they are of undetermined number or in the  
5 sense that they are prolonged beyond the near future. The  
6 GIC payments are indefinite in both senses.

7 The interest payments continue indefinitely in the  
8 sense that they are prolonged. And the number of payments  
9 is not fixed because they end when and if:

- 10 • the issuer demands the return of all of the  
11 principal to finance the capital project;
- 12 • the GIC is assigned (with the prior written  
13 consent of the issuer); or
- 14 • the provider's credit rating falls below a  
15 specified level, at which point the issuer can  
16 terminate the GIC and withdraw the funds for any  
17 purpose, including reinvestment.

18 In any event, when anticipated economic benefit  
19 continues, in a regular and ordinary course, well beyond the  
20 period "when the unique threats to society posed by a  
21 conspiracy are present," the advantageous interest payment  
22 is the result of a completed conspiracy, and is not in

1 furtherance of one that is ongoing.<sup>5</sup> As the Supreme Court  
2 has explained:

3        Though the result of a conspiracy may be continuing,  
4        the conspiracy does not thereby become a continuing  
5        one. Continuity of action to produce the unlawful  
6        result, or . . . 'continuous co-operation of the  
7        conspirators to keep it up' is necessary.

8  
9 Fiswick v. United States, 329 U.S. 211, 216 (1946)

10 (citations omitted) (quoting United States v. Kissel, 218  
11 U.S. 601, 607 (1910)). The stream of GIC interest payments  
12 does not raise the underlying concern of concerted action,  
13 and therefore is not a continuous action that prolongs the  
14 life of the conspiracy.<sup>6</sup>

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<sup>5</sup> The dissent assumes that because GE was (necessarily) found to be a co-conspirator, its acts over the full term of the contract were acts performed as a co-conspirator and were therefore "overt acts." This argument assumes its own conclusion: characterizing GE's contractual performance over decades as "overt acts" assumes that the conspiracy continued indefinitely over that time notwithstanding that in every other respect it had run its course.

<sup>6</sup> As in Doherty, "the cases the government has cited . . . [are] consistent with this approach." Doherty, 867 F.2d at 62. Nearly every case involved either continued concerted action or a few payments over a short time period. See, e.g., Salmonese, 352 F.3d at 614 (just over a handful of sales over a ten-week period); United States v. Mennuti, 679 F.2d 1032 (2d Cir. 1982) (single purchase of a home); United States v. A-A-A Elec. Co., 788 F.2d 242 (4th Cir. 1986) (payoffs to co-conspirators continued after award of contract); United States v. Girard, 744 F.2d 1170 (5th Cir. 1984) (last payment on one-year government contract made fewer than three months after final payoff to co-conspirators); United States v. Walker, 653 F.2d 1343



1 **CONCLUSION**

2 For the foregoing reasons, we hold that the government  
3 did not allege overt acts within the limitations period.  
4 Accordingly, we reverse the judgments of conviction, and  
5 remand to the district court for dismissal of the  
6 indictment.

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(9th Cir. 1981) (conspirators continued to divide profits from scheme on a yearly basis).

1       KEARSE, Circuit Judge, dissenting:

2                   I respectfully dissent from the majority's decision to reverse the convictions of Messrs.  
3       Grimm, Carollo, and Goldberg ("defendants") on statute-of-limitations grounds. In my view, a major  
4       flaw in the majority's opinion is its failure to acknowledge the implications of the facts that the  
5       superseding indictment ("Indictment") alleged, and that the jury was instructed that in order to convict  
6       it must find, that the corporate organizations that won the described guaranteed investment contracts  
7       ("GICs") by engaging in the bid-rigging conspiracies--which enabled them to, inter alia, pay interest  
8       to municipalities at artificially depressed rates for the duration of the GICs--were themselves  
9       coconspirators, albeit unindicted coconspirators.

10                   At various stages of the bid rigging, all three defendants were employed by General  
11       Electric or related companies, which were referred to in the Indictment as "Provider B." The  
12       Indictment alleged that Provider B sold investment agreements and other municipal finance contracts  
13       through its business leaders and marketers, including Grimm, Carollo, and Goldberg. (See Indictment  
14       ¶ 2.) Grimm and Goldberg had authority to and did submit bids for investments and other municipal  
15       finance contracts on behalf of Provider B; Carollo was a manager and supervisor with respect to that  
16       aspect of Provider B's business. (See id. ¶¶ 3-5.) During the bid-rigging period, Goldberg left  
17       Provider B and joined Financial Security Assurance, part of a group of related financial services  
18       companies that was referred to in the Indictment as "Provider A." (See Indictment ¶¶ 50, 51.) As a  
19       vice president or director of Provider A, Goldberg "had authority to and did submit bids for  
20       investment agreement[s] or other municipal finance contracts for Provider A." (Id. ¶ 51.)

