07-1618-cr

United States Court of Appeals

For The

Second Circuit

UNITED STATES OF AMERICA

Appellee,

v.

JOSEPH MASSINO, also known as Joey Messina, JOHN JOSEPH SPIRITO, also known as Johnny Joe, EMANUEL GUARAGNA, ANTHONY FRASCONE, also known as Anthony Nicole, also known as Anthony the Hat, ANTHONY SIANO, RUSSEL TRUCCO, also known as The Truck, ANTHONY DONATO, VINCENT BASCIANO,

Defendants,

PATRICK DeFILIPPO, also known as Patty from the Bronx,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF
DEFENDANT-APPELLANT PATRICK DeFELIPPO

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Table of Contents

Preliminary Statement

Patrick DeFilippo appeals from a judgment of conviction and sentence filed on March 27, 2007, in the United States District Court for the Eastern District of New York, following a jury trial before the Honorable Nicholas Garaufis, in which he was convicted of RICO, gambling, and conspiracy to use extortionate means to collect extensions of credit. He was acquitted of two counts of extortion and the jury failed to return a verdict on counts pertaining to murder. Mr. DeFilippo was sentenced principally to 40 years imprisonment and was ordered to forfeit $4,376,787.

A timely notice of appeal was filed March 30, 2007.

Statement of Subject Matter and Appellate Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York, which had jurisdiction pursuant to 18 U.S.C. § 3231. Judgment was filed March 27, 2007, and a timely Notice of Appeal was filed on March 30, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues Presented for Review

1. In a case that turned on the jury's assessment of the cooperating witnesses' credibility, was Mr. DeFilippo prejudiced by the trial court's

erroneous admission of testimony that (1) every organized crime member charged with a crime is guilty; (2) the government witnesses had successfully testified at other trials that resulted in convictions; (3) another Bonanno family member recommended killing the children and families of cooperators and leaving them in the street; and (4) the trial judge in this case, Judge Garaufis, would ultimately judge each cooperator's credibility before imposing sentence?

2. Was it proper for the trial court, with no forewarning or discussion, to (1) strike cross-examination of government star witness Salvatore Vitale suggesting he knew he could face the death penalty if the government didn't sign a cooperation agreement with him; and (2) requiring defense counsel to obtain the court's approval for each question asked of Vitale before the court would require Vitale to answer?

3. Did the sentencing court properly consider the murder of George Sciascia – as to which the jury did not return a verdict – to be "relevant conduct" under U.S.S.G. § 1B1.3, that could be used to calculate Mr. DeFilippo's Sentencing Guidelines upon a finding that Mr. DeFilippo was guilty by a "preponderance of the evidence," where in fact the murder was not "relevant" to any conspiratorial object of which Mr. DeFilippo was

convicted, thereby requiring application of the "beyond a reasonable doubt" standard under U.S.S.G. § 1B1.2(d) and Application Note 5 thereof?

4. Did the government prove beyond a reasonable doubt that Mr. DeFilippo conspired to kill David Nunez in furtherance of the affairs of the Bonanno family Enterprise, where there was no evidence Mr. DeFilippo knew the shooting was intended to further the affairs of the Enterprise?

5. Did the sentencing court correctly find that the Sentencing Guidelines for the Nunez murder conspiracy should be calculated based on the harsher post-November 2004 Guidelines, where Mr. DeFilippo was incarcerated in 2003 and was not thereafter a member of the named Enterprise, and where the sentencing court refused to hold a hearing upon the contested issue of whether Mr. DeFilippo's legal fees were in part paid by the Enterprise in 2005?

6. Do the errors addressed in this brief individually or cumulatively require that Mr. DeFilippo be granted a new trial or a resentencing?

Statement of the Case

Patrick DeFilippo was tried jointly with Vincent Basciano upon charges contained in an eleven-count superseding indictment of RICO conspiracy, gambling, extortion, attempted murder and murder. The charges and verdict as to Mr. DeFilippo are summarized in the following table:

Count	Charge	Racketeering Act	Jury Finding	Verdict
1	RICO conspiracy			Guilty
		2 – illegal gambling – Joker Poker machines	proved	
		3 – conspiracy to murder and attempted murder – David Nunez	proved	
		4 – illegal gambling – Bookmaking	proved	
		7 – consp to use extortionate means to collect extensions of credit	proved	
		8 – use of extortionate means to collect extension of credit from Frank Giannini	Not proved	
		9 – use of extortionate means to collect extension of credit from Andrew lnu	Not proved	

		10 murder of Gerlando Sciascia	No finding	
Two	Illegal Gambling – Joker Poker Machines			Guilty
Three	Illegal Gambling conspiracy – Bookmaking			Guilty
Four	Illegal Gambling – Bookmaking			Guilty
Five	Consp. to use extortionate means to collect extensions of credit			Guilty
Six	– Use of extortionate means to collect extension of credit from Frank Giannini			Not Guilty
Seven	– Use of extortionate means to collect extension of credit from Andrew lnu			Not Guilty
Eight	Murder in aid of racketeering – George Sciascia			No verdict
Nine	Conspiracy to murder in aid of racketeering – George Sciascia			No verdict
Ten	Use of a firearm during crime of violence			No verdict

The anonymous prospective jurors[1] received their questionnaires on January 17, 2006, and questioning of the jurors in court began February 6, 2006. Trial commenced February 27, 2006, and the verdict was returned May 9, 2006, after 6 days of deliberation. Mr. DeFilippo, 68 years old and in poor health, was sentenced on March 27, 2007 to a total of 40 years imprisonment – a *de facto* life sentence – three years of supervised release and forfeiture in the amount of $4,376,787 (ST 49). This lengthy sentence was imposed in large part because the district court applied the Sentencing Guidelines applicable to the murder charge, upon which the jury had failed to return a verdict,

The evidence at trial broadly demonstrated that Mr. DeFilippo was a long-standing member of the Bonanno family who eventually rose to the level of "capo" or captain. He had become a Bonanno family member at a relatively young age because his father had been a member, but he never flourished in the role. He was, essentially, a bookie, and a not very successful one at that; government cooperator Richard Cantarella described him as a "brokester" – someone who never had much money (4455). He lived for a while in a high rise apartment on the east side of Manhattan, but thereafter moved to a less expensive apartment in the Bronx (2846, 7296).

[1] The court granted the government's motion for an anonymous jury because of allegations made by the government with respect to Mr. Basciano. See Doc. #389.

He had a good reputation within the so-called family (7472), and abundant evidence showed him going out of his way on more than one occasion to protect others from harm. On one notable occasion, and at personal peril, he ignored an order to "hit" Bonanno member Anthony Donato, who had falsely claimed to have committed a murder that, in fact, had been committed by a Gambino family member (3473-74, 3594-95).

Mr. DeFilippo, through defense counsel, acknowledged during both opening statement and summation, that he was a member of the Bonanno family and also that he was a bookie (e.g., 9846-47), but he denied the balance of the charges. Given these admissions, we concentrate below on the evidence adduced regarding the charges in dispute, rather than the sports betting and Joker Poker charges. We include a discussion of the George Sciascia murder, upon which the jury failed to return a verdict, because the district court eventually found that the murder was "relevant conduct" proven by a preponderance of the evidence and that it therefore could be used in calculating Mr. DeFilippo's sentencing guidelines. See Point Three. This charge – never proven to the unanimous satisfaction of the jury – drove the sentence in this case.

A. The Attempted Murder of David Nunez

David Nunez – who did not testify at trial – was shot on November 14, 1985 as he was about to enter a livery cab driven by Steve Dunne. The evidence showed that he was likely shot by codefendant Vincent Basciano, who (along with Anthony Donato) was a passenger in a car driven by Mr. DeFilippo. The government argued that this shooting was related to the affairs of the Bonanno Enterprise and that Mr. DeFilippo understood as much. Although the evidence was sufficient for the jury to conclude that Mr. DeFilippo drove the vehicle in question (and he in fact pleaded guilty after this incident in state court to attempted possession of a weapon, for which he received a probationary sentence), it was not sufficient to prove that Mr. DeFilippo knowingly participated in the attempted murder to further the Bonanno Family Enterprise. See Point Four.

Most of the testimony regarding the Nunez shooting concerned Mr. Basciano and very little concerned Mr. DeFilippo. Beginning in the early 1980s, Mr. Basciano was involved in a numbers business that eventually operated in the Bronx, Brooklyn and Queens (Tr. 7923-49 (Bottone); 7930-55 (Caruncho); 8118-22 (Colangelo); 5768-69 (Cicale); 4732 (Tartaglione)). He at first worked in the business for Anthony Colangelo, Sr. (a/k/a Tony Coles) but later ran the business after Colangelo, Sr. went to prison in 1983.

(Tr. 7923-99 (Bottone); 7930-55 (Caruncho); 8118-22, 8126-28 (Colangelo)).

Anthony Colangelo, Jr., testified that he worked in his father's numbers business for approximately a year in the early 1980s (Tr. 8118-22). His father was "associated" with the Bonanno family (as distinct from being an inducted member) and was friendly with, among many others, Dominic Trinchera, Basciano and DeFilippo (whom he had known since he was very young) (Tr. 8118-22). Colangelo, Jr. would sometimes pick up money from his father's business and deliver it to his father's wife. On occasion he would deliver money to Mr. DeFilippo, but there was no testimony as to why these deliveries were made (Tr. 8122).

Cooperating witness Anthony Bottone testified that Basciano and Donato ran a numbers business in the Bronx in the early 1980s and that at some point they had a dispute with David Nunez. Nunez was related to Stefano Larerio, a/k/a "Stevie the Blind," and was associated with several successful numbers stores in various Bronx locations, including on Gun Hill Road. (Tr. 7953-54). After Vincent Basciano was arrested for the November 14, 1985 shooting of David Nunez, Bottone's father told Bottone he had set up Nunez because "there was some kind of beef and this guy Steve Blind's son-in-law [i.e. Nunez] used the Arrow car service" at a

regular time every day, which facilitated the planning of the shooting. (7955-57). Over objection by Mr. DeFilippo's attorney (5661, 5719), government cooperating witness Dominic Cicale testified to a conversation he had years later with Basciano, during which Basciano discussed (without specifically identifying) the Nunez attempted murder. According to Cicale, Basciano told him that in 1985 Basciano, DeFilippo and Donato were involved in an attempted murder in which Basciano "shot the guy," but were stopped by a police car some 20 blocks away (Tr. 5681, 5719-23). Additionally, Basciano supposedly complained to Cicale about Mr. DeFilippo, and told Cicale that if Cicale were to do "a piece of work never… let Patty DeFilippo set it up because he doesn't know what he's doing… [because] after that shooting there should have been another vehicle for him to get into." (Tr. 5721).

Nunez survived the shooting and dropped the charges after a "sit down" involving the Bonanno leadership after which "everything [was] squashed" (7955-56).

Although the indictment charged – and the government argued – that this shooting was in furtherance of the affairs of the Bonanno Family in that it appeared to be consistent with the Bonanno family's general willingness to use violence to eliminate competition (5750, 5775), Joseph Massino – who

later became Bonanno Boss – was uncharacteristically ignorant of it. Salvatore Vitale testified that shortly after Massino "came home" from prison in 1992, Massino told Vitale during a discussion of whether Massino would promote Mr. DeFilippo to captain, that:

> [B]efore he elevated Patty… to captain he wanted to check out that they [Basciano and DeFilippo] were involved in a shooting somewhere in the Bronx. And Patty got away in a cab. And he wanted to investigate it more before he elevated Patty to captain . . . that Vinny and Patty were involved in a shooting. Patty got away.

(Tr. 2687-88).

B. The Murder of George Sciascia

The most serious charge against Mr. DeFilippo was that he shot and killed George Sciascia. Sciascia was a Bonanno Capo who had lived in Canada as well as New York. He had participated in several murders in the United States, the most infamous of which was the "three captains" murder in 1981, and also included the murders of Sonny Black Napolitano in 1982 and Joseph "Big Joe" LoPresti in 1992. Although the jury failed to return a verdict on any of the Sciascia-related counts, we address below the evidence regarding the Sciascia murder because the trial court's conclusion that the evidence established Mr. DeFilippo's guilt of this murder by a

preponderance of the evidence established Mr. DeFilippo's base offense level of 43 and, consequently, animated his forty-year sentence.

Sciascia's bullet-ridden body was found in the Bronx on March 18, 1999, after he had apparently been murdered while in a car with at least two other Bonanno family members. The government's assertion that Mr. DeFilippo shot and killed George Sciascia in that car must be viewed through the prism of the New York Police Department and FBI's own contrary informant information. The government provided the defense various Brady disclosures both prior to and during trial, indicating that Vincent Basciano either killed George Sciascia himself or ordered John Spirito (Messrs. DeFilippo and Basciano's codefendant, who pleaded guilty to conspiracy to murder Sciascia) to kill Sciascia.[2] Specifically, by letter dated December 6, 2005 (document # 383), the government provided the defense handwritten notes of NYPD Detective Jerry Swartz identifying John Spirito as the "possible shooter" and stating "hit ordered by Vinny Basciano." The government thereafter supplemented this information in a letter dated December 21, 2005 (document # 399), stating (1) that the Detective (now identified as "Schwartz") "obtained information that an

[2] The defense made – and the court denied – numerous severance motions made in light of these Brady disclosures. We do not raise the court's denial of these motions on appeal because Mr. DeFilippo was not convicted of the Sciascia murder.

individual associated with Throggs Neck Jewelers may have been involved in the Sciascia murder" and (2) that inmate Michael Tessari stated that he was told by fellow inmate Indelicato that "Vinny" – whom he understood to be the person known as "Vinny Gorgeous" and "Vinny from the Bronx" [i.e. Vincent Basciano] – had a certain area "locked up" for narcotics distribution because "Vinny" and "Vito" got "George" out of the area.

Then, mid-trial, in a letter dated April 10, 2006 (document # 557), the government belatedly disclosed an FBI 302 dated April 5, 1999 (less than three weeks after the murder), reflecting information obtained from a then-informant, identifying Mr. Basciano as the shooter:

> VINNY BASCIANO killed GERALD SCIASCIA without sanction.
> The "hit" started at BASCIANO's pizzeria on Tremont
> Avenue in the Bronx.
> BALDO AMATO helped move and dump the body.
> BASCIANO is the acting skipper for PAT DEFILIPPO.
> DEFILIPPO is not doing well.

At trial, the defense did not argue that Basciano was the shooter because the defense's many severance motions were denied and such an argument at a joint trial would have pitted the defendants against one another – a sure recipe for disaster. Yet the likelihood that Basciano, and not Mr. DeFilippo, was involved in the shooting is substantial. Also, a realistic possibility – supported by the evidence – was that Salvatore Vitale

was far more involved in the murder – as the shooter or otherwise – than he acknowledged at trial. Due to his status within the Bonanno family Vitale – and not DeFilippo – would logically have been the front seat passenger in the car in which Sciascia was the back seat passenger, and to have fired back toward Sciascia.[3] Furthermore, both Basciano and Vitale had a history of extreme violence – Vitale having been involved in some 11 murders and Basciano in several – whereas Mr. DeFilippo had been involved in none. Vitale, for his part, was jealous of anyone who got too close to Joe Massino (5168-69), and Sciascia was on Massino's ruling Committee, thereby posing a threat to Vitale's plan to some day ascend to the pinnacle of power in the Bonanno family. James Tartaglione agreed that Vitale would "stop at nothing and take anybody out of the way that was close to Joe Massino" (5168-69). Indeed, virtually any of the government's cooperating witnesses were more likely "hit men" than DeFilippo since every one of them – other than attorney Tommy Lee – had been involved in murders. Moreover, Vitale had acknowledged that "when Joe needed a shooter" he called upon

[3] Ballistics evidence definitively demonstrated that George Sciascia, when shot, was in the back of the car and the shooter was in the front seat (3396-3400); undisputed Bonanno protocol would have required that the shooter be of higher rank than Sciascia to have been in the front seat with Sciascia in the back seat (3418); Sciascia was of higher rank than DeFilippo, since the former was on the overseeing Bonanno ruling committee but of lower rank than Vitale, who was Bonanno underboss. Thus if Basciano was not the shooter, the shooter most likely was Vitale himself – who had been involved in numerous previous hits.

Vitale (3453). At the same time, Vitale would likely have seen Sciascia as a potential threat not only to his standing with Joseph Massino, but also to his life, as Sciascia – reputedly a large-scale drug dealer – was himself responsible for numerous murders.

