EXHIBIT A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15-2811, 15-2826, 15-2844, 15-2925, 19-1398

UNITED STATES OF AMERICA

v.

NICODEMO S. SCARFO, SALVATORE PELULLO,
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 Judge: Honorable Robert B. Kugler

Argued
July 6, 2021

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

(Opinion Filed: July 15, 2022)

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OPINION OF THE COURT

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JORDAN, *Circuit Judge.*

I. OVERVIEW

Everybody calls me a racketeer. I call myself a businessman.

– Alphonse Gabriel Capone

The four appellants before us – Nicodemo Scarfo, Salvatore Pelullo, William Maxwell, and his brother John Maxwell – were convicted for their roles in the unlawful takeover and looting of FirstPlus Financial Group, a publicly traded mortgage loan company. Their scheme commenced with the Defendants'[1] and their co-conspirators' extortion of FirstPlus's board of directors and its chairman to gain control of the company. Once they forced the old leadership out, the Defendants proceeded to drain the company of its value by causing it to enter into expensive consulting and legal-services agreements with themselves, causing it to acquire (at vastly inflated prices) shell companies they personally owned, and using bogus trusts to funnel FirstPlus's assets into their own accounts. The Defendants and their crew ultimately bankrupted FirstPlus, leaving its shareholders with worthless stock.

Each Defendant was convicted of more than twenty counts of criminal behavior and given a substantial prison

[1] We use the capitalized term "Defendants" to refer to the four individuals who were convicted and are now appealing, and "defendants" with a lower case "d" to refer to everyone who was indicted and part of the proceedings before the District Court.

sentence. Now, in this consolidated appeal, their combined efforts challenge almost every aspect of their prosecutions, including the investigation, the charges and evidence against them, the pretrial process, the government's compliance with its disclosure obligations, the trial, the forfeiture proceedings, and their sentences. Although they raise a multitude of issues, only one entitles any of them to relief: the government has conceded that the District Court's assessment of John Maxwell's forfeiture obligations was improper under a Supreme Court decision handed down during the pendency of this appeal. Having jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we will affirm all the convictions and sentences, except for the forfeiture portion of John Maxwell's sentence. We will remand that for the District Court to reassess what share of the forfeiture sum he should pay.

II. BACKGROUND[2]

A. The Organized Crime Origins

This case has its roots in organized crime, and, like other mob cases, it gets its start with family – both biological and made. Nicodemo Domenico "Little Nicky" Scarfo Sr. was the "boss" of the Philadelphia branch, or "family," of La Cosa

[2] The following factual background is based on the evidence adduced at trial and is cast in the light most favorable to the prosecution. *See United States v. Pungitore*, 910 F.2d 1084, 1097 (3d Cir. 1990) ("We are bound, after a jury has delivered a guilty verdict, to interpret the evidence in a light most favorable to the government.").

Nostra ("LCN") for most of the 1980s.[3] *See United States v. Pungitore*, 910 F.2d 1084, 1098 (3d Cir. 1990). He oversaw nearly a decade of murders, gambling, and extortion for the benefit of LCN. *Id.* at 1097-1102; *see also United States v. Scarfo*, 850 F.2d 1015, 1016 (3d Cir. 1988).

By the time the Defendants here began their FirstPlus scheme, however, he was out of the game, serving a lengthy federal prison sentence. *Pungitore*, 910 F.2d at 1152. His son, Nicodemo Salvatore "Nicky" Scarfo (the "Scarfo" in this opinion), wanted to fill the power vacuum, but his attempted takeover of the Philadelphia LCN family did not go according to plan. On Halloween in 1989, as he was having dinner at a restaurant, masked assailants ambushed him, shooting him several times but, no doubt to their chagrin, not killing him.

When he recovered, Scarfo sought the help of the Lucchese LCN family, which operated in northern New Jersey. He had an "in" with the Luccheses: their boss was incarcerated in the same prison as his father. According to the government's expert on the structure and operations of LCN, eventually the

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[3] "La Cosa Nostra" is "an Italian phrase which literally translates as 'our thing' or 'this thing of ours.'" *Pungitore*, 910 F.2d at 1097 n.3. According to an FBI agent who testified at trial, the word "mafia" – despite its ubiquity in discussions of mobsters – refers to Italian organized crime based in Italy, while LCN is based in the United States. (JAC at 8282.) LCN is headed by a commission of "bosses," who in turn direct the illegal activities of regional organized crime "families." *Pungitore*, 910 F.2d at 1097. A family is "a highly structured criminal enterprise with a well defined chain-of-command" comprising multiple layers of operatives. *Id.* at 1098.

Lucchese family integrated Scarfo into their organization as a "made member" – someone who has been "fully inducted" and has "taken an oath of loyalty to the family." (JAC at 8280-81.) Being a made member meant that he had to generate money for the Lucchese family and share with it the profits of any criminal activities he pursued.

Scarfo's longtime friend Salvatore Pelullo, although not a blood relative, had a close relationship not only with Scarfo but with Scarfo's father too. The older Scarfo treated Pelullo as his nephew. Pelullo became an "associate" of the Luccheses – a criminal colleague who hadn't been "formally initiated into [the family's] ranks." *Pungitore*, 910 F.2d. at 1098. The government's expert testified that an associate like Pelullo had to "share … the profits of any of [his] criminal activity" with the family, and he had to answer to a made member, such as Scarfo, who would "supervis[e] and direct[]" his actions. (JAC at 8286-87 (trial testimony of government LCN expert).)

Before the events at issue in this case, Scarfo and Pelullo had each earned criminal convictions. Scarfo was convicted in 1990 of assaulting a woman in a hospital elevator, and then in 1993 for racketeering conduct. In 2002, he was convicted of running an illegal gambling business. Pelullo, meanwhile, was convicted of bank fraud and making false statements to the SEC in 1999. Three years later, he pled guilty to wire fraud.

B. The FirstPlus Takeover

In 2007, Scarfo and Pelullo stumbled on "the golden vein of deals" – an opportunity that seemed so lucrative, they thought they could ride it into retirement. (JAC at 1781-82.)

That opportunity was FirstPlus, a Texas-based mortgage company whose main operating subsidiary had recently exited bankruptcy after falling on hard times. Following that restructuring, FirstPlus began receiving periodic, multi-million-dollar "waterfall" payments from its bankruptcy trust.[4] At that point, it was essentially a dormant parent company receiving the waterfall payments but doing no business.

After the payments started coming in, a former FirstPlus employee, Jack Roubinek, had the idea to locate investors and gain control of FirstPlus. In early 2007, he contacted his attorney, William Maxwell, and asked him to research the possibility of investing in FirstPlus. At around the same time, Pelullo learned about FirstPlus from his business acquaintance David Roberts, a mortgage broker from Staten Island. A group including Pelullo, Roberts, Scarfo, Roubinek, and Gary McCarthy (Pelullo's attorney and an eventual codefendant)

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[4] As part of the subsidiary's bankruptcy, a creditor's trust was set up to pay the subsidiary's creditors, one of which was FirstPlus, which held an unsecured claim against its subsidiary. Income generated by the subsidiary from outstanding mortgages and investments flowed to the trust, which paid it out to creditors in order of priority, creating a "waterfall" of payments. Several years later, a grantor's trust was established as a result of litigation with shareholders. That second trust was interposed between the creditor's trust and the creditors: a portion of the money coming into the creditor's trust was routed to the grantor's trust, and from there it was disbursed to FirstPlus, other creditors of the subsidiary, and FirstPlus shareholders.

gathered in Philadelphia to discuss a potential takeover of FirstPlus.

