

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2018

5
6 (Argued: May 29, 2019 Decided: October 18, 2019)

7
8 Docket No. 17-4092-cr
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11
12 UNITED STATES OF AMERICA,

13
14 *Appellee,*

15
16 v.

17
18 RODERICK ARRINGTON,

19
20 *Defendant-Appellant.**
21
22

23 Before:

24
25 LYNCH and LOHIER, *Circuit Judges*, and COGAN, *District Judge.***
26

27 Roderick Arrington appeals from a judgment of conviction entered
28 after a jury trial in the United States District Court for the Western District of
29 New York (Arcara, J.). We conclude that the trial evidence was sufficient to
30 support each count of conviction, including Arrington's convictions for
31 murder and attempted murder in aid of racketeering under 18 U.S.C. § 1959.
32 We also conclude, however, that Arrington's Sixth Amendment right to
33 effective assistance of counsel was violated when the District Court failed to
34 ensure that Arrington understood the full scope of the consequences arising

* The Clerk of Court is directed to amend the official caption to conform with the above.

** Judge Brian M. Cogan of the United States District Court for the Eastern District of New York, sitting by designation.

1 from his counsel's conflict of interest, including the disadvantages of a trial
2 severance that counsel proposed. We therefore **VACATE** Arrington's
3 conviction and **REMAND** to the District Court for a new trial.

4
5 ANDREW LEVCHUK, Amherst, MA, *for Defendant-*
6 *Appellant* Roderick Arrington.
7

8 WEI XIANG, Assistant United States Attorney (Mary
9 C. Baumgarten, Assistant United States Attorney, *on*
10 *the brief*), *for* James P. Kennedy, Jr., United States
11 Attorney for the Western District of New York,
12 Buffalo, NY, *for Appellee* United States of America.
13

14 LOHIER, *Circuit Judge*:

15 Roderick Arrington appeals from a judgment of conviction entered
16 after a jury trial in the United States District Court for the Western District of
17 New York (Arcara, I). We conclude that the trial evidence was sufficient to
18 support each count of conviction, including Arrington's convictions for
19 murder and attempted murder in aid of racketeering under 18 U.S.C. § 1959.
20 We also conclude, however, that Arrington's Sixth Amendment right to
21 effective assistance of counsel was violated when the District Court failed to
22 ensure that Arrington understood the full scope of the consequences arising
23 from his counsel's conflict of interest, including the disadvantages of a trial
24 severance that counsel proposed. We therefore vacate Arrington's conviction
25 and remand to the District Court for a new trial.

BACKGROUND

Because this is an appeal from a judgment of conviction entered after a jury trial and Arrington challenges the sufficiency of the evidence against him, the following facts are drawn from the trial evidence and described in the light most favorable to the Government. See United States v. Caltabiano, 871 F.3d 210, 218 (2d Cir. 2017).

A. The “Schuele Boys” and Arrington’s Role

This case centers on the drug trafficking of a violent gang operating principally in a neighborhood on the east side of the City of Buffalo. The Government refers to the members of the gang as “the Schuele Boys,” after Schuele Avenue, a street in the neighborhood. Gov’t App’x 66–67. The Schuele Boys—including Arrington, his co-defendants Aaron Hicks, Marcel Worthy, and LeTorrance Travis, and witnesses Jerome Grant and Demario James—grew up together in the neighborhood.

Arrington’s trial focused largely on the group’s drug trafficking starting around 2010. Some Schuele Boys members arranged to transport kilograms of cocaine and marijuana to Buffalo through “traps” in vehicles or through shipped parcels. Hicks, Travis, and Worthy were responsible for distributing

1 the cocaine and marijuana when it arrived in Buffalo. Another Schuele Boys
2 member and co-defendant, Julio Contreras, invested some of the drug
3 proceeds in G.O.N.E. Entertainment, a record label incorporated by Hicks that
4 promoted Schuele Boys associate Sandy Jones. Two music videos produced
5 by G.O.N.E. starred Jones, included scenes with Arrington, Hicks, Travis,
6 Worthy, and other Schuele Boys members, and contained lyrics that
7 referenced drug trafficking, drug proceeds, guns, and violence committed to
8 protect the drug business.

9 Arrington appears to have been only peripherally involved in the
10 group's core drug distribution activities. For example, Arrington was present
11 when Grant and others broke down a forty-pound bale of marijuana for sale.
12 Grant also testified that Arrington sold him marijuana in 2001 and cocaine in
13 2013. And in 2014 the police executed a warrant to search Arrington's
14 mother's house, where Arrington had been staying, and found heroin, drug
15 paraphernalia, and a loaded handgun.

16 But violence played an important part in protecting the Schuele Boys
17 and their territory for drug dealing in the neighborhood, and it is Arrington's
18 role as an "enforcer" that is a central focus of our sufficiency review. At trial,

1 the Government repeatedly described Arrington as an “enforcer” or as
2 “muscle” for the Schuele Boys. See, e.g., Gov’t App’x 102–03, 108, 1077, 1086,
3 1091–92, 1102. Grant testified that Arrington once expressed his frustration
4 with wearing an ankle monitor because he wanted to “tak[e] hits,” which
5 Grant understood to mean that Arrington wanted to kill on behalf of others.
6 Gov’t App’x 531, 533. Arrington also offered to kill people for Grant. And
7 James testified that Arrington offered, for a discounted price reserved for
8 close friends or relatives, to “take care of” someone who had robbed James.
9 Gov’t App’x 636.

10 B. The Murder of Quincy Balance and Attempted Murder of Damon
11 Hunter
12

13 Arrington’s role as an “enforcer” for the Schuele Boys was on full
14 display in August 2012. On August 26, 2012, Schuele Boys member and drug
15 dealer Walter “Matt” Davison—Hicks’s best friend—was shot and killed. In
16 the immediate aftermath of Davison’s murder, Arrington and other Schuele
17 Boys members talked about two individuals that they believed were involved

1 in Davison's killing. Arrington was armed with guns at that gathering. Later,
2 at Davison's wake, the same group vowed to kill whoever had killed Davison.

