The indictment contained notices of forfeiture, alerting the Defendants that the government intended to seek forfeiture at sentencing if it secured their convictions.[93] During the forfeiture phase of the proceedings, the jury returned a special verdict finding that all the sought-after property was subject to

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[93] The government obtained forfeiture pursuant to 18 U.S.C. §§ 981(a)(1)(C) (permitting civil forfeiture of "[a]ny property … which constitutes or is derived from proceeds traceable to[,]" *inter alia*, a securities fraud conspiracy, wire fraud, or a wire fraud conspiracy), 982(a)(1) (authorizing criminal forfeiture of "any property … involved in" a money laundering conspiracy conviction), and 1963(a)(3) (permitting forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity … in violation of [the RICO statute]"), as well as 28 U.S.C. § 2461(c) (authorizing criminal forfeiture where civil forfeiture is permitted in connection with a criminal offense). Under a number of those provisions, the government was entitled to the specific property forfeited or, where that property had been dissipated, to the value of that property. *See* Sonja Ralston & Michael A. Fazio, *The Post-*Honeycutt *Landscape of Asset Forfeiture*, DOJ J. Fed. L. & Prac., Sept. 2019, at 33, 60-61 (noting that 21 U.S.C. § 853(p) "provides the court authority to forfeit untainted assets in place of the dissipated tainted assets"); *United States v. Bermudez*, 413 F.3d 304, 306 (2d Cir. 2005) ("Section 982 … incorporates by reference the substitute asset provisions of 21 U.S.C. § 853[,]" with one exception not raised here.); 18 U.S.C. § 1963(m) (permitting substitution where property forfeitable under § 1963(a) has been dissipated).

forfeiture. The District Court then imposed forfeiture money judgments holding all four Defendants – including Pelullo and John Maxwell – jointly and severally liable for $12 million, which it found to be a fair approximation of the "proceeds" of their crimes.[94]

2. *Honeycutt* and Its Progeny

Under the law at the time of the District Court proceedings, the imposition of joint and several liability was appropriate, and, sensibly, the Defendants did not object to that

[94] Recall that the District Court calculated nearly $14.2 million in loss to the victims of the Defendants' scheme in determining their guidelines ranges. That amount is also reflected in the Court's order that the Defendants pay the victims almost $14.2 million in restitution. *See United States v. Leahy*, 438 F.3d 328, 338 (3d Cir. 2006) (en banc) ("Restitution is … a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct."). The $12 million in forfeiture ordered by the Court does not conflict with the loss calculation because forfeiture is measured by the defendant's ill-gotten gains, not the loss to the victims. *See United States v. Lacerda*, 958 F.3d 196, 218 (3d Cir. 2020) ("[T]he purpose of forfeiture statutes is to separate the criminal from his ill-gotten gains." (citing *Honeycutt v. United States*, 137 S. Ct. 1626, 1631 (2017))). Sentencing ranges generally only take into consideration the latter. *See* U.S.S.G. § 2B1.1 cmt. n.3(B) ("The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.")

aspect of the forfeiture order. While their appeals were pending, however, the Supreme Court issued its decision in *Honeycutt*. The case involved a hardware store manager who was convicted of conspiring to sell an iodine product from the store's stock, all the while knowing it would be used to manufacture methamphetamine. *Honeycutt*, 137 S. Ct. at 1630. The government conceded that the manager "had no controlling interest in the store and did not stand to benefit personally" from the sale. *Id.* at 1630-31 (internal quotation marks omitted). Still, the government sought forfeiture judgments against both the owner and the manager in an amount equal to the store's total proceeds from the sale of the iodine product. *Id.* at 1631. The forfeiture provision at issue, 21 U.S.C. § 853, permitted liability for "any proceeds the person obtained, directly or indirectly, as the result of" illegal drug distribution. *Id.* at 1632 (quoting 21 U.S.C. § 853(a)(1)). The Supreme Court read that statute as limiting forfeiture "to property the defendant himself actually acquired as the result of the crime" – in other words, "tainted property acquired or used by the defendant[.]" *Id.* at 1632-33, 1635. It reasoned that the word "obtain" in § 853(a) "defines forfeitable property solely in terms of personal possession or use." *Id.* at 1632. Thus, the Supreme Court concluded, because the manager "had no ownership interest in [the] store and did not personally benefit from the [iodine product] sales[,] … § 853 does not require any forfeiture." *Id.* at 1635.

Following *Honeycutt*, we observed in *United States v. Gjeli*, 867 F.3d 418, 427 (3d Cir. 2017), that 18 U.S.C. §§ 981(a)(1) and 1963, two of the provisions relied on here, "are substantially the same as the one under consideration in *Honeycutt*." Thus, the lessons of *Honeycutt* apply "with equal force" to Pelullo's and John Maxwell's forfeiture orders, or at

least with respect to those statutes.[95] *Id.* at 427-28. Because their arguments are raised for the first time on appeal, however, they must meet the test for plain error. *See supra* note 49.

