No. _____

IN THE

Supreme Court of the United States

LOUIS McINTOSH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was convicted of, *inter alia*, a §924(c) offense based on an attempted Hobbs Act robbery, notwithstanding this Court's recent determination in *United States v. Taylor*, 20-1459 (June 21, 2022) holding that attempted Hobbs Act robbery cannot validly serve as a §924(c) predicate.

In addition, the Second Circuit relying on *Dolan v. United States*, 560 U.S. 605 (2010) (MVRA's time prescriptions are merely time-related directives) and *United States v. Martin*, 662 F.3d 301 (4th Cir. 2011) (applying *Dolan* to Rule 32.2, Fed. R. Crim. P.) rejected petitioner's argument that the district court's forfeiture order was invalid because contrary to the requirements of Rule 32.2(b) the government failed to submit a preliminary order of forfeiture until more than two-and-half years after sentencing, and the government also failed to comply with the district court's direction that it provide a formal order of forfeiture within one week of sentencing. The Sixth Circuit in *United States v. Maddux,* 37 F.4th 1170 (6th Cir. 2022) rejected both the decision below and *Martin*, concluding that Rule 32.2 was a mandatory claim processing rule preventing forfeiture in that case. The Eighth Circuit in *United States v. Shakur*, 691 F.3d 979 (8th Cir. 2011) went even further, holding that Rule 32.2's mandates are jurisdictional, and a court lacks the "power to enter" forfeiture once Rule 32.2's deadlines have passed.

Finally, petitioner was also convicted of Hobbs Act robbery and a corresponding §942(c) offense based on his theft of cash from an individual's home. The Solicitor General candidly admitted in a prior case before this Court that:

> when there's a robbery of an individual, the links [to Commerce] are much more attenuated and there's a longer chain of causation to get to commerce. And so in those contexts, even within the depletion of assets theory that my brother espouses before the Court, the courts have said, as a normal matter, robberies of individuals just don't fall within the Commerce Clause.

Taylor v. United States, 14-6166 (Transcript of Oral Argument, Feb, 23, 2016) at 23-24. Despite this concession the Second Circuit upheld petitioner's conviction under the depletion of assets theory, a theory that when applied to an individual effectively eviscerates the "interstate commerce" element and raises serious Federalism concerns.

This petition raises the following questions:

1. Whether petitioner's §924(c) conviction based on an attempted Hobbs Act robbery should be vacated in light of *United States v. Taylor*?

2. Whether a district court may enter a forfeiture order outside the time limitations set forth in Rule 32.2

3. Is the theft of cash from an individual sufficient to satisfy the "interstate commerce" element of 18 U.S.C. §1951 a necessary predicate for federal jurisdiction of what is otherwise local criminal conduct that should be prosecuted by the individual states?

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The Opinion of the United States Court of Appeals for the Second Circuit affirming certain portions of petitioner's judgment of conviction as well as the district court's authority to order forfeiture in this matter is reported as *United States v. McIntosh,* 24 F.4th 857 (2d Cir. 2022), a copy of which is annexed hereto as Appendix A. The summary order of the United States Court of Appeals for the Second Circuit affirming in part and vacating in part petitioner's amended judgment, reversing the district court's judgment of acquittal, and remanding for resentencing is reported as *United States v.* McIntosh, 2022 WL 274225 (2d Cir. Jan. 31, 2022), a copy of which is annexed hereto as Appendix B.

The unreported order of the United States Court of Appeals for the Second Circuit, dated April 27, 2022, denying petitioner's petition for rehearing with a suggestion for rehearing *en banc* is annexed hereto as Appendix C.

JURISDICTION

The judgments of the United States Court of Appeals sought to be reviewed were entered on January 31, 2022, and the orders of that court denying petitioner's petition for rehearing was entered on April 27, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND FEDERAL RULE PROVISIONS

U.S. Constitution, Article 1, Section 8, Clause 3:

> The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. Constitution, Amend. X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

18 U.S.C. §924(c) provides in relevant part:

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i)a court shall not place on probation any person convicted of a violation of this subsection; and

(ii)no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A)has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B)that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §1951:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Rule 32.2, Fed.R. Crim. P.:

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 substitute 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 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 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).

