No. 22-7386

In the Supreme Court of the United States

LOUIS MCINTOSH, AKA LOU D, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court possessed the authority to order forfeiture, when it ordered forfeiture at sentencing and in the judgment of conviction but failed to enter a preliminary order of forfeiture under Federal Rule of Criminal Procedure 32.2(b) within the timeframe contained in that rule.

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OPINIONS BELOW

The amended opinion of the court of appeals (J.A. 132-143) is reported at 58 F.4th 606. The amended summary order of the court of appeals (J.A. 144-155) is not published in the Federal Reporter but is available at 2023 WL 382945. The relevant opinion of the district court (J.A. 85-110) is not published in the Federal Reporter but is available at 2017 WL 3396429.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2023. The petition for a writ of certiorari was filed on April 24, 2023. The petition was granted on September 29, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

Pertinent statutes and rules are reproduced in the appendix to this brief. App., *infra*, 1a-26a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty of one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951; two counts of committing Hobbs Act robbery, in violation of 18 U.S.C. 1951; one count of attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951 and 2; four counts of using, carrying, or possessing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1); and three counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). J.A. 1-9, 40-41. The district court entered a judgment of acquittal on the attempted robbery count and the corresponding Section 924(c) count. J.A. 5-6, 39. The court sentenced petitioner to 720 months of imprisonment, to be followed by three years of supervised release. J.A. 42-43. The court also ordered petitioner to forfeit $75,000 and a specific BMW car, while directing the government to submit a separate written order of forfeiture to that effect within one week for the court's signature, which did not occur. J.A. 50, 62. The court's judgment contained a clerical error regarding the amount of forfeiture. J.A. 50.

Petitioner appealed his conviction and sentence, and the government cross-appealed the district court's partial judgment of acquittal. Before any decision on the merits, the court of appeals granted the government's unopposed motion to remand to correct the clerical error in the judgment and to request entry of a separate written order of forfeiture. J.A. 74-75. On remand, the

district court entered a separate written order of forfeiture, again requiring petitioner to forfeit $75,000 and the car, and an amended judgment correcting the prior clerical error. J.A. 123, 124-129.

On review of the amended judgment, the court of appeals affirmed petitioner's convictions on eight counts; reversed the district court's judgment of acquittal on the attempted robbery count; affirmed the judgment of acquittal on the accompanying Section 924(c) count; vacated petitioner's conviction on another Section 924(c) count; vacated the forfeiture order in part; and remanded for resentencing and entry of a revised forfeiture order. J.A. 132-143, 144-155.

On the second remand, the district court resentenced petitioner to 300 months of imprisonment, to be followed by three years of supervised release. J.A. 166-167. The court also entered an agreed-upon order of forfeiture, requiring petitioner to forfeit $28,000 and the car. J.A. 175, 184-186. Petitioner has appealed the judgment on resentencing.

A. Legal Background

This case concerns the procedures for ordering a defendant to forfeit property to the United States in a criminal case. Criminal forfeiture—as distinct from *in rem* civil forfeiture—is "an aspect of punishment imposed following conviction of a substantive criminal offense." *Libretti* v. *United States*, 516 U.S. 29, 39 (1995). The forfeiture of the defendant's interest in property occurs within the criminal proceeding itself, pursuant to several interrelated statutes and the Federal Rules of Criminal Procedure.

1. Under 28 U.S.C. 2461, if a defendant is charged with an offense for which Congress has authorized civil or criminal forfeiture, the government "may include no-

tice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure." 28 U.S.C. 2461(c). If the defendant is convicted of the offense, the court "shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to * * * the Federal Rules of Criminal Procedure and section 3554 of title 18," using "[t]he procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853)." *Ibid.*

The two cross-referenced statutes, 18 U.S.C. 3554 and 21 U.S.C. 853, trace their roots to the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 212(a)(2), 303, 98 Stat. 1990-1991, 2044-2045, which established procedures to "enhance the use of forfeiture * * * as a law enforcement tool" to combat "racketeering and drug trafficking," S. Rep. No. 225, 98th Cong., 1st Sess. 191 (1983). Congress later broadened the availability of criminal forfeiture as a sanction for other offenses while incorporating those preexisting procedures. 28 U.S.C. 2461(c); see Combating Terrorism Financing Act of 2005, Pub. L. No. 109-177, Tit. IV, § 410, 120 Stat. 246; Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 16, 114 Stat. 221. Thus, although 18 U.S.C. 3554 and 21 U.S.C. 853 continue to refer by their terms to the drug-trafficking and racketeering offenses for which they were originally enacted, the procedures set forth in them are now more broadly applicable.

Section 3554 provides that the district court, "in imposing a sentence on a defendant" for specified offenses, "shall order, in addition to the sentence that is imposed pursuant to the provisions of [18 U.S.C.] 3551, that the defendant forfeit property to the United States in accordance with * * * [21 U.S.C. 853]." 18 U.S.C.

3554. Section 853 in turn provides that the court "shall order" forfeiture "in addition to any other sentence imposed," and specifies various details of how the forfeiture is effectuated—including procedures for seizing and holding the property pending trial, disposing of it after forfeiture, and adjudicating any claims by third parties. 21 U.S.C. 853(a); see 21 U.S.C. 853(c) and (e)-(p).

For the offense at issue here—Hobbs Act robbery under 18 U.S.C. 1951—Congress has authorized the forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to [the] violation." 18 U.S.C. 981(a)(1)(C); see 18 U.S.C. 1956(c)(7), 1961(1). Forfeiture of such property ensures that the defendant does not benefit "from his ill-gotten gains." *Honeycutt* v. *United States*, 581 U.S. 443, 447 (2017) (citation omitted).

2. In addition to the statutory framework discussed above, criminal forfeiture occurs "pursuant to * * * the Federal Rules of Criminal Procedure," 28 U.S.C. 2461(c), which address forfeiture primarily in Rule 32.2.

Rule 32.2 provides that a "court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant." Fed. R. Crim. P. 32.2(a). If the defendant is then convicted of the relevant offense or pleads guilty, Rule 32.2 directs the court to determine "what property is subject to forfeiture under the applicable statute," and to make that determination "[a]s soon as practical" after the verdict or acceptance of a plea. Fed. R. Crim. P. 32.2(b)(1)(A). "If the court finds that property is subject to forfeiture," the court "must promptly enter a preliminary order of forfeiture" identifying the specific property subject to forfeiture or the amount of any for-

feiture money judgment. Fed. R. Crim. P. 32.2(b)(2)(A). Rule 32.2 states that, "[u]nless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4)." Fed. R. Crim. P. 32.2(b)(2)(B).

Rule 32.2(b)(4) provides that a "preliminary forfeiture order becomes final as to the defendant" "[a]t sentencing," unless the defendant consents to an earlier time. Fed. R. Crim. P. 32.2(b)(4)(A). Notably, the order becomes final at sentencing only "as to the defendant," not "as to third parties." *Ibid.* Because criminal forfeiture is not an *in rem* proceeding, additional process is required to ensure that no third-party interests are superior to those that the defendant forfeits to the United States. See Fed. R. Crim. P. 32.2(b)(6) and (c); cf. 21 U.S.C. 853(n).

Rule 32.2(b)(4) also specifies that the sentencing court "must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing." Fed. R. Crim. P. 32.2(b)(4)(B). The court must also "include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36." *Ibid.*

B. The Present Controversy

1. From 2009 to 2011, petitioner was the leader of a crew that committed "a series of violent robberies and attempted robberies" in New York. J.A. 134. In one of the robberies, petitioner and two other members of the crew robbed a man at his home in Lynbrook, New York. J.A. 148-150. The robbers approached the victim while he was working in his garage, held him at gunpoint, and

bound and gagged him while they searched his home. J.A. 17-21. After the robbers found $70,000 in cash, petitioner pulled the victim's pants down and tasered his genitals, demanding to know if any additional money was hidden in the house. J.A. 22-24, 28-29. Petitioner and the others fled when they heard a passing siren. Trial Tr. 418-419.

Petitioner used part of his share of the Lynbrook robbery proceeds to buy a BMW from a salvage yard for about $10,000. J.A. 29-30, 32-35. The car was purchased with cash and money orders, and petitioner's mother was listed as the buyer. J.A. 26, 35-36.

2. a. On January 18, 2012, a federal grand jury in the Southern District of New York returned a superseding indictment charging petitioner with one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951; two counts of committing Hobbs Act robbery, in violation of 18 U.S.C. 1951; one count of attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951 and 2; four counts of using, carrying, or possessing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) and 2; and three counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). J.A. 1-9. Five other members of the crew were also charged with various offenses in the same indictment. *Ibid.* The indictment alleged that, for the Hobbs Act counts, the defendants "shall forfeit" to the United States "all property * * * that constitutes or is derived from proceeds traceable to the commission of the offenses, including but not limited to a sum in United States currency representing the amount of proceeds obtained as a result of the offenses." J.A. 10-11.

The government later provided a bill of particulars, specifying that the "property subject to forfeiture" for the Hobbs Act counts included the BMW that petitioner had purchased. J.A. 12-13. By that time, the BMW had been seized and was in the custody of the local police. The government sought and obtained an order under 21 U.S.C. 853(e)(1) authorizing the police to hold onto the car so that it would be "available for forfeiture at the conclusion" of the case. J.A. 15.

