

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
3 August Term, 2003  
4

5 (Argued: May 17, 2004

Decided: September 14, 2004)

6  
7 Docket Nos. 03-1349(L), -1351(CON)  
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9 UNITED STATES OF AMERICA,

10  
11 Appellee,

12  
13 - v. -

14 ANTHONY BRUNO, ANGELO CERASULO, JOHN IMBRIECO,

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17 Defendants,

18 MARIO FORTUNATO and CARMINE POLITO,

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21 Defendants-Appellants,

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22 Before: MINER and KATZMANN, Circuit Judges, and TSOUCALAS, Judge.<sup>\*</sup>  
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24 Appeals from judgments entered in the United States District Court for the Eastern  
25 District of New York (Glasser, J.), convicting defendants-appellants, following a jury trial, of:  
26 (i) racketeering conspiracy, in violation of 18 U.S.C. § 1962(d); (ii) racketeering, in violation of  
27 18 U.S.C. § 1962(c); (iii) murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1);  
28 conspiracy to defraud the United States by making false statements and obstructing justice, in  
29 violation of 18 U.S.C. § 371; (iv) making false statements, in violation of 18 U.S.C. §  
30 1001(a)(2); and (v) obstruction of justice, in violation of 18 U.S.C. § 1503(a), (b)(3); and  
31 principally sentencing them to life imprisonment.

32 Reversed in part, vacated in part, and remanded.

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1 <sup>\*</sup> The Honorable Nicholas Tsoucalas, of the United States Court of International Trade,  
2 sitting by designation.

1 DIARMUID WHITE, White & White, New  
2 York, NY (Gerald J. McMahon, Esq., New  
3 York, NY, on the briefs) for Defendant-  
4 Appellant Carmine Polito.

5  
6 PAUL SHECHTMAN, Stillman &  
7 Friedman, P.C., (Sara Beth Savage, on the  
8 briefs) New York, NY, for Defendant-  
9 Appellant Mario Fortunato.

10  
11 DANIEL S. DORSKY, Special Assistant  
12 United States Attorney for the Eastern  
13 District of New York (Roslynn R.  
14 Mauskopf, United States Attorney, on the  
15 brief; Assistant United States Attorneys  
16 David C. James, Paul Weinstein, and Todd  
17 Harrison, of counsel), for Appellee.

1 MINER, Circuit Judge:

2           These appeals arise from the November 24, 1994 shootings of Genovese Crime Family  
3 associates Sabatino Lombardi and Michael D’Urso by John Imbrieco and Anthony Bruno while  
4 the victims were playing cards at a Genovese Crime Family social club. Although Lombardi was  
5 fatally wounded, D’Urso survived and subsequently became a cooperating witness for the  
6 Government. Bruno, Imbrieco, and the “getaway” driver, defendant Angelo Cerasulo, later pled  
7 guilty to various crimes and agreed to cooperate with the Government. The remaining  
8 participants in the November 1994 shootings — defendants-appellants Mario Fortunato and  
9 Carmine Polito — were subsequently tried for, and convicted of, violating various federal statutes  
10 relating to the Violent Crimes in Aid of Racketeering Act (“VCAR”), the Racketeer Influenced  
11 and Corrupt Organizations Act (“RICO”), and obstruction of justice for their roles in planning  
12 these shootings and subsequently obstructing the federal investigation of the shootings by  
13 attempting to influence the testimony of two grand jury witnesses and lying to the FBI.

14           Of the several arguments raised by Polito and Fortunato, we find that the following have  
15 merit and decline to reach the others: (1) The RICO conspiracy, substantive RICO, and VCAR  
16 convictions (Counts I, II, and III) must be reversed for lack of legally sufficient evidence. In  
17 particular, the evidence was insufficient either to establish that Polito and Fortunato murdered  
18 Lombardi to “maintain or increase” positions in the Genovese Crime Family or to establish that  
19 the shootings of Lombardi and D’Urso were related to the activities of the Genovese Family  
20 criminal enterprise. In addition, the evidence was insufficient to establish a corrupt endeavor to  
21 influence the testimony of two grand jury witnesses. (2) Because of this latter deficiency, the  
22 convictions relating to obstruction of justice (VII and VIII) also must be reversed for lack of

1 legally sufficient evidence. (3) The convictions relating to Cerasulo’s false statements (Count V)  
2 must be reversed for lack of legally sufficient evidence under the Government’s Pinkerton  
3 liability theory. (4) The convictions for false-statement conspiracy (included in Count IV) must  
4 be vacated because the District Court committed plain error in admitting the hearsay evidence  
5 supporting those convictions, in violation of the Confrontation Clause. (5) The convictions for  
6 conspiracy to obstruct justice (included in Count IV) must be reversed because the evidence was  
7 legally insufficient to support those convictions. (6) The convictions relating to Fortunato’s false  
8 statements (Count VI) must be vacated due to spillover prejudice. And (7) the District Court  
9 improperly instructed the jury with respect to the court’s authority to sentence cooperating  
10 witnesses in the absence of a § 5K1.1 letter from the Government.

11 Accordingly, for the reasons set forth below, we reverse the convictions under Counts I,  
12 II, III, V, VII, and VIII and for obstruction-of-justice conspiracy under Count IV; vacate the  
13 convictions for false-statement conspiracy under Count IV and the false-statements convictions  
14 under Count VI; and remand for a new trial consistent with this opinion.

## 15 BACKGROUND

16 Viewing the evidence in the light most favorable to the Government, see United States v.  
17 Wilkerson, 361 F.3d 717, 721 (2d Cir. 2004), the evidence presented at trial was as follows:

### 18 I. Appellants and Their Associates

19 Lombardi worked at a restaurant in Little Italy, where he became acquainted with several  
20 organized crime figures, including Joe Zito. Zito was a “soldier” in the Genovese Family and led  
21 a “crew” that reported to Rosario Gangi, a Genovese Family “capo.” Lombardi and D’Urso  
22 became members of Zito’s crew and participants in Zito’s loansharking activities.

1           Polito, a cousin of Lombardi, owned and operated a pizzeria in Queens. He was an  
2 inveterate gambler, who had borrowed money from Genovese Family loansharks, including  
3 Lombardi and D’Urso, and used the borrowed funds to pay his gambling debts. Zito would  
4 dispense money to Lombardi, who would loan some of it out and then pass the rest along to  
5 D’Urso, who then would loan it out to Polito, among others. Eventually, Salvatore Aparo, the  
6 acting capo to whom Zito reported after Gangi went to prison, began dispensing money directly  
7 to D’Urso for him to loan out. In addition to being a loansharking customer of Lombardi and  
8 D’Urso, Polito was “on record” with Zito because Zito had helped Polito with his gambling  
9 debts. By 1993, Polito owed hundreds of thousands of dollars to various loansharks, including  
10 approximately \$70,000 to D’Urso.

11           Polito, D’Urso, and Lombardi regularly played cards at D’Urso’s social club in  
12 Williamsburg, Brooklyn, and the three became close friends. Fortunato, another close friend of  
13 Polito, was one of the founders of Fortunato Brothers Bakery, a well-known Italian bakery in  
14 Williamsburg. Fortunato’s involvement in Genovese Family affairs was largely limited to  
15 playing in high-stakes card games with Polito, Lombardi, and D’Urso at a social club located on  
16 Mulberry Street in Manhattan that was operated by Genovese Family soldier Tommy Cestaro.  
17 Lombardi had provided the necessary introductions to permit Polito and Fortunato to attend this  
18 social club. Historically, D’Urso had a poor personal relationship with Fortunato, a  
19 contemporary of D’Urso’s father, and viewed Fortunato as arrogant. On several occasions,  
20 D’Urso had physically assaulted Fortunato over remarks that he had made that D’Urso found  
21 offensive. Nevertheless, D’Urso and Fortunato continued to see each other at card games  
22 frequented by Polito.

1 II. Robbery of Chemical Bank

2 For almost forty years, Fortunato had been a friend of Alfred Driano, a seventy-two-year-  
3 old vault attendant at a Manhattan branch of Chemical Bank. Some time in 1993, Fortunato  
4 introduced Driano to Polito and told Polito that Driano worked at a bank. Driano was later  
5 approached by two men who sought his assistance in robbing the bank. Driano declined and then  
6 reported the incident to Polito and Fortunato, who told him that these men were “rough guys,”  
7 that he was “in deep now” and could not back out, and that he would be paid for his assistance.  
8 Shortly thereafter, the same two men again unsuccessfully attempted to enlist Driano’s assistance  
9 in robbing the bank by asking him if he would open the door to the vault area of the bank when  
10 the armored truck guards arrived with a delivery of money.

11 On December 21, 1993, the bank was robbed, apparently without Driano’s assistance.  
12 Two men with guns and masks forced their way into the vault area, struck Driano in the back  
13 with a hard object, and stole \$1.5 million. After the robbery, the police recovered from the  
14 getaway van approximately \$537,000 of the stolen money and a business card from the Fortunato  
15 family’s bakery. Polito received about \$80,000-90,000 for his role in planning the robbery.

16 After the robbery, Driano complained that he had not been paid. To keep Driano quiet,  
17 Gangi told D’Urso to make sure that Polito and Fortunato paid Driano off. Afterwards, Gangi  
18 and a member of his crew physically assaulted Polito at the latter’s pizzeria for Polito’s failure to  
19 pay Driano. Fortunato also told Driano that Fortunato had been beaten for failing to advance  
20 Driano his share of the bank robbery money and that Fortunato had been given twenty-four hours  
21 to pay Driano. Fortunato complied by facilitating the payment of \$10,000 to Driano by a third

1 party. When Driano was subpoenaed several years later in connection with an investigation of  
2 the robbery, Fortunato told Driano to say only that he had not been involved.