3. Post-*Honeycutt*: John Maxwell

We begin with John Maxwell, who was the Chief Executive Officer and a board member of FirstPlus, albeit in title only. He was installed in those roles by Pelullo and William Maxwell. No one could fairly describe John Maxwell as a "mastermind" of the conspiracy, *cf. Honeycutt*, 137 S. Ct. at 1633 (describing, as an example of someone who could be held jointly and severally liable, a drug dealer "mastermind" who obtained all the proceeds of a drug distribution scheme), and our analysis can begin and end with the government's concession of plain error and acknowledgement that John's role in the conspiracy was "akin to the manager of the hardware store in *Honeycutt*[.]" (Answering Br. at 278.) We understand the government to be agreeing to a remand of John Maxwell's case so that the forfeiture order against him can be modified to allow liability only for the portion of proceeds he actually obtained. We accept that concession and will remand for further proceedings.[96] On remand, the District Court should

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[95] We do not decide today whether *Honeycutt* also applies to 18 U.S.C. § 982(a)(1), the third basis cited for the forfeiture orders.

[96] As noted, *United States v. Gjeli* extended the holding of *Honeycutt* – where the relevant forfeiture provision applied to proceeds "obtained … as the result of" an offense – to 18 U.S.C. § 981(a)(1)(C), which permits forfeiture of proceeds

calculate how much John "himself actually acquired" due to his involvement in the schemes. *Honeycutt*, 137 S. Ct. at 1635.

4. Post-*Honeycutt*: Pelullo

Pelullo argues that, like John Maxwell, he too should not have been held jointly and severally liable. Pelullo's arguments, however, fail under prong two of plain-error review: even assuming *Honeycutt* applies, *see supra* notes 95-96, there was no "clear" or "obvious" error. *Olano*, 507 U.S. at 734. Unlike the defendant in *Honeycutt*, Pelullo was a primary leader and organizer of the FirstPlus scheme, "call[ing] all the shots."[97] (JAD at 1552.) He exercised dominion and control over the entirety of the proceeds reaped

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"traceable to" an offense, and 18 U.S.C. § 1963(a)(3), which covers proceeds "obtained … from" unlawful conduct. *United States v. Gjeli*, 867 F.3d 418, 427-28 & n.16 (3d Cir. 2017). Section 982(a)(1), one of the bases for the forfeiture order here, permits forfeiture of "property … involved in" an offense. We need not opine on whether *Honeycutt* prohibits joint and several liability under § 982(a)(1), *see supra* note 95, since the government has conceded error as to John Maxwell. *United States v. Senke*, 986 F.3d 300, 306 (3d Cir. 2021) (accepting the government's concession of plain error and remanding for further proceedings).

[97] Relying on extensive evidence introduced at trial, the government characterizes Pelullo as sitting at the "pinnacle of [the] criminal enterprise and ma[king] all the decisions about disbursing its proceeds, including to himself." (Answering Br. at 274; *see also* Answering Br. at 14-16, 19-20.)

from the scheme. He gave definitive commands to employees, directed the disbursement of company funds, and issued instructions to FirstPlus's lawyers, accountants, and other consultants, all of which evidenced his control over the criminal operation.

The Supreme Court in *Honeycutt* emphasized the importance of having an "ownership interest" in or "personal benefit" from the proceeds of a crime. 137 S. Ct. at 1635. It is not plainly wrong to interpret Pelullo's leadership of the FirstPlus looting, coupled with his supervision of the individuals who were distributing the stolen funds, as demonstrating his ownership of or benefit from the proceeds of the criminal enterprise. It follows that it was not plainly wrong to interpret *Honeycutt* as allowing Pelullo to be held jointly and severally liable.

Pelullo contends that he should only be liable for the money that ended up in his pocket. But even after *Honeycutt*, multiple people can "obtain" the same proceeds over the course of a crime where they jointly controlled the enterprise. *See United States v. Cingari*, 952 F.3d 1301, 1306 (11th Cir. 2020) (holding that imposition of joint and several liability on "spouses who jointly operated their fraudulent business" for the full proceeds of their scheme was not plainly erroneous). Thus, as someone who controlled the criminal enterprise, Pelullo can be held jointly and severally liable for funds that he did not walk away with.

That others may have also benefited from the proceeds in question does not mean the District Court plainly erred in holding Pelullo liable for the entire amount. Again, he personally benefited from and exerted control over those funds,

which is the type of conduct that the Supreme Court indicated can give rise to forfeiture liability. While we decline to make here any definite statement about who is subject to joint and several liability for the entirety of the proceeds of a criminal scheme under *Honeycutt*, any error in Pelullo's sentence in this regard was not plain, and he is therefore not entitled to relief from the forfeiture order.

C. Delay in Forfeiture of Pelullo's Property

During its investigation, the government seized a yacht and a Bentley automobile that it believed Pelullo and Scarfo acquired with the proceeds of their criminal enterprise. It did not seek to formally acquire title to those assets until three years later, when it requested their forfeiture as part of the indictment. Pelullo objects to that delay as violating both the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") and the Fifth Amendment's Due Process Clause. But he gave up his rights under CAFRA, and the government's delay in initiating a criminal forfeiture proceeding was not so unreasonable as to violate due process, so he is not entitled to relief.

1. Background

In May 2008, FBI officials executed two warrants authorizing them to seize the yacht "Priceless," which was docked in a marina in Miami, and Pelullo's 2007 Bentley automobile, which was also in Miami at the time. The officials obtained those warrants based on affidavits alleging that the yacht and Bentley had been purchased with the proceeds of Scarfo's and Pelullo's unlawful activities at FirstPlus. The FBI then immediately turned the yacht – which it valued at $850,000, the price for which the vessel was purchased – over

to the United States Marshals Service. The Marshals Service, in turn, contracted with a private company to maintain the yacht.

