by granting the continuance outweigh[ed] the best interests of the public and the defendants in a speedy trial."[31] (GSA at 407F (citing 18 U.S.C. § 3161(h)(7)(A), (B)(ii)).) It entered an indefinite continuance without a set end date, with trial to take place on a date "to be determined[.]" (GSA at 407F.)

Like all the other parties, Pelullo stipulated to entry of the CCO, and he never advanced a speedy-trial argument or asked the District Court to set a trial date prior to seeking dismissal of the charges on Speedy Trial Act grounds in March 2013 – roughly sixteen months after the CCO was entered. Yet he now takes issue with the open-ended nature of the continuance, saying it failed to incentivize the parties to move quickly toward trial and enabled the government to delay providing discovery.

In *United States v. Lattany*, 982 F.2d 866, 877, 881 (3d Cir. 1992), we authorized district courts to enter open-ended continuances to serve the ends of justice as long as they are "not permitted to continue for an unreasonably long period of time" and are supported by on-the-record factual findings.

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[31] The District Court also held that the defendants had waived their "rights under the Speedy Trial Act[.]" (GSA at 407F.) That was not correct: while a defendant whose rights have already been violated but who fails to raise the issue prior to pleading guilty or going to trial loses his "right to dismissal[,]" 18 U.S.C. § 3162(a)(2), "a defendant may not prospectively waive the application of the Act." *Zedner v. United States*, 547 U.S. 489, 503 (2006). Because the District Court's decision to grant a continuance was otherwise proper, however, that error does not alter our analysis.

While a continuance must be reasonable in length, defendants are not "free to abuse the system by requesting [ends-of-justice] continuances and then argu[ing] that their convictions should be vacated because the continuances they acquiesced in were granted." *Id.* at 883; *accord United States v. Fields*, 39 F.3d 439, 443 (3d Cir. 1994) (Alito, J.) ("The defendant's arguments are disturbing because he would have us order the dismissal of his indictment based on continuances that his own attorney sought.").

The continuance here was appropriate. Pelullo explicitly conceded in the District Court "that the complex designation [was] factually supported" (JAB at 1933), and he does not identify any clear error in the District Court's findings. As the extensive motions practice in which the parties engaged and the duration of the trial both confirm, the number of defendants, factual complexities of the case, and sheer volume of discovery all required difficult and time-consuming pretrial preparation by the parties.[32] Indeed, Pelullo himself joined in a request to delay for six weeks the start of trial following jury selection, even though the District Court proposed beginning trial immediately, and even though Pelullo had recently begun arguing that his rights under the Speedy Trial Act were being violated. *Cf. United States v. Jernigan*, 20 F.3d 621, 622 n.5

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[32] Any blame for delay in affording the defendants discovery, meanwhile, appears to be attributable to third-party vendors who were overwhelmed by the scale of the discovery demands. For its part, the District Court provided Pelullo and Scarfo access to computer systems inside their detention facility so they could review the discovery and discuss it with their attorneys.

(5th Cir. 1994) (defendant's speedy trial claim "is stripped of all force by the fact that he sought … additional continuances after the complained-of delay" (emphasis omitted)).

The District Court certainly did not abuse its discretion in authorizing the continuance it did. As in *Lattany*, the continuance was granted before the end of the Speedy Trial Act's seventy-day window; the District Court "contemporaneously and specifically justified the continuance by a finding that it was necessary for [the defendants] to adequately prepare [their] defense," and further justified it by reference to the "numerous charges" in the case; the Court "continually attempt[ed] to accommodate [Pelullo] throughout the pretrial stage"; Pelullo "acquiesced in the motion[] for [a] continuance[]"; and, beyond all dispute, the case was complex. *Lattany*, 982 F.2d at 878, 883; *see also Fields*, 39 F.3d at 444 ("[A]n 'ends of justice' continuance may be granted for the purpose of giving counsel additional time to prepare motions in 'unusual' or 'complex' cases."). Allowing discovery and pretrial motions to play out and then turning to trial, as the District Court did, was a reasonable approach that conformed with the requirements of the Speedy Trial Act.

Pelullo nevertheless notes that the Act requires a court to schedule a date for trial "at the earliest practicable time[,]" 18 U.S.C. § 3161(a), and objects that the District Court did not set a trial date until a year and a half after the indictment. But the scheduling of a trial date is a means to an end: the court "shall" set a trial date "*so as to assure a speedy trial*." *Id.* (emphasis added). All the District Court needed to do was set a date as soon as doing so was "practicable." *Id.* It ably met those obligations here. Once the end was reasonably within sight in 2013, the Court scheduled a date for trial. Given the

reasonableness of the continuance, the District Court did not err in waiting to schedule the trial, and Pelullo has failed to demonstrate a violation of the Speedy Trial Act.[33]

B. Admission of La Cosa Nostra Evidence and Denial of the Maxwells' Motion for Severance

The Defendants contend that the District Court erred in admitting evidence of Scarfo's and Pelullo's ties to La Cosa Nostra pursuant to Federal Rules of Evidence 403 and 404(b) and that, accordingly, they are entitled to new trials.[34] The Maxwells further contend that the District Court abused its

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[33] Because the District Court complied with § 3161(a), we need not address whether a violation of that provision automatically requires dismissal or whether a defendant who was not given a trial date "at the earliest practicable time" must establish that he was prejudiced by that delay.

[34] Pelullo and John Maxwell primarily briefed the admission of organized crime evidence, and both specifically adopt each other's arguments. William Maxwell did not separately brief the admission of organized crime evidence, but he specifically adopted the arguments of Pelullo and John, so the issue belongs to all three of those Defendants. While Scarfo did not specifically adopt the other Defendants' arguments and thus forfeited them, *see supra* note 19, we nonetheless refer to the arguments in this section as belonging to "the Defendants" for the sake of simplicity.

William provided only limited briefing on severance, but, again, he specifically joined John's arguments with respect to that issue. Accordingly, we attribute any arguments made by John on severance to William as well.

discretion by denying their motion to sever their trial from that of Scarfo and Pelullo since the evidence of mob ties, even if properly admitted, prejudiced their defenses. We reject each of those contentions.

1. Admission of LCN Evidence[35]

Prior to trial, the government moved for permission to introduce evidence of Scarfo's and Pelullo's association with organized crime, including an explanation of the hierarchy of LCN and the custom of paying superiors within the organization. The government presented two alternative arguments in support of its request: first, the evidence was intrinsic to the charged offenses; and second, even if not intrinsic, the evidence was admissible as evidence of prior bad acts pursuant to Federal Rule of Evidence 404(b). Over the Defendants' objections, the District Court permitted introduction of the LCN evidence as "classic 404(b) evidence."[36] (JAB at 2343.) It reasoned that the evidence was

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[35] We review decisions to admit evidence for abuse of discretion, and such discretion is construed especially broadly in the context of Rule 403. *United States v. Moreno*, 727 F.3d 255, 262 (3d Cir. 2013) ("In order to justify reversal, a district court's analysis and resulting conclusion must be arbitrary or irrational." (citation omitted)). "However, to the extent the District Court's admission of evidence was based on an interpretation of the Federal Rules of Evidence, the standard of review is plenary." *United States v. Bobb*, 471 F.3d 491, 497 (3d Cir. 2006).

[36] The District Court disagreed with the government's

"relevant because it explain[ed] how and why the takeover occurred" and was "offered … to show motive and control[.]" (JAB at 2343.) The Court also decided the evidence was "sufficiently probative under [Rule] 403 because it … provide[d] an explanation as to why people would do what they [allegedly] did in this case," and that, although the evidence of mob ties may have been prejudicial, that prejudice did not "significantly outweigh[] the relevance of the testimony about the membership in La Cosa Nostra." (JAB at 2343.)