3 In November 1995, Polito and other Genovese Family members and associates pled guilty  
4 to federal charges involving the Chemical Bank robbery, resulting in Polito spending several  
5 years in prison. Although the Government has made much of Fortunato's involvement in this  
6 robbery in order to establish that he was an associate of the Genovese Family, it is worth noting  
7 that Fortunato was never criminally charged with participating in the robbery.

### 8 III. Polito's Unsuccessful Attempts to Switch Crews

9 Most of the participants in the Chemical Bank robbery were members of a Genovese  
10 Family crew that reported to Genovese capo "Alley Shades" Malangone. At the time of the bank  
11 robbery, Zito was trying to avoid attention from law enforcement by keeping a low profile; Zito  
12 made it known that he did not want anyone from his crew committing armed robberies. As noted  
13 above, at the time of the Chemical Bank robbery, Polito owed several hundred thousand dollars  
14 in loansharking and gambling debts and participated in the robbery to get money to pay down  
15 some of his debts.

16 Following the bank robbery, Polito began spending more time with members of  
17 Malangone's crew. According to D'Urso, Polito did this so that he could participate in more  
18 significant crimes, repay his outstanding gambling debts, and eventually become a "made"  
19 member of the Genovese Family. Lombardi became angry at Polito upon learning that Polito  
20 was hanging out with Malangone's crew. But when Lombardi tried to stop Polito from hanging  
21 out with Malangone's crew, Lombardi was reprimanded by Malangone, who told Lombardi that  
22 he had no authority to tell Polito what to do because Lombardi was not a made member of the

1 Genovese Family. Lombardi then complained to Zito, who called Malangone. Zito told  
2 Malangone that he didn't want Polito hanging out with Malangone's crew; Malangone deferred,  
3 agreeing "that he [would] stop it."

4 IV. The Shootings of Lombardi and D'Urso

5 At some point during 1994, Polito and his cousin Imbrieco, an associate of the Bonnano  
6 Crime Family, asked another one of their cousins, Cerasulo, to kill D'Urso and Lombardi.  
7 According to Cerasulo, Polito told him that D'Urso and Lombardi had previously "set [Polito]  
8 up" for a robbery,<sup>1</sup> that Polito owed them a lot of money, and that they were "pieces of shit" who  
9 "had to go." Cerasulo testified that he agreed to participate in the murder because he "wanted to  
10 get a reputation" and that Polito had promised him that Fortunato and others would pay Cerasulo  
11 to commit the murder. Cerasulo also testified that he asked Polito if he had received permission  
12 from higher-ups in the Genovese Family to kill two Genovese associates; Cerasulo never  
13 testified as to what Polito's response was, if any. Cerasulo did testify that Fortunato provided  
14 him with one of Polito's guns to commit the murder. Cerasulo and Imbrieco later went to  
15 Lombardi's house to ambush Lombardi and D'Urso, but Cerasulo got cold feet at the last minute  
16 and aborted the mission.

17 Polito subsequently asked Cerasulo to find someone else to commit the murders, so  
18 Cerasulo recruited Bruno, who was a close friend of both Cerasulo and Imbrieco and, according  
19 to the Government, an "aspiring mobster." Bruno agreed to kill D'Urso and Lombardi to

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1 <sup>1</sup> This is a reference to a 1993 armed robbery that took place at D'Urso's social club while  
2 D'Urso, Polito, and others were playing cards. In the course of the robbery, \$700 was stolen and  
3 Polito was shot in the leg. According to D'Urso, Polito believed that D'Urso had been behind  
4 the robbery.

1 enhance his standing with “connected” people — i.e., Polito and Imbrieco, whom Bruno knew to  
2 be associated with organized crime. With Bruno in on the scheme, the plan was that he and  
3 Imbrieco would do the shooting, and Cerasulo would drive the getaway car. Bruno also got cold  
4 feet, however, and when he had the opportunity, he failed to shoot Lombardi and D’Urso.

5 By the end of November 1994, Polito owed Lombardi about \$50,000 and D’Urso about  
6 \$10,000. Polito explained to his cohorts that he wanted the murders to be committed before late  
7 November to avoid repaying those debts. Three days before Polito’s debt to Lombardi was due,  
8 D’Urso was playing cards at a Genovese Family social club. The door to the club was locked  
9 from the inside to prevent uninvited persons from entering the club. Polito and Fortunato later  
10 joined the game and suggested that D’Urso invite Lombardi as well. Lombardi eventually  
11 arrived. Imbrieco, Bruno, and Cerasulo arrived still later (around midnight).

12 Just before the shooting began, Lombardi and D’Urso were seated next to each other,  
13 with Imbrieco and Bruno standing directly behind them. At some point during the card game,  
14 Bruno pulled out his gun, placed it to the back of D’Urso’s head, and fired. Cerasulo then ran  
15 out of the club to start the car, while Bruno and Imbrieco began shooting at Lombardi. Lombardi  
16 subsequently died from his gunshot wounds, but D’Urso eventually recovered.

17 Immediately after the shootings, Polito and Fortunato ran out of the club. Bruno and  
18 Imbrieco followed them and joined Cerasulo in the getaway car. Cerasulo drove Bruno and  
19 Imbrieco to an automobile impound yard in Greenpoint, Brooklyn, where they abandoned the car.  
20 Polito later picked them up and drove to a diner in Queens. Fortunato walked home and went to  
21 bed.

1 V. The Events Following the Shootings and the Belated Grand Jury Investigation

2 Hours after the shootings, Fortunato told several people, including NYPD detectives, that  
3 he had left the club before the shootings occurred. But, after learning that D’Urso had survived,  
4 Fortunato admitted that he had been at the club when the shootings occurred, but maintained that  
5 he had not actually witnessed who fired the shots. He stuck with this story, telling it both to the  
6 local police investigating the shootings and, years later, to the FBI when he was arrested in  
7 January 2002.

8 All the participants in the shootings decided to lay low out of fear that D’Urso would  
9 retaliate against them. Imbrieco, Polito, and Cerasulo drove to Long Island City to meet with  
10 Fortunato. They then drove to Manhattan in Fortunato’s car to pick up Bruno. The cabal then  
11 drove to New Jersey to formulate a plan. On the way to New Jersey, Polito told Bruno that “we  
12 are all together now. Just calm down.” According to Cerasulo, they agreed “to stick together”  
13 and not “tell nobody who did nothing.” During the drive, Polito and Fortunato discussed  
14 traveling to Italy, while the other three men planned to go to Florida. Polito and Fortunato  
15 dropped off the others at a train station, where they boarded a train bound for North Carolina. A  
16 few days later, however, the three men returned to New York City by bus, intending to hide.  
17 Although Polito had no intention of attending Lombardi’s wake or funeral, Zito and Aparo  
18 ordered Fortunato to attend the services. The three conspirators were interviewed by local police  
19 in December 1994. Each of the three denied doing the shootings and claimed not to have seen  
20 the shooters — notwithstanding the fact that the three were the only individuals in the locked,  
21 private social club with Lombardi and D’Urso that night, and the only ones to emerge unscathed.

1           After the shootings, Fortunato sought protection from Genovese Family capo “Tough  
2 Tony” Federici against any retaliation by D’Urso. Polito once again began hanging out with  
3 Malangone’s crew. At one point, Gangi attempted to get permission from higher-ups in the  
4 Genovese Family for D’Urso to kill Polito, but Malangone successfully intervened on Polito’s  
5 behalf, and D’Urso was told not to retaliate. After Aparo became acting capo, he was told by his  
6 superiors that, if anything happened to Polito, Aparo would be held personally responsible.  
7 D’Urso ignored these warnings, however, and hired someone in an unsuccessful attempt to kill  
8 Polito.

9           In June 1998 (while Polito was still incarcerated pursuant to his Chemical Bank robbery  
10 guilty plea), D’Urso began cooperating with the Government and wearing a wire to record his  
11 conversations with several organized crime members, including Aparo.<sup>2</sup> In one of those recorded  
12 conversations, Aparo told D’Urso that Malangone had attempted to “release” Polito to a crew in  
13 the Luchese Crime Family, but that Aparo had vetoed this attempt because Polito “belonged” to  
14 Aparo.

15           In January 2001 — more than six years after the shootings — Fortunato’s brother,  
16 Michael Fortunato (“Michael”), received a federal grand jury subpoena and was told by the FBI  
17 that Fortunato was being investigated for the 1993 Chemical Bank robbery. According to  
18 Michael’s grand jury testimony, shortly after he was subpoenaed, he told Fortunato that the FBI

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1           <sup>2</sup> As discussed below, the contents of some of these tape recordings were introduced at  
2 the trial giving rise to this appeal, in conjunction with D’Urso’s testimony on behalf of the  
3 Government. Because we are reversing the RICO and VCAR convictions, we decline to address  
4 Polito’s and Fortunato’s argument that the District Court abused its discretion in admitting the  
5 hearsay statements in these tape recordings under either Fed. R. Evid. 801(d)(2) (coconspirator  
6 statements) or Fed. R. Evid. 804(b)(2) (declarations made against penal interest).

