No. _____

In the

Supreme Court of the United States

DAVID DAVALOS SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether a district court exceeds its jurisdiction by entering a preliminary order of forfeiture and an order of money judgment beyond the time limits set by Federal Rules of Criminal Procedure 32.2 and 35.

2. Whether a district court lacks authority to enter a preliminary order of forfeiture and an order of money judgment after the defendant files his notice of appeal.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PRAYER

Petitioner David Davalos Sr. respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on April 20, 2020.

OPINIONS BELOW

The Fifth Circuit's decision affirming in part, vacating in part, and remanding the case for further proceedings (App. 1a-13a) is reported at *United States v. Davalos*, 810 Fed. Appx. 268 (5th Cir. Apr. 20, 2020).

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2020. On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari to and including September 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

The relevant Federal Rules of Criminal Procedure (Fed. R. Crim. P. 32.2 and 35) are reproduced in the appendix to this petition. *See* App. 26a-32a.

STATEMENT OF THE CASE

In August 2016, a federal grand jury returned a nine-count indictment against petitioner and 25 others. Petitioner was specifically named in two counts: Count Three, which charged him with conspiring to possess with intent to distribute five or more kilograms of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A); and Count Five, which alleged that he opened, used, and maintained a premise in Crystal City, Texas, for the purpose of distributing cocaine in violation of 21 U.S.C. § 856(a)(1) and (b).

The indictment included both (1) a notice of demand for forfeiture of real property; and (2) a money judgment with a provision regarding substitute assets. In January 2017, the government filed a bill of particulars stating that it sought the criminal forfeiture of both the property named in the indictment and additional properties described in the bill.

In March 2017, petitioner pleaded guilty to Counts Three and Five of the indictment without a plea agreement. The government offered a factual basis supporting the plea, which petitioner admitted with two exceptions. Specifically, petitioner (1) objected to the drug quantity and drug proceeds in the factual basis, and (2) notified the court that he did not agree to the government's forfeiture provisions. The district court approved petitioner's plea, but deferred matters related to the forfeiture to the sentencing hearing.

In May 2018, the government filed an advisory regarding the items of which it intended to seek forfeiture at the upcoming sentencing hearing. The advisory noted that, with respect to petitioner, the government planned to seek (1) "[a] sum of money equal to the proceeds obtained by [petitioner] from the violations he has pled guilty to"; (2) real property located at 310 West Zapata Street in Crystal City, Texas; (3) $4,118.00 in U.S. currency; and (4) a 2004 Cadillac Escalade.

Petitioner's sentencing hearing took place on August 29, 2018. During the hearing, the court held a sealed bench conference to resolve issues regarding drug quantity, role adjustments, and forfeiture. Following the bench conference, the court determined that petitioner was subject to a guideline sentence of 210–262 months for Count Three and 210–240 months for Count Five. The district court found the advisory guideline sentencing ranges "adequate" and imposed a concurrent 235-month term of imprisonment on each count. The court also sentenced petitioner to supervised release. Significantly, the court did not orally pronounce a preliminary order of forfeiture or a forfeiture money judgment at sentencing.

The district court entered its written judgment on September 6, 2018. That judgment included an order of forfeiture and a forfeiture money judgment. However, the government had not yet filed a motion for a preliminary order of forfeiture or motion for entry of money judgment. Petitioner filed his notice of appeal on September 19, 2018.

Several weeks after entry of the district court's written judgment and petitioner's notice of appeal, the government filed a motion for a preliminary order of forfeiture and a motion for entry of money judgment. The district court then entered a preliminary order of forfeiture and an order of money judgment. Those orders were filed 83 and 97 days after petitioner's sentencing, respectively.

On appeal, petitioner challenged (1) the district court's untimely entry of the preliminary order of forfeiture and order of money judgment, (2) the lack of factual support for the money judgment, and (3) his within-guidelines sentence. Petitioner also sought to remand to conform the district court's oral pronouncement of sentence to its written judgment.

