No. _____

In The
Supreme Court of the United States

JAMES MARCELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Double Jeopardy Clause preclude successive RICO conspiracy prosecutions when the offense charged in the second indictment includes the offense charged in the first indictment?

PARTIES TO THE PROCEEDING

Petitioner James Marcello, Frank Calabrese, Sr., Joseph Lombardo, Paul Schiro and Anthony Doyle were parties in the Seventh Circuit. Petitioner is the only party in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Marcello respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion affirming petitioner's conviction, App. 1-50, is reported at 679 F.3d 521. The district court's opinion denying petitioner's post-trial motion to dismiss on double jeopardy grounds, App. 51-58, is unreported, but available at 2008 WL 4211657. The Seventh Circuit's opinion on interlocutory appeal, affirming the district court's denial of petitioner's pre-trial double jeopardy motion, App. 59-81, is reported at 490 F.3d 575. The district court's opinion denying petitioner's pre-trial motion to dismiss on double jeopardy grounds, App. 82-91, is unreported, but available at 2007 WL 1141922 and 2007 WL 1141940. The district court's judgment, App. 91-102, is unreported. The Seventh Circuit's order denying rehearing with suggestion for rehearing *en banc*, App. 103, is unreported.

JURISDICTION

The court of appeals entered judgment on May 1, 2012, and denied petitioner's petition for rehearing with suggestion for rehearing *en banc* on August 6, 2012. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

In pertinent part, the Fifth Amendment to the United States Constitution provides:

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

STATEMENT OF THE CASE

Petitioner was "twice put in jeopardy" "for the same offence." The government brought both prosecutions pursuant to the same RICO conspiracy statute, 18 U.S.C. § 1962(d). Both prosecutions involved the same original agreement – to conduct the affairs of the Chicago Outfit through a "pattern of racketeering activity" and "collection of unlawful debt." The second conspiracy charge fully contained the first in terms of: the overall conspiratorial group; temporal period; statutes comprising the "racketeering activity"; collection of debt theory of liability;

and conspiratorial objectives of institutional self-preservation and providing members with earnings.

In a 2-1 decision, the Seventh Circuit pronounced that double jeopardy can take "two forms," one governed by *Blockburger v. United States*, 284 U.S. 299 (1932), and the other by a self-created test not anchored to this Court's precedent. See App. 3, 62. The Seventh Circuit deemed the two offenses in this case different because the first focused on petitioner's role as a member of a subsidiary group (a street crew), while the second looked to petitioner's role on behalf of the parent (the Outfit itself). But, as Judge Wood observed in dissent, "Nothing in either the Double Jeopardy Clause or RICO calls for . . . [the] inconsequential distinctions" posited by the majority. App. 32.

In *United States v. Dixon*, 509 U.S. 688 (1993), this Court held that *Blockburger* governs Fifth Amendment's "same offence" determinations. If the Seventh Circuit majority had applied *Dixon* and not resorted to a post-second-trial, conduct-based analysis, there could be no dispute about the viability of petitioner's double jeopardy claim. By resorting to an enigmatic test to find an absence of a double jeopardy breach, the Seventh Circuit majority deviated from the Double Jeopardy Clause, this Court's jurisprudence and sister circuit cases.

I. Proceedings Below.

A. First RICO conspiracy prosecution.

In 1992, federal prosecutors in the Northern District of Illinois obtained a grand jury indictment against petitioner and ten others, including Samuel Carlisi, Joseph Braccio, Anthony Chiarmonte and Anthony Zizzo. The indictment contained a RICO conspiracy count. App. 122-52. The "enterprise" was "association-in-fact" called "the Carlisi Street Crew" that "was part of a larger criminal organization known as "the mob" or "the Outfit." *Id*. at 122-23. The RICO conspiracy was alleged to have occurred between 1979 "through at least May 1990" in various places in the Northern District of Illinois. *Id*. at 127.

The indictment alleged that petitioner agreed to "conduct the affairs of the enterprise" through a "pattern of racketeering activity" and "collection of unlawful debt." *Id*. at 127-28. Statutes comprising the "pattern of racketeering activity," included the following:

- Conducting an illegal gambling business, 18 U.S.C. § 1955.
- Making and conspiring to make extortionate extensions of credit, 18 U.S.C. § 892.
- Collecting and conspiring to collect extensions of credit by extortionate means, 18 U.S.C. § 894.

- Intimidation and conspiracy to commit intimidation, Ill. Rev. Stat., ch. 38 ¶¶ 8-2 and 12-6.
- Conspiracy to commit murder, Ill. Rev. Stat., ch. 38 ¶¶ 8-2 and 9-1.

App. 128-29. The indictment's "collection of unlawful debt" section charged that the debts were for illegal gambling and usurious loans. *Id*. at 149-52.

The indictment provided that "[b]eginning in approximately 1987, Carlisi also occupied a supervisory position within the Outfit." App. 124. The indictment made similar allegations about petitioner:

> Defendant James J. Marcello was second-in-command of the enterprise. He relayed orders and messages from Samuel A. Carlisi to members, employees, and associates of the Carlisi Street Crew, and scheduled meetings for Samuel A. Carlisi with the enterprise's members, employees, and associates. He also supervised those in charge of the various income-producing activities of the enterprise. Marcello received and disbursed Carlisi Street Crew funds, and collected "street tax" payments. He also served as a go-between for Samuel A. Carlisi and representatives of other Chicago "Outfit" street crews, for relaying messages and arranging meetings.

Id. at 124-25.

In 1993, petitioner went to trial. Although the government presented evidence relating to street crew activities (the indictment also contained substantive counts), the government did not limit its proof to such conduct. Rather, the government took the position that the Chicago Outfit was a self-contained, business-like organization composed of various divisions. Pet. Court of Appeals ("CA") Br. 23-24. Through the testimony of Leonard Patrick – a long-time Outfit leader, who headed his own street crew – and other witnesses, the government adduced evidence about the Outfit's history and structure. See *id*. at 27-28. The jury heard evidence about two-dozen Outfit leaders and members, who were not defendants. See *id*. at 26; Govt. CA Br. 52; Pet. CA Reply Br. 7-8 n. 2. The prosecutors urged admission of this evidence because those persons were part of the "group in this case." 1st Tr. 2389. Patrick also gave extensive testimony about his street crew, and its interactions with Outfit leaders, including Carlisi and petitioner. See *United States v. Zizzo*, 120 F.3d 1338, 1345 (7th Cir. 1997).

Prosecutors introduced extensive surveillance evidence, including testimony and photographs depicting Carlisi and petitioner meeting with Outfit leaders, who did not belong to the Carlisi street crew. See Pet. CA Br. 32-33. Illustrative is a photo of petitioner (wearing sunglasses) and Carlisi (wearing a cap) with Joseph Ferriola and Rocco Infelise, "members of the Ferriola Street Crew," *United States v.*

DiDomenico, 78 F.3d 294, 298 (7th Cir. 1996), on July 21, 1986. See Pet. CA Br. 32-33; http://www.justice.gov/usao/iln/hot/familySecrets/2007_08_01/photo_july_21_1986a.pdf (Govt. Ex.).

Also introduced as evidence of overall mob business were photographs of Salvatore Galluzzo and Frank Saladino, a co-defendant in petitioner's second indictment. Doc. 60. Both had been affiliated with an Outfit crew, but had absconded to another territory. The following exhibit depicted Saladino and Galluzzo near a restaurant where they had met Carlisi and petitioner on April 20, 1989. See Pet. CA Br. 33; http://www.justice.gov/usao/iln/hot/familySecrets/2007_07_26/photo_april_20_1989.pdf (Govt. Ex.); see also Pet. CA Br. 32 (surveillance of Carlisi and petitioner with Louis Eboli, an alleged hitman, and "associate of a number of the upper echelon Chicago mob individuals," 2nd Tr. 547, 2310-11, and affiliate of Anthony "Jeep" Daddino, and Joseph Lombardo, another co-defendant in petitioner's second indictment).

Violence as an enforcement mechanism was not off-limits at the trial. See *Zizzo*, 120 F.3d 1338. Nor was murder, as the government "presented evidence about the commission of six murders," App. 42 (Wood, J., partially dissenting), and the alleged "racketeering activity" included murder conspiracy. App. 112. The government introduced evidence that Carlisi wanted

"Jeep" killed because he might become an informant against the Outfit. *Zizzo*, 120 F.3d at 1345 ("As Carlisi put it during a chat with Marcello and Patrick, 'There is a million people gonna get hurt, including me, if we don't kill that Jeep.' "). According to the government's evidence, petitioner coordinated efforts to carry out the plan with Mario Rainone, the Patrick street crew's number-two man. See *id*.; see also Pet. CA Br. 39; Pet. CA Reply Br. 6.

The government elicited proof that Carlisi became the boss of the entire Outfit in 1986, with petitioner serving as the underboss. Pet. CA Br. 26-30. Thus, in closing arguments, the prosecution asserted:

> Like any other corporate structure, this corporate structure had a head, its Lee Iacocca, and that person was the defendant Sam Carlisi.
>
> Carlisi was at the top of this organization. He called the shots. . . .
>
> [T]his was the guy who ran the town. He was the boss of bosses. He was the man who determined in Chicago who lived and who died.
>
> You don't get much more powerful than that. . . .
>
> The day to day operations of this organization were overseen by Carlisi's underboss, James Marcello.

> Marcello can best be described as the vice president in charge of operations.

1st Tr. 6973; see also *id*. at 7051, 7622.

The jury found petitioner guilty. In sentencing petitioner to 150 months imprisonment, the district court calculated the sentencing guidelines on the basis of the murder conspiracy guideline, and imposed an upward departure for "organized crime." Pet. CA Br. 19. The Seventh Circuit affirmed. *Zizzo*, 120 F.3d 1338.

B. Second RICO conspiracy charge.

Petitioner served time in Pekin, Illinois, where Nicholas Calabrese, the brother of Frank Calabrese, Sr., another co-defendant in petitioner's second indictment, was also an inmate. In the early 2000s, Calabrese became an informant, and ultimately made allegations about petitioner's conduct during the same time-period covered by petitioner's first indictment. Pet. CA Br. 2. Calabrese claimed that petitioner had been involved in the homicides of Nicholas D'Andrea, and Anthony and Michael Spilotro. See *id*. at 6-15.

In 2002, federal prosecutors in the Northern District of Illinois obtained a sealed indictment of Calabrese. *Id*. at 2. In 2005, prosecutors superseded that indictment, adding counts and defendants, including petitioner. Doc. 60. The indictment again named petitioner in an Outfit-based RICO conspiracy

count. App. 153-74. As Judge Wood observed, the "overlap" between this indictment and petitioner's former indictment was "great[ ]." App. 41. "[T]he time and location of . . . [the] earlier indictment . . . [was] completely subsumed within the present one." *Id*. at App. 37. (Petitioner's second indictment provided that the conspiracy lasted between the mid-1960s and continued through the date of the indictment. App. 161.) The charged "enterprise" again was an "association-in-fact," known as "the Outfit" or the "Chicago mob." App. 154. According to the indictment, subgroups called "crews" carried out the "enterprise's" activities. *Id.* at 155. Petitioner was alleged to have been a member of "the Melrose Park Street Crew" (another name for the Carlisi street crew). *Id.* at 3, 29, 157. The indictment charged that petitioner was "made" – a status normally conferred upon Outfit members of Italian descent who had been sponsored and committed at least one murder on the "enterprise's" behalf. *Id*. at 156-57.

Statutes comprising the "pattern of racketeering activity" included some of the same statutes listed in the previous indictment, *i.e.,* conducting an illegal gambling business; making and conspiring to make extortionate extensions of credit; collecting and conspiring to collect extensions of credit by extortionate means; intimidation and conspiracy to commit intimidation; and conspiracy to commit murder. *Id*. at 170-71. The "collection of unlawful debt" related to the Outfit's gambling and usurious loan businesses. *Id*. at 172.

C. Pre-trial double jeopardy challenge.

1. In the district court, petitioner moved pre-trial to dismiss or strike the RICO conspiracy charge on double jeopardy grounds. Doc. 253. (Calabrese, Sr., who had earlier pled guilty to an Outfit-based RICO conspiracy charge, App. 3, also sought double jeopardy relief.) Petitioner did not seek a radical departure from established precepts. He conceded that he could be prosecuted in State court, *Bartkus v. Illinois*, 359 U.S. 121 (1959), for substantive RICO or an offense apart from RICO conspiracy, *United States v. Felix*, 503 U.S. 378 (1992), or a RICO conspiracy occurring *after* the RICO conspiracy offense charged in the first indictment. See App. 81 (Wood, J., partially dissenting). Petitioner did assert that he could not be reprosecuted for the RICO conspiracy that had been prosecuted in his first case, and moved to strike that portion of the indictment. Applying a five-factor balancing test, the district court denied relief. App. 82-91.

2. Petitioner and Calabrese, Sr. took interlocutory appeals. In a 2-1 decision, the Seventh Circuit affirmed. Citing this Court's decision in *Dixon*, 509 U.S. 688, among others, the majority (Judge Posner, joined by Judge Sykes) acknowledged that "[t]he government may not bring a second prosecution under a statute the elements of which are included in the elements of the statute under which the defendant was previously prosecuted." App. 62. While this case involved successive prosecutions under the same statute, the majority branded this case "different,"

and framed the issue as "how great a difference there is between the conduct charged in the previous prosecution and in the present one." *Id*.

The majority conceded that the offense period and the "predicate acts" between the two RICO conspiracy charges overlapped. *Id*. at 66. According to the majority, this did not make a difference: "Even if the predicate acts in the previous and present prosecutions were identical and the enterprises were under common control, separate prosecutions might not be barred." *Id*. at 65.

Conjuring corporate, criminal and civil law examples, the majority also staked out a position that the Outfit constituted a separate "enterprise" from its street crews:

> The enterprise is the Chicago Outfit, and insofar as is known at this time, it is a different enterprise from the Carlisi and Calabrese street crews . . . Were it the same enterprise, we would have a different case. But it is not, and that is critical.

Id. at 64. The majority reached this conclusion even though it had earlier acknowledged what petitioner had argued all along – that Chicago has been home to a single organized crime family, "the lineal descendant of Al Capone's gang." *Id*. at 60.

The majority allowed for the possibility of establishing a double jeopardy violation after the second trial "if the evidence presented by the government at the new trial differs only trivially from the evidence

upon which" petitioner's first conviction was based. App. 68. The majority concluded:

> At this stage, we cannot know how great the overlap will be, and so we have no basis for forbidding the trial to go forward. But "if it becomes clear from the trial that [the defendant] is being prosecuted twice for the same conspiracy, he is free to raise such arguments after trial if he is convicted on the RICO conspiracy count."

Id. at 69 (citation omitted).

3. Judge Wood partially dissented. She initially observed that petitioner's prior indictment "made clear that the criminal organization with which Marcello was associated was part and parcel of the Chicago Outfit." App. 70. That the present indictment labeled the "enterprise" the Chicago Outfit, instead of a street crew, did not detract Judge Wood from determining that "the government is pursuing the same enterprise now as it did before." *Id*. at 79.

Judge Wood emphasized that "the government may not bring one narrow charge first and then later bring a broader charge that entirely encompasses the first one." *Id*. at 76-77. Finding the majority's hypotheticals inapposite, Judge Wood deduced that the government "has merely found broader evidence of criminal culpability and has added to the list of criminal predicate acts." *Id*. at 79. The nominal differences between the "predicate acts" in the first and second indictments did not vitiate the double

jeopardy bar, according to Judge Wood, since the overlaps between the two indictments were "considerable." *Id*. at 80. In support of the propositions that the "enterprises" did not differ between the two cases, Judge Wood cited indictment's language and Seventh Circuit cases that had termed Outfit street crews as Outfit subgroups. *Id*. at 79-80.

Judge Wood further criticized the majority's ruling allowing the successive prosecution to proceed:

> It is willing to give the defendants half a loaf with respect to their double jeopardy defense, by inviting them to renew this motion *after* trial if it turns out that they have been convicted on the basis of evidence that has been recycled from the earlier trials. But, as the majority rightly notes, the Fifth Amendment protects people from twice having to stand trial for a given offense . . . It is not limited to an *ex post* vindication at the end of a trial.

Id. at 72-73 (emphasis original) (citation omitted).

D. Second trial.

Petitioner's second trial (before an anonymous jury) "had an unmistakable air of *déja vu*." App. 42 (Wood, J., partially dissenting).[1] The government

[1] The day after release of the Seventh Circuit's opinion, Calabrese, Sr. and petitioner moved to stay the judgment. See *United States v. Calabrese*, No. 07-1962, June 13, 2007 Docket

(Continued on following page)

again introduced evidence about the Outfit's history and structure as a singular, vertically-organized entity, and the overall Outfit leadership roles held by Carlisi and petitioner commencing in the mid-1980s. Pet. CA Br. 3-5. The jury heard testimony about Carlisi, Braccio, Chiarmonte and Zizzo, defendants in petitioner's first indictment, as well as approximately two-dozen Outfit leaders/members who were mentioned at the prior trial. See App. 19 (Wood, J., partially dissenting); see also Pet. CA Br. 26; Govt. CA Br. 52; Pet. CA Reply Br. 7-8 n. 2. As during petitioner's first trial, the jury heard evidence about bookmaking, juice loans and street-tax during the 1980s. Pet. CA Br. 30-31; Pet. CA Reply Br. 11-13. The Outfit's efforts to stymie a movie theater owner's decision to eliminate union projectionists – the topic of proof at the prior trial, see *Zizzo*, 120 F.3d at 1345 – also arose. Pet. CA Br. 31. Government witnesses in both cases testified about petitioner's counter-surveillance driving habits, use of pay phones and code, and ostensible employment at a trucking company. *Id*. at 32-33. A litany of surveillance evidence, identical to that adduced in the first case, was admitted. *Id*. For example, the government argued that photographs of Saladino and Galluzzo leaving a restaurant after meeting with Carlisi and petitioner, *supra,* at 7, depicted upper-brass Outfit members

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Entry (7th Cir.). The Seventh Circuit denied that request, *id*., and jury selection commenced four days later.

resolving a street crew-level dispute, colloquially known as a "sit-down." Pet. CA Br. 33.

The jury was given RICO conspiracy instructions that were substantially similar, and in some respects identical, to the instructions given at petitioner's first trial. Compare App. 104-13 with App. 114-21. Like petitioner's first jury, the second jury was told that RICO conspiracy does not require proof that racketeering acts were actually committed. As it had at the first trial, the government emphasized this point in closing argument. Pet. CA Br. 22.

The jury convicted petitioner of RICO conspiracy, illegal gambling, obstruction of justice and conspiracy to commit tax fraud. Following the return of the guilt-phase verdicts, the district court presided over a supplementary jury proceeding to determine whether certain defendants, including petitioner, were eligible for enhanced sentences. See 18 U.S.C. § 1963(a). The jury could not reach a verdict on the D'Andrea homicide allegations, but found petitioner accountable for the aggravating circumstances surrounding the Spilotro brothers' homicides.

Petitioner re-raised his double jeopardy claim post-trial. Docs. 748, 751, 810. The district court again denied relief, App. 51-58, and sentenced petitioner to life imprisonment on the RICO conspiracy count. App. 92-102.

E. Direct appeal.

Petitioner, along with his four trial co-defendants, took a direct appeal to the Seventh Circuit. The same panel that had heard the interlocutory appeal considered the appeal, and its vote did not change. Judge Posner, joined by Judge Sykes, wrote an opinion rejecting petitioner's double jeopardy challenge. Judge Wood again filed a partial dissent.

1. The majority described the double jeopardy issue raised by petitioner and Calabrese, Sr. as the "most substantial[ ] claim" on appeal. App. 2-3. The majority perceived that "double jeopardy can take two forms": 1) successive prosecutions involving overlapping essential elements; and 2) successive prosecutions for the same offense. *Id*. at 3-4. According to the majority, the latter form "can be a difficult determination to make when the offense is conspiracy." *Id*. at 4.

The majority acknowledged the overlap of the crimes agreed to have been committed on behalf of the "enterprise" between the first and second prosecutions, albeit murder was "particularly emphasized" in the second case. *Id*. at 5, 7, 9-19. The majority examined whether petitioner's agreement to facilitate the criminal activities of his street crew and the Outfit were "one and the same because the street crews are components of the Outfit." *Id*. at 5.

The majority posed a series of hypotheticals in which a corporate employee could be twice prosecuted absent offending double jeopardy principles based on

activity conducted on behalf of the parent entity and its subsidiary. Using its examples as setting the legal standard, the majority concluded:

> The Outfit and its subsidiary street crews are different though overlapping enterprises pursuing different though overlapping patterns of racketeering. And so they can be prosecuted separately without encountering the bar of double jeopardy.

Id. at 7.

Without examining the scope of the agreement proved in petitioner's first case, the majority found that petitioner's second case involved proof of conspiracy in petitioner's capacity as an Outfit leader, as opposed to a street crew member. *Id*. at 8-9. Overlooking the murder-related evidence in petitioner's first case, the majority also said that petitioner had conspired to commit murder in his capacity as an Outfit member, as opposed to a street crew member. *Id*. Not addressing whether an Outfit conspiracy was proven at the first trial, the majority maintained that the government "took pains" at the second trial to distinguish between Outfit and street crew conspiracies. *Id*. at 9.

2. Judge Wood disputed the majority's assessment about the "weak" nature of the double jeopardy claims, and drew "the opposite conclusion: the double jeopardy violation that I feared would occur from this retrial has unequivocally occurred." App. 27. Judge Wood explained that petitioner had already been

prosecuted and convicted for his part in street crew activities "that lie at the heart of the Outfit's Chicago operations." *Id*. Judge Wood pointed out that the second prosecution "entirely subsumes the span" of petitioner's earlier conspiracy prosecution. *Id*.

Judge Wood observed that the case "requires us to decide under what circumstances it is permissible to carve multiple 'enterprises' out of one group" – here, the Chicago Outfit, an organization that has had a constant structure. *Id*. at 28. Judge Wood articulated that, while petitioner's first trial focused on street crew activities, and the second "the big picture," both cases were "inescapably about the entirety of the operation." *Id*. at 30. She further noted: "[I]n both of Marcello's trials the government elicited testimony that implicated the *same* nineteen people (in addition to the five standing trial) in the Outfit's conspiracy." *Id*. at 42 (emphasis original).

Judge Wood criticized and countered the majority's corporate analogies, concluding that nothing in the Double Jeopardy Clause called for the majority's "inconsequential distinctions." *Id*. at 32. Judge Wood warned that the majority's distinctions bordered on the "absurd," and threatened to "eviscerate any protection the Double Jeopardy Clause provides" since single organizations always could be divided into multiple "enterprises." *Id*. at 32, 34.

Accepting as undisputed that petitioner's street crew "operated within and exclusively for the Outfit," Judge Wood continued:

> This can only mean that their prosecutions were for the work that they did for the Outfit, each one through his own Street Crew. The facts developed at trial simply do not support the proposition that the Crews were stand-alone operations, acting as independent contractors for the Outfit.

Id. at 34.

Recounting the government's presentation of evidence relating to six murders at petitioner's first trial, *id*. at 42, Judge Wood voiced that the second trial's emphasis on murders did not change the nature of the RICO conspiracy charged in each case: "Disturbing though this conduct is, however, these murders do not support the proposition that the enterprise known as the Outfit is different from the enterprises involved in the first cases." *Id*. at 35; see also *id*. at 40. Judge Wood supported this point with courts of appeals cases finding that "'a lower level authority within the hierarchy of organized crime family' is still a component of the same crime family." *Id*. (citations omitted).

Judge Wood faulted the majority for not finding the two prosecutions to have involved a "single coordinated operation." *Id*. at 36. By applying the five-factor test used by lower courts to determine overlap among conspiracy charges, Judge Wood commented

that the answer to each question pointed in the same direction: toward a single pattern of racketeering activity involving the same object. *Id*. at 37. Judge Wood further cited this Court's decision in *Dixon* as the test for determining whether the same prosecution involves the "same offense." *Id*. at 40.

Concluding her dissent on the double jeopardy point by reaffirming that the government may not reprosecute an individual for RICO conspiracy whenever it gathers broader evidence of criminality, Judge Wood wrote:

> When the government chooses to use this broad and powerful tool once, however, "its choice has consequences." *Basciano*, 599 F.3d at 203. One of those consequences is refraining from prosecuting the defendant again, for the *same* conspiracy, when it obtains broader evidence of criminal culpability. As I explained in my separate opinion before these trials went forward, I see no difference in the essential agreement that was at issue in the earlier cases and in this case.

Id. at 43.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's 2-1 decision deviates from this Court's cases in a number of respects. First, rather than applying the test enunciated in *Blockburger v. United States*, 284 U.S. 299 (1932), as

dictated by this Court's holding in *United States v. Dixon*, 509 U.S. 688 (1993), the majority created its own amorphous test that did not focus on the Fifth Amendment's "same offence" language, but rather weighed evidence adduced *after* petitioner had been put to trial. Second, the majority's approach departs from the protection against being "twice put in jeopardy," and this Court's directive to resolve double jeopardy claims before a second trial occurs. See *Abney v. United States*, 431 U.S. 651 (1977).

Petitioner's second RICO conspiracy prosecution fully engulfed his first. The majority, however, found against petitioner's double jeopardy claim by artificially dividing a singular agreement into two. In reaching this result, the majority deviated from this Court's multiple conspiracy, *Braverman v. United States*, 317 U.S. 49 (1942), and included-offense jurisprudence, *e.g., Brown v. Ohio,* 432 U.S. 161 (1977). Furthermore, courts of appeals have routinely accepted that a lower level of authority within the hierarchy of organized crime does not constitute a separate "enterprise" from the overall organized crime entity itself. See *United States v. Basciano*, 599 F.3d 184, 200 (2d Cir. 2010); *United States v. Ciancaglini*, 858 F.2d 923, 929 (3d Cir. 1988); *United States v. Langella*, 804 F.2d 185, 189 (2d Cir. 1986). The majority, however, reached the opposite conclusion, thereby creating a circuit conflict. See App. 40 (Wood, J., dissenting).

The issue presented by this case recurs, and warrants this Court's review. Double jeopardy

historically has been a difficult area of the law, and one on which the lower courts need guidance. Notwithstanding the conundrum, the issue here is suitable for this Court's consideration because it involves supplying content to the applicable legal test for defining the Fifth Amendment.

I. The Seventh Circuit Majority Decision Unacceptably Deviates From The Double Jeopardy Clause, This Court's Jurisprudence, And Circuit Cases.

A. The majority's analysis is incompatible with the standards enunciated by this Court to determine whether a person has been "put twice in jeopardy" for the "same offence."

1. Notwithstanding the prolix of lower court opinions in this case and the occurrence of two lengthy trials, the issue presented here is straightforward. In the court of appeals, petitioner asserted that *Dixon* – which held that the *Blockburger* test governs the determination of whether offenses are the same for double jeopardy purposes[2] – demonstrated that his successive RICO conspiracy prosecutions were for the "same offence." Pet. CA Br.

[2] The *Blockburger* test has also been referred to as the "same evidence" test. The test, however, "has nothing to do with the *evidence* presented at trial [and] . . . is concerned solely with the statutory elements of the offenses charged." *Grady v. Corbin*, 495 U.S. 508, 521 n. 12 (1990) (emphasis original).

20-22. According to the Seventh Circuit majority, *Blockburger* and *Dixon* apply only when successive prosecutions are brought under different statutes, but not when a defendant is twice charged under the same statute. App. 3. The majority did not cite any cases from this Court to support its second-form-of-double-jeopardy idea. The majority went on to apply its own variant of a nebulous conduct-based test that examined evidence adduced after a second trial. See App. 3-11; see also *id*. at 62 (majority in the interlocutory appeal describes the issue as "how great a difference there is between the *conduct* charged in the previous prosecution and in the present one") (emphasis added). But, as the dissent emphasized, the majority manufactured "inconsequential distinctions." App. 32.