1 claimed that Fortunato had been involved in the Chemical Bank robbery and was likely to be  
2 arrested. Fortunato responded: “[L]et them do whatever they want to do. I have nothing to do  
3 with anything.” Michael also testified that Fortunato told him that he did not remember anything  
4 about the night of Lombardi’s murder and that Fortunato had fallen down because “maybe”  
5 somebody had pushed him when the shooting began. Thus, Fortunato denied to Michael having  
6 seen who shot Lombardi.

7 In October 2001, Cerasulo’s father, Giuseppe Cerasulo (“Giuseppe”), also was  
8 subpoenaed to testify before the grand jury. Cerasulo testified at trial that, in late 1994, he told  
9 Giuseppe that he had not seen who did the shootings. Cerasulo was present when the FBI served  
10 the grand jury subpoena on Giuseppe, and at that time Cerasulo told the agents that he had not  
11 witnessed who shot Lombardi and D’Urso.

#### 12 VI. Arrests, Indictment, Guilty Pleas, and Trial

13 After their arrests in 2002 for Lombardi’s murder, Polito told Cerasulo that they all had to  
14 “stick together.” During a prison conversation that took place after Polito had expressed concern  
15 about whether Bruno would begin cooperating with the Government, Polito told Cerasulo that  
16 Polito would supply Bruno with an attorney. After this conversation, an attorney came to visit  
17 Bruno and told him that she had been sent by Polito and that her fee had been paid; Bruno  
18 declined to retain her. Fortunato also unsuccessfully offered to hire a lawyer for Bruno. In June  
19 or July 2002, Bruno pled guilty to murder in aid of racketeering pursuant to a cooperation  
20 agreement. After testifying for the Government at the trial of Polito and Fortunato, Bruno was  
21 sentenced to ten years’ imprisonment.

1 In August 2002, the remaining four conspirators were charged by a federal grand jury in  
2 an eight-count superseding indictment. Count I charged all four defendants with “racketeering  
3 conspiracy” — i.e., violating the RICO statute by conspiring to commit the predicate racketeering  
4 acts enumerated in Count II. Count II charged Fortunato and Cerasulo with “racketeering” —  
5 conducting the affairs of the Genovese Family enterprise through a pattern of racketeering  
6 activities, consisting of five predicate acts (“Racketeering Acts One through Five”): (1)  
7 conspiring to murder Lombardi and D’Urso, (2) murdering Lombardi, (3) attempting to murder  
8 D’Urso, (4) corruptly endeavoring to influence Michael’s grand jury testimony, and (5)  
9 conspiring to rob, and robbing, the Chemical Bank branch.<sup>3</sup> Count III charged all four  
10 defendants with the murder of Lombardi as a violent crime in aid of racketeering.

11 Count IV charged all four defendants with conspiring to (i) obstruct justice and (ii) make  
12 false statements in connection with the substantive crimes charged in Counts V through VIII.  
13 Count V charged all four defendants with Cerasulo’s false statement to the FBI that he did not  
14 know who did the shootings.<sup>4</sup> Count VI charged all four defendants with Fortunato’s false  
15 statement to the FBI that he, too, did not know who did the shootings. Count VII charged all four  
16 defendants with Cerasulo’s obstruction of justice in trying to influence Giuseppe’s grand jury

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1 <sup>3</sup> The indictment redacted the names of Giuseppe Cerasulo and Michael Fortunato,  
2 referring to them, respectively, as “John Doe 1” and “John Doe 2.”

1 <sup>4</sup> As discussed in more detail below, Polito and Fortunato could be held criminally liable  
2 for their coconspirator Cerasulo’s subsequent criminal conduct under the Supreme Court’s  
3 decision in Pinkerton v. United States, 328 U.S. 640, 646–48 (1946), if the Government could  
4 establish that (i) Cerasulo’s criminal conduct had been committed in furtherance of the alleged  
5 conspiracy among the three of them to obstruct justice and make false statements, and (ii)  
6 Cerasulo’s criminal conduct reasonably could have been foreseen by them as a consequence of  
7 the alleged conspiracy.

1 testimony. And Count VIII charged all four defendants with Fortunato's obstruction of justice in  
2 trying to influence Michael's grand jury testimony. The indictment also sought forfeiture of \$1.6  
3 million and certain other assets.

4 On September 26, 2003, Cerasulo pled guilty to murder in aid of racketeering pursuant to  
5 a cooperation agreement. After testifying for the Government at the trial of Polito and Fortunato,  
6 Cerasulo was sentenced to ten years' imprisonment. On January 10, 2003, Imbrieco pled guilty  
7 to RICO conspiracy and conspiracy to defraud the Government by making false statements and  
8 obstructing justice, pursuant to a plea agreement that promised him a twenty-year sentence.

9 Although Imbrieco did not testify at the trial of Polito and Fortunato, excerpts from the transcript  
10 of his plea allocution were read to the jury. In those excerpts, Imbrieco admitted that: (i) he had  
11 conspired with Cerasulo and Fortunato to murder Lombardi and D'Urso; (ii) he had conspired  
12 with Fortunato, Polito, and Cerasulo to make false statements to the FBI and influence the  
13 testimony of grand jury witnesses; and (iii) an effort was made to influence the grand jury  
14 testimony of Giuseppe.

15 On January 28, 2003, after a ten-day trial, the jury convicted Polito and Fortunato on all  
16 counts charged in a redacted superseding indictment<sup>5</sup> and returned a forfeiture finding of  
17 \$275,000. On June 6, 2003, Polito and Fortunato were sentenced principally to life  
18 imprisonment and ordered to forfeit \$275,000 (jointly and severally). These timely appeals  
19 followed.

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1 <sup>5</sup> The redacted superseding indictment deleted all references to the defendants who had  
2 pled guilty.

1 **DISCUSSION**

2 I. Admission of Imbrieco’s Plea Allocution and Michael Fortunato’s Grand Jury Testimony

3 We turn first to whether the District Court’s admission of two hearsay statements —  
4 Imbrieco’s plea allocution and Michael’s grand jury testimony — violated the Confrontation  
5 Clause of the Sixth Amendment in light of the Supreme Court’s recent decision in Crawford v.  
6 Washington, 124 S. Ct. 1354 (2004).<sup>6</sup> There, the Court held that the Confrontation Clause was  
7 violated when the state trial court admitted a statement made by the defendant’s wife to the  
8 police, notwithstanding the wife’s unavailability to testify at trial due to the invocation of the  
9 marital privilege. Specifically, the Court held that “[t]estimonial statements of witnesses absent  
10 from trial [are to be] admitted only where the declarant is unavailable, and only where the  
11 defendant has had a prior opportunity to cross-examine.” Id. at 1369. In reaching this  
12 conclusion, the Court identified earlier lower federal court cases where testimonial statements  
13 had been admitted in contravention of its interpretation of the Confrontation Clause, including  
14 cases where a “plea allocution show[ed] [the] existence of a conspiracy,” id. at 1372 (citing, inter  
15 alia, United States v. Dolah, 245 F.3d 98, 104–05 (2d Cir. 2001)), and cases involving the  
16 admission of grand jury testimony, see id. (citing, inter alia, United States v. Papajohn, 212 F.3d  
17 1112, 1118–20 (8th Cir. 2000)).

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1 <sup>6</sup> In light of our conclusion that the admission of these hearsay statements violated the  
2 Confrontation Clause, we decline to reach the subsidiary arguments of Polito and Fortunato that  
3 (i) the District Court abused its discretion in admitting Imbrieco’s plea allocution under Fed. R.  
4 Evid. 804(b)(3) as a statement against Imbrieco’s penal interest; and (ii) the District Court abused  
5 its discretion in admitting Michael’s grand jury testimony under the “residual” or “catchall”  
6 hearsay exception contained in Fed. R. Evid. 807.

1 In a letter brief submitted pursuant to Fed. R. App. P. 28(j), the Government does not  
2 dispute the applicability of Crawford to the admission of Imbrieco’s plea allocution and  
3 Michael’s grand jury testimony; there is no question that both hearsay statements were  
4 testimonial statements made by declarants (a) who were unavailable to testify at the time that  
5 their hearsay statements were admitted into evidence, and (b) whose hearsay statements were not  
6 subject to cross examination by the defendants at the time the statements were made. Instead, the  
7 Government argues that our review is limited to plain error because (i) no Confrontation Clause  
8 objection was raised to the admission of Imbrieco’s plea allocution, and (ii) the only  
9 Confrontation Clause objection to the admission of Michael’s grand jury testimony was made in  
10 a footnote contained in a letter brief to the District Court. See United States v. Dukagjini, 326  
11 F.3d 45, 60 (2d Cir. 2002) (“We adhere to the principle that, as a general matter, a hearsay  
12 objection by itself does not automatically preserve a Confrontation Clause claim.”). For the  
13 reasons set forth below, we find that the admission of these hearsay statements was plain error,  
14 and we exercise our discretion to vacate the convictions with respect to the false-statement  
15 conspiracy charged in Count IV.