A few days later, attorney Mark Cedrone – who briefly represented Pelullo before the District Court – wrote to the government on behalf of PS Charters, a company that Scarfo and Pelullo had set up to conceal their ownership of the yacht. Cedrone "demand[ed] the immediate return of [the yacht] to PS Charters[,]" claiming that the vessel was acquired for legitimate business use and that the seizure "deprived PS Charters of the opportunity to further its … business as planned[.]" (D.I. 662-10 at 2.)

As the government showed at trial, however, that was not true. PS Charters was owned by Seven Hills and LANA and was set up to allow Pelullo and Scarfo to buy the boat for their own personal use, while avoiding detection. Although PS Charters nominally owned the yacht, Pelullo had a financial interest in the ship through Seven Hills, which owned a fifty-fifty interest in PS Charters with LANA. Pelullo controlled Coconut Grove Trust – of which his children were nominally beneficiaries – which owned Seven Hills.

In response to Cedrone's letter, the government informed Cedrone that it was prepared to file a civil action to seek forfeiture of the yacht but that Pelullo would have to submit to civil discovery, including a deposition. Cedrone then changed course and said that, while his client was still "considering judicial action[,]" "it would seem to be in everyone's interests that at least the [yacht] be sold and we can

then later fight about the proceeds."[98] (D.I. 700-1 at 4). Pelullo's trial counsel later admitted before the District Court that it was "possibly right" that Cedrone "didn't [want] to submit" Pelullo to depositions and that he "kind of backed off" his request for the return of the yacht.[99] (JAB at 3913-14.)

That was the end of the dialogue between Cedrone and the government until the following year, when the government "called him and advised him that the boat was actually totaled." (JAB at 3914.) "Totaled," as Pelullo's trial counsel put it, was not an exaggeration. While the precise chain of events is unclear, the yacht suffered irreparable damage to its engines when, in July 2009, it sank following maintenance undertaken during the third-party contractor's possession. The government then negotiated a $450,000 insurance payout, which was substituted for the ship during the forfeiture proceedings. *See supra* note 93.

When the government obtained the indictment in 2011, it included five criminal forfeiture allegations against Pelullo and some of the other Defendants, each associated with

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[98] Cedrone also acknowledged that he was representing PS Charters (this time, along with Seven Hills) "in connection with the Government's seizure of ... the Bentley automobile[,]" but he did not express any desire for the return of the car. (D.I. 700-1 at 4.)

[99] Particularly in light of that concession, Pelullo's claim that "the Government did absolutely NOTHING in response" to "Cedrone's requests" is an obvious misstatement of the record. (SP Opening Br. at 212.)

specific counts. The allegations all requested the forfeiture of the proceeds of those offenses, which included the yacht and the Bentley, as well as an airplane, jewelry, and the contents of various bank accounts.

After Cedrone's initial dialogue with the government, Pelullo did not press his claim for return of the yacht or pursue any judicial action until more than five years later. In September 2013 – on the eve of trial – Pelullo filed a motion for the return of his property pursuant to Federal Rule of Criminal Procedure 41(g), seeking the Bentley, a 50% interest in the yacht, and certain cash, several computers, and FirstPlus stock. The District Court denied the motion, finding that Cedrone had waived "any rights that [Pelullo] had" to a prompt initiation of a civil forfeiture action by failing to "follow up" after his initial communications with the government.[100] (JAB at 3930.)

The Court completed the criminal forfeiture process after the Defendants were convicted. It held a separate forfeiture proceeding, at the conclusion of which the jury found, beyond a reasonable doubt, that the property referenced in the indictment – including the yacht and the Bentley – was subject to forfeiture.

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[100] The District Court also found that Pelullo failed to demonstrate an ownership interest in the yacht. The government does not rely on that finding in defending the Court's decision, "[i]n light of the trial evidence regarding Pelullo's control of Seven Hills and the Coconut Grove Trust[.]" (Answering Br. at 249 n.56.)

2. CAFRA[101]

Pelullo asserts that he was entitled to the protections of CAFRA, 18 U.S.C. § 983 *et seq.* That statute governs nonjudicial forfeiture, a process that allows the government to obtain title to seized property without any involvement by the courts, as long as it gives affected parties timely notice and no one comes forward to claim an interest in the property. *Langbord v. U.S. Dep't of Treasury*, 832 F.3d 170, 182 n.4 (3d Cir. 2016) (en banc); *see also* 18 U.S.C. § 983(a)(1)(A)(i), (a)(2)(B); 19 U.S.C. §§ 1607(a), 1609. If someone does contest the seizure, the government must then promptly initiate a civil or criminal judicial forfeiture proceeding and obtain a court order to allow title to pass to the United States. 18 U.S.C. § 983(a)(3). Pelullo argues that the government violated CAFRA's deadlines for giving notice of a forfeiture and initiating a forfeiture action.