3 Four days after Davison's death, on August 30, 2012, Quincy Balance
4 and Damon Hunter approached Hicks in the Schuele neighborhood to
5 convince Hicks that they were not responsible for Davison's death, as Hunter
6 had been previously warned that "someone was after" Hunter and Balance
7 for killing Davison. Gov't App'x 977. Moments after Balance started talking
8 with Hicks, Arrington emerged from "the other side of the street." Id. at 988.
9 Balance approached Arrington, apparently intending to explain that he had
10 not killed Davison. Arrington then pulled out a pistol and shot Balance dead.
11 Hunter heard the shots and yelled at Arrington that he had nothing to do
12 with Davison's death. Hunter then dropped to the ground unharmed, rolled
13 under a truck, and began running away as shots flew past him.

14 Arrington was later arrested at this mother's house on October 31, 2014.
15 After his arrest and detention for murder, Arrington made a number of
16 incriminating statements and engaged in some conduct evincing
17 consciousness of guilt. For example, in early 2015, Arrington repeatedly
18 asked Grant whether he had spoken with law enforcement. Additionally,

1 Arrington told Grant, with apparent relief, that Hunter had given his
2 assurance that he was not cooperating against Arrington about “shooting”
3 Balance. Gov’t App’x 500, 504–08. Arrington also wrote a note to a friend
4 pressuring him not to cooperate and directing the friend to tear up the note
5 after reading it.

6 C. Procedural History

7 On June 19, 2015, the Government filed a superseding indictment
8 against Arrington, Hicks, Worthy, Travis, and Contreras. Arrington was
9 charged with twelve counts: racketeering conspiracy in violation of 18 U.S.C.
10 § 1962(d); narcotics conspiracy in violation of 21 U.S.C. § 846; possession of a
11 firearm in furtherance of a crime of violence and drug trafficking crime in
12 violation of 18 U.S.C. § 924(c)(1)(A)(i); murder in aid of racketeering activity
13 in violation of 18 U.S.C. § 1959(a)(1); two counts of discharge of a firearm in
14 furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii);
15 discharge of a firearm in furtherance of a crime of violence, resulting in
16 murder, in violation of 18 U.S.C. § 924(j)(1); attempted murder in aid of
17 racketeering activity in violation of 18 U.S.C. § 1959(a)(5); possession of heroin
18 with intent to distribute in violation of 21 U.S.C. § 841(a)(1); maintaining

1 drug-involved premises in violation of 21 U.S.C. § 856(a)(1); possession of a
2 firearm in furtherance of drug trafficking crimes in violation of 18 U.S.C.
3 § 924(c)(1)(A)(i); and possession of a firearm and ammunition by a convicted
4 felon in violation of 18 U.S.C. § 922(g)(1).

5 1. Pretrial Proceedings

6 On April 22, 2016, Arrington's trial attorney, Andrew LoTempio,
7 disclosed to the District Court his ongoing representation in a separate but
8 related case of Michael Robertson, who had been mentioned in certain
9 discovery documents. A magistrate judge (Scott, M.I.) held a hearing in
10 accordance with United States v. Curcio, 680 F.2d 881 (2d Cir. 1982), to
11 determine whether or not a conflict of interest existed, and appointed
12 independent Curcio counsel for Arrington. After conferring with Arrington,
13 Curcio counsel recommended that Magistrate Judge Scott not find a conflict
14 of interest with respect to LoTempio's representation of Robertson. The
15 Magistrate Judge then granted LoTempio's motion to withdraw his
16 representation of Robertson and accepted Arrington's in-court waiver of a
17 potential conflict related to LoTempio's representation of Robertson. At the
18 hearing, LoTempio disclosed that he previously also represented Hicks "in

1 unrelated criminal matters.” Dist. Ct. Dkt. No. 92. We see no record of any
2 further discussion of LoTempio’s prior representation of Hicks that day.

3 On September 14, 2016, Arrington, represented by LoTempio, moved to
4 sever his trial from that of his co-defendants, and, on October 11, 2016,
5 requested an immediate trial. In his severance motion, Arrington, relying
6 primarily on Bruton v. United States, 391 U.S. 123 (1968), said that his co-
7 defendants’ post-arrest statements and confessions might implicate him. That
8 motion was denied. Almost a year later, on August 28 and August 31, 2017,
9 respectively, Travis and Contreras pled guilty, leaving Arrington, Hicks, and
10 Worthy set to proceed to trial on September 11, 2017.

11 On September 3, 2017, roughly one week before trial, Hicks filed a
12 motion urging the District Court to find that LoTempio had an actual conflict
13 of interest stemming from his prior representation of Hicks in a state court
14 matter referenced as an overt act in the superseding indictment. The overt
15 act, which the Government alleged was committed in furtherance of the
16 racketeering enterprise, related to Hicks’s retrieval of a box containing thirty-
17 three pounds of marijuana in 2014. Hicks’s trial attorney, Robert Ross Fogg,

1 asserted that LoTempio's conflict of interest was unwaivable and, in any
2 event, that Hicks refused to waive it.

3 2. The Curcio Hearing

4 On September 5 and 6, the District Court (Arcara, J.) held a Curcio
5 hearing to address the conflict arising from LoTempio's prior representation
6 of Hicks. Arrington was in the courtroom at the start of the hearing on the
7 first day, as were LoTempio, Fogg, and Hicks. The District Court informed
8 Arrington that he had "a very strong interest in having Mr. LoTempio cross-
9 examine all the witnesses against [him] aggressively to try to challenge the
10 believability or the credibility or the reliability of the witnesses." Joint App'x
11 260. Because LoTempio also owed a duty to Hicks, the District Court
12 explained, LoTempio could not use information he had learned while
13 representing Hicks, and therefore "might not be able to represent [Arrington]
14 as zealously as he should by aggressively cross-examining witnesses of events
15 that happen[ed] in 2014," Joint App'x 261, and might "have to pull some
16 punches . . . because of his loyalty to . . . Hicks," Joint App'x 262-63.

