No. 20-5778

IN THE SUPREME COURT OF THE UNITED STATES

DAVID DAVALOS, SR., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court possessed jurisdiction to order forfeiture, when it included an order of forfeiture in the judgment of conviction but failed to enter a preliminary order of forfeiture under Federal Rule of Criminal Procedure 32.2 until after petitioner had filed his notice of appeal from that judgment.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Balboa-Falcon, No. 16-cr-1115 (Sept. 6, 2018)

United States Court of Appeals (5th Cir.):

United States v. Davalos, No. 18-50784 (Apr. 20, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not published in the Federal Reporter but is reprinted at 810 Fed. Appx. 268.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2020. The petition for a writ of certiorari was filed on September 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to possess with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 846, and opening, using, and maintaining premises for the purpose of distributing cocaine, in violation of 21 U.S.C. 856. Pet. App. 2a, 14a. He was sentenced to 235 months of imprisonment, followed by five years of supervised release, and was ordered to forfeit real property in Crystal City, Texas and $1,794,000 in the form of a money judgment. Id. at 15a-16a, 20a. The court of appeals vacated the forfeiture money judgment and remanded for the district court to "conduct factfinding regarding the appropriate value of the money judgment in accordance with" Honeycutt v. United States, 137 S. Ct. 1626 (2017). Pet. App. 12a. The court also remanded for the district court to amend the special conditions of supervised release contained in the written judgment to conform to the conditions orally announced at petitioner's sentencing. Id. at 12a-13a. The court affirmed in all other respects. Id. at 13a.

1. Petitioner and his two brothers sold large quantities of cocaine out of three distribution houses in Crystal City, Texas. Presentence Investigation Report (PSR) ¶¶ 44, 48. Petitioner operated the distribution house at 307 West Zapata Street, across the street from his residence at 310 West Zapata Street, where he

stored proceeds from the sales. PSR ¶¶ 48, 54. Petitioner and his brothers obtained the cocaine from a Mexican drug-trafficking organization that had smuggled it across the border. PSR ¶¶ 43-44. Between October 2012 and August 2016, the conspirators sold approximately 230 kilograms of cocaine for a total of about $5.98 million. PSR ¶¶ 43, 47. Each distribution house, including the one operated by petitioner, individually sold about 1.5 kilograms of cocaine each month, at a value of approximately $28,000 per kilogram. PSR ¶¶ 44, 47. In August 2016, petitioner was arrested at his residence, where investigators discovered $4118 in United States currency, as well as a firearm and ammunition. PSR ¶ 62.

On August 10, 2016, a grand jury returned an indictment charging petitioner with conspiring to possess with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), 846, and opening, using, and maintaining premises (the distribution house in Crystal City) for the purpose of distributing cocaine, in violation of 21 U.S.C. 856(a)(1) and (b). Indictment 3-4. The indictment also provided notice of the government's intention to seek forfeiture of (1) property in Crystal City that petitioner used in connection with his drug-distribution activities (307 and 310 West Zapata Street), and (2) a money judgment holding petitioner and his coconspirators jointly and severally liable for $5.98 million in proceeds from the conspiracy. Indictment 8-10.

2. Forfeiture is mandatory for certain drug-trafficking offenses. See 21 U.S.C. 853(a); Honeycutt, 137 S. Ct. at 1630. A district court must order forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation," 21 U.S.C. 853(a)(1), as well as "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," 21 U.S.C. 853(a)(2). In Honeycutt, this Court held that 21 U.S.C. 853 does not authorize joint and several liability for members of a drug-trafficking conspiracy, but rather authorizes forfeiture by each defendant of only the property that the defendant obtained as the result of the crime. 137 S. Ct. at 1630.

Federal Rule of Criminal Procedure 32.2 sets forth the procedures governing criminal forfeiture. It provides that a court may enter a judgment of forfeiture only if the government gave notice of forfeiture in the indictment. Fed. R. Crim. P. 32.2(a). "As soon as practical after a verdict or finding of guilty," the court "must determine what property is subject to forfeiture under the applicable statute." Fed. R. Crim. P. 32.2(b)(1)(A). "If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay." Ibid. The court must conduct a hearing if requested by either party and "must promptly enter a preliminary order of forfeiture" if it "finds that property is subject to forfeiture." Fed. R. Crim.