1                   In light of the Indictment's allegations that Grimm, Carollo, and Goldberg, in engaging  
2 in bid rigging, acted on behalf of providers who were coconspirators, several well established  
3 principles of conspiracy liability compel me to conclude that the statute of limitations did not bar the  
4 prosecution of these defendants.

5                   [T]he crucial question in determining whether the statute of limitations has run  
6 is the scope of the conspiratorial agreement, for it is that which determines  
7 both the duration of the conspiracy, and whether the act relied on as an overt  
8 act may properly be regarded as in furtherance of the conspiracy.

9                   Grunewald v. United States, 353 U.S. 391, 397 (1957) (emphases added). In order "[t]o constitute  
10 an overt act for purposes of the statute of limitations the act must involve some affirmative conduct  
11 or deliberate omission on the part of [a defendant] or her coconspirators," United States v. Ben Zvi,  
12 242 F.3d 89, 97 (2d Cir. 2001) ("Ben Zvi"); see, e.g., United States v. Salmonese, 352 F.3d 608,  
13 617-18 (2d Cir. 2003) ("Salmonese"). However, "[t]he overt act, without proof of which a charge of  
14 conspiracy [under 18 U.S.C. § 371] cannot be submitted to the jury, . . . need not be itself a crime."  
15 Braverman v. United States, 317 U.S. 49, 53 (1942).

16                   Foreseeable acts of one coconspirator in furtherance of the conspiracy are attributable  
17 to all coconspirators. See, e.g., Pinkerton v. United States, 328 U.S. 640, 646-47 (1946); United  
18 States v. Milstein, 401 F.3d 53, 72 (2d Cir. 2005). This principle is applicable even if the  
19 coconspirator who so acts is unindicted. See, e.g., United States v. Grammatikos, 633 F.2d 1013,  
20 1023 (2d Cir. 1980) (acts of unindicted coconspirators may prove continued existence of the  
21 conspiracy); see also United States v. Matthews, 168 F.3d 1234, 1246 (11th Cir.) (unindicted  
22 coconspirator's overt acts within a district in furtherance of a conspiracy suffice to establish venue in  
23 the district), cert. denied, 528 U.S. 883 (1999); United States v. Sandy, 605 F.2d 210, 215-16 (6th  
24 Cir.) (overt acts alleged and proven to have been performed by an unindicted coconspirator sufficed  
25 to connect the defendants to the conspiracy), cert. denied, 444 U.S. 984 (1979).

1 Conspiracy is "a continuing crime[] that is not complete until the purposes of the  
2 conspiracy have been accomplished or abandoned." United States v. Pizzonia, 577 F.3d 455, 466 (2d  
3 Cir. 2009) (internal quotation marks omitted), cert. denied, 558 U.S. 1115 (2010); see generally  
4 United States v. Kissel, 218 U.S. 601, 610 (1910) ("a conspiracy may have continuance in time").  
5 "Once a conspiracy is shown to exist, which in its nature is not ended merely by lapse of time, it  
6 continues to exist until consummated, abandoned or otherwise terminated by some affirmative act."  
7 United States v. Rucker, 586 F.2d 899, 906 (2d Cir. 1978) ("Rucker").

8 Applying this principle, "[t]his court has consistently ruled that where a conspiracy's  
9 purpose is economic enrichment, the jointly undertaken scheme continues through the conspirators'  
10 receipt of 'their anticipated economic benefits.'" Salmonese, 352 F.3d at 615 (quoting United States  
11 v. Mennuti, 679 F.2d 1032, 1035 (2d Cir. 1982), and citing United States v. LaSpina, 299 F.3d 165,  
12 175 (2d Cir. 2002); Ben Zvi, 242 F.3d at 98; United States v. Fletcher, 928 F.2d 495, 500 (2d Cir.),  
13 cert. denied, 502 U.S. 815 (1991); United States v. Knuckles, 581 F.2d 305, 313 (2d Cir.), cert.  
14 denied, 439 U.S. 986 (1978)); see also United States v. Azeem, 946 F.2d 13, 16 (2d Cir. 1991) ("A  
15 conspiracy continues after the occurrence of the underlying offense and is not completed until the  
16 conspirators receive their payoffs."); United States v. Fitzpatrick, 892 F.2d 162, 167 (1st Cir. 1989)  
17 ("a conspiracy continues until the anticipated economic benefits of the defendant are realized").  
18 "[A]bsent withdrawal, a conspirator's 'participation in a conspiracy is presumed to continue until the  
19 last overt act [in furtherance of the conspiracy] by any of the conspirators.'" Salmonese, 352 F.3d  
20 at 615 (quoting United States v. Diaz, 176 F.3d 52, 98 (2d Cir.), cert. denied, 528 U.S. 875 (1999)).  
21 And "[e]very act in furtherance of the conspiracy is regarded in law as a renewal or continuance of  
22 the unlawful agreement." Rucker, 586 F.2d at 906.