The courts of appeals have generally eschewed the *Blockburger* test when the offense at issue is conspiracy or RICO. See, *e.g.*, *United States v. Rigas*, 605 F.3d 194, 212-13 (3d Cir. 2010) (*en banc*); *United States v. Basciano*, 599 F.3d 184, 200 (2d Cir. 2010); *United States v. Wheeler*, 535 F.3d 446, 450 (6th Cir. 2008); *United States v. Doyle*, 121 F.3d 1078, 1089-90 (7th Cir. 1997); *United States v. Dean*, 647 F.2d 779, 788 (8th Cir. 1981); Note, "*Totality of Circumstances" Test Used In Conspiracy Defendants' Double Jeopardy Cases*, 33 Vill. L. Rev. 674, 675 (1988). These courts have reasoned that *Blockburger* is limited to situations when the same act or transaction is alleged to have violated two different statutes. See *Rigas*, 605 F.3d at 204-05; *United States v. Keen*, 104 F.3d 1111, 1118 n. 12 (9th Cir. 1997). While some cases have

advocated a "unit of prosecution" approach based on cases such as *Sanabria v. United States*, 437 U.S. 54 (1978), and *United States v. Universal C.I.T. Credit Corp*., 344 U.S. 218, 225 (1952), *e.g., United States v. Evans*, 854 F.2d 56, 59 (5th Cir. 1988), "unit-of-prosecution cases . . . have been litigated in an astonishing number of statutory contexts with little apparent analytical consistency." *Whalen v. United States*, 445 U.S. 684, 704 (1980) (Rehnquist, J., joined by Burger, C.J., dissenting). Absent directive from this Court, the courts of appeal have often employed a "factor analysis," *United States v. Bendis*, 681 F.2d 561, 564-65 (9th Cir. 1982), in conspiracy and same statute cases. Although the actual content of this test varies among the circuits, see *United States v. Liotard*, 817 F.2d 1074, 1078 n. 7 (3d Cir. 1987), and has been modified in the RICO context, *United States v. Ruggiero,* 754 F.2d 927, 932 (11th Cir. 1985), it does require "comprehensive review of the relevant facts." Note, *Single vs. Multiple Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes,* 65 Minn. L. Rev. 295, 312 (1980).[3]

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[3] This test derives from *Short v. United States*, 91 F.2d 614, 619 (4th Cir. 1937). In opposing a double jeopardy claim based on multiple conspiracy charges in *Short*, the government asserted that certain factors showed offense disparity. Ironically, the Fourth Circuit applied the factors to find against the government. In any event, the test for RICO offenses consists of the following factors: 1) time of the activities; 2) identity of involved persons; 3) statutory offenses; 4) "the nature and scope

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The holistic double jeopardy approach has not been universally followed. "[P]rior to *Blockburger*, the Court seems to have applied the 'same evidence' test to find separate offenses when but a single statutory provision was involved." *Evans*, 854 F.2d at 59 (discussing *Burton v. United States*, 202 U.S. 344 (1906), and *Carter v. McClaughry,* 183 U.S. 367 (1902)). *Dixon*, of course, overruled *Grady v. Corbin*, which had added a "same conduct" layer to *Blockburger*. *United States v. Brooklier*, 637 F.2d 620, 624 (9th Cir. 1981), commented that, aside from the Double Jeopardy Clause's collateral estoppel component (see *Yeager v. United States*, 129 S. Ct. 2360 (2009), *Ashe v. Swenson*, 397 U.S. 436 (1970)), *Blockburger* "and nothing more, governs all post-conviction prosecutions." In *Keen,* 104 F.3d at 1118 n. 12, and, more recently, *Rigas*, 605 F.3d at 204, the *government* took the position that *Blockburger* governs double jeopardy analysis of successive prosecutions *brought under the same statute*.

The majority's ultimate legal standard – a sort of "it is what we say it is" method, dependent on unrealistic corporate hypotheticals about the Ford Motor Company manufacturing sawed-off shotguns, App. 6-7 – is incompatible with *Dixon* and the Double

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of the activity the government seeks to punish under each charge"; and 5) locations of the activity. App. 84-85 (Wood, J., partially dissenting) (citing *United States v. Marren,* 890 F.2d 924, 935 (7th Cir. 1989)); see also App. 69.

Jeopardy Clause, which does not elucidate any exceptions to its "same offence" language. It defeats the goal of a uniform body of constitutional law to deploy divergent tests to define the same constitutional term. Although this Court had "long assumed that the *Blockburger* test is also a rule of constitutional stature," *Missouri v. Hunter,* 459 U.S. 359, 374 (1983) (Marshall, J., joined by Stevens, J., dissenting), *Dixon* made that clear. To be sure, *Blockburger* and many cases applying it, have addressed offenses charged under separate statutes. See, *e.g*., *Albernaz v. United States*, 450 U.S. 333, 337-40 (1981). But *Dixon* did not create a conspiracy exception, elevate *dicta* in *Sanabria* into a holding,[4] or endorse a conduct-based approach. Rather, *Dixon* firmly held that the Fifth Amendment's "same offence" language is not subject to an interchangeable test:

> [T]here is *no* authority, except *Grady*, for the proposition that . . . [the Double Jeopardy Clause] has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term "same offence" (the words of the Fifth Amendment at issue here) has two different

[4] On "unusual facts," 437 U.S. at 56, *Sanabria* found a double jeopardy violation in a case in which the government had appealed from a judgment of acquittal on a single charge brought under 18 U.S.C. § 1955. In a footnote, *Sanabria* stated that the Court had not applied *Blockburger* "[b]ecause only a single violation of a single statute is at issue." 437 U.S. at 70 n. 24.

> meanings – that what is the same offense is yet *not* the same offense.

509 U.S. at 704 (emphasis original); see also *Rutledge v. United States*, 517 U.S. 292, 297 (1996); *Witte v. United States*, 515 U.S. 389, 396 (1995). Consequently, Judge Wood's dissent was correct in declaring that the *Dixon* (*ergo Blockburger*) should be used to evaluate a double jeopardy claim:

> [F]ederal courts use a "same offense" test for double jeopardy purposes, not a "same evidence" or even a "same allegation" test [citing *Dixon*, 509 U.S. at 696] . . . Thus, if the *pattern* of activity is the same, even if there are some differences in detail, this points to a finding of "same offense."

App. 40 (emphasis original).

As often the case with multi-factor balancing tests, the standard applied by the Seventh Circuit majority is afflicted with the vice of subjectivity. "The multi-factor analysis . . . is not tied to any standard. None of the factors deemed important . . . go to the material element of the offense, the defendant's agreement."[5] William H. Theis, *The Double Jeopardy Defense and Multiple Prosecutions for Conspiracy,* 49 SMU L. Rev. 269, 306 (1996). Although totality of the

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[5] Examples of cases highlighting the open-ended nature of the test include: *United States v. Smith*, 82 F.3d 1261, 1267 (3d Cir. 1996); *United States v. Calderone,* 982 F.2d 42, 45 (2d Cir. 1992); *United States v. Korfant*, 771 F.2d 660, 662 (2d Cir. 1985).

circumstances tests may be appropriate to define fluid concepts such as probable cause, cf. *Illinois v. Gates*, 462 U.S. 213 (1982), they are not appropriate for defining constitutional terms that must remain constant across a wide sea of cases. See *Crawford v. Washington,* 541 U.S. 36, 60-68 (2004) (emphatically rejecting use of an amorphous test, the outcome of which often is dependent on the personal judicial predilections, to implement the Confrontation Clause). And, even if the five-factor test is the correct way to analyze certain double jeopardy claims, petitioner is entitled to relief since the factors all weighed in his favor. See App. 37, 80 (Wood, J., partially dissenting).

2. The Seventh Circuit majority's approach also dilutes the Fifth Amendment's protection against being "twice put in jeopardy." In the interlocutory appeal, the majority, again over dissent, departed from this Court's decision in *Abney* by deferring final resolution of petitioner's double jeopardy claim until after the conclusion of his second trial. See Recent Cases, *Seventh Circuit Holds That RICO Conspiracy Charges Can Proceed To Trial Despite Unresolved Double Jeopardy Claims,* 121 Harv. L. Rev. 2222, 2223 (2008) (majority opinion on interlocutory appeal in this case "effectively denied the defendants their Fifth Amendment right to ensure before trial that they were not being tried a second time for the same crime"). The majority's course countenances wading in *Grady*'s "same conduct" waters, and contravenes *Dixon*, which precludes a fact-oriented double

jeopardy analysis. See also *Grady*, 495 U.S. at 529-30 (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting).

Petitioner acknowledges that double jeopardy claims involving successive prosecutions under the same statute entail some determination of whether the offenses are the same "in fact." See *Gavieres v. United States*, 220 U.S. 338, 343 (1911); see also *Yeager*, 129 S. Ct. at 2371 (Scalia, J., joined by Thomas and Alito, JJ., dissenting); *Burton v. United States*, 202 U.S. 344, 380 (1906). But the *facts* pertinent to a double jeopardy claim are not to be analyzed based on evidence adduced after a second trial. As Judge Seyla wrote in *United States v. Nascimento,* 491 F.3d 25, 48 (1st Cir. 2007): "[I]n resolving a double jeopardy challenge . . . a court should not bog itself down in the minutiae of the evidence underlying the charges but, rather, should confine itself to the statutory elements of the two offenses." Indeed, it has been this Court's longstanding practice to evaluate double jeopardy claims before trial from the face of charging instruments. See *Dixon*, 509 U.S. at 708 n. 12 ("[i]t would be a rare and unsatisfactory indictment that did not set forth the factual basis for the charges"); *Abney*, 431 U.S. at 659 ("the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial"); see also *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (an indictment must enable defendant "to plead . . . conviction in bar of future prosecutions for the same offense") (quoting

Hamling v. United States, 418 U.S. 87, 117 (1974)). Here, by endorsing a malleable *post hoc* double jeopardy analysis, the majority defeated the fundamental purpose of the Double Jeopardy Clause: to prevent the accused from having to run the gantlet twice. See, *e.g., United States v. Wilson*, 420 U.S. 332, 340-45 (1975); *Green v. United States*, 356 U.S. 165, 187 (1958).

B. The majority's artificial division of a single agreement conflicts with this Court's multiple conspiracy and included-offense jurisprudence, and sister circuit cases.

1. The gravamen of a RICO conspiracy is an agreement to conduct the affairs of an "enterprise" through a "pattern of racketeering activity," or "collection of unlawful debt." *Salinas v. United States*, 522 U.S. 52 (1997); 18 U.S.C. § 1962(d). By determining that an agreement to conduct the affairs of an Outfit street crew was legally distinct from an agreement to conduct the Outfit's affairs, the Seventh Circuit majority inappropriately divided a single agreement into two.[6]

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[6] The majority reached this conclusion in spite of the second conspiracy's complete temporal engulfment of the first, App. 3, 27, 29, 59, 71, 81. See *Short,* 91 F.2d at 619 (reasonable to conclude that "both indictments relate to the same conspiracy" when conspiracy's time-period is covered by both indictments). The majority's holding fails to account for the petitioner's street

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Because Judge Wood could identify "no difference in the essential agreement that was at issue in the earlier cases and in this case" App. 43, she would have reversed petitioner's convictions "on the ground that this prosecution violated . . . his rights under the Double Jeopardy Clause." *Id*. at 50. This Court's *Braverman* decision provides direct support for Judge Wood's position. There, this Court announced:

> Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

317 U.S. at 53; see also *Sanabria*, 437 U.S. at 72-74 (extending *Braverman* to "business" crimes); cf. *Albernaz*, 450 U.S. at 339 (consecutive sentences on separate convictions for conspiracy to import

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crew being "part and parcel of the Chicago Outfit." App. 70 (Wood, J., partially dissenting). Also ignored by the majority were the first indictment's allegations and ensuing proof about petitioner's Outfit leadership role. See App. 124-25; *supra*, at 4-9. And, in both prosecutions, the government presented testimony that organized crime in Chicago consists of a single family, organized by a chain of command consisting of six street crews answering to higher-ups. See Pet. CA Br. 3-5. Furthermore, the facts "developed at trial do not support the proposition that the Crews were stand-alone operations, acting as independent contractors for the Outfit." App. 34 (Wood, J., partially dissenting).

marijuana, 21 U.S.C. § 963, and conspiracy to distribute marijuana, 21 U.S.C. § 846, did not violate Double Jeopardy Clause because each conspiracy arose under a different statute and required proof of a fact the other did not); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946) (defendants convicted under two separate conspiracy statutes, 15 U.S.C. §§ 1 and 2 did not have a viable double jeopardy defense; application of *Blockburger* showed two separate offenses).

2. This Court has stated that when "a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *In re Nielsen*, 131 U.S. 176, 188 (1889); see also *Dixon*, 509 U.S. at 698 (Scalia, J., joined by Kennedy, J., plurality); *Illinois v. Vitale*, 447 U.S. 410, 419-20 (1980); *Harris v. Oklahoma*, 433 U.S. 682, 682-83 (1977) (*per curiam*); *Brown,* 432 U.S. 161; *Ex parte Snow*, 120 U.S. 274 (1887). Because the offense charged in petitioner's second RICO conspiracy prosecution engulfed the offense charged in petitioner's first case, the second RICO conspiracy prosecution should have been barred. See Pet. CA Br. 23-38; Pet. CA R'hg Pet. 9-15.

Although this Court in *dicta* has sometimes cautioned against transposing included-offense principles to multi-layered conduct, *Felix*, 503 U.S. at 390, *Garrett v. United States*, 471 U.S. 773, 789 (1985), those pronouncements preceded *Dixon* in which this Court made clear that, absent a collateral estoppel

claim, only one test governs Fifth Amendment "same offence" determinations. See *Dixon*, 509 U.S. at 704. In any event, this case provides the Court with an opportunity to resolve the tension emanating from its included-offense precedent, compare *Dixon,* 509 U.S. at 705-09 (Scalia, J., joined by Kennedy, J., plurality) with *Dixon,* 509 U.S. at 749-59 (Souter, J., joined by Stevens, J., concurring and dissenting), and to harmonize *Felix* and *Garrett* with *Dixon*. See also *Rutledge*, 517 U.S. at 300, 307 n. 17 (ruling that conspiracy is an included offense of CCE so that defendant could not be cumulatively punished, but not exploring that "holding . . . for purposes of the successive prosecution strand of the Double Jeopardy Clause"); Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions In Complex Criminal Cases: A Model,* 25 Conn. L. Rev. 95, 132-33 (1992) ("courts . . . need to define a workable double jeopardy test for compound-complex offenses").

3. Prior to this case, courts of appeal had consistently recognized that "'a lower level of authority within the hierarchy of organized crime' is still a component of the same crime family." App. 35 (Wood, J., partially dissenting) (quoting *United States v. Langella*, 804 F.2d 185, 189 (2d Cir. 1986), and citing *United States v. Ciancaglini*, 858 F.2d 923, 929 (3d Cir. 1988)); see also *United States v. Boyle*, 452 Fed. Appx. 55, 58 (2d Cir. 2011); *Basciano*, 599 F.3d at 189, 200. The "inconsequential distinction" created by the majority – that a subgroup within an organized crime entity is a distinct "enterprise" from the overall

organized crime entity itself – places this case in conflict with other circuit decisions. Indeed, the decision below starkly conflicts with the Second Circuit's *Basciano* opinion, a case that sustained a double jeopardy claim to a successive substantive RICO prosecution notwithstanding differences between the alleged "patterns of racketeering activity." No rational basis exists to accord defendants in, for example, the Second Circuit, more double jeopardy protection than defendants in the Seventh Circuit. This Court's review is necessary to ensure a uniform body of double jeopardy law. See U.S. Sup. Ct. R. 10(a).

C. The majority decision provides the government with too much leeway to try a person twice for the same offense.

The Seventh Circuit majority opinion is constitutionally infirm and dangerous because it confers too much power to the Executive Branch. See Department of Justice, *Criminal RICO: A Manual for Federal Prosecutors,* Comment 9-110-000C (2012) (citing Seventh Circuit's decision on interlocutory appeal here). The combination of RICO and conspiracy provide prosecutors with an omnipotent, yet potentially elusive, weapon. See *United States v. Monsanto*, 836 F.2d 74, 86 (2d Cir. 1987) (Oakes, J., dissenting); Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165 (1980); cf. *H.J. Inc. v. Northwestern Bell Telephone Co*., 492 U.S. 229,

255-56 (1989) (Scalia, J., joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ., dissenting) ("the highest Court in the land has been unable to derive from" RICO nothing more than "meager guidance"); *Krulewitch v. United States,* 336 U.S. 440, 446 (1949) (Jackson, J., concurring) ("[t]he modern crime of conspiracy is so vague that it almost defies definition"). But with RICO's flexibility comes consequences, App. 43 (Wood, J., partially dissenting), *Basciano*, 599 F.3d at 203, including a bar on twice prosecuting the same agreement.

To avoid the Double Jeopardy Clause per the majority's view, all the government need do is synthetically "carve multiple 'enterprises' out of one group." App. 28 (Wood, J., partially dissenting). Whenever a person undesirable to the government is acquitted, or released from prison (as with petitioner), adding additional ingredients to the mix and changing labels avoids the constitutional prohibition against double jeopardy. See *United States v. Macchia*, 35 F.3d 662, 673 (2d Cir. 1994) (Newman, J., concurring) (whether government's decision to prosecute "same defendants for larger conspiracies after concluding that sentencing on a smaller conspiracy was inadequate" withstands double jeopardy scrutiny is an issue not "free from doubt"). "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of . . . units." *Brown*, 432 U.S. at 169; see also *Sanabria*, 437 U.S. at 72-74 (double jeopardy bar cannot be

avoided "by the simple expedient of dividing a single crime into a series of temporal or spatial units"); *Braverman*, 317 U.S. at 52-54 (same); *Snow*, 120 U.S. at 286 (there is "no support to the view that a grand jury may divide a single continuous offense running through a past period of time into such parts as it may please, and call each part a separate offense"); *Crepps v. Durden*, 2 Cowp. 640, 98 Eng.Rep. 1283 (K.B. 1777) (baker's sale of four loaves of bread in violation of law prohibiting business/labor on the Lord's day constituted one offense, as opposed to four).

II. This Case Is A Suitable Vehicle To Resolve A Recurring Constitutional Issue About Which There Is Substantial Confusion.

This Court's guidance is needed. To date, this Court has "not focused on the unique problems raised by the double jeopardy plea in successive conspiracy prosecutions. The lower courts have decided a number of cases raising these issues, but their opinions have not evolved clear rules or even a clear approach." See Theis, *supra,* at 270; see also Note, *Single vs. Multiple Criminal Conspiracies*, *supra*, at 295 (discussing approaches). Although the 20 words in the Double Jeopardy Clause are not exceedingly complex, "the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz*, 450 U.S. at 343; see also *Texas v. Cobb*, 532 U.S. 162, 185 (2001) (Breyer, J., joined by Stevens, Souter and Ginsburg, JJ., dissenting) ("[T]he simple-sounding *Blockburger* test has

proved extraordinarily difficult to administer in practice. Judges, lawyers, and law professors often disagree about how to apply it."). The difficulty is underscored when conspiracy is at issue, see *Felix*, 503 U.S. at 388, cf. *Sanabria*, 437 U.S. at 74 n. 33, as both the majority and dissenting opinions in this case recognized. App. 4, 28, 78; see also *Ruggiero,* 754 F.2d at 931.

The recurring nature of the issue is also evident – it potentially arises anytime a prosecutor pursues a second prosecution grounded in conspiracy, the "darling of the modern prosecutor's nursery," *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (Hand, J.), or the same statute as charged in a previous case. The relationship between conspiracy and the Double Jeopardy Clause arises with enough frequency in the lower courts to warrant this Court's attention at this time.[7]

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[7] For post-*Dixon* cases in which courts ordered some double jeopardy relief, see: *Rigas*, 605 F.3d 194; *Basciano*, 599 F.3d 184; *United States v. Rabhan*, 628 F.3d 200 (5th Cir. 2010); *United States v. Wayerski*, 624 F.3d 1342 (11th Cir. 2010); *United States v. Arroyo*, 546 F.3d 54 (1st Cir. 2008); *United States v. Ansaldi*, 372 F.3d 118 (2d Cir. 2004); *United States v. Lopez*, 356 F.3d 463 (2d Cir. 2004); *United States v. Maslin*, 356 F.3d 191 (2d Cir. 2004); *United States v. Alerta*, 96 F.3d 1230 (9th Cir. 1996); *United States v. Caraballo-Cruz*, 52 F.3d 390 (1st Cir. 1995). For cases in which defendants' double jeopardy-related arguments were not met with success, see: *United States v. El-Mezzain*, 664 F.3d 467 (5th Cir. 2011); *United States v. Gerhard*, 615 F.3d 7 (1st Cir. 2010); *United States v. Wheeler*, 535 F.3d 446 (6th Cir. 2008); *United States v. Hassoun*, 476 F.3d 1181 (11th Cir. 2007); *United States v. Laguna-Estela*, 394 F.3d 54 (1st Cir. 2005);

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Finally, this case presents a suitable vehicle for this Court's review. The government cannot advance

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United States v. Luong, 393 F.3d 913 (9th Cir. 2004); *United States v. DeCologero,* 364 F.3d 12 (1st Cir. 2004); *United States v. Ziskin*, 360 F.3d 934 (9th Cir. 2003); *United States v. Estrada*, 320 F.3d 173 (2d Cir. 2003); *United States v. Mackins*, 315 F.3d 399 (4th Cir. 2003); *United States v. Cole*, 293 F.3d 153 (4th Cir. 2002); *United States v. Arlt,* 252 F.3d 1032 (9th Cir. 2001); *United States v. Ervasti*, 201 F.3d 1029 (8th Cir. 2000); *United States v. Aguilera*, 179 F.3d 604 (8th Cir. 1999); *United States v. LiCausi,* 167 F.3d 36 (1st Cir. 1999); *United States v. Williams,* 155 F.3d 418 (4th Cir. 1998); *United States v. Montgomery*, 150 F.3d 983 (9th Cir. 1998); *United States v. Holloway,* 128 F.3d 1254 (8th Cir. 1997); *United States v. McDougal,* 133 F.3d 1110 (8th Cir. 1998); *United States v. Otis*, 127 F.3d 829 (9th Cir. 1997); *United States v. Doyle,* 121 F.3d 1078 (7th Cir. 1997); *United States v. Stoddard,* 111 F.3d 1450 (9th Cir. 1997); *United States v. Morris,* 99 F.3d 476 (1st Cir. 1996); *United States v. Asher*, 96 F.3d 270 (7th Cir. 1996); *United States v. Sertich*, 95 F.3d 520 (7th Cir. 1996); *United States v. Rodriguez-Aguirre,* 73 F.3d 1023 (10th Cir. 1996); *Smith*, 82 F.3d 1261; *United States v. Petty*, 62 F.3d 265 (8th Cir. 1995); *United States v. Ledon*, 49 F.3d 457 (8th Cir. 1995); *United States v. Bennett,* 44 F.3d 1364 (8th Cir. 1995); *Macchia,* 35 F.3d 662; *United States v. Cruce*, 21 F.3d 70 (5th Cir. 1994); *United States v. Beszborn,* 21 F.3d 62 (5th Cir. 1994); *United States v. Mintz*, 16 F.3d 1101 (10th Cir. 1994). Generally not included in these citations are instances in which conspiracy convictions have been vacated because they were included in CCE offenses. See *Rutledge*, 517 U.S. 292. The subject of multiple conspiracies is also litigated in contexts apart from double jeopardy, for example, when defendants mount variance claims based on *Kotteakos v. United States*, 328 U.S. 750 (1946), see, *e.g.*, Raphael Prober and Jill Randall, *Federal Criminal Conspiracy*, 40 Am. Cr. L. Rev. 577, 592 (Spring 2003), Theis, *supra*, at 301-04, or seek multiple conspiracy jury instructions. See, *e.g., United States v. Edwards*, 69 F.3d 419, 433-34 (10th Cir. 1995).

a waiver or forfeiture supplication, as petitioner's double jeopardy contentions were squarely presented in the district court and on appeal both before and after trial. The issue presented has been the subject of two extensive court of appeals opinions, each with a vigorous dissent. Moreover, the issue on which this Court's guidance is needed requires fashioning objective *legal* standards. That type of inquiry is ideal for this Court's consideration.

CONCLUSION

WHEREFORE, based on the foregoing, Petitioner James Marcello respectfully moves this Honorable Court to grant certiorari.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 09-1265, 09-1287, 09-1376,
09-1602, 09-2093, 09-2109

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAUL SCHIRO, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 02 CR 1050-7, -4, -3, -2, -10 –
James B. Zagel, *Judge*.

ARGUED FEBRUARY 13, 2012 – DECIDED MAY 1, 2012

Before POSNER, WOOD, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. This long-running criminal case is before us for the second time. In the first appeal, decided in *United States v. Calabrese,* 490 F.3d 575 (7th Cir. 2007), two defendants, Frank J. Calabrese, Sr., and James Marcello, charged with violating RICO by conspiring to conduct an enterprise's affairs through a pattern of racketeering

activity, 18 U.S.C. § 1962(d), appealed from the denial of their motions to dismiss the indictment. The indictment charged them, along with other members of the "Chicago Outfit" – the long-running lineal descendant of Al Capone's gang – with having conducted the Outfit's affairs through a pattern of racketeering activity that extended from the 1960s to 2005 and included a number of murders, along with extortion, obstruction of justice, and other crimes. Calabrese and Marcello contended that the trial, which was scheduled to begin on June 19, 2007, would place them in double jeopardy, and so they moved the district court to dismiss the charges. We affirmed the denial of their motions, holding that they had failed to show a sufficient overlap between the current indictment and previous indictments to establish that the new prosecution was placing them in double jeopardy, though we noted that, depending on the approach taken by the government in the forthcoming trial, the trial might vindicate their claim. *United States v. Calabrese, supra,* 490 F.3d at 580-81.

So they were tried, together with three other members of the Outfit – Joseph Lombardo, Paul Schiro, and Anthony Doyle. The trial lasted almost three months, and resulted in the conviction of all five defendants by the jury. The judge sentenced Calabrese, Marcello, and Lombardo to life in prison, Schiro to 20 years, and Doyle to 12 years, and also imposed forfeiture and restitution on all the defendants. All five defendants appeal. The most substantial claims are renewed claims of double

jeopardy by Calabrese and Marcello, and we begin there.

The Outfit conducts its operations in Chicago through "street crews." Calabrese was the boss of the Calabrese Street Crew (also known as the South Side/ 26th Street Crew). Marcello was a member of the Carlisi Street Crew (also known as the Melrose Park Crew). Marcello had been indicted in 1992 along with eight others for conspiring, in violation of RICO, to conduct the affairs of the Carlisi Street Crew by means of a variety of criminal acts committed between 1979 and 1990, including the operation of an illegal gambling business, extortion, intimidation, conspiracy to commit arson and murder, and the collection of unlawful gambling debts. He had been convicted in 1993 and sentenced to 150 months in prison, and his conviction and sentence had been affirmed in *United States v. Zizzo,* 120 F.3d 1338 (7th Cir. 1997). Calabrese had been charged in 1995 with participation in a similar conspiracy, though the offense period was 1978 through 1992. He had pleaded guilty in 1997 and been sentenced to 118 months in prison. He had not appealed.

Double jeopardy can take two forms. One is prosecution for a crime the elements of which overlap the elements of a crime involving the same facts for which the defendant had been prosecuted previously. And in such a case, a case "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is

whether each provision requires proof of a fact which the other does not." *Blockburger v. United States,* 284 U.S. 299, 304 (1932); *see also United States v. Dixon,* 509 U.S. 688, 696 (1993); *United States v. Doyle,* 121 F.3d 1078, 1089-90 (7th Cir. 1997). For example, there would be only one offense for purposes of assessing double jeopardy if the second prosecution was for a lesser included offense of the crime for which the defendant had been prosecuted the first time. The other form of double jeopardy is prosecuting a person a second or subsequent time for the same offense, and that can be a difficult determination to make when the offense is conspiracy. *Id.; United States v. Calabrese, supra,* 490 F.3d at 578. Heraclitus famously said that one never steps into the same river twice. What he meant was that one never steps into the same water; the river is the same, even though its substance is always changing. And so a conspiracy can be the same even if all the acts committed pursuant to it are different, because it is the terms of the agreement rather than the details of implementation that determine its boundaries.

Both the earlier and the current indictments of Calabrese and Marcello charge a RICO conspiracy – an "agreement . . . to knowingly facilitate the activities of the operators or managers" of an enterprise that commits crimes that are on a list (in the RICO statute) captioned "racketeering activity." *Brouwer v. Raffensperger, Hughes & Co.,* 199 F.3d 961, 967 (7th Cir. 2000); *see* 18 U.S.C. §§ 1961(1), 1962(d); *United States v. Pizzonia,* 577 F.3d 455, 466 (2d Cir. 2009).

The question is whether the second conspiracy is the same conspiracy. That's a harder question than whether two criminal statutes have the same elements, or whether an indictment for robbery charges the same robbery as a previous indictment.

The earlier and later conspiracies that Calabrese and Marcello were charged with overlapped. The crimes they were accused of agreeing to commit included some that had been alleged in the earlier indictments (the same crimes but different criminal acts) but other crimes as well, crimes with which they had not been charged previously, including murders (particularly emphasized in the current indictments) and travel in interstate commerce in pursuit of the Outfit's criminal objectives. Calabrese and Marcello argue that their agreement to facilitate the criminal activities of their street crews and their agreement to facilitate the criminal activities of the Outfit itself are one and the same because the street crews are components of the Outfit.

To evaluate the argument we need to distinguish between two situations. In one a defendant initially is prosecuted for his involvement in a component organization and later for his involvement in the parent organization – of which he is a member simply by virtue of having joined one of the component organizations. In the other a defendant is prosecuted successively for joining a parent and one of its component organizations that he serves in different ways.

A worker at Ford Motor Company's River Rouge Complex is an employee of Ford Motor Company. His agreement to work on the River Rouge assembly line contributes both to the plant's output and to the output of the company as a whole, of which River Rouge's output is simply a part. If Ford produced sawed-off shotguns rather than automobiles, the worker could be prosecuted for conspiring with employees of Ford or employees at the River Rouge plant to produce an illegal weapon, but he could not be prosecuted for two separate conspiracies, because the members and the objectives and the activities of the two conspiracies (conspiracy with employees of Ford, conspiracy with employees at River Rouge) would be identical.