Consistent with that ruling, Agent Kenneth Terracciano testified at trial about the hierarchy of LCN, Scarfo's father's involvement in LCN, the attempted murder of Scarfo in 1989, and Scarfo's subsequent status with the Lucchese family. Terracciano did not testify that Scarfo had committed any crimes on behalf of the Lucchese family and did not even mention Pelullo. The government instead sought to establish Pelullo's allegiance to LCN by introducing evidence of, among other things, his close relationship with Scarfo and Scarfo's father, including during the takeover of FirstPlus, and his efforts to get Scarfo's father released from prison.

Throughout the trial, the District Court repeatedly provided limiting instructions to the jury. Namely, each time LCN or organized crime was mentioned, the Court informed the jury that "[t]here [was] no evidence and the government [did] not allege that any defendants, other than Scarfo and Pelullo, were associates in any organized crime organization."

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alternative argument that the evidence of LCN ties was intrinsic to the indicted crimes and hence not subject to Rule 404(b).

(JAC at 1750-51; *see also* JAC at 711-13, 5434-35.) The Court made clear it was up to the jurors to decide whether Scarfo or Pelullo "were so associated or whether they made use of, sought the benefit of or benefited from their association with La Cosa Nostra, and whether either of them used those associations to further the unlawful goals of the RICO enterprise alleged in this case." (JAC at 1750-51; *see also* JAC at 711-13.) The jury was also instructed that none of those associations could be considered "as proof that … Scarfo and Pelullo had a bad character or any propensity to commit crime." (JAC at 1751; *see also* JAC at 712-13, 1473.)

Under Federal Rule of Evidence 404(b), evidence of a defendant's prior crimes, wrongs, or other acts "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character" – in other words, it may not be used to show that a person had a propensity for crime. Fed. R. Evid. 404(b)(1). Such evidence is admissible, however, "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). We have explained that 404(b)(2) evidence is admissible "if it is: (1) offered for a non-propensity purpose; (2) relevant to that identified purpose; (3) sufficiently probative under Rule 403 so its probative value is not [substantially] outweighed by any inherent danger of unfair prejudice; and (4) accompanied by a limiting instruction, if requested." *United States v. Garner*, 961 F.3d 264, 273 (3d Cir. 2020) (citation and internal quotation marks omitted). "In a conspiracy case, evidence of other bad acts, subject always to the requirements of Rule 403, can be admitted to explain the background, formation, and development of the illegal relationship." *United States v. Escobarde Jesus*, 187 F.3d 148,

169 (1st Cir. 1999); *accord United States v. Reifler*, 446 F.3d 65, 91-92 (2d Cir. 2006) ("Evidence that a defendant had ties to organized crime may be admissible in a variety of circumstances[,]" including to explain "how the illegal relationship between [co-conspirators] developed[.]" (citation omitted)).

The Defendants contend that the District Court abused its discretion by admitting the organized crime evidence. More specifically, they allege that the evidence was not relevant, was not offered for a non-propensity purpose, and was unduly prejudicial. All three arguments lack merit.

First, the District Court correctly deemed the LCN evidence relevant. Federal Rule of Evidence 402 states "[i]rrelevant evidence is not admissible." As the Court noted, the LCN evidence explained "how and why the takeover [of FirstPlus] occurred." (JAB at 2343.) So the evidence was relevant. And proving motive is a proper purpose for evidence under Rule 404(b). Virtually everything in this case traces back to the conspirators' decision to seize control of the company, which was motivated at least in part by Pelullo's and Scarfo's LCN obligations. That is most relevant to Pelullo (and Scarfo), but it is relevant to the Maxwells too. The Maxwells may have boarded the conspiracy for their own reasons, but they still got on. The ties to LCN help explain how and why the railroad was being operated.

In that vein, the evidence shed light on Scarfo's and Pelullo's relationship, explaining why Pelullo was subservient to Scarfo even though Pelullo was the operational leader of the

FirstPlus scheme.[37] *See United States v. King*, 627 F.3d 641, 649 (7th Cir. 2010) (affirming admission of gang evidence that "helped establish the relationship among [the co-conspirators and] the rank of those men within the gang," which "was central to the government's theory"). It also explained Scarfo's need to pay off the Lucchese crime family. And, contrary to the Defendants' arguments, it is immaterial whether Scarfo and Pelullo also engaged in the conspiracy for personal reasons – namely, a desire to line their own pockets – in addition to doing so to meet their LCN obligations. "[T]he law recognizes that there may be multiple motives for human behavior[,]" and evidence of other motives does not render irrelevant the evidence of Scarfo's and Pelullo's LCN ties. *See United States v. Technodyne LLC*, 753 F.3d 368, 385 (2d Cir. 2014) (citing *Anderson v. United States*, 417 U.S. 211, 226 (1974) ("A single conspiracy may have several purposes, but if one of them – whether primary or secondary – be the violation of a federal law, the conspiracy is unlawful[.]")).

So, the evidence was offered for, and relevant to, a non-propensity purpose. Even then, it still had to survive Rule 403's balancing test. And it did. The District Court said that

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[37] To only highlight a few examples indicating Pelullo's subservience to Scarfo, Pelullo ensured that Scarfo received $33,000 per month plus expenses through a sham consulting agreement under which Scarfo did nothing of value, and he fraudulently obtained a mortgage for Scarfo's wife. In addition, evidence indicated that Pelullo was driven by his fear of not being able to pay Scarfo's father. (*See* JAD at 1468 ("[W]hatta we gonna do without that money they're they're [sic] dead. … [M]y uncle is gonna f[***]in' kill me.").)

it was sure there was some prejudice to Pelullo and Scarfo from the introduction of the evidence, but it found that the prejudicial effect did not substantially outweigh the probative value of the organized crime evidence because that evidence helped explain why the Defendants did what they did. (JAB at 2343.)

Pelullo argues that the balancing was "insufficient and substantively improper[,]" but he does not specify what else the Court should have considered or why the Court's reasoning was deficient. (SP Reply Br. at 23-24.) Because the Court "engage[d] in a Rule 403 balancing and articulate[d] on the record a rational explanation," the 403 challenge fails. [38] *United States v. Sampson*, 980 F.2d 883, 889 (3d Cir. 1992).

The Maxwells make a related prejudice argument. They contend that, due to the admission of LCN evidence, "Scarfo's

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[38] Pelullo makes an additional Rule 403 argument on a separate piece of evidence. He says the District Court improperly admitted testimony from FirstPlus secretary David Roberts that, shortly after the FirstPlus takeover, Pelullo told him, William Maxwell, and John Maxwell "that if we ever rat, our wives will be f[***]ed by the N word and our children will be sold off as prostitutes." (JAC at 1848.) The Court determined that the threat was probative in showing that Pelullo wanted to "drive home the point that he was threatening harm and he obviously thought that ... the listener [would have understood he] was in grave danger." (JAB at 2402.) The Court concluded that any prejudicial effect from the disgusting phrasing of the threat was outweighed by the relevance of proving Pelullo's state of mind. Because the Court conducted

proverbial blood spilled all over" them, resulting in a "taint [that] could not be washed away or otherwise cle[a]nsed." (JM Opening Br. at 37.) But the District Court, in addition to weighing the evidence under Rule 403, provided clear instructions to the jury that only Scarfo and Pelullo, not any of the other defendants, were associated with LCN and the Lucchese family.

