the § 922(d)(1) object of the conspiracy count at issue, that in itself is enough to sustain the conviction, regardless of any potential *Rehaif* error associated with the § 922(g)(1) object.[55]

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[55] Pelullo also asserts that the *Rehaif* error entitles him to "complete dismissal of the indictment" or, at a minimum, vacatur of the RICO conspiracy conviction, since the indictment and the government's case at trial relied heavily on the firearms. (3d Cir. D.I. 322 at 21-24.) But any *Rehaif* error here would not require automatic reversal of his conviction. *Greer*, 141 S. Ct. at 2100. Rather, because Pelullo did not object to the government's mentions of the firearms (or the presence of the guns in the courtroom), he bears the burden, on plain-error review, of showing a "reasonable probability" that he would have been acquitted of the other charges but for the gun evidence. *Id.* at 2096-97. His conclusory claim of "extreme prejudice" due to a "changed … dynamic [at] trial" caused by the guns is insufficient to carry that burden. (3d Cir. D.I. 322 at 25.) It is also unsupported by the record. While the RICO conspiracy portion of the indictment mentioned the firearms, none of the charged racketeering predicate offenses had anything to do with the firearms conspiracy. And the case against Pelullo at trial on the other counts rested on a great deal more evidence than just his involvement with firearms – namely, the extensive testimonial and documentary proof of his leading role in the FirstPlus takeover scheme.

E. Sufficiency of Evidence to Support William Maxwell's Convictions

1. Conviction for Conspiracy to Unlawfully Transfer or Possess a Firearm[56]

William Maxwell disputes the sufficiency of the evidence supporting his conviction for conspiracy to unlawfully transfer a firearm.[57] That count was brought under the general conspiracy statute, 18 U.S.C. § 371, which requires the government to prove "(1) an agreement between two or more persons to achieve an unlawful goal; (2) the defendant intentionally joined the agreement, with knowledge of its objective; and (3) an overt act taken in furtherance of the conspiracy by a co-conspirator." *United States v. Whiteford*, 676 F.3d 348, 357 (3d Cir. 2012). Insofar as William was concerned, the object of the alleged conspiracy was to get guns

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[56] William Maxwell moved before the District Court for judgment of acquittal on this count. We exercise plenary review over the denial of the motion, although "we view the evidence in the light most favorable to the government, mindful that it is the jury's province (and not ours) to make credibility determinations and to assign weight to the evidence." *United States v. Richardson*, 658 F.3d 333, 337 (3d Cir. 2011).

[57] The same count also charged a conspiracy to unlawfully possess a firearm, but, as in the previous section, it is sufficient for us to concern ourselves with William's efforts to transfer a firearm. *See supra* Section V.D.

into the hands of Scarfo and Pelullo, both of whom were convicted felons.

The evidence supporting that count involved William's brother John delivering a firearm from Dallas, Texas, to Scarfo's home in Egg Harbor Township, New Jersey. The FBI recorded multiple wiretapped phone conversations between John and Pelullo as John made his way to New Jersey. In one call on September 6, 2007, John expressed his suspicion that he was being followed by "a chopper over-head" and "a black and white Suburban [that was] right behind [him] too." (JAD at 6156.) They agreed that John should stop for lunch, presumably to avoid leading the suspected surveillance vehicles to Scarfo's house. Later that day, John and Pelullo spoke again; John said he "talked to Bill [i.e., William Maxwell] and he[, William,] said it could be everything and it could be nothing. He said there's no way of knowing. He said ... just take whatever precautions that you [Pelullo] thought were best." (JAD at 6168.) Months later, FBI agents executed a search warrant at Scarfo's house in Egg Harbor Township and uncovered a gun that, according to an ATF report, John Maxwell purchased from a pawn and gun shop in Dallas on September 4, 2007.

William Maxwell claims that the only evidence tying him to the firearm delivery – the call in which John told Pelullo about his conversation with William – was insufficient to bring William within the conspiracy to have the firearm transferred to or possessed by Pelullo or Scarfo. We take that as an argument that the government failed to furnish sufficient evidence of the second element of a conspiracy under 18 U.S.C. § 371: that William intentionally joined an agreement with knowledge of its objective. *Whiteford*, 676 F.3d at 357.

But considering that phone call, as we must, in the light most favorable to the jury's verdict, it is enough. *United States v. Richardson*, 658 F.3d 333, 337 (3d Cir. 2011). From John's statement on the phone that he "talked to Bill" about the suspected surveillance vehicles (JAD at 6168), a rational trier of fact could have found that William had knowledge of John's illicit objective to deliver the firearm. *See United States v. Caraballo-Rodriguez*, 726 F.3d 418, 431 (3d Cir. 2013) (en banc) ("[A]lthough the prosecution must prove the defendant's knowledge of the conspiracy's specific objective, that knowledge need not be proven by direct evidence."). And a rational jury could also have found, from John's statement noting William's shared concern about the possibility of surveillance and the advice he gave about the precautions to take (or at least whose precautions to follow), that William was in on the agreement. *See United States v. McKee*, 506 F.3d 225, 241 (3d Cir. 2007) ("A defendant's knowledge and intent may be inferred from conduct that furthered the purpose of the conspiracy."). Although thin, there was thus sufficient evidence as to the second element of the charge – that William intentionally joined the conspiracy, knowing of its objective.[58]

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[58] The evidence of the first and third elements of a conspiracy was also sufficient, and William does not meaningfully contest those elements. As to the first, the multiple wiretapped phone calls between John and Pelullo as John made his way to New Jersey, plus John's call with William, supported a finding that an agreement existed for John to deliver a firearm to Scarfo's home, where it would be possessed unlawfully by Scarfo or Pelullo. *See United States v. McKee*, 506 F.3d 225, 238 (3d Cir. 2007) (permitting circumstantial proof of agreement "based upon reasonable

2. Convictions for Wire Fraud and Conspiracy to Commit Wire Fraud[59]

William Maxwell also disputes the sufficiency of the evidence supporting his guilty verdict on sixteen counts of wire fraud and one count of conspiracy to commit wire fraud. Those counts were predicated on William's involvement in two schemes to defraud FirstPlus, namely by causing the company to pay substantial sums to Pelullo's and Scarfo's sham businesses, and by causing the company to purchase other Pelullo- and Scarfo-owned businesses at vastly inflated prices.

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inferences drawn from actions and statements of the conspirators or from the circumstances surrounding the scheme"). And as to the third element, John's purchase of the firearm and his cross-country drive to deliver it are certainly overt acts taken in furtherance of the conspiracy. *See id.* at 243 ("[A]n overt act of one conspirator is the act of all[.]").

[59] Because William Maxwell did not move at trial for a judgment of acquittal supporting these convictions, we review for plain error. *See supra* note 49. We look for "a manifest miscarriage of justice[.]" *United States v. Burnett*, 773 F.3d 122, 135 (3d Cir. 2014) (citation omitted). "[T]he record must be devoid of evidence of guilt or the evidence must be so tenuous that a conviction is shocking." *Id.*

Pelullo and John Maxwell purport to adopt William's arguments on this issue, but William's arguments pertain specifically to his particular conduct supporting the convictions, and adoptions "that concern an argument specific to the arguing party will not be regarded[.]" *United States v. Williams*, 974 F.3d 320, 374 n.41 (3d Cir. 2020).

