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

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed Jan. 18, 2012]

UNITED STATES OF AMERICA -v.- LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," EDWARD RAMIREZ, a/k/a "Taz," TERRENCE DUHANEY, a/k/a "Bounty Killer," TURHAN JESSAMY, a/k/a "Vay," QUINCY WILLIAMS, a/k/a "Capone," TYRELL ROCK, a/k/a "Smurf," and NEIL MORGAN, a/k/a "Steely," Defendants.	**INDICTMENT** S3 11 Cr. 500 (KMK)

COUNT ONE

The Grand Jury charges:

1. From at least in or about 2009, through in or about 2011, in the Southern District of New York and elsewhere, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," EDWARD RAMIREZ, a/k/a "Taz," TERRENCE DUHANEY, a/k/a "Bounty Killer," TURBAN JESSAMY, a/k/a "Vay," QUINCY WILLIAMS, a/k/a "Capone," TYRELL ROCK, a/k/a "Smurf," and NEIL MORGAN, a/k/a "Steely," the defendants, and others known and unknown, unlawfully and knowingly did combine, conspire, confederate, and agree together and with each other to commit robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1),

and would and did thereby obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, MCINTOSH, RAMIREZ, DUH.ANEY, JESSAMY, WILLIAMS, ROCK, and MORGAN, and others known and unknown, agreed to commit armed robberies of suspected narcotics traffickers and others involved in commercial activities that affected interstate commerce.

Overt Acts

2. In furtherance of the conspiracy and to effect the illegal object thereof, the following overt acts, among others, were committed in the Southern District of New York:

a. On or about April 30, 2010, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," EDWARD RAMIREZ, a/k/a "Taz," and NEIL MORGAN, a/k/a "Steely," and others known and unknown, attempted to rob individuals they believed to be narcotics dealers in the vicinity of Cliff Street, Yonkers, New York, during which robbery MCINTOSH discharged a shotgun.

b. On or about May 15, 2010, TURHAN JESSAMY, a/k/a "Vay," EDWARD RAMIREZ, a/k/a "Taz," and TYRELL ROCK, a/k/a "Smurf," and others known and unknown, attempted to rob individuals they believed to be narcotics dealers in the vicinity of Mount Vernon Avenue and High Street, Mount Vernon, New York.

c. On or about May 24, 2010, QUINCY WILLIAMS, a/k/a "Capone", possessed a gun in the

vicinity of Union and Fifth Streets, Mount Vernon, New York.

d. On or about October 28, 2010, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," and TERRENCE DUHANEY, a/k/a "Bounty Killer," stole individuals' cellular phones and the proceeds of a card game at a men's club in the vicinity of Lake Street, Poughkeepsie, New York, during which robbery McIntosh discharged a gun and assaulted an individual.

(Title 18, United States Code, Section 1951.)

COUNT TWO

The Grand Jury further charges:

3. From at least in or about 2009, through in or about 2011, in the Southern District of New York and elsewhere, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," EDWARD RAMIREZ, a/k/a "Taz," TERRENCE DUHANEY, a/k/a "Bounty Killer," TURHAN JESSAMY, a/k/a "Vay," QUINCY WILLIAMS, a/k/a "Capone," TYRELL ROCK, a/k/a "Smurf," and NEIL MORGAN, a/k/a "Steely," the defendants, and others known and unknown, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, namely, the robbery conspiracy charged in Count One of this Indictment, knowingly did use and carry firearms, and in furtherance of such crime, did possess firearms, and did aid and abet the use, carrying, and possession of firearms, which firearms were discharged.

(Title 18, United States Code, Sections 924(c)(1)(A)(iii) and 2.)

COUNT THREE

The Grand Jury further charges:

4. On or about May 15, 2010, in the Southern District of New York, TURHAN JESSAMY, a/k/a "Vay," EDWARD RAMIREZ, a/k/a "Taz," and TYRELL ROCK, a/k/a "Smurf," the defendants, unlawfully and knowingly did attempt to commit robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), and would thereby have obstructed, delayed, and affected commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, JESSAMY, RAMIREZ, and ROCK attempted to rob individuals they believed to be narcotics dealers in the vicinity of Mount Vernon Avenue and High Street, Mount Vernon, New York.

(Title 18, United States Code, Sections 1951 and 2.)

COUNT FOUR

The Grand Jury further charges:

5. On or about May 15, 2010, in the Southern District of New York, TURHAN JESSAMY, a/k/a "Vay," EDWARD RAMIREZ, a/k/a "Taz," and TYRELL ROCK, a/k/a "Smurf," the defendants, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, namely, the attempted robbery charged in Count Three of this Indictment, knowingly did use and carry firearms, and in furtherance of such crime, did possess firearms, and did aid and abet the use, carrying, and possession of firearms, which were discharged during the attempted robbery.

(Title 18, United States Code, Sections 924(c)(1)(A)(iii), 924(c)(1)(C)(i), and 2.)

COUNT FIVE

The Grand Jury further charges:

6. On or about April 30, 2010, in the Southern District of New York, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," EDWARD RAMIREZ, a/k/a "Taz," and NEIL MORGAN, a/k/a "Steely," the defendants, and others known and unknown, unlawfully and knowingly did attempt to commit robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), and would thereby have obstructed, delayed, and affected commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, MCINTOSH, RAMIREZ, and MORGAN attempted to rob individuals they believed to be narcotics dealers in the vicinity of Cliff Street, Yonkers, New York, during which attempted robbery MCINTOSH discharged a shotgun.

(Title 18, United States Code, Sections 1951 and 2.)

COUNT SIX

The Grand Jury further charges:

7. On or about April 30, 2010, in the Southern District of New York, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," EDWARD RAMIREZ, a/k/a "Taz," and NEIL MORGAN, a/k/a "Steely," the defendants, and others known and unknown, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, namely, the attempted robbery charged in Count Five of this Indictment, knowingly

did use and carry firearms, and in furtherance of such crime, did possess firearms, and did aid and abet the use, carrying, and possession of firearms, which were discharged during the attempted robbery.

(Title 18, United States Code, Sections 924(c)(1)(A)(iii), 924(c)(1)(C) (i), and 2.)

COUNT SEVEN

The Grand Jury further charges:

8. On or about September 26, 2010, in the Southern District of New York and elsewhere, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," the defendant, and others known and unknown, unlawfully and knowingly did commit robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), and did thereby obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, MCINTOSH stole money and other items from an individual in the vicinity of Horton Avenue, Lynbrook, New York.

(Title 18, United States Code, Sections 1951 and 2.)

COUNT EIGHT

The Grand Jury further charges:

9. On or about September 26, 2010, in the Southern District of New York and elsewhere, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," the defendant, and others known and unknown, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, namely, the robbery charged in

Count Seven of this Indictment, knowingly did use and carry firearms, and in furtherance of such crime, did possess firearms, and did aid and abet the use, carrying, and possession of firearms, which were brandished during the robbery.

(Title 18, United States Code, Sections 924(c)(1)(A)(ii), 924(c)(1)(C)(i), and 2.)

COUNT NINE

The Grand Jury further charges:

10. On or about October 28, 2010, in the Southern District of New York, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," and TERRENCE DUHANEY, a/k/a "Bounty Killer," the defendants, and others known and unknown, unlawfully and knowingly did commit robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), and did thereby obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, MCINTOSH and DUHANEY stole individuals' cellular phones and the proceeds of a card game at a men's club in the vicinity of Lake street, Poughkeepsie, New York, during which robbery MCINTOSH discharged a gun and assaulted an individual.

(Title 18, United States Code, Sections 1951 and 2.)

COUNT TEN

The Grand Jury further charges:

11. On or about October 28, 2010, in the Southern District of New York, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," and TERRENCE DUHANEY, a/k/a "Bounty Killer," the

defendants, and others known and unknown, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, namely, the robbery charged in Count Nine of this Indictment, knowingly did use and carry firearms, and in furtherance of such crime, did possess firearms, and did aid and abet the use, carrying, and possession of firearms, one of which was discharged during the robbery.

(Title 18, United States Code, Sections 924(c)(1)(A)(iii), 924(c)(1)(C)(i), and 2.)

COUNT ELEVEN

The Grand Jury further charges:

12. On or about May 15, 2010, in the Southern District of New York, TYRELL ROCK, a/k/a "Smurf," the defendant, having been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce a firearm, to wit, a Astra .45 caliber handgun, which previously had been shipped and transported in interstate and foreign commerce.

(Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).)

COUNT TWELVE

The Grand Jury further charges:

13. In or about May 2011, in the southern District of New York, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," the defendant, having been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce a firearm, to wit, a Cugir .223 caliber auto-loading ri-

fle, which previously had been shipped and transported in interstate and foreign commerce.

(Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).)

COUNT THIRTEEN

The Grand Jury further charges:

14. From in or about 2010 up to and including on or about June 14, 2011, in the Southern District of New York, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," the defendant, having been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce a firearm, to wit, a Ruger 9 millimeter handgun, which previously had been shipped and transported in interstate and foreign commerce.

(Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).)

COUNT FOURTEEN

The Grand Jury further charges:

15. From in or about 2010 up to and including on or about June 14, 2011, in the Southern District of New York, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," the defendant, having been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce a firearm to wit a Bushmaster .223 caliber rifle, which previously had been shipped and transported in interstate and foreign commerce.

(Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).)

COUNT FIFTEEN

The Grand Jury further charges:

16. On or about December 6, 2011, in the Southern District of New York, NEIL MORGAN, a/k/a "Steely," the defendant, having been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce ammunition, to wit, .32 caliber CBC ammunition, .38 caliber Federal ammunition, and 9 millimeter FC ammunition, among other ammunition, all of which had been shipped and transported in interstate and foreign commerce.

(Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).)

FORFEITURE ALLEGATION AS TO COUNTS ONE, THREE, FIVE, SEVEN, AND NINE

17. As a result of committing one or more of the offenses, in violation of Title 18, United States Code, Section 1951, alleged in Counts One, Three, Five, Seven, and Nine of this Indictment, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," EDWARD RAMIREZ, a/k/a "Taz," TERRENCE DUHANEY, a/k/a "Bounty Killer," TURHAN JESSAMY, a/k/a "Vay," QUINCY WILLIAMS, a/k/a "Capone," TYRELL ROCK, a/k/a "Smurf," and NEIL MORGAN, a/k/a "Steely," the defendants, shall forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, 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.

Substitute Assets Provision

18. If any of the above-described forfeitable property, as a result of any act or omission of the defendants:

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third person;

(3) has been placed beyond the jurisdiction of the Court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to 21 U.S.C. § 853(p), to seek forfeiture of any other property of said defendants up to the value of the forfeitable property.

(Title 18, United States Code, Section 981, Title 28, United States Code, Section 2461, Title 18, United States Code, Section 1951, and Title 21, United States Code, Section 853.)

[handwritten signature]
FOREPERSON

[handwritten signature]
PREET BHARARA
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
[filed Feb. 22, 2012]

UNITED STATES OF AMERICA -v.- LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," EDWARD RAMIREZ, a/k/a "Taz," TERRENCE DUHANEY, a/k/a "Bounty Killer," TURHAN JESSAMY, a/k/a "Vay," QUINCY WILLIAMS, a/k/a "Capone," TYRELL ROCK, a/k/a "Smurf," and NEIL MORGAN, a/k/a "Steely," Defendants.	**GOVERNMENT'S FORFEITURE BILL OF PARTICULARS** S3 11 Cr. 500 (KMK)

Pursuant to United States v. Grammatikos, 633 F.2d 1013, 1024 (2d Cir. 1980), the Government respectfully gives notice that the property subject to forfeiture as a result of the offenses described in Counts One, Three, Five, Seven, and Nine of the Indictment, as alleged in the Forfeiture Allegation, includes but is not limited to the following:

One Grey BMW 528, VIN# WBANF33506CS35810.

Dated: New York, New York
February 22, 2012

Respectfully Submitted,

PREET BHARARA
United States Attorney

By:___/s/_________________
SARAH R. KRISSOFF
Assistant United States Attorney
Telephone: (212) 637-2232

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
[filed Apr. 4, 2012]

UNITED STATES OF AMERICA -v.- LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," EDWARD RAMIREZ, a/k/a "Taz," TERRENCE DUHANEY, a/k/a "Bounty Killer," TURHAN JESSAMY, a/k/a "Vay," QUINCY WILLIAMS, a/k/a "Capone," TYRELL ROCK, a/k/a "Smurf," and NEIL MORGAN, a/k/a "Steely," Defendants.	**ORDER PURSUANT TO 21 U.S.C. § 853** S3 11 Cr. 500 (KMK)

WHEREAS, the Government has moved for an Order authorizing the United States and its agencies, including the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") and the United States Marshal Service ("USMS"), as well as the Westchestr County Department of Public Safety ("WCPD"), to maintain custody of the property described below pending the conclusion of the above-referenced criminal case:

One Grey BMW 528, VIN# WBANF33506CS35810

(the "Seized Asset");

WHEREAS, the Seized Asset is already in the lawful custody of the WCPD; and

WHEREAS, the Government has represented to the Court that the Seized Asset will be available for forfeiture at the conclusion of the pending criminal case; and

WHEREAS, the Seized Asset is alleged to be forfeitable to the United States pursuant to Title 21, United States Code, Section 853; and

WHEREAS, Section 853(e)(1) authorizes the Court to take any action necessary to preserve the availability of property for forfeiture;

IT IS HEREBY ORDERED, that the United States and its agencies, including ATF and the USMS, as well as the WCPD, are authorized to maintain and preserve the Seized Asset until the conclusion of the instant criminal case, pending further Order of this Court,

AND IT IS FURTHER ORDERED, that this Order satisfies the requirements described in Title 18, United States Code, Section 983(a)(3)(B)(ii)(II).

Dated: New York, New York
April 4, 2012

SO ORDERED:

[handwritten signature]
HONORABLE KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

[39] **UNITED STATES DISTRICT COURT**
SOUTHERN DISTRICT OF NEW YORK

[filed Aug. 28, 2013]

UNITED STATES OF AMERICA, v. LOUIS MCINTOSH, Defendant.	11 Cr. 500 (SHS)

August 13, 2013
10:03 a.m.

Before:

HON. SIDNEY H. STEIN
District Judge

APPEARANCES

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SARAH KRISSOFF
JESSICA MASELLA
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AIELLO & CANNICK
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DEVERAUX L. CANNICK
CALVIN H. SCHOLAR
INARA KHASHMATI

Also present: Agent Michael Burke, ATF
Darci Brady, paralegal
Phillippa Ross, paralegal

* * *

[113] Q. Mr. Rizzatti, I now want to turn to a different topic and ask you whether you have been the victim of a robbery at your house on Horton Avenue?

A. Yes.

Q. Do you recall the date of that incident?

A. Not exactly.

Q. Do you recall the time of year and the year?

A. Yes. It was the last Sunday in September.

Q. Of which year?

A. 2010.

Q. Approximately what time?

A. 7:30. About 7:30. It was dark.

[114] BY MS. MASELLA:

Q. And what were you doing at that time?

A. I was polishing an antique car that I have.

Q. And what area of your property were you at that time?

A. In the garage.

Q. Was your garage door open or closed?

A. It was open.

Q. At some point did you see an individual or individuals enter the garage area?

A. Yes.

Q. How many individuals?

A. Two.

* * *

[116] Q. What did the two individuals do when they came into your garage?

A. Well, the first one, the black guy who had the gun, came up to me and he says, don't look at me. And they moved me toward the back of the garage, facing the back of the garage, and they made me kneel down.

Q. What happened after that?

A. The second individual, Spanish or white guy, whatever he was, tried to shut the garage door with the button. But it wouldn't go down because there was an ice cream freezer in the way. So there was—I remembered it was clicking, the light was going on. And then he moved the freezer out of the way, and he pulled the string, and he finally got the garage door to shut.

Q. And what happened after the garage door was shut?

A. I was facing the back of the garage, kneeled down, and [117] he—he asked me where the money is.

MR. CANNICK: Objection, your Honor. "He."

Q. I'm going to ask you, sir, when you say "he," do you mean the first individual or the second individual?

A. I'm sorry. The first guy, the black guy with the gun. He asked me where the money was. And I didn't answer him. And then I told him, whatever you find, you can keep. And I don't know if it was him or the other guy proceeded to take—tape my wrists together.

Q. What kind of tape was used?

A. Duct tape. It was duct tape.

Q. Was that duct tape that was in your garage, or was it something that they had brought with them?

A. I don't know that. I can't answer that question.

Q. What happened after your wrists were taped?

A. He asked me if I had an alarm system on my house.

MR. CANNICK: Objection.

Q. I'm sorry. Again?

A. The guy with the gun asked me if I had an alarm system in my house and if anyone was in there, and I told them no. At that point I remember the gun was on my neck at one point. He put the pistol to my neck and pushed my neck. And as I was kneeling there, he taped me. He showed me a taser. I saw a taser momentarily.

Q. Stop for one second. And when you say you saw a taser, can [118] you describe what you saw.

A. It was dark. It was oblong. It had some prongs on it, and that's about it.

Q. Approximately how big was it?

A. Maybe three inches, four inches in length.

THE COURT: Were the lights on in your garage?

THE WITNESS: Yes.

MR. CANNICK: Your Honor, may we be clear as to when he said "he" showed me the taser, who's the he?

Q. The first guy, Mr. Rizzatti, or the second guy showed you the taser?

A. The first individual with the pistol.

Q. What happened after that?

A. They taped my mouth and they walked me outside of my garage. There's a door on the side of the garage which leads to the back door to the house. And we went to the house. We proceeded—he opened the door. We went downstairs. Oh, before that he taped my eyes. That's right. Oh, no. Excuse me. He taped my mouth. I'm sorry. He taped my mouth, and then we went to the house. Again, once we went downstairs—

* * *

[119] Q. What happened when you got downstairs?

A. They walked me—I have a workout bench. We went downstairs and they put me on the bench. At that point in time they taped me eyes.

Q. Do you recall which individual or—

A. I can't remember that. I don't remember which one actually taped my eyes, but my eyes were taped. And they tied me to—there's like a little workout bench, and they tied me to that bench with a cord.

