

## **Rule 32.2(b) / Failure to Enter Preliminary Order of Forfeiture / Oral Announcement of the Forfeiture**

*The failure to enter a post-verdict preliminary order of forfeiture is harmless error if there is no prejudice to the defendant; thus, a court that conducts a forfeiture hearing may enter a forfeiture order at sentencing even if no preliminary order was entered.*

*The oral announcement of the forfeiture at sentencing satisfies the requirement that an order that is final as to the defendant be entered at sentencing; the court may later amend the judgment to include a written record of the forfeiture even if there was no previously-entered written order.*

*United States v. Lee*, 77 F.4th 565 (7th Cir. 2023).

**Seventh Circuit** \* Defendant was convicted by a jury of defrauding the Chicago White Sox by selling tickets to baseball games that were intended to be promotional giveaways and not sold for profit.

The indictment advised Defendant that the Government would be seeking the forfeiture of the proceeds of Defendant's offense. Contrary to Rule 32.2(b)(2), however, the court did not issue a preliminary order of forfeiture following the return of the verdict, but Defendant and the Government did exchange briefs regarding the amount that would be subject to forfeiture, and the court did hold a forfeiture hearing prior to sentencing.

At the conclusion of the hearing, the court found that Defendant's calculation of the forfeiture amount was correct, and at sentencing it orally announced that Defendant would forfeit \$455,229 in proceeds. The court, however, never issued a written forfeiture order, and contrary to Rule 32.2(b)(4)(B), did not include a forfeiture order in the judgment.

"Realizing the procedural snarl that was developing," the Government filed a motion asking the court to enter a forfeiture order and to include it in the judgment; but the court refused to do so. It reasoned that the failure to include a forfeiture order in the judgment would be a clerical error that the court was able to correct only if the court had issued a forfeiture order in the first place; but because it had never entered a written order of forfeiture, there was nothing to include in the judgment, and it was too late, after sentencing, to issue a forfeiture order for the first time. The Government appealed.

The panel began by noting that the circuits appear to be split on the consequences of a trial court's failure to follow the requirements of Rule 32.2(b): The Sixth and Eighth Circuits hold that the failure is fatal and that no forfeiture order may be entered after judgment is final; but the Fourth and Second Circuits have treated the failure to comply with the letter of Rule 32.2(b) as harmless error, and have allowed trial courts to enter forfeiture order post-sentencing.

The panel then proceeded to reconcile the apparent split in the circuits.

What all of the prior cases have in common, the panel said, was the failure to enter a preliminary order of forfeiture in accordance with Rule 32.2(b)(2). That failure is clearly error; but the consequences of that error depend on what happens next.

In the Sixth and Eighth Circuit cases, the trial judge not only failed to enter a preliminary order of forfeiture but also failed otherwise to conduct any forfeiture hearing or to mention the forfeiture at sentencing. In contrast, in the Fourth and Second Circuit cases, the trial judge did address the forfeiture issue at sentencing and gave the defendant the opportunity to respond. In the panel's view, "there is a world of difference" between these two situations.

The requirement of a post-verdict preliminary order of forfeiture, the court held, is a time-related directive, not a claims-processing rule. Thus, if the failure to follow the rule does not cause the defendant any prejudice, the court may find that the error was harmless and proceed to enter a forfeiture order at sentencing.

The requirement that a forfeiture order be entered at sentencing, on the other hand, is a claims-processing rule. Thus, if as in the Sixth and Eighth Circuit cases, the trial court not only fails to enter the preliminary order of forfeiture post-verdict, but also fails to address the forfeiture issue at all until after sentencing, the error is fatal.

In this case, the court concluded that because the trial court addressed the forfeiture issue at sentencing, but failed only to enter the post-verdict preliminary order, there was no reason the court could not enter a forfeiture order at sentencing.

Moreover, there is no reason that the order entered at sentencing must be in writing. It is the oral announcement of the sentence that controls. Thus, because the trial judge in this case did include the \$455,229 forfeiture order in the oral announcement of the sentence, it complied with the claims-processing rule, and there was no reason why the court could not thereafter have reduced the forfeiture order to writing and included it in the judgment, as the Government

requested.

So, the Government's appeal was granted and the case was remanded to amend the judgment to reflect the oral announcement of the forfeiture. *SDC*

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**Comment:** The cases on this benighted area of the law are collected in Sections XI.B, C and D of the Criminal Forfeiture Case Outline. As the facts in those cases illustrate, the district courts have found a myriad of ways of failing to comply with the seemingly straightforward requirements of Rule 32.2(b). Many courts fail to enter a preliminary order following the verdict; others address the forfeiture issue at sentencing but fail to include the forfeiture in the oral announcement, and others ignore the forfeiture issue completely until days, weeks, or months after sentencing.

The happy news is that the panel in this case attempts to reconcile the disparate outcomes in these cases by articulating a straightforward rule: the requirement of entering a post-verdict preliminary order is a time-related directive that results only in harmless error if ignored, as long as there was no prejudice to the defendant. And there is no such prejudice if the defendant was nevertheless given ample notice of the Government's motion for a forfeiture order and an opportunity to contest it.

On the other hand, entering a forfeiture order that is final as to the defendant at sentencing is a claims-processing rule that must be followed. So, a series of errors that includes not only failing to enter the post-verdict preliminary order but also the failure to address the forfeiture issue at all prior to sentencing is fatal. *Compare 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 authority to enter the order at a later time, as long as the defendant was aware of the forfeiture at sentencing) *and United States v. McIntosh*, 58 F.4th 606 (2nd Cir. 2023) (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) *with United States v. Maddux*, 37 F.4th 1170 (6th Cir. 2022) (the procedures in Rule 32.2(b) "ensure defendants receive due process paired with finality and efficiency; they are "claims-processing rules", not "time-related directives," that bind the courts and are not subject to harmless error analysis; following *Shakur* and declining to follow *Martin* and *McIntosh*); *United States v. Shakur*, 691 F.3d 979, 988-89 (8th Cir. 2012) (wholesale violation of Rule 32.2(b), including 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; forfeiture order vacated).

Here, the court failed to enter the post-verdict preliminary order but it did hold a forfeiture hearing (and ultimately sided with the defendant as to the amount subject to forfeiture); and did enter a final order of forfeiture in the form of the oral announcement at sentencing. So, because the only error was the violation of the time-related directive and there was no prejudice to the defendant, the district court should have granted the Government's motion to make the forfeiture part of the judgment. *SDC*