17 LoTempio confirmed that he could not use any information from Hicks's
18 earlier case to cross-examine Hicks. Joint App'x 263-64. In response to these

1 warnings, Arrington repeatedly said that he understood the nature of the
2 conflict. The District Court then apprised Arrington of his right to a conflict-
3 free lawyer, assigned independent Curcio counsel to advise Arrington,
4 instructed Arrington that he could discuss whether or not to waive the
5 conflict with both Curcio counsel and LoTempio, and gave Arrington ample
6 time to decide. Arrington and his Curcio counsel then left the courtroom to
7 discuss the issues in another room.

8 Unfortunately, the District Court continued to discuss the nature of the
9 conflict with LoTempio and Fogg while Arrington was outside the courtroom.
10 Fogg argued that LoTempio should be disqualified because Hicks would be
11 less likely to testify in his own defense if LoTempio, his former lawyer, could
12 cross-examine him. LoTempio responded that “it would put me in an awful
13 predicament if [Hicks] took the stand and it would probably be more of a
14 severance issue than me being removed.” Joint App’x 268. This was the first
15 time anyone mentioned severing the trials of Arrington and Hicks as a
16 solution to LoTempio’s conflict of interest. In response, the District Court
17 suggested that severance might make “the issue go[] away.” Joint App’x 272.

1 The next day, September 6, the District Court finished its Curcio
2 colloquy with Arrington and, based on Curcio counsel's representations,
3 accepted Arrington's waiver of the conflict and adjourned. Later that day, the
4 District Court held a separate proceeding to deal with Hicks's motion to
5 disqualify LoTempio. Although LoTempio was present virtually throughout,
6 the record suggests that Arrington was not even in the courtroom and did not
7 otherwise participate in this proceeding.¹ In any event, the District Court
8 never addressed Arrington about LoTempio's request for a severance (or
9 anything else) during the proceeding even though it significantly affected
10 Arrington.

11 The proceeding started with Fogg again arguing that Hicks would be
12 less likely to testify because of LoTempio's conflict, that the conflict was not
13 waivable, and that disqualifying LoTempio was the only appropriate remedy.
14 Severance, Fogg added, was not in his client's best interest.

15 Because it framed the District Court's decision to sever the trials, we
16 quote LoTempio's response at length:

¹ It is helpful for appellate review for the minute entry on the docket (or for the transcript of proceedings) to indicate that a criminal defendant is present in the courtroom.

1 Now, I don't know [what Hicks will say]. If he
2 [inculcates Arrington], then I owe a duty to Mr. Arrington
3 to go after Mr. Hicks and impeach him and cross-examine
4 him with everything I have at my abilities. And you know,
5 it would be hard for me to separate what I know from . . .
6 what Mr. Hicks may or may not have told me when I
7 represented him during the overt act in this.

8 So, the Canons of Ethics basically start with the idea
9 that I can't represent either one of them. And then it goes
10 on to say that, depending on how related the matters are,
11 increases the prohibition. And here, they're definitely
12 related to one another. The two cases, they're inextricably
13 interwoven. They're part and parcel of the charges.

14 And then the question then becomes, can
15 [Arrington] consent? And it talks about cases where he
16 can't even consent because the temptation of a lawyer
17 serving both people is so grave that there shouldn't even
18 be consent. So, I think, at this point—I don't know that it's
19 appropriate to kick me off the case. I think that the
20 appropriate remedy, at this point, would be to grant a
21 severance.

22 And then, only if Mr. Hicks cooperates with the
23 government in a separate trial against Mr. Arrington
24 would this issue come up again. If he doesn't cooperate,
25 then he's removed from . . . Mr. Arrington's case, and I
26 never have to cross-examine him and I'm never tempted to
27 use information that he gave to me and it becomes a moot
28 point. If he does cooperate, then we're kind of kicking the
29 can down the road, but you're still giving – at least giving
30 Mr. Arrington an opportunity to keep the attorney of his
31 choice.

32 So, I think that this case would come back on appeal
33 if we don't at least do a severance. I guess that's my
34 opinion, for what it's worth. And I'm asking that you do
35 that, because otherwise, I'm being put in a predicament

1 where I am going to almost have to choose between Mr.
2 Arrington and my duty to—that's still left over to my
3 former client, which is to not talk about things or confront
4 him with things that I may or may not remember. I'm
5 being put in an awful position.

6
7

8
9 So, at this late stage, I think that the—I would like to
10 represent Mr. Arrington and continue to do that. And I
11 think the only way that that can happen, without me
12 violating my former client's rights, is if we're given a
13 separate trial. And I don't care if I go first. I'm ready to try
14 the case. I'll go first, if you want. Doesn't matter to me.

15
16 Joint App'x 302–05.

17 LoTempio's proposal did not go over well with the other parties. Fogg
18 continued to strongly oppose severance, while the Government disputed that
19 severance would resolve the conflict because Arrington could still call Hicks
20 as a witness in his own case. But the District Court was concerned about
21 delaying trial, and it ultimately agreed to sever the trials and to immediately
22 try Arrington and Worthy.

23 3. Arrington's Trial and the Jury Verdict

24 Trial started on September 11, 2017. Worthy pled guilty on the first
25 morning of jury selection, leaving Arrington to be tried alone. During trial, it

1 became abundantly clear that Arrington killed Balance and tried to shoot
2 Hunter. For example, Worthy confirmed that Arrington shot Balance and
3 tried to shoot Hunter. Another witness, Ja'Quan Johnson, testified that
4 Arrington shot Balance, and that in the days leading up to the shooting,
5 Arrington asked people in the neighborhood about Balance's whereabouts.

6 Arrington's defense at trial focused on the Government's limited
7 evidence that Arrington participated in the Schuele Boys' drug dealing or
8 acted as their "enforcer." Arrington consequently argued that because no
9 conspiracy or racketeering enterprise existed under federal law, any murder
10 charges against him should have instead proceeded in state court.

