

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TERRY CHRISTENSEN,
Defendant-Appellant.

No. 08-50531

D.C. No.
2:05-cr-01046-
DSF-8

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY PELLICANO,
Defendant-Appellant.

No. 08-50570

D.C. No.
2:05-cr-01046-
DSF-1

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARK ARNESON,
Defendant-Appellant.

No. 09-50115

D.C. No.
2:05-cr-01046-
DSF-7

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYFORD EARL TURNER, AKA
Seal B,
Defendant-Appellant.

No. 09-50125

D.C. No.
2:05-cr-01046-
DSF-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ABNER NICHERIE,
Defendant-Appellant.

No. 09-50128

D.C. No.
2:05-cr-01046-
DSF-6

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEVIN KACHIKIAN,
Defendant-Appellant.

No. 09-50159

D.C. No.
2:05-cr-01046-
DSF-3

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYFORD EARL TURNER, AKA
Seal B,
Defendant-Appellant.

No. 10-50434

D.C. No.
2:05-cr-01046-
DSF-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARK ARNESON,
Defendant-Appellant.

No. 10-50462

D.C. No.
2:05-cr-01046-
DSF-7

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY PELLICANO, AKA Seal A,
Defendant-Appellant.

No. 10-50464

D.C. No.
2:05-cr-01046-
DSF-1

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TERRY CHRISTENSEN,
Defendant-Appellant.

No. 10-50472

D.C. No.
2:05-cr-01046-
DSF-8

OPINION

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted
November 4, 2013—Pasadena, California

Filed August 25, 2015

Before: Raymond C. Fisher and Richard R. Clifton, Circuit
Judges, and Dana L. Christensen, Chief District Judge.*

Opinion by Judge Clifton;
Partial Concurrence and Partial Dissent by Chief District
Judge Christensen

* The Honorable Dana L. Christensen, United States Chief District Judge
for the District of Montana, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed in part, vacated in part, and remanded, in a case in which six defendants were convicted of multiple offenses stemming from a widespread criminal enterprise offering illegal private investigation services in Southern California.

The panel vacated Rayford Earl Turner's conviction for aiding and abetting computer fraud, Mark Arneson's convictions for computer fraud and unauthorized computer access, and Anthony Pellicano's convictions for aiding and abetting both computer fraud and unauthorized computer access. The panel also vacated Abner Nicherie's conviction for aiding and abetting a wire interception. The panel affirmed the rest of the convictions, including the RICO convictions of Pellicano, Arneson, and Turner for operating Pellicano Investigative Agency's (PIA's) criminal enterprise, attorney Terry Christensen's convictions based on hiring that enterprise to illegally wiretap a litigation opponent, and Kevin Kachikian's convictions for his role in PIA's wiretapping. The panel vacated the sentences imposed on the defendants whose convictions were vacated in part – Pellicano, Arneson, and Turner – and remanded for resentencing on their remaining, affirmed convictions. The panel remanded for further proceedings on the vacated counts of conviction, including the possibility of retrial, as may be appropriate, on those charges.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Regarding Pellicano's, Arneson's, and Turner's convictions for racketeering and RICO conspiracy, the panel (1) held that the government presented sufficient evidence from which the jury could conclude that Arneson and Turner knew about the essential nature of their illegal enterprise with Pellicano; and (2) rejected Pellicano and Arneson's challenges to (a) the bribery predicate acts upon which their RICO convictions rest and (b) Pellicano's challenge to the predicate acts of honest services fraud.

The panel held that the jury instructions defining both computer fraud and unauthorized computer access of United States agency information under the Computer Fraud and Abuse Act (CFAA) were plainly erroneous, and that the error was prejudicial. The panel therefore vacated Turner's conviction for aiding and abetting computer fraud, Arneson's convictions for computer fraud and unauthorized computer access, and Pellicano's convictions for aiding and abetting both computer fraud and unauthorized computer access. The panel rejected Turner, Arneson, and Pellicano's contention that their convictions for identity theft and racketeering cannot stand once the CFAA computer fraud and unauthorized computer access convictions have been set aside.