But that claim comes too late. Pelullo waived any rights he may have had under CAFRA, just as the District Court said. *See United States v. Desu*, 23 F.4th 224, 231 (3d Cir. 2022) ("Waiver is an 'intentional relinquishment or abandonment of a known right.'" (citation omitted)). The government represented, and Pelullo does not argue otherwise, that it was prepared to initiate judicial forfeiture proceedings when, through counsel, PS Charters demanded the yacht. As soon as the prospect of Pelullo facing discovery in a civil forfeiture

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[101] We review for clear error the District Court's factual determination of waiver. *See Resol. Tr. Corp. v. Forest Grove, Inc.*, 33 F.3d 284, 285 (3d Cir. 1994); *Bermuda Exp., N.V. v. M/V Litsa (Ex. Laurie U)*, 872 F.2d 554, 562 n.7 (3d Cir. 1989).

action arose, however, PS Charters decided to "back[] off" and to consent to the government not filing any action. (JAB at 3913-14, 3921.) It was not until five years later that Pelullo himself demanded the return of the property. He offers no basis for disturbing the District Court's finding that his actions constituted a waiver of his rights under CAFRA.[102] PS Charters was Pelullo's tool.[103] After employing it to, in effect, ask the government not to initiate civil forfeiture proceedings, Pelullo cannot now complain that the government's failure to file an action violated his rights.[104]

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[102] Pelullo does not address the legal significance of Cedrone's discussions with the government except to call them, without explanation, "a complete red herring[.]" (SP Reply Br. at 47-48.)

[103] In so recognizing, we are not engaged in an ersatz corporate veil-piercing. Rather, Pelullo admits that PS Charters was his tool by asserting that Cedrone was really acting on his behalf in requesting the return of the yacht. How much PS Charters was also under Scarfo's control is not a question before us.

[104] Pelullo also points to Department of Justice policy statements that set internal deadlines for bringing a judicial forfeiture action. But the government's internal policies, such as its Asset Forfeiture Policy Manual, do not "create enforceable rights for criminal defendants[,]" so Pelullo would not be entitled to relief even if the government failed to abide by its own rules. *United States v. Wilson*, 413 F.3d 382, 389 (3d Cir. 2005).

3. Due Process[105]

Pelullo also claims that the government's "indefinite" – actually, forty-two-month – "retention of property" between the seizure and the filing of the criminal indictment "trampled upon" his right to due process. (SP Opening Br. at 219.)

When the government seizes property, it cannot hold it forever. Rather, due process requires that it afford a property owner a judicial hearing without "undue delay." *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 564 (1983). Borrowing from jurisprudence under the Speedy Trial Clause of the Constitution, we take a "flexible approach" in assessing the reasonableness of a delay in filing a forfeiture action, looking to (1) the length of the delay, (2) the reason for it, (3) the timing of the claimant's assertion of his rights, and (4) any prejudice to the claimant caused by the delay. *Id.* at 562, 564 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). No one factor is dispositive, as they are all merely "guides" in helping us balance the competing interests of the claimant and the government to determine whether "the basic due process requirement of fairness" has been met. *Id.* at 565.

The substantial length of the delay here – almost forty-two months between the seizure of the yacht and Bentley on May 8, 2008, and the grand jury's issuance of the indictment

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[105] We review the District Court's factual findings for clear error and its analysis of whether Pelullo's due process rights were violated de novo. *Burkett v. Fulcomer*, 951 F.2d 1431, 1437-38 (3d Cir. 1991).

on October 26, 2011 – decisively favors Pelullo, a conclusion the government does not dispute. *See id.* at 565 (deeming delay of eighteen months "quite significant").

On the second factor, Pelullo contends that the government's reason for that delay was "simple [g]overnment failure to take any required action[.]" (SP Opening Br. at 217.) The government responds that the timing of the indictment was not the product of bad faith or frivolous concerns, but rather the complexity of the criminal case and the "substantial tasks facing the prosecutors after the warrants were executed." (Answering Br. at 263.) The government has the better of that argument.

Although the pendency of criminal proceedings "does not automatically toll the time for instituting a forfeiture proceeding[,]" *$8,850*, 461 U.S. at 567, the government may often have good cause to wait to seek forfeiture as part of a criminal prosecution rather than pursuing a separate civil forfeiture proceeding in advance of an indictment. A civil action could "substantially hamper" the prosecution by "serv[ing] to estop later criminal proceedings" or "provid[ing] improper opportunities for the claimant to discover the details of a contemplated or pending criminal prosecution." *Id.* Saving the forfeiture claim for the criminal proceeding may help a claimant too: "[i]n some circumstances, a civil forfeiture proceeding would prejudice the claimant's ability to raise an inconsistent defense in a contemporaneous criminal proceeding." *Id.* Those are serious concerns, and we are hard-pressed to say that the government's reason for choosing the criminal-forfeiture route was an improper one.

That is especially true given the complexities of the criminal proceedings here. We have no doubt that it took considerable time for the government to process all the data it seized from various searches, select the appropriate criminal charges for the co-conspirators, and draft the resulting 25-count, 107-page indictment. There is also no indication in the record that the government failed to pursue its investigation with diligence or intentionally delayed in securing an indictment. *See $8,850*, 461 U.S. at 568; *cf. United States v. Velazquez*, 749 F.3d 161, 186 (3d Cir. 2014) (finding that second factor cuts "strongly" in defendant's favor due to government being "strikingly inattentive" in bringing defendant to trial). We thus cannot say that the reasons for the delay are inadequate and favor Pelullo.

