No. 22-7386

IN THE
Supreme Court of the United States

LOUIS MCINTOSH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a district court may enter a preliminary criminal forfeiture order outside the time limitation set forth in Federal Rule of Criminal Procedure 32.2(b)(2)(B).

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INTRODUCTION

The government was somewhat indifferent to forfeiture in this case. True, the indictment included a forfeiture allegation, albeit without any details, and the bill of particulars mentioned a BMW, but not the amount of a money judgment sought; after that, however, there was radio silence. At trial, the jury wasn't asked to make any findings as to forfeiture either. And after trial, the government's sentencing memo made no reference to *any* proposed forfeiture—vehicular or otherwise.

Instead, just after the district court indicated that it was about to pronounce a sentence, the government for the first time informed the district court that, in addition to a $75,000 restitution order that it had just requested in response to the district court's inquiry, it

was also asking for a $75,000 forfeiture money judgment, in addition to the BMW. The government promised to have a proposed forfeiture order "within the next week," but it never came. It was only after the court of appeals remanded the case mid-appeal in 2013 to address errors in the district court's restitution and forfeiture orders that a preliminary forfeiture order was entered, two-and-a-half years after sentencing and over petitioner's objection.

The government's lackadaisical attitude towards forfeiture is the polar opposite of what is contemplated by the Federal Rules of Criminal Procedure which contain an elaborate process for sorting out forfeiture prior to the time a defendant stands for sentencing.

Specifically, Rule 32.2(b)(2)(B) requires that "the court must enter [a] preliminary order [of forfeiture] sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant" at sentencing. That didn't happen in this case, though, because the government did not submit a proposed preliminary order of forfeiture.

There's no dispute that the deadline in Rule 32.2(b)(2)(B) was blown. The question before this Court is whether this missed deadline has (a) consequence, or (b) "no consequence whatever." *Dolan v. United States*, 560 U.S. 605, 621 (2010) (Roberts, C.J., dissenting). Most deadlines do have consequences. A missed jurisdictional deadline "prevents the court from permitting or taking the action to which the statute attached the deadline." *Id.* at 610 (majority opinion). And a party can enforce a "claims-processing rule" that is not adhered to. *Id.*

The court of appeals, however, thought the missed deadline in Rule 32.2(b)(2)(B) was one of those rare deadlines that might as well not exist, because it may have "no consequence" when ignored. *Id*. at 621 (Roberts, C.J., dissenting). It did so by relying on this Court's decision in *Dolan* designating a deadline relating to restitution as a "time-related directive." But applying the *Dolan* methodology—looking at the Rule's text, structure, and purpose—makes plain that the pre-sentencing preliminary forfeiture order requirement in Rule 32.2(b)(2)(B) is a mandatory claims-processing rule that petitioner was entitled to enforce.

OPINIONS BELOW

The Second Circuit's amended opinion (JA 132-43) is published at 58 F.4th 606. The Second Circuit's amended summary order (JA 144-55), issued on the same day, is not published or reprinted in the Federal Reporter, but is available at 2023 WL 382945. The district court's order rejecting petitioner's objections to the timing of the preliminary order under review (JA 85-110) is not reported in the Federal Supplement, but is available at 2017 WL 3396429.

JURISDICTION

The Second Circuit entered its amended judgment on January 25, 2023. JA 132. Petitioner filed a petition for a writ of certiorari on April 24, 2023, which this Court granted on September 29, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 32.2 is reprinted in the Appendix to this brief.

STATEMENT

A. Factual Background

In June 2011, petitioner Louis McIntosh ("petitioner") was indicted along with five others for Hobbs Act robbery and weapons-related offenses committed in New York. JA 134. The indictment also contained a forfeiture allegation but did not identify any specific property to be forfeited. JA 10-11. Indeed, the only specific property ever identified by the government was via a notice served on petitioner some eight months later, when the government notified petitioner of its intent to forfeit a BMW that was seized at the time of petitioner's arrest. C.A. Dkt. #272 at A536.[1] The government's forfeiture bill of particulars likewise failed to identify the amount of any money judgment it would seek. JA 12.

Petitioner went to trial in August 2013 with the government pursing a theory that petitioner had purchased the seized BMW using proceeds from one of the robberies committed five days earlier. JA 32-38. In fact, the evidence showed that the automobile was purchased by Janet McIntosh, petitioner's mother, with a number of money orders. JA 26, 32-38.

Petitioner was convicted on all counts. JA 134.[2] The jury was discharged and not asked to make any findings with respect to forfeiture.[3] In its sentencing

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[1] "C.A. Dkt." refers to documents in the court of appeals. Cites to "S.D.N.Y. Dkt." refer to documents in the district court.

[2] Post-trial the district court directed a judgment of acquittal on two counts relating to a charged attempted robbery. JA 134 n.2.

[3] Relatedly, the record contains no indication that the district court determined, as required, whether the parties wanted the

memo, the government made no reference to any proposed forfeiture, S.D.N.Y. Dkt. #212, and the government filed no preliminary order of forfeiture, JA 135; BIO 7. Instead, at sentencing—as the district court was about to pronounce a sentence, and after it inquired whether the government had a proposed restitution order—the government for the first time informed the district court that, in addition to a $75,000 restitution order, it was asking for a $75,000 forfeiture money judgment, "as well as the BMW that was purchased with robbery proceeds." JA 54.

In response to the district court's inquiry whether the government had an order of forfeiture, the government responded, "[w]e don't have the order today, but we are prepared to submit it within the next week." *Id.* Defense counsel objected to any forfeiture. *Id.* When pressed for the basis of the objection, defense counsel argued that there was no evidence connecting the purchase of the BMW with any robbery proceeds, and that there was evidence that petitioner had received the money to purchase the vehicle from his family. JA 54-55. The government argued that the timing of the purchase in relation to the offense established the requisite connection. *Id.* In addition to imposing a lengthy sentence of imprisonment, and $75,000 in restitution, the district court directed "an order of forfeiture of $75,000, plus a BMW." JA 61-62. The district court ordered the government to "submit an order of forfeiture for signature by the Court within a week" and found "that the $75,000 and the BMW are the fruits of the [funds] derived from the crimes." JA 62.

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jury to determine the forfeitability of the BMW. *See* Fed. R. Crim. P. 32.2(b)(5)(A).

In its written judgment, which contained a "clerical error," the district court indicated that the defendant was to forfeit, "$**95**,000 in U.S. currency and a BMW." JA 50 (emphasis added); see JA 88 n.2 (noting parties' agreement that reference to $95,000 was a "clerical error"). The district court's written judgment once again repeated the directive it gave at sentencing that "[t]he government will submit an Order of Forfeiture for the Court's signature within one week." JA 50. Despite the government's representation that it would do so, and the district court's repeated direction to the same effect, the government never submitted an order of forfeiture. BIO 7; JA 87-88.

Petitioner thereafter appealed.

B. Procedural Posture

As relevant here, petitioner's first appeal challenged the district court's restitution and forfeiture orders, noting that the government had never submitted an order of forfeiture. C.A. Dkt. #94 at 55. After petitioner filed his opening brief, the government moved for a limited remand to the district court pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), to allow the district court to "correct the written Judgment, and supplement the record with regard to his restitution and forfeiture orders by issuing formal, written orders." JA 68 ¶10. According to the government, its files reflected the fact that it had prepared a formal order of forfeiture but did not submit it to the district court. JA 71. "To the extent that McIntosh contests the timeliness of such an order, he may do so before the District Court on remand, and the District Court may make whatever findings it deems appropri-

ate." JA 71 ¶16. The Second Circuit granted the government's motion and remanded the case back to the district court. JA 74-75.

On remand, the district court entered an order directing the government to submit a proposed preliminary order of forfeiture by December 23, 2016, *i.e.*, some two and a half years after the original sentencing proceedings in this matter. JA 76-77.