P. 32.2(b)(1)(B) and (b)(2)(A). "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." Fed. R. Crim. P. 32.2(b)(2)(B). As a general matter, the order becomes final as to the defendant (but not necessarily third parties) at sentencing, and the court "must" include the forfeiture order in its judgment, though it may later correct a failure to do so, Fed. R. Crim. P. 32.2(b)(4)(A) and (b)(4)(B).

3. On March 30, 2017, petitioner pleaded guilty to both substantive charges in the indictment, but reserved his right to oppose forfeiture. Plea Hr'g Tr. 2, 4-5, 46-47. Petitioner stated at his plea hearing that he would "defer" the forfeiture issue "to a later hearing before the Court." Id. at 2.

After the PSR was produced, the government filed an advisory noting its understanding that the court would conduct a forfeiture hearing at petitioner's sentencing. D. Ct. Doc. 981, at 1-2 (May 18, 2018). The government advised the court that it would be prepared to support forfeiture of a money judgment in the amount of the proceeds petitioner obtained from his criminal offenses as well as the property petitioner used to commit the charged offenses, namely (1) 310 West Zapata Street (petitioner's residence), (2) $4118 in United States currency (the cash found in petitioner's

residence at the time of his arrest), and (3) a 2004 Cadillac Escalade. Id. at 2.

On August 29, 2018, the district court held a sentencing and forfeiture hearing. At that hearing, the government informed the district court that, in light of this Court's intervening decision in Honeycutt, it no longer sought to hold petitioner jointly and severally liable for the conspiracy's combined proceeds of $5.98 million, and instead sought a money judgment for $1,794,000. Sent. Tr. 65-66. The government offered testimony showing that petitioner sold 1.5 kilograms of cocaine per month at his distribution house over the course of the 46-month conspiracy, that one kilogram of cocaine sold for at least $26,000 during the relevant period, and that petitioner therefore obtained approximately $1,794,000 in proceeds. Id. at 18-21. The district court agreed and indicated it would order the forfeiture of $1,794,000. Id. at 65-66. The court also indicated that it would order the forfeiture of petitioner's property interest in 310 West Zapata Street, finding that petitioner used the property to facilitate his drug-distribution activities. Id. at 69-70. But the court rejected forfeiture of the $4118 and the Cadillac Escalade on the ground that those items had not been listed in the indictment. Id. at 70-71. The court memorialized its determinations in a written judgment issued eight days later, on September 6, 2018. See Pet. App. 20a (ordering forfeiture of "[a] sum of money equal to * * * $1,794,000.00" and of

"[r]eal [p]roperty located and situated at 310 West Zapata Street, Crystal City, Zavala County, Texas").

On September 19, 2018, petitioner filed a notice of appeal. D. Ct. Doc. 1155. On October 1, 2018, the government filed a motion asking the district court to enter a preliminary order of forfeiture for the 310 West Zapata Street property. D. Ct. Doc. 1163. That same day, the government also filed a motion asking the district court to enter a money judgment for $1,794,000. D. Ct. Doc. 1164. Petitioner did not respond to either motion, and the district court granted both motions and entered the proposed orders on November 20, 2018, and December 4, 2018, respectively. Pet. App. 21a-25a.[1]

4. In a per curiam, unpublished opinion, the court of appeals affirmed in part and vacated and remanded in part. Pet. App. 1a-13a. The court rejected petitioner's contention, raised for the first time on appeal, that the district court lacked subject-matter jurisdiction to enter a preliminary order of forfeiture and an order of money judgment after sentencing, in violation of the timing requirements set forth in Rule 32.2. Id. at 3a-4a. Rule 32.2 requires a district court to determine what property is subject to forfeiture "[a]s soon as practical after" a finding of guilt or the acceptance of a guilty plea. Fed. R. Crim. P. 32.2(b)(1)(A). The