Pelullo fares even worse on the third factor – the timing of the claimant's assertion of a right to judicial review of the seizure – since he initially invoked his rights and then changed his mind and backed off the request. As discussed above, Pelullo waived his rights by agreeing through counsel that the government need not immediately initiate judicial forfeiture proceedings. He then did nothing for five years and only filed a motion to get the property back roughly two years after he was indicted. His contention that he "asserted [his right] from the very outset of the seizure" cannot be squared with the record. (SP Opening Br. at 217.)

That inaction weighs heavily against him when considering whether a due process violation occurred. Specifically, a defendant's failure to file a Rule 41(g) motion or, "[l]ess formally," request the return of his seized property "can be taken as some indication that [the defendant] did not desire an early judicial hearing." *$8,850*, 461 U.S. at 569; *cf.*

United States v. Ninety Three Firearms, 330 F.3d 414, 424-26 (6th Cir. 2003) (finding no due process violation where the claimant's "sole attempt to regain his property consisted of a letter he filed shortly after the seizure").

Finally, as to the fourth factor, Pelullo claims prejudice by arguing that, "because of the [g]overnment's dilatory conduct[,]" he "lost" a number of "key witnesses" – mainly various FirstPlus-affiliated officers and attorneys – who could have aided in his defense but passed away prior to his indictment. (SP Opening Br. at 221.) Pelullo provides a list of those individuals, along with their titles and connections to him or FirstPlus, but he fails to identify what admissible evidence he could have elicited from any of those persons to help his case. His conclusory claims that certain witnesses would have been "key" or "provide[d] information favorable to the defense" on certain issues are insufficient to establish prejudice.[106] (SP Opening Br. at 102-03.) *See United States v. Childs*, 415 F.2d 535, 539 (3d Cir. 1969) (finding no "prejudicial delay whatsoever" from deceased and unavailable witnesses because

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[106] Pelullo also suggests that the seizure of his assets left him unable to hire his counsel of choice. The Supreme Court, however, has held that neither the Fifth Amendment nor the Sixth Amendment prevents the government from seizing, prior to trial, assets that a defendant "might have wished to use to pay his attorney." *United States v. Monsanto*, 491 U. S. 600, 616 (1989). Moreover, even if we were to agree with Pelullo on his point, the overall balance of the factors – particularly the reason-for-delay and timely-assertion-of-rights factors – would still tilt the balance decisively against him.

defendant did not show how their testimony would have been material to his defense).

In sum, the balancing of factors precludes a determination that Pelullo's due process rights were violated. But our conclusion that Pelullo has not made out a due process violation should not be read as approval of the government's conduct in this case. While the yacht sat in the custody of a third party to whom the Marshals Service had entrusted it, it sank and suffered irreparable damage. At that point, the United States had not formally secured title to the vessel – nor had any forfeiture proceeding even begun. Though the cause of the boat's loss is not clear from the record, the government is left in a very poor light. It ought to go without saying that seized property must be properly cared for. The government may ultimately prevail in forfeiture proceedings and then may dispose of the property in whatever lawful way it deems fit. But there is no guarantee that it will prevail. To ensure that property owners' interests are not wiped out before a hearing, it is critical that the government exercise appropriate diligence to prevent any destruction of not-yet-forfeited property. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) ("[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement."). It utterly failed in that responsibility in the case of the yacht "Priceless," so the more accurate name of the vessel turned out to be "Half-Priced." That is a consequential breach of duty and should not pass unnoticed.

Despite that, under the relevant framework and the arguments presented to us, we cannot say that the delay in initiating forfeiture proceedings deprived Pelullo of "the basic

due process requirement of fairness[.]" *$8,850*, 461 U.S. at 565. As a result, his challenge fails.[107]

VII. *BRADY* ISSUES

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

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[107] Pelullo also summarily argues that he is entitled to compensation for the seizures and the return of his assets. He cites virtually no authority for that proposition. The one source he does reference, 28 U.S.C. § 2465(b), is irrelevant; it only applies to civil forfeiture proceedings in which the claimant "substantially prevails[.]" Because Pelullo has not adequately developed the issue for our review, we will not attempt to sua sponte discern any potential legal bases for granting him the relief he seeks. *See Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007).

He also claims, again without citing authority, that the Bentley and the firearms found on the yacht should not have been admitted into evidence. He argues they were unlawfully seized, but he does not identify any viable basis for deeming the seizures unlawful or explain why, if the seizures were infirm, any legal violation required exclusion of that evidence.

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

Scarfo challenges the District Court's denial of his post-trial request for leave to file a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. His request explained that his proposed motion was based on purported *Brady* violations and new information that only surfaced after trial. The "new information" consisted of certain witness statements taken prior to the trial and pursuant to an unrelated investigation of human-trafficking activity, an investigation that was ultimately prosecuted in the United States District Court for the Eastern District of Pennsylvania (the "*Botsvynyuk* case").[109] *See generally United States v. Churuk*, 797 F. App'x 680, 682 (3d Cir. 2020) (summarizing that prosecution). Scarfo and his codefendants wanted access to those witness statements, memorialized on FBI forms known as 302s, because they might mention Pelullo.[110] And, because of

[108] The standard of review associated with this motion is discussed herein.

[109] The government, for its part, first learned about the witness statements when Pelullo's attorney notified the government that he had received the documents from a defense attorney in the *Botsvynyuk* case. Prosecutors then obtained copies of the statements from their counterparts in the Eastern District of Pennsylvania before furnishing them to the District Court here for in camera review.