To prove wire fraud, the government needed to show "(1) the defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of interstate wire communications in furtherance of the scheme." *United States v. Andrews*, 681 F.3d 509, 518 (3d Cir. 2012) (citation, internal quotation marks, and alteration omitted). As for the charge of conspiracy to commit wire fraud, once again that required the government to prove "(1) a conspiracy existed; (2) the defendant knew of it; and (3) the defendant knowingly and voluntarily joined it." *United States v. Wheeler*, 16 F.4th 805, 819 (11th Cir. 2021) (citation omitted). William does not focus his attack on the evidence supporting any particular element; he instead claims that he only did "as directed[.]"[60] (WM Opening Br. at 34-36.) But the trial evidence against him belies that attempted evasion.[61]

There was, for example, plenty of evidence to support the jury's finding that William Maxwell participated in the scheme to defraud FirstPlus by causing the company to funnel money to Pelullo and Scarfo. Evidence at trial showed that FirstPlus gave to William, as "Special Counsel," the authority "to retain any and all consulting firms, in [his] sole discretion" and compensated him $100,000 per month plus expenses for his efforts. (JAD at 1653-56.) With that authority, he retained

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[60] Specifically, he is referring to the jury's verdict with respect to Counts 4 through 16.

[61] William Maxwell tries to resist any such conclusion by pointing to instances in which he provided legitimate legal services for FirstPlus. But evidence of legal conduct does not negate the evidence of other, illegal conduct.

Seven Hills (Pelullo's company) pursuant to a consulting agreement in which Seven Hills was given authority to "run the entire operation of FirstPlus Financial Group and its subsidiaries" in exchange for $100,000 per month plus expenses. (JAC at 3755.) Seven Hills then turned around and retained LANA (Scarfo's company), whereby LANA would receive $33,000 of Seven Hills's $100,000 per month, plus expenses, to perform identical duties as Seven Hills, although it was clear that LANA was not actually going to perform any of those duties, nor was Seven Hills. William was the one who made those payments happen: he received monthly expense reports from Seven Hills and would coordinate and then issue payments for those expenses by wire transfer on behalf of FirstPlus from his attorney trust account.

William also disputes the sufficiency of the evidence of his participation in the purchases of Rutgers and Globalnet.[62] But he fails on that score too. When Pelullo bullied Kenneth Stein into drafting inflated business valuations for Rutgers and Globalnet, it was actually William Maxwell who signed the engagement letter formally hiring Stein, with Pelullo operating behind the scenes. And when Stein was compensated for his services, the payment came via wire transfer from William's law firm account. Moreover, William participated in a discussion that resulted in the inclusion of a false statement in FirstPlus's 10-K regarding its acquisitions of Rutgers and Globalnet from Seven Hills and LANA. When those deals came together, Pelullo had lawyers working on both sides of the transaction. Nevertheless, FirstPlus falsely claimed in its

[62] Specifically, he is referring to the jury's verdict with respect to Counts 17 through 19.

10-K that the acquisitions of Rutgers and Globalnet were "arms-length" deals, notwithstanding William's unsupported assertion to the contrary. (JAD at 2771.)

In sum, evidence of William's participation in the wire fraud counts and the wire fraud conspiracy was neither lacking nor so "tenuous" as to render the convictions "shocking." *United States v. Burnett*, 773 F.3d 122, 135 (3d Cir. 2014). In fact, it was quite the opposite. His convictions on the wire-fraud related counts are amply supported by the trial record.

F. Juror Issues[63]

1. Background

Toward the end of trial and through jury deliberations, the District Court confronted a number of jury-related issues, ranging from scheduling concerns to allegations of juror misconduct.

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[63] Scarfo and John Maxwell set forth the challenges to the jury-related issues that are addressed in this section. Scarfo's argument was specifically adopted by John Maxwell and Pelullo – and it effectively includes everything raised by John – so the challenges to these jury-related issues apply to all three of those Defendants. William Maxwell specifically adopted John's arguments, addressed, *infra*, in Sections V.F.2 and V.F.5, but not the remaining arguments raised only by Scarfo, which he has thus forfeited. *See supra* note 19. We nonetheless refer to the arguments in this section as belonging to "the Defendants" for the sake of simplicity.

By mid-June 2014, closing arguments in the case were under way. On the morning of June 16, the Court and parties anticipated that the summation for one of the defendants, David Adler, would continue where it had left off the previous day. Before the jury was brought in, however, the District Court notified the parties that Juror #8 was "distraught," worrying that "her name is known and, therefore, her family's name is known." (JAC at 13557.) The Court expressed its opinion that Juror #8 should be excused because "[s]he says she can no longer be fair and impartial." (JAC at 13557.) The Court also disclosed that it had spoken with Juror #8 about similar concerns "three or four weeks ago[,]" and, at the time, she had expressed a willingness "to try to see [the case] to the end." (JAC at 13557.) But Juror #8's anxiety continued to grow, and the Court decided that, after she voiced her concerns again, it "d[id]n't see any choice but to let her go." (JAC at 13557.) The government agreed with the Court that Juror #8 should be excused. The Defendants' attorneys did as well, though they requested that she be instructed to not tell the other jurors the reason for her being excused. Their request was heeded: the Court confirmed with Juror #8 that she had not expressed her concerns to other jurors, and, when the Court notified the remaining jurors that Juror #8 had been excused and an alternate would take her place, it did not explain why. The Defendants also asked whether a record had been created to document Juror #8's concerns, which the Court confirmed had been done. The trial record includes the transcript of an in camera conversation with Juror #8 earlier that day, in which Juror #8 asked to be excused for the same reasons relayed by the Court to the parties.

The jury started its deliberations two days later, on June 18. Several days later, another juror had to be excused.

Juror #12 had a prepaid vacation starting on June 28, and pursuant to the Court's earlier promise to honor all jurors' prepaid vacation plans, Juror #12 was to be excused on June 27, a Friday, if the jury was still deliberating. The Court allowed the parties to choose whether to "go with eleven after [Juror #12] leaves or [to] substitute alternate number one in her place." (JAC at 14000.) On the Tuesday of Juror #12's last week, however, the jury asked the Court – and the Court agreed – to give them Fridays off from deliberations in light of employment hardships, which moved up Juror #12's last day to June 26. The Court then notified the parties of the requested schedule change and the effect it would have on the jury composition and deliberations:

> [I]t's the consensus of the jury they not work Friday at all. Now, obviously that means juror number twelve's last day will be Thursday. … They all understand that if they don't have a verdict when 12 leaves, they're going to get an alternate in there, have to start again next week. …
>
> So we're not working Friday and you know tomorrow we're ending early. … It's tense in there, which is not unexpected, given the length of this trial and the issues that they have to decide. We put a terrible burden on them with a hundred and seventy questions in the questionnaire and they seem to be working through it. But it's tense and I don't think you're going to have a verdict this week. I could be wrong, but I don't think so. That's just my guess at this point.

(JAC at 14002-03.)

That Thursday, Juror #12's last day, Scarfo's and Adler's attorneys raised concerns about what the jury believed would be the effect of Juror #12's excusal on the jury composition and its deliberations. Specifically, they were concerned that the jury's knowledge of Juror #12's excusal would put pressure on them to reach a verdict before she left – particularly if they knew that, were an alternate to replace her, their deliberations would have to start anew. Although the attorneys conceded that an instruction to start deliberations anew was required once the alternate was seated, *see* Fed. R. Crim. P. 24(c)(3),[64] they wanted to ensure that the instruction wasn't given until the alternate was actually seated, so as not to put pressure on the jury to reach a verdict before the replacement occurred. In fact, the attorneys were concerned that the Court may have already told the jury about starting anew earlier that week, when the jurors had asked not to deliberate on Fridays.

