

SCOTUS to Decide If the Feds Have to Follow the Forfeiture Rules

By Evan T. Barr
January 3, 2024

On Sept. 29, 2023, the U.S. Supreme Court granted certiorari in *McIntosh v. United States* to determine whether a district court may enter a preliminary order of forfeiture divesting a defendant of his or her property outside the time limits set forth in the Federal Rules of Criminal Procedure.

A preliminary order of forfeiture is typically a ministerial formality and rarely the subject of controversy. A circuit split has developed, however, regarding the consequences that may arise from the government's failure to comply with the requirements of the preliminary order rule in a timely fashion.

The court's decision in *McIntosh*, beyond resolving this obscure point of procedure, may also clarify whether the government can be strictly held to the kinds of deadlines that bedevil every other litigant.

Preliminary Order of Forfeiture

If the government seeks to forfeit property as part of any sentence imposed on a defendant, it must give notice of that intent in the charging instrument. Following a conviction, the court then must determine whether there is property of the defendant (typically proceeds of the crime) that will be subject to confiscation. In making this determination, the court may rely on the terms of a plea agreement, a special verdict form returned by the jury, or the court's own findings.

Federal Rule of Criminal Procedure 32.2(b)(2) provides that once the court makes that determination, "it must *promptly* enter a preliminary order of forfeiture" which remains in place until the time of sentencing (emphasis added.) The preliminary order must describe any specific properties associated with the crime, substitute assets to be seized in the event directly forfeitable property is no longer available, and the amount of any money judgment sought.

Upon entry of a preliminary order, the government may seek discovery to locate additional assets, obtain restraining orders to preserve at-risk properties, and commence proceedings to resolve third-party claims. It also gives the defense an opportunity to ensure that the listed assets have been described accurately and to challenge whether a nexus between the offense and the property has been established.

To allow time for these options, the preliminary order ideally should be entered well before sentencing. The rule, however, does not include a specific timetable aside from mandating that it be done "promptly." This ambiguity has led



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to divergent practices among U.S. attorney's offices, and conflicting court rulings.

The Second Circuit's Ruling in 'McIntosh'

In 2011, a grand jury indicted Louis McIntosh on Hobbs Act and firearms charges in connection with a string of violent robberies. The indictment gave notice that the government would seek to forfeit all proceeds and property resulting from the offenses. In 2013, a jury convicted McIntosh and he was later sentenced to 60 years in prison. The district court at sentencing also ordered McIntosh to forfeit \$75,000 and a BMW that he had purchased with robbery proceeds.

The district court did not enter a preliminary order of forfeiture prior to sentencing, apparently because the government failed to submit a proposed order. At sentencing, the district court verbally imposed forfeiture but directed the government to submit a formal written order within one week, which remarkably the government also failed to do. After further delays not relevant here, in August 2017, the district court finally entered a judgment incorporating forfeiture of the money and the car.

On appeal, McIntosh argued that the forfeiture order should be vacated because the district court had failed to enter a preliminary order as required under Rule 32.2(b)(2). The U.S. Court of Appeals for the Second Circuit disagreed. Noting that "[n]othing in the federal rules sets forth the consequences of a failure by the district court to issue the preliminary order prior to sentencing," the Second Circuit instead found the Supreme Court's decision in *Dolan v. United States*, 560 U.S. 605 (2010) to be dispositive.

Dolan involved a provision in the Mandatory Victims Restitution Act (MVRA) requiring the court to make final determinations of victim losses within 90 days after sentencing. Because the district court in *Dolan* had held a restitution hearing after the 90-day period had elapsed, the issue for the court was whether the resulting restitution order could stand.



Photo: Diego M. Radzinski/ALM

The U.S. Supreme Court in Washington, D.C.

The Supreme Court created a framework to analyze the consequences of a missed deadline when not specified in the statute. The court described three categories: "jurisdictional rules" where expiration of a deadline creates an absolute prohibition; "claims processing rules" which do not limit the court's jurisdiction but rather regulate timing for the filing of motions or claims and can be waived if not invoked by either party; and "time-related directives" designed to keep a process moving but which do not deprive a judge or other public official of the power to take action in the event a deadline is missed.

