

1 KEARSE, Circuit Judge, dissenting:

2 I respectfully dissent from the majority's decision to reverse the convictions of Messrs.
3 Grimm, Carollo, and Goldberg ("defendants") on statute-of-limitations grounds. In my view, a major
4 flaw in the majority's opinion is its failure to acknowledge the implications of the facts that the
5 superseding indictment ("Indictment") alleged, and that the jury was instructed that in order to convict
6 it must find, that the corporate organizations that won the described guaranteed investment contracts
7 ("GICs") by engaging in the bid-rigging conspiracies--which enabled them to, inter alia, pay interest
8 to municipalities at artificially depressed rates for the duration of the GICs--were themselves
9 coconspirators, albeit unindicted coconspirators.

10 At various stages of the bid rigging, all three defendants were employed by General
11 Electric or related companies, which were referred to in the Indictment as "Provider B." The
12 Indictment alleged that Provider B sold investment agreements and other municipal finance contracts
13 through its business leaders and marketers, including Grimm, Carollo, and Goldberg. (See Indictment
14 ¶ 2.) Grimm and Goldberg had authority to and did submit bids for investments and other municipal
15 finance contracts on behalf of Provider B; Carollo was a manager and supervisor with respect to that
16 aspect of Provider B's business. (See id. ¶¶ 3-5.) During the bid-rigging period, Goldberg left
17 Provider B and joined Financial Security Assurance, part of a group of related financial services
18 companies that was referred to in the Indictment as "Provider A." (See Indictment ¶¶ 50, 51.) As a
19 vice president or director of Provider A, Goldberg "had authority to and did submit bids for
20 investment agreement[s] or other municipal finance contracts for Provider A." (Id. ¶ 51.)

1 In light of the Indictment's allegations that Grimm, Carollo, and Goldberg, in engaging
2 in bid rigging, acted on behalf of providers who were coconspirators, several well established
3 principles of conspiracy liability compel me to conclude that the statute of limitations did not bar the
4 prosecution of these defendants.

5 [T]he crucial question in determining whether the statute of limitations has run
6 is the scope of the conspiratorial agreement, for it is that which determines
7 both the duration of the conspiracy, and whether the act relied on as an overt
8 act may properly be regarded as in furtherance of the conspiracy.

9 Grunewald v. United States, 353 U.S. 391, 397 (1957) (emphases added). In order "[t]o constitute
10 an overt act for purposes of the statute of limitations the act must involve some affirmative conduct
11 or deliberate omission on the part of [a defendant] or her coconspirators," United States v. Ben Zvi,
12 242 F.3d 89, 97 (2d Cir. 2001) ("Ben Zvi"); see, e.g., United States v. Salmonese, 352 F.3d 608,
13 617-18 (2d Cir. 2003) ("Salmonese"). However, "[t]he overt act, without proof of which a charge of
14 conspiracy [under 18 U.S.C. § 371] cannot be submitted to the jury, . . . need not be itself a crime."
15 Braverman v. United States, 317 U.S. 49, 53 (1942).

16 Foreseeable acts of one coconspirator in furtherance of the conspiracy are attributable
17 to all coconspirators. See, e.g., Pinkerton v. United States, 328 U.S. 640, 646-47 (1946); United
18 States v. Milstein, 401 F.3d 53, 72 (2d Cir. 2005). This principle is applicable even if the
19 coconspirator who so acts is unindicted. See, e.g., United States v. Grammatikos, 633 F.2d 1013,
20 1023 (2d Cir. 1980) (acts of unindicted coconspirators may prove continued existence of the
21 conspiracy); see also United States v. Matthews, 168 F.3d 1234, 1246 (11th Cir.) (unindicted
22 coconspirator's overt acts within a district in furtherance of a conspiracy suffice to establish venue in
23 the district), cert. denied, 528 U.S. 883 (1999); United States v. Sandy, 605 F.2d 210, 215-16 (6th
24 Cir.) (overt acts alleged and proven to have been performed by an unindicted coconspirator sufficed
25 to connect the defendants to the conspiracy), cert. denied, 444 U.S. 984 (1979).

1 Conspiracy is "a continuing crime[] that is not complete until the purposes of the
2 conspiracy have been accomplished or abandoned." United States v. Pizzonia, 577 F.3d 455, 466 (2d
3 Cir. 2009) (internal quotation marks omitted), cert. denied, 558 U.S. 1115 (2010); see generally
4 United States v. Kissel, 218 U.S. 601, 610 (1910) ("a conspiracy may have continuance in time").
5 "Once a conspiracy is shown to exist, which in its nature is not ended merely by lapse of time, it
6 continues to exist until consummated, abandoned or otherwise terminated by some affirmative act."
7 United States v. Rucker, 586 F.2d 899, 906 (2d Cir. 1978) ("Rucker").

