

Docket Nos. 06-1274, 06-2569, 07-1086

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

PAUL A. DECOLOGERO, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF DEFENDANT-APPELLANT PAUL A. DECOLOGERO

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STATEMENT OF JURISDICTION

Paul A. DeCologero appeals the final judgement of his criminal convictions after a jury trial, and his life sentence, from the District Court, Judge Rya W. Zobel, presiding, District of Massachusetts, in Indictment No. 1:01-cr-10373-RWZ-1.

Jurisdiction of this Court is invoked under 28 U.S.C. §1291, as an appeal from a final judgment of conviction and sentence in an United States District Court. Notice of appeal was timely filed in accordance with Fed. R. App. P. 4(b), on December 22, 2006. Doc. 1942.

ISSUES PRESENTED

I. APPELLANT PAUL A. DECOLOGERO'S TRIAL COUNSEL OPERATED UNDER AN ACTUAL CONFLICT OF INTEREST, BROUGHT TO THE DISTRICT COURT'S ATTENTION PRIOR TO TRIAL, BUT NEGLECTED AND GIVEN NO HEARING, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

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VI. THE DISTRICT COURT ERRED IN DENYING APPELLANT A CONTINUANCE OF THE TRIAL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

VII. APPELLANT WAS DENIED EXCULPATORY EVIDENCE IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

STATEMENT OF THE CASE

Paul A. DeCologero was indicted on October 17, 2001. Doc. 1. There was an interlocutory appeal filed in this Court of Appeals on March 25, 2003. Doc. 511. The appeal resulted in a published opinion upholding the denial of Paul A. Decologero's motion to dismiss the indictment on double jeopardy and estoppel grounds, and overturning an order to sever the counts into two trials. *United States v. DeCologero*, 364 F.3d 12 (1st Cir. 2004). The mandate was filed in the district court on May 10, 2004. Doc. 747.

On January 9, 2006, jury selection began in the trial of Paul A. DeCologero and co-defendants John P. DeCologero, Jr., Paul J. DeCologero, and Joseph Pavone. Tr. v. 1, p. 49.¹ The trial proceeded over 40 days, and the jury returned its verdicts on

¹ The trial testimony ("Tr.") in the district court is listed by volume (v) and page (p). The Joint Appendix is "JA." The Addendum is "A."

March 20, 2006. Doc. 1800 (JA584-87). Paul A. DeCologero was found guilty of Count 1 (RICO conspiracy), Count 2 (RICO), Count 3 (Witness tampering conspiracy), Count 4 (Witness tampering by misleading conduct), Count 5 (Witness tampering by attempting to kill), Count 6 (Witness tampering by killing, i.e., murder), Count 8 (Conspiracy to commit Hobbs Act robberies), Count 9 (Stevens Hobbs Act robbery), Count 10 (Marijuana possession with intent to distribute), Count 11 (Using or Carrying Firearm during and in relation to Stevens robbery), Count 13 (Using or carrying a firearm during and in relation to Sapochetti robbery), Count 17 (Marijuana conspiracy), 18 (Felon in possession of a firearm), and 23 (Cocaine conspiracy). Doc. 1915 (A18-21). He was acquitted of four counts. Doc. 1800 (JA584-87).

A sentencing hearing was held on September 28, 2006, and Paul A. DeCologero was sentenced to life in prison. *Id.* His motion for new trial was denied on December 15, 2006. Doc. 1934. His notice of appeal was filed December 22, 2006. Doc. 1942.

STATEMENT OF FACTS

1. Origins of La Cosa Nostra in New England.

La Cosa Nostra (LCN), commonly known as the Mafia, organizes itself around regional contingents called “Families” for the purpose of organized crime. *United*

States v. Ferrara, 456 F.3d 278, 280, n.1 (1st Cir. 2006).² For many years, the New England LCN was controlled by Raymond Patriarca, Sr., of Providence, Rhode Island. *United States v. Patriarca*, 948 F.2d 789, 790 (1st Cir. 1991). He allowed portions of the Greater Boston area to be overseen by Genarro Angiulo and his brothers from the North End, until they were finally undermined in 1981 by FBI electronic surveillance of their once impregnable 98 Prince Street office. *See United States v. Angiulo*, 897 F.2d 1169, 1176 (1st Cir. 1990). They were ultimately convicted of a racketeering conspiracy pursuant to 18 U.S.C. 1961 *et seq.* (RICO). *Id.*³

Others stepped in to fill the vacuum. In 1984, Patriarca died and his son, Raymond Patriarca, Jr. took over the family. *United States v. Barone*, 114 F.3d 1284, 1289 (1st Cir. 1997).

2. Carrozza vs. Salemme.

In 1989, a conflict developed when an LCN faction led by Robert Carrozza, Joseph Russo, and Vincent Ferrarra began to challenge Patriarca, Jr.'s leadership of the New England organization. *United States v. Marino*, 277 F.3d 11, 19 (1st Cir. 2002). That year, William Grasso, one of the leaders of the Patriarca Family, was

² This Court may draw on facts found in other cases. *McIntyre v. United States*, 367 F.3d 38, 42 (1st Cir. 2004).

³ *See also* GERARD O'NEILL & DICK LEHR, *THE UNDERBOSS: THE RISE AND FALL OF A MAFIA FAMILY* (Public Affairs 1989).

killed. *Id.*

An attempt was also made to murder Frank Salemme, who was at that time in the Patriarca Family leadership. *Id*; see also *United States v. Carrozza*, 4 F.3d 70, 89 (1st Cir. 1993). Vincent Michael Marino a/k/a Gigi Portalla⁴ was involved in the murder attempt and had reason to fear Salemme would return the favor. *Marino*, 277 F.3d at 19. It was during the 1980's that Thomas Regan⁵ worked for Chad Wedic, a Salemme employee. *Tr. v. 24*, p. 39.

In 1991, Salemme became the boss of the Patriarca Family. *Marino*, 277 F.3d at 19. The conflict escalated. On one side was the leadership of the Patriarca Family, and on the other side was the rival Carrozza faction, both seeking to seize control. Each side took steps to eliminate members of the other, by murder or, at least, injury. *Id.* at 18.

Both factions wanted to collect the extortion payments to the Patriarca Family and control its other business, including drug distribution. *Id.* at 19, 21. Between 1991 and 1994, there were a series of confrontations between the two factions resulting in murders and the looting of drugs. *Id.* at 19-20. Paul A. Decologero (hereafter “Paul A.”), was alleged to have been associated with Carrozza and to have participated in

⁴ He is also known as “Vincent M. Portalla.” *United States v. Portalla*, 985 F.2d 681, 622 (1st Cir. 1993).

⁵ Thomas Regan was a crucial government witness against appellant in the trial below.

murder attempts on Salemme and members of his group. *See United States v. Marino*, 200 F. 3d 6, 19 (1st Cir. 1999).

3. Other Players.

The LCN was not the only criminal organization operating in and around Boston during the 1980's and '90s. The Winter Hill Gang was a “clandestine criminal organization engaged in multiple crimes, including murder, bribery, extortion, loan sharking, and illegal gambling.” *United States v. Connolly*, 341 F.3d 16, 20 (1st Cir. 2003). Despite the fact that the Winter Hill Gang and LCN were often rivals, members of the two groups frequently cooperated in criminal undertakings. James Bulger and Stephen Flemmi were members of the Winter Hill Gang. Bulger and Flemmi reported to the FBI on the activities of both the Gang and La Cosa Nostra for over a decade. *Id.*

John Connolly, a FBI Special Agent, who was instrumental to prosecuting the Angiulos and other LCN figures, handled Bulger and Flemmi as informants until his retirement from the agency in 1990. *Connolly*, 341 F.3d at 19; *see also United States v. Flemmi*, 225 F.3d 78 (1st Cir. 2000). This Court found:

While serving as an FBI agent, Connolly had been intimately involved in the criminal activities of the Winter Hill Gang and its members, receiving and making bribes from and on behalf of members of the Gang. Even after his retirement from the Bureau, Connolly allegedly continued to exploit his connections within the Bureau to become privy to confidential information that he would then pass along to members of the Winter Hill Gang. *Connolly*, 341 F.3d at 20.

Information obtained from Connolly, and his FBI supervisor John Morris, and given to Bulger and Flemmi, resulted in the murders of informants and rivals, as well as allowing Bulger's successful escape from arrest. *Id.* at 23-25. Kevin Weeks, who identified himself as Bulger's "right-hand man," was the government's star witness in Connolly's prosecution for RICO. *Id.* at 23.

Flemmi was ultimately convicted of RICO offenses, despite his argument that his actions had been sanctioned by the FBI. *Flemmi*, 225 F.3d at 91. Carrozza rival, Frank Salemme, was convicted in the same indictment upon his guilty plea. Flemmi had helped the FBI to prosecute Carrozza and his associates. *See United States v. Salemme*, 91 F.Supp.2d 141, 153 (D. Mass. 1999) (Wolf, J.).

4. Thomas Regan and Steve Dicenso.⁶

By the early 1990's, Thomas Regan began robbing drug dealers round Boston, assisted once by Frank Salemme's son. Tr. v. 23, pp. 49, 58.⁷ In late 1994, Regan robbed drug dealers Phil Soccorso and Gary Ramus. Tr. v. 25, pp. 29-32; v. 26, 137-38; v. 27, pp. 16-17. In late 1995, Regan participated in robbing drug dealer Richard Pesaturo. Tr. v. 23, pp. 43, 50-54. He attempted to rob drug dealer Daniel Pollard. *Id.*

⁶ These were the main witnesses against Paul A. in the trial below.

⁷ In 1995, Whitey Bulger's associate, Kevin Weeks, assisted Regan in a business dispute. Tr. v. 24, pp. 116-18.

at 57-58. On Halloween 1996, Regan was involved in the robbery of drug dealer Michael Stevens. *Id.* at 119; v. 26, pp. 104-11. On November 13, 1996, Regan and James Penta robbed drug dealer James Marrone. Tr. v. 24, pp. 70-71. In January 1997, he took part in the robbery of drug dealer Gerald Godreau. Tr. v. 23, p. 164.

Regan also sold drugs between 1977 and 1997. *Id.* at 55-57. Throughout this time, and until it was diagnosed in 2005, Regan suffered from an untreated bipolar disorder that caused him anxiety and rage. Tr. v. 23, P. 103-104.

Regan and Steven Dicenso participated in an October 1996 burglary of drug dealer Jeffrey North's home, resulting in the theft of weapons, ammunition, and drugs. Tr. v. 9A⁸, p.19, 21-22. That same month, Dicenso (but not Regan), participated in the robbery of drug dealer Al Sapochetti. Tr. v. 11, p. 19-20.

5. Aislin Silva's Murder.

About a week after the North burglary, Medford police heard that a woman named Aislin Silva had a collection of weapons in her apartment. *United States v. Capozzi*, 486 F.3d 711, 716 (1st Cir. 2007).⁹ On November 5, 1996, local police and ATF Special Agent John Mercer went to Silva's apartment, obtained her consent to

⁸ There is a separate volume on Trial Day 9 covering only Dicenso's direct testimony.

⁹ Many of the relevant facts surrounding Silva's murder were found by this Court in the appeal of co-defendant Derek Capozzi's conviction from the same indictment, but in a separate, earlier trial.

search her apartment for weapons, and found a duffle bag of weapons under her bed. Inside the bag were an automatic machine pistol, a .357 magnum revolver, and an AR-15 semiautomatic assault rifle, along with several hundred rounds of ammunition and two non-functioning hand grenades. *Id.*

Dicenso had stored these and other weapons at Silva's apartment. Tr. v. 11, p. 15. During the search, DiCenso and Paul J. DeCologero (Paul A.'s nephew) arrived at Silva's apartment, were identified by police, and were then allowed to leave. *Capozzi*, 486 F.3d at 716.