On June April 20, 2020, the court of appeals issued an unpublished opinion affirming in part, vacating in part, and remanding the case for further proceedings. The court of appeals held that although subject matter jurisdiction is reviewed *de novo*, petitioner's challenge to the district court's untimely entry of the preliminary order of forfeiture and order of money judgment was reviewable for plain error only. Although petitioner satisfied the first two prongs of plain error review, the court of appeals held that petitioner could not satisfy the third prong. According to the court of appeals, petitioner could not show that there was a reasonable probability that the result of his proceedings would have been any different had the district court followed the appropriate procedures. For this reason, the court of appeals denied petitioner's

challenge to the district court's untimely entry of the preliminary order of forfeiture and order of money judgment.

This petition follows.

REASONS FOR GRANTING THE WRIT

This case presents the Court an opportunity to resolve an ever-widening circuit split on an important and recurring question of federal law. The courts of appeals have adopted at least four distinct positions with respect to the power of district courts to enter either a preliminary order of forfeiture or an order of money judgment after sentencing and judgment.

The question whether district courts have the power to enter a preliminary order of forfeiture or an order of money judgment without complying with the procedures laid out in Federal Rule of Criminal Procedure 32.2 is an important one. Federal courts order forfeiture in thousands of cases each year and the consequences of district courts' failure to adhere to the strictures of Rule 32.2 has produced a steady stream of litigation reaching inconsistent results. Petitioner's challenges to the preliminary order of forfeiture and the order of money judgment in this case would have succeeded in at least three circuits. This case presents an ideal vehicle both to resolve the issue and to clarify that the plain language of Rules 32.2 and 35 precludes district courts from entering a preliminary order of forfeiture or an order of money judgment outside the time limits set by those rules. Further, this case presents an ideal vehicle to resolve the

related issue of whether a district court has jurisdiction to order forfeiture after the defendant files his notice of appeal.

I. The courts of appeals are deeply divided over two related questions: (1) whether a district court has jurisdiction to order forfeiture outside of the time limits set by Rules 32.2 and 35, and (2) whether a district court has jurisdiction to order forfeiture after the defendant files his notice of appeal.

A. The conflict among the courts of appeals is widespread and longstanding.

Several courts of appeals have now weighed in on the validity of forfeiture orders that are issued and/or amended after a defendant has been sentenced. Their answers differ strikingly. The Eighth Circuit has held that a district court's failure to issue a timely order of forfeiture either prior to sentencing, as provided in Rule 32.2, or within the 14–day correction period under Rule 35 renders it without jurisdiction to enter a forfeiture order. The First and Sixth Circuit have held that that a district court lacks authority to enter a forfeiture order after the defendant files his notice of appeal. The Fourth Circuit has held, in a split opinion, that Rule 32.2's requirement that a forfeiture order be included in a final judgment is not jurisdictional but rather a time-related directive. Finally, the Fifth Circuit has held that plain error review applies to a district court's failure to abide by the time limits set by Rule 32.2 because the issue is not jurisdictional.

1. The Eighth Circuit. The Eight Circuit has adopted a straightforward interpretation of Rules 32.2 and 35. It has held that a district court's failure to issue a

timely order of forfeiture either prior to sentencing, as provided in Rule 32.2, or within the 14–day correction period under Rule 35 renders it without jurisdiction to enter a forfeiture order.

In *United States v. Shakur*, 691 F.3d 979 (8th Cir. 2012), the government brought several forfeiture allegations against Shakur. *Id*. at 984–85. After he was found guilty of the underlying offenses, Shakur filed a *pro se* motion contesting several of the forfeiture allegations. *Id*. at 985. The district court summarily denied the motion without acknowledging Shakur was contesting any of the allegations. *Id*. In the six months between the guilty verdict and the sentencing hearing, the government:

> failed to file a Rule 32.2(b)(1)(A) motion seeking "forfeiture of specific property," and the district court violated Rule 32.2(b)(1)(B) by failing to conduct a hearing on the Forfeiture Allegations that Shakur had contested. Most significantly, the district court violated Rule 32.2(b)(2)(A) and (B) by not entering a preliminary order of forfeiture "sufficiently in advance of sentencing to allow the parties to suggest revisions." Indeed, the court failed to enter a preliminary order of forfeiture.
>
> *Id*.