Petitioner objected to the government's proposed preliminary forfeiture order, arguing that the government had lost its right to seek forfeiture as a result of its failure to comply with Rule 32.2. S.D.N.Y. Dkt. #256 at 8-10. Petitioner argued further that he was prejudiced by the government's delay since the value of the seized automobile—which the government now conceded should be credited against the money judgment—was continuously dropping in value with the passage of time. *Id.* at 10-11. Overruling these objections, JA 85, the district court entered the government's order of forfeiture, JA 111. The district court likewise issued an amended judgment correcting the forfeiture amount to $75,000, not $95,000 as was indicated in the original judgment, and reducing the previously imposed $75,000 award of restitution to $4,598. JA 119-23.

The current appeal followed. On January 31, 2022, the court of appeals issued a published opinion and summary order that affirmed in part, reversed and vacated in part, and remanded for resentencing. *See United States v. McIntosh*, 24 F.4th 857 (2d Cir. 2022); *United States v. McIntosh*, No. 14-1908, 2022 WL 274225 (2d. Cir. Jan. 31, 2022). Petitioner filed a petition for a writ of certiorari from those decisions, and this Court granted the petition, vacated the judgment,

and remanded for further consideration in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022). *See McIntosh v. United States*, 143 S. Ct. 399 (2022). On remand, the court of appeals issued an amended opinion (JA 132-43) and summary order (JA 144-55).

In its published opinion, the court of appeals, relying on this Court's decision in *Dolan v. United States*, 560 U.S. 605 (2010), rejected petitioner's challenge to the timeliness of the forfeiture order. JA 136-42. In the view of the court of appeals, "the considerations that pertained to the restitution order in *Dolan* similarly apply to the Rule 32.2(b) deadline for forfeiture," such that it is also properly classified as "a time-related directive," meaning that no consequences flowed from the missed deadline. JA 137-38.

Despite affirming the district court's authority to order forfeiture, the court of appeals vacated and remanded for recalculation of the forfeiture amount. JA 148. The court of appeals noted that the $75,000 figure was improperly based on a theory of joint and several liability, which the government conceded was not available in this context. *Id.* (citing *Honeycutt v. United States*, 581 U.S. 443, 448-50 (2017)).

The district court resentenced petitioner on May 3, 2023. The district court entered a new preliminary order of forfeiture, providing for forfeiture in the amount of $28,000, with credit from the sale of the BMW. JA 160.

On September 20, 2023, more than 12 years after the BMW was seized, the district court entered a final order of forfeiture as to the vehicle. JA 184-86. The or-

der noted that notice of the government's intent to forfeit the vehicle was first published on April 25, 2023. JA 185.

This Court granted certiorari on September 29, 2023.

SUMMARY OF ARGUMENT

Rule 32.2(b)(2)(B) requires that a preliminary order of forfeiture be entered "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant" at sentencing. The Second Circuit's conclusion that this deadline is a mere "time-related directive," which the district court and government can ignore, is incorrect. In fact, the requirement in Rule 32.2(b)(2)(B) that a court enter a preliminary forfeiture order before sentencing is a mandatory claims-processing rule that petitioner was entitled to hold the government to.

A. This Court has set out two main classes of time limits. Some time limits are jurisdictional, and when such a deadline is missed the court loses power to "permit[] or tak[e] the action to which the statute attached the deadline." *Dolan*, 560 U.S. at 610. In earlier eras courts used the term "jurisdictional" somewhat loosely, and in the last decade or so this Court has been reining in the overuse of this term, and classing most deadlines as "mandatory claims-processing rules." These rules, comprising the bulk of time limits, "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times," *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), and can be enforced by one party against another. In *Dolan*, this

Court characterized the deadline at issue as a "time-related directive," one which "does not deprive a judge . . . of the power to take the action to which the deadline applies if the deadline is missed," and which a party does not necessarily receive the benefit of even when raised. 560 U.S. at 611. There are few such "time-related directives"—*Dolan* cites to only three other instances of such timelines, *id.*, and in the thirteen years since *Dolan* this Court has not identified another.

B. The text, structure, and purpose of Rule 32.2(b)(2)(B) indicate that the pre-sentencing timing requirement is a mandatory claims-processing rule. The text is unambiguous—it uses the word "must" repeatedly in the context of the preliminary forfeiture order (and other, more permissive words, like "may," in other parts of the Rule). And the text of the Rule provides targeted flexibility—indicating that the drafters knew how to provide leeway when it was intended. Finally, the centrality of the preliminary forfeiture order is evident because in places the Rule refers to the preliminary forfeiture order as just "the order"—no modifier needed.

The structure of Rule 32.2, too, indicates that the timing of the preliminary forfeiture order is a mandatory claims-processing rule. The Rule walks the parties through the criminal forfeiture process step-by-step. First comes notice; then a jury determination (if requested) or judicial determination of forfeitability; then a preliminary forfeiture order. After entry of the preliminary forfeiture order, the parties have an opportunity to "suggest revisions or modifications before the order becomes final." Rule 32.2(b)(2)(B). Only after

all this does the "the preliminary forfeiture order become[] final as to the defendant" at sentencing. Rule 32.2(b)(4). Not only is the preliminary forfeiture order a critical step in the process, but its importance is underlined because it changes the parties' relationships vis-à-vis the property, as after the entry of a preliminary forfeiture order the government can seize the property and order its interlocutory sale. And, more generally, recognizing the pre-sentencing preliminary forfeiture order requirement as a mandatory claims-processing rule—enforceable against the government—makes sense because the Rule places the burden on the government to move the criminal forfeiture process forward.

The purposes of Rule 32.2(b)(2)(B) also indicate that the pre-sentencing preliminary forfeiture order is a mandatory claims-processing rule. Rule 32.2, properly followed, ensures criminal defendants receive due process before their property is permanently taken by the government. It also promotes judicial economy, another important animating purpose behind Rule 32.2(b)(2)(B).

C. This Court's caselaw confirms that Rule 32.2(b)(2)(B) is a mandatory claims-processing rule. This Court has consistently held that deadlines contained in court-created rules, like this one, are of the mandatory claims-processing variety. More broadly, this Court "ha[s] repeatedly held that filing deadlines" are the "quintessential claim-processing rules." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013). And it is not just parties to whom claims-processing rules are directed—this Court has also held that such rules can be directed to courts.

Dolan does not counsel otherwise. In addition to the stark differences in text between the Mandatory Victims Restitution Act and Rule 32.2, the contexts are meaningfully distinct. The MVRA's text and purpose, this Court held, reflected a statutory goal of seeking to ensure that crime victims received restitution. But forfeiture is quite unlike restitution—it is punishment, not recompense. And critically, unlike restitution, forfeiture doesn't meaningfully benefit victims. Moreover, unlike in *Dolan*, acknowledging Rule 32.2 as a mandatory claims-processing rule would not meaningfully harm third parties—victims or otherwise—who are protected by Rule 32.2's provisions setting forth a comprehensive process for third parties with an interest in the property to be forfeited. Finally, here, unlike in *Dolan*, there are no equitable concerns because the government was both the party responsible for the missed deadline and the party that would bear the cost of the rule's enforcement. The upshot of this case is simple: the government has to follow the rules before it takes someone's property.

ARGUMENT

Rule 32.2(b)(2)(B)'s Requirement that a Court Enter A Preliminary Order of Forfeiture Before Sentencing Is A Mandatory Claims-Processing Rule.

A. This Court's Classes of Time Limits.

There is no dispute that the district court neglected to enter a preliminary order of forfeiture before sentencing, as required by Rule 32.2(b)(2)(B). JA 135-36.[4] The district court's violation of Rule 32.2(b)(2)(B) was the result of the government's failure to submit a proposed preliminary order of forfeiture. *Id.*; BIO 7. In fact, after identifying the BMW in its forfeiture bill of particulars, the government next mentioned forfeiture again only as an afterthought during petitioner's sentencing proceedings after the district court indicated it was about to pronounce its sentencing determination. JA 53-55.

The question before this Court is what consequences, if any, flow from this missed deadline. "The Court's answers" to questions along these lines "have varied depending upon the particular statute and time limit at issue." *Dolan v. United States*, 560 U.S. 605, 610 (2010). The Court has identified two main types of time limits: those that are jurisdictional and those that are "claims-processing" rules.