23 In the present case, the allegations in the five counts of the Indictment on which  
24 defendants were convicted clearly delineate the scope of the conspiratorial agreements with respect

1 to goals, memberships, and durations. As to the conspiratorial objectives, the Indictment alleged that  
2 one of the goals of each of the conspiracies charged in Counts I, II, and IV was "to defraud municipal  
3 issuers and to obtain money and property from municipal issuers by means of false and fraudulent  
4 pretenses" (Indictment ¶¶ 19, 27, 44), "increasing . . . the . . . profitability of investment agreements  
5 and other municipal finance contracts awarded to Provider B by municipal issuers . . . through the  
6 control and manipulation of bidding for investment agreements and other municipal finance contracts"  
7 (id. ¶¶ 21(a), 29(a), 46(a) (emphases added)). Similarly, the Indictment alleged that a goal of the  
8 conspiracies charged in Counts V and VI was to increase the profitability of such contracts for  
9 Provider A. (See, e.g., id. ¶¶ 56(a), 63(a).)

10 As to membership in the conspiracies, Counts I and II of the Indictment alleged that  
11 all three defendants' "co-conspirators[] includ[ed] Provider B" (Indictment Count I, ¶¶ 18, 19, 20, 22;  
12 id. Count II ¶¶ 26, 27, 28, 30); and Count IV alleged that Grimm's "co-conspirators[] includ[ed]  
13 Provider B" (Indictment ¶¶ 43, 44, 45, 47). Counts V and VI likewise alleged that Goldberg's  
14 "co-conspirators[] includ[ed] Provider A." (Indictment Count V, ¶¶ 53, 54, 55, 57; id. Count VI,  
15 ¶¶ 60, 61, 62, 64.)

16 As to duration, the Indictment alleged that length of the investment agreements of the  
17 type that were subjected to bid rigging here varies from "as short as one month to as long as thirty  
18 years." (Indictment ¶ 10.) To the extent that the providers sought to enjoy the difference between a  
19 fairly arrived-at market rate of interest and the fraudulently arrived-at rate of interest to which the  
20 municipalities agreed as a result of the bid rigging, the providers would realize economic gains each  
21 time they made an interest payment to the municipal entity at the lower rate. See, e.g., United States  
22 v. Walker, 653 F.2d 1343, 1347 (9th Cir. 1981) (finding injury to victim of rigged contract with each  
23 of the defendant's payments at a "noncompetitive price"), cert. denied, 455 U.S. 908 (1982).

1           With respect to overt acts in furtherance of the conspiracies, Counts I, II, and IV  
2 alleged, inter alia, that, Provider B made its payments on the GICs to the relevant municipal entities  
3 "at artificially determined [and/or] suppressed rates." (Indictment Count 1, ¶ 22(f); id. Count II,  
4 ¶¶ 30(f), 30(g)(iii)); id. Count IV, ¶¶ 47(f), 47(g)(iii).) Provider B was alleged to have continued to  
5 make such payments at least until approximately November 1, 2005 (Indictment Count I, ¶ 22(g)(iii)),  
6 June 30, 2006 (id. Count II, ¶ 30(g)(iii)), and November 1, 2006 (id. Count IV, ¶ 47(g)(iii)). Counts  
7 V and VI similarly alleged that Provider A made payments on the relevant contracts at interest rates  
8 that were artificially determined, and that those payments continued at least until October 2006  
9 (Indictment Count V, ¶ 57(g)(iv)), and April 2006 (id. Count VI, ¶ 64(g)(iii)). All of these dates were  
10 within the five-year limitations period that ended with the return of the original indictment in this case  
11 on July 27, 2010.

12           Whether the allegations in the Indictment were proven--including whether the  
13 unindicted corporate organizations, Providers A and B, were coconspirators--was of course a matter  
14 for the jury. "A corporation can act only through its agents, and the acts of individuals on the  
15 corporation's behalf may be properly chargeable to it." United States v. Paccione, 949 F.2d 1183,  
16 1200 (2d Cir. 1991) (internal quotation marks omitted), cert. denied, 505 U.S. 1220 (1992).