Kevin Meuse and DiCenso tried to get Silva to take an overdose quantity of heroin by telling her it was cocaine. The attempted overdose failed, and DiCenso and Silva stayed the night of November 12, 1996 at DiCenso's apartment. The next morning, Meuse arrived and sent DiCenso to the hardware store to buy a hacksaw and cutting shears. When DiCenso returned to the apartment, Silva was dead, and Meuse admitted he had broken her neck. *Id.*

Meuse left the apartment and came back with Derek Capozzi. The three dismembered Silva's body in the apartment's bathtub, stuffed the body parts into plastic garbage bags and then into duffle bags, and carried her remains to Capozzi's rental car. They drove to a Home Depot, where Capozzi and Meuse bought a shovel and lime and then drove to a location on the North Shore chosen by Capozzi, where

they buried Silva's remains. They then drove to a car wash in Danvers to dispose of evidence and clean the car used to transport Silva's body. DiCenso went to a nearby Ann & Hope store and bought three pairs of sneakers to replace the ones worn during the burial of Silva's remains. *Id.*

The day after Silva was killed, bloody plastic bags, duffle bags, and four empty lime bags, among other evidence, were found in and around a trash dumpster at the Danvers car wash in question. Meuse's fingerprint was found on one item. The blood, hair and tissue found on and in the plastic bags were determined through DNA testing to belong to Silva. A Home Depot security video showed Capozzi pushing a shopping cart out of the store containing what looked like four bags of lime and Meuse leaving the store with a shovel. A receipt from the Danvers Ann & Hope found in DiCenso's wallet two days later showed that he purchased an iced tea at the store at about 9 p.m. on the night Silva was killed. *Id.* Another Ann & Hope receipt showed that he purchased three pairs of sneakers and three sweat suits at about the same time. *Capozzi*, 486 F.3d at 716-17.

6. Regan and Dicenso Arrested.

DiCenso was charged by criminal complaint in February 1997 with being a felon in possession of the recovered guns at Silva's apartment. *Capozzi*, 486 F.3d at 719. Because of health problems stemming from a November 1996 heroin overdose

and following his motion for a competency evaluation under 18 U.S.C. § 4241 *et seq.*, DiCenso was examined by mental health professionals and found incompetent to stand trial. *Id.* The government dismissed the complaint on June 27, 1997. *Id.*

Regan was in custody for a May 1996 federal robbery charge, for which he later received a 151-month sentence in 1999. Tr. v. 22, pp. 135-36. By October 1997, Dicenso was trying to contact Regan. Tr. v. 7, p. 116; Doc. 1524-4. Regan's girlfriend Andrea McMahon spoke to Dicenso by phone twice and also visited Regan in prison. Tr. v. 31, pp. 17-19, 33-34; GX-176, 177. Dicenso later claimed that he last spoke to Regan in mid-1996, before his overdose. Tr. v. 11, pp. 22-23.

In late 1997, Regan began cooperating with government agents against Paul A. Tr. 12/16/05 Hearing, p. 58. In February 1998, Regan told ATF Special Agent John Mercer about his participation in the robberies of Soccorso, Ramus, Stevens, Pesaturo, and North, the North burglary, and his knowledge of the Sapochetti robbery. Tr. v. 7, p. 79. Soon thereafter, Mercer interviewed those victims and other persons, to corroborate the crimes had occurred. *Id.*

Regan was convicted as the result of a plea agreement in which the government dropped a firearm count against Regan and supported a sentence reduction, shaving about four years from his original incarceration. Tr. v. 22, pp. 139-40. He later went into the witness protection program upon release. Tr. v. 25, p. 6.

On July 15, 1998, Special Agent Mercer, testified before a grand jury and responded to questions from AUSA Christopher Bator.¹⁰ Doc. 1911, Tab. 49. Besides implicating Paul A. in some of his robberies, Regan had reported the Sapochetti robbery to Mercer, and that Sapochetti was aligned with Salemme. *Id.*

7. The Carrozza Case.

In April 1997, Paul A., Robert Carrozza, Vincent Marino, and other alleged members of the Carrozza faction of the LCN were indicted for a RICO conspiracy occurring between 1989 and 1994 (hereafter “*Carrozza*”).¹¹ *See Marino*, 200 F. 3d at 7. At trial, the government alleged that Paul A. met with members of the Carrozza faction to discuss killing Salemme and other enemies in the rival faction. *Marino*, 277 F.3d at 19. The government also alleged that Paul A. went with Carrozza associates on excursions to locate and shoot people on the hit list. *Id.* The battle for control between the Salemme and Carrozza factions has been named, “the War.”

The *Carrozza* case trial began in 1998. The lead prosecutor in the *Carrozza* case was Assistant United States Attorney Jeffrey Auerhahn.¹² *See United States v.*

¹⁰ Bator also participated in the instant prosecution. Mercer was the case agent.

¹¹ The Carrozza indictment is contained in the record appendix of Paul A.’s interlocutory appeal Nos. 03-1442 and 03-1443.

¹² Later, in 2002, it was discovered that Auerhahn lied about withholding exculpatory evidence in another LCN case, preceding the *Carrozza* prosecution, by failing to disclose that a government witness provided false trial testimony. *Ferrara*, 456 F.3d 287.

Carrozza, Cr. No. 97-40009 (D. Mass. 1998) (Gorton, J.). The main investigative agency was the FBI.

In response to an objection by Paul A.'s attorney, that it was highly prejudicial to introduce evidence of a home invasion against Paul A. during that trial, AUSA Auerhan argued that one purpose of the conspiracy was to rip off drug dealers, and to use the profits in order to further the aims of Carrozza in displacing Salemme. Doc. 1615-2. P. 7 The objection was overruled. Later trying to admit a tape of Paul A. speaking, Auerhahn argued that Paul A. said he was involved in the Carrozza conspiracy from 1993 to 1996, and that he was still involved. Doc. 1629.

After a 55-day trial in the *Carrozza* case, Paul A. was acquitted of the RICO conspiracy charges, and his involvement in that indictment ended there. The jury either hung or acquitted the other defendants. *Marino*, 200 F. 3d at 8-9. Although, he had been debriefed by the government, and his allegations against Paul A. had allegedly been corroborated, Thomas Regan was never called as a witness in *Carrozza*. Paul A. had previously pleaded guilty to an unrelated drug conspiracy charge in November 1997 and received a 96-month sentence. Tr. v. 35, p. 125; *see also* Paul A.'s PSR.

8. Dicenso "Recovers."

Following dismissal of the firearms complaint, Steve DiCenso lived at his

mother's home and spent a great deal of time in Internet chat rooms. *Capozzi*, 486 F.3d at 716. ATF Special Agent John Mercer, acting in an undercover capacity and using a female identity, "Julie," engaged in a lengthy online "relationship" with DiCenso. *Id.* at 719-20. More than 400 pages of chats and emails were preserved by Mercer and provided to a psychiatrist for an evaluation of DiCenso's competency during that period. *Id.* at 720. On June 30, 1999, the government filed a second felon-in-possession complaint against DiCenso. After lengthy competency proceedings, DiCenso was found competent for trial. *Id.*

The government then began to discuss with DiCenso his possible cooperation. *Id.* DiCenso knew that Kevin Meuse had already committed suicide in prison. *Tr. v. 7*, p. 121. On October 12, 2000, the parties signed a proffer agreement, and lengthy debriefings followed. *Capozzi*, 486 F.3d at 720. The proffers, protected by direct use immunity, included DiCenso's admissions of his own involvement in the murder, dismemberment, and burial of Silva. *Id.*

On October 6, 2001, DiCenso signed a plea and cooperation agreement with the government. *Id.* DiCenso then pled guilty to a one-count information charging him with a substantive violation of RICO. The racketeering activity charged in the RICO information included conspiracy to murder, attempted murder, and aiding and abetting murder, as well as Hobbs Act conspiracy, Hobbs Act robbery and related offenses

stemming from the robberies of Michael Stevens, Al Sapochetti, and Jeffrey North, and marijuana and cocaine conspiracies. *Id.*

DiCenso's plea agreement stated that he faced a minimum and maximum punishment of life imprisonment under the information. *Id.* The then-mandatory sentencing guidelines called for a guideline sentencing range of life. The plea and cooperation agreement also provided for a departure motion to be made by the government for substantial assistance, and a departure motion to be made by DiCenso based on his physical impairments. This Court found, “DiCenso was shown to have had a powerful motive – avoidance of a life sentence and possibly of prison altogether – to cooperate with the government and to testify falsely if necessary.” *Capozzi*, 486 F.3d at 724.

Regan also continued to cooperate with the ATF and prosecutors.¹³ On September 19, 2001, he told the grand jury in the instant case that Gigi Portalla (Vincent Marino), Mikey Romano, and Paul A., had been seeking to take control over the Salemme faction, and that Paul A. was using weapons and drug money to help do so. Doc. 620, 866 (Ex. H).¹⁴

¹³ The government has denied Regan ever cooperated with the FBI. Doc. 1618, p. 9.

¹⁴ Judge Zobel granted Paul A.’s request that all grand jury transcripts become part of the court record. Tr. 2/24/03 Hearing, p. 187.

9. Instant Indictment.

On October 17, 2001, when the indictment in the instant case was filed, it had been three years since Paul A. was acquitted of RICO charges in the *Carrozza* case. Doc. 1 (JA243-316). The allegations here were basically of two types: (1) those related to the murder of Aislin Silva, and (2) those involving robberies of drug dealers.¹⁵ The former raised the prospect of a capital sentence, which was only resolved the following July when the government announced it would not seek the death penalty against Paul A. Doc. 23. The robberies of drug dealers were those committed by Thomas Regan (Soccorso, Ramus, Stevens, Godreau, and North) and Steve Dicenso (Sapochetti, Stevens, and North), allegedly at the behest of Paul A. Doc. 1 (JA243-316).

Most of the substantive charges in the instant indictment were within weeks or days away of exceeding the pertinent statutes of limitation. Some of the racketeering acts alleged in the RICO counts were outside the statutes of limitation and could not have been charged as separate substantive counts. *See* Doc. 1 (JA243-316) and Doc. 1923-2, n. 5.

By this time, the FBI misconduct in the handling of Bulger and Felmmi,

¹⁵ Racketeering Act 14 to Count I was a conspiracy to collect credit by extortionate means, but it basically involved a debt from a drug dealer. Other allegations involved possession of drugs and firearms that were the fruits of the robberies. *See* Doc. 1923-2, n.4.

resulting in the conviction of ex-Special Agent Connolly, was well known.¹⁶ Also disclosed by then was that Felmmi's brother Vincent and Joseph Barboza had been FBI informants who murdered a man and allowed others to be accused and convicted in their stead, all under the knowledge and protection of their FBI handlers. *See Patterson v. United States*, 451 F.3d 268, 269 (1st Cir. 2006); *Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004). The prosecution in which AUSA Auerhahn lied about withholding exculpatory evidence of a different LCN murder was also an FBI investigation. *Ferrara*, 456 F.3d at 289. However, none of this had been public at the time of the *Carrozza* trial.

10. Pretrial Double Jeopardy Claim.

During pretrial proceedings in this case, Paul A. raised the issue that his acquittal in the *Carrozza* case barred his prosecution for the RICO counts in this case based upon double jeopardy and estoppel grounds. Doc. 298, 299, 477, 594, 866, 1544. About the same time, the district court became concerned about trying all the charges in a single trial. Tr. 3/14/03 Hearing, p. 49. The court denied the double jeopardy and estoppel claims, but ordered the trial severed into two sets of counts. Doc. 509.

