

Preliminary Order of Forfeiture / Failure to Enter Order Prior to Sentencing

Supreme Court holds that a district court's failure to enter a preliminary order of forfeiture prior to a defendant's sentencing, as required by Rule 32.2(b)(2)(B), does not bar the district court from entering a forfeiture order at sentencing.

But the Court nevertheless admonishes the Government for not reminding the district court of its obligation to enter the preliminary order and for not proposing one prior to sentencing as the Justice Department's Policy Manual instructs prosecutors to do.

Such failures, the Court says, should be a "rare occurrence."

McIntosh v. United States, 601 U.S. ___, ___ S. Ct. ___, 2024 WL 1642827 (U.S. Apr. 17, 2024).

Supreme Court * The Government obtained an indictment charging Defendant with multiple robberies under the Hobbs Act and informing him that it would be seeking the forfeiture of the proceeds of his offense as part of his sentence. The Government also provided Defendant with a bill of particulars advising him that his BMW automobile was subject to forfeiture as an asset traceable to those proceeds.

A jury found Defendant guilty on all counts but notwithstanding the references to forfeiture in the indictment and the bill of particulars, the Government failed to mention forfeiture in its sentencing memorandum or to submit a proposed preliminary order of forfeiture prior to sentencing. Consequently, the court did not enter a preliminary order of forfeiture as required by Rule 32.2(b)(2)(B).

The prosecutors, however, did request the entry of a forfeiture order at the sentencing hearing itself, and the court did include a forfeiture money judgment and the forfeiture of the BMW in both the oral announcement of Defendant's sentence and in the written judgment. It also ordered the Government to submit a proposed written forfeiture order "within a week," but the Government failed to do so.

Defendant appealed and the Government requested a remand to the district court so that the court could enter the written forfeiture order. The Second Circuit granted the request and the case was remanded.

On remand, Defendant objected that because the district court had failed to comply with Rule 32.2(b)(2)(B) by issuing a preliminary order of forfeiture prior to sentencing, the forfeiture order that was orally announced at his sentencing was void, and the court was barred from entering the written order. The district court held, however, that Rule 32.2(b)(2)(B) is a “time-related directive,” not a “mandatory claims-processing rule,” and that the court’s failure to comply with the rule did not bar it from entering a forfeiture order as part of Defendant’s sentence. Accordingly, the court entered the written order and when Defendant appealed again, the Second Circuit affirmed the district court. *United States v. McIntosh*, 58 F.4th 606 (2nd Cir. 2023.), amending 24 F.4th 857(2nd Cir. 2022) (March 2022 *Digest*).

The Supreme Court granted *cert.* to resolve what Defendant claimed was a split in the circuits on this issue.

In a unanimous opinion written by Justice Sotomayor, the Court agreed with the Government, the district court, and the Second Circuit that Rule 32.2(b)(2)(B) is a “time-related directive” and that a trial court’s failure to follow the rule by entering a preliminary order of forfeiture prior to sentencing does not bar the entry of a forfeiture order at sentencing. At most, the Court said, a trial court’s failure to follow the rule would allow a defendant to object to the forfeiture under the harmless error standard.

The Court gave several reasons for its ruling. First, Rule 32.2(b)(2)(B) provides that “unless doing so is impractical,” a court must enter a preliminary order of forfeiture “sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications” before the order becomes final. “Both the impracticality exception and the sufficiently-in-advance condition,” the Court said, suggest that the Rule “contemplates flexibility” regarding the entry of a preliminary order of forfeiture, and not a “rigid” or “inflexible” claims-processing rule.

Second, Rule 32.2(b)(2)(B) does not specify a consequence for noncompliance. “In the absence of such a specification,” the Court said, “courts will not in the ordinary course impose their own coercive sanction for noncompliance with a timing directive.”

“Indeed,” the Court continued, “it would be especially strange to prohibit a sentencing court from ordering forfeiture for not complying” with a part of Rule 32.2 that does not specify that consequence for noncompliance, when other parts of Rule 32.2 do bar the entry of a forfeiture order as a consequence for such noncompliance. For example, a court may not impose a forfeiture order if

the Government fails to including notice of its intent to seek forfeiture in the defendant's indictment as required by Rule 32.2(a).

Third, the Court noted that "Rule 32.2(b)(2)(B) governs the conduct of the district court, not the litigants." It does not say that *the Government* must enter a preliminary order but that *the court* must do so. Indeed, it does not mention the Government at all.