STATEMENT

1. Petitioner was convicted after a jury trial of, *inter alia*, a number of Hobbs Act robbery related offenses all of which were alleged to have involved the use of guns. The district court granted petitioner's Rule 29 motion as to one charged incident (Cliff Street) vacating a count of attempted Hobbs Act robbery (Count Five) and his possession of a weapon in connection with that offense (Count Six). But even with the vacatur of those counts the district court was still compelled to impose a virtual life sentence of 720 months because the indictment charged petitioner with multiple §924(c) offenses including an overarching §924(c) conspiracy charge.

The indictment included a forfeiture allegation advising petitioner that the government would seek forfeiture of "all property, real and personal, 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." A40-A41.[1] The only specific property, however, identified by the government in its bill of particulars was the BMW seized from petitioner at the time of his arrest. Doc.#83 at 3.

Prior to sentencing the government failed to submit a preliminary order of forfeiture. At sentencing and over objection, the district court ordered petitioner to

[1] References to "Doc#__" are to docket entries in the United States District Court for the Southern District of New York for Case No. 7:11-cr-500 (SHS); "A__" refers to page numbers in the Appendix filed by Petitioner in the United States Court of Appeals for the Second Circuit in Case No. 14-1908.

forfeit $75,000 and a BMW (A496), but according to the written judgment the forfeiture amount was set at $95,000 and petitioner's BMW. A517. The district court also directed the government to submit an order of forfeiture within a week of the judgment which the government never submitted. *Id.*

Petitioner challenged all these errors on his initial appeal, and the government moved for a limited remand pursuant to the procedure set forth in *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994). On remand, and more than two-and-half years after sentencing, the government for the first time submitted a preliminary order of forfeiture. Doc#246. Both in the district court, and later in the Court of Appeals, petitioner argued that the government's forfeiture order was too late, and the government forfeited its right to forfeiture. Both the district court and the Second Circuit rejected the argument concluding that the requirements contained in Rule 32.2(b) were simply "time-related directives" that did not prevent a district court from ordering forfeiture even if the deadline is missed. Instead, the district court ordered petitioner to forfeit $75,000 in forfeiture albeit this time accepting petitioner's argument that he was entitled to a credit against the $75,000 for the value of the BMW but rejecting petitioner's argument that he should get the benefit of the value of the car at the time it was seized.

The Court of Appeals also vacated one of the §924(c) counts (Count Two) because it was no longer valid after *Davis*, but reinstated petitioner's convictions for attempted Hobbs Act robbery and the corresponding §924(c) charge predicated on that

conviction, concluding that the district court erred when it had granted petitioner's Rule 29 motion as to those convictions. The Court of Appeals also rejected petitioner's claim that attempted Hobbs Act robbery cannot serve as a valid §924(c) predicate.

Among the Hobbs Act robberies for which petitioner was convicted was the home invasion robbery of an "individual" in Lynbrook, New York on or about September 26, 2010, in violation of 18 U.S.C. §§1951 and 2 (the "Lynbrook robbery") (Count Seven) and a corresponding count (Count Eight) charging petitioner with using, carrying, and possessing firearms in connection with the Lynbrook robbery, in violation of 18 U.S.C. §§924(c)(1)(A)(ii), 924(c)(1)(C)(i), and 2.

2. Trial commenced on August 12, 2013. The government called 25 witnesses, including victims of the various alleged robberies, law enforcement officers who responded to the crime scenes and executed arrests and searches, cooperating witnesses, and an expert in the field of ballistics. With respect to the Lynbrook robbery, the principal subject of this petition, the government presented evidence through four witnesses only two of whom touched on the interstate commerce element. Robert Rizzatti the alleged victim of the offense and Michael Wolf a cooperating witness and an alleged participant in the robbery.