¹⁶ *See* DICK LEHR & GERARD O'NEILL, BLACK MASS: THE TRUE STORY OF AN UNHOLY ALLIANCE BETWEEN THE FBI AND THE IRISH MOB (Perennial 2001).

Paul A. filed an interlocutory appeal of the district court's denial of his motion to dismiss. Doc. 461. The government then filed an appeal of the judge's order to sever some of the counts into separate trials. Doc. 511. The district court stayed the proceedings, except for discovery matters, while the appeals were pending. Doc. 533.

On April 12, 2004, this Court decided both appeals in a published opinion. *United States v. DeCologero*, 364 F.3d 12 (1st Cir. 2004). The district court was upheld in denying the double jeopardy and estoppel claims, but reversed for severing the counts into separate trials.¹⁷ *Id.* Appellant's claim was decided pursuant to *Abney v. United States*, 431 U.S. 651 (1977), which makes such issues immediately appealable, but they may be resolved only by a comparison of the allegations in the successive indictments. *See DeCologero*, 364 F.3d at 18. The mandate was filed in the district court on May 10, 2004. Doc. 747.

Later, counsel filed a supplemental motion to dismiss on double jeopardy grounds, a memorandum, and exhibits, that had not previously been presented to the district court or this Court of Appeals. Doc. 1614, 1615, 1615-2. The motion was denied. Doc. 1637.

11. Early Conflicts.

¹⁷ This Court did not discuss the district court's concerns about double jeopardy as a basis to sever the counts into separate trials.

The day after the mandate was returned, the government sent Paul A.'s attorneys a letter indicating that another client of their firm (who had not been mentioned during the previous years of discovery), might have a connection to the case. Doc. 1489. Two months later, in a second letter, the government stated it had information that counsels' other client was allegedly involved in the murder of Aislin Silva. Doc. 1490.

On July 20, 2004, a motion was filed to disqualify the counsel for three of the defendants on the grounds that they had conflicts of interest. *Capozzi*, 486 F.3d at 714. It was then revealed that the FBI had this information since 1998. Tr. 7/22/04 Hearing, p. 24, 33. Based upon an opinion obtained from the Massachusetts Board of Bar Overseers, Paul A.'s counsel sought to withdraw. *Id.* at pp. 4-8; Doc. 908.

As a result, lawyers for Paul A., John P. DeCologero, Jr., and Paul J. DeCologero, withdrew from the case and were replaced by successor counsel. *Capozzi*, 486 F.3d at 714. On September 23, 2004, the district court appointed John Salsberg of Salsberg & Schneider to represent Paul A. Doc. 1033; Tr. v. 1, p 50. By this time, most of the experienced federal criminal practitioners in the Greater Boston area already had some connection to related LCN investigations.¹⁸ See Tr. 7/22/04 Hearing, p. 39.

¹⁸ To avoid another such conflict, the undersigned Federal Public Defender for the Northern District of New York, was appointed pursuant to special permission granted by the Chief Judges of the First and Second Circuits.

11. “The War.”

At the same time that the appeals were proceeding, and the conflicts of interest were being uncovered, there was a continuing dispute between Paul A. and the government about the extent to which the *Carrozza* case and “the War” could be mentioned at trial. Paul A. made it clear, in multiple pleadings, and on the record in open court, that his defense to the indictment was that Regan and Dicenso were lying about Paul A.’s participation in the crimes in return for reduced sentences, and that – rather than being co-conspirators – they were affiliated with his enemies in the Salemme faction. Tr. 2/24/03 Hearing, pp. 98-99, 101-02, 105-06, 112-14; Doc. 620.

Prior to the return of the mandate, the government filed a motion in limine, acknowledging that Paul A. might wish to refer to such matters in his defense, but seeking to prohibit their mention as irrelevant to the instant case. Doc. 735. The government asserted “the War” ended in 1994. *Id.* at n. 2. The government also offered to amend its indictment to omit any transactions related to “the War,” but only if the court first granted its motion in limine. *Id.* at n. 1.

On July 15, 2004, Paul A. filed a motion for additional discovery about the connection of “the War” to the current indictment. Doc. 870. In it, he referred to recently obtained grand jury testimony that robbery victim, Al Sapochetti, was a partner to Salemme associate, Bobby Luisa; and that the case agent, John Mercer, had

described Paul A. and Gigi Portalla (Marino) as “fighting with Salemme” in an effort to take control of the area.¹⁹ On July 19, 2004, the government filed a document “withdrawing” its previous motion in limine. Doc. 901. However, on November 25, 2005, the government submitted a short response to Paul A.’s motion for discovery, again calling “the War” irrelevant to the indictment. Doc. 1519.

Three days later, on November 28, 2005, the government sought to cure its own indictment of multiple references to “the War,” by moving to strike references to “the Patriarca La Cosa Nostra (‘LCN’) Family,” “The Carrozza faction,” the terms “war” and “war chest,” and an alleged attempt to kill John “Jackie” Salemme (Frank’s brother), with a pipe bomb. Doc. 1522. Paul A. and his co-defendants objected that this made the “DeCologero Crew” (as named by the government), seem vastly more powerful and influential than the evidence supported, as well as substantially amending the case against them. Doc. 1587. The court ultimately denied the government’s motion, but allowed the government to file a new indictment that eliminated and renumbered some dismissed counts. Doc. 1618, pp. 10-11.

On December 1, 2005, Paul A. filed with the court an affidavit sworn by Vincent Marino a/k/a Gigi Portalla stating that Marino had information to provide

¹⁹ The government provided a letter to all counsel, discussing Regan’s admission that he was present when Paul A. met with Portalla, Michael Romano, and Anthony Ciampi. Doc. 1659. The government also admitted Sapochetti was aligned with Salemme. Doc. 1923-2, n. 10.

about “the War,” and events leading up to the disappearance of Aislin Silva. Doc. 1543. Ten days later, the government filed a response to Paul A.’s previous request for FBI and DEA reports, downplaying the FBI’s involvement in the current indictment, and attempting to distance the case from *Carrozza*. Doc. 1568.

The next day, December 12, 2005, the government filed another short pleading, this time specifically disputing any basis for disclosing FBI and DEA reports relating to Vincent Marino. Doc. 1575. On December 15, 2005, in open court, Paul A. raised the issue that discovery had indicated that Portalla (Marino) was a suspect in Silva’s murder. Tr. 12/16/05 Hearing, pp. 39, 46.²⁰ AUSA Timothy Feeley responded that he did not want to open a “Pandora’s box of discovery.” *Id.* at 42. The court later denied Paul A.’s request for that discovery. Doc. 1618, p. 8.

12. Other Proceedings.

On December 12, 2004, the district court severed defendants Derek Capozzi and Daniel Tsoukalas into separate trials. Doc. 1140. Tsoukalas was set for trial the following April, Capozzi in September, and the remaining defendants, including Paul A., in January 2006. *Id.* The order of trials was influenced by the fact that Paul A. and two others had new counsel that needed time to prepare for trial. *See Capozzi*, 486

²⁰ In particular, newly released phone records showed calls between Kevin Meuse’s phone and Portalla, and news articles indicated that law enforcement was investigating Portalla as a suspect in Silva’s murder. *Id.*

F.3d at 714.

Capozzi had two trials. On September 27, 2004 trial began against Capozzi on the Hobbs Act conspiracy, robbery, drug and firearms counts, with another trial to follow on the witness-tampering and murder-related counts. *Id.* On October 13, 2004, he was convicted of a Hobbs Act robbery conspiracy, but no substantive counts. *Id.*

On May 10, 2005, a jury convicted Capozzi of the witness tampering conspiracy, and accessory after the fact to commit witness tampering, both related to the murder of Aislin Silva. *Id.* The government later dismissed the RICO conspiracy charges against Capozzi. *Id.*

13. Final Pretrial Matters.

When Paul A.'s original appointed lawyers withdrew from his representation, due to a conflict of interest, his lead counsel explained to the court that a replacement would need 18 months of eight to 10-hour days, six days a week, to prepare for trial. Tr. 7/22/04 Hearing, pp. 41-42. On November 8, 2005, all remaining defendants moved to continue the trial from January 2006 until July 2006. Doc. 1481. Paul A.'s attorney, John Salsberg, had previously requested 18 months to prepare for trial. Doc. 1104.

The court set trial to begin January 9, 2006. Doc. 1140. In support of the joint motion for a continuance, Salsberg filed an affidavit stating that he had not previously

accounted for the time he then spent trying another federal RICO prosecution between January 31, 2005 to March 15, 2005, as well as the rest of his docket. Doc. 1481-2. He concluded that despite spending all available time in preparation, he would not be ready to represent Paul A. at trial by January 9, 2006. *Id.* He filed an additional motion on January 6, 2006, requesting at least two more weeks to prepare. Doc. 1619.

On January 9, 2006, the day jury selection was scheduled to begin, Paul A. filed a motion seeking the recusal of the judge and substitution of counsel. Doc. 1641 (JA 502-07).²¹ The basis for urging substitution of counsel was (1) that Salsberg was unprepared, (2) that Salsberg's partner Michael Schneider had represented Jon Minotti, a potential witness in the case, and (3) that another lawyer in Salsberg's firm, Ryan Schiff, worked for Robert Sheketoff during his representation of Vincent Marino a/k/a Gigi Portallo. *Id.* (JA503-04).²²

In open court, the judge was adamant in requiring Paul A. to choose, then and there, to proceed with Salsberg or go *pro se*. Tr. v. 1, pp. 3-49 (JA527-75). After discussing some other points, Paul A., Salsberg, and the judge, returned to the issue

²¹ Although recorded as filed on January 17, 2006, the motion was clearly discussed in open court by Paul A., attorney Salsberg, and the judge on January 9, 2006. See Tr. v. 1, pp. 4-9 (JA530-35).

²² Schiff filed pleadings on behalf of Paul A. in this case. See Doc. 1629. Sheketoff was counsel of record for Marino in *Carrozza* at trial and on appeal. See Cr. No. 97-40009 (D. Mass. 1998) (Gorton, J.); *Marino*, 277 F.3d at 17.

of the conflicts. The court was under the impression that Paul A. intended to *create* a conflict by suing his lawyer. Tr. v. 1, pp. 34-35 (JA560-61). The government then interjected a different issue – whether Paul A. had a right to hybrid representation – which confused the discussion further. The government argued that Paul A. could either have Salsberg try all aspects of the case or go *pro se*, but that the trial duties could not be divided between them, and that the court could not decide for Paul A. which choice to make. *Id.* at 6, 30-33 (JA532, 556-59); *see also* Doc. 1618, pp. 10-1; and Doc. 900.

Salsberg indicated that he understood Paul A. was referring to the conflicts caused by members of his firm had by representing Minotti and Marino (Portalla), and he brought it to the court’s attention. *Id.* at 34-35 (JA560-61). However, the judge never seemed to comprehend the true extent of the conflicts. *Id.* Salsberg even told the court that because of the apparent conflicts he could not help Paul A. to decide what to do. *Id.* at 41 (JA567).

There was then another extended exchange between Paul A. and the judge, in which Paul A. kept repeating that he needed independent, conflict-free counsel in order to help him to decide what to do, and the judge insisted that he choose Salsberg or represent himself. *Id.* at 35 to 39 (JA561-65). Much of the discussion went like this:

PAUL A: My choice is to go forward with the assistance of counsel, not Mr.

Salsberg, until this matter is cleared up.
THE COURT: That is not an available choice. *Id.* at 42 (JA568).