"A jurisdictional prescription sets the bounds of the court's adjudicatory authority." *Santos-Zacaria v.*

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[4] The failure to enter a preliminary order of forfeiture was not the only violation of Rule 32.2(b). The district court likewise never determined as required by Rule 32.2(b)(5)(A) whether either party wanted "the jury [to] be retained to determine the forfeitability of specific property" were it to return a guilty verdict.

Garland, 598 U.S. 411, 416 (2023) (internal quotation marks omitted). Once a jurisdictional deadline has expired, a court loses power to "permit[] or tak[e] the action to which the statute attached the deadline." *Dolan*, 560 U.S. at 610. "The prohibition is absolute," and "parties cannot waive" a jurisdictional deadline, "nor can a court extend that deadline for equitable reasons." *Id.* This Court encountered a jurisdictional deadline in *Bowles v. Russell*, 551 U.S. 205 (2007), where a district court had purported to extend the time for filing a notice of appeal beyond the statutory deadline. *Id.* at 206-07 (noting 30-day deadline for filing a notice of appeal under 28 U.S.C. § 2107(a), and 14-day deadline for same if a district court grants a motion to reopen under 28 U.S.C. § 2107(c)). This Court held that the statutory deadline for filing a notice of appeal was jurisdictional, and since petitioner's error in missing the deadline was "of jurisdictional magnitude, he [could] not rely on forfeiture or waiver to excuse his lack of compliance," nor could he fall back on the "unique circumstances" of his case. *Bowles*, 551 U.S. at 213-14.

Most time limits are not jurisdictional, but are instead "claims-processing rules."[5] These rules "govern how courts and litigants operate within th[e] bounds" of the court's adjudicatory authority. *Santos-Zacaria*, 598 U.S. at 416. Claims-processing rules "seek to promote the orderly progress of litigation by requiring

[5] "In recent years, the Court has undertaken to ward off profligate use of the term" *jurisdictional*, *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1848 (2019) (cleaned up), and has been classifying most deadlines that come before it as claims-processing rules. *See infra* at 33-35 (listing examples).

that the parties take certain procedural steps at certain specified times." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). In *Kontrick v. Ryan*, 540 U.S. 443 (2004), for example, this Court addressed one such time limit—how long, under the Bankruptcy Rules, a creditor has to file a complaint objecting to a debtor's discharge. *Id.* at 446. The Court held that the time limit in question was "an inflexible claim-processing rule," which is "unalterable on a party's application." *Id.* at 456.

Finally, in *Dolan*, the Court characterized the deadline at issue as a "time-related directive," one which "does not deprive a judge . . . of the power to take the action to which the deadline applies if the deadline is missed." *Dolan*, 560 U.S. at 611. *Dolan*'s holding was limited; it held that that the Mandatory Victims Restitution Act's 90-day deadline for making a final determination of the victim's losses did not bar the district court from making a final determination after the deadline—"at least where . . . the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount." *Id.* at 608. Because a district court may take the relevant action after the expiration of the time period, even over a party's objection, a missed time-related directive may have "no consequence whatever." *Id.* at 621 (Roberts, C.J., dissenting). Perhaps unsurprisingly then, there are few such "time-related directives"—*Dolan* cites to only three other instances of such timelines, *id.* at 611 (majority opinion), and in the thirteen years since *Dolan* this Court has not identified another.

So, what type of a deadline is Rule 32.2(b)(2)(B)'s requirement that "the court must enter the preliminary order [of forfeiture] sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant" at sentencing? "In answering this kind of question, this Court has looked to statutory language, to the relevant context, and to what they reveal about the purposes that a time limit is designed to serve." *Dolan*, 560 U.S. at 610.

B. Rule 32.2's Language, Context, and Purpose Indicate Rule 32.2(b)(2)(B)'s Timing Requirement Is A Mandatory Claims-Processing Rule.

The statutory language, relevant context, and purpose of the Rule all reveal that Rule 32.2(b)(2)(B)'s timing requirement for the preliminary order of forfeiture is a mandatory claims-processing rule—that is, a rule that "govern[s] how courts and litigants operate," furthers "the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times,'" *Santos-Zacaria*, 598 U.S. at 416 (quoting *Henderson*, 562 U.S. at 435), and is "unalterable on a party's application," *Kontrick*, 540 U.S. at 456.

1. Text

The Rule's language makes clear that the timing of the preliminary order of forfeiture is mandatory. Subsection (b) of Rule 32.2, entitled "Entering a Preliminary Order of Forfeiture," sets out the requirements for such an order, including a number of prescriptions as to timing. To start, even before the trial concludes the court must be attentive to the issue of forfeiture

and "*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." Rule 32.2(b)(5)(A) (emphasis added). And then, "*[a]s soon as practical* after a verdict or finding of guilty . . . the court *must* determine what property is subject to forfeiture." Rule 32.2(b)(1)(A) (emphases added).

Next, "[i]f the court finds that property is subject to forfeiture," the court "*must promptly* enter a preliminary order of forfeiture setting forth the amount of any money judgment" or directing the forfeiture of specific property. Rule 32.2(b)(2)(A) (emphasis added). The next provision—and key for current purposes—elaborates on this "promptness" requirement. Entitled "Timing," Rule 32.2(b)(2)(B) provides that "the court *must* enter the preliminary order sufficiently *in advance of sentencing*." Rule 32.2(b)(2)(B) (emphases added).[6]

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[6] These are just two of *twenty* "musts" in Rule 32.2. *See* Rule 32.2(a) ("A court *must not* enter a judgment of forfeiture in a criminal proceeding unless the indictment or information" provided the defendant with notice relating to forfeiture (emphasis added)); Rule 32.2(b)(1)(A) (for forfeiture of "specific property, the court *must* determine whether the government has established the requisite nexus between the property and the offense" (emphasis added)); *id.* (for forfeiture of funds, "the court *must* determine the amount of money that the defendant will be ordered to pay" (emphasis added)); Rule 32.2(b)(1)(B) (if either party contests the forfeiture and requests a hearing, "the court *must*" conduct one (emphasis added)); Rule 32.2(b)(2)(A) ("the court *must* enter the [preliminary] order without regard to any third party's interest in the property" and the question of third-party interest "*must* be deferred" until later in the process (emphases added)); Rule 32.2(b)(4)(B) ("The Court *must* include the forfeiture when

The word "must" denotes an absolute requirement.[7] *See Must*, Webster's Third New International Dictionary 1492 (1993) ("must" means "is compelled" or "required by law"); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112-15 (2012) (the word "must" is a "mandatory" word that "impose[s] a duty"). In fact, "must" is the gold standard under federal law for expressing a mandatory obligation. Guidelines promulgated under the Plain Writing Act, Pub. L. 111-274 (2010), specifically require those drafting federal rules or regulations to use "must" (instead of "shall") "to impose require-

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orally announcing the sentence or *must* otherwise ensure that the defendant knows of the forfeiture at sentencing" (emphases added)); Rule 32.2(b)(5)(A), (B) ("the court *must* determine before the jury begins deliberating whether either party requests" the jury decide "the forfeitability of specific property," in which case "the government *must* submit a proposed Special Verdict Form") (emphases added)); Rule 32.2(b)(6) (using four "musts" in setting forth requirement of publishing and sending notice of the forfeiture order to third parties); Rule 32.2(c)(1), (2) ("the court *must* conduct an ancillary proceeding" if "a third party files a petition asserting an interest in the property to be forfeited," after which "the court *must* enter a final order of forfeiture" (emphases added)); Rule 32.2(d) (during the pendency of an appeal the court "*must* not transfer any property interest to a third party" (emphasis added)); Rule 32.2(e)(2) (using "must" to describe court's obligations with regard to property located after a final order of forfeiture).

[7] Because the Federal Rules of Criminal Procedure, once effective, have the force and effect of law, *United States v. Marion*, 404 U.S. 307, 319 (1971), courts apply "traditional tools of statutory construction" to interpret them, *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988).

ments"—that is, "to express a requirement or obligation" that leaves no room for discretion.[8] Bryan Garner takes the same view. Bryan Garner, A Dictionary of Modern Legal Usage 577-78 (2d ed. 1995) (noting "must" denotes "an absolute requirement" and that drafters "consider *must* a much better word than *shall* for stating requirements"); *see also Gutierrez de Martinez v. Lamango*, 515 U.S. 417, 432 n.9 (1995) (contrasting "must" with "shall" on the ground that the latter sometimes is merely permissive). And not only that—the "must" here is directed to the district court, "creat[ing] an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). There accordingly can be no doubt that the word "must" compels the action that follows it.