Additionally, Vitale was certainly in a position to falsely accuse Mr. DeFilippo of the Sciascia murder and motivated to do so. Indeed, the stage was set to blame Mr. DeFilippo from the way the murder was set up in the first place – Sciascia was likely lured to 79th Street by invoking Mr. DeFilippo's name.[4] And John Spirito was used as the driver because Vitale – or Basciano – knew Sciascia would be comfortable getting into Spirito's

[4] Supposedly found on Sciascia's body was a note that said "Pat D 79", the letters "FRI" and other writing the government suggested referred to First Avenue. (3820, GX 60). The government argued this reflected the information contained in a message Sciascia had received advising him to meet Mr. DeFilippo 79th Street and First Avenue – the location where Sciascia apparently entered the car in which he was murdered. The government's theory was marred by the fact that Sciascia was killed on a Thursday, not a Friday as the "FRI" notation would suggest. Further, Vitale testified that Mr. DeFilippo had supposedly left this message at Throggs Neck Jewelers, which was owned by a John Chiazeese, a close family friend of Sciascia's. Mr. Chiazeese testified as a government witness, however, that no such not was left with him (3905). The "Pat 79" note itself was admitted, over objection, through retired detective Joseph Neenan, who was present at the crime scene where Sciascia's body was found but who had not himself recovered the note from the body, but rather apparently received it from someone else (3826 "Q Were you the one who personally removed those documents from Mr. Sciascia? A. No"). When defense counsel requested a voir dire of the retired detective, the government prosecutor objected, insisting there was no such thing as a voir dire regarding evidence (3814) (MR. ANDRES: Since when do we have voir dire as regards the admission of evidence? MR. LEVITT: That's what it's for. MR. ANDRES: Says who?... What rule, What case?... I never heard of it, ever… I've never heard of voir dire over an issue of evidence."), and the court admitted the note over objection (3816) as well as over a renewed motion to exclude (3840-48).

car – since Spirito and Mr. DeFilippo were friends, as were Mr. DeFilippo and Sciascia.

Notwithstanding the direct accusations against Basciano – as reflected in the government's *Brady* disclosures – the government adopted a theory of Sciascia's murder expounded by Salvatore Vitale – government cooperating witness, former Bonanno underboss and Joseph Massino brother-in-law – that held Mr. DeFilippo responsible.

Vitale testified as follows: Massino had spoken to Vitale at a social gathering and asked Vitale to supervise the murder of Sciascia, who Massino supposedly wanted killed because Sciascia had accused Massino's friend, Anthony Graziano, aka "TG", of having a drug problem (2796-97, 2799-2802).

During this same meeting, Massino told Vitale to contact Bonanno member Anthony Urso, a/k/a Tony Green, and retrieve from him a gun and silencer that James Tartaglione had previously given the family (2802, 3303). He also told Vitale that Mr. DeFilippo was going to actually make the plans and do the hit, but that Vitale should offer assistance – such as a car – if needed – and make sure Mr. DeFilippo didn't make any mistakes (2802-03).

Vitale followed these orders. He retrieved the gun – actually two guns – and a silencer from Tony Green, after he was driven to see Green by Joe Destafano, a/k/a Joe Shakes (2805). And during this same general time period he met with Mr. DeFilippo (2806). Mr. DeFilippo said he was planning the murder by leaving a message for Sciascia at a jeweler, telling Sciascia to meet him on Thursday at 79th Street and First Avenue. Mr. DeFilippo also informed Vitale during this conversation that he was going to murder Sciascia in John Spirito's SUV, and that Michael Mancuso, a/k/a Michael Nose, would be nearby in a gold Altima, acting as backup (2813-15).

Vitale told Mr. DeFilippo he was crazy to use John Spirito's car, but Mr. DeFilippo insisted, saying Sciascia might be suspicious if asked to enter a strange car (2806-07). A night or so before the murder, Vitale had dinner with Mr. DeFilippo and Joe Shakes at the York Grill on the upper east side of Manhattan. There, they asked the proprietor, Anthony Greco, to hold the bag with the guns and silencer while they dined. After dinner, Vitale asked Joe Shakes to retrieve the bag and, after he did so, Vitale and Mr. DeFilippo entered Joe Shakes' car and test fired the weapon out of the sun roof in the middle of Manhattan (2811-2813).

On Thursday night, Vitale went to the vicinity of 79th Street and First Avenue to observe the anticipated events. He drove around for a long time but saw nothing. After a while he called Mr. DeFilippo's apartment. Mr. DeFilippo came downstairs and told Vitale the murder had been accomplished and that Spirito was on his way to the Bronx with the body (2814-16). A day or two later, Mr. DeFilippo supposedly beeped Vitale. Vitale called Mr. DeFilippo and they agreed to meet. At the ensuing meeting, Mr. DeFilippo told Vitale that John Spirito's car was too bloody to be cleaned and that he needed help disposing of it (2816-19). Vitale therefore called Jerry Assaro, who agreed to get rid of the car (2819-21). A stolen vehicle report and insurance claim were thereafter filed, reporting the car stolen (GX 105,106).

Sciascia's body was found the same night as the murder, in the Bronx. Supposedly found on his body (see fn. 4 ante) was a note that said "Pat D 79", and which bore additional writing as well, that the government suggested referred to First Avenue (3820; GX 60).

Vitale testified that soon after the murder he participated in two meetings with Bonanno boss Joseph Massino. At one, attended by both Mr. DeFilippo and Vitale, Massino supposedly was holding an unidentified note and questioned whether the murder occurred on 74th Street or 79th Street, and

both Vitale and Mr. DeFilippo said it occurred on 79th Street (2824). At the second meeting – between Vitale and Massino only – Massino supposedly told Vitale to forgive the loan Mr. DeFilippo had outstanding with Vitale and Massino – apparently a payback to Mr. DeFilippo for killing Sciascia (2833).

The government's contrary position notwithstanding, none of Vitale's testimony regarding the alleged involvement of Mr. DeFilippo in the murder was credibly corroborated at trial, and much of Vitale's testimony was refuted by other government witnesses.[5] For example:

- Vitale's testimony that he was first ordered to participate in the murder during a conversation with Massino was not corroborated at trial since Massino (who was a government cooperator) did not testify.
- Vitale claimed that the silencer he retrieved from Tony Green to use in the Sciascia murder had been a gift to the Bonanno family from James Tartaglione (3303), but Tartaglione testified as a government witness that he had never made any such gift (Tr. 5183-84).

[5] Additionally, the government elicited that Mr. DeFilippo lived only several blocks from the East 79th Street location where George Sciascia was murdered, but Salvatore Vitale acknowledged on cross-examination that his- Vitale's- son, whom Vitale would occasionally visit, lived only a block away (3312).

- Vitale claimed he – in the company of Joe "Shakes" DeStefano – transferred the gun to Mr. DeFilippo at the York Grill restaurant, but DeStefano did not testify and the York Grill's proprietor, Anthony Greco, testified as a defense witness that every time he saw Vitale eat at the York Grill, Vitale was accompanied by his wife (9018).
- Vitale claimed that Mr. DeFilippo had left the "Pat D 79 – FRI" message for Sciascia at Throggs Neck Jewelers, but its proprietor, John Chiazeese – who considered Sciascia as an "uncle" – testified no such message had been left (3905) (and it would have made no sense at all for Mr. DeFilippo to generate a message --which seemingly referenced Friday, rather than the day of the murder which was Thursday – that would have identified him as the person with whom Sciascia last met before his murder).
- Vitale claimed that Mr. DeFilippo was planning to lure Sciascia to a meeting on East 79th Street by suggesting its purpose was to settle a dispute between Mr. DeFilippo and Sciascia regarding "some pot" (Tr. 2806-07), but there was no evidence at all that Mr. DeFilippo had any drug involvements at any time in his life.

- Vitale claimed he called Mr. DeFilippo from the street the night of the murder to see what was happening, but no corroborating phone records were introduced.
- Vitale claimed that Joseph Massino told Vitale, during their meeting at a diner, to forgive a loan sharking debt that Mr. DeFilippo owed to Vitale and Massino as a thank you for the Sciascia murder (2832-33), and that the loan was therefore not outstanding as of 2003 when Vitale was arrested (3157) but in fact the debt had not been removed from the book (as Vitale claimed was his invariable practice) and – according to a previous statement by Vitale to the FBI – Mr. DeFilippo continued to make payments on the debt until Vitale's arrest (9143-44).

Accordingly, although Vitale directly accused Mr. DeFilippo of shooting Sciascia, his identification of Mr. DeFilippo was entirely uncorroborated, was substantially refuted by the government's own witnesses and documentary evidence, and was contrary to the substantial intelligence obtained by the government from various confidential sources. Yet, although he was not convicted of this murder he was sentenced for it.

C. Joker-Poker Machines

Racketeering Act Two of Count One (RICO conspiracy) and Count Two charged Mr. DeFilippo with illegal gambling through the use of Joker Poker machines. Although the testimony regarding these charges was far from overwhelming, we do not question its legal sufficiency in this appeal, and we therefore do not discuss the evidence in detail.

Joker Poker machines are a form of electronic game that simulates poker. Customers purchase tokens from the owner of an establishment in which the machines have been placed and they use the tokens to play the games. They can then exchange their tokens for cash, and the profits are split between the owner of the establishment and the owner of the machines (5743-44).

Testimony established that persons working with Mr. DeFilippo controlled Joker Poker machines that were placed in various establishments, and certain witnesses directly implicated Mr. DeFilippo in this business. Salvatore Vitale testified, for example, that Mr. DeFilippo's name would be on lists that were given to him by Bonanno family member and Massino confidante Richard Cantarella, identifying persons who would make required 10% payments to Massino from Joker Poker profits (Tr. 3169). Vitale also claimed that he and Mr. DeFilippo attended a "sitdown" with the Lucchese family over a Joker Poker "spot" controlled by Vincent Basciano

and that Mr. DeFilippo thereafter said "we'd" – i.e DeFilippo and Basciano – put aside money each month for Vitale and Massino. Witness James "Jimmy the General" Barbieri claimed to have seen Joker Poker machines in Mr. DeFilippo's social club (7297), though James Tartaglione said he never saw any such machines there (5198-99) and none were found when the club was searched by the FBI on February 28, 2002 (7647).

Mr. DeFilippo also discussed Joker Poker machines on various tapes (e.g., GX 340(ee), 340(ff), 340(gg), (ff)), but whether he was talking of machines in which he had an interest – as opposed to discussing machines controlled by others – is not clear.

Additionally, Dominic Cicale testified that Vincent Basciano told him that Mr. DeFilippo had a Joker Poker business, though he provided no details (4748-49).

D. Extortionate Collection of Credit and Related Conspiracy

Racketeering Act 7 and Count Five charged Mr. DeFilippo with conspiring to use extortionate means to collect extensions of credit. Racketeering Acts 8 and 9, and Counts Six and Seven charged Mr. DeFilippo with using extortionate means to collect extensions of credit.

The evidence of these charges was virtually non-existent. Mr. DeFilippo was acquitted of the substantive charges of using extortionate

means to collect extensions of credit from two individuals (Frank Giannini and "Andrew lnu"), but was convicted of conspiring to do so. As with respect to the Joker Poker charges, the evidence regarding the extortionate collection of credit conspiracy was weak, but we do not argue legal insufficiency on appeal.

At trial several witnesses testified that others in the Bonanno family would threaten debtors implicitly or explicitly to obtain repayment of loans. Government witness James Barbieri testified that if debtors did not pay, "[s]ometimes you discuss it and sometimes you could resort to violence," and he said he had threatened violence in connection with loan sharking. (Tr. 7244). Dominic Cicale testified that he was involved in the assault of a man named Eric over a gambling debt owed to Vincent Basciano and had also threatened Mark Stagg over a debt. (Tr. 5413-14, 5418-19, 6220-22, 6229). Salvatore Vitale claimed that Mr. DeFilippo and persons in Mr. DeFilippo's "crew" had borrowed money from Vitale at 1½ "points" to lend this money to others for profit (Tr. 2694-95; 2701-2708). Admitted into evidence was Emanuel Guaragna's loan sharking book recovered from Guaragna's home, (Tr. 7720-28; GX 305), which documented loan payments from ten borrowers between 1996 and 2002 (Tr. 7726); GX 305. There also was evidence that members of a

"crew" had to provide a portion of their profits from various conduct, including money lending, to the captain (Tr. 2691).

We do not challenge the legal sufficiency of the conviction for conspiring to use extortionate means to collect extensions of credit.

E. Pre-Verdict Motions

At the completion of the government's case-in-chief (8878) and after the defense rested, Mr. DeFiliippo moved for a judgment of acquittal under Fed.R.Crim.P. 29 (8880, 9351). The Court denied the motions, except that it initially reserved decision as to the charges of extortionate extension and collection of credit (Tr. 8879-8905, 9351).

F. The Jury's Partial Verdict

On May 9, 2006, after six days of deliberation, the jury returned a partial verdict, as reflected in the chart, ante at 7 (Tr. 10341-56).

G. Post-trial Motions and Decision

Mr. DeFilippo filed post-trial motions challenging the sufficiency of the evidence with respect to the attempted murder of David Nunez and the charges of conspiracy to use extortionate means to collect extensions of credit. The court denied these motions in a memorandum and order dated December 21, 2006.

H. Sentencing

The court imposed sentence on March 14, 2007, rejecting the many arguments counsel made in his pre-sentence submissions as well as at the sentencing proceeding itself. Of greatest significance to this appeal, the court ruled that the Sciascia murder (as to which the jury did not return a verdict) was relevant conduct proven by a preponderance of the evidence, and which therefore could be used to calculate the applicable Sentencing Guidelines, resulting in a Guideline level of 43 (ST 20, 24-25, 28).

Had the court not so found, then Mr. DeFilippo's Guidelines would have been substantially lower, determined based on Mr. DeFilippo's conviction of RICO conspiracy, the predicate acts of which were the attempted murder of David Nunez, the extortionate collection of credit conspiracy, sports gambling and Joker Poker gambling (and related conspiracies).[6] With respect to the attempted murder count, the court ruled that the higher November 2004 amendments would apply, even though the attempted murder occurred in 1985 and Mr. DeFilippo was incarcerated in 2003, because, according to the court, Mr. DeFilippo remained a member of the RICO conspiracy since he supposedly was given money from the Bonanno family "war chest" in 2005 to defray his legal expenses. Mr. DeFilippo, through counsel, had disputed this in his presentence letter,

[6] The Guidelines calculation for the David Nunez attempted murder/conspiracy Racketeering Act is addressed in Point Five.

saying that Mr. DeFilippo informed him that the money used to pay legal fees came initially from Mr. DeFilippo's savings and then from his family's sale of property. The court denied defense counsel's request for a hearing to resolve this factual dispute (see ST 14-18).

Based on the above findings the court sentenced Mr. DeFilippo to a total sentence of 40 years (ST 46), as follows:

Count One RICO Conspiracy: 20 years

Count Two (Gambling): 5 years

Count Three (Gambling): 5 years

Count Four (Gambling): 5 years

Count Five (extortionate collection of credit conspiracy): 5 years

Forfeiture was ordered in the amount of $4,376,787 (ST 49).

Argument

Argument Summary

The district court's imposition of a 40 year sentence that was driven by the Sciascia murder – of which Mr. DeFilippo was not convicted – ironically leaves Mr. DeFilippo in a less advantageous appellate posture than if he had been convicted of that murder. After all, he would then have been entitled to an entirely new trial – or at least a resentencing -- by showing that non-harmless error occurred – as it did – with respect to the evidence

introduced regarding the Sciascia counts. Yet because he was not convicted of that murder he is without those avenues of redress. Additionally, since the other counts of conviction barely increased his final adjusted offense level, the efficacy of raising issues directed at only particular counts of conviction is limited.

For these reasons we emphasize on appeal those issues that, if accepted by this Court, would either result in a new trial or a remand for resentencing under lower Guidelines.

In Point One we address four of the enumerable, substantial evidentiary errors that infected the trial. First, government cooperating witnesses James Tartaglione was permitted to testify not only that *he* had never been charged with a crime he didn't commit, but to his knowledge *no organized crime member* had *ever* been charged with a crime that member did not commit. This testimony – essentially telling the jury "they're all guilty – was devastating because Tartaglione was a high ranking and experienced organized crime member whom the jury would presume "knows" such things, yet this was in fact irrelevant and otherwise inadmissible opinion testimony that, under any circumstances should have been excluded under Fed.R.Evid. 403.