Upon hearing those concerns, the Court said it was "positive [the jurors] know that there will be a substitution" upon Juror #12's excusal (JAC at 14018), but it was unsure whether the jury had been told that seating an alternate would require their deliberations to begin again. The Court acknowledged, however, that it likely had instructed the alternates "that the deliberations would have to start over again because of a new juror" and that "the new juror has a right to

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[64] Rule 24(c)(3) provides, in relevant part: "If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew."

be heard on all the issues in the case." (JAC at 14020.) Scarfo's attorney then raised another concern: the alternates may have relayed that message to the jurors while being transported to and from the courthouse together. The Court agreed that such conversations were possible but that they would have violated the daily instruction to jurors and alternates to not talk about the case. Ultimately, the Defendants noted for the record their objections "to the extent that this jury understands at this point that they will be required, in the event of a substitution for juror number 12, to restart their deliberations." (JAC at 14021.) Nevertheless, they acknowledged there was likely no in-the-moment remedy to their concerns, and the Court did not attempt to fashion one.

Later that same day, the jury passed a note to the Court: "We are unanimous on some counts, but we are not unanimous yet on others. Are we under a time constraint to reach unanimity?" (D.I. 1115 (single and double underlining in original).) The Court proposed to the parties that the jury simply be told it was under no time constraint. The Defendants supported that idea, but the government requested an instruction that the jury was allowed to reach a partial verdict. After some discussions, the Court opted for the shorter answer and told the jury there was no time constraint. It then excused Juror #12 for her vacation and sent the rest of the jury home for the weekend without receiving a verdict. With the jury gone, the parties agreed to have the Court empanel an alternate juror the following week instead of allowing an eleven-juror deliberation.

Before deliberations began the following Monday morning, Juror #7 had an in camera conversation with the Court to voice her "frustration" with deliberations because

other jurors were "shutting [her] down" when she disagreed with them. (NSA at 18.) Apparently, the other jurors' "minds [were] made up[,]" and they were unwilling to debate certain issues any further. (NSA at 18, 20.) She further explained that "two cli[ques]" had arisen among the jury by virtue of the two different vans that transported jurors and alternates to and from the courthouse each day. (NSA at 18-19.) She was also offended when the alternate who was set to replace Juror #12 was told by another juror, "[W]elcome to hell." (NSA at 19.) Nevertheless, despite her concerns, she assured the Court, when asked, that she could remain fair and impartial as the deliberations continued.

The parties were promptly provided both a transcript of that in camera conversation and an opportunity to react. Manno asked the Court to remind the jurors, "as a cautionary measure," that they could not discuss the case without all twelve jurors present and that they faced no time constraint on their deliberations. But the Court thought the reminders were unnecessary: a warning was given each day that the jury was not to discuss the case outside the jury room, and the Court had told the jurors the prior week, in response to their note, that they were under no time constraints.[65]

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[65] While the parties were on the topic of cliques within the jury, Scarfo's attorney disclosed on the record that, over a month ago, he had seen a juror and an alternate having dinner together at a nearby restaurant but felt that it "was perfectly appropriate, given the fact that friendships develop." (JAC at 14068-69.) On appeal, the Defendants flag that disclosure in a footnote and point out that the Court "did not inquire into the nature of the jurors' outside-the-courthouse relationship" (NS

While the parties were all gathered in the courtroom, Scarfo's attorney took the opportunity to move for a mistrial, arguing that the previous week had put pressure on the jury to reach a verdict before Juror #12's excusal that would spill over into further deliberations, forcing the replacement juror to "be subject to the will of those jurors who are already deliberating." (JAC at 14069-72.) The Court denied that motion because the jury had not delivered any verdicts the prior week and the Court, upon empaneling Juror #12's replacement, would instruct the jury to start deliberations over again. The jury then came out, and, as promised, the Court empaneled Juror #12's replacement and instructed the jury to start its deliberations anew.[66]

The Court also distributed twelve clean verdict sheets to the jurors and allowed them to dispose of any previous sheets or notes if they wanted to. That evening, the jurors handed their old verdict sheets to the Court for disposal. Pelullo's attorney later expressed concern that the old verdict sheets had been in the jury room during their Monday deliberations with the replacement juror and therefore may have influenced the

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Opening Br. at 121 n.41), but they do not argue that the Court committed reversible error.

[66] Just before the replacement juror was empaneled, Pelullo's attorney objected to the replacement (despite agreeing to it the previous Friday), asking the Court to exercise its discretion to allow the existing jury to continue deliberations with only eleven jurors. The Court overruled the objection.

newly constituted jury. He asked the Court to preserve the old verdict sheets for the parties to examine, but the Court explained that they had already been destroyed.

The following morning, Tuesday, July 1, the Court notified the parties that it had received three more notes from jurors with upcoming vacation plans, the earliest of which did not start until July 8. After raising multiple options for accommodating those plans without losing the jury, the Court and the parties agreed simply to let deliberations play out for the week and to defer any decision until the next week, when the vacations would actually start.[67]

More jury issues arose on Wednesday, July 2. An alternate notified the Court in camera of an incident that occurred the previous afternoon as the jurors were transported back to their cars. In the transport van, the alternate heard three jurors discussing one of the Court's instructions and some facts in the case. The alternate told them that the conversation was inappropriate and that they should stop. The three jurors then whispered for the remainder of the trip, so the alternate could not make out what they were saying.

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[67] Scarfo's attorney raised another concern the next day, namely that the jury might again feel pressure to reach a verdict before the next juror's vacation, given that they had previously learned after Juror #12's departure that they had to start deliberations anew when jurors were replaced by alternates. He conceded, however, that he could not propose a good solution to his concern, and the Court did not take any action.

The Court relayed that in camera conversation to the parties and gave them an opportunity to research the issue and consider possible remedies. The government proposed simply giving another reminder to the jury that their deliberations must stay in the jury room. The Defendants, on the other hand, wanted to question the alternate and the three jurors on the conversation in the van. They also wanted to question the entire jury on any other conversations outside the jury room that occurred during trial and deliberations, and on whether they formed opinions from those conversations.[68] The Defendants apparently believed that there were bigger problems unfolding in the jury room, claiming that the combination of the conversation in the van and Juror #7's vocal frustrations earlier in the week raised the possibility that the jury was deliberating in separate cliques and not altogether in the jury room. The Court denied the Defendants' requests, concluding that the negative effects of interrupting deliberations would outweigh the potential benefits of further inquiry, particularly where the alleged misconduct was only an intra-jury communication, not an extra-jury influence.

The jury returned its verdict the next day, July 3.

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[68] Because the Court's conversation with the alternate had not been transcribed, the Defendants also requested that it produce a transcription for all future judge-juror conversations.

2. Disclosure of the District Court's First Conversation with Juror #8[69]

As noted earlier, the District Court disclosed to the parties that Juror #8 feared the disclosure of her identity and potential retaliation, which she voiced to the Court outside the presence of the parties. The Court's disclosure came after its second conversation with Juror #8, so the Defendants now fault the Court for failing to disclose Juror #8's concerns after the first conversation, which occurred "three or four weeks" prior. (JAC at 13557.) According to the Defendants, they were "stripped of an opportunity to be heard" when the issue of Juror #8's fear first arose. (NS Opening Br. at 155.) They claim that, had they been given that opportunity, they would have immediately moved to remove her from the jury. Instead, Juror #8 continued to serve an additional three or four weeks, creating what the Defendants describe as an "overwhelming" "likelihood" that the rest of the jury "learned of Juror #8's fear that harm would inevitably come to her or her family upon rendering a verdict[.]" (NS Opening Br. at 156.) The Defendants therefore claim that the Court's initial silence amounted to a violation of Federal Rule of Criminal Procedure 43, the Due Process Clause of the Fifth Amendment, and the Confrontation Clause of the Sixth Amendment, since it effectively prevented them from being contemporaneously

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[69] We review for harmless error a district court's denial of a criminal defendant's right to be present at every stage of his or her criminal proceeding. *United States v. Toliver*, 330 F.3d 607, 611-12 (3d Cir. 2003).

involved in their trial proceedings. *United States v. Toliver*, 330 F.3d 607, 611 (3d Cir. 2003).