The case proceeded to trial. As relevant here, the government presented testimony from one of petitioner's coconspirators establishing that petitioner purchased the BMW with proceeds of the Lynbrook robbery, as well as corroborating evidence from the salvage yard and petitioner's cellphone. J.A. 29, 34-37; see Trial Tr. 1044-1045 (government's closing argument). The trial evidence also established that petitioner and his coconspirators "netted at least $75,000 in cash and cell phones from" the charged series of robberies, most of which came from the Lynbrook robbery. J.A. 86.

The jury convicted petitioner on all counts. J.A. 134. Neither party requested that the jury be retained to make any findings regarding forfeiture. See Fed. R. Crim. P. 32.2(b)(5)(A). After trial, the district court granted petitioner's motion for a judgment of acquittal on one of the Hobbs Act counts and a corresponding Section 924(c) count. J.A. 39.

The district court held a sentencing hearing on May 23, 2014. J.A. 52. The court had not entered a preliminary order of forfeiture beforehand. The government stated at the hearing that it was "seeking forfeiture of * * * $75,000 in a money judgment, as well as the BMW." J.A. 54. The government also stated that it was prepared to submit a separate written order of forfei-

ture "within the next week." *Ibid.* Petitioner did not raise any objection to that proposed timing, but he did argue that no "dispositive" evidence tied the "money that was utilized to purchase the BMW" to the Lynbrook robbery. *Ibid.* The court overruled petitioner's objection, citing its recollection of the trial evidence. J.A. 55.

The district court sentenced petitioner to 720 months of imprisonment, to be followed by three years of supervised release. J.A. 59-60. In pronouncing the sentence, the court stated that it was "directing an order of forfeiture of $75,000, plus a BMW," based on the court's finding that the "$75,000 and the BMW are the fruits of the crime[s]." J.A. 62. The court also stated that the government "shall submit an order of forfeiture for signature by the [c]ourt within a week." *Ibid.* In its judgment of conviction, the court ordered petitioner to forfeit "$95,000 in U.S. currency and a BMW," while again directing the government to submit a separate written order of forfeiture for the court's signature "within one week," which inadvertently did not occur. J.A 50; see J.A. 41.

b. Petitioner appealed his conviction and sentence, and the government cross-appealed the district court's partial judgment of acquittal. J.A. 145. Although petitioner noticed his appeal in June 2014, he did not file his opening brief until June 2016. In that brief, petitioner argued that the written judgment was erroneous insofar as it ordered forfeiture of $95,000 rather than $75,000 (as pronounced at sentencing), and that any moneys obtained by the government in selling the forfeited BMW should be credited against his obligation to pay the forfeiture money judgment. 14-1908 Pet. C.A. Br. 59-60. Petitioner also observed that the government

had not submitted a separate written order of forfeiture for the court's signature, but he did not raise any claim of error based on that oversight. See *id.* at 55.

The government agreed with petitioner that the written judgment was incorrect insofar as it ordered forfeiture of $95,000 rather than $75,000. J.A. 68. The government therefore moved to remand the case to the district court to correct the written judgment. *Ibid.* The government also took the position that, on remand, the court would have the authority to supplement the existing record by entering a "formal order[] of * * * forfeiture," *ibid.*, and that petitioner could "contest[] the timeliness of such an order" on remand should he wish to do so, J.A. 71. Petitioner did not oppose the remand. J.A. 73. The court of appeals granted the government's motion and remanded the case. J.A. 74-75.

c. On remand, petitioner contended for the first time that the government had "forfeited its right to forfeiture." D. Ct. Doc. 256, at 12 (Mar. 3, 2017) (capitalization and emphasis omitted). At a hearing, petitioner acknowledged that he "knew of the forfeiture at sentencing," because the court had "orally announced the forfeiture, and * * * put it into the judgment." J.A. 81. But he maintained that the failure to enter a preliminary forfeiture order before sentencing "bar[red]" the court from proceeding with forfeiture. J.A. 101.

The district court rejected that argument based on *Dolan* v. *United States*, 560 U.S. 605 (2010), which addressed a statutory deadline in the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227. See J.A. 101-109. The provision at issue in *Dolan* authorized a court to postpone making a final determination of the amount of mandatory restitution required in a given case for up to

"90 days after sentencing." 18 U.S.C. 3664(d)(5). This Court held that the 90-day deadline is a "time-related directive," rather than a jurisdictional or mandatory claim-processing rule, and hence that a sentencing court's failure to satisfy it "does not deprive the court of the power to order restitution." 560 U.S. at 611. In concluding that Rule 32.2(b)(2)(B) is similarly a time-related directive, the district court emphasized that petitioner had been on notice of the government's forfeiture allegations "from the time he saw the 2011 indictment," and that the "final amount of forfeiture was found on the record" at the 2014 sentencing, after petitioner had been given "ample opportunity to challenge" it. J.A. 107-108. The court also found that the failure to observe the procedural steps in Rule 32.2 had not caused petitioner any prejudice. J.A. 109.

On August 8, 2017, the district court entered a written order requiring petitioner to forfeit the BMW and $75,000, less any proceeds from selling the car. J.A. 126, 128. The court also entered an amended judgment ordering forfeiture of the car and $75,000, again with credit for any sale. J.A. 123.

3. On January 25, 2023, the court of appeals affirmed in part, reversed and vacated in part, and remanded for resentencing in a published opinion (J.A. 132-143) and a summary order (J.A. 144-155).[1]

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[1] The court of appeals issued its original opinion and summary order on January 31, 2022. 24 F.4th 857; 2022 WL 274225. Petitioner filed a petition for a writ of certiorari from those decisions, and this Court granted his petition, vacated the judgment, and remanded the case for further consideration in light of *United States* v. *Taylor*, 142 S. Ct. 2015 (2022). See 143 S. Ct. 399 (No. 22-5235). On remand, the court of appeals issued the amended opinion and summary order discussed in the text. See J.A. 133 n.1, 145 n.1.

As relevant here, the court of appeals rejected petitioner's contention that the forfeiture order should be vacated "because the district court failed to enter a preliminary forfeiture order before sentencing." J.A. 136. Like the district court, the court of appeals found instructive this Court's holding in *Dolan*, *supra*, that the MVRA's 90-day deadline to order restitution is a time-related directive, which is "legally enforceable" but does "not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed." J.A. 137 (citation omitted).

The court of appeals reasoned that "the considerations that pertained to the restitution order in *Dolan* similarly apply" to Rule 32.2(b)(2)(B). J.A. 138. First, the court observed that "Rule 32.2 'does not specify a consequence for noncompliance with its timing provisions.'" *Ibid.* (quoting *Dolan*, 560 U.S. at 611). Second, the court noted that "the deadline to enter the preliminary order is intended to give the parties time 'to advise the court of omissions or errors in the order before it becomes final,'" and thus the deadline serves primarily to further the "accuracy" of the order rather than to provide "certainty" or "repose" to the defendant. *Ibid.* (quoting Fed. R. Crim. P. 32.2 advisory committee's note (2009 Amendment)). Third, the court reasoned that "preventing forfeiture due to the missed deadline" could harm "the victims of the crime," who are not responsible for missed deadlines and who are "frequently" the recipients of forfeited funds. J.A. 139. Fourth, it noted that adopting petitioner's interpretation would "disproportionately benefit defendants." *Ibid.* Finally, the court pointed out that "a defendant concerned about possible delays or mistakes can remind

the district court of the preliminary order requirement any time before sentencing." *Ibid.*

The court of appeals also rejected petitioner's contention that he was prejudiced by the delay due to a loss in value of the BMW. J.A. 140. The court noted that petitioner was on notice of the potential forfeiture and could have sought an interlocutory sale of the BMW under the Federal Rules of Criminal Procedure. *Ibid.*

Despite affirming the district court's authority to order forfeiture, the court of appeals vacated and remanded for recalculation of the forfeiture amount. J.A. 148, 155. The $75,000 figure had been based on "the total amount stolen in the robberies," rather than the amount that petitioner personally received. J.A. 148. In light of this Court's decision in *Honeycutt* v. *United States*, *supra*, the court of appeals "conclude[d] and the government * * * concede[d]" that petitioner could not be held "jointly and severally liable" for forfeiture of the total amount. J.A. 148. The court of appeals also reversed the district court's judgment of acquittal on the attempted Hobbs Act robbery count; affirmed the judgment of acquittal on the accompanying Section 924(c) count; vacated petitioner's conviction on another Section 924(c) count; affirmed on all other counts of conviction; and remanded for resentencing. J.A. 134, 147-155.

4. Petitioner filed a petition for a writ of certiorari from the court of appeals' interlocutory judgment. While that petition was pending, the proceedings continued on remand in the district court. The parties submitted an agreed-upon preliminary order of forfeiture, providing for forfeiture of $28,000 and the BMW, in advance of the resentencing hearing. J.A. 156-163; see J.A. 177. The district court signed the agreed-upon order, included the forfeiture in pronouncing sentence at

the resentencing hearing, and entered an amended judgment reflecting the revised forfeiture order. J.A. 163, 175, 178-180. In light of other legal developments not pertinent here, the court resentenced petitioner to 300 months of imprisonment, to be followed by three years of supervised release. J.A. 166-167.