At first, according to Roberts, their thinking was "to try to raise money to buy [FirstPlus's] stock[.]" (JAC at 1791.) That plan, however, fell through: the group realized that none of them had the money needed to buy the stock. Luckily for them, however, FirstPlus had recently fired Jack Draper, a high-ranking employee. Draper had griped about his firing to Roubinek – the two having become acquainted while employed at FirstPlus – and to William Maxwell.[5] Those three were joined by Roberts and Pelullo for a meeting in Dallas, where Draper, bearing a grudge, told the group he was willing to "divulge all" and accuse the FirstPlus board and CEO Daniel Phillips of financial improprieties. (JAC at 1813-16 (trial testimony of Roberts).)

That "completely changed the direction of the plan." (JAC at 1815.) Seeing an opportunity, Pelullo, who was emerging as the leader of the takeover group, worked with William Maxwell to send letters to Phillips and other board members. The letters were purportedly written by Draper and threatened that he would go to "the FBI, the IRS[,] the U.S. Attorney's [O]ffice[,] [FirstPlus's] Bankruptcy's attorney and the SEC" with claims of financial misconduct including bribery, money laundering, and Sarbanes-Oxley violations.[6]

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[5] William Maxwell's brother, John, is another of the Defendants here. We thus refer to each Maxwell brother using either his full name or just his first name.

[6] The Sarbanes-Oxley Act of 2002 was enacted "[t]o

(JAC at 1822.) They also threatened to tell Phillips's wife – who was then divorcing him – that Phillips had raped an assistant and used the company's moneys to pay off the victim when she got pregnant. According to Phillips, all those claims were false, but he was nonetheless concerned that their dissemination would cause grave damage to his and the company's reputations.

The letters had their intended effect. Phillips met with William Maxwell and Pelullo, who indicated the allegations would be dropped if Phillips and the FirstPlus board handed the business over to them. Evidently, it was an offer he couldn't refuse.

Phillips swiftly persuaded the entire board to give up their positions rather than try to engage in what would be a messy and expensive fight with Pelullo's group. Pelullo then selected a new board of directors for FirstPlus: William Handley (a friend of Pelullo's who took over as Chief Financial Officer), John Maxwell (William Maxwell's brother and the titular Chief Executive Officer), Roberts (who became secretary of the company), Harold Garber (Scarfo's father's attorney, who became the new board chairman), and Robert O'Neal (one of William's clients, who later succeeded Garber

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safeguard investors in public companies and restore trust in the financial markets[,]" *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014), by mandating that public companies take particular steps to assure the integrity of their audits and financial reports.

as chairman).[7] The necessary corporate formalities were followed and, on June 7, just four days after sending the threatening letters, Pelullo and his cronies had total control of the company.

C. The FirstPlus Fraud

With FirstPlus in their power, the new officers and directors went to work – making the company work for them. Pelullo, along with William Maxwell, controlled the show. They even obtained stamps of the directors' signatures so they could run the looting scheme without interference.

The board entered into a "legal services agreement" with William, who became FirstPlus's "special counsel." (JAC at 5315-16; JAD at 1653, 1673-75.) The contract formally granted him significant power within the organization. It purported to give him "[a]ll legal authority for any matter involving" FirstPlus; the power to select and retain legal counsel, accountants, and, "in [his] sole discretion," "any and all consulting firms"; and the right to "spend funds, incur legal expenses, and to expend fees in excess of [his] retainer and to seek reimbursement[.]" (JAD at 1673-75.) He could also "restrict disclosure of information … to any person[,]" including the members of the board. (JAD at 1674-75.) For his supposed labors, William made $100,000 a month, plus expenses of up to $30,000.

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[7] William Handley and John Maxwell became codefendants in this case.

With that authority, William hired Pelullo as a consultant to FirstPlus, a role that shielded him from public scrutiny. In practice, though, Pelullo was the "de facto president" of the company, according to FirstPlus's public auditor, Anthony Buczek. (JAC at 7069.) John Maxwell was named as CEO, but he largely functioned under Pelullo's control.

Using his controlling position at FirstPlus, and with William's help, Pelullo set up several channels through which money flowed out of FirstPlus's accounts and into his and Scarfo's coffers. For one, Pelullo set up a bogus trust that ostensibly had his children as its beneficiaries. In practice, however, according to codefendant Cory Leshner, the trust was "created for the purposes of owning" Seven Hills Management, LLC, a company with Pelullo's brother-in-law, Alexander Lyubarskiy, listed as its head.[8] (JAC at 3661.) Lyubarskiy's supposed management of Seven Hills was strictly for show; "[e]verything he did was at the direction of Mr. Pelullo." (JAC at 3665.)

William Maxwell, on FirstPlus's behalf, retained Seven Hills to provide FirstPlus with "consulting services." (JAD at 675.) The agreement entrusted Seven Hills (and, through it, Pelullo) with "a litany of duties" that Leshner summarized as "helping run the entire operation" of FirstPlus. (JAC at 3755.) Seven Hills was compensated $100,000 each month, plus $15,000 in expenses.

[8] Leshner served as Pelullo's personal assistant and a vice president of Seven Hills.

Scarfo, meanwhile, profited from FirstPlus as well. Like Pelullo, he set up a trust that was nominally intended to "benefit[] [his] daughter" but in actuality served as a vehicle for his own gain. (JAC at 3673, 4026 (trial testimony of Leshner).) That trust, in turn, owned Learned Associates of North America, LLC ("LANA"); both entities were run "[o]n paper" by Scarfo's cousin and codefendant John Parisi. (JAC at 3675.) That was a ruse to keep Scarfo's name off the books; "[i]n reality," it was Scarfo, not Parisi, who controlled the trust and LANA. (JAC at 3673-75.) LANA enabled Scarfo to get in on the take through a secondary consulting agreement between LANA and Seven Hills. The agreement obliged LANA to perform for FirstPlus "exactly the same" tasks that Seven Hills was already being paid to do, according to an FBI investigator. (JAC at 579.) In practice, LANA performed no work, but the deal entitled LANA (and, through it, Scarfo) to a roughly one-third cut of what Seven Hills was getting from FirstPlus. As the government puts it, those payments were "effectively 'tribute'" to Scarfo. (Answering Br. at 18.)

Those arrangements were all facilitated by William Maxwell, to whose attorney trust account the consulting fees and expenses were wired. William generally passed those on to Seven Hills, which in turn sent $33,000 a month, plus so-called expenses, to LANA. Pelullo was "completely involved with" and oversaw the flow of money from FirstPlus to Maxwell and on to the consulting firms. (JAC at 3933 (trial testimony of Leshner).)

Pelullo and Scarfo also profited from FirstPlus by having it acquire three shell companies they owned. First up was Rutgers Investment Group, LLC, an unsuccessful mortgage loan provider majority owned by LANA and Seven

Hills. Rutgers's single source of revenue was receivables it supposedly got from Shore Escapes, a defunct vacation sales company also owned by Seven Hills and LANA. It was make-believe money, but on June 7, the new team's first day in office, Pelullo got approval for the acquisition from the FirstPlus board, and the following month FirstPlus bought Rutgers for approximately $1.8 million and 500,000 FirstPlus shares.

Two more acquisitions of companies owned by Seven Hills and LANA followed soon after. FirstPlus bought Globalnet Enterprises, LLC, a financially struggling cleaning company, for around $4.5 million and more than one million shares of FirstPlus stock. It then paid $725,000 – including $100,000 directly to each of Seven Hills and LANA – to buy The Premier Group, LLC, a company that Pelullo set up in May 2007 to hold the assets of a company at least nominally in the business of representing the interests of insurance policyholders.