But if after producing sawed-off shotguns in the River Rouge plant an employee who had worked there is promoted into the Ford executive suite in Detroit as a regional manager and while there prepares financial reports designed to conceal from the government Ford's income from the production of illegal weaponry at River Rouge and other Ford plants, he has joined a separate though overlapping conspiracy.

We see from this example that depending on what the employee does, there can be two different enterprises that he is assisting rather than one even though they are affiliated; and provided that either they are indeed different (as in our example) or the patterns of racketeering activity are different (in other than small ways, *United States v. Calabrese,*

supra, 490 F.3d at 580-81; *see also United States v. Pizzonia, supra,* 577 F.3d at 464-65; *United States v. Ciancaglini,* 858 F.2d 923, 930 (3d Cir. 1988), which would suggest that the government was trying to take two bites of what was really just one apple), there is no double jeopardy. *United States v. DeCologero,* 364 F.3d 12, 18-19 (1st Cir. 2004). The Outfit and its subsidiary street crews are different though overlapping enterprises pursuing different though overlapping patterns of racketeering. And so they can be prosecuted separately without encountering the bar of double jeopardy. *United States v. Pizzonia, supra,* 577 F.3d at 463-64; *United States v. Wheeler,* 535 F.3d 446, 453-54 (6th Cir. 2008); *United States v. DeCologero, supra,* 364 F.3d at 18-19.

If as in our first Ford hypothetical you do street crew business only, you are not working for two different enterprises even though the street crew is a branch; the enterprises are no more different than two nested Russian dolls are. But if you murder, which is Outfit business because it is too sensitive to be left to the street crews, you are working for the Outfit in a respect that is different from your street crew work; you are demonstrating that your agreement to assist the Outfit is broader than and distinct from your agreement to assist your street crew, just as conspiring to assemble shotguns at a plant is different from conspiring to conceal the assembly of shotguns at numerous plants.

The street crews (six in number in the relevant period) are operating divisions of the Outfit in Chicago.

But the Outfit has powers and responsibilities distinct from those of the street crews. Only the Outfit can approve murders. Murders, or at least the kind of murders that the Outfit commits, generate no revenue directly. The benefits they confer, notably reducing the risk of apprehension and conviction by eliminating informants and imposing discipline on members, accrue to the entire organization. Only the Outfit can form ad hoc groups whose members are drawn from two or more street crews to perform special tasks, such as surveillance of a person whom the Outfit's leadership has decided should be murdered. Only the Outfit can authoritatively resolve disagreements between street crews. And only the Outfit has a financial stake in Las Vegas. A member of a street crew is a member of the Outfit, but as in our second Ford example these are separate enterprises despite their affiliation. *United States v. Calabrese, supra,* 490 F.3d at 578; cf. *United States v. DeCologero, supra,* 364 F.3d at 17-18; *United States v. Langella,* 804 F.2d 185, 188-89 (2d Cir. 1986). One enterprise (the Outfit) coordinates the Chicago mob, and commits crimes such as witness tampering and obstruction of justice to minimize government intrusion into the affairs of the entire mob; the other focuses on street-level vice.

The present indictment, and the evidence presented at trial to prove its allegations, concerns conspiracies involving Calabrese and Marcello in their capacity as Outfit members, not as street crew members. In particular, they conspired to commit

murder, and did commit murder, as members of the Outfit, not as members of street crews. One of the murder conspiracies in which they were involved was intended to protect the Outfit's interest in Las Vegas casinos. There was no Las Vegas street crew, though of course members of the Outfit oversaw the Outfit's skim of Las Vegas casino profits. The Outfit is more than the sum of the street crews.

All this would be obvious if the Chicago Outfit were a corporation and the street crews were subsidiaries. But it would be beyond paradoxical if by virtue of being forbidden by law to form subsidiaries, employees of criminal enterprises obtained broader rights under the double jeopardy clause than the employees of legal ones.

There is overlap as we said between the successive prosecutions, especially with regard to the types of street-level vice charged in previous indictments. But after we warned in our previous decision that if the government's evidence at the trial of the present case (which remember was about to start when we rendered that decision) duplicated its evidence in the previous trials of Calabrese and Marcello, the defendants might be able to plead double jeopardy successfully, *United States v. Calabrese, supra,* 490 F.3d at 580-81; cf. *United States v. Laguna-Estela,* 394 F.3d 54, 58-59 (1st Cir. 2005); *United States v. Solano,* 605 F.2d 1141, 1145 (9th Cir. 1979), the government took pains to present evidence in the current trial of conduct that had not figured in the previous ones and that distinguished the scope of the

Outfit conspiracy from that of the street crew conspiracies. We did not think that the defendants had proved double jeopardy from a comparison of indictments, and their claim is even weaker now that the second trial has been conducted. We can't say that the "government contrived the differences to evade the prohibition against placing a person in double jeopardy." *United States v. Calabrese, supra,* 490 F.3d at 580. The present trial substantiated the functional differences between the Outfit and the street crews that show that these are different criminal enterprises, with different functions that generate different though overlapping patterns of racketeering activity. *United States v. Langella, supra,* 804 F.2d at 188-89.

But the means by which the government has thwarted the double jeopardy defense raises the question whether the defendants may have a good defense of statute of limitations. The murders that the Outfit orchestrated are the best evidence that the Outfit conspiracy was different from the street crew conspiracies for which Calabrese and Marcello had already been placed in jeopardy. But the last Outfit murder charged, that of John Fecarotta, was committed in 1986, 19 years before the present indictment and therefore well outside the 5-year statute of limitations for RICO offenses. That is the default federal statute of limitations when a criminal statute fails to specify a statute of limitations, 18 U.S.C. § 3282; *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* 483 U.S. 143, 155-56 (1987), and RICO is such a statute.

Marcello's operation of illegal gambling machines and Calabrese's participation in street-tax collection (despite his being in prison) persisted into the statutory period, but those are street-crew activities rather than Outfit activities. But a statute of limitations for conspiracy does not begin to run until the conspiracy ends, *United States v. Yashar,* 166 F.3d 873, 875-76 and n. 1 (7th Cir.1999); *United States v. Maloney,* 71 F.3d 645, 659-61 (7th Cir. 1995); *United States v. Yannotti,* 541 F.3d 112, 123 (2d Cir. 2008), and the separate conspiracy involving the Outfit continued into the statutory period, even if no predicate acts (crimes that constitute a pattern of racketeering activity) were committed during that period. But some were – namely, as the district judge found, obstructions by Calabrese and Marcello of the government's investigation of the Outfit.

There is another statute of limitations issue. Joseph Lombardo argues that he withdrew from the conspiracy in 1992, which if true means that the five-year statute of limitations had run by the time he was indicted in 2005. The principal evidence of withdrawal was an announcement that he placed in the *Chicago Tribune* and two other Chicago newspapers in which he said he'd just been released from federal prison on parole and that "if anyone hears my name used in connection with any criminal activity please notify the F.B.I., local police and my parole officer, Ron Kumke." The government describes the announcement as a "stunt," but whatever it was, it was not effective withdrawal.

One cannot avoid liability for conspiracy simply by ceasing to participate, *United States v. Bafia,* 949 F.2d 1465, 1477 (7th Cir. 1991); *United States v. Borelli,* 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.), hoping the conspiracy will continue undetected long enough to enable the statute of limitations to be pleaded successfully when one is finally prosecuted, the conspiracy having at last been detected. It is true that although the best evidence of withdrawal is reporting the conspiracy to the authorities with sufficient particularity to facilitate their efforts to thwart and prosecute it, *United States v. Wilson,* 134 F.3d 855, 863 (7th Cir. 1998); *United States v. Patel,* 879 F.2d 292, 294 (7th Cir. 1989); *United States v. Randall,* 661 F.3d 1291, 1294-95 (10th Cir. 2011), a number of cases hold that an unequivocal statement of resignation communicated to one's conspirators can also constitute withdrawal. E.g., *United States v. Arias,* 431 F.3d 1327, 1341 (11th Cir. 2005); *United States v. Greenfield,* 44 F.3d 1141, 1149-50 (2d Cir. 1995). The rationale is that "by communicating his withdrawal to the other members of the conspiracy, a conspirator might so weaken the conspiracy, or so frighten his conspirators with the prospect that he might go to the authorities in an effort to reduce his own liability, as to undermine the conspiracy." *United States v. Paladino,* 401 F.3d 471, 479-80 (7th Cir. 2005). This implies that a public announcement that is certain to be seen by one's coconspirators could do the trick, though we can't find any examples. No matter; Lombardo asked for a jury instruction on withdrawal and his request was granted. Doubtless

the jury agreed with the prosecution that the *Tribune* ad was a stunt; and its rejection of the claim of withdrawal was reasonable and therefore binds us.

Marcello raises an evidentiary issue. A victim's daughter identified Marcello's voice as that of the man who called her father on the day of the father's disappearance. Marcello wanted to present an expert witness who would testify that voice identifications are often mistaken. The judge excluded the evidence. He was skeptical about its empirical basis and also thought that the jury already had a good understanding of the fallibility of "earwitness" identification. We do not suggest that such expert evidence is worthless or that jurors always grasp the risk of misidentification inherent in eyewitness and earwitness testimony. But a trial judge has a responsibility to screen expert evidence for reliability and to determine the total effects of proposed evidence, weighing its probative value against its potential to (among other things) confuse the jury. *See* Fed. R. Evid. 403. Both reliability and potential for confusion were factors in this case and we cannot say the judge abused his discretion in refusing to admit the expert evidence, which the jury might have taken as a signal that it should disregard the witness's identification testimony. *See United States v. Bartlett,* 567 F.3d 901, 906 (7th Cir. 2009). If jurors are told merely that voice identifications frequently are mistaken, what are they to do with this information? The defendant's lawyer will argue mistaken identification and jurors told that

such mistakes are common may be afraid to make their own judgment.

We turn now to issues involving the district judge's dealings with the jury. Most of the defendants' complaints about those dealings have no merit. They complain about his occasional discussions with jurors in the jury room but those discussions appear to have been limited to matters of scheduling, which being unrelated to the merits of the prosecution do not provide a ground for a new trial. *Rushen v. Spain,* 464 U.S. 114, 117-19 (1983) (per curiam). "[T]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication." *Id.* at 125-26 (concurring opinion).

The judge also was justified in granting anonymity to the jurors in such a high-profile trial involving a gang that though much diminished from its glory days (*see* Gerry Smith, "25 Years After Notorious Hit, Mob Has Quieter Presence; Chicago's Outfit Weaker Today, Experts Say," *Chicago Tribune,* June 21, 2011, p. C6; John J. Binder, *The Chicago Outfit* 111-12 (2003); Chicago Crime Commission, *Organized Crime in Chicago* 4 (1990)), continues to inspire fear. *United States v. Benabe,* 654 F.3d 753, 761 (7th Cir. 2011); *United States v. DiDomenico,* 78 F.3d 294, 301-02 (7th Cir. 1996) (another prosecution of the Chicago Outfit);

United States v. Moore, 651 F.3d 30, 48-49 (D.C. Cir. 2011) (per curiam); *United States v. Deitz,* 577 F.3d 672, 684-85 (6th Cir. 2009); *United States v. Gotti,* 459 F.3d 296, 345-46 (2d Cir. 2006). He was likewise justified in refusing to voir dire the jurors every time the media published news about the trial. The notoriety of the Outfit guaranteed extensive press coverage, resulting in such tidbits as an interview with the government's mob expert, name-calling by a victim's brother, a story that Marcello had been "humiliated" by his mistress's testimony, and an opinion piece saying that the jurors would be "basically stupid" if they didn't convict the defendants. The judge had told the jurors not to pay attention to the media and not to do research on their own. To voir dire them on the subject without reason to believe they were disobeying his order (and no reason to believe that was presented) would have insulted them by implying distrust of their willingness or ability to obey his orders.

But supposing some of them did surreptitiously read the items in question, this would have been very unlikely to influence the verdict. And that is crucial. For there is no duty to voir dire jurors about media coverage that falls short of "prejudicial publicity," *United States v. Trapnell,* 638 F.2d 1016, 1022 (7th Cir. 1980), in the sense of publicity that is likely to affect the verdict. The district judge did not abuse his discretion in determining that the media coverage of this case wasn't prejudicial; it neither was inflammatory nor added anything of substance to the evidence

presented at the trial. *United States v. Warner,* 498 F.3d 666, 679 (7th Cir. 2007); *United States v. Sanders,* 962 F.2d 660, 671 (7th Cir. 1992); *United States v. Williams-Davis,* 90 F.3d 490, 499-502 (D.C. Cir. 1996). "It is for the trial judge to decide at the threshold whether news accounts are actually prejudicial; whether the jurors were probably exposed to the publicity; and whether the jurors would be sufficiently influenced by bench instructions alone to disregard the publicity." *United States v. Rasco,* 123 F.3d 222, 230-31 (5th Cir. 1997), quoting *Gordon v. United States,* 438 F.2d 858, 873 (5th Cir. 1971). And the judge did that.

Nor did he abuse his discretion by allowing the jurors to take a break from jury duty for a week between the rendition of the general verdict and the deliberations on the special verdict, and by declining to sequester them during either set of deliberations. An experienced trial judge who presides over a long jury trial obtains a feel for the jurors' needs, capacities, feelings, and idiosyncrasies that the appellate court can't duplicate, and this means that we're in a poor position to second guess his decisions concerning such matters as scheduling and whether to sequester jurors during deliberations.

Of greater concern are the judge's communications with an alternate juror who, the judge learned from the jury administrator, had said she was uncomfortable serving on the jury. The judge observed her in the jury box and also in a visit to the jury room. He thought she indeed seemed uncomfortable, and

maybe anxious and even panicky, so he met with her in private and asked her whether everything was okay. She said it was but also asked whether the trial was nearly over. The judge said it was. She also asked him whether any threats had been made against her, and he assured her that none had been. She said she had not discussed her feelings with any of the other jurors. Nevertheless the judge removed her from the jury. Although she was an alternate, she would have been a deliberating juror had she not been removed, because other jurors were removed later.

The defendants argue that the judge should have told the lawyers about the situation before removing the juror, and perhaps given them a chance to voir dire her, or at least suggest questions for the judge to ask her. Given her anxieties it would not have been a good idea to confront her with the defendants' lawyers – that is, agents of the defendants; she would have been intimidated by their presence. A defendant's interest in being present at all stages of his trial is limited, *United States v. Bishawi,* 272 F.3d 458, 461-62 (7th Cir. 2001), by the need for orderly administration of criminal trials. The defendants tacitly acknowledge this by not arguing that they should have been present when the judge was discussing the juror's anxieties with her.

But before dismissing her the judge should have told the lawyers about his discussions with her, *United States v. Evans,* 352 F.3d 65, 70 (2d Cir. 2003); *United States v. Edwards,* 188 F.3d 230, 235-37 and n. 2 (4th Cir. 1999); cf. *United States v. Pressley,* 100

F.3d 57, 59-60 (7th Cir. 1996); *United States v. Vega,* 285 F.3d 256, 266-67 (3d Cir. 2002), for they might have suggested that he question her further, albeit outside their presence. She had already answered the essential questions, however, by saying she hadn't been threatened (for remember that she asked the judge *whether* she had been threatened) and hadn't discussed her anxieties with the other jurors. What more was there to ask her?

Given her state of mind, the judge was justified in removing her from the jury. *United States v. Anderson,* 303 F.3d 847, 853 (7th Cir. 2002); *United States v. Edwards,* 342 F.3d 168, 182-83 (2d Cir. 2003); *United States v. Thomas,* 116 F.3d 606, 613-14 (2d Cir. 1997). Had she become a deliberating juror (as she would have), she might have felt pressured to cause the jury to hang in order to avoid mob retribution for returning a guilty verdict. The judge's failure to consult the lawyers was thus a harmless error, as in such cases as *Olszewski v. Spencer,* 466 F.3d 47, 64 (1st Cir. 2006), and *United States v. Evans, supra,* 352 F.3d at 70; *see also Remmer v. United States,* 347 U.S. 227, 229 (1954); *United States v. Bishawi, supra,* 272 F.3d at 462; *United States v. Edwards, supra,* 188 F.3d at 236 n. 2.

Another juror claimed to have discovered, through a combination of overhearing and lip reading, defendant Calabrese mutter when the prosecutor was giving his closing argument "you are a fucking dead man," the "you" apparently being the prosecutor. Nobody else in the courtroom seems to have heard

Calabrese's remark. The juror's observation did not come to light until the trial ended, whereupon the defendants moved for a new trial, which the judge denied. The defendants (other than Calabrese, who argues that the juror in question fabricated the story and used the fabrication to poison the other jurors against him) argue that the death threat was made and that it turned the jurors against all the defendants since they were being tried together as co-conspirators.

In an evidentiary hearing conducted after the trial, the district judge determined that Calabrese had indeed uttered the remark – the juror hadn't made it up. *United States v. Calabrese,* No. 02 CR 1050, 2008 WL 1722137, at *1 (N.D. Ill. Apr. 10, 2008). But he refused to voir dire the other jurors to determine whether they had heard it and if so whether it had influenced their deliberations. *United States v. Calabrese,* No. 02 CR 1050-2, -3, -4, -10, 2008 WL 4274453, at *5-*8 (N.D. Ill. Sept. 10, 2008). He based his finding that Calabrese had uttered the remark in part on his observations of Calabrese's courtroom demeanor throughout the trial, and that was proper – a judge has the same right as jurors to base credibility findings on demeanor. *United States v. Calabrese, supra,* No. 02 CR 1050, 2008 WL 1722137, at *4-; *United States v. Mendoza,* 522 F.3d 482, 491 (5th Cir. 2008); 2 John Henry Wigmore, *Evidence in Trials at Common Law* § 274, pp. 119-20 (James H. Chadbourn ed. 1979). But he should have inquired whether any of the other jurors had heard or otherwise been made

aware of Calabrese's alleged remark, and, if so, whether in conjunction with his other disruptive acts at trial – screaming "them are lies" during the prosecution's argument and making faces and noises – the remark could have seriously reduced the other defendants' chances of being acquitted. *See Remmer v. United States, supra*, 347 U.S. at 229; *United States v. Davis,* 15 F.3d 1393, 1412 (7th Cir. 1994); *United States v. Bristol-Mártir,* 570 F.3d 29, 42 (1st Cir. 2009). The judge may have been too confident that no one had heard the remark except that one juror and too quick to conclude as he did that since the defendants were a varied lot, the jurors wouldn't hold Calabrese's remark against his codefendants.

But the remark itself in context was not so poisonous that even if all the jurors heard or were told of it their verdict might have been different. By the time of the closing argument the prosecution had provided compelling evidence that all the defendants had knowingly aided the Outfit and at least three had committed serious crimes on its behalf, including participation in a conspiracy to commit murders that had resulted in at least 18 deaths. The incremental shock effect on the jury of Calabrese's threat and his other disruptive conduct could not have made the difference between conviction and acquittal of any of the crimes for which the jury convicted them. *United States v. Mannie,* 509 F.3d 851, 856-57 (7th Cir. 2007); *see also Zafiro v. United States,* 506 U.S. 534, 537-39 (1993); *United States v. Morales,* 655 F.3d 608, 624-25 (7th Cir. 2011).

Anthony Doyle's appellate counsel makes a number of convoluted objections to the jury instructions. Doyle's trial counsel sensibly had not made such objections, which would have confused the jury without increasing the likelihood of acquittal. We discuss just the strongest objection.

Although the judge correctly instructed the jurors that their "verdict, whether it be guilty or not guilty, must be unanimous," Doyle argues that the instructions as a whole allowed the jury to render a non-unanimous guilty verdict, for example because the judge further instructed the jury that "to prove a defendant guilty of the [RICO] conspiracy . . . the government must prove . . . that the defendant . . . knowingly conspired to conduct or participate in the conduct of the affairs of an enterprise through . . . a pattern of racketeering activity . . . or . . . the collection of unlawful debt." This allowed the jury, Doyle argues, to convict him even if half the jurors thought he had conspired to conduct the affairs of the Outfit only through a pattern of racketeering activity and half only through the collection of unlawful debts, with the jurors failing to agree unanimously on either object of the RICO conspiracy. The jury should, he argues, have been instructed that to return a guilty verdict it had to either find unanimously that the Outfit conspiracy had agreed to engage in a pattern of racketeering activity, or find unanimously that it had agreed to engage in the collection of an unlawful debt, or find unanimously that it had agreed to engage in both a pattern of racketeering activity and the

collection of an unlawful debt, and then find unanimously that Doyle had joined the first conspiracy or the second, or both.

This may be correct, cf. *United States v. Griggs,* 569 F.3d 341, 344 (7th Cir. 2009); *United States v. Sababu,* 891 F.2d 1308, 1325-26 (7th Cir. 1989), though we cannot find any cases that address whether pattern of racketeering activity and collection of unlawful debts are separate elements of a RICO violation, which would require unanimity of the jurors on either (or both) to convict (as the jury did), *Richardson v. United States,* 526 U.S. 813, 817-23 (1999), or instead are different ways of committing the same crime, which would not require unanimity as to each way. *Id.* But suppose the former, that "pattern of racketeering" and "collection of unlawful debt" are indeed separate elements of a RICO offense. Still, not only would the instruction that Doyle's appellate counsel proposes have been difficult for jurors to understand; it would not have changed the verdict, and either or both may have been why Doyle's trial lawyer did not request such an instruction.

The evidence that the Outfit conspiracy contemplated both racketeering activity (such as murder) and the collection of unlawful debts (namely "juice loans," offered at usurious interest rates) was overwhelming. Specific unanimity instructions, as distinct from a general instruction that the jury must unanimously find the defendants guilty beyond a reasonable doubt in order to convict (and that instruction

was given), are necessary only when there is a significant risk that the jury would return a guilty verdict even if there were less than unanimity with regard to one or more elements of the crime. There was not a significant risk here, given the weight of the evidence of *both* elements (if they are indeed elements and not means). *United States v. Zizzo, supra,* 120 F.3d at 1358; *United States v. Nicolaou,* 180 F.3d 565, 572 n. 3 (4th Cir. 1999).

Many of Doyle's other objections are to the absence of instructions that would have required the jurors to agree unanimously on the means by which his conduct satisfied the elements of the RICO offense. But as we have already intimated, jurors don't have to agree on means. Suppose a defendant on trial for murder had first choked his victim and then shot him, and some jurors think the choking killed him and others that he was alive until he was shot. It is enough that they are unanimous that the defendant killed him. *Richardson v. United States, supra,* 526 U.S. at 817; *Schad v. Arizona,* 501 U.S. 624, 631-32 (1991) (plurality opinion); *id.* at 649-50 (concurring opinion); *United States v. Griggs, supra,* 569 F.3d at 343-44; *United States v. Talbert,* 501 F.3d 449, 451-52 (5th Cir. 2007).

A number of cases say that in a RICO conspiracy case the jury should be instructed that it must agree unanimously on the "types of racketeering activity" that the conspirators agreed to commit. E.g., *United States v. Randall, supra,* 661 F.3d at 1298-99; *United States v. Applins,* 637 F.3d 59, 80-81 (2d Cir. 2011).

But we have our doubts (and in any event any error in failing to include such an instruction was harmless). If you joined the Outfit, you agreed to commit or assist in committing an open-ended range of crimes, and it ought to be enough that the jury was unanimous that you indeed agreed that you would commit whatever crimes within that range you were assigned. Another way to put this – a way that preserves continuity with the cases that require that the jury be instructed that it must agree on the "type" of racketeering activity that the conspirators agreed to undertake – is that scope determines type. Suppose conspirators agree to commit any criminal act that will yield a profit of at least $5,000. Cf. *Salinas v. United States,* 522 U.S. 52, 63-64 (1997). Any such act, whether burglary or bank fraud, would then be within the scope of the conspiracy rather than belonging to a separate "type" of racketeering activity, such as burglary or bank fraud.

We need to say something finally about the evidence against Paul Schiro and the restitution order against Doyle. The indictment accused Schiro not only of being a member of the Outfit but also of murdering another member, Emil "Mal" Vaci, because the Outfit was concerned that Vaci might be planning to betray the Outfit to the government. Vaci was murdered, but the jury refused in its special verdict to find that Schiro had been involved in the murder. This was a semantic rather than a substantive finding, because although Schiro wasn't the trigger man, as apparently had been intended, he participated

substantially in the planning and surveillance that preceded the murder. Moreover, while his involvement was the most colorful charge against him, the jury was entitled to find, as it did, that he was a member of the Outfit and had conspired with other members to participate in its affairs, knowing that it would commit a variety of crimes, such as Vaci's murder; the jury must have distinguished between conspiracy to do something and involvement in the act.

Schiro's lawyer also complains about the judge's refusal to sever his trial from that of the other defendants, in particular Calabrese, Lombardo, and Doyle, all of whom testified, and whose arrogant and incredible testimony undoubtedly helped to convict them. Lombardo mentioned his acquaintance with Schiro in his testimony. These defendants would have been well advised not to testify, and their decision to testify hurt Schiro. But no reasonable jury would have acquitted Schiro even if he had been tried by himself (or with Marcello, who also didn't testify), so ample was the evidence of his membership in the Outfit conspiracy.

The defendants were ordered to pay restitution in conformity with the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A. The total amount, all of which was for the lost future earnings of 14 of the 18 murder victims whom the defendants were found to have conspired to kill, exceeded $4 million. All but 1 percent of this amount, $44,225.73, was allocated jointly and severally to the four defendants, *see*

United States v. Dokich, 614 F.3d 314, 318 (7th Cir. 2010), other than Doyle, who was assessed only the 1 percent because he had joined the conspiracy late, in 1999. As all the murders occurred before then, it was improper to assess him any share of the restitution ordered. *United States v. Squirrel,* 588 F.3d 207, 215-16 (4th Cir. 2009). That is the only reversible error we find, and so other than reversing that part of his sentence we affirm the judgments.

AFFIRMED IN PART AND
REVERSED IN PART.

WOOD, *Circuit Judge*, dissenting in part. If anyone doubted that the Chicago Outfit during its heyday ranked as one of the most dangerous and reprehensible criminal organizations in our nation's history, the record compiled in this case would put those uncertainties to rest. And the five defendants now before us – Frank J. Calabrese, Sr., James Marcello, Joseph Lombardo, Paul Schiro, and Anthony Doyle – sat at the very top of the enterprise. The indictment on which this quintet stood trial is breathtaking in its temporal and substantive scope: through the convenient device of the conspiracy offense, the government has been seeking to hold the defendants responsible for virtually everything that the Outfit did or sponsored for a 42-year period (1960-2002). Although I have a few reservations that I explain below about the convictions of Lombardo, Schiro, and Doyle, in the end I join my colleagues in affirming their convictions

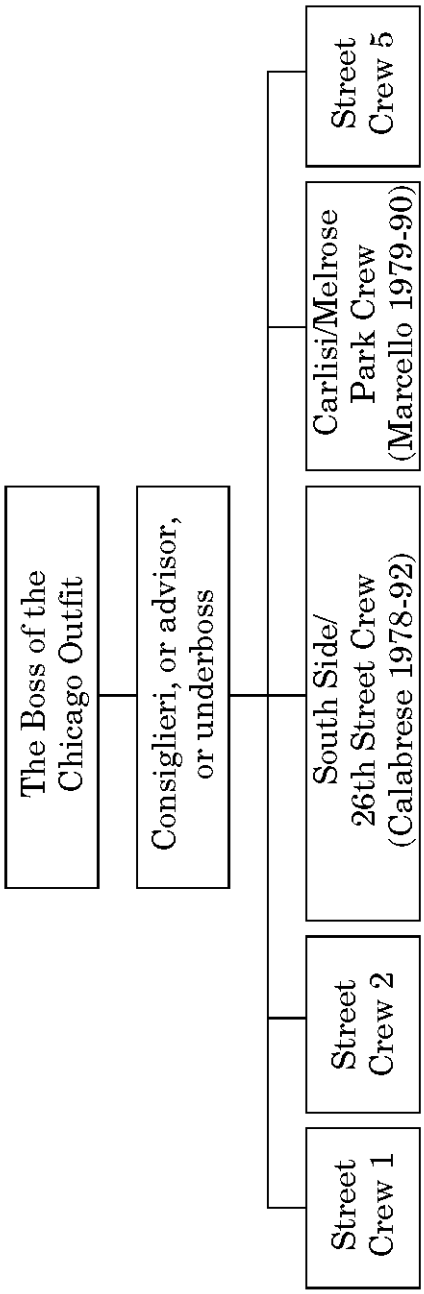
and sentences. Regrettably, however, I must part company with their assessment of the double jeopardy argument that Calabrese and Marcello have advanced. In their view, *ante* at 9, that argument is "even weaker" in light of the evidence presented at the second trial than it was when this panel rejected this argument before the 2005 trial began. *See United States v. Calabrese,* 490 F.3d 575 (7th Cir. 2007). I draw the opposite conclusion: the double jeopardy violation that I feared would occur from this retrial has unequivocally occurred. Calabrese and Marcello had each already been convicted and imprisoned for their part in the street crews that lie at the heart of the Outfit's Chicago operation. *See United States v. Zizzo,* 120 F.3d 1338 (7th Cir. 1997) (Marcello), and *ante* at 3. Those prosecutions covered the period from 1978 to 1992 for Calabrese and from 1979 to 1990 for Marcello. The current prosecution entirely subsumes the span of those conspiracies. I therefore dissent, on that basis only, from the decision to affirm those two convictions.