16 “[B]efore an appellate court can correct an error not raised at trial, there must be (1) error,  
17 (2) that is plain, and (3) that affects substantial rights.” Johnson v. United States, 520 U.S. 461,  
18 466–67 (1997) (internal quotation marks omitted). “If all three conditions are met, an appellate  
19 court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously  
20 affect[ed] the fairness, integrity, or public reputation of judicial proceedings.” Id. (internal  
21 quotation marks omitted); see also Fed. R. Crim. P. 52(b). Here, it cannot be gainsaid that the  
22 District Court plainly erred in admitting into evidence testimonial hearsay statements that the

1 Crawford Court expressly stated are not admissible under the Confrontation Clause. We hasten  
2 to observe that the able District Court made its rulings before the Supreme Court issued  
3 Crawford, and that only a soothsayer could have known with any certainty that the Court would  
4 change the legal landscape. That these statements were clearly admissible under our  
5 interpretation of the Confrontation Clause at the time they were admitted is of no moment,  
6 however, given that “[a]n error is ‘plain’ if it is ‘clear’ or ‘obvious’ at the time of appellate  
7 consideration.” United States v. Thomas, 274 F.3d 655, 667 (2d Cir. 2001) (en banc) (emphasis  
8 added) (quoting Johnson, 520 U.S. at 467–68).

9 Next, we conclude that this error affected the substantial rights of Polito and Fortunato.  
10 The Supreme Court has identified two kinds of errors that substantially affect a defendant’s  
11 rights. The first class of errors are “structural” errors, that is, a “defect affecting the framework  
12 within which [a] trial proceeds, rather than simply an error in the trial process itself.” Arizona v.  
13 Fulminante, 499 U.S. 279, 310 (1991). These structural errors are “so serious” that they “defy  
14 harmless-error analysis,” and thus have been found by the Supreme Court in “only . . . a very  
15 limited class of cases.” Johnson, 520 U.S. at 468–69.<sup>7</sup> To date, the Supreme Court has not held  
16 that the Confrontation Clause error raised here is one of those cases.

17 With regard to all other errors, such an error “affects a defendant’s substantial rights if it  
18 is prejudicial and it affected the outcome of the district court proceedings.” Thomas, 274 F.3d at

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1 <sup>7</sup> See, e.g., Sullivan v. Louisiana, 508 U.S. 275 (1993) (erroneous reasonable doubt  
2 instruction to jury); Vasquez v. Hillery, 474 U.S. 254 (1986) (unlawful exclusion of grand jurors  
3 of defendant’s race); Waller v. Georgia, 467 U.S. 39 (1984) (right to a public trial); McKaskle v.  
4 Wiggins, 465 U.S. 168 (1984) (right to self-representation at trial); Gideon v. Wainwright, 372  
5 U.S. 335 (1963) (total deprivation of right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (lack  
6 of impartial trial judge).

1 668 (internal quotation marks omitted). “Though prejudice is also required to show that an error  
2 is not harmless, pursuant to Fed. R. Crim. P. 52(a), the important difference of plain error  
3 prejudice [in most cases] is that it is the defendant rather than the Government who bears the  
4 burden of persuasion with respect to prejudice.” *Id.* (internal quotation marks omitted; alteration  
5 in original).<sup>8</sup> Because we find that the admission of these hearsay statements fails to satisfy the  
6 more exacting test applicable to “non-structural” errors, we need not — and do not — decide  
7 whether the District Court’s error in admitting these statements was a structural error that would  
8 not require a finding of prejudicial effect.

9 “The erroneous admission of evidence is not harmless unless [we] can conclude with fair  
10 assurance that [this] evidence did not substantially influence the jury.” *United States v. Jean-*  
11 *Baptiste*, 166 F.3d 102, 108 (2d Cir. 1999); see *Kotteakos v. United States*, 328 U.S. 750, 764–65  
12 (1946). “An error in the admission of evidence may be deemed harmless only if it is highly  
13 probable that the error did not contribute to the verdict.” *Jean-Baptiste*, 166 F.3d at 108 (internal  
14 quotation marks omitted). “In making this determination, we consider principally whether the  
15 [G]overnment’s case against the defendant[s] was strong; whether the evidence in question bears  
16 on an issue that is plainly critical to the jury’s decision . . . ; whether the evidence was  
17 emphasized in the [G]overnment’s presentation of its case and in its arguments to the jury; and  
18 whether the case was close.” *Id.* at 108–09 (internal quotation marks and citations omitted).

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1 <sup>8</sup> “When, as here, the source of the alleged error is a supervening judicial decision that  
2 alters ‘a settled rule of law in the circuit,’ we have in the past applied a ‘modified plain error  
3 rule’ in which the Government bears the burden of persuasion as to whether substantial rights  
4 have been affected.” *Thomas*, 274 F.3d at 668 n.15 (quoting *United States v. Santiago*, 238 F.3d  
5 213, 215 (2d Cir. 2001)). We need not decide whether the Supreme Court’s decision in *Johnson*  
6 implicitly overruled our modified plain error rule because, as discussed below, the defendants  
7 here prevail under ordinary plain error review.

1           We cannot conclude with fair assurance that the admission of Imbrieco’s plea allocution  
2 and Michael’s grand jury testimony did not substantially influence the jury’s guilty verdict. Cf.  
3 United States v. McClain, 2004 WL 1682768, at \*3 (2d Cir. July 28, 2004) (finding that the  
4 erroneous admission of the co-conspirators’ testimonial plea allocutions was harmless error  
5 “beyond a reasonable doubt”). Indeed, Michael’s grand jury testimony was the only evidence  
6 offered to support the charge that Fortunato had corruptly endeavored to influence Michael’s  
7 grand jury testimony, and, thus, this testimony formed the entire basis for the obstruction-of-  
8 justice violation alleged in Count VIII and for Racketeering Act Four in Count II. Plainly, then,  
9 the admission of this testimony contributed to the jury’s conclusion that Fortunato committed  
10 these offenses. In any event, even were we to deem Michael’s grand jury testimony admissible,  
11 for the reasons discussed below, the evidence was insufficient to support the defendants’  
12 convictions under Counts II and VIII (see discussion infra Parts II.B and II.C.1, respectively),  
13 which, therefore, are reversed instead of vacated.

14           Imbrieco’s plea allocution was also offered to establish the false-statement and  
15 obstruction-of-justice conspiracies charged in Count IV. One of the elements of a conspiracy to  
16 obstruct justice or to defraud the government is, of course, an agreement to do so. See United  
17 States v. Ballistrea, 101 F.3d 827, 832 (2d Cir. 1996); see also United States v. Schwarz, 283  
18 F.3d 76, 105–06 (2d Cir. 2002). Here, the only evidence that an illegal agreement existed, either  
19 to make false statements or to obstruct justice, was (i) Imbrieco’s plea allocution, and (ii)  
20 Cerasulo’s testimony that, shortly after the shootings, the defendants agreed “to stick together”  
21 and not “tell nobody who did nothing.” As discussed below, however, see discussion infra Part  
22 II.C., Cerasulo’s testimony alone is insufficient to establish an agreement either to make false

1 statements to the FBI or to obstruct justice by corruptly endeavoring to influence the grand jury  
2 testimony of Giuseppe and/or Michael. Thus, it is clear that the admission of Imbrieco’s plea  
3 allocution contributed to the jury’s conclusion that Polito and Fortunato conspired to obstruct  
4 justice and to make false statements to the FBI.

5 Because there was plain error and because that error affected the substantial rights of  
6 Polito and Fortunato, we turn to the fourth prong of the plain-error test — whether we should  
7 exercise our discretion to notice the plain error. “We are permitted to exercise our discretion to  
8 notice a plain error only when the error ‘seriously affect[ed] the fairness, integrity or public  
9 reputation of judicial proceedings.’” Thomas, 274 F.3d at 671 (emphasis added) (quoting United  
10 States v. Olano, 507 U.S. 725, 736 (1993)). We find that the fairness and integrity of the  
11 proceedings in this case were seriously affected by the unconstitutional admission of these  
12 hearsay statements.

13 Here, as we discuss in more detail below, the evidence supporting the defendants’  
14 convictions was, with respect to most of the counts charged in the indictment, legally  
15 insufficient. Indeed, some of the convictions are supported by quanta of evidence that are  
16 deemed “legally sufficient” only because, in assessing a legal-sufficiency challenge, we must  
17 consider improperly admitted hearsay testimony.<sup>9</sup> And the only count that is supported by  
18 properly admitted, legally sufficient evidence (Count VI) relates to the cover-up of acts for which  
19 we find Polito and Fortunato were not criminally liable as charged. It is also notable that, but for  
20 the inclusion of the obstruction-of-justice predicate act, the substantive RICO charges, at least,

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1 <sup>9</sup> See United States v. Cruz, 363 F.3d 187, 197 (2d Cir. 2004); see also infra note 20.

