

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15-2811

UNITED STATES OF AMERICA

v.

NICODEMO S. SCARFO,
Appellant

(D.N.J. No. 1-11-cr-00740-001)

Present: JORDAN, Circuit Judge

1. Letter Motion by Appellant Nicodemo S. Scarfo to Appoint CJA Counsel for Filing of Certiorari in Supreme Court.

Respectfully,
Clerk/pdb

ORDER

The foregoing motion is hereby DENIED.

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: October 19, 2022

PDB/cc: Nicodemo S. Scarfo

Sabrina G. Comizzoli, Esq.

Mark E. Coyne, Esq.

Norman Gross, Esq.

Bruce P. Keller, Esq.

APPENDIX A

**UNITED STATES OF AMERICA v. NICODEMO S. SCARFO, SALVATORE PELULLO, WILLIAM
MAXWELL, and JOHN MAXWELL, Appellants**
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
41 F.4th 136; 2022 U.S. App. LEXIS 19690
Nos. 15-2811, 15-2826, 15-2844, 15-2925, 19-1398
July 6, 2021, Argued
July 15, 2022, Opinion Filed

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1} On Appeal from the United States District Court for the District of New Jersey. (D.C. Nos. 1-11-cr-0740-001 thru 004). District Judge: Honorable Robert B. Kugler. United States v. Scarfo, 2012 U.S. Dist. LEXIS 134169 (D.N.J., Sept. 19, 2012)

Counsel Michael E. Riley [ARGUED], Law Offices of Riley and Riley, Marlton, NJ, Counsel for Nicodemo S. Scarfo.
Troy A. Archie [ARGUED], Afonso Archie & Foley, Cinnaminson, NJ, Counsel for Salvatore Pelullo.
Michael N. Huff [ARGUED], Philadelphia, PA, Counsel for William Maxwell.
Mark W. Catanzaro, Mount Holly, NJ, Counsel for John Maxwell.
Rachel A. Honig, Sabrina G. Comizzoli, Mark E. Coyne, Bruce P. Keller [ARGUED], Office of United States Attorney, Newark, NJ; Norman Gross [ARGUED], Office of United States Attorney, Camden, NJ, Counsel for Appellee.

Judges: Before: AMBRO, JORDAN, and BIBAS, Circuit Judges.

CASE SUMMARY Where prosecutors obtained defendant's cell site location information (CSLI) pursuant to court order following Stored Communications Act's (SCA) procedures, in 2007 and 2008 no precedent required them to do more, and government was not expected to have anticipated Carpenter rule, good faith exception applied to acquisition of data without warrant.

OVERVIEW: HOLDINGS: [1]-Where the prosecutors obtained defendant's cell site location information (CSLI) pursuant to a court order following the Stored Communications Act's (SCA) procedures, in 2007 and 2008 no binding precedent required them to do more, and the court did not expect the government to have anticipated the new rule announced in Carpenter, its reliance on the SCA was reasonable, and therefore the good faith exception applied to its acquisition of the CSLI data without a warrant; [2]-The two-year delay between defendant's arrest and his trial did not violate the Speedy Trial Act because the district court properly ordered a continuance in response to the complex nature of the case and it schedule the trial once it made sense to do so. The case involved 13 codefendants, dozens of charges, 1 million pages of information, and the parties acceded to a complex case order.

OUTCOME: Convictions affirmed, sentences affirmed in part and reversed in part.

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APPENDIX B

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VII. *Brady* Issues

Finally, Scarfo and Pelullo raise issues relating to the government's disclosure obligations. Scarfo says he should have had a chance to move for a new trial based on "new" evidence from a separate case that he believes was material here,{2022 U.S. App. LEXIS 157} and Pelullo claims that the government withheld evidence that one of its key witnesses at trial was under investigation at the time. Neither argument is persuasive.

A. Denial of Scarfo's Request to File a Motion for a New Trial Pursuant to Rule 33(b)108

Scarfo challenges the District Court's denial of his post-trial request for leave to file a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. His request explained that his proposed motion was based on purported *Brady* violations and new information that only surfaced after trial. The "new information" consisted of certain witness statements taken prior to the trial and pursuant to an unrelated investigation of human-trafficking activity, an investigation that was ultimately prosecuted in the United States District Court for the Eastern District of Pennsylvania (the "*Botsvynyuk* case").109 See generally *United States v. Churuk*, 797 F. App'x 680, 682 (3d Cir. 2020) (summarizing that prosecution). Scarfo and his codefendants wanted access to those witness statements, memorialized on FBI forms known as 302s, because they might mention Pelullo.110 And, because of Pelullo's involvement in the human trafficking, the Defendants thought the documents might in turn show criminal conduct by Cory Leshner - Pelullo's "right hand man" and later{2022 U.S. App. LEXIS 158} a key government witness - and therefore provide helpful impeachment evidence. (D.I. 1237 at 12-13.)