I

At first glance, the Fifth Amendment's prohibition that no person can be "twice put in jeopardy of life or limb" for "the same offense," U.S. CONST. AMEND. V, is clear enough. As we have explained, "the double jeopardy clause imposes limits on a defendant's criminal exposure. . . . [T]he government cannot reprosecute a defendant for the same offense whenever it obtains broader evidence of criminal culpability."

United States v. Thornton, 972 F.2d 764, 765 (7th Cir. 1992). But this simple rule becomes difficult when the "same offense" in question is a conspiracy; the problems compound when it is a RICO conspiracy. A conspiracy has "no easily discernable boundaries with regard to time, place, persons, and objectives." *Id.* How, then, can we tell when one conspiracy ends and another picks up? The question becomes even more vexing when we deal with members of a complex enterprise who have allegedly conspired to violate RICO. A RICO "enterprise" is loosely defined as "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette,* 452 U.S. 576, 583 (1981).

This case requires us to decide under what circumstances it is permissible to carve multiple "enterprises" out of one group. And we must do so with reference to the tightly organized, hierarchical organization commonly known as the Chicago Outfit. As the prosecution has conceded, the Chicago Outfit was organized as follows between 1960 and 2005:


The Boss of the Chicago Outfit
Consiglieri, or advisor, or underboss
Street Crew 1
Street Crew 2
South Side/ 26th Street Crew (Calabrese 1978-92)
Carlisi/Melrose Park Crew (Marcello 1979-90)
Street Crew 5

Each Street Crew was headed by its own Boss, called a "Capo" (literally meaning "head," from the Latin word "capus" – familiar to English speakers from the word "decapitate," meaning to cut off the head). As I will describe in more detail in a moment, it is true that the earlier prosecutions of Calabrese and Marcello focused primarily on their work at the Street Crew level than on the relation between the Crews and the Boss, while the current cases look at the big picture. But that does not change the fact that both cases are inescapably about the entirety of the operation. Tempting though it may be to slice these activities more finely when we evaluate the earlier cases (pretending that the Street Crews were somehow independent of the higher echelons of the organization) and to focus on the vertical relation between the Boss and the Crews (pretending that the organization as a whole had some existence apart from its Street Crews), the facts compel the conclusion that those inside and outside the group understood throughout every relevant time that this was all one integrated, highly coordinated organization.

The majority has drawn an analogy to complex legitimate corporate enterprises (which obviously should be no worse off under either RICO or the Double Jeopardy Clause than their illicit counterparts), but this exercise does not strengthen its point. Suppose we think of the Outfit as a company and the Street Crews as its branch offices, rather like the Ford Motor Company and its River Rouge Complex. The majority concedes that a worker at the Ford

River Rouge Complex is affiliated not only with that immediate Complex, but is in fact an employee of the overarching enterprise known as Ford Motor Company. *Ante* at 525-26. By working on the assembly line there, he contributes to Ford's business. *Id.* And if Ford made two different products – say cars and bicycles (or sawed-off shotguns, as the majority postulates) – the worker on the car line would still be working for Ford, just as the worker in the bicycle plant (or the shotgun business) would be. The key point is that there is only one enterprise, which makes money through multiple lines of commerce.

The majority notes that certain actions can be taken by the line workers (the Crew members) only with the approval of central management (the Boss). In the Outfit's case, this includes committing murder; in the Ford example, we can imagine a host of more mundane activities such as deciding to build a new line of cars, making a hiring decision, or authorizing an expenditure over $1,000. Such limitations on the authority of lower management and line workers are routine in the business world; no one subject to them would think for a moment that the actions he was authorized to take on his own (such as expenditures below the threshold) were *not* for the enterprise's welfare, while actions he took with approval of higher management were. The Ford employee is still a Ford employee, whether he exercises delegated discretion or whether he must follow the orders of his Ford superiors. Should the janitorial staff at the River Rouge Complex be considered to be conspiring with a

different "enterprise" than a notional enterprise made up of the assembly line workers? What if the sanitation workers required approval from HR before they hired a new janitor to join their ranks? Would the action of hiring a janitor somehow become associated with the "HR-enterprise," but all other janitorial actions remain confined to the "janitor-enterprise"? Nothing in either the Double Jeopardy Clause or RICO calls for such inconsequential distinctions. Indeed, if the majority's view were correct, we would eviscerate any protection the Double Jeopardy Clause provides against repeat prosecutions for conspiracy; single organizations could be carved into any number of different "enterprises" to avoid the Clause's protection. (I note in passing that the Supreme Court has treated corporations as "persons" for purposes of the Double Jeopardy Clause. *See*, *e.g., United States v. Martin Linen Supply Co.,* 430 U.S. 564 (1977).)

To make the analogy clearer, let's pretend that a hypothetical car manufacturer, Voiture, is using some of its employees to run a video poker side-business at a local bar, and that the employees are well aware that these activities violate the law. Let's further assume that a Voiture employee works full-time at its assembly line in Indiana, spending most of her days at that facility making cars but occasionally conferring about the poker business with her superiors at headquarters over the phone or in person. Law enforcement agents get wind of illegal conduct taking place and bring an indictment against the Indiana employee. The indictment charges that the Indiana

facility is a RICO enterprise, and that the employee has conspired with members of that enterprise to further the activities of the video poker business at the bar in question, using company facilities and time. After a trial, a jury finds her guilty and she serves time in prison.

Years pass, and another Voiture employee decides that he has had enough with the corporation and its illegal activities. He decides to turn on his coworkers and tell law enforcement everything he knows. (Or perhaps, closer to this case, confronted with his own misdeeds he comes clean in exchange for the government's leniency.) Through this informant, officials have proof for the first time that the employee who was prosecuted earlier actually was handling video poker for Voiture in all of central Indiana, not just in the bar that was involved in the first case. They decide to charge her again, this time with an indictment covering the full scope of her crimes. Again, rather than charge her for the underlying substantive conduct, they charge her with *conspiracy.* This time, prosecutors are careful to say that the enterprise is Voiture as a whole, not just the Indiana regional center. Moreover, they emphasize that Voiture's central management had to approve each location for the illegal machines. This, they say, avoids any double jeopardy problem, because (the argument goes), the enterprise whose illegal activities she was furthering the second time was Voiture, not its Indiana plant.

Such a distinction would be absurd. Higher management was already fully implicated in the earlier scheme. Nothing separates the "enterprise" of the plant from the "enterprise" of the company as a whole. Companies work through people; large companies usually find it convenient to work through divisions based on geography, line of business, or both. The Indiana employee, by working for the Indiana assembly plant and consulting as need be with higher management, was by definition working for the company as a whole. The fact that Voiture organizes itself in a vertical structure with regional manufacturing centers does not mean that each center is a separate enterprise from Voiture itself, even if the centers cannot take certain actions without the approval of Voiture's management. This reality cannot be evaded by naming the regional center of Voiture in the charging documents the first time around. Nor, in this case, can it be evaded by naming the Street Crews first and later appealing to an Outfitwide conspiracy.

Returning to our case, no one disputes the fact that the Calabrese and Marcello Street Crews operated within and exclusively for the Outfit. This can only mean that their prosecutions were for the work that they did for the Outfit, each one through his own Street Crew. The facts developed at trial simply do not support the proposition that the Crews were stand-alone operations, acting as independent contractors for the Outfit. Nor is this a case in which either Calabrese or Marcello is being asked to be

criminally responsible for the activities of other Street Crews, *qua* Street Crews. The only difference between the present case and each man's earlier prosecution – a difference to which the government alludes repeatedly – is the wider scope of the recent prosecution, and especially the fact that it encompasses murders authorized at the highest levels of the Outfit. Disturbing though this conduct is, however, these murders do not support the proposition that the enterprise known as the Outfit is different from the enterprises involved in the first cases. We must recognize, as have our sister circuits, that a crime family in "a lower level of authority within the hierarchy of organized crime" is still a component of the same crime family. *United States v. Langella,* 804 F.2d 185, 189 (2d Cir. 1986); *see also United States v. Ciancaglini,* 858 F.2d 923 (3d Cir. 1988) (concluding that two Philadelphia-based crime families were part of the same enterprise). If the Street Crews were "self-sufficient enterprises that function[ ] without oversight" from the Outfit, we would have a different case. *Langella,* 804 F.2d at 189. But as the majority concedes, they are not. The Street Crews were the mob's hands, the Outfit its head. There is no way to divide the two.

II

My dissent does not proceed from the assumption that one person is incapable of entering into two different RICO conspiracies with the same enterprise. I agree with the majority that the contrary is true. As

the Second Circuit noted in *United States v. Basciano,* "enterprise and pattern are distinct elements of racketeering." 599 F.3d 184, 204 (2d Cir. 2010). I therefore have no quarrel with the proposition that a person who has once been prosecuted for a low-level conspiracy (perhaps to sell marijuana from a corrupt branch office of a company), is not immune from prosecution in a different, much larger conspiracy (such as a nationwide conspiracy orchestrated at the highest levels to commit financial fraud). In that example, even though the wrongdoer would have made a second agreement with the same enterprise, it would have been an agreement to commit a different *pattern* of racketeering activity.

As I read the majority's opinion, it accepts that if the Carlisi and 26th Street Crews were doing the actual work of the Outfit during the times covered by their earlier indictments, then this would be a different case. But, they conclude, neither Crew was doing so. My problem with that conclusion is not with the theory but with the application. As I said before, it is certainly possible that a case could arise in which actions taken by the Outfit amounted to a different pattern of racketeering than the activities that take place at the Crew level, even though the two are part of the same enterprise. But the facts of this case show instead a single coordinated operation. We can see this by considering the various types of evidence that shed light on the question whether two conspiracies conducted by the same enterprise are distinct. This includes "(1) the time of the various activities charged as separate patterns of racketeering; (2) the identity

of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the corrupt activity took place." *United States v. Marren,* 890 F.2d 924 (7th Cir. 1989); *see also United States v. Sertich,* 95 F.3d 520 (7th Cir. 1996). When the answers to each of these questions point in the same direction, the court must find that there is just one pattern of racketeering and the conspiracies had essentially the same object. In such a case, it would violate double jeopardy to bring a second prosecution.

It may help in this case to compare the first and second prosecutions using a table, beginning with Calabrese's case. It is undisputed that the time and location of his earlier indictment are completely subsumed within the present one. I thus focus on the parts of the indictment summarizing the offenses charged:

Calabrese	1995 Indictment	2005 Indictment
Enterprise	"The Calabrese Street Crew was part of a larger criminal organization known to the public as 'the Mob,' and to its members and associates as 'The Outfit.'"	"The Chicago Outfit was known to its members and associates as 'the Outfit' and was also known to the public as 'organized crime,' the 'Chicago Syndicate' and the 'Chicago Mob.'"

Purpose	"The Calabrese Street Crew existed: (1) to generate income for its members through illegal activities, and (2) to cover up and to conceal evidence of the crew's involvement in illegal activities after commission of those illegal acts."	"The Chicago Outfit existed to generate income for its members and associates through illegal activities."
Activities	"The illegal activities of the crew included, but were not limited to: (1) making loans to individuals at usurious rates of interest [juice loans] . . . (2) 'collecting' through 'extortionate means' juice loans constituting 'extensions of credit,' . . . (3) collecting debts incurred in the crew's juice loan business, . . . (4) using threats, violence and intimidation to collect juice loan debts and to discipline crew members; (5) devising a scheme to defraud and to obtain money and property by	"The illegal activities of the Chicago Outfit included, but were not limited to: (1) collecting 'street tax,' that is, extortion payments required as the cost of operating various businesses; (2) the operation of illegal gambling businesses, which included sports bookmaking and the use of video gambling machines; (3) making loans to individuals at usurious rates of interest [juice loans]; (4) 'collecting' through 'extortionate means' juice

	means of false and fraudulent representations through the use of the mails; and (6) tampering with witnesses to, and victims of, the crew's illegal activities."	loans constituting 'extensions of credit' . . . (5) collecting debts incurred in the Chicago Outfit's illegal gambling business . . . (6) collecting debts incurred in the Chicago Outfit's juice loan business . . . (7) using threats, violence, and intimidation to collect street tax and juice loan debts; (8) using threats, violence, and intimidation to discipline Chicago Outfit members and associates; (9) using murder of Chicago Outfit members, associates and others to advance the interests of the Chicago Outfit's illegal activities; (10) obstructing justice and criminal investigations by . . . murdering

		witnesses . . . and (11) traveling in interstate commerce to further the goals of the criminal enterprise."

These quotations from the two indictments demonstrate that the only difference between the earlier and the later one is that the second contains a wider array of alleged criminal activity. But federal courts use a "same offense" test for double jeopardy purposes, not a "same evidence" or even a "same allegation" test. *United States v. Dixon,* 509 U.S. 688, 696 (1993). Thus, if the *pattern* of activity is the same, even if there are some difference in detail, this points to a finding of "same offense."

Here, the second indictment adds to the first's list of the Outfit's illegal activities and in some respects is more specific. It offers more detail about the street tax and illegal gambling operations, and it squarely accuses the defendants of committing murder in furtherance of their illegal conspiracy. Obviously, murder is as serious a charge as can be made, but the addition of murder to the list does not change the nature of the offense with which these defendants were charged: RICO conspiracy. Although the government and majority focus on murder as the key distinguishing feature, they overlook the fact that the earlier indictment accused Calabrese of being responsible for highly violent activity against both Outfit

members and witnesses. When the federal government later uncovers additional evidence of discrete acts of such violence, it is free to prosecute Calabrese for those acts (assuming that a federal statute covers them) or assist state authorities in a state prosecution, but it cannot reprosecute him for the *agreement* he made with the Outfit to engage in that pattern of conduct just because it finds evidence of ever more heinous actions in support of that agreement. It is worth noting that if the earlier charge had been a substantive one accusing Calabrese of extortion, and the new indictment charged him with the substantive offense of murder, the situation would be entirely different: those are two different offenses. Indeed, the government might this time around have been able to prosecute one or both of these defendants for conspiracy to commit murder for the purpose of gaining entrance to or maintaining a position in an enterprise engaged in racketeering, in violation of 18 U.S.C. § 1959(a). *See Basciano,* 599 F.3d at 198-99 (holding that a conspiracy to violate Section 1959 is not the same offense as a conspiracy to violate Section 1962). But that is not the choice that it made.

The overlap in Marcello's two indictments is even greater. Calabrese's second indictment differed slightly from the first because it contained more detailed references to illegal gambling, street tax, and the additional allegations of specific murders. Marcello's first indictment is even closer to the second because the first referred to illegal gambling and attempted murder. And because Marcello went to trial in both

the earlier and present cases, the evidence presented at his trials brings the double jeopardy violation into even sharper view. Crucially, given the majority's current emphasis on the murder evidence, the government *also* presented evidence about the commission of six murders at Marcello's first trial. Finally, in both of Marcello's trials the government elicited testimony that implicated the *same* nineteen people (in addition to the five standing trial) in the Outfit's conspiracy. The current trial had an unmistakable air of *déja vu*.

The majority may well be correct that its hypothetical Ford worker who agrees to manufacture guns at time A could also be convicted of a separate conspiracy if, at time B, he agrees to work at corporate headquarters to conceal the illegal income from guns. *Ante* at 6. To determine whether those two prosecutions would be barred by the Double Jeopardy Clause we would look to the same five-factor test outlined above; if the activities were indeed sequential and did not overlap and the activities were distinct as they seem to be (building guns versus concealing income), there may be no problem with prosecuting the income-concealment conspiracy after gun-manufacturing conspiracy. Unfortunately, that example does not describe this case. Here, the government's charges against Marcello and Calabrese covered the same period of time and the same pattern of racketeering activity. The Outfit's commission of violence and murder was a greater focus of the government's case the

second time around, but it was also a component of the first two prosecutions.

Perhaps the government played its cards too soon by moving ahead with the earlier prosecutions (how could it have known that in 1999 the FBI would rediscover gloves that Nick Calabrese carelessly discarded after the 1986 Fecarotta murder, that the gloves would still have Nick's DNA on them, and that this would lead him to flip), but that is the price that occasionally is exacted by the Double Jeopardy Clause. Conspiracy can reach back almost indefinitely. If the conspiracy itself is a durable one that lasts over many years or even decades, as this one did, the indictment could (as this one did) reach back even to the year in which the distinguished U.S. Attorney for the Northern District of Illinois was born. When the government chooses to use this broad and powerful tool once, however, "its choice has consequences." *Basciano,* 599 F.3d at 203. One of those consequences is refraining from prosecuting the defendant again, for the *same* conspiracy, when it obtains broader evidence of criminal culpability. As I explained in my separate opinion before these trials went forward, I see no difference in the essential agreement that was at issue in the earlier cases and in this case. I would reverse Calabrese and Marcello's convictions on the ground that the present trial has violated their rights under the Double Jeopardy Clause. To this extent, I therefore respectfully dissent.

III

Although I agree with the outcome the majority reaches on the remaining issues, I find two of those questions to be closer than they do, and so I add a few words about them.

A. Voir Dire

All of the defendants except Doyle argue that the district court should have asked the jurors whether they had been exposed to various news articles that were published during the trial. I agree with my colleagues that the district court's decision not to do so does not amount to reversible error. Even if a district court's failure to *voir dire* is error, we reverse only if "there is any substantial likelihood that the defendants were denied a fair trial." *United States v. Balistrieri,* 779 F.2d 1191, 1214 (7th Cir. 1985). Here, even if the jurors had read all of the items the defendants have complained about, it would not have made any difference to them. Things might be different if the news articles had contained references to inadmissible evidence or information going beyond the horrific account to which the jurors were exposed during the trial, but I am satisfied that those problems did not arise.

My concern is over the district court's wholesale refusal to explore the jurors' exposure to outside publicity. My colleagues find no problem with that and so do not need to reach the issue of harmless error; I am not so sure. When a defendant's notoriety

"guarantee[s] extensive press coverage," *ante* at 14, it is imperative that the court be ready to make use of the limited two-step *voir dire* process we established in *Margoles v. United States,* 407 F.2d 727, 735 (7th Cir. 1969), to ensure that the trial is fair. *Voir dire* helps to guarantee that a trial's outcome is determined by events inside the courtroom, not what is going on outside in the court of public opinion. Since *Margoles,* we have repeatedly told district courts that when "prejudicial publicity is brought to the court's attention during a trial . . . the court *must* ascertain if any jurors who had been exposed to such publicity had read or heard [it]." *United States v. Trapnell,* 638 F.2d 1016, 1022 (7th Cir. 1980) (emphasis added). This is not meant to be a burdensome procedure; only when a juror admits that she has read or heard the item in question must the court go on to examine that juror about the publicity's effect. *Id.* Far from insulting the jurors, asking a simple question about whether they have read or heard an item reiterates the importance of the court's instruction to avoid the news, and thus communicates to the jury the court's respect for the fair trial rights of the accused. For a court to refuse to conduct *voir dire* even *once* in the course of a sensitive and lengthy trial with extensive media coverage, especially after defendants brought to light some articles that were borderline prejudicial (such as the op-ed telling jurors they were "stupid" if they did not convict), was a move that could have undermined the whole trial. A court should not risk jeopardizing the outcome of the trial by failing even to check that jurors were following the instructions.

The fact that the gamble worked here, and that the record does not support a finding of prejudicial error, is not enough to commend this practice.

B. Marcello's Voice Identification Expert

Finally, I do not believe the district court's decision to exclude expert testimony on the reliability of voice identification evidence was correct, although I agree with my colleagues that it does not require reversal.

Marcello was accused of murdering Michael Spilotro. Spilotro's daughter, Michelle, testified that on the day of her father's murder, a man called their home and asked to speak to him. She testified that the same person had regularly called her father. Three years after Spilotro's death, Michelle listened to a "voice lineup" put together by the FBI. The first five voices on the tape were those of officers reading a sample piece of text; the last was Marcello's. Michelle picked Marcello's voice as the one she remembered hearing on the day of her father's death. At trial, she told the jury that she was "100 percent sure" it was Marcello's voice she had heard on the phone.

Marcello sought to have an expert, Dr. Daniel Yarmey, testify about the reliability of voice identification. Dr. Yarmey is a professor of psychology who has conducted extensive research in the areas of memory; he has investigated voice identification in particular. His testimony would have done much more than tell jurors "voice identifications frequently

are mistaken." *Ante* at 13. He was prepared to educate the jury about error rates associated with voice identification – in some studies, misidentification rates were as high as 45% – and the factors that affect the reliability of voice lineups. Dr. Yarmey had also conducted his own evaluation of the lineup that Michelle Spilotro had heard. He recruited 157 undergraduates at his university to listen to the lineup, evaluate it using a number of factors, and try to identify the suspect's voice. The listeners were able to do so at a rate that exceeded pure chance.

The district court refused to admit this expert testimony, not because of any deficiencies in Dr. Yarmey's qualifications, but because the district court believed that this information was something the "jury knows anyway." The court also assessed the voice lineup on its own and concluded that there was "nothing about the difference [between Marcello's voice and the others] that would suggest to a hearer, to a listener, that one or the other was actually the suspect."

Even though our review of a district court's decision not to admit expert testimony is deferential, *see United States v. Carter,* 410 F.3d 942, 950 (7th Cir. 2005), in my view the district court's refusal to admit Dr. Yarmey's testimony was a mistake. In recent years, courts have become more aware of the reality that human memory is not necessarily reliable. A study of 200 wrongful convictions revealed that 79% rested in part on mistaken eyewitness identifications. Brandon L. Garrett, *Judging Innocence,* 108 COLUM.

L. REV. 55, 60 (2008). This does not mean that courts must impose a blanket ban on such testimony, but it is critical to be cautious. We cannot ignore the power that a witness's claim to be "100% sure" may have on a jury, nor can we ignore that such witnesses are sometimes, unfortunately, mistaken. The Supreme Court recently emphasized that one tool that courts can use to ensure juries do not give such testimony more weight than it is worth is to allow "expert testimony on the hazards of eyewitness identification." *Perry v. New Hampshire,* 132 S. Ct. 716, 729 (2012). As Dr. Yarmey's resarch [sic] shows, a witness's voice memory is not exempt from the sort of problems that we more commonly associate with a witness's vision; just as with eyewitness identification, expert testimony on the reliability of voice identification reveals vulnerabilities that lie outside the range of common knowledge.

The district court's decision not to admit Dr. Yarmey's testimony evinces a misunderstanding of the purpose of expert testimony on the reliability of a witness's memory. As we explained in *United States v. Bartlett,* expert testimony should not be kept out simply because a court believes "jurors know from their daily lives that memory is fallible." 567 F.3d 901, 906 (7th Cir. 2009). That may be true, but "[t]he question that social science can address is *how* fallible," *id.,* and thus how deeply the jury might wish to discount any given identification. "That jurors have beliefs about this does not make expert evidence irrelevant; to the contrary, it may make such evidence

vital, for if jurors' beliefs are mistaken then they may reach incorrect conclusions. Expert evidence can help jurors evaluate whether their beliefs about the reliability of eyewitness testimony are *correct*." *Id.* As is clear from the district court's remarks in this case, the court itself held beliefs about the reliability and suggestiveness of the voice lineup that are belied by the expert's conclusions. As far as we know, the jurors shared these misconceptions. This case thus highlights why it is critical for jurors to hear expert testimony in order to be able correctly to evaluate a witness's memory. Just because courts have routinely admitted laywitness identification in the past is no reason to continue to do so without skepticism, in light of modern research showing the fallibility of such identifications. When a court does admit such identification testimony, expert testimony will often be necessary to enable jurors to properly evaluate its reliability.

I do not believe, however, that this error warrants reversal of Marcello's conviction. Even if Michelle Spilotro had not testified, there was ample additional evidence – notably Nick Calabrese's testimony – that implicated Marcello in Spilotro's murder. The error was therefore harmless.

* * *

In conclusion, I would affirm (with the minor adjustment for Doyle's restitution obligation discussed in the majority's opinion) the convictions and sentences of Joseph Lombardo, Paul Schiro, and

Anthony Doyle. I would reverse the convictions of Frank J. Calabrese, Sr., and James Marcello, on the ground that this prosecution violated each man's rights under the Double Jeopardy Clause. To that extent, I respectfully dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, v. JAMES MARCELLO, *et al.*	No. 02 CR 1050-2 Judge James B. Zagel

MEMORANDUM OPINION AND ORDER

(Filed Sep. 10, 2008)

I. BACKGROUND

The Government charged James Marcello, Frank Calabrese, Sr. and several other individuals with conducting the affairs of a criminal enterprise known as The Chicago Outfit. Specifically, Defendants were accused of conspiring to engage in the affairs of a racketeering enterprise in violation of 18 U.S.C. § 1962(d). Defendants Marcello and Calabrese, Sr. filed motions to dismiss claiming that the indictment placed them in double jeopardy. Mr. Marcello so claimed because he was convicted in 1993 with conspiring to conduct the affairs of the Carlisi Street Crew. Mr. Calabrese, Sr. claimed that this indictment places him in double jeopardy because he pleaded guilty in 1997 to conspiring to conduct the activities of the Calabrese Street Crew. Following my denial of their motions to dismiss, Messrs. Marcello and Calabrese, Sr. filed an interlocutory appeal. The Seventh Circuit affirmed my denial. *United States v. Calabrese*, 490 F.3d 575 (7th Cir. 2007). After the trial, Messrs. Marcello and

Calabrese, Sr. renewed their motions to dismiss Count One.[1]

II. THE CHICAGO OUTFIT IS A DIFFERENT CONSPIRACY THAN THE CARLISI AND/OR THE CALABRESE STREET CREWS

Judge Posner, writing for the majority, held that the indictment did not offend the double jeopardy clause. *Calabrese*, 490 F.3d at 578-81. The court explicitly held that "[t]he two conspiracies in this case are two separate offenses." *Id.* at 579. The court indicated just how separate it considered the conspiracies to be when it opined that "[e]ven if the predicate acts in the previous and present prosecutions were identical and the enterprises were under common control, separate prosecutions might not be barred." *Id.* The court could not have been clearer than when it stated "the defendants are . . . charged with a different conspiracy from what was charged in their previous prosecutions." *Id.*

The import of all this is that to the extent Messrs. Marcello and Calabrese, Sr. are attempting to reconsider the question of whether the overlap in the conspiracies leads to a double jeopardy problem, their efforts are unavailing. The Seventh Circuit has already ruled on that question. The court conclusively determined that whatever relatedness may exist

[1] The motions became fully briefed on July 11, 2008.

between the conspiracies, it is not substantial enough to place Messrs. Marcello and Calabrese, Sr. in double jeopardy.

III. POST-TRIAL RECONSIDERATION TO FOCUS ON OVERLAP IN EVIDENCE

The court of appeals did acknowledge, however, that a double jeopardy problem could, potentially, develop if there was too much overlap between the evidence the Government used to prosecute this case and the evidence it used to prosecute the earlier cases. *Id.* at 580 ("As the overlap between two prosecutions of the same person grows, however, the characterization of the two proceedings as charging separate criminal acts becomes less convincing."). The court theorized that a double jeopardy problem might exist if "at the trial of the defendants under the new indictment the only predicate acts the government is able to prove are the acts that it proved against Marcello its first prosecution of him and that Calabrese acknowledged as part of his guilty plea in his first prosecution. . . ." *Id.* at 580.[2]

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[2] Even if the evidence were the same, though, a double jeopardy problem would not necessarily exist. In such a scenario, the Government – to ensure that there was no double jeopardy problem – would have to go on to prove "that the later conspiracy had as an objective not involved in the earlier conspiracies to enrich or otherwise advance objectives of the Outfit that were distinct from the objectives of the street crews." *Calabrese*, 490 F.3d at 580. I read Judge Posner's opinion as holding that if the

(Continued on following page)

The court held that the defendants could re-raise their double jeopardy claims after the trial. *Id.* at 580-81. The court made clear, however, that the proper way to analyze the issue in a post-trial situation was to compare the evidence the Government used in the earlier prosecutions with the evidence it used in this case. *Id.*[3] The court suggested that a double jeopardy problem could develop "if the evidence presented by the government at the new trial differs only trivially from the evidence upon which Calabrese's and Marcello's previous convictions were based." *Id.* at 580.

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evidence is *not* the same, then we need not reconsider whether "the later conspiracy had as an objective not involved in the earlier conspiracies to enrich or otherwise advance objectives of the Outfit that were distinct from the objectives of the street crews." *Id.*

[3] Again, this is because the court decided that, on the papers, the Chicago Outfit is a separate conspiracy from the Carlisi Street Crew, and a separate conspiracy from the Calabrese Street Crew. What the panel left open was the possibility, however, that a double jeopardy problem could emerge if the Government sought to prove Mr. Marcello's participation in the Chicago Outfit via the same evidence it used to prove his participation in the Carlisi Street Crew, and if it sought to prove Mr. Calabrese, Sr.'s participation in the Chicago Outfit via the same evidence it used to prove his participation in the Calabrese Street Crew. The court suggested that overlap could pose a problem if we reached a point where "the differences [between the two prosecutions] are minor and it seems that the government contrived the differences to evade the prohibition against placing a person in double jeopardy." 490 F.3d at 580.