1 would be time-barred by the applicable five-year statute of limitations.<sup>10</sup> Allowing these “cover-  
2 up” convictions to stand based solely on unconstitutionally inadmissible hearsay testimony  
3 would indeed lead to a result that would seriously call into question the fairness and integrity of  
4 these proceedings. For all of these reasons, we exercise our discretion to notice the plain error of  
5 the District Court in admitting the hearsay testimony of Michael and Imbrieco, and we vacate the  
6 convictions for false-statement conspiracy under Count IV of the indictment.<sup>11</sup>

## 7 II. Sufficiency of the Evidence

### 8 A. Appellants’ Arguments

9 Both defendants challenge the legal sufficiency of the evidence supporting all counts  
10 except Count VI, the count relating to false statements that Fortunato made to an FBI agent.  
11 First, defendants argue that the evidence underlying the VCAR and RICO counts relating to the  
12 murder of Lombardi, the attempted murder of D’Urso, and the conspiracy to murder Lombardi  
13 and D’Urso (collectively, the “Shootings”) was legally insufficient to establish that Polito and

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1 <sup>10</sup> A substantive RICO count is time-barred where the defendant has not committed at  
2 least one predicate racketeering act within five years of the date of the indictment. 18 U.S.C. §  
3 3282(a); see United States v. Zvi, 168 F.3d 49, 54 (2d Cir. 1999). Here, all but one of the five  
4 enumerated racketeering acts charged in the original indictment were committed outside the  
5 limitations period. Only Racketeering Act Four, which charged the obstruction-of-justice  
6 conspiracy between December 2000 and January 25, 2001, occurred within the limitations  
7 period. A RICO conspiracy, however, “is presumed to exist until there has been an affirmative  
8 showing that it has been terminated[;] and its members continue to be conspirators until there has  
9 been an affirmative showing that they have withdrawn.” United States v. Spero, 331 F.3d 57, 60  
10 (2d Cir. 2003); see United States v. Salerno, 868 F.2d 524, 534 & n.4 (2d Cir. 1989). Here,  
11 because we reverse the RICO conspiracy convictions on other grounds, we do reach the issue, as  
12 we did not in Spero, of what implications a defendant’s continued membership in an ongoing  
13 organized crime family may have on the statute of limitations for a RICO conspiracy charge.

1 <sup>11</sup> We take a different tack with the convictions for obstruction-of-justice conspiracy  
2 under Count IV. See discussion infra Part II.C.1.a.

1 Fortunato committed the charged racketeering acts to “maintain or increase” positions in the  
2 Genovese Crime Family, or to establish that these offenses were related to the activities of the  
3 Genovese Family enterprise. Second, defendants argue that the evidence underlying the charged  
4 conspiracy to obstruct justice was legally insufficient because, when they decided to “stick  
5 together” shortly after the Shootings took place, it was not reasonably foreseeable that a federal  
6 grand jury would be empaneled. And third, defendants argue that the evidence underlying the  
7 substantive obstruction-of-justice and false-statement counts was legally insufficient.

8 As a preliminary matter, the logical implications of these arguments require some  
9 explication. First, if the Shootings were not committed to maintain or increase the defendants’  
10 positions in the Genovese Family, then the convictions of the defendants under Count III (murder  
11 in aid of racketeering) must be reversed. Second, if the Shootings were not related to the  
12 activities of the Genovese Family, then three of the five predicate racketeering acts enumerated in  
13 Count II are legally insufficient. And third, if, in addition, the evidence was legally insufficient  
14 to support the obstruction-of-justice predicate act (i.e., Fortunato’s allegedly corrupt efforts to  
15 influence Michael’s grand jury testimony), then the RICO convictions cannot be affirmed,  
16 because the only predicate act remaining in the indictment — the robbery of, and conspiracy to  
17 rob, Chemical Bank — would be insufficient to establish a “pattern of racketeering activity,”  
18 which must include at least two predicate racketeering acts within ten years of each other. See  
19 Diaz, 176 F.3d at 93. Accordingly, the survival of the RICO convictions depends not only on the  
20 sufficiency of the evidence relating to the Shootings, but also on the sufficiency of the evidence  
21 relating to obstruction of justice by attempting to influence Michael’ grand jury testimony.

1           The standard under which we review a challenge to the sufficiency of the evidence in a  
2 criminal trial is familiar:

3           A defendant challenging a conviction based on a claim of insufficiency of the  
4 evidence bears a heavy burden. The evidence presented at trial should be viewed  
5 in the light most favorable to the [G]overnment, crediting every inference that the  
6 jury might have drawn in favor of the [G]overnment. We consider the evidence  
7 presented at trial in its totality, not in isolation, but may not substitute our own  
8 determinations of credibility or relative weight of the evidence for that of the jury.  
9 We defer to the jury's determination of the weight of the evidence and the  
10 credibility of the witnesses, and to the jury's choice of the competing inferences  
11 that can be drawn from the evidence. Accordingly, we will not disturb a  
12 conviction on grounds of legal insufficiency of the evidence at trial if any rational  
13 trier of fact could have found the essential elements of the crime beyond a  
14 reasonable doubt.

15       United States v. Dhinsa, 243 F.3d 635, 648–49 (2d Cir. 2001) (citations and internal quotation  
16 marks omitted). Finally, “[i]n situations where some [G]overnment evidence was erroneously  
17 admitted, we must make our determination concerning sufficiency taking into consideration even  
18 the improperly admitted evidence.” Cruz, 363 F.3d at 197 (citations omitted). With this  
19 deferential standard of review in mind, we turn to the arguments of Polito and Fortunato  
20 regarding the sufficiency-of-evidence issue.

21           B.       Legal Sufficiency of the Evidence Relating to the Shootings

22           Polito and Fortunato first argue that, when viewed in the light most favorable to the  
23 Government, the evidence was not legally sufficient (i) to establish that they murdered Lombardi  
24 to maintain or increase their positions in the Genovese Crime Family; and (ii) to establish that the  
25 Shootings were related to the activities of the Genovese Family enterprise.



1 For example, we have affirmed racketeering convictions when: (i) the charged  
2 racketeering acts were committed or sanctioned by high-ranking members of an enterprise to  
3 protect the enterprise’s operations and to advance the objectives of the enterprise; and, similarly,  
4 (ii) where one or more leaders of an enterprise committed the charged racketeering acts in  
5 response to a threat posed to the enterprise and to prevent the leaders’ positions within the  
6 enterprise from being undermined by that threat.<sup>13</sup> On the other hand, we have reversed or  
7 vacated defendants’ racketeering convictions in cases where the evidence showed that the  
8 murders (or other racketeering acts) were “purely mercenary,” Thai, 29 F.3d at 818, and in cases  
9 where the defendant was neither a member of the enterprise nor involved in its criminal  
10 activities.<sup>14</sup>

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<sup>12</sup>(...continued)

1 671; Rahman, 189 F.3d at 126; Diaz, 176 F.3d at 94–95; United States v. Reyes, 157 F.3d 949,  
2 955 (2d Cir. 1998); United States v. Polanco, 145 F.3d 536, 540 (2d Cir. 1998); United States v.  
3 Malpeso, 115 F.3d 155, 164 (2d Cir. 1997); United States v. Thai, 29 F.3d 785, 817 (2d Cir.  
4 1994); United States v. Rosa, 11 F.3d 315, 340–41 (2d Cir. 1993); United States v. Concepcion,  
5 983 F.2d 369, 381 (2d Cir. 1992).

1 <sup>13</sup> See, e.g., Pimentel, 346 F.3d at 296 (defendant gang leader ordered murder of fellow  
2 gang member to prevent victim from challenging defendant’s leadership position); Dhinsa, 243  
3 F.3d at 672 (racketeering acts committed by defendant, the leader of the enterprise, to silence  
4 both victims, who were believed to be cooperating with the Government and who posed a threat  
5 to the enterprise’s operations and defendant’s leadership); Diaz, 176 F.3d at 95–96 (defendant  
6 sanctioned murders of both rival drug dealer and suspected informant to protect drug gang’s  
7 territory and to maintain defendant’s leadership position in the gang).

1 <sup>14</sup> See, e.g., Ferguson, 246 F.3d at 135–36 (defendant was “an outside hit man who did  
2 not belong to or seek to join” the drug gang and who did not participate in the gang’s “core  
3 activities of drug sales, extortion or robbery”); Polanco, 145 F.3d at 540 (defendant was not a  
4 member of the drug gang but merely someone who sold guns to the gang that were used to  
5 commit the charged racketeering acts); Thai, 29 F.3d at 818 (defendant participated in the  
6 charged racketeering activities solely for monetary compensation).

1                   2.       Relatedness of RICO Predicate Acts

2                   Turning to the RICO statute, the Government is required to show, inter alia, “that the  
3 racketeering predicates are related, and that they amount to or pose a threat of continued criminal  
4 activity.” H. J. Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 239 (1989) (emphasis omitted). To  
5 establish that the predicate acts are related, the Government must show that the racketeering acts  
6 relate both to one another and — of significance here — to the enterprise. See Polanco, 145 F.3d  
7 at 541; United States v. Minicone, 960 F.2d 1099, 1106 (2d Cir. 1992); accord United States v.  
8 Corrado, 227 F.3d 543, 554 (6th Cir. 2000). Relatedness between the racketeering acts and the  
9 enterprise can be proven by showing either that: (i) the offense related to the activities of the  
10 enterprise, or (ii) the defendant was able to commit the offense solely because of his position in  
11 the enterprise. Minicone, 960 F.2d at 1106; accord United States v. Miller, 116 F.3d 641, 676  
12 (2d Cir. 1997). Moreover, it is not necessary that the offense be in furtherance of the enterprise’s  
13 activities for the offense to be related to the activities of the enterprise. Miller, 116 F.3d at 676.

14                   We next examine the evidence relating to the involvement of Polito and Fortunato in the  
15 Shootings, in light of the foregoing legal analysis.

16                   3.       Polito

17                   As discussed above, the evidence established that Polito had several motivations for  
18 wanting to kill Lombardi and D’Urso: Polito owed them significant amounts of money from  
19 loansharking; he believed that D’Urso had previously “set him up” for a robbery; and he wanted  
20 to switch from Zito’s crew to Malangone’s crew to increase his chances of securing ill-gotten  
21 gains. The Government argues on appeal that it was this last motivation that satisfied the  
22 “position related” element of § 1959. The Government’s argument is fatally flawed for several

1 reasons, however. First, it cites no authority — and we have found none — for the proposition  
2 that an associate of an organized crime family switching from one crew to another is per se  
3 evidence of maintaining or increasing his position in a criminal enterprise. Absent any such  
4 authority, we think it simply too tenuous to conclude that switching from a temporarily less  
5 active crew to a more active crew within the same organized crime family was likely to result in  
6 Polito maintaining or advancing his position in that enterprise.