17           The jury here was instructed that "the government must prove that there was a mutual  
18 agreement among the defendant under consideration and at least one other person, together with the  
19 respective corporate provider and the broker that they represent, to cooperate with each other to  
20 accomplish the objectives of each charged conspiracy." (Trial Transcript ("Tr.") 3222 (emphases  
21 added); see also id. at 3223 ("Ultimately, you must ask yourself if the government has proved beyond  
22 a reasonable doubt the conspirators in the count you are considering, acting on behalf of the named  
23 corporate provider and broker, came to an understanding to violate the law and to accomplish the  
24 unlawful objectives of the alleged conspiracy." (emphasis added)).)

1           In finding defendants guilty on the five counts under consideration, the jury necessarily  
2 found that Provider B conspired with the defendants charged in Counts I, II, and IV, and that Provider  
3 A conspired with the defendant charged in Counts V and VI. Defendants have not challenged the  
4 sufficiency of the evidence to support such findings, and I see no basis for such a challenge.

5           Whether an act by a coconspirator is in furtherance of the conspiracy is likewise a  
6 factual question to be determined by the jury. See, e.g., Nye & Nissen v. United States, 336 U.S. 613,  
7 618 (1949); United States v. Bruno, 873 F.2d 555, 560 (2d Cir.), cert. denied, 493 U.S. 840 (1989).  
8 The jury here was instructed that "[a]n overt act was 'in furtherance' of a conspiracy if the act was  
9 undertaken in order to advance an objective of the conspiracy." (Tr. 3235 (emphasis added).) It was  
10 also instructed that, in order to convict, it must find "that at least one object of each conspiracy existed  
11 at some point in time, within the period alleged in each of the counts." (Tr. 3224.)

12           In my view, it was permissible for the jury to find that (a) an objective of the  
13 conspiracies was, as alleged, to enable the providers to make their periodic interest payments at  
14 artificially suppressed rates, and (b) that objective existed within the limitations period. It was also  
15 permissible for the jury to find that all of the providers' interest payments were acts in furtherance of  
16 the conspiracies. Indeed, the payments were essential to the conspiracies' success: If the payments  
17 were not made, the providers would be in breach of the investment contracts and would cease to  
18 achieve their conspiratorial goals of economic gain through payments of interest below fair market  
19 rates.

20           The majority's conclusion that the statute of limitations bars this prosecution is flawed,  
21 in my view, not only because of its disregard of the roles of Providers A and B as coconspirators but  
22 also because of its misinterpretation of this Court's prior rulings and its reliance on inappropriate  
23 factors. For example, the majority points out that many of the investment contracts at issue are to be  
24 performed "over a long time, typically up to 20 years or more." (Majority opinion ante at 14.) But

1 "the duration of the conspiracy" is "determine[d]" by "the scope of the conspiratorial agreement,"  
2 Grunewald, 353 U.S. at 397; and here the precise goals of the conspiratorial agreements were to have  
3 long-term contracts awarded to Providers A and B, during which the providers would repeatedly make  
4 interest payments at artificially depressed rates, and thereby repeatedly reap the desired economic  
5 gains. The majority also states that the providers are making payments that are "noncriminal in  
6 themselves." (Majority opinion ante at 14.) But an overt act "need not be itself a crime." Braverman,  
7 317 U.S. at 53. The majority further states that there was no evidence of "concerted activity" within  
8 the limitations period. (Majority opinion ante at 14.) But foreseeable overt acts by one coconspirator  
9 in furtherance of the conspiracy are attributable to all coconspirators. See, e.g., Pinkerton, 328 U.S.  
10 at 646-47. "[A] conspiracy is a partnership in crime; and an 'overt act of one partner may be the act  
11 of all without any new agreement specifically directed to that act.'" United States v. Socony-Vacuum  
12 Oil Co., 310 U.S. 150, 253-54 (1940) (quoting Kissel, 218 U.S. at 608).