IV. EVIDENCE IN THIS TRIAL REVEALS MORE THAN FORMAL DIFFERENCE

Upon comparing the evidence presented in this trial with the evidence used against Messrs. Marcello and Calabrese, Sr. in their prior prosecutions, it is clear that there is not sufficient overlap such that a double jeopardy problem emerged.

A. Mr. Marcello

There was considerable variance between the evidence used to convict Mr. Marcello previously, and the evidence used to convict him in this case. The Government proved Mr. Marcello's involvement in the Carlisi Street Crew by pointing to evidence related to sports book-making, extortionate loans, the attempted extortion of a theater owner, the conspiracy to murder Anthony Daddino, and the collection of street tax from Kenton Pilet's card game. By contrast, the Government proved Mr. Marcello's involvement in the Chicago Outfit by relying on evidence of the murders of Anthony Spilotro, Michael Spilotro, and Nicholas D'Andrea; the collection of street tax from the Celozzi-Ettelson dealership; illegal gambling through M&M Amusements; and obstruction of justice related to Mario Rainone, Connie Marcello, and Nicholas Calabrese. This does not constitute sufficient overlap such that a double jeopardy problem emerged.

In his reply brief, Mr. Marcello attempts to argue that there was substantial overlap between the evidence used in the two convictions. For instance, he

points out that there was sports bookmaking, extortionate extensions of credit, "street tax," and murder involved in both prosecutions. There are two reason why Mr. Marcello's arguments are unpersuasive. First, there is a finite list of illegal activities in which organized crime operations like the ones involved here engage. Therefore, pointing out, for instance, that "street tax" was involved in both cases is not probative of whether or not the Government is attempting to convict him here with the same evidence it used in 1995. In order to prevail, Mr. Marcello would have had to demonstrate that the Government was seeking to convict Mr. Marcello now by referring to *the same illegal acts* (i.e., not just the same type of conduct, but the same discrete acts) that it used to convict him of participating in the Carlisi Street Crew. He has failed to do so.

Second, the existence of *some* overlap between the two prosecutions is not enough to merit dismissal of Count One. No one suggests that the Carlisi and Calabrese Street Crews were or are totally unrelated to the Chicago Outfit. Furthermore, the Seventh Circuit acknowledged that there was some overlap, noting that the defendants here are "charged with having conspired to conduct the affairs of the parent (the Outfit) by acts that are not identical to the acts charged in the first set of prosecutions, *though there is overlap*." *Id.* at 579 (emphasis added). The question is not whether or not there is overlap, but whether the overlap in the evidence is so great that there is "a merely formal difference . . . between the successive

prosecutions." *Id.* at 580. There was sufficient variance between the evidence used in the two prosecutions to merit a finding that there were more than "mere formal differences."

B. Mr. Calabrese, Sr.

The predicate acts and evidence upon which the Government relied to convict Mr. Calabrese, Sr. in this case were different than the predicate acts and evidence upon which Mr. Calabrese, Sr.'s 1997 guilty plea was based. There was an assortment of evidence against Mr. Calabrese, Sr. in this trial that was not involved in his 1997 guilty plea, including the extortion of James Stolfe/Connie's Pizza, the attempted obstruction of justice relating to Mr. Stolfe's grand jury testimony, various illegal gambling activities (including bookmaking), and the attempted obstruction of justice relating to the John Fecarotta homicide. Furthermore, and most obvious, the 2007 case focused a great deal of attention on the murders of Michael Albergo, Michael Cagnoni, William Dauber, Charlotte Dauber, Richard Ortiz, Arthur Morawski, and John Fecarotta.[4] In his 1997 plea agreement, Mr. Calabrese, Sr. did not admit to any attempted or completed murders.

In short, while both cases contained some evidence about "street tax," extortionate extensions of

[4] The Government presented evidence of other alleged murders, but these are the ones for which the jury found Mr. Calabrese, Sr. responsible.

credit, and witness tampering, the Government did not seek to prove Mr. Calabrese, Sr.'s involvement with the Chicago Outfit by relying on the same evidence that undergirded Mr. Calabrese, Sr.'s 1997 guilty plea.

V. CONCLUSION

I have compared the evidence the Government used to convict Messrs. Marcello and Calabrese, Sr. in this trial with the evidence that was used to convict Mr. Marcello in 1995, and with the evidence that formed the basis for Mr. Calabrese, Sr.'s guilty plea in 1997. I find that the Government did not seek to rely on the same illegal acts that it used to convict Mr. Marcello, and to which Mr. Calabrese, Sr. admitted as part of his plea.[5] Accordingly, I find that no double jeopardy problem arose during the trial. The motions to dismiss Count One on double jeopardy grounds are DENIED.

ENTER:

/s/ James B. Zagel
James B. Zagel
United States District Judge

DATE: September 10, 2008

[5] Judge Wood, in her partial dissent, offered a different framework for examining these issues. In my view, even under the framework she suggests, there was enough evidence to convict Mr. Marcello and Mr. Calabrese, Sr. under Count One based upon their conduct after 1990 and 1992, respectively.

490 F.3d 575

United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Frank J. CALABRESE, Sr., and James Marcello, Defendants-Appellants.
Nos. 07-1962, 07-1969.

Argued May 29, 2007.
Decided June 12, 2007.

Mitchell A. Mars (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Joseph R. Lopez (argued), Michael W. Martin, Chicago, IL, for Defendants-Appellants.

Before POSNER, WOOD, and SYKES, Circuit Judges.

POSNER, Circuit Judge.

Two defendants in a pending RICO prosecution for conspiracy to conduct an enterprise's affairs through a pattern of racketeering activity, 18 U.S.C. § 1962(d), appeal from the denial of their motion to dismiss the indictment. They contend that the trial, scheduled to begin on June 19, will place them in double jeopardy.

Marcello's claim is based on a 1992 indictment charging him and eight others with conspiring to conduct the affairs of the Carlisi Street Crew by means of numerous illegal acts between 1979 and 1990 – acts such as extortion, intimidation, arson, conspiracy to commit murder, usury, witness tampering, and

efforts to collect unlawful gambling debts. Such acts, if proved, are "predicate acts" two or more of which establish the "pattern of racketeering activity" required for a violation of RICO. Marcello was convicted in 1993 and sentenced to 150 months in prison, and his conviction was affirmed in *United States v. Zizzo,* 120 F.3d 1338 (7th Cir.1997). Calabrese, the other appellant, was charged in a 1995 indictment, together with six others, with participation in a similar conspiracy, though the offense period was 1978 through 1992 and the enterprise was a different street crew – the Calabrese Street Crew. Calabrese pleaded guilty in 1997 and was sentenced to 118 months in prison. He did not appeal.

The two street crews are components of the "Chicago Outfit," the lineal descendant of Al Capone's gang, http://en.wikipedia.org/wiki/Chicago-Outfit (visited June 1, 2007). The new indictment charges our two defendants, along with seven others only one of whom was a defendant in the previous prosecutions, with conspiring to conduct the affairs of the Chicago Outfit itself through a pattern of racketeering activity. The offense period runs from the 1960s to 2005 and thus overlaps the periods of the conspiracies with which Calabrese and Marcello had previously been charged. The predicate acts alleged include some of the criminal acts charged in the earlier indictments but also a number of criminal acts that were not charged, including many murders, usurious loans, incidents of witness tampering and other obstructions of justice, and travel in interstate commerce for the

purpose of accomplishing the Outfit's criminal objectives. Some of the predicate acts occurred after the offense periods charged in the earlier prosecutions, but others occurred before or during those periods.

The purpose of the Fifth Amendment's double jeopardy clause is to prevent the government from harassing people by prosecuting them for the same conduct that was the subject of a prior prosecution. The purpose is most strongly engaged when the prior prosecution resulted in an acquittal; for then, were it not for the double jeopardy defense, the government could keep retrying the defendant until a jury convicted him – with enough throws of a pair of dice the desired combination is bound to appear eventually. Even when the initial prosecution is successful, allowing the government to prosecute the defendant again for the same crime, perhaps long after he has been released from prison, would result in punishment beyond what the law allows. For even if the defendant received the same sentence and it was made to run concurrently with the sentence imposed in the first prosecution, he would have been subjected to the burden of a second trial. That is why our two defendants can appeal from the denial of their motion to dismiss the indictment rather than having to wait until conviction and sentence to appeal. *Abney v. United States,* 431 U.S. 651, 659-62, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *Green v. United States,* 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). "The burden of a second trial is one of the harms that the double-jeopardy clause is intended to prevent, and [it

is] a harm that (unlike the harm of conviction) is irreparable once the second trial has been conducted." *Reimnitz v. State's Attorney of Cook County,* 761 F.2d 405, 410 (7th Cir.1985).

The government may not bring a second prosecution under a statute the elements of which are included in the elements of the statute under which the defendant was previously prosecuted. *United States v. Dixon,* 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); *United States v. Olmeda,* 461 F.3d 271 (2d Cir.2006); *see Rutledge v. United States,* 517 U.S. 292, 297-98, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996); *Blockburger v. United States,* 284 U.S. 299, 303-04, 52 S.Ct. 180, 76 L.Ed. 306 (1932). And so it may not, for example, charge him in the second prosecution with having attempted to murder someone, when in the first case he had been charged with murdering the person. Cf. *United States v. Luskin,* 926 F.2d 372, 377-78 (4th Cir.1991). For the proof that the government would have had to present to establish his guilt of murder would, without more, establish attempted murder as well.

This case is different because the statutory offense charged is the same one as in the previous prosecutions, and the question is simply how great a difference there is between the conduct charged in the previous prosecutions and in the present one. As regards the predicate acts charged in the present indictment that occurred after the offense periods in the earlier ones, there can be no question of double jeopardy. For those acts show that the defendants

continued conspiring after the previous prosecution. And there is no suggestion that the government, knowing that the defendants were continuing to engage in criminal acts up to the date of their arrests or indictments, backdated the offense periods so that if the prosecutions failed the defendants could be prosecuted on the basis of acts they committed after those offense periods. The double jeopardy clause deprives the prosecution "of an opportunity . . . to supply evidence at a successive trial that it failed to present the first time around." *United States v. Estrada,* 320 F.3d 173, 180 (2d Cir.2003). Otherwise there would be "concern that the government may be free to pursue successive prosecutions under RICO by merely alleging two predicate acts – sufficient to establish a pattern of racketeering activity under 18 U.S.C. § 1961(5) – and, by holding in reserve other predicate acts, bring future RICO prosecutions against participants in the same enterprise." *United States v. Russotti,* 717 F.2d 27, 34 (2d Cir.1983).

The concern of the defendants in this case is different. It is that some of the predicate acts in the new indictment were predicate acts in the old ones. And so the defendants ask us, if we are unwilling to order the entire indictment thrown out, at least to order it trimmed to eliminate the overlap.

The argument misunderstands the actual charge in the indictment. The defendants are not being charged with murder, or arson, or intimidation, etc. They are being charged with participating in a conspiracy to operate an enterprise by means of criminal

acts that include murder, arson, intimidation, etc. The enterprise is the Chicago Outfit, and insofar as is known at this time, it is a different enterprise from the Carlisi and Calabrese street crews. *United States v. Langella,* 804 F.2d 185, 189 (2d Cir.1986). Were it the same enterprise, we would have a different case. *United States v. DeCologero,* 364 F.3d 12, 17-18 (1st Cir.2004). But it is not, and that is critical.

To illustrate, suppose the defendants were officers of a corporation and also members of the board of directors of a wholly owned subsidiary of the corporation, and they agreed to conduct the affairs of the wholly owned subsidiary through a pattern of racketeering activity and the affairs of the parent corporation through a pattern of racketeering activity as well. These would be different conspiracies and hence different crimes even if the acts constituting the pattern of racketeering activity overlapped. *See id.* at 18; *United States v. Ciancaglini,* 858 F.2d 923, 928 (3d Cir.1988); *United States v. Langella, supra,* 804 F.2d at 188-90; *United States v. Ruggiero,* 754 F.2d 927, 934 n. 15 (11th Cir.1985). Prosecutors often have a choice between charging a single conspiracy or multiple conspiracies when dealing with members of a loose-knit, reticulated criminal enterprise. E.g., *United States v. Reiter,* 848 F.2d 336, 340-41 (2d Cir.1988); *United States v. Ingman,* 541 F.2d 1329, 1330-31 (9th Cir.1976) (per curiam). What the government may not do is "reprosecute a defendant *for the same offense* whenever it obtains broader evidence of criminal culpability." *United States v. Thornton,*

972 F.2d 764, 765 (1992) (emphasis added). But the two conspiracies in this case are two separate offenses.

Even if the predicate acts in the previous and present prosecutions were identical and the enterprises were under common control, separate prosecutions might not be barred. If a defendant drives two of his friends to an intersection where there are two banks, and each friend robs one of the banks, the driver could be prosecuted twice for two different offenses of aiding and abetting bank robbery, even though he drove only once. For he would have committed two separate offenses, and in *United States v. Dixon, supra,* 509 U.S. at 704, 113 S.Ct. 2849, the Supreme Court made clear that that is the test. *See also United States v. Hatchett,* 245 F.3d 625, 639-40 (7th Cir.2001). Or suppose in our hypothetical corporate example that the defendants, having been prosecuted for conducting the affairs of the subsidiary by a pattern of racketeering activity, were prosecuted a second time on the theory that by that very conduct they had enriched the parent and so had conducted its affairs as well through a pattern – albeit the same pattern – of racketeering activity. The offenses would not be the same; the second would require proof that the first had not required. *United States v. Kimbrew,* 406 F.3d 1149, 1152 (9th Cir.2005); *see United States v. Dixon, supra,* 509 U.S. at 700-02, 113 S.Ct. 2849; *United States v. Hatchett, supra,* 245 F.3d at 639-40. It would be just like our hypothetical robbery case. In this case the defendants are not only charged with a different conspiracy from what was charged in their

previous prosecutions, but also charged with having conspired to conduct the affairs of the parent (the Outfit) by acts that are not identical to the acts charged in the first set of prosecutions, though there is overlap. *United States v. Ciancaglini, supra,* 858 F.2d at 925-26.

Corporate analogies are appropriate because the Chicago Outfit is a substantial commercial firm, albeit an illegal one (yet it has outlasted many a legal firm). Of course, being an illegal enterprise, it cannot have formal subsidiaries, but if the street crews are functional subsidiaries, that should suffice for purposes of analyzing a double jeopardy defense. It would be beyond paradoxical if by virtue of their employers' being forbidden by law to form subsidiaries, the employees of criminal enterprises obtained broader rights under the double jeopardy clause than the employees of legal ones.

Civil analogies are also appropriate, given the resemblance between double jeopardy and res judicata. Imagine, then, successive suits for copyright infringement. The first is against the publisher of an abridged book that copies passages from the plaintiff's copyrighted work, and the suit names the publisher's employee who did the actual copying as an additional defendant. The second suit complains about an unabridged edition of the same book, which copies those passages plus others and which was published at the same time as the abridged edition but by the parent of the publisher of that edition, and names the same employee as an additional defendant

because he either is employed by both the parent and the subsidiary or moved between them, copying the plaintiff's work for the editions published by his successive employers. The second claim against the employee would not be barred by res judicata despite the overlap, cf. *Realex Chemical Corp. v. S.C. Johnson & Son, Inc.,* 849 F.2d 299, 303 (8th Cir.1988), and the same thing is true in this case with respect to double jeopardy.

As the overlap between two prosecutions of the same person grows, however, the characterization of the two proceedings as charging separate criminal acts becomes less convincing. Finally a point is reached at which the differences are minor and it seems that the government contrived the differences to evade the prohibition against placing a person in double jeopardy. For while the government is not required to charge in its first prosecution of a person all the possible offenses that the facts in the government's possession would enable it to charge (as in our robbery case), *United States v. Dixon, supra,* 509 U.S. at 704-05, 113 S.Ct. 2849, it can still be precluded from bringing "a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts." *Id.* at 705, 113 S.Ct. 2849; *see United States v. DeCologero, supra,* 364 F.3d at 18; *United States v. Lopez,* 356 F.3d 463, 467 (2d Cir.2004) (per curiam); *United States v. Ciancaglini, supra,* 858 F.2d at 930. But we are not at that point in this case, and this apart from the fact that the government did not lose the previous cases.

At least we are not at that point yet. For suppose that at the trial of the defendants under the new indictment the only predicate acts the government is able to prove are the acts that it proved against Marcello its first prosecution of him and that Calabrese acknowledged as part of his guilty plea in his first prosecution, and the government's defense to the claim of double jeopardy is merely that when the two defendants were committing illegal acts on behalf of their respective street crews, they were simultaneously committing those acts on behalf of the Outfit, the crews' parent. That would be a merely formal difference (like saying they were committing the acts on behalf of their families, whom they hoped to enrich) between the successive prosecutions, unless the government went on to prove that the later conspiracy had as an objective not involved in the earlier conspiracies to enrich or otherwise advance objectives of the Outfit that were distinct from the objectives of the street crews. But the appeals are from the denial of the motion to dismiss the indictment, not from judgment after trial. We have no basis at this preliminary stage for thinking that the government will fail to prove separate conspiracies. *United States v. Flick,* 716 F.2d 735, 738-39 (9th Cir.1983).

It will be a more difficult case if the evidence presented by the government at the new trial differs only trivially from the evidence upon which Calabrese's and Marcello's previous convictions were based. (This is conceivable because the five-year statute of limitations applicable to RICO prosecutions, 18

U.S.C. § 3282; *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* 483 U.S. 143, 155-56, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987), does not bar conviction for a RICO conspiracy involving predicate acts committed more than five years before the prosecution was commenced, provided the conspiracy continued into the limitations period. E.g., *United States, v. Yashar,* 166 F.3d 873, 875-76 (7th Cir.1999); *United States v. Gonzalez,* 921 F.2d 1530, 1547-48 (11th Cir.1991); *United States v. Bortnovsky,* 879 F.2d 30, 36 n. 11 (2d Cir.1989).) With the tail thus wagging the dog, a conviction would be in jeopardy of placing the defendants in double jeopardy, a conclusion that many cases would reach by application of a five-factor or "totality of the circumstances" test that amounts to asking how much the two prosecutions overlap. E.g., *United States v. Sertich,* 95 F.3d 520, 524 and n. 1 (7th Cir.1996); *United States v. Ciancaglini, supra,* 858 F.2d at 927; *United States v. Russotti, supra,* 717 F.2d at 32-34 (2d Cir.1983). At this stage, we cannot know how great the overlap will be, and so we have no basis for forbidding the trial to go forward. But "if it becomes clear from the trial that [the defendant] is being prosecuted twice for the same conspiracy, he is free to raise such arguments after trial if he is convicted on the RICO conspiracy count." *United States v. Solano,* 605 F.2d 1141, 1145 (9th Cir.1979); *see also United States v. Flick, supra,* 716 F.2d at 738; *United States v. Stricklin,* 591 F.2d 1112, 1119 (5th Cir.1979); *United States v. Young,* 503 F.2d 1072, 1077 n. 17 (3d Cir.1974). All three of the judges on this panel agree that the defendants must stand trial again; the

incremental burden of having to litigate with reference to some acts that may have been involved in the earlier prosecutions is therefore likely to be modest.

Affirmed.

WOOD, Circuit Judge, concurring in part and dissenting in part.

Fifteen years and twelve years ago respectively, James Marcello and Frank Calabrese, Sr., were indicted under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d), for conspiring to engage in a pattern of racketeering activity through an enterprise. The enterprise in question for Marcello was the "Carlisi Street Crew," which was specifically alleged to be "part of a larger criminal organization known as 'the mob' or 'the Outfit.'" Paragraph 4 of the indictment charged that "the 'boss' of the Crew was ultimately responsible to the head of the Outfit and was required to ensure that the leadership of the Outfit received a share of the proceeds from the Crew's activities." Paragraph 5(b) went on to allege that Marcello served as a go-between for Samuel Carlisi, the head of the Crew, and representatives of other Chicago "Outfit" street crews. In short, the 1992 indictment made it clear that the criminal organization with which Marcello was associated was part and parcel of the Chicago Outfit. The same picture emerges from the 1995 indictment against Calabrese. It, too, asserts in paragraph 1 that "[t]he Calabrese Street Crew was part of a larger criminal

organization known to the public as 'the Mob,' and to its members and associates as 'The Outfit.'" Frank Calabrese, Sr., according to paragraph 3(a) of the indictment, "resolved disputes both within the Calabrese Street Crew and between that crew and other organized crime street crews," and he "represented the Calabrese Street Crew in meetings with members of other organized crime crews."

In the indictment now before us, both Marcello and Calabrese have been charged once again with participating in a RICO conspiracy in violation of 18 U.S.C. § 1962(d). This time, the alleged "enterprise" is the Outfit itself, rather than any of its constituent parts. There is also a temporal difference between the Second Superseding Indictment before us, which was returned by the Special August 2003-2 Grand Jury on June 2, 2005, and the earlier two indictments. It covers more than forty years, "[f]rom approximately the middle of the 1960s through the date of the return of this indictment." Marcello's earlier indictment spanned the time period from approximately 1979 through "at least" May 1990, and Calabrese's specified the period from 1978 through April of 1992. Finally, although (as the government concedes) some of the predicate acts supporting the RICO charge are the same as the ones alleged in the two men's earlier indictments, the 2005 indictment asserts many more.

In the interest of a prompt decision in this case, I do not wish to belabor the points I am making here. In brief, however, I do agree with the majority in one significant respect. As they note, *ante* at ___, there

can be no question of double jeopardy for acts that took place as part of the continuation of the conspiracy after the time periods covered by the earlier indictments. No matter what, therefore, these defendants are not entitled to avoid altogether the trial that is scheduled to begin soon. The more difficult question is whether the government is entitled to rely on predicate acts that were committed during the time periods for which Marcello and Calabrese have already stood trial and been convicted, whether or not those acts were identified earlier as support for the earlier RICO conspiracies. The defendants are correct to emphasize, in this connection, that they were found guilty (by jury and by plea) of conducting a RICO conspiracy, not of committing a series of discrete criminal acts. They freely concede that there would be no double jeopardy problem if the government wanted to indict them for the substantive crimes reflected in many of the predicate acts, such as murder, money laundering, or fraud.

The majority, by drawing analogies to corporate governance models and the law of copyright, is satisfied that the conspiracy in the present case is not quite the same as the conspiracy charged in the earlier cases. It is willing to give the defendants half a loaf with respect to their double jeopardy defense, by inviting them to renew this motion *after* trial if it turns out that they have been convicted on the basis of evidence that has been recycled from the earlier trials. But, as the majority rightly notes, the Fifth Amendment protects people from twice having to

stand trial for a given offense. *See Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). It is not limited to an *ex post* vindication at the end of a trial.

Perhaps the majority's analogies would be apt, if it were clear that the focus earlier had been exclusively on actions taken respectively by the Carlisi Street Crew and the Calabrese Street Crew. But the earlier indictments show that the charges encompassed the role that the two crews were playing in the larger Chicago Outfit – precisely the enterprise that is alleged in this new case. In *United States v. DeCologero,* 364 F.3d 12, 17-18 (1st Cir.2004), the court explicitly refused to conclude that enterprises resembling those charged in this case were distinct:

> The present indictment charges the defendants with participating in a nominally different enterprise – the "DeCologero Crew" – said by the government to be "a separate entity from the Patriarca La Cosa Nostra ('LCN') Family, yet . . . structured in a similar manner to a crew or regime of La Cosa Nostra" and "aligned with" the Carrozza faction of the Patriarca Family. According to the charge, the DeCologero Crew's aim was "controlling, supervising, and financing illegal activities," including generating money through robbery and drug sales "for the personal use of members . . . and to build up a war chest of firearms, weapons, and ammunition which was to be used, in part, to support the" Carrozza faction.

> If the double jeopardy problem turned solely on whether the two cases involved the same enterprise, we would be faced with a hard question. The RICO statute loosely defines an "enterprise" to include not only any legal entity (*e.g.,* a corporation) but also "any union or group of individuals associated in fact." 18 U.S.C. § 1961(4). Although the DeCologero indictment alleges that the Carrozza faction and DeCologero crew were separate enterprises, the proffered evidence could support the view that both were part of a vertically organized endeavor, with DeCologero somewhere in the middle of the organizational pyramid.
>
> Past cases have stressed that conspiracies cannot be artificially broken up for the purpose of bringing separate cases, *see Braverman v. United States,* 317 U.S. 49, 53, 63 S.Ct. 99, 87 L.Ed. 23 (1942), and there is no reason why the rule should be any different for RICO enterprises. But whether there was one enterprise or two need not be resolved. Every circuit to have examined the issue has agreed that double jeopardy only bars successive RICO charges involving both the same enterprise *and* the same pattern of racketeering activity. In our view the current RICO charges do involve a different pattern than the old.

Id. See also United States v. Ciancaglini, 858 F.2d 923, 929 (3d Cir.1988) ("Because of the overlap, however, we are unable to conclude that this was not the same 'enterprise.' Both indictments involved

Philadelphia-based crime families, and both alleged enterprises with the same goal."). The *DeCologero* court thus ultimately found no double jeopardy problem, but only because "*all* of the [racketeering acts] in the present indictment are different from those charged in the [previous] case." *Id.* at 19 (emphasis in original).

The majority and the government also cite *United States v. Langella,* 804 F.2d 185, 189 (2d Cir.1986), but that case is easily distinguished. Although the court held that "the Colombo Organized Crime Family of La Cosa Nostra" and "the Commission of La Cosa Nostra" were two different enterprises, it carefully explained that "the Commission" is an independent entity with a separate purpose from an individual family of La Cosa Nostra, such as the Colombo family. *Id.* As *Langella* recognized, "The indictment alleged that the Commission was a council of leaders of various organized crime families, 'an enterprise distinct from the individual Families,' established with the special purposes of, *inter alia,* resolving disputes among families and carrying out 'joint ventures' involving more than one family." *Id.* at 187. Indeed, the court signaled that it might feel differently about a case like ours:

> Although the Commission and the Colombo Family, in a sense, are vertically organized segments of an intricate, organized crime structure, the allegations of the two indictments sufficiently demonstrate that they are two separate and independent criminal

> enterprises. *Significantly, the Colombo Family is not merely a lower level of authority within the hierarchy of organized crime: Within its own sphere of operation, the Colombo Family is a self-sufficient enterprise that functions without oversight by the Commission.*

Id. at 189 (emphasis added). The patterns of racketeering charged also distinguish Langella from our case. The *Langella* court began its comparison of the nature and scope of the racketeering charged in the two indictments by stating, "Here, there is *absolutely no overlap of any kind* between the patterns of racketeering activity alleged in the two indictments." *Id.* (emphasis added). No one asserts that the same is true here. As the government candidly conceded at oral argument, "There will be some overlapping proofs with respect to what was covered in the first case . . . "

This court has already held, in *United States v. Thornton,* 972 F.2d 764 (7th Cir.1992), that the government may not bring one narrow charge first and then later bring a broader charge that entirely encompasses the first one:

> The government has taken great pains to emphasize that the conspiracy alleged in the Pennsylvania indictment lasted only a few months, involved many fewer people, and was therefore much smaller in scope than the conspiracy alleged in the Illinois indictment, which involved some forty plus coconspirators, trafficking to numerous states,

> and encompassed a seven-to-nine-year time frame. Moreover, the government emphasized in the hearing before the district judge that the agent involved in the [narrower] Pennsylvania indictment knew nothing about the activities alleged in the [broader] Illinois indictment. It appears that in making such arguments the government is implying that even assuming that the Pennsylvania indictment charged the same conspiracy as the Illinois indictment, there is no double jeopardy problem because the first-charged conspiracy was only a small subset of the later-charged conspiracy and because the government did not know that this was one conspiracy. We must remember, however, the double jeopardy clause imposes limits on a defendant's criminal exposure. In order to stay true to these finality requirements, the government cannot reprosecute a defendant for the same offense whenever it obtains broader evidence of criminal culpability.

Id. at 765. In my opinion, that is what the government is trying to do here, insofar as the charges cover the same time periods as those in the earlier indictments. That is why the majority's bank robbery analogy is inapposite. In that example, the government can certainly bring two separate charges against the driver. But that is because the driver's single act aided the commission of two separate crimes: the robbery of Bank 1 and the robbery of Bank 2. That analogy assumes the answer to the

question before us: whether the government is now charging these defendants with new crimes for which they never stood trial, in which some of the evidence that supported their earlier conviction also underlies the new charges. My response is that we do not have two distinct crimes analogous to the two bank robberies. Instead, the indictments from the previous cases are entirely subsumed within the new indictment. The fact that the new indictment also lists additional predicate acts does not change the fact that the defendants are currently exposed to criminal liability for crimes for which they have already served their punishments. We have already noted that "[d]eciphering what constitutes prosecution for the same offense for purposes of double jeopardy is . . . even more difficult when we move from single layered crimes such as bank robberies to prosecution for multilayered crimes such as conspiracies which expand over time and place. The reason for the added complexity is that it is difficult to apply double jeopardy's notions of finality to crimes which have no easily discernable boundaries with regard to time, place, persons, and objectives." *Thornton,* 972 F.2d at 765 (citations omitted). Not a single case that has considered the double jeopardy issue in the RICO conspiracy context involving organized crime families has permitted an indictment that encompasses such a substantial portion of a prior one.