Limiting instructions are an appropriate way to ensure that a jury understands the purpose for which evidence of prior acts may be considered, and such instructions are generally sufficient "to cure any risk of prejudice[.]" *Zafiro v. United States*, 506 U.S. 534, 539 (1993); *see also United States v. Lee*, 612 F.3d 170, 185 (3d Cir. 2010) (upholding a decision to admit evidence under Rule 404(b) in part because the district court gave a limiting instruction). There is particular reason to think that the jury followed those instructions here because some of the Maxwells' codefendants – Adler, McCarthy, and Manno – were acquitted, despite also being associated with the FirstPlus takeover. *See, e.g.*, *United States v. Greenidge*, 495 F.3d 85, 95 (3d Cir. 2007) (noting "the fact that the jury acquitted [a codefendant] is critical proof that the jury was 'able to separate the offenders and the offenses'" (citation omitted)); *United States v. Sandini*, 888 F.2d 300, 307 (3d Cir. 1989) (finding claim of prejudice "without merit" where a codefendant was acquitted of some charges, "a fact indicating that the jury carefully weighed the evidence relating to each

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an appropriate Rule 403 balancing analysis and reached a rational conclusion, we discern no error in the admission of that evidence. *United States v. Sampson*, 980 F.2d 883, 889 (3d Cir. 1992).

defendant and each charge"); *United States v. Solis*, 299 F.3d 420, 441 (5th Cir. 2002) ("[T]he jury acquitted some of the alleged co-conspirators, supporting an inference that the jury sorted through the evidence … and considered each defendant and each count separately[.]"). We thus see no reason to stray from "the almost invariable assumption of the law that jurors follow their instructions[.]" *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

2. Denial of the Maxwells' Severance Motion[39]

Separately, the Maxwells assert that they are entitled to a new trial because the District Court abused its discretion in denying their motion to sever their trials from that of Scarfo and Pelullo. They say that the introduction of evidence of Scarfo's and Pelullo's connections to organized crime created spillover prejudice because the Maxwells were not part of the mob but were nonetheless effectively grouped in with it. Once more, we are unpersuaded.

In assessing the Maxwells' request for severance, the District Court observed that a "fundamental princip[le]" of federal criminal law is the "preference for joint trials of defendants who are indicted together." (D.I. 297 at 17 (internal quotation marks omitted) (quoting *United States v. Urban*, 404 F.3d 754, 775 (3d Cir. 2005)).) Noting that the preference "is particularly strong in cases involving multiple defendants

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[39] "[D]enial of severance is committed to the sound discretion of the trial judge[.]" *United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991).

charged under a single conspiracy" (D.I. 297 at 17 (citing *United States v. Voigt*, 89 F.3d 1050, 1094 (3d Cir. 1996))), the Court held that the Maxwells did not meet the heavy burden of demonstrating the need for severance based on a risk of spillover prejudice.[40] It also promised to instruct the jury on "the limited admissibility of certain evidence" about Scarfo's and Pelullo's ties to organized crime. (D.I. 297 at 27.)

"A defendant seeking a new trial due to the denial of a severance motion must show that the joint trial led to 'clear and substantial prejudice resulting in a manifestly unfair trial[,]'" a demanding standard that requires more than "[m]ere allegations of prejudice[.]" *United States v. John-Baptiste*, 747 F.3d 186, 197 (3d Cir. 2014) (first quoting *Urban*, 404 F.3d at 775; and then quoting *United States v. Reicherter*, 647 F.2d 397, 400 (3d Cir. 1981)). The Maxwells "are 'not entitled to severance merely because they may have a better chance of acquittal in separate trials.'" *Id.* (quoting *Zafiro*, 506 U.S. at 540). In making the initial determination of whether to grant severance, the "critical issue" before a district court is "not whether the evidence against a co-defendant is more damaging but rather whether the jury will be able to compartmentalize the evidence as it relates to separate defendants in view of its

[40] Other defendants – Gary McCarthy, Howard Drossner, David Adler, Donald Manno, William Handley, and John Parisi – sought severance, many of them for the same reasons, and the Court rejected their arguments as well.

volume and limited admissibility." *Id.* (citation and internal quotation marks omitted).

The Maxwells fail to show that any claimed spillover prejudice from the organized crime evidence concerning Scarfo and Pelullo was clear and substantial and, instead, make "mere allegations of prejudice" that are insufficient to clear the high bar for severance. *Id.* (citation omitted). In *United States v. Eufrasio*, 935 F.2d 553 (3d Cir. 1991), which involved a RICO prosecution of Scarfo's father's criminal enterprise, we rejected the same sort of spillover prejudice argument. We concluded that because "all appellants were charged with the same conspiracy to participate in the same Scarfo enterprise, the public interest in judicial economy favored joinder." *Id.* at 568. The Maxwells' argument based on prejudice from their codefendants' mob ties is even less compelling than that of the *Eufrasio* defendants because, here, the District Court repeatedly gave limiting instructions that "[t]here is no evidence and the government does not allege that any defendants[,] other than Scarfo and Pelullo[,] were associates [in] any organized crime organization." (JAC at 712, 1751.) The Maxwells' only response is that the jury may not have followed these instructions. But, as discussed earlier, we presume that the jury follows instructions, which "often will suffice to cure any risk of prejudice." *Zafiro*, 506 U.S. at 539. There is no reason to believe otherwise in this case. Indeed, the acquittal of other defendants indicates just the contrary. The District Court did not abuse its discretion in concluding that the jury could "compartmentalize the evidence" as it related to the Maxwells, *John-Baptiste*, 747 F.3d at 197

(citation omitted), and, consequently, severance was not warranted.

V. TRIAL ISSUES

We turn now to the purported errors at the trial. Scarfo objects to being tried alongside his former counsel, while Pelullo argues that his trial counsel had an undisclosed conflict of interest by being under federal investigation during this case. The Defendants also challenge their RICO conspiracy convictions: Scarfo claims that the jury instructions constructively amended the indictment as to that count, and the other three Defendants challenge the jury instructions on and the sufficiency of the evidence supporting one of the predicate acts that formed the basis for their RICO conspiracy convictions. In addition, Pelullo asserts that the instructions on the felon-in-possession conspiracy charge were missing an element required under *Rehaif v. United States*, 139 S. Ct. 2191 (2019). William Maxwell further claims there was insufficient evidence for many of his convictions. Finally, several Defendants advance claims of error relating to the conduct of various jurors. None of those arguments entitle any of the Defendants to reversal of the convictions or a new trial.

A. Scarfo's Joint Trial with Former Counsel Donald Manno[41]

Scarfo argues that he deserves a new trial because he

[41] We address this issue here, as arising out of trial, because Scarfo did not move before the trial to have his case severed from Manno's. Manno did seek severance, but, as

was tried jointly with his codefendant and former attorney, Donald Manno, who proceeded *pro se*. In particular, he contends – for the first time on appeal[42] – that Manno's self-representation "stripped" him (Scarfo) "of a fair and unbiased trial guaranteed by the Sixth Amendment." (NS Opening Br. at 43.) As the government puts it, Scarfo "claims Manno had a conflict of interest that Scarfo refused to waive, so Manno couldn't represent *himself* without violating *Scarfo's* Sixth Amendment right to conflict-free counsel." (Answering Br. at 49.)

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discussed herein, the argument he made in the District Court was different from the Sixth Amendment theory Scarfo now advances.

We need not decide whether Scarfo would need to establish plain error to succeed on his unpreserved Sixth Amendment claim or whether any violation of his rights was a per se reversible error, since his claim lacks merit under either standard.

[42] Although, as just noted, Scarfo did not raise this issue before the District Court, Manno did seek to sever his trial from Scarfo's. But even though there was a presumption that all defendants joined each other's motions, Manno's request – which articulated a need for severance to protect his own interests – was insufficient to preserve an objection from Scarfo. Indeed, the District Court pointed out as much, denying one of Manno's severance motions partly because "Scarfo has not objected at this point to the proposed testimony, and he would be the one prejudiced by it." (JAB at 842.)