Paul A. then asked for a five-minute consultation with Salsberg, which was denied by the court. *Id.* at 38 (JA564). The judge told Paul A. that the jury venire panel was coming in and that Paul A. should allow Salsberg to represent him during jury selection. *Id.* at 44 (JA570). Even though Salsberg also said that he thought this failed to resolve the conflict, Paul A. acquiesced to the court's wishes, but never conceded that the conflict was resolved. *Id.* at 44-46 (JA570-72).

After jury selection, but before opening statements, there was one more discussion about Paul A.'s representation. Tr. v. 4, pp. 4-8. No mention was made of the conflict. Instead, a compromise was reached about Paul A.'s participation in his own defense. *Id.*; *See also* Doc. 1641 (JA500).²³

14. The Trial.

In his opening statement on behalf of Paul A., Salsberg told the jury that the evidence would show that Regan was working for Frank Salemme. Tr. v. 5, pp. 100-01. The government objected, and the court sustained the objection, telling Salsberg to "stick to this case." *Id.*

The government's case against Paul A. was primarily the testimony of Steve

²³ The judge had read the motion in its entirety by then, as indicated by her handwritten ruling, placed on the motion itself, dated January 13, 2006. *Id.* (JA500).

Dicenso and Thomas Regan. Dicenso testified he was part of the “DeCologero Crew,” headed by Paul A., and consisting of the other co-defendants; along with Thomas Regan, the late Kevin Meuse, Dave Pasquerelli, and Derek Cappozzi. Tr. v. 9A, pp. 11-12. He alleged that Paul A. decided whom to rob and how to divide the spoils. Tr. v. 9A, pp. 5-6.

Dicenso described burglarizing the home of Jeffrey North, assisted by Thomas Regan, Paul J. DeCologero (Paul A.’s nephew), and Kevin Meuse. *Id.* at 21-22. He stated that weapons and drugs taken there were brought to Paul A. at his home for distribution. *Id.* at 23-24. He told the jury about storing drugs and weapons at Aislin Silva’s apartment and the events leading to her murder. *Id.* at 24-40.

Dicenso said Gigi Portalla (Marino), visited Paul A. to view the weapons and was given one of the firearms. Tr. v. 11, p. 16-18; v. 13, p. 13. Government witnesses Steve Supino and John DeCologero, Sr. (Paul A.’s brother), said Portalla went to Silva’s apartment to get the firearm.²⁴ Tr. v. 21, pp. 59-60; v. 29, pp. 108-10. Silva’s boyfriend, Torin DeVitto, said he had never seen Paul A. or heard his name, but that Dicenso had shown up once with someone else. Tr. v. 19, pp. 32-33. Dicenso attempted to distance himself from Portalla. Tr. v. 16, p. 45.

²⁴ John P. DeCologero, Sr., (brother of Paul A., and father of Paul J. and John P.), pled guilty to a RICO offense on February 28, 2003. *Cappozzi*, 486 F.3d at 714.

Dicenso said that after the ATF discovered the weapons at Silva's apartment, Paul A. told him, Kevin Meuse, and Derek Capozzi, to keep Silva away from law enforcement. Tr. v. 10, p. 6. According to Dicenso, Paul A. asked Dicenso to take Silva on a shopping spree in New York City for the weekend. *Id.* 9-14.

When Dicenso brought Silva back to Boston, he said that he met alone with Paul A. and the late Kevin Meuse. *Id.* 20-22. He testified that Paul A. told them, "She has to be killed." *Id.* at 21. Dicenso said that Paul A. later helped provide him with heroin in attempt to get Silva to overdose. *Id.* at 26-28. When that failed, Kevin Meuse broke her neck the next day, allegedly upon the order of Paul A. *Id.* at 30-31. After dismembering and disposing of Silva's body, Dicenso testified that he reported the facts to Paul A. *Id.* at 44.

Dicenso said he helped rob Jeffrey North in Spring 1996 in order to join the crew. *Id.* at 55-59. He testified he also robbed Michael Stevens, Tr. 11, pp. 5-14, and Al Sapochetti, at the behest of Paul A. *Id.* at 19-22.²⁵

Although the government repeatedly argued that the conspiracy did not precede 1995, evidence of earlier conduct was presented. In reference to the charge of extorting Shane Finethy, the government went back to 1993 to show that Paul A. sold

²⁵ The Sapochetti robbery occurred the same day as Dicenso also claimed to have helped put a pipe bomb under Jackie Salemme's car. Tr. v. 15, p. 28. Sapochetti at first said that it was Billy Ierardo who robbed him that day. Tr. 12/16/05 Hearing, p. 48.

him drugs. Tr. V. 20, p. 6 (“The Court: I don't know why you need to go to '93.”).²⁶ The government said soon after: “That's not to say that the conspiracy began in 1995. It's the charged part, your Honor.” *Id.* at p. 8. Also, the robberies of Philip Soccorso and Gary Ramus occurred in late 1994. Tr. v. 25, pp. 29-32.

Thomas Regan admitted to participating in the robberies of Soccorso, Ramus, Richard Pesaturo, Richard Bentley, Gerald Godreau,²⁷ Michael Stevens, the attempted robbery of Daniel Digger Pollard, and the burglary of Jeffrey North. Tr. v. 22, pp. 141-42. In each instance, Regan testified he worked on behalf of Paul A. Tr. v. 23, p. 32, 44, 58, 71, 110, 180. He also admitted to participating in robberies of drug dealers during the early 1990's, and the November 13, 1996 robbery of James Marrone, none of which had anything to do with Paul A. Tr. v. 24, pp. 70-71; v. 25, p. 49.

Regan claimed to have heard Paul A. tell Dicenso to keep Aislin Silva away from law enforcement, after the weapons were found at her apartment. Tr. v. 23, p. 137. However, Regan provided no testimony that he heard Paul A. order Silva's murder.

Regan discovered Dicenso unconscious the day following Silva's murder, after Dicenso overdosed from heroin. *Id.* at 148-50. Paul A.'s attorney tried to explore the

²⁶ The loan itself was in the Summer or Fall of 1994. Tr. v, p. 10.

²⁷ Godreau testified that one of the robbers explained to him that he had not been “paying rent to Frank Salemme.” Tr. v. 27, p. 162.

suspicious circumstances under which Regan found Dicenso, pointing out that Regan cleaned up the scene. Tr. v. 34, pp. 4-5.²⁸ The day of the murder was also the day Regan claimed to have been robbing James Marrone with James Penta. Tr. v. 24, pp. 70-71.

There were many objections sustained to Salsberg's questions about any reference to Regan's relationship with the Salemme faction. *See* Tr. v. 25, pp. 11-15, 38-42, 47-48. Paul A.'s counsel kept trying to explain that Regan was involved with the Salemme faction, and because Paul A. was not, Paul A. was being blamed for the crimes of Regan, Dicenso, Meuse, and Cappozzi. Tr. v. 25, pp. 42-43.

The government repeatedly attempted to limit Salsberg's inquiries to the year 1996 and nothing before. Tr.v. 25, pp. 44-46. This was despite the fact the government had introduced racketeering acts that went back as far as 1993. Tr. v. 20, p. 6.

After the government rested, Paul A. moved for a judgement of acquittal. Doc. 1746. The court took the motion under advisement. Tr. v. 31, p. 104. It was later denied. Docket Sheet Entry 10/12/06 (JA235).

Salsberg attempted to elicit testimony from a witness that Dicenso arrived at Paul A.'s gym, sometime after the weapons were stored at Silva's, and that Paul A.

²⁸ Regan claimed he found Dicenso unconscious and others who appeared to be dead. Tr. v. 23, pp. 147-52. All counsel had received a letter from the government, during the trial, that there was information that Regan killed those persons by injecting them with heroin. Doc. 1643.

responded angrily by yelling the name of Salemme associate “Bobby Luisa.” Tr. v. 35, pp. 8-10. The court sustained an objection that this was hearsay. *Id.* Salsberg tried to explain that it was not hearsay because it was simply the exclamation of a name, and that it was relevant because Paul A. would testify about the conversation later at the trial. He received no relief. *Id.* at pp. 14-17. Salsberg attempted to elicit the same information from another witness to the conversation. Tr. v. 33, pp. 105-06. The court sustained that objection also. *Id.*

Salsberg was also prevented from presenting evidence that Regan and Kevin Meuse tried to keep Paul A. away from Silva, and the events leading to her murder. Tr. v. 35, pp. 22-23. Salsberg sought to call an Eric Dalbo to say Regan told him that he was delivering firearms to Frank Salemme and Bobby Luisa, but that was overruled by the court. Tr. v. 35, pp. 64-65.

Salsberg complained that he had belatedly received phone records indicating 13 calls to Portalla (Marino), on a phone purchased by Kevin Meuse. Tr. v. 30, pp. 142-43.²⁹ In the middle of trial, the government stated that a confidential informant worked for Portalla, but it was not revealed who the person was. Tr. v. 14, pp. 92-93. Salsberg filed for a mid-trial continuance for time in order to produce Portalla to testify. Doc.

²⁹ Case agent John Mercer admitted he never attempted to investigate Portalla’s connection to the case even after finding the calls. Tr. v. 31, p. 44.

1750. He based the request on the testimony of Steve Supino and John DeCologero, Sr., both of whom stated Portalla had gone to Silva's apartment to view and retrieve weapons - information Salsberg had not previously received in discovery. *Id.*

Salsberg also filed a motion seeking the court's assistance producing Portalla as a witness for Paul A. Doc. 1734. Although Salsberg had not personally spoken to Portalla, Tr. v. 30, pp. 148, he claimed that his associate Ryan Schiff was checking into it. *Id.* at p. 5.³⁰ The court did not want to wait. Tr. v. 33, p. 162; v. 35, p. 56.

In another motion, Salsberg announced that he received during trial (for the first time), a DEA report linking Jon Minotti to the weapons Dicenso stored at Silva's apartment, and that Minotti made relevant statements to the DEA about who was responsible for Silva's murder. Doc. 1759. The motion sought a writ for Minotti's appearance. *Id.* The court denied the request. Tr. v. 36, p. 16-17.

Recognizing that Salsberg's conflicts were now causing actual problems for his defense, Paul A. began filing his own motions regarding Portalla and Minotti. Paul A. filed a motion seeking Minotti's appearance, and complaining that Salsberg's partner, Michael Schneider, had withdrawn from representing Minotti for the very conflict affecting Paul A. now. Doc. 1782 (JA508-15). He attached the motion and affidavit

³⁰ Paul A. previously alerted the court that Schiff had represented Portalla in the *Carrozza* case. Doc. 1641 (JA500-07).

that Schneider filed in order to be allowed to withdraw. *Id.* (JA514-15)(“Counsel believes that there now exists a substantial possibility that a potential conflict of interest with the interests of another of his firm’s clients may ripen into an actual conflict of interest.”).³¹

The matter came up in open court when, Anthony Bucci, a potential witness for Paul A., appeared before the judge with his attorney during a break in trial testimony. Tr. v. 35, pp. 73-74. Bucci told the judge that he had information about Jon Minotti. At that point, the judge became concerned that the testimony might raise a conflict for Salsberg and told him to think about whether it was wise to call Bucci. *Id.* Bucci was never called.

Paul A. filed another *pro se* motion seeking to disqualify Salsberg and his firm from representing him any longer. Doc. 1784. He cited Salsberg’s inability to interview or produce either Minotti or Portalla as evidence of the adverse effect the conflict was having on his defense. *Id.* Two separate motions by Paul A. requested that Salsberg be replaced with “conflict-free” counsel. Doc. 1785, 1786 (JA516-26). No order was issued, and the court’s only comment about the conflicts was that, “I devoutly hope we're not raising any conflict questions now.” Tr. v. 35, pp. 73-74.