11 The trial lasted nine days. During the first full day of jury
12 deliberations, one juror alerted the District Court that he knew one of the
13 victims of a shooting mentioned at trial and said that his personal knowledge
14 might impair his ability to deliberate. The District Court denied Arrington's
15 motion for a mistrial, replaced the juror with an alternate, and instructed the

1 jury to “start all over again” and “disregard your earlier deliberations.” Gov’t
2 App’x 1243–44, 1248–49, 1254.

3 A few hours later, the reconstituted jury convicted Arrington on Counts
4 1 through 8: racketeering conspiracy (Count 1), narcotics conspiracy (Count
5 2), possession of firearms in furtherance of a crime of violence or drug
6 trafficking crime (Count 3), murder in aid of racketeering activity (Count 4),
7 two counts of discharge of a firearm in furtherance of crimes of violence
8 (Counts 5 and 8), discharge of a firearm causing death in furtherance of a
9 crime of violence (Count 6), and attempted murder in aid of racketeering
10 activity (Count 7). The jury acquitted Arrington of the four remaining drug or
11 gun possession charges.

12 4. Hicks’s Trial and Retrial

13 Hicks’s trial took place shortly after Arrington’s. Testifying in his own
14 defense, Hicks denied the existence of the Schuele Boys enterprise, denied
15 knowing why Balance was killed, and claimed that he did not see Arrington
16 at the scene of Balance’s murder. Hicks confirmed that Balance and Hunter

1 told him that they did not kill Davison; but Hicks also testified that Balance
2 told him that Hunter was responsible.

3 A jury convicted Hicks of narcotics conspiracy, acquitted him of
4 possession of a firearm in furtherance of a crime of violence or drug
5 trafficking offense, and deadlocked on the racketeering conspiracy charge.

6 The Government retried Hicks on the racketeering conspiracy charge, and the
7 second jury convicted him. Hicks did not testify at his second trial.

8 5. Arrington's Post-Trial Motions and Sentencing

9 Arrington filed a motion for acquittal under Federal Rule of Criminal
10 Procedure 29, arguing principally that the evidence was insufficient to
11 establish an enterprise, Arrington's membership in the enterprise, his role in a
12 drug conspiracy, or that Arrington killed Balance in furtherance of any
13 enterprise. The District Court denied the motion, concluding that the
14 evidence showed that Arrington knew of the conspiracy's core racketeering
15 activity and knowingly joined the conspiracy. Joint App'x 669–79. The
16 District Court also found that the evidence established that the Schuele Boys
17 were an association-in-fact enterprise in which Arrington held a position. The
18 District Court pointed to the “overwhelming evidence” that Arrington

1 murdered Balance and attempted to murder Hunter and determined that a
2 reasonable jury could conclude that Arrington did so to maintain or promote
3 his position in the enterprise. Joint App'x 675.² This appeal followed.

4 DISCUSSION

5 On appeal, Arrington makes three main arguments.

6 First, he challenges the sufficiency of the evidence supporting each
7 count of conviction.³ We conclude that the evidence, viewed in the light most
8 favorable to the Government, was sufficient to support each count of
9 conviction.

10 Second, Arrington argues that his Sixth Amendment right to conflict-
11 free counsel was violated when the District Court failed to disqualify his trial
12 counsel, or, alternatively, that the District Court failed to conduct a waiver
13 colloquy that adequately informed Arrington of the nature of the conflict.

² The District Court did, however, vacate one of Arrington's discharge convictions (Count 5) as the lesser-included offense of another (Count 6).

³ Although we vacate Arrington's conviction on other grounds discussed below, we address his sufficiency challenges because we would be required to direct the District Court to enter a judgment of acquittal if there were insufficient evidence to support conviction, instead of vacating the conviction and remanding for a new trial. United States v. Rosemond, 841 F.3d 95, 113 (2d Cir. 2016).

1 Because we agree that Arrington’s waiver was not knowing and intelligent,
2 we vacate Arrington’s conviction and remand for a new trial.

3 We therefore need not, and do not, reach Arrington’s third argument
4 that the District Court abused its discretion in replacing a juror for good cause
5 and refusing to grant a mistrial.

6 A. Sufficiency of the Evidence

7 We review sufficiency challenges de novo, considering the evidence in
8 its totality. United States v. Persico, 645 F.3d 85, 104 (2d Cir. 2011). We defer
9 to the jury’s choice between competing inferences reasonably drawn from the
10 evidence. Id. In a criminal case, we will uphold the conviction if, “after
11 viewing the evidence in the light most favorable to the prosecution, any
12 rational trier of fact could have found the essential elements of the crime
13 beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979).

14 1. Racketeering Conspiracy

15 The conspiracy provision of the Racketeer Influenced and Corrupt
16 Organizations Act (RICO), 18 U.S.C. § 1962(d), “proscribes an agreement to
17 conduct or to participate in the conduct of [an] enterprise’s affairs through a
18 pattern of racketeering activity.” United States v. Pizzonia, 577 F.3d 455, 462

(2d Cir. 2009). To prove a RICO conspiracy, the Government need not establish the existence of an enterprise, United States v. Applins, 637 F.3d 59, 75 (2d Cir. 2011), or that the defendant committed any predicate act, United States v. Yannotti, 541 F.3d 112, 129 (2d Cir. 2008). It need only prove that the defendant knew of, and agreed to, the general criminal objective of a jointly undertaken scheme. Applins, 637 F.3d at 75; see United States v. Zichettello, 208 F.3d 72, 99–100 (2d Cir. 2000).

Here, a reasonable jury could find beyond a reasonable doubt that Arrington agreed with other members of the Schuele Boys to function as a unit for the common purpose of selling drugs. First, evidence at trial established that, while his personal participation was limited, Arrington knew that his associates were involved in the drug trafficking business. We note especially the evidence that Arrington offered James, a Schuele Boys member, a “family price” to retaliate against a robber who stole marijuana belonging to James. Gov’t App’x 636. We also note Arrington’s participation in the G.O.N.E. music videos. Second, based on the evidence we have already described, a reasonable jury could find beyond a reasonable doubt that Arrington murdered Balance and shot at Hunter in retaliation for Davison’s

1 murder and to protect the Schuele Boys' drug trafficking business, although
2 the connection between the murder and the business itself is a close call. See
3 Yannotti, 541 F.3d at 122.