The second of these evidentiary errors was the improper introduction of mounds of evidence, through numerous witnesses, including FBI agents and cooperators, endlessly detailing the supposed success of these and other cooperating witnesses in helping to convict *other* defendants in *other* cases. This testimony was irrelevant and served no purpose other than to improperly bolster the credibility of these cooperating witnesses, and to encourage the jurors, in essence, to jump on the bandwagon of juries that had previously found these witnesses credible.

Third, the Court permitted the government to introduce the irrelevant, inflammatory and emotionally charged testimony of James Tartaglione, that he had reviewed taped comments of Bonanno Member Anthony Urso that the Bonannos should "whack" the family and children of cooperators "and throw them in the streets and make a lesson out of this."

Fourth, the court permitted the government to repeatedly invoke the name of the judge to its benefit by eliciting from each of its cooperating witnesses that "Judge Garaufis" would decide whether each was telling the truth.

In Point Two we address two errors committed by the court in back-to-back rulings issued without any discussion or forewarning, the first striking certain cross-examination from the previous day addressed to

whether lynchpin government witness Salvatore Vitale was aware at the time he first proffered to the government that he might face the death penalty if he was not accepted as a cooperator, and the second requiring defense counsel to obtain the court's approval, in front of the jury, for every question he sought to ask Vitale – a procedure that lasted for some fifty questions. These two rulings were announced previous to any discussion with counsel and the court denied defense counsel's motion for a sidebar to permit counsel to address them both as they were being announced and immediately thereafter.

In Point Three, we urge that the district court wrongly considered the Sciascia murder when determining Mr. DeFilippo's Sentencing Guidelines. The court held that it could do so because the Sciascia murder was "relevant conduct" that need only be proved by a preponderance of the evidence. In fact it was not relevant conduct under U.S.S.G. § 1B1.3 because it did not relate to any object of the RICO conspiracy of which Mr. DeFilippo was convicted. Accordingly, it could not be used in determining Mr. DeFilippo's Guidelines absent a finding of proof beyond a reasonable doubt under U.S.S.G. § 1B1.2(d) and Application Note 5 thereof.

In Point Four, we urge that the evidence was insufficient to prove RA-3, which charged Mr. DeFilippo with the 1985 attempted murder of David

Nunez. The evidence established neither that this attempt was related to the affairs of the Bonanno Enterprise, nor that if it was, Mr. DeFilippo was aware of this relationship.

In Point Five, we demonstrate that the sentencing court erroneously determined the Guidelines with respect to the Nunez attempted murder using the November 2004 amendments which greatly increased the base offense level. This was improper because Mr. DeFilippo was incarcerated in 2003 and no longer a member of the Enterprise, and the court erred when it refused to grant a hearing to resolve disputed factual assertions relevant to this finding.

Finally, in Point Six, we argue that the foregoing issues, individually or collectively, compel a grant of relief.

Point One

THE TRIAL COURT WRONGLY ADMITTED TESTIMONY (1) FROM GOVERNMENT WITNESS JAMES TARTAGLIONE THAT NEITHER HE, NOR ANY OTHER ORGANIZED CRIME MEMBER TO HIS KNOWLEDGE, HAD EVER BEEN CHARGED WITH AN OFFENSE OF WHICH THEY WERE NOT GUILTY; (2) FROM SEVERAL GOVERNMENT WITNESSES THAT NUMEROUS OTHER PERSONS HAD BEEN CHARGED AND CONVICTED ON THE STRENGTH OF INFORMATION AND TESTIMONY SUPPLIED BY THE GOVERNMENT'S COOPERATING WITNESSES; (3) THAT IN A TAPE-RECORDED STATEMENT, NON-TESTIFYING BONANNO MEMBER ANTHONY URSO SAID THEY SHOULD "WHACK" THE CHILDREN OF COOPERATORS; AND (4) FROM VARIOUS WITNESSES THAT JUDGE GARAUFIS WOULD DECIDE IF THEY ARE TELLING THE TRUTH

In a case largely dependent on the jury's credibility assessment of cooperating witnesses and coconspirator hearsay declarants, the trial court committed reversible error with several erroneous – and in some instances borderline bizarre – evidentiary rulings that permitted the government to improperly bolster its case with irrelevant, immaterial and unfairly prejudicial evidence. These rulings included: (1) permitting government witness James Tartaglione to testify he was aware of no instance when either he or any other organized crime member had been charged with an offense of which the accused was not guilty; (2) permitting several witnesses to testify that numerous *other* defendants in *other* cases had been arrested and convicted on the strength of the testimony offered by the government's cooperating witnesses and others; (3) permitting testimony that non-

testifying coconspirator Anthony Urso said during a tape-recorded statement that the family and children of cooperators should be "whacked" and left in the street; and (4) permitting numerous cooperating witnesses to testify that "Judge Garaufis" would decide whether they were telling the truth. A trial court's admission of evidence is generally reviewed for abuse of discretion. See, e.g., United States v. Salameh, 152 F.3d 88, 129 (2d Cir. 1998).

A. The Court's Four Erroneous Evidentiary Rulings

1. Testimony of James Tartaglione that Everyone Charged is Guilty.

James Tartaglione was a pivotal witness for the government. By virtue of his position in the Bonanno family – major loan shark, member of the ruling commission, and confidante of Joe Massino – his testimony had the air of authority. He emphasized the requirement imposed on him by the government that he testify honestly (4974), and he also testified regarding extensive tape-recorded conversations with Mr. Basciano that the government claimed evidenced Mr. DeFilippo's guilt of the Sciascia murder (4815, 4816).

It was during his direct examination regarding these conversations with Basciano that the government embarked on a line of inquiry that drew numerous objections, but to which Tartaglione was ultimately permitted to

respond: whether he – Tartaglione – had ever been charged with a crime of which he was not guilty, and whether *any* organized crime figure, to his knowledge, had *ever* been charged with a crime of which that person was not guilty. While questioning Tartaglione regarding a consensually recorded conversation he had had with Mr. Basciano and others, the government transitioned – awkwardly – into the offending questions by asking Tartaglione about his taped comment, made in the context of a discussion about charges brought against organized crime members by the federal government, "They don't only hit you with this charge, 9,684 other charges." It appears – as later statements by the prosecutor suggest – that the prosecutor, having carefully planned out this line of examination, thought that by asking Tartaglione abut this statement he could get away with asking him whether *all* charges brought against *all* organized crime members are valid. And so the testimony proceeded:

> Q: Then, there's a discussion that says: "They paint you in a certain light." Mr. Basciano says: "They paint you in a certain light." And there's a discussion, in which you say: "They don't only hit you with this charge, 9,684 other charges." When Mr. Basciano said "They paint you in a certain light," what did you understand that to mean.
>
> A: That they take you and they look at you as a different type of a person.
>
> Q: Who is "they"?

A: The law enforcement.

Q: Okay. And when you said "9,684 other charges," what did you mean by that?

A: I was just saying it to say that you know how the government does this and that. What did you want me to say? Did you want me to turn around and say "Jesus, they are so nice, they are this and that"? They'll think I'm crazy.

MR. LEVIN: Objection.

THE COURT: Sustained. The jury will disregard that.

MR. ANDRES: What's the basis, Judge? Withdraw.

BY MR. ANDRES:

Q: When you sat there and you said that 9,000 charges, why did you say that?

A: Just to win their confidence, just to sit down and say that, "I'm with you." Just to say something.

Q: ***During the course of the time that you have been involved in the Bonanno Family, do you specifically know of anyone that's been charged with a crime that they were not guilty of?***

MR. LEVIN: Objection, 6012.

THE COURT: Sustained

BY MR. ANDRES:

Q: ***Sir, have you ever been charged with a crime that you weren't guilty of?***

A: ***No.***

MR. LEVIN: Objection.

THE COURT: Overruled.

BY MR. ANDRES:

Q: ***Have you ever been charged with a crime that you weren't guilty of?***

MR. LEVITT: Objection.

THE COURT: Overruled. You may answer.

A: ***No.***

Q: ***Are you aware, based on your experience in organized crime, of anyone that's been charged with a crime they didn't commit?***

MR. LEVIN: Objection.

MR. LEVITT: Objection.

THE COURT: Sustained.

BY MR. ANDRES:

Q: ***When you made a reference to "9,684 other charges," had you known, with respect to that comment, that specific comment, had you known of anyone in organized crime that had been charged with a crime that was not guilty of it?***

MR. LEVIN: Objection.

MR. LEVITT: Objection.

MR. ANDRES: Judge, can I have a sidebar?

THE COURT: You may answer.

A: ***No. It's not so.***

MR. LEVIN: Your Honor, may we have a sidebar?

THE COURT: No. [emphasis added]

At the next break in the testimony, the attorneys for Basciano and DeFilippo raised several objections to Tartaglione's direct testimony, including the above-quoted portions, and moved as well for a mistrial. The applications ultimately were denied, the court saying "[O]verruled. There is nothing that can be done about it now. Next" (4832):

> MR. LEVITT: Yes, Your Honor. I am, most respectfully, joining in the mistrial motion made by Mr. Levin on several points, Your Honor. First, with respect to the testimony by this witness that he's never known an organized crime case, somebody who is charged with a crime who wasn't guilty. We objected to that testimony and I believe we asked for a side-bar which was denied.
>
> THE COURT: Right. You did.
>
> MR. LEVITT: That was the fact that there was conversation here which may have elicited a question that may have elicited that response does not make it relevant, does not make it admissible, and does not make it otherwise permissible under the rules of evidence, all of them, including rule 403. What the government did there was essentially to tell this jury that it's the opinion of this witness who's been in organized crime for years and years and years with the extensive experience that when somebody is charged they are guilty. That was the very clear import. They used that improperly to bolster their case and to obtain a conviction based on this man's opinion that everybody who he knows who has ever been charged is guilty. Now, we also know because he is testifying in this case that he knows

that Mr. DeFilippo is charged, and therefore, the reasonable inference from what he said was that, therefore, Mr. DeFilippo must be guilty because everybody is guilty.

THE COURT: I have your point.

MR. ANDRES: The degrees of separation there, that is not question. I asked a specific question about him based on this transcript and you will notice that I have one of Mr. Levin's arguments.

THE COURT: Mr. Levitt.

MR. ANDRES: Whatever. Have these lapses, Judge, between what is actually said and his 17 suggestions or presumptions. Mr. Levitt can argue all of those things to the jury. I asked this witness based on a statement that he is making because what is happening here is this, Judge, this witness is the only one that was at this conversation, and he is testifying about what happened at that conversation during that conversation. And I am not aware of any case law which precludes a participant in a conversation to testify about what happened during that conversation and that's all that's happening and we have been at it for a half hour.

THE COURT: Fifteen minutes.

MR. LEVITT: Most respectfully, I would like to know what the relevance is of this witness testifying that is in his vast experience everybody in organized crime who is charged with a crime is guilty. I would ask what the relevance of that was, most respectfully.

MR. ANDRES: No. I am not here for cross-examination, Judge, which you said repeatedly it relates directly to a comment that he made on this transcript.

MR. LEVITT: What comment?

> MR. ANDRES: He made a comment that what the government does is they paint people in a certain light and they charge you with 9,684 charges to suggest, quite clearly, that you are charged with everything in the book that you are not guilty of, that they paint you in a certain light, and they charge you with all these crimes. So the follow-up question asked if he'd ever been charged with a crime that he didn't commit. He said no. I then asked if he ever knew anybody, and knowing that Mr. Levitt would argue to this Court that Mr. Tartaglione is somehow an expert and that his credibility is going to sway this jury is silly because he'll have an opportunity to cross-examine him. And I asked Mr. Cantarella similar questions about whether he's charged with crimes he didn't commit.
>
> MR. LEVITT: The reason the government just gave a complete non-answer is because there is no answer. He should not have been permitted to give that testimony. It was obviously meant to bolster the case and to suggest inferentially that Mr. DeFilippo is guilty. It is outrageously prejudicial and I am moving for a mistrial.

The mistrial motion was denied (4836).

2. Testimony Regarding Previous Convictions Secured Through the Testimony of Cooperating Witnesses

a. Testimony of FBI Special Agent John Carillo.

During the redirect examination of FBI Special Agent John Carillo – who testified as an expert on organized crime, loan sharking and illegal gambling – the government asked numerous questions to elicit testimony – over objection – that high-ranking members of organized crime were responsible for numerous convictions of organized crime members in other cases, and it then asked a series of additional questions to elicit that

numerous high ranking organized crime members were incarcerated as a result of successful federal prosecutions:

> Q: Are there higher ranking members of organized crime who have cooperated?
>
> A: Yes.
>
> Q: The information that they have provided has that led to other investigations?
>
> MR. LEVIN: Objection.
>
> THE COURT: Overruled.
>
> A: Led to numerous other investigations and arrests.
>
> Q: Convictions?
>
> A: Yes.
>
> Q: Okay. And that is because they have testified in open court?
>
> MR. LEVITT: Objection. Move to strike.
>
> THE COURT: Sustained.
>
> MR. LEVITT: I ask the jury be told to disregard.
>
> THE COURT: The jury will disregard the question. Next question.
>
> MR. ANDRES: May we have a side bar.
>
> THE COURT: Let's keep going.
>
> Q: Do you remember Mr. Quijano asked you a question about the murder of the three captains?

A: Yes.

Q: Okay. Those were three Bonanno Family captains, is that correct?

A: Yes.

Q: Do you know where the information about those murders came from?

A: The information, from cooperating witnesses.

Q: Okay. The information about those murders and all of the information that Mr. Quijano asked you about came from cooperating witnesses?

MR. LEVITT: Objection. May we have a side bar, please?

THE COURT: Asked and answered.

Q: Did that information lead to indictments?

A: Yes.

MR. LEVITT: Objection.

THE COURT: Overruled.

A: Yes.

Q: And convictions?

MR. LEVITT: Objection.

THE COURT: Overruled.

A: Yes.

Q: Those convictions were based on information from cooperating witnesses?

MR. LEVITT: Objection to the leading.

THE COURT: Asked and answered.

****

Q: Were members of the Bonanno family prosecuted for that murder [of Everett Hatcher]?

A: Yes.

Q: Okay. Were those prosecutions based on the testimony of cooperating witnesses?

A: Yes.

Q: Okay.

MR. LEVITT: I ask for a side bar.

Q: Do you know if Anthony Spero --

THE COURT: Overruled.

Q: Was [Joseph D'Amico] also involved in the murder of Louis Tuzzio?

A: Yes.

Q: Did he provide credible information --

MR. LEVITT: Objection.

MR. LEVIN: Objection.

THE COURT: Sustained.

MR. LEVITT: Judge, may we have a side bar, please?

THE COURT: No.

Q: Do you know if Mr. D'Amico also provided evidence about the involvement of Bonanno Family members and associates in other murders?

A: Yes, he did. (2427-2432).

* * * *

Q: In the year 2000, what was the official position that Carmine Persico held in the Colombo family?

A: He was the boss.

Q: Where was he?

A: Incarcerated.

MR. LEVITT: Asked and answered.

MR. QUIJANO: Ruling, please.

THE COURT: Asked and answered.

A: Why?

MR. ANDRES: Yes.

THE COURT: You may answer.

A: He was in for numerous homicides.

Q: Is that a result of a federal prosecution?

MR. QUIJANO: Objection, form, relevance.

THE COURT: On form, yes. On relevance, no. You can ask it again.

Q: Do you know if he was prosecuted in the state or federal government?

MR. QUIJANO: Objection.

THE COURT: By whom was he prosecuted if you know?

THE WITNESS: Federal government.

Q: Do you know if his conviction was the result of information provided by cooperating witnesses?

MR. LEVITT: Objection.

THE COURT: Overruled.

A: Yes, it was.

Q: You testified that John Gotti was in jail; is that correct?

A: Yes.

Q: Carmine Persico was in jail; is that correct?

A: Yes.

Q: Who was the boss of the Lucchese Family?

A: Vic Amuso.

Q: Was he in jail?

A: Yes.

THE COURT: Would you use the microphone?

MR. ANDRES: Sorry.

Q: Who is the boss of the Genovese organized crime family?

A: Vincent Gigante.

Q: Is he in jail?

A: He's deceased today. He was in prison.

Q: Do you know who he was prosecuted by?

A: The federal government.

Q: Was he convicted --

MR. LEVITT: Judge, I'm sorry, I have to ask for a side bar, please.

MR. ANDRES: Same question.

MR. LEVITT: Please.

THE COURT: Next question.