[1] Ancillary litigation involving the rights of third parties in the property at 310 West Zapata Street remains ongoing. See D. Ct. Doc. 1206 (Feb. 6, 2019); Fed. R. Crim. P. 32.2(b)(4)(A).

rule contemplates that the court will "promptly" enter a "preliminary order of forfeiture," and that, "[u]nless doing so is impractical," the preliminary order will be entered "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final" at the time of sentencing. Fed. R. Crim. P. 32.2(b)(2)(A)-(B) and (b)(4)(A). If the property cannot be identified before sentencing, the rule provides that a forfeiture order can be amended after sentencing. Fed. R. Crim. P. 32.2(b)(2)(C) and (b)(4)(C).

In rejecting petitioner's contention, the court of appeals relied on its prior decision in United States v. Marquez, 685 F.3d 501 (5th Cir. 2012), which held that Rule 32.2's deadlines are "procedural requirements," not jurisdictional conditions. Pet. App. 5a (quoting Marquez, 685 F.3d at 509).

Because the issue was both nonjurisdictional and unpreserved, the court of appeals applied plain-error review. Pet. App. 5a. It determined that the district court erred in failing to enter a preliminary order of forfeiture in advance of sentencing. Id. at 6a. But it held that the error did not require reversal under the plain-error test because petitioner had failed to demonstrate that it affected his substantial rights. Ibid. In particular, petitioner had not shown that "there is a reasonable probability that the result of his proceedings would have been any different had the district court followed the appropriate procedures." Ibid.

Nevertheless, the court of appeals vacated and remanded the money judgment. Pet. App. 8a. Citing Honeycutt, the court held that "a defendant may not be held jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." Id. at 7a. The court concluded that the district court failed to make "any factual findings about whether [petitioner] actually acquired [the amount the court imposed as forfeiture] as a result of the crime." Id. at 8a. The court of appeals remanded for factfinding as to the appropriate amount of the money judgment. Ibid.[2]

5. On remand, the district court ordered the parties to file briefs by February 26, 2021, addressing the district court's "pending factfinding as to the appropriate value of the money judgment, in accordance with the decision in Honeycutt." D. Ct. Doc. 1293 (Jan. 26, 2021).

ARGUMENT

Petitioner contends (Pet. 15-18) that the district court lacked jurisdiction to order forfeiture in violation of the timing requirements contained in Rule 32.2 and, relatedly, that his filing

[2] The court of appeals also rejected petitioner's challenge to his 235-month term of imprisonment. Pet. App. 9a-11a. And it concluded that the special conditions of supervised release contained in the district court's written judgment did not reflect the conditions that had been orally imposed at sentencing. Id. at 11a-12a. It therefore remanded for the district court to "conform the written judgment to its oral pronouncement of sentence." Id. at 12a-13a. Those aspects of the court of appeals' decision are not at issue here.

of a notice of appeal divested the district court of jurisdiction to order forfeiture. Petitioner also asserts (Pet. 6-13) that the courts of appeals are divided over both of these questions. The Court should deny the petition for a writ of certiorari. This case is in an interlocutory posture and therefore does not warrant review at this time. In any event, petitioner's arguments lack merit, and the unpublished decision by the court of appeals does not conflict with a decision from any other court of appeals.

1. At the outset, review is unwarranted in the current posture because the decision below is interlocutory. See, e.g., American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 384 (1893); see also Stephen M. Shapiro et al., Supreme Court Practice 4-55 n.72 (11th ed. 2019) (noting that the Court generally denies interlocutory petitions in criminal cases). Although the court of appeals rejected petitioner's jurisdictional argument, it vacated the money judgment and remanded for the district court to make further factual findings as to the appropriate amount of that judgment. See p. 9, supra.

Under this Court's ordinary practice, the interlocutory posture of a case "alone furnishe[s] sufficient ground for the denial of the application." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded to the district court "is

not yet ripe for review by this Court"). That approach promotes judicial efficiency, because the proceedings on remand may diminish the significance of the issues presented in a petition or even render them moot -- such as, in this case, if the district court were to find that petitioner personally received only a small fraction of the conspiracy's total proceeds. It also enables issues raised at different stages of lower-court proceedings to be consolidated in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). This case presents no occasion for the Court to depart from its usual practice.