[110] "The FD-302, commonly referred to simply as a '302', is the form … used by FBI agents to summarize

Pelullo's involvement in the human trafficking, the Defendants thought the documents might in turn show criminal conduct by Cory Leshner – Pelullo's "right hand man" and later a key government witness – and therefore provide helpful impeachment evidence. (D.I. 1237 at 12-13.)

Pelullo thus filed a sealed motion to compel disclosure of the 302s, and Scarfo filed a motion to subpoena the documents pursuant to Federal Rule of Criminal Procedure 17.[111] After reviewing the 302s in camera – and entertaining

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witnesses' statements and interviews." *United States v. Lacerda*, 958 F.3d 196, 218 n.7 (3d Cir. 2020). Apparently Pelullo was involved with one of the companies that hired the human-trafficking victims in the *Botsvynyuk* case, but the investigation there did not uncover any evidence that Pelullo was complicit in the violations. When trial in that case was approaching, a defense attorney – Mark Cedrone, who had represented Pelullo in earlier stages of this case – may have intended to allege that Pelullo was responsible for employing the victims, so, for purposes of discovery, government attorneys put together a file of all documents containing Pelullo's name. Pelullo's attorney here "had the opportunity to review a portion of the 302 reports [produced by the government] and take notes on relevant details set forth therein" (D.I. 1237 at 5), but the Defendants wanted to have their own copies of the entire file.

[111] As the government points out, a subpoena pursuant to Rule 17 was likely an improper mechanism for obtaining the sought-after information. That rule provides, in relevant part, "The court may direct the witness to produce [books, papers,

multiple rounds of briefing plus a hearing – the District Court denied the motions as seeking irrelevant and non-exculpatory information and because the 302s never mentioned Leshner. The Court also made clear that it would not entertain any more motions from the Defendants before sentencing.

Scarfo then requested leave to move for a new trial.[112] The District Court denied the request as "probably untimely" and because the 302s simply did not contain the information claimed by Scarfo. (D.I. 1281.) It is that decision – not the previous decision denying Scarfo's Rule 17 motion to

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documents, data, or other objects the subpoena designates] in court before trial or before they are to be offered in evidence." Fed. R. Crim. P. 17(c)(1). It is "not intended to provide a means of discovery for criminal cases" but rather "was designed to expedite a trial by providing a time and place *before* trial for the inspection of the subpoenaed materials." *United States v. Amirnazmi*, 645 F.3d 564, 595 (3d Cir. 2011) (citations, internal quotation marks, and alterations omitted).

[112] Scarfo claimed that his motion was

> based upon new information that surfaced post-trial, related to the (1) the investigation in *United States v. Botsvynyuk*, (2) the Pelullos, (3) the Leshners, (4) Frank McGonigal, (5) Ken Stein, (6) Gary McCarthy, and (7) Howard Drossner, and all mentioned parties' ties to use of indentured servitude by and through various related cleaning companies.

(D.I. 1280 at 2 (footnotes omitted).)

subpoena the 302s – that Scarfo now challenges on appeal.[113] He concedes that he has "struggled to identify applicable precedent related to a court's failure to consider a motion for new trial[,]" but he still believes that the District Court's denial of leave to file the new-trial motion violated his constitutional rights. (NS Opening Br. at 176.)

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

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[113] The government's arguments on the merits of Scarfo's Rule 17 motion are therefore irrelevant.

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

[114] The one case Scarfo does cite, *Ogden v. United States*, 112 F. 523 (3d Cir. 1902), predates the adoption of the Federal Rules of Criminal Procedure, which impose a "rigid" time limit on motions for new trials. *Eberhart v. United States*, 546 U.S. 12, 13 (2005). It is also factually distinguishable: the defendant there moved for a new trial immediately following the verdict based on undisputed evidence of extraneous influences on the jury, while Scarfo joined in three prior new-trial motions and does not dispute that the documents he sought would not have given him the information he wanted. *Ogden*, 112 F. at 524-25.

Gonzalez, 905 F.3d 165, 195 (3d Cir. 2018) (citation omitted).[115]

B. Pelullo's Motion for Remand Based on *Giglio* Evidence[116]

Unbeknownst to the Defendants or the District Court, Robert O'Neal – the FirstPlus chairman, who flipped and

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

[116] We do not apply a standard of review in the typical sense, since Pelullo could not have raised this issue – which first came to the parties' attention while this appeal was pending – before the District Court. Rather, we look to the burden of proof applicable to *Brady* and *Giglio* claims, as discussed herein.

Pelullo bases his motion on 28 U.S.C. § 2106, which provides that, when reviewing a decision on appeal, we "may remand the cause and ... require such further proceedings to be had as may be just under the circumstances." *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812 (5th Cir. 2004). "Section 2106 grants us broad power when it comes to how best to dispose of a matter under our review." *Id.* at 819. Where a remand to the district court "would be an exercise in futility[,]"

testified for the government at trial – was himself under investigation in an unrelated criminal matter in the Western District of Texas while trial in this case was underway. That investigation culminated in O'Neal's indictment in December 2020, which the government brought to the Defendants' attention a few months later, after it had been unsealed. Pelullo now asks us to remand his case to the District Court so that he can seek an evidentiary hearing and move for a new trial pursuant to Rule 33 based on what he says was the government's failure to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).[117] We decline to grant such relief.