The panel rejected Kachikian's challenges to the jury instructions which, he argued, required reversal of his convictions for conspiracy to intercept wire communications and manufacturing and/or possessing a wiretapping device.

The panel vacated Nicherie's conviction for aiding and abetting wiretapping. The panel held that one of the government's two theories was improper, and that although there was sufficient evidence to support a conviction on the

other theory, the evidence was not so overwhelming to conclude that the error was harmless.

The panel held that the substantial majority of recordings that Pellicano secretly made of his conversations with Christensen did not qualify for protection under the attorney-client privilege, that production of the limited portions that might have been privileged was harmless, and that the recordings did not qualify for production under the work product doctrine.

The panel held that the district court's findings regarding a juror's untruthfulness and unwillingness during deliberations to follow the law were not clearly erroneous, that those findings provided cause for dismissing the juror, and that neither dismissal of the juror nor the denial of the defendants' motion for a new trial was an abuse of discretion.

Affirming Christensen's sentence, the panel rejected the defendant's challenges to an upward adjustment for supervisory role, to an enhancement for economic gain, and to an adjustment for abuse of a position of trust. The panel held that Christensen's sentence, which included an upward departure for substantial harm not accounted for in the Sentencing Guidelines, was not substantively unreasonable.

The panel rejected Pellicano's argument that the matter should be assigned to a different district judge.

The panel held that the district court did not err in ordering Pellicano, Turner, and Arneson to forfeit \$2,008,250, which represents the proceeds they obtained from their RICO enterprise. The panel rejected the defendants' argument that they had a right to a jury trial on the forfeiture

amount, that the district court used the incorrect standard of proof, that the district court incorrectly calculated the amount, and that liability should not have been joint and several.

The panel addressed others issues in a concurrently filed memorandum disposition.

Concurring in part and dissenting in part, Chief District Judge Christensen wrote that the district court erred by dismissing the juror based on a determination that he was not credible and had lied to the court on an unrelated issue concerning his views on federal tax laws.

COUNSEL

Seth M. Hufstedler (argued), Dan Marmalefsky (argued), and Benjamin J. Fox, Morrison & Foerster LLP, Los Angeles, California, for Defendant-Appellant Terry Christensen.

Steven F. Gruel (argued), San Francisco, California, for Defendant-Appellant Anthony Pellicano.

Chad S. Hummel (argued) and Emil Petrossian, Manatt, Phelps & Phillips LLP, Los Angeles, California; Becky Walker James, Los Angeles, California, for Defendant-Appellant Mark Arneson.

Karen L. Landau (argued), Oakland, California, for Defendant-Appellant Rayford Lee Turner.

Katherine Kimball Windsor (argued), Pasadena, California, for Defendant-Appellant Abner Nicherie.

Benjamin L. Coleman (argued), Coleman & Balogh LLP, San Diego, California, for Defendant-Appellant Kevin Kachikian.

André Birotte Jr., United States Attorney, Central District of California, Robert E. Dugdale, Chief, Criminal Division, Kevin M. Lally (argued) and Joshua A. Klein (argued), Assistant United States Attorneys, for Plaintiff-Appellee.

OPINION

CLIFTON, Circuit Judge:

Six defendants appeal their criminal convictions stemming from a widespread criminal enterprise offering illegal private investigation services in Southern California. At the center of this criminal enterprise was Pellicano Investigative Agency, known as PIA. Defendant Anthony Pellicano operated PIA, ostensibly as a legitimate private investigation agency. But many of PIA's investigation methods were, in fact, illegal. Pellicano bribed Los Angeles area police officers, such as Defendant Mark Arneson, for access to confidential law enforcement databases. He orchestrated wiretaps on investigative targets so he could overhear their conversations with friends, family, medical professionals, and legal counsel. He paid a telephone company employee, Defendant Rayford Turner, for the confidential technical information he needed for the wiretaps, and hired a software developer, Defendant Kevin Kachikian, to create custom software to record the conversations Pellicano overheard. At the height of PIA's success, scores of people retained PIA for its often illegal services. Most pertinent to this case, Defendant Terry Christensen, an attorney, hired PIA to assist in litigation in which he represented his client, Kirk Kerkorian, against Lisa Bonder. Pellicano wiretapped Bonder's telephone and frequently discussed with Christensen what he heard. Defendant Abner Nicherie also hired PIA to wiretap the husband of a woman whose business Nicherie hoped to take over.

PIA's criminal enterprise began to unravel in 2002, when the FBI investigated PIA's attempt to intimidate a reporter, Anita Busch. This investigation led to a search, pursuant to a

search warrant, of PIA's offices. By 2003, the government was investigating the widespread scope of PIA's illegal activities. A grand jury returned an indictment charging Pellicano, Arneson, and Turner with crimes under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, for their roles in operating PIA's criminal enterprise. The indictment also variously charged Defendants with other crimes, including wiretapping, computer fraud, honest services fraud, identity theft, and conspiracy offenses. The case proceeded to two separate jury trials, which resulted in the convictions of all six Defendants on at least some counts. Defendants appeal their convictions.

In this opinion, we vacate Turner's conviction for aiding and abetting computer fraud, Arneson's convictions for computer fraud and unauthorized computer access, and Pellicano's convictions for aiding and abetting both computer fraud and unauthorized computer access. We also vacate Nicherie's conviction for aiding and abetting a wire interception. The rest of the convictions are affirmed, including the RICO convictions of Pellicano, Arneson, and Turner for operating PIA's criminal enterprise, Christensen's convictions based on hiring that enterprise to illegally wiretap Lisa Bonder, and Kachikian's convictions for his role in PIA's wiretapping. We vacate the sentences imposed on the defendants whose convictions were vacated in part—Pellicano, Arneson, and Turner—and remand for resentencing on their remaining, affirmed convictions. We remand for further proceedings on the vacated counts of conviction, including the possibility of retrial, as may be appropriate, on those charges.

Defendants have raised a staggering number of issues on appeal. Their briefs—fourteen in all—totaled over 900

pages.¹ Many of the issues raised on appeal do not warrant discussion in a precedential opinion. We thus address many issues in a concurrently filed memorandum disposition, in which we affirm on all the issues covered in the memorandum. In this opinion, we address those issues that merit an extended discussion.

I. Background

These consolidated appeals arise out of the prosecution in two separate trials of private investigator Defendant Anthony Pellicano and several individuals associated with him. Pellicano owned and operated Pellicano Investigative Agency (“PIA”). He provided investigation services to clients in connection with litigation and personal matters.

The factual core of this case is simple: PIA’s investigations were often illegal. Pellicano wiretapped investigative targets, for instance, and used proprietary software called “Telesleuth,” which Defendant Kevin Kachikian developed and updated over the course of several years, to record wiretapped phone conversations. Pellicano related the content of those conversations (e.g., by playing recordings) to clients, who often used what they learned to gain an advantage in litigation.

To get the technical information he needed to install the wiretaps, Pellicano paid Defendant Rayford Turner, a telephone company technician, to obtain cable-pairing data from the telephone company, SBC. Turner himself did not have access to SBC databases, but he paid other SBC

¹ The government was similarly verbose. Its answering brief was nearly 700 pages.

employees, non-parties Teresa Wright and Michele Malkin, to access the databases and give Turner the information PIA wanted. Turner then gave the information to Pellicano and implemented wiretaps. Pellicano and PIA also paid an LAPD officer, Defendant Mark Arneson, to search confidential police databases for information about various investigative targets and provide that information to PIA.²