8 Applying this principle, "[t]his court has consistently ruled that where a conspiracy's
9 purpose is economic enrichment, the jointly undertaken scheme continues through the conspirators'
10 receipt of 'their anticipated economic benefits.'" Salmonese, 352 F.3d at 615 (quoting United States
11 v. Mennuti, 679 F.2d 1032, 1035 (2d Cir. 1982), and citing United States v. LaSpina, 299 F.3d 165,
12 175 (2d Cir. 2002); Ben Zvi, 242 F.3d at 98; United States v. Fletcher, 928 F.2d 495, 500 (2d Cir.),
13 cert. denied, 502 U.S. 815 (1991); United States v. Knuckles, 581 F.2d 305, 313 (2d Cir.), cert.
14 denied, 439 U.S. 986 (1978)); see also United States v. Azeem, 946 F.2d 13, 16 (2d Cir. 1991) ("A
15 conspiracy continues after the occurrence of the underlying offense and is not completed until the
16 conspirators receive their payoffs."); United States v. Fitzpatrick, 892 F.2d 162, 167 (1st Cir. 1989)
17 ("a conspiracy continues until the anticipated economic benefits of the defendant are realized").
18 "[A]bsent withdrawal, a conspirator's 'participation in a conspiracy is presumed to continue until the
19 last overt act [in furtherance of the conspiracy] by any of the conspirators.'" Salmonese, 352 F.3d
20 at 615 (quoting United States v. Diaz, 176 F.3d 52, 98 (2d Cir.), cert. denied, 528 U.S. 875 (1999)).
21 And "[e]very act in furtherance of the conspiracy is regarded in law as a renewal or continuance of
22 the unlawful agreement." Rucker, 586 F.2d at 906.

23 In the present case, the allegations in the five counts of the Indictment on which
24 defendants were convicted clearly delineate the scope of the conspiratorial agreements with respect

1 to goals, memberships, and durations. As to the conspiratorial objectives, the Indictment alleged that
2 one of the goals of each of the conspiracies charged in Counts I, II, and IV was "to defraud municipal
3 issuers and to obtain money and property from municipal issuers by means of false and fraudulent
4 pretenses" (Indictment ¶¶ 19, 27, 44), "increasing . . . the . . . profitability of investment agreements
5 and other municipal finance contracts awarded to Provider B by municipal issuers . . . through the
6 control and manipulation of bidding for investment agreements and other municipal finance contracts"
7 (id. ¶¶ 21(a), 29(a), 46(a) (emphases added)). Similarly, the Indictment alleged that a goal of the
8 conspiracies charged in Counts V and VI was to increase the profitability of such contracts for
9 Provider A. (See, e.g., id. ¶¶ 56(a), 63(a).)

10 As to membership in the conspiracies, Counts I and II of the Indictment alleged that
11 all three defendants' "co-conspirators[] includ[ed] Provider B" (Indictment Count I, ¶¶ 18, 19, 20, 22;
12 id. Count II ¶¶ 26, 27, 28, 30); and Count IV alleged that Grimm's "co-conspirators[] includ[ed]
13 Provider B" (Indictment ¶¶ 43, 44, 45, 47). Counts V and VI likewise alleged that Goldberg's
14 "co-conspirators[] includ[ed] Provider A." (Indictment Count V, ¶¶ 53, 54, 55, 57; id. Count VI,
15 ¶¶ 60, 61, 62, 64.)

16 As to duration, the Indictment alleged that length of the investment agreements of the
17 type that were subjected to bid rigging here varies from "as short as one month to as long as thirty
18 years." (Indictment ¶ 10.) To the extent that the providers sought to enjoy the difference between a
19 fairly arrived-at market rate of interest and the fraudulently arrived-at rate of interest to which the
20 municipalities agreed as a result of the bid rigging, the providers would realize economic gains each
21 time they made an interest payment to the municipal entity at the lower rate. See, e.g., United States
22 v. Walker, 653 F.2d 1343, 1347 (9th Cir. 1981) (finding injury to victim of rigged contract with each
23 of the defendant's payments at a "noncompetitive price"), cert. denied, 455 U.S. 908 (1982).

1 With respect to overt acts in furtherance of the conspiracies, Counts I, II, and IV
2 alleged, inter alia, that, Provider B made its payments on the GICs to the relevant municipal entities
3 "at artificially determined [and/or] suppressed rates." (Indictment Count 1, ¶ 22(f); id. Count II,
4 ¶¶ 30(f), 30(g)(iii)); id. Count IV, ¶¶ 47(f), 47(g)(iii).) Provider B was alleged to have continued to
5 make such payments at least until approximately November 1, 2005 (Indictment Count I, ¶ 22(g)(iii)),
6 June 30, 2006 (id. Count II, ¶ 30(g)(iii)), and November 1, 2006 (id. Count IV, ¶ 47(g)(iii)). Counts
7 V and VI similarly alleged that Provider A made payments on the relevant contracts at interest rates
8 that were artificially determined, and that those payments continued at least until October 2006
9 (Indictment Count V, ¶ 57(g)(iv)), and April 2006 (id. Count VI, ¶ 64(g)(iii)). All of these dates were
10 within the five-year limitations period that ended with the return of the original indictment in this case
11 on July 27, 2010.