As the Supreme Court put it in *United States v. Turkette,* 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), a RICO "enterprise" is an entity made up

of "a group of persons associated together for a common purpose of engaging in a course of conduct." *Id.* at 583, 101 S.Ct. 2524. A "pattern of racketeering activity" is "a series of criminal acts as defined by the statute." *Id.* Comparing the 2005 indictment with its 1992 and 1995 forebears, I conclude that the government is pursuing the same enterprise now as it did before. It has merely found broader evidence of criminal culpability and has added to the list of criminal predicate acts. The language of the 2005 indictment says as much, where it charges that "[t]he criminal activities of the Chicago Outfit were carried out in part by sub-groups, or 'crews,' which were generally given territories in different locations in the Chicago area." *See also United States v. DiDomenico,* 78 F.3d 294, 297-298 (7th Cir.1996) ("The Chicago Outfit (the 'Outfit,' the 'Mob,' the 'Mafia') – the criminal enterprise whose most notorious boss was Al Capone – operates through 'street crews.'"); *id.* at 302 (noting, in a case charging twenty members of the "Ferriola Street Crew," and in which the indictment defined the enterprise as "The Joseph Ferriola Street Crew," that the district court was entitled to empanel an anonymous jury because "[t]his is not a case . . . in which the defendants are rumored to have 'Mob' connections. The defendants *are* the 'Mob.'" (emphasis in original)). The indictment before us goes so far as to name both the Carlisi and the Calabrese Street Crews as subgroups of the Outfit. Borrowing from the majority's analysis, the structures of the enterprises charged in the earlier indictments are more closely

analogous to a branch office or division of one company than they are to a distinct subsidiary.

While the new indictment alleges more predicate acts than the earlier ones, the overlaps are considerable. (Thus, we cannot say, as the *DeCologero* and *Langella* courts did, that "*all* of the [racketeering acts] in the present indictment are different from those charged in the [previous] case," 364 F.3d at 19 (emphasis in original), or "there is absolutely no overlap of any kind between the patterns of racketeering activity alleged in the two indictments," 804 F.2d at 189.) As I noted earlier, many of the predicate acts charged in the 2005 indictment are identical to those in the earlier indictments. Moreover, if one were to look at the various "factors" identified in *United States v. Marren,* 890 F.2d 924 (7th Cir.1989), on which the government is content to rely, it is hard to resist the conclusion that these cases are about the same pattern of conduct. Those factors are "(1) the time of the various activities charged as separate patterns of racketeering; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the corrupt activity took place under each charge." *Id.* at 935. In the end, we must decide whether the area of overlap is so substantial that the two cases must be regarded as functionally the same. *United States v. Sertich,* 95 F.3d 520, 524 (7th Cir.1996). With respect to the period of

time covered by the earlier indictments, the identity of the predicate acts is, in my view, easily great enough that we must find for the defendants on this part of the case too.

Although I would deny the defendants' request for outright dismissal of this indictment, I would grant their alternative petition for an order striking all of the averments in Count One that relate to the prior RICO conspiracy charges – that is, for Marcello the conspiracy that lasted from 1979 to 1990, and for Calabrese the conspiracy that went from 1978 to 1992. To that extent, I therefore dissent from the majority's judgment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, v. NICHOLAS CALABRESE, et al.	No. 02 CR 1050-2 Judge James B. Zagel

MEMORANDUM OPINION AND ORDER

(Filed Apr. 17, 2007)

Before me are defendants James Marcello's and Frank Calabrese Sr.'s motions to dismiss Count One of the second superseding indictment on double jeopardy grounds. For the reasons that follow, their motions are denied.

I. BACKGROUND

Both James Marcello ("Marcello") and Frank Calabrese, Sr. ("Calabrese") (collectively "Defendants") have previously been convicted of conspiring to violate the RICO statute, 18 U.S.C. § 1962. In 1992, the Government charged Marcello in a multi-count indictment that included a RICO count ("Previous Marcello Indictment"). The time frame of the conspiracy alleged in the Previous Marcello Indictment was approximately 1979 through 1990. In 1993, a jury convicted Marcello of the RICO conspiracy and of two substantive counts as well. Marcello was sentenced to 150 months in prison.

In 1995, the United States charged Calabrese in a multi-count indictment ("Previous Calabrese Indictment"). Count One of that indictment charged him with a RICO conspiracy that was alleged to have spanned from 1978 to 1992. Calabrese pled guilty to the RICO count and to several substantive counts as well. He was sentenced to 118 months incarceration.

Since Count One of the second superseding indictment in this case charges a violation of 18 U.S.C. § 1962, Defendants argue it should be dismissed on double jeopardy grounds.

II. DISCUSSION

The Double Jeopardy Clause states: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . " U.S. CONST. amend V. The Supreme Court has explained the underlying purpose of this protection:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). However, the protections the Double Jeopardy Clause affords are not absolute. *See Tibbs v. Florida*, 457

U.S. 31 (1982) (holding that a defendant who successfully appeals a conviction is subject to retrial); *United States v. Tateo*, 377 U.S. 463 (1964).

In a pre-trial double jeopardy review, "the defendant bears the burden of making a prima facie showing that the two indictments cover the same offense, and thereafter the burden shifts to the government to demonstrate that it has not twice prosecuted the defendant for the same conspiracy." *United States v. Thornton*, 972 F.2d 764, 767 (7th Cir. 1992). For purposes of this motion, the allegations in the indictment are assumed to be true.

In the conspiracy context, the Double Jeopardy Clause prohibits an individual from being prosecuted for two separate conspiracies if only one conspiracy existed. *Braverman v. United States*, 317 U.S. 49, 53 (1942); *Thornton*, 972 F.2d at 766. Because a conspiracy is essentially an agreement, "a determination of whether the Government can prosecute on more than one conspiracy rests on whether there exists more than one agreement." *United States v. Dortch*, 5 F.3d 1056, 1061 (7th Cir. 1993) (*quoting United States v. Chiatello*, 804 F.2d 415, 418 (7th Cir. 1986)).

When analyzing the double jeopardy implications of successive RICO prosecutions, the Seventh Circuit has applied a five-factor test. *See United States v.*

Marren, 890 F.2d 924, 935 (7th Cir. 1989).[1] The five factors are:

> (1) the time of the various activities charged as separate patterns of racketeering; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the corrupt activity took place under each charge.

Id.

Applying this five-factor test here, I find that the second superseding indictment charges a different conspiracy than those at issue in Defendants' previous indictments. Accordingly, I conclude that the second superseding indictment does not violate the Double Jeopardy Clause.

A. Time of Activities

There is not sufficient temporal overlap between the conspiracy alleged in the second superseding indictment and the conspiracies for which Defendants

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[1] This five-factor test has also been employed by the Eighth, Second, Eleventh and Third Circuits. *See United States v. Dean*, 647 F.2d 779, 788 (8th Cir. 1981); *United States v. Langella*, 804 F.2d 185, 189 (2d Cir. 1986); *United States v. Ruggiero*, 754 F.2d 927, 932 (11th Cir. 1985); *United States v. Ciancaglini*, 858 F.2d 923, 927-29 (3d Cir. 1988).

were previously indicted to render them the same conspiracy for double jeopardy purposes. The second superseding indictment charges a conspiracy that is alleged to have taken place for approximately four decades (the 1960s through 2005). By contrast, the previous Marcello Indictment covered a conspiracy that lasted for approximately 11 years, and the Previous Calabrese Indictment covered a conspiracy that lasted for approximately 14 years. Though there is certainly overlap, it is not substantial enough to render the conspiracy charged in the second superseding indictment to be identical, for double jeopardy purposes, to Defendants' previous indictments. The Seventh Circuit has often declined to conclude that a single conspiracy existed even when indictments' dates substantially overlap. *See, e.g., Dortch*, 5 F.3d at 1062; *Thornton*, 972 F.2d at 767-68; *United States v. Dempsey*, 806 F.2d 766, 767 (7th Cir. 1986); *Chiatello*, 804 F.2d at 419.

The timing factor is particularly unhelpful to Defendants here, since the second superseding indictment charges criminal activity that is alleged to have continued occurring for years *after* Defendants' previous convictions. The Supreme Court has admonished: "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal and spatial units." *Brown v. Ohio*, 432 U.S. 161, 169 (1977). The fact that the second superseding indictment alleges criminal activity occurring after the Defendants'

previous indictments evidences that "the government did not arbitrarily divide the time frame of one conspiracy into two in order to improperly charge two conspiracies." *Dortch*, 5 F.3d at 1062.

The fact that the Government is alleging that Defendants continued engaging in criminal activity after their prior indictments makes it extremely difficult for Defendants to rely on a double jeopardy theory for another reason as well. The Double Jeopardy Clause is not a license that enables individuals to re-engage – with impunity – in the same type of criminal activity for which they have been previously convicted. *See Garrett v. United States*, 471 U.S. 773, 798 (1985) (O'Connor, J., concurring) ("[W]here the defendant continues unlawful conduct after the time the Government prosecutes him for a predicate offense, I do not think he can later contend that the Government is foreclosed from using that offense in another prosecution . . . "); *see also Dortch*, 5 F.3d at 1063 ("[T]he guarantee against double jeopardy does not insulate a criminal from punishment for a subsequent offense merely because he chooses to continue committing the same type of crime."). In short, the timing factor does not counsel in favor of a finding that the second superseding indictment offends the Double Jeopardy Clause.

B. Identity of Defendants

The second factor – "identity of defendants" – also suggests that the second superseding indictment

does not implicate any double jeopardy concerns. Marcello concedes in his brief that "James Marcello is the only defendant named here and in [The Previous Marcello Indictment]." Similarly, Calabrese is one of only two defendants that are named both here and in the Previous Calabrese Indictment. This minimal level of overlap among defendants is insufficient to suggest that the conspiracy charged in the second superseding indictment and the conspiracies for which Defendants were previously indicted are one conspiracy. *See Dortch*, 5 F.3d at 1062; *Chiatello*, 804 F.2d at 418.

C. Statutory Offenses Alleged

The third factor – statutory offenses alleged – similarly fails to advance Defendants' argument that the second superseding indictment offends the Double Jeopardy Clause. While the second superseding indictment alleges some of the same predicate offenses that were involved in the Defendants' previous indictments, it also charges violations of five additional federal statutes and identifies 18 murders and one attempted murder not alleged in the Defendants' previous indictments. There is insufficient statutory overlap between the second superseding indictment and the Defendants' previous indictments to conclude that there was but one conspiracy. *See United States v. Langella*, 804 F.2d 185, 190 (2d Cir. 1986).

D. Nature and Scope of Criminal Activity

The nature and scope of the criminal activity charged in the second superseding indictment is broader and more pervasive than that which was charged in either the Previous Calabrese Indictment or the Previous Marcello Indictment. While some of the proof will overlap, this does not, in and of itself, indicate a double jeopardy concern. This is particularly true where, as here, the second indictment involves activity alleged to have occurred *after* the previous indictments. As Chief Justice Rehnquist pointed out: "one who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting." *Garrett*, 471 U.S. at 790. Both the Previous Marcello Indictment and the Previous Calabrese Indictment charged criminal activity that was much more limited in scope than the activity alleged in the second superseding indictment. Accordingly, applying this factor to the situation at hand, I cannot conclude that the second superseding indictment poses double jeopardy concerns.

E. Location of the Violations

The final factor – the location of the violations – does not help Defendants here. First of all, the Previous Marcello Indictment and the Previous Calabrese Indictment centered primarily on activities occurring in the Chicago area. While the second superseding indictment is also focused on Chicago, it also alleges

criminal activities in other states, including Nevada, Arizona, and Indiana. Furthermore, even if all the activities alleged in the Defendants' previous indictments and the second superseding indictment had occurred in Chicago, it does not necessarily follow that double jeopardy would be implicated. *See Dortch*, 5 F.3d at 1063 (concluding "[t]he greater St. Louis area is certainly large enough to be home to more than one conspiracy to distribute cocaine"). The greater Chicago area is far larger than the greater St. Louis area. Therefore, if the greater St. Louis area can accommodate more than one conspiracy to distribute cocaine, then *a fortiori*, the greater Chicago area can accommodate more than one RICO conspiracy.

III. CONCLUSION

In sum, after applying the five-factor test enunciated in *Marren*, I conclude that the Defendants' previous indictments charged different conspiracies than the one charged in the second superseding indictment. Therefore, Count One of the second superseding indictment is not barred by the Double Jeopardy Clause. As noted above, this result is particularly justified here, where the second superseding indictment charges criminal activity which is alleged to have occurred after the Defendants' previous

convictions. Defendants' motions to dismiss Count I are denied.

ENTER:

/s/ James B. Zagel
James B. Zagel
United States District Judge

DATE: Apr 17, 2007

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number: 02 CR 1050-2
JAMES MARCELLO	USM Number: 99076-012
	Marc W. Martin Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1, 2, 3 and 8 of the second superseding indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18:1962(d)	Racketeering conspiracy	3/8/2007	SS1
18:1955	Conducting an illegal gambling business	3/8/2007	SS2
18:1510	Obstruction of criminal investigation	1/30/2003	SS3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☑ Count(s) remaining ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

2/5/2009
Date of Imposition of Judgment

/s/ James B. Zagel
Signature of Judge

JAMES B. ZAGEL USDJ
Name of Judge Title of Judge

2/25/2009
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18:371	Conspiracy to defraud the Internal Revenue Service	4/30/2004	SS8

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Life imprisonment. This term consists of life imprisonment as to second superseding count 1, a term of thirty months as to superseding count 2, a term of sixty months as to superseding counts 3, and term of sixty months as to superseding count 8. Said terms to be served concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

thirty-six (36) months. Term consists of thirty six months each of counts 1, 2, 3 and 8 of the second superseding indictment, to be served concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two

periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as

well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 400.00	$	$

☑ The determination of restitution is deferred until 3/10/2009 . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss***	**Restitution Ordered**	**Priority or Percentage**
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 400.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 6, 2012

Before

RICHARD A. POSNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

Nos. 09-1287, 09-1602, 09-2109

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* FRANK CALABRESE, SR. and JAMES J. MARCELLO, *Defendants-Appellants.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 1:02-CR-01050-2, -4 James B. Zagel, *Judge*.

ORDER

On June 13, 2012, defendants-appellants Frank Calabrese, Sr. and James Marcello filed a petition for rehearing with suggestion for rehearing *en banc*; and, on June 29, 2012, the plaintiff-appellee filed a response to the petition for rehearing *en banc*. All of the judges on the original panel have voted to deny the petitions, and none of the active judges has requested a vote on the petitions for rehearing *en banc*. The petitions are therefore DENIED.

**IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION**

**UNITED STATES
OF AMERICA**

02 CR 1050 – 2-4, 7, 10

v.

JAMES MARCELLO, *et al.*

JURY INSTRUCTIONS GIVEN

(Filed Sep. 10, 2007)

Count One of the indictment charges each of the defendants with conspiring to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity or the collection of unlawful debt.

The United States Code provides in pertinent part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (c) of this section.

To prove a defendant guilty of the conspiracy charged in Count One, the government must prove the following propositions:

First, that after October 13, 1970, the defendant you are considering knowingly conspired to conduct or participate in the conduct of the affairs of an enterprise, through:

(a) A pattern of racketeering activity, described in Count One, Paragraph 46; or

(b) The collection of unlawful debt, described in Count One, Paragraph 47. Second, that the criminal objectives of the conspiracy alleged in Count One continued beyond April 21, 2000;

Third, that the Chicago Outfit was an enterprise; and

Fourth, that the activities of the Chicago Outfit affected interstate commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to a particular defendant, then you should find that defendant guilty of Count One.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt as to a particular defendant, then you should find that defendant not guilty of Count One.

The conspiracy charged in Count One is defined as an agreement between two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement may be inferred from all the circumstances and the conduct of all the alleged participants.

To be a member of the conspiracy, a defendant need not join at the beginning or know all the other members or the means by which the purpose was to be accomplished. The government need not prove that all of the details of the conspiracy alleged in the indictment were actually or formally agreed upon or carried out. However, the government must prove beyond a reasonable doubt that a defendant was aware of the common purpose and was a willing participant in the charged conspiracy.

In deciding whether a particular defendant joined the charged conspiracy, you must base your decision only on what the defendant did or said. In determining what that defendant did or said, you may consider that defendant's own words or acts. You may also consider the words or acts of other persons to decide what that defendant did or said, and you may use them to help you understand what that defendant did or said.

The defendants are charged in Count One with participating in a single conspiracy to conduct, and to

participate in the conduct, of the affairs of an enterprise through a pattern of racketeering activity. Proof that there were multiple conspiracies is not necessarily proof of a single conspiracy, nor is it necessarily inconsistent with the existence of a single conspiracy.

If you do not find beyond a reasonable doubt that a particular defendant was a member of any conspiracy, you should find the defendant not guilty of Count One.

Proof of several separate or independent conspiracies will not establish the single conspiracy alleged in Count One unless one of the several conspiracies which is proved is included within the single conspiracy alleged in Count One.

In considering the question of whether a single conspiracy or multiple conspiracies existed, you are instructed that while the parties to an agreement must know of each other's existence, they need not know each other's identity nor need there be direct contact. The agreement may continue for a long period of time and include the performance of many transactions. New parties may join the agreement at any time. The parties are not always identical, but this does mean that there are separate conspiracies.

In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy.

If you find beyond a reasonable doubt that there was one overall conspiracy as alleged in Count One, and that a particular defendant was a member of that conspiracy, then you should find that defendant guilty of Count One.

If you find beyond a reasonable doubt that there were two or more conspiracies and that a particular defendant was a member of or aided and abetted one or more conspiracies, you may find that defendant guilty of Count One only if you further find beyond a reasonable doubt that this proven conspiracy was included within the conspiracy alleged in Count One.

In order to find a "pattern of racketeering activity" for purposes of Count One you must find beyond a reasonable doubt that a defendant agreed that some members of the conspiracy would commit at least two acts of racketeering as described in Count One, Paragraph 46. You must also find that those acts were in some way related to each other and that there was continuity between them.

Acts are related to each other if they are not isolated events, that is, if they have similar purposes or results, or participants, or victims, or are committed a similar way or are part of the affairs of the same enterprise.

There is continuity between acts if, for example, they are ongoing over a substantial period of time, or had the potential to continue over a substantial period, or if they are part of the regular way some entity does business or conducts its affairs.

For purposes of Count One, the government does not have to prove that any racketeering acts were actually committed at all, or that a defendant agreed to personally commit any such acts, or that a defendant agreed that two or more specific acts would be committed.

The term "enterprise" includes a criminal organization.

The term "enterprise" can include a group of people associated together for a common purpose of engaging in a course of conduct. This group may be associated together for purposes that are both legal and illegal.

In considering whether a group is an "enterprise," you should consider whether it has an ongoing organization or structure, either formal or informal, and whether the various members of the group functioned as a continuing unit. A group may continue to be an "enterprise" even if it changes membership by gaining or losing members over time.

The government must prove that the group described in the indictment was the "enterprise" charged, but need not prove each and every allegation in the indictment about the enterprise or the manner in which the enterprise operated. The government must prove the association had some form or structure beyond the minimum necessary to conduct the charged pattern of racketeering.

A person conducts or participates in the conduct of the affairs of an enterprise if that person uses his position in, or association with, the enterprise to perform acts which are involved in some way in the operation or management of the enterprise, directly or indirectly, or if the person causes another to do so.

In order to have conducted or participated in the conduct of the affairs of an enterprise, a person need not have participated in all the activity alleged in Count One.

To be associated with an enterprise, a person must be involved with the enterprise in a way that is related to its affairs or common purpose, although the person need not have a stake in the goals of the enterprise and may even act in a way that subverts those goals. A person may be associated with an enterprise without being so throughout its existence.

For purposes of Count One, interstate commerce includes the movement of money, goods, services or persons from one state to another. This would include the purchase or sale of goods or supplies from outside the state in which the enterprise was located, the use of interstate mail or wire facilities, or the causing of any of those things. If you find that beyond a reasonable doubt that the actions of the enterprise affected in any degree the movement of money, goods or services across state lines, then interstate commerce was engaged in or affected.

The government need only prove that the enterprise as a whole engaged in interstate commerce or

that its activity affected interstate commerce to any degree, although proof that racketeering acts did affect interstate commerce meets that requirement. The government need not prove that a defendant engaged in interstate commerce, or that the acts of a defendant affected interstate commerce.

The law defines "racketeering activity" as follows:

A. Any act which is in violation of any of the following provisions of Title 18, United States Code:

(1) Section 892 (relating to the making of and conspiracy to make extortionate extensions of credit, or "juice loans");

(2) Section 894 (relating to collecting and conspiracy to collect extensions of credit, or "juice loans," by extortionate means);

(3) Section 1951 (relating to the interference with commerce by threats and violence, in the collection of "street tax," and conspiring to commit this offense);

(4) Section 1955 (relating to the operation of an illegal gambling business);

(5) Section 1503 (relating to obstructing the due administration of justice);

(6) Section 1510 (relating to obstruction of criminal investigations);

(7) Section 1952 (relating to interstate travel in aid of a racketeering enterprise); and

B. Any act which is in violation of any of the following provisions of Illinois, Arizona, and Nevada state laws:

(1) First degree murder under:

(a) Illinois Law, Illinois Revised Statutes, Chapter 38, § 9-1;

(b) Arizona Law, Arizona Revised Statutes, § 13-1105.

(2) Conspiracy to commit murder under:

(a) Illinois Law, Illinois Revised Statutes, Chapter 38, § 8-2;

(b) Arizona Law, Arizona Revised Statutes, § 13-1003;

(c) Nevada Law, Nevada Revised Statutes, § 199.480.

(3) Attempted murder under Illinois Law, Illinois Revised Statutes Chapter 38, § 8-4;

(4) Intimidation under Illinois Law, Illinois Revised Statutes, Chapter 38, § 12-6,

(5) Conspiracy to commit intimidation under Illinois Law, Illinois Revised Statutes, Chapter 38, § 8-2.

Any violation of any of these statutes may constitute a distinct act of "racketeering activity."

For purposes of your consideration of Count One, the conspiracy alleged in Count Eight to impede the IRS does not constitute "racketeering activity."

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 92 CR 1063
v.	)	Honorable Paul Plunkett
JAMES J. MARCELLO, *et al*.,	)	
Defendants.	)	

EXCERPT FROM JURY INSTRUCTIONS
(INSTRUCTIONS ON COUNT 1, RICO CONSPIRACY)

* * *

In Count One of the indictment, each of the defendants except Joseph Braccio and Gill Valerio is charged with conspiring to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity or the collection of unlawful debt.

Title 18, United States Code, Section 1962 provides in pertinent part:

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

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

To find a defendant guilty of the conspiracy charged in Count One, the government must prove the following elements:

First, that the enterprise in Count One existed;

Second, that the enterprise engaged in interstate or foreign commerce, or that its activities affected interstate or foreign commerce;

Third, that the defendant was employed by or associated with the enterprise; and

Fourth, that the defendant knowingly conspired with another person to conduct or participate in the conduct of the affairs of the enterprise, directly or indirectly, through:

(A) A pattern of racketeering activity consisting of the commission of two or more racketeering acts; or

(B) The collection of unlawful debt.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt as to a particular defendant, then you should find that defendant guilty of Count One.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt as to

a particular defendant, then you should find that defendant not guilty of Count One.

The conspiracy charged in Count One is defined as a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement may be inferred from all the circumstances and the conduct of all the alleged participants.

Please remember, however, that only the defendant's own words and acts show whether that particular defendant joined the conspiracy. You may consider statements by other persons in deciding what a particular defendant did and said or to help you understand a defendant's acts and statements, but only if you have found through the defendant's own words and acts that he or she joined the conspiracy.

To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which the purpose was to be accomplished. The government need not prove that all of the details of the conspiracy alleged in the indictment were actually agreed upon or carried out. However, the government must prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant in the charged conspiracy.

The term "enterprise," as used in these instructions, may include a group of people associated in fact, even though this association is not recognized as a legal entity. A group or association of people can be an "enterprise" if these individuals have joined together for the purpose of engaging in a common course of conduct. Such an association of persons may be established by evidence showing an ongoing organization, formal or informal, and by evidence that the people making up the association functioned as a continuing unit. Such an association of individuals may retain its status as an "enterprise" even though the membership of the association changes by adding or losing individuals during the course of its existence.

The government must prove that each defendant charged in Count One was employed by or associated with the enterprise. It is not required that the defendant was employed by or associated with the enterprise for the entire time that the enterprise existed. It is required, however, that the government prove, beyond a reasonable doubt, that at some time during the period indicated in the indictment, the defendant in question was employed by or associated with the enterprise.

The terms "conduct" and "participate in the conduct of" the affairs of an enterprise include the performance of acts, functions or duties which are necessary to, or helpful in, the operation of the enterprise.

A defendant "conducts" or "participates in the conduct of" the affairs of an enterprise if he uses his position or association with the enterprise to facilitate the racketeering activity or collection of unlawful debt described in Count One and the evidence. However, a defendant must have agreed that some member of the enterprise would have some part in directing its affairs.

In order to establish a "pattern of racketeering activity" as to a particular defendant, the government must prove, beyond a reasonable doubt, that the defendant agreed that some member of the conspiracy would commit at least two acts of racketeering activity described in Count One as those offenses are defined in these instructions. In addition, you must unanimously agree as to which two acts of racketeering the defendant you are considering agreed would be committed. You do not have to find, however, that all of the defendants agreed that the same two racketeering acts would be committed.

The government need not prove, however, that any racketeering acts were actually committed or that an overt act was committed in furtherance of the conspiracy. Nor is it necessary for you to find that any defendant agreed that he personally would perform the two or more acts of racketeering, but the defendant must have agreed that at least two such acts constituting a "pattern" be committed by some member of the conspiracy.

While proof of Count One requires that you find a defendant agreed that two racketeering acts would be committed, a finding of two such acts, in and of itself, may not be sufficient to constitute a "pattern of racketeering activity." To find a pattern of racketeering you must find that there is a relationship between the racketeering acts and that there is continuity with respect to those acts. Two acts of racketeering are related if the acts have the same or similar purpose, results, participants, victims or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events. There is continuity with respect to acts of racketeering if, for example, the acts are ongoing over an identifiable period, or if the acts are part of an ongoing entity's regular way of doing business.

In reference to Count One, the government must prove that the enterprise engaged in interstate commerce or that its activity affected interstate commerce. However, the government need not show any particular degree of effect on interstate commerce, or prove that any defendant engaged in interstate commerce or that the acts of any defendant affected interstate commerce.

I instruct you that interstate commerce is affected if you find that the alleged enterprise had any impact, regardless of how small or indirect, on the movement of any money, goods, services, or persons from one State to another. The enterprise itself need not be engaged in interstate commerce. It is only necessary that the activities of the enterprise,

however minimally, have an effect on commerce between two different States. However, if the racketeering acts of the enterprise do affect interstate commerce, then the enterprise affects interstate commerce. If you find that the government has proved beyond a reasonable doubt that the actions of the enterprise, including any action by any defendant, affected in any degree the movement of money, goods or services across State lines, then I instruct you as a matter of law as to Count One that commerce was engaged in or affected as required by the statute.

The law defines "racketeering activity" as follows:

Any act which is indictable under any of the following provisions of Title 18, United States Code:

(1) Section 1955 (relating to the operation of an illegal gambling business);

(2) Section 892 (relating to the making of and conspiracy to make extortionate extensions of credit);

(3) Section 893 (relating to the financing of extortionate extensions of credit); and

(4) Section 894 (relating to collecting and conspiracy to collect extensions of credit by extortionate means).

Any act which is chargeable under any of the following provisions of the Illinois Revised Statutes, Chapter 38:

(1) Section 12-6(a)(1) (intimidation); and

(2) Section 8-2 (relating to conspiracy to commit murder).

Any violation of any of these statutes may constitute a distinct act of "racketeering activity."