At the sentencing hearing, the trial court made a summary finding that forfeiture would be imposed. *Id*. at 985–86. The court again failed to make the finding required by Rule 32.2(b)(1)(A), that the property was subject to forfeiture under the applicable statute, and in the case of specific property, that the government had established the requisite nexus between the property and the offense. *Id*. at 986. The court's judgment stated only that forfeiture would be imposed by further order. *Id*. Several months later, the court entered a preliminary order of forfeiture. *Id.*

The Eighth Circuit found a number of problems with this approach. Criminal forfeiture is criminal punishment, *Libretti v. United States*, 516 U.S. 29, 39–41 (1995), and as with any punishment, there are procedural safeguards on its use. *United States v. Bennett*, 423 F.3d 271, 276 (3d Cir. 2005). Rule 32.2(b)(4) provides that a preliminary forfeiture order becomes final as to the defendant at sentencing and "must" be included "directly or by reference" in the final judgment. *Shakur*, 691 F.3d at 986–87. "Thus, a final order of forfeiture that is not part of the judgment 'has no effect.'" *Id*. at 987 (quoting Bennett, 423 F.3d at 275). However, in cases where a preliminary order of forfeiture is timely entered before sentencing, the failure to incorporate that order in the final judgment is a clerical error correctable under Rule 36. *Id*.; *see also*, *United States v. Koch*, 491 F.3d 929, 932 (8th Cir. 2007); *United States v. Hatcher*, 323 F.3d 666, 673 (8th Cir. 2003). But in *Shakur*, no preliminary order of forfeiture was ever entered or even approved prior to sentencing and the entry of judgment. *Shakur*, 691 F.3d at 987.

Failing to enter a preliminary order of forfeiture prior to sentencing is not merely a technical violation of Rule 32.2, but goes to the fundamental procedural due process requirement that defendants "'receive adequate notice and procedures to contest the deprivation of property rights' that result from criminal forfeiture . . . ." *Id*. Shakur received no pre-sentencing evidentiary hearing on the forfeiture allegations, and no judicial pronouncement of what specific property would be forfeited. *Id*. Moreover,

> Shakur timely contested six of the government's Forfeiture Allegations, but his objections were entirely ignored. He was denied timely determination of "the requisite nexus," Rule 32.2(b)(1)(A); a hearing on

> the contested allegations, Rule 32.2(b)(1)(B); the entry of a preliminary order "directing the forfeiture of specific property," Rule 32.2(b)(2)(A); and entry of that order "sufficiently in advance of sentencing" to allow him to seek revisions, Rule 32.2(b)(2)(B). Finally, after sentencing, he was denied inclusion of a preliminary forfeiture order in his judgment of conviction, Rule 32.2(b)(4)(B), which deprived him of "the right to have the entire sentence imposed as a package and reviewed in a single appeal," *Koch*, 491 F.3d at 932.
>
> The wholesale violation of these Rule 32.2(b) mandates denied Shakur a meaningful opportunity to contest the deprivation of his property rights, as due process required. In these circumstances, we have no difficulty concluding that the district court's forfeiture order of October 26, 2011, did not merely correct a "clerical error," as Rule 36 permits. The violations were prejudicial legal errors, not clerical errors.

Id. at 988–89 (footnote omitted).

Whether an error is "legal" or merely "clerical" has important jurisdictional consequences. Once a sentence has been imposed, the trial judge's authority to modify it is limited to Rule 35, which imposes a 2–week time period that is "'jurisdictional and may not be extended.'" *Id*. at 988 n.6 (quoting *United States v. Addonizio*, 442 U.S. 178, 189 & n.16 (1979)). If the 2–week limit of Rule 35 has passed, a court only has jurisdiction to correct clerical errors in the judgment (under Rule 36). Because the error in *Shakur* was "legal" in nature, the trial court was without jurisdiction to enter a preliminary order of forfeiture following the judgment. *Id*. at 989.

2. The First and Sixth Circuits. In *United States v. Carman*, 933 F.3d 614 (6th Cir. 2019), the district court did not enter a forfeiture order at sentencing. *Id.* at 616. However, after Carman appealed her conviction and sentence to the Sixth

Circuit, the district court purported to amend her sentence by entering a forfeiture order against Carman in the amount of approximately $17.5 million. *Id*. at 615.

As an initial matter, the Sixth Circuit held that "the district court's violations of Rule 32.2 . . . did not themselves deprive the court of jurisdiction to enter the forfeiture order." *Id*. at 617. In fact, the defendant's notice of appeal deprived the district court of jurisdiction to enter the forfeiture order.

