

## High Court Forfeiture Case Again Pits Text Against Purpose

By **Anden Chow and Christian Bale** (February 26, 2024, 12:17 PM EST)

On Tuesday, the U.S. Supreme Court will hear oral argument on the issue of whether a federal district court may still impose asset forfeiture on a criminal defendant if it fails to enter a preliminary order of forfeiture within the time frame set forth in the Federal Rules of Criminal Procedure.

Although this case addresses a narrow area of criminal law, it has broader implications for how procedural deadlines in federal court are to be interpreted, and the ongoing battle between textualism and purposivism.

### The Rule

Criminal forfeiture deprives wrongdoers of the instrumentalities and proceeds of an offense. The Supreme Court explained in its 2014 *Kaley v. U.S.* decision that the purpose of forfeiture is "to ensure that crime does not pay."<sup>[1]</sup> Forfeitures "punish wrongdoing, deter future illegality, and 'lessen the economic power' of criminal enterprises."

Federal Rule of Criminal Procedure 32.2 sets forth several steps that must be undertaken before forfeiture may be imposed on a criminal defendant. Most pertinently here, if the district court determines after conviction or guilty plea "that property is subject to forfeiture, it must promptly enter a preliminary order" identifying the property in question.

The district court "must enter the preliminary order sufficiently in advance of sentencing" — as the order becomes final at sentencing — so that parties may "suggest revisions or modifications" beforehand.<sup>[2]</sup>

### The Controversy

The petitioner in this case, Louis McIntosh, led a crew that committed a series of violent robberies in New York from 2009 to 2012. McIntosh used some of the stolen proceeds to buy a BMW for himself.

In January 2012, a federal grand jury in the Southern District of New York indicted McIntosh for a variety of federal crimes. Consistent with the first step of Rule 32.2, the indictment charging McIntosh gave notice that he was to forfeit "all property ... derived from proceeds traceable to the commission of the offenses." McIntosh proceeded to trial, and a jury found him guilty of the charges.

In 2014, the U.S. District Court for the Southern District of New York held a sentencing hearing. Beforehand, the district court had not entered a preliminary order of forfeiture. Nevertheless, in addition to sentencing McIntosh to 60 years in prison, the district court orally imposed forfeiture of \$75,000 and the BMW, representing the proceeds of McIntosh's crime.

The court ordered the government to submit a proposed written order within a week, but the government neglected to do so. As a result, no written order of forfeiture was entered until its absence



Anden Chow



Christian Bale

was noticed more than three years later, in 2017.

At that point, McIntosh objected to the entry of the forfeiture order, contending that the district court no longer had the authority to enter such an order due to its failure to adhere to Rule 32.2(b)(2)(B)'s timing rule that 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."

The district court disagreed and entered the order.

### **The Second Circuit's Reliance on Dolan**

On appeal, the U.S. Court of Appeals for the Second Circuit upheld the district court's entry of the forfeiture order. The Second Circuit primarily cited the Supreme Court's 2010 opinion in *Dolan v. U.S.*, in which the court held that missing the 90-day statutory deadline set forth in the Mandatory Victims Restitution Act was not a bar to imposing restitution.

The Supreme Court's analysis in *Dolan* focused on three considerations.

First, the court observed that "where, as here, a statute 'does not specify a consequence for noncompliance with' its 'timing provisions,' 'federal courts will not in the ordinary course impose their own coercive sanction.'"

Second, the court determined that the that the primary purpose of the MVRA, as evidenced by its text and legislative history, was to "ensure that victims of a crime receive full restitution."

The court stressed the text of the MVRA, which says that "[n]otwithstanding any other provision of law ... the court shall order" restitution for qualifying crimes. The court reasoned that, were the MVRA's timing requirement to impose a strict deadline, the victims, through no fault of their own, would suffer the adverse consequences of the deadline being missed.

Third, the court noted that a defendant could mitigate prejudice by informing the judge of the approaching deadline.