7           Second, even when the evidence is construed in the light most favorable to the  
8 Government, no rational juror could conclude that killing Lombardi and/or D’Urso would have  
9 resulted in Polito’s being able to switch crews. Polito was not a made member of the Genovese  
10 Family; nor was he acting on the orders of a made member (or anyone else) in that organization.  
11 Polito was merely an associate of the Genovese Family whose principal ties to that organization  
12 were in his capacity as a gambling and loansharking customer. Lombardi and D’Urso also were  
13 associates and not made members of the Genovese Family. Thus, the Government failed to  
14 establish through the conclusory, uncorroborated, biased, and illogical testimony of D’Urso how  
15 the killing of Lombardi and/or D’Urso would have resulted in Zito or Aparo “releasing” Polito so  
16 that he could switch crews. Nor was there any evidence that Malangone, to whose crew Polito  
17 desired to switch, had authorized the Shootings, nor that Polito would have been accepted by  
18 Malangone into his crew after the Shootings. Thus, even crediting D’Urso’s testimony that  
19 Polito wanted to switch to Malangone’s temporarily “more active crew,” there is no evidence  
20 from which a rational juror could conclude that Polito participated in the murder of Lombardi  
21 and the attempted murder of D’Urso to enable him to switch crews.

1 Third, there was significant evidence that Polito’s shooting of Lombardi and D’Urso was  
2 done in contravention of Genovese Family protocols and that Polito’s role in the Shootings  
3 actually decreased his standing in the Genovese Family. Instead of taking credit for the  
4 Shootings as a badge of honor, the participants laid low and denied any involvement in the  
5 Shootings. In fact, tape-recorded conversations between D’Urso and Aparo that were made years  
6 after the Shootings showed that higher-ups in the Genovese Family considered killing Polito for  
7 organizing the Shootings without proper authorization, but then decided against doing so out of  
8 fear that Polito would start cooperating with the Government if he found out they were planning  
9 to kill him. In sum, no rational juror could have found that Polito participated in the Shootings to  
10 maintain or increase his position in the Genovese Family.

11 With respect to the “relatedness” element under RICO, see Minicone, 960 F.2d at 1106,  
12 we conclude that no rational juror could have found that Polito was able to arrange the Shootings  
13 “solely by virtue of his position” in the Genovese family. It is undisputed that Cerasulo and  
14 Imbrieco were Polito’s cousins and that Bruno was recruited by his friend Cerasulo. As noted  
15 above, none of the shooters was a made member of the Genovese Family; nor were the Shootings  
16 themselves sanctioned by the family. Indeed, all evidence suggests otherwise. On the other  
17 hand, it is entirely reasonable to conclude that Polito planned the Shootings to avoid repaying his  
18 loansharking debts and because he despised D’Urso — in other words, that for Polito the murder  
19 of Lombardi and the attempted murder of D’Urso were simply personal matters. Accordingly,  
20 based on the evidence adduced, we conclude that no rational juror could have found the  
21 Shootings to be related to the activities of the Genovese Family.

1                   4.     Fortunato

2                   The evidence concerning Fortunato's role in the Shootings was even weaker than the  
3 evidence against Polito. As discussed above, Fortunato's involvement in Genovese Family  
4 affairs consisted of a limited role in the 1993 Chemical Bank robbery, regularly playing cards  
5 with Polito and other Genovese associates at a Genovese Family social club, being a close friend  
6 of Polito's, and being an extortion victim who paid protection money for his bakery. Indeed, the  
7 only evidence concerning Fortunato's motivation for participating in the Shootings is that he  
8 hated D'Urso, who had a history of beating him up.

9                   According to the Government, "Fortunato could expect that the [Shootings] would  
10 enhance his standing in the Genovese [F]amily simply because of his close relationship with  
11 Polito." Thus, this argument necessarily depends on our concluding that the evidence concerning  
12 Polito's role in the Shootings was legally sufficient to support a RICO and VCAR conviction.  
13 But as we have rejected this argument with respect to Polito, so too we reject it with respect to  
14 Fortunato.

15                  Finally, we find no evidence in the record showing that Fortunato's role in the Shootings  
16 was related to the activities of the Genovese Family or that he was able to facilitate the Shootings  
17 solely because of his position in the Genovese Family. Indeed, it is a close question whether  
18 Fortunato was even a member of Zito's crew, let alone an associate of the Genovese Family,  
19 notwithstanding D'Urso's biased and incredible testimony that such was the case.

20                  In light of all the foregoing, we conclude that the evidence was legally insufficient to  
21 establish either RICO or VCAR liability on the part of either Polito or Fortunato for the  
22 Shootings. Accordingly, we reverse the convictions under Count III in the indictment (which

1 related exclusively to the Shootings themselves). But for the fact that the predicate racketeering  
2 acts enumerated in the indictment also included an obstruction-of-justice offense, we could  
3 dispose of Counts I and II on the same basis as Count III. But because those counts — and,  
4 indeed, all of the remaining counts in the indictment — also charged the defendants with crimes  
5 relating to the defendants’ efforts to cover up their roles in the Shootings, we must examine the  
6 legal sufficiency of the evidence of those “cover-up” crimes, to which we now turn our attention.

7 C. Legal Sufficiency of the Evidence That Polito and Fortunato Obstructed Justice,  
8 Made False Statements, and Conspired to Obstruct Justice and Make False  
9 Statements

10 The defendants argue that the evidence was legally insufficient to support their  
11 convictions for obstruction of justice, making a false statement to the FBI, and conspiring to  
12 defraud the Government by committing both of these offenses. For the reasons set forth below,  
13 we conclude that the evidence was legally insufficient to support the convictions relating to the  
14 conspiracies to obstruct justice charged in Counts I and IV; the obstructions of justice charged in  
15 Count II, VII, and VIII; and the false statements of Cerasulo charged in Count V.<sup>15</sup> We find,  
16 however, that the evidence (i) would be legally sufficient, had all of that evidence been properly  
17 admitted, to support the conviction of the defendants for the false-statement conspiracy charged  
18 in Count IV and (ii) was legally sufficient to support the conviction of the defendants for the  
19 false statements of Fortunato charged in Count VI — i.e., telling the FBI that he did not see who  
20 shot Lombardi and D’Urso. Nevertheless, we vacate (i) the convictions for false-statement

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1 <sup>15</sup> Because we reverse the RICO convictions on the ground that the Government failed to  
2 prove at least two predicate racketeering acts, we need not reach the arguments of Polito and  
3 Fortunato that the RICO counts must also be reversed because the remaining predicate act is  
4 time-barred.

1 conspiracy under Count IV, for the improper admission of Imbrieco’s plea allocution and  
2 Michael’s grand jury testimony, as discussed in Part I, supra, and (ii) the convictions under Count  
3 VI for the reasons discussed below.

4 1. Conspiracy to Obstruct Justice and Obstruction of Justice

5 “A conspiracy to defraud under [18 U.S.C. § 371] embraces any conspiracy for the  
6 purpose of impairing, obstructing, or defeating the lawful function of any department of  
7 government.” Ballistrea, 101 F.3d at 831 (internal quotation marks omitted). As discussed  
8 above, the evidence that the defendants conspired to obstruct justice and obstructed justice was  
9 that, shortly after the Shootings, they agreed on a cover story to tell the authorities investigating  
10 the Shootings and continued to stick to this cover story even after a federal grand jury was  
11 empaneled years later. Section 1503 of Title 18 of the United States Code provides, in relevant  
12 part, that it is a crime to “corruptly . . . endeavor[] to influence, obstruct, or impede, the due  
13 administration of justice.” 18 U.S.C. § 1503(a).

14 Preliminarily, we note that Polito and Fortunato argue on appeal that the obstruction-of-  
15 justice charges should have been dismissed by the District Court because they should have been  
16 brought under the federal witness tampering statute, 18 U.S.C. § 1512, instead of the obstruction-  
17 of-justice statute, 18 U.S.C. § 1503. In making this argument, the defendants rely on our  
18 decision in United States v. Masterpol, 940 F.2d 760 (2d Cir. 1991), where we held that in  
19 enacting § 1512 Congress implicitly removed witness tampering from the scope of § 1503. The  
20 District Court concluded that the defendants had waived this argument by having failed to raise it  
21 in a pretrial motion to dismiss the indictment. On appeal, the Government asks us to affirm the  
22 District Court’s waiver analysis or, alternatively, to overrule our decision in Masterpol (whose

1 reasoning has been rejected by every other federal court of appeals that has considered the issue).  
2 We decline to reach these arguments, given our conclusion below that the evidence supporting  
3 the obstruction-of-justice convictions is legally insufficient.