Pelullo made sure that FirstPlus bought his and Scarfo's companies on preposterously favorable terms. To conduct valuations of the target businesses, he brought in Kenneth Stein, the head of a business brokerage firm. Stein told Pelullo that he (Stein) was unqualified to perform the valuations, but Pelullo said to "[j]ust go get it done[.]" (JAC at 4743-44.) Though Stein believed that the companies' financials were "horrific" and "atrocious" (JAC at 4841), Pelullo pressured him into preparing nominally "independent" valuation reports that overvalued the businesses. William Maxwell covered up Pelullo's involvement by listing his own name on the engagement letters and handling Stein's payments.

Also helping grease the skids were two of Pelullo's attorneys – David Adler and Gary McCarthy. Although FirstPlus's public filings said that the acquisitions were "completed on an arms-length basis" (JAD at 2337), that was not even remotely true. Pelullo had his lawyers on both sides of the negotiating table, with Adler representing FirstPlus and McCarthy representing the shell companies.

In the meantime, Scarfo, Pelullo, and William Maxwell began to take advantage of their ill-gotten gains. Scarfo bought a house and expensive jewelry for his wife; Pelullo purchased a Bentley automobile; Scarfo and Pelullo together bought a yacht; and William and Pelullo had FirstPlus acquire a plane for their personal use. The scheme was working as planned.

Still, the fact that FirstPlus was a public company, with disclosure requirements under federal securities laws, added complications to the looting. To get around those requirements, Pelullo hired Anthony Buczek as FirstPlus's auditor, based on a referral by Howard Drossner, who later became a codefendant. Pelullo pressured Buczek into hiding or obscuring material information about the company – such as the Rutgers and Globalnet acquisitions, the consulting agreements, and Pelullo's prior federal fraud convictions[9] – even though FirstPlus was required to disclose that information in its SEC filings.

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[9] Pelullo knew that his prior felony convictions posed a problem: he told Leshner that he "didn't want to be on the [FirstPlus] board of directors because of his previous convictions." (JAC at 3650-51.)

D. The Investigation and Takedown

The party had to come to an end, and eventually the actions of the FirstPlus thieves caught up with them. While investigating a tip that Scarfo was again trying to gain control of the Philadelphia LCN, the Federal Bureau of Investigation became aware of the mob ties and suspicious circumstances surrounding the resignation and replacement of FirstPlus's former board. As FBI agents dug deeper, they came to believe – rightly – that Pelullo and Scarfo were behind the FirstPlus takeover and would systematically steal from it. They obtained court permission to track the defendants' locations through their cellphones and wiretap their calls over the course of several months. Among the calls that agents picked up were communications between Pelullo and his lawyers (Maxwell, McCarthy, and Donald Manno). To weed out any discussions protected by Pelullo's attorney-client privilege, the government asked the District Court to review in camera the records of wiretaps assembled by a special "filter team" before they were transmitted to prosecutors [10] – all, of course, unbeknownst to Pelullo.

The conspirators eventually came to suspect that they were under investigation. For example, while on a long drive from Dallas to deliver a gun to Scarfo's house in New Jersey,

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[10] The filter team, which comprised both prosecutors and investigators, reviewed the contents of the intercepted calls between Pelullo and his lawyers to protect the attorney-client privilege. *See infra* Section III.B.1. The filter team sought court permission to transmit non-privileged communications to the prosecution team. *Id.*

John Maxwell suspected that the government had agents following him in a car and in a helicopter.

The government's investigation escalated on May 8, 2008. That day, the FBI executed search warrants at thirteen locations across the country, including FirstPlus's offices in Texas and the defendants' homes, offices, and law firms in Pennsylvania and New Jersey. They also seized the plane, the Bentley, and the yacht, along with guns they found on board the yacht and more guns and ammunition found at Scarfo's and Pelullo's homes and Pelullo's office. It took another three years for the government to obtain an indictment from a grand jury, but that day did arrive. In unpacking the evidence and building their case, prosecutors set up additional filter teams to review the evidence recovered from McCarthy's and Manno's law offices and to set aside anything that was privileged before turning the rest over to the team handling the prosecution of the defendants.

E. The Damage

When Scarfo, Pelullo, and their co-conspirators took over the company in early June 2007, FirstPlus had almost $10 million in its accounts, and it received a $4.4 million waterfall payment later that year. By the following May, when the FBI seized the accounts, there was less than $2,000 left. Between the fraudulent consulting and legal-services agreements channeled through bogus trusts and the acquisitions of virtually worthless companies, the conspirators had bled FirstPlus dry. It soon fell into bankruptcy, leaving its more than 1,200 public stockholders with the company's husk.

F. Indictment and Pretrial Proceedings

In October 2011, a federal grand jury in New Jersey handed down a twenty-five-count indictment against thirteen defendants, based on the FirstPlus scheme. All four Defendants before us – Scarfo, Pelullo, and the Maxwell brothers – were charged with conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d); conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371; conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349; sixteen substantive counts of wire fraud, in violation of 18 U.S.C. § 1343; conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h); conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349; conspiracy to make false statements in connection with a loan application, in violation of 18 U.S.C. §§ 371 and 1014; and conspiracy to transfer a firearm to prohibited persons, or to possess a firearm by a convicted felon, in violation of 18 U.S.C. §§ 371 and 922. In the RICO conspiracy count, prosecutors charged all four Defendants with engaging in a pattern of racketeering activity comprising various predicate acts: mail fraud, wire fraud, bank fraud, obstruction of justice, extortion under the federal Hobbs Act, interstate travel in aid of racketeering, money laundering, and fraud in the sale of securities.

In addition, Scarfo, Pelullo, and William Maxwell were charged with conspiracy to obstruct justice, in violation of 18 U.S.C. § 1512(k). Scarfo, alone, was also charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). And finally, the indictment sought criminal forfeiture of assets acquired from the proceeds of the

defendants' criminal misdeeds, including the vehicles, jewelry, and other assets that had been seized pursuant to the search warrants in 2008.

The other nine defendants, who were less involved in the scheme, were charged with various combinations of those counts, though none faced as many charges as did the four primary Defendants. Five of the lesser players – Leshner, Parisi, Drossner, Lisa Murray-Scarfo,[11] and Todd Stark[12] – took plea deals before the case went to trial. Due to William Handley's poor health, the charges against him were severed and eventually dismissed. That left three other defendants – McCarthy, Adler, and Manno, all of whom were lawyers – alongside the main four heading to trial.

Extensive motions practice, discovery, and pretrial proceedings ensued, lasting more than two years. Given the breadth of evidence and the amount of time it was going to take all parties to get ready for trial, the District Court designated the matter a "complex case" and so tolled the deadlines of the Speedy Trial Act.

The parties also engaged in comprehensive briefing and argument on numerous issues, some of which are relevant here.

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[11] Lisa Murray-Scarfo is Scarfo's wife, who, along with the four primary Defendants, was indicted for conspiracy to commit bank fraud and conspiracy to make false statements in connection with a loan application.

[12] Stark worked for Seven Hills as Pelullo's driver and was indicted for conspiring to get Pelullo a firearm.

Multiple defendants, including both Maxwells, sought to sever their trials, particularly from Scarfo's and Pelullo's. The District Court denied those motions. In early 2013, Pelullo unsuccessfully tried to have the charges against him dismissed on the basis of the Speedy Trial Act, complaining that the government and the Court were taking too long to bring the case to trial. Later that year, Pelullo asked the Court to order that the yacht and the Bentley, among other assets, be returned to him, which the Court refused to do.