According to Wolf, once while driving with petitioner he told him about a loan shark he knows living on Long Island that would be an easy robbery target since "he lends money and he has a lot of money in the house that I've seen before." A239(T.397). According to Wolf, Rizzatti also operated an ice cream business, buying

ice cream from the Haagen Dazs "factory" in the Bronx and selling it to bodegas in Brooklyn. A239 (T.398). Wolf borrowed money on two occasions from Rizzatti. On the first occasion, Wolf borrowed $25,000 and the transaction was arranged through a middleman. A239 (T. 399). According to Wolf he used the money to pay contractors from Tennessee that were re-siding his log cabin. A239 (T.400). The second time, Wolf borrowed $75,000 directly from Rizzatti. A240 (T.401). Wolf indicated that he had subsequent dealings with Rizzatti, in which Rizzatti helped him launder money for a friend cashing checks, at times for as much as $100,000. A240(T.403), A266 (T.505). Wolf drove with petitioner and another individual "Julian" to Rizzatti's Long Island home in September 2010, and that he waited in the car while petitioner and Julian carried out the robbery. A241-A245 (T.407-423).

The government also called Rizzatti to testify. According to Rizzatti he was self-employed in the wholesale ice cream business. A167(T.111). Rizzatti indicated that *in connection with his ice cream business*, he obtains goods from New York State suppliers, including a supplier in the Bronx and another one in Richmond Hill, which he distributes locally to mom-and-pop grocery stores. A167(T.111) (emphasis added). Rizzatti's understood that at some point since he started his business, the Haagen-Dazs ice cream he purchased in the Bronx was manufactured in Woodbridge, New Jersey, a fact he knew because "a very long time ago" which he later clarified to mean "the early eighties," Rizzatti had visited the plant. A167(T.111-112), A173(T.135).

According to Rizzatti, on a Sunday in September 2010 he was in his garage polishing an antique car he owned when two individuals with their faces covered and one of whom was carrying a pistol approached him and made him kneel. A68-69(T.115-17). When asked where the money was, Rizzatti at first didn't answer but then said that whatever they found they could keep. *Id.* The robbers then proceeded to duct tape Rizzatti's wrists, and his mouth and they brought him into the basement where they placed him on a workout bench, tied him to it and taped his eyes. A169(T.119). The two assailants then rummaged through the basement, asking Rizzatti where the money was and when he failed to answer they tasered him on the neck. A169(T.120). Eventually, the assailants found $70,000 in cash that was stored in the sheetrock in the ceiling, as well as a pistol. A170(T.121). After the money was found in the ceiling, the black individual asked him where the rest of the money was and when Rizzatti motioned that there was nothing else, the individual pulled down his pants and tasered his genitals. A170(T.122-23). After that it got silent and Rizzatti was able to free himself. A170(T.123). Rizzatti went to his neighbor and told him that he had been robbed and they called the police. A171(T.127). According to Rizzatti, the source of the stolen money was "from all my work from over the years." A171(T.128). The court sustained the defense objection when the government attempted through leading questions to elicit that the stolen money would have been used for Rizzatti's ice cream business. A171(T.128).

On cross-examination, Rizzatti sought to deny that he was a loan shark, indicating that he was unable to remember the terms of the loans he extended. A173(T.131). At the same time, Rizzatti admitted that he "might have" told the prosecutors that he charged Wolf two points per month on his loan. A176(T.148). Moreover, Rizzatti admitted that he asked to speak to an attorney when asked by law enforcement concerning the source of the stolen funds. A177(T.152).

REASONS FOR GRANTING THE WRIT

I.

In reversing the judgment of acquittal granted by the district court with respect to Count Six, the Court of Appeals based on prior Second Circuit precedent also rejected petitioner's argument that his conviction on Count Six remained invalid because attempted Hobbs Act robbery is not a crime of violence under the categorical approach. *McIntosh*, 2022 WL 274225 at *5.