2. Petitioner contends (Pet. 15-17) that district courts lack jurisdiction to order forfeiture when they deviate from the time limits contained in Rule 32.2, and he further contends (Pet. 6-9) that the courts of appeals are divided over the issue. Neither of those contentions is correct.

a. Rule 32.2 provides that if a district 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" and "directing the forfeiture of specific property." Fed. R. Crim. P. 32.2(b)(2)(A). In addition, "[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." Fed. R. Crim. P. 32.2(b)(2)(B). Here, "the written judgment entered by the district court included an order of forfeiture and a forfeiture money judgment," but "[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." Pet. App. 4a.

Contrary to petitioner's contention, Rule 32.2's timing requirements are not jurisdictional. This Court has repeatedly made clear that deadlines in "procedural rule[s]" are ordinarily "nonjurisdictional" and can therefore "be waived or forfeited by an opposing party." Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019). And the Court has found that a limitation similar to the deadline here was nonjurisdictional even when contained in a statute rather than a rule of procedure. In Dolan v. United States, 560 U.S. 605 (2010), the Court considered a mandatory-restitution statute, which provided that "the court shall 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 Court distinguished between a jurisdictional deadline, which imposes an "absolute" "condition upon * * * a court's authority," and "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." Dolan, 560 U.S. at 610-611. The Court classified the restitution deadline as a time-related directive. Among other things, the Court observed that where "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.'" Id. at 611 (citation omitted). And it found that the imposition of a sanction 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).

Rule 32.2 is part of the Federal Rules of Criminal Procedure, not a statute. Petitioner does not identify any features of that procedural rule that would nevertheless justify according it jurisdictional status. Moreover, under Dolan's reasoning, Rule 32.2 qualifies as a time-related directive rather than an absolute jurisdictional bar. It does not specify any sanction for noncompliance. And petitioner had ample notice of both the government's intention to seek forfeiture and the specific property it sought to forfeit. See pp. 3, 5-6, supra. Petitioner identifies no basis for distinguishing Dolan and, in fact, does not even address the case -- other than by including (Pet. 16) a passing quotation from the Chief Justice's dissent.

Petitioner suggests (Pet. 11-12, 16-17) that Rule 32.2 must be read in conjunction with Rule 35, which allows a court "14 days after sentencing" in which to "correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). In his view, the district court lacked authority under Rule 35 to enter the preliminary order of forfeiture and money judgment more than 14 days after sentencing. That contention is inapposite on these facts. Even assuming that Rule 35 limits a court's ability to order forfeiture more than 14 days after sentencing -- a point the government does not concede -- the district court's oral pronouncement at sentencing and written judgment of conviction in this case ordered the forfeiture of the same property that was described in the later documents. Compare Sent. Tr. 65-66, 69-70; Pet. App. 20a, with Pet. App. 21a, 24a. Nothing in the subsequent preliminary order or money judgment purported to correct petitioner's sentence. The partial dissent in United States v. Martin, 662 F.3d 301 (4th Cir. 2011), cert. denied, 566 U.S. 955 and 568 U.S. 852 (2012) (cited at Pet. 12), is thus irrelevant, because the original sentence in that case had omitted any order of forfeiture. See id. at 310-311 (Gregory, J., concurring in part and dissenting in part) ("[F]orfeiture was included neither in the oral sentence nor in the written judgment for any of the appellants.").

The decision below accords with the decisions from other circuits, which have consistently held that a district court's failure