The government subsequently published notice of the forfeiture of the BMW on an official government website for 30 days. J.A. 185; see Fed. R. Crim. P. 32.2(b)(6)(C). No third party claimed any interest in the car. On September 20, 2023, the district court entered a final order vesting in the United States "[a]ll right, title and interest" in the car. J.A. 186.

Petitioner appealed from the resentencing judgment. On September 28, 2023, petitioner filed his opening brief in that appeal, challenging various aspects of his convictions and revised sentence—but not the revised forfeiture order. The following day, this Court granted his petition for a writ of certiorari to review the court of appeals' earlier, interlocutory judgment. The government then moved to hold the resentencing appeal in abeyance, and the court of appeals granted that motion. See 23-6571 C.A. Order 1 (Oct. 11, 2023).

SUMMARY OF ARGUMENT

A district court's failure to enter a preliminary order of forfeiture before sentencing, when required by Rule 32.2(b)(2)(B) of the Federal Rules of Criminal Procedure, does not disable the court from ordering forfeiture at sentencing.

A. The question presented here is analogous to the question this Court addressed in *Dolan* v. *United States*, 560 U.S. 605 (2010). *Dolan* concerned a provision in the Mandatory Victims Restitution Act of 1996 (MVRA) authorizing a district court to postpone making

a final determination of the amount of restitution required in a given case until up to 90 days after sentencing. This Court held that a district court that makes such a final determination *more* than 90 days after sentencing nonetheless retains authority to order restitution because the 90-day provision is a time-related directive intended to spur courts to act. The Court emphasized that the MVRA itself does not specify a consequence for a district court's noncompliance with the 90-day deadline, and that innocent third parties would be harmed if the statute were construed as disabling a court from acting after the deadline. Petitioner suggests that *Dolan* was aberrational. But when Congress has not specified a penalty or disability for a judicial or other public officer's failure to meet a statutory deadline, this Court has often declined to fashion one.

B. The court of appeals correctly applied those principles here. Rule 32.2(b)(2)(B) provides that, if the defendant has been convicted of an offense for which Congress has authorized (and the government has properly sought) criminal forfeiture as punishment, the district 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 as to the defendant" at sentencing, unless entering a preliminary order in that timeframe is "impractical." Fed. R. Crim. P. 32.2(b)(2)(B). That timing requirement is not jurisdictional in nature, as petitioner no longer disputes. Instead, in light of its text, context, and history, Rule 32.2(b)(2)(B) is best construed as a flexible time-related directive.

Rule 32.2 does not specify any penalty or disability if the district court fails to enter a preliminary order before sentencing, and it imposes an obligation on the

court itself, not the parties. Both considerations support reading Rule 32.2(b)(2)(B) as specifying a deadline to spur the court to act—but not as disabling the court from acting after the deadline has passed. The structure and context of Rule 32.2(b)(2)(B) confirm that interpretation. In various ways, Rule 32.2 provides the district court with a degree of flexibility that would be inconsistent with petitioner's interpretation. The rule-drafting history also makes clear that the requirement to enter a preliminary order before sentencing (when that is practical) was designed to promote the accuracy of the forfeiture order—not to create any basis for a defendant to be absolved of an otherwise-mandatory forfeiture obligation.

Interpreting Rule 32.2(b)(2)(B) as a time-related directive rather than a mandatory claim-processing rule is also the best reading in light of the statutory framework for criminal forfeiture. Again and again, Congress has made clear that criminal forfeiture is a mandatory consequence of conviction that the court "shall" order at sentencing, when the statutory requirements have been satisfied. A court gives proper effect to those statutory commands when it orders forfeiture at sentencing even though the court has neglected to enter a preliminary order of forfeiture beforehand. That approach best serves the purposes of criminal forfeiture, which include depriving the defendant of ill-gotten gains and compensating victims.

C. Petitioner's contrary arguments lack merit. He principally emphasizes the mandatory language of Rule 32.2(b)(2)(B): The district court "must" enter a preliminary order of forfeiture before sentencing, unless doing so is impractical. But that language does not distinguish Rule 32.2(b)(2)(B) from the MVRA provision at

issue in *Dolan* or other similar cases involving statutory deadlines for action by judicial or other public officers. Petitioner is also wrong to contend that *Dolan* is distinguishable on the theory that criminal forfeiture, unlike restitution, does not benefit victims. Forfeiture and restitution work hand-in-hand, and the federal government has returned billions of dollars to victims through asset forfeiture. Those victims have no role in a court's failure to comply with Rule 32.2(b)(2)(B) and should not suffer as a consequence of such a failure. A violation of Rule 32.2(b)(2)(B) should instead be analyzed like other procedural errors in the sentencing process and should be disregarded if harmless.

D. The district court's violation of Rule 32.2(b)(2)(B) was harmless in this case, and the judgment should be affirmed. Petitioner was on notice of the government's forfeiture allegations from the moment he was indicted; the pretrial bill of particulars specified that the government would seek forfeiture of the BMW that petitioner purchased with proceeds from one of his robberies; and the amount of the forfeiture money judgment was established by the trial evidence. Petitioner was given an opportunity to contest forfeiture at sentencing, and he has never identified any actual prejudice from the inadvertent lack of a preliminary order beforehand. Alternatively, if the Court determines that Rule 32.2(b)(2)(B) is a mandatory claim-processing rule, the case should be remanded for a determination whether petitioner forfeited any objection to the lack of a preliminary order under the particular circumstances of this case.

ARGUMENT

A DISTRICT COURT'S FAILURE TO ENTER A PRELIMINARY ORDER OF FORFEITURE BEFORE SENTENCING DOES NOT DEPRIVE THE COURT OF AUTHORITY TO ORDER FORFEITURE AT SENTENCING

The court of appeals correctly determined that a district court's failure to enter a preliminary order of forfeiture before sentencing does not deprive the court of authority to order forfeiture at sentencing or otherwise "render the forfeiture invalid." J.A. 139. Rule 32.2 of the Federal Rules of Criminal Procedure states that, "[u]nless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications." Fed. R. Crim. P. 32.2(b)(2)(B). Even if a court neglects to enter a preliminary order of forfeiture before sentencing in accordance with Rule 32.2(b)(2)(B), the court may still order forfeiture in imposing a sentence. That result follows from this Court's decision in *Dolan* v. *United States*, 560 U.S. 605 (2010); from the text, structure, and history of Rule 32.2; and from the statutory framework for criminal forfeiture.

A. This Court's Decision In *Dolan* Provides The Proper Framework For Evaluating Rule 32.2(b)(2)(B)

As the lower courts have recognized, the natural "starting point" for analyzing the timing provisions in Rule 32.2 is this Court's decision in *Dolan*, which arose in the "closely related" context of criminal restitution. *United States* v. *Lee*, 77 F.4th 565, 577-578 (7th Cir. 2023); see J.A. 136-141 (applying *Dolan*). In *Dolan*, the Court addressed a statutory deadline in the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227. See *Dolan*, 560 U.S. at 607-608. Like criminal forfeiture, restitu-

tion under the MVRA is a mandatory consequence of conviction, not a discretionary sentencing option. The MVRA instructs that, "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of" an offense covered by the statute, the district court "*shall* order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1) (emphasis added). Restitution is generally ordered at sentencing. See 18 U.S.C. 3556. But if the "victim's losses are not ascertainable by the date that is 10 days prior to sentencing," the MVRA permits the court to "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5).

The question presented in *Dolan* was whether a district court that "misse[s] the 90-day statutory deadline 'for the final determination of the victim's losses'" under the MVRA nonetheless retains authority to order the defendant to pay restitution. 560 U.S. at 609 (quoting 18 U.S.C. 3664(d)(5)). In answering that question, the Court observed that some deadlines "impose[] a 'jurisdictional' condition upon * * * a court's authority" to hear or decide a matter. *Id.* at 610. Other deadlines function as "more ordinary 'claims-processing rules,' rules that do not limit a court's jurisdiction, but rather regulate the timing of motions or claims brought before the court." *Ibid.* Parties may waive or forfeit objections based on such rules, whereas jurisdictional defects "'may be raised at any time' and courts have a duty to consider them *sua sponte*." *Wilkins* v. *United States*, 598 U.S. 152, 157 (2023) (citation omitted).

In *Dolan*, the Court explained that in still other instances where a statute directs "a judge or other public official" to act within a specified period, the Court has "found that [the] deadline seeks speed by creating a

time-related directive that is legally enforceable," but that missing the deadline does not deprive the official of "the power to take the action to which the deadline applies." 560 U.S. at 611. For example, in *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), the Court held that a judicial officer's failure to conduct a detention hearing for a pretrial detainee within the prescribed statutory timeframe does not "defeat the Government's authority to seek detention of the person charged" or require "the release of a person who should otherwise be detained." *Id.* at 717. The Court observed that, although the duty to hold a hearing within the prescribed time limits is "mandatory," the "sanction for breach is not loss of all later powers to act." *Id.* at 718.