In *United States v. Taylor*, 20-1459 (June 21, 2022), this Court held -- in the context of a Section 924(c) conviction also premised on an attempt to commit Hobbs Act robbery -- that an attempted Hobbs Act robbery is not a predicate "crime of violence" within the meaning of Section 924(c)(3)(B). Slip op. At 13-14. As a result, the petition for a writ of certiorari should be granted, the court of appeals' judgment reinstating Count Six should be vacated, and the case should be remanded for further consideration in light of *Taylor*.

II.

Rule 32.2, Fed. R. Crim. P. governs the procedures related to criminal forfeiture. Subsection (b) captioned "Preliminary Order of Forfeiture" sets forth the requirements that are required before a defendant can be ordered to forfeit money or property. Thus, Rule 32.2(b)(1)(A) provides that the district court must determine what property is forfeitable "[a]s soon as practical after a verdict." Once such a determination is made Rule 32.2(b)(2)(A) directs a district court to "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." Rule 32.2(b)(2)(B) captioned "timing" elaborates on the promptness requirement directing 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)." (emphasis added). Finally, Rule 32.2(b)(4)(A) provides that unless consented to by the defendant "the preliminary forfeiture order becomes final as to the defendant" at sentencing, and pursuant to Rule 32.2(b)(4)(B) "[t]he court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture," and "must also include the forfeiture order, directly or by reference, in the judgment." *Id.*

The government conceded below that it failed to adhere to the requirements contained in Rule 32.2(b). It never filed a preliminary order of forfeiture. Doc#272 at 16. And, even after sentencing when the district court gave the government a week to submit a final order of forfeiture it failed to do so, only getting around to submitting one two-and half years after sentencing, and after petitioner appealed claiming that the district court's actions with respect to forfeiture were riddled with error.

In *Dolan v. United States*, 560 U.S. 605 (2010), this Court described three types of statutory deadlines: 1) a "jurisdictional" the passage of which "prevents the court from permitting or taking the action to which the statute attached the deadline. The prohibition is absolute. The parties cannot waive it, nor can a court extend that deadline for equitable reasons."; 2) a "claims-processing rule[]" which does not limit a court's jurisdiction, rather these rules "regulate the timing of motions or claims brought before the court" the benefit of which can be forfeited; and 3) "time-related directives" that are "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." 560 U.S. at 610. In *Dolan*, five justices of this Court concluded that the time-limits set forth in the restitution statute (i.e., the MVRA) was a time-related directive, and a district court's failure to order restitution prior to the 90-day deadline did not prevent it from later ordering restitution.

A clear circuit split exists concerning the failure to adhere to the requirements contained within Rule 32.2(b) relating to forfeiture. The Second Circuit below and the

Fourth Circuit in *Martin*, 662 F.3d 301 (4th Cir. 2011), held that the timing requirements set forth in Rule 32.2(b) are no different from the statutory deadline contained in the MVRA and as to which this Court in *Dolan* ruled was simply a "time-related directive." By contrast, the Sixth Circuit in *United States v. Maddux*, 37 F.4th 1170 (6th Cir. 2022) recently concluded that Rule 32.2(b) was a claim processing rule and denied the government the ability to seek forfeiture where, as here, it only filed a preliminary order of forfeiture years after sentencing. The Eighth Circuit in *United States v. Shakur*, 691 F.3d 979 (8th Cir. 2012) went even further finding that even though the defendant received notice at the end of his sentencing hearing and again in the written judgment that the court would impose forfeiture because there was no preliminary order of forfeiture prior to sentencing and no inclusion of that order in the judgment, the district court's attempt to include a preliminary order of forfeiture 83 days after the judgment issued was invalid. "[T]he court was without power to enter that order, and . . . [t]here can be no criminal forfeiture in this case." 691 F.3d at 989. In the view of the Eighth Circuit, Rule 32.2 is jurisdictional. Indeed, *Shakur* cited this Court's decision in *United States v. Addonizio,* 442 U.S. 178, 189 & n. 16, (1979) that "'once a sentence has been imposed, the trial judge's authority to modify it is' limited to Rule 35, which imposes a time period that 'is jurisdictional and may not be extended.'" *Shakur*, 691 F.3d at 989 and n. 6.