Q. Once your eyes were taped, were you able to see any longer?

A. No.

Q. And what type of cord was used to tie you to the bench?

A. A vacuum cord, a vacuum cleaner cord.

Q. Was that something that was in your basement?

A. Yes, it was.

Q. And where on your body were you tied to the bench, which [120] portion?

A. Around my torso. My arms are not—having—just around my upper body, just to hold me in place.

Q. What happened after you were tied to the bench?

A. He was kind of asking me where the money was, and—

Q. Again, I'm sorry, Mr.—do you know which individual, could you tell?

A. It was the first guy, the black individual was asking me where the money was. And I wasn't answering him, so he tasered my neck a few times. And then they were just rummaging around the basement.

Q. How many times were you tasered in the neck?

A. Maybe three, four times. Three, four times he hit me in the neck. And I—I just—as he hit me, I just—I remember the—I just locked up and my heart was racing a lot.

Q. And while that was happening were you able to hear anything around you?

A. Just rummaging around. They were just rummaging around inside the place. I remember at one point I have a—I have the deer head, a deer head in the basement. And the second individual was fooling around with it. And the first individual said like—he told him something about, leave that alone, don't play around with that. I remember that part.

Q. What happened after that?

A. They were rummaging around and they knocked the sheetrock [121] down. There was money up in the

sheetrock, and they knocked the sheetrock. And I heard the sheetrock falling down. And that point I knew they had found the money in the basement.

Q. You said "the money." Did you have anything stored above the sheetrock ceiling?

A. Yes.

Q. What did you have stored in the sheetrock ceiling?

A. The money.

Q. Approximately how much money?

A. Seventy thousand.

Q. And was the $70,000 or so packaged in any particular way?

A. Yes, it was.

Q. How was it packaged?

A. It was packaged in packs of 2,000, wrapped in 10,000 packs.

Q. And how were the packs of 2,000 wrapped?

A. They were wrapped in bank straps and then rubber band in 10,000 packs.

Q. What were the bank straps made out of?

A. They were pink, pink $2,000 bank straps. It said 2,000 on each strap, and they were pink.

Q. And then there were rubber bands after that?

A. Yes.

Q. Did you have anything else in the ceiling?

A. Yes.

Q. What else did you have in the ceiling?

[122] A. There was a handgun.

Q. What kind of gun did you have?

A. A Smith & Wesson five-shot pistol, revolver.

Q. What color was it?

A. Stainless.

Q. Was it loaded or unloaded?

A. Loaded.

Q. Anything else in the ceiling?

A. That was it.

Q. After you heard the sheetrock ceiling fall, what happened next?

A. There was just like—there was moving around, and then he said—

Q. Do you know which individual?

A. Yeah. The first individual, I'm sorry. The first individual said, where's the rest of the money? And I was—my eyes were taped. My mouth was taped. So I was motioning, you know, no. And he goes, well, we're going to do it like this, and he pulls my pants down and he tasers my genitals. How many times? Maybe three, four times.

Q. Was that first individual saying anything at that time?

A. Yes. He said—he said, where's the rest of the money? And I was motioning, because I couldn't talk. And he says, well, we're going to do it like this, like—and he pulls my pants down and tasers me.

[123] Q. How did you react at that point?

A. My heart was racing and I was wrangling. It was pretty—it was a pretty bad experience.

Q. How long did that go on for, the tasering?

A. Fifteen seconds, twenty seconds approximately.

Q. What did you hear after that?

A. A little bit—excuse me. A little bit after that, it just got silent. Everything got silent. And I was waiting and I didn't hear anything. So a little time went by, and I had the tape, so I started to undo the tape. I got my hands free. I took the tape off and I turned the cord around, and I carefully went to the staircase that was going up, because I didn't know if they were still in the house or if they had left.

Q. Approximately how long had the robbers been in your house in total?

A. Thirteen minutes, fourteen minutes? Not long. Not long.

Q. And what did you do after you got the tape off your hands and your eyes?

A. Well, I went to the door and looked up, because I was afraid if they were still in the house. And nobody was there, so I went up the stairs. I went to my neighbor's house and told them I was robbed and called the police.

[252] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed Aug. 28, 2013]

UNITED STATES OF AMERICA, v. LOUIS MCINTOSH, Defendant.	11 Cr. 500 (SHS)

August 14, 2013
10:00 a.m.

Before:

HON. SIDNEY H. STEIN
District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
SARAH KRISSOFF
JESSICA MASELLA
Assistant United States Attorneys

AIELLO & CANNICK
Attorneys for Defendant
DEVERAUX L. CANNICK
CALVIN H. SCHOLAR
INARA KHASHMATI

Also present: Special Agent Michael Burke, ATF
Darci Brady, paralegal
Phillippa Ross, paralegal

* * *

[289] MICHAEL BURKE, called as a witness by the Government, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. MASELLA:

Q. Good morning, sir.

A. Good morning.

Q. Where do you work?

A. I am a special agent with the United States Justice Department, specifically the Bureau of Alcohol, Tobacco and Firearms and Explosives.

* * *

[318] Q. Agent Burke, during the course of your investigation, did you learn the name of Louis McIntosh's mother?

A. Yes.

Q. What is that name?

A. Janet McIntosh.

* * *

[349] MICHAEL WOLF, called as a witness by the Government, having been duly sworn, testified as follows:

DIRECT EXAMINATION

* * *

[415] Q. And where did you go in the Bronx?

A. Back to the house on 223rd Street.

Q. And what do you do there?

A. Take everything from the trunk of the Charger and then go into the house.

Q. And that's the bag that you stated before?

A. The bag, yes.

Q. And who goes in the house?

A. Me, Julian and Lou.

Q. And what happens when you go inside?

A. We open—I opened up the black bag, and there was a big money counting machine and the stun gun. And then there was two pistols. There was the pistol that Lou normally has and a little silver revolver.

Q. And that was all in the bag?

A. Yes.

Q. And did you see anything else?

A. Well, the money, but that wasn't in the bag.

Q. And where—what money did you see?

A. It was a bunch of $2,000 like wrappers, 20s wrapped in $2,000 wrappers.

Q. And where did the money come from? When did you first see the money?

A. Lou had the money.

Q. And do you know, did you see where he took the money from?

[416] A. It was in a bag that he had in the house, like a—little pull—like a string on it.

Q. And what did you do with the money?

A. We started splitting it. He told Julian to run out to the car for something, I'm not sure what, and he told me to hide like 10,000 so Julian didn't see it.

Q. Did you do that?

A. Yes.

Q. And what—I'm sorry. What did the money look like?

A. It was in $2,000 wrappers, 20s in—split up into $2,000.

Q. And what did the wrappers look like? What's a wrapper?

A. They were purple. It said $2,000 on it. They're purple and they're wrapped individually, you know, to make $2,000 out of 20s.

Q. And did you and McIntosh count the money?

A. Yes.

Q. And approximately how much was there?

A. About 70,000.

Q. Did you discuss what happened at the robbery?

A. Yes.

Q. And during that discussion did McIntosh say anything to you about what happened during the robbery?

A. Yes.

Q. What did he say?

A. Just that they duct taped Rob to his incline bench. He had [417] an incline bench in the basement. And they were zapping him in the crotch with the stun gun. Lou was zapping him with the stun gun, and

that Julian kind of had to plead with him to—enough, it's enough. He said his name. G was upset that he said—Lou called him G. He was upset that he said his name.

* * *

[422] Q. Mr. Wolf, did McIntosh tell you what he did with his share of the money from the robbery in Long Island?

A. Yes.

Q. What did he say?

A. He bought a BMW and a bracelet.

[423] Q. And did you ever see that car?

A. Yes.

Q. Do you know what kind of BMW it was?

A. 525. Silver 525.

Q. How long after the robbery did he buy that car?

A. Not very long at all. Within a week.

Q. Did he tell you where he bought the car?

A. He bought it from a salvage yard he said. I am not sure where. It was salvaged.

Q. I am going to show you Government Exhibit 901. If you can take a look at the item in there.

Do you recognize any of the items in Government Exhibit 901?

A. Yes. The bracelet and the ring.

Q. How do you recognize those items?

A. He bought the bracelet and the ring from a friend of mine's jewelery stove.

Q. When did he buy those?

A. Within a few weeks of the robbery.

Q. When you refer to "he," you are referring to McIntosh?

A. Lou, yes. Sorry.

[477] **UNITED STATES DISTRICT COURT**
SOUTHERN DISTRICT OF NEW YORK

[filed Aug. 28, 2013]

UNITED STATES OF AMERICA, v. LOUIS MCINTOSH, Defendant.	11 Cr. 500 (SHS)

August 15, 2013
9:37 a.m.

Before:

HON. SIDNEY H. STEIN
District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
SARAH KRISSOFF
JESSICA MASELLA
Assistant United States Attorneys

AIELLO & CANNICK
Attorneys for Defendant
DEVERAUX L. CANNICK
CALVIN H. SCHOLAR
INARA KHASHMATI

Also present: Agent Michael Burke, ATF
Darci Brady, paralegal
Phillippa Ross, paralegal

* * *

[556] ALLEN VRABEL, called as a witness by the Government, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. MASELLA:

Q. Good morning, sir.

A. Good morning.

Q. Could you tell us where you work?

A. Economy Auto, Incorporated.

[557] Q. And what is Economy Auto, Incorporated?

A. We sell salvaged vehicles.

Q. Where is it located?

A. In South Amboy, New Jersey.

Q. And how long have you worked at Economy Auto, Incorporated?

A. Since I was 15 years old.

Q. How old are you now, sir?

A. Fifty-three.

Q. What is your role with respect to that business? What is your title?

A. I'm president.

Q. Who else is involved in running that business?

A. It's a family business. My brother and me are partners.

Q. And when you say a salvage yard, can you just explain to the jury what you mean by that.

A. We sell and repair some—sell damaged motor vehicles in their as-is condition.

Q. What types of records do you maintain with respect to the sale of cars at your business?

A. Sale slips and copies of the invoices.

Q. And is that done for every sale that's made in your view?

A. Yes.

Q. Do you keep any records with respect to the identification of the purchaser of a vehicle?

A. Yes, we do.

[558] Q. And how are those records with respect to your business maintained?

A. We keep them as a sale copy for each vehicle that's sold in the jacket.

Q. Where are they kept?

A. At Economy Auto, Incorporated.

Q. And how long do you keep those records?

A. For seven years.

Q. Are you one of the people that has access to those records?

A. Yes.

Q. And are you one of the people that has responsibility for maintaining those records?

A. Yes.

Q. And are they regularly kept in the course of your everyday business at Economy Auto—

A. Yes.

Q. —Incorporated?

A. Yes.

Q. I'm going to approach, sir, now, and show you what's been marked for identification as Government Exhibit 650. Take a look at that, please.

A. Okay.

Q. Do you recognize those documents, Mr. Vrabel?

A. Yes, I do.

Q. And did you provide those documents?

[559] A. Yes, I did.

Q. Are those some of the documents that are regularly kept and maintained in the course of your business at Economy Auto, Incorporated?

A. Yes, they are.

Q. And are they accurate?

A. Yes. They look it, yes.

MS. MASELLA: Your Honor, the government offers government Exhibit 650.

MR. CANNICK: No objection.

THE COURT: Admitted.

(Government's Exhibit 650 received in evidence)

BY MS. MASELLA:

Q. Mr. Vrabel, I'd just like to ask you a few questions about those documents. Do those relate to the purchase of a particular car?

A. Yes, they do.

Q. What type of a car was it?

A. 2006 BMW.

Q. And what was the model on the car?

A. 525 XI.

Q. What was the date of the purchase?

A. 10/1 of 2010.

Q. What was the price?

A. $10,345.

[560] Q. And did you keep any records with respect—

THE COURT: When you said the date of purchase, is that the date that Economy Auto, Inc. purchased the 2006 BMW?

A. No. Date of sale. Excuse me, if I said purchase. This is the date of sale.

THE COURT: Date of sale?

Q. Sale to an individual?

A. It says date of sale to the individual.

THE COURT: To who? Oh, to somebody. Date of sale—

THE WITNESS: Exactly, yes.

THE COURT: Proceed.

MS. MASELLA: Thank you, your Honor.

BY MS. MASELLA:

Q. Are there any records with respect to the identification of the purchaser for that BMW?

A. Yes.

Q. What type of record is it?

A. In this case New York driver's license.

Q. And who is the individual who purchased that vehicle according to the driver's license identification?

A. Janet M. McIntosh.

Q. Do you keep any records with respect to the type of payment that was made with respect to that vehicle?

A. Yes, we do.

Q. What type of payment was made?

[561] A. Money orders.

Q. How much payment was made in money orders for that vehicle?

A. $8,000 in money orders.

Q. And was that one money order or several money orders?

A. Several.

Q. And what were the amounts of the money orders used to pay

for that vehicle?

A. Should I read them all or—the 8,000 total, it looks like 1,000, 2,000, 3,000, 4,000, 4,000 in thousand-dollar money orders. And it looks like—no, excuse me. 5,000 in thousand-dollar money orders, and the balance in $500 money orders.

Q. I want to approach now and show you—actually, it's in evidence. Let's put it on the screen, Ms. Ross. Government Exhibit 110-A37, please.

Mr. Vrabel, it should be on the screen in front of you. It's going to be on the big screen in a moment.

Do you recognize what is depicted in that photograph?

A. Yes.

Q. Can you tell us what it is?

A. A 2006 BMW.

Q. And what is the location depicted in that photograph?

A. That is at our yard.

Q. That's your yard?

A. Yes.

[562] MS. MASELLA: No further questions, your Honor.

THE COURT: Thank you. Any cross-examine?

MR. CANNICK: Briefly.

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. CANNICK:

Q. Sir, at the time of this sale—this was a salvage vehicle, right?

A. Yes.

Q. What was its damage?

A. I really—you know what, I don't know.

Q. As you sit here today, you don't know the amount of moneys that would be necessary to restore it to—

A. No, I don't.

MR. CANNICK: Thank you. Nothing further—one second, your Honor?

THE COURT: Yes.

Q. And these vehicles that come to your yard—it's a yard?

A. Yes.

Q. Wreckers or tow truck?

A. Yes.

Q. And are they vehicles that you go to an auction and purchase?

A. Some, yes. All depends on the vehicle.

Q. Do you know whether or not that one was?

[563] A. No, I do not.

Q. As you sit here today, would it be fair to say that you don't have any independent recollection whatsoever about this vehicle, other than you had it at one point in time and you sold it?

A. Yes.

MR. CANNICK: Thank you.

MS. MASELLA: Nothing further.

THE COURT: Thank you, sir. You are excused. You may step down.

(Witness excused)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed Jan. 17, 2014]

UNITED STATES OF AMERICA, V. LOUIS MCINTOSH,	**JUDGMENT OF ACQUITTAL** 11 Cr. 500 (SHS)

In an Opinion and Order dated today, the Court granted in part defendant's motion pursuant to Federal Rule of Criminal Procedure 29(c) and directed that a judgment of acquittal be entered on Counts Three and Four. (Dkt. No. 196.) That Opinion referred to the counts of the indictment as numbered in the version of the S3 Indictment that was redacted and submitted to the jury.

Counts Three and Four of the redacted indictment correspond to Counts Five and Six of the S3 Indictment. Accordingly, it is ORDERED that defendant is acquitted on Counts Five and Six of the S3 Indictment.

[handwritten signature]
Sidney H. Stein U.S. District Judge
January 17, 2014

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[filed Mar. 28, 2014]

UNITED STATES OF AMERICA **v.** LOUIS MCINTOSH	**JUDGMENT IN A CRIMINAL CASE** Case Number: 01:11 Cr. 00500 (SHS) USM Number: 65254-054 Deveraux L. Cannick Defendant's Attorney

THE DEFENDANT:

☐pleaded guilty to count(s)

☐pleaded nolo contendere to count(s)
which was accepted by the court.

☒was found guilty on count(s) 1, 2, 5, 6, 7, 8, 9, 10, 12, 13, and 14 in the (S3) Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951	Conspiracy to Commit Hobbs Act Robbery	12/31/2011	1
18 U.S.C. 925(c)(1)(A)(iii)	Use of a Firearm in Furtherance of a Crime of Violence	12/31/2011	2, 8, 10
18 U.S.C. 1951	Hobbs Act Robbery	10/28/2010	7, 9

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒The defendant has been found not guilty on count(s) 5 and 6. See Judgment of Acquittal entered on 01/17/2014.
☒Count(s) Underlying Indict. & open counts ☐is ☒are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/23/2014
Date of Imposition of Judgment

[handwritten signature]
Signature of Judge

Sidney H. Stein, U.S.D.J.
Name and Title of Judge

May 27, 2014
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. 922(g)(1)	Felon in Possession of a Firearm	6/14/2011	12, 13, 14

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

720 months as follows: 36 months on each of Counts 1, 7, 9, 12, 13, and 14 to run concurrently with each other; a mandatory minimum of seven years on Count 8 to run consecutive to the sentence imposed on Counts 1, 7, 9, 12, 13, and 14; a mandatory minimum of 25 years on Count 2 to run consecutive to the sentence imposed in Counts 1, 7, 8, 9, 12, 13, and 14; a mandatory minimum of 25 years on Count 10 to run consecutive to the sentence imposed on Counts 1, 2, 7, 8, 9, 12, 13, and 14.

☒The court makes the following recommendations to the Bureau of Prisons:

That defendant be incarcerated in the tri state area in order to facilitate visits with his family in the New York metropolitan area.

☐The defendant is remanded to the custody of the United States Marshal.

☐The defendant shall surrender to the United States Marshal for this district:

☐at __________ ☐a.m. ☐p.m. on ___________.

☐as notified by the United States Marshal.

☐The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐before 2 p.m. on ___________.

☐as notified by the United States Marshal.

☐as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _______ to __________ at ________ with a certified copy of this judgment.

UNITED STATES MARSHAL

By ______________
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Three years on each Count to run concurrently with each other.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*Check, if applicable*)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (*Check, if applicable*.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (*Check, if applicable.*)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (*Check, if applicable.*)

☐ The defendant shall participate in an approved program for domestic violence. (*Check, if applicable.*)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant s compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

The defendant shall continue to make restitution payments at the rate of 15% of his gross monthly earnings.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$900.00	$0.00	$75,000.00

☐The determination of restitution is deferred until____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination

☐The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Clerk of Court, U.S. District Court, S.D.N.Y.		$75,000.00	

500 Pearl Street New York, NY 1007-1312 (For disbursement to the victims. The government will provide the list of victims within 60 days.)			