And when "must" doesn't really mean must—in other words, when a failure to follow the procedure is correctable—the Rule is explicit about that as well. For example, although the Rule provides that "[t]he court must" include the forfeiture order in the judgment, "the court's failure to do so *may* be corrected at any time under Rule 36." Rule 32.2(b)(4)(B) (emphasis added). So the Rule provides for a do-over where it intended one.[9]

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[8] Plain Language Action and Information Network, Keep It Conversational: Shall and Must, https://www.plainlanguage.gov/guidelines/conversational/shall-and-must/; *see also* Plain Language Action and Information Network, Federal Plain Language Guidelines 25 (May 2011) ("Use 'must' to indicate requirements.").

[9] The correction contemplated by Rule 32.2(b)(4)(B) presupposes that a preliminary order of forfeiture was actually entered.

As this provision also illustrates, the Rule uses a different word—"may"—to provide the court with optionality.[10] May, unlike "must" connotes flexibility. *See, e.g.*, *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282, 286 (1995) (because the Declaratory Judgment Act provides that federal courts "*may* declare the rights and other legal relations of any interested party," district courts "possess discretion" to award declaratory relief"); *May*, Merriam Webster's Collegiate Dictionary (10th ed. 1993) ("have the ability," "have permission to"; "used nearly interchangeably with *can*"). This difference in word choice, between "must" and "may," should be respected. *See, e.g.*, *Univ. of Texas Sw. Med.*

United States v. Shakur, 691 F.3d 979, 987 (8th Cir. 2012) (concluding that "when the court has entirely failed to enter either a preliminary or a final forfeiture order before entry of final judgment and passage of the fourteen-day correction period granted by Rule 35," the subsequent entry of those orders cannot be corrected by means of Rule 36).

[10] "May" appears throughout the Rule. *See* Rule 32.2(b)(1)(B) ("The court's determination *may* be based on evidence already in the record. (emphasis added)); Rule 32.2(b)(2)(C) ("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" general forfeiture order that states it will later be amended (emphasis added)); Rule 32.2(b)(3) ("The court *may* include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal" (emphasis added)); Rule 32.2(b)(4)(C) (providing the parties "may file an appeal" from an amended forfeiture order, if one exists); Rule 32.2(b)(6) (using three "mays" in describing notice and publication requirements); Rule 32.2(c)(1)(A),(B) (same, in describing ancillary proceedings regarding forfeiture); Rule 32.2(d) (the court "may stay" and "may amend"); Rule 32.2(e)(1)("the court may at any time" amend a forfeiture order to include subsequently located property); *cf.* Rule 32.2(a) ("should not").

Ctr. v. Nassar, 570 U.S. 338, 353 (2013) (drafting body's "choice of words is presumed to be deliberate").

The Rule provides other flexibility, too—but only in places. Indeed, the preliminary order's timing provision contains its own exception—specifically, a court "must" enter the preliminary order before sentencing "[u]nless doing so is impractical." Rule 32.2(b)(2)(B). Here, the broad rule—"must enter the preliminary order sufficiently in advance of sentencing"—has a single, written exception. *Id.* Because the drafters chose to include no other "exceptions to a broad rule," this Court must "apply the broad rule." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020). That is, "unless doing so is impractical," a district court *must* enter the preliminary order before sentencing. Rule 32.2(b)(2)(B).

And in other places, the Rule gives flexibility regarding forfeiture order timelines. If, before sentencing, a court cannot "identify all the specific property subject to forfeiture or calculate the total amount of the money judgment," it has the option of entering a "general" preliminary forfeiture order that anticipates a later amendment. Rule 32.2(b)(2)(C). What is more, after an order of forfeiture, the court can "at any time" amend an existing forfeiture order to include "subsequently located property." Rule 32.2(e).[11] In other words, the Rule provides flexibility as to timelines where the drafters intended, and lack of flexibility where they did not. These textual choices have meaning. *See, e.g.*, *City of Chicago v. Envtl. Defense Fund*,

[11] And if multiple third parties file petitions in the same case, a single ruling is not appealable until the court has ruled on all the petitions—that is, "unless the court determines that there is no just reason for delay." Rule 32.2(c)(3).

511 U.S. 328, 338 (1994) (noting that a drafting body is presumed to "act intentionally and purposely when it includes particular language in one section of a statute but omits it in another" and existence of statutory exemption "shows that Congress knew how to draft" such a provision "when it wanted to" (cleaned up)).

Finally, the centrality of the preliminary forfeiture order to the operation of Rule 32.2 is evident because the Rule refers to it in places as "*the* forfeiture order." *See* Rule 32.2(b)(4)(B), (C) (emphasis added); *see also* Rule 32.2(b)(6). No modifier needed. *See* U.S. Department of Justice, Criminal Division, Asset Forfeiture Policy Manual 2023, 2-4 (recognizing that reference to "order of forfeiture," without a modifier, means preliminary forfeiture order (citing 21 U.S.C. § 853(g))). That is because there is just one forfeiture order in the text of the Rule, which "*becomes* final" as to the defendant at sentencing; the Rule contains no mention of a "final sentencing order." In short, the text makes clear that "the forfeiture order"—also known as the preliminary forfeiture order—"must" be entered in advance of sentencing.

2. Structure

1. The structure of Rule 32.2 indicates the pre-sentencing requirement of a preliminary forfeiture order is a mandatory claims-processing rule. As the Sixth Circuit put it, "it's hard to imagine a better example" of a mandatory claims-processing rule "than Rule 32.2," which "regulates every stage of the criminal forfeiture process" through an "A-to-Z roadmap for criminal forfeiture." *United States v. Maddux*, 37 F.4th 1170, 1178 (6th Cir. 2022).

Rule 32.2 outlines the process, step-by-step. The first subsection, 32.2(a), entitled "Notice to the Defendant," requires that a court "must not enter a judgment of forfeiture" unless the indictment or information provided notice to the defendant that the government plans on seeking forfeiture. Rule 32.2(a). For cases tried before a jury, "the court must determine" in advance of deliberations "whether either party requests that the jury be retained to determine the forfeitability of specific property," and, if so, "the government must submit a proposed Special Verdict Form." Rule 32.2(b)(5)(A), (B).

Rule 32.2(b) sets forth the requirements that kick in immediately after a guilty verdict or plea, which center around, as the title indicates, "Entering a Preliminary Order of Forfeiture." Time is of the essence: "[a]s soon as practical" after a determination of guilt, "the court must determine what property is subject to forfeiture." Rule 32.2(b)(1)(A). The Rule spells out steps a court must take to determine what property is subject to forfeiture, and requires a hearing if forfeiture is contested. Rule 32.2(b)(1)(A), (B).

If, after those steps, "the court finds that property is subject to forfeiture," Rule 32.2(b) goes on, "it *must promptly* enter a preliminary order of forfeiture." Rule 32.2(b)(2)(A) (emphasis added). And, "[u]nless doing so is impractical," it "must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final." Rule 32.2(b)(2)(B).

The finality of forfeiture stems directly from the preliminary forfeiture order, underlining the necessity of the preliminary order's existence. Indeed, the provision explaining when finality occurs is nested

within subsection (b), which focuses on "Entering a Preliminary Order of Forfeiture." Rule 32.2(b)(4). The finality provision explains that "[a]t sentencing . . . *the preliminary forfeiture order* becomes final as to the defendant." Rule 32.2(b)(4)(A) (emphasis added).

The preliminary order's centrality appears elsewhere in Rule 32.2 as well. After the conclusion of any "ancillary proceeding," relating to third-party rights, "the court must enter a final order of forfeiture *by amending the preliminary order* as necessary." Rule 32.2(c)(2) (emphasis added). If, in contrast, "no third party files a timely petition, *the preliminary order becomes the final order of forfeiture*." *Id.* (emphasis added). Finally, for any "subsequently located property," the court is required to "amend an *existing preliminary . . . order* to include it." Rule 32.2(e)(2)(A) (emphasis added). In short, the preliminary order is the key step in the process established by Rule 32.2's "rigid procedure, to ensure that any forfeiture order is correct *before* it becomes final." *Maddux*, 37 F.4th at 1175 (emphasis added). It is not mere window dressing that can be skipped without consequence.