According to the Second Circuit below, "the considerations that pertained to the restitution order in *Dolan* similarly apply to the Rule 32.2(b) deadline for forfeiture." 24

F.4th at 860. Those considerations consist of the fact that 1) Rule 32.2 "does not specify a consequence for noncompliance with its timing provisions"; 2) according to the Advisory Committee notes the purpose of a preliminary order of forfeiture is to "give the parties time 'to advise the court of omissions or errors in the order before it becomes final" and there "is no mention of an interest in giving defendants certainty as to the amounts forfeited before sentencing"; 3) "because forfeited funds frequently go to the victims of the crime" disallowing forfeiture due to a missed deadline "would tend to harm innocent people who are not responsible for the oversight"; 4) "interpreting the deadline rigidly" would "disproportionately benefit defendants"; and 5) a defendant concerned about delay "can remind the district court of the preliminary order requirement any time before sentencing." *McIntosh*, 24 F.4th at 860-861.

As the Sixth Circuit recognized in *Maddux*, in rejecting *McIntosh* the Second Circuit's reasoning is not persuasive. Instead, Rule 32.2 is more properly considered a mandatory claims-processing rule (*Maddux*) or a jurisdictional rule (*Shakur*) and the government forfeited its ability to seek forfeiture when it failed to adhere to those deadlines.

Thus, *Maddux* reasoned that "Rule 32.2's text, context, and purpose squarely place it in *Dolan's* second category, as a mandatory claims processing rule." 37 F.4th at 1177. First, Rule 32.2(b) repeatedly uses the term "must." *See* Fed. R. Crim. P. 32.2(b)(1)(A), (b)(2)(A), (b)(2)(B), (b)(4)(B). Calling the Rule's requirements "time related directives," however, "effectively erases its mandatory language." *Maddux,* 37

F.4th at 1177. True, as noted by the Second Circuit, the Rule contains no specific consequence for a missed deadline, "[b]ut whatever, if anything, the text of Rule 32.2(b) lacks, its structure makes up the difference—a structure that dovetails with other rules at giving sentences finality." *Id.* Thus, the rule provides in a subsection captioned "when final" that "at sentencing" "any preliminary forfeiture order 'becomes final as to the defendant." *Id.* (*quoting* Rule 32.2(b)(4)(A)). "Final means final, so Rule 32.2(b) envisions only one bite at the apple." *Maddux,* 37 F.4th at 1177. Moreover, the Rule "squarely contemplates a 'court's *failure* to enter a[] [preliminary forfeiture] order' by sentencing — a failure it directs 'the *government*' to appeal once 'judgment is entered.'" *Id.* (original emphasis and alterations). All of this makes Rule 32.2 unlike the restitution statute which specifically contemplates the need for "not wrap[ping] up restitution under a single bow *at* sentencing." *Id.*

Second, *Maddux* found that "it's hard to imagine a better example" of a "claim processing rule than Rule 32.2" since the "rule regulates every stage of the criminal forfeiture process" from indictment through judgment and thereafter litigating third-party interests. *Maddux*, 37 F.4th at 1178. "This A-to-Z- roadmap for criminal forfeiture . . . is the quintessential claims-processing rule." *Id.*

Third, *Maddux* rejected the Second Circuit's view that Rule 32.2 was not designed to give "defendants certainty as to the amounts forfeited before sentencing." Unlike the MVRA which this Court in *Dolan* found "seeks speed primarily to help the victims of crime and secondarily to help the defendant" (*Dolan*, 560 U.S. at 613), when it comes

to forfeiture, "Rule 32.2(b) flips that script—it arms defendants with procedures to correct preliminary forfeiture orders before sentencing." *Maddux*, 37 F.4th at 1178. By culminating forfeiture at sentencing, "defendants can be sure no more forfeiture awaits them—just like they can be sure that no other new punishment does." *Maddux*, 37 F.4th at 1178.