Because Scarfo was represented by independent, conflict-free counsel throughout his trial, he was not deprived of a Sixth Amendment right. If anything, Scarfo's challenge to the fairness of his trial sounds in due process more than in the Sixth Amendment. But Scarfo waived any due process claim he may have had and is not entitled to relief on that basis.

1. Background

Among those indicted alongside Scarfo was Manno, who appears to have been one of Scarfo's go-to criminal defense attorneys. According to Manno, he represented Scarfo in several matters, including when Scarfo was seeking habeas relief while imprisoned on state RICO charges related to gambling, when he was charged with possessing a deadly weapon in connection with an altercation at an Atlantic City bar, and when he faced charges of illegal gambling and loan-sharking. As his codefendant in this case, however, Manno did not represent Scarfo. For that task, the District Court appointed counsel.

The Court allowed Manno to represent himself but denied his initial request for severance. Prior to trial, Manno moved once more for severance and moved for permission to introduce evidence of "certain legal services" he had provided to Scarfo. (D.I. 664 at 1-2.) He said he needed the evidence to illustrate his "professional and personal relationship" with Scarfo and Pelullo and to emphasize his role as a criminal defense attorney "as a partial explanation" for some of his conduct. (D.I. 664-1 at 3.) He also argued that the evidence was relevant to show that the approximately $20,000 in fees he received from LANA was compensation for legal services and "totally legitimate and unrelated to [FirstPlus]." (D.I. 664-1 at

4.) Because Manno's defense would depend on addressing his relationship with Scarfo, which centered around Scarfo's criminal activities, Manno said that severance was necessary. He warned that "one of two results" would occur if he and Scarfo were tried together: "Either Scarfo or other defendants or all will be prejudiced by the admission of other convictions and allegations of bad acts[,] or Manno will be denied the ability to fully develop his relationship with Scarfo and others." (D.I. 664-1 at 9.)

Scarfo did not object to those requests, and the District Court granted Manno's motion in part, authorizing him to introduce evidence of his attorney-client relationship, but it refused to sever the trials. Accordingly, at trial, Manno questioned witnesses about and introduced evidence of his prior representations of Scarfo. Although the jury found Scarfo guilty, Manno was ultimately acquitted of all charges.

2. Sixth Amendment

Had Manno represented Scarfo at trial, there would be weight to Scarfo's Sixth Amendment arguments. But Manno did not. Instead (and to repeat), Scarfo was represented by independent, conflict-free counsel. The absence of any issues with Scarfo's own representation is dispositive and means that Scarfo has no Sixth Amendment claim. *Cf. United States v. Voigt*, 89 F.3d 1050, 1078 (3d Cir. 1996) (finding Sixth Amendment caselaw inapplicable to evaluating "the possibility that [a potential trial witness's] prior representation of [certain defendants] during the grand jury investigation might affect [their] ability to receive a fair trial").

The Sixth Amendment "commands, not that a trial be fair, but that … particular guarantee[s] of fairness be provided[.]" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). It does so by defining "the basic elements of a fair trial[,]" "including [through] the Counsel Clause." *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). That provision entitles a criminal defendant "to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Scarfo does not argue that the District Court failed to appoint him counsel, or that he was denied "the right to adequate representation by an attorney of reasonable competence [or] the right to the attorney's undivided loyalty free of conflict of interest." *United States v. Moscony*, 927 F.2d 742, 748 (3d Cir. 1991) (citation omitted). Therefore, he suffered no deprivation of his Sixth Amendment rights.

Scarfo musters an extensive array of cases in supposed aid of his argument, but none are on point. In all those cases, the defendant's challenge related to the assistance provided by his *then-current* defense counsel or his inability to select counsel of his choice. *See, e.g.*, *Wheat v. United States*, 486 U.S. 153, 155-57, 164 (1988) (approving district court's "refusal to permit the substitution of counsel" due to defendant's desired counsel's conflicts of interest); *Voigt*, 89 F.3d at 1071-80 (summarizing caselaw governing "denials of the right to counsel" of choice); *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 127 (3d Cir. 1984) (reversing conviction "because trial counsel had an actual conflict of interest"). None stand for the proposition that a defendant's Sixth Amendment right to counsel is violated if his *former* counsel is involved in the proceedings in another capacity. *See United States v. Ramon-Rodriguez*, 492 F.3d 930, 945 (8th Cir. 2007) ("[Defendant] cites no authority, and we have found none, in

which [a Sixth Amendment conflicted-counsel issue arises in] a situation involving a defendant's prior attorney in the absence of any alleged conflict involving actual trial counsel."); *English v. United States*, 620 F.2d 150, 151-52 (7th Cir. 1980) (holding that defendant could not raise an ineffective-assistance-of-counsel claim against former attorney who had switched to representing codefendant).

In the absence of any conflicts between Scarfo and the trial counsel he actually had, the effort to use the Sixth Amendment right to conflict-free counsel to condemn Manno's presence in the case "entails the pounding of a square peg into a round hole."[43] *United States v. Poe*, 428 F.3d 1119, 1122-24 (8th Cir. 2005) (finding no conflict of interest from fact that codefendant's counsel previously represented defendant in separate state-court prosecution).

Scarfo nevertheless tries to support his claim by pointing to a conversation the District Court had with government counsel and Manno. In that discussion, the Court "urge[d] [Manno] to seek independent counsel … and not represent [him]self[,]" explaining that he could be "subject … to [an] ethics investigation or prosecution." (Nicodemo Scarfo Appendix ("NSA") at 6.) The Court explained to Manno that

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[43] Scarfo insists that, at a minimum, the District Court should have conducted an inquiry into the potential conflict, and he claims that its failure to do so was reversible error. Again, though, he relies on caselaw focused on protecting a defendant's Sixth Amendment right to have his *current* counsel be conflict-free. That concern was not in play here, making those cases inapposite.

he was in a "very difficult position" due to the "potential risk of revealing client confidences without the permission of [his] client which would ... potentially expose[] [him] to ethics problems."[44] (NSA at 5.)

That conversation avails Scarfo nothing. The District Court's warnings to Manno confirm that the Court was aware that Manno might be opening *himself* up to potential ethical and professional conflicts by choosing to represent himself. But any issues Manno faced would not, and did not, affect Scarfo's ability to receive conflict-free assistance of counsel from his trial attorney.[45]

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[44] In passing, Scarfo also attempts to frame that conversation as infringing on his Sixth Amendment right to be present at all critical stages of trial. The government explains that it asked for the chambers conference because Manno made certain statements in his severance motion that were inconsistent with the government's evidence, and it wanted to give Manno a chance to retract his false statements before they were revealed in open court. Scarfo makes no showing that his absence from that discussion undermined his rights or harmed his defense at trial, so the conference does not provide a basis for disturbing his convictions. *Cf. infra* Section V.F.2.

[45] Similarly misplaced is Scarfo's reliance on the New Jersey Rules of Professional Conduct to argue that Manno violated his ethical obligations, an issue that he forfeited in any event by failing to raise it in his opening brief. *See United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005). That argument is simply beside the point in this Sixth Amendment

Ultimately, any potential legal or ethical issues arising from Scarfo being tried alongside Manno are not cognizable as a violation of the Sixth Amendment right to counsel.

3. Due Process

Setting aside Scarfo's Sixth Amendment argument, the facts he alleges do implicate interesting questions as to his Fifth Amendment due process rights. *See Strickland*, 466 U.S. at 684-85 (noting that "[t]he Constitution guarantees a fair trial through the Due Process Clauses," while the Sixth Amendment only protects particular "elements of a fair trial"); *cf. Voigt*, 89 F.3d at 1071-77 (affirming district court's decision to disqualify defendant's counsel who had conflict of interest with codefendants, in the "interest[] of the proper and fair administration of justice"). Scarfo asserts that, due to the conflict of interest caused by Manno's presence as a codefendant, he could not take the stand – since that would open himself up to cross-examination by Manno – and he was prevented from asserting an advice-of-counsel defense. Those claims raise non-frivolous issues about trial severance, but Scarfo has expressly disclaimed any "challenge [to] the district court's decision to deny Manno's motions seeking to sever his trial from that of his clients." (NS Opening Br. at 19.)