Pelullo thus filed a sealed motion to compel disclosure of the 302s, and Scarfo filed a motion to subpoena the documents pursuant to Federal Rule of Criminal Procedure 17.111 After reviewing the 302s in camera - and entertaining multiple rounds of briefing plus a hearing - the District Court denied the motions as seeking irrelevant and non-exculpatory information and because the 302s never mentioned Leshner. The Court also made clear that it would not entertain any more motions from the Defendants before sentencing.

Scarfo then requested leave to move for a new trial.112 The District Court denied the request as "probably untimely" and because the 302s simply did not contain the information claimed by Scarfo. (D.I. 1281.) It is that decision - not the previous decision denying Scarfo's Rule 17 motion to subpoena the 302s - that Scarfo now challenges on appeal.113 He concedes that he has "struggled to identify applicable precedent related to a court's failure to consider a motion for new trial[.]" but he still believes that the District Court's denial of leave to file the new-trial motion violated his constitutional{2022 U.S. App. LEXIS 159} rights. (NS Opening Br. at 176.)

In many contexts, we have adhered to an abuse-of-discretion standard of review when evaluating a challenge to a district court's denial of a request for leave to take some step in litigation. See, e.g., *Talley v. Wetzel*, 15 F.4th 275, 285 n.6 (3d Cir. 2021) (leave to amend complaint); *Jones v. Zimmerman*, 752 F.2d 76, 78 (3d Cir. 1985) (leave to proceed in forma pauperis); *In re United Corp.*, 283 F.2d 593, 594-96 (3d Cir. 1960) (leave to file untimely statement of objections to an agency decision). The same deference should be afforded to district courts that find it necessary to prohibit further motion practice when issues have been aired and the time has come to move on. Cf. *Pierce v. Underwood*, 487 U.S. 552, 558 n.1, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) ("It is especially common for issues involving what can broadly be labeled 'supervision of litigation,' ... to be given abuse-of-discretion review."); *United States v. Sheppard*, 17 F.4th 449, 454 (3d Cir. 2021) ("Underlying our review for abuse of discretion are the principles that: 1) a district court may have a better vantage point than we on the{2022 U.S. App. LEXIS 160} Court of Appeals to assess the

matter, and 2) courts of appeals apply the abuse-of-discretion standard to fact-bound issues that are ill-suited for appellate rule-making[.]" (citations and internal quotation marks omitted)).

Scarfo does not raise any basis for concluding that the District Court abused its discretion in denying his request, nor do we detect any. He does not dispute the District Court's conclusions that a motion for a new trial would likely be untimely and that the 302s did not contain the information he claimed they did. Nor does he dispute that the Court had already entertained "an extraordinary number of written motions" (D.I. 1281 at 1) - including more than a half-dozen after trial. Instead, he simply summarizes his attempts in the District Court to procure the 302s, then concludes that he "seeks remand for consideration of his motion for new trial under Rule 33(b), given the facts set forth herein[.]"¹¹⁴ (NS Opening Br. at 181.) Because he fails to demonstrate that the District Court's denial of leave was "arbitrary or irrational" or rested upon "a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact[.]" Scarfo has not shown{2022 U.S. App. LEXIS 161} an abuse of discretion. *United States v. Gonzalez*, 905 F.3d 165, 195 (3d Cir. 2018) (citation omitted).¹¹⁵

given him the information he wanted. *Ogden*, 112 F. at 524-25.
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We remain cognizant of the countervailing due process interests in having one's arguments heard in court. One can imagine a scenario in which a party is cut off too soon and is precluded from making an argument essential to its case. Accordingly, we encourage district courts to exercise discretion cautiously in the face of such countervailing interests. Still, wherever the outer bounds of that discretion may be, the District Court was well within them here.

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WILLIAM MAXWELL, and JOHN MAXWELL,
Appellants

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Nos. 1-11-cr-0740-001 thru 004)
District Judges: Honorable Robert B. Kugler

SUR PETITION FOR REHEARING

Present: McKEE, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR.,
RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, Circuit Judges

The petition for rehearing filed by appellant Nicodemo Scarfo in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATE: September 22, 2022
PDB/cc: All Counsel of Record

APPENDIX C

**Additional material
from this filing is
available in the
Clerk's Office.**