4 2. Narcotics Conspiracy

5 For largely the same reasons that the evidence was sufficient to support
6 Arrington's conviction for RICO conspiracy, the evidence was also sufficient
7 to support his conviction for narcotics conspiracy. Arrington concedes the
8 existence of a drug conspiracy involving Hicks, Travis, Worthy, and others.
9 He simply denies that he joined the conspiracy. But a reasonable jury could
10 have found that Arrington's role and offers to serve as "muscle" assisted his
11 co-conspirators' drug trafficking activities. See United States v. Hawkins, 547
12 F.3d 66, 71 (2d Cir. 2008).

13 3. Murder and Attempted Murder in Aid of Racketeering

14 To convict Arrington for committing a violent crime in aid of
15 racketeering under 18 U.S.C. § 1959, the Government had to establish that: (1)
16 a racketeering enterprise existed; (2) the enterprise's activities affected
17 interstate commerce; (3) Arrington had a position in the enterprise; (4)
18 Arrington committed a violent crime; and (5) Arrington committed the

1 violent crime, as relevant here, “for the purpose of . . . maintaining or
2 increasing position in [the] enterprise.” Id. § 1959(a); United States v.
3 Concepcion, 983 F.2d 369, 380–81 (2d Cir. 1992). On appeal, Arrington
4 challenges the sufficiency of the evidence supporting the first, third, and fifth
5 elements. We address each of Arrington’s challenges in turn.

6 a. The Existence of a Racketeering Enterprise

7 “[A]n association-in-fact enterprise is simply a continuing unit that
8 functions with a common purpose.” Boyle v. United States, 556 U.S. 938, 948
9 (2009); see also United States v. Pierce, 785 F.3d 832, 838–39 (2d Cir. 2015). As
10 we explained above with respect to Arrington’s conviction for racketeering
11 conspiracy, a reasonable jury could conclude from evidence of the
12 relationship between Hicks, Travis, Worthy, Contreras, and others, and from
13 their actions over a period of years, that the Schuele Boys were “a continuing
14 unit that function[ed] with [the] common purpose” of selling drugs in and
15 around their neighborhood on the east side of Buffalo. Boyle, 556 U.S. at 948.

1 We therefore reject Arrington’s sufficiency challenge to the first element of his
2 conviction for committing a violent crime in aid of racketeering activity.

3 b. Arrington’s Position in a Racketeering Enterprise

4 Despite Arrington’s limited participation in the enterprise’s core drug
5 trafficking activity, for many of the same reasons that we conclude there was
6 sufficient evidence of Arrington’s agreement to participate in the RICO
7 conspiracy, we are also of the view that the evidence at trial was sufficient to
8 allow a reasonable jury to conclude that Arrington held a position within the
9 Schuele Boys enterprise. While Arrington’s position was, to be sure, a low
10 and peripheral one, any position is enough. See United States v. Brady, 26
11 F.3d 282, 290 (2d Cir. 1994). Arrington served as an enforcer for the Schuele
12 Boys, able and willing to hurt people who crossed its members. Arrington’s
13 role in the G.O.N.E. music videos and his activities while in jail also
14 evidenced his membership in the Schuele Boys.

15 c. The Motive Requirement

16 As relevant here, § 1959 required the Government to prove that
17 Arrington committed a crime of violence at least in part “for the purpose
18 of . . . maintaining or increasing [his] position in” the Schuele Boys enterprise.

1 18 U.S.C. § 1959(a); see United States v. Pimentel, 346 F.3d 285, 295–96 (2d Cir.
2 2003); United States v. Thai, 29 F.3d 785, 817 (2d Cir. 1994). This motive
3 requirement is “satisfied if ‘the jury could properly infer that [Arrington]
4 committed his violent crime because he knew it was expected of him by
5 reason of his membership in the enterprise or that he committed it in
6 furtherance of that membership.’” Thai, 29 F.3d at 817 (quoting Concepcion,
7 983 F.2d at 381).

8 Arrington argues that there was insufficient evidence for the jury to
9 conclude that he killed Balance or tried to kill Hunter for the purpose of
10 maintaining or promoting his position within the Schuele Boys group.
11 Arrington does not dispute that Balance and Hunter were targeted to avenge
12 Davison’s death and barely disputes the strong evidence that he shot them.
13 See, e.g., Gov’t App’x 1128; Appellant’s Br. 35–36.⁴ The real question for us,
14 then, is whether there was evidence from which a reasonable jury could
15 conclude that Arrington committed either act in furtherance of, or as an

⁴ As the District Court recognized, the evidence of Arrington’s personal involvement in the murder was overwhelming. Three eyewitnesses identified Arrington as the shooter. See Gov’t App’x 562–75, 933–34, 989–92.

1 integral aspect of, his role as an enforcer for the Schuele Boys. Although it is a
2 close call, the answer is yes.

3 At trial, some witnesses testified about the use of violence to protect the
4 Schuele Boys' drug business. A few witnesses described Arrington's offers to
5 serve as an enforcer for members of the Schuele Boys and to kill people on
6 their behalf either for free or at a discounted "family" price. And in the run-
7 up to Balance's murder, Arrington, armed, talked with Hicks, Worthy, and
8 others about killing whoever had killed Davison.

9 What gives us some pause about the evidence of Arrington's
10 motivation is that he appears to have been a peripheral member of the
11 Schuele Boys. And his work for the group could suggest a financial or
12 personal motivation as much as it does an effort to protect the group's
13 reputation or members. Urging that conclusion, Arrington points to our
14 decisions in Thai and United States v. Bruno, 383 F.3d 65 (2d Cir. 2004), in
15 which we vacated convictions under § 1959.