MR. LEVITT: May I please have a side bar, your Honor?

THE COURT: Actually, go back. We're near the end of the day. I think it would be appropriate to resume tomorrow morning at 10:00 o'clock. I'm going to remind the jurors not to discuss the case with anyone, not to discuss the case among themselves. If you're taking notes, please leave them in the jury deliberation room. (2440-2443).

After the jury was dismissed for the day the defendants explained their objections to the testimony, to no avail:

MR. LEVITT: I have been objecting to the questions whether or not certain organized crime bosses were convicted based upon the testimony of confidential informants. I move to strike all of that testimony. The jury is being misled into believing these confidential informants, number one, made the cases against these people without the wealth of other evidence there

was in the case, also implying they're necessarily believable, therefore you should believe confidential informants. It has no relevance to this case whatsoever. It's highly inflammatory. It should have been -- it should not have been permitted in the first place. The jury has now heard it. It's extremely prejudicial. I would invoke also Rule 403 besides relevance. It is unfairly misleading this jury over and over and over again.

THE COURT: Do you want to add anything to that or can I just go to Mr. Andres?

MR. LEVIN: Actually the same point.

THE COURT: Mr. Andres?

MR. ANDRES: Mr. Quijano asked a variety of questions --

THE COURT: Would you come up, please, to the well?

MR. ANDRES: It's entirely relevant. Mr. Quijano asked whether these men who were in jail in separate states, could have met. If that's not misleading to the jury, I don't know what is. They were physically in jail so they can't.

MR. QUIJANO: Not the testimony, not my question.

THE COURT: Stop. I want to discuss Mr. Levitt's point. I don't want to get off the point Mr. Levitt made. I want a discussion about whether the testimony as to what role cooperators played in the conviction of these people is relevant to the cross-examination of this expert witness, relevant -- and whether it's prejudicial and if it is prejudicial, what I ought to do about it.

MR. ANDRES: ***You know what, I don't know if it's relevant to the cross-examination, Judge, but you sustained every objection I made to it.*** [emphasis added] When Mr. Levin asked questions about cooperating witnesses who lie, whether they corroborate, how they corroborated --

THE COURT: Mr. Levin didn't do anything.

MR. ANDRES: Mr. Levitt, I'm sorry. Mr. Levitt specifically asked questions about cooperating witnesses, how their information was used and whether they trusted the people. How is it, Judge, how is it the defense gets to ask if law enforcement has ever made a mistake ever? That's like asking whether a defendant was ever guilty. These are the most prejudicial questions possible on cross-examination. Mr. Carillo, has the government ever made a mistake? Well, you know, Judge, there are mistakes being made today by the government. The government is not on trial. They're not.
These questions that the defense lawyers ask, my questions are directly in response to them. When Mr. Levitt asked questions about cooperating witnesses, to suggest their information is not sufficient or that they're lying, all of that is inappropriate. This witness can't testify about all the things that cooperating witnesses do. He doesn't have knowledge about that. He's being asked about proffer sessions, being asked about debriefing sessions. Mr. Quijano himself is relying on the information from cooperating witnesses in asking him questions. All the information that comes out about the three captains which the defense assumes as facts comes from cooperating witnesses. All the things they opened on which they assumed are facts come from cooperating witnesses. So, to not allow the government to respond by asking about how cooperating witnesses are used is crazy. They raised the issue.

THE COURT: We're pretty far afield at this point.

MR. LEVITT: We're far afield --

THE COURT: Because the defense opened the door by asking specific questions of an expert witness about specific crimes. Then the defense opened the door by putting into question whether the government makes mistakes. That having been said, how much more do we have to add to this by having an extensive discussion about what cooperating witnesses did in many different cases? Your point is made. What more needs to be done? You don't have to guild the lily here.

MR. LEVITT: The problem, number one, I move to strike that testimony and for a curative instruction. Otherwise I move for mistrial. Number two --

THE COURT: Motion to strike is denied. Your motion for mistrial is denied. You opened the door. You live with what you did. The defense decided to take a certain path. The government objected. I overruled the objection and the expert witness testified in fact as a fact witness as the
defense's fact witness, in fact. You made him your witness by doing that.

MR. LEVITT: I didn't, your Honor.

THE COURT: I'm sorry, that's my ruling.

MR. LEVITT: I would like to make my record.

THE COURT: You have made your record. That's it. You're going to sit down or taken out.

MR. LEVITT: I will. (2444).

b. Testimony of Salvatore Vitale.

During the redirect examination of Salvatore Vitale, the government asked Vitale about information and testimony Vitale provided against persons other than Mr. DeFilippo or Basciano (3514). When the questioning turned to whether Vitale had provided information regarding one Joseph Cammarano, defense counsel objected and requested a sidebar (3517-18). Counsel raised two objections. First, he argued that the questioning was beyond the scope of cross-examination as defense counsel had not examined

Vitale regarding whether he gave information regarding these other persons. Second, he objected that "what the government is attempting to infer here improperly is that because he provided information about these other people who the government also elicited in some instances were convicted, therefore he must be providing accurate information with respect to these defendants" (3519). The government responded that the testimony was admissible because counsel, on cross, "asked about all of these people, and asked about all of the murders. And, aside from that, he, in his opening statement, spoke directly about the fact that Mr. Vitale was targeting -- scapegoating is the words that he used, scapegoating Mr. DeFilippo" (3520). The court overruled the objection.

The prosecutor then asked several pages of questions regarding other persons about whom Vitale provided information:

> Q: During the course of your cooperation, did you provide information about Joseph Cammarano?
>
> A: Yes.
>
> Q: Who is he?
>
> A: Captain in the Bonanno Family.
>
> Q: Anthony Calabrese?
>
> A: Bonanno family.
>
> Q: Provide information?

A: Yes.

Q: About involvement in murder?

A: Yes.

Q: Michael Nose, did you provide information about Michael Nose?

A: Yes.

Q: Who is Michael Nose?

A: Goodfella in the Bonanno Family.

Q: How about Anthony Rabito?

A: Captain in the Bonanno family.

Q: Provided information about him?

A: Yes.

Q: Baldo Amato?

A: Goodfella in the Bonnano family.

Q: Provide information about him?

A: Yes.

Q: Jerry Asaro?

A: Yes.

Q: Generosa Basciano?

A: Yes.

Q: Both of those men associated with the Bonanno family?

A: Yes.

Q: Joseph D'Amico?

A: Yes.

Q: Joseph DeSimone?

A: Yes.

Q: Both of these men are associated with the Bonanno family?

A: Yes.

Q: Anthony Black?

A: Yes.

Q: Bruno Indelicato?

A: Yes.

Q: Who is Bruno Indelicato?

A: Goodfella in the Bonanno family.

Q: Robert Lino, did you provide information about Robert Lino?

A: Yes.

Q: Michael Cardello?

A: Yes.

Q: Perry Criscitelli?

A: Who?

Q: Perry Criscitelli.

A: Yes.

Q: All three of those people involved in the Bonanno family?

A: All soldiers.

Q: Were you debriefed about them?

A: Pardon.

Q: Debriefed about those individuals?

A: Yes.

Q: Did you provide information about those individuals to the government?

A: Yes.

Q: Joe Shakes?

A: Yes.

Q: Manny from the Bronx?

A: Yes.

Q: Who is Manny from the Bronx?

A: Acting captain.

Q: Provide information about him?

A: Yes, for Patty DeFilippo.

Q: Did you identify his position in organized crime?

A: Yes.

Q: Identify his involvement in jury tampering?

A: Yes.

MR. LEVITT: Your Honor --

Q: How about --

THE COURT: Is there an objection?

MR. LEVITT: Leading, cumulative.

THE COURT: Overruled. You may continue.

Q: Pete Rosa?

A: Yes.

Q: Provide information about him?

A: Yes.

Q: Veto Rizzuto?

A Yes.

Q: Where does Vito Rizzuto operate?

A: Montreal, Canada.

Q: Provided information about in him in murder?
A: Yes.

Q: Filocomo?

A: Yes.

Q: Johnny Joe Sperito?

A: Yes.

Q: Provide information about Johnny Joe Sperito?

A: Yes.

Q: At the time you provided information about Sperito, did you know if the murder he was involved in was death eligible?

A: I didn't know that.

Q: Provide information about Steven LoCurto?

A: Stevie Blue.

A: Yes.

Q: Is it fair to say you provided information about all the people that you know in the Bonanno family?

A: That's true.

Q: Did you meet and were you debriefed by FBI agents from other organized crime squads?

A: All four.

Q: Meet with people from the Colombo squad?

A: I did.

Q: How about the Genovese squad?

A: I did.

Q: The Gambino squad?

A: Yes.

Q: Did you provide information about those criminal enterprises?

A Yes.

Q: Are there other people in the Bonanno family who? I haven't mentioned that you provided information about?

A: Not that I can recall.

Q: Is it fair to say you provided any evidence or any information that you provided about members or associates of organized crime?

A: Any knowledge I had, yes.

Q Provided information about commission meetings; is that correct?

A : Yes.

Q: Provided information about the location where the bodies of the three captains were buried, as you understood it?

A: I provided information where they were dropped off on the street corner. Where the actual grave was I don't know. (3523-28).

c. Redirect Testimony of FBI Special Agent Gregory Massa

During the redirect testimony of FBI agent Gregory Massa on March 8, 2006, the government was permitted, over objection, to elicit that "Anthony Urso and 28 other individuals were arrested based in part on information from Salvatore Vitale" (3697). Defense counsel's objection was overruled and a request for a sidebar was denied. The government then

continued this line of inquiry, expanding the list of informants to numerous other government cooperators, including James Tartaglione, Joseph D'Amico, Frank Coppa and Richard Cantarella:

> Q: So Anthony Urso and those 28 other people were arrested based in part on information from Salvatore Vitale?
>
> A: Yes.
>
> Q: And based in part on information from James Tartaglione?
>
> A: Yes, sir.
>
> Q: Based in part on information from Joseph D'Amico?
>
> A: Yes, sir.
>
> Q: Based in part on information from Frank Coppa?
>
> A: Yes, sir.
>
> Q: Richard Cantarella?
>
> A: Yes, sir.
>
> Q: All of whom were cooperating witnesses --
>
> MR. LEVITT: May I have continuing objection?
>
> THE COURT: Yes. Your objection is noted.
>
> Q: All of whom had cooperated with the government at that time?
>
> A: Yes, sir.
>
> Q: And who had signed cooperation agreements?

A: Yes, sir. (3697-98).

3. Testimony of James Tartaglione that Anthony Urso Suggested that Families and Children be "Whacked"

The prosecutor asked questions during his redirect testimony of cooperating witness James Tartaglione regarding his review of tapes in preparation for his testimony at Joseph Massino's trial, and elicited that Tartaglione had not reviewed all the tapes in their entirety and could not recall "each and everything that was said on each of the recordings" (5758-59). The prosecutor (using a leading question) then asked Tartaglione whether he remembered a recorded conversation between himself, Tony Urso and Joe Cammarano (at which neither Basciano nor Mr. DeFilippo was present) during which Urso talked "about killing kids" (5759). The testimony and objection proceeded as follows:

> Q: As you sit here today, sir, do you have a specific recollection of something that Mr. Urso said about killing kids?
>
> A: Yes.
>
> MR. LEVIN: Objection, move to strike.
>
> Q What was said?
>
> MR. LEVIN: Relevance.
>
> THE COURT: Side bar.
>
> (At Side bar.)

MR. LEVIN: The basis of my objection is relevance as to Mr. Basciano. This is a conversation that took place at a time when Mr. Basciano was not present, either was Mr. DeFilippo and Mr. Urso was speaking to this witness telling this witness they're going to kill some of the rats' kids, throw them in the street. This is highly inflammatory, highly prejudicial. It has nothing to do with Mr. Basciano.

MR. ANDRES: You'll remember I objected prior to Mr. Levin bringing out the other tapes. He said he wanted to bring out all the tapes. We talked about 40 tapes, asked if he remembered anything, if he had a specific recollection, if he knew about them, if he studied them. He remembers this
one. This is a specific instance --

THE COURT: What's the relevance?

MR. ANDRES: Something he remembered, something that relates to the affairs of the Bonanno Family. It's something --

THE COURT: What has it to do with these defendants, either one of them?

MR. ANDRES: Judge it has to do with the investigation and what he remembers. They can get up on redirect, say was Vinny Basciano there, Patrick DeFilippo? They could do that. I'm not suggesting Mr. Basciano was there. The point is there's been a question asked about the other tapes, if he has any memory of them, asked him specifically over and over again in questions which really were largely irrelevant: Do you have an independent recollection ever each and everything that happened? Do you have an independent recollection of this? Do you remember that? Do you remember this? Well, this is something he remembers. This is one of the tapes he made, was part of the investigation.

THE COURT: What about the 403 issue, the inflammatory nature of the testimony as opposed to its probative value for this case?

MR. ANDRES: First of all, they opened the door wide open.

THE COURT: That doesn't absolve you of arguing the issue, does it?

MR. ANDRES: It's certainly no more or less probative or prejudicial than anything else. No one isaccusing either of these defendants of doing it. They couldget up on redirect, do it. This is the thing the Bonanno Family does. Mr. Levin's client was also involved in the conspiracy to murder Mr. Cicale's girlfriend. That's going to come out. This isn't any more prejudicial, came out in the Massino trial, too. There was nothing about it that implicated either of these men. He should be allowed to
rebut, either that or there should be an instruction that Mr. Levin's questions --

MR. LEVIN: Keep your hands down. The jury watches us.

THE COURT: Yes. Go ahead.

MR. ANDRES: There should be an instruction to the jury Mr. Levin's questions were inappropriate because the evidence that he related to was not relevant, but he brought before this jury that there were 40 other tapes, that they didn't review, nobody remembered, nobody prepared him on. That's not fair to the government. He's opened the door. Now I'm answering that question.

THE COURT: I heard you what is the nature of the evidence you expect to adduce from this set of questions?

MR. ANDRES: He's going to say Mr. Urso in discussing cooperating witnesses talked about killing the family and kids of cooperating witnesses. We didn't even ask to play the tape, Judge. We didn't ask to play the tape like we did in the Massino case. We didn't. Now it's come in because Mr. Levin has again misled the jury. If he's allowed to mislead the jury like that, we're not allowed to rebut that in any way, that's not fair to the government.

THE COURT: Anything else, Mr. Levin, Mr. Levitt?

MR. LEVITT: I was about to say the government's argument that, A, it's somehow relevant rebuttal to show that he has specific recollections concerning other tapes is somehow relevant, it eludes me. If that is marginally relevant, to say in order to make his point he should beentitled to bring out Mr. Urso wanted to murder the childrenof cooperators is so far off the map in terms of a reasonable rebuttal as to just, most respectfully, be absurd, forgetting about the 403 issue which is important. It has zero relevance to this case. The government is taking the position because this witness was asked general questions concerning his recollection of things, therefore the government can cherry pick any statement in 40 tapes no matter how inflammatory is just beyond the pale.

MR. ANDRES: Why are they bringing up the other tapes, do it with
impunity, take out the pieces they like? Mr. Levin's reads from things. They're not in evidence. He doesn't have the ability to do that. It's not appropriate. He's reading from transcripts that are not in evidence. He
hasn't tried to play the tapes. They talk about 40 tapes, misleading the jury.

THE COURT: I've considered all the arguments and I find it's appropriate redirect.

(Open court.)
Q: Mr. Tartaglione, I was asking you before a tape recording that was made with Mr. Urso and Mr. Cammarano, do you remember that?

A: Yes.

Q: Do you remember a comment about the murdering the wives and children of cooperating witnesses?

A: Yes.

Q: Can you explain to the jury what was said by Mr. Urso?

A: ***That anybody that's cooperating that we should hack[7] out their kids or the family, just so -- and throw them in the streets and make a lesson out of this*** (emphasis added)**.**

Q: Why would that make a lesson?

A: That if you became a cooperator, you would have second thoughts about being a cooperator.

Q: Why in the Bonanno Family, why would it cause a problem for the Bonanno Family for people to cooperate?

A: Excuse me?

Q: Why would it cause a problem for the Bonanno Family for members of the Bonanno Family to be cooperating?

A: Well, you cooperate, you tell them everything that you know about the family.

Q: Would that relate to criminal activity?

A: It would be criminal activity and indictments.

Q: When Mr. Urso said that, Mr. Basciano wasn't present, was he?

A: No.

Q: Mr. DeFilippo wasn't present?

A: No.