> "Filing a notice of appeal transfers adjudicatory authority from the district court to the court of appeals." *Manrique v. United States*, —— U.S. ——, 137 S. Ct. 1266, 1271, 197 L.Ed.2d 599 (2017). Specifically, the filing "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co*., 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curiam). The district court does retain "limited jurisdiction to take actions in aid of the appeal." *United States v. Sims*, 708 F.3d 832, 834 (6th Cir. 2013) (internal quotation marks omitted). But that class of actions is "narrowly defined," *id*., and does not include "actions that alter the case on appeal." *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1013 (6th Cir. 2003) (emphasis added and internal quotation marks omitted).
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> *Id*. at 617.

In short, the Sixth Circuit adopted the First Circuit's reasoning in *United States v. George*, 841 F.3d 55 (1st Cir. 2016) which *sua sponte* had held the same.

3. The Fourth Circuit. In *United States v. Martin*, 662 F.3d 301 (4th Cir. 2011), a divided panel "refuse[d] to vacate the district court's tardy forfeiture orders." *Id.* at 310.

In *Martin*, the district court held two evidentiary forfeiture hearings and announced its conclusion "that the government's preliminary forfeiture order is fully

supported." *Id*. at 305. Immediately after the second forfeiture hearing, the court sentenced defendants without even mentioning forfeiture. *Id*. No one objected to the court's failure to include forfeiture in the oral pronouncement of the sentence. *Id.* The court did not enter a preliminary forfeiture order until one month after sentencing. *Id*. Six months after sentencing, the district court issued a final order of forfeiture but did not amend the judgments to include that order. *Id*. "Some four years after its initial entry," the district court amended the judgments to include the final order of forfeiture. *Id*. 312.

Rather than apply plain error review, as the Fifth Circuit did in the case below, the Fourth Circuit reviewed the district court's findings of fact for clear error and the district court's legal interpretations *de novo*. *Id*. at 306. Ultimately, the panel majority concluded that the court had jurisdiction to enter the tardy orders because defendants were on notice of the pending forfeiture.

> Appellants themselves do not—and indeed could not—argue that they were caught off-guard. The district court held multiple, comprehensive hearings on forfeiture, in which both the fact of liability and the amount were determined. The district court made clear at the end of the final forfeiture hearing—a mere minutes prior to sentencing Appellants—that it intended to enter the forfeiture order. Appellants lack of surprise is further evidenced by the fact that they did not challenge the forfeiture until almost three years after the district court entered the final order of forfeiture.

Id. at 309 (citation omitted).

Judge Roger Gregory, however, observed in his dissent that the panel majority did not even address Rule 35. *Id.* at 311 (Gregory, J., concurring in part and dissenting

in part). According to Judge Gregory, the 32.2 violation, "coupled with expiration of Rule 35's timeline, is determinative." *Id*. at 312. "Rule 32.2 read in conjunction with Rule 35" renders the district court without jurisdiction to enter a forfeiture order once the fourteen-day period after sentencing has lapsed. *Id*. 314.

> [F]ar in advance of the amendment of judgment, the seven-day [now fourteen-day[1]] window to amend the oral sentences had closed, and the appellants' sentences had become final. By modifying its judgments four years after sentencing through Rule 36, the district court attempts to sweep Rule 35 under the rug. The fact that the court modified judgment some four years later via Rule 36's "at any time" allowance cannot trump Rule 35's seven-day window to correct a "clear error" in sentencing. Rule 35 would never be necessary if we so broadly read Rule 36's corrective power. To allow such backdoor routes would cast Rule 35 out of the Federal Rules of Criminal Procedure and undermine the finality of criminal sentences.
>
> *Id*. at 312.

In conclusion, Judge Gregory stated that he would "find that the district court had no authority to enter the preliminary order of forfeiture after the sentence became final, nor did it have authority to issue its final order of forfeiture." *Id*. at 315.