³¹ Schneider’s affidavit, in support of withdrawing from Minotti’s defense, was sworn to approximately one month after Salsberg was appointed to represent Paul A. Doc. 1782 (JA508-15). Therefore, there was at least one month where both men were represented by the same firm.

Paul A.'s case consisted of the testimony of his sister Joanne DeCologero, Tr. v. 33, pp. 75-143; Michelle Abramo, *Id.* at pp. 143-148; Paul DeCologero (Paul A.'s son), *Id.* at 148-162 and Tr. v. 34, pp. 39-78; Wes Posey, *Id.* at pp. 12-39; Lorrie Walsh, *Id.* at pp. 79-88; Pamela Porcaro, *Id.* at pp. 88-96; Marianne DeCologero, *Id.* at pp. 96-124; Bart McGondel, *Id.* at pp. 124-28; David DeCologero, *Id.* at pp. 128-41; Ellen Ann Wilson, *Id.* at pp. 141-59; Dominica Ortisi, *Id.* at pp. 159-84; Peter Thomas Ippolito, *Id.* at pp. 184-86 and Tr. v. 35, pp. 2-27; Ralph Scarpa, *Id.* at pp. 28-34; William Mahoney, *Id.* at pp. 36-42; and Teresa Sabatino, *Id.* at pp. 42-50.

Paul A. testified last. *Id.* at pp. 84-157 and Tr. v. 36, pp. 9-107. At the beginning of his testimony, the court noted that Salsberg would be allowed a continuing objection to the curtailment of questioning. Tr. v. 35, p. 85. The court consistently prevented Paul A. from stating his role in "the War" or connecting the government's witnesses to his enemies. Tr. v. 35, pp. 133-35; v. 36, p. 7. Then Paul A. rested his case. *Id.* at p. 109.

On March 20, 2006, the jury convicted Paul A. of Count 1 (RICO conspiracy), Count 2 (RICO),³² Count 3 (Witness tampering conspiracy), Count 4 (Witness tampering by misleading conduct), Count 5 (Witness tampering by attempting to kill),

³² There were 14 racketeering acts alleged. Of those, the 4th, 7th, and 10th were found to be "not proven." Subsections of the 6th and 8th were "not proven." Doc. 1800 (JA584-87).

Count 6 (Witness tampering by killing, i.e., murder), Count 8 (Conspiracy to commit Hobbs Act robberies), Count 9 (Stevens Hobbs Act robbery), Count 10 (Marijuana possession with intent to distribute), Count 11 (Using or Carrying Firearm during and in relation to Stevens robbery), Count 13 (Using or carrying a firearm during and in relation to Sapochetti robbery), Count 17 (Marijuana conspiracy),³³ 18 (Felon in possession of a firearm), and 23 (Cocaine conspiracy).³⁴ Paul A. was acquitted of the Sapochetti Hobbs Act robbery, the Godreau Hobbs Act robbery, the marihuana possession with intent to distribute (related to Godreau), and of using or carrying a firearm during and in relation to the Godreau robbery.

On the day after the verdicts, Salsberg himself filed a motion to withdraw, but it was not based upon his firm's relationship to Minotti or Portalla, rather because of a civil lawsuit Paul A. had filed against him before the trial had started. Doc. 1788. That motion to withdraw was granted. Doc. 1801.

After another lawyer was appointed – and then withdrew because of a conflict of interest, Doc. 1807 – Paul A. was appointed yet another new counsel who assisted with his post-trial motions for acquittal and new trial, as well as his sentencing

³³ It is troubling that the jury crossed out the word “robbery” and inserted “burglary,” raising the possibility of a variance. However, absent relief on other grounds in this brief, it has no effect upon appellant's life sentence.

³⁴ These numbers are taken from the Judgement. The verdict sheet is numbered differently. Doc. 1800 (JA584-87).

hearing. Doc. 1808. Paul A. raised the issue of Salsberg's conflict in a *pro se* motion for new trial. Doc. 1892. Newly appointed counsel also raised that error, as well as others, in a lengthy motion, a memorandum, and appendices, urging a new trial. Doc. 1895, 1896, 1897.

On September 28, 2006, Paul A. was sentenced to life in prison and a total of \$1400 in special assessments. Doc. 1915. His motion for new trial was denied on December 15, 2006. Doc. 134. He filed notice of appeal on December 22, 2006.

SUMMARY OF ARGUMENT

By the time this case was tried, the FBI and the United States Attorney for the District of Massachusetts had suffered a series of embarrassing defeats in their pursuit of the New England LCN. Agents were accused of crimes, and convictions of alleged LCN members were overturned, due to serious misconduct. In *Carrozza*, Paul A., and many of his co-defendants, had been acquitted after a long and expensive trial.

That history created at least three dynamics which caused reversible errors to occur in the prosecution of this case. The first – because of the many related LCN prosecutions in the district over recent decades, the potential for conflicts of interest among a small cadre of local lawyers, exponentially increased. The second – by the time of trial in this case, an FBI investigation into anything regarding LCN was perceived as tainted. The third – because Paul A. was completely exonerated in

Carrozza, there was a contradiction in again attempting to associate him with the hierarchy of LCN.

The first dynamic resulted in the disqualification of Paul A.'s counsel after two years of trial preparation, and replacement by a lawyer whose partner and associate represented important potential witnesses in this case. Despite Paul A.'s timely and specific complaints, before and during trial, the judge never held a hearing or assessed the conflicts in any manner. Although, it became clear during trial these were actual conflicts of interest, that determination is now unnecessary, because over 60 years of Supreme Court Sixth Amendment precedent requires automatic reversal for failure to hold a hearing on the matter.

The second and third dynamics affected Paul A.'s claims of double jeopardy, denial of the right to present a defense, denial of compulsory process, denial of a speedy trial, denial of a continuance, and denial of exculpatory evidence. Each resulted from the government's efforts to distance this case from the failed FBI investigation in *Carrozza*.

The convictions should be reversed because it violated the Double Jeopardy Clause of the Fifth Amendment to prosecute Paul A. for RICO and RICO conspiracy after his acquittal for the same charges. This case was a creative attempt to refashion the failed *Carrozza* prosecution. His remaining counts should be retried without the

unfair prejudice of the RICO allegations, evidence of which would otherwise have been inadmissible at trial.

The trial court denied Paul A. his Sixth Amendment right to present a defense by repeatedly sustaining government objections regarding any reference to “the War,” thereby preventing Paul A. from showing the motivations of the witnesses cooperating against him. Erroneous rulings about hearsay and relevance stripped Paul A. of a defense.

Preventing the appearance of Vincent Marino a/k/a Gigi Portalla denied Paul A. the right of compulsory process under the Sixth Amendment. It was made clear to the court well before trial that Portalla was a necessary witness for the defense. When the time came to bring him to court, the judge denied the resources that the Marshal needed to timely transport him from federal prison.

Refusing Paul A. a continuance of the trial denied him his Sixth Amendment right to effective assistance of counsel. For months, his counsel had complained to the court that he needed more time to prepare for trial. On the morning of trial, the court was faced with complaints over counsel’s conflicts of interest. The court, having for years presided over the case, and its companion cases, was unwilling to wait. The court should have continued the trial to resolve whether counsel suffered under actual conflicts of interest.

Denying Paul A. exculpatory evidence was in violation of the Sixth Amendment. Paul A. specifically requested law enforcement reports relating to the investigation of Gigi Portalla (Marino), in Silva's murder. The requests were denied, and only during trial did the government admit there was a confidential informant working for Portalla, but the discovery was never provided. This evidence was material and was reasonably likely to have changed the result.

STATEMENT JOINING CO-APPELLANTS' BRIEFS

Pursuant to Fed. R. App. P. 28(i), Paul A. DeCologero, hereby adopts by reference all points of error, arguments, and authorities in the briefs of his co-appellants Joseph Pavone, John P. DeCologero, Jr., and Paul J. DeCologero, to the extent that these apply to him.

ARGUMENT

I. APPELLANT PAUL A. DECOLOGERO'S TRIAL COUNSEL OPERATED UNDER AN ACTUAL CONFLICT OF INTEREST, BROUGHT TO THE DISTRICT COURT'S ATTENTION PRIOR TO TRIAL, BUT NEGLECTED AND GIVEN NO HEARING, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

Where a constitutional right to counsel exists, the Sixth Amendment provides a correlative right to representation that is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). When a district court ignores repeated objections to a counsel's conflict of interest, this Court of Appeals need not consider whether the

record establishes an actual conflict of interest, or even prejudice, because it is the trial court's failure to make findings that requires reversal. *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980); *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). The standard of review is *de novo*. *Familia-Consoro v. United States*, 160 F.3d 761, 765 (1st Cir. 1998).

In this case, the allegation that Paul A.'s attorney, John Salsberg, had two serious potential conflicts of interest, was raised by motion before trial. Doc.1641 (JA500-07). The motion stated that Salsberg's partner Michael Schneider, represented Jon Minotti for at least a month during the time Salsberg represented Paul A. It also alleged that Salsberg's associate, Ryan Schiff, represented Vincent Marino (Gigi Portalla) – former co-defendant to Paul A. in *Carrozza* and a suspect in Aislin Silva's murder. *Id.* Both Minotti and Marino (Portalla) were potential witnesses in the case below. Paul A. immediately brought the pending motion to the court's attention:

PAUL A.: I do not wish to go forward with Mr. Salsberg at this time due to the fact of the motion in front of you, because I'm stuck in a spot that I don't know what to do right now and I need assistance of counsel.

THE COURT: You have Mr. Salsberg. Tr. v. 1, p. 9 (JA535).

Salsberg acknowledged the potential conflict, but the judge ignored him, apparently confused that Paul A. was merely referring to his recently filed lawsuit:

THE COURT: What is your decision as to whether you go by yourself or whether you have Mr. Salsberg represent you?

PAUL A.: I can't answer it, your Honor, at this time without assistance of

counsel. That's what I'm answering on the record right now, your Honor.

THE COURT: Well, in that case, I think Mr. Salsberg needs to go ahead on your behalf.

SALSBERG: Could I say one thing, your Honor? I know that there's been allegations of conflicts of interest in the law firm --

THE COURT: Yes, but you can't create a conflict and then say there is a conflict, and that is what is happening now. It is not a real conflict. He's creating it. And if, in fact, there is going to be such a conflict, then I'm going to insist that Mr. DeCologero represent himself. I mean, that's the other choice he has.

SALSBERG: I just meant that there is -- in the allegations of the draft lawsuit, there are allegations of conflict of interest, your Honor, which I now gather you're saying you don't believe that those are conflicts of interest.

THE COURT: Well, he's creating them.

AUSA FEELEY: Your Honor, to repeat myself -- and I'm sorry, but I don't think this Court can order Mr. Salsberg to represent Mr. DeCologero.

THE COURT: Well, I said, in that case, Mr. Paul DeCologero represents himself. Tr. v. 1, pp. 34-35 (JA560-61).

Paul A. then asked for a five-minute consultation with Salsberg, which was denied by the court. *Id.* at 38 (JA564). The judge told Paul A. that the jury venire panel was coming in and that Paul A. should allow Salsberg to represent him during jury selection. *Id.* at 44 (JA570). Even though Salsberg also said that he thought this failed to resolve the conflict, Paul A. acquiesced to the court's wishes, but never conceded that the conflict was resolved. *Id.* at 44-46 (JA570-72).

After jury selection, but before opening statements, there was one more discussion about Paul A.'s representation. Tr. v. 4, pp. 4-8. No mention was made of

the conflict. Instead, a compromise was reached about Paul A.'s participation in his own defense. *Id*; *See also* Doc. 1641(JA500-07).