According to his indictment, O'Neal ran chiropractic clinics in Texas and received millions of dollars in illegal kickbacks from hospitals and other healthcare providers, payments that he disguised as marketing fees and shared with

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we may "make a complete disposition of the case" ourselves rather than having the District Court consider the matter in the first instance. *Id.*; *Beck v. Reliance Steel Prods. Co.*, 860 F.2d 576, 581 (3d Cir. 1988).

[117] The other Defendants all join in Pelullo's motion. In a second motion filed nearly a year after his original one, Pelullo makes the same arguments but also says we should dismiss the indictment against him with prejudice or order the District Court to do so. He offers no support for that extraordinary demand. Nor could he; the remedy for a *Brady* or *Giglio* violation is a new trial, not dismissal. *Giglio v. United States*, 405 U.S. 150, 153-55 (1972).

certain co-conspirators.[118] The indictment charged that, beginning in 2008 and continuing through 2013, O'Neal conspired with others to defraud the government and to solicit and collect healthcare kickbacks, in violation of 18 U.S.C. § 371. O'Neal was also charged with four counts of violating, and aiding and abetting the violation of, the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)(2).

When a prosecutor in this case notified the Defendants of the Texas investigation in March 2021, he relayed the message from the O'Neal prosecution team in Texas that O'Neal first became a subject of investigation in 2013 and was not identified as a target until 2017. The Texas prosecutors also reportedly said that "the investigation of O'Neal remained covert" through at least the conclusion of the Defendants' trial in July 2014. (3d Cir. D.I. 345-3 at 3.) O'Neal was ultimately indicted in December 2020 and pled guilty the following August.

The prosecution team here asserts that it "did not learn O'Neal was even being investigated," or that "his prosecution concerned conduct dating back to 2008," until late January 2021. (3d Cir. D.I. 356.) And it did not obtain a copy of the

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[118] In this context, a "kickback" is a payment made to encourage a healthcare provider to refer a patient to the defendant or to compensate the healthcare provider for doing so. 42 U.S.C. § 1320a-7b(b). Those payments are illegal when the patient's medical care is covered in whole or in part by a federal healthcare program such as Medicare or Medicaid. *Id.*

indictment until early February.[119] It also claims to have confirmed that, before early 2021, none of the "surviving members of the prosecution team" – who include prosecutors, FBI investigators, and a special agent for the Department of Labor – knew that "O'Neal was under investigation for any crimes with which he has now been charged." (3d Cir. D.I. 345-3 at 2-3.)

Pelullo doesn't buy that explanation. He notes that the crimes alleged in O'Neal's indictment "temporally overlap[ped]" with O'Neal's involvement in FirstPlus and his cooperation with the prosecutors in this case (3d Cir. D.I. 345-2 at 12-15), and he asks us to allow him to develop an evidentiary record in the District Court as to what the prosecutors knew about O'Neal at the time of trial. That record, he says, will enable him to move for a new trial based on the government's violation of its duty to turn over all "evidence [that] is material either to guilt or to punishment[,]" *Brady*, 373 U.S. at 87, including evidence "affecting [the] credibility" of its trial witnesses, *Giglio*, 405 U.S. at 153-55. The government's failure to turn over such evidence, if the information were in its actual or constructive possession, could violate his due process rights and require a new trial. *Id.*;

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[119] The government initially represented that "Pelullo's prosecution team knew nothing about the investigation of O'Neal or the conduct prompting his indictment until shortly before the February 2021 unsealing of that indictment." (3d Cir. D.I. 346 at 2.) It then clarified that the indictment had been unsealed in early January 2021 – which is confirmed by the docket – but nonetheless insisted that it did not know about the investigation until late January.

Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 291-92 (3d Cir. 2016) (en banc).

The government responds that any knowledge the Texas prosecutors had about the O'Neal investigation should not be imputed to those in New Jersey and that, accordingly, the information was not in its possession – in any meaningful sense – at the time of trial. In this case, we need not wrestle with the question of imputation of knowledge, because Pelullo's motion for a new trial would fail anyway for two distinct reasons: it would be time-barred and it would not rest on a material nondisclosure.

First, remanding the case would prove fruitless because any motion would be time-barred. Rule 33(b)(1) provides that a motion for a new trial based on newly discovered evidence must be brought within three years of the verdict. *See United States v. O'Malley*, 833 F.3d 810, 813 (7th Cir. 2016) (applying Rule 33(b)(1) to *Brady* and *Giglio* claim); *United States v. Battles*, 745 F.3d 436, 447 (10th Cir. 2014) (same for *Brady* claim). That deadline is an "inflexible" one "meant to bring a definite end to judicial proceedings[.]" *United States v. Higgs*, 504 F.3d 456, 464 (3d Cir. 2007). Pelullo contends that it is unfair to apply that rule here, where it was the government who kept the investigation hidden until more than three years after he was convicted, but that characterization, even if it were accurate, does not allow us to disregard Rule 33's mandatory language. And, as the government points out, refusing to ignore the time limits of Rule 33 does not leave a defendant utterly bereft of the ability to pursue a *Giglio* claim. Once his convictions become final, he may be able to timely seek appropriate relief in the District Court pursuant to 28 U.S.C. § 2255. *See O'Malley*, 833 F.3d at 813 (concluding that "a

postjudgment motion based on newly discovered evidence which happens to invoke a constitutional theory" – such as *Giglio* – "can be brought under Rule 33(b)(1) or § 2255").