4. The Fifth Circuit. In this case, the Fifth Circuit recognized that the "the government did not actually move for a preliminary order of forfeiture or for entry of money judgment until more than a month after sentencing." App. 4a. Further, "[t]he preliminary order of forfeiture was not issued until 83 days after sentencing, and the

[1] The version of Federal Rule of Criminal Procedure 35 in effect under the circumstance of the case provided that a court may correct a sentence "[w]ithin 7 days after sentencing." Fed. R. Crim. P. 35(a) (2007). In 2009 the rule was amended to provide for a 14-day time limit. Fed. R. Crim. P. 35(a) (2009).

order of money judgment was entered 97 days after sentencing." App. 4a. Nonetheless, it held that the "issue presented here is not jurisdictional, and plain error review applies." App. 5a. In effect, the Fifth Circuit circumscribed the time limits in Rule 32.2 when read with Rule 35.

The Fifth Circuit's approach thus conflicts with the rule adopted and applied by the Eighth Circuit (and urged by Fourth Circuit Judge Gregory in his dissent in *Martin*). In the Eighth Circuit, a district court's failure to issue a timely order of forfeiture either prior to sentencing, as provided in Rule 32.2, or within the 14–day correction period under Rule 35 renders it without jurisdiction to enter a forfeiture order.

The Fifth Circuit's approach also conflicts with the approach taken by the First and Sixth Circuits. As explained above, the First and Sixth Circuits have each held that a defendant's notice of appeal deprives the district court of jurisdiction to enter a forfeiture order.

B. The courts of appeals are incapable of resolving this frequently recurring conflict.

The decisions discussed in Part I(A) of this petition show that courts of appeals have repeatedly been confronted with questions regarding Rule 32.2's time limits and whether a district court lacks authority to enter a forfeiture order after the defendant files his notice of appeal. That is hardly surprising. As recently noted by one commentator, "criminal forfeitures are a ubiquitous part of federal law enforcement. Criminal forfeitures account for half of all contested forfeiture actions in federal courts,

and are routinely sought in drug and money laundering cases." Note, Benjamin Gillig, *Nexus Rethought: Toward a Rational Factual Standard for Federal Criminal Forfeitures*, 102 IOWA L. REV. 286, 298-99 (2016) (footnotes omitted). What the courts of appeals' opinions reveal, beyond the fact that issues regarding untimely forfeiture orders arise frequently and have produced a deep and wide circuit split, is that the lower courts' decisions are not converging on a consistent approach.

C. This case presents the right opportunity for resolving the conflict.

This case presents a perfect opportunity for this Court to decide: (1) whether district courts have the power to order forfeiture outside the time limits set forth in Rules 32.2 and 35, and (2) whether a district court has jurisdiction to order forfeiture after the defendant files his notice of appeal.

Here, the district court did not orally pronounce a preliminary order of forfeiture or a forfeiture money judgment at sentencing. To be sure, the district court did include an order of forfeiture and a forfeiture money judgment on the last page of the written judgment and conviction. App. 20a. However, the forfeiture money judgment in the written judgment did not even frame the award in terms of a forfeiture under 21 U.S.C. § 853, the forfeiture statue applicable to petitioners' offenses of conviction. Instead, the district court worded the money judgment in the written judgment as an award of forfeiture under 18 U.S.C. 982(a)(2)(B), a forfeiture statute inapplicable to petitioner's offenses of conviction. Further, "the government did not actually move for a preliminary order of forfeiture or for entry of money judgment until more than a month

after sentencing" and after petitioner had filed his notice of appeal. App. 4a. "The preliminary order of forfeiture was not issued until 83 days after sentencing, and the order of money judgment was entered 97 days after sentencing." App. 4a. Finally, even after the decision rendered by the Fifth Circuit in the case below, the district court still has not amended the petitioner's written judgment to conform it to the preliminary order of forfeiture.[2]

Moreover, the circuit conflict identified above was outcome determinative in this case. The Eighth Circuit has vacated a forfeiture order in a case that was in the same posture as petitioner's, holding that the district court lacked jurisdiction to issue and/or amend a forfeiture order after the 14-day period set forth in Rule 35 expired. In *Martin*, Judge Gregory maintained in his dissent that the same rule should have been adopted in the Fourth Circuit. Finally, the First and Sixth Circuits have each reversed forfeiture orders in cases in the same posture as petitioner's, stating that a district court lacks authority to enter a forfeiture order after the defendant files his notice of appeal.