Later, in the middle of trial, a potential defense witness, Anthony Bucci, spoke directly to the judge with his lawyer. Tr. v. 35, pp. 73-74. The court was again confronted with the issue of the Minotti conflict, but the court simply brushed it aside:

BUCCI: It's stuff in the protective order. It says -- I mean -- would I be able to testify just directly to something like this, where this kid is saying that I don't want to -- in other words, the informant in my case was Jon Minotti. He's also represented by, actually, your firm, and he made statements that aren't true. Other than -- because I thought about it after. Other than --

THE COURT: Is that going to come in, too? You know the other problem is I devoutly hope we're not raising any conflict questions now.

BUCCI: That's what I was worried about, lawyer conflict.

THE COURT: No, no, attorney-client conflict.

SALSBERG: This was all addressed at the very beginning of this case. Mr. Schneider withdrew on the Minotti case. There was discussion with the prosecutor about it. There has been further discussion about it.

THE COURT: All right. I don't know what the answer is, but I guess it's another reason why you should carefully think. *Id.*³⁵

Paul A. filed *pro se* motions, again raising the issue of Salsberg's conflicts regarding Minotti and Marino (Portalla). Doc. 1782, 1786 (JA508-15, 516-22) and 1784, 1785. He received no hearing. The court's final comment on the matter was cryptic:

³⁵ Salsberg's comments indicate that he discussed the potential conflict with prosecutors early in the case, but did not bring it to the court's attention at that time.

I have your various motions, and I'm prepared to rule on them. I do not see how Mr. Minotti can give admissible testimony. Therefore, there is no need to bring him in. Tr. v. 36, p. 3.

It is presumed that the trial court is aware of a potential conflict when a party brings the issue to the court's attention. *Wood, supra*, at 272-73. Failure to hold a hearing on the matter is a denial of due process. *Id.* at 273-274. "[A] defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." *Cuyler, supra*, at 348.

Partners in a single firm, representing defendants with common interests, may have actual conflicts of interest, just as individual lawyers representing multiple defendants. *Burger v. Kemp*, 483 U.S. 776, 783 (1987); *see also Duvall v. State*, 923 A.2d 81, 98-100 (Md. 2007) (public defender office is considered a firm for purposes of assessing conflicts, and in that case an actual conflict required automatic reversal). Here, two members of Salsberg's firm created two different, but equally troubling, actual conflicts.

A court may rely on representations made by counsel to resolve potential conflicts. *Cuyler, supra*, at 346-47. However, in this case, Salsberg never explained the effect of the conflicts. For an example of a disaster that can occur by waiting for the conflicted counsel to raise the issue himself, *see Perrillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000)(reversing death sentence and conviction).

In *Glasser v. United States*, 315 U.S. 60, 68-69 (1942), two defendants went to trial. Glasser had two lawyers, but on the day of jury selection, his co-defendant was without counsel. With the co-defendant's permission, but over Glasser's mild protest, the court appointed one of Glasser's lawyers to the co-defendant. This was held to be reversible error, with no showing of actual prejudice necessary. *Id.*

This case is much like *Glasser* in that the court was confronted with the potential conflicts on the day of jury selection, but instead of resolving them, ignored them. “[I]nstead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights.” *Id.* at 72.

Glasser also answers the question of whether Paul A.'s acquiescence to the court's suggestion – that Salsberg go forward with jury selection – is some form of waiver. It clearly was not. “Under these circumstances to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused.” *Id.* At 72.

The same is true of the court's agreement to allow Paul A. to assist in his own defense on a limited basis – a promise that was later revoked. That arrangement was irrelevant to assessing and curing the conflicts.

“The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.” *Holloway v. Arkansas*, 435 U.S. 475, 487 (1978):

Moreover, this Court has concluded that the assistance of counsel is among those “constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. *Chapman v. California*, 386 U.S. 18, 23 (1967). When a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage, reversal is automatic. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963). *Holloway*, *supra*, at 489.

However, even if no objection is made, or the objection is fully assessed by the trial court but denied, a finding on appeal of an actual conflict of interest will still require reversal. *Cuyler*, 446 U.S. at 348-49. For example, an actual conflict occurs when counsel fails to cross examine a witness whose answers might harm his other client. *Id.* An actual conflict is never harmless error. *Id.* at 349. “[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.” *Id.* at 349-50.

When a defendant makes a timely and colorable showing that his counsel labored under an actual conflict of interest, he may be entitled to relief without regard to proof of prejudice. ” *United States v. Segarra-Rivera*, 473 F.3d 381, 385, n. 2 (1st Cir. 2007), citing, *Cuyler*, *supra*, at 349-50 and *United States v. Torres-Rosario*, 447 F.3d 61, 64 (1st Cir. 2006). A full evidentiary hearing is required to resolve the matter.

Id. at 386. *See also Harris v. Carter*, 337 F.3d 758, 764 (6th Cir. 2003)(objection to conflict of interest was timely even when discovered and raised during trial).

Once an actual conflict is established, a defendant need not prove prejudice, but simply that a lapse in representation resulted from the conflict. *United States v. Williams*, 392 F.3d 96, 106 (2d Cir. 2004). A defendant can prove a lapse in representation by demonstrating that some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with, or not undertaken, due to the attorney's other loyalties or interests. *United States v. Schwartz*, 283 F.3d 76, 91 (2d Cir. 2004). An actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation. *Williams, supra*, at 108.

Because the court never investigated Paul A.'s repeated complaints about Salsberg's apparent conflicts, no showing of an actual conflict is necessary. However, there was plenty of evidence supporting the kind of "lapse in representation" to make such a finding. Salsberg appears to have done little to timely obtain Marino's (Portalla) testimony or even interview him. Marino's sworn affidavit, that he was willing to testify, was filed in the record early in the case. Doc. 1543. Salsberg also accepted the judge's suggestion not to call Bucci to testify, when it was patent this

might expose Salsberg's conflict in his partner's representation of Minotti.

The conflicts obviously occurred because of the many related LCN prosecutions in the state and federal courts of Massachusetts. However, such circumstances require more vigilance, not less. Although, it was reasonable for Judge Zobel to have been frustrated with all the late government disclosures, and the years of proceedings, her response to Paul A.'s complaints should have been an immediate evidentiary hearing. Instead, there was no review at all. For those reasons, this Court should reverse Paul A.'s convictions and order a new trial.

II. APPELLANT'S CONVICTIONS FOR COUNTS I AND II OF THE INDICTMENT VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

Whether the object of a single agreement is to commit one or many crimes, it is in either case the agreement itself which constitutes the conspiracy that the statute punishes. *Braverman v. United States*, 317 U.S. 49, 53 (1942). A defendant, having been acquitted of RICO charges is shielded by the Constitution's prohibition of double jeopardy from the RICO charges if, the RICO charges in the two cases are "the same." *DeCologero*, 364 F.3d at 17 (hereafter "*DeCologero I*"); U.S. Const. Amend. V. The standard of review for whether the cases meet that legal definition is *de novo*. See *United States v. Cartagena-Carrasquillo*, 70 F.3d 706, 714 (1st Cir. 1995).

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). *Decologero, supra*. RICO violations require not only participation in a criminal enterprise but also participation in a “pattern of racketeering activity,” which in turn requires proof of at least two of a list of specified federal or state crimes. *Id.* at 16.

In *DeCologero I*, this Court compared the indictment in this case and the indictment in *Carrozza*, and found each represented a different pattern of racketeering. *Id.* at 19. Now that the trial has been completed, there is additional evidence to consider, some of which was not disclosed to Paul A. prior to the first appeal. *See United States v. Stricklin*, 591 F.2d 1112, 1119 (5th Cir. 1979)(pretrial review does not make double jeopardy issue *res judicata*).

The basis for appeal in *DeCologero I* was *Abney v. United States*, 431 U.S. 651, 658-60 (1977), which allows an interlocutory appeal on double jeopardy grounds under the “collateral order exception” to the “final judgement rule.” That exception permits an appellate court to compare the indictments prior to trial, but defers any review of the sufficiency of those indictments until a final judgement. *Id.* at 663. In this appeal of Paul A.’s final judgement, the Court may take a broader view.

The issue that was addressed in *DeCologero I* was whether the two cases involved the same “pattern of racketeering.” Conspiracies cannot be artificially broken

up for the purpose of bringing separate cases, including RICO enterprises. *Decologero, supra*, at 16. However, double jeopardy only bars successive RICO charges involving both the same enterprise *and* the same pattern of racketeering activity. *Id.*

In deciding whether the patterns of racketeering are the same for double jeopardy purposes, a “totality of the circumstances” test, using factors like those for evaluating the identity of conspiracies, is utilized. *Id.* These factors include the time, the place, the people, and the nature and scope of the activities involved in each indictment. *Id.*

In *DeCologero I*, this Court found that although the *Carrozza* indictment alleged conduct between 1989 to 1994, the government presented evidence of events through 1998. *Id.* at 17. In this trial, the government went back to 1993 and 1994, much to the chagrin of the judge:

But one of the reasons why I am excluding the Sapochetti robbery from the first trial is because there is, there is evidence in the Carrozza trial that talks about, if not evidence, representations by the government in that case that talk about how the conspiracy in fact went further. There is a statement in the government’s summary of evidence that although it wouldn’t talk about Sapochetti being part of the War, that nonetheless there is such evidence that Sapochetti was part of the War, and I want out of an abundance of caution not to go there. Tr. 3/14/03 Hearing, p. 49.

In fact, the evidence at trial showed that the Soccorso robbery was in 1994. Tr. v. 25, pp. 29-32.

Regarding another charged racketeering act, the court said: “I don't know why you need to go to '93.” Tr. V. 20, p. 6. To which the government responded: “That's not to say that the conspiracy began in 1995. It's the charged part, your Honor.” *Id.* at p. 8. In other words, there was about five years (1993-1998), of overlapping conduct between *Carrozza* and this case.

In *DeCologero I*, this Court left open the question of whether the enterprises in *Carozza* and this case were the same:

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. *Id.* at 18.

Only Paul A. was charged in *Carrozza* and the case below, but that does not end the comparison of common participants. Vincent Marino a/k/a Gigi Portalla was tried with Paul A. in *Carrozza*. In this case, despite the government's best efforts to prevent any discovery about Portalla, it was learned that witnesses had linked him to Silva's murder, that witnesses who testified for the government placed Portalla at Silva's apartment viewing and retrieving weapons, and there were phone records of calls between Portalla and the phone of Kevin Meuse - the man who broke Silva's neck. *See* Tr. v. 14, pp. 92-93, v. 30, pp. 142-43.

Thomas Regan told the government, in February 1998, months before the

Carrozza trial began, that Paul A. and Portalla were aligned with Carrozza against the Salemme faction in “the War.” Doc. 1659. The government cannot first accuse Paul A. of aligning with Carrozza and Portalla, only to artificially end that relationship in 1994, in order to be able to bring a second “different” RICO case.

Based solely upon a comparison of the indictments, this Court called the enterprises alleged in *Carrozza* and this case, “nominally different.” *Id.* at 17-18. An examination now reveals a distinction without a difference. What was previously described as “a hard question” is now fairly straightforward. *See Id.* at 18.

In *Carrozza*, Paul A. was grouped with Carrozza LCN figures allegedly higher in the organization than him. In this case, he was alleged to be higher up than his co-defendants. In a vertically organized conspiracy, such distinctions are meaningless to the issue of whether the enterprise is the same. Additionally, persons involved in the *Carrozza* enterprise, surfaced in this case – in particular Gigi Portalla (Marino).