2. The preliminary order also changes the parties' relationships vis-à-vis the property, highlighting the centrality of this step in the criminal forfeiture process. "The entry of a preliminary order of forfeiture authorizes the Attorney General . . . to seize the specific property subject to forfeiture." Rule 32.2(b)(3); *see also* 21 U.S.C. § 853(g). It likewise "authorizes the [government] . . . to conduct [] discovery" to assist in "identifying, locating, or disposing of the property," and "to commence proceedings . . . governing third-party rights." Rule 32.2(b)(3). The Rule even allows for "the interlocutory sale of property alleged to be forfeitable,"

before a final forfeiture order—an allowance that presupposes the existence of a preliminary order of forfeiture that "alleged" specific property "to be forfeitable." Rule 32.2(b)(7).

The government's Asset Forfeiture Policy Manual consistently recognizes the preliminary order as a turning point in the criminal forfeiture process because it gives the government these additional seizure powers. *See, e.g.*, Asset Forfeiture Policy Manual at 2-1 ("Seizure generally occurs . . . pursuant to a preliminary order of forfeiture."); *id.* at 2-4 ("[A]ssets subject to criminal forfeiture" may "remain in the defendant's custody until the court enters a preliminary order of forfeiture."); *id.* at 4-4 ("Only after the court has entered a preliminary order of forfeiture against the real property may the government take physical custody of the real property.").

3. The structure of Rule 32.2 envisions that forfeiture disputes between the defendant and the government are hashed out through the preliminary forfeiture order process, before "the preliminary forfeiture order becomes final as to the defendant" at sentencing. Rule 32.2(b)(4)(A). In other words, "Rule 32.2(b) envisions only one bite at the apple—unless Rules 35(a) or 36 permit a later, smaller bite after sentencing." *Maddux*, 37 F.4th at 1177.[12] A court may be able to correct

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[12] The government has not argued that either Rule applies here. *See generally* BIO. Rule 35(a) plainly does not apply—that Rule gives the district court authority to correct a sentencing error, but only within 14 days, and only for errors "that resulted from arithmetical, technical, or other clear error." *See also* Fed. R. Crim. P. 32.2, Advisory Committee Notes, 2009 Amendments, Subdivision (b)(2)(B) (noting same restrictions). Nor does Rule

the failure to include "the forfeiture order" in the judgment under Rule 36, *see* Rule 32.2(b)(4)(B), but only where the preliminary order was entered in the first place. *See United States v. Shakur*, 691 F.3d 979, 987 (8th Cir. 2012). Allowing for the skipping-over of the preliminary order with no consequence overrides the trial court's circumscribed power to correct sentences under Rules 35(a) and 36. *See* Fed. R. Crim. P. 45(b)(2) ("The court may not extend the time to take any action under Rule 35, except as stated in that rule.").

4. Recognizing the pre-sentencing preliminary forfeiture order requirement as a mandatory claims-processing rule makes sense because the Rule places the burden on the government to move the criminal forfeiture process forward. It is up to the government to decide to seek forfeiture, and if it does it must first provide notice to the defendant of its intentions in the indictment or information. Rule 32.2(a). To effectuate notice, "the government lists the real property subject to forfeiture in the forfeiture notice of the indictment or in a bill of particulars and records a notice of *lis pendens*." Asset Forfeiture Policy Manual at 4-4. After guilt is determined, "[i]f the government seeks forfeiture of specific property" it must "establish[] the requisite nexus between the property and offense." Rule 32.2(b)(1)(A).

And although, of course, the court must *enter* a preliminary order of forfeiture, the onus is on the government to submit a proposed preliminary order. *See* Asset Forfeiture Policy Manual at 4-5, 10-3 (setting out language and information that should be included in

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36, which covers only "clerical" errors in a judgment, and requires notice. Fed. R. Crim. P. 36.

proposed forfeiture orders); *id.* at 11-10 ("to ensure that a valid forfeiture results" from a plea agreement "[t]he USAO must . . . ensure that the court issues a preliminary order of forfeiture that incorporates the settlement or terms of the plea agreement"); *id.* at App'x A (requiring consultation by USAO with the U.S. Marshals Service "before submitting or filing any proposed court orders to restrain[or] seize" certain property); *see also, e.g.*, *United States v. Liquidators of Eur. Fed. Credit Bank*, 630 F.3d 1139, 1144 (9th Cir. 2011) (noting, in passage outlining "briefly, [] how the system works," after a conviction "the government may move for entry of a preliminary order of forfeiture"). Indeed, in this case the district court failed to enter a preliminary order before sentencing "because the government did not submit a proposed order." JA 135-36. The government has admitted this was "a mistake." JA 80; JA 87.[13] Because Rule 32.2 makes clear that it is the government's job to make sure the court follows the procedures outlined therein, there is no incongruity in holding the government to these timelines.

3. Purpose

1. Rule 32.2(b) explains that its requirement of a preliminary order "sufficiently in advance of sentencing" is "to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant [at sentencing]." Rule 32.2(b)(2)(B). Two goals underlie this timing rule.

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[13] Rule 32.2, moreover, does contemplate a "court's failure to enter a [preliminary forfeiture] order" before sentencing, but again places the duty on the government—this time to appeal. Rule 32.2(b)(4)(C); *see Maddux*, 37 F.4th at 1177.

"Rule 32.2(b)'s undoubtable purpose is to ensure defendants receive due process paired with finality and efficiency." *Maddux*, 37 F.4th at 1178. Those twin goals are consistent with the aims of the Rules as a whole, which "are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable delay and expense." Fed. R. Crim. P. 2 ("Interpretation."). The Government recognizes these purposes as well. In its Asset Forfeiture Policy Manual, DOJ notes that involving the district courts before forfeiture "allow[s] neutral and detached judicial officers to review the basis for seizures before they occur," protects "against potential civil suits claiming wrongful seizures"; and, importantly, "reduc[es] the potential that the public will perceive property seizures to be arbitrary and capricious." Asset Forfeiture Policy Manual at 1-13.

2. Rule 32.2, properly followed, ensures criminal defendants receive due process before their property is permanently seized by the government. First, the notice requirement in the indictment or information. Rule 32.2(a). Under this notice provision, "[t]he court may direct the government to file a bill of particulars to inform the defendant of the identity of the property that the government is seeking to forfeit or the amount of any money judgment sought." Advisory Committee Notes, 2009 Amendments, Subdivision (a). This is "to enable the defendant to prepare a defense or avoid unfair surprise." *Id.*[14]

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[14] Here, the government provided a bill of particulars only identifying the BMW and not indicating the amount of money judgment it was seeking. JA 12.

Next, a hearing—to determine whether the property is subject to forfeiture, or the amount of a personal money judgment. Rule 32.2(b)(1)(B). The Rule designates this the "Forfeiture Phase of the Trial." Rule 32.2(b)(1). It can be conducted by the court after a plea or verdict, *id.* 32.2(b)(1)(B), or, in the case of a jury trial, after inquiry by the district court, either party can request "that the jury be retained to determine the forfeitability of specific property after it returns a guilty verdict" through use of a special verdict form. Rule 32.2(b)(5).

