

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2013

(Argued: November 19, 2013 Decided: December 9, 2013)

Docket Nos. 12-4310-cr; 12-4365-cr; 12-4371-cr

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United States of America,

Appellee,

- v. -

Peter S. Grimm, Dominick P. Carollo, Steven E. Goldberg,

Defendants-Appellants,

and

UBS AG, UBS Securities LLC, UBS Financial Services, Inc.,

Intervenors.

- - - - -x

Before: KEARSE, JACOBS and STRAUB, Circuit
 Judges.

Peter Grimm, Dominick Carollo, and Steven Goldberg

appeal from judgments of conviction entered in the United
States District Court for the Southern District of New York
(Baer, J.). We reverse on the ground that the indictment is
barred by the applicable statutes of limitations.

1 Judge KEARSE dissents in a separate opinion.

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1 DENNIS JACOBS, Circuit Judge:

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

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

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

10 11 I

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

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

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

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

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

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

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

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

1 bid. And sometimes a broker would rig an auction by asking
2 certain providers to submit intentionally losing bids.

3 Depending on the fraudulent bid rate, the municipal bond
4 rate, and the market interest rate, each deal defrauded the
5 municipality, the Treasury, or both.

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

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

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

5 After a three-week trial and three days of
6 deliberations, a jury convicted Goldberg on four counts,
7 Grimm on three counts, and Carollo on two counts. The
8 district court denied Defendants' post-verdict motions,
9 reiterating that the "conspiracy lasts . . . so long as the
10 conspirators obtain an economic benefit through artificially
11 suppressed payments." United States v. Carollo, et al., No.
12 10-cr-654 (HB), ECF No. 285 at 11 (S.D.N.Y. Nov. 20, 2012).
13

14 II

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

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

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

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

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

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

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

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

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

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

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

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

1 Doherty, 867 F.2d at 61) (emphasis in original).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 **CONCLUSION**

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

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