G. Trial

Trial for the seven remaining defendants kicked off on January 8, 2014. Because the case involved organized crime, the District Court empaneled an anonymous jury. All defendants were represented by counsel, except for Manno, who proceeded pro se. To simplify the proceedings, the District Court allowed any motion by one defendant to count as having been made on behalf of all the defendants.

Still, conducting a joint trial for seven defendants facing twenty-five counts in a complex case proved challenging, and trial stretched through eighty-four days in court over the course of six months. Several participants in the conspiracy, including Roberts, O'Neal, and Leshner, turned on their associates and testified for the prosecution. The defendants did not testify but instead relied on cross-examination, character witnesses, and expert testimony to present the case for the defense.

Scarfo's, Pelullo's, and William Maxwell's defenses hinged on the proposition that they had simply been engaged in standard, run-of-the-mill business practices. John Maxwell, for his part, claimed he had been in the dark as to the others'

malfeasance. The three attorney defendants – McCarthy, Adler, and Manno – blamed their clients and said they had been unaware of the criminal conduct.

The government sought to rebut those narratives, telling jurors: "Is this how legitimate businessmen conduct themselves? The answer to that is overwhelmingly no. Legitimate businessmen don't lie, they don't cheat, they don't steal." (JAC at 12687; *accord* JAC at 12504.) The government also pointed to the mob connections behind the entire operation, explaining to the jury how organized crime works and connecting LCN, and Scarfo's and Pelullo's roles within it, to the FirstPlus scheme. The District Court repeatedly made clear to the jurors, however, that they could consider that evidence only as it may show that Scarfo and Pelullo (and not any of the other defendants) were linked to organized crime, and only for the purpose of determining their motives and the modus operandi of the scheme.

In mid-June 2014, the jury began to deliberate. The Court delivered extensive instructions after hearing objections from the parties. The verdict form asked the jury to reach a unanimous finding of guilty or not guilty beyond a reasonable doubt on each of the charges, as well as to make specific findings as to whether the government had proven each of the RICO predicate acts as to each of the defendants.

Given the length of the trial, perhaps it was inevitable that some juror issues would arise. Even before deliberations started, the Court excused a juror who expressed fears that her and her family's identities would be revealed to the defendants. An alternate was seated in her stead. And after the jury had been deliberating for a week, another juror was excused

because she had prepaid vacation plans. Rather than proceeding with an eleven-member jury, the parties agreed to have the Court substitute an alternate juror and instruct the jurors to start their deliberations anew.

The Court also fielded a complaint from a juror, who said that other members of the jury were being intransigent in discussions, and another complaint from an alternate, who told the Court that he had witnessed jurors discussing the case outside of the jury room, in violation of the Court's instructions. In each case, the Court inquired into the concerns, informed the parties, and gave them an opportunity to suggest how to proceed. Both times, the Court ultimately chose to allow the jurors to continue their deliberations.

The jury reached its verdict on July 3. It convicted Scarfo, Pelullo, and the Maxwell brothers on virtually all charges – though the Maxwells were acquitted of the bank fraud and false statements conspiracies[13] – and found that the government had proven each of the charged racketeering predicate acts that the Court had sent to the jury (which, for some of the defendants, was fewer than the eight predicates listed in the indictment). McCarthy, Adler, and Manno, however, were acquitted. The District Court then held separate forfeiture proceedings, at the end of which the jury found that the proceeds from the fraudulent scheme, including the specific property the government had sought – the airplane, yacht,

[13] While the jury verdict form did not list either John or William as defendants under those counts, they were indicted for those offenses and are listed on the District Court docket as "acquitted" of those charges.

Bentley, and jewelry, along with FirstPlus stock certificates, the contents of bank accounts, and several thousand dollars in cash – were all forfeit.

H. Post-Trial Proceedings and Sentencing

A blizzard of post-trial motions followed, including several attempts to secure new trials, all of which were rejected. Eventually, the District Court told the Defendants to stop filing motions, and it moved on to the sentencing phase.

It sentenced both Scarfo and Pelullo to 360 months' imprisonment, William Maxwell to 240 months, and John to 120 months. As relevant here, the Court calculated the sentencing ranges after finding that the Defendants had caused a loss of more than $14 million – the value FirstPlus lost over the course of the scheme – and had harmed more than 1,000 victims – reflecting the number of shareholders whose investments had been rendered worthless.

The District Court also ordered the Defendants to pay more than $14 million in restitution and held them jointly and severally liable for a $12 million forfeiture order for the proceeds of their criminal activities. The forfeiture ruling also transferred to the United States title to all the items the Defendants had purchased with ill-gotten payments the jury found were forfeitable.

I. Appeals

The Defendants each timely appealed, and we

consolidated their appeals.[14] In August 2017, however, we granted Pelullo's request to remand his case for the District Court to address his motion for a new trial based on his claim that one of his attorneys labored under an undisclosed conflict of interest. Following briefing and an evidentiary hearing, the District Court denied Pelullo's motion in February 2019. He appealed that ruling, and we consolidated that appeal with the others.

Before us, the parties completed a supplemental round of briefing on Pelullo's claim regarding a federal investigation and indictment of O'Neal for separate and unrelated wrongdoing. They also submitted letters and briefing addressing the effect of certain Supreme Court decisions that issued while these appeals were pending.

The Defendants' appeals raise some two dozen issues, depending on how you count them, across five phases of the prosecution: (1) the government's investigation, (2) pretrial proceedings, (3) trial, (4) sentencing, and (5) post-trial issues concerning the government's compliance with its disclosure obligations.

III. INVESTIGATION ISSUES

Pelullo makes two claims of error arising out of the government's investigation. First, he says that the government

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[14] All record citations, except where otherwise indicated, are to the combined District Court docket in No. 1-11-cr-0740. All citations to the docket in this appeal are to the docket in No. 15-2826.

violated his Fourth Amendment rights by tracking cell site location information from his cellphones without obtaining a warrant. Second, he criticizes the government's procedures for processing communications intercepted from wiretapped phones and for reviewing potentially privileged documents seized from his attorneys' offices. Neither claim entitles him to relief.

A. Collection of Pelullo's Cell Site Location Information[15]

The Stored Communications Act ("SCA") allows government investigators to collect suspects' cell site location information ("CSLI").[16] 18 U.S.C. § 2703(c). Investigators can obtain a court order to that end by submitting "specific and articulable facts showing that there are reasonable grounds to believe that the [data] are relevant and material to an ongoing criminal investigation." *Id.* § 2703(d). In 2007 and 2008, prosecutors in this case repeatedly sought authorization to gain

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[15] We review a "denial of a motion to suppress for clear error as to the underlying factual findings and exercise plenary review over its application of the law to those facts." *United States v. Burnett*, 773 F.3d 122, 130 (3d Cir. 2014).

[16] "CSLI is a type of metadata that is generated every time a user's cell phone connects to the nearest antenna. The user's cell phone service provider retains a time-stamped record identifying the particular antenna to which the phone connected." *United States v. Goldstein*, 914 F.3d 200, 202 (3d Cir. 2019). "Because most people constantly carry and frequently use their cell phones, CSLI can provide a detailed log of an individual's movements over a period of time." *Id.*

access to CSLI for Pelullo's and Scarfo's phones.[17] The District Court approved the requests, authorizing the collection from Pelullo's cellphone provider of nine months of historical cell site data, going as far back as September 2006, and eleven months of prospective data, through May 2008.[18]

As trial approached, Pelullo moved to suppress that evidence based on the duration of the tracking and the government's failure to show probable cause for obtaining the information. The District Court denied the motion, holding (in reliance on our precedent at the time) that probable cause was not required to obtain the CSLI and that, even if it was, the

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[17] The investigators also obtained authorization to use two other surveillance methods: pen registers to record outgoing phone numbers dialed on the phones, 18 U.S.C. § 3127(3), and trap-and-trace devices to record incoming phone numbers, *id.* § 3127(4).