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA v. SAMUEL A. CARLISI JAMES J. MARCELLO ANTHONY C. ZIZZO ANTHONY N. CHIARAMONTI FRANK J. BONAVOLANTE BRETT K. O'DELL JOSEPH J. BONAVOLANTE RICHARD GERVASIO GILL M. VALERIO JAMES R. DIDOMENICO JOSEPH BRACCIO	No. 92 CR 1064 Violations: Title 18, United States Code, Sections 892, 893, 894, 1955, 1962(d); Title 26, United States Code, Sections 7203 and 7206(1) (Filed Jul. 24, 2006)

COUNT ONE

The SPECIAL SEPTEMBER 1990 GRAND JURY charges:

I. **THE ENTERPRISE**

1. At all times material to this indictment, there existed a criminal organization headed by defendant SAMUEL A. CARLISI, and which is referred to hereafter as the "Carlisi Street Crew." The Carlisi Street Crew constituted an "enterprise" as that term is used in Title 18, United States Code, Section 1961(4), that is, a group of individuals associated in fact, which enterprise was engaged in and the activities of which affected interstate commerce. The

Carlisi Street Crew was part of a larger criminal organization known to the public as "the mob," and to its members and associates as "The Outfit."

2. Defendants SAMUEL A. CARLISI, JAMES J. MARCELLO, ANTHONY C. ZIZZO, ANTHONY N. CHIARAMONTI, FRANK J. BONAVOLANTE, BRETT K. O'DELL, JOSEPH J. BONAVOLANTE, RICHARD GERVASIO, and GILL M. VALERIO were employed by and associated with the Carlisi Street Crew.

3. The Carlisi Street Crew existed primarily to provide income to its members through illegal activities. The illegal activities of the Crew included: conducting a sports bookmaking business; collecting "street tax," that is, extortion payments required as a cost of operating various businesses including illegal gambling businesses; making "juice loans," that is, loans to individuals at usurious rates of interest, and extortionate extensions of credit within the meaning of Title 18, United States Code, Section 891(6); financing a juice loan operation run by other Outfit associates; and using threats, violence and intimidation to collect gambling debts and juice loans, as well as to control or affect the activities of at least one legitimate business.

4. In order to carry out its activities, the Carlisi Street Crew maintained a structure and chain of command, which consisted of a leader or "boss," assistants to the "boss," supervisors of its income-producing activities, and agents, employees and

associates, all of whom were compensated from its activities. In addition, the "boss" of the Crew was ultimately responsible to the head of the Outfit and was required to ensure that the leadership of the Outfit received a share of the proceeds from the Crew's activities. The roles and responsibilities of the members of the Carlisi Street Crew were as follows:

(a) Defendant SAMUEL A. CARLISI was the leader or boss of the enterprise. In that capacity, he supervised and approved its membership, roles and recruitment, its various criminal activities, and the use of its funds. He also resolved disputes within the Crew. Beginning in approximately 1987, CARLISI also occupied a supervisory position within the Outfit. In that capacity, CARLISI coordinated the activities of his crew and at least one other organized crime street crew, the Lenny Patrick Street Crew, and used his position to authorize criminal activities which benefited the Carlisi Street Crew and its members.

(b) Defendant JAMES J. MARCELLO was the second-in-command of the enterprise. He relayed orders and messages from SAMUEL A. CARLISI to members, employees, and associates of the Carlisi Street Crew, and scheduled meetings for SAMUEL A. CARLISI with the enterprise's members, employees, and associates. He also supervised those in charge of the various income-producing activities of the enterprise. MARCELLO received and disbursed Carlisi Street Crew funds, and collected "street tax" payments. He also served as a go-between for SAMUEL A. CARLISI and representatives of other Chicago

"Outfit" street crews, for relaying messages and arranging meetings.

(c) Defendant ANTHONY C. ZIZZO was the next in command for the Carlisi Street Crew, supervising street level activities including the financing and operation of its illegal gambling business and the collection of its gambling debts and juice loans. ZIZZO personally collected payments from juice loans made by the Carlisi Street Crew and repayments of funds advanced to other Outfit associates.

(d) Defendant ANTHONY N. CHIARAMONTI assisted ANTHONY C. ZIZZO with collecting gambling debts and with making and collecting juice loans. He served as an "enforcer" for the Carlisi Street Crew, and employed threats, intimidation, and violence to collect its debts, enforce its rules, and satisfy its demands. CHIARAMONTI was also involved in financing the enterprise's illegal gambling business, and in supervising an "office" or betting location of that business in 1980 and 1981.

(e) Defendant FRANK J. BONAVOLANTE supervised the day-to-day operation of the illegal gambling business conducted by the Carlisi Street Crew. This included participation in the collection of problem gambling debts, and the referral of some of those debtors to ANTHONY C. ZIZZO, ANTHONY N. CHIARAMONTI, and BRETT K. O'DELL for juice loans to satisfy their gambling debts. He also assisted in the collection of street tax and juice loan payments.

He made periodic reports on the status of the illegal gambling business to JAMES J. MARCELLO.

(f) Defendant BRETT K. O'DELL assisted ANTHONY N. CHIARAMONTI in making and collecting juice loans and in obtaining street tax payments. O'DELL also assisted CHIARAMONTI in operating an "office" or betting location of the enterprise's illegal gambling business in 1980 and 1981.

(g) Defendants JOSEPH J. BONAVOLANTE, RICHARD GERVASIO, and GILL M. VALERIO worked under FRANK J. BONAVOLANTE, and ran "office" locations for the illegal gambling business, served as phone men accepting and recording bets from customers, and assisted in making payments to winners and collections from losers. They also assisted in the collection of problem gambling debts.

5. At times material to this indictment, there also existed another organized crime street crew, which was known as the Lenny Patrick Street Crew. The Patrick Street Crew included Lenny Patrick, Mario Rainone, James LaValley, Nicholas Gio and Gary Edwards. The Patrick Street Crew engaged in a variety of illegal activities, including running a juice loan operation and committing extortion and intimidation. In approximately 1987 or 1988, the Carlisi Street Crew provided funding for the Patrick Street Crew's juice loan operation and took an interest in the profits from that business. Subsequently, Joseph Vento, a member of the Carlisi Street Crew, was

assigned to supervise the juice loan operation of the Patrick Street Crew.

II. THE CONSPIRACY

6. From approximately 1979 through at least May 1990, at Chicago, Bloomingdale, Brookfield, Cicero, Countryside, Melrose Park, North Riverside and elsewhere in and outside of the Northern District of Illinois, Eastern Division,

SAMUEL A. CARLISI
JAMES J. MARCELLO
ANTHONY C. ZIZZO
ANTHONY N. CHIARAMONTI
FRANK J. BONAVOLANTE
BRETT K. O'DELL
JOSEPH J. BONAVOLANTE
RICHARD GERVASIO and
GILL M. VALERIO

defendants herein, being employed by and associated with an enterprise, that is, the Carlisi Street Crew, which enterprise engaged in and the activities of which affected interstate commerce, did knowingly combine, conspire, confederate and agree together and with other persons known and unknown to the Grand Jury, including Leonard Patrick, Mario Rainone, Joseph Vento, James LaValley, Gary Edwards, Steven Veteto, and Kenton A. Pielet, to conduct and participate, directly and indirectly, in the conduct of the affairs of the Carlisi Street Crew through: (1) a pattern of racketeering activity and (2) the collection of unlawful debt, as those terms are

defined in Title 18, United States Code, Sections 1961(1) and 1961(6), respectively, and as further specified in paragraphs 7 and 8 below.

7. The racketeering activity consisted of violations of the following federal and state laws:

(a) Conducting an illegal gambling business, in violation of Title 18, United States Code, Section 1955.

(b) Making and conspiring to make extortionate extensions of credit, in violation of Title 18, United States Code, Section 892.

(c) Financing extortionate extensions of credit, in violation of Title 18, United States Code, Section 893.

(d) Collecting and conspiring to collect extensions of credit by extortionate means, in violation of Title 18, United States Code, Section 894.

(e) Intimidation in violation of Chapter 38, Illinois Revised Statutes, Section 12-6, and conspiracy to commit intimidation, in violation of Chapter 38, Illinois Revised Statutes, Section 8-2.

(f) Conspiracy to commit arson within the meaning of Chapter 38, Illinois Revised Statutes, Section 20-1, in violation of Chapter 38, Illinois Revised Statutes, Section 8-2.

(g) Conspiracy and solicitation to commit murder within the meaning of Chapter 38, Illinois

Revised Statutes, Section 9-1, in violation of Chapter 38, Illinois Revised Statutes, Sections 8-1.1 and 8-2.

8. The collection of unlawful debt consisted of collection of debts incurred or contracted in gambling activity and in connection with the business of gambling, in violation of Title 18, United States Code, Section 1955, and Chapter 38, Illinois Revised Statutes, Section 28-1.1, and incurred in connection with the business of lending money at usurious rates and which loans were unenforceable under Illinois laws relating to usury, specifically, Chapter 38, Illinois Revised Statutes, Section 39-1 and Chapter 17, Illinois Revised Statutes, Section 6404.

9. As part of the conspiracy each of the defendants would and did agree to: (1) the commission of multiple acts of racketeering and (2) the collection of unlawful debt in the conduct of the affairs of the Carlisi Street Crew.

10. It was part of the conspiracy that defendants SAMUEL A. CARLISI, JAMES J. MARCELLO, ANTHONY C. ZIZZO, ANTHONY N. CHIARAMONTI, FRANK J. BONAVOLANTE, BRETT K. O'DELL, JOSEPH J. BONAVOLANTE, RICHARD GERVASIO, and GILL M. VALERIO operated an illegal sports bookmaking business.

11. It was further part of the conspiracy that defendants SAMUEL A. CARLISI, JAMES J. MARCELLO, ANTHONY C. ZIZZO, ANTHONY N. CHIARAMONTI, FRANK J. BONAVOLANTE, BRETT K. O'DELL, and JOSEPH J. BONAVOLANTE,

made juice loans to individuals, including customers of their illegal sports bookmaking business. Those loans carried interest rates of 5% per week or 260% per year. In making such loans, the defendants relied upon the borrowers' understanding that delay or failure to repay the loans could result in the use of violence against the borrowers.

12. It was further part of the conspiracy that defendants SAMUEL A. CARLISI and JAMES J. MARCELLO advanced $200,000 in cash to Leonard Patrick for Patrick and Mario Rainone to use in making juice loans, with the understanding that the defendants would receive a percentage of the profits from those loans. Rainone, James LaValley and other Patrick Street Crew members and associates made and collected juice loans from these funds.

13. It was further part of the conspiracy that defendants SAMUEL A. CARLISI, JAMES J. MARCELLO, ANTHONY C. ZIZZO, ANTHONY N. CHIARAMONTI, FRANK J. BONAVOLANTE, BRETT K. O'DELL, JOSEPH J. BONAVOLANTE, RICHARD GERVASIO, and GILL M. VALERIO and their co-conspirators collected debts incurred in connection with the illegal sports bookmaking and juice loan businesses described above. The defendants and their co-conspirators collected delinquent debts by utilizing violence, intimidation and threats.

14. It was further part of the conspiracy that defendants SAMUEL A. CARLISI and JAMES J. MARCELLO directed Lenny Patrick to have

members of the Patrick Street Crew intimidate the owner of a theater. Following that direction, Mario Rainone, James LaValley and Nicholas Gio attempted to start a fire at the theater and to cause an explosion on the roof of the theater.

15. It was further part of the conspiracy that defendants SAMUEL A. CARLISI and JAMES J. MARCELLO did solicit Mario Rainone to assist others with the planned murder of Anthony F. Daddino, an associate of the Carlisi Street Crew.

16. It was further part of the conspiracy that the defendants would and did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden the purposes of and acts done in furtherance of the conspiracy.

III. **PATTERN OF RACKETEERING ACTIVITY**

(First Alternative Grounds of Liability)

17. Among the acts agreed to and undertaken as part of the conspiracy to conduct the enterprise's affairs through a pattern of racketeering activity were the following:

A. Conducting an illegal gambling business (18 U.S.C. § 1955)

(1) From approximately 1979 through at least May 1990, the Carlisi Street Crew operated a sports bookmaking business which accepted wagers on the outcome of sporting contests, including

football, basketball, and baseball games and horse races. Bettors, known as "players," telephoned agents of the Crew or one of the locations, known as "offices" or "wirerooms," run by the Crew to obtain information concerning the wagering lines or point spreads on the contests and to place wagers, which were made on credit. Players who lost their wagers were obligated to pay the Crew the face amount of the wager plus 10%; players who won received a payment in the amount of the wager.

(2) The Crew employed a variety of "agents" to assist in the operation of its bookmaking business. These agents recruited and sponsored players to the Crew's betting offices, collected from unsuccessful players and paid winning players. Certain agents also gave out line information to players and accepted and relayed their wagers to the office. The agents were paid a commission based on a percentage of the losses of the players they sponsored and serviced. On occasion, agents were held responsible for uncollected payments due from their players.

(3) From the summer of ~~1981~~ [1980] through about December 12, 1985, Kenton Pielet served as an agent for the Crew's bookmaking business, under the direct supervision of FRANK J. BONAVOLANTE. When Pielet collected from losing players, he paid the proceeds to FRANK J. BONAVOLANTE, JOSEPH J. BONAVOLANTE, ANTHONY C. ZIZZO and others acting at their direction.

(4) From about the fall of 1983 through about January 1986, Marvin Showalter served as an agent for the Crew's bookmaking business under the supervision of FRANK J. BONAVOLANTE.

(5) During the fall of 1981, George Friedel served as an agent for the Crew's bookmaking business under the supervision of ANTHONY C. ZIZZO, ANTHONY N. CHIARAMONTI and BRETT K. O'DELL. From 1982 through 1987, Friedel served as an agent under the supervision of FRANK J. BONAVOLANTE. In addition, acting in an undercover capacity for the Federal Bureau of Investigation ("FBI"), Friedel also served as an agent under the supervision of FRANK J. BONAVOLANTE from October 1989 through May 1990. As an agent for the Crew's bookmaking business, Friedel collected money from losing players and paid that money to FRANK J. BONAVOLANTE, JOSEPH J. BONAVOLANTE, ANTHONY C. ZIZZO and others acting at their direction.

(6) Beginning prior to 1986 and continuing through about January 1989, Thomas Briscoe served as an agent for the Crew's bookmaking business under the supervision of FRANK J. BONAVOLANTE and others. Briscoe met with RICHARD GERVASIO to turn over money collected from losing players and to receive payments for winning players.

(7) In order to collect delinquent gambling debts, the defendants and their co-conspirators employed violence, threats of violence and acts of

intimidation against players and, on occasion, agents of the bookmaking operation.

(8) In order to minimize the loss of income from delinquent gambling debts, the defendants and their co-conspirators would require that delinquent debtors obtain a juice loan at an interest rate of 5% per week to pay off the gambling debt or would charge interest on the gambling debt itself.

B. Making and conspiring to make extortionate extensions of credit (18 U.S.C. § 892)

George Friedel

(9) In approximately 1981, ANTHONY N. CHIARAMONTI and BRETT K. O'DELL made a $2,000 juice loan to George Friedel. Friedel was required to pay 5% weekly interest on the loan. In connection with the loan, ANTHONY N. CHIARAMONTI made implicit threats that violence would result if Friedel failed to make timely payments.

(10) In approximately 1982 or 1983, ANTHONY N. CHIARAMONTI and BRETT K. O'DELL made a $7,000 juice loan to George Friedel, which also carried an interest rate of 5% per week.

(11) In approximately 1986, ANTHONY C. ZIZZO made a $3,000 juice loan to George Friedel at an interest rate of 5% per week. ZIZZO warned Friedel not to be late on his payments. Friedel made

his payments to ZIZZO and FRANK J. BONAVOLANTE.

Larry Reitman

(12) In approximately 1982, Kenton Pielet arranged for Larry Reitman to receive a juice loan from ANTHONY N. CHIARAMONTI. CHIARAMONTI loaned Reitman $5,000 at 5% weekly interest. CHIARAMONTI implicitly threatened Reitman with violence if timely payments were not made.

(13) Larry Reitman failed to make most of the payments, and ANTHONY N. CHIARAMONTI and BRETT K. O'DELL subsequently demanded that Kenton Pielet make the payments. Pielet made a number of payments to them until he was informed by JAMES J. MARCELLO that the debt had been resolved.

Samuel Gianforte

(14) Between approximately 1984 and 1986, Samuel Gianforte was betting on sporting events with the Carlisi Street Crew through George Friedel. Gianforte incurred a gambling debt which he was unable to pay. Because FRANK J. BONAVOLANTE held Friedel accountable for this gambling debt, Friedel referred Gianforte to BRETT K. O'DELL for a juice loan to cover it.

(15) BRETT K. O'DELL lent Gianforte a sum of money to cover his gambling debt at 5%

weekly interest. O'DELL and Friedel implicitly threatened Gianforte with violence if timely payments were not made. When Gianforte could no longer make his juice loan payments, he sought and received assistance from Anthony Panico who paid off Gianforte's debt.

Anthony LaBarbera

(16) Between August 11 and August 17, 1988, ANTHONY N. CHIARAMONTI, acting on behalf of ANTHONY C. ZIZZO, loaned $5,000 to Anthony LaBarbera at 5% weekly interest. The loan was made in the form of a check drawn on a bank account in the name of "A. Chiaro" and signed by CHIARAMONTI. LaBarbera was aware of CHIARAMONTI's reputation for violence in connection with the juice loan business.

(17) During the period September 9, 1988 through September 29, 1989, Anthony LaBarbera made juice loan payments to ANTHONY N. CHIARAMONTI and to representatives of CHIARAMONTI and ANTHONY C. ZIZZO, and was threatened by CHIARAMONTI in this regard.

Patrick Crew loans

(18) Between approximately late 1987 and approximately October 1989, Lenny Patrick, Mario Rainone and James LaValley made juice loans from funds advanced by SAMUEL A. CARLISI and

JAMES J. MARCELLO for that purpose. Patrick, LAValley and Gary Edwards continued to make juice loans from these funds until approximately February 1990, under the supervision of ANTHONY C. ZIZZO and Joseph Vento. The interest rates on all of these loans were between 2.5% and 5% per week, and the loans were made to debtors with the understanding that violence could occur to them if timely payments were not made.

C. Collecting and conspiring to collect extensions of credit through extortionate means, intimidation, and conspiracy to commit intimidation: juice loans and gambling debts (18 U.S.C. § 894; Ch. 38, Ill.Rev.Stat., §§ 12-6 & 8-2)

Frank Perri

(19) In approximately 1983, Frank Perri was betting on sporting events with the Carlisi Street Crew through Kenton Pielet. Perri incurred a $1,500 gambling debt which he was unable to pay. Pielet referred Perri to ANTHONY N. CHIARAMONTI and BRETT K. O'DELL for a juice loan, pursuant to standing orders he had received from FRANK J. BONAVOLANTE. CHIARAMONTI and O'DELL made the juice loan to Perri and required him to pay 5% weekly interest on the debt.

(20) Frank Perri subsequently received three additional juice loans from ANTHONY N. CHIARAMONTI, totalling more than $5,000.

(21) Perri became unable to make all of his interest payments, and Kenton Pielet made some of those payments to FRANK J. BONAVOLANTE on Perri's behalf.

(22) Eventually, Pielet and BRETT K. O'DELL had a meeting with Perri to discuss the payments. O'DELL confronted Perri, slapped him in the face, and required him to make a $100 payment.

William Stone and Special Agent David Brundage

(23) Beginning in approximately September 1985, William Stone bet on football and baseball games with Carlisi Street Crew after being recruited by Kenton Pielet. Stone made a series of losing wagers and ended up owing $13,800, which he was unable to pay. Pielet paid a portion of that debt to FRANK J. BONAVOLANTE on behalf of Stone, and subsequently discussed the debt with BONAVOLANTE. Pielet then had a series of conversations with Stone about repayment of the debt.

(24) On November 1, 1985, FRANK J. BONAVOLANTE, identifying himself as Pielet's boss, called Stone and demanded to know where the money was. Pielet subsequently called Stone and instructed him that he owed not only the original principal amount but also 5% per week interest. Pielet implicitly threatened Stone with violence if he did not pay.

(25) On November 20, 1985, Pielet met with Stone to discuss the debt. Pielet rescinded the

interest charges and informed Stone that he had been told to make a weekly pickup of installment payments from Stone.

(26) On November 22, 1985, FRANK J. BONAVOLANTE, again identifying himself as Pielet's boss, called Stone. BONAVOLANTE told Stone that he needed a commitment or he would employ "drastic measures" and "come down hard" on Stone.

(27) On December 4, 1985, Pielet met with Stone. During the meeting Stone blamed his inability to pay on the fact that another individual owed him money. Pielet reported back to FRANK J. BONAVOLANTE, who told him to take Steven Veteto, a collector for ANTHONY N. CHIARAMONTI, with him to meet Stone the following day.

(28) On December 5, 1985, Steven Veteto and Kenton Pielet attempted to force their way into Stone's apartment to discuss the debt.

(29) On December 7, 1985, Pielet called FRANK J. BONAVOLANTE and told him that he was going to meet with Stone and the person who owed Stone money on December 9. BONAVOLANTE said that he would contact Steven Veteto and instruct him to attend the meeting.

(30) On December 9, 1985, Pielet and Veteto met William Stone at a restaurant in downtown Chicago. Accompanying Stone was FBI Special Agent David Brundage, who was posing in an

undercover capacity as the person who owed Stone money. Pielet and Veteto demanded money from both Stone and Agent Brundage to satisfy Stone's debt and made a number of threats, including a threat by Pielet to give Brundage "a crack right here," and a threats by Veteto to "bust" Brundage's head, to "bust" Brundage's head through a window, and to "go to . . . whacking" both Brundage and Stone.

(31) On December 12, 1985, Pielet and Veteto confronted Stone and Agent Brundage outside the same restaurant. When Agent Brundage told them that he could not get the money, Veteto grabbed him, punched him in the face, and ordered him to get the money.

Michael Huber

(32) Beginning in approximately 1986, Michael Huber bet with the Carlisi Street Crew through RICHARD GERVASIO.

(33) In approximately late 1987 or early 1988, Huber lost at least $2,000 in bets which he was unable to pay. RICHARD GERVASIO eventually informed Huber that others were "on him" to get the money and that Huber would have to deal with somebody else. In approximately mid-1988, GERVASIO instructed Huber to meet with him and another unknown individual. That individual told Huber that they meant business and demanded payment of his gambling debt in one week.

(34) Huber failed to pay as required, and RICHARD GERVASIO and the other unknown individual arranged for Huber to meet two other unknown men in a restaurant parking lot. One of those men questioned Huber and demanded the money, and the other man slapped Huber in the face and head. The men also made implicit threats of harm if Huber did not come up with the money.

(35) Huber had a second meeting on a later day with the same two men in the restaurant parking lot. When Huber told them he still did not have the money, one of the men searched him for a concealed recording device and the other man grabbed him by the throat and demanded payment.

(36) On November 11, 1989, another individual confronted Huber and demanded payment of the debt. This man pinned Huber in a door, grabbed Huber's arm, and insisted that Huber pay. He also made implicit threats of harm if Huber did not pay.

(37) Thereafter, the same man confronted and called Huber on a number of occasions to demand payment of the debt. The final call, to Huber's wife, was made on January 5, 1990.

(38) On January 6, 1990, a fire gutted the car owned by Huber's wife.

Anthony Pape, Jr.

(39) Beginning in approximately 1979 and continuing periodically through 1988, Anthony Pape,

Jr. placed sports bets with the Carlisi Street Crew. Pape dealt with a variety of individuals, including FRANK J. BONAVOLANTE, JOSEPH J. BONAVOLANTE, and GILL M. VALERIO.

(40) During the 1988 football season, Pape lost a series of bets and ended up owing $13,000. When Pape informed GILL M. VALERIO that he could not pay, VALERIO informed Pape that he "had a big problem" and that he had to pay all the money by the next day.

(41) JOSEPH J. BONAVOLANTE then called Pape and threatened to make Pape's head "black and blue" if Pape failed to pay.

(42) FRANK J. BONAVOLANTE subsequently called Pape to demand the money owed and told him that if he did not come up with the money by that night, "not even God could help" him. FRANK J. BONAVOLANTE also imposed a $2,000 interest charge on the debt.

(43) Thereafter, GILL M. VALERIO and another person made a series of phone calls to Pape demanding payment. Pape's father eventually paid FRANK J. BONAVOLANTE $15,000 to cover the debt.

Anthony LaBarbera

(44) Between August 11 and August 17, 1988, ANTHONY N. CHIARAMONTI, acting on

behalf of ANTHONY C. ZIZZO, loaned $5,000 to Anthony LaBarbera at 5% weekly interest.

(45) This juice loan was made in the form of a check drawn on a bank account in the name of "A. Chiaro" and signed by ANTHONY N. CHIARAMONTI.

(46) Between January 13, 1989 and September 22, 1989, when LaBarbera became delinquent in his juice loan payments, ANTHONY N. CHIARAMONTI made implied threats to LaBarbera, some in behalf of ANTHONY C. ZIZZO.

(47) On or about February 23, 1989, ANTHONY N. CHIARAMONTI demanded that LaBarbera catch up on his juice loan payments or pay off the entire loan. CHIARAMONTI threatened that LaBarbera's failure to do so would be very costly for LaBarbera's health and warned LaBarbera that if he didn't come in with the money due, they would put a deadline on the entire debt and come for it all.

Other juice loan debtors

(48) On dates unknown, ANTHONY N. CHIARAMONTI and BRETT K. O'DELL used violence to collect juice loan payments from other debtors, including an individual at a junkyard, who CHIARAMONTI stabbed with a knife, and a person in Cicero, Illinois, who O'DELL punched in the face. CHIARAMONTI also stuck a debtor in the chin with

a fork, and placed another debtor on a hot stove griddle at a restaurant.

D. Financing extortionate extensions of credit (18 U.S.C. § 893)

(49) In approximately 1987, Leonard Patrick contacted SAMUEL A. CARLISI and asked him for permission to expand his juice loan business. CARLISI gave Patrick permission to do so.

(50) In approximately late 1987 or early 1988, Leonard Patrick contacted JAMES J. MARCELLO, who scheduled a meeting between Patrick and SAMUEL A. CARLISI. During the meeting, CARLISI agreed to advance Patrick $100,000 for juice loans, with the understanding that Patrick would repay the entire investment before taking any profits and that thereafter CARLISI would receive a one-third share of any juice loan profits generated by Patrick's operation.

(51) JAMES J. MARCELLO subsequently met with Leonard Patrick and gave him $100,000 in cash in a paper bag.

(52) Several weeks later, Leonard Patrick contacted JAMES J. MARCELLO again, and requested additional funds for juice loans. MARCELLO gave Patrick another $100,000 in cash.

(53) Leonard Patrick and members of his crew used the funds advanced by SAMUEL A.

CARLISI and JAMES J. MARCELLO to make juice loans to their customers.

(54) Periodically, Leonard Patrick arranged to meet JAMES J. MARCELLO and repaid him $10,000 to $20,000 on the funds advanced. During the summer of 1988, Patrick also met with SAMUEL A. CARLISI and handed him $75,000 in cash in a paper bag in partial repayment of the funds advanced.

(55) On or about January 30, 1990, Leonard Patrick gave a $5,000 repayment of the juice-loan advance to Gary Edwards to give to James LaValley, with instructions for LaValley to take the money to ANTHONY C. ZIZZO. LaValley took the money to ZIZZO.

E. Intimidation and conspiracy: street tax (Ch. 38, Ill.Rev.Stat., §§ 12-6 & 8-2)

(56) From approximately late 1979 through late 1980, Kenton Pielet held high stakes card games at his apartment and elsewhere. Over the course of several meetings, SAMUEL A. CARLISI and JAMES J. MARCELLO told Pielet that if he continued to operate the game, he would have to pay CARLISI a street tax of 50% of his profits. Pielet agreed, and CARLISI instructed him to pay the money to FRANK J. BONAVOLANTE.

(57) Pielet continued to hold card games, and in some instances held rigged card games without notifying SAMUEL A. CARLISI or sharing the profits with him.

(58) One of the players in Pielet's rigged card games informed ANTHONY N. CHIARAMONTI that Pielet was holding the games.

(59) In approximately April or May 1980, during a rigged card game at Kenton Pielet's apartment, ANTHONY N. CHIARAMONTI, BRETT K. O'DELL and a third person forced their way into the apartment at gun point. CHIARAMONTI took money and valuables from Pielet and the others running the game, and CHIARAMONTI demanded that each of them pay him an additional $2,000. During the incident, CHIARAMONTI pushed and threatened Pielet. He also threatened one of the participants with a knife and threatened to shoot off his knee cap. O'DELL held a gun to the same person's head.

(60) Kenton Pielet later met with SAMUEL A. CARLISI, who ordered him not to have further unauthorized games. Subsequently, Pielet held a number of card games after giving notice to CARLISI and his representatives. Following each game, Pielet gave FRANK J. BONAVOLANTE or JAMES J. MARCELLO 50% of the profits.

(61) In or about 1982 or 1983, ANTHONY N. CHIARAMONTI and ANTHONY C. ZIZZO informed James Palaggi and another individual that they collected street tax from the owner of an automobile salvage business known as Globe Auto Recycling in Des Plaines, Illinois, and that Palaggi and the other individual should not attempt to do so.

(62) Sometime between approximately 1988 and 1990, ANTHONY N. CHIARAMONTI informed James Palaggi that he was raiding card games in the Cicero, Illinois area that were operating without permission and that had not been paying the required street tax. CHIARAMONTI asked Palaggi to assist him in these raids.