The Defendants are correct that they generally have the "right to be present in the courtroom at every stage of [their] trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (under the Confrontation Clause); *accord United States v. Bertoli*, 40 F.3d 1384, 1397 (3d Cir. 1994) (under the Due Process Clause); Fed. R. Crim. P. 43(a)(2) ("[T]he defendant must be present at … every trial stage[.]"). But that right is not absolute. While we have "stress[ed] the advisability of having counsel present for all interactions between the court and jurors," *United States v. Savage*, 970 F.3d 217, 242 (3d Cir. 2020), "[t]he defense has no constitutional right to be present at every interaction between a judge and a juror[.]" *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (citation and internal quotation marks omitted). To guarantee an absolute right would run counter to the "day-to-day realities of courtroom life" because "[t]here is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Rushen v. Spain*, 464 U.S. 114, 118-19 (1983) (per curiam). Still, "[w]hen an *ex parte* communication [between judge and juror] relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties." *Id.* at 119.

It may have been less than ideal for the District Court not to notify the parties of the first communication with Juror #8 until after speaking with her again three or four weeks later. The Supreme Court has instructed trial courts to "promptly" notify the parties after a communication from a juror. *Id.* at 117 n.2. And it would have been better for the first

communication to have been transcribed, which is "our preference [for] such interactions[.]" *Savage*, 970 F.3d at 242. It was on a relevant topic bearing directly on Juror #8's ability to remain fair and impartial while she heard evidence. *See Rushen*, 464 U.S. at 119 (noting that disclosure is proper when the communication "relates to some aspect of the trial"). Although the Defendants' attorneys did not necessarily need to be present for Juror #8's first communication with the Court, *Gagnon*, 470 U.S. at 526, the better course would have been to consult them after the communication and to give them a chance to participate in the decision-making on how to proceed. *Cf. Toliver*, 330 F.3d at 616 ("[B]y not informing counsel of the jury's note [requesting a specific transcript] before responding, the trial judge foreclosed any opportunity for the defense to argue against submitting the testimony at all, or at least to argue that the transcript should include relevant portions of cross-examination.").

But even if the Court's delay were seen as error, it was harmless. *Id.* at 613. The Defendants' complaint is that the delay gave Juror #8 a chance to express her fears to her fellow jurors and thus infect the entire jury with fearful bias against the Defendants. But they do nothing more than speculate that other jurors learned of Juror #8's fear of retaliation. In fact, the record supports the opposite conclusion: in response to concerns raised by the Defendants' attorneys, the Court "inquire[d] again as to whether or not [Juror #8] made any comments to any of the jurors about the reasons why she can't continue" and confirmed that Juror #8 "ha[d] not made any comments at all to other jurors." (JAC at 13562.) The Defendants' "sheer speculation" to the contrary cannot substantiate their claim that they were harmed by the late

disclosure of the first conversation the Court had with Juror #8. *United States v. Provenzano*, 620 F.2d 985, 997 (3d Cir. 1980).

3. Purported Coercion of the Jury by the District Court[70]

The Defendants question the validity of the verdict in light of supposed coercion of the jury. In particular, the Defendants claim that the jury believed it was under time constraints to reach a verdict after deliberations started, largely brought on by the forthcoming departure of certain jurors for their prepaid vacations. According to the Defendants, the jury believed it would have to start deliberations anew each time a juror was excused, so the jurors felt rushed to reach a verdict before more jurors could be excused. Combining that prospect with the fact that the trial had already lasted months longer than originally promised, the Defendants say the jury was coerced by the District Court into reaching its verdict quickly.

It is true that "a trial judge may not coerce a jury to the extent of demanding that they return a verdict." *United States v. Jackson*, 443 F.3d 293, 297 (3d Cir. 2006) (citation and internal quotation marks omitted). "We will find a supplemental charge to be unduly coercive, however, only where the charge caused the jury to be influenced by concerns irrelevant to their task and where the jury reached its

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[70] "In reviewing jury instructions, we consider the legal standard stated in the instructions de novo, but apply an abuse of discretion standard as to the specific wording of the instructions." *United States v. Boone*, 458 F.3d 321, 326 (3d Cir. 2006).

subsequent verdict for reasons other than the evidence presented to it." *United States v. Boone*, 458 F.3d 321, 326 (3d Cir. 2006) (citation, internal quotation marks, and alterations omitted). Thus, undue coercion from a trial court "generally involve[s] substantial and explicit pressure from the court for a verdict or for a particular result." *Id.* at 327.

That is why instructions are permissible when they, for example, merely remind jurors of their oaths or simply explain that disagreement would result in retrial. *Id.* at 326-27; *cf. Jackson*, 443 F.3d at 298 (coercive charge when the court "goes further and unduly emphasizes the consequences, i.e., time, toil, or expense, that will accompany a failure to arrive at a[] unanimous verdict"). Similarly, when it comes to jurors' understanding of the length of deliberations, we have drawn a distinction between impermissible "*affirmative* coercive conduct" by the court – such as reminding the jury of the approaching weekend – and a permissible failure to address a question about an approaching holiday. *United States v. Graham*, 758 F.2d 879, 883-85 (3d Cir. 1985) ("The impending holiday of and by itself is an insufficient additional factor to render the district court's order for further deliberations coercive.").

With respect to the original jury – before Juror #12 was excused – the Defendants cannot complain of any coerced verdict. For one, the record does not clearly support the Defendants' claim that the jury knew it would have to start deliberations anew after Juror #12 was replaced. The Defendants latch onto the District Court's concession that it told alternates that the deliberations would start anew if they replaced a juror, speculating that the alternates relayed that message to the jurors, in direct contravention of the Court's

order not to discuss the case outside deliberations.[71] But we assume that jurors follow instructions. *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985).

More clear – though still not entirely so – is the District Court's statement to the parties that the jurors "all understand that if they don't have a verdict when [Juror #]12 leaves, they're going to get an alternate in there, have to start again next week." (JAC at 14002.) But regardless of the jury's understanding of the consequences of Juror #12's excusal, the fact remains that it did not return a verdict before Juror #12 was replaced by an alternate and the jury was instructed to start over. The Defendants cannot complain about a coerced verdict when there was no verdict at all at that point. *See Jackson*, 443 F.3d at 297 (supplemental charges were coercive when they "*caused*" the jury to be influenced by irrelevant concerns and reach a verdict for reasons other than the evidence presented (emphasis added) (citation omitted)).

After Juror #12 was replaced, the jury may well have believed that deliberations would have to start anew again if

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[71] And because the Defendants simply speculate that alternates told jurors about starting deliberations anew upon a substitution, we disagree with the Defendants that the Court had an obligation to conduct a hearing to determine the existence of improper contact between jurors and alternates. *See United States v. Console*, 13 F.3d 641, 669 (3d Cir. 1993) (holding that "[t]here is no obligation for the judge to conduct an investigation" if there is no "reason to believe that jurors have been exposed to prejudicial information" (citation and internal quotation marks omitted)).

another juror was replaced. Even though other options were available and considered here,[72] the jurors saw what happened after Juror #12 was replaced – the Court instructed them, pursuant to Federal Rule of Criminal Procedure 24(c)(3),[73] to start over – and they could have "assum[ed] that substitution was the only option[.]" (NS Opening Br. at 123.) But that assumption, without more, does not amount to coercion. Other than complying with Rule 24(c)(3), the District Court undertook no "*affirmative* coercive conduct" that would put pressure on the jury to reach a verdict by a certain deadline. *Graham*, 758 F.2d at 885. The Defendants point to no instance in which the Court imposed any "pressure … for a verdict or for a particular result." *Boone*, 458 F.3d at 327. Without any other indicia of coercion, the Defendants effectively invite us to deem a use of Rule 24(c)(3) to be coercive per se, for the message it sends to a newly constituted jury.[74] We decline that invitation.