TOTALS $0.00 $75,000.00

☐Restitution amount ordered pursuant to plea agreement $___________

☐The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

> ☐the interest requirement is waived for ☐fine ☐restitution
>
> ☐the interest requirement for the ☐fine ☐restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒Lump sum payment of $900.00 due immediately, balance due

☐not later than ______, or

☐in accordance with ☐C, ☐D, ☐E, or ☐F below; or

B ☐Payment to begin immediately (may be combined with ☐C, ☐D, or ☐F below); or

C ☐Payment in equal ______ (e.g., weekly, monthly, quarterly) installments of $______ over a period of ______ (e.g., months or years), to commence ______ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐Payment in equal ______ (e.g., weekly, monthly, quarterly) installments of $ ______ over a period of ______ (e.g., months or years), to commence ______ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐Payment during the term of supervised release will commence within ______ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒Special instructions regarding the payment of criminal monetary penalties:

If the defendant is engaged in a BOP non UNICOR work program, the defendant shall pay $25 per quarter toward the criminal financial penalties.

> However, if the defendant participates in the BOP's UNICOR program as a grade 1 through 4, the defendant shall pay 50% of his monthly UNICOR earnings toward the criminal financial penalties, consistent with BOP regulations at 28 C.F.R. § 545.11.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐The defendant shall pay the cost of prosecution.

☐The defendant shall pay the following court cost(s):

☒The defendant shall forfeit the defendant's interest in the following property to the United States:

> $95,000.00 in U.S. currency and a BMW. The government will submit an Order of Forfeiture for the Court's signature within one week.

Payments shall be applied in the following order: (I) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6)

community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed June 18, 2014]

UNITED STATES OF AMERICA,

v.

LOUIS McINTOSH,

Defendant.

11 Cr. 500 (SHS)

May 23, 2014
10:20 a.m.

Before:

HON. SIDNEY H. STEIN
District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: JESSICA MASELLA
SARAH KRISSOFF
Assistant United States Attorneys

AIELLO & CANNICK
Attorneys for Defendant
BY: DEVERAUX L. CANNICK
-and-
CALVIN H. SCHOLAR
Attorney for Defendant

Also present: Agent Michael Burke, ATF

* * *

[23] THE COURT: All right. I will now impose sentence.

I have given you the sentence I intend to impose. I will also add the standard, mandatory, and special conditions and the other recommendations of the probation department.

The probation department is recommending $75,000 in restitution. What is the position of the defense on that?

That's the amount of money that was estimated that was taken from the victim in the Lynbrook robbery.

MR. CANNICK: Your Honor, if my recollection of the facts are correct, he was not in a position to categorically state the amount of money that was taken.

THE COURT: That's correct, he was not.

MR. CANNICK: I would object to the amount, and I would object to any restitution being made here.

THE COURT: Thank you.

What is the position of the government?

MS. MASELLA: We are seeking restitution in the amount of $75,000. That is, in the government's view, a conservative estimate of what was taken from the Lynbrook robbery as well as the Poughkeepsie robbery. There was testimony not only from the Lynbrook victim but from—

THE COURT: There was testimony about the wrapping of the bank notes.

MS. MASELLA: Correct. And also from the cooperating [24] witnesses who saw the money the next day

and from Michael Wolf who received a portion of the money.

In addition, there was testimony about approximately $12,000 being taken from the Poughkeepsie robbery, which was divided between McIntosh and the two other robbers. In addition to restitution, we are also going to be seeking forfeiture of the $75,000 in a money judgment, as well as the BMW that was purchased with robbery proceeds.

THE COURT: Do you have an order?

MS. MASELLA: We don't have the order today, but we are prepared to submit it within the next week.

THE COURT: Mr. Cannick, what is your position on that?

MR. CANNICK: We would object to that as well.

THE COURT: Any basis for objecting to the forfeiture?

MR. CANNICK: I don't think there was any direct tie-in of that money that was utilized to purchase the BMW. I think that there was a reference that money was obtained from my client's family for the purchase of the vehicle.

THE COURT: Ms. Masella.

MS. MASELLA: The cooperating witness Michael Wolf testified that McIntosh purchased the BMW shortly after the Lynbrook robbery, and we also had the documents and testimony of the individual who sold the BMW within days of that robbery. It was purchased in large amounts of cash.

[25] MR. CANNICK: There is nothing dispositive to say that whatever currency was used to purchase the

car came from my client or the robbery. The car was purchased by a family member.

THE COURT: Still, I do remember, now that Ms. Masella is reminding me of the evidence, of the closeness in time, and there was even other evidence about something he said to someone about that BMW. But the evidence is adequate to have them forfeit the BMW.

Let me put on the record my findings on the 924 point that Mr. Scholar was raising, as well as how I come up with the more liberal, as it were, that is the ordering of the 924(c) charges that's more favorable for the defendant.

Separation of the 924(c), my reasoning is as follows: The jury convicted Mr. McIntosh on three counts under 18 U.S.C. 924(c), which provides a mandatory minimum sentence when "any person during and in relation to any crime of violence uses or carries a firearm, where who in furtherance of any such crime possesses a firearm." Each conviction under 924(c) requires its own consecutive sentence.

Mr. McIntosh's sentencing memorandum seeking to avoid consecutive sentences for the multiple 924(c) counts argued that the Court should "construe the indictment as if the subsequent 924 counts were charged in one count as part of Count Two." That's from the sentencing memorandum of the [26] defendant at 9. This argument relies on the premise that a "conspiracy is a single ongoing crime."

The defense characterizes Count Two as a "single charge of the 924 conspiracy." So the defense believes that Count Two subsumes the two other 924(c) counts, that is Counts Six and Eight. But Count Two does

not charge a 924 conspiracy. It actually charges the use of a firearm in furtherance of a Hobbs Act conspiracy set forth in Count One. Count Six charges the use of a firearm in furtherance of the Lynbrook loan shark robbery. And Count Eight charges yet another separate use of a firearm in furtherance of the Poughkeepsie men's club robbery. Count Two is not associated with any particular robbery and ample evidence at trial supports a 924(c) conviction separate and apart from the conduct in Count Six and Eight.

As set forth in that section of the government's brief that Ms. Masella read, and as added to by the Court, each 924(c) conviction here is based—that is, Two, Six and Eight—is based on a separate predicate offense and separate conduct as required by *United States v. Mejia*, 545 F.3d 179, 204-205 (2d Cir. 2008). In *Mejia*, the U.S. Court of Appeals for the Second Circuit held that separate shootings constitute separate 924(c) violations, even though a single conspiracy tied together the assaults that were the separate predicate offenses. *Mejia* 206.

So, too, in the case of Mr. McIntosh. Separate uses [27] of firearms constitute the separate 924(c) convictions, even though they are all part of the same conspiracy. A reasonable jury could have found that distinct conduct gave rise to Counts Two, Six and Eight, and I am therefore bound under 924(c) and *Mejia*, and related cases, such as the summary order in *United States v. Young* of the Second Circuit in the last month or two, to sentence Mr. McIntosh consecutively on each count, and that's what I intend to do.

Now, in regard to the 7, plus 25, plus 25, as opposed to the 10, plus 25, plus 25, my decision is as follows:

Mr. McIntosh has not previously been convicted under 924(c). Therefore, one of his convictions on Counts Two, Six and Eight represent a first conviction for him under 924(c). The other two counts are second and third convictions, that is subsequent convictions. 18 United States Code is clear that "in the case of a second or subsequent conviction under that subsection, the person shall be sentenced to a term of imprisonment of not less than 25 years. That's 924(c)(1)(C).

Therefore, for each of Mr. McIntosh's second and third convictions under that subsection, I am required to sentence him to a minimum of 25 years' imprisonment. In other words, his two subsequent offenses under 924(c), no matter which two counts represent those two subsequent offenses as opposed to the initial conviction, together require a total sentence with the two subsequent counts of 50 years, that's 25 years on each. [28] But before those 50 years begin, Mr. McIntosh must first serve his sentence on the initial conviction under 924(c). But the length of the sentence on the initial conviction depends upon the definition of the initial and subsequent convictions, that is, whichever count is the initial conviction as opposed to the two subsequent convictions under 924(c) determines how much time must pass until Mr. McIntosh can begin serving the 50 years he must serve on the two subsequent convictions.

For Counts Two and Eight, the jury found that a firearm was discharged. For Count Six, the jury found only that a firearm was brandished. For an initial conviction of a discharged firearm requires a minimum sentence of 10 years' imprisonment. That's 924(c)(1)(A)(iii). But a brandished firearm requires a

minimum sentence of "only" 7 years in 15 prison. 18 U.S.C. 924(c)(1)(A)(ii).

Thus, if the initial conviction is on Count Two, for which the jury found the firearm was discharged, then that conviction requires a mandatory minimum sentence of 10 years, to be followed by 25 and then 25 again. By contrast, if the initial conviction is under Count Six, that is the Lynbrook robbery, where the jury found a firearm was simply brandished rather than discharged, that conviction requires a sentence of 7 years, to be followed by the 50 years on the other two subsequent convictions, that is Counts Two and Eight.

Thus, if Count Two comes first, then the consecutive [29] mandatory minimum sentences on the 924(c) counts add up to 60 years. If Count Six comes first, then the consecutive mandatory minimum sentences on the firearm counts add up to 57 years, which is the more lenient sentence.

I therefore determine that Count Six is the initial conviction under 924(c), and Counts Two and Eight are the second and third convictions, that is the subsequent convictions. Count Six charges McIntosh with conduct on the September 26, 2010 robbery. Count Eight charges McIntosh with conduct on the October 28, 2010 robbery. Count Two extends beyond those dates covering both earlier and later dates. Count Two charges conduct from 2009 through 2011. The conduct in Count Six ended before the conduct in Counts Two and Eight ended so it is the initial offense.

To the extent that there is no intuitive sequence between Count Six and Two because the time of Count Two encompasses the time of Count Six, the rule of

lenity resolved that ambiguity in favor of Count Six's conduct having transpired first.

Count Six, the initial offense under 924(c), carries a mandatory minimum of 7 years. And Two and Eight, the subsequent offenses, each carry a mandatory minimum of 25 years. The 924(c) charges all together, therefore, require a minimum sentence of 57 years, not 60 years.

Accordingly, I hereby state the sentence as follows:

[30] The offense level is 34, the criminal history category is III, the guideline range is 188 to 235 months, followed by a mandatory minimum of 57 years to run consecutive.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that the defendant, Louis McIntosh, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 720 months as follows:

On Counts One, Five, Seven, Nine, Ten and Eleven, he is sentenced to 36 months on each count to be served concurrently with each other. He is to serve a mandatory minimum 7 years on Count Six, to be served consecutively to the service of the sentence on Counts One, Five, Seven, Nine, Ten and Eleven. On Count Two, he is sentenced to a mandatory minimum of 25 years, which is to be served consecutively to both the 36 months on Counts One, Five, Seven, Nine, Ten and Eleven, and consecutive to the 7 years on Count Six. On Count Eight, he is sentenced to a mandatory minimum of 25 years, which will be served consecutively to the other counts, for a total of 720 months.

Upon release from imprisonment, Mr. McIntosh shall be placed on supervised release. On each of the counts of conviction—that is Counts One, Two, Five, Six, Seven, Eight, Nine, Ten and Eleven—three years on each count to be served concurrently with each other. He shall serve his term of supervised release with the following conditions:

[31] He shall not commit another federal, state or local crime.

He shall not illegally possess a controlled substance.

He shall not possess a firearm, dangerous weapon or destructive device.

He shall refrain from any unlawful use of a controlled substance.

He shall submit to one drug test within 15 days of his placement on supervised release and at least two unscheduled drug tests thereafter as directed by his probation officer.

He shall cooperate in the collection of DNA as directed by his probation officer.

He shall comply with standard conditions 1 through 13, plus the following special conditions:

He shall submit his person, residence, place of business, vehicle or any other premise under his control to a search on the basis that his probation officer has a reasonable belief that contraband or evidence of a violation of any condition of release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to search may be grounds for revocation. Mr. McIntosh shall inform all other residents that the premises may be subject to search pursuant to this condition.

He shall also provide the probation officer with access to all requested financial information.

[32] He shall not incur new credit charges or open additional lines of credit without the approval of his probation officer unless he is in compliance with the installment payment schedule I am about to impose on restitution.

Within 72 hours of release from the custody of the Bureau of Prisons, he shall report in person to the probation office in the district to which he is released.

I am not imposing a fine because I find Mr. McIntosh lacks the ability to pay a fine after taking into account his lack of assets, the sentence I am imposing on him, and his restitution and forfeiture obligations.

I hereby impose restitution in the sum of $75,000, payable to the Clerk of the United States District Court for disbursements to the victims.

Pursuant to 18 U.S.C. 3664(d)(1), within 60 days, the government shall provide the Court with a listing of the amounts subject to restitution with the specific victims, which will then be provided to the clerk of court so that the court can set forth who the victims are and the amount due.

The restitution is going to be paid while the defendant is in prison on the following schedule:

If he is engaged in a BOP non-UNICOR work program, he shall pay $25 per quarter towards the criminal financial penalties, but if he participates in the BOP's UNICOR program [33] as grade 1 through 4, he shall pay 50 percent of his monthly UNICOR earnings towards the criminal financial penalties consistent with BOP regulations at 28 CFR 545.11. After

his release from prison, he shall pay 15 percent of his gross monthly earnings toward restitution.

I have considered the factors set forth in 18 U.S.C. 3664(f)(2) in imposing restitution, and I have specifically considered the amount of the loss sustained by any victim as a result of the offense, Mr. McIntosh's financial resources, and his financial needs and earning ability, and the fact that the significant likelihood is that he will be incarcerated during a substantial portion of his remaining life and paying restitution pursuant to the BOP regulations concerning work programs of prisoners.

I hereby order that Mr. McIntosh pay to the United States a special assessment of $900, that is $100 on each of the remaining counts of conviction, and that payment is due immediately.

I am also directing an order of forfeiture of $75,000, plus a BMW. The government shall submit an order of forfeiture for signature by the Court within a week. I am finding that the $75,000 and the BMW are the fruits of the crime derived from the crimes.

My reason for the sentence is I understand my authority under the guidelines. I understand that the [34] guidelines are advisory. I understand my authority to vary from the guidelines. I have no choice under the 924 counts in terms of the mandatory minimums. I was not going to impose a sentence above the mandatory minimum on the 924(c) counts. As I have said, I have given the more lenient ordering of the 924(c) counts. And in terms of the underlying offenses, I have sentenced him to 36 months, which I think is appropriate, reasonable and fair, and sufficient but not greater than necessary, and meet the ends of the criminal justice system having in mind the mandatory

nature of the minimums on the 924(c) counts. I have factored in all of the factors in 18 U.S.C. 3553(a) to determine what sentence is reasonable and appropriate, and I have imposed it.

Mr. Cannick, do you know any legal reason why the sentence I have imposed should not be imposed as I have stated it?

MR. CANNICK: No.

THE COURT: Ms. Masella?

MS. MASELLA: No.

THE COURT: I hereby order the sentence to be imposed as I have stated it.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[filed Aug. 24, 2016]

LOUIS MCINTOSH, Petitioner-Appellant -v.- UNITED STATES OF AMERICA, Respondent-Appellee.	**AFFIRMATION** No. 14-1908
STATE OF NEW YORK NEW YORK COUNTY SOUTHERN DISTRICT OF NEW YORK	ss.:

SARAH R. KRISSOFF, pursuant to Title 28, United States Code, Section 1746, hereby affirms under penalty of perjury:

1. I am an Assistant United States Attorney in the Office of Preet Bharara, United States Attorney for the Southern District of New York, and I represent the United States in this appeal. I submit this affirmation in support of the Government's motion to remand this appeal so the District Court can amend the Judgment and Conviction to correct the forfeiture amount, and for the District Court's consideration of formal restitution and forfeiture orders.

STATEMENT OF FACTS

A. McIntosh's Trial and Sentencing

2. Louis McIntosh appeals from a judgment of conviction entered on May 28, 2014, by the Honora-

ble Sidney H. Stein, United States District Judge, following his trial conviction.

3. Indictment S3 11 Cr. 500 (the "S3 Indictment") was filed on January 17, 2012, in fifteen counts. Louis McIntosh was charged in eleven counts.[1] Count One charged McIntosh and others with participating in a Hobbs Act robbery conspiracy, from at least in or about 2009 through in or about 2011, in violation of Title 18, United States Code, Section 1951. Count Two charged McIntosh and others with using, carrying, and possessing firearms in connection with the robbery conspiracy charged in Count One, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(iii) and 2. Counts Three, Five, and Seven charged McIntosh and others with substantive Hobbs Act robberies, in violation of Title18, United States Code, Sections 1951 and 2. Counts Four, Six, and Eight charged McIntosh and others with using, carrying, and possessing firearms in connection with each of those Hobbs Act robberies, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii), 924(c)(1)(A)(iii), 924(c)(1)(C)(i), and 2. Counts Nine, Ten, and Eleven charged McIntosh with possessing guns after having been convicted of a felony, to wit, a Cugir .223 caliber auto-loading rifle, a Ruger 9 millimeter handgun, and a Bushmaster .223 caliber rifle, respectively, in violation of Title 18,

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[1] In connection with trial, the S3 Indictment was redacted to remove references to other defendants not on trial, and the counts were, accordingly, renumbered. The count numbers referred to herein are the count numbers in the redacted S3 Indictment, which were the count numbers utilized during the course of the trial, and the count numbers referred to in Judge Stein's January 17, 2014 opinion and order. (A. 18).

United States Code, Sections 922(g)(1) and 924(a)(2). (Docket Entry 59; A. 26-37).[2]

4. Trial on the indictment began on August 12, 2013, and ended on August 22, 2013, when the jury convicted McIntosh on all counts. (Docket Entries 163-81; A. 18). On January 17, 2014, Judge Stein issued an opinion and order directing a judgment of acquittal on one of the substantive robbery counts, Count Three (originally, Count Five), and the corresponding gun charge, Count Four (originally, Count Six). (Docket Entry 196; A. 447-63).

5. On May 23, 2014, Judge Stein sentenced McIntosh to 720 months' imprisonment, to be followed by a term of three years' supervised release, and imposed a mandatory $900 special assessment. (A. 23, 464-99). After hearing argument at the sentencing proceeding regarding the restitution and forfeiture, Judge Stein also ordered McIntosh to pay $75,000 in restitution to the victims, and ordered the forfeiture of $75,000 and a BMW that was purchased with the proceeds from one of the robberies. (A. 486-88, 495-96). Judge Stein further requested that the Government provide the District Court with (1) a list of the specific victims to receive restitution within 60 days; and (2) a formal forfeiture order within one week after sentencing. At sentencing, Judge Stein also detailed a payment schedule for the restitution. (A. 495-96).