12 Whether the allegations in the Indictment were proven--including whether the
13 unindicted corporate organizations, Providers A and B, were coconspirators--was of course a matter
14 for the jury. "A corporation can act only through its agents, and the acts of individuals on the
15 corporation's behalf may be properly chargeable to it." United States v. Paccione, 949 F.2d 1183,
16 1200 (2d Cir. 1991) (internal quotation marks omitted), cert. denied, 505 U.S. 1220 (1992).

17 The jury here was instructed that "the government must prove that there was a mutual
18 agreement among the defendant under consideration and at least one other person, together with the
19 respective corporate provider and the broker that they represent, to cooperate with each other to
20 accomplish the objectives of each charged conspiracy." (Trial Transcript ("Tr.") 3222 (emphases
21 added); see also id. at 3223 ("Ultimately, you must ask yourself if the government has proved beyond
22 a reasonable doubt the conspirators in the count you are considering, acting on behalf of the named
23 corporate provider and broker, came to an understanding to violate the law and to accomplish the
24 unlawful objectives of the alleged conspiracy." (emphasis added)).)

1 In finding defendants guilty on the five counts under consideration, the jury necessarily
2 found that Provider B conspired with the defendants charged in Counts I, II, and IV, and that Provider
3 A conspired with the defendant charged in Counts V and VI. Defendants have not challenged the
4 sufficiency of the evidence to support such findings, and I see no basis for such a challenge.

5 Whether an act by a coconspirator is in furtherance of the conspiracy is likewise a
6 factual question to be determined by the jury. See, e.g., Nye & Nissen v. United States, 336 U.S. 613,
7 618 (1949); United States v. Bruno, 873 F.2d 555, 560 (2d Cir.), cert. denied, 493 U.S. 840 (1989).
8 The jury here was instructed that "[a]n overt act was 'in furtherance' of a conspiracy if the act was
9 undertaken in order to advance an objective of the conspiracy." (Tr. 3235 (emphasis added).) It was
10 also instructed that, in order to convict, it must find "that at least one object of each conspiracy existed
11 at some point in time, within the period alleged in each of the counts." (Tr. 3224.)

12 In my view, it was permissible for the jury to find that (a) an objective of the
13 conspiracies was, as alleged, to enable the providers to make their periodic interest payments at
14 artificially suppressed rates, and (b) that objective existed within the limitations period. It was also
15 permissible for the jury to find that all of the providers' interest payments were acts in furtherance of
16 the conspiracies. Indeed, the payments were essential to the conspiracies' success: If the payments
17 were not made, the providers would be in breach of the investment contracts and would cease to
18 achieve their conspiratorial goals of economic gain through payments of interest below fair market
19 rates.

20 The majority's conclusion that the statute of limitations bars this prosecution is flawed,
21 in my view, not only because of its disregard of the roles of Providers A and B as coconspirators but
22 also because of its misinterpretation of this Court's prior rulings and its reliance on inappropriate
23 factors. For example, the majority points out that many of the investment contracts at issue are to be
24 performed "over a long time, typically up to 20 years or more." (Majority opinion ante at 14.) But

1 "the duration of the conspiracy" is "determine[d]" by "the scope of the conspiratorial agreement,"
2 Grunewald, 353 U.S. at 397; and here the precise goals of the conspiratorial agreements were to have
3 long-term contracts awarded to Providers A and B, during which the providers would repeatedly make
4 interest payments at artificially depressed rates, and thereby repeatedly reap the desired economic
5 gains. The majority also states that the providers are making payments that are "noncriminal in
6 themselves." (Majority opinion ante at 14.) But an overt act "need not be itself a crime." Braverman,
7 317 U.S. at 53. The majority further states that there was no evidence of "concerted activity" within
8 the limitations period. (Majority opinion ante at 14.) But foreseeable overt acts by one coconspirator
9 in furtherance of the conspiracy are attributable to all coconspirators. See, e.g., Pinkerton, 328 U.S.
10 at 646-47. "[A] conspiracy is a partnership in crime; and an 'overt act of one partner may be the act
11 of all without any new agreement specifically directed to that act.'" United States v. Socony-Vacuum
12 Oil Co., 310 U.S. 150, 253-54 (1940) (quoting Kissel, 218 U.S. at 608).