Q: At the time was Mr. Urso the highest ranking member of the Bonanno Family on the street?

[7] Should be "whack".

A: Yes. (5263-65).

4.Testimony that Judge Garaufis Would Determine Whether Witnesses were Truthful.

Prior to opening statements, counsel for Mr. DeFilippo asked for a ruling prohibiting the government from mentioning during opening statement or thereafter, that its cooperating witnesses had pleaded guilty before the same judge who was presiding at the trial, leading to the following colloquy and, ultimately, an adverse ruling.

> MR. LEVITT: … I am asking that the government not allude either during their opening statement or thereafter to the fact that Your Honor specifically will be the judge who will be sentencing many of the cooperators.
>
> MR. ANDRES: That, Judge, is a fact that came in during the last trial, and certainly, I am not aware of any legal principle that precludes us from doing so. Excuse me. Your Honor specifically told many of the jurors already during the voir dire that you would be sentencing them or that the Judge sentenced them and it is relevant – specifically relevant because some of these witnesses who will be sentenced by you are here testifying in front of the Judge that will sentence them.
>
> THE COURT: Well, that will come out, I take it, during their testimony. At some point if there is any question raised on cross-examination about reasons to lie or reasons totell the truth under the cooperation agreement; isn't that right?
>
> MR. LEVITT: Sure, but it doesn't have to mean that they knew this Judge in particular is the one who will be sentencing them. I think it is wrong because, first, it is confusing the line between the Judge's role as fact finder and the Judge's role as giver of the law. In this case I think it makes you appear to be interested in

> the outcome to those lay jurors. I have no objection to the witnesses testifying that their sentence ultimately is up to the Judge. I simply don't think that it is appropriate, and I have had this issue before, and there is no law that I am aware of but I have had judges who have said, fine, the witness can testify that the final sentence is up to the Judge but not to invoke Your Honor's name in that process.
>
> MR. ANDRES: Once again, you are being asked to poll the rest of the judges in this courthouse.
>
> MR. LEVITT: I am not asking.
>
> MR. ANDRES: We had extensive pretrial motions. Mr. Levitt punted on many of those and didn't respond. Now, at the last minute he is raising issues which he has not briefed, which he is making oral applications and if he wants to proceed through it he should address the Court in a brief.
>
> THE COURT: I am not going to limit the government in that regard. Motion is denied. (1951-53).

The government thereafter took every opportunity to associate the judge with the proceedings involving these witnesses, eliciting from its cooperating witnesses that each had pleaded guilty in front of Judge Garaufis and that their credibility would be judged by his Honor. See, e.g., 2548, 2911, 2915, 2916 (Salvatore Vitale); 4290 (Cantarella); 5853, 5856, 5860, 5861 (Cicale); 6839, 6884, 6885, 6886, 6887, 6891 (Lee), 7366, 7483 (Barbieri), Anthony Bottone (April 11)[8]

[8] Given the government's repeated invocation of Judge Garaufis' name before the jury one of the many ironies of the trial was the application by the lead prosecutor, Mr. Andres, during the cross-examination of Dominic Cicale by Mr. Basciano's defense

B. The Applicable Law

The four evidentiary errors identified in this Point implicate both overlapping and distinct rules of evidence, but all have in common the prosecutor's calculated introduction of irrelevant yet highly inflammatory or otherwise unfairly prejudicial testimony in order to secure an edge in a close case. We address these errors *seriatim.*

1. Tartaglione's Testimony that Everyone Charged with a Crime is Guilty was Inadmissible Opinion Testimony

James Tartaglione's testimony that he didn't know "of anyone that's been charged with a crime that they were not guilty of" was opinion testimony. As such, it could properly have been admitted, if at all, only upon a showing that it was (1) relevant evidence under Fed.R.Evid. 401 and 402; (2) a proper subject for lay opinion testimony under Fed.R.Evid. 701; and (3) not excludable under Fed.R.Evid. 403. The testimony in fact satisfied none of these requirements.

Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the

---

counsel, for a ruling that defense counsel "not mention my name as they have repeatedly" (5949).

determination of the action more probable or less probable than it would be without the evidence." Testimony that other persons charged with unspecified crimes in unidentified other cases could have no conceivable relevance to whether Mr. DeFilippo was guilty of the charges in his indictment. Yet the evidence powerfully – and improperly – sent the message that "they're all guilty."

The proffer of relevance by the prosecutor was nonsensical. When the question was first asked (in a leading fashion – "*…do you specifically know of anyone that's been charged with a crime that they were not guilty of?"* (4794)) – an objection was sustained. Shortly thereafter the question was asked a second time (again in a leading fashion) – "*Are you aware, based on your experience in organized crime, of anyone that's been charged with a crime they didn't commit?"* (4795)) and again the objection was sustained. Finally, the prosecutor sought to tether the question to Tartaglione's tape-recorded statement regarding how the federal government indicts organized crime members on multiple charges, asking, "*When you made a reference to '9,684 other charges,' had you known, with respect to that comment, that specific comment, had you known of anyone in organized crime that had been charged with a crime that was not guilty of it?"* This time the court

overruled defense counsel's objection and the witness answered "*No. It's not so"* (4796).

After the jury was excused, the prosecutor again sought to justify the testimony by claiming it was relevant to the "9,684 other charges" statement, yet this certainly was not so, and the prosecutor's reference to this earlier statement was an obvious, forced effort to give Tartaglione's inadmissible testimony a patina of relevance. Indeed, the prosecutor's explanation rings hollow since he had already elicited from Tartaglione that the reason he made the "9,684 other charges" statement was merely to "win [the] confidence" of those present. There was no reasonable justification for further eliciting Tartaglione's belief that no one in organized crime had ever been charged with a crime of which he was not guilty. What comes through from the three times the objectionable question was asked – always in leading form – is that the prosecutor had a plan to elicit this testimony – it was no mistake – and repeatedly endeavored to do so until he hit the right chord with the judge. Yet, in fact, the testimony was irrelevant and therefore inadmissible.

Moreover, even had the testimony been relevant it would have been inadmissible because it was an opinion that did not satisfy the requirements

of Fed.R.Evid. 701. Rule 701, titled *Opinion Testimony by Lay Witnesses* provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Tartaglione's testimony was, in fact, an opinion, because (at least as to defendants other than him) it expressed his belief that all organized crime defendants are guilty as charged. Obviously, he could not know this in all cases as a matter of fact. Yet his testimony did not meet the first and second requirements for admissibility under Rule 701: There was, of course, no foundation for his assertion that he had never "known of anyone in organized crime that had been charged with a crime that was not guilty of it," and therefore it cannot be said that this opinion was "rationally based" on his "perception" rather than being some uninformed conclusion he adopted based on who-knows-what. More significantly, however, the testimony was helpful neither to a "clear understanding of the witness' testimony" nor to "the determination of a fact in issue." In fact, the objectionable testimony shed no meaningful light at all on the balance of

Tartaglione's testimony, nor did it shed a single lumen of light on whether Mr. DeFilippo committed the charged offenses.

The government tried, awkwardly, to link the testimony to Tartaglione's taped reference to "9,684 other charges," but this was a contrivance. As mentioned above, Tartaglione had earlier explained he made this comment to "win [the] confidence" of his companions, or as Tartaglione put it, "to say that you know how the government does this and that," i.e. he was simply trying to empathize with Basciano, who said, "They paint you in a certain light" (4794). Tartaglione continued in this vein stating, "What did you want me to say? Did you want me to turn around and say 'Jesus, they are so nice, they are this and that'? They'll think I'm crazy." Id.

This Court recently discussed the parameters of lay opinion testimony under Fed.R.Evid. 701 in United States v. Kaplan, 490 F.3d 110 (2d Cir. 2007). Kaplan was an appeal from a conviction of a lawyer whose firm handled accident cases, many of which were fraudulent in that either the accidents were staged or the injuries exaggerated. The leaders of the fraud were doctors that ran a medical clinic and referred the cases to the law firm. The law firm was originally run by a lawyer named Alexander Galkovich, but after he was arrested for fraud, the conspirators had to get a new lawyer

to front as the firm's principal. Enter Mr. Kaplan, who supposedly bought the Galkovich firm but who was rarely present, as the office continued to run as it always had. Galkovich eventually agreed to cooperate with the government and the scheme unraveled. He thereafter gave extensive testimony, including lay opinion testimony under Rule 701. He testified, for example, that when he spoke with Kaplan about the business, Kaplan had said he had "experience with these kinds of cases." When asked what he understood "these kind of cases" to mean, he testified:

> That he understood that these were car accident cases where people exaggerated their injuries, where it was crucial to have a narrative report that exaggerated the injuries, that these reports were bought for the best of prices to get the best of reports and that you could settle these cases for very good money in a short period of time.

Galkovich also referred to further conversations with Kaplan and said he concluded from these conversations that, "I think he knew exactly what he was getting into." 490 F.3d at 117.

The central question on appeal was whether this and other, similar opinion testimony was properly admissible under Rule 701. The court held it was not because the evidence failed to demonstrate that the witness's lay opinion testimony was "rationally based on the perception of the witness":

> When Galkovich was asked to articulate the basis for his opinion, he answered, "I based it on the only thing I could base it on, which is my experience there, what people said about

490 F.3d at 119. Also inadmissible, said the Court, was Galkovich's testimony regarding his and other persons' knowledge that these cases were fraudulent – admitted as circumstantial evidence of Kaplan's knowledge – as there was no testimony that Kaplan was aware of the opinion of these other persons. Any minimal relevance of this testimony, said the court, was substantially outweighed by the risk of unfair prejudice.

Galkovich's testimony at least arguably was relevant, as it addressed the central issue of Kaplan's knowledge; it foundered, however, on the first requirement under Rule 701, because it was not shown to be rationally based on the witness' perception. Tartaglione's testimony, however, was not even relevant, let alone did it satisfy the first and second requirements of lay opinion testimony. Moreover, as with Galkovich's testimony, Tartaglione's should have been excluded under Rule 403 because it was precisely the sort of testimony that jurors might latch on to – unfairly – to ignore other evidence and find the defendant guilty. Tartaglione, a Bonanno capo and member of the ruling committee, told the jury they're all guilty – all the

time. Any juror who accepted this inadmissible and inflammatory statement as true really didn't have to go much further to return a verdict of guilty.

2. Testimony that the Government's Cooperating Witnesses had Secured Numerous Other Convictions Constituted Improper Bolstering

The testimony of the government's expert witnesses, Agent Carillo, that the government's cooperating witnesses in this and other cases were responsible for securing enumerable other convictions was inadmissible because it was irrelevant, yet calculated to influence the jurors by giving them a comfort level with a guilty verdict, i.e. "other juries believed these witnesses and so we should too." Yet, as a matter of law, the fact that some other jury convicted other defendants at trials in which the testimony of various cooperators may or may not have been significant had no conceivable relevance to whether these jurors should believe these witnesses with respect to the guilt – or not – of Mr. DeFilippo.

The government, apparently recognizing this testimony was not otherwise relevant, conjured a theory of "opening the door" that was a canard. When the court finally heard defense counsel's objections to FBI Agent Carillo's testimony regarding the previous successes of cooperator-driven testimony, defense counsel moved to strike the testimony as irrelevant and otherwise excludable under Rule 403, arguing: "The jury is

being misled into believing these confidential informants, number one, made the cases against these people without the wealth of other evidence there was in the case, also implying they're necessarily believable, therefore you should believe confidential informants. It has no relevance to this case whatsoever. It's highly inflammatory. It should … not have been permitted in the first place" (2444).

When the court asked the prosecutor to direct his remarks at the above-quoted argument he conceded "I don't know if it's relevant to the cross-examination…," but argued the objected-to testimony was relevant because counsel for Mr. DeFilippo had asked the witness, "if law enforcement has ever made a mistake ever?" The prosecutor continued (without a hint of irony), "That's like asking whether a defendant was ever guilty. These are the most prejudicial questions possible on cross-examination" (2445-46). The court then ruled that "the defense opened the door by asking specific questions of an expert witness about specific crimes. Then the defense opened the door by putting into question whether the government makes mistakes" (2446-47), adding, after Mr. DeFilippo's counsel moved for a curative instruction or a mistrial, "You opened the door. You with what you did." When counsel objected he in fact did not open the

door and asked to make a further record the court said, "You're going to sit down or [be] taken out" (2447).

Counsel did not open the door to Agent Carillo's extensive testimony regarding the supposed successes of cooperating witnesses in other federal cases. Carillo had testified for the government as an organized crime expert,[9] imparting substantial information regarding the structure of organized crime families in general and the Bonanno family in particular. During cross-examination of Agent Carillo, counsel for Mr. DeFilippo asked Agent Carillo a series of questions addressing the sources of his information, particularly members of organized crime who cooperate with the government (2414-15). Counsel then attempted to ask a series of questions regarding the credibility of such sources, but the government objected to each such question and each objection was sustained (2415-18). Counsel then asked Agent Carillo the following question, and the following answer was given:

> Q: Nonetheless, over the years, and not -- and again I am asking you as an expert in the structure of organized crime, mistakes have been made with respect to who, for example, was the boss of particular crime families?
>
> MR. ANDRES: Objection. Asked and answered.

[9] Counsel had moved pretrial to exclude such testimony as violative of Crawford. The motion was denied. (Doc. #420).

THE COURT: No. I will allow it.

A: Yes, there have been mistakes.

Counsel then asked Agent Carillo about specific instances where mistakes may have been made by the FBI (2419-20).

Apparent from the foregoing testimony is that defense counsel was permitted to ask only limited questions of Agent Carillo regarding "mistakes" that may have been made by the FBI. These questions did not, however, specifically concern cooperating individuals, but rather general FBI intelligence. Counsel's questions were entirely proper since Carillo testified as an expert, and he was permitted to give full responses that included his assurance that the FBI corroborates its information before relying on it (2419: "As far as mistakes that I have made personally, I've never acted on the information of a cooperator or an informant because we corroborate it before we act").

None of these questions opened the door to the flood of redirect testimony elicited from Agent Carillo about the bountiful successes of cooperating witnesses in criminal cases. Moreover, any marginal relevance of this testimony – and there in fact was none – was substantially outweighed by the risk of unfair prejudice pursuant to Fed.R.Evid. 403, particularly the risk that the jury would wrongly determine the government's

cooperators to be credible based on the supposed successes of other cooperators in different cases. In this context, the testimony misleadingly suggested that these witnesses must have been honest because their testimony resulted in enumerable other convictions, a conclusion that ignores the facts of the cases at which these witnesses testified, the charges, the other evidence that was admitted, and the quite distinct possibility that these witnesses also testified regarding charges that ended in acquittal.

Accepting the government's position would result in giving the government a blank check to routinely introduce evidence that its cooperating witnesses are generally believed by juries and result in convictions, any time a defense attorney questions an organized crime "structure" witness regarding the reliability of the sources he or she uses to form opinions. This is not, and should not be, the law.

3. Testimony Regarding the Bonanno Family's Intent to "Whack" Families and Children of Cooperators was Irrelevant and Prejudicial

There was no relevance to Tartaglione's testimony that Anthony Urso suggested, in a tape-recorded conversation, that the Bonanno family should "[w]hack out the[] kids or the family" of cooperators and "throw them in the street." Its singular and transparent purpose was to inflame the jury against Messrs. DeFilippo and Basciano – who were not present when the statement

was made, much less did they ratify its sentiment. The prosecutor argued the testimony was admissible because counsel for Mr. Basciano had cross-examined Tartaglione regarding his recollection – or lack of recollection - of the content of 40 tapes that had not been played during the government's direct examination. "He remembers this one" said the prosecutor (5260). When asked by the court, "What's the relevance?" the prosecutor responded, "Something he remembered, something that relates to the affairs of the Bonanno Family." The court then asked about the Rule 403 issue, and the prosecutor replied, "It's certainly no more or less probative or prejudicial than anything else. No one is accusing either of these defendants of doing it… This is the thing the Bonnano Family does" (5261).

In fact, there was no evidence that "this is the thing the Bonnano Family does" and it certainly had no relevance at all to any issue in the case. Moreover, the cross-examination of Tartaglione by Mr. Basciano's lawyer regarding whether the witness recollected the content of unplayed tapes did not give the government license to admit absolutely anything said in those tapes, relevant or not, unfairly inflammatory or not; the government still was bound by the rules of evidence (or should have been).