[2] "Br." refers to McIntosh's brief on appeal; "A." refers to the appendix filed with that brief; "Docket Entry" refers to an entry on the District Court's docket; "App. Docket Entry" refers to an entry on this Court's docket for this appeal; "Tr." refers to the trial transcript.

6. The Judgment was filed on May 28, 2014. (Docket Entry 215; A. 511-17). The Judgment set the restitution amount at $75,000, and ordered the forfeiture of $95,000 and the BMW. (A. 516-17).

B. McIntosh's Appeal

7. McIntosh filed his notice of appeal on May 28, 2014. (A. 24, 518; Docket Entry 216). The Government filed its notice of cross-appeal on June 26, 2014. (Docket Entry 219). On June 14, 2016, McIntosh filed his brief on appeal, arguing principally that (1) his 924(c) convictions should be vacated because Hobbs Act robbery, and conspiracy to commit the same, are not "crimes of violence" under the "force clause" of § 924(c)(3)(A), and the "risk of force clause" (§ 924(c)(3)(B)) is void for vagueness after *Johnson* v. *United States*, 135 S. Ct. 2551 (2015); (2) one of McIntosh's Hobbs Act robbery convictions, and the related 924(c) conviction, should be vacated because the evidence was insufficient to establish the interstate commerce element and there was no venue for those counts; and (3) the District Court's orders of restitution and forfeiture are invalid and must be vacated. (App. Docket Entry 94). In connection with the restitution, McIntosh argues that the order of restitution must be vacated because the District Court did not identify the particular victims to receive the restitution, and their individual loss amounts. (Br. 56). McIntosh further complains that the bulk of the restitution was improperly intended to compensate a victim whom, McIntosh claims, illegally obtained the money that was taken from him. (Br. 57-58). McIntosh asserts that the District Court's order of forfeiture is also flawed, and must be reversed, because (1) the written Judgment indicates a forfeiture amount of $95,000 and a BMW, when the District Court only

orally ordered forfeiture in the amount of $75,000 and a BMW; and (2) the forfeiture order is duplicative of the restitution order. (Br. 59-60).

8. The Government's opposition brief is currently due to the Court on September 12, 2016. (App. Docket Entry 108).

ARGUMENT

9. The Government agrees with McIntosh that the forfeiture amount set forth in the written Judgment is incorrect, and should be reduced from $95,000 to $75,000, to conform with the District Court's oral pronouncement of forfeiture at McIntosh's sentencing. Further, the Government agrees with McIntosh that the District Court docket does not reflect (1) the issuance of a written, formal forfeiture order; or (2) further specification of the victims to receive the restitution ordered at sentencing. (A. 1-25).

10. Accordingly, having reviewed the applicable case law and rules, and in the pursuit of judicial economy and efficient use of resources, the Government respectfully requests that this Court remand this case in accordance with the procedures set forth in *United States* v. *Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), to allow Judge Stein to correct the written Judgment, and supplement the record with regard to his restitution and forfeiture orders by issuing formal, written orders.

11. Upon remand, the District Court would have the authority to correct the written Judgment and supplement the record by entering the formal orders of restitution and forfeiture. Rule 36 of the Federal Rules of Criminal Procedure gives the District Court

the authority to correct the Judgment, upon remand. Accordingly, a limited *Jacobson* remand would allow the District Court to amend the Judgment to reflect the appropriate, lower forfeiture amount orally pronounced at sentencing.

12. With regard to restitution, in *United States* v. *Dolan*, 130 S.Ct. 2533 (2010), the Supreme Court held that a sentencing court that misses the ninety day deadline for making final determination of victim losses, set forth in the Mandatory Victims Restitution Act ("MVRA"), nonetheless retains power to order restitution where the sentencing court had made clear that it would be ordering restitution. The Second Circuit has routinely applied this holding. *See*, *e.g.*, *United States* v. *Qurashi*, 634 F.3d 699, 705 (2d Cir. 2011) (no prejudice where restitution hearing was held more than ninety days after sentencing, when District Court made clear that it would be ordering restitution); *United States* v. *Anderson*, 419 F. App'x 16, 17 (2d Cir. 2011) (applying *Dolan* and holding that Government's delay in providing specific victim information to the District Court did not invalidate restitution, where the District Court stated at sentencing that it would be ordering restitution, leaving open only the amount and specific victim information); *United States* v. *Gushlak*, 728 F.3d 184, 191-92 (2d Cir. 2013) (holding that District Court was authorized to enter a restitution order significantly after the sentencing, when it was made clear at the sentencing that such an order would be entered when the appropriate restitution amount was determined).

13. Here, the record regarding restitution was nearly complete. After hearing the evidence presented at trial, and hearing the parties' arguments at

sentencing regarding the appropriate amount of restitution, Judge Stein orally ordered McIntosh to pay $75,000 in restitution to the victims. (A. 486-88, 495-96). At sentencing, Judge Stein also detailed a payment schedule for the restitution. (A. 495-96). This restitution amount was set forth in the written Judgment. (A. 516-17). Unlike *Dolan* and its progeny, the *only* item left open with regard to the restitution was the provision, by the Government, of a list of the victims, and their contact information. (A. 495; 511-17). Indeed, many of the victims, including the victim to whom the vast majority of the restitution is owed, testified at trial. (Tr. 110-55; 564-626; 648-61).

14. The Government has been unable to confirm, one way or the other, whether the victim list was provided, after sentencing, to the District Court or the Clerk of the Court. Accordingly, given the case law and the ample record regarding restitution, on remand, the Government will provide such a list to the District Court as part of a formal restitution order, and request that the District Court enter such an order. To the extent that McIntosh contests the entry of such an order, or the inclusion of particular victims, he may do so before the District Court on remand, and the District Court can make whatever factual record is appropriate regarding those objections, if any.

15. The principles set forth in *Dolan* also apply to the District Court's determination of forfeiture. *See United States* v. *Martin*, 662 F.3d 301, 308-10 (4th Cir. 2011) (refusing to vacate the District Court's forfeiture orders, which were entered beyond the time periods set forth in the applicable rule). Again, the record regarding forfeiture in the District Court was nearly complete. After hearing the evidence present-

ed at trial, and argument at the sentencing proceeding regarding the forfeiture, Judge Stein orally ordered the forfeiture of $75,000 and a BMW that was purchased with the proceeds from one of the robberies. (A. 486-88, 495-96). Judge Stein included the money judgment (albeit with a higher, incorrect amount) and the forfeiture of the BMW in the Judgment (Docket Entry 215; A. 511-17). Judge Stein further requested that the Government provide the District Court with a formal forfeiture order within one week after sentencing. (A. 495-96).

16. While the Government has located correspondence confirming that the formal forfeiture order for McIntosh was prepared, the Government has been unable to confirm, one way or the other, whether the formal order was subsequently transmitted to the District Court. Accordingly, given the case law and the ample record regarding forfeiture, on remand the Government will provide the District Court with the formal forfeiture order it requested, and request that the District Court enter the order and simultaneously correct the Judgment to reflect the correct forfeiture amount. 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 appropriate.

17. Remanding this appeal under *Jacobson* for the limited purpose of entering the formal written orders of restitution and forfeiture, and correcting the forfeiture amount on the Judgment, will conserve judicial resources because it will enable the resolution of all of McIntosh's appellate issues at the same time, on a complete record. Moreover, McIntosh is not prejudiced by the relatively limited delay that will be

occasioned by this remand, because (a) McIntosh himself did not file his principal brief on appeal until more than two years after his sentencing; (b) McIntosh's first appellate issue is foreclosed by this Court's recent decision in *United States* v. *Hill*, --- F.3d ---, 2016 WL 4120667 (2d Cir. Aug. 3, 2016), which squarely rejects McIntosh's claim regarding the viability of his Section 924(c) convictions after *Johnson*; and (c) McIntosh's remaining appellate issue, regarding the sufficiency of the evidence on one of the robbery counts and its associated Section 924(c) count, even if successful, would still leave him serving a substantial sentence of more than 400 months' imprisonment.

18. Following Judge Stein's correction of the clerical error in the Judgment, and entry of the previously-requested formal orders of restitution and forfeiture (or, should McIntosh object before Judge Stein, decision not to enter any further orders on restitution or forfeiture), either party could restore jurisdiction to this Court by filing with the Clerk within fourteen days of the District Court's action a letter advising the Clerk that jurisdiction could be restored, and proposing a schedule for supplemental briefing by McIntosh, if any, and the filing of the Government's opposition brief on appeal.

19. As noted above, the Government's opposition brief on appeal is currently due on September 12, 2016. If the Court denies this motion on any date after August 29, 2016, the Government respectfully requests that its brief be due 14 days after the entry of the order denying this motion.

20. I have spoken with McIntosh's counsel, who has indicated that he has no objection to the remand requested herein.

CONCLUSION

21. For the reasons stated above, this Court should remand this case in accordance with the procedures set forth in United States v. Jacobson, 15 F.3d at 22, in order to allow Judge Stein to amend the Judgment to correct the forfeiture amount, and enter the previously-requested formal restitution and forfeiture orders on the district court docket.

I declare under penalties of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. § 1746.

Dated: New York, New York
August 24, 2016

<u>/s/ Sarah R. Krissoff</u>
Sarah R. Krissoff
Assistant United States Attorney
Telephone: (212) 637-2232

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[filed Nov. 30, 2016]

United States of America, *Appellee-Cross-Appellant*, v. Edward Ramirez, AKA Taz, et al., *Defendants*, Louis McIntosh, AKA Lou D, AKA Lou Diamond, AKA G, *Defendant-Appellant-Cross-Appellee*	No. 14-1908 (L), 14-3922 9XAP)

John M. Walker, Jr., Robert D. Sack, Denny Chin, *Circuit Judges*.

The Government moves to remand the appeal pursuant to the procedures set forth in *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994). Appellant does not oppose the motion. Upon due consideration, it is hereby ORDERED that the motion is GRANTED.

On remand, if it wishes to pursue restitution and forfeiture, the Government shall provide the district court with a victim list and request entry of formal orders of restitution and forfeiture. The district court retains discretion on remand to consider additional evidence or to refer the case for further factfinding, as may be helpful to its determination. Additionally, the district court may, in accordance with Federal Rule of Criminal Procedure 36, "amend the written judgment so that it conforms with the oral sentence pronounced by the court." *United States v. Werber*, 51 F.3d 342, 347 (2d Cir. 1995); *see* Fed. R. Crim. P. 36.

In accordance with *Jacobson*, the mandate shall issue forthwith. Jurisdiction over the appeal will be automatically restored to this Court, without the need for a new notice of appeal, upon notification of the Clerk of Court within fourteen (14) days of the district court's decision.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk

[SEAL]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed Dec. 2, 2016]

UNITED STATES OF AMERICA, -against- LOUIS MCINTOSH, Defendant.	11-Cr-500 (SHS) **ORDER**

SIDNEY H. STEIN, U.S.D.J.

The Court has received the Order and Mandate of the Second Circuit issued on November 30, 2016, in which a panel of the Second Circuit granted the government's unopposed motion to remand this matter to this Court pursuant to the procedures set forth in *United States v. Jacobson,* 15 F.3d 19, 22 (2d Cir. 1994).

If the government wishes to pursue restitution and forfeiture it shall provide this Court with a list of victims and the amount of restitution due each victim and proposed formal orders of restitution and forfeiture. If the parties are able to agree upon the orders, they should do so and submit the agreed upon orders to the Court on or before December 23, 2016. If they cannot agree upon the orders, the government is directed to submit its proposed orders on or before December 23, 2016, and the defense shall submit its objections to the proposed orders on or before January 13, 2017.

After submission of those proposed orders and the adjudication of any disputes, the Court will amend

the written judgment of conviction filed on May 28, 2014, and entered on June 2, 2014, pursuant to Fed. R. Crim P. 36 to change the forfeiture amount from "$95,000 in U.S. currency and a BMW" to "$75,000 in U.S. currency and a BMW" in order for the judgment to conform to the sentence orally pronounced by the Court.

Dated: New York, New York
December 2, 2016
SO ORDERED:

[handwritten signature]
Sidney H. Stein, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed Aug. 2, 2017]

UNITED STATES OF AMERICA, v. LOUIS McINTOSH, a/k/a "Lou D," A/k/a "Lou Diamond," a/k/a "G,", Defendant.	11 Cr. 500 (SHS)

Oral Argument
New York, N.Y.
July 14, 2017
11:00 a.m.

Before:

HON. SIDNEY H. STEIN,
District Judge

APPEARANCES

JOON H. KIM
Acting United States Attorney for
the Southern District of New York
SARAH R. KRISSOFF
Assistant United States Attorney

NEWMAN & GREENBERG LLP
Attorneys for Defendant
STEVEN Y. YUROWITZ

* * *

[9] THE COURT: And that would be on the schedule that I had imposed in the original judgment and at sentencing. Let me just take a look at the original judgment here.

Yes, the date of it is May 27, 2014, and it provides for restitution of $75,000. That obviously will be changed. And it was restitution at the rate of 15 percent gross monthly earnings, so I'll keep that the same. And everybody agrees that the clerical error by the Court is to be changed; that is, the judgment improperly said $95,000 and the BMW, when orally it was in the correct amount, $75,000 forfeiture and the BMW.

* * *

[15] THE COURT: Let me ask a separate question. The forfeiture order in the original judgment said 95,000 and should have said 75,000, in U.S. currency, and the BMW. The preliminary order of forfeiture says, "Now therefore," there's an order as a result of the offense, "money judgment in the amount of $75,000 shall be entered. As a result of the offenses charged, all of the defendant's title in the seized vehicle is hereby forfeited for disposition."

Does that mean that the revised judgment should simply say $75,000 in U.S. currency?

MS. KRISSOFF: Your Honor, I think the judgment would need to reflect the $75,000 and the BMW. The order makes it clear that any proceeds obtained after the sale of the BMW would then be applied to the money judgment.

THE COURT: All right. I understand.

MR. YUROWITZ: Paragraph 8.

THE COURT: Pardon me?

MR. YUROWITZ: That's in paragraph 8.

MS. KRISSOFF: Yes.

THE COURT: Fine, that takes care of that, so it will [16] say 75,000 and the BMW.

Next question. Why did the government not give me a preliminary order of forfeiture prior to or at sentencing?

MS. KRISSOFF: Your Honor, I think this was just a mistake. I myself was on leave at the time of the sentencing. I came back with my very young child for the sentencing and had somebody care for my child so I could be here.

THE COURT: You mean you didn't leave the baby alone, is that what you're telling the Court?

MS. KRISSOFF: No. Yes, your Honor, a number of paralegals watched the baby so I could be here for the sentencing, and I was very thankful to them for that. In fact, it was the forfeiture paralegal team, ironically.

I wasn't working at the time, so I don't know what happened.

THE COURT: All right.

MS. KRISSOFF: I think it was a mistake, your Honor.

THE COURT: Falling in between the stools, OK, but the fact is there was no preliminary order of forfeiture, so now let's turn to that question.

MS. KRISSOFF: Yes, your Honor.

THE COURT: Just a moment.

Mr. Yurowitz is saying that it's too late to obtain for-

feiture here because the Federal Rules of Criminal Procedure are quite specific, specifically 32.2(b)(2)(B): "Unless doing [17] so is impracticable," and I don't think anyone is claiming here that that phrase is relevant, "the court must enter the preliminary order," that's the preliminary order of forfeiture under 32.2(b)(2)(B), "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under 32.2(b)(4)."

Given the fact that the Court did not enter a preliminary order, and none was presented to it before or at sentencing, speak to me, Ms. Krissoff.

MS. KRISSOFF: Your Honor, it is our position, and we have discussed this at length with our forfeiture chiefs as well, and it's our position that Rule 32.2(b)(4)(B) especially contemplates a later amendment to add a forfeiture order to the judgment.

THE COURT: Let's just make sure the record is clear. (b)(4)(B) says, "the court must include the forfeiture when orally announcing the sentence," and we're all agreed that I did, correct?

MS. KRISSOFF: Yes.

THE COURT: I orally announced the forfeiture, and not only that, I put it into the judgment, "or must otherwise ensure that the defendant knows of the forfeiture at sentencing."

Everyone agrees that he knew of the forfeiture at sentencing, correct, Mr. Yurowitz?

[18] MR. YUROWITZ: Yes.

THE COURT: OK. "The court must also include the forfeiture order directly or by reference in the judg-

ment." The Court did that, so we don't have to go on to the Court's failure. I see that (4)(B) was complied with, no question. All three of us agree on that, but how does that get you out of the "must" language of (2)(B)?

* * *

[40] MR. YUROWITZ: OK, your Honor. Just one clarification. I think when your Honor was discussing the actual language of the judgment, which was $75,000 and the forfeiture—

THE COURT: Yes.

MR. YUROWITZ: —if the written judgment itself could indicate the credit, because otherwise I think what's going to happen is that the BOP is then going to seek to take from him $75,000 without crediting.

THE COURT: I don't have any objection to that. I understand. Let me just see. You said that was paragraph 8?

MR. YUROWITZ: Yes.

THE COURT: "Add paragraph 8 language to judgment." I have no objection to that.

Ms. Krissoff.

[41] MS. KRISSOFF: That's fine, your Honor.

THE COURT: OK, but I gather that in the procedure, what I need do here is enter the preliminary order of judgment and then that becomes a final order of forfeiture with the entry of the amended judgment. Is that right? The government should look at that, because if the government has to submit a separate final order of forfeiture, it should do that.

Mr. Yurowitz.

MR. YUROWITZ: I believe that's the way. Typically the preliminary order comes first, before sentencing, and then becomes final.

THE COURT: It becomes final upon sentencing.

MR. YUROWITZ: As to the defendant, yes.

THE COURT: Yes. Right. OK. At least you and I agree.

MS. KRISSOFF: Yes, your Honor, because it's preliminary, but then it becomes final. The preliminary order of forfeiture should issue first and then the judgment, and then it's final as to the defendant, of course.

THE COURT: And there's no separate paper, is that correct?

MS. KRISSOFF: Not for the defendant.

THE COURT: Right.

MS. KRISSOFF: That's right, because then we have to do, because of the BMW there's a process of notification [42] regarding that.

THE COURT: Yes, there's a separate order regarding that.