16 Both cases are distinguishable. In Thai, the evidence showed that the
17 defendant committed murder for "purely mercenary" reasons (money), rather
18 than to protect his criminal organization or maintain his position within it. 29

1 F.3d at 818; accord United States v. Ferguson, 246 F.3d 129, 135–36 (2d Cir.
2 2001) (defendant was an outside hitman who did not belong to the gang).
3 And in Bruno, the defendant was motivated entirely by money and a personal
4 vendetta to commit a violent crime that served only to decrease his position
5 within the Genovese crime family. 383 F.3d at 84–85. Here, in contrast to
6 both Thai and Bruno, there is no evidence that Arrington was paid to avenge
7 Davison’s murder. Nor is there evidence, as the Government observes, that
8 Arrington harbored a motive for the shootings unrelated to his attachment to
9 the Schuele Boys. To the contrary, in this case, as in United States v. Burden,
10 while “[p]ersonal beefs also may have been satisfied . . . the evidence
11 supported a finding” that Arrington “engaged in violent acts because it was
12 expected of [him] as . . . [a] member[] of the [enterprise].” 600 F.3d 204, 221
13 (2d Cir. 2010).

14 In arriving at this conclusion, we rely on the evidence that some
15 Schuele Boys members believed that Davison, a fellow member, was killed
16 during a drug robbery committed by Balance and Hunter. Such a robbery
17 would have posed a direct threat to the Schuele Boys. We are also persuaded
18 by evidence that Arrington’s plan to murder Balance and Hunter was hatched

1 with other Schuele Boys members, not alone. At Davison’s wake, for
2 example, Arrington talked with Schuele Boys members specifically about
3 killing Balance and Hunter. For these reasons, the jury properly could have
4 inferred that Arrington sought to avenge Davison’s murder on behalf of the
5 Schuele Boys and thereby confirm his position as an enforcer in the group—in
6 other words, that the shootings were not merely “an act of personal revenge”
7 but also “tied to [Arrington’s] racketeering activities.” United States v. James,
8 239 F.3d 120, 124 n.5 (2d Cir. 2000).

9 4. Firearms Counts

10 In addition to challenging the racketeering and narcotics conspiracy
11 charges against him, Arrington attacks his convictions on the firearms-related
12 charges (Counts 3, 5, 6, and 8) on the ground that the evidence was
13 insufficient to support the predicate crimes of violence or drug trafficking
14 (Counts 1, 2, 4, and 7). Because we reject those sufficiency arguments above,

1 we also reject Arrington’s sufficiency challenge with respect to his firearms
2 convictions.

3 B. The Conflict of Interest in Representation

4 Although there was sufficient evidence to support Arrington’s counts
5 of conviction, we agree with Arrington that his waiver of LoTempio’s conflict
6 of interest was not knowing and intelligent. We therefore vacate Arrington’s
7 conviction.

8 1. Legal Background

9 The Sixth Amendment right to effective assistance of counsel “generally
10 ensures that an accused may be represented by any attorney who will agree to
11 take his case.” United States v. Perez, 325 F.3d 115, 124 (2d Cir. 2003). A
12 defendant has a “correlative right to representation that is free from conflicts
13 of interest.” Cardoza v. Rock, 731 F.3d 169, 183 (2d Cir. 2013) (quoting Wood
14 v. Georgia, 450 U.S. 261, 271 (1981)).

15 When a defendant’s right to choose the counsel he wants “conflicts with
16 the right to an attorney of undivided loyalty, the choice as to which right is to
17 take precedence must generally be left to the defendant.” Perez, 325 F.3d at
18 125. But district courts have an “independent duty to ensure that criminal

1 defendants receive a trial that is fair and does not contravene the Sixth
2 Amendment.” Wheat v. United States, 486 U.S. 153, 161 (1988). For that
3 reason, “[w]hen a district court is sufficiently apprised of even the possibility
4 of a conflict of interest” — as the District Court was here—it has a threshold
5 obligation to “investigate the facts and details of the attorney’s interests to
6 determine whether the attorney in fact suffers from an actual conflict, a
7 potential conflict, or no genuine conflict at all.” United States v. Levy, 25 F.3d
8 146, 153 (2d Cir. 1994); see Perez, 325 F.3d at 125.

9 An attorney has an actual conflict “when, during the course of the
10 representation, the attorney’s and defendant’s interests diverge with respect
11 to a material factual or legal issue or to a course of action.” United States v.
12 Schwarz, 283 F.3d 76, 91 (2d Cir. 2002) (quotation marks omitted). The
13 attorney suffers from only a potential conflict when the “interests of the
14 defendant may place the attorney under inconsistent duties at some time in
15 the future.” Perez, 325 F.3d at 125 (quotation marks omitted).

16 If the district court concludes that defense counsel has a genuine
17 conflict, it has to determine whether the conflict is so severe as to require the
18 attorney’s disqualification or whether it is a lesser conflict that can be waived

1 in a Curcio hearing. Levy, 25 F.3d at 153. In most cases where a defendant's
2 attorney has a conflict, the defendant "may make a knowing and intelligent
3 waiver of his right to a conflict-free lawyer if he desires to continue the
4 representation." United States v. Cain, 671 F.3d 271, 293 (2d Cir. 2012). In
5 rare cases, an attorney's conflict is unwaivable because it is so serious that "no
6 rational defendant . . . would have knowingly and intelligently desired" the
7 conflicted attorney's representation, Perez, 325 F.3d at 127; see Cain, 671 F.3d
8 at 293; Schwarz, 283 F.3d at 95–97; United States v. Fulton, 5 F.3d 605, 613 (2d
9 Cir. 1993), or because, as we have also phrased it, the conflict is "so severe as
10 to indicate per se that the rendering of effective assistance will be impeded,"
11 Perez, 325 F.3d at 125. We have identified such "per se violation[s] of the
12 Sixth Amendment" where the "defendant's counsel was unlicensed, and
13 when the attorney has engaged in the defendant's crimes." Fulton, 5 F.3d at
14 611.

