

Preliminary Order of Forfeiture / Money Judgment

Rule 32.2(b)(2)(B), which requires courts to issue a preliminary order of forfeiture prior to sentencing, is a “time-related directive”, not a jurisdictional requirement. So, a court’s failure to comply with the rule does not render the forfeiture order invalid.

That the Government bears some of the responsibility for the court’s violation of the rule – because it failed to submit a proposed order of forfeiture in advance of sentencing – does not mean the defendant is entitled to a windfall.

Overly strict application of the procedural rules governing forfeiture would undermine forfeiture’s deterrent value and harm the innocent victims who depend on forfeiture to obtain restitution.

Defendants are entitled to credit against a forfeiture money judgment for the value of specific assets that are forfeited, but the credit is based on the value obtained from the sale of the asset, not its value when it was seized.

A defendant concerned that the depreciation in the value of an asset will reduce the credit he will obtain against a forfeiture judgment can ask for an interlocutory sale.

United States v. McIntosh, 58 F.4th 606 (2nd Cir. 2023).

Second Circuit * Defendant was convicted of multiple armed robberies. At sentencing, the court ordered him to pay a forfeiture money judgment equal to the value of the proceeds of his offense, and to forfeit a BMW that he had purchased with those proceeds. The forfeiture order provided that he would be entitled to credit against the forfeiture judgment for the amount of money that the Government obtained from the sale of the vehicle.

Defendant appealed, arguing *inter alia* that the forfeiture order was invalid because the district court had not entered a preliminary order in advance of sentencing as Rule 32.2(b)(2)(B) requires.

Applying the Supreme Court’s decision in *Dolan*, which lays out the framework for determining when a procedural rule is jurisdictional and when it is not, the panel held that the rule requiring a court to enter a preliminary order of forfeiture in advance of sentencing is a “time-related directive” and not a jurisdictional requirement. Thus, the district court’s failure to follow the rule – apparently because the Government failed to submit a proposed preliminary

order – did not render the forfeiture order invalid.

The court cited several reasons for this view: 1) the rule itself does not specify a consequence for non-compliance; 2) the purpose of the rule – according to the Advisory Committee’s Notes – was to enhance the accuracy of forfeiture orders by giving the parties the opportunity to correct errors prior to sentencing, not to give the defendant advance notice of the forfeiture order; 3) “because forfeited funds frequently go to the victims of the crime, preventing forfeiture due to the missed deadline would tend to harm innocent people;” 4) interpreting the rule rigidly would provide defendants with an undeserved windfall; and 5) defendants who want advance notice of a forfeiture order “can remind the district court of the preliminary order requirement any time before sentencing.”

Defendant argued that the rule should nevertheless be strictly enforced because the Government – in failing to submit a proposed order of forfeiture prior to sentencing -- bears some of the responsibility for the court’s failure to comply with the rule. But the panel did not agree. The failure to comply with a time-related directive is not fatal, the court said, “even if the Government should have been more diligent” in reminding the district court of the rule.

Separately, Defendant argued that he was not given proper credit for the value of the BMW. The court agreed that when a defendant is ordered to pay a forfeiture judgment equal to the proceeds of his crime, he is entitled to credit for the value of any specific assets that were purchased with those proceeds and are forfeited. But nothing in the law requires that the credit be based on the value of the asset at the time it was seized, as Defendant argued, instead of at the time it is sold.

Defendant also argued that the Government’s delay in waiting until the litigation over the forfeiture order was over before selling the BMW deprived him of proper credit, but the court held that if Defendant was concerned about that issue, he could have agreed to an interlocutory sale. “Crediting defendants for property depreciation that occurred during litigation and which defendants could likely prevent by requesting a sale,” the court said, “would, in most cases, undermine forfeiture’s deterrent value and possibly shortchange victims.”

So, the order of forfeiture was affirmed. *SDC*

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Comment: This is not the first appellate case to hold that the rule requiring courts to enter a preliminary order of forfeiture in advance of sentencing is a

time-related directive and not a jurisdictional requirement, and that the failure to comply with the rule does not render an order of forfeiture invalid. Indeed, the court collects the cases from the other circuits that so hold. *See, e.g., United States v. Guzman-Cordoba*, 988 F.3d 391 (7th Cir. 2021) (the trial court’s failure to enter a preliminary order of forfeiture as required by Rule 32.2(b)(2) was clear errors, but it did not affect the defendant’s substantial rights); *United States v. Bradley*, 897 F.3d 779 (6th Cir. 2018) (agreeing that there were Rule 32.2 irregularities, but holding that “not all coloring outside the lines produces a constitutional violation,” and that defendant’s due process rights were not violated); *United States v. Dahda*, 852 F.3d 1282 (10th Cir. 2017) (failure to enter preliminary order of forfeiture prior to sentencing, while plain error, did not affect defendant’s substantial rights where defendant was not deprived of opportunity to be heard and did not show that he would have made additional arguments if the preliminary order had been entered); [United States v. Farias, 836 F.3d 1315 \(11th Cir. 2016\)](#) (trial judge’s failure to issue a preliminary order of forfeiture prior to sentencing, as Rule 32.2(b) requires, is harmless error if the defendant was on notice of the Government’s intent to seek forfeiture and of the amount it intended to seek); *United States v. Cereceres*, 771 Fed. Appx. 803 (9th Cir. 2019) (failure to enter a preliminary order of forfeiture prior to sentencing as required by Rule 32.2 is harmless error if the defendant was aware of the Government’s request for forfeiture and was given the opportunity to object); and other cases cited in Section XI.B.5 of the Criminal Forfeiture Case Outline. *Cf. United States v. Martin*, 662 F.3d 301, 308-09 (4th Cir. 2011) (applying *Dolan*; the failure to enter an order of forfeiture at sentencing, as Rule 32.2(b)(4)(B) requires, does not deprive the court of jurisdiction to enter the order at a later time, as long as the defendant was aware of the forfeiture at sentencing).

What prosecutors will find most interesting about this opinion, therefore, is not its holding, but its rationale. Several times, the court emphasizes that the purpose of forfeiture is to deprive criminals of the proceeds of their crimes, that it has a deterrent purpose, and that innocent victims depend on forfeiture to recover their property through restitution. Thus, as the court makes clear, the primary rationale for not requiring strict compliance with the procedural rules for entering a forfeiture order is that it would provide defendants with an undeserved windfall, undermine the deterrent value of forfeiture, and harm innocent victims. *SDC*