MS. KRISSOFF: That's correct, your Honor, but the money judgment will be final.

I'm sorry, your Honor.

THE COURT: Go ahead.

MS. KRISSOFF: But the money judgment will be final as to the defendant at the time.

THE COURT: Let me phrase it my way and see if we agree. The preliminary order of forfeiture, which I go back, should have been submitted before sentencing,

being signed now, after I deal with the timing point of Mr. Yurowitz, assuming it's signed now and the amended judgment is entered, upon the entry of the amended judgment, the preliminary order of forfeiture becomes a final order of forfeiture as to the defendant. Are we agreed on that?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed Aug. 8, 2017]

UNITED STATES OF AMERICA, -against- LOUIS McINTOSH, Defendant.	11-Cr-500 (SHS) <u>OPINION & ORDER</u>

SIDNEY H. STEIN, U.S. District Judge.

This action has been remanded to this Court to determine the propriety of formal orders of restitution and forfeiture against defendant Louis McIntosh. Although the parties have reached agreement as to the restitution that McIntosh must pay to the victims of his crimes, he maintains several challenges to the government's proposed order of forfeiture. For the reasons that follow, this Court concludes that none of defendant's objections precludes the entry of the government's proposed order of forfeiture.

In addition, subsequent to the U.S. Court of Appeals for the Second Circuit remanding this action, the U.S. Supreme Court has held that the forfeiture provision for drug crimes does not permit a defendant to be held liable jointly and severally for property derived by his co-conspirators. The question now is whether that holding extends to robbery offenses. This Court has concluded that it does not and therefore an order of joint and several forfeiture liability may be entered in this robbery and firearms action.

I. HISTORY

The Court assumes familiarity with the facts underlying this action, which are set forth more fully in *United States v. McIntosh,* No. 11 Cr. 500, 2014 WL 199515 (S.D.N.Y. Jan. 17, 2014), and *United States v. McIntosh,* 33 F. Supp. 3d 448 (S.D.N.Y. 2014). Briefly stated, McIntosh was convicted after a jury trial in 2013 of nine counts that, taken together, describe a spree of violent robberies and firearm offenses by a group of conspirators led by McIntosh. Defendant and his co-conspirators netted at least $75,000 in cash and cell phones from these robberies. *(See* Transcript of Sentencing, Dkt. No. 217, at 23-24; Transcript of Trial, Dkt. Nos. 165-79, at 121, 416, 445-47, 866-67, 877, 933-34.) Most of this sum was taken from Frank Flowers and Robert Rizzatti, robbery victims whose own possession of the money in question appeared to derive from activities of dubious legality (gambling and loan sharking, respectively). According to testimony adduced at trial, McIntosh divided the robbery proceeds among himself and the other defendants, using a portion of his own share to buy a BMW 525 automobile. (Trial Tr. at 419-23, 445-48.) A car matching that description was purchased in McIntosh's mother's name for $10,345 in cash and money orders within a week of the robbery of Rizzatti. *(See id.* at 422-23, 458, 559-61, 1044-45; Sentencing Tr. at 24.) The government seized the BMW in 2011 and has stored it at the Westchester County Department of Public Safety since that time. (Transcript of Oral Argument dated July 14, 2017, Dkt. No. 272, at 14.)

On May 23, 2014, this Court sentenced McIntosh to a term of imprisonment of 720 months, followed by three years of supervised release. The Court also

orally imposed restitution in the sum of $75,000 and directed forfeiture of $75,000 and the BMW, which the Court found on the record to be the fruits of the crimes.[1] (Sentencing Tr. at 32-33.) The Court set forth those provisions in the resulting judgment. (Judgment in a Criminal Case, Dkt. No. 215, at 5-6.)

In what the government now admits was "a mistake," it did not submit a preliminary order of forfeiture to the Court at or before sentencing, as required by Federal Rule of Criminal Procedure 32.2(b). (Argument Tr. at 16.) Nor did the government submit an order of restitution or a list of the amounts due to particular victims within sixty days of sentencing, as directed by the Court at sentencing. (Sentencing Tr. at 32.)

Of course, McIntosh did not lack for notice of the government's plan to pursue the proceeds of his crimes. At the initiation of the prosecution in 2011, the indictment included an allegation that the defendants "shall forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offenses," or substitute assets if they dissipated these proceeds. (Dkt. No. 2 at 7.) In 2012, the government's bill of particulars further specified the government's intent to seek forfeiture of the specific

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[1] Although the written judgment referred to forfeiture of "$75,000 *and* a BMW" (emphasis added), a more precise enumeration of the forfeited property is "a BMW and $75,000, with a credit for the net proceeds of the government's sale of the seized BMW," because the BMW itself was bought using money from the robberies. The parties have agreed to this refinement. (Argument Tr. at 40-41.)

BMW purchased with a portion of those proceeds. (Dkt. No. 83.) And testimony at trial substantiated that purchase, along with robbery proceeds of at least $75,000. *Cf. United States v. Treacy,* 639 F.3d 32, 48 (2d Cir. 2011) ("The calculation of forfeiture amounts is not an exact science. [T]he court need not establish the loss with precision but rather need only make a reasonable estimate of the loss, given the available information." (internal quotation omitted)). At sentencing, the Court directed the government to provide a formal order of forfeiture for the $75,000 and the BMW within one week as well as the schedule of victims for restitution within sixty days, as set forth above. (Sentencing Tr. at 32-33.) The government failed to submit either of these documents until this matter was remanded on the government's motion to correct those errors, two and one half years after sentencing.

McIntosh's sentence and the Court's accompanying instructions were memorialized in the "Judgment in a Criminal Case" dated May 28, 2014.[2] (Dkt. No. 215.) McIntosh appealed and the government cross-appealed from the judgment. *(See* Dkt. Nos. 216, 219.) On the government's unopposed motion for remand, the Second Circuit remanded this matter to this Court pursuant to the procedures set forth in *United States v. Jacobson,* 15 F.3d 19, 22 (2d Cir.

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[2] The judgment mistakenly referred to the amount of forfeiture as being "$95,000," rather than the $75,000 orally directed at sentencing. However, "[i]t is clearly established in this Circuit that '[i]t is the oral sentence which constitutes the judgment of the court, and which is authority for the execution of the court's sentence. *United States v. Werber,* 51 F.3d 342, 347 (2d Cir. 1995) (quoting *United States v. Marquez,* 506 F.2d 620, 622 (2d Cir. 1974)). The parties agree this was a clerical error. *(See* Argument Tr. at 9.)

1994), instructing that "[o]n remand, if [the government] wishes to pursue restitution and forfeiture, the Government shall provide the district court with a victim list and request entry of formal orders of restitution and forfeiture," and indicating that this Court "may, in accordance with Federal Rule of Criminal Procedure 36, amend the written judgment so that it conforms with the oral sentence pronounced by the court." (Dkt. No. 245 (internal quotation omitted).)

On remand, the parties ultimately agreed to a schedule of victims and a restitution amount of $4,598. The reduction in restitution from $75,000 to $4,598 is explained essentially by the fact that the victims Flowers and Rizzatti have decided not to seek restitution for their losses. As a result, the Court will sign the agreed-upon order of restitution and amend the judgment to reflect the new restitution amount.

Although the parties now agree regarding restitution, they do not agree as to forfeiture. McIntosh has raised a series of challenges to the amount and timing of the proposed forfeiture order submitted by the government. This Opinion now addresses those arguments.

II. DISCUSSION

A. Joint and Several Liability

McIntosh's first challenge to the proposed amount of forfeiture rests on a recent decision by the Supreme Court, *Honeycutt v. United States,* 137 S. Ct. 1626 (2017). In that case, the Supreme Court held that the forfeiture provision for drug crimes, found at 21 U.S.C. § 853, does not permit a defendant to be held jointly and severally liable for property derived by his co-conspirators from the crime. McIntosh now

argues that that decision compels the limitation of his own forfeiture to the value of the property that he *personally* obtained from his crimes, which is substantially less than the total amount of proceeds the conspirators obtained from the robbery conspiracy. (Dkt. No. 264 at 4- 5.)

But the statutory basis for forfeiture here is not 21 U.S.C. § 853; it is 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461. Given the Supreme Court's narrow holding in *Honeycutt* and the distinctions between *Honeycutt* and this case in statutory text and structure, this Court determines that that case has not altered longstanding Second Circuit precedent that permits McIntosh to be held liable for the forfeitable proceeds of the conspiracy jointly and severally with his co-conspirators.

1. The Statute in Honeycutt: 21 U.S.C. § 853.

21 U.S.C. § 853(a)—the statute at issue in *Honeycutt*—provides for criminal forfeiture of the following three categories of property involved in drug manufacturing and distribution crimes:

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in

> paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The text of Section 853 does not elucidate whether joint and several liability is available for forfeiture. Since Congress enacted the provision, however, all but one of the several courts of appeals to reach the question arrived at the same answer: yes. *See Honeycutt,* 137 S. Ct. at 1631 & n.1 (collecting cases).

The Supreme Court reached the opposite result in *Honeycutt,* finding joint and several liability "inconsistent with the statute's text and structure," as well as its legislative history. *Id.* at 1630, 1635. Justice Sotomayor's opinion for a unanimous Court found this inconsistency between permitting joint and several liability, on one hand, and the text of the statute, on the other hand, "most clear" in the text of Section 853(a)(1). In that provision, the verb "obtained" in its ordinary meaning referred to something brought into one's personal possession or us— not "property that was acquired by someone else." *Honeycutt,* 137 S. Ct. at 1632. The references to "the person's property" and "his interest in" a criminal enterprise, under the other two prongs of Section 853(a), reinforced that conclusion. More generally, the Supreme Court read the combined provisions of Section 853(a) to limit forfeiture to "tainted property; that is, property flowing from, or used in, the crime itself." *Id.* (citations omitted). Joint and several liability would run afoul of both those restrictions, allowing the government to reach beyond the property personally obtained by the defendant being sentenced—because a co-conspirator had obtained it instead—and beyond the tainted proceeds of the

crime—because, if the co-conspirator had retained his ill-gotten gains, the defendant being sentenced would have to pay the difference out of untainted assets from his own pocket.

The Supreme Court secured further support from three other portions of Section 853 underscoring the limitation to tainted property: (1) Section 853(c), providing that the government's title to the property vests only upon the commission of the offense; (2) Section 853(e)(1), permitting pretrial freezes only of property shown to have a connection to the underlying crime; and (3) Section 853(d), establishing a rebuttable presumption of forfeiture for property acquired by the defendant "during the period of the violation" with "no likely source for such property other than the violation." *Honeycutt,* 137 S. Ct. at 1633. Interpreting Section 853(a) to allow joint and several liability would also render redundant Section 853(p)'s narrower allowance for forfeiture of "substitute property" in limited circumstances when the defendant dissipates the original, tainted assets. *Id.* at 1634. For its part, the government pointed to Section 853(o)'s direction that the statute be "liberally construed to effectuate its remedial purposes." But the Court rejected that exhortation as insufficient to overcome the "plain text" at issue. *Id.* at 1635 n.2.

Finally, the Supreme Court rejected joint and several liability under Section 853 as inconsistent with the history of forfeiture in general and of that provision in particular. The historical nature of forfeiture as an *in rem* proceeding suggested that it would apply only to tainted assets unless Congress specifically provided otherwise, and the statute's legislative history "confirm[ed]" that Congress intended to effect only technical improvement of forfeiture

proceedings, not a "significant expansion of the scope of property subject to forfeiture." *Id.* at 1635.

2. The Statutes Here: 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461.

The government seeks forfeiture here pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, not 21 U.S.C. § 853. (S3 Indictment, Dkt. No. 59, at 10-11.) 18 U.S.C. § 981(a)(1)(C) renders forfeitable "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation" of specified provisions of Title 18. In this statute, unlike in 21 U.S.C. § 853, "proceeds" is a defined term. Trebly defined, in fact: 18 U.S.C. § 981(a)(2) provides distinct definitions for three categories of offenses. As relevant to McIntosh, Section 981(a)(2)(A) provides:

> In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

3. These Statutes' Text and Structure Differ Materially.

The language of Section 853 has some similarities to the statutes here. First, the use of the verb "obtained"—in the definition of "proceeds" and in other subsections of Section 981—resembles the language in Section 853(a)(1) that the Supreme Court in *Honeycutt* found "most clear[ly]" to limit forfeiture to personal liability. Second, the requirement that property

be "traceable to a violation" calls to mind Section 853's restriction to "tainted" property. That inference is strengthened by Section 981(f)'s provision that the government's right to the property "shall vest ... upon commission of the act giving rise to forfeiture"—i.e., the offense—just as in Section 853(c).

On the other hand, there remain significant material differences between Section 981 and the statute at issue in *Honeycutt.* The word "person," on which the Supreme Court placed significant weight in *Honeycutt,* does not appear in the operative provisions of Section 98l(a). Conversely, the expansive term "traceable," used numerous times in Section 981 to characterize forfeitable property, has no analog in the narrower language of Section 853. Indeed, the text of the provision the government seeks to apply against McIntosh—"Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation," in Section 981(a)(1)(C)—is self-evidently broader and less focused on personal possession than "any property constituting, or derived from, any proceeds *the person* obtained, directly or indirectly, as the result of such violation," in Section 853(a)(1) (emphasis added).

4. Second Circuit Precedent Mandates Joint and Several Liability Under Section 981.

This case does not arise on a blank slate, however. The Second Circuit has consistently read Section 981 to provide joint and several liability for forfeiture orders against co-conspirators. *E.g., United States v. Contorinis*, 692 F.3d 136, 147 (2d Cir. 2012); *United States v. Viloski*, 814 F.3d 104, 108 & n.2 (2d Cir. 2016); *United States v. Mandell*, 752 F.3d 544, 554

(2d Cir. 2014) (per curiam). When doing so, it has anchored its reasoning firmly in the specific text of Section 981.

In *United States v. Contorinis*, 692 F.3d 136 (2d Cir. 2012), for example, the court analyzed an order of criminal forfeiture pursuant to Section 981(a)(1)(C), the same provision at issue here. For defendants such as the one in *Contorinis*, who was convicted of securities fraud rather than robbery, the statute provides a more lenient definition of "proceeds": "the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services." 18 U.S.C. § 981(a)(2)(B). The Second Circuit noted that "the statute does not expressly identify the 'whom' that must do the acquiring that results in forfeiture," but the court inferred, from the *in personam* nature of criminal forfeiture and its underlying principles, that the defendant must be the one who acquired the proceeds. *Contorinis,* 692 F.3d at 146. And yet, "[t]his general rule is somewhat modified by the principle that a court may order a defendant to forfeit proceeds received by others who participated jointly in the crime, provided the actions generating those proceeds were reasonably foreseeable to the defendant." *Id.* at 147.

The court did not endorse joint and several liability as a freestanding common law principle or a transplant from the Section 853 context, however. Instead, it justified the doctrine using the specific text of Section 981(a)(2)(B) in the following words:

> The extension of forfeiture to proceeds received by actors in concert with a defendant may be deemed to be based on the view that the pro-

> ceeds of a crime jointly committed are within the possessory rights of each concerted actor, i.e. are "acquired" jointly by them and distributed according to a joint decision.... [T]he property must have, at some point, been under the defendant's control or the control of his co-conspirators in order to be considered "acquired" by him."

Id.

The Second Circuit in *United States v. Torres,* 703 F.3d 194 (2d Cir. 2012), offered a similarly careful textual reading of the provision applicable to McIntosh, Section 981(a)(2)(A). As in *Honeycutt,* the *Torres* court acknowledged that the dictionary defined "obtain" with reference to personal possession, but it cautioned that "in assessing whether Torres 'obtained' fungible proceeds subject to forfeiture under § 981, we may not read the word in isolation; we must consider it in light of its modifiers and the language of the rest of the statute." *Torres,* 703 F.3d at 199. And the statute here not only contains the broad modifier "directly or indirectly," but "further reaches (and 'is not limited to') 'net gain or profit,' and property 'traceable' to the property that was obtained by the defendant as a result of the offense." *Id.* The Second Circuit concluded that the text of Section 981(a)(2)(A) "suggests Congress's desire to encompass not only the very property that was unlawfully obtained. Rather, the forfeiture statute envisions and tolerates some attenuation of the chain of events between the crime and the related property or gain it makes subject to forfeiture." *Id.*

Once again, this was no offhand extension of precedent, but a clear-eyed interpretation of the

statute at hand, for the court wrote that although it "recognize[d] the dangers inherent in too broad a reading of the forfeiture statutes[, t]he construction [it] offer[ed] here is textually driven." *Id.* at 202 (citation omitted).

Torres offers further indication that the Second Circuit's body of law interpreting Section 981 rests on textual ground distinct from, and stronger than, 21 U.S.C. § 853, the statute at issue in *Honeycutt. Cf United States v. Seabrook,* 661 F. App'x 84, 86 (2d Cir. 2016) (summary order) ("Section 981(a)(1)(C) does not contain the language in § 853(a) relied on by Seabrook, *i.e.,* the forfeiting of 'any proceeds the person obtained' or 'any of the person's property.' The language in § 981 is much broader "(citation omitted)).

5. Honeycutt Did Not Overrule the Prior Second Circuit Case Law Interpreting Section 981.

As to the well-developed case law in this and other circuits providing for joint and several liability under Section 981 and other criminal forfeiture provisions scattered throughout the U.S. Code, the unanimous Supreme Court in *Honeycutt* said not a word. That was not for lack of notice. The government discussed those precedents in its submissions before the Court at both the certiorari and merits stages. Academic commentators on joint and several liability have not shied from addressing the various statutory bases for forfeiture. *See, e.g.,* 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 13.02[5] (2017).

In writing, however, the Supreme Court meticulously avoided mention of any forfeiture statute

apart from Section 853. In fact, both when the Court in *Honeycutt* framed the question presented and when it expressly announced its holding, it wrote in terms strictly limited to the words of Section 853. Justice Sotomayor wrote that the issue to be decided was "whether, under§ 853, a defendant may be held jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." She concluded that "such liability is inconsistent with the statute's text and structure." 137 S. Ct. at 1630; *see also id.* at 1632. That careful judicial craftsmanship speaks volumes.