4 a. Conspiracy to Obstruct Justice

5 To secure a conviction for conspiracy to obstruct justice under § 1503, the Government  
6 “must establish (1) that [one] defendant (a) knowingly entered into an agreement with another,  
7 (b) with knowledge, or at least anticipation, of a pending judicial proceeding, and (c) with the  
8 specific intent to impede that proceeding; and (2) the commission of at least one overt act in  
9 furtherance of the conspiracy.” Schwarz, 283 F.3d at 105–06. “[A] judicial proceeding need not  
10 be pending at the time the conspiracy began so long as the [defendants] had reason to believe one  
11 would begin and one in fact did.” Id. at 107. Finally, the conduct offered as proof of the intent  
12 to obstruct a federal proceeding must, “in the defendant’s mind, [have had] the natural and  
13 probable effect of obstructing [the proceeding].” Id. at 109 (internal quotation marks omitted).

14 The leading § 1503 case in this Circuit is Schwarz, which arose out of the infamous, in-  
15 custody abuse of Abner Louima by police officers, who were subsequently tried for, among other  
16 things, violating § 1503 by lying to federal investigators.<sup>16</sup> There, the evidence showed that,  
17 shortly after Louima was assaulted, the police officer-defendants agreed “generally to impede  
18 investigators by putting forth and corroborating a false version of what occurred.” Id. at 106.  
19 During “numerous communications among the [defendants] and others at key points during the

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1 <sup>16</sup> Because the defendants were prosecuted for lying to federal investigators instead of  
2 federal grand jury witnesses, we had no occasion to address the issue discussed above regarding  
3 our conclusion in Masterpol that charges of lying to, or trying to influence, federal grand jury  
4 witnesses should be prosecuted under § 1512.

1 investigations, [the defendants] offered parallel accounts that evolved as other evidence in the  
2 case surfaced.” Id.

3 On appeal, we found that there was sufficient evidence to establish that the defendants  
4 had generally agreed to impede the investigation and that at least one of them knew about, or  
5 anticipated the existence of, a federal grand jury. Id. at 106–07. But we found insufficient  
6 evidence that one of the defendants had specifically intended to impede or obstruct the grand jury  
7 proceeding. Id. at 109. Although the evidence established that this defendant’s memo book had  
8 been subpoenaed, it did not establish that he knew that the allegedly false statements he had  
9 made to federal investigators would be conveyed to the federal grand jury. As we explained,  
10 “[h]e may have hoped that they would be provided to the grand jury, and surely there was that  
11 possibility; but there was insufficient evidence to enable a rational trier of fact to conclude that  
12 [he] knew that this would happen or that he entertained any expectations on that score that were  
13 based on such knowledge.” Id. (internal quotation marks omitted). “At best, the [G]overnment  
14 proved that [he], knowing of the existence of a federal grand jury investigation, lied to federal  
15 investigators regarding issues pertinent to the grand jury’s investigation.” Id.

16 Here, whether the defendants knowingly entered into an agreement to impede a potential  
17 grand jury proceeding or to obstruct justice is irrelevant, since the evidence is not sufficient to  
18 satisfy either the second or the third elements of a conspiracy to obstruct justice. With respect to  
19 the second element — knowledge of a grand jury proceeding — the grand jury was not  
20 empaneled until some time in 2000, i.e., six years after the Shootings had occurred and the  
21 defendants had agreed not to “tell nobody who did nothing.” In contrast, the grand jury in  
22 Schwarz handed down indictments months after the victim was attacked. Id. at 81. Thus, when

1 the defendants in this case agreed in 1994 “that [they] [wouldn’t] tell nobody who did nothing,”  
2 they could not reasonably have foreseen a federal grand jury investigation, especially given that  
3 the criminal investigation was being conducted by local police and prosecutors — as it would  
4 indeed continue to be for several years after the Shootings occurred.<sup>17</sup>

5 With regard to the third element, specific intent, the jury certainly was entitled to infer  
6 from the evidence that, in 2001, both Fortunato and Cerasulo knew about the grand jury when  
7 they spoke with their respective relatives. There is little or no evidence, however, that either  
8 Fortunato or Cerasulo specifically intended that the statements they made at that time to their  
9 respective relatives would eventually be passed along to the grand jury. Cerasulo testified that,  
10 shortly after the Shootings in 1994, Cerasulo told Giuseppe that Cerasulo had not been involved  
11 in the shooting of Lombardi. Almost seven years later, in October 2001, FBI agents came to  
12 Giuseppe’s pizzeria and (in Cerasulo’s presence) served Giuseppe with a grand jury subpoena  
13 and told him that he would be asked questions about Cerasulo’s involvement in the Lombardi  
14 shooting. In the presence of Giuseppe, the FBI agents then asked Cerasulo about the Lombardi  
15 shooting. Cerasulo told them that he had “heard shots . . . [and had run] out.” Cerasulo testified  
16 that, after 1994, he and Giuseppe “never really talked about” the Lombardi shooting. Moreover,  
17 Cerasulo did not testify that he told Giuseppe to lie to the grand jury. Indeed, Cerasulo  
18 repeatedly denied ever telling Giuseppe “the truth” about what had happened on the night in

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1 <sup>17</sup> Judge Katzmann takes issue with the majority on this point as to the second element,  
2 concluding that the modus operandi of individuals involved in organized crime is to assume that  
3 anything they say could be used at some point in any variety of legal proceedings, however far  
4 down the road.

1 question.<sup>18</sup> Thus, Cerasulo's statements to Giuseppe, and to the police in Giuseppe's presence,  
2 without more, are legally insufficient to support a conviction for conspiracy to obstruct justice  
3 under § 1503. See Schwarz, 283 F.3d at 108.

4 With respect to Michael, the Government also failed to establish that Fortunato  
5 specifically intended that the statements he made to Michael would be passed along to the grand  
6 jury. First, there was no evidence that, between the time Michael received the grand jury  
7 subpoena and the time he testified before the grand jury, Fortunato knew that Michael had  
8 received the subpoena. Second, Michael's testimony establishes only that, shortly after he  
9 received his grand jury subpoena, he confronted Fortunato about his role in the bank robbery and  
10 the Shootings. In response, Fortunato denied any involvement in the robbery and specifically  
11 told Michael that he had not seen Lombardi's shooter. And like Cerasulo with Giuseppe,  
12 Fortunato never asked Michael to lie to the grand jury. Thus, like Cerasulo's statements to  
13 Giuseppe, Fortunato's statements to Michael, standing alone, are legally insufficient to support a  
14 conviction under § 1503. See id.

15 Finally, the Government relies heavily on the excerpts from Imbrieco's improperly  
16 admitted plea allocution to prove these obstructions of justice. While Imbrieco's plea allocution  
17 may have been probative of whether a conspiracy existed in 1994 to obstruct a grand jury  
18 investigation and whether a grand jury investigation was foreseeable in 1994, it sheds no light on  
19 whether, in 2001, Cerasulo spoke to Giuseppe with the specific intent of obstructing the federal  
20 grand jury investigating the Shootings. Indeed, there is nothing in the plea allocution indicating

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1 <sup>18</sup> Giuseppe's grand jury testimony was not introduced at trial.

1 that Imbrieco spoke to Cerasulo about any conversations that Cerasulo may have had with  
2 Giuseppe.<sup>19</sup>

3 b. Obstruction-of-Justice Counts

4 The evidence relating to the obstruction of justice was the same evidence that was used to  
5 support the convictions for conspiracy to obstruct justice. Thus, the evidence against Fortunato  
6 with respect to the obstruction-of-justice count concerning Michael is also legally insufficient.  
7 Polito's obstruction-of-justice convictions were premised on a Pinkerton theory of liability, as  
8 were Fortunato's and Polito's convictions with respect to the grand jury testimony of Giuseppe.  
9 As discussed above, in Pinkerton, 328 U.S. at 646–48, the Supreme Court held that “a defendant  
10 who does not directly commit a substantive offense may nevertheless be liable if the commission  
11 of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to

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1 <sup>19</sup> As noted above, Imbrieco's plea allocution only discussed Cerasulo's — and not  
2 Fortunato's — attempt to influence a grand jury witness. In Imbrieco's plea allocution, he  
3 described an agreement among the defendants in 1994 (as incredible as it seems) to make false  
4 statements to the FBI, by answering the following questions in the affirmative:

5 [Did] you, Fortunato, Polito, Cerasuolo [sic] or anybody else h[ave] a meeting of  
6 the minds, an understanding, that a false statement was going to be made to an  
7 FBI agent[?] . . . And also [did] you and one or more of these other people named  
8 or anybody else tr[y] to obstruct the due administration of justice[?]

9 Did you have such an agreement?

10 . . . .

11 Is it also true that on or about [November 7, 2001], John Doe [i.e.,  
12 Giuseppe], who the Grand Jury kn[ew] the identity of, testified before a Grand  
13 Jury in this Court[?]

14 . . . .

15 [Was there] an effort made to influence the testimony of that Grand Jury?

1 the defendant as a consequence of their criminal agreement.” Cephas v. Nash, 328 F.3d 98, 101  
2 n.3 (2d Cir. 2003). Thus, under Pinkerton, a defendant may be found “guilty on a substantive  
3 count without specific evidence that he committed the act charged if it is clear that the offense  
4 had been committed, that it had been committed in the furtherance of an unlawful conspiracy,  
5 and that the defendant was a member of that conspiracy.” United States v. Miley, 513 F.2d 1191,  
6 1208 (2d Cir. 1975).

7 As discussed above, the evidence that Cerasulo and Fortunato specifically intended to  
8 influence the testimony of their respective relatives was legally insufficient with respect to the  
9 conspiracy to obstruct justice; thus neither Polito’s nor Fortunato’s obstruction-of-justice  
10 convictions can be sustained under a Pinkerton theory of liability.