As described above, there is a commonality of dates and persons between both cases. What this Court focused upon in *DeCologero I* was the difference in the types of crimes alleged. *Id.* Reading only the *Carrozza* indictment, it would seem that case was primarily about the murders and attacks on the Salemme faction by Carrozza followers. However, the lead *Carrozza* prosecutor’s own words belie that conclusion:

The indictment is not just about the rivalry, even though there’s a lot of other evidence. The indictment is to take over and control illegal activity

in the Boston area by both controlling not just picking up envelopes and [sic] he said from bookmakers and drug dealers but also, as we have had other evidence, **by ripping off drug dealers, by stealing their product and selling it for a profit, and they used that to make their money through other means to further some of the aims of the group...** (*emphasis added*). Doc. 1615-2, p. 7.

As Judge Zobel later recognized, this was exactly what the allegations of the Sapochetti robbery were – robbing a rival drug dealer to further “the War.” Tr. 3/14/03 Hearing, p. 49. Later in *Carrozza*, trying to admit a tape of Paul A. speaking, prosecutor Auerhahn argued:

It’s clear from the context of the conversation itself, from the content, from the substance of the conversation, that Mr. **DeCologero is saying in no uncertain terms that it’s the same conspiracy that I was involved in back in ‘93 and ‘94 and ‘95 and ‘96 that I’m still involved**, and I want to make sure that Patriarca knows that he has people who are loyal to him on the street, not just that we’re here holding things, and he talks about the fact that he’s going to get out soon and he’ll return to what once was. (*emphasis added*). Doc. 1629.³⁶

Those are the exact same years that the government attributed racketeering acts to Paul A., in the trial below.

Following a retrial of the *Carrozza* case, Vincent Marino (Portalla) was convicted as a participant in the RICO conspiracy. Appealing his conviction, Marino argued that he was not part of the “Patriarca Family” pattern of racketeering activity,

³⁶ At the trial below, one of the prosecutors said this taped statement “was going to be offered [in *Carrozza*] for the purpose of establishing his [Paul A.’s] participation in the enterprise charged in *Carrozza*.” Tr. v. 31, pp. 11-12.

but part of a rival faction engaged in drug trafficking. *Marino*, 277 F.3d at 27. This Court rejected that argument, holding that all the defendants in the *Carrozza* case were part of the same LCN family as their rivals, sharing common goals and a common pattern of racketeering. *Id.* at 26-28.

That same broad definition of a “pattern of racketeering” must also apply to Paul A. If “ripping off drug dealers” and drug distribution were part of the pattern of racketeering in *Carrozza*, the government should not be able to carve out a new RICO charge merely by calling something the “DeCologero Crew” and attributing additional, but identical, crimes to them.

The government drafted the indictment in this case three years after Paul A.’s acquittal in *Carrozza*. He was continuously in prison, serving a different sentence, between each event. All of the acts alleged in this case occurred before the *Carrozza* case was even filed. Therefore, the government had the motive and opportunity to draft its new RICO case in order to appear as little like *Carrozza* as possible. However, that is not the same as an actual difference.

Even if the government can distinguish the allegations of the Silva murder from the pattern of racketeering alleged in *Carrozza*, it is only the robberies that made this a RICO case, and those allegations were no different than the same pattern of conduct introduced against Paul A. in *Carrozza*. Absent charging the robberies, this would

have been a witness tampering-murder case, in which evidence of robberies would have merely been inadmissible prior acts. *See* Fed. R. Evid. 404(b); *United States v. Varoudakis*, 233 F.3d 113, 124 (1st Cir. 2000); *United States v. Aguilar-Aranceta*, 58 F.3d 796, 802 (1st Cir. 1995). Excluding the robberies would have made a case, built only upon two cooperating career criminals, drastically weaker.

This was exactly why the district court severed Derek Capozzi's case into two trials. In the first trial he faced robbery, drug, and firearm counts. *Capozzi*, 486 F.3d at 714. In the second, he was tried for witness tampering regarding the Silva murder. Absent the RICO charges, which were later dismissed, the transactions were not sufficiently related. *Id.*

The evidence of the enterprises and patterns of racketeering alleged in *Carrozza* and this case were the same. The Double Jeopardy Clause of the Fifth Amendment requires Counts 1 and 2 be reversed. The remaining counts must also be reversed so that Paul A. may be retried solely on the merits of those allegations, and not on the basis of conduct that was otherwise outside the statute of limitations, or was simply inadmissible under Fed. R. Evid. 404(b).

III. THE DISTRICT COURT REPEATEDLY DENIED APPELLANT THE RIGHT TO PRESENT A DEFENSE, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

The United States Supreme Court has repeatedly held that a defendant's right

to present a defense is a basic component of the Sixth Amendment. *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 1732 (2006); *Chambers v. Mississippi*, 410 U.S. 284, 289-90 (1973); *In Re Oliver*, 333 U.S. 257, 273 (1948). That means that the rules of evidence and procedure may not be used merely to defeat a defendant's opportunity to defend himself. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). The standard of review is *de novo*. See *United States v. Pinillos-Prieto*, 419 F.3d 61, 72 (1st Cir. 2005).

In this case, that right was infringed on repeated occasions, when the court sustained objections by the government to questions and arguments made by Paul A.'s counsel while attempting to present a defense. In his opening statement on behalf of Paul A., Salsberg told the jury that the evidence would show that Regan was working for Frank Salemme. Tr. v. 5, pp. 100-01. The government objected and the court sustained the objection, saying, "Why don't we stick to this case." *Id.* That prohibition was enforced strongly during Regan's cross examination,³⁷ to which Salsberg complained:

SALSBERG: If Mr. Regan was. Because he was receiving information from the Salemme faction. What the thrust of our defense is, which I was explaining yesterday, the crux of it, in fact, is that one of the reasons that Mr. Regan is saying and doing what he's doing is

³⁷ The court was also influenced by the objections of Paul A.'s co-defendants, whose defenses to the indictment were arguably inconsistent with Paul A.'s demurrer. See Tr. v. 4, p. 105; v. 24, p. 67.

because he is involved with the Salemme group, and that the enemy of that group was Paul A. DeCologero. And they were in some battle with him. So that, consequently, it wasn't as though he was working with Paul or a friend of Paul's.

THE COURT: Yesterday I thought you were explaining that Paul was aligned with them.

SALSBERG: No, oh, no. I was explaining that he was not aligned with the Salemme faction. That, in fact, the Salemme -- what I was saying is that the allegation is that Paul DeCologero was involved with the Carrozza group. The Carrozza group is in a battle with Patriarca's group. Patriarca is no longer involved, it's run by Salemme. So that what's happening here is he's supposed to be -- Paul DeCologero is supposed to be assembling guns in order to take over organized crime from Frank Salemme. What I'm saying is that he wouldn't be doing all these deals and robberies with Thomas Regan if Thomas Regan was really involved with Frank Salemme... Tr. v. 25, pp. 42-43.

Salsberg had received a letter from prosecutors that there was information that Regan intentionally attempted to murder Dicenso and others. Doc. 1643. He was attempting to show, not only that Regan was associated with Paul A.'s enemies, but that there was evidence he had a role in Silva's murder:

SALSBERG: -- immediately after Stephen DiCenso supposedly, according to him, is involved in the murder and dismemberment of Ms. Silva. He then goes over to Thomas Regan's house, sleeps on the couch, according to Mr. Regan. They claim that there is no discussion about anything that happened. The next day there is an event where Mr. DiCenso almost dies. A couple of other people almost -- do die. And Mr. Regan shows up, is taking the heroin, taking other drugs, hiding his involvement in whatever happened over there. Clearly he plays a central role in what actually happened, and we have a right to show that somebody else may very well have committed this offense rather than that Paul DeCologero did... Tr. v. 34, pp. 4-5.

Salsberg tried to introduce evidence of an important incident – that occurred after weapons were alleged to have been stored at Silva’s, but before her murder – in which the key players in her murder told Paul A. to mind his own business:

SALSBERG: What I understood what he will testify to is that he overheard Meuse and Regan telling Mr. DeCologero to stay out of their business involving Stephen DiCenso and Aislin Silva. It was to stay out of that to -- that this was something they were dealing with, and it was not his business. It was not Mr. DeCologero's business. Your Honor, I suggest due process requires that we be allowed to get this in. Otherwise, we're not -- we're deprived of a right to present a defense.

THE COURT: Well, you are doing a magnificent job of presenting a defense. The problem is there isn't much to the defense so far. You know, if due process allows this, then we might as well do a way with the rules of evidence. I don't think it's admissible. Tr. v. 35, pp. 22-23.

Although the court defined it as hearsay, telling someone to “stay out of our business” asserts no fact. It is a command, not a declaration, and thus not hearsay. *See United States v. Murphy*, 193 F.3d 1, 5 (1st Cir. 1999). Besides, Regan was a trial witness and subject to cross examination. Therefore, there was no evidentiary prohibition against admitting the statement.

Salsberg attempted to elicit the same information from another witness to the conversation. Tr. v. 33, pp. 105-06. The court also sustained that objection. *Id.* When Paul A. tried to testify about the incident, the court stopped him:

SALSBERG: ...Mr. DeCologero asked him where these -- what these guns were about, and he said these guns were going to Bobby Luisi. Mr. DeCologero says, Get out of here. Those people are trying to kill

me.

THE COURT: No. We're not getting into that. Tr. v. 36, 7.

Another manner in which Salsberg was cut off was regarding the time frame he was allowed to explore. The court sustained government objections to questions asking about anything before 1995:

AUSA DINISCO: It's the Carrozza case. This is the Carrozza case. It's in –

SALSBERG: No, it isn't.

DINISCO: Yes, it is. It's in 1993. You haven't moved from that point.

SALSBERG: '94 I said. 1994.

THE COURT: Yeah, but these events in question here took place in '96.

SALSBERG: Well, I think --

THE COURT: The charges here have to do with '96.

SALSBERG: No, I think it's '95, your Honor. And also you just heard testimony that this other robbery took place in 1994.

* * *

DINISCO: And can we have a date? Again, this is --

SALSBERG: Early 1994.

DINISCO: This is Carrozza.

SALSBERG: No, it isn't. It's showing he had an ongoing relationship with the Salemme faction.

* * *

SALSBERG: No, this -- these facts about whether there was a threat against Paul DeCologero by the Salemme faction never came up in the Carrozza case.

THE COURT: If there was a threat against him in '95 and '96, it's one thing; but '94 is not this case.

SALSBERG: Because when he learns that the threat is there, that is supposed to control what Paul is doing later, that he's supposed to be assembling weapons to fight this particular war. That that's where supposed --

THE COURT: But that is the war that's Carrozza. That's not this case. Tr.v. 25, pp. 44-46.

The government confused the court into believing that anything that occurred

before the dates alleged in the indictment was “*Carrozza*,” and anything afterward was not, and therefore could not be related to “the War.” This distinction was artificial and its falsity was best exemplified by the Sapochetti robbery. Before the grand jury, Sapochetti testified that he was personally involved in organized crime with Jackie Salemme and Bobby Luisa, and that the robbers told him they wanted to kill those men. Doc. 1897, Tab. 31 (003975, 003990-92). However, rather than introducing these facts, that showed “the War” continued through at least October 1996, the government simply did not call Sapochetti.

Finally, when Paul A. testified, at the end of his case, he was prevented from giving any background about his relationship with the men he accused of framing him for murder:

SALSBERG: What was your relationship with Thomas Regan during the first half of 1996?

PAUL A.: Well, during the first half of 1996 he was still dating my cousin Theresa. We were friends to a certain point, because he was an associate of Bulger and Flemmi's --

AUSA FEELEY: Objection.

PAUL A.: -- and I was at war, allegedly -- like I was saying, that's why they were looking --

AUSA FEELEY: Objection.

PAUL A.: -- to kidnap and kill my family.

AUSA FEELEY: Objection.