Scarfo's disclaimer is an unequivocal waiver as to severance – the only plausible step the District Court could have taken to eliminate any potential due process issues with

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challenge, which requires a showing that Scarfo's actual trial counsel provided ineffective assistance.

the joint trial.[46] In the face of that waiver, we decline to consider an argument Scarfo has not himself articulated. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("[O]ur [adversarial] system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." (internal quotation marks, citation, and brackets omitted)). The District Court's denial of severance may well be entirely justifiable, but even if it were not, Scarfo does not advance a due process theory for severance, so we will not "sally forth … looking for wrongs to right." *Id.* (citations omitted).

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[46] Scarfo also offers several alternative solutions in lieu of severance, but there is a disconnect between those proposed remedies and Scarfo's complaints. As mentioned above, Scarfo's theory of unfairness and prejudice is that Manno's mere *presence* as a codefendant at the trial prevented Scarfo from taking the stand and raising an advice-of-counsel defense. He now suggests that the District Court should have disqualified Manno from representing himself or, at a minimum, appointed standby counsel for Manno. Scarfo does not explain how those strategies – which would have entailed abridging Manno's Sixth Amendment right to self-representation – would have prevented the harm he says he suffered.

Scarfo also assigns error to the District Court's failure to obtain a conflict waiver from him. But he undercuts that by saying that even if the Court had done so, "such a waiver would be invalidated" – thus taking his own proposed remedy off the table. (NS Opening Br. at 99 n.27.)

B. Pelullo's Sixth Amendment Ineffective Assistance of Counsel Claim[47]

Pelullo's longtime attorneys – William Maxwell, Donald Manno, and Gary McCarthy – were all indicted alongside Pelullo, leaving him without counsel. Therefore, the District Court appointed Troy Archie to represent him under 18 U.S.C. § 3006A. Given the case's complexity and discovery demands, the Court shortly thereafter appointed J. Michael Farrell as co-counsel. Pelullo now seeks a new trial or an evidentiary hearing for further factfinding because, he argues, Farrell's performance was rendered deficient by a previously undisclosed conflict of interest. We are not persuaded and hold that Pelullo did not suffer ineffective assistance of counsel.

1. Background

Pelullo and Farrell had their fair share of disagreements at the outset of Farrell's engagement. The two apparently did not see eye-to-eye on trial strategy, and Pelullo did not appreciate Farrell's lack of engagement. Those disputes are unrelated to the conflict-of-interest issue before us, but, within

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[47] Whether a trial counsel's representation of a defendant was constitutionally inadequate is a mixed question of law and fact. When reviewing mixed questions, we apply de novo review to applications of law, but review for clear error "case-specific factual issues" like the "weigh[ing of] evidence" and "credibility judgments[.]" *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967-69 (2018).

a few months of Farrell's appointment, they led to Pelullo's request that Farrell be replaced. Although the Court granted that request, Pelullo soon regretted losing Farrell, and he asked to have him reappointed. Pelullo explained that he had "irreconcilable differences" with the lawyer who had been appointed in Farrell's stead and that replacing Farrell was "an error in … judgment" that arose from his "not clearly understanding [the] situation and how fortunate [he] was to have Mr. F[a]rrell." (D.I. 486.) Pelullo praised Farrell, stating he was "up to speed" and "more than comp[etent] and more than effective[.]" (D.I. 486.) The Court acquiesced to Pelullo's wishes and reappointed Farrell in July 2013.

Farrell represented Pelullo through trial (alongside Archie), employing aggressive litigation tactics. The District Court repeatedly reprimanded Farrell for, among other things, repeated interruptions and argumentativeness. At several points, the Court warned him that, "if [he thought his] goal here [was] to set up an ineffective assistance of a counsel defense[,]" he would be "take[n] … off th[e] case[.]" (*E.g.*, JAC at 318.) After trial, the Court determined that Pelullo required only one attorney at sentencing and terminated Farrell's appointment in November 2014, after which Pelullo requested Farrell's reassignment. He told the Court that, despite their early differences, he and Farrell had formed "a bond" and that "Farrell [was] agreeable to [his] defense strategy[.]" (D.I. 1231; JAE at 463-64.) Pelullo noted that he "d[id] not seek counsel of choice, [but] rather effective counsel." (D.I. 1231.) The Court denied that request in April 2015.

Meanwhile, unbeknownst to Pelullo, Farrell had been dealing with his own legal troubles. In March 2014, about halfway through Pelullo's trial, a subpoena was issued for

Farrell's office manager to testify about Farrell before a grand jury in the United States District Court for the District of Maryland. Farrell, in response, retained Joseph Fioravanti, a former federal prosecutor. Fioravanti tried to discover whether Farrell was either a subject or target of the investigation. Those efforts proved unsuccessful, so Fioravanti advised Farrell not to inform his clients, including Pelullo, because he was not yet known to be a subject or target. Farrell heeded that advice and kept from Pelullo, Archie, and the District Court that some kind of investigation in Maryland was underway. The U.S. Attorney's Office for the District of New Jersey, which was prosecuting the Defendants here, remained similarly unaware of the grand jury investigation in the District of Maryland.

It was not until August 2014, the month after the trial in this case ended, that Fioravanti received a "target letter" informing him that the U.S. Attorney's Office for the District of Maryland was considering filing criminal charges against Farrell. (JAE at 927, 1093, 1102.) In January 2016, more than eighteen months after the guilty verdicts here, an indictment charging Farrell with crimes relating to a large marijuana trafficking ring was unsealed. That charge bore no relation to Pelullo's crimes. *United States v. Farrell*, 921 F.3d 116, 123 (4th Cir. 2019). It was only after Farrell's indictment became public that the prosecutors on Pelullo's case became aware of the charges.

By the time Farrell's indictment was unsealed, Pelullo had already appealed his conviction. Once that indictment came to light, however, Pelullo sought and obtained from us a limited remand for further factfinding on what Pelullo claimed was a conflict of interest with Farrell. On remand, Pelullo filed a Rule 33 motion for a new trial on the ground that the evidence

revealed Farrell had provided ineffective assistance of counsel. In his motion, Pelullo claimed that Farrell had labored under a conflict of interest during the trial due to the investigation in Maryland. Despite previously not just accepting but actively promoting Farrell's aggressive trial tactics, Pelullo alleged that Farrell's aggression was caused by the stress of being under investigation himself and that those tactics were damaging.

The District Court held a hearing on the motion, at which Farrell bolstered that line of argument. He confirmed that his "aggressive nature" had been due to the pending investigation and that it "affected [his] ability to represent [Pelullo] in a conflict-free manner[.]" (JAE at 615-16.) He explained that he viewed the prosecution of himself as "a direct threat on the ability of criminal defense attorneys in Maryland – in America to defend their clients" and that "it was inconsistent with the principles of our Republic[.]" (JAE at 579.) It was, he claimed, his personal indignation that fueled his overly aggressive defense of Pelullo.

The District Court denied the new-trial motion. It found Farrell's testimony entirely unreliable, and it determined that the investigation in the District of Maryland did not affect Farrell's performance at trial. The Court explained further that Pelullo may have "at most" had a potential conflict-of-interest claim due to Farrell's failure to disclose the investigation, rather than by virtue of Farrell's aggressive defense. (JAE at 1046.) But, given the overwhelming evidence of Pelullo's guilt and his evident approval of Farrell's tactics, the Court concluded that Pelullo "fail[ed] utterly to demonstrate any prejudice." (JAE at 1046.)