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[72] "The Federal Rules of Criminal Procedure currently provide courts three options after excusing a juror for good cause during deliberations: (1) declare a mistrial; (2) proceed with eleven jurors; or (3) seat an alternate." *United States v. James*, 955 F.3d 336, 346 (3d Cir.) (citation, internal quotation marks, and alterations omitted), *cert. denied*, 141 S. Ct. 329 (2020).

[73] *See supra* note 64.

[74] The Defendants emphasize the *lack* of evidence that the jury was *not* coerced by an understanding that deliberations would start anew with another replacement. But the burden of showing error remains with them. *See United States v.*

4. Purported Coercion of the Substituted Juror by Other Jurors[75]

The Defendants also complain about a different type of juror coercion: pressure from other jurors on the alternate who replaced Juror #12. They claim that the alternate confronted "outward hostility from the deliberating jurors" just prior to being empaneled and that the initial jury had already reached unanimity on certain issues before he joined. (NS Opening Br. at 133-34.) Together, those supposed facts leave the Defendants with "little doubt that the Alternate felt pressure to comply with previously made decisions and acquiesce to the majority's previous determinations as to guilt and innocence." (NS Opening Br. at 138.) And that pressure was allegedly reflected in the timing of the verdict, returned three days after the alternate was empaneled, when contrasted against the seven days that the original jury deliberated. The District Court's decision to empanel the alternate under such coercive conditions was an abuse of discretion, claim the Defendants, and so requires reversal.

Juror coercion can indeed arise not only from trial court instructions but also from other jurors who are forced to start deliberations anew with an alternate. *See Claudio v. Snyder*,

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Jackson, 443 F.3d 293, 297 (3d Cir. 2006) ("[The defendant] must show that the Court's action was 'arbitrary, fanciful or clearly unreasonable.'" (citation omitted)).

[75] "We review for abuse of discretion a district court's decision to dismiss a juror and to impanel an alternate juror." *United States v. Glover*, 681 F.3d 411, 422 (D.C. Cir. 2012).

68 F.3d 1573, 1575-77 (3d Cir. 1995); *e.g.*, *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (en banc). When an alternate is empaneled after jury deliberations have commenced, it is not unnatural to worry "that the 11 original regular jurors may have already made up their minds to convict and, together, may coerce the alternate juror into joining in their position." *United States v. Kopituk*, 690 F.2d 1289, 1310 (11th Cir. 1982).

But precautions are available to limit that potentially coercive dynamic. In *Claudio v. Snyder*, we affirmed the denial of habeas relief when, in the petitioner's state-court trial, an alternate replaced a juror after deliberations had commenced. 68 F.3d at 1574, 1577. Although the manner of replacement violated a state procedural rule prohibiting substitutions after the start of deliberations, we followed our sister circuits in holding that, as a federal constitutional matter, such a substitution "does not violate the Constitution, so long as the judge instructs the reconstituted jury to begin its deliberations anew and the defendant is not prejudiced by the substitution." *Id.* at 1575, 1577. We concluded in that case that both requirements were met, noting that the petitioner had not been prejudiced because alternates were chosen in the same manner as regular jurors, the alternates and jurors heard the same evidence and legal instructions, the replacement juror affirmed that she had not been influenced by outside discussions or media reports, and the reconstituted jury deliberated longer than the original jury did. *Id.*

As in *Claudio*, the record reflects no problematic coercion here. Upon empaneling Juror #12's replacement, the Court instructed the new jury to start its deliberations anew, as prescribed by Rule 24(c)(3). And, as in *Claudio*, the alternate

juror was selected in the same manner as the regular jurors, heard the same evidence and instructions,[76] and affirmed that

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[76] Although the Court instructed the newly constituted jury that all previous instructions (which the alternate heard) remained in effect, the Defendants nonetheless complain that the alternate "was not part of the process in formulating [previous] question[s]" from the jury about answering interrogatories for the RICO predicate acts, and he therefore did not understand the Court's responsive instruction to the same degree as the other eleven. (NS Opening Br. at 135-36.) We disagree. The jury's questions were straightforward: (1) whether they had to answer each interrogatory or could stop after finding two were committed, and (2) whether they should leave an interrogatory blank if they were not unanimous as to that interrogatory. The Court's answer was also clear:

> Of course you must consider all the interrogatories and you must attempt to answer all of them unanimously. All 12 of you have to agree on at least two predicate or qualifying acts as to any individual defendant. If you find the Government has proven beyond a reasonable doubt two or more predicate or qualifying acts, then you can find the Government has proven one of the essential elements of Count one which is the RICO conspiracy as to that defendant. Now all 12 of you have to agree on the same predicate or qualifying act or acts. That is, you can't have six agree on one and six agree on another. All 12 have to agree on each predicate

he had not been influenced by external sources. Although the reconstituted jury here did not deliberate for as long as the original jury, it still deliberated for three days before returning a verdict. That amount of time does not persuade us that the original jurors coerced the alternate into agreeing with the counts on which they were apparently unanimous before Juror #12 was excused. *See United States v. Oscar*, 877 F.3d 1270, 1289 (11th Cir. 2017) (noting that nine-hour deliberations after empaneling alternates "indicat[ed] that the jury did in fact renew its deliberations[,]" even though original jury deliberated "for several days"); *cf. Lamb*, 529 F.2d at 1156 (finding coercion of substitute juror when deliberations of reconstituted jury lasted 29 minutes).[77] And although it may

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act you found to have been proven.

(JAC at 13989.) We don't see what special background experience was necessary for the alternate to understand what was asked or what was instructed.

[77] The Defendants rely heavily on *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975), which is distinguishable not only factually, as noted above, but also legally. The Ninth Circuit was in that case interpreting an old, since-amended version of Rule 24(c) that required the court to discharge all alternate jurors when the jury retired to deliberate. *Id.* at 1155; Fed. R. Crim. P. 24(c) advisory committee's note to 1999 amendment. Further, the Ninth Circuit made explicit that it relied *exclusively* on that old version of Rule 24(c) in reversing the conviction. *See Lamb*, 529 F.2d at 1156 n.7 ("While we have noted the obvious coercive effect suggested by the final deliberative period of only twenty-nine minutes, that is not a factor contributing to our conclusion in this case. The

be true that one juror told the replacement, "[W]elcome to hell" (NSA at 19), it is not at all plain that the comment was intended or received as "outward hostility[,]" as the Defendants claim. (NS Opening Br. at 133.) Tone, facial expressions, and body language all matter mightily in communication, and we have none of those to aid us in understanding whether the comment had an edge or was just a joke. Plus, the lack of any juror issues over the next three days of deliberations convinces us that the alternate was not singled out or coerced into a certain verdict, notwithstanding Juror #7's earlier-voiced frustration with the dynamics in the jury room. Our concern here is coercion specifically aimed at the alternate juror, not general tension in the jury room, and we find no evidence in the record of such coercion. *Oscar*, 877 F.3d at 1289.[78]

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mandatory provision of Rule 24 having been violated, the period of time during which the substitute juror participated in the deliberations is essentially irrelevant.").

[78] The Defendants also make much of the fact that the original jurors could keep their notes from the first deliberations and did not return their original verdict sheets until the end of their first full day of deliberations with the replacement juror. Although it perhaps would have been "good practice" to confiscate the old notes and verdict sheets before the newly constituted jury commenced deliberations, "we cannot say that it is required[,]" *United States v. Oscar*, 877 F.3d 1270, 1289 n.18 (11th Cir. 2017), or that, as the Defendants claim, "the substituted alternate would have naturally felt pressure to play catch up and concede certain previously made decisions." (NS Opening Br. at 136.)