15 Where an attorney suffers from a waivable actual or potential conflict,
16 the district court must conduct a Curcio hearing to determine whether the
17 defendant will knowingly and intelligently waive his right to conflict-free
18 representation. Curcio, 680 F.2d at 881-91; Levy, 25 F.3d at 153. To ensure

1 that a defendant's waiver is made knowingly and intelligently at the Curcio
2 hearing, the district court should: "(i) advise the defendant of the dangers
3 arising from the particular conflict; (ii) determine through questions that are
4 likely to be answered in narrative form whether the defendant understands
5 those risks and freely chooses to run them; and (iii) give the defendant time to
6 digest and contemplate the risks after encouraging him or her to seek advice
7 from independent counsel." United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir.
8 1986). In evaluating a district court's fidelity to Curcio's guidance, "we are
9 more concerned with whether the defendant appreciated his predicament and
10 made a properly informed choice than we are with whether the trial judge
11 recited any particular litany of questions." United States v. Jenkins, 943 F.2d
12 167, 176 (2d Cir. 1991). We also recognize that a district court must decide
13 whether to allow a waiver of a conflict of interest "not with the wisdom of
14 hindsight after the trial has taken place, but in the murkier pre-trial context,"
15 when the "likelihood and dimensions of nascent conflicts of interest are
16 notoriously hard to predict." Wheat, 486 U.S. at 162.

17 On appeal, a defendant challenging his conviction on the ground that
18 he was deprived of his Sixth Amendment right to effective assistance of

1 counsel as the result of a conflict must demonstrate, first, that the conflict was
2 either unwaivable or that his waiver was not knowing and intelligent, see
3 Schwarz, 283 F.3d at 95, and second, that he was prejudiced by the conflict,
4 see Levy, 25 F.3d at 152, in other words, that “but for counsel’s unprofessional
5 errors, the result of the proceeding would have been different,” Fulton, 5 F.3d
6 at 609 (quotation marks omitted). As for the second requirement, where the
7 conflict is potential we require that the defendant establish prejudice. Where
8 an actual conflict exists, however, we presume prejudice and require only that
9 the defendant show that “a lapse in representation . . . resulted from the
10 conflict.” Iorizzo, 786 F.2d at 58 (quotation marks omitted). A lapse in
11 representation means that some “plausible alternative defense strategy or
12 tactic might have been pursued, and that the alternative defense was
13 inherently in conflict with or not undertaken due to the attorney’s other
14 loyalties or interests.” Levy, 25 F.3d at 157 (quotation marks omitted).

1 2. Counsel's Conflict

2 Arrington argues that LoTempio's conflict was not waivable. If that
3 were right, then the District Court would have abused its discretion in
4 denying Hicks's motion to disqualify LoTempio. See Schwarz, 283 F.3d at 95.
5 But we conclude that the two conflicts that arose from LoTempio's prior
6 representation of Arrington's co-defendant were both waivable.

7 The first conflict arose from LoTempio's duty to Hicks, his former
8 client, which compromised his ability to be a zealous advocate for Arrington.
9 LoTempio had represented Hicks with respect to one of the overt acts in the
10 indictment, and he was therefore barred from using the fruits of that
11 representation to benefit Arrington or from fully cross-examining witnesses
12 about related events. The effects of this conflict would have been magnified
13 had Hicks testified in his own defense at a joint trial. See, e.g., United States
14 v. Kliti, 156 F.3d 150, 154–55 (2d Cir. 1998); United States v. Leslie, 103 F.3d
15 1093, 1098 (2d Cir. 1997); United States v. Lussier, 71 F.3d 456, 462 (2d Cir.
16 1995); United States v. Malpiedi, 62 F.3d 465, 470 (2d Cir. 1995).

17 Although LoTempio's conflict compromised his ability to be a zealous
18 advocate for Arrington, it was nonetheless waivable. See Perez 325 F.3d at

1 127–29; Iorizzo, 786 F.2d at 59; see also Lussier, 71 F.3d at 462. For one thing,
2 we have generally found that this type of conflict is waivable. See United
3 States v. Oberoi, 331 F.3d 44, 50 (2d Cir. 2003). For another thing, this first
4 conflict stemming from LoTempio’s prior representation was potential, not
5 actual; at the time the District Court severed the trials, it was not clear that
6 Hicks would testify or what he would say if he did. See Lussier, 71 F.3d at
7 462; see also Joint App’x 302.

8 The second, more serious conflict arose from Hicks’s refusal to waive
9 LoTempio’s conflict, LoTempio’s insistence on severing the trials, and
10 LoTempio’s offer to have Arrington tried first. Recall that Hicks was
11 concerned that LoTempio would draw from his prior representation of Hicks
12 when cross-examining Hicks if he testified. This put LoTempio in what he
13 aptly called an “awful predicament.” Joint App’x 268. It could be reasonably
14 inferred that LoTempio suggested a severance (something he had raised on
15 different grounds about a year earlier and had not since revisited) in response
16 to the “predicament” presented by Hicks’s disqualification motion. See Joint
17 App’x 268, 303–04. During the Curcio hearing, LoTempio stated: “I would
18 like to represent Mr. Arrington and continue to do that. And I think the only

1 way that that can happen, without me violating my former client's rights, is if
2 we're given a separate trial. And I don't care if I go first. I'm ready to try the
3 case. I'll go first, if you want. Doesn't matter to me." Joint App'x 304–05. By
4 proposing that Arrington be tried first, LoTempio surrendered the significant
5 strategic advantage of learning the Government's evidence with respect to
6 Hicks in advance of or during Arrington's trial. At that point, because
7 LoTempio's interest and Arrington's interest "diverge[d] with respect to a . . .
8 course of action," LoTempio's conflict was actual, not potential. Schwarz, 283
9 F.3d at 91 (quotation marks omitted).