2. Ineffective Assistance of Counsel Claim

Although we typically do not entertain ineffective-assistance-of-counsel claims on direct appeal, we may do so "when the record is sufficient to allow determination of the issue." *United States v. Thornton*, 327 F.3d 268, 271 (3d Cir. 2003). Because we previously remanded the issue for further factfinding and the District Court conducted an extensive evidentiary hearing, the record is sufficient for us to consider the issue now. There is no clear error in the finding that Farrell's self-deprecatory testimony was unreliable and that his representation of Pelullo was unaffected by the Maryland investigation. *See United States v. Gambino*, 864 F.2d 1064, 1071 n.3 (3d Cir. 1988) (applying clear-error standard to district court's factfinding with respect to "external events and the credibility of the witnesses"). On the record developed in the District Court, we agree that this argument for a new trial fails.

As already discussed, *supra* Section V.A.2, the Sixth Amendment protects a criminal defendant's right to effective assistance of counsel. U.S. Const. amend. VI; *United States v. Cronic*, 466 U.S. 648, 653-57 (1984). That right is "recognized ... because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658. Pursuant to that right, counsel owes a defendant certain duties, including the "duty to perform competently" and the "duty of loyalty[.]" *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 131-32 (3d Cir. 1984) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

Nonetheless, "[a]n error by counsel ... does not warrant setting aside the judgment of a criminal proceeding if the error

had no effect on the judgment." *Strickland*, 466 U.S. at 691. Accordingly, a criminal defendant pursuing an ineffective assistance claim must show not only that his counsel's performance was deficient, but also that the deficient performance prejudiced his defense. *Id.* at 687. Although a defendant must make both showings to succeed, in certain circumstances prejudice may be presumed. One such circumstance is when counsel breaches the duty of loyalty to his client by maintaining an actual conflict of interest during the representation. *Id.* at 692.

Conflicts arise when counsel's personal interests are "inconsistent, diverse or otherwise discordant with those of his client and ... affect[] the exercise of his professional judgment on behalf of his client." *Zepp*, 748 F.2d at 135 (citation and internal quotation marks omitted). When there is "a[n actual] conflict *that affected counsel's performance* – as opposed to a mere theoretical division of loyalties" – the defendant need not make a separate showing of prejudice. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002). A defendant alleging an actual conflict must establish that "trial counsel's interest and the defendant's interest diverge[d] with respect to a material factual or legal issue or to a course of action." *Zepp*, 748 F.2d at 136 (alteration in original) (citation and internal quotation marks omitted).

A criminal investigation of counsel, even for crimes unrelated to those being prosecuted in the defendant's trial, can generate an actual conflict when counsel seeks to curry favor with the attorneys prosecuting his client, thus resulting in counsel "pull[ing] ... his punches." *Reyes-Vejerano v. United States*, 276 F.3d 94, 99 (1st Cir. 2002). Conversely, a lack of evidence that counsel pulled his punches may serve as an

indication that he was not "intimidated by a threat of prosecution" in defending his client. *United States v. Montana*, 199 F.3d 947, 949 (7th Cir. 1999). And where a defendant "show[s] only that his lawyer was under investigation and that the lawyer had some awareness of an investigation" during the defendant's trial, but fails to demonstrate that the lawyer's interests diverged from that of the defendant, beyond "the general and unspecified theory that [the attorney] must have wanted to please the government[,]" he has not demonstrated an actual conflict. *Reyes-Vejerano*, 276 F.3d at 99.

That is the case here. Pelullo has presented no evidence that prosecutors in the District of New Jersey knew of the case against Farrell in the District of Maryland or that Farrell thought they did. *Cf. Armienti v. United States*, 234 F.3d 820, 824-25 (2d Cir. 2000) (holding that the defendant presented a "plausible claim" of an actual conflict where his attorney "was being criminally investigated by the same United States Attorney's office that was prosecuting" the defendant, and, during trial, he failed "to conduct further investigation, fail[ed] to vigorously cross-examine the government's witnesses, ... fail[ed] to make various objections[,]" was "ill-prepared and distracted[,]" and "misadvised [the defendant] not to talk to the probation department at the time of his sentencing"). There is thus no reason to think that Farrell pulled his punches – that he took it easy on the government to secure the prosecutors' good favor.

In fact, he did quite the opposite, something Pelullo acknowledges and now tries to turn to his advantage. Pelullo contends that Farrell's "rage and a quixotic sense of revenge against an unfair [g]overnment[,]" fueled by the criminal investigation, turned him into "an aggressive madman" driven

"not by Pelullo's best interests but … [instead by] his personal outrage about his own legal problems." (SP Opening Br. at 43-44.) Pelullo offers examples of when Farrell's "rage" supposedly made his representation inadequate, such as his repeated misspeaking on cross and direct examination, presenting a failed *Daubert* challenge, and offering a "catastrophic closing argument" that was a three-day "epic rant, devoid of purpose or focus[.]" (SP Opening Br. at 52-54.) Farrell's personal interest in getting revenge against the government, Pelullo claims, conflicted and interfered with the duty to act in Pelullo's best interests.

Those examples may speak to Farrell's level of competence, but they do not demonstrate any divergence between his interests and those of Pelullo. *Zepp*, 748 F.2d at 136. Farrell's pugnacious approach was fully approved by Pelullo, and Farrell's mistakes were, as the District Court noted, unsurprising in the course of "a very long trial[.]" (JAE at 529.) *See Strickland*, 466 U.S. at 689 (warning against "second-guess[ing defense] counsel's assistance after conviction or adverse sentence" and too readily deeming representation deficient in hindsight); *United States v. Williams*, 631 F.2d 198, 204 (3d Cir. 1980) (holding no ineffective assistance of counsel where defendant concurred in his counsel's trial strategy). In fact, Pelullo sought out Farrell's services precisely because of his aggressive defense style. That he got what he wanted but it didn't produce the desired results does not mean he is free to call it constitutionally deficient advocacy now.

The alleged conflict of interest affecting Farrell's representation is significantly different from fact patterns in which an actual conflict has been found. In *Government of*

Virgin Islands v. Zepp, 748 F.2d 125, 136 (3d Cir. 1984), we reasoned that defense counsel should have withdrawn because he "could have been indicted for the same charges on which he represented [the defendant] … and … was a witness for the prosecution." Farrell, by contrast, was under investigation for activities unrelated to Pelullo's charges and had no personal stake in the success or failure of Pelullo's defense. Nor does the trial record present a scenario in which the same United States Attorney's Office prosecuted both the defendant and investigated his attorney. In such a situation, there is a clear motive for counsel to "temper[] his defense … in order to curry favor with the prosecution, perhaps fearing that a spirited defense … would prompt the Government to pursue the case against [him] with greater vigor." *United States v. Levy*, 25 F.3d 146, 156 (2d Cir. 1994); *see, e.g.*, *Armienti*, 234 F.3d at 824-25 (ordering an evidentiary hearing on a potential conflict of interest because defense counsel was under investigation by the same United States Attorney's Office prosecuting the defendant); *United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987) (holding that when counsel was under investigation by the same United States Attorney's Office as his client an actual conflict of interest existed, warranting a new trial), *overruled on other grounds as recognized by United States v. Watson*, 866 F.2d 381, 385 (11th Cir. 1989).

Pelullo argues that we should assume that the government attorneys here were aware of the grand jury investigation in the District of Maryland. He asks that we treat the two U.S. Attorneys' offices as "one combined entity[,]" and thus conclude that he was prejudiced. (SP Opening Br. at 77.) We do not accept that premise. *See United States v. Pelullo*, 399 F.3d 197, 218 (3d Cir. 2005) (declining to impute to the prosecution team constructive knowledge of information

held by a federal agency that was not involved in the investigation and prosecution of the case).