This being done, the court "must promptly" enter the preliminary order. Rule 32.2(b)(2)(A). Rule 32.2(b)(2)(B), on its face, explains that the purpose of a pre-sentencing preliminary forfeiture order is "to allow the parties to suggest revisions or modifications before the order becomes final." That is, the defendant must have an opportunity to correct the preliminary order and dispute its accuracy. Only after this, "the preliminary order becomes the final order of forfeiture," but only "if the court finds that the defendant . . . had an interest in the property that is forfeitable." Rule 32.2(c)(2).[15]

The Rule further provides for the stay of a forfeiture order pending appeal, which "is to ensure that the

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[15] This rule was strengthened through the notice and comment process. *See* Advisory Committee Notes, 2000 Amendments, GAP Report—Rule 32.2 ("[S]ubdivision (b) was redrafted to make it clear that if no third party files a petition to assert property rights, the trial court must determine whether the defendant has an interest in the property to be forfeited and the extent of that interest. As published, the rule would have permitted the trial judge to order the defendant to forfeit the property in its entirety if no third party filed a claim.").

property remains intact and unencumbered so that it may be returned to the defendant in the event the appeal is successful." Advisory Committee Notes, 2000 Amendments, Subdivision (d). And, "[i]f the defendant prevails on appeal, he or she recovers the property as if no conviction or forfeiture ever took place." *Id.* This step-by-step course—in which the preliminary order is key—ensures that a defendant receives procedural due process. *See Shakur*, 691 F.3d at 988.

The Rule protects not only the property rights of a criminal defendant, but those of third parties. It requires the government to provide notice to "any person who reasonably appears to be a potential claimant with standing to contest the forfeiture" after the court enters the preliminary order of forfeiture. Rule 32.2(b)(6)(A); *see also* Asset Forfeiture Policy Manual at 5-11 (acknowledging that this notice requirement is triggered by the preliminary forfeiture order in 32.2(b)(2)). If a third-party files a petition asserting an interest in the personal property to be forfeited, the Rule requires the district court to conduct an "ancillary proceeding" to get to the bottom of the ownership question. Rule 32.2(c). But the Rule balances the interests of third parties with those of criminal defendants, envisioning the ancillary proceeding as running parallel to (and after) the defendant-protective procedures of the Rule. *See* Rule 32.2(b)(2)(A) ("The court must enter the [preliminary] order without regard to any third party's interest in the property."). In short, the Rule is focused on procedural protections that ensure due process to both the criminal defendant and to any third party whose property rights are implicated by a criminal forfeiture.

3. Rule 32.2(b)'s framework was also animated by a concern for judicial economy. *See Maddux*, 37 F.4th at 1175. The court "must promptly" enter a preliminary forfeiture order and "must" do so "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final." Rule 32.2(b)(2)(A), (B). The government has linked this requirement to the court's and parties' ability "[t]o try to identify errors before sentencing," because otherwise "the period for correcting such errors is potentially very short." Asset Forfeiture Policy Manual at 5-22. In such a situation, "the parties may be left with no alternative to an appeal, which is a waste of judicial resources." Advisory Committee Notes, 2009 Amendments, Subdivision (b)(2)(B).[16]

Indeed, Rule 32.2(b)(2)(B)'s timing provision was promulgated to address just these concerns. This provision was added in 2009; before it existed, "[m]any courts . . . delayed entry of the preliminary order until the time of sentencing." Advisory Committee Notes, 2009 Amendments, Subdivision (b)(2)(B). The pre-sentencing-preliminary-forfeiture-order requirement put an end to this practice, which was "undesirable because the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant" at sentencing and in the entry of judgment. *Id.* This was a problem because after sentencing, "the rules give the sentencing court

[16] And in the face of an appeal, the Rule is still attentive to the interests of third parties, *see supra* 30, and "allows the court to proceed with the resolution of third party claims even as the appellate court considers the appeal" because "[o]therwise, third parties would have to await the conclusion of the appellate process even to *begin* to have their claims heard." Advisory Committee Notes, 2000 Amendments, Subdivision (d) (emphasis added).

only very limited authority to correct errors or omissions in the preliminary forfeiture order"—specifically, the seven-day period set out in Rule 35(a) or Rule 36's allowance to correct clerical errors. *Id.* But "[i]f the order contains errors or omissions that do not fall within Rules 35(a) or 36, and the court delays entry of the preliminary forfeiture order until the time of sentencing, the parties may be left with no alternative to an appeal, which is a waste of judicial resources." *Id.* The amendment in which Rule 32.2(b)(2)(B)'s timeline came into existence, then, to "require[] the court to enter the preliminary order in advance of sentencing to permit time for corrections," was meant to conserve scarce judicial resources. *Id.*[17]

C. This Court's Caselaw Confirms that Rule 32.2(b)(2)(B) Is A Mandatory Claims-Processing Rule.

1. As explained above, "the language, the context, and the purposes of" Rule 32.2 all point to the pre-sentencing preliminary forfeiture order as a mandatory claims-processing rule. *Dolan*, 560 U.S. at 611. This Court's caselaw requires the same conclusion.

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[17] Judicial economy is also best-served by keeping the "impracticality" exception to Rule 32.2(b)(2)(B)'s timing requirement as appropriately circumscribed. Notably, the government has never attempted to argue that it was excused from timely submitting a proposed preliminary forfeiture order in this case because doing so was "impractical." *See* JA 80; JA 87 (admitting failure to submit proposed order was "a mistake"). Nor did the district court here make factual findings explaining why it would have been impractical to adjudicate the forfeiture amount prior to sentencing. *See, e.g.*, *United States v. Mincey*, 800 F. Appx 714, 727 (11th Cir. 2020).

In *Kontrick*, the Court addressed the requirement in the Bankruptcy Rules that gives a creditor 60 days to object to a debtor's discharge. 540 U.S. at 446. As in this case, the applicable "time constraints" were contained in "Rules prescribed by this Court for 'the practice and procedure'" to apply in a certain type of case—there, bankruptcy; here, federal criminal. *Id.* at 453 (noting 28 U.S.C. § 2072 "similarly provid[es] for Court-prescribed 'rules of practice and procedure'"). The Court concluded that the timing requirement was "an inflexible claim-processing rule" that was "unalterable on a party's application." *Id.* at 456. The rules served to "instruct the court on the limits of its discretion to" take a particular action. *Id.*

Similarly, in *Eberhart v. United States*, 546 U.S. 12 (2005), this Court held that the seven-day limit for filing a motion for a new trial (not based on newly discovered evidence) under Federal Rule of Criminal Procedure 33(b)(2) was a "rigid" claims-processing rule. *Id.* at 13, 15. As in *Kontrick*, the Court observed, the Rules required an action to occur within "a set period of time." *Id.* at 15; *see also United States v. Robinson*, 361 U.S. 220, 229 (1960) (holding Federal Rule of Criminal Procedure 45(b)'s prohibition on certain extensions of time is "mandatory"). So too in *Manrique v. United States*, 581 U.S. 116 (2017), where the Court concluded that "[t]he requirement that a defendant file a timely notice of appeal from an amended judgment imposing restitution [under Federal Rule of Appellate Procedure 4] is at least a mandatory claim-processing rule." *Id.* at 121; *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 19 (2017) ("[A] time limit prescribed . . . in a court-made rule" is "a mandatory claim-processing rule."); *c.f. Union Pac. R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 83-84

(2009) (holding National Railroad Adjustment Board's rules were claims-processing rules). In short, this Court has always considered court-issued federal procedural rules to be mandatory claims-processing rules.

More broadly, this Court "ha[s] repeatedly held that filing deadlines" are the "quintessential claim-processing rules." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013) (quoting *Henderson*, 562 U.S. at 435 and addressing statutory deadline for filing administrative appeal); *see also United States v. Wong*, 575 U.S. 402, 410 (2015) ("Time and again, we have described filing deadlines as quintessential claims processing rules" (quotation marks omitted)). Like other rules that "regulate the timing of motions . . . brought before the court," *Dolan*, 560 U.S. at 610, they "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 562 U.S. at 435 (addressing statutory deadline for filing administrative appeal). These rules "present[] a question of time"; they ask "not whether, but when" a party must take a specified action. *Scarborough v. Principi*, 541 U.S. 401, 413 (2004) (addressing deadline for filing a fee award under the Equal Access to Justice Act).