Based on these factors, the Supreme Court concluded that the 90-day deadline was merely "a time-related directive" intended to spur the district court to act that does not "deprive a judge ... of the power to take the action to which the deadline applies if the deadline is missed," and not a "mandatory claims-processing rule" violation that would deprive a judge of that power.

Attempting to apply the *Dolan* analytical framework to Rule 32.2(b), the Second Circuit concluded in *McIntosh* that "the considerations that pertained to the restitution order in *Dolan* similarly apply to the Rule 32.2(b) deadline for forfeiture."<sup>[3]</sup>

Those considerations were that:

- Rule 32.2(b) does not state a consequence for noncompliance with its provisions;

- A Federal Rules Advisory Committee's note states that a preliminary order is meant "to advise the court of omissions or errors in the order before it becomes final," and so, the Second Circuit reasoned, a preliminary order is not meant to give the defendant repose;
- Strictly enforcing the preliminary order requirement would tend to benefit perpetrators of crime and harm victims, "because forfeited funds frequently go to the victims of the crime"; and
- A defendant "can remind the district court of the preliminary order requirement any time before sentencing."

In so ruling, the Second Circuit joined the U.S. Courts of Appeals for the Fourth and Seventh Circuits,[4] which have also held the timing rule in Rule 32.2(b) to be a time-related directive. But it diverged from the U.S. Courts of Appeals for the Sixth and Eighth Circuits,[5] which have interpreted the timing rule to be a mandatory requirement that deprives the district court of authority to order forfeiture if not followed.

The Supreme Court granted certiorari, likely to resolve this circuit split.

### **The Arguments Before the Supreme Court**

In his briefing before the Supreme Court, McIntosh argues that the text and structure of Rule 32.2(b) indicate that the requirement to enter a preliminary forfeiture order before sentencing is a claims-processing rule.

For example, he points to the fact that Rule 32.2(b) unambiguously instructs that the district court "must promptly enter a preliminary order of forfeiture," whereas Rule 32.2(b) elsewhere uses the permissive "may" in describing actions that might be taken by a district court.

McIntosh stresses that Rule 32.2(b)'s procedural requirements are meant to ensure that defendants receive due process before the government permanently deprives them of their property.

McIntosh also seeks to distinguish the purpose of Rule 32.2(b) from that of the restitution statute. He asserts that, whereas the MVRA's purpose is to ensure that victims are made whole, forfeiture is meant to punish the defendant.

While acknowledging that "the attorney general 'is authorized' to transfer forfeited property to victims," he notes that such transfer is merely discretionary, unlike restitution owed to victims under the MVRA.

And, he argues, unlike in *Dolan*, there is no equitable concern at issue here, because the government is both the party responsible for complying with the rules governing criminal forfeiture, and the only party that bears the cost of failing to comply with those rules.

Taken together, McIntosh argues that the language and purpose of MVRA are distinct enough from Rule 32.2(b) such that the court's reasoning in *Dolan* is inapplicable to his case.

The government responds that Rule 32.2(b) is indistinguishable from the MVRA, and asks the court to follow the reasoning of the Second Circuit. In particular, the government invokes the overarching statutory framework to emphasize the significance Congress placed on effectuating criminal forfeiture.

Specifically, the government directs the Supreme Court's attention to Title 28 of the U.S. Code, Section 2461(c), which provides that where a defendant is convicted of a criminal offense subject to forfeiture, "the court shall order the forfeiture of the property as part of the sentence in the criminal case."

The government also points out that billions of dollars in forfeiture proceeds have been returned to victims.

### **Text, Purpose or Both?**

This case, like *Dolan*, may divide the court. Four justices remain from *Dolan*: Justices Clarence Thomas, Samuel Alito and Sonia Sotomayor remain from the 5-4 majority, and Chief Justice John Roberts remains from the dissent, which eschewed the majority's "series of irrelevancies" of focusing on the MVRA's purpose in favor of what he perceived to be its "clear statutory text."