THE COURT: Mr. DeCologero, you just went way beyond the question. Stick to the question, please.

PAUL A.: Yes, your Honor. Tr. v. 35, p. 133-34.

* * *

SALSBERG: The question is, first of all, do you know -- did you know in 1995

and 1996 what the Patriarca La Cosa Nostra Family was?
PAUL A.: Yes.
SALSBERG: What was it?
THE COURT: I don't think we need to get into that.
AUSA FEELEY: Objection.
PAUL A.: Frank Salemme was the boss of the family --
AUSA FEELEY: Objection, Mr. DeCologero.
THE COURT: Hold it. The objection to the question is sustained. Tr. v. 35, p. 135.

Prior to closing, the government filed a motion in limine seeking to prevent Paul A. from referring to the *Carozza* case or any “dissident faction” in closing argument. Doc. 1779. The motion was basically moot because by that point, the court had prevented any such evidence from the jury. Salsberg could only make a fleeting reference to Portalla, Tr. v. 38, p. 140, without providing any background about his role in “the War,” or that he had been suspected of Silva’s murder by law enforcement.

The government did not want Paul A. to explain anything about “the War” for fear it would drastically complicate the prosecution and show its witnesses had several motivations to frame Paul A. It was difficult enough proving a RICO conspiracy based almost solely upon the testimony of two cooperating career criminals, one of whom this Court has already found to be motivated to lie. *See Capozzi*, 486 F.3d at 724.

Additionally, discussion of “the War” would inevitably bring attention to the previous FBI investigations and misconduct. The prosecutors legitimately worried that any mention of FBI participation in the instant case might make Boston-area jurors

suspicious about the government's credibility. When Paul A. asked for FBI reports in discovery, the prosecutor called it a "Pandora's box." Tr. 12/16/05 Hearing, p. 42.

However, none of these reasons excused the court from denying Paul A. the ability to defend the charges. Whatever the court or prosecutors may have felt about the merits of Paul A.'s defense is immaterial. As long as his case did not violate established rules of evidence or procedure, he had a right to present evidence supporting his defense. That protection was denied in violation of the Sixth Amendment and his Fifth Amendment right to due process of law. His convictions should be reversed and the case remanded for a new trial.

IV. APPELLANT WAS DENIED THE RIGHT OF COMPULSORY PROCESS TO PRESENT THE TESTIMONY OF VINCENT MARINO A/K/A GIGI PORTALLA, IN VIOLATION OF THE SIXTH AMENDMENT.

A criminal defendant has a Sixth Amendment right to have compulsory process for obtaining witnesses in his defense. *Washington v. Texas*, 388 U.S. 14, 18-19 (1967). In this case, the judge erred by refusing to lend her authority to obtain Portalla's (Marino) appearance. The standard of review is *de novo*. *Bowling v. Vose*, 3 F.3d 559, 561, n. 4 (1st Cir. 1993).

Salsberg sought to have the United States Marshal transport Portalla from federal prison. Doc. 1734. At first, the judge said that money was not an obstacle, but when Salsberg told her the Marshal needed her to order funds, she refused:

SALSBERG: That may well be, your Honor, right. In terms of Mr. [sic] Portella, I would just ask that the Court please allow the money to have him brought in here. He's a crucial witness.

THE COURT: It's not just a question of money. It's a question of resources in general. As I told you before, your request was made very late in the game, and usually they want three weeks' notice. Tr. v. 33, p. 162.

* * *

SALSBERG: And then there is also the issue of whether or not anything has been done to have Mr. Vincent Marino-GiGi Portalla. We did file a motion for additional time. I've done what I could do to speak with the marshals. The marshal said the only way to get him here promptly would be with the Court's intervention and the order of some funds.

THE COURT: Okay. I am not intervening. I told you that. Tr. v. 35, p. 56.

Her action denied access to Portalla as a witness. The judge could not deny Portalla's appearance, unless she first found he was either not competent to testify or simply had no admissible testimony. *See Taylor v. Illinois*, 484 U.S. 400, 417 (1988). She made no such findings. Portalla's affidavit had previously been filed to establish that he was willing to give testimony about the circumstances of "the War." The prosecutors also admitted they had a confidential informant who worked for Portalla. Tr. v. 14, pp. 92-93. Since he had previously been convicted in that conspiracy, Portalla had no basis to invoke his Fifth Amendment right and refuse to answer questions about those events.

Refusing to intervene in the production of a necessary witness denied Paul A. his right to compulsory process guaranteed by the Sixth Amendment. The case should

be reversed and remanded for a new trial.

V. THE APPELLANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL IN VIOLATION OF THE SIXTH AMENDMENT.

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial...” *United States v. Doggett*, 505 U.S. 647, 651 (1992); *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Determining a violation of this right requires an assessment of the extent of the delay, whether the government is to blame, whether the defendant asserted the right, and the prejudice resulting. *Id.* The standard of review is abuse of discretion. *United States v. Maxwell*, 351 F.3d 35, 40 (1st Cir. 2003).

In this case, the focus is primarily upon the government’s responsibility for the delay and the prejudice to Paul A. Except for the substantive counts of witness tampering, the rest of the indictment was based upon conduct that the government had the ability to prosecute at the time the *Carrozza* case was tried. The information had been received from Thomas Regan and allegedly corroborated by Special Agent Mercer in early 1998.

Particularly in regard to the RICO counts, the government strategically delayed its accusations against Paul A. until after *Carrozza* was tried. Paul A. was prevented from defending those charges during the *Carrozza* trial – charges that were part of the same alleged pattern of racketeering as *Carrozza*. *See infra* Issue II. He raised the

issue prior to trial and it was denied. Doc. 620, Docket Sheet 5/4/04 (JA100).

In *United States v. Marion*, 404 U.S. 307 (1971), the Supreme Court held that a case filed within the statute of limitations is not be presumed to violate Sixth Amendment speedy trial. This case should be treated as an exception to that rule because the government intentionally caused the delay, and Paul A. suffered actual prejudice.

This case is also unlike *United States v. Lovasco*, 431 U.S. 783 (1997), in which the government's delay in bringing charges was excused because the case was still under investigation. The portion of the case that remained under investigation here was the Silva murder. There was no need to wait to bring the other charges. The government's reason for seeking to try them together was to associate the Silva charges with a "criminal enterprise" as part of a larger "pattern of racketeering."

Rather than merely the extent of the delay – approximately three years between the *Carrozza* trial and the instant indictment – this Court should look to the fact that the government intentionally denied Paul A. his opportunity to defend the charges during a single proceeding. For that reason, he was denied his Sixth Amendment right to a speedy trial. All counts, except those related to the witness tampering allegations, should be reversed and remanded with orders to dismiss. The remaining counts should be reversed and remanded for a new trial.

VI. THE DISTRICT COURT ERRED IN DENYING APPELLANT A CONTINUANCE OF THE TRIAL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

An unreasoning and arbitrary “insistence upon expeditiousness in the face of a justifiable request for delay” violates the right to the assistance of counsel. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Otherwise, a trial court has broad latitude in scheduling trials. *Morris v. Slappy*, 461 U.S. 1, 11 (1983). The standard of review is abuse of discretion. *Avery v. Alabama*, 308 U.S. 444, 446 (1940).

After being removed for a conflict of interest, Paul A.’s previous lead counsel explained what her replacement would need to accomplish before trial:

Well, I think - - the last I counted there’s close to 10,000 pages of discovery and we’ve Bate [sic] stamped every one. I will spend whatever time is necessary. I think it will take six months of somebody doing nothing but this case, which means clearing their other cases away in order to focus exclusively on this. I think, frankly, you’re talking about a lawyer who’s going to spend, including trial time, about a year doing nothing but this case. So I think six months of 8 to 10 hour days, probably six days a week, will do it. I know the kind of time that I’ve put in on it and I’ve been on it for two and a half years. Tr. 7/22/04 Hearing, p. 41-42.

In this case, replacement counsel was given 15 months, two and one half of which he spent each day in the trial of a different RICO case. The new counsel’s requests for continuance were denied, not only over objections regarding inadequate preparation, but in the face of claims that he labored under conflicts of interest. The

requests for rescheduling the trial for six months, delaying it for two weeks, and then finally, even a five minute recess before jury selection, were all denied.

This case is unlike many cases in which a defendant seeks a continuance on the eve of trial in order to change his representation. *See e.g. United States v. Allen*, 789 F.2d 90, 93 (1st Cir. 1986) (denying continuance for last minute substitution of appointed counsel). It is improper to deny a continuance when the court has failed to even review the basis for the defendant's request. *See United States v. Prochilo*, 187 F.3d 221, 228 (1st Cir. 1999).

Paul A. sought time to resolve the conflicts, which he neither created, nor controlled. *See infra* Issue I. The court made no assessment and made no findings. The court's denial of a continuance to review whether counsel suffered under an actual conflict of interest, was unreasonable and arbitrary, reflecting an abuse of discretion. The case should be reversed and remanded for a new trial.

VII. APPELLANT WAS DENIED EXCULPATORY EVIDENCE IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Favorable evidence is material, and constitutional

error results from its suppression by the government, “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). This Court has applied a clearly erroneous standard to reviewing whether evidence was withheld in bad faith. *See United States v. Garza*, 435 F.3d 73, 75 (1st Cir. 2006).

A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. *Id.* A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. Once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Materiality is defined in terms of suppressed evidence considered collectively, not item by item. *Id.*; *see also Kyles v. Whitley*, 514 U.S. 419, 433-38 (1995).

In this case, Paul A. made a timely request for evidence about the investigation of Gigi Portalla (Marino) as a suspect in the murder of Aislin Silva. Doc. 1543. The government admitted there was evidence linking Portalla to Silva, Doc. 1524-2, 1524-3, but refused to provide it and the court denied the motion to produce it. Doc. 1568. The government’s explanation for withholding it was that it would open a “Pandora’s

box.” Tr. 12/16/05 Hearing, pp. 39, 46.

At trial, two government witnesses testified that Portalla was at Silva’s apartment in the days leading up to her murder. Tr. v. 21, pp. 59-60; v. 29, pp. 108-10. Phone records showed calls between Portalla and a phone purchased by Kevin Meuse. Tr. v. 30, pp. 142-43. Belatedly, the government admitted it had an informant working for Portalla. Tr. v. 14, pp. 92-93. The government still refused to provide the underlying reports.

There is a reasonable probability that providing Paul A. access to this information would have affected the outcome of the trial. Withholding this information, denied Paul A. his Fifth Amendment right to due process of law. This case should be reversed and remanded for a new trial.

CONCLUSION

For the above reasons, the judgement of conviction in the district court should be reversed and remanded for a new trial.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32 (a)

The undersigned counsel certifies that this brief complies with the type-volume limitations, typeface requirements and type style requirements of Fed. R. App. P. 32 (a)(7).

1. This brief contains 17, 069 words within the type volume limitation of Fed. R. App. P. 32 (a)(7)(B) exclusive of the portions exempted by Fed. R. App. P. 32 (a)(7)(B)(iii). A motion to extend the word limit is pending with the Court.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in proportionally spaced typeface using Corel WordPerfect X3 software in Times New Roman, 14 point font in text and Times New Roman 12 point font in footnotes.
3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32 (a)(7), may result in the Court's striking this brief and imposing sanctions against the person using the brief.

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CERTIFICATE OF SERVICE

I, Lillian Spagnola, certify that today, August 22, 2007, copies of the Appellant's Brief, were served upon, Assistant United States Attorneys, Dina Michael Chaitowitz and Timothy Q. Feeley, Kirby Heller USDOJ, and to Co-Appellants' counsel, by both electronic and regular mail.

Lillian Spagnola