PIA's activity on behalf of client Robert Pfeifer concisely illustrates how Pellicano, Arneson, and Turner operated the illegal investigations. Pfeifer, not named as a party in this case, retained PIA in July 2000 to influence his former girlfriend, Erin Finn, to recant deposition testimony about Pfeifer's drug use. The evidence established that Pellicano paid Arneson \$2,500, and that Arneson accessed law-enforcement databases to acquire criminal history and/or information from the Department of Motor Vehicles (DMV) on Pfeifer, Finn, and Finn's friends and associates. Arneson then gave this information to Pellicano. Turner provided Pellicano with confidential subscriber information from SBC, and a wiretap on Finn was initiated. The wiretap revealed extensive information about Finn's business, which Pfeifer used to get her to recant her testimony.

Based on Pfeifer's case and many others, the grand jury returned an indictment charging Pellicano, Arneson, and Turner with RICO violations. The indictment alleged that they formed an enterprise for "the common purpose of earning income through the conduct of diverse criminal activities including, but not limited to, illegal wiretapping, unauthorized access of protected computers, wire fraud,

² Pellicano also paid at least one other police officer for information from police databases. That person was not charged in this action.

bribery, identity theft, and obstruction of justice.” The predicate acts included bribery, honest services wire fraud, and identity theft. Kachikian, the Telesleuth developer, was not charged with RICO violations; he was charged with conspiracy to intercept, interception of communications, and possession of a wiretapping device.

The government also prosecuted two of PIA’s clients: Defendants Abner Nicherie and Terry Christensen. Abner Nicherie hired Pellicano to wiretap Ami Shafir, the husband of Sarit Shafir, whose business Nicherie hoped to take over. Nicherie went to PIA many times to listen to and transcribe Ami Shafir’s telephone conversations, which were in Hebrew. The intercepted conversations included Ami Shafir’s confidential communications with his attorneys.

Terry Christensen hired Pellicano to wiretap Lisa Bonder. Bonder was engaged in a child support dispute with Christensen’s client, Kirk Kerkorian. A central part of Christensen’s strategy was proving that the child involved in the dispute was not his client’s biological child. A DNA test eventually proved that another man was the father. While the litigation was ongoing, Pellicano intercepted many of Bonder’s conversations, including conversations with her attorneys, family, and friends about the child support litigation. The main evidence against Christensen consisted of recordings of more than 30 phone conversations in which he discussed with Pellicano the wiretap on Bonder. These recordings, which Pellicano recorded secretly, were seized from PIA’s offices.

The government’s investigation into PIA began when it investigated threats against reporter Anita Busch. On the morning of June 20, 2002, Busch went to her car on the street

outside her home and found that her car had been vandalized. The windshield had been punctured, a handwritten sign reading “STOP” had been placed on the car, and a dead fish and a rose had been left on the windshield. An informant recorded his conversations with Alex Proctor, who stated that Pellicano had hired him to vandalize Busch’s car. Based in large part on the informant’s recordings, in November 2002, the government obtained warrants to search PIA for evidence that Pellicano was involved in the vandalism. The government seized computers and data storage devices pursuant to the warrant. After obtaining more evidence of the widespread extent of PIA’s illegal investigations, the government obtained more warrants in July 2003 and seized additional records from the data storage devices previously taken from PIA, including the Pellicano-Christensen recordings.

A grand jury returned an indictment,³ and the Defendants were prosecuted in two trials. The first trial included (1) RICO and related charges against Pellicano, Arneson, and Turner and (2) wiretapping and related charges against Pellicano, Kachikian, and Nicherie. The second trial, in which only Pellicano and Christensen were defendants, focused on the Lisa Bonder wiretap.

The Defendants in the first trial (Pellicano, Arneson, Turner, Kachikian, and Nicherie) were convicted on the following charges:

³ The Fifth Superseding Indictment was the operative charging document. The government filed a redacted Fifth Superseding Indictment during the first trial, which dismissed some counts and renumbered the remaining ones.