Maddux likewise rejected the Second Circuit's argument that treating Rule 32.2 as a mandatory claim processing rule would harm victims. First, the government's timely appeal of a Rule 32.2(b) error can be corrected by a government appeal. Second, the purposes of forfeiture and restitution are distinct. Forfeiture "is to punish the defendant by stripping him of unlawful gains; restitution's purpose is distinct–to restore the victim's loss." *Maddux*, 37 F.4th at 1179. Because of the former purpose, forfeited property "ordinarily ends up in the hands of the government, not victims." *Id.* And the fact that certain officials have the discretion to transfer forfeited property to victims" only serves to "attenuate[] any potential impact on victims, who thus only *might* receive forfeited property." *Id.* (original emphasis). Indeed, in light of *Dolan*'s rule permitting restitution after the 90-day period, it is hard to see how a victim will be harmed by the failure to timely order forfeiture since the district court can still direct the defendant to make restitution.

Based on the foregoing analysis, and its reasoning that both *McIntosh* and *Martin* would undo the 14-day deadline called for by Rule 35(a), *Maddux* agreed with *Shakur* that "where a district court entered neither preliminary not final forfeiture orders

'before entry of final judgment and passage of the fourteen-day corrections period granted by Rule 35" an error that occurred here, the government should be denied forfeiture. *Maddux*, 37 F.4th at 1180.

Maddux's only departure with *Shakur* was whether Rule 32.2 is even more than a "claims-processing rule" but in fact jurisdictional. *Maddux*, 37 F.4th at 1180 n. 7. In the view of *Shakur*, forfeiture is no different from other aspects of a criminal sentence which under Rule 35 cannot be corrected more than 14 days after sentencing.

This Court should grant certiorari to resolve the split. Rules of Supreme Court, Rule 10(a).

III.

This Court has previously recognized the fundamental proposition that:

> The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

United States v. Morrison, 529 U.S. 598, 618 (2000) (citations omitted). Moreover, "in a Hobbs Act prosecution, charge and proof "that interstate commerce is affected is

critical since the Federal Government's jurisdiction of this crime rests only on that interference. *Stirone v. United States*, 361 U.S. 212, 218 (1960). And "[t]here is nothing more crucial, yet so strikingly obvious, as the need to prove the jurisdictional element of a crime." *United States v. Leslie*, 103 F.3d 1093, 1103 (2d Cir.1997) (reversing conviction where government failed to prove interstate commerce element of money laundering offense).

True, "the statutory language sweeps within it all persons who have 'in any way or degree affect[ed] commerce . . . by robbery or extortion" (*United States v. Culbertson*, 435 U.S. 371, 373 (1978)) but a standard that would "expand the reach of the Hobbs Act to include every robbery or extortion committed" would be invalid. *See, e.g., United States v. Perrotta,* 313 F.3d 33, 38 (2d Cir. 2002). As a result, the Court in *Perrotta* concluded that the fact that a robbery victim was employed by a company that did "business in interstate commerce, without more, stretch[ed] the Hobbs Act too far." 313 F.3d at 38.

Likewise, courts have rejected the theory that a theft of currency satisfies the commerce element because United States currency almost inevitably travels interstate from the U.S. Mint where it is produced. Such a theory would be "inappropriate" as it would mean that any robbery of cash could automatically be prosecuted as a Hobbs Act in all but the two places (Texas and D.C.) where such currency is printed. *United States v. Peterson*, 236 F.3d 848, 853 (7th Cir. 2001). An untenable result since robbery

is part of the general police power, an area where "the States possess primary authority." *United States v. Lopez*, 115 S. Ct. 1624, 1631 n.3 (1995).