[18] "Prospective" CSLI means data collected after the government obtains court permission to acquire it, while "historical" CSLI describes data already in existence at the time of the court order. *In re Application of U.S. for an Order Authorizing Installation & Use of a Pen Register & a Caller Identification Sys.*, 402 F. Supp. 2d 597, 599 (D. Md. 2005).

The District Court similarly approved the collection of prospective and historical CSLI from Scarfo's phone, and Scarfo moved alongside Pelullo in the District Court to suppress that data. But he does not, on appeal, challenge the Court's denial of his suppression motion, so we are only concerned with Pelullo's attack on the government's gathering of CSLI from his phones.

evidence was nonetheless admissible by virtue of the good-faith exception.

Pelullo characterizes the government's applications as "the most egregious and intrusive surveillance request ever filed by a United States Attorney." (SP Opening Br. at 184.) He argues that the District Court erred in refusing to suppress the CSLI evidence obtained during the tracking.[19] His

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[19] Invoking Federal Rule of Appellate Procedure 28(i), each Defendant purports to adopt all arguments of his "co-appellants which are applicable to himself." (SP Opening Br. at 223; NS Opening Br. at 183; WM Opening Br. at 36; JM Opening Br. at 49.) Each Defendant then identifies specific arguments advanced by codefendants that he intends to adopt. We will recognize their specific adoptions but not the "blanket request[s]" to adopt, which "fail[] to specify which of the many issues of [their] codefendants [they] believe[] worthy of our consideration." *United States v. Fattah*, 914 F.3d 112, 146 n.9 (3d Cir. 2019) (citing Fed. R. App. P. 28(a)(5)). "[W]e will [not] scour the record and make that determination for [them]." *Id.*; *accord Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993). Each Defendant has thus abandoned and forfeited any argument raised by his codefendants that he did not specifically adopt.

As already noted, Scarfo did not adopt Pelullo's CSLI argument. *Supra* note 18. Both Maxwells, however, did specifically adopt the argument. Their problem is they lack standing to pursue that Fourth Amendment claim, as no CSLI pertaining to them was collected by the government. *See United States v. Cortez-Dutrieville*, 743 F.3d 881, 883 (3d Cir. 2014) (defendant seeking "to invoke the Fourth Amendment's

reasoning centers on *Carpenter v. United States*, in which the Supreme Court held that the collection of historical CSLI is a "search" under the Fourth Amendment and that the SCA's "reasonable grounds" standard for obtaining a court order "falls well short" of the probable cause standard the Fourth Amendment imposes. 138 S. Ct. 2206, 2219-21 (2018).

Nobody disputes that, under *Carpenter*, acquiring a defendant's CSLI without a warrant is an unconstitutional search. *United States v. Goldstein*, 914 F.3d 200, 203 (3d Cir. 2019). The question is whether Pelullo was entitled to a remedy for that violation of his Fourth Amendment rights – specifically, to have the illegally obtained CSLI suppressed at trial.

The exclusionary rule is a "judicially created remedy" by which evidence is suppressed in order to "deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236-38 (2011). We do not reflexively apply it whenever an unconstitutional search takes place. *Goldstein*, 914 F.3d at 203. Instead, it is reserved for those cases where its expected deterrent effect justifies its use. *Id.* at 203-04.

One set of circumstances in which suppression is not justified is when the government has an "objectively reasonable good faith belief in the legality of [its] conduct" at the time of the search. *Id.* at 204 (alteration in original). That good-faith exception to the exclusionary rule is satisfied when

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exclusionary rule" must have standing, which is the case when he has a "legitimate expectation of privacy in the invaded place" (citation omitted)).

the search in question was undertaken in "reli[ance] on a properly-obtained valid judicial order, a then-valid statute, and then-binding appellate authority[.]" *Id.* Here, prosecutors obtained CSLI pursuant to a court order following the SCA's procedures, and, in 2007 and 2008, no binding precedent required them to do more. On the contrary, that was standard procedure at the time. *See id.*; *United States v. Curtis*, 901 F.3d 846, 849 (7th Cir. 2018); *United States v. Joyner*, 899 F.3d 1199, 1205 (11th Cir. 2018). Because we do not expect the government to have anticipated the "new rule" announced a decade later in *Carpenter*, its reliance on the SCA was reasonable, and so the good-faith exception applies to its acquisition of CSLI data without a warrant. *Goldstein*, 914 F.3d at 201, 204-05.

Pelullo argues against that conclusion, saying that the government lacked a good- faith basis for seeking prospective CSLI – particularly over a lengthy time period – without a warrant. He seeks to cabin *Carpenter* and *Goldstein* as announcing a "new rule" only as to *historical* CSLI.[20] Tracking his movements in real time, Pelullo says, involved an "even greater intrusion into [his] privacy, for a far longer period of time[,]" and so the government should have known that it needed a warrant even prior to *Carpenter*. (SP Opening Br. at 189.)

Yet Pelullo cites no pre-*Carpenter* authority from appellate courts that would have put the government on notice that seeking prospective CSLI required doing more than

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[20] For the distinction between prospective and historical CSLI, see *supra* note 18.

satisfying the SCA's requirements.[21] He cannot even show a consensus among district courts: at the time the orders at issue here were signed, courts had reached differing conclusions on whether officers seeking CSLI needed to show probable cause and get a warrant, and they were still grappling with the Fourth Amendment's application to both historical and prospective CSLI. *See, e.g.*, *In re Applications of U.S. for Orders Pursuant to Title 18, U.S. Code Section 2703(d)*, 509 F. Supp. 2d 76, 78-79, 78 n.4 (D. Mass. 2007) (noting a "disagreement among courts" and collecting cases that granted applications under the SCA standard and those that instead required a showing of probable cause).[22] Neither we nor the Supreme Court had addressed the issue. We did weigh in a few years after the searches here took place, in *In re Application of the U.S. for an Order Directing a Provider of Electronic Communication*

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[21] After argument, Pelullo brought to our attention *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330 (4th Cir. 2021) (en banc), in which the Fourth Circuit extended *Carpenter* to new aerial surveillance technology and enjoined the City of Baltimore's use of it. Setting aside that the case does not deal with CSLI, it does not affect our analysis of the state of the law *before* the Supreme Court held in *Carpenter* that collecting historical CSLI constituted a search.

[22] Some of those cases held that prospective CSLI was not authorized by the SCA. But even if the data collection here violated the SCA, "suppression is not a remedy for a violation of the [SCA]" and is only appropriate if "cell site location data was obtained … in violation of the Fourth Amendment." *United States v. Guerrero*, 768 F.3d 351, 358 (5th Cir. 2014).

Service to Disclose Records to the Government, 620 F.3d 304, 312-13 (3d Cir. 2010), but that was only to decide that, for Fourth Amendment purposes, acquiring historical CSLI was not a search, a holding later abrogated by *Carpenter*. In sum, then, the officers lacked clear guidance from any caselaw, much less binding precedent, that would have put them on notice that obtaining prospective CSLI would require compliance with the Fourth Amendment.

Undeterred, Pelullo highlights language in *In re Application* noting that CSLI could "be used to allow the inference of present, or even future, location" and thus resembles a tracking device. *Id.* He also points out that the D.C. Circuit held, prior to *Carpenter*, that GPS tracking requires a warrant. *United States v. Maynard*, 615 F.3d 544, 563-64 (D.C. Cir. 2010). Based on those and other decisions, he says that, even before *Carpenter*, the heightened threat to privacy posed by prospective CSLI should have been evident to the officers.