In *Dolan*, the Court classified the MVRA's deadline as "this third kind of limitation," such that exceeding the 90-day limit "does not deprive the court of the power to order restitution." 560 U.S. at 611. The Court emphasized that the text of the MVRA "does not specify a consequence for noncompliance with" the statutory deadline. *Ibid.* (citation omitted). The Court also observed that "to read the statute as depriving the sentencing court of the power to order restitution would harm those—the victims of crime—who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit." *Id.* at 613-614. And the Court found that the imposition of a judicially created sanction for missing the 90-day deadline would be particularly inappropriate where the defendant "'knew about restitution,' including the likely amount, well before expiration of the 90-day time limit." *Id.* at 615 (citation omitted).

Petitioner suggests (Br. 36) that *Dolan* "coined a new type" of statutory deadline that had only three ex-

emplars and should not be joined by any others. But this Court has "long recognized that 'many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them . . . do not limit their power or render its exercise in disregard of the requisitions ineffectual.'" *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993) (quoting *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)). As a result, the Court has made clear that when Congress "does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Ibid.* Likewise, the Court does not ordinarily "infer congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 (2003). Instead, the Court reads a "statutory date as a spur to prompt action, not as a bar to tardy completion of the business." *Id.* at 172.

The Court's construction of the MVRA in *Dolan* reflected those well-established principles, which the Court has repeatedly applied to conclude that missing a deadline does not by itself deprive a judge or other official of the authority to take action "outside the statutory period." *Barnhart*, 537 U.S. at 161. For instance, in *James Daniel Good*, the Court held that the failure of federal officers to comply with statutory timing directives for *civil*-forfeiture proceedings did not disable them from seeking forfeiture of property used to commit a federal drug offense. 510 U.S. at 63-65; see also, *e.g.*, *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998) (agency's failure to submit report by statutory deadline did not "mean that [it] lacked power to act");

Brock v. *Pierce County*, 476 U.S. 253, 266 (1986) (requirement that agency "'shall' take action within 120 days" did not "divest [it] of jurisdiction to act after that time"). In other words, the Court has explained "time and again" that "an official's crucial duties are better carried out late than never." *Nielsen* v. *Preap*, 139 S. Ct. 954, 967 (2019) (opinion of Alito, J.).

B. Rule 32.2(b)(2)(B) Is A Time-Related Directive, Not A Mandatory Claim-Processing Rule

The same considerations that supported treating the MVRA's 90-day deadline as a time-related directive in *Dolan* apply to Rule 32.2(b)(2)(B). The text, context, and history of Rule 32.2 make clear that its requirement to enter a preliminary order of forfeiture before sentencing, when that is practical, is a directive to the court about the timeline for post-verdict (or post-plea) forfeiture proceedings—not an inflexible claim-processing rule. The statutory framework confirms that criminal forfeiture, like restitution under the MVRA, is a mandatory consequence that flows from the defendant's conviction. A defendant should not be absolved of that consequence merely because the court neglects to enter a preliminary order of forfeiture before sentencing.

1. Rule 32.2(b)(2)(B) is not jurisdictional

To "begin with the low-hanging fruit," *Lee*, 77 F.4th at 578, Rule 32.2(b)(2)(B) is not jurisdictional in the technical sense of that term—as petitioner himself no longer disputes (cf. Pet. 17). District courts have "original jurisdiction * * * of all offenses against the laws of the United States." 18 U.S.C. 3231. Criminal forfeiture of a defendant's interest in property occurs within that grant of jurisdiction because criminal forfeiture is an "aspect of [the] punishment imposed following convic-

tion of a substantive criminal offense." *Libretti* v. *United States*, 516 U.S. 29, 39 (1995).

For at least two reasons, a district court's failure to enter a preliminary order of forfeiture "in advance of sentencing," Fed. R. Crim. P. 32.2(b)(2)(B), does not divest the court of any aspect of its jurisdiction over the criminal case. First, this Court generally applies a "clear statement rule" before concluding that "'Congress imbued a procedural bar with jurisdictional consequences.'" *Wilkins*, 598 U.S. at 158 (citation omitted). Rule 32.2(b)(2)(B) does not contain such a clear statement. The provision does not mention jurisdiction—unlike another forfeiture provision, see 21 U.S.C. 853(*l*) (stating that district courts "shall have jurisdiction" to order forfeiture of property "without regard to [its] location"). Nor is it phrased as a limitation on the court's authority to act. Second, Rule 32.2(b)(2)(B) is a product of the judicial rulemaking process under the Rules Enabling Act, 28 U.S.C. 2071 *et seq*. The rules of practice and procedure adopted by the federal courts generally "do not create or withdraw federal jurisdiction" because that is Congress's prerogative. *Kontrick* v. *Ryan*, 540 U.S. 443, 453 (2004) (citation omitted); see *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) (per curiam) (applying *Kontrick* and holding that the deadline for a criminal defendant's motion for a new trial in Fed. R. Crim. P. 33(b)(2) was "nonjurisdictional").

2. Rule 32.2(b)(2)(B) sets forth a flexible time-related directive addressed to the district court

a. Rule 32.2(b)(2)(B) sets forth a timing requirement that is designed to spur the district court to act before sentencing, but not to disable the court from acting at sentencing in cases in which the court neglected to enter a preliminary order beforehand. Most importantly,

Rule 32.2(b)(2)(B) "'does not specify a consequence for noncompliance with' its 'timing provisions.'" *Dolan*, 560 U.S. at 611 (quoting *James Daniel Good*, 510 U.S. at 63). The Court should not impose its own coercive sanction for noncompliance with the timing requirement where Congress—and, here, the Rules Committee—has declined to do so.

Indeed, the inference that Rule 32.2(b)(2)(B) does not operate to disable a court from ordering forfeiture at sentencing, even if the court has neglected to enter a preliminary order of forfeiture beforehand, is especially strong because an adjacent provision expressly limits the court's power when there has been a failure to satisfy a different requirement of the rule. Under Rule 32.2(a), if the government "seek[s] the forfeiture of property as part of any sentence," the government must include a forfeiture allegation in the indictment or information, and if the government fails to do so, the "court must not enter a judgment of forfeiture." Fed. R. Crim. P. 32.2(a). Rule 32.2(a) thus specifies a circumstance in which the court is disabled from ordering forfeiture as a result of a procedural misstep by the government. The absence of any similar sanction in Rule 32.2(b)(2)(B) is presumably deliberate and should be given effect. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983); see also *Lee*, 77 F.4th at 582.

This Court confronted an analogous situation in *State Farm Fire & Casualty Co.* v. *United States ex rel. Rigsby*, 580 U.S. 26 (2016), which addressed a provision in the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, stating that a relator's complaint "shall remain under seal for at least 60 days," 31 U.S.C. 3730(b)(2). The relator in the case violated the seal, see *Rigsby*, 580 U.S. at 31, but this Court held that the FCA did not require

dismissal of the action. The Court explained that the "'shall' be kept under seal" language "creates a mandatory rule that the relator must follow," but that "[t]he statute says nothing * * * about the remedy for a violation of that rule." *Id.* at 33-34. By contrast, several provisions of the FCA "do require, in express terms, the dismissal of the relator's action." *Id.* at 34. Invoking the "general principle that Congress' use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision," *ibid.* (citation omitted), the Court declined to read into the FCA a dismissal requirement for all violations of the 60-day seal. Similarly, if the drafters of Rule 32.2(b)(2)(B) had "intended to require" that a defendant be absolved of any liability for criminal forfeiture by a court's violation of that provision, they "would have said so." *Ibid.*

A second textual feature of Rule 32.2(b)(2)(B) confirms that it is a time-related directive rather than a mandatory claim-processing rule. Like the MVRA provision at issue in *Dolan*, Rule 32.2(b)(2)(B) imposes an obligation on the court rather than the parties: "Unless doing so is impractical, the *court* must enter [a] preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant" at sentencing. Fed. R. Crim. P. 32.2(b)(2)(B) (emphasis added). Petitioner is therefore wrong, as a textual matter, to contend (Br. 27) that "it is the government's job" to ensure that the court enters a preliminary order of forfeiture. Rule 32.2 contains multiple provisions specifying steps the government may or must take.[2] But

[2] For example, if either party requests that a jury be retained after the verdict to make forfeiture findings, "the government must

Rule 32.2(b)(2)(B) is not one of them. See J.A. 139 (recognizing that "Rule 32.2(b)(2)(B) governs the conduct of the district court, not the litigants").

As a matter of best practices, the Department of Justice instructs its prosecutors to recommend that the district court enter a preliminary order of forfeiture before sentencing, which the government failed to do here. See Money Laundering and Asset Recovery Section, Dep't of Justice, *Asset Forfeiture Policy Manual* 5-22 (2023). By its plain terms, however, Rule 32.2(b)(2)(B) states that "the court must enter [a] preliminary order," not that the government must ask the court to do so. Fed. R. Crim. P. 32.2(b)(2)(B). That aspect of Rule 32.2(b)(2)(B) serves to further distinguish it from claim-processing rules. Such rules ordinarily "requir[e] that the *parties* take certain procedural steps at certain specified times." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011) (emphasis added).