If the prosecutor's motive was to establish Tartaglione's familiarity with the unplayed tapes there were other, less inflammatory ways to make

the point. The prosecutor's choice of snippets betrays his true motive: to unfairly and inaccurately portray Mr. DeFilippo as someone who knowingly embraced an organization that would murder women and children. While this prosecutor – like all prosecutors – may strike hard blows, he was not at liberty to strike foul ones. Berger v. United States, 295 U.S. 78, 88 (1935). Yet he did, again and again and again.

4. The Repeated Testimony of the Government's Cooperating Witnesses that Judge Garaufis Would Decide if They Are Truthful Improperly Bolstered their Credibility and Wrongly Made it Appear That the Government and the Judge Were on the Same Team.

The court should not have permitted the government to elicit, repeatedly, each cooperating witnesses' understanding that Judge Garaufis would ultimately judge his credibility and pronounce sentence. Not only was the identity of the sentencing judge irrelevant to any fact in issue, but such testimony wrongly suggested to the jury that the government and Judge Garaufis were in a truth-finding partnership and that the judge was not merely the judge of the law but served a credibility-finding function as well. In essence, the government was signaling to the jury, "We wouldn't put on false testimony before this judge."

The government's repeated invocation – through its witnesses – of Judge Garaufis' name and stature could not have been lost on the jury. See

generally Bollenbach v. United States, 326 U.S. 607, 612 (1946)("'[t]he influence of the trial judge is necessarily and properly of great weight' and the jurors are ever watchful of the words that fall from him")(citation omitted). Indeed, such undoubtedly was the government's motive in repetitively invoking his Honor's name. When counsel requested that the judge not be referred to by name the prosecutor did not even attempt to proffer its relevance, but instead simply said defense counsel "punted" on the issue by not raising it at some time earlier than before the beginning of opening statements (1953).

This case is a far cry from United States v. Miller, 116 F.3d 641, 683 (2d Cir. 1997), where this Court found that an unobjected-to statement in summation, that cooperators would be sentenced by the trial judge, was not plain error, and likely not error, but in any event harmless. Here, by contrast, the government drilled into the jury Judge Garaufis' active involvement in judging the witness's credibility:

> Vitale:
>
> Q: Did you plead guilty to those murders in front of a federal judge?
>
> A: I did.
>
> Q: Which judge?
>
> A: In front of Judge Garaufis. (2547-8).

* * * *

Q: When you pled guilty did you appear before a federal judge?

A: Yes.

Q: Which judge?

A: Judge Garaufis. (2910-11).

* * * *

Q: A prosecutor in the United States Attorney's Office will write that letter?

A: Yes.

Q: Who gets the letter?

A: Judge Garaufis. (2915).

* * * *

Q: And who ultimately will decide what sentence you are going to get?

A: Judge Garaufis. (2916).

* * * *

Cantarella:

Q: When you pled guilty, did you appear before a judge?

A: Yes.

Q: Which judge?

A: Judge Garaufis. (4290).

* * * *

Cicale:

Q: And in February, did you sign a cooperation agreement?

A: Yes, I did.

Q: Did you plead guilty to certain crimes?

A: Yes, I did.

Q: Did you do that in front of a Federal Judge?

A: Yes, I did.

Q: Which Judge?

A: Judge Garaufis. (5853).

Q: You testified that you pled guilty in front of Judge Garaufis. At that time, did he explain to you what penalties you faced?

A: Yes, he did. (5856).

Q: And who writes the 5K letter?

A: The prosecutor.

Q: And who does it go to?

A: It goes to Judge Garaufis.

Q: Is that letter important to you?

A: It's very important to me.

Q: Why?

A: Because it gives Judge Garaufis a discretion that he could give me a downward departure from my sentence.

Q: Is Judge Garaufis obligated to give you a lower sentence?

A: No, he is not.

Q: And who ultimately decides what your sentence will be?

A: Judge Garaufis.

Q: What happens if you breach your agreement in any way?

A: I'll be facing death.

Q: Or life imprisonment?

A: Yes, sir. (5860).

* * * *

Barbieri:

Q: Did you ultimately plead guilty in court?

A: Yes.

Q: Before which judge?

A: Judge Garaufis. (7483).

* * * *

Q: You testified about them here today and yesterday?

A: Yes.

Q: Before judge Garaufis?

A: Yes.

Q: The same judge that will sentence you?

A: Yes.

Q: The same judge that is sentencing you is going to know about all your crimes?

A: Yes.

Q: Even the ones you didn't plead guilty to?

A: Yes. (7366).

It is one thing to permit a discreet mention to the jury during summation that a challenged witness will be sentenced by the trial judge (see United States v. Forbes, 2006WL 2850412 (D.Conn. 2006) ("Under Second Circuit law, the government is permitted to inform the jury during summation, after an attack on the credibility of a witness who testifies pursuant to a cooperation agreement, that pursuant to the terms of the agreement, the witness will be sentenced by the same judge before whom the witness testifies"), but it is quite another to countenance endless repetition by virtually every cooperating witness that this judge will pass on the credibility of the witness and that this judge will determine the witness's truthfulness and that this judge will likely give the witness credit only if the witness is honest. What these arguments suggest is that this judge, being privy not only to the same information as the jury but quite likely additional facts as well, knows what is truthful and what is not, and that the witness therefore would never testify falsely and thereby seal his own doom. Some

testimony or argument may be tolerated, or found harmless, when said once, yet be recognized as prejudicial when used as a virtual incantation. See United States v. Becker, __ F.3d __, 2007 WL 2669604 (2d Cir. September 13, 2007) (court observes, as one of the reasons for finding Crawford error not harmless, that "the sheer number of plea allocutions admitted to prove the conspiracy in this case is significant, and highlights the importance of such testimony to the government's case").

At the racketeering trial in United States v. Amato et al., 03 CR 1382 (NGG), tried before Judge Garaufis shortly after the end of the instant trial, the government agreed not to elicit from its cooperating witnesses that they would be sentenced by Judge Garaufis (Amato Transcript at 819). Unfortunately this agreement came too late to benefit Mr. DeFilippo, and, as a result, he was prejudiced by repeated testimony from multiple cooperating witnesses wrongly suggesting that the trial judge reliably served the role of truth-telling catalyst.

In sum, the court's willingness to give the government wide berth in its presentation of evidence resulted in a trial infected by an extraordinary array of inadmissible and prejudicial testimony, only a fraction of which is catalogued here: informing the jury that all organized crime defendants are guilty: that the same witnesses who testified against Mr. DeFilippo had been

believed by other juries previously in similar cases; that Bonanno family members would "whack" innocent women and children and leave them in the gutter; and that each cooperating witness would not lie because they would inevitably be sentenced before the omniscient trial judge. After such testimony Mr. DeFilippo had little chance of securing a verdict based on admissible evidence, and in this light, the verdict was no surprise. This Court should not hesitate to find that the trial court's admission of this evidence was an abuse of discretion, United States v. Salameh, 152 F.3d 88, 129 (2d Cir. 1998), and that Mr. DeFilippo's conviction should therefore be reversed and a new trial granted.

Point Two

THE TRIAL COURT ERRED WHEN, IN A SINGLE RULING, IT (1) STRUCK IMPORTANT CROSS-EXAMINATION OF LYNCHPIN GOVERNMENT WITNESS SALVATORE VITALE; AND (2) SUA SPONTE ORDERED DEFENSE COUNSEL TO PAUSE AFTER EACH QUESTION TO OBTAIN THE COURT'S APPROVAL BEFORE VITALE WOULD BE REQUIRED TO ANSWER

The court dealt two serious, unfair blows to the defense early in the trial. First, the court struck cross-examination testimony of the government's first (and most important) cooperating witness – Salvatore Vitale – that he was aware that another Bonanno family member had been the subject of a death penalty prosecution for murderous conduct as a Bonanno family member. This ruling removed from the jury critical

evidence establishing Vitale's motive to lie. Then, adding insult to injury, the court sua sponte instructed Vitale to not answer the questions of Mr. DeFilippo's attorney until the court approved each one, regardless whether the government interposed and objection. Both of these rulings were erroneous and denied Mr. DeFilippo a fair trial.

A. The Court's Sua Sponte Striking of Vitale's Testimony that he was Aware Pitera Received the Death Penalty and Instructing the Witness to Pause Before Answering Each Question Posed By Mr. DeFilippo's Attorney so that the Court Could Rule

Salvatore Vitale was the government's first witness and its most important one. As Bonanno underboss, he provided lengthy and detailed testimony regarding the structure and workings of the Bonanno family and specific and damaging testimony regarding each of the charges against Mr. DeFilippo. Counsel for Mr. Basciano was the first to cross-examine Vitale. Counsel for DeFilippo followed, on March 6, 2006. During the first day of his cross-examination of Vitale, Mr. DeFilippo's counsel questioned Vitale about whether he had wanted to be "the first in the door to tell the government about the Sciascia murder," and Vitale said this was "not true" (3248). Vitale then denied he understood, before agreeing to proffer with the government, that he could face the death penalty for the 1999 murder of George Sciascia – thus providing him a motive to minimize his own role in

the murder and falsely accuse DeFilippo.[10] To challenge this denial defense counsel cross-examined him regarding whether he knew as early as 1995 that another Bonanno family member, Thomas Pitera, had been the subject of a death penalty prosecution (3174-77). He nonetheless persisted in claiming he was not aware *he* might be subject to a death penalty prosecution:

> Q: You knew from Tommy Karate's experience that it could be a death penalty case, didn't you?
>
> A: That's not true.
>
> Q: You knew there was a death penalty, right?
>
> A: No, I did not.
>
> Q: Didn't know there was such a thing as a death penalty?
>
> MR. ANDRES: There's a question and an answer.
>
> THE COURT: Let him answer the question.
>
> A: I didn't know about death penalty eligibility.
>
> Q: Sorry?
>
> A: Didn't know about death penalty eligibility.

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[10] During opening statement, Mr. DeFilippo's attorney argued that Vitale had falsely implicated DeFilippo in Sciascia's murder to enhance his own cooperation (2067). As defense counsel was about to commence his cross-examination, the government commented, "Mr. Levitt opened on a theory he could not prove, period. He opened this trial on the theory that Sal Vitale put Patti DeFilippo in the death penalty because he wanted to get credit for it. Mr. Levitt can't prove that. There's an example, number one, of him misstating the facts. He cannot prove that" (3137).

> Q: What did you think was different between the Sciascia murder and Tommy Karate's murder which you already acknowledged you knew was a death penalty case?
>
> MR. ANDRES: Objection.
>
> THE COURT: Sustained.
>
> MR. LEVITT: Might I ask for a ruling, your Honor?
>
> Might I ask for a ruling why, Your Honor?[11]

The balance of cross by Mr. DeFilippo's counsel on March 6th was aggressive but otherwise uneventful. The following day, the defense agreed to permit the government to call a witness out of turn. After the conclusion of that witness's testimony cross-examination of Vitale by Mr. DeFilippo's counsel was set to resume. As the cross was about to begin, the court *sua sponte*, in the jury's presence and with no forewarning, began to tell the jury it was about to give it an instruction "regarding the cross-examination of this witness and what you may or may not consider…" (3415).[12] Defense counsel at this point requested a side-bar, which was denied, and the court continued:

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[11] Vitale went on to testify that, even though he had already pleaded to the Sciascia murder he believed that if the government "rips up the cooperation agreement" he could be tried for the Sciascia murder and "maybe get the death penalty" (3560-61).

[12] That morning the government submitted a letter (Doc. # 519) objecting that Pitera had been charged with a CCE offense, 18 U.S.C. § 848, whereas Vitale had not. Plainly, however, just as DeFilippo was charged with a death-eligible offense for the Sciasica murder, Vitale could have been as well, and the government in fact halted Vitale's proffer

> Yesterday counsel for defendant DeFilippo asked witness Salvatore Vitale questions about an individual named Thomas Pitera, who was tried in this district for a death eligible crime. Counsel suggested that Mr. Vitale was also subject to the death penalty for the same crimes. This was not accurate. Mr. Vitale was charged pursuant to a different statute which was not charged in the Pitera case and for which Mr. Pitera was not subject to the death penalty. Accordingly, I am going to strike the testimony and instruct you not to consider it during your deliberations in this case. (3415).

The court immediately thereafter announced to the jury that, regardless of whether the government objected to a particular question the court would henceforth approve or disapprove each question asked by defense counsel before the witness would be required to answer the question:

> Third, with respect to the continued cross-examination of Mr. Vitale, I'm going to instruct counsel that they are to proceed as follows: First, that when a question is asked on cross-examination that the government may or may not make an objection, but I'm instructing the witness not to answer until I have specifically given him the instruction to do so. (3416).

Defense counsel objected to both instructions and requested a sidebar, which was denied (3415, 3416), but nonetheless proceeded with his cross-examination. Vitale answered defense counsel's first three questions without pausing, whereupon the court ordered him to stop:

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when he began to talk about the Sciascia murder, while the government considered the related death penalty issues (9174-75).

> THE COURT: No, no. You can't answer until I give you permission to answer. When I tell you you can answer, then you can answer. That's what we're going to do. You may answer.
>
> A: Yes. (3416).

The examination then proceeded as the court ordered for the next eight pages of transcript, comprising some 50 questions, when the jury and the witness were excused and the court said, "We'll resume at 1:30" (3424, 3425). Counsel for both defendants sought to address the judge, but he walked out of the courtroom without responding. Counsel for Mr. DeFilippo then said, "May the record reflect the court just left the room," whereupon the judge abruptly re-entered the courtroom and declared:

> THE COURT: Excuse me. When I said 1:30, that was the last item that's going on this record. Don't you dare try to put something on the record when I'm not in the courtroom. 1:30. That's it. Don't try it or I'll find you in contempt. (3425).

After lunch, Mr. DeFilippo's counsel put on the record his objection to the court's rulings. He objected to the court striking Vitale's testimony regarding Pitera both because it had been done without discussion or forewarning, and because the fact that Pitera was charged with a CCE offense and Vitale was not was irrelevant; rather, what was significant was that Vitale had committed conduct similar to that for which Vitale knew Pitera was required to stand trial for his life, and so Vitale likely understood

that he, too, could be subject to a death penalty prosecution for killing George Sciascia (3249). Counsel also objected to the court's instruction to the witness to await the court's ruling before answering each question (3429-30). The court said it did so because the prior day "even where there was an objection, I was not given an opportunity to rule on the objection" and that he was "compelled to do it by Mr. Levitt's conduct" (3430). It then suspended the procedure and the cross-examination continued.

B. The Applicable Law

Each of these two rulings was unjustified and prejudicial. The ruling striking the Pitera-related testimony undercut defense counsel's legitimate argument that Vitale had minimized his own involvement in the Sciascia murder and fabricated DeFilippo's involvement both to make himself more valuable as a cooperator and also to reduce the likelihood that he could be subject to a death penalty prosecution. This argument was relevant not only to Vitale's testimony regarding Mr. DeFilippo, but directly bore upon his overall credibility as well. The ruling requiring that all questions posed by defense counsel be vetted by the court before they were answered by Vitale chilled the cross-examination and sent a message to the jury that the defense cross-examination was inappropriate and that defense counsel was shady.

Both rulings undercut defense counsel's position in front of the jury, and suggested to the jurors that the court favored the government's position.

1. The Pitera Cross

Defense counsel's cross-examination of Vitale regarding Pitera was entirely appropriate. Certainly the defense was entitled to show that Vitale was motivated to cooperate, at least in part, by his concern that he might otherwise be subject to a death penalty prosecution, and that this concern colored the information he provided the government. To this end, counsel properly asked Vitale about his knowledge that Tommy Pitera – another Bonanno member – was required to stand trial for his life for conduct analogous to that in which Vitale engaged. Vitale admitted that he was aware that Pitera in fact was prosecuted in a capital case, and the point therefore was a legitimate one, even as Vitale claimed – falsely the defense suggests – that he was nonetheless unaware that *he* might be charged with a death-eligible crime for his involvement in the Sciascia murder.

The government argued in its letter of March 6, 2006 that the questioning was illegitimate because Pitera had been capitally prosecuted for a drug-related murder under the CCE statute and that neither the Sciascia murder nor any other murder committed by Vitale was drug-related. This argument missed the point. Defense counsel established through Vitale that

Vitale was aware that Bonanno member Pitera had been capitally prosecuted for his murderous conduct, and it was a reasonable inference, therefore, that Vitale was therefore aware that he, too, could have been capitally prosecuted – under whatever statute – for *his* murderous conduct. When Vitale denied knowing this, defense counsel sought to provide Vitale an opportunity to explain how this could be so, but the government objected and the objection was sustained (3248-49).