Setting aside that the GPS data considered by the D.C. Circuit reveals a person's movements more precisely than does CSLI, which logs the suspect's general area, "only *binding* appellate precedent" "at the time of the search" is relevant to the good-faith exception. *Goldstein*, 914 F.3d at 205. While conducting this investigation, prosecutors dealt with an unsettled area of law but relied in good faith on what was available to them – the plain text of the SCA and the court order they obtained in compliance with that Act. Given those circumstances, excluding the CSLI would not have "serve[d] any deterrent purpose[,]" *id.* at 204, and the District Court did not err in refusing to suppress the evidence.

Pelullo nonetheless insists that, even under the law as it then existed, the CSLI should have been suppressed because the government, in its applications for the court orders, misrepresented the technological capabilities of the equipment used to collect information from Pelullo's phone and falsely claimed that the phone had a connection to New Jersey.[23] He cites the principle that evidence must be suppressed "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *United States v. Leon*, 468 U.S. 897, 923 (1984).

His claim that the government made misrepresentations in those applications fails, however, because he did not first raise it before the District Court. Federal Rule of Criminal Procedure 12 requires that a request to suppress evidence "be raised by pretrial motion[.]" Fed. R. Crim. P. 12(b)(3)(C). As a result, a suppression argument raised for the first time on appeal is forfeited, and we do not consider it even under Rule 52(b)'s plain-error standard. *United States v. Rose*, 538 F.3d 175, 182-84 (3d Cir. 2008). Pelullo offers no explanation for why he did not object in the District Court to the alleged

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[23] Specifically, Pelullo argues that the government misrepresented both that it lacked the capability to collect outgoing phone numbers dialed on his cellphones using a pen register without also collecting dialed "content" information, such as bank account numbers and Social Security numbers, and that it was unable to obtain precise "pin-point" location information for his phones using CSLI and could only ascertain the larger "sector" in which the phones were located. (SP Opening Br. at 195-98.)

misrepresentations, so there is no "good cause" to excuse his failure to do so.[24] *Id.* at 184-85.

Even if Pelullo had not forfeited that suppression argument, his challenge to the evidence would prove fruitless. The government only introduced a small quantity of CSLI at trial. And what it did rely on merely served to corroborate other evidence of Pelullo's whereabouts. For example, multiple witnesses testified that Pelullo was in Dallas during the takeover of FirstPlus, and, as a further example, visitor logs and security footage showed that Pelullo repeatedly visited Scarfo's father in prison in Atlanta. Any alleged error in the admission of the CSLI was "rendered harmless" "in light of all of the other evidence" at trial.[25] *United States v. Perez*, 280 F.3d 318, 338 (3d Cir. 2002).

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[24] It is true that Pelullo joined Scarfo's challenge regarding the duration of the tracking and the lack of probable cause. But neither defendant raised the misrepresentation issue noted here, and accordingly it is forfeited. *See United States v. Joseph*, 730 F.3d 336, 342 (3d Cir. 2013) (holding that a suppression argument in the district court must match the argument in the court of appeals to be preserved).

[25] Pelullo also argues that improprieties in the collection of the CSLI led to his conviction because they served as one of the bases for the government's requests to conduct wiretaps. That, too, is not a basis for relief, since Pelullo makes no effort to show that the wiretap applications would have been devoid of probable cause without the CSLI. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (holding that, when a defendant establishes the falsity of a statement in an affidavit used to

B. Filter Teams[26]

Because federal agents intercepted and seized materials covered by attorney-client privilege, the government established filter teams to keep that information out of

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procure a warrant and when "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded").

[26] We exercise de novo review over specific legal issues underlying the claim of attorney-client privilege and review factual determinations for clear error. *In re Impounded*, 241 F.3d 308, 312 (3d Cir. 2001). We review for abuse of discretion a district court's judgment that the crime-fraud exception applies. *Id.* at 318. We review pre-indictment procedures used by the District Court for abuse of discretion. *See In re Grand Jury Subpoena*, 223 F.3d 213, 219 (3d Cir. 2000) (finding no abuse of discretion in district court "denying Appellant and/or his attorney access to this information to protect grand jury secrecy").

Preserved Fifth Amendment claims are typically reviewed for harmless error, *United States v. Toliver*, 330 F.3d 607, 613 (3d Cir. 2003), while infringements on the Sixth Amendment right to counsel are generally structural errors that require automatic reversal, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). With regard to Pelullo's challenges to ex parte proceedings, however, we need not grapple with the varying standards of review because those claims fail under any standard, as he identifies no error. We analyze his separation-of-powers claim under the harmless-error standard, as discussed in greater detail herein.

prosecutors' hands. Pelullo challenges the procedures employed by the filter teams and the District Court's attorney-client privilege rulings as deprivations of his Fifth Amendment right to due process and his Sixth Amendment right to counsel, and as violative of the separation of powers.[27] As a remedy for those alleged errors, he claims he is entitled to a new trial. His arguments fail.

1. Background

In August 2007, approximately four years before Pelullo was indicted, the District Court entered an order permitting the government to intercept his cellphone communications, having found probable cause that he and others were committing criminal offenses and using communications with counsel to further those offenses. While wiretapping Pelullo's phone, federal agents intercepted calls between Pelullo and his attorneys.

Knowing that some of those communications could be privileged, the government deployed a "Wiretap Filter Team" between federal investigators and the prosecution team, to examine the communications and sort them into three categories before turning them over to the prosecutors: (1) communications protected by the attorney-client privilege; (2) communications that would be privileged but for the crime-fraud exception, which excludes from the scope of the

[27] John and William Maxwell say they adopt Pelullo's arguments on these issues. That adoption, however, is ineffective, because Pelullo's briefing focuses specifically on alleged intrusions into his own attorney-client privilege, an issue that has no relevance to the Maxwells.

attorney-client privilege any communications made "in furtherance of a future crime or fraud"; and (3) unprivileged communications. *United States v. Zolin*, 491 U.S. 554, 563 (1989). Once the Wiretap Filter Team sorted the information, it sought court approval to share with the prosecution team unprivileged communications and communications falling under the crime-fraud exception.

The Wiretap Filter Team was headed by Assistant U.S. Attorney ("AUSA") Melissa Jampol. She and her team reviewed wire and text communications between Pelullo and his attorneys, including, among others, David Adler, Gary McCarthy, and Donald Manno. Federal agent Kevin Moyer, who engaged as well in the surveillance of Scarfo and others for a brief period, was also assigned to the Wiretap Filter Team. In connection with his surveillance responsibilities, Moyer interacted with members of the prosecution team.

During the duration of the wiretap, which was from August 2007 through January 2008, Jampol submitted five sealed ex parte motions to the District Court seeking to disclose communications to the prosecution team. The District Court granted each of those motions, authorizing disclosure of selected intercepted communications to the prosecution team. The Wiretap Filter Team's memoranda of law, including supporting affidavits and related papers, remained under seal until after Pelullo's indictment was unsealed. Following the indictment's unsealing, all the intercepted communications, including those not yet disclosed to the prosecution team, were provided to Pelullo's counsel, giving him an opportunity to challenge any of the communications as privileged, prior to their potential use at trial. Pelullo's counsel moved to exclude the intercepted communications en masse, without identifying

any particular communication claimed to be privileged. The District Court denied that motion.

Roughly nine months after the entry of the order, law enforcement officials executed search warrants at the offices of both Manno's solo law practice and McCarthy's law firm. Two more filter teams were established to review and sort out privileged materials seized from those offices: the "Manno Filter Team" and the "McCarthy Filter Team."