Here the Court of Appeals upheld petitioner's conviction based on its conclusion that only the "possibility or potential" for a "very slight effect on interstate commerce" was needed. *United States v. McIntosh*, 2022 WL 274225, *2-*3. Thus, despite the fact that there was no evidence that any of the money stolen from Rizzatti's house would be used in his ice cream business — the district court sustained an objection when the government tried to elicit such evidence at trial A171(T.128) — because only " possibility or potential" of a "very slight effect" on interstate commerce was necessary, the Second Circuit deemed it sufficient that Rizzatti had in the *past* purchased ice cream from an in-state supplier that purchased ice cream from an out of state supplier. But the fact that an individual earned money from activity that at some point involved interstate commerce says nothing of the money's use or lack of it in the future and stretches the depletion of assets theory beyond elasticity. Moreover, such reasoning is inconsistent with the plain language of the statute (18 U.S.C. §1951(b)(3)) which requires that the defendant "obstructs, delays, or affects commerce" (*i.e.,* conduct which is prospective).

Alternatively, the Court of Appeals found such a "possibility or potential" because in the past Rizzatti had lent money to an in-state borrower who in turn used that money to pay an out-of-state contractor. But money will always eventually travel at some point in interstate commerce. Indeed, it would be ironic, if not perplexing, to

find the interstate commerce element satisfied because it "depleted" Rizzatti's loansharking "business" when he denied even being a loan shark. A172(T.131) ("Q. What is the nature of your work? A. Wholesale ice cream. Q. But you're a loan shark as well, am I correct, sir? A. No, sir").

In any event, absent evidence that Rizzatti in some way solicited or knowingly serviced out-of-state customers, the fact that a borrower of money happened to use the money in interstate commerce is insufficient. Accepting this logic would mean that if a robbery victim had previously used his savings to make intrastate purchases at the local corner grocery whose proprietor spent those funds out-of-state, the commerce element would be satisfied since as a result of the robbery the victim's future to ability to engage in such transactions will have been hampered. Effectively it would mean any robbery can be prosecuted under the Hobbs Act because inevitably the money any individual spends will eventually travel at some point down the line out of state.

Before the government can even hope to satisfy the depletion of assets theory other circuits have required the government to present evidence that the money at issue would have been used by the *victim* in interstate commerce. *United States v. Peterson*, 236 F.3d 848, 854 (7th Cir. 2001) (to meet the depletion of assets theory, the government must present evidence that the business is *"actively engaged* in interstate commerce or customarily purchases in interstate commerce") (emphasis added).

Similarly, in *United States v. Wang*, 222 F.3d 234 (6th Cir. 2000), the Sixth Circuit vacated a Hobbs Act robbery conviction where cash was stolen from the home of a

couple, even though they owned a restaurant business and some of the cash constituted that day's cash receipts from the restaurant. "[W]here, as here, the criminal act is directed at a private citizen, the connection to interstate commerce is much more attenuated." 222 F.3d at 238. In reversing the defendant's conviction, the Sixth Circuit found that taking the cash from the home had at most nothing more than "an absolute de minimis effect" on commerce since there was no proof that the victim's "closed the restaurant, that they were unable to order any further goods from out of state." This same can be said for this case. Even assuming that cash found behind sheetrock in Rizzatti's home had anything to do with either his ice cream business or the loan shark business he denied being involved in.

In sum, it is time for this Court to put the brakes on the government's never-ending desire to expand the breadth of the Hobbs Act. Robbery is at its core a state offense and that is where petitioner should have been prosecuted. Indeed, to the extent that Hobbs Act can be viewed as covering petitioner's conduct it is unconstitutional under the 10th Amendment since there is simply no limiting principle that would prevent the Hobbs Act from being used to prosecute any state robbery offense. The effect of the Court of Appeal's decision here is that unless the robbery victim lives in a cave and grows their own food, money robbed from him will be subject to federal prosecution since at some point such money will have a connection to interstate commerce.

The Court should grant certiorari to resolve this important constitutional issue.

CONCLUSION

Because the decision of the Second Circuit on at least three separate points of law critical to the outcome of the appeal conflicts with decisions of either this Court or other circuit courts, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED
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