Finally, the timeline belies Pelullo's argument that Farrell began his representation of Pelullo "motivated by his own personal anima rather than the best interests of his client." (SP Opening Br. at 45.) As Farrell testified, he was not aware of the investigation's existence until halfway through trial, in either March or April of 2014. Without that knowledge, Farrell could not have begun his representation with the intention Pelullo attributes to him. Farrell's consistently aggressive tactics suggest that his litigation strategy was not affected by his being under investigation but was rather a matter of style. We thus conclude that Farrell's representation of Pelullo did not present an actual conflict.

To the extent that Pelullo and Farrell had a potential conflict of interest, Pelullo needed to show that the potential conflict caused him prejudice. He has failed to do that. *Strickland*, 466 U.S. at 687. There is no reasonable probability he would have been acquitted in the absence of Farrell's services, given the overwhelming evidence of his guilt. *See id.* ("This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").

In short, Pelullo was not deprived of his Sixth Amendment right to the effective assistance of counsel and so is not entitled to a new trial.[48]

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[48] Because the District Court fully developed the record and did not err, Pelullo is not entitled to yet another evidentiary

C. Convictions for RICO Conspiracy Under 18 U.S.C. § 1962(d)

The jury convicted the Defendants of conspiring, in violation of RICO, to "conduct or participate … in" the affairs of an enterprise engaged in interstate commerce "through a pattern of racketeering activity[.]" 18 U.S.C. § 1962(c); *id.* § 1962(d) (making it "unlawful for any person to conspire to violate any of the provisions of subsection … (c)"). RICO lists dozens of federal crimes and incorporates many state crimes that qualify as predicate "racketeering activit[ies.]" *Id.* § 1961(1). To constitute a "pattern[,]" there must be "at least two acts of racketeering activity[.]" *Id.* § 1961(5). Here, that meant, to be guilty of the conspiracy, each Defendant had to have agreed that he or his co-conspirators would perform two or more of the predicate acts listed in § 1961(1). The jury found, in response to special interrogatories, that Pelullo and Scarfo each agreed to the commission of eight such predicate acts, that William Maxwell agreed to the commission of seven, and that John Maxwell agreed to the commission of six. The Defendants raise claims of error related to the RICO conspiracy charge, but none is persuasive.

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hearing either.

1. Constructive Amendment of Indictment[49]

Scarfo complains to us about the verdict form's special interrogatories.[50] According to Scarfo, the District Court violated his Fifth Amendment rights by constructively amending the indictment in the verdict form when it specified

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[49] We review for abuse of discretion a district court's determination of whether to submit special interrogatories to a jury. *United States v. Console*, 13 F.3d 641, 663 (3d Cir. 1993). While a properly preserved claim of constructive amendment or variance receives plenary review, we review for plain error when it is raised for the first time on appeal. *United States v. Vosburgh*, 602 F.3d 512, 531 (3d Cir. 2010). The test for plain error requires the appellant to show "(1) an 'error'; (2) 'that is plain'; (3) 'that affect[ed] substantial rights'; and (4) that failure to correct the error would 'seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Defreitas*, 29 F.4th 135, 144 (3d Cir. 2022) (alterations in original) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

[50] Pelullo and John Maxwell both specifically adopt Scarfo's argument "as to … shifting of RICO[.]" (SP Opening Br. at 223; JM Opening Br. at 49.) To the extent they intend to refer to Scarfo's constructive amendment argument, their claims fail for the same reason as does Scarfo's – namely, that the verdict form did not expand the potential bases for liability under the RICO charge beyond those listed in the indictment. William Maxwell, meanwhile, does not specifically adopt Scarfo's argument, so he has forfeited it.

a particular group of racketeering activities applicable to each defendant. Separately, he suggests that the special interrogatories made him seem comparatively more culpable than the codefendants for whom fewer predicate acts were listed, prejudicing him in the eyes of the jury and causing juror confusion. He did not raise those issues at trial, so we review for plain error.[51] *United States v. Duka*, 671 F.3d 329, 352 (3d Cir. 2011).

Eleven of the thirteen defendants were charged with engaging in a RICO conspiracy. That count in the indictment

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[51] Scarfo argues that his constructive amendment claim was preserved when his attorney raised the following concern in the District Court:

> [G]iven that it is a RICO conspiracy charge I think it would be worth reiterating with the jurors that all defendants are charged with the same RICO conspiracy charge because I think it is – I think it was a little bit unclear, given your remarks to them about the verdict form, that they may have concluded that some defendants are charged with different forms of – with different kinds of RICO conspiracy and I think that may generate some confusion.

(JAC at 12498.) The District Court responded that the "verdict form itself" showed that all defendants were charged with the same RICO conspiracy and that the only difference among them was "in the predicate qualifying acts." (JAC at 12498.) Scarfo at no point referenced the indictment nor mentioned constructive amendment or prejudice, so plain-error review is appropriate.

listed eight specific predicate acts, namely, mail fraud, wire fraud, bank fraud, obstruction of justice, extortion, interstate travel in aid of racketeering, money laundering, and securities fraud.

The verdict form asked the jury to first indicate whether it found Scarfo and his alleged co-conspirators guilty or not guilty of RICO conspiracy. Below that, special interrogatories appeared under each defendant's name, asking if the jury "unanimously find[s] that the government proved beyond a reasonable doubt" that the named defendant agreed to commit specified predicate acts. (GSA at 409-15.) The form provided "yes" or "no" spaces for the foreman to check for each predicate act. Some defendants were charged with different and fewer predicate acts than others were. For example, Scarfo's name on the verdict form included all eight potential predicate acts (as it did in the indictment), while some of his co-conspirators had fewer predicate acts listed. The District Court instructed the jury that they needed to unanimously find an answer on the interrogatories regarding acts of racketeering activity but that they should not "answer these interrogatories until after [they] ha[d] reached [their] verdict." (JAC at 12390.)

The Fifth Amendment requires that a defendant be tried only for crimes for which he has been indicted. *See* U.S. Const. amend. V; *Stirone v. United States*, 361 U.S. 212, 217 (1960). Accordingly, a court cannot later amend an indictment – either formally or constructively – to include new charges. *Ex parte Bain*, 121 U.S. 1, 6-9 (1887). A constructive amendment occurs when the court "broaden[s] the possible bases for conviction from th[ose] which appeared in the indictment." *United States v. McKee*, 506 F.3d 225, 229 (3d Cir. 2007)

(citation and internal quotation marks omitted). For instance, an indictment is constructively amended if the jury instructions "modify essential terms of the charged offense" such that "the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." *United States v. Daraio*, 445 F.3d 253, 259-60 (3d Cir. 2006).

That did not take place here. The interrogatories required the jury to support their decision by identifying at least two predicate acts for each defendant, after determining whether the defendants were guilty of RICO conspiracy. Those interrogatories did not, as Scarfo argues, turn the predicate acts into elements of the RICO conspiracy. The indictment alleged that each defendant agreed to commit at least two predicate acts and listed all the predicates that later appeared in the interrogatories. If anything, the District Court narrowed, rather than "broaden[ed,] the possible bases for conviction" by instructing jurors to find each predicate act unanimously beyond a reasonable doubt and by removing certain predicate acts for some defendants. *McKee*, 506 F.3d at 229; *cf. United States v. Miller*, 471 U.S. 130, 136 (1985) ("[T]he right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime [than are proven at trial]."). Scarfo, in fact, had the same eight predicate acts listed under his name on the verdict form as were charged in the indictment. For him, then, there was no difference at all between the indictment and the potential bases for conviction listed in the verdict form.

