

Rule 32.2(b) / Consequences of Failure to Enter Forfeiture Order at Sentencing

Sixth Circuit holds that the procedures in Rule 32.2(b) are mandatory; so, unless Rules 35(a) or 36 apply or the Government appeals, the failure to enter a forfeiture order at sentencing is fatal.

United States v. Maddux, 37 F.4th 1170, 1178 (6th Cir. 2022).

Sixth Circuit * Defendant and her husband were convicted of fraud and money laundering in connection with the sale of untaxed cigarettes. When the verdict was returned, the Government moved for a preliminary order forfeiting specific assets that had been listed in the indictment and requesting the entry of a money judgment. At sentencing, however, the court ordered the forfeiture only of the specific assets; it made no mention of the money judgment and the Government did not raise the issue.

Five months after Defendant's sentencing and while her appeal was pending, the district court finally granted the Government motion, imposing a money judgment of \$17.5 million. In an intervening appeal, however, the Sixth Circuit held that a district court lacks jurisdiction to issue a forfeiture order while an appeal is pending, vacated the forfeiture order, and remanded the case to the district court. *United States v. Carman*, 933 F.3d 614 (6th Cir. 2019) (October 2019 *Digest*).

On remand, the Government renewed its motion for a money judgment which Defendant opposed on the ground that a court lacks authority under Rule 32.2(b) to enter a forfeiture order after a sentence becomes final; but the court held that the procedures in Rule 32.2(b) are "time-related directives" which do not deprive a district court of the power to enter a forfeiture order even if the deadlines set forth in the rule are missed. *United States v. Maddux*, 2020 WL 4453745, *3 (E.D. Ky. Aug. 3, 2020) (collecting cases holding that the deadlines in Rule 32.2 are "time-related directives") (September 2020 *Digest*). Defendant appealed.

On appeal, the panel acknowledged that other courts have held that the procedures in Rule 32.2(b) are only time-related directives; it declined, however, to follow those cases, holding instead that the procedures in Rule 32.2(b) are "mandatory claims-processing rules" that are binding on the courts "and may not be equitably tolled." Moreover, the panel said, "they are not subject to harmless error analysis."

That the procedures in Rule 32.2(b) are mandatory and binding, the court said, is clear from the structure of the rule. Rule 32.2(b)(4)(A) provides that a forfeiture order becomes final as to the defendant “at sentencing.” “Final” the court said, “means final.” Rule 32.2(b)(2)(C) provides for the entry of a forfeiture order in general terms that may be amended later, but that applies only if the general order is entered at sentencing. Otherwise, the only exceptions contemplated by the rule are corrections to clerical errors that may be made at any time pursuant to Rule 36, and corrections to other errors or omissions within 14 days of sentencing pursuant to Rule 35(a).

Accordingly, the court concluded, “if forfeiture is not included in the sentence per Rule 32.2(b), it may be added later only if Rules 35(a) or 36 allow for it (or if the Government timely appeals and wins a resentencing).”

The Government argued that such a strict construction of the rule would deprive it of the ability to use forfeiture to recover property for the benefit of victims, but the court was not persuaded. Rule 32.2(b)’s “A-to-Z roadmap for criminal forfeiture requires that certain procedural steps be taken at certain specific times,” the court said, “to ensure defendants receive due process paired with finality.”

It is true that the forfeiture statutes allow the Attorney General to remit forfeited funds to victims, the court continued. But if the district court fails to enter a forfeiture order at sentencing after the Government has filed a timely motion, the Government’s remedy is to appeal. Its failure to do so in that instance “is its own fault;” it cannot leverage the court’s sympathy for “blameless, non-party victims” as a reason to ignore the mandatory nature of the rule.

In this case, the court concluded, the Government’s decision not to appeal “was fatal.”

Finally, the court noted that the outcome might have been different if the district court had at least mentioned the possibility of entering a money judgment at sentencing, because doing so would “ensure[] that he defendant knows of the forfeiture” at that time. But because the district court did not mention the money judgment at sentencing in this case, that exception would not apply.

Accordingly, the court held that because the procedures in Rule 32.2(b) were not followed, the Government did not appeal, and Rules 35(a) and 36 did not apply, the forfeiture money judgment was void and was reversed. *SDC*

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Comment: There is now a clear split in the circuits on this recurring issue. The Fourth and Second Circuits have held that the procedures in Rule 32.2(b) are “time-related directives” the violation of which does not deprive the district court of the ability to enter a forfeiture order after the defendant is sentenced. *United States v. Martin*, 662 F.3d 301, 308-09 (4th Cir. 2011) (the failure to enter an order of forfeiture at sentencing, as Rule 32.2(b)(4)(B) requires, does not deprive the court of the ability to enter the order at a later time, as long as the defendant was aware of the forfeiture at sentencing); *United States v. McIntosh*, 24 F.4th 857 (2nd Cir. 2022) (following *Martin*; Government’s failure to follow time-directed rule in providing court with a proposed order of forfeiture at or before sentencing did not bar court from entering order later).

In both cases, the courts followed the Supreme Court’s decision in *Dolan v. United States*, 560 U.S. 605, 619-20 (2010), which held that the statute requiring a court to enter a restitution order within 90 days of sentencing does not deprive the court of the authority to enter a belated order if it misses the deadline.

Other courts have reached a similar conclusion without relying expressly on *Dolan*. See, e.g., *United States v. Marquez*, 685 F.3d 501, 509-10 (5th Cir. 2012) (the provisions of Rule 32.2(b) are “not empty formalities;” they are mandatory; but if the defendant does not object, the district court’s failure to enter any forfeiture order until three weeks after sentencing or to mention forfeiture in the oral announcement, while “plainly erroneous,” does not render the forfeiture void in the absence of showing of prejudice to the defendant). There are other cases on this point in Section XI.C of the Criminal Forfeiture Case Outline.

On the other hand, in *United States v. Shakur*, 691 F.3d 979, 988-89 (8th Cir. 2012), the Eighth Circuit held that the wholesale violation of Rule 32.2(b), including the failure to issue preliminary order of forfeiture prior to sentencing, failure to conduct evidentiary hearing and make finding of forfeitability at sentencing, and failure to issue any forfeiture order until 83 days after sentencing, deprived defendant of due process rights and right to appeal all aspects of his sentence at one time. See also *United States v. Petrie*, 302 F.3d 1280, 1284 (11th Cir. 2002) (district court lacked jurisdiction to enter a preliminary order of forfeiture 6 months after defendant was sentenced; the scheme set forth in Rule 32.2 is “detailed and comprehensive”).

In this case, the Sixth Circuit sides with the Eighth Circuit in *Shakur* and expressly declines to follow the Fourth and Second Circuits in *Martin* and *McIntosh*.

Accordingly, in the Sixth Circuit at least, the rule is quite clear: Including a notice of forfeiture in the indictment and moving for a preliminary order of forfeiture prior

to sentencing are not enough to comply with Rule 32.2(b); a forfeiture order – at least one in general terms under Rule 32.2(b)(2)(C) – must be entered *at sentencing*. The panel leaves open the possibility that it may be enough if the district court mentions the forfeiture orally at sentencing, but otherwise the failure to enter a forfeiture order at sentencing is fatal – unless the narrow provisions of Rules 35(a) or 36 apply, or unless the Government takes a successful appeal. See Rule 32.2(b)(4)(C) (authorizing a Government appeal from the court’s failure to enter a forfeiture order at sentencing). *SDC*