A precedential decision by the Second Circuit remains binding on this Court "unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or [the court of appeals] *en bane." In re Sokolowski,* 205 F.3d 532,535 (2d Cir. 2000) (per curiam) (internal quotation omitted). What the Supreme Court emphatically did not do in *Honeycutt* is overrule the Second Circuit's Section 981 cases, which rest on specific textual grounds distinguishable from Section 853. This Court therefore remains bound by the Second Circuit's repeated holdings that Section 981(a)(1)(C) allows joint and several liability for criminal forfeiture. *E.g., United States v. Contorinis,* 692 F.3d 136 (2d Cir. 2012); *United States v. Viloski,* 814 F.3d 104 (2d Cir. 2016); *United States v. Mandell,* 752 F.3d 544 (2d Cir. 2014) (per curiam).

What is more, where such forfeiture is available, it is required. 28 U.S.C. § 2461(c) commands that "[i]f the defendant is convicted of the offense giving rise to the forfeiture, the court *shall* order the forfeiture of the property" (emphasis added). *See Torres,* 703 F.3d at 204 ("[T]he court's orders of forfeiture and restitu-

tion were mandatory under the statutes applicable here."). For the reasons stated, McIntosh must forfeit the value of the proceeds traceable to the crime, even those that now rest in the hands of his co-conspirators.

B. Valuation of Depreciable Assets

McIntosh argues next that, to the extent forfeiture is allowed, the government should bear the loss of any decline in value of the forfeited BMW in the interval between its seizure in 2011 and the government's forthcoming sale of the vehicle. (Dkt. No. 256 at 10-11.) As noted, the government has already agreed that the amount of money due under the forfeiture order will be reduced by the value of the BMW, as it should be. McIntosh cites no authority for his argument that this offset should be calculated on any other basis than the net proceeds at the time of sale. Further, he offers no evidence that the automobile has in fact lost significant value while in the government's custody.

McIntosh's best argument relies on 19 U.S.C. § 1612, a customs provision brought to bear on this case by a serpentine strand of statutory cross-references,[3] which instructs in mandatory terms that

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[3] 28 U.S.C. § 2461(c) incorporates the procedures of 21 U.S.C. § 853 into these criminal forfeiture proceedings; 21 U.S.C. § 8530) commands that "[e]xcept to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section"; Section 881(d) in tum provides that the "provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws ... shall apply to seizures and forfeitures ... under any of the provisions of this subchapter, ... except that such duties as are imposed upon the customs officer or any other person

the government *"shall* proceed *forthwith* to advertise and sell" certain seized assets at risk of depreciation (emphases added). But the statute expressly conditions that command on a discretionary finding: the duty to sell forthwith applies "[w]henever it appears to the Customs Service"—or here, the Department of Justice—that the seized property "is liable to perish or to waste or to be greatly reduced in value by keeping, or that the expense of keeping the same is disproportionate to the value thereof." 19 U.S.C. § 1612(a). That threshold determination has not been made here. On the contrary, the government avers that the BMW "remains in workable condition" at the Westchester County Department of Public Safety, (Argument Tr. at 14), and McIntosh offers no evidence to controvert that assessment.

Moreover, McIntosh cites no decision applying Section 1612 to reduce the forfeiture amount, as he urges, and such an interpretation sits uneasily with Supplemental Rule G(7)(b) of the Federal Rules of Civil Procedure. That rule, made applicable to this case by Federal Rule of Criminal Procedure 32.2(b)(7), allows a court to order an interlocutory sale of seized property so as to prevent its "deterioration, decay, or injury by being detained in custody pending the action." If McIntosh were concerned about a sharp decline in value of the seized vehicle,

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with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General"; and 19 U.S.C. § 1612—the provision relied on by McIntosh—is one of the customs provisions incorporated by Section 881(d) into forfeitures. *See United States v. 414 Kings Highway,* 128 F.3d 125, 127 & n.2 (2d Cir. 1997).

he could have moved for its interlocutory sale at any time after the 2011 indictment—or at the very least, after the 2012 bill of particulars specifically targeted the BMW for forfeiture.

This Court does not condone the haphazard way in which the government has prosecuted its forfeiture allegation against McIntosh over the past six years. However, where, as here, defendant has not moved for an interlocutory sale of the seized automobile, and has presented no evidence of any significant decline in its value, the Court declines to reduce the amount of forfeiture to account for post-seizure depreciation of the BMW he purchased with the cash proceeds of his armed robberies.

C. Timeliness of Forfeiture Order

Finally, McIntosh contends that the government's failure to timely submit a forfeiture order at sentencing pursuant to Federal Rule of Criminal Procedure 32.2 bars the Court from entering an order of forfeiture three years after sentencing. However, under the reasoning of *Dolan v. United States,* 560 U.S. 605, 611 (2010), the failure of the government to submit an order of forfeiture and of the Court to enter a forfeiture order at sentencing "does not deprive the court of the power to order" forfeiture later. Although *Dolan* explicitly addressed the power to issue an untimely order of restitution—not forfeiture—the mass of authority in the lower courts has persuasively interpreted its logic to extend to forfeiture as well.

Here, where McIntosh was on notice at and before sentencing of the government's intention to seek forfeiture, and the subsequent delay caused him no prejudice, the missed deadlines in the Federal Rules

raise no bar to the entry of a formal order of forfeiture at this time.

1. Rule 32.2's Deadlines Were Not Met.

McIntosh contends that the government's failure to comply with the rules governing the entry of a forfeiture order at the time of his sentencing precludes the entry of such an order now, some three years later. Federal Rule of Criminal Procedure 32.2 prescribes a detailed timeline for the imposition of a sentence of criminal forfeiture. Once the government provides notice in the indictment of its intent to seek forfeiture pursuant to Rule 32.2(a), the Court must determine what property is forfeitable "[a]s soon as practical after a verdict," *id.* 32.2(b)(1)(A), and "promptly" enter a preliminary order of forfeiture for that property, *id.* 32.2(b)(2)(A). Specifically, "[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 [at sentencing] under Rule 32.2(b)(4)." *Id.* 32.2(b)(2)(B). At sentencing, "[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.* 32.2(b)(4)(B).

Here, although the indictment's forfeiture allegation provided the initial notice required by Rule 32.2(a), the government never submitted a proposed preliminary order pursuant to 32.2(b)(2)(A)—let alone "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications be-

fore the order becomes final." Nor does the government assert any "impracticality" or other excuse for its noncompliance. *(See* Dkt. No. 262 at 9-10; Argument Tr. at 16-17.) Further, although the Court orally "determine[d] what property is subject to forfeiture" and included the penalty in its announcement of the sentence and in the judgment, as required by Rule 32.2(b)(1) and 32.2(b)(4)(B), the government failed to submit an order of forfeiture pursuant to Rule 32.2(b)(4)(A) either at sentencing, or in the week thereafter, despite being directed to do so by the Court. *(See* Sentencing Tr. at 24, 33.)

2. These Errors Do Not Deprive the Court of Power to Enter an Untimely Order of Forfeiture.

But the Federal Rules do not specify the consequences of failing to comply with the deadlines set forth in Rule 32.2. The Supreme Court's decision in *Dolan v. United States,* 560 U.S. 605 (2010), supplies a tripartite framework by which to determine the effects of such time limits. At one extreme, a "jurisdictional" deadline "prevents the court from permitting or taking the action to which the statute attached the deadline. The prohibition is absolute." *Id.* at 610. Other time limits are "more ordinary 'claims-processing rules'" that lack automatic fatal effect: "[u]nless a party points out to the court that another litigant has missed such a deadline, the party forfeits the deadline's protection." *Id.* Finally, the weakest category of deadline is a "time-related directive," something "that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed." *Id.* at 611 (citing, inter alia,

*United States v. Montalvo-Murillo,*495 U.S. 711, 722 (1990)).

In *Dolan,* the Supreme Court held that the ninety-day post-sentencing period within which to enter an order of restitution prescribed by the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3664(d)(5), was a "time-related directive" within the third and most lenient category above—and hence, that a sentencing court's failure to meet it "does not deprive the court of the power to order restitution." *Dolan,* 560 U.S. at 611. Justice Breyer's majority opinion identified six considerations in "the language, the context, and the purposes of the statute" that supported this conclusion: (1) the absence of any specified consequence for noncompliance; (2) the statute's primary emphasis on the substantive purpose of helping crime victims; (3) the reinforcement of that purpose by the procedural deadline at issue; (4) the perversity of the result that a strict application of the time limit would hurt the victims who are the statute's intended beneficiaries; (5) the Supreme Court's previous interpretation of "similar statutes similarly"; and (6) the ability of most defendants to mitigate any harm by alerting the court to the deadline's approach (or, if needed, by seeking a writ of mandamus). *Id.* at 611-16.

The Second Circuit has not yet considered the application of *Dolan* to the procedural rules governing criminal forfeiture.[4] But the Supreme Court's broad

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[4] The government's position here may find indirect support in *United States v. Mandell,* 752 F.3d 544 (2d Cir. 2014) (per curiam), which rejected a challenge to the government's failure to enter a preliminary order in advance of sentencing as required by Rule 32.2(b). Because the defendant had not raised his objection before the district court, the Second Circuit applied plain

framing of its decision—"[t]his case concerns the remedy for missing a statutory deadline," 560 U.S. at 607—makes clear that its framework is applicable beyond the specific context of the MVRA. Importantly, every circuit to address the forfeiture issue head-on since *Dolan* has concluded that the deadlines in Rule 32.2 fall in the forgiving category of "time-related directives." *See United States v. Farias,* 836 F.3d 1315, 1330 (11th Cir. 2016); *United States v. Davies,* 601 F. App'x 97, 100 (3d Cir. 2015); *United States v. Williams,* 720 F.3d 674, 702 (8th Cir. 2013); *United States v. Schwartz,* 503 F. App'x 443, 447 (6th Cir. 2012); *United States v. Martin,* 662 F.3d 301 (4th Cir. 2011).[5] Other courts in this District have reached the same conclusion. *See United States v. Reese,* 36 F. Supp. 3d 354, 365 (S.D.N.Y. 2014); *United States v. Vilar,* No. 05 CR 621 RJS, 2010 WL 3447222 (S.D.N.Y. Aug. 26, 2010).

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error review pursuant to Federal Rule of Criminal Procedure 52(b). *Mandell,* 752 F.3d at 553. The court's application of the plain error standard at least implies that Rule 32.2(b)'s preliminary order deadline is *not* a "jurisdictional" bar under *Dolan's* three-part framework—because it if were, it could not have been waived below. *See Dolan,* 560 U.S. at 610 (citing *John* R. *Sand* & *Gravel Co. v. United States,* 552 U.S. 130, 133-34 (2008)); *United States v. Edwards,* 834 F.3d 180, 191 (2d Cir. 2016) (Jurisdictional defect would merit de novo review).

[5] The chorus is not quite unanimous: in *United States v. Shakur,* 691 F.3d 979, 988 n.6 (8th Cir. 2012), the U.S. Court of Appeals for the Eighth Circuit dropped a footnote to express its "reluctan[ce]" to extend *Dolan's* holding to Rule 32.2, "[a]lthough the issue is not before us"—a manifest admission of dictum. A later panel of the Eighth Circuit expressly distinguished *Shakur's* dicta and designated another forfeiture deadline, in Rule 32.2(b)(5)(A), a "time-related directive" under *Dolan's* framework. *See Williams,* 720 F.3d 674 at 700-02.

As the U.S. Court of Appeals for the Fourth Circuit persuasively explains in *United States v. Martin,* 662 F.3d 301, 308-10, the *Dolan* factors point in the same direction for forfeiture as they do for restitution. As in the MVRA, Rule 32.2 imposes mandatory deadlines but specifies no consequence for letting them lapse; in such cases "federal courts will not in the ordinary course impose their own coercive sanction." *Dolan,* 560 U.S. at 611 (quoting *United States v. James Daniel Good Real Prop.,* 510 U.S. 43, 63 (1993)). The underlying purpose of criminal forfeiture is not to protect defendants but "to punish the offender" by forcing "the disgorgement ... of his ill-gotten gains." *United States v. Contorinis,* 692 F.3d 136, 146 (2d Cir. 2012) (internal quotations omitted). The Supreme Court's admonition to interpret "similar statutes similarly" (i.e., here, loosely), as well as the ability of defendants to mitigate any harm by objecting at or after sentencing, also militate against an "ironclad" jurisdictional reading of Rule 32.2's time limits.

It is true, as the dissenting judge noted in *Martin,* that Rule 32.2, in the context of forfeiture, does not place the same "weight" on the interests of victims that the MVRA does in the context of restitution. 662 F.3d at 313-14 (Gregory, *J.,*s concurring in part and dissenting in part). But such concerns

still remain potent in this context. The Advisory Committee Notes explain that Rule 32.2(b)'s forfeiture procedures, while designed in part to ensure notice to the defendant, also serve to protect the rights of third parties who may have claims to the offender's property. Just as the recipients of restitution under the MVRA, these blameless beneficiaries would be perversely punished by a procrustean application

of the procedural safeguards erected in their name. So too would the victims of the crime, confidential informants, and other "innocent persons," to whom the government is authorized to remit forfeited proceeds in the interest of justice. *See* 21 U.S.C. § 853(i). As in *Dolan,* the gravity of these third-party interests provides a "strong indication" that the drafters of the forfeiture deadlines did not intend criminal defendants to reap a windfall from the government's or court's delay. 560 U.S. at 614.

3. McIntosh Received Ample Notice of Forfeiture.

The Supreme Court cabined the reach of its decision in *Dolan* to cases in which the defendant receives advance notice of the restitution penalty: "We hold that a sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution—at least where, as here, 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." 560 U.S. at 608; *see also id* . at 620.

Here, the fact that the government was seeking and the Court was ordering forfeiture was pellucidly clear to defendant. McIntosh knew the government sought forfeiture of his robbery proceeds from the time he saw the 2011 indictment; he received notice of the specific personal property sought in the 2012 bill of particulars and the 2013 trial, (Trial Tr. at 422-23, 458, 559-61); the final amount of forfeiture was found on the record by the Court at the 2014 sentencing, (Sentencing Tr. at 33), and specified in the resulting judgment, (Judgment at 7). Defendant received, and has made use of, ample opportunity to

challenge the government's proposed forfeiture before this Court. (*See* Sentencing Tr. at 24-25.)

For that reason, McIntosh's citations to *United States v. Westmoreland,* No. 3:10-CR-68 JCH, 2010 WL 5441976 (D. Conn. Dec. 28, 2010), and *United States v. Shakur,* 691 F.3d 979, 988-89 (8th Cir. 2012), are inapposite. This is not a case in which the gross violations of sentencing procedure denied the defendant any meaningful opportunity to contest an untimely forfeiture order, as in *Shakur,* or where the government and court entirely failed to address forfeiture at the sentencing hearing, as in *Westmoreland.*

Indeed, the Court's oral sentence left no substantive aspect of the forfeiture unfixed or in doubt. *Cf United States v. Yeje-Cabrera,* 430 F.3d 1, 15 (1st Cir. 2005) ("[T]he portion of Rule 32.2 which was violated here is largely a housekeeping rule and does not itself go to any fundamental rights of defendants."); *United States v. Bennett,* 423 F.3d 271, 281-82 (3d Cir. 2005) ("purely administrative" procedural lapse in ordering forfeiture "is for all practical purposes tantamount to a mere clerical error").

4. McIntosh Suffered No Cognizable Prejudice From the Forfeiture Order's Untimeliness.

The Supreme Court also posited in *Dolan* that the judicial inquiry into a deadline's consequences could take into account the prejudice that delay causes an individual defendant—such as any loss of evidence necessary to challenge or appeal the forfeiture amount. 560 U.S. at 617. But the only prejudice McIntosh alleges is a purported decline in value of the forfeited BMW since its seizure. (Dkt. Nos. 256 at

10,264 at 3.) As described above, defendant's argument on this point lacks factual and legal support. McIntosh presents no evidence to rebut the government's affirmation that the vehicle remains in working condition and he presents no evidence of any value it may have lost. Nor does he offer authority for the proposition that a decline in value would amount to legally cognizable prejudice, when he had the ability throughout to seek an interlocutory sale of the BMW. *See, e.g., United States v. Gushlak,* 728 F.3d 184, 191-92 (2d Cir. 2013); *United States v. Qurashi,* 634 F.3d 699, 705 (2d Cir. 2011) (applying *Dolan* to reject challenges to delayed restitution, where the defendants asserted prejudice without evidentiary support).

The failure to observe the procedural niceties of Rule 32.2 in this case did not prejudice McIntosh so as to deprive this Court of power to order forfeiture at this time. *See Schwartz,* 503 F. App'x at 449; *Bennett,* 423 F.3d at 282.[6]

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[6] In addition to the three primary arguments addressed above, McIntosh also contends that the Fifth and Sixth Amendments raise impediments to the imposition of restitution and forfeiture: he demands first that the exact amount of restitution and forfeiture be specified in the indictment and charged to a jury, and second that that amount be proved beyond a reasonable doubt. (Dkt. No. 256 at 1-4.)

However, controlling precedent from the Second Circuit forecloses McIntosh's constitutional challenges to both these penalties. *See United States v. Stevenson,* 834 F.3d 80, 85-86 (2d Cir. 2016) (forfeiture); *United States v. Bengis,* 783 F.3d 407, 411-12 (2d Cir. 2015) (restitution). McIntosh concedes that authority and states that he raises these arguments simply to preserve them for appeal in the event the law changes. (Dkt. Nos. 256 at 3-4, 264 at 1.)

III. CONCLUSION

As this Court has previously observed, Louis McIntosh is a violent, felonious predator. *See United States v. McIntosh,* No. 11 Cr. 500, 2014 WL 199515, at *10 (S.D.N.Y. Jan. 17, 2014). But he is also a defendant deserving of even-handed and informed dispensation of justice. For the reasons set forth in this Opinion, the Court will enter the proposed orders of restitution and forfeiture submitted by the government and will file an amended judgment to reflect the proper forfeiture amount of $75,000 and its relationship to the seized BMW as well as restitution of $4,598.

Dated: New York, New York
August 8, 2017

SO ORDERED:

[handwritten signature]
Sidney H. Stein, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed Aug. 8, 2017]

(NOTE: Identify Changes with Asterisks (*))

UNITED STATES OF AMERICA

v.