Scarfo also argues that listing more predicates under his name than under his codefendants' names was unfair and caused prejudice and juror confusion. The District Court's

instructions remedied any potential problem, however, by clarifying to the jurors that they first needed to find each defendant guilty or not guilty before turning to the interrogatories as a check on their verdict. *See United States v. Console*, 13 F.3d 641, 663 (3d Cir. 1993) (noting that "an instruction to the jury to answer the [special] interrogatories [regarding RICO predicates] only after it votes to convict" "alleviat[es] the danger of prejudice to the defendant"). Moreover, any disparity between Scarfo and the other defendants was of his own making. There was evidence that he engaged in more criminal wrongdoing than some of his codefendants. Given his own conduct, he cannot now complain that he may have appeared more culpable before the jury than others did. We thus detect no error, much less plain error, in the formulation of the special interrogatories accompanying the RICO conspiracy charge.

2. Jury Instructions and Sufficiency of the Evidence

Next, the Defendants challenge the jury instructions and the sufficiency of the evidence pertaining to the RICO conspiracy convictions, but they do so by attacking only one predicate act: extortion under the federal Hobbs Act.[52] Their

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[52] Pelullo and William Maxwell set forth the challenges to the RICO conspiracy convictions that are addressed in this section. Their arguments were specifically adopted by each other and by John Maxwell, so the claims in this section apply to all three of those Defendants. Though Scarfo did not specifically adopt the other Defendants' arguments and thus forfeited them, *see supra* note 19, we nonetheless refer to the

challenges thus fail for a simple reason: they do not address any of the other predicate acts that support those convictions, and each convicted Defendant had more than two such acts to their discredit, so the elimination of the Hobbs Act predicate makes no difference.[53] Even if we agreed with their Hobbs Act arguments (which we do not), their convictions for RICO conspiracy are still supported by the other predicate acts found by the jury. *See United States v. Pungitore*, 910 F.2d 1084, 1107 (3d Cir. 1990) ("Thus, even if we deleted the [extortion] act, we would affirm the convictions" for RICO conspiracy.). Their convictions for RICO conspiracy thus stand.

D. Firearm Conspiracy Conviction Following *Rehaif*[54]

Pelullo was charged with a conspiracy, in violation of 18 U.S.C. § 371, having two objects: first, to provide firearms

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arguments in this subsection as belonging to "the Defendants" for the sake of simplicity.

[53] Scarfo and Pelullo were each found to have agreed to all eight of the listed predicates. *Supra* p. 81. William Maxwell was found to have agreed to the commission of mail fraud, wire fraud, obstruction of justice, extortion, interstate travel in aid of racketeering, money laundering, and fraud in the sale of securities. John Maxwell was found to have agreed to the commission of mail fraud, wire fraud, extortion, interstate travel in aid of racketeering, money laundering, and fraud in the sale of securities.

[54] "[U]npreserved *Rehaif* claims are subject to plain-

to felons (namely, Scarfo and himself), contrary to 18 U.S.C. § 922(d)(1), and, second, to unlawfully possess firearms as a felon, contrary to 18 U.S.C. § 922(g)(1). He objects to his conviction on that count and asserts that the government failed to allege in the indictment and prove at trial, under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), that he knew he was a felon when he possessed the guns. Even if that claim had merit, however, his challenge fails because he has not identified any error in his conviction as to the first object of the conspiracy – namely, to transfer firearms to felons in violation of § 922(d)(1). Because that is an independent and sufficient basis to affirm the guilty verdict on the conspiracy count, we need not, and do not, address whether there was error as to the second object of the conspiracy, the possession of firearms.

In its investigation, the government seized a small arsenal of guns and ammunition from Pelullo's and Scarfo's homes, Pelullo's office, and their yacht. It also collected evidence showing how Pelullo and Scarfo had acquired those weapons: for example, it uncovered Pelullo's and the Maxwell brothers' coordinated efforts to have John Maxwell drive a firearm across the country from Dallas to Scarfo's home in New Jersey. *See infra* Section V.E.1. Since Pelullo and Scarfo had previously been convicted of felonies, neither of them was allowed to have a gun. As noted earlier, *supra* p. 8, Pelullo had convictions for bank fraud, making false statements in an SEC filing, and wire fraud, while Scarfo's criminal record included a guilty plea for conducting an illegal gambling business. The government thus alleged in the indictment that Pelullo

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error review[.]" *Greer v. United States*, 141 S. Ct. 2090, 2099 (2021).

unlawfully conspired both to violate § 922(d)(1) by providing firearms to Scarfo and himself and to violate § 922(g)(1) by possessing firearms.

Pelullo focuses his arguments on the second object of the conspiracy charge, the § 922(g)(1) violation, but he does not argue that there was insufficient proof that he conspired to transfer firearms to Scarfo in violation of § 922(d)(1). That failure dooms his claim. In a "multiple-object conspiracy" like this one, a guilty verdict will stand so long as there is sufficient evidentiary support for any of the charged objects. *Griffin v. United States*, 502 U.S. 46, 47, 56-57 (1991). We may thus "affirm [Pelullo's] conviction[] as long as we find that there was sufficient evidence with respect to one of the [two] alleged prongs of the conspiracy." *United States v. Gambone*, 314 F.3d 163, 176 (3d Cir. 2003).

Section 922(d)(1) makes it unlawful "to sell or otherwise dispose of any firearm … to any person" while "knowing or having reasonable cause to believe that such person" has been indicted for or convicted of "a crime punishable by imprisonment for a term exceeding one year[.]" That same *mens rea* (or guilty state of mind) – namely, "knowing or having reasonable cause to believe" that the recipient of the firearms is a convicted felon – also applies to cases, like this one, involving a conspiracy to violate § 922(d)(1). That is because the government cannot secure a conspiracy conviction without proving that the defendant had the *mens rea* required for the substantive offense that was the object of the conspiracy. *See United States v. Alston*, 77 F.3d 713, 718 (3d Cir. 1996). The Supreme Court's *Rehaif* decision applied the "presumption in favor of scienter" (that is, a presumption of intent or knowledge of wrongdoing) to read

into § 922(g) a requirement that the defendant know his status as a member of a class of persons prohibited from having a firearm, but that has no bearing on § 922(d), which contains an express *mens rea* element. 139 S. Ct. at 2194-96; *see also id.* at 2209 (Alito, J., dissenting) (arguing that the majority read into § 922(g) a *mens rea* element more stringent than the one that Congress explicitly required for § 922(d) charges).

Perhaps it is no surprise that Pelullo does not challenge the § 922(d)(1) object of the conspiracy conviction, since overwhelming trial evidence shows that Pelullo knew or, at a minimum, had powerful cause to believe, that Scarfo was a felon when Pelullo conspired to transfer a firearm to him. Pelullo's counsel explained to the jury, in his opening statement, that "[t]he reason why [Pelullo] helped Mr. Scarfo is because they're both prior felons." (JAC at 100.) Counsel leaned on Scarfo's and Pelullo's prior felonies as part of a narrative of rags to riches turned sour by government overreach, painting them as "two felons who were in business together that had a checkered past" who had turned their lives around to "mak[e] millions of dollars" in "legitimate" business. (JAC at 96.) In his closing argument, Pelullo's counsel again emphasized to the jurors that Pelullo and Scarfo were "two convicted felons" who had supposedly "partner[ed] in good faith to succeed in business legitimately[.]" (JAC at 12805.) Moreover, as more fully described in the next section, *infra* Section V.E.1, the way in which Pelullo endeavored to procure a firearm for Scarfo by secretive means – having John Maxwell buy a gun in Texas and drive it halfway across the country to New Jersey and instructing him to avoid law enforcement officials along the way – demonstrates Pelullo well understood that Scarfo, as a prior felon, was prohibited from having firearms. Because there was sufficient evidentiary support for