By striking the testimony the court excluded a substantial line of cross that addressed the most significant reason imaginable for Vitale to lie – to avoid a potential death penalty prosecution. Given that even extrinsic proof of a direct motive to fabricate is admissible (see, e.g., Justice v. Hoke, 90 F.3d 43, 48 (2d Cir. 1996) ("extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground")), surely this direct proof from Vitale's own mouth – his understanding that Bonanno member Pitera was subject to the death penalty for committing murder – should not have been excluded.

2. The Vetting of Questions on Cross-Examination

These were, as can be imagined, emotionally charged proceedings and, certainly, there were many objections – some overruled and some sustained – to each lawyer's inquiries of Vitale. Yet no conduct by counsel

for Mr. DeFilippo during his cross of Vitale remotely justified the court's ruling, with no prior discussion, disrupting the flow of cross and requiring Vitale to await the court's ruling before responding to defense counsel's questions.

The court claimed this extreme measure was required because defense counsel repeatedly spoke over the court when the government objected to questioning (3430). But this simply is not so. In fact, over some 150 pages of cross-examination of this major prosecution witness the record reflects but a single instance where the court stated that defense counsel had not provided it an opportunity to rule on an objection (3250). On that occasion, addressing the government's objection and request for an "offer of proof" with respect to a line of cross-examination, the court said, "You know, I don't get a chance to do my job, you're not going to get a chance to do your job. I don't know why I'm here if you're just going to go ahead with the next question. You want to run this trial, get a judgeship. The jury is excused" (3251). Whatever the court's – and the attorneys' – frustrations during this long and contentious trial, the court's *sua sponte* ruling that defense counsel needed to vet each question with the court before the witness would be required to answer, was unsupportable.

3.Each erroneous ruling was prejudicial

Each of these two erroneous rulings damaged Mr. DeFilippo at a critical juncture in the trial – the cross-examination of the first, and most important, government cooperating witness, Bonanno underboss and government cooperator Salvatore Vitale. The rulings signaled the jury that defense counsel had acted improperly and needed to be sanctioned. No similar remedy was invoked with respect to the government, and the clear message sent to the jury was that the court favored the prosecution over the defense.

The opportunity provided by these rulings was not lost on the government. In fact, in the face of the court's order striking Vitale's acknowledgment that he was aware that Thomas Pitera had faced the death penalty for murders committed as a Bonanno member, the government argued on summation there was no evidence that Vitale knew he could have faced the death penalty when he first decided to proffer (1038). Vitale's testimony that he knew Pitera faced the death penalty for his murderous conduct as a Bonanno member betrays the cynicism behind this argument, but the government apparently believed itself liberated from the truth with the striking of the relevant cross. Whatever the government's thinking in this regard it certainly benefited from the court's rulings striking this critical

cross of Vitale and casting Mr. DeFilippo's counsel as wrong-doer who, unlike the government, was deserving of sanction. These rulings, however, denied Mr. DeFilippo his Sixth Amendment rights to effective assistance of counsel and a fair trial.

Point Three

THE COURT ERRED IN HOLDING THAT THE SCIASCIA MURDER SHOULD BE CONSIDERED IN DETERMINING THE APPLICABLE GUIDELINE LEVEL BECAUSE IT WAS RELEVANT CONDUCT THAT NEED BE PROVEN ONLY BY A PREPONDERANCE OF THE EVIDENCE

The court found that the Sciascia murder charge could be used to calculate Mr. DeFilippo's sentencing guidelines because it was relevant conduct that needed to be proved only by a preponderance of the evidence. (ST 20, 24-25). We respectfully disagree. U.S.S.G. § 1B1.3 (relevant conduct) and its "preponderance of the evidence" standard apply only where the non-convicted conduct is "relevant" to a conspiratorial object of which the defendant was found guilty. Where, on the other hand, the court considers increasing a defendant's sentence based on a conspiratorial object of which defendant was *not* convicted and which is *unrelated* to a proven conspiratorial object, U.S.S.G. § 1B1.2(d) applies, and requires that the court

find the unproven object to have occurred beyond a reasonable doubt.[13] The trial court's determination of which Guideline applies is reviewed by this Court *de novo*. United States v. Kilkenny, 493 F.3d 122, 125 (2d Cir. 2007).

U.S.S.G. § 1B1.2(d) states that a "conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." Application Note 5 in turn advises, in pertinent part, that:

> [p]articular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under § 3D1.2(d) (e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because § 1B1.3(a)(2) [[describing 'relevant conduct'] governs consideration of the defendant's conduct.

The Sentencing Commission has indicated that the "if the court ... would convict," the language of Application Note 5 requires a sentencing court to apply the beyond a reasonable doubt standard. See U.S.S.G.App. C,

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[13] Defense counsel specifically argued that the Sciascia murder "should not be considered relevant conduct under U.S.S.G. § 1B1.3…" (Letter from defense counsel to Judge Garaufis, January 8, 2007 (Doc. # 690 at 1.) See also ST 22 (same argument).

Amend. 75. See also United States v. Ruggiero, 100 F.3d 284, 291 (2d Cir. 1996).

In this case, Mr. DeFilippo was charged, in Count One, with conspiring to violate RICO. The indictment defines the objects of the conspiracy both in its introductory language and also in the alleged racketeering acts. The introductory language of the indictment alleges that the "primary purpose of the Bonanno family is to generate money for its members and associates" (Par. 10), and that its other purposes include using "the resources of the Bonanno family to settle personal grievances and vendettas, sometimes with approval of higher-ranking members of the Bonanno family." Id. The racketeering acts alleged in Count One reflect means by which these purposes allegedly were pursued.

Thus, Mr. DeFilippo was charged in racketeering acts relating to Joker Poker machines (RA-2); the attempted murder of David Nunez (RA-3); bookmaking (RA-5); conspiring to use, and using, extortionate means to collect extortionate extensions of credit (RA-7-9) and the murder of George Sciascia (RA-10). Each of these alleged racketeering acts – except the murder of George Sciascia – was supposedly committed to advance the profit motive of the Bonanno family. The Joker Poker, bookmaking and extortionate collection of credit charges self-evidently reflected money-

making activities. And, though not entirely clear from the evidence, the government maintained that David Nunez was targeted for murder by Vincent Basciano because he was working in a numbers business that was too close to Basciano's and was therefore an unwanted competitor:[14]

> [T]he evidence in this case clearly shows that dispute must have been related to the illegal numbers business. After all, all of the players involved were part of that business: Nunez, Stevie the Blind, Bottone and Basciano (9549).

The murder of George Sciascia, however, did not relate at all to the profit-making objective of the Bonanno family. Rather, the government's theory was that Joseph Massino ordered the Sciascia murder because Sciascia had accused Massino's friend Anthony Graziano, a/k/a "TG," of being a drug addict (2796-97, 2799-2802). This was, purely and simply, a revenge motive or, in the words of the indictment, using "the resources of the Bonanno family to settle personal grievances and vendettas…" Yet the jury did not convict Mr. DeFilippo of any such conspiratorial object. Thus, in order to include this charge in the Guidelines computation U.S.S.G. § 1B1.2 required – at least – that the sentencing court find the Sciascia murder proved beyond a reasonable doubt.

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[14] In Point Four we argue that the Nunez attempted murder was not proven as to Mr. DeFilippo.

Rather than require proof beyond a reasonable doubt under U.S.S.G. § 1B1.2, the sentencing court instead found that the Sciascia murder need only be proved by a preponderance of the evidence under U.S.G.G. § 1B1.3. This finding, however, reflected a misapplication of § 1B1.3, which would permit other crimes to be considered "relevant conduct" only if they are "relevant" to a conspiratorial object of which the jury unquestionably found the defendant guilty. The distinction between § 1B1.2 and § 1B1.3 was addressed in United States v. Ruggiero, supra. There, defendants Palazzolo and Olivieri pleaded guilty to a RICO conspiracy involving a group of people who kidnapped drug dealers for ransom. Although each pleaded guilty to only two such kidnappings, the government reserved the right to prove other kidnappings and to argue they should be considered "relevant conduct" under § 1B1.3. After a Fatico hearing, the court found that the other kidnappings had been proven by a preponderance of the evidence and considered them in calculating each defendant's Guidelines under the relevant conduct provisions of § 1B1.3.

On appeal, defendants argued that § 1B1.2(d) required that the other kidnappings be proved beyond a reasonable doubt. This Court found otherwise, however, concluding that § 1B1.2(d) was not applicable in Ruggiero because the defendants had pleaded guilty to a RICO conspiracy

involving predicate acts of kidnapping and the sentencing court had properly considered other kidnappings as relevant conduct under U.S.S.G. § 1B1.3:

> The problem with this argument is that U.S.S.G. § 1B1.2(d) and Application Note 5 are not relevant to the sentences of these Appellants. That commentary "is provided to address cases in which the jury's verdict does not specify how many or which offenses were the object of the conspiracy of which the defendant was convicted." U.S.S.G. App. C, Amend. 75. Here, Appellants have pleaded guilty to a racketeering charge. Unlike a conspiracy count for which many objectives may be charged but only one need be found for conviction, Appellants' pleas left no mystery regarding the predicate acts underlying their charge of conviction. Olivieri and Palazzolo admitted in open court to participating in two kidnappings. The principal issue at sentencing was not whether their pleas were not coextensive with the conduct covered by the pleas but whether there was *additional* relevant conduct that should be taken into account under U.S.S.G. § 1B1.3. Nowhere do the Sentencing Guidelines suggest that the higher standard of Application Note 5 applies to an ordinary relevant conduct inquiry. *See United States v. Concepcion*, 983 F.2d 284 at 388 (2d Cir. 1996).

Ruggiero permitted the use, as relevant conduct, of kidnappings to which the defendants did not plead guilty because these additional kidnapping were relevant to the conspiratorial object – kidnapping for money – to which the defendants had pleaded guilty. This Court acknowledged, however, that § 1B1.2 and its "beyond a reasonable doubt" standard applies in those cases where a defendant is convicted under a "conspiracy count for which many objectives may be charged but [as to which] only one need be found for conviction." 100 F.3d at 291. In such

cases, fairness requires that a defendant not be sentenced as though he had been convicted of certain conspiratorial objects except upon a finding of proof beyond a reasonable doubt. In Ruggiero, the defendant had been convicted – upon his plea – of kidnapping as a conspiratorial object, and the question was *how many* kidnappings he in fact had committed. This was a question the court said could be answered pursuant to the relevant conduct provisions of § 1B1.3 and upon proof by a preponderance of the evidence.

Here, by contrast, the jury found Mr. DeFilippo guilty of RICO conspiracy because, in furtherance of the profit motive of the Bonanno Family Enterprise, he had committed the David Nunez attempted murder, engaged in a conspiracy to collect loans through extortionate means, and had engaged in illegal gambling. What the sentencing court in essence determined was that Mr. DeFilippo also engaged in conduct relating to *another* conspiratorial object, Joseph Massino's use of violence – the murder of George Sciascia – to avenge a perceived slight against a trusted friend. Not only was this crime not "relevant" to the profit-motivated objective of the conspiracy that was advanced by the racketeering acts of which Mr. DeFilippo was convicted, there is not even any evidence that Mr. DeFilippo was aware that Joseph Massino wanted to kill Sciascia because Sciascia had accused Anthony Graziano of drug use. Accordingly, the court should have

applied § 1B1.2(d), and the required standard of proof beyond a reasonable doubt.

This is consistent with cases from other circuits. For example, in United States v. Farese, 248 F.3d 1056 (11th Cir. 2001), the defendants pled guilty to RICO conspiracy, but their plea did not establish "whether money laundering or mail fraud was the object of the racketeering activity" alleged in the indictment. The Eleventh Circuit vacated the sentences because the district court found money laundering to have been an object of the conspiracy by a preponderance of the evidence rather than beyond a reasonable doubt under § 1B1.2(d). 248 F.3d at 1060-61.

In United States v. Gonzales, 1998 WL 2551 (S.D.N.Y. 1998), the defendant, who worked at a New York Blood Center testing lab was convicted of a conspiracy that had two objects – making false statements and adulterating and misbranding blood. She was also convicted of a substantive charge of making false statements regarding a blood-testing proficiency exam. The jury was hung with respect to a substantive charge of adulterating and misbranding blood and with respect to a substantive charge of making false statements regarding a blood test (a practice known as "plate fixing"). The Probation Department nonetheless considered the plate fixing charge as "relevant conduct" and the defendant objected, arguing that given

the general verdict of guilty as to the conspiracy count "it is impossible to know… whether she was found guilty of conspiracy to falsify the proficiency exam or of conspiracy to fix plates," and that § 1B1.2 and not § 1B1.3 therefore governed. The government argued that the "escape clause" of Application Note 5 applied, i.e. that § 1B1.3 applied because "the object offenses specified in the conspiracy count would be grouped together under § 3D1.2(d)." The court ultimately found that the object offenses would not be grouped and that § 1B1.2 – and its requirement of proof beyond a reasonable doubt – therefore applied. Finding, further, that the government had failed to meet this burden of proof, the court declined to factor the plate fixing charge into the Guidelines analysis.

Here, there can be no question that the "escape clause" of Application Note 5 does not apply because the Sciascia murder would not, under any circumstances, have been grouped – and in fact was not grouped – with the offenses of conviction.

Because the court wrongly applied § 1B1.3 and its "preponderance of the evidence" standard, rather than § 1B1.2 and its "beyond a reasonable doubt standard," Mr. DeFilippo's sentence should be vacated and remanded for resentencing.

Point Four

THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. DEFILIPPO ATTEMPTED TO KILL DAVID NUNEZ IN FURTHERANCE OF THE AFFAIRS OF THE BONANNO CRIME FAMILY

The jury found Racketeering Act 3 (attempted murder of David Nunez) of Count One (Rico Conspiracy) "proved," but in fact the evidence was legally insufficient because (1) the evidence was insufficient to prove beyond a reasonable doubt that the Nunez shooting was in furtherance of the affairs of the Bonanno Family; and (2) even if Basciano had undertaken to shoot Nunez to further the affairs of the Bonanno Family, the evidence was insufficient to prove that DeFilippo shared that motive. Sufficiency of evidence is reviewed *de novo*. United States v. Wallace, 447 F.3d 184, 186 (2d Cir. 2006).

The standard governing sufficiency challenges is well known: "We overturn a conviction on that basis only if, after viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences in its favor, we determine that 'no rational trier of fact' could have concluded that the Government met its burden of proof. United States v. Morrison, 153 F.3d 34, 49 (2d Cir.1998)." United States v. Glenn, 312 F.3d 58, 63 (2d Cir. 2002). The government need not negate every theory of

innocence to prove guilt beyond a reasonable doubt, id.; however, the court will find insufficient evidence that stands in equipoise, or nearly so:

> *Jackson [v. Virginia]* requires that a rational juror be able to find the defendant guilty beyond a reasonable doubt, 443 U.S. at 319, 99 S.Ct. 2781, and if the evidence viewed in the light most favorable to the prosecution gives "equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," then "a reasonable jury must necessarily entertain a reasonable doubt." *United States v. Lopez,* 74 F.3d 575, 577 (5th Cir.) (internal quotation marks and emphasis removed), *cert. denied,* 517 U.S. 1228 (1996); *see also United States v. Andujar*, 49 F.3d 16, 20 (1st Cir.1995); *United States v. Wright,* 835 F.2d 1245, 1249 (8th Cir.1987); *Cosby v. Jones,* 682 F.2d 1373, 1383 (11th Cir.1982).

Glenn, supra, 312 F.3d at 70. See also United States v. Cassese, 428 F.3d 92, 98-99 (2d Cir. 2005); cf United States v. MacPherson, 424 F.3d 183, 190 (2d Cir. 2005).

In Glenn, this Court reversed the defendant's conviction of murder, because the "Government's evidence gave 'nearly equal circumstantial support' to competing explanations for Lewis's death," Id. at 70, notwithstanding evidence that the defendant (Parker) (1) had a motive to kill the victim (Lewis); and (2) the opportunity to do so; (3) arguably possessed a weapon to accomplish the crime; and (4) made false statements to the police. See also United States v. Paloscio, 2003 WL 1872657 (SDNY April 10, 2003) (McKenna) (citing Glenn and finding evidence insufficient to

prove that murder was committed by defendant to gain entrance to, maintain, or increase his role in the criminal organization).