LOUIS MCINTOSH

Date of Original Judgment: 05/27/2014
(Or Date of Last Amended Judgment

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 01:11 Cr. 00500 (SHS)
USM Number: 65254-054
Steven Y. Yurowitz
Defendant's Attorney

Reason for Amendment:

☒Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
☐Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
☐Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
☐Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
☐Modification of Imposed Term of lmprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
☐Direct Motion to District Court Pursuant ☐28 U.S.C. § 2255 or ☐18 U.S. C. § 3559(c)(7)
☐Modification of Restitution Order (18 U.S.C. § 3664

THE DEFENDANT:

☐pleaded guilty to count(s)

☐pleaded nolo contendere to count(s)
which was accepted by the court.

☒was found guilty on count(s) 1, 2, 5, 6, 7, 8, 9, 10, 12, 13, and 14 in the (S3) Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951	Conspiracy to Commit Hobbs Act Robbery	12/31/2011	1
18 U.S.C. 925(c)(1)(A)(iii)	Use of a Firearm in Furtherance of a Crime of Violence	12/31/2011	2, 8, 10
18 U.S.C. 1951	Hobbs Act Robbery	10/28/2010	7, 9

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒The defendant has been found not guilty on count(s) 5 and 6. See Judgment of Acquittal entered on 01/17/2014.

☐Count(s) Underlying Indict. & open counts ☐is ☒are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this di strict within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the

court and United States attorney of material changes in economic circumstances.

8/8/2017
Date of Imposition of Judgment

[handwritten signature]
Signature of Judge

Sidney H. Stein, U.S.D.J.
Name and Title of Judge

August 8, 2017
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. 922(g)(1)	Felon in Possession of a Firearm	6/14/2011	12, 13, 14

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

720 months as follows: 36 months on each of Counts 1, 7, 9, 12, 13, and 14 to run concurrently with each other; a mandatory minimum of seven years on Count 8 to run consecutive to the sentence imposed on Counts 1, 7, 9, 12, 13, and 14; a mandatory minimum of 25 years on Count 2 to run consecutive to the sentence imposed in Counts 1, 7, 8, 9, 12, 13, and 14; a mandatory minimum of 25 years on Count 10 to run consecutive to the sentence imposed on Counts 1, 2, 7, 8, 9, 12, 13, and 14.

☒The court makes the following recommendations to the Bureau of Prisons:

That defendant be incarcerated in the tri state area in order to facilitate visits with his family in the New York metropolitan area.

☐The defendant is remanded to the custody of the United States Marshal.

☐The defendant shall surrender to the United States Marshal for this district:

☐at __________ ☐a.m. ☐p.m. on ___________.

☐as notified by the United States Marshal.

☐The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐before 2 p.m. on ___________.

☐as notified by the United States Marshal.

☐as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _______ to __________ at ________ with a certified copy of this judgment.

UNITED STATES MARSHAL

By ______________
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Three years on each Count to run concurrently with each other.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
6. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements

(such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature____________ Date ___________

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

The defendant shall continue to make restitution payments at the rate of 15% of his gross monthly earnings.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$900.00	$0.00	$0.00	$4,598.00*

☐The determination of restitution is deferred until____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination

☐The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss****	**Restitution Ordered**	**Priority or Percentage**
Clerk of Court, U.S. District Court, S.D.N.Y. 500 Pearl Street New York, NY 1007-1312 (For disbursement to the victims as set forth in the Schedule of Victims.)*		$4,598.00*	

TOTALS $0.00 $4,598.00*

☐Restitution amount ordered pursuant to plea agreement $____________

☐The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐the interest requirement is waived for ☐fine ☐restitution

☐the interest requirement for the ☐fine ☐restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒Lump sum payment of $900.00 due immediately, balance due

☐not later than ______, or

☐in accordance with ☐C, ☐D, ☐E, or ☐F below; or

B ☐Payment to begin immediately (may be combined with ☐C, ☐D, or ☐F below); or

C ☐Payment in equal ______ (e.g., weekly, monthly, quarterly) installments of $______ over a period of ______ (e.g., months or years), to commence ______ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐Payment in equal ______ (e.g., weekly, monthly, quarterly) installments of $ ______ over a period of

______ (e.g., months or years), to commence ______ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐Payment during the term of supervised release will commence within ______ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒Special instructions regarding the payment of criminal monetary penalties:

If the defendant is engaged in a BOP non UNICOR work program, the defendant shall pay $25 per quarter toward the criminal financial penalties. However, if the defendant participates in the BOP's UNICOR program as a grade 1 through 4, the defendant shall pay 50% of his monthly UNICOR earnings toward the criminal financial penalties, consistent with BOP regulations at 28 C.F.R. § 545.11.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount,

Joint and Several Amount, and corresponding payee, if appropriate.

☐The defendant shall pay the cost of prosecution.

☐The defendant shall pay the following court cost(s):

☒The defendant shall forfeit the defendant's interest in the following property to the United States:

> A BMW and $75,000 in U.S. currency with a credit for the net proceeds of the government's sale of the seized BMW.*

Payments shall be applied in the following order: (I) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed Aug. 8, 2017]

UNITED STATES OF AMERICA, -v.- LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," Defendant.	**PRELIMINARY ORDER OF FORFEITURE AS TO SPECIFIC PROPERTY/MONEY JUDGMENT** S3 11 Cr. 500 (SHS)

WHEREAS, on or about January 18, 2022, Louis McIntosh, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," (the "defendant"), among others, was charged in a fifteen-count Indictment, S2 1 Cr. 500 (KMK) (the "Indictment"), with conspiring to commit robbery, in violation of Title 18, United States Code, Section 1951 (Count One); with the use, carrying, and possession of firearms during and in relation to a crime of violence, to wit, the robbery conspiracy charged in Count One, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(iii) and 2 (Count Two); with committing robberies, and attempting to do so, in violation of Title 18, United States Code, Sections 1951 and 2 (Counts Five, Seven, and Nine); with the use, carrying, and possession of firearms during and in relation to a crime of violence, to wit, the attempted robbery charged in Count Five, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(iii), 924(c)(1)(C), and 2 (Count Six); with the use, carrying, and

possession of firearms, which were brandished during and in relation to a crime of violence, to wit, the robbery charged in Count Seven, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii), 924(c)(1)(C)(i), and 2 (Count Eight); with the use, carrying, and possession of firearms, one of which was discharged, during and in relation to a crime of violence, to wit, the robbery charged in Count Nine, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(iii), 924(c)(1)(C)(i), and 2 (Count Ten); with possession of a firearm, which previously had been shipped and transported in interstate and ·foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2) (Counts Twelve through Fourteen);

WHEREAS, the Indictment included a forfeiture allegation, seeking forfeiture to the United States, pursuant to 18 U.S.C. § 98l(a)(1)(C) and 28 U.S.C. § 2461, of all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offenses alleged in Counts One, Five, Seven, and Nine of the Indictment, including but not limited to a sum of United States currency representing the amount of proceeds obtained as a result of the offenses alleged in Counts One, Five, Seven, and Nine of the Indictment;

WHEREAS, on or about February 2, 2012, the Government filed a Bill of Particulars identifying the following property as being subject to forfeiture as a result of the offense described in Counts One, Five, Seven, and Nine of the Indictment:

a. One Grey BMW 528, VIN# WBANF33506CS35810 (the "Seized Vehicle");

WHEREAS, on or about August 22, 2013, the defendant was found guilty, following a jury trial, of Counts One, Two, Six through Ten, and Twelve through Fourteen of the Indictment; and

WHEREAS, on May 23, 2014, the defendant was sentenced and ordered to forfeit, a sum of money equal to $75,000 in United States currency, representing the amount of proceeds obtained as a result of the offenses alleged in Counts One, Seven, and Nine of the Indictment, and all right, title, and interest in the Seized Vehicle;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. As a result of the offense charged in Counts One, Seven, and Nine of the Indictment, a money judgment in the amount of $75,000 in United States currency (the "Money Judgment") shall be entered against the defendant.

2. As a result of the offenses charged in Counts One, Five, Seven, and Nine of the Indictment, all of the defendant's right, title and interest in the Seized Vehicle is hereby forfeited to the United States for disposition in accordance with the law, subject to the provisions of 21 U.S.C. § 853.

3. Pursuant to Rule 32.2(b)(4) of the Federal Rules of Criminal Procedure, upon entry of this Preliminary Order of Forfeiture as to Specific Property/Money Judgment, this Order is final as to the defendant, LOUIS MCINTOSH, and shall be deemed part of the

sentence of the defendant, and shall be included in the judgment of conviction therewith.

4. Upon entry of this Preliminary Order of Forfeiture as to Specific Property/Money Judgment, the United States Marshals Service (or its designee) is authorized to seize the Seized Vehicle and hold the Seized Vehicle in its secure, custody and control.

5, Pursuant to 21 U.S.C. § 853(n)(1), Rule 32.2(b)(6) of the Federal Rules of Criminal Procedure, and Rules G(4)(a)(iv)(C) and G(S)(a)(ii) of the Supplemental Rules for Admiralty or Mari time Claims and Asset Forfeiture Actions, the United States shall publish for at least thirty (30) consecutive days on the official government internet forfeiture site, www.forfeiture.gov, notice of this Preliminary Order of Forfeiture as to Specific Property/Money Judgment. Any person, other than the defendant in this case, claiming an interest in the Seized Vehicle must file a petition within sixty (60) days from the first day of publication of the notice on this official government internet site, or no later than thirty-five (35) days from the mailing of actual notice, whichever is earlier.

6. This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the Seized Vehicle, shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title and interest in the Seized Vehicle and any additional facts supporting the petitioner's claim and the relief sought, pursuant to 21 U.S.C. § 853(n).

7. Pursuant to Rule 32.2(b)(6)(A) of the Federal Rules of Criminal Procedure, the Government shall send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

8. Upon adjudication of all third-party interests, this Court will enter a Final Order of Forfeiture with respect to the Seized Vehicle pursuant to 21 U.S.C. § 853(n) and Rule 32.2(c)(2) of the Federal Rules of Criminal Procedure, in which all third-party interests will be addressed. Any net proceeds realized by the Government from the sale of the Seized Vehicle after it is forfeited and sold shall be credited towards the Money Judgment.

9. All payments on the outstanding Money Judgment shall be made by postal money order, bank or certified check, made payable, in this instance to the United States Marshals Service, and delivered by mail to the United States Attorney's Office, Southern District of New York, Attn: Money Laundering and Asset Forfeiture Unit, One St. Andrew's Plaza, New York, New York 10007 and shall indicate the defendant's name and case number.

10. Upon execution of this Preliminary Order of Forfeiture as to Specific Property/Money Judgment, and pursuant to 21 U.S.C. § 853, the United States Marshals Service shall be authorized to deposit the payments on the Money Judgment in the Assets Forfeiture Fund, and the United States shall have clear title to such forfeited property.

11. The Court shall retain jurisdiction to enforce this Order, and to amend it as necessary, pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure.

12. Pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, upon entry of this Preliminary Order of Forfeiture as to Specific Property/Money Judgment, the United States Attorney's Office is authorized to conduct any discovery needed to identify, locate or dispose of forfeitable property, including depositions, interrogatories, requests for production of documents and the issuance of subpoenas, pursuant to Rule 45 of the Federal Rules of Civil Procedure.

13. The Clerk of the Court shall forward three certified copies of this Order to Assistant United States Attorney, Sarah Eddy, Chief, Money Laundering and Asset Forfeiture Unit, One St. Andrew's Plaza, New York, New York 10007.

Dated: New York, New York
August 8, 2017

SO ORDERED:

[handwritten signature]
HONORABLE SIDNEY H. STEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed June 14, 2022]

UNITED STATES OF AMERICA,

-v-

LOUIS MCINTOSH,

Defendant.

11-Cr-500 (SHS)

ORDER

SIDNEY H. STEIN, U.S. District Judge.

In light of the Mandate of the U.S. Court of Appeals for the Second Circuit issued on May 6, 2020, remanding this matter to this Court for resentencing,

IT IS HEREBY ORDERED that:

1. The U.S. Probation Office is directed to prepare a revised presentence report on or before August 10, 2022;

2. The CJA attorney on duty today, Jacqueline E. Cistaro, is appointed to represent the defendant on remand;

3. The defendant shall file his resentencing submission on or before August 24, 2022;

4. The government shall file its resentencing submission on or before August 31, 2022;

5. The defendant shall be resentenced on September 14, 2022, at 11:00 a.m.;

6. Defendant's motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) [Doc. No. 354] is dismissed without prejudice; and

7. Defendant's Motion for Appointment of Counsel [Doc. No. 353] in connection with his motion for compassionate release is dismissed without prejudice.

Dated: New York, New York
June 14, 2022

SO ORDERED:
[handwritten signature]
Sidney H. Stein, U.S.D.J.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[filed Jan. 25, 2023]

Nos. 14-1908, 14-3922, 17-2623

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

v.

LOUIS MCINTOSH, AKA Lou D, AKA Lou Diamond, AKA G,
Defendant-Appellant-Cross-Appellee

EDWARD RAMIREZ, AKA Taz, TERRENCE DUHANEY, AKA Bounty Killer, TURHAN JESSAMY, AKA Vay, QUINCY WILLIAMS, AKA Capone, TYRELL ROCK, AKA Smurf, NEIL MORGAN, AKA Steely
Defendants,

Appeal from the United States District Court for the Southern District of New York.

Before: WALKER, LOHIER, *Circuit Judges,* and STANCEU, *Judge.*[*]

Louis McIntosh appeals various issues arising from his 2017 amended judgment of conviction for Hobbs Act robbery and firearm offenses in the Southern District of New York (Sidney H. Stein, *J.*). In this opinion, we address two of McIntosh's arguments—first, that the order of forfeiture entered against him should be vacated because the district

[*] Senior Judge Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

court failed to enter a preliminary order prior to sentencing, as required by Federal Rule of Criminal Procedure 32.2(b)(2)(B); second, that he was improperly convicted of possessing firearms as a felon, Counts Twelve through Fourteen, because the government did not prove that he knew that he was a felon. As to these issues, we **AFFIRM** the judgment of the district court. We address his remaining arguments in a separate summary order filed concurrently with this opinion.

STEVEN YUROWITZ, Newman & Greenberg LLP, New York, NY, *for Defendant-Appellant-Cross-Appellee Louis McIntosh*.

SARAH KRISSOFF, Assistant United States Attorney (Thomas McKay, Assistant United States Attorney, *on the brief*), *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY, *for Appellee-Cross-Appellant United States of America*.

JOHN M. WALKER, JR., *Circuit Judge*:

Louis McIntosh appeals various issues arising from his 2017 amended judgment of conviction for Hobbs Act robbery and firearm offenses in the Southern District of New York (Sidney H. Stein, *J.*).[1] In

[1] This opinion was originally filed on January 31, 2022, with a concurrently filed summary order. *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). On July 26, 2022, McIntosh filed a petition for a writ of certiorari with the Supreme Court. On November 7, 2022, the Supreme Court granted McIntosh's petition for a writ of certiorari, vacated our judgment, and remanded the case for further consideration in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022), which

this opinion, we address two of McIntosh's arguments—first, that the order of forfeiture entered against him should be vacated because the district court failed to enter a preliminary order prior to sentencing, as required by Federal Rule of Criminal Procedure 32.2(b)(2)(B); second, that he was improperly convicted of possessing firearms as a felon, Counts Twelve through Fourteen, because the government did not prove that he knew that he was a felon. As to these issues, we **AFFIRM** the judgment of the district court. We address his remaining arguments in a separate summary order filed concurrently with this opinion.

BACKGROUND

In 2011, Appellant Louis McIntosh and several others were indicted on multiple counts of Hobbs Act robbery and related firearms charges. The charges arose from a series of violent robberies and attempted robberies that occurred between 2009 and 2011. The indictment contained a forfeiture allegation, consistent with 18 U.S.C. § 98l(a)(1)(C) and 28 U.S.C. § 2461(c), requiring the forfeiture of all proceeds and property resulting from the offenses.

In August 2013, a jury in the Southern District of New York convicted McIntosh on all counts.[2] The district court sentenced McIntosh to 720 months' im-

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held that attempted Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c). *See McIntosh v. United States*, 143 S. Ct. 399 (2022). Because *United States v. Taylor* does not affect the analysis in this opinion, we now reissue it, with only minor non-substantive changes.

[2] After jury deliberations, the district court directed a judgment of acquittal on two counts. The district court's order as to those counts hasno bearing on the issues discussed in this opinion.

prisonment and three years of supervised release. The district court also ordered McIntosh to pay restitution and to forfeit $75,000 and a BMW that McIntosh had purchased with robbery proceeds.

Before imposing forfeiture, Federal Rule of Criminal Procedure 32.2(b) requires the district court to "promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment . . . [and] directing the forfeiture of specific property."[3] "Unless doing so is impractical," this preliminary order "must" be entered "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final."[4] The preliminary order becomes final at sentencing and must be included in the judgment.[5]

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. At sentencing, after verbally ordering forfeiture, the district court instructed the government to propose a formal order of forfeiture within one week, which the government also failed to do. As a result, no written order of forfeiture was entered.

After the entry of judgment, McIntosh timely appealed. In 2016, on the government's unopposed motion, we remanded the case pursuant to *United States v. Jacobson*[6] and instructed the government, if it wished to pursue forfeiture, to ask the district court to enter a formal order of forfeiture. The government

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

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

[5] Fed. R. Crim. P. 32.2(b)(4)(A)-(B).

[6] 15 F.3d 19 (2d Cir. 1994).

then filed a proposed order, and McIntosh raised several challenges in response.

On August 8, 2017, the district court denied McIntosh's objections and entered a preliminary order for forfeiture. The order required McIntosh to pay $75,000 in forfeiture and to turn over the BMW, with funds from the sale of the car being credited against the $75,000.[7] The order was included in an amended judgment filed the same day. McIntosh timely appealed the amended judgment.

DISCUSSION

I

On appeal, McIntosh challenges the forfeiture order, which he says should be vacated because the district court failed to enter a preliminary forfeiture order before sentencing, as required by Federal Rule of Criminal Procedure 32.2(b)(2)(B). We disagree.

Nothing in the federal rules sets forth the consequences of a failure by the district court to issue the preliminary order prior to sentencing. We find the Supreme Court's decision in *Dolan v. United States*, however, to be instructive.[8] There, in a restitution case, the Supreme Court laid out a framework for analyzing "the consequences of [a] missed deadline" when not specified in the relevant statute.[9] The Court described three kinds of deadlines: "jurisdictional rules" that present an absolute prohibition; "claims-processing rules" that can bar certain actions

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[7] In our accompanying summary order, we vacate the $75,000 forfeiture on other grounds and remand the case to the district court for recalculation.