Justice Roberts thus framed the difference of opinion among the Justices in *Dolan* as a battle of textualism versus purposivism, and a similar battle could play out in *McIntosh*.<sup>[6]</sup>

If textualism wins the day, the government may face greater difficulty than it did in *Dolan*. The language of the timing rule is unambiguous that the district court "must" enter the preliminary order of forfeiture, absent impracticality.

Further, although Title 28 of the U.S. Code, Section 2461(c), does provide that the "the court shall order the forfeiture of the property as part of the sentence in the criminal case," it requires the court do so "pursuant to the Federal Rules of Criminal Procedure" — one of which, as we know, is Rule 32.2(b)'s timing requirement.

Another interesting question is, even if the court agrees with the government and the Second Circuit's interpretation of Rule 32.2(b)'s advisory note, what is the import of the note in this case if the text of Rule 32.2(b) is clear?

We can also expect the parties to make purpose-based and equitable arguments, such as whether forfeiture is meant to work hand in glove with restitution to compensate victims, and whether it's fair to consider whom a deadline would benefit or penalize in deciding whether it's a time-related directive or claims-processing rule.

There is another subtle framing battle that has also emerged between the parties. The government has characterized Rule 32.2(b)'s timing rule as directed to the district court. The government therefore argues that it would be unfair for it, and the public interests it represents, to be penalized for a failing of the district court.

*McIntosh*, in contrast, has cast the entirety of Rule 32.2 as setting forth requirements for both the district court and the government. Accordingly, he argues that the government should not benefit from its own failure to abide by a rule meant to ensure a defendant receives due process.

How the Supreme Court justices elect to proceed down the framing decision tree will be fascinating in the upcoming oral argument and subsequent opinion. It may also have significant implications for how defense counsel address forfeiture issues in the lead-up to sentencing, especially in the current

environment, where the government has increasingly placed forfeitable assets such as cryptocurrencies in its crosshairs.

If the Supreme Court permits the Second Circuit rule to stand, defense counsel will have to determine whether it is in the best interest of the client to notify the government of its mistake in failing to request a preliminary order prior to sentencing.

Despite the strange posture of the defense initiating such a discussion, the resulting finality may be worth it when weighed against the possibility that the government could revive forfeiture proceedings long after sentencing — potentially forever.

---

*Anden Chow is a partner at MoloLamken LLP. He previously served as an assistant U.S. attorney in the U.S. Attorney's Office for the Southern District of New York.*

*Christian Bale is an associate at MoloLamken.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] *Kaley v. United States*, 571 U.S. 320 (2014).

[2] Fed. R. Crim. P. 32.2(b)(2)(A).

[3] *United States v. McIntosh*, 58 F.4th 606 (2d Cir. 2023), cert. granted in part, 144 S. Ct. 479 (2023).

[4] *United States v. Lee*, 77 F.4th 565 (7th Cir. 2023); *United States v. Martin*, 662 F.3d 301 (4th Cir. 2011).

[5] *United States v. Maddux*, 37 F.4th 1170 (6th Cir. 2022); *United States v. Shakur*, 691 F.3d 979 (8th Cir. 2012).

[6] Interestingly, Justice Gorsuch, then a circuit court judge, authored the Tenth Circuit's opinion in *Dolan* that was appealed. Although Judge Gorsuch also held that a district court's failure to adhere to MVRA's timing rule does not bar it from entering a restitution order, his opinion took a slightly different approach. Judge Gorsuch prioritized the mandatory nature of the district court's obligation to impose restitution, as set forth in MVRA's the first paragraph, which provides that a district court "shall" order restitution "[n]otwithstanding any other provision of law," and the statute's title: the Mandatory Victims Restitution Act. Additionally, Judge Gorsuch pointed out that the MVRA itself authorizes the district court to correct a restitution order at any time after the deadline, evidencing fluidity in the timing rule in service of the stated mandatory restitution.