11 2. Conspiracy to Make False Statements and Making False Statements

12 It is a crime to make “any materially false, fictitious, or fraudulent statement[s] or  
13 representation[s]” to an FBI agent. 18 U.S.C. § 1001(a)(2); see Ballistrea, 101 F.3d at 834.

14 a. False-Statement Conspiracy

15 We find that there would be legally sufficient evidence, had all of that evidence been  
16 properly admitted, to satisfy the elements of a conspiracy on the part of Polito and Fortunato to  
17 make false statements, as alleged in Count IV. First, Imbrieco’s plea allocution established the  
18 existence of an agreement among the defendants in 1994 to make false statements to the FBI. As  
19 alluded to above, although Imbrieco’s plea allocution was improperly admitted, we must consider  
20 it as having been properly admitted for the purpose of assessing the legal sufficiency of the

1 evidence to support a criminal conviction.<sup>20</sup> And second, Cerasulo testified that, in 2001, when  
2 he was questioned by FBI agents when they served a grand jury subpoena on Giuseppe, Cerasulo  
3 denied having been involved in the Shootings. This testimony would be legally sufficient to  
4 establish an overt act in furtherance of the false-statement conspiracy. For the reasons set forth  
5 above, however, see discussion infra Part I, we vacate the false-statement-conspiracy convictions  
6 under Count IV, on the ground that Imbrieco’s plea allocution was improperly admitted, and  
7 remand for a new trial on these charges.

8 b. False-Statement Counts

9 Count V charged Polito and Fortunato with making false statements under a Pinkerton  
10 theory of liability, for the false statements made by Cerasulo to the FBI in 2001 when he denied  
11 having been involved in the Shootings. Here, a rational juror could not have concluded that  
12 Polito and Fortunato could have reasonably foreseen when they entered into their false-statement  
13 conspiracy in 1994 that Cerasulo, as a natural or necessary consequence of their agreement,  
14 would make a false statement to an FBI agent in the course of a federal grand jury investigation  
15 that was convened six years later. As we explained in United States v. Jordan, 927 F.2d 53, 56  
16 (2d Cir. 1991), Pinkerton did not create “a broad principle of vicarious liability that imposes

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1 <sup>20</sup> See Cruz, 363 F.3d at 197; United States v. Glenn, 312 F.3d 58, 67 (2d Cir. 2002); see  
2 also Lockhart v. Nelson, 488 U.S. 33, 39–40 (1988); Burks v. United States, 437 U.S. 1, 17–18  
3 (1978); Greene v. Massey, 437 U.S. 19, 24 (1978). Where, “as here, the evidence is determined  
4 to be insufficient when the improperly admitted evidence is excluded from the equation but  
5 sufficient when the improperly admitted evidence is included in the equation, the remedy is  
6 affected. In such a case, retrial rather than acquittal is the remedy.” Cooper v. McGrath, 314 F.  
7 Supp. 2d 967, 999 (N.D. Cal. 2004); see Lockhart, 488 U.S. at 39–40; accord Wigglesworth v.  
8 Oregon, 49 F.3d 578, 582 (9th Cir. 1995); United States v. Chu Kong Yin, 935 F.2d 990, 1001  
9 (9th Cir. 1991). Cf. United States v. Aarons, 718 F.2d 188, 189 (6th Cir. 1983) (noting that the  
10 sufficiency-of-evidence issue “is determinative of whether the appellant may be retried”).

1 criminal responsibility upon every co-conspirator for whatever substantive offenses any of their  
2 confederates commit.” Accordingly, because Pinkerton liability does not lie with respect to  
3 Cerasulo’s false statements to the FBI, we reverse the convictions relating to the false-statement  
4 offenses charged in Count V.

5 Finally, with respect to Count VI, the defendants do not challenge the sufficiency of the  
6 evidence relating to their liability for Fortunato’s false statements to the FBI. Instead, they argue  
7 that we should vacate Count VI and remand for a new trial due to the prejudicial spillover from  
8 the evidence admitted with respect to the counts that we have reversed on appeal. We agree.

9 “We look to the totality of the circumstances to assess prejudicial spillover of evidence.”  
10 United States v. Naimann, 211 F.3d 40, 50 (2d Cir. 2000). “Specifically we examine: 1)  
11 whether the evidence on the [reversed] counts was inflammatory and tended to incite or arouse  
12 the jury to convict the defendant[s] on the remaining counts; 2) whether the evidence on the  
13 [reversed] counts was similar to or distinct from that required to prove the remaining counts; and  
14 3) the strength of the [G]overnment’s case on the remaining counts.” Id. Here, we conclude that  
15 our reversal of the RICO and VCAR convictions also requires that we vacate Fortunato’s false-  
16 statement conviction “given the enormous amount of prejudicial spillover evidence admitted to  
17 prove the RICO enterprise and its extensive criminal activities.” United States v. Tellier, 83 F.3d  
18 578, 581–82 (2d Cir. 1996) (internal quotation marks omitted). Fortunato’s false-statement  
19 conviction involved a single statement “to which all but a tiny sliver of the evidence admitted on  
20 the RICO charges [was] irrelevant.” Id. at 582. Thus, it cannot be denied that the spillover

1 prejudice with respect to Count VI was significant. Accordingly, we vacate the convictions  
2 relating to Count VI and remand for a new trial on that count.<sup>21</sup>

3 III. Jury Instruction Relating to Authority of District Court to Sentence Cooperating Witness

4 Because we are remanding for a new trial with respect to certain of the counts charged in  
5 the indictment, we briefly comment on one of the challenges raised by Polito and Fortunato to  
6 the District Court’s jury instructions, as this issue may arise again in the event of a retrial.<sup>22</sup>  
7 Specifically, the defendants argue that the District Court erred in instructing the jury that the  
8 court had the authority to sentence cooperating witnesses below the statutory mandatory  
9 minimum sentence of life imprisonment without a § 5K1.1 letter from the Government.

10 The District Court instructed the jury that “the final determination as to the sentence to be  
11 imposed rests with the Court, whether or not . . . a motion ha[d] been made pursuant to [§] 5K1.1  
12 of the [G]uidelines.” Specifically, the charge read, in relevant part:

13 [Section 5K1.1] provides that upon a motion by the [G]overnment . . .  
14 stating that a defendant has provided substantial assistance in the investigation or  
15 prosecution of another person who has been charged with a crime, the court may  
16 depart from the [G]uidelines and sentence that person without regard to what the  
17 [G]uidelines may require.

18 There are two factors to be borne in mind in that regard. First, only the  
19 [G]overnment can make such a motion. It cannot be compelled to do so; and . . .  
20 [s]econd, the court has complete discretion as to whether it will or will not grant

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1 <sup>21</sup> Polito’s liability on this count was based on Pinkerton.

1 <sup>22</sup> Given our disposition of these appeals, we decline to address the remaining arguments  
2 of Polito and Fortunato, that the District Court erred in instructing the jury with respect to: (a)  
3 the “position-related motivation” element of 18 U.S.C. § 1959(a); (b) whether the jury was  
4 permitted to draw a negative inference from the fact that Government witnesses had been  
5 prepared by the Government’s lawyers prior to testifying at trial; and (c) the defense theory that  
6 their participation in the Shootings was motivated by personal animosity toward the victims.

1 that motion, and the court is free, in any event, to impose a sentence within the  
2 [G]uidelines as it deems appropriate.

3 In short, the final determination as to the sentence to be imposed rests with  
4 the Court, whether or not . . . a motion has been made pursuant to [§] 5K1.1 of the  
5 [G]uidelines.

6 The clear implication of this instruction was that the District Court had the power to sentence a  
7 cooperating witness to less than life imprisonment, even without a § 5K1.1 motion from the  
8 Government.<sup>23</sup>

9 Our case law is clear, however, that even when a witness has, in fact, cooperated with the  
10 prosecution, a district court is not authorized to depart below a statutory mandatory minimum  
11 sentence unless the Government has moved for a downward departure pursuant to U.S.S.G. §  
12 5K1.1. See, e.g., United States v. Harrison, 241 F.3d 289, 294 (2d Cir. 2001); see also 18 U.S.C.  
13 § 3553(e). The statutory mandatory minimum sentence for murder in this case was life  
14 imprisonment (or death). See 18 U.S.C. § 1959(a)(1). Thus, the District Court should not have  
15 instructed the jury that it had the authority to depart downward from life imprisonment in the  
16 absence of a § 5K1.1 letter from the Government. See United States v. James, 239 F.3d 120,  
17 126–27 (2d Cir. 2000).

18 \* \* \*

19 We have considered the parties’ remaining arguments and find them to be without merit.

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1 <sup>23</sup> The excerpts from the charging conference contained in the appendices make clear that  
2 the District Court’s jury instruction with respect to this issue arose from its misperception that  
3 Bruno, Cerasulo, and D’Urso had been charged with second-degree murder under the generic  
4 federal murder statute, which provides that “[w]hoever is guilty of murder in the second degree,  
5 shall be imprisoned for any term of years or for life.” 18 U.S.C. § 1111(b).

1 **CONCLUSION**

2 In sum, for the foregoing reasons, we reverse the convictions under Counts I, II, III, V,  
3 VII, and VIII in toto, and the convictions under Count IV for obstruction-of-justice conspiracy.  
4 We vacate the convictions under Count IV for false-statement conspiracy and the convictions  
5 under Count VI in toto. And we remand for a new trial consistent with this opinion.