5. District Court's Response to Report of Juror Misconduct[79]

Finally, the Defendants fault the District Court for not inquiring, to the degree they wanted, into an alternate's report of a discussion about the case among three jurors while being transported from the courthouse to their cars. As explained above, the District Court questioned the alternate when he brought the issue up, then questioned the marshal who was driving the transportation van, but the Court declined the Defendants' subsequent request to allow them to interview the alternate, the van driver, and the entire jury for any other communications about the case. As a result, the Defendants tell us, the District Court was unable to evaluate the full extent of misconduct and the prejudice to the Defendants, and we, in turn, are unable to engage in meaningful review of the Court's decision and thus must order a retrial.

Generally, "[j]uror questioning is a permissible tool where juror misconduct is alleged, and we have encouraged its use in such investigations." *Boone*, 458 F.3d at 327. But to mitigate "intrusion into jury deliberations[,]" "a district court should be more cautious in investigating juror misconduct during deliberations than during trial, and should be exceedingly careful to avoid any disclosure of the content of deliberations." *Id.* at 329. Thus, we require "substantial evidence of jury misconduct … during deliberations [before] a district court may, within its sound discretion, investigate the

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[79] "This Court reviews a trial court's response to allegations of juror misconduct for abuse of discretion." *Boone*, 458 F.3d at 326.

allegations through juror questioning or other appropriate means." *Id.* Further, as we stated in *United States v. Resko*, "there is a clear doctrinal distinction between evidence of improper *intra*-jury communications and *extra*-jury influences[,]" as the latter "pose a far more serious threat to the defendant's right to be tried by an impartial jury." 3 F.3d 684, 690 (3d Cir. 1993). That distinction exists because, with intra-jury communications, "the proper *process* for jury decisionmaking has been violated, but there is no reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial." *Id.*

The Defendants rely heavily on *Resko*, where, after a juror informed a court officer that jurors were discussing the case during recesses and while waiting in the jury room, the court discovered that all twelve jurors had engaged in such discussions. *Id.* at 687-88. Although the misconduct involved merely intra-jury communications, we held that it was an abuse of discretion for the district court to rely solely on a brief questionnaire asking each juror whether they had discussed the case (everyone answered "yes") and, if so, whether they had formed an opinion from those discussions (everyone answered "no"). *Id.* at 691. By stopping there, we held, the district court left unanswered critical questions about the nature and extent of those discussions. *Id.* at 690-91.

But the key difference between *Resko* – "a difficult case" in "which our holding [was] limited," *id.* at 690, 695 – and this case is that, here, the evidence of intra-juror communications was limited to an isolated event among just a few jurors. In *Resko*, the triggering complaint came from a juror who broadly claimed, one week into trial, that jurors discussed the case. *Id.* at 687. The court then learned that all

jurors engaged in such discussions. *Id.* at 688. Here, by contrast, an alternate notified the court of one specific discussion among three jurors, which occurred over six months after trial commenced. Given the narrow scope of the alternate's allegations, the Court was within its discretion to question only the alternate and the marshal about the particular incident, but to deny the Defendants' requests to question the entire deliberating jury about all communications dating back to the start of trial. *Cf. Boone*, 458 F.3d at 330 (no abuse of discretion to question only the juror who was allegedly refusing to deliberate). Further distinguishing this case from *Resko*, the alleged misconduct here occurred after deliberations had begun, when the District Court necessarily was more hesitant to intrude. *Boone*, 458 F.3d at 329. It was certainly within its discretion to consider the potential effect of that intrusion and so to conduct a more limited and targeted inquiry into the allegation.

VI. SENTENCING ISSUES

Finally, Pelullo and John Maxwell challenge their sentences. First, Pelullo argues that the District Court erred procedurally and substantively in sentencing him to 360 months' imprisonment.[80] Second, Pelullo and John Maxwell claim that holding them jointly and severally liable for the total amount of the forfeiture order was improper under the Supreme Court's decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017). Third, Pelullo challenges the forfeiture of his Bentley automobile and yacht, contending that the government's delay

[80] Scarfo adopts one of Pelullo's procedural-error arguments. *See infra* note 84.

in seeking forfeiture after it seized those assets violated his statutory and due process rights. While we will vacate the forfeiture piece of John Maxwell's sentence and remand for resentencing, Pelullo has failed to show error on any of his sentencing claims.

A. Pelullo's Sentencing Challenges[81]

Pelullo complains of his thirty-year sentence, although his crimes exposed him to a potentially lengthier period of incarceration.[82] When reviewing a sentence, we "first consider whether the district court committed procedural error, such as 'improperly calculating[] the Guidelines range[,]'" and then we assess whether the sentence was substantively reasonable. *United States v. Seibert*, 971 F.3d 396, 399 (3d Cir. 2020) (first alteration in original) (quoting *United States v. Tomko*, 562

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[81] We review the District Court's factual findings for clear error, its interpretation of the guidelines *de novo*, and its application of the guidelines for abuse of discretion. *United States v. Seibert*, 971 F.3d 396, 399 (3d Cir. 2020); *United States v. Tomko*, 562 F.3d 558, 567-68 (3d Cir. 2009) (en banc).

[82] The guidelines recommended a life sentence, but the District Court could not have set that lengthy a sentence for any one count because the highest maximum sentence for any of Pelullo's convictions was thirty years. U.S.S.G. § 5G1.1(c). In theory, the Court could have set Pelullo's individual sentences on his various counts to run consecutively rather than concurrently, *id.* § 5G1.2(b)-(d), which would have authorized a sentence as high as 445 years.

F.3d 558, 567 (3d Cir. 2009) (en banc)). Pelullo insists that the District Court committed three "significant procedural errors" in its analysis, and he critiques the substantive reasonableness of his sentence as well.[83] (SP Opening Br. at 106.)

1. Guidelines Sentencing Range Calculation

Pelullo argues that the Court erred in calculating his guidelines range, claiming that it applied the over-$14 million securities fraud loss to punish him for the bank fraud count.[84]

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[83] Pelullo adds another objection in his reply brief, alleging that the District Court failed to conduct his sentencing in "the proper order[.]" (SP Reply Br. at 39-41.) But he did not raise that issue in his opening brief, so it is forfeited. *United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005).

[84] Scarfo specifically adopts Pelullo's argument as to this issue. *See supra* note 19. The District Court calculated Scarfo's total offense level following the same grouping approach that it took in sentencing Pelullo and reached a level of 43, the same one that applied to Pelullo. We thus treat Pelullo's argument as applying to Scarfo as well. Nonetheless, that argument fails for the reasons discussed herein, so Scarfo, like Pelullo, is not entitled to relief.

Scarfo also attributes error to what he says was the District Court's failure to "consider either of his sentencing memoranda[.]" (NS Opening Br. at 183 n.61.) The record reflects that the Court was unable to review, ahead of Scarfo's sentencing hearing, a submission from his counsel that only came in earlier that day. The Court, however, gave Scarfo's

Those assertions reflect a miscomprehension of the guidelines.

To calculate the guidelines range "[w]hen a defendant has been convicted of more than one count," the sentencing court must assemble closely related counts into what are called "Groups." U.S.S.G. § 3D1.1(a). The court then "[d]etermine[s] the offense level applicable to each Group" and "the combined offense level applicable to all Groups taken together[.]" *Id.* "The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level" and then increasing that offense level based on the number of "Units." U.S.S.G. § 3D1.4. A Unit is a sentencing construct that, according to § 3D1.4 of the guidelines, functions like this: the court "[c]ount[s] as one Unit the Group with the highest offense level" and adds "one additional Unit for each Group that is equally serious or from 1 to 4 levels less serious" than the highest-level Group and "one-half Unit [for] any Group that is 5 to 8 levels less serious[,]" while "any Group that is 9 or more levels less serious than the Group with the highest offense level" does not generate any Units. *Id.* The total number of Units thus informs how many extra levels are added to the offense level of the highest-level Group, based on a formula in § 3D1.4, to arrive at a combined offense level.[85]

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counsel an opportunity to raise the issues from that memorandum at the hearing and said that counsel could "put anything you want on the record and if I can respond, I will." (JAF at 6-7.)