But it is not just parties to whom claims-processing rules are directed: "Claim-processing can also be addressed to courts." *Santos-Zacaria*, 598 U.S. at 420. They "instruct the court on the limits of its discretion" to take a particular action. *Kontrick*, 540 U.S. at 456; *see also Gonzalez v. Thaler*, 565 U.S. 134, 141, 143 (2012) (holding AEDPA's provision that a circuit court judge may issue a certificate of appealability only "if

the applicant has made a substantial showing of a denial of a constitutional right" is a mandatory claims-processing rule). Rule 32.2 is directed both at the government and the district court. It notifies the government that it must *submit* a proposed preliminary order—and the district court that it "must enter" such an order—"sufficiently in advance of sentencing." Rule 32.2(b)(2)(B). Here, because the government failed to submit a proposed preliminary forfeiture order within the Rule's specified timeline—and the district court therefore failed to enter a preliminary order—the district court lacked the authority to later enter a preliminary order over petitioner's objection. *See Eberhart*, 546 U.S. at 17 ("[D]istrict courts must observe the clear limits of the Rules of Criminal Procedure.").

What is more, a number of the rules that this Court has designated as falling within the capacious "claims-processing" category, such as pre-suit exhaustion requirements, are those designed to make the court's ultimate determination more efficient and accurate—just like the preliminary forfeiture order here. *See Santos-Zacaria*, 598 U.S. at 416-18 & n.4 (collecting cases and observing that "exhaustion promotes efficiency"); *see also Wilkins v. United States*, 598 U.S. 152, 158 (2023) (noting procedural rules "keep things running smoothly and efficiently" and characterizing such claims-processing rules as "mundane").

Notably, in *all* these cases, this Court addressed the border between "jurisdictional" rules—a category this Court has restricted as it has "tried in recent cases to bring some discipline to the use of the term"—and "claims-processing rules," and found the rules at issue fell in the latter category. *Henderson*, 562 U.S.

at 435; *see also Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019) (noting that Court has, in recent years, addressed "an array of mandatory claim-processing rules"). So while deadlines in the "jurisdictional" bucket have been shrinking from year-to-year as this Court brings "discipline" to overuse of the term "jurisdictional," the result is almost every deadline being termed a "claims-processing rule," of which Rule 32.2(b)(2)(B) is just another example.

2. *Dolan* does not counsel otherwise. *Dolan* coined a new, third type of deadline—those that are neither jurisdictional (which are mandatory) nor claims-processing rules (which can be enforced), but are mere "time-related directives" (which can be ignored). *See Dolan*, 560 U.S. at 621 (Roberts, C.J., dissenting) ("Under the Court's view, failing to meet the 90-day deadline has no consequence whatever."). *Dolan* perceived only three prior cases with such deadlines, *id.* at 611, and in the dozen years since *Dolan*—and innumerable cases addressing what "type" of a deadline something is—this Court has not found another "time-related directive." It should not start here.

In *Dolan*, this Court addressed the statutory deadline in the Mandatory Victims Restitution Act providing that "the court shall set a date for the final determination of the victim's losses, not to exceed 90-days after sentencing." 560 U.S. at 608. The Court concluded that this limit was a "time-related directive" and the court could still order the restitution after the deadline—"at least where . . . the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open . . . only the amount." *Id.* at 608, 611. *Dolan* has little relevance here.

Let's start with the logistics. Should the district court and the government have needed the flexibility—as seen in *Dolan*—to "ma[k]e clear prior to the deadline's expiration that it would order [forfeiture], leaving open . . . only the amount," there is a mechanism they could have used. *Id.* at 608. Specifically, the government could have asked the district court to enter a "general" preliminary forfeiture order under Rule 32.2, which provides information then-available, but anticipates a later amendment. Rule 32.2(b)(2)(C). But no preliminary forfeiture order—general or otherwise—occurred in this case, and such a general order would have been inappropriate here since the government had all the information it required as to forfeiture.

In addition to the differences in posture, the Court's analysis in *Dolan* is inapplicable for present purposes. As to its textual analysis, the Court in *Dolan* recognized that the MVRA's use of the word "shall" suggested a requirement, but noted that "a statute's use of that word alone" is not enough. *Dolan*, 560 U.S. at 611. Here, though, Rule 32.2 uses a different word—the more mandatory "must," *see supra* at 18-19 & n.8. Additionally, as set out above, the Rule provides numerous other indications that the requirement of a preliminary forfeiture order "sufficiently in advance of sentencing" is mandatory, not "th[e] word alone." *Id.* at 611. So *Dolan*'s spare discussion of "shall" in the MVRA is irrelevant.

Dolan's discussion of the MVRA's purpose is likewise inapplicable. Of principal importance to the Court in *Dolan* was the overarching thrust of the MVRA—in both text and purpose—which was to ensure that victims received restitution. *See Dolan*, 560

U.S. at 612 ("[T]he Act's procedural provisions reinforce this substantive purpose, namely, that the statute seeks primarily to ensure that victims of a crime receive full restitution."). The Court concluded that the statutory emphasis on speed—*i.e.,* the deadline in question—existed "primarily to help the victims of crime and only secondarily to help the defendant." *Id.* at 613.[18] And to read the MVRA "as depriving the sentencing court of the power to order restitution would harm those—the victims of crime—who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit." *Id.* at 613-14.[19] None of this reasoning applies to Rule 32.2(b)(2)(B)'s timing requirement.

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[18] In *Lagos v. United States*, 138 S. Ct. 1684 (2018), the Court held that despite the statutory purpose recognized in *Dolan*, "to ensure that victims of a crime receive full restitution," *id.* at 1689 (quoting *Dolan*, 560 U.S. at 612), the MVRA did not cover reimbursement for certain costs claimed by the victim. In other words, even the MVRA's express interest in victim protection goes only so far. *Id.* ("But a broad general purpose of this kind does not always require us to interpret a restitution statute in a way that favors an award."); *c.f. Paroline v. United States*, 572 U.S. 434, 446 (2014) (holding restitution statute covering child pornography includes a proximate causation requirement).

[19] The other cases noted by *Dolan* which involved a mere time-related directive involved similar concerns. 560 U.S. at 611. *United States v. Montalvo-Murillo*, 495 U. S. 711, 722 (1990), involved public safety, which could be harmed by the release of a defendant whose bail detention hearing was not timely conducted; *Brock v. Pierce County*, 476 U.S. 253, 259 (1986), involved "the integrity of a Government program," which would be harmed if misused federal grant funds could not be recovered on the basis of a missed deadline, and *Barnhart v. Peabody Coal Company*, 537 U. S. 149, 171-72 (2003), involved harm to retirees if a missed

Here, the "basic purpos[es]" of the schemes in question dictate different results. *Dolan*, 560 U.S. at 615. As the Court observed again and again in *Dolan*, the purpose of the MVRA was to compensate victims. *See id.* at 612 (MVRA "seeks primarily to ensure that victims of a crime receive full restitution); *id.* at 613 (MVRA "seeks speed primarily to help the victims of crime"); *id.* ("*primarily* designed to help victims of crime secure prompt restitution"); *id.* at 614 (noting statute "seeks to benefit" crime victims); *id.* at 615 (compensating victims is "the basic purpose of the Mandatory Victims Restitution Act").[20]

Unlike restitution, forfeiture is punishment. *Libretti v. United States*, 516 U.S. 29, 38-39 (1995). As such, it is imposed as part of the sentence. *Id.* And 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. *See supra* at 31-32.

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deadline prevented the later award of benefits. Nothing like that would occur in the forfeiture context.

[20] This is consistent with the Government's understanding of the purposes of restitution. *See, e.g.*, Asset Forfeiture Policy Manual at 14-1 ("Restitution is a court-ordered equitable remedy intended to make crime victims whole."); *Id.* at 14-8. Because of this purpose, restitution's reach is broader than that of forfeiture: "The statutes governing restitution permit the government to enforce the restitution order as a final judgment against almost all of the defendant's property, not just facilitating property or fraud proceeds that may be subject to forfeiture." *Id.* at 14-8.