That does not mean that the Government does not bear some of the blame for what happened in this case. Although Rule 32.2(b)(2)(B) does not put any obligation on the Government regarding the entry of a preliminary order of forfeiture, the Justice Department's Asset Forfeiture Policy Manual "instructs its prosecutors to recommend a preliminary order of forfeiture prior to sentencing to assist judges at sentencing." Here, the Court said, "in circumstances that this Court *expects are a rare occurrence*," the prosecutors failed to remind the trial court of its obligation to enter a preliminary order, failed to prepare a preliminary order, and failed to comply with the court's order at sentencing to prepare a written order within a week of the sentencing hearing.

Nevertheless, the Court held that because "Rule 32.2(b)(2)(B)'s plain terms require a district court, and not the prosecutors, to enter a preliminary order," the prosecutors' failure to follow the policy directive was not a reason to bar the district court from entering a forfeiture order.

So, the Court held that Rule 32.2(b)(2)(B) is a "time-related directive," and that the violation of the rule by the district court did not bar the court from entering a forfeiture order as part of the defendant's sentence. At most, a violation of the rule would be subject to review under the harmless error standard.

So, the forfeiture order entered by the district court was affirmed. *SDC*

Contact:

Comment: The Supreme Court granted *cert.* in this case ostensibly to resolve a split in the circuits on the consequences of a trial court's failing to adhere to Rule 32.2's requirements, but in fact, there was no such split in the circuits on the issue that was actually presented in this case.

Indeed, the Courts of Appeals have been unanimous in holding that a trial judge's failure to enter a preliminary order of forfeiture prior to sentencing as Rule 32.2(b)(2)(B) requires *does not* bar the court from entering a forfeiture order at sentencing. See Section XI.C.1 of the Criminal Forfeiture Case Outline. The

judgment of the Supreme Court in this case merely affirms that rule. So, why did the Supreme Court grant *cert.* in this case?

In his *cert.* petition, the defendant conflated the appellate cases dealing with the failure to enter a *preliminary* order in compliance with Rule 32.2(b)(2)(B) with the cases dealing with the failure to make forfeiture part of the oral announcement of the defendant's sentence *at the sentencing hearing* in compliance with Rule 32.2(b)(4)(B). The courts are indeed split on the consequences of the failure to comply with *that* rule, with some courts holding that the failure to enter a forfeiture order and to make it part of the oral announcement of the defendant's sentence at the sentencing hearing is fatal, and others holding that the district court retains the power to enter a forfeiture order at a later time, *see, id.* at § XI.D; but compliance with Rule 32.2(b)(4)(B) was not at issue in this case.

In a footnote in the Opinion, Justice Sotomayor appears to acknowledge that the Court was misled as to the need to render a decision on the issue that was actually presented. *McIntosh*, slip op. at 4 n.3, citing *United States v. Lee*, 77 F.4th 565, 577 (7th Cir. 2023) (explaining why the cases holding that the failure to enter a forfeiture order at the sentencing hearing is fatal do not apply to the failure to enter a preliminary order of forfeiture). Nevertheless, much of the reasoning in *McIntosh* may apply when the time comes to determine whether the failure to enter a forfeiture order *at sentencing* in compliance with Rule 32.2(b)(4)(B) is fatal or not.

For example, like the rule pertaining to preliminary orders, the rule governing the entry of a forfeiture order at sentencing does not specify a consequence for noncompliance, and it is directed at the court, not at the litigants. Citing those two factors, the Government is certain to argue that both rules are time-related directives, and that just as noncompliance with Rule 32.2(b)(2)(B) is not fatal, neither is noncompliance with Rule 32.2(b)(4)(B).

On the other hand, the latter rule contains none of the flexible language regarding the timing of the entry of the order that the former rule does. Where Rule 32.2(b)(2)(B) says that a preliminary order must be entered before sentencing "unless doing so is impractical," Rule 32.2(b)(4)(B) says that the court "must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing." Defendants will surely argue that that distinction means that the latter rule is a rigid requirement, the violation of which deprives the defendant of his right to have his entire sentence made known to him at one time.

The other important aspect of this case is the Court's concern with the prosecutors' failure to follow the DOJ Policy Manual's instruction to prepare a

preliminary order of forfeiture for the court's consideration in advance of sentencing, so that the court is reminded of its obligation to enter such an order in compliance with Rule 32.2(b)(2)(B). The court says, "in circumstances that this Court expects are a rare occurrence." the prosecutors failed to do what they were instructed to do.

Sadly, what occurred in this case is far from a "rare occurrence." As all asset forfeiture specialists in the U.S. Attorney's Offices know, the failure of the criminal AUSAs to follow the letter of Rule 32.2 in the weeks leading up to and including the sentencing hearing is commonplace. Whether the clear warning from the Supreme Court in *McIntosh* that this is not acceptable will spur greater compliance with the DOJ policy in future cases remains to be seen. *SDC*