II. District courts lack the power to order forfeiture outside of the time limits set by Rules 32.2 and 35.

The Eighth Circuit was correct to hold that a district court's failure to issue a timely order of forfeiture either prior to sentencing, as provided in Rule 32.2, or within

[2] The district court does not need to amend the petitioner's written judgment to conform it to the order of money judgment. In the case below, the Fifth Circuit held as follows: "Because the money judgment entered against Mr. Davalos is without sufficient factual support, it should be vacated and this case remanded for the purpose of making factual findings regarding the appropriate money judgment." App. 8a.

the 14–day correction period under Rule 35 renders it without jurisdiction to enter a forfeiture order. *Shakur*, 691 F.3d at 986–89. "Rule 32.2(b)(4) provides that a preliminary forfeiture order becomes final as to the defendant at sentencing and 'must' be included 'directly or by reference' in the final judgment." *Id*. at 986-87. "Thus, a final order of forfeiture that is not part of the judgment 'has no effect.'" *Id*. at 987. Rule 35(a) gives the district court plenary power to amend a final order in a criminal case for fourteen days after sentencing. Fed. R. Crim. P. 35(a). However, Rule 35(a) does not apply here because "[t]he preliminary order of forfeiture was not issued until 83 days after sentencing, and the order of money judgment was entered 97 days after sentencing." App. 4a.

The Fifth Circuit's decision to the contrary omits any discussion of Rule 35. Instead, it follows its precedent in *United States v. Marquez*, 685 F.3d 501 (5th Cir. 2012), holding that the rules set forth in Rule 32.2 "procedural requirements." App. 5a. Under this approach, it seems that after a defendant "has served his entire sentence—and who knows how long after?—a court might still order additional imprisonment, additional restitution, an additional fine, . . . an additional condition of supervised release," or additional forfeiture. *Dolan v. United States*, 560 U.S. 605, 627 (2010) (Roberts, C.J., dissenting).

In light of a proper construction of the plain language of Rules 32.2 and 35, there is no support for the Fifth Circuit's position. In fact, given the various incentives busy federal courts face, it is entirely possible that the Fifth Circuit's approach, by removing

any adverse consequences from a court's failure to comply with the time limits set forth in Rules 32.2 and 35, will actually delay the prompt entry of forfeiture orders and work to the detriment of the government's collection efforts. If it doesn't matter when a forfeiture order is entered, resolution of forfeiture claims may end up being postponed while district courts turn to other issues that seem more pressing.

III. District courts lack jurisdiction to order forfeiture after the defendant files his notice of appeal.

A forfeiture order is "part of the [defendant's] sentence in the criminal case[.]" 28 U.S.C. § 2461(c); *see also* Fed. R. Crim. P. 32.2(b)(4)(B); *Libretti*, 516 U.S. at 38-39 ("Forfeiture is an element of the sentence[.]"). The issue of forfeiture thus falls within the "aspects of the case" as to which petitioner's notice of appeal transferred adjudicatory authority to the Fifth Circuit. *Griggs v. Provident Consumer Disc. Co*., 459 U.S. 56, 58 (1982) (per curiam). "And the district court's narrow authority to take actions in aid of the appeal" did not include the authority to enter a forfeiture order." *Carman*, 933 F.3d at 617 (cleaned up). To the contrary, the preliminary order of forfeiture and order of money judgment "altered the case on appeal by altering the sentence itself." Id. (cleaned up). The district court therefore lacked authority to enter its preliminary order of forfeiture and order of money judgment after petitioner had filed his notice of appeal. *See id*.; *George*, 841 F.3d at 70-71.

To be sure, petitioner did not raise this issue in the Fifth Circuit until he filed a Federal Rule of Appellate Procedure 28(j) letter after the briefing had been completed.

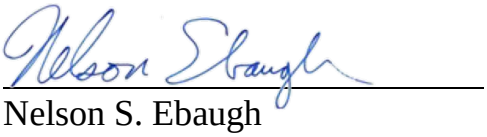
However, "[a] litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same . . . action, even initially at the highest appellate instance." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (citing *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) (challenge to a federal court's subject-matter jurisdiction may be made at any stage of the proceedings, and the court should raise the question sua sponte); *Capron v. Van Noorden*, 2 Cranch 126 (1804) (judgment loser successfully raised lack of diversity jurisdiction for the first time before the Supreme Court)).

In sum, the Fifth Circuit should have held that the district court lacked jurisdiction to enter its preliminary order of forfeiture and order of money judgment after petitioner had filed his notice of appeal.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,



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