[85] Specifically, if the total number of Units is 1, no extra levels are added; if it is 1.5, one level is added; if it is 2, two

Here, the District Court split the twenty-four counts of which Pelullo was convicted into five Groups:

Group	Description	Offense Level
1	Takeover of FirstPlus and accompanying securities fraud	43[86]
2	Bank fraud	23
3	Obstruction of justice	23
4	Extortion	31
5	Firearm transfer and possession	24

Although Pelullo focuses on the fact that his Group 2 convictions had a lower offense level than Group 1, the District Court correctly looked for the Group with the *highest* offense level, consistent with the guidelines' instructions, and that was Group 1. *See* U.S.S.G. §§ 3D1.1(a), 3D1.4. Since all the other Groups' offense levels were at least 9 levels below that of Group 1, the number of Units was just one, which did not

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levels are added; if it is 2.5-3, three levels are added; if it is 3.5-5, four levels are added; and if it exceeds 5, five levels are added. U.S.S.G. § 3D1.4.

[86] While the PSR erroneously calculated Pelullo's Group 1 offense level as 42, the District Court applied the correct level of 43. The sentencing hearing transcript suggests that the Court mistakenly stated (or a transcription error stated) a level of 33, but the Court's calculation of a recommended sentence of life imprisonment reflects that it understood the total offense level to be 43.

require additional level increases. *Id.* § 3D1.4. Accordingly, Pelullo's total offense level was correctly calculated as 43.

Pelullo's claim that the District Court somehow cross-applied the securities-related loss to the bank fraud claim is spurious. The Court appropriately divided the offenses into Groups and took the offense level of the highest-scoring Group – which itself factored in an enhancement for the $14 million loss FirstPlus suffered – as Pelullo's total offense level. That number, "a single offense level that encompasse[d] all the counts of which [Pelullo was] convicted[,]" U.S.S.G. ch.3, pt. D, introductory cmt., was then used to generate a single recommended sentencing range covering all of Pelullo's offenses.[87] There was no error in how the District Court applied the guidelines' provisions governing cases with convictions on multiple counts.

2. Loss Amount Enhancement

Next, Pelullo objects to the District Court's calculation of the loss amount. The Court adopted the presentence report's recommendation and found that the securities fraud offense Group – on which the Court based the total offense level –

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[87] After argument, Pelullo brought to our attention *United States v. Okulaja*, 21 F.4th 338, 347-50 (5th Cir. 2021), which addressed whether relevant conduct for which the defendant was not indicted could be considered in calculating offense levels. Here, though, the District Court did not rely on any conduct that was irrelevant to the Group 1 securities fraud-based offenses that Pelullo was convicted of when determining the total offense level.

resulted in more than $14 million in loss, triggering a 20-level enhancement under U.S.S.G. § 2B1.1(b)(1)(K). Pelullo claims that finding a loss amount of more than $14 million was a factual error, that "he received far less" than $14 million from his participation in the scheme, and that the calculation did not account for the benefits he conferred on FirstPlus. (SP Opening Br. at 113-15, 118-24.) Calculated correctly, Pelullo says, the loss amount would have instead led to only a 16-level enhancement.

In theft cases, of which this case is one variety, a court calculates the offense level by looking to the "loss" to victims, U.S.S.G. § 2B1.1(b)(1), which the government must prove by a preponderance of the evidence. *United States v. Evans*, 155 F.3d 245, 253 (3d Cir. 1998). The court "need only make a reasonable estimate of the loss." U.S.S.G. § 2B1.1 cmt. n.3(C). Here, the District Court chose to calculate the loss by calculating the change in FirstPlus's value caused by the conspirators. FirstPlus started with roughly $10 million in its bank accounts; received $4.4 million in bankruptcy payments over the course of the scheme; and had less than $2,000 left when law enforcement arrived, resulting in a net loss of almost $14.2 million, once a loan Pelullo made to the company is taken into account.[88] The cash outflows included the millions

[88] According to the PSR, the total diminution in the value of FirstPlus's accounts was $14,440,798. The discrepancy between that amount and the nearly $14.2 million final loss amount is due, it seems, to a $260,000 loan Pelullo made to the company, for which he received a credit in the loss-amount calculation. The record is not entirely clear as to how the $14.44 million diminution was calculated, but no party has

that FirstPlus paid to Seven Hills and LANA for low- or no-value assets, as well as the fraudulent consulting and legal fees it paid to Seven Hills, LANA, and William Maxwell. Those losses were supported by testimony and evidence admitted at trial. Indeed, Pelullo's own expert witness assumed that the $14 million amount was correct – describing it as "a conservative number" for the total amount of money that "walked out the door" – and Pelullo never presented any alternative loss calculations. (JAE at 186, 222.)

Pelullo nevertheless challenges that finding by asserting that the FBI agent who provided evidence of the loss at trial only accounted for roughly $11.2 million withdrawn from FirstPlus's accounts. But any distinction between $11 and $14 million would not help Pelullo, as the guidelines impose a 20-level enhancement for all thefts of between $9.5 and $25 million. U.S.S.G. § 2B1.1(b)(1)(K); *cf. United States v. Isaac*, 655 F.3d 148, 158 (3d Cir. 2011) (holding that error in calculating defendant's criminal history score was harmless because "the same Guideline range would have applied" with the correct number). In any event, because $14 million is a fair estimate of the amount FirstPlus "actually ended up losing[,]" *United States v. Kopp*, 951 F.2d 521, 531 (3d Cir. 1991), *abrogated on other grounds as recognized by United States v. Corrado*, 53 F.3d 620 (3d Cir. 1995), and was backed up by largely uncontested evidence at trial, we cannot say that the District Court clearly erred in selecting that figure.

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argued that the District Court clearly erred in accepting that amount as the change in value of FirstPlus's accounts over the course of the conspiracy.

Pelullo next suggests that he should only have been held liable for the approximately $2.6 million he personally gained from the scheme. That theory, though, is a nonstarter, as the guidelines expressly advise courts to not rely on a defendant's gain, unless unable to calculate the victim's loss. U.S.S.G. § 2B1.1 cmt. n.3(B).

Third, Pelullo contends that he was entitled to credit, and an accompanying reduction in the loss amount, for the services he provided FirstPlus. While a $260,000 loan that Pelullo made to FirstPlus was credited as an offset to the total loss amount, *supra* note 88, he says his loss amount should have been reduced further, down to $8.8 million. He rightly points out that a defendant can have the amount of loss from a theft reduced by the fair market value of any legitimate services he rendered to his victim. *See* U.S.S.G. § 2B1.1 cmt. n.3(E). At trial, Pelullo sought to establish the value of his work through the expert testimony of an accountant who calculated various offsets. The District Court, however, rejected those calculations, which were based on FirstPlus's SEC filings from 2007 and 2008 and on the faulty assumption that FirstPlus was operated as a legitimate business. There was "no question[,]" as the Court saw it, that the fraudulent SEC filings were "phony from day one[,]" and so it refused to "credit [the expert's] testimony … because he relie[d] on phony information." (JAE at 239.) Pelullo offers us no reason to disturb that finding. *See Ramsay v. Nat'l Bd. of Med. Exam'rs*, 968 F.3d 251, 261 (3d Cir. 2020) (findings of fact are only clearly erroneous if they are "completely devoid of minimum evidentiary support displaying some hue of credibility" or they "bear[] no rational relationship to the supportive evidentiary data" (citation omitted)). And since he could not provide "estimates of the value of [his] work" other than those based on the fraudulent

SEC filings, the District Court properly declined to reduce the loss amount. *United States v. Washington*, 715 F.3d 975, 985 (6th Cir. 2013).