Petitioner observes that claim-processing rules can "be addressed to courts." Pet. Br. 34 (quoting *Santos-Zacaria* v. *Garland*, 598 U.S. 411, 420 (2023)). But the examples he identifies (Br. 34-35) are all unlike Rule 32.2(b)(2)(B). They each involved rules or statutes that, even if phrased in terms of action by a court, governed the procedures for parties seeking to press a claim in civil litigation; none involved deadlines for action by a judicial or other public officer. See *Santos-Zacaria*, 598 U.S. at 417-419 (exhaustion requirement for nonciti-

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submit a proposed Special Verdict Form." Fed. R. Crim. P. 32.2(b)(5)(B). If the court orders forfeiture of specific property, "the government must publish notice of the order and send notice" to interested persons. Fed. R. Crim. P. 32.2(b)(6)(A). And Rule 32.2(e) specifies steps that a court may take to amend an existing forfeiture order "[o]n the government's motion." Fed. R. Crim. P. 32.2(e)(1).

zen's petition for review); *Kontrick*, 540 U.S. at 456 (deadline for creditor to object to bankruptcy discharge); *Gonzalez* v. *Thaler*, 565 U.S. 134, 140-143 (2012) (requirement for habeas petitioner to obtain certificate of appealability). When a private litigant fails to satisfy such a rule, only his own rights are affected—even when the rule is phrased as a limitation on steps that a court may take. By contrast, when a government official fails to complete a task within a required period of time, the public is usually also affected. See *Brock*, 476 U.S. at 261 (explaining that enforcing a statutory deadline for a private plaintiff's failure to file a complaint "prejudiced only that plaintiff," whereas prohibiting an agency from acting after the deadline "would prejudice the rights of the taxpaying public"). Rule 32.2(b)(2)(B) is about action by a public official—imposing an obligation not on the parties but on the judicial officer overseeing the proceedings.

b. The structure and context of Rule 32.2(b)(2)(B) confirm that a district court may order forfeiture at sentencing even if the court has not entered a preliminary order of forfeiture earlier. Indeed, Rule 32.2(b)(2)(B) expressly contemplates that possibility. It requires the court to enter a preliminary order of forfeiture before sentencing "[u]nless doing so is impractical." Fed. R. Crim. P. 32.2(b)(2)(B). The district court did not view that exception as applicable here (J.A. 103), and petitioner contends (Br. 21) that the inclusion of an express exception for impracticality counsels against inferring any other exceptions. But the impracticality exception belies petitioner's theory that Rule 32.2(b)(2)(B) imposes a "rigid procedure." Pet. Br. 24 (citation omitted). Even when a district court *fully complies* with Rule 32.2(b)(2)(B), entering a preliminary order of for-

feiture before sentencing is not an invariable requirement for ordering forfeiture at sentencing.

Rule 32.2(b)(2)(B) does not even specify a fixed point in time for entering a preliminary order of forfeiture. It instead states that the district court must enter a preliminary order "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final" at sentencing. Fed. R. Crim. P. 32.2(b)(2)(B). In straightforward cases, a court may conclude that entering a preliminary order the day before, or even the morning of, sentencing gives the parties ample time to suggest any necessary revisions. Rule 32.2(b)(2)(B)'s flexible standard for determining when to enter a preliminary order is, again, inconsistent with reading the provision as a rigid timing constraint.

Other related provisions likewise bespeak flexibility. Rule 32.2(b)(1)(A) directs the court to determine what property is subject to forfeiture under the applicable statute "[a]s soon as practical after a verdict or finding of guilty." Fed. R. Crim. P. 32.2(b)(1)(A). And Rule 32.2(b)(2)(A) states that "[i]f the court finds that property is subject to forfeiture, it must *promptly* enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria." Fed. R. Crim. P. 32.2(b)(2)(A) (emphasis added). Those provisions, like Rule 32.2(b)(2)(B), use qualitative standards to establish the timeline for post-verdict (or post-plea) forfeiture proceedings, not precise deadlines.

More broadly, a variety of provisions in the Federal Rules of Criminal Procedure require the district court to take certain steps in imposing a sentence but do not

forever disable the court from acting if it fails to do so. Rule 32(h), for example, provides that the court "must give the parties reasonable notice" if it intends to depart from the Sentencing Guidelines on a ground not identified in the presentencing report or the parties' submissions. Fed. R. Crim. P. 32(h). If a court fails to give such notice, its procedural error would be reviewed for harmlessness, and the remedy for non-harmless error would be resentencing—not a complete loss of the power to act. See, *e.g.*, *United States* v. *Spencer*, 848 F.3d 324, 328 (4th Cir. 2017) (failure to provide notice did not affect defendant's "substantial rights"); *United States* v. *Zelaya-Rosales*, 707 F.3d 542, 545 (5th Cir. 2013 (same). Likewise, if a court fails to perform one of the tasks that Rule 32(i) specifies for the court to do "[a]t sentencing," Fed. R. Crim. P. 32(i), the court would not lose the power to impose a sentence on the defendant. The same should be true for a court's error in failing to enter a preliminary order of forfeiture before sentencing.

c. Petitioner contends (Br. 23-24) that the "preliminary order" is central to the forfeiture process under Rule 32.2 because a preliminary order entered before sentencing "becomes final as to the defendant" at sentencing. Fed. R. Crim. P. 32.2(b)(2)(B); see Fed. R. Crim. P. 32.2(b)(4)(A). But Rule 32.2(b)(2)(B) makes it clear that a court need not enter a preliminary order before sentencing when doing so would be "impractical." Fed. R. Crim. P. 32.2(b)(2)(B). In those instances, the rule contemplates that the court will simply proceed to order forfeiture at sentencing.

Petitioner also emphasizes (Br. 22, 24-25) that Rule 32.2 refers in places to a preliminary order of forfeiture as "*the* order" and attaches legal consequences to the

entry of such an order. Fed. R. Crim. P. 32.2(b)(2)(B) (emphasis added). Rule 32.2(b)(3), for example, states that the "entry of a preliminary order" authorizes the government to seize any specific property identified in that order. Fed. R. Crim. P. 32.2(b)(3). And when the court enters a preliminary order of forfeiture for specific property before sentencing, the government may begin the process of giving public notice of the forfeiture to ensure that no third party has any valid interest in it—under procedures that are applicable by their terms to "the order" of forfeiture. Fed. R. Crim. P. 32.2(b)(6)(A); see 21 U.S.C. 853(n)(1); see also *Asset Forfeiture Policy Manual* at 5-12.

Those provisions demonstrate that a preliminary order of forfeiture entered under Rule 32.2 is an order with legal effect—not merely a draft or proposed order. Rule 32.2 therefore refers to a preliminary order as "the order" where appropriate, and the entry of a preliminary order can trigger statutory consequences flowing from "an order of forfeiture." 21 U.S.C. 853(g) (authority to seize property); see *Asset Forfeiture Policy Manual* at 2-4. But none of the provisions on which petitioner relies suggests that a court lacks authority to enter an order of forfeiture at sentencing if the court has failed to comply with the directive in Rule 32.2(b)(2)(B) to enter a preliminary order beforehand. Read as a whole, Rule 32.2 instead makes clear that the "preliminary" order is designed to be subsumed by the order of forfeiture announced at sentencing and made part of the judgment in accordance with Rule 32.2(b)(4). The final order is the one that "conclusively determines all of the

defendant's interest in the forfeited property." *United States* v. *Pelullo*, 178 F.3d 196, 202 (3d Cir. 1999).[3]

d. The history of Rule 32.2 confirms that a district court's failure to enter a preliminary order of forfeiture before sentencing does not disable the court from ordering forfeiture at sentencing. The Federal Rules of Criminal Procedure were first amended to regulate criminal forfeiture in 1972, following statutory changes that made criminal forfeiture more widely available. See Fed. R. Crim. P. 32 advisory committee's note (1972 Amendment). The 1972 amendments authorized the government to seize property "[w]hen a verdict contains a finding of property subject to a criminal forfeiture." Fed. R. Crim. P. 32(b)(2) (1972). That language was interpreted to mean that "any forfeiture order [was] part of the judgment of conviction" and therefore could not be entered "before sentencing." Fed. R. Crim. P. 32 advisory committee's note (1996 Amendment). Over time, it became clear that a district court's lack of express authority to order forfeiture before sentencing, even on a preliminary basis, "pose[d] real problems." *Ibid.* Property potentially subject to forfeiture could be lost or dissipated in the interim, and third parties were forced to

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[3] Petitioner suggests (Br. 22) that Rules 32.2(b)(4)(B) and (C) use the phrase "the forfeiture order" to refer to a preliminary order. Those provisions, however, are referring to the order announced at sentencing, which is "final as to the defendant." Fed. R. Crim. P. 32.2(b)(4)(A). Petitioner is also wrong to rely (Br. 24-25) on Rule 32.2(b)(7), which authorizes the sale of property "alleged to be forfeitable" before "entry of a final forfeiture order." Fed. R. Crim. P. 32.2(b)(7). That provision allows for an interlocutory sale of property "alleged to be forfeitable" in the indictment or information. *Ibid.* Rule 32.2(b)(7) does not presuppose the entry of a preliminary order of forfeiture before an interlocutory sale, and it says nothing at all about the relationship between preliminary and final orders.

wait until after sentencing to petition for a determination of their interests. *Ibid.*

In 1996, the Rules Committee addressed those problems by promulgating an amendment "specifically recognizing the authority of the court to enter a preliminary forfeiture order before sentencing." Fed. R. Crim. P. 32 advisory committee's note (1996 Amendment). Entry of a preliminary order was initially discretionary. *Ibid.*; see Fed. R. Crim. P. 32(d)(2) (1996) ("may enter"). In 2000, various scattered forfeiture provisions were consolidated into Rule 32.2. See Fed. R. Crim. P. 32.2 advisory committee's note (2000). As part of those changes, the relevant language was revised to state that the court "shall promptly enter a preliminary order of forfeiture" after finding that property is subject to forfeiture. Fed. R. Crim. P. 32.2(b)(2) (2000).