AUSA Matthew Smith and federal agent Michael O'Brien formed the Manno Filter Team. O'Brien performed an initial review of materials seized from Manno's law office, trying to make sure those items fell within the scope of the search warrant, and Smith then made the privilege determinations. *Manno v. Christie*, 2008 WL 4058016, at *5 (D.N.J. Aug. 22, 2008). If Smith determined that items were not privileged, he turned them over to the prosecution team, without going through the District Court first. *Id.* In contrast, if he thought that certain items might be privileged, he then determined whether an exception to the privilege, such as the crime-fraud exception, applied. *Id.* When such an exception did apply, Smith would "'meet and confer' with Manno or any … individual who may have a claim of privilege in an attempt to work out a resolution." *Id.* Then, if that was unsuccessful in resolving any concerns, Smith applied to the District Court for a privilege determination before disclosing anything to the prosecution team. *Id.*

The McCarthy Filter Team, led by Department of Justice attorney Cynthia Torg, followed similar procedures. It cataloged the materials seized from McCarthy's law office and substantively evaluated them. Because the materials included

multiple parties and transactions, the team worked with McCarthy's counsel to identify items covered by the attorney-client privilege and the names of any of McCarthy's clients who may have held the corresponding privilege as to those items. Any items identified as "potentially privileged" were segregated, and in February 2013, nearly one and a half years after Pelullo's indictment, his counsel in this case was provided copies of those items to confirm if either Pelullo or Seven Hills claimed that privilege. The McCarthy Filter Team then sought to work with Pelullo's counsel to resolve privilege disputes and reduce the volume of contested documents that the District Court needed to review.

2. Challenges to Filter Team Procedures

Pelullo first challenges the propriety of the procedures employed by the Wiretap Filter Team and Manno Filter Team, saying they violated his Fifth and Sixth Amendment rights. He asserts it was improper for Agent Moyer to be on both the Wiretap Filter Team and an investigative team that had regular contact with the prosecution. He claims that error necessarily led to privileged information making its way from the Wiretap Filter Team to the prosecution. Additionally, Pelullo contends the Manno Filter Team's attorney-client privilege determinations were improperly made by Agent O'Brien, a non-attorney.

While rare, governmental intrusion into an attorney-client relationship has occasionally risen to the level of "outrageous government conduct" violative of the Fifth

Amendment's Due Process Clause.[28] *United States v. Voigt*, 89 F.3d 1050, 1066 (3d Cir. 1996). We have exercised "scrupulous restraint" before declaring government action so "outrageous" as to "shock[] ... the universal sense of justice[.]" *Id.* at 1065 (citation omitted). We thus require defendants to show the government knew of and deliberately intruded into the attorney-client relationship, resulting in "actual and substantial prejudice." *Id.* at 1066-67. But nowhere does Pelullo claim the government's conduct "amount[ed] to an abuse of official power that 'shocks the conscience'" or otherwise explain how his due process rights were violated. *Fagan v. City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994) (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992)). He directs us to "no document, no telephone call, nothing that was turned over to the prosecution team that in any way has been used against [him] improperly[.]" (JAB at 2225.) Although Agent Moyer's presence on both a surveillance team

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[28] Common-law attorney-client privilege, which Pelullo asserts, has been described as overlapping with the Fifth Amendment protection against self-incrimination. *See Fisher v. United States*, 425 U.S. 391, 405 (1976) (noting the overlap between the right against self-incrimination and the attorney client privilege); *In re Foster*, 188 F.3d 1259, 1271 (10th Cir. 1999) ("Under *Fisher*, [the attorney-client] privilege effectively incorporates a client's Fifth Amendment right; it prevents the court from forcing [the attorney] to produce documents given it by [the client] in seeking legal advice if the Amendment would bar the court from forcing [the client] himself to produce those documents."). Pelullo, however, only argues a Fifth Amendment due process violation, and he does not invoke his right against self-incrimination.

and a filter team may have run afoul of Department of Justice procedures, [29] that alone is not enough to establish a constitutional violation.

With respect to the Manno Filter Team, Pelullo is not quite accurate when he says that Agent O'Brien, a non-attorney, performed the initial privilege determinations. O'Brien did screen the materials in the first instance to decide what fell within the scope of the warrant. *Manno*, 2008 WL 4058016, at *5. The initial privilege review, however, was performed by AUSA Smith. *Id.* And even if that were not the case, Pelullo does not present an argument that O'Brien being an initial screener would "shock the conscience."

Finally, in a conclusory fashion, Pelullo also asserts that the errors he alleges are also all in violation of the Sixth Amendment. But the Sixth Amendment does not attach before the indictment. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *United States v. Kennedy*, 225 F.3d 1187, 1194 (10th Cir. 2000) ("Government intrusions into pre-indictment attorney-client relationships do not implicate the Sixth Amendment.").

Pelullo fails to identify any constitutional deficiencies in the procedures of the filter teams, and we discern no error.

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[29] A Department of Justice manual provides that "'privilege team[s]' should … consist[] of agents and lawyers not involved in the underlying investigation." U.S. Dep't of Justice, *Justice Manual* § 9-13.420 (2021).

3. Challenges to Ex Parte Proceedings

Next, Pelullo challenges the ex parte proceedings held in conjunction with the filter teams, saying they violated his Fifth Amendment due process rights, his Sixth Amendment right to counsel, and separation of powers principles. Again, he comes up short. The use of filter teams is an acceptable method of protecting constitutional privileges. Moreover, Pelullo has not identified any privileged materials that were improperly shared with the prosecution, nor has he otherwise attempted to demonstrate prejudice.

The use of filter teams in conjunction with ex parte proceedings is widely accepted. *See, e.g.*, *In re Search of Elec. Commc'ns*, 802 F.3d 516, 530 (3d Cir. 2015) ("[T]he use of a 'taint team' to review for privileged documents [is] a common tool employed by the Government."); *In re Grand Jury Subpoenas*, 454 F.3d 511, 522 (6th Cir. 2006) (explaining that when "potentially-privileged documents are already in the government's possession, … the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege"); *United States v. Avenatti*, 559 F. Supp. 3d 274, 282 (S.D.N.Y. 2021) ("[T]he use of a filter team is a common procedure in this District and has been deemed adequate in numerous cases to protect attorney-client communications." (citation and internal quotation marks omitted)). Contrary to Pelullo's suggestion, he had no pre-indictment Sixth Amendment rights, nor did he have a Fifth Amendment due process right to notice of the ex parte proceedings. Indeed, his surveillance was consistent with the Wiretap Act, which requires courts to seal all government applications for wiretaps and any resulting orders. 18 U.S.C. § 2518(8)(a)-(b). That sealing provision was established "to

protect the confidentiality of the government's investigation[,]" *United States v. Florea*, 541 F.2d 568, 575 (6th Cir. 1976), which the sealing did here until the appropriate time. Although the Act entitles the subject of the wiretap to notice and an inventory of the intercepted communications within a reasonable time, such notice may be postponed pursuant to an ex parte showing of good cause. 18 U.S.C. § 2518(8)(d).

Good cause is not a high bar, and an ongoing criminal investigation will typically justify delayed notice of the wiretap. *E.g.*, *United States v. John*, 508 F.2d 1134, 1139 (8th Cir. 1975); *United States v. Manfredi*, 488 F.2d 588, 602 (2d Cir. 1973). It did so in this case. The undercover investigation here continued until the intercepted communications gave the government probable cause in May 2008 to search the law offices of Manno and McCarthy. By executing those searches pursuant to warrants, the government's investigation could no longer continue undercover. Pelullo was thus notified about the existence of the wiretap shortly thereafter.