Finally, Pelullo also says that his loss amount should have been reduced to account for business expenses he incurred while running the company. A defendant may receive a credit for expenses he incurred while providing "legitimate" services, "even amid [his] fraudulent conduct[.]" *United States v. Blitz*, 151 F.3d 1002, 1012 (9th Cir. 1998) (citation omitted). He may not, however, receive "a credit for money spent perpetuating a fraud." *United States v. Whatley*, 133 F.3d 601, 606 (8th Cir. 1998). That was the case here, as the takeover of FirstPlus "was a complete and utter fraud from day one." (JAE at 240.) The scheme sought to bleed FirstPlus dry but to keep the company going just long enough to collect a few more bankruptcy payments. Any real work Pelullo performed amid those efforts served solely to give the operation a patina of legitimacy so as to keep the scheme running. That was no "service[]" rendered to the company by the conspirators; it was all just "part of the fraudulent scheme." *United States v. Lacerda*, 958 F.3d 196, 215 (3d Cir. 2020); *accord Blitz*, 151 F.3d at 1012. The District Court did not err in refusing to lower the loss amount.

3. Victim Number Enhancement

Pelullo also argues that the District Court erred in treating each FirstPlus shareholder as a victim of Pelullo's offenses. Because FirstPlus had 1,254 shareholders when the Defendants' fraudulent scheme took place, Pelullo received a six-level enhancement for offenses "involv[ing] 250 or more victims[.]" U.S.S.G. § 2B1.1(b)(2)(C). He claims, however,

that the FirstPlus shareholders were not victims, since the government did not prove that the fraud made them lose money or made the stock price drop. That argument is spectacularly wrong.

A victim is "any person who sustained any part of the actual loss determined under subsection (b)(1)." U.S.S.G. § 2B1.1 cmt. n.1. A person counts as a victim if he "suffer[ed] permanent 'pecuniary harm,'" which is "harm that is monetary or that otherwise is readily measurable in money." *United States v. Smith*, 751 F.3d 107, 118 (3d Cir. 2014) (quoting U.S.S.G. § 2B1.1 cmt. n.3(A)(iii)). FirstPlus's shareholders easily fit that definition. After its subsidiary emerged from bankruptcy, FirstPlus was receiving substantial periodic payments based on those proceedings. When the Defendants took over the company, they diverted and appropriated the funds for themselves, depriving the shareholders "of the waterfall payments that they were entitled to[.]" (JAF at 44.) As the District Court observed, once the fraud was revealed, FirstPlus fell into bankruptcy and its shares were left with "no value whatsoever." (JAF at 45.)

Pelullo quarrels with those findings by parsing the timeline finely. He notes that FirstPlus's stock price was higher when he resigned than when he first joined, and he faults the District Court for failing to compare the stock price before and after the fraud. Neither of those points acknowledges the fundamental effect that the fraudulent scheme had on FirstPlus and its shareholders. The Defendants extracted millions of dollars from a public company, all the while covering up their fraud. All "who bought or held stock when the false information was disseminated by [Pelullo] suffered a loss," *United States v. Peppel*, 707 F.3d 627, 647 (6th Cir. 2013),

especially once the scheme rendered FirstPlus "insolven[t]" and forced it into bankruptcy. (JAF at 45.) No creative measurement of the stock price at different times, no willful ignorance of the effect that the misrepresentations had on the stock price, and no attempts to blame the company's downfall on the government's discovery of the fraudulent scheme can rewrite reality. Pelullo fails to identify any errors at all, let alone clear errors, in the District Court's findings of fact.[89]

Finally, Pelullo claims that the shareholders "acquiesce[d]" in the conspirators' misdeeds. (SP Opening Br. at 125.) During the Defendants' tenure, the shareholders let FirstPlus sue to terminate a trust that allocated more than 50% of the waterfall payments to them, and they later voted against issuing dividends. Pelullo says those actions amounted to acquiescence in the fraudulent enterprise he and his co-conspirators ran. But people can't consent to something they don't know is happening. The conspirators kept investors in the dark, hiding Pelullo's and Scarfo's involvement, William Maxwell's hefty fees, and the sham character of the

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[89] Pelullo objects that the government only called one shareholder to testify at trial. That did not prevent the District Court from also counting as victims the rest of the shareholders who bought or held stock while the scheme was ongoing. Other evidence in the record showed that they suffered loss, as their shares became worthless and they were deprived of their portion of the waterfall payments. *See, e.g.*, *United States v. Naranjo*, 634 F.3d 1198, 1206, 1214 (11th Cir. 2011) (affirming district court's "reli[ance] at sentencing on estimates of the number of victims and amount of losses" based on investigator's testimony).

transactions FirstPlus was forced to enter. The District Court did not err in counting FirstPlus's shareholders as victims. They obviously were.

4. Substantive Reasonableness

Finally, Pelullo attacks the substantive reasonableness of his sentence, arguing that the District Court imposed "a 30-year sentence for what amounted to, at most, a $2,921.14 loss to [a] bank."[90] (SP Opening Br. at 109.) That grossly mischaracterizes and minimizes the nature of Pelullo's misconduct. He was found guilty of twenty-four different offenses that harmed more than 1,000 victims and cost a public company many millions of dollars. A thirty-year sentence was eminently reasonable, given the breadth and seriousness of the criminal conduct of which he was convicted. Pelullo's assertion to the contrary has plenty of brass but no merit.

B. Joint and Several Forfeiture Liability Following *Honeycutt*[91]

1. Background

The District Court imposed a $12 million forfeiture order and held the Defendants jointly and severally liable for

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[90] Pelullo does not explain how he calculated that supposed loss amount.

[91] When an appellant raises an issue for the first time on appeal, we review for plain error. *United States v. Saada*, 212 F.3d 210, 223 (3d Cir. 2000). That holds true even when the

the total amount. While this appeal was pending, the Supreme Court issued its decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), holding that 21 U.S.C. § 853(a)(1), a forfeiture provision similar to the ones relied on by the government here, did not permit the imposition of joint and several liability on a defendant for property that he did not acquire. Pelullo and John Maxwell now argue, for the first time on appeal, that the imposition of joint and several liability was erroneous under *Honeycutt*. [92] They contend that *Honeycutt* precludes the imposition of joint and several liability in a forfeiture judgment. True enough, to a degree, but only John is entitled to relief. While we accept the government's concession that imposing joint and several liability on John was improper, we conclude that Pelullo – as a leader of the conspiracy – cannot show plain error in the District Court's forfeiture order and, as such, remains liable for the full $12 million.

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issue may have become apparent only with the emergence of new precedent. *See United States v. Nasir*, 982 F.3d 144, 160 (3d Cir. 2020) (en banc), *cert. granted, judgment vacated on other grounds*, 142 S. Ct. 56 (2021). "Whether the alleged error is plain is evaluated based on the law at 'the time of appellate review[,]' regardless of whether it was plain at the time of trial." *Id.* (alteration in original) (quoting *Henderson v. United States*, 568 U.S. 266, 269 (2013)). The test for plain error is set forth, *supra*, in note 49.

[92] Although Pelullo separately briefs this issue, he also specifically adopts arguments made by John Maxwell. Because neither Scarfo nor William Maxwell specifically adopt those arguments, they have forfeited them.