13 The majority also, in my view, misinterprets the opinion of this Court in Salmonese  
14 as adopting the decision of the First Circuit in United States v. Doherty, 867 F.2d 47 (2d Cir. 1989),  
15 which found a certain conspiracy count time-barred where the only acts within the limitations period  
16 were the defendant's receipt of higher salary payments as a result of a promotion following his  
17 unlawful advance acquisition of test questions. The Doherty court concluded that the statute of  
18 limitations barred the count in question because the defendant's "receipt of salary is a 'result' of, not  
19 an act in furtherance of, the conspiracy," 867 F.2d at 62, and that the indefinite duration of such salary  
20 payments raised the specter of "extending the conspiracy statute of limitations indefinitely beyond the  
21 period when the unique threats to society posed by a conspiracy are present," id. The majority  
22 describes Salmonese as stating that the statute of limitations has run where

23 "there is no evidence that any concerted activity posing the special societal  
24 dangers of conspiracy is still taking place." Salmonese, 352 F.3d at 616 (citing  
25 Doherty, 867 F.2d at 61).



1 (Majority opinion ante at 14.) I have several problems with this interpretation.

2 To begin with, Salmonese was in fact quoting Doherty for purposes of discussion,  
3 rather than citing it as authority for the resolution of the Salmonese appeal. The next sentence in  
4 Salmonese began: "Were this court to follow Doherty, [the defendant] would not benefit . . . ."  
5 Salmonese, 352 F.3d at 616 (emphasis added).

6 Thus, Salmonese, unlike Doherty, affirmed the defendant's conviction and rejected his  
7 statute-of-limitations defense. The fact that Salmonese affirmed as to a conspiracy that came to a  
8 natural end after a limited period of time provides no authority for the proposition that the conspiracy  
9 in the present case must be deemed to have ended after a similarly limited period. Here, the  
10 coconspirators agreed to engage in bid rigging in order to secure for Providers A and B, respectively,  
11 lengthy contracts that would give the provider an economic gain each time it made an interest  
12 payment at the artificially depressed rate. The defendants thus entered into conspiracies that were not  
13 completed with the awards of the rigged contracts.

14 Further, although the majority quotes Fiswick v. United States, 329 U.S. 211, 216  
15 (1946), as supporting its view that "the advantageous interest payment" in this case "is the result of  
16 a completed conspiracy, and is not in furtherance of one that is ongoing" (majority opinion ante at 15-  
17 16 (emphasis in original)), the majority miscasts the "result" of the bid-rigging conspiracy and ignores  
18 part of Fiswick's quoted language. The Fiswick Court stated that what is necessary for a conspiracy  
19 to "become a continuing one" is "[c]ontinuity of action to produce the unlawful result, **or** . . .  
20 'continuous cooperation of the conspirators to keep it up.'" 329 U.S. at 216 (emphasis added). These  
21 are alternative ways in which a conspiracy may be continued; a conspiracy may be one that is  
22 "continuing" if there is simply a "[c]ontinuity of action to produce the unlawful result," id. And in  
23 this case I think it clear that continuity of action was present--and indeed was essential to the scheme.  
24 The "result" of the bid rigging is not, as the majority states, the providers' "payments"; the result is

1 the artificially arrived-at interest rate that gives the providers an economic gain each time a payment  
2 is made. Periodic payments must be made by the providers in order to realize the desired economic  
3 benefit from their advantageous interest-rate differential. Thus, continuity of action after the awards  
4 of these rigged contracts was integral to the success of the conspiracies.

5 Finally, the majority's view that in this case there is no evidence of any continued  
6 concerted activity posing the special societal dangers of society (see, e.g., majority opinion ante at 16  
7 ("[t]he stream of GIC interest payments does not raise the underlying concern of concerted action"))  
8 seems to me misguided. The policies underlying punishment of conspiracies include recognition that  
9 "[c]oncerted action . . . increases the likelihood that the criminal object will be successfully attained,"  
10 and that "[g]roup association for criminal purposes often, if not normally, makes possible the  
11 attainment of ends more complex than those which one criminal could accomplish." Callanan v.  
12 United States, 364 U.S. 587, 593 (1967). Those policies should be of concern here. The bid rigging  
13 made it possible for the provider coconspirators to win contracts that would enable them to pay  
14 interest to the municipalities at substandard rates--something no single bidder could accomplish alone--  
15 and allowed the coconspirators to succeed in a scheme sufficiently complex to allow various  
16 coconspirators to enjoy their illegal gains at different times and for prolonged periods.

17 In sum, my view is that where a conspiracy is specifically designed to enable some of  
18 the coconspirators to win contracts that will provide them with economic gains repeatedly over the  
19 life of the contract by allowing them to make periodic interest payments at artificially low rates, the  
20 conspiracy ordinarily does not end--and each of the conspiracies at issue here did not end--before the  
21 contracting coconspirator's last payment pursuant to the contract.

22 Accordingly, I dissent from the decision that the present prosecution was barred by the  
23 statute of limitations.