Critically, unlike restitution, forfeiture doesn't meaningfully benefit victims. *See Maddux*, 37 F.4th at 1179 ("Forfeited property thus ordinarily ends up in the hands of the government, not victims"). Indeed, the government instructs its line prosecutors that "[u]nder no circumstances should [a] criminal AUSA make representations to a defendant or the court that forfeited funds will be used to satisfy restitution." Asset Forfeiture Policy Manual at 14-6. Among other reasons, "the forfeited assets may not be used to satisfy [a] restitution order if other assets are available for that purpose." *Id.* at 14-8.[21]

And although the attorney general "is authorized" to transfer forfeited property to victims, 18 U.S.C. § 982(b)(1) (incorporating by reference 21 U.S.C. § 853(i)), this transfer is discretionary, making it "quite unlike the restitution mandatorily destined for victims under the MVRA." *Maddux*, 37 F.4th at 1179; *see* Asset Forfeiture Policy Manual at 14-1 (noting "discretionary procedures"). What is more, the discretionary processes by which forfeited assets are returned to victims—called remission and restoration—

[21] Moreover, in many cases it would be impossible—and perhaps contrary to public policy—for forfeited funds to be turned over to those who might be considered the "victims" of a crime. For example, forfeiture is frequently applied to federal drug crimes, where there are no identifiable victims and where routing forfeited funds to restitution would make little sense. *See* 21 U.S.C. § 853(a) (making property proceeds of drug crimes forfeitable, as well as any real or personal property used to commit, or to facilitate the commission, of the offense). Indeed, all but one of the controlled substances offenses contained under Title 21 are omitted from the MVRA, indicating that Congress has deemed restitution inappropriate in such circumstances. *See* 18 U.S.C. § 3663A(c).

are elaborate, requiring an entire dozen-page chapter in the government's Asset Forfeiture Manual—and a chart to boot. *See generally* Asset Forfeiture Policy Manual at 14-1-14-12.[22]

Moreover, unlike in *Dolan*, *see* 560 U.S. at 613-14, acknowledging Rule 32.2 as a mandatory claims-processing rule would not meaningfully harm third parties—victims or otherwise—who are protected by Rule 32.2's provisions setting forth a comprehensive process for third parties with an interest in the property to be forfeited. *See supra* at 30. Because third parties are protected by the Rule's "ancillary proceedings" that run parallel to the criminal proceeding, Rule 32.2 expressly provides that "[t]he court must enter the [preliminary] order without regard to any third party's interest in the property." Rule 32.2(b)(2)(A). Indeed, third-parties' interests in a timely resolution of forfeiture proceedings are actually *furthered* by ac-

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[22] Remission, for its part, "is a process" under which "the Department solicits, considers, and rules on petitions for payment." Asset Forfeiture Policy Manual at 14-1. Restoration authorizes "the Attorney General to transfer forfeited funds to a court for satisfaction of a criminal restitution order, provided that" the court has issued a restitution order identifying specific victims and losses, and "that all victims named in the order otherwise qualify for remission under the applicable regulations." *Id.* The facts of this case, demonstrate why remission has no application here. The bulk of the forfeiture ordered in this case related to monies stolen from individuals engaged in either the loansharking business or operating an illegal gambling parlor. In the initial appeal, petitioner argued that it would be against public policy to order restitution to victims for what was essentially the proceeds from their own criminal conduct. C.A. Dkt. #94, at 57-58. Upon remand, the parties agreed to exclude these amounts from restitution.

knowledging the preliminary order deadline is mandatory and enforceable. That is, having any disputes between the government and the defendant regarding forfeiture hashed out before sentencing allows for a clean ancillary proceeding for that third party. *See* Rule 32.2 Advisory Committee Notes, 2000 Amendments, Subdivision (b) (noting sequencing of preliminary order of forfeiture before ancillary proceedings solves problem of where "third parties who might have an interest in the forfeited property are not parties to the criminal case"). What is more, in light of *Dolan*, which allows for restitution after the MVRA's 90-day time period, it is hard to see how a victim will ever be harmed by the failure to timely order *forfeiture* since the district court can still direct the defendant to make *restitution*.[23]

Finally, the equities here, unlike in *Dolan*, do not counsel in favor of deeming Rule 32.2's requirement of a preliminary forfeiture order before sentencing as a time-related directive. In *Dolan*, the Court was concerned about a mismatch between the party harmed by enforcement of the time limit (the victim, who would not receive compensation) and the party responsible for the missed deadline (the government).

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[23] If anything, as this case demonstrates, third-parties are harmed through the delay that is occasioned when the deadlines set forth in Rule 32.2 are not observed. The trial record showed that the purchaser of the BMW seized by the government was petitioner's mother. JA 35-36. As a result, she was entitled to submit a claim challenging the forfeiture of the vehicle. *See* Rule 32.2(c)(1). Where, as here, the notice prescribed by Rule 32.2(b)(6) was not published until 12 years after the vehicle was seized, JA 185, it is highly likely that any third party who possessed an interest had lost track of the matter and was no longer watching to see whether notice was even published.

See 560 U.S. at 613-14 (noting enforcing time limit "would harm those—the victims of crime—who likely bear no responsibility for the deadline's being missed"). No such concerns lie here, where the government was both responsible for the missed deadline and would bear the cost of the rule's enforcement. *See* JA 135 ("In this case, the district court did not enter a preliminary order prior to sentencing, *apparently because the government did not submit a proposed order*" (emphasis added)). And unlike a victim of crime, the federal government, which collects trillions of dollars in revenue annually, cannot be meaningfully harmed by an inability to collect a criminal defendant's assets through criminal forfeiture when it occasionally misses Rule 32.2's deadline. *Compare* https://fiscaldata.treasury.gov/americas-finance-guide/government-revenue/ (reporting the U.S. government collected $4.44 trillion in revenue in fiscal year 2023), *with* JA 160 ($28,000 restitution order in this case). And no harm may even befall the government, because—should criminal forfeiture not be an option in a particular case—it may be able to reach the assets through civil forfeiture. *See* 18 U.S.C. § 981; *United States v. Ursery*, 518 U.S. 267, 287-88 (1996) (pursing civil and criminal forfeiture based on the same underlying offense does not pose a double jeopardy problem).

The equities in fact point in favor of recognizing Rule 32.2(b)(2)(B) as a claims-processing rule. When the federal government seeks to take property from an individual, it's not too much to ask that the government dot its *i*'s and cross its *t*'s before doing to. *C.f. Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) (noting the Tucker Act "provides the standard procedure for bringing" Fifth Amendment takings claims

against the federal government). And the federal government is more than happy to have the Federal Rules recognized as claims-processing rules when missed deadlines inure to the government's benefit, *see, e.g.*, *Eberhart*, 546 U.S. 12 (holding as claims-processing rule Federal Rule of Criminal Procedure 33(a)'s "rigid" requirement that any motion for a new trial not based on newly discovered evidence be filed within 7 days after a verdict); *Manrique*, 581 U.S. 116 (holding Federal Rule of Appellate Procedure 4's requirement that a defendant file a timely notice of appeal "is at least a mandatory claim-processing rule"). But claims-processing rules are a two-way street. Sometimes deadlines are placed on the government, and when it misses those deadlines, basic fairness dictates these rules, like the rest of the Federal Rules, be treated as relating to claims processing. Here, it would be particularly problematic to arrogate power to the government to correct its errors (by designating Rule 32.2(b)(2)(B) as a time-related directive) at the expense of criminal defendants—to whom "procedural protections are of heightened importance." *Dolan*, 560 U.S. at 626 (Roberts, C.J., dissenting); *c.f. Bittner v. United States*, 598 U.S. 85, 101 (2023) (rule of lenity requires that provisions "imposing penalties are to be 'construed strictly' against the government and in favor of individuals"). Of course, if, in the face of all this, Rule 32.2(b)(2)(B)'s existence as a mandatory claims-processing rule is "thought to be inequitable," the Advisory Committee is free to amend Rule 32.2 to turn it into simply a time-related directive. *Bowles*, 551 U.S. at 214.

* * *

The government failed to propose a preliminary order of forfeiture, and so the district court failed to enter one within the deadline set by Rule 32.2(b)(2)(B). JA 135. "That was wrong." *Dolan*, 560 U.S. at 629 (Roberts, C.J., dissenting); *see also* JA 80 (government admitting it made "a mistake"). "But two wrongs do not make a right, and that mistake gave the court no authority to" purport to enter a preliminary order of forfeiture for the first time 2.5 years after petitioner's original sentencing. *Dolan*, 560 U.S. at 629 (Roberts, C.J., dissenting).

CONCLUSION

For these reasons, the Court should reverse.

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APPENDIX

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Federal Rule of Criminal Procedure 32.2

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 applica-

ble 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).