Pelullo next challenges the procedures employed by the Manno and McCarthy Filter Teams, arguing they violated separation-of-powers principles. The Manno and McCarthy Filter Teams, as detailed above, instituted procedures to ensure the protection of privileged materials. In challenging those procedures, Pelullo relies predominantly on a Fourth Circuit case, *In re Search Warrant*, 942 F.3d 159 (4th Cir. 2019), which held comparable conduct unconstitutional. That case, however, arose in the context of a motion for a temporary restraining order brought by a law firm to enjoin the use, without adequate process, of materials that had been seized as part of a criminal investigation into one of its clients. *Id.* at

164. The Fourth Circuit reversed the district court's denial of the motion, ordering that the challenged filter team procedures be enjoined. *Id.* at 170.

Pelullo's argument arises in an entirely different procedural posture: on post-conviction appeal. The full applicability of the Fourth Circuit's precedent is thus open to question. More importantly, however, Pelullo has not identified any way in which the process used to screen for attorney-client privileged material caused him harm. We do not believe, nor has Pelullo suggested, that the alleged error – allowing an executive branch employee to make an initial privilege determination – is structural. *See United States v. Colon-Munoz*, 192 F.3d 210, 217 n.9 (1st Cir. 1999) (finding alleged separation-of-powers violation not structural because it "involve[d] the structure of the federal government rather than the structure of the criminal trial process as a reliable means of determining guilt or innocence"); *see also Neder v. United States*, 527 U.S. 1, 8-9 (1999) (structural error is that which would "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair'" (citation omitted)).

Thus, we employ harmless-error review, and the answer to whether there was any error here that caused Pelullo harm is simple. There was not. Despite having had a full and fair opportunity to do so, before both the District Court and us, Pelullo has not pointed to any piece of evidence that was privileged but improperly provided to the prosecution. Without reaching the question of whether a constitutional violation occurred (and without commenting on the

advisability of the particular screening methods employed by the government), it is clear that, even if there were error, there was no prejudice as a consequence. *See United States v. Schneider*, 801 F.3d 186, 200 (3d Cir. 2015) ("An error is harmless when it is highly probable that it did not prejudice the outcome." (citation and internal quotation marks omitted)). Because Pelullo has not shown that injury resulted from the filter teams' review, any error was harmless, and his Fifth and Sixth Amendment claims fail.

4. Crime-Fraud Exception

Pelullo's final complaint about the handling of his attorney-client privilege assertions in the District Court is that the Court applied the incorrect standard when determining whether the crime-fraud exception applied to certain intercepted communications. But it is Pelullo who misconstrues that exception.

The crime-fraud exception to the attorney-client privilege limits "the right of a client to assert the privilege … with respect to pertinent [communications] seized by the government, when the client is charged with continuing or planned criminal activity." *In re Impounded Case*, 879 F.2d 1211, 1213 (3d Cir. 1989). To invoke the exception, the party seeking to overcome the privilege must first demonstrate "a factual basis … to support a good faith belief by a reasonable person that the [seized] materials may reveal evidence of a crime or fraud." *Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 96 (3d Cir. 1992). If that threshold is crossed, the district court will conduct an in camera review to determine whether the party advocating the exception has made "a prima facie showing that (1) the client was committing or intending to

commit a fraud or crime, … and (2) the attorney-client communications were in furtherance of that alleged crime or fraud[.]" *In re Grand Jury Subpoena*, 223 F.3d 213, 217 (3d Cir. 2000) (citations omitted).

Contrary to the just-quoted precedent, Pelullo says that the crime-fraud exception requires something beyond a prima facie showing, that some heightened standard governs whether disclosure to the prosecution is permitted. He is wrong. As our precedent makes clear, there is no heightened standard beyond the requisite prima facie showing. Here, the District Court performed the correct analysis when it determined, based on the government's prima facie showing, that Pelullo was committing crimes and that the communications at issue included discussion furthering those crimes. The Court's conclusion was supported by the filter teams' evidence of Pelullo's criminal activities, the connection between his attorneys and the purported fraud, and analysis of how Pelullo's conversations with attorneys furthered that fraud.

In sum, the showing required to apply the crime-fraud exception was met by the evidence provided by the filter teams, and the District Court relied on the appropriate legal standard in making its determinations. Pelullo has not established any error based on the government's use of filter teams.

IV. PRETRIAL ISSUES

The Defendants claim to have identified multiple errors arising from what happened – and didn't happen – prior to trial. First, Pelullo asserts that the District Court failed to promptly set a trial date and so deprived him of a speedy trial. Next, Pelullo and both Maxwells complain about the District Court's

grant of the government's request to introduce evidence of Scarfo's and Pelullo's ties to organized crime, and the Maxwells insist that the Court should have severed their trial from that of their codefendants. None of those arguments is persuasive.

A. Speedy Trial Act Claim[30]

Although Pelullo was arrested in November 2011, his trial did not occur until more than two years later. He objects to the length of that delay, blaming the government for causing the holdup and faulting the District Court for waiting too long to set a trial date. He asks us to reverse his conviction and order dismissal of the charges with prejudice. But because the District Court properly ordered a continuance in response to the complex nature of the case, and because it scheduled trial once it made sense to do so, Pelullo's arguments fail.

To "assure a speedy trial" for all defendants, the Speedy Trial Act sets timing deadlines for the stages of a criminal prosecution. 18 U.S.C. § 3161(a). A defendant must be indicted within thirty days of his arrest, and he must be tried within seventy days of the later of his indictment or initial appearance. *Id.* § 3161(b), (c)(1). The Speedy Trial Act generally insists on strict conformity with its deadlines:

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[30] We exercise plenary review of a district court's interpretation of the Speedy Trial Act and review factual conclusions for clear error. *United States v. Lattany*, 982 F.2d 866, 870 (3d Cir. 1992). We review for abuse of discretion a district court's grant of a continuance after a proper application of the Act to established facts. *Id.*

charges "shall be dismissed" if a defendant is not afforded a trial on time. *Id.* § 3162(a)(2). Nonetheless, those deadlines can be tolled for good cause. *Id.* § 3161(h); *accord United States v. Adams*, 36 F.4th 137, 144-45 (3d Cir. 2022). Delay is allowed for the duration of a continuance granted by the district court "on the basis … that the ends of justice [are better] served by taking such action [and that doing so] outweigh[s] the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). If a continuance is improper or the court does not justify its findings on the record, however, the clock continues to run. *Id.*; *Zedner v. United States*, 547 U.S. 489, 508 (2006).

Case complexity is an acceptable reason for tolling Speedy Trial Act deadlines, 18 U.S.C. § 3161(h)(7)(B)(ii), and this case was certainly complex. It involved thirteen codefendants, dozens of charges, "approximately 1,000,000 pages of information[,]" and "voluminous" amounts of discoverable material, including seven months of wire taps, hundreds of phone call recordings, items seized from seventeen locations, and data from sixty computers. (Government's Supplemental Appendix ("GSA") at 407D.) In light of all that, the parties wisely acceded to a Complex Case Order ("CCO"), which the District Court entered in December 2011, just over a month after the defendants were indicted and well before the seventy-day deadline. The District Court found that the defendants would need "considerable time" to look over the documents and craft their defenses and pretrial motions. (GSA at 407E.) Specifically citing "the nature of the prosecution, its complexity[,] and the number of defendants," the Court designated the case as complex, determined that it would be "unreasonable to expect adequate preparation" within the seventy-day window, and found that "the ends of justice served