Although the 2000 amendments made entry of a preliminary order mandatory rather than discretionary, they did not expressly require that the preliminary order be entered before sentencing. "Many courts * * * delayed entry of the preliminary order until the time of sentencing." Fed. R. Crim. P. 32.2 advisory committee's note (2009 Amendment). Such delays, however, proved "undesirable" in some cases because "the parties ha[d] no opportunity to advise the court of omissions or errors" before sentencing, *ibid.*, at which point Rule 32.2 required that the "order of forfeiture * * * be made part of the sentence and included in the judgment," Fed. R. Crim. P. 32.2(b)(3) (2000). Once a forfeiture order was part of the judgment, the district court's authority to correct any errors was "limited," sometimes leaving the parties "with no alternative to an appeal, which is a waste of judicial resources." Fed. R.

Crim. P. 32.2 advisory committee's note (2009 Amendment).

Rule 32.2 was therefore amended in 2009 to its present form, under which the court "must enter" a preliminary order of forfeiture "sufficiently in advance of sentencing" to permit the opportunity for error correction that had been lacking under the pre-2009 version of the rule, "[u]nless doing so is impractical." Fed. R. Crim. P. 32.2(b)(2)(B); see Fed. R. Crim. P. 32.2 advisory committee's note (2009 Amendment) ("The amendment requires the court to enter the preliminary order in advance of sentencing to permit time for corrections, unless it is not practical to do so in an individual case.").

Nothing in the 2009 amendments suggests that the Rules Committee was imposing a mandatory claim-processing rule that could, in some circumstances, bar entry of a forfeiture order at sentencing. Indeed, reading Rule 32.2(b)(2)(B) that way would be antithetical to its history. As just explained, the concept of a preliminary order originated in the 1996 amendments primarily as a way to *facilitate* forfeiture during the potentially lengthy delay between conviction and sentencing. And the requirement to enter a preliminary order before sentencing, unless impractical, was designed to avoid errors and needless post-judgment litigation. Thus, like the 90-day deadline in the MVRA, Rule 32.2(b)(2)(B) operates "only secondarily to help the defendant." *Dolan*, 560 U.S. at 613. Its principal purpose is to assist the court itself in entering an accurate and complete order.

3. Petitioner's interpretation of Rule 32.2(b)(2)(B) is inconsistent with the statutory framework for criminal forfeiture and its purposes

a. The statutory framework for criminal forfeiture confirms that the district court does not lose its author-

ity to order forfeiture if the court fails to comply with Rule 32.2(b)(2)(B). The relevant statutes underscore that criminal forfeiture is a mandatory consequence of conviction for specified offenses and that the key point in time for ordering forfeiture is sentencing. Petitioner's reading of Rule 32.2(b)(2)(B) fails to account for those background features of the statutes.

Under 28 U.S.C. 2461, if a defendant is convicted of a criminal offense for which forfeiture is authorized and the government has properly included a forfeiture allegation in the indictment or information, then "the court shall order the forfeiture of the property as part of the sentence in the criminal case." 28 U.S.C. 2461(c). Section 2461(c) incorporates by reference other forfeiture statutes enacted originally for certain racketeering and drug-trafficking offenses. See *ibid.* (forfeiture shall be ordered "pursuant to * * * section 3554 of title 18," under the "procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853)"); see also p. 4, *supra*. Those statutes likewise state that the court "shall order" criminal forfeiture "in imposing a sentence." 18 U.S.C. 3554; see 21 U.S.C. 853(a) ("The court, in imposing sentence on such person, shall order * * * that the person forfeit to the United States all property described in this subsection.").

Congress "could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied." *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) (discussing Section 853(a)). It is therefore well established that criminal forfeiture is mandatory, not discretionary, "when the relevant prerequisites are satisfied." *United States* v. *Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (citing cases); see, *e.g.*, *United States* v. *Hampton*, 732 F.3d 687, 691 (6th Cir.

2013) (expressing "no doubt" that criminal forfeiture under Section 2461(c) is "mandatory"), cert. denied, 571 U.S. 1145 (2014). In contrast to a criminal fine, "which the district court retains discretion to reduce or eliminate, the district court has no discretion to reduce or eliminate mandatory criminal forfeiture." *United States* v. *Phillips*, 704 F.3d 754, 769 (9th Cir. 2012) (citation and emphasis omitted), cert. denied, 569 U.S. 1031 (2013); see 18 U.S.C. 3571 (fines).

The statutory framework is also significant in that it consistently mandates that forfeiture be imposed *at sentencing*, whereas no statute expressly requires the entry of a preliminary order before sentencing. Of course, the Federal Rules of Criminal Procedure are "as binding as any statute" on the district courts, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988), and Section 2461(c) confirms that criminal forfeiture shall be ordered "pursuant to" those Rules, 28 U.S.C. 2461(c). But in evaluating the consequences that follow from a district court's failure to comply with Rule 32.2(b)(2)(B), it is instructive that the statutory framework focuses on sentencing and not on antecedent procedural steps between conviction and sentencing.

Here, the district court orally ordered forfeiture at petitioner's original sentencing, see J.A. 62, and in that respect this case is more straightforward than the facts of *Dolan* itself. As explained above, *Dolan* concerned a provision authorizing a district court to determine the final amount of restitution required under the MVRA up to 90 days after sentencing. See 560 U.S. at 607-608. Petitioner repeatedly invokes (Br. 2-3, 15, 36, 44-45) the dissenting opinion in that case, which would have held that a district court that misses the 90-day deadline lacks authority to order restitution—on the theory that,

absent the special 90-day provision, the background rule should be that restitution must be ordered at sentencing. See *Dolan*, 560 U.S. at 622 (Roberts, C.J., dissenting). That logic does not apply here. In this case, the district court did order forfeiture *at sentencing*. The case therefore does not implicate any concerns about "alter[ing] a sentence" after it has been imposed. *Id.* at 624. Petitioner's challenge in this Court instead rests exclusively on the lack of a preliminary order *before* sentencing. And the statutory framework confirms that the lack of such a preliminary order did not prevent the district court from complying with its obligation to order forfeiture at sentencing.

b. Petitioner's approach is also inconsistent with the purposes reflected in the criminal-forfeiture statutes. Unlike civil *in rem* forfeiture, criminal forfeiture is an "element of the sentence imposed" for the commission of an offense. *Libretti*, 516 U.S. at 38-39; see, *e.g.*, *United States* v. *Bajakajian*, 524 U.S. 321, 332 (1998) (explaining that criminal forfeitures "have historically been treated as punitive, being part of the punishment imposed"). Requiring the defendant to forfeit property used in or derived from crime "serve[s] important governmental interests." *Honeycutt* v. *United States*, 581 U.S. 443, 447 (2017). Criminal forfeitures "punish wrongdoing, deter future illegality, and 'lessen the economic power' of criminal enterprises." *Kaley* v. *United States*, 571 U.S. 320, 323 (2014) (quoting *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 630 (1989)). The government also uses forfeiture "to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities like police training." *Ibid.* This Court has accordingly recognized the "strong governmental interest

in obtaining full recovery of all forfeitable assets." *Ibid.* (citation omitted).

Petitioner's reading of Rule 32.2(b)(2)(B) would frustrate those interests and undercut the statutory framework. Under his approach, if the district court inadvertently neglects to enter a preliminary order of forfeiture "in advance of sentencing" even though doing so was not "impractical," Fed. R. Crim. P. 32.2(b)(2)(B), the defendant would be entitled to enforce the supposedly mandatory claim-processing rule in Rule 32.2(b)(2)(B) at sentencing, thereby avoiding the very forfeiture that Congress otherwise mandated as punishment for the offense. The government, the public, and victims would suffer as a result. Nothing in Rule 32.2 requires providing the defendant with such a "windfall." *Montalvo-Murillo*, 495 U.S. at 720.

C. Petitioner's Remaining Arguments Lack Merit

Petitioner's remaining arguments for reversal lack merit. Construing Rule 32.2(b)(2)(B) as a time-related directive analogous to the provision at issue in *Dolan* gives due respect to the mandatory language of the rule, protects victims, and maintains a vital role for the rule in the criminal-forfeiture process.