10 But even though this second conflict was actual, it was also waivable.
11 See Perez, 325 F.3d at 125; compare Fulton, 5 F.3d at 612–13 (witness
12 implicated defendant's attorney in drug deal, which created a conflict that "so
13 permeate[d] the defense that no meaningful waiver can be obtained"). Three
14 reasons in particular compel this view. First, Arrington had no discernible
15 right to proceed to trial with or after Hicks. See Zafiro v. United States, 506
16 U.S. 534, 539–40 (1993). Second, LoTempio's conflict primarily implicated his
17 ethical obligation to Hicks, and while he had a financial interest in continuing
18 to represent Arrington, that interest was not of sufficient magnitude to

1 establish an unwaivable conflict. See Perez, 325 F.3d at 126–27 (finding
2 attorney’s interest in standard retainer fee did not create unwaivable conflict
3 as it did not approach the exceptional financial self-interest presented in
4 Schwarz); cf. Schwarz, 283 F.3d at 98; Fulton, 5 F.3d at 613 (attorney conflict
5 driven by counsel’s interest in “self-preservation”).

6 And third, while there may be tactical advantages to being tried second
7 if a severance is granted, they are not necessarily so compelling as to create an
8 unwaivable conflict. A reasonable defendant may decide to retain a trusted
9 attorney, even at the risk of losing those advantages, after being properly
10 informed of the risks and benefits of severance. We therefore cannot say
11 under the circumstances that “no rational defendant would knowingly and
12 intelligently desire the conflicted lawyer’s representation.” Levy, 25 F.3d at
13 153.

14 3. The Inadequacy of the Waiver Colloquy

15 Although LoTempio’s conflict was waivable, Arrington’s waiver here
16 was neither knowing nor intelligent. Before a defendant can waive his
17 attorney’s conflict, he must be advised of the conflict’s significant strategic
18 consequences. Here, the District Court failed to advise Arrington at all about

1 the main strategic disadvantages arising from LoTempio's conflict noted
2 above.

3 To be sure, on the first day of the Curcio hearing, with Arrington
4 present, the District Court described Arrington's interest in having LoTempio
5 vigorously cross-examine Hicks should he testify and told Arrington how
6 LoTempio's conflict might affect his interests. The District Court then
7 arranged for Arrington to meet with independent Curcio counsel and gave
8 Arrington a day to consider what he wanted to do.

9 But Arrington was not told about the severance or that he would be
10 tried first until after the District Court ordered it. He was absent when
11 Hicks's counsel moved to disqualify LoTempio and the initial discussion
12 about severing the trials occurred. Nor, it appears, was Arrington in court
13 when LoTempio offered to proceed with Arrington's trial first, even though
14 the proposal put Arrington at a strategic disadvantage. The District Court
15 thus never directly addressed Arrington regarding these consequences of his
16 counsel's conflict, and we have no record of LoTempio independently
17 discussing them with Arrington. In other words, Arrington was not given
18 reasonably adequate information about the material risks of LoTempio's

1 continued representation, particularly the risks of a trial severance and the
2 risk of being required (let alone volunteered) to be tried first.

3 As for the inquiry the District Court should have conducted, as noted
4 “we are more concerned with whether the defendant appreciated his
5 predicament and made a properly informed choice than we are with whether
6 the trial judge recited any particular litany of questions.” Jenkins, 943 F.2d at
7 176. But district courts must at least “advise the defendant of the dangers
8 arising from the particular conflict.” Iorizzo, 786 F.2d at 59. Where, as here,
9 those “dangers” include giving up the strategic advantages of a joint trial or
10 being tried before a co-defendant, they should be a part of the judge’s inquiry
11 to obtain the defendant’s informed consent. See RESTATEMENT (THIRD) OF THE
12 LAW GOVERNING LAWYERS § 122 cmt. c(i) (AM. LAW INST. 2000) (Informed
13 consent “requires that each affected client be aware of the material respects in
14 which the representation could have adverse effects on the interests of that
15 client,” including “tactical considerations . . . that would be foreclosed or
16 made less readily available by the conflict”). Where a counsel’s conflict of
17 interest materially affects a significant tactical or strategic consideration, a

1 court should advise the defendant of the nature of that risk as part of a Curcio
2 inquiry.

3 Finally, we conclude that “a lapse in representation[] resulted from the
4 conflict,” Iorizzo, 786 F.2d at 58 (quotation marks omitted), because some
5 “plausible alternative defense strategy or tactic might have been pursued” but
6 for LoTempio’s actual conflict of interest, Levy, 25 F.3d at 157 (quotation
7 marks omitted). Had Arrington and Hicks been tried together and Hicks
8 testified, Arrington might have been able to benefit from Hicks’s testimony.

9 As it turns out, Hicks, testifying in his own defense at trial, denied the
10 existence of the Schuele Boys enterprise, that Balance’s murder was in
11 retaliation for Davison’s, or having seen Arrington at the scene of Balance’s
12 murder. It is impossible to know whether the outcome for Arrington would
13 have changed had Hicks’s testimony come during or before Arrington’s trial.

14 But at the end, when the conflict is actual, as it is here, “the applicable
15 standard requires only the demonstration of a conflict inconsistent with a
16 plausible trial strategy or tactic,” not prejudice. Malpiedi, 62 F.3d at 470.

17 Arrington had to show that an alternative strategic approach (not severing the
18 trials, or pressing to be tried after Hicks) was “not undertaken due to

1 [LoTempio's] other loyalties and interests." Id. at 469 (quotation marks
2 omitted). Once such a showing is made, as we think it was here, Strickland's
3 "fairly rigid" presumption of prejudice applies. Strickland v. Washington,
4 466 U.S. 668, 692 (1984).

5 Having determined that Arrington's right to effective counsel was
6 violated, we vacate the convictions and remand for a new trial. The Sixth
7 Amendment compels this result regardless of the strength of the trial
8 evidence.

9 CONCLUSION

10 Because we conclude that Arrington's waiver of his counsel's conflict of
11 interest was not knowing and intelligent, we **VACATE** Arrington's conviction
12 and **REMAND** to the District Court for a new trial.