to comply with Rule 32.2's deadlines regarding preliminary orders of forfeiture does not deprive that court of subject-matter jurisdiction. See, e.g., United States v. Carman, 933 F.3d 614, 616-617 (6th Cir. 2019); United States v. Schwartz, 503 Fed. Appx. 443, 447 (6th Cir. 2012) (unpublished), cert. denied, 568 U.S. 1239 (2013); Martin, 662 F.3d at 309-310; see also United States v. McIntosh, No. 11-CR-500, 2017 WL 3396429, at *9 (S.D.N.Y. Aug. 8, 2017) ("[E]very circuit to address the forfeiture issue head-on since Dolan has concluded that the deadlines in Rule 32.2 fall in the forgiving category of 'time-related directives.'") (citing cases). Thus, in evaluating alleged violations of the Rule's deadlines, the courts of appeals have applied harmless-error review (when an objection was preserved) or plain-error review (when it was not). See United States v. Dahda, 852 F.3d 1282, 1297 (10th Cir. 2017), aff'd on other grounds, 138 S. Ct. 1491 (2018); United States v. Farias, 836 F.3d 1315, 1330 (11th Cir. 2016), cert. denied, 138 S. Ct. 68 (2017); United States v. Moreno, 618 Fed. Appx. 308, 313-314 (9th Cir. 2015) (unpublished); United States v. Mandell, 752 F.3d 544, 553 (2d Cir. 2014) (per curiam), cert. denied, 135 S. Ct. 1402 (2015); Schwartz, 503 Fed. Appx. at 447.

Because the deadline here is nonjurisdictional and petitioner failed to preserve his objection, plain-error review applies. The court of appeals below correctly held that petitioner cannot satisfy the plain-error standard, and petitioner does not appear to con-

tend otherwise. The district court's failure to enter a preliminary order of forfeiture before directing forfeiture in the sentencing hearing and in the written judgment did not affect petitioner's substantial rights. See United States v. Olano, 507 U.S. 725, 732 (1993). Petitioner had ample notice that the government would seek forfeiture of 310 West Zapata Street and a money judgment: The government provided notice in the indictment and filed an advisory before sentencing that referenced both items. See pp. 3, 5-6, supra; see also, e.g., Dahda, 852 F.3d at 1297 (finding no prejudice where defendant received adequate notice). And petitioner now has an additional opportunity to contest the amount of the money judgment on remand.

b. Petitioner asserts (Pet. 6-9) that the decision below conflicts with United States v. Shakur, 691 F.3d 979 (8th Cir. 2012), cert. denied, 568 U.S. 1219 and 568 U.S. 1257 (2013). There, the Eighth Circuit concluded that a district court's "wholesale violation of * * * Rule 32.2(b)['s] mandates denied [the defendant] a meaningful opportunity to contest the deprivation of his property rights, as due process required." Id. at 988-989. The court of appeals noted, among other things, that the district court's "Judgment in a Criminal Case * * * simply stated, 'Forfeiture will be imposed by further order of the Court,'" without specifying the property at issue. Id. at 986. The court of appeals held that the post-judgment forfeiture order "did not merely

correct a 'clerical error,' as [Federal Rule of Criminal Procedure] 36 permits." Id. at 989.

Shakur is materially different from this case in multiple respects. Although the Shakur court observed that it "would be reluctant to follow" the Fourth Circuit's decision in Martin -- which applied Dolan in deeming the deadlines in Rule 32.2 nonjurisdictional -- it recognized that it was not deciding that issue and that "Martin is factually distinguishable," because the defendant in Martin (like petitioner here) did not suffer prejudice from the timing violations. 691 F.3d at 988 & n.6. And the district court in this case, unlike in Shakur, specified in the original criminal judgment the property that was subject to the forfeiture order. The absence of any conflict between Shakur and the decision below is confirmed by a later Eighth Circuit decision, which distinguished Shakur in the course of holding that another deadline in Rule 32.2 is nonjurisdictional in light of Dolan. See United States v. Williams, 720 F.3d 674, 701-702 & n.20 (8th Cir. 2013), cert. denied, 571 U.S. 1223 (2014).

3. Petitioner further contends (Pet. 17-18) that his filing of a notice of appeal divested the district court of jurisdiction to enter a forfeiture order. And he asserts (Pet. 9-10) that there is a circuit conflict on this issue. Review of this question is unwarranted for multiple reasons.

a. As a threshold matter, the issue petitioner raises is not properly presented here. The district court indicated its intention to order forfeiture during petitioner's August 29 sentencing hearing and then included provisions ordering forfeiture in petitioner's September 6 criminal judgment -- both of which occurred before petitioner filed his notice of appeal on September 19. See Pet. App. 20a; pp. 6-7, supra. This case therefore does not implicate the question whether a district court may order a forfeiture for the first time after the defendant files a notice of appeal. See Moreno, 618 Fed. Appx. at 315 n.5 (rejecting argument "that the notice of appeal divested the court of jurisdiction to enter the belated 'preliminary' forfeiture order" where "the district court's judgment," issued before the filing of the notice of appeal, "detailed the property to be forfeited") (citation omitted).