1. Petitioner principally contends (Br. 16-21) that Rule 32.2(b)(2)(B) should be construed as a mandatory claim-processing rule because it uses the word "must" rather than "may." But that language does not distinguish this case from *Dolan* or the many other cases construing similar language in a statutory deadline for action by a public official. See *Dolan*, 560 U.S. at 607-608 (quoting the statutory requirement that a court "shall set a date * * * not to exceed 90 days after sentencing"); see also *Barnhart*, 537 U.S. at 158 ("'shall' * * * assign[]"); *Regions Hospital*, 522 U.S. at 459 n.3 ("shall

report"); *Montalvo-Murillo*, 495 U.S. at 717 ("shall hold a hearing"); *Brock*, 476 U.S. at 256 ("'shall' determine"). The Court explained in *Dolan* that the use of such mandatory language "alone has not always led this Court to interpret statutes to bar judges (or other officials) from taking action to which a missed statutory deadline refers." 560 U.S. at 611-612; cf. Antonin Scalia & Bryan A. Garner, *Reading Law* 115 (2012) ("What is the effect of failing to honor a mandatory provision's terms? That is an issue for a treatise on remedies, not interpretation."). And as with the provision at issue in *Dolan*, no statute or rule specifies any consequence for a district court's failure to comply with the "must" language in Rule 32.2(b)(2)(B).

There is also mandatory language pointing in the opposite direction here, just as in *Dolan*. See 560 U.S. 612 (emphasizing that the MVRA specifies that a court "*shall* order" restitution) (citation omitted). As explained above, the relevant statutes provide that the district court "shall order" criminal forfeiture at sentencing if the prerequisites have been satisfied. 18 U.S.C. 3554; 21 U.S.C. 853(a); 28 U.S.C. 2461(c). A court appropriately gives effect to *that* mandatory language when it orders criminal forfeiture at sentencing, despite having neglected to enter a Rule 32.2 preliminary order beforehand.

To the extent that petitioner suggests (Br. 37) that the "must" language in Rule 32.2(b)(2)(B) is somehow "more mandatory" than the "shall" language at issue in *Dolan*, petitioner is mistaken. Some careful legal drafters have long used "shall," rather than "must," to prescribe that someone has a duty to take an action. See *Black's Law Dictionary* 1653 (11th ed. 2019) (describing "Has a duty to" as "the mandatory sense [of 'shall']

that drafters typically intend and courts typically uphold"); Bryan A. Garner, *Garner's Dictionary of Legal Usage* 952-954 (3d ed. 2011); see also, *e.g.*, *Murphy* v. *Smith*, 583 U.S. 220, 223-224 (2018) (paraphrasing statutory "shall" to mean "must"). Indeed, Rule 32.2 itself previously used the word "shall," but that term was replaced with "must" in amendments that were "intended to be stylistic only." Fed. R. Crim. P. 32.2 advisory committee's note (2002 Amendment); see Fed. R. Crim. P. 32.2(b)(2) (2000) ("shall promptly enter").

2. Petitioner also contends (Br. 37-44) that the forfeiture rule at issue here is distinguishable from the restitution statute in *Dolan* because restitution directly benefits victims, who would ordinarily have no role in causing a missed deadline. See *Dolan* 560 U.S. at 613-614 ("[T]o read the [MVRA] as depriving the sentencing court of the power to order restitution would harm those—the victims of crime—who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit."). It is true that the property a defendant is ordered to forfeit in a federal criminal prosecution is forfeited "to the United States." 18 U.S.C. 3554; see 21 U.S.C. 853(a) (same). But as this Court has recognized, the government uses the money and property obtained by criminal forfeiture "to recompense victims of crime" and for other public purposes, including "improv[ing] conditions in crime-damaged communities." *Kaley*, 571 U.S. at 323. Thus, the court of appeals was correct to conclude that *Dolan*'s reasoning with regard to innocent victims applies here: "[B]ecause forfeited funds frequently go to the victims of the crime, preventing forfeiture due to the missed deadline would tend to harm innocent people who are not responsible for the oversight." J.A. 139; see *United*

States v. *Martin*, 662 F.3d 301, 309 (4th Cir. 2011) (similar), cert. denied, 566 U.S. 955, and 568 U.S. 852 (2012).

Indeed, the Attorney General has made "[r]ecovering assets that may be used to compensate victims" one of the "primary goals" of the Department of Justice's asset-forfeiture program. Dep't of Justice, *The Attorney General's Guidelines on the Asset Forfeiture Program* 4 (2018). Funds received through criminal forfeiture are deposited into the Treasury and are available for specified purposes, including payments to victims via "remission." 28 U.S.C. 524(c)(1)(E)(i); see 28 U.S.C. 524(c)(1) and (4). "Remission" is a discretionary procedure under which victims and other third parties can petition the government to be paid out of forfeited funds. See 28 C.F.R. 9.8 (remission procedures for victims). Through remission and related programs, "the victim compensation program has returned more than $12 billion in forfeited assets to victims since 2000." Money Laundering and Asset Recovery Section, Dep't of Justice, *Victims* (Dec. 22, 2023), perma.cc/QZL7-KZXA; see *Kaley*, 571 U.S. at 323 n.1 (noting that, "[b]etween January 2012 and April 2013, for example, the Department of Justice returned over $1.5 billion in forfeited assets to more than 400,000 crime victims"). Petitioner's assertion (Br. 40) that criminal forfeiture "doesn't meaningfully benefit victims" is baseless.

Criminal forfeiture also works hand-in-hand with restitution. When a sentencing court orders both criminal forfeiture and restitution, the government may in some circumstances "restore forfeited property to [the] victims," to be credited against the defendant's restitution obligation. 21 U.S.C. 853(i)(1); see *Asset Forfeiture Policy Manual* at 14-6 to 14-9 (restoration procedures and requirements). The restoration process is often

more effective for victims than restitution alone. The government shoulders the burden of ensuring that the victims obtain compensation for their losses. The government can also use the authorities available under the forfeiture laws to seize or restrain tainted property pending trial, whereas restitution is ordered only after conviction. See Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 1-2(e), at 7-8 (3d ed. 2022) (describing those advantages and explaining that forfeiture "serves as a more effective way of recovering money for victims than * * * restitution"); cf. Dep't of Justice, *The Attorney General Guidelines for Victim and Witness Assistance* 68 (2022) (discussing the interplay between restitution and forfeiture and advising prosecutors "[w]herever possible" to "use civil or criminal asset forfeiture to recover assets to return to victims of crime"). Thus, even when a court orders restitution, the "victim's hope of getting paid may rest on the government's superior ability to collect and liquidate a defendant's assets" through criminal forfeiture. *Blackman*, 746 F.3d at 143.

Petitioner's interpretation of Rule 32.2(b)(2)(B) would therefore disserve victims who would otherwise benefit from remission and restoration and who will presumably have no responsibility for a district court's failure to enter a preliminary order of forfeiture. As this Court recognized in *Dolan*, "[t]he potential for such harm—to third parties—normally provides a strong indication that Congress did not intend a missed deadline" to carry such untoward consequences. 560 U.S. at 614; cf. *James Daniel Good*, 510 U.S. at 65 (relying in part on the government's interest in "obtaining revenue from forfeited property" to hold that the failure of public officials to comply with certain "internal timing pro-

visions" did not deprive them of the authority to seek civil forfeiture of property used in drug crimes).

3. Finally, petitioner contends in various ways that treating Rule 32.2(b)(2)(B) the same way that this Court treated the 90-day statutory deadline in *Dolan* will effectively deprive the rule of any effect, such that it "might as well not exist." Pet. Br. 3. But treating Rule 32.2(b)(2)(B) as a flexible time-related directive does not render it "mere window dressing." *Id.* at 24. When it would be practical to enter a preliminary order of forfeiture before sentencing and the district court neglects to do so in accordance with Rule 32.2(b)(2)(B), the court commits an error. Like other similar procedural errors, however, a court's inadvertent failure to enter a preliminary order of forfeiture before sentencing is subject to harmless-error principles, if the defendant raises a timely objection. See Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); see, *e.g.*, *Lee*, 77 F.4th at 583 (applying those principles and finding a violation of Rule 32.2(b)(2)(B) harmless); *United States* v. *Farias*, 836 F.3d 1315, 1330 (11th Cir. 2016) (same), cert. denied, 583 U.S. 817 (2017).

On petitioner's approach, by contrast, even an inadvertent and harmless violation of Rule 32.2(b)(2)(B) might prevent a district court from ordering the criminal forfeiture that Congress mandated as punishment for an offense. This Court has stated that, "[b]y definition, mandatory claim-processing rules * * * are not subject to harmless-error analysis." *Manrique* v. *United States*, 581 U.S. 116, 125 (2017); see *Eberhart*, 546 U.S. at 15 (stating that mandatory claim-processing rules are "unalterable on a party's application") (quoting *Kontrick*, 540 U.S. at 456). Thus, if Rule 32.2(b)(2)(B) were

treated as a mandatory claim-processing rule, a defendant might be entitled to insist that the forfeiture proceedings not go forward after a technical violation of the rule, even if the defendant was in no way harmed by the violation.