13 The majority also, in my view, misinterprets the opinion of this Court in Salmonese
14 as adopting the decision of the First Circuit in United States v. Doherty, 867 F.2d 47 (2d Cir. 1989),
15 which found a certain conspiracy count time-barred where the only acts within the limitations period
16 were the defendant's receipt of higher salary payments as a result of a promotion following his
17 unlawful advance acquisition of test questions. The Doherty court concluded that the statute of
18 limitations barred the count in question because the defendant's "receipt of salary is a 'result' of, not
19 an act in furtherance of, the conspiracy," 867 F.2d at 62, and that the indefinite duration of such salary
20 payments raised the specter of "extending the conspiracy statute of limitations indefinitely beyond the
21 period when the unique threats to society posed by a conspiracy are present," id. The majority
22 describes Salmonese as stating that the statute of limitations has run where

23 "there is no evidence that any concerted activity posing the special societal
24 dangers of conspiracy is still taking place." Salmonese, 352 F.3d at 616 (citing
25 Doherty, 867 F.2d at 61).

1 (Majority opinion ante at 14.) I have several problems with this interpretation.

2 To begin with, Salmonese was in fact quoting Doherty for purposes of discussion,
3 rather than citing it as authority for the resolution of the Salmonese appeal. The next sentence in
4 Salmonese began: "Were this court to follow Doherty, [the defendant] would not benefit"
5 Salmonese, 352 F.3d at 616 (emphasis added).

6 Thus, Salmonese, unlike Doherty, affirmed the defendant's conviction and rejected his
7 statute-of-limitations defense. The fact that Salmonese affirmed as to a conspiracy that came to a
8 natural end after a limited period of time provides no authority for the proposition that the conspiracy
9 in the present case must be deemed to have ended after a similarly limited period. Here, the
10 coconspirators agreed to engage in bid rigging in order to secure for Providers A and B, respectively,
11 lengthy contracts that would give the provider an economic gain each time it made an interest
12 payment at the artificially depressed rate. The defendants thus entered into conspiracies that were not
13 completed with the awards of the rigged contracts.

14 Further, although the majority quotes Fiswick v. United States, 329 U.S. 211, 216
15 (1946), as supporting its view that "the advantageous interest payment" in this case "is the result of
16 a completed conspiracy, and is not in furtherance of one that is ongoing" (majority opinion ante at 15-
17 16 (emphasis in original)), the majority miscasts the "result" of the bid-rigging conspiracy and ignores
18 part of Fiswick's quoted language. The Fiswick Court stated that what is necessary for a conspiracy
19 to "become a continuing one" is "[c]ontinuity of action to produce the unlawful result, **or** . . .
20 'continuous cooperation of the conspirators to keep it up.'" 329 U.S. at 216 (emphasis added). These
21 are alternative ways in which a conspiracy may be continued; a conspiracy may be one that is
22 "continuing" if there is simply a "[c]ontinuity of action to produce the unlawful result," id. And in
23 this case I think it clear that continuity of action was present--and indeed was essential to the scheme.
24 The "result" of the bid rigging is not, as the majority states, the providers' "payments"; the result is

1 the artificially arrived-at interest rate that gives the providers an economic gain each time a payment
2 is made. Periodic payments must be made by the providers in order to realize the desired economic
3 benefit from their advantageous interest-rate differential. Thus, continuity of action after the awards
4 of these rigged contracts was integral to the success of the conspiracies.

5 Finally, the majority's view that in this case there is no evidence of any continued
6 concerted activity posing the special societal dangers of society (see, e.g., majority opinion ante at 16
7 ("[t]he stream of GIC interest payments does not raise the underlying concern of concerted action"))
8 seems to me misguided. The policies underlying punishment of conspiracies include recognition that
9 "[c]oncerted action . . . increases the likelihood that the criminal object will be successfully attained,"
10 and that "[g]roup association for criminal purposes often, if not normally, makes possible the
11 attainment of ends more complex than those which one criminal could accomplish." Callanan v.
12 United States, 364 U.S. 587, 593 (1967). Those policies should be of concern here. The bid rigging
13 made it possible for the provider coconspirators to win contracts that would enable them to pay
14 interest to the municipalities at substandard rates--something no single bidder could accomplish alone--
15 and allowed the coconspirators to succeed in a scheme sufficiently complex to allow various
16 coconspirators to enjoy their illegal gains at different times and for prolonged periods.

17 In sum, my view is that where a conspiracy is specifically designed to enable some of
18 the coconspirators to win contracts that will provide them with economic gains repeatedly over the
19 life of the contract by allowing them to make periodic interest payments at artificially low rates, the
20 conspiracy ordinarily does not end--and each of the conspiracies at issue here did not end--before the
21 contracting coconspirator's last payment pursuant to the contract.

22 Accordingly, I dissent from the decision that the present prosecution was barred by the
23 statute of limitations.