- Pellicano: RICO (18 U.S.C. § 1962(c));
RICO conspiracy (18 U.S.C. § 1962(d));
Honest-services wire fraud (18 U.S.C. §§ 1343, 1346);
Unauthorized computer access of United States agency information (18 U.S.C. §§ 1030(a)(2)(B), (c)(2)(B)(i));
Identity theft (18 U.S.C. § 1028(a)(7));
Computer fraud (18 U.S.C. § 1030(a)(4));
Conspiracy to intercept and use wire communications (18 U.S.C. § 371);
Interception of wire communications (18 U.S.C. § 2511(1)(a), (d)); and
Possession of a wiretapping device (18 U.S.C. § 2512(1)(b)).
- Arneson: RICO (18 U.S.C. § 1962(c));
RICO conspiracy (18 U.S.C. § 1962(d));
Honest services wire fraud (18 U.S.C. §§ 1343, 1346);
Unauthorized computer access of United States agency information (18 U.S.C. §§ 1030(a)(2)(B), (c)(2)(B)(i));
Identity theft (18 U.S.C. § 1028(a)(7));
Computer fraud (18 U.S.C. § 1030(a)(4)).
- Turner: RICO (18 U.S.C. § 1962(c));
RICO conspiracy (18 U.S.C. § 1962(d));
Identity theft (18 U.S.C. § 1028(a)(7));
Computer fraud (18 U.S.C.

§ 1030(a)(4);
Conspiracy to intercept and use wire communications (18 U.S.C. § 371);
Interception of wire communications (18 U.S.C. § 2511(1)(a), (d)); and
False statements (18 U.S.C. § 1001(a)(2)).

Kachikian: Conspiracy to intercept and use wire communications (18 U.S.C. § 371);
Possession of a wiretapping device (18 U.S.C. § 2512(1)(b)).

Nicherie: Aiding and abetting interception of wire communications (18 U.S.C. § 2511(a), (d)).

The jury acquitted Pellicano of one count of unauthorized computer access, Turner of four counts of intercepting wire communications, and Kachikian on all counts of intercepting wire communications.

In the second trial, Pellicano and Christensen were each convicted of one count of conspiracy to intercept and use wire communications, 18 U.S.C. § 371, and one count of interception of wire communications, 18 U.S.C. §§ 2511(1)(a), (d).

Pellicano was sentenced to 180 months of imprisonment, Arneson to 121 months, Turner to 121 months, Kachikian to 27 months, Nicherie to 21 months, and Christensen to 36 months. Pellicano, Arneson, and Turner were also ordered to forfeit \$2,008,250, jointly and severally.

II. Standards of Review

We address the standard of review for most issues as we discuss the relevant arguments below. Because they apply to multiple issues in the case, we address the standards for plain error and clear error review here at the outset.

When a defendant raises an argument for the first time on appeal, the plain error standard of review applies. *See* Fed. R. Crim. P. 52(b); *United States v. Pelisamen*, 641 F.3d 399, 404 (9th Cir. 2011). Plain error requires that (1) there was error; (2) it was plain; and (3) the error affected substantial rights. *United States v. Olano*, 507 U.S. 725, 732–35 (1993). When confronted with plain error, an appeals court shall exercise its discretion and reverse only if the error “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 736 (internal quotation marks omitted) (alteration in original). Plain error review applies on direct appeal even where an intervening change in the law is the source of the error. *Johnson v. United States*, 520 U.S. 461, 467–68 (1997); *Pelisamen*, 641 F.3d at 404.

We review for clear error a district court’s findings of fact. A finding of fact is clearly erroneous only where it is “(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” *United States v. Pineda-Doval*, 692 F.3d 942, 944 (9th Cir. 2012) (citation and internal quotation marks omitted). Clear error review is deferential, and “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *United States v. Working*, 224 F.3d 1093, 1102 (9th Cir. 2000) (en banc) (quotation omitted).