Whether adopting that approach would actually benefit defendants in practice is unclear. Even mandatory claim-processing rules are subject to waiver and forfeiture, see, *e.g.*, *Eberhart*, 546 U.S. at 18-19, and the time for lodging a proper objection to a perceived violation of Rule 32.2(b)(2)(B) would presumably be at sentencing. But if the defendant raises an objection at that point, no obvious obstacle would prevent the court from entering a preliminary order at that time and postponing the sentencing hearing so that the parties have a "sufficient[]" opportunity "to suggest revisions or modifications before the order becomes final as to the defendant" at the rescheduled sentencing. Fed. R. Crim. P. 32.2(b)(2)(B). Postponing the sentencing and thus effectively reopening the period in which to comply with Rule 32.2(b)(2)(B) would be consistent with the district court's discretionary control over its docket and its general authority to extend deadlines (subject to exceptions not relevant here). See Fed. R. Crim. P. 45(b).

Accordingly, petitioner's approach may well simply result in needless delay. Or, a district court may feel compelled to proceed with a previously scheduled sentencing hearing—at which, for example, victims of the defendant's crimes may have made arrangement to appear and be heard, see 18 U.S.C. 3771—even if doing so means that the court cannot order criminal forfeiture, despite forfeiture being mandatory. Neither possibility counsels in favor of treating Rule 32.2(b)(2)(B) as a mandatory claim-processing rule.

D. The Judgment Should Be Affirmed

The court of appeals correctly held that Rule 32.2(b)(2)(B) is not a mandatory claim-processing rule but rather a time-related directive analogous to the MVRA provision in *Dolan*. See J.A. 136-139. The court of appeals also correctly determined that, on the particular facts of this case, petitioner failed to show any prejudice from the absence of a preliminary order of forfeiture before sentencing. J.A. 140-141. The district court's error was therefore harmless and "must be disregarded." Fed. R. Crim. P. 52(a).

As the district court explained, petitioner was on notice that the government was seeking forfeiture of the proceeds of his robberies "from the time he saw the 2011 indictment." J.A. 107. The government's pretrial bill of particulars also informed petitioner that the government was seeking forfeiture of the BMW that petitioner purchased with the proceeds of the Lynbrook robbery. *Ibid.*; see J.A. 12-13. The trial testimony established both the amount of the robbery proceeds and the fact that petitioner used a portion of those proceeds to purchase the car. See p. 8, *supra*. Although the court neglected to enter a preliminary order of forfeiture before the initial sentencing hearing, petitioner was given an opportunity to contest forfeiture at that hearing, and he availed himself of that opportunity—arguing that the car may have been purchased by a family member, despite unequivocal trial testimony from his coconspirator that petitioner himself bought the car using money from the robbery. J.A. 54-55. The court found at sentencing that the forfeited assets constituted the "fruits of [petitioner's] crime," and he has abandoned any challenge to that finding. J.A. 62.

In the lower courts, petitioner claimed to have been prejudiced by the district court's failure to enter a preliminary forfeiture order before his initial sentencing on the theory that, had such an order been entered, the BMW could have been sold earlier, thus limiting its depreciation over time. The district court (J.A. 108-109) and the court of appeals (J.A. 140-141) both correctly rejected that claim, and petitioner does not renew it in this Court. When a party is concerned about the possibility of such depreciation, Rule 32.2 and the forfeiture laws provide mechanisms for an interlocutory sale during the ongoing proceedings. See Fed. R. Crim. P. 32.2(b)(7); cf. p. 31 n.3, *supra* (explaining that an interlocutory sale can occur even without a preliminary order of forfeiture). Petitioner "could have sought an interlocutory sale of the car if he had wished to preserve its value," but he failed to do so. J.A. 140.

The judgment should therefore be affirmed. If, on the other hand, the Court were to conclude that Rule 32.2(b)(2)(B) is a mandatory claim-processing rule, then the case should be remanded to the court of appeals for further consideration. Petitioner did not insist at the original sentencing hearing that the absence of a preliminary order of forfeiture disabled the district court from ordering forfeiture, nor did he raise that argument in his opening brief on appeal. After petitioner filed his opening brief, the court of appeals granted the government's unopposed motion to remand the case to the district court to correct a typographical error about the amount of forfeiture in the original judgment, and to permit the government to request entry of a separate written order of forfeiture that the government had neglected to provide for the district court's signature after sentencing. It was during that remand that petitioner

first argued that the government had "forfeited its right to forfeiture" based on the absence of a preliminary order before his initial sentencing. D. Ct. Doc. 256, at 12 (capitalization and emphasis omitted). The district court rejected that argument, entered a separate written order of forfeiture, and corrected the clerical error in its initial judgment. J.A. 101-109, 124-129.

After the initial remand, the case returned to the Second Circuit, which ultimately affirmed most but not all of petitioner's convictions, vacated the amount of the forfeiture money judgment, and remanded the case for resentencing and entry of a revised forfeiture order. J.A. 132-143, 144-155. During that second remand, petitioner agreed to the entry of a revised forfeiture order; the district court entered the agreed-upon preliminary order of forfeiture before petitioner's resentencing; the preliminary order became final as to petitioner at resentencing; and the court included forfeiture in both its oral pronouncement of petitioner's revised sentence and its resentencing judgment. See J.A. 156-163, 175, 177-180. Thus, the now-operative order of forfeiture became final as to petitioner at his resentencing, after the entry of a preliminary order beforehand. Under the circumstances, petitioner has relinquished any objection to forfeiture based on Rule 32.2(b)(2)(B), even if that provision is a mandatory claim-processing rule.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. 18 U.S.C. 3554 provides:

Order of criminal forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

2. 21 U.S.C. 853 provides:

Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addi-

tion to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably

without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have

an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order en-

tered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) ORDER TO REPATRIATE AND DEPOSIT.—

(A) IN GENERAL.—Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) FAILURE TO COMPLY.—Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfei-

ture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf,

the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(*l*) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any wit-

ness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(*o*) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of title 18.

3. 28 U.S.C. 2461(c) provides:

Mode of recovery

(c) If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to to[1] the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.

4. Fed. R. Crim. P. 32(b) (1972) provided:

Sentence and Judgment.

(b) JUDGMENT.

(1) *In General.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is

[1] So in original.

found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture*. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

5. Fed. R. Crim. P. 32(d) (1996) provided:

Sentence and Judgment

(d) JUDGMENT.

(1) *In General*. A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture*. If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct

any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

6. Fed. R. Crim. P. 32.2 (2000) provided:

Criminal Forfeiture

(a) NOTICE TO THE DEFENDANT. A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.

(b) ENTRY OF PRELIMINARY ORDER OF FORFEITURE; POST VERDICT HEARING.

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in an indictment or information with regard to which criminal forfeiture is sought, the court shall determine what property is subject to forfeiture under the applicable statute. If forfeiture of specific property is sought, the court shall determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court shall determine the amount of

money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

(2) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(3) The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing-or at any time before sentencing if the defendant consents-the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite

nexus between the property and the offense committed by the defendant.

(c) ANCILLARY PROCEEDING; FINAL ORDER OF FORFEITURE.

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court shall conduct an ancillary proceeding but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

(2) When the ancillary proceeding ends, the court shall enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely claim, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not

object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property.

(3) If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions, unless the court determines that there is no just reason for delay.

(4) An ancillary proceeding is not part of sentencing.

(d) STAY PENDING APPEAL. If a defendant appeals from a conviction or order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but shall not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(e) SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.

(1) On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court shall:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) There is no right to trial by jury under Rule 32.2(e).

7. Fed. R. Crim. P. 32.2 provides:

Criminal Forfeiture

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture.

(1) *Forfeiture Phase of the Trial.*

(A) *Forfeiture Determinations.* As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) *Evidence and Hearing.* The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

(2) *Preliminary Order.*

(A) *Contents of a Specific Order.* If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any sub-

stitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) *Timing*. Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) *General Order*. If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) ***Seizing Property***. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing

third-party rights. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) ***Sentence and Judgment***.

(A) *When Final.* At sentencing—or at any time before sentencing if the defendant consents—the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).

(B) *Notice and Inclusion in the Judgment.* The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) *Time to Appeal.* The time for the defendant or the government to file an appeal from the forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(5) *Jury Determination*.

(A) *Retaining the Jury*. In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) *Special Verdict Form*. If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(6) *Notice of the Forfeiture Order*.

(A) *Publishing and Sending Notice*. If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) *Content of the Notice*. The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) *Means of Publication; Exceptions to Publication Requirement*. Publication must take

place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) *Means of Sending the Notice*. The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)-(v) of the Federal Rules of Civil Procedure.

(7) ***Interlocutory Sale***. At any time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.

(1) ***In General***. If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal

Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

(2) ***Entering a Final Order***. When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.

(3) ***Multiple Petitions***. If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.

(4) ***Ancillary Proceeding Not Part of Sentencing***. An ancillary proceeding is not part of sentencing.

(d) Stay Pending Appeal. If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary pro-

ceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(e) Subsequently Located Property; Substitute Property.

(1) ***In General***. On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) ***Procedure***. If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) ***Jury Trial Limited***. There is no right to a jury trial under Rule 32.2(e).