Second, Pelullo offers us no reason to believe that the nondisclosure of the investigation into O'Neal was material. The government's failure to disclose potential impeachment evidence violates due process, and thus requires a new trial, "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Put somewhat differently, a *Brady* or *Giglio* claim requires a showing that the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). The O'Neal evidence does not change the lighting here in any material way. Had the Defendants known in advance that O'Neal was a subject (but not yet a target) of an investigation – and had they used that evidence to undermine O'Neal's credibility on the stand or to persuade the government not to call O'Neal as a witness – that would not have saved them from conviction.

Pelullo and the government disagree as to O'Neal's significance to the prosecution's case-in-chief: Pelullo calls him "the Government's main witness" (3d Cir. D.I. 345-2 at 45), while the government says that his testimony was of a "limited nature" (3d Cir. D.I. 345-3 at 3). It appears to us that O'Neal's testimony about the looting of FirstPlus was one piece of corroboration within a mass of damning evidence. There were nineteen other government witnesses and extensive documentary evidence. *See, e.g., supra* Sections II.G, III.A-B, IV.B, V.C-E. In the face of that overwhelming proof of guilt,

the Defendants could not have evaded conviction by pointing out that O'Neal ran a shady chiropractic practice, nor by persuading the government to sideline him at trial. *Cf. Giglio*, 405 U.S. at 151, 154-55 (finding due process violation where government did not reveal impeachment evidence about "the only witness linking petitioner with the crime[,]" on whose testimony "the Government's case depended almost entirely").

Notwithstanding that other evidence, Pelullo insists that O'Neal's testimony was essential to establishing the fraudulent acquisitions of Scarfo's and Pelullo's shell companies and to connecting Pelullo to LCN. He first argues that "the Government's theory that the acquisitions were fraudulent depended directly upon O'Neal's testimony, and specifically the notion that the acquisitions were made without [O'Neal's] knowledge or consent." (3d Cir. D.I. 345-2 at 18.) But Pelullo's counsel already attacked O'Neal's credibility on that claim at trial. He impeached O'Neal with a transcript of a board meeting in which O'Neal discussed the acquisition of Rutgers and authorized William Maxwell to sign off on the sale on his behalf. We seriously doubt that impeaching O'Neal with evidence of his unrelated wrongdoing would have changed his credibility in the eyes of the jury.

As for Pelullo's claim that O'Neal's testimony was necessary to prove Pelullo's mob ties, his own briefing undercuts that assertion. O'Neal testified that he was told by William Maxwell that Pelullo "was a consultant for Mr. Scarfo and his group[,]" which O'Neal took to mean that Pelullo was connected to "[o]rganized crime." (JAC at 2595-96.) Pelullo himself portrays that statement as "cryptic and devoid of actual content[,]" and he likewise describes O'Neal's testimony about his perception of Scarfo as "the Godfather" as unpersuasive

and speculative. (3d Cir. D.I. 345-2 at 18-22.) And, as Pelullo points out, O'Neal admitted on cross-examination that his only knowledge of organized crime came from watching movies and news coverage about Italian-American mobsters. More importantly, the proof of Pelullo's mob ties hardly depended on O'Neal's passing impressions. Pelullo's own statements and long history with the Scarfos proved that point.[120]

In short, the evidence of O'Neal's participation in the kickback scheme does not "put the whole case in such a different light as to undermine confidence in the verdict."[121]

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[120] As already noted, *see supra* Section IV.B.1, the evidence of Pelullo's mob ties outside of what O'Neal had to say was extensive. The government presented expert testimony about Scarfo's and Scarfo's father's records of involvement with LCN. It then connected Pelullo to LCN through evidence of, *inter alia*, his effectively familial relationship with the Scarfos, his efforts to ensure Scarfo profited from FirstPlus without doing any work, and his fear of the consequences of failing to provide financially for Scarfo's father.

[121] Pelullo also uses his motion to address several other issues, including alleged deficiencies in the government's pretrial compliance with its disclosure obligations unrelated to the O'Neal investigation and post-trial discoveries of purported inconsistencies in O'Neal's testimony. He cites little in support of those allegations – some of which appear to duplicate arguments raised in his primary briefing – and offers no reason why those issues could not have been fully argued in his opening brief, so we decline to address them. *See United*

Kyles, 514 U.S. at 435. Remanding Pelullo's case – and delaying the resolution of his and the other Defendants' appeals – would therefore inevitably fail to secure him a new trial, and so a remand is not in order.

VIII. CONCLUSION

The Defendants have raised a wide-ranging and extensive list of objections to their convictions and sentences, but none, save one, entitle any of them to relief. We will accordingly affirm the convictions and sentences of Scarfo, Pelullo, and William Maxwell. We will also affirm John Maxwell's conviction, but we will vacate his sentence and remand to the District Court for further proceedings consistent with this opinion. We conclude with a particular commendation to the District Court for its deft and wholly admirable management of this very complicated matter.

States v. Rawlins, 606 F.3d 73, 82 n.11 (3d Cir. 2010) (refusing to address argument that appellant "fail[ed] to develop"); *United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) (requiring that issues be raised in an opening brief to avoid forfeiture).