This Court should find, as a matter of law, that the evidence was insufficient to prove that the 1985 shooting of David Nunez – charged in Racketeering Act 3 – was related to the Bonanno Family Enterprise or that, if it was, Mr. DeFilippo knew as much.

Relatedness between racketeering acts and the charged enterprise can be "proven by showing either that: (i) the offense related to the activities of the enterprise, or (ii) the defendant was able to commit the offense solely because of his position in the enterprise." United States v. Bruno, 383 F.3d 65, 84 (2d Cir. 2004). Viewing the evidence in the light most favorable to the government the evidence admitted against Mr. DeFilippo (discussed ante at 11-14) regarding the Nunez shooting showed only that: (1) Nunez worked in the numbers business in the neighborhood where he was shot; (2) Mr. DeFilippo, along with Vincent Basciano and Anthony Donato were associated with or members of the Bonanno family and were also involved in the business of gambling; (3) the three conspired to kill Nunez; (4) toward that end, Basciano shot him; and (5) each of the three alleged conspirators pleaded guilty to weapons possession after the car in which they were traveling was stopped by the police soon after the shooting.

This evidence was insufficient to prove that the shooting was related to the Bonanno Family Enterprise, or, if it was, that Mr. DeFilippo knew as much. That the participants were members of the enterprise is not sufficient to prove that the conduct related to the affairs of the enterprise; if membership alone were sufficient the relatedness requirement would be redundant, as any crime committed by enterprise members would necessarily qualify as a racketeering act. Nor was there evidence that Mr. DeFilippo was able to commit the offense solely because of his position in the enterprise. On the contrary, the evidence shows simply that someone – likely Basciano – stepped out of a car and shot Nunez; this evidence hardly evidences conduct that could be accomplished solely because of the perpetrators' membership in the enterprise.

The government argued, in opposition to the defendants' post-trial motions, that the Nunez shooting was consistent with a general Bonanno policy to use "violence to resolve disputes and eliminate competition relating to gambling operations," Gov. Opposition to Rule 29 Motion (Doc. # 636) at p. 15, and that Nunez therefore may have been shot for working at a competing business owned by his father-in-law "Stevie the Blind." Id. at 19. The only direct evidence of why Nunez became a target, however, was Anthony Bottone's testimony that his father told Anthony that he had set

Nunez up because "there was some kind of beef and that this guy Steve Blind's son-in-law used the Arrow car service daily" (7955-57). This evidence, and the related arguments, hardly permitted a reasonable juror to conclude beyond a reasonable doubt that the Nunez shooting was in furtherance of the Bonanno Enterprise. No other cogent arguments in support of such a finding exist.

The government argues, further, that the evidence supports the conclusion that Mr. DeFilippo was aware of the connection between the Nunez shooting and the enterprise (assuming there was a connection) "based on Mr. DeFilippo's own association with the family, his receipt of proceeds from the Colangelo-Basciano illegal policy operation, his conspiracy and participation with other members of that policy operation (Basciano and Donato) in the shooting, and his role in arranging the getaway car." Id. at 16-17. The stated conclusion, however, does not follow from the cited factors, which collectively say nothing about what Mr. DeFilippo knew about Basciano's motive to shoot Nunez. Rather, these factors merely establish Mr. DeFilippo's tangential involvement in gambling and participation in the shooting incident itself. There is no evidence that Mr. DeFilippo knew "Stevie the Blind" or Nunez, or had any understanding why Basciano wanted him murdered.

The trial court found the evidence against Mr. DeFilippo to be sufficient based on the following analysis:

> Given his close association with the Bonanno crime family enterprise, evidence that he was both a partner with Basciano in illegal gambling and a recipient of profits from the illegal policy operation, and his conspiracy and participation with other members of that policy operation in the shooting, it was certainly reasonable for the jury to have inferred that DeFilippo knew that the shooting related to the affairs of the Bonanno crime family enterprise.

Op. December 21, 2006 (Doc. # 660) at 10.

The flaw in the court's reasoning lies in its assumption that Mr. DeFilippo and Mr. Basciano were partners in the illegal gambling business at the time of the Nunez shooting – in 1985. This was not the evidence at trial. To support this claim the court cites, *inter alia,* the testimony of James Tartaglione. See opinion at 7 ("In addition, Basciano and DeFilippo partnered together in at least one illegal gambling business. (Tr. at 4732))." At the cited page, however, Tartaglione gave the following testimony:

> Q: Do you know during the course of your involvement in the Bonanno Family whether Mr. DeFilippo was involved in the policy business?
>
> A: Yes.
>
> Q: How did you know that?
>
> A: From what I understood, they were partners with him and Vinny. Vinny was with him at that time. (4732).

The cited testimony does not support the district court's assertion that there was a DeFilippo-Basciano partnership in the numbers business in *1985*, nor does the balance of the relevant testimony. In fact, amidst the lengthy testimony regarding "who was doing what" in 1985, the sole reference to Mr. DeFilippo and gambling at that time was the testimony of Anthony Colangelo Jr. that he worked with his father in policy gambling, and "on occasion… gave money to Patty" (8122). This testimony hardly supports the conclusion that Mr. DeFilippo was aware of Basciano's alleged motive to shoot David Nunez.

For these reasons, the Court should find that the evidence was insufficient to prove that the Nunez shooting was "related" to the affairs of the Bonanno Family Enterprise, or if it was, that Mr. DeFilippo knew as much, and therefore dismiss Racketeering Act 3.

Point Five

THE TRIAL COURT WRONGLY CALCULATED THE SENTENCING GUIDELINES WITH RESPECT TO THE NUNEZ ATTEMPTED MURDER BASED ON 2004 AMENDMENTS TO THE GUIDELINES THAT POST-DATED THE END OF MR. DEFILIPPO'S PARTICIPATION IN THE CONSPIRACY UPON HIS ARREST IN 2003

Although Mr. DeFilippo's ultimate Guidelines level was driven principally by the Sciascia murder – a charge upon which the jury did not reach a verdict – we ask the Court to review as well the Guidelines

calculation with respect to Racketeering Act 3, the attempted murder of David Nunez, as that calculation will ultimately drive Mr. DeFilippo's resentencing should the Court (1) not grant a new trial; (2) remand for resentencing because the Sciascia murder was wrongly used to calculate Mr. DeFilippo's offense level; and (3) find the evidence sufficient with respect to the Nunez attempted murder.

The trial court adopted the PSR's adjusted offense level of 39 for the Nunez attempted murder (ST 15-18) calculated as follows:

Base offense level:	33
Serious bodily injury:	2
Leadership role: (ST 17-18)	4
Adjusted offense level:	39

The court did so over defense counsel's objection, *inter alia*, that the applicable guidelines were those that preceded the November 2004 amendments, which substantially increased the base offense level under U.S.S.G. § 2A2.1. Counsel argued that Mr. DeFilippo's membership in the conspiracy ended with his arrest in 2003 and that under no circumstances did his conspiratorial conduct extend past the date of amendment for the applicable Guideline, U.S.S.G. § 2A2.1, in November 2004. Previous to this

amendment, the base offense level for this offense was 22 or, if the defendant's conduct was premeditated, 28 (See Doc. # 679 at 8).

The sentencing court disagreed. First, it found that, although Mr. DeFilippo was arrested in 2003, his conspiratorial conduct in the RICO Enterprise extended after the November 2004 because, according to recorded statements made by Bonanno boss Joseph Massino to Vincent Basciano in 2005, DeFilippo received money from the Enterprise "war chest" for legal fees (ST 16).[15] The court rejected counsel's proffer – and refused to hold a hearing upon the assertion – that Mr. DeFilippo's legal fees in fact were not paid by the Enterprise but rather by his personal family, because counsel only presented his own proffer rather than present "documentary or otherwise verifiable proof." (ST 17). Second, it ruled that the leadership role adjustment was appropriate, explaining: "[I]n addition to DeFilippo's seniority within the enterprise and financial motive to kill Nunez, his leadership role in the attempted murder was established by the testimony of Dominick Cicale, who testified at trial that Basciano had

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[15] The court ruled (ST 16):

> I find that he continued to be an active member of the Bonanno Crime Family enterprise well past the date of his arrest, specifically conversations recorded between Joseph Massino, the putative boss of the Bonanno Crime Family enterprise and co-defendant, Vincent Basciano, revealed that DeFilippo had received, and was going on to continue to receive, funds from the Bonanno Crime Family war chest, end quote, which is a fund used to pay the legal fees of members of the enterprise who have been arrested.

complained about the way in which DeFilippo had "set it up," referring to the logistics of the shooting, trial transcript page 5721."

We respectfully disagree with both of the district court's rulings.

A defendant, once incarcerated, is presumed to not remain a member of the charged conspiracy. As Judge Johnson explained in United States v. Escobar, 842 F.Supp. 1519, 1528 (E.D.N.Y. 1994):

> The Second Circuit has held that the arrest of one conspirator may constitute that conspirator's withdrawal from the conspiracy. *United States v. Cruz,* 797 F.2d 90, 98 (2d Cir.1986). While the arrest and incarceration of a conspirator does not always constitute withdrawal from the conspiracy, there is a rebuttable presumption that incarceration constitutes withdrawal by that conspirator. *United States v. Castellano,* 610 F.Supp. 1359, 1419 (S.D.N.Y.1985); *See Generally United States v. Borelli,* 336 F.2d 376, 390 (2d Cir.1964), *cert. denied sub nom. Cinquegrano v. United States,* 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). ("The unlikelihood of the other conspirators relying for further aid on a person known to be confined for the very offense in which they were engaging makes such confinement a sufficient 'affirmative act' to sustain the defense of withdrawal"). Whether or not the arrest and incarceration of a conspirator constitutes withdrawal may be determined by the facts of the case. *United States v. Panebianco,* 543 F.2d 447, 454 n. 5 (2d Cir.1976), *cert. denied sub nom. Anatala v. United States,* 429 U.S. 1103, 97 S.Ct. 1128, 51 L.Ed.2d 553 (1977).

The assertion – even if true, and it is not – that Mr. DeFilippo received "war chest" funds for his attorney fees from the Enterprise does not rebut the presumption that Mr. DeFilippo's membership in the Enterprise did not extend beyond his incarceration in 2003. It may well be that Bonanno boss

Massino thought he could control Mr. DeFilippo by extending "war chest" funds to him, but there is no evidence that in fact Mr. DeFilippo considered himself – or in fact remained – a member of the charged conspiracy after his incarceration.

Furthermore, the sentencing court erred when it ruled that defense counsel's proffer that Mr. DeFilippo's legal fees came from his family and not from the Enterprise was insufficient to warrant a hearing upon the issue and that it was therefore appropriate for the court to make a contrary finding based only on the Massino-Basciano conversation. Specifically, defense counsel stated in his Reply Sentencing Memorandum of February 8, 2007 (Doc. # 679)(at p. 9):

> [W]e deny that any such payments were received and request a hearing thereon should the government push the issue. Rather, Mr. DeFilippo has informed undersigned counsel that his legal fees were paid from his personal savings and, thereafter, from his family's sale of property

He reiterated his position at the sentencing hearing (at ST 13-14):

> Your Honor, the only other thing that I would say is that to the extent that the Government is relying on its proffer that Mr. DeFilippo's legal fees were, in part, supposedly paid by a member or members of the [Bonanno] family. Number one, we explicitly dispute that. We have proffered to the Court that Mr. DeFilippo's legal fees were paid first from his own assets and then from selling family property. His family chipped in to the extent that if there is any issue about whether or not the Government's proffer, even if true, would be sufficient to prove that Mr. DeFilippo remained a member past the November

> 2004 amendments, we would ask for a hearing, but we don't think that the proffer, even if it were true, and it's not, would be sufficient. But we explicitly, we explicitly challenge it now,

The government responded it was ready for a hearing, stating, "Mr. Levitt wants a hearing to admit his billing records, the testimony of any members of Mr. DeFilippo's family, who, in fact, paid his legal fees or anything to that extent, is certainly his burden, and we're available to cross-examine any one of those individuals…" (ST 15).

Defense counsel thus disputed the "war chest" claim, identified the specific source of the disputed funds, and informed the court that the defense assertion was based on conversations with Mr. DeFilippo. The government, for its part, stated it was prepared for a hearing on the issue. Surely this factual dispute was sufficiently placed in issue to require a hearing under fundamental principles of procedural due process and Fed.R.Crim.P. 2(i)(1)(C) and (i)(2), pursuant to which defendants are entitled to object to relevant portions of the Presentence Report and the court "may permit the parties to introduce evidence on the objections" they raise. The court's refusal to consider additional evidence and its reliance on a single conversation between Bonanno boss Joseph Massino and codefendant Vincent Basciano was directly contrary to the purposes and intent of Rule 32:

Rule 32 in general--and subdivisions (f) and (i) in particular--is intended to provide efficient and "focused, adversarial resolution of the legal and factual issues ... to ensure that a defendant is not sentenced on the basis of materially untrue statements or misinformation." *United States v. Sisti, 91 F.3d 305, 310 (2d Cir.1996*) (citations and internal quotation marks omitted). This purpose is clear from the history of the Rule's enactment. The Judicial Conference first proposed the provisions pertaining to objections to the PSR in 1993 amid concerns that "sentencing hearings would become more complex due to the new fact finding requirements imposed by guideline sentencing methodology." Report of the Advisory Committee on Criminal Rules to the Committee on Rules of Practice and Procedure 9 (Nov. 15, 1992), *available at* www.uscourts.gov/rules/Minutes/CR1092.pdf (last accessed August 3, 2007). Thus, in 1994 the Supreme Court approved, and Congress adopted, a version of Rule 32 that newly "focused on preparation of the [PSR] as a means of identifying and narrowing the issues to be decided at the sentencing hearing." *Id.* In the same revision, Rule 32 was drafted to reflect greater emphasis on a defendant's right to argue objections to the district court at the sentencing hearing. *Id.* at 12. The Conference shaped both these provisions to "maximize judicial economy by providing for more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing." *Id.* at 11; *see also* Federal Criminal Code and Rules 147 (Thomson West 2007). The case law confirms this understanding of Rule 32's purpose. *See Sisti, 91 F.3d at 310 ("A defendant must have an opportunity to assure the accurate presentation of reliable sentencing information to the district court.*" (citations and internal quotation marks omitted)); *United States v. Reiss,* 186 F.3d 149, 157 (2d Cir.1999) (similar); *United States v. Perez-Ruiz,* 421 F.3d 11, 13 (1st Cir.2005) (stating that "the sentencing procedures laid out by Rule 32 are designed to narrow the issues and provide due notice"); *United States v. Virgen-Chavarin,* 350 F.3d 1122, 1132 (10th Cir.2003) (stating that Rule 32 "provides for focused, adversarial development of the factual and legal issues relevant to determining the appropriate

> Guidelines sentence ... by ... permitting the parties to object ... [and allowing] the probation officer ... [to] meet with the parties to discuss objections, investigate further, and revise the PSR as appropriate") (internal quotations omitted); *United States v. Pabon-Cruz,* 321 F.Supp.2d 570, 573 (S.D.N.Y.2003) (stating that "the process of disclosure, comment, and judicial ruling provided by Rules 32(e)-(i) is more than adequate to address any inaccuracy in the PSR").

United States v. Cole, __ F.3d __, 2007 WL 2263934 (2nd Cir. 2007) (footnote omitted).

The court erred in accepting as true the claims of Joseph Massino and Vincent Basciano and rejecting, without a hearing, the contrary claims of Mr. DeFilippo. This factual dispute was significant since the Guidelines applicable to attempted murder had substantially changed in November 2004, increasing the base offense level from 22 (if Mr. DeFilippo had no foreknowledge of the shooting) or 28 (if he did), to 33.

For these reasons, should the court remand for a recalculation of the Guidelines and for resentencing without consideration of the Sciascia murder, the sentencing court should be directed to recalculate the Guidelines using the pre-November 2004 Guideline Book.

Point Six

SINGULARLY OR CUMULATIVELY THE ERRORS ADDRESSED HEREIN REQUIRE REVERSAL OF MR. DeFILIPPO'S CONVICTION AND SENTENCE

We respectfully submit that each error addressed in this brief merits relief, but also that these errors, cumulatively, demonstrate that both the conviction and sentence were the product of serious error, and that both should be vacated.

Conclusion

For the foregoing reasons, Mr. DeFilippo's conviction and sentence should be vacated and a new trial ordered, or Mr. DeFilippo should be resentenced.

Dated: New York, New York
October 30, 2007

Respectfully submitted,

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