The *Dolan* court concluded that the 90-day MVRA deadline was a "time-related directive" for three main reasons. First, the restitution statute did not specify a consequence for noncompliance with the prescribed timeframe. Second, the purpose of the MVRA was to aid crime victims in securing prompt recovery, not to provide procedural safeguards for defendants. Third, depriving the sentencing court of the power to order restitution would harm crime victims who bore no responsibility for a missed deadline. Based on this analysis, the blown deadline did not require the restitution order to be set aside.

Applying this framework in *McIntosh*, the Second Circuit held that the Rule 32.2 forfeiture deadline was analogous to the restitution provision in *Dolan*. First, the court noted, the rule did

not specify a consequence for noncompliance. Second, the rule is supposed to give the parties time to advise the court of errors or omissions, not give defendants certainty as to the forfeited amount, consistent with the general purpose of forfeiture in depriving defendants of ill-gotten gains. Third, because forfeited funds can sometimes be directed to victims of the crime, preventing forfeiture due to a missed deadline would tend to harm innocent parties and disproportionately benefit defendants. Fourth, a defendant concerned about delays or mistakes could simply remind the district court of the preliminary order requirement at any time prior to sentencing.

Accordingly, the Second Circuit rejected McIntosh's appeal and upheld the forfeiture order against him despite the obvious and undisputed procedural defects.

The Circuit Split and Issue for SCOTUS

The U.S. Courts of Appeals for the Fourth and Seventh Circuits have similarly read Rule 32.2 to be merely a "time-related directive" along the lines articulated by the Second Circuit in *McIntosh* and thus have held that a delay in filing the preliminary order does not deprive a court of the ability to impose forfeiture at sentencing. See *United States v. Martin*, 662 F.3d 301 (4th Cir. 2011) and *United States v. Lee*, 77 F.4th 565 (7th Cir. 2023). The Sixth and Eighth Circuits, by contrast, view Rule 32.2 as a more exacting "claims processing rule," and have held that failure to timely file a preliminary order may invalidate any subsequent forfeiture judgment. See *United States v. Maddux*, 37 F.4th 1170 (6th Cir. 2022) and *United States v. Shakur*, 691 F.3d 979 (8th Cir. 2012).

These courts have emphasized that Rule 32.2, unlike the 90-day clock in *Dolan*, is supposed to ensure that forfeiture is resolved fully and fairly and to provide a defendant with a meaningful opportunity to contest

the deprivation of property rights as due process requires.

The Supreme Court agreed to hear this case (notwithstanding the small amount at stake) to resolve this circuit split. If experience is a guide, it is unlikely the justices did so merely to announce that forfeiture and restitution can be treated similarly. Rather, the Supreme Court in the past has seized upon instances of prosecutorial overreach in civil and criminal forfeiture matters to curtail the government's otherwise unfettered discretion and authority in this area of the law.

The Solicitor General (whose brief is due soon) will argue that McIntosh was not prejudiced by the procedural lapse, had notice of the government's plans and cannot point to anything substantial that he (or the court) would have been done differently had the preliminary order been timely filed. On the other hand, she faces the unenviable task of justifying what amounts to either prosecutorial incompetence, a cavalier disregard for the rules, or both. That is something you can expect both conservative and liberal justices alike to pounce on during oral argument.

The petitioner in *McIntosh* has argued that unlike restitution, forfeiture is a form of punishment that does not meaningfully benefit crime victims. When the federal government seeks to take property from an individual, he asserts, it is not too much to ask that the government comply with the exact letter of the law. There are many instances, he says, in which the government is more than happy to have certain federal rules recognized as rigid "claims-processing" rules when missed deadlines inure to the government's benefit. Basic fairness dictates that when it comes to deadlines, it's a "two-way street."

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