In addition, petitioner concedes (Pet. 17) that he did not raise this issue until after briefing had already been completed in the court of appeals -- even though the district court entered the preliminary order of forfeiture and the money judgment several months before petitioner filed his opening brief in the court of appeals. See Pet. C.A. Br. (Apr. 5, 2019); Pet. App. 21a-23a (preliminary order of forfeiture) (Nov. 20, 2018); Pet. App. 24a-25a (money judgment) (Dec. 4, 2018). As a result, the court of appeals did not address the argument. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question present-

ed was not pressed or passed on below." United States v. Williams, 504 U.S. 36, 41 (1992) (citation and internal quotation marks omitted). There is no reason to depart from that general rule here. Regardless of whether petitioner's objection raises a nonforfeitable jurisdictional issue, see Pet. 18, this case is an unsuitable vehicle.

b. Even if the issue were properly presented, petitioner's argument that the filing of a notice of appeal divested the district court of jurisdiction would be incorrect. Petitioner relies (Pet. 17) on Griggs v. Provident Consumer Disc. Co., 459 U.S. 56 (1982) (per curiam), which observed that "[t]he filing of a notice of appeal is an event of jurisdictional significance -- it 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." Id. at 58. Griggs held that a premature notice of appeal failed to confer jurisdiction on the court of appeals. Id. at 61.

Although Griggs referred to the effect of the notice of appeal as "jurisdictional," that comment was dictum, and this Court has since clarified that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." Hamer v. Neighborhood Hous. Servs., 138 S. Ct. 13, 17 (2017) (quoting Kontrick v. Ryan, 540 U.S. 443, 452 (2004)). The principle that a notice of appeal divests the district court of control "is not derived from the jurisdictional statutes or from the rules," but rather "is a judge-made

doctrine, designed to promote judicial economy and avoid the confusion and inefficiency that might flow from putting the same issue before two courts at the same time." 20 James Wm. Moore et al., Moore's Federal Practice ¶ 303.32[1] (3d ed. 2017). Thus, in United States v. Carpenter, 941 F.3d 1 (1st Cir. 2019), the court of appeals approved the district court's entry of a forfeiture order after a notice of appeal had been filed, reasoning that the divestiture principle is "not 'jurisdictional'" and is instead "'rooted in concerns of judicial economy, crafted by courts.'" Id. at 6 (quoting United States v. Rodríguez-Rosado, 909 F.3d 472, 477-478 (1st Cir. 2018)). The same logic would apply here.

c. Petitioner contends that the decision below conflicts with cases from the First and Sixth Circuits holding that district courts lacked authority to enter orders of forfeiture after defendants had filed notices of appeal. See Pet. 9-10 (citing Carman, supra, and United States v. George, 841 F.3d 55 (1st Cir. 2016)). Petitioner is mistaken. The court of appeals here did not address the effect of a notice of appeal, much less do so in a way that might conflict with Carman and George. Moreover, in each of those cases, the judgment of conviction had not included any order of forfeiture, and it was accordingly necessary for the district court to impose such an order after the fact. See George, 841 F.3d at 70 ("While the appeal was pending, the district court * * * purposed to enter an amended judgment, which for the first time included an

order of forfeiture."); Carman, 933 F.3d at 616-618 (same). Here, by contrast, the district court's original judgment of conviction expressly ordered petitioner to forfeit his residence and $1,794,000, and the district court did not purport to amend that judgment in its subsequent preliminary order and money judgment. In George itself, the First Circuit distinguished a case in which "forfeiture 'was properly a part of the [initial] judgment.'" 841 F.3d at 72 (citation omitted). Thus, the decisions in George and Carman are not implicated here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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