(63) On several occasions, ANTHONY N. CHIARAMONTI, James Palaggi, and a third person went to the location where one of the unauthorized card games was reportedly operating, with the intention to rob the card game.

F. Intimidation, arson and conspiracy: Lake Theater (Ch. 38, Ill.Rev.Stat., §§ 12-6, 20-1, & 8-2)

(64) In approximately 1988, JAMES J. MARCELLO called Leonard Patrick and arranged for the two of them to meet. MARCELLO met Patrick at a restaurant in Westchester, Illinois. MARCELLO, speaking on behalf of SAMUEL A. CARLISI, told Patrick that they had a job for him. MARCELLO advised Patrick that there was a problem between the owner of the Lake Theater in Oak Park, Illinois, and the projectionists union. MARCELLO told Patrick in substance that they wanted him to give the owner some trouble and scare him off. Patrick agreed to undertake the job.

(65) Patrick then met with Mario Rainone and instructed Rainone to scare the owner of the Lake Theater. Rainone agreed to handle the job.

(66) Mario Rainone met with his subordinate, James LaValley, explained the situation, and told LaValley to use an incendiary grenade to start a fire at the theater.

(67) James LaValley and another member of the Patrick Crew, Nicholas Gio, surveilled the Lake Theater on a number of occasions to determine how to undertake the job. LaValley decided to throw an incendiary grenade on the roof of the theater. Rainone approved the idea and provided LaValley with the incendiary grenade.

(68) On a date unknown, James LaValley and Nicholas Gio traveled to the Lake Theater with jugs containing gasoline and the incendiary grenade. They punctured holes in the gasoline containers and threw them on the roof. LaValley then attempted, but failed, to get the incendiary grenade on the roof.

(69) Later the same night, on the instructions of Mario Rainone, LaValley and Gio returned to the Lake Theater and attempted to ignite the roof by throwing a homemade "Molotov cocktail" on the roof. That device also failed to start the fire.

(70) Within a few days after these attempts, Mario Rainone and another individual went to the Lake Theater and threw a Mark II military explosive-fragmentation hand grenade on the roof of

the theater. The grenade malfunctioned and did not detonate.

G. Solicitation and Conspiracy to Commit Murder: Anthony F. Daddino (Ch. 38, Ill.Rev.Stat., §§ 9-1, 8-1.1 & 8-2)

(71) Anthony F. Daddino worked for ANTHONY C. ZIZZO in the collection of juice loans and the operation of a card room in Franklin Park, Illinois.

(72) On or about September 29, 1989, Anthony F. Daddino was found guilty of conspiracy and extortion charges in case number 88 CR 763, and was scheduled to be sentenced on November 15, 1989.

(73) On or about October 25, 1989, JAMES J. MARCELLO and Joseph Vento solicited Mario Rainone to assist in the planned murder of Anthony F. Daddino.

(74) During the period October 27, 1989 through November 5, 1989, Leonard Patrick discussed the planned murder of Anthony F. Daddino with SAMUEL A. CARLISI and JAMES J. MARCELLO.

IV. **COLLECTION OF UNLAWFUL DEBT**
(Second Alternative Grounds of Liability)

18. The collection of unlawful debt through which the defendants agreed to conduct and participate in the affairs of the enterprise, consisted of

multiple acts of collecting and attempting to collect and aiding and abetting in the collection and attempted collection of usurious loans and gambling debts. An unlawful debt is defined by Title 18, United States Code, Section 1961(6), as a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States or the law of the State of Illinois, or which was unenforceable in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States or the law of the State of Illinois, or the business of lending money or a thing of value at a rate usurious under state or federal law, where the usurious rate was at least twice the enforceable rate. The collections of unlawful debt agreed to as part of the conspiracy included the following:

A. Gambling debts

(1) From the fall of 1988 through January 6, 1990, RICHARD GERVASIO and others took actions to induce Michael Huber to repay a gambling debt.

(2) In approximately the fall of 1988, FRANK J. BONAVOLANTE, JOSEPH J. BONAVOLANTE and GILL M. VALERIO collected a gambling debt from Anthony Pape.

(3) From approximately September 1987 through approximately January 1989, FRANK J.

BONAVOLANTE and RICHARD GERVASIO collected from Thomas Briscoe gambling debts owed by Briscoe.

(4) From approximately September 1987 through approximately January 1989, Thomas Briscoe collected gambling debts owed by his customers, including Pete Matthews and an individual known as "Ali Baba," to the Carlisi Street Crew.

(5) From approximately October 1989 through approximately May 1990, George Friedel collected gambling debts from his customers on behalf of ANTHONY C. ZIZZO and FRANK J. BONAVOLANTE, and turned the proceeds over to FRANK J. BONAVOLANTE and others acting at his direction.

(6) From approximately October 1989 through approximately March 1990, ANTHONY C. ZIZZO and FRANK J. BONAVOLANTE collected from George Friedel portions of a gambling debt incurred by a bettor in 1987 for which they held Friedel responsible.

B. Juice loan debts

(7) During the summer of 1988, SAMUEL A. CARLISI collected $75,000 in cash from Leonard Patrick in partial repayment of funds advanced to finance the Patrick Street Crew's juice loan business. At least a portion of this money came from juice loan collections by members of the Patrick Street Crew.

(8) Between 1988 and January 1990, JAMES J. MARCELLO collected periodic payments of $10,000 to $20,000 in cash from Leonard Patrick and his representatives, in partial repayment of funds advanced to finance the Patrick Street Crew's juice loan business. At least a portion of this money came from juice loan collections by members of the Patrick Street Crew.

(9) On or about January 30, 1990, ANTHONY C. ZIZZO collected $5,000 in cash from James LaValley, acting in Leonard Patrick's behalf, in partial repayment of funds advanced to finance the Patrick Street Crew's juice loan business. At least a portion of this money came from juice loan collections by members of the Patrick Street Crew;

In violation of Title 18, United States Code, Section 1962(d).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA v. NICHOLAS W. CALABRESE, JAMES MARCELLO, JOSEPH LOMBARDO, also known as "The Clown," "Lumpy," and "Lumbo," FRANK CALABRESE, SR., FRANK SCHWEIHS, also known as "The German," PAUL SCHIRO, also known as "The Indian," MICHAEL MARCELLO, also known as "Mickey," NICHOLAS FERRIOLA, ANTHONY DOYLE, also known as "Twan," MICHAEL RICCI, THOMAS JOHNSON, JOSEPH VENEZIA, and DENNIS JOHNSON	No. 02 CR 1050 Violations: Title 18, United States Code, Sections 2, 371, 894, 1001(a)(2), 1510, 1951, 1955, and 1962(d) Second Superseding Indictment (Filed Jun. 2, 2005)

COUNT ONE

The SPECIAL AUGUST 2003-2 GRAND JURY charges:

I. THE ENTERPRISE

1. At times material to this indictment there existed a criminal organization which is referred to hereafter as "the Chicago Outfit." The Chicago Outfit was known to its members and associates as "the Outfit" and was also known to the public as "organized crime," the "Chicago Syndicate" and the "Chicago Mob." The Chicago Outfit was an "enterprise" as that term is used in Title 18, United States Code, Section 1961(4), that is, it constituted a group of individuals associated in fact, which enterprise was engaged in and the activities of which affected interstate commerce. The enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise.

2. The Chicago Outfit existed to generate income for its members and associates through illegal activities. The illegal activities of the Chicago Outfit included, but were not limited to (1) collecting "street tax," that is, extortion payments required as the cost of operating various businesses; (2) the operation of illegal gambling businesses, which included sports bookmaking and the use of video gambling machines; (3) making loans to individuals at usurious rates of interest (hereafter referred to as "juice loans"), which loans constituted "extortionate extensions of credit," as that term is defined in Title 18, United States Code, Section 891(6); (4) "collecting" through "extortionate means" juice loans constituting "extensions of credit," as those terms are defined in Title 18, United

States Code, Sections 891(5), (7) and (6), respectively; (5) collecting debts incurred in the Chicago Outfit's illegal gambling businesses; (6) collecting debts incurred in the Chicago Outfit's juice loan business, which debts carried rates of interest at least twice the rate enforceable under Illinois law; (7) using threats, violence and intimidation to collect street tax and juice loan debts; (8) using threats, violence, and intimidation to discipline Chicago Outfit members and associates; (9) using murder of Chicago Outfit members, associates and others to advance the interests of the Chicago Outfit's illegal activities; (10) obstructing justice and criminal investigations by intimidating, bribing, retaliating against, and murdering witnesses and potential witnesses who could provide information adverse to the enterprise's interests; and (11) traveling in interstate commerce to further the goals of the criminal enterprise.

3. In order to carry out its criminal activities, the Chicago Outfit maintained a structure and chain of command. The criminal activities of the Chicago Outfit were carried out in part by sub-groups, or "crews," which were generally given territories in different geographic locations in the Chicago area. These crews were known by their geographic areas, and included the Elmwood Park crew, the North Side/Rush Street crew, the South Side/26th Street or Chinatown crew, the Grand Avenue crew, the Melrose Park crew, and the Chicago Heights crew. Each crew was run by a crew leader, also known as a street boss or "capo," and these crew bosses reported to an underboss, or

"sotto capo," who was second in command of the Chicago Outfit, and therefore referred to at times as "Number Two." The overall leader of the Chicago Outfit was referred to as the Boss or "Number One." The Chicago Outfit also utilized a "consigliere," who provided advice to the Boss.

4. When an individual conducting illegal activities on behalf of the Chicago Outfit proved himself particularly trustworthy and was to be given special status in the enterprise, he was given "made" status. An individual could not normally be "made" unless he was of Italian descent, and had committed at least one murder on behalf of the enterprise. An individual had to be sponsored by his capo before he could be "made," which occurred at a ceremony in which the person to be "made" swore allegiance to the enterprise. This ceremony was attended by the individual's capo, as well as other ranking members of the Chicago Outfit. Once "made," the individual was accorded greater status and respect in the enterprise. An individual who was "made" or who committed a murder on behalf of the Outfit was obligated to the enterprise for life to perform criminal acts on behalf of the enterprise when called upon.

5. Disputes between members of different crews were to be resolved first by their respective capos, and, if no resolution could be made between the capos, then the Boss would settle the dispute.

6. During the course of the conspiracy, Anthony Accardo, also known as "Big Tuna," and "Joe Batters,"

Joseph Aiuppa, also known as "Doves," and "Joey O'Brien," Sam Carlisi, also known as "Wings," and John Monteleone, also known as "Johnny Apes," among others, acted as Boss of the Chicago Outfit.

7. During the course of the conspiracy, Joseph Aiuppa, and Jack Cerone, among others, acted as Sotto Capo, or Underboss, of the Chicago Outfit.

8. During the course of the conspiracy, Joseph Ferriola was a "made" member of the Chicago Outfit who reported directly to the Boss. Harry Aleman, William Petrocelli, also known as "Butch," Jerry Scarpelli, and others, were criminal associates who reported at various times to Joseph Ferriola.

9. Defendant JAMES MARCELLO was a member of the Melrose Park crew, was a "made" member of the Chicago Outfit, and committed murder and other criminal activities on its behalf. Defendant JAMES MARCELLO continued to conduct criminal activities on the Outfit's behalf while incarcerated through his brother, defendant MICHAEL MARCELLO, and others.

10. Defendant JOSEPH LOMBARDO, also known as "the Clown," "Lumpy," and "Lumbo," was a member of the Grand Avenue crew, and committed murder and other criminal activities on its behalf.

11. Defendant FRANK CALABRESE, SR., was a member of the South Side/26th Street crew, was a "made" member of the Chicago Outfit, and committed murder and other criminal activities on its behalf.

Defendant FRANK CALABRESE, SR., continued to conduct criminal activities on the Outfit's behalf while incarcerated through defendants FERRIOLA, DOYLE, RICCI, and others.

12. Other members of the South Side/26th Street crew were James Torello, also known as "Turk," Angelo LaPietra, also known as "the Hook," and "the Bull," and James LaPietra, all of whom served as capos of this crew during the course of the conspiracy. Additional members of this crew included John Monteleone, John Fecarotta, Ronald Jarrett, James DiForti, Frank Saladino, Frank Furio, and Frank Santucci.

13. Defendant NICHOLAS CALABRESE is the brother of defendant FRANK CALABRESE, SR., was also a member of the South Side/26th Street crew, was a "made" member of the Chicago Outfit, and committed murder and other criminal activities on its behalf.

14. Defendant FRANK SCHWEIHS, also known as "the German," was an enforcer for the Chicago Outfit, imposing and collecting "street tax" for himself and Outfit members, and making additional collections on behalf of the enterprise through the use of extortionate means. Defendant SCHWEIHS also agreed to commit murder on behalf of the Chicago Outfit.

15. Defendant PAUL SCHIRO, also known as "the Indian," was a criminal associate of defendant SCHWEIHS, "made" member Anthony Spilotro, and

Outfit associate Joseph Hansen, who committed murder and other criminal activities on behalf of the Chicago Outfit.

16. Defendant MICHAEL MARCELLO, also known as "Mickey," is the brother of defendant JAMES MARCELLO, and was a member of the Melrose Park crew. Defendant MICHAEL MARCELLO assisted his brother's participation in the activities of the enterprise while defendant JAMES MARCELLO was in jail, by keeping his brother informed of the enterprises's activities, delivering messages to persons associated with the enterprise, and carrying out illegal activities of the Chicago Outfit, including the operation of an illegal, video gambling business.

17. Defendant NICHOLAS FERRIOLA is the son of Joseph Ferriola, and was a member of the South Side/26th Street crew who assisted defendant FRANK CALABRESE, SR.'s participation in the activities of the enterprise while defendant FRANK CALABRESE, SR., was in jail, by keeping defendant FRANK CALABRESE, SR., informed of the enterprise's activities, delivering messages to persons associated with the enterprise, collecting monies generated by extortionate demands of defendant FRANK CALABRESE, SR., and carrying out other illegal activities of the Chicago Outfit, including the operation of an illegal sports bookmaking business.

18. Defendant ANTHONY DOYLE, also known as "Twan," is a retired Chicago Police Department ("CPD") officer, who, at the time he was employed as a CPD

officer, assisted defendant FRANK CALABRESE, SR.'s participation in the activities of the enterprise while defendant FRANK CALABRESE, SR., was in jail, by keeping defendant FRANK CALABRESE, SR. informed of a law enforcement investigation into the murder of John Fecarotta, committed by defendants FRANK CALABRESE, SR., NICHOLAS CALABRESE, and others. Defendant DOYLE also agreed to pass messages from defendant FRANK CALABRESE, SR., in jail to other members of the Chicago Outfit, including messages designed to determine whether defendant NICHOLAS CALABRESE or James DiForti, now deceased, was cooperating with law enforcement about the activities of the enterprise.

19. Defendant MICHAEL RICCI is a retired CPD officer, who at the time he was subsequently employed with the Cook County Sheriff's Department, assisted defendant FRANK CALABRESE, SR.'s participation in the activities of the enterprise while defendant FRANK CALABRESE, SR., was in jail, by agreeing to pass messages from defendant FRANK CALABRESE, SR., to other members of the Chicago Outfit, including messages designed to determine whether defendant NICHOLAS W. CALABRESE or James DiForti was cooperating with law enforcement about the activities of the enterprise. Defendant RICCI also agreed to assist defendant FRANK CALABRESE, SR., in collecting monies generated by extortionate demands of defendant FRANK CALABRESE, SR., and to provide materially false

information to special agents of the Federal Bureau of Investigation.

II. THE RACKETEERING CONSPIRACY

20. From approximately the middle of the 1960s through the date of the return of this indictment, the exact dates being unknown to the Grand Jury, in the Northern District of Illinois, Eastern Division, and elsewhere,

NICHOLAS W. CALABRESE,
JAMES MARCELLO,
JOSEPH LOMBARDO, also known as
"The Clown," "Lumpy," and "Lumbo,"
FRANK CALABRESE, SR.,
FRANK SCHWEIHS, also known as "The German,"
PAUL SCHIRO, also known as "The Indian,"
MICHAEL MARCELL, also known as "Mickey,"
NICHOLAS FERRIOLA,
ANTHONY DOYLE, also known as "Twan," and
MICHAEL RICCI,

defendants herein, being persons employed by and associated with an enterprise, that is, the Chicago Outfit, which enterprise engaged in and the activities of which affected, interstate commerce, did knowingly conspire and agree, with other persons known and unknown to the Grand Jury, to conduct and to participate, directly and indirectly, in the conduct of the affairs of the Chicago Outfit through: (1) a "pattern of racketeering activity," as that term is defined in Title 18, United States Code, Sections 1961(1) and 1961(5), and as further specified in paragraph 48 of this count,

and (2) the "collection of unlawful debt," as that term is defined in Title 18, United States Code, Section 1961(6), and as further specified in paragraph 49 of this count, both in violation of Title 18, United States Code, Section 1962(c).

21. It was part of the conspiracy that each defendant agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the enterprise.

22. It was further part of the conspiracy that the defendants, together with other persons known and unknown to the Grand Jury, each agreed to conduct and to participate in the conduct of the Chicago Outfit's affairs through the collection of unlawful debt.

23. It was further part of the conspiracy that acts involving murder would be attempted and were committed to further the criminal objectives of the Chicago Outfit and protect the enterprise from law enforcement. Such acts involving murder included the acts committed by the following defendants as set out below:

a. In or about August, 1970, defendant FRANK CALABRESE, SR., and others committed the murder of Michael Albergo, also known as "Hambone," in Chicago, Illinois;

b. On or about September 27, 1974, defendants JOSEPH LOMBARDO, FRANK SCHWEIHS and others committed the

murder of Daniel Seifert, in Bensenville, Illinois;

c. On or about June 24, 1976, defendant FRANK CALABRESE, SR., and others committed the murder of Paul Haggerty, in Chicago, Illinois;

d. On or about March 15, 1977, defendant FRANK CALABRESE, SR., and others committed the murder of Henry Cosentino in Illinois;

e. On or about January 16, 1978, defendant FRANK CALABRESE, SR., and others committed the murder of John Mendell, in Chicago, Illinois;

f. On or about January 31, 1978, defendant FRANK CALABRESE, SR., and others committed the murders of Donald Renno and Vincent Moretti, in Cicero, Illinois;

g. On or about July 2, 1980, defendant FRANK CALABRESE, SR., and others committed the murders of William and Charlotte Dauber, in Will County, Illinois;

h. On or about December 30, 1980, defendant FRANK CALABRESE, SR., and others committed the murder of William Petrocelli, in Cicero, Illinois;

i. On or about June 24, 1981, defendant FRANK CALABRESE, SR., and others

committed the murder of Michael Cagnoni, in DuPage County, Illinois;

j. On or about September 13, 1981, defendant JAMES MARCELLO and others committed the murder of Nicholas D'Andrea, in Chicago Heights, Illinois;

k. On or about April 24, 1982, defendants JAMES MARCELL, FRANK CALABRESE, SR., and others committed the attempted murder of Individual A, in Lake County, Illinois;

l. On or about July 23, 1983, defendant FRANK CALABRESE, SR., and others committed the murders of Richard D. Ortiz and Arthur Morawski, in Cicero, Illinois;

m. On or about June 7, 1986, defendants FRANK SCHWEIHS, PAUL SCHIRO, and others committed the murder of Emil Vaci, in Phoenix, Arizona;

n. On or about June 14, 1986, defendant JAMES MARCELLO and others committed the murders of Anthony and Michael Spilotro, in DuPage County, Illinois;

o. On or about September 14, 1986, defendants NICHOLAS CALABRESE, FRANK CALABRESE, SR., and others committed the murder of John Fecarotta, in Chicago, Illinois.

24. It was further part of the conspiracy that at times members of one crew would assist members of other crews in homicides, by conducting surveillances of and luring intended victims so that the victims would not be alerted that they were targeted for murder.

25. It was further part of the conspiracy that cash payments would be and were extorted from numerous individuals as "street tax" to allow businesses run by those individuals to continue to operate.

26. It was further part of the conspiracy that loans made at usurious rates, or "juice loans," would be and were made to numerous individuals. These loans carried interest rates generally ranging from one percent (1%) to ten percent (10%) per week, which translate into annual rates of 52% to 520%, respectively. In making these juice loans, the conspirators agreed to rely and did rely upon the borrower's understanding at the time the loan was made that delay or failure to repay the loans could result in, the use of violence or other criminal means to cause harm to the borrower. The conspirators also understood at the time each juice loan was made that delay or failure to repay the loans could result in the use of violence or other criminal means to cause harm to the particular borrower.

27. It was further part of the conspiracy that "juice loan" payments would be and were collected from numerous juice loan debtors, who borrowed

money from conspirators at the rates described in the previous paragraph. The conspirators each understood at the time they collected each juice loan payment that delay or failure to repay the loan could result in the use of violence or other criminal means to cause harm to the particular debtor. The conspirators used violence, intimidation and threats to collect these debts.

28. It was further part of the conspiracy that collections would be made of debts incurred in connection with the juice loan business described in this Count, which business charged rates of interest at least twice the rate enforceable under Illinois law.

29. It was further part of the conspiracy that members and associates of the Chicago Outfit would and did knowingly conduct, finance, manage, supervise, direct, and own all or part of illegal gambling businesses in violation of the laws of the State of Illinois, including illegal sports bookmaking businesses, and businesses which utilized video gambling machines for illegal wagering.

30. It was further part of the conspiracy that members and associates of the Chicago Outfit agreed to collect and did collect debts incurred in connection with illegal gambling businesses described in this Count.

31. It was further part of the conspiracy that members and associates of the Chicago Outfit used violence, intimidation and threats to: (1) instill discipline within the Chicago Outfit by compelling adherence

to the Chicago Outfit's edicts and instructions; and (2) punish conduct by Chicago Outfit members, associates and others, which the hierarchy of the Chicago Outfit believed was adverse to the interests of the Chicago Outfit.

32. It was further part of the conspiracy that members and associates of the Chicago Outfit would and did obstruct the due administration of justice by: (1) intimidating, harming, and killing witnesses and potential witnesses who could provide information detrimental to the operations of the enterprise; (2) providing false information to law enforcement officers; and (3) paying money to individuals to keep them from cooperating with law enforcement officials.

33. It was further part of the conspiracy that the conspirators would and did use nominees, "fronts," and fictitious names to hide the proceeds of criminal activities.

34. It was further part of the conspiracy that the conspirators would and did use coded language in their discussions and written materials, and utilized coded names for discussing fellow conspirators and victims of their criminal activities.

35. It was further part of the conspiracy that the conspirators would and did collect information from corrupt law enforcement sources to determine and disrupt legitimate law enforcement investigation into the activities of the enterprise.

36. It was further part of the conspiracy that the conspirators would and did steal, store, and utilize "work cars" for use in their criminal activities, including surveillance of murder victims and committing murders.

37. It was further part of the conspiracy that the conspirators would and did use walkie-talkies and citizen band radios to communicate amongst themselves while conducting criminal activities, including murder.

38. It was further part of the conspiracy that the conspirators would and did monitor law enforcement radio frequencies, and acquire radio equipment, monitors, and crystals to do so, in order to detect and avoid law enforcement inquiry into their activities, including murder.

39. It was further part of the conspiracy that the conspirators would and did conduct surveillance to detect the presence of law enforcement while they and coconspirators were committing illegal activities, including murder.

40. It was further part of the conspiracy that the conspirators would and did acquire explosives, explosive devices, detonators, transmitters, and remote control devices with the intent to murder individuals without needing to be in the immediate vicinity of the intended victim.

41. It was further part of the conspiracy that the conspirators would and did acquire and store firearms to be used to commit murder.

42. It was further part of the conspiracy that the conspirators would and did use pagers and pay phones in an effort to reduce law enforcement's ability to intercept their communications.

43. It was further part of the conspiracy that the conspirators would and did maintain hidden interests in businesses, from which they could receive income not traceable to them.

44. It was further part of the conspiracy that the conspirators would and did maintain hidden control of labor organizations and assets.

45. It was further part of the conspiracy that the conspirators would and did utilize the threat of labor union violence or disruptions to induce payments to the enterprise to keep "union peace."

46. It was further part of the conspiracy that the conspirators would and did maintain written records and ledgers for their loansharking and bookmaking activities.

47. It was further part of the conspiracy that members and associates of the Chicago Outfit misrepresented, concealed and hid, caused to be misrepresented, concealed and hidden, and attempted to misrepresent, conceal and hide the operation of the Chicago Outfit and acts done in furtherance of the enterprise.

III. PATTERN OF RACKETEERING ACTIVITY

(First Alternative Ground of Liability)

48. The pattern of racketeering activity through which the defendants agreed to conduct and to participate in the conduct of the Chicago Outfit's affairs, consisted of multiple violations of the following federal and state laws:

(a) Acts and threats involving murder chargeable under the law of the States of Illinois, Arizona, and Nevada, which are punishable by imprisonment for more than one year; that is, first degree murder (Illinois: Illinois Revised Statutes, Chapter 38, §9-1; Arizona: Arizona Revised Statutes §13-1105), conspiracy to commit murder (Illinois: Illinois Revised Statutes, Chapter 38, §8-2; Arizona: Arizona Revised Statutes 613-1003; Nevada: Nevada Revised Statutes §199.480), and attempted murder (Illinois: Illinois Revised Statutes, Chapter 38, §8-4);

(b) Making and conspiring to make extortionate extensions of credit, indictable under Title 18, United States Code, Section 892;

(c) Collecting and conspiring to collect extensions of credit by extortionate means, indictable under Title 18, United States Code, Section 894;

(d) Interference with commerce by threats and violence, and conspiring to commit this offense, indictable under Title 18, United States Code, Section 1951;

(e) Acts and threats involving extortion in violation of state law, which are punishable by imprisonment for more than one year; that is, intimidation, in violation of Chapter 38, Illinois Revised Statutes, §12-6 (which later became 720 ILCS 5/12-6 of the Illinois Compiled Statutes) and conspiracy to commit intimidation, in violation of Chapter 38, Illinois Revised Statutes, §8-2 (which later became 720 ILCS 5/8-2 of the Illinois Compiled Statutes);

(f) Operating an illegal gambling business indictable under Title 18, United States Code, Section 1955;

(g) Obstructing the due administration of justice, indictable under Title 18, United States Code, Section 1503;

(h) Obstruction of criminal investigations, indictable under Title 18, United States Code, Section 1510;

(i) Witness tampering, indictable under Title 18, United States Code, Section 1512;

(j) Retaliating against a witness, indictable under Title 18, United States Code, Section 1513;

(k) Interstate travel in aid of racketeering enterprises, indictable under Title 18, United States Code, Section 1952.

IV. COLLECTION OF UNLAWFUL DEBT

(Second Alternative Ground of Liability)

49. The collection of unlawful debt through which the defendants agreed to conduct and to participate in the affairs of the enterprise, consisted of multiple acts of collecting and attempting to collect debt incurred in connection with the Chicago Outfit's operation of illegal gambling businesses and its lending money at usurious rates, which loans were unenforceable under Illinois laws relating to usury, such gambling and loan debts constituting unlawful debt as defined in Title 18, United States Code, Sections 1961(6)(A) and (B).

V. NOTICE OF ENHANCED SENTENCING

50. Each of the murders identified in paragraph 23 above, with the exception of paragraph 23(m), was committed in violation of Illinois Revised Statutes, Chapter 38, §9-1, in that in each such instance the named defendants killed the named victim(s) without lawful justification in performing acts which caused the death of the named victims(s): a) intending to kill and do great bodily harm to the named victim(s), and knowing that such acts would cause death to the named victim(s), and b) knowing that such acts created a strong probability of death and great bodily harm to the named victim(s).

51. In addition, with respect to each of the murders identified in paragraphs 23(f), (g), (h), (i), (j), (l), (n), and (o), each murder was accompanied by

exceptionally brutal and heinous behavior indicative of wanton cruelty, in violation of Illinois Revised Statutes, Chapter 38, §1005-8-1.

52. With respect to the murders identified above in paragraphs 23(f), (h), (j), and (n), each murdered individual was killed by the named defendants in the course of another felony, namely, aggravated kidnaping, in violation of Illinois Revised Statutes, Chapter 38, §10-2, §1005-8-1, and §9-1(b)(6).

53. With respect to the murder of Michael Cagnoni, identified above in paragraph 23(i), defendant FRANK CALABRESE, SR., committed the murder of Michael Cagnoni in the course of another felony, namely, arson, in violation of Illinois Revised Statutes, Chapter 38, §20-1, §1005-8-1, and §9-1(b)(6).

54. With respect to the murder of Emil Vaci, identified above in paragraph 23(m), defendants FRANK SCHWEIHS and PAUL SCHIRO conspired to commit and committed first degree murder in violation of Arizona Revised Statutes §13-1003 and §13-1105, in that FRANK SCHWEIHS and PAUL SCHIRO, with the intent to promote and aid the commission of first degree murder, agreed with each other and others known and unknown, and with premeditation, that at least one person would cause the death of Emil Vaci, and that FRANK SCHWEIHS and PAUL SCHIRO, knowing that their conduct would cause death, caused the death of Emil Vaci with premeditation.

All of the above in violation of Title 18, United States Code, Sections 1962(d) and 1963.