[8] 560 U.S. 605 (2010).

[9] *Id.* at 610.

but also may be waived; and "time-related directives" that are "legally enforceable but [do] 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."[10]

The *Dolan* Court concluded that a 90-day statutory deadline to order restitution was a time-related directive. The Court considered a number of relevant circumstances. It stated that when "a statute does not specify a consequence for noncompliance with its timing provisions, federal courts will not in the ordinary course impose their own coercive sanction."[11] It examined the text and structure of the statute and determined that the deadline "is primarily designed to help victims of crime secure prompt restitution rather than to provide defendants with certainty as to the amount of their liability."[12] The Court was mindful that preventing restitution would harm victims, "who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit."[13] This suggested that the deadline is not meant to be a firm prohibition. The Court also cited other cases in which deadlines were interpreted flexibly in order to preserve their purpose or to avoid disproportionally benefiting convicted defendants.[14] Finally, it noted that defendants who wished to avoid delay were always free to remind the district court of the statutory deadline.[15] Taken together, these cir-

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[10] *Id.* at 610-11.

[11] *Id.* at 611 (internal quotation marks omitted).

[12] *Id.* at 613.

[13] *Id.* at 613-14.

[14] *Id.* at 614-15.

[15] *Id.* at 616.

cumstances led the Supreme Court to conclude that the restitution deadline is a time-related directive. As a result, so long as the district court makes clear prior to the deadline expiring that it intends to impose restitution, "a sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution."[16]

We think the considerations that pertained to the restitution order in *Dolan* similarly apply to the Rule 32.2(b) deadline for forfeiture. The Fourth Circuit adopted this view a year after *Dolan* when, in *United States v. Martin*, it applied *Dolan*'s considerations to a previous version of Rule 32.2(b) and found its deadline to be a time-related directive.[17] For several reasons, we agree with the reasoning in *Martin* and believe it applies with equal force to the current version of the rule.

First, Rule 32.2 "does not specify a consequence for noncompliance with its timing provisions."[18] Second, the Federal Rules Advisory Committee's notes on the revised rule make clear that the deadline to enter the preliminary order is intended to give the parties time "to advise the court of omissions or errors in the order before it becomes final" because there is limited opportunity to do so after judgment is finalized.[19] At the same time, the comments make no mention of an interest in giving defendants certainty as to the amount to be forfeited before sentencing. This focus on accuracy, not the defendant's repose, is

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[16] *Id.* at 608.

[17] 662 F.3d 301 (4th Cir. 2011).

[18] *Dolan*, 560 U.S. at 611 (internal quotation marks omitted).

[19] Fed. R. Crim. P. 32.2(b) advisory committee's note to 2009 amendment.

consistent with the substantive purpose of forfeiture, which is to "deprive criminals of the fruits of their illegal acts and deter future crimes."[20] Third, because forfeited funds frequently go to the victims of the crime, preventing forfeiture due to the missed deadline would tend to harm innocent people who are not responsible for the oversight.[21] Fourth, consistent with examples cited in *Dolan*, interpreting the deadline rigidly here would disproportionately benefit defendants. And, finally, as in *Dolan*, a defendant concerned about possible delays or mistakes can remind the district court of the preliminary order requirement any time before sentencing.

Our analysis is reinforced by the decisions of sister circuits that have also found the Rule 32.2(b) deadline to be non-jurisdictional.[22] Thus, we conclude that Rule 32.2(b)(2)(B) is a time-related directive. Accordingly, the district court's failure to enter a preliminary order in time does not render the forfeiture invalid.

McIntosh raises several counterarguments, none of which are persuasive. He cites an Eleventh Circuit case for the proposition that "strict compliance with the letter of the law by those seeking forfeiture must be required."[23] But Rule 32.2(b)(2)(B) governs the conduct of the district court, not the litigants. The issue here is whether the district court had the author-

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[20] *Martin*, 662 F.3d at 309.

[21] *Id.*

[22] *See United States v. Carman*, 933 F.3d 614, 617 (6th Cir. 2019); *United States v. Cereceres*, 771 F. App'x 803, 804 (9th Cir. 2019); *United States v. Farias*, 836 F.3d 1315, 1330 (11th Cir. 2016).

[23] *United States v. $38,000.00 in U.S. Currency*, 816 F.2d 1538, 1547 (11th Cir. 1987).

ity to enter the order despite its failure to comply with the timing requirements, not whether the government should have been more diligent. Even if the government bears some responsibility for the mistake, Rule 32.2(b)(2)(B)'s status as a time-related directive means that it is not a fatal one.

McIntosh also asserts that forfeiture is unlike restitution, which was at issue in *Dolan*, because restitution is intended to assist the victims of crimes. It is true that forfeiture and restitution serve different purposes: restitution is for "remediating a loss," while forfeiture is for "disgorging a gain."[24] But that distinction is less material here. Forfeiture also serves other important purposes, and we see no reason why, for purposes of timing, restitution and forfeiture should be treated differently under these circumstances.

McIntosh next argues that he was prejudiced by the delay because his BMW lost value while the forfeiture issue was litigated.[25] But McIntosh knew that the district court would order forfeiture, and as the district court pointed out, he could have sought an interlocutory sale of the car if he had wished to preserve its value. Doing so would have been consistent with the structure of the rule, which permits the sale of property prior to sentencing but only with the defendant's consent.[26] McIntosh also argues that the government alone is responsible for preserving the

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[24] *United States v. Torres*, 703 F.3d 194, 196 (2d Cir. 2012).

[25] *See United States v. Qurashi*, 634 F.3d 699, 705 (2d Cir. 2011) (noting that *Dolan* permits us to take into account claimed prejudices resulting from delays).

[26] Fed. R. Crim. P. 32.2(b)(4)(A); Fed. R. Crim. P. 32.2(b) advisory committee's note to 2000 amendment.

value of seized assets, but for support he cites only to an inapposite customs statute.[27] McIntosh has not demonstrated prejudice sufficient to void the forfeiture order.

McIntosh also points to the structure of Rule 32.2 to argue that the preliminary order deadline must be interpreted strictly. Should the court forget to include the forfeiture order in the final judgment, Rule 32.2(b)(4)(B) permits the judgment to be corrected under Rule 36, which governs the correction of clerical errors. From this provision, McIntosh infers that all the other requirements of the rule, which do not have related correction provisions, are strictly enforceable. But Rule 32.2(b)(4)(B) simply makes clear that forgetting to incorporate the order in the final judgment is a clerical error and should be treated as such. It sheds no light on the treatment of procedural errors. Indeed, the statute at issue in *Dolan* similarly stated that a sentence containing an order of restitution can "subsequently be . . . corrected under Rule 35."[28] This provision, however, did not transform the statute's other requirements into ironclad limits, and neither does reference to Rule 36 in Rule 32.2(b)(4)(B) do so here.

Finally, we reject McIntosh's claim that he should be credited for the value of the BMW at the time it was seized, not its eventual sale price. He cites no authority directly supporting this point, instead relying on statutes that require the government or courts to preserve the value of seized assets. The statutes he cites deal with protecting the interests of

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[27] 19 U.S.C. § 1612 (requiring the prompt sale of property seized under customs law).

[28] 18 U.S.C. § 3664(o)(1)(A).

lienholders and others with claims on the property, not the individual subject to the forfeiture order.[29] Crediting defendants for property depreciation that occurred during litigation and which defendants could likely prevent by requesting a sale would, in most cases, undermine forfeiture's deterrent value and possibly shortchange victims.

II

McIntosh also contests his convictions on Counts Twelve through Fourteen for possessing a firearm as a felon. At trial, McIntosh stipulated that he had been convicted of a crime punishable by a year or more in prison, but the stipulation did not state that he was aware of this fact when he possessed the firearms. The government, meanwhile, offered no evidence suggesting that McIntosh was aware of his felon status, but McIntosh did not object.

In *Rehaif v. United States*, the Supreme Court held that the relevant statutes required the government to show "that the defendant knew he possessed a firearm and also that he knew he had the relevant [felon] status when he possessed it."[30] On appeal, McIntosh argues that the district court committed plain error when it failed to instruct the jury about the knowledge element of these counts. Plain error arises when, among other requirements, "there [is] a reasonable probability that the error affected the outcome of the trial."[31]

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[29] *See* 19 U.S.C. § 1612; Fed R. Civ. P., Supp. Rule G(7)(b); 18 U.S.C. § 981(g)(6).

[30] 139 S. Ct. 2191, 2194 (2019).

[31] *United States v. Nouri*, 711 F.3d 129, 139 (2d Cir. 2013) (quotation marks omitted).

McIntosh's argument is foreclosed by the recent Supreme Court decision *Greer v. United States*.[32] In *Greer*, the Supreme Court held that, to establish plain error under *Rehaif*, a defendant must "make an adequate showing on appeal that he would have presented evidence in the district court that he did not in fact know he was a felon when he possessed firearms."[33] McIntosh has offered no such evidence. Consequently, we have "no basis to conclude that there is a 'reasonable probability' that the outcome would have been different absent the *Rehaif* error," and so we cannot find plain error.[34]

McIntosh argues that the district court's failure to instruct the jury on the point should, on its own, be enough to establish plain error. But *Greer* has made clear that "*Rehaif* errors fit comfortably within the general rule that a constitutional error does not automatically require reversal of a conviction."[35] McIntosh "must satisfy the ordinary plain-error test."[36] He has not done so here, and so we affirm the district court on Counts Twelve through Fourteen.

CONCLUSION

For the foregoing reasons, as to the issues discussed above, we **AFFIRM** the judgment of the district court.

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[32] 141 S. Ct. 2090 (2021).

[33] *Id.* at 2097.

[34] *Id.*

[35] *Id.* at 2100 (quotation marks omitted).

[36] *Id.*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[filed Jan. 25, 2023]

AMENDED SUMMARY ORDER

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

v.

LOUIS MCINTOSH, AKA Lou D, AKA Lou Diamond, AKA G,
Defendant-Appellant-Cross-Appellee

EDWARD RAMIREZ, AKA Taz, TERRENCE DUHANEY, AKA Bounty Killer, TURHAN JESSAMY, AKA Vay, QUINCY WILLIAMS, AKA Capone, TYRELL ROCK, AKA Smurf, NEIL MORGAN, AKA Steely
Defendants,

Nos. 14-1908, 14-3922, 17-2623

PRESENT: JOHN M. WALKER, JR., RAYMOND J. LOHIER, JR., *Circuit Judges*, TIMOTHY C. STANCEU,* *Judge.*

APPEARING FOR APPELLANT: STEVEN YUROWITZ, Newman & Greenberg LLP, New York, NY.

APPEARING FOR APPELLEE: SARAH KRISSOFF, Assistant United States Attorney (Thomas McKay, Assistant United States Attorney, *on the brief*), *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY.

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* Senior Judge Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

Appeal from a ruling of the United States District Court for the Southern District of New York (Sidney H. Stein, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the amended judgment entered on August 8, 2017 is in part AFFIRMED and in part VACATED. The judgment of acquittal entered on January 17, 2014 is in part AFFIRMED and in part REVERSED. The case is REMANDED to the district court for resentencing.[1]

Appellant Louis McIntosh appeals from a 2017 amended judgment of conviction following a 2014 trial for several Hobbs Act robberies. The government cross-appeals from a district court judgment of acquittal vacating two counts of McIntosh's conviction. McIntosh raises several issues for review, three of which the government does not contest. McIntosh's

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[1] This summary order was originally filed on January 31, 2022, with a concurrently filed opinion. *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). On July 26, 2022, McIntosh filed a petition for a writ of certiorari with the Supreme Court. On November 7, 2022, the Supreme Court granted McIntosh's petition for a writ of certiorari, vacated our judgment, and remanded the case for further consideration in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022), which held that attempted Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c). *See McIntosh v. United States*, 143 S. Ct. 399 (2022). Because *United States v. Taylor* only affects our analysis as to Count Six, and McIntosh has not yet been resentenced, *see United States v. McIntosh*, No. 7:11-cr-500-1 (SHS), Dkt. No. 387 (S.D.N.Y. Nov. 10, 2022) (adjourning resentencing to February 14, 2023), we now issue this amended summary order, which is substantively unchanged except as to our analysis regarding Count Six.

uncontested arguments are: first, that his conviction on Count Two of the indictment was improper because conspiring to commit Hobbs Act robbery is not a crime of violence; second, that he was improperly sentenced because the district court did not take account of his firearm mandatory minimum sentence when calculating his predicate offense sentences; and, third, that the district court improperly found him jointly and severally liable for the robberies' proceeds.

In addition, McIntosh claims that he was improperly convicted of Counts Seven and Eight because venue was not proper in the Southern District of New York and because the robbery at issue did not have a connection to interstate commerce. And, finally, he argues that the forfeiture and restitution orders should be vacated because he was not present when they were imposed and the amount calculated was not proven beyond a reasonable doubt. In its cross appeal, meanwhile, the government argues that the district court erred when it ruled that there was not enough evidence to convict McIntosh on Counts Five and Six.

This summary order addresses the above arguments. In addition, McIntosh argues that his forfeiture should be vacated because the district court did not enter a preliminary forfeiture order prior to sentencing, as required by Federal Rule of Criminal Procedure 32.2. He also asserts that he was improperly convicted of possessing firearms as a felon, Counts Twelve through Fourteen, because the government did not prove that he knew that he was a felon. A separate opinion issued concurrently with this summary order addresses these arguments.

We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision.

I. McIntosh's Uncontested Arguments

McIntosh first argues that his conviction on Count Two of the indictment was improper. Count Two alleged that he violated 18 U.S.C. § 924(c) by carrying firearms in furtherance of a conspiracy to commit Hobbs Act robbery. Section 924(c) criminalizes the use of firearms in furtherance of "any crime of violence." 18 U.S.C. § 924(c)(1)(A). We have since held, however, that conspiring to commit Hobbs Act robbery is not a "crime of violence" under § 924(c). *See United States v. Barrett*, 937 F.3d 126, 127 (2d Cir. 2019) ("*Davis* precludes us from concluding, as we did in our original opinion, that Barrett's Hobbs Act robbery conspiracy crime qualifies as a § 924(c) crime of violence." (citing *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019))). As a result, McIntosh's conviction on Count Two is vacated.

McIntosh next challenges his sentence on the basis that the district court did not consider the severity of the mandatory minimum sentence imposed by McIntosh's firearm convictions when calculating his sentence for the Hobbs Act offenses. In doing so, the court followed our then controlling precedent. *See United States v. Chavez*, 549 F.3d 119, 135 (2d Cir. 2008). Subsequently, however, the Supreme Court held that a sentencing court *is* permitted to consider the mandatory minimum resulting from such offenses, abrogating *Chavez*. *See Dean v. United States*, 137 S. Ct. 1170 (2017). We remand the case for resentencing in light of *Dean*.

Finally, McIntosh objects to being held jointly and severally liable for the proceeds of the robberies. At sentencing, the district court ordered McIntosh to pay $75,000 in forfeiture, the total amount stolen in the robberies, even though the evidence suggests that he received only a portion of that amount. In *Honeycutt v. United States*, the Supreme Court held that a different forfeiture statute precluded joint and several liability among conspirators. 137 S. Ct. 1626, 1632 (2017). We conclude and the government now concedes that *Honeycutt*'s reasoning applies with equal force to the forfeiture statute at issue here, 18 U.S.C. § 981(a)(1)(c). Accordingly, the forfeiture order is vacated, and the issue is remanded to be recalculated consistent with the understanding that *Honeycutt* prohibits joint and several liability under 18 U.S.C. § 981(a)(1)(c).[2]

II. McIntosh's Contested Arguments

a. Counts Seven and Eight

McIntosh's first contested argument is that he was improperly convicted of Counts Seven and Eight, which allege the robbery of loan shark and wholesale ice cream salesman Robert Rizzatti in Lynbrook, Long Island. McIntosh contends that the Southern District of New York was not the appropriate venue for these counts and that the prosecution failed to establish the robbery's required connection to interstate commerce.

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[2] Given the government's concession, "we need not here decide whether *Honeycutt*'s reasoning applies equally in all respects to forfeiture orders under 18 U.S.C. § 981(a)(1)(C)." *United States v. Gil-Guerrero*, 759 F. App'x 12, 18 n.8 (2d Cir. 2018).

Venue "is *not* an element of a crime," and so it need only be proved by a preponderance of the evidence. *United States v. Rommy*, 506 F.3d 108, 119 (2d Cir. 2007) (quotation marks omitted). For Hobbs Act robbery and related firearms charges, venue is "proper in any district where interstate commerce is affected or where the alleged acts took place." *United States v. Davis*, 689 F.3d 179, 186 (2d Cir. 2012) (quotation marks and citation omitted).

In this case, the government sufficiently established venue. Rizzatti purchased ice cream for his business from a distributor located in the Southern District. The distributor, in turn, sourced the product from a factory in New Jersey. A loss of capital likely affected Rizzatti's future purchases, in turn affecting interstate commerce. The government also introduced evidence showing that McIntosh took substantial steps toward the completion of the Lynbrook robbery in the Southern District, including meeting with and recruiting co-conspirators, gathering weapons beforehand, and dividing the proceeds of the robbery. *See United States v. Davis*, 689 F.3d 179, 190 (2d Cir. 2012) (holding that a defendant's telephone call to the Southern District to recruit co-conspirators contributed to making the district a proper venue for prosecution for attempted robbery). Both the effect on interstate commerce and the steps taken in the district are enough to establish proper venue in the Southern District of New York. Our precedent here is well-established and binding, and we decline McIntosh's invitation to have us reexamine it.

McIntosh also argues that the government did not show an effect on interstate commerce because it did not prove that the stolen money would have otherwise been used by Rizzatti to purchase ice cream. By

stealing his money, however, McIntosh reduced Rizzatti's available funds, which would have at least marginally affected his ability to purchase ice cream in the future. Venue was proper in this case.

In addition to his venue arguments, McIntosh asserts that the Lynbrook robbery lacked a sufficient nexus to interstate commerce to satisfy the jurisdictional element of Hobbs Act robbery. *See* 18 U.S.C. § 1951(a). In a Hobbs Act prosecution, the burden of proving a nexus to interstate commerce is minimal and "may be satisfied by a showing of a very slight effect on interstate commerce." *United States v. Angelilli*, 660 F.2d 23, 35 (2d Cir. 1981). "[A]ll that need be shown is the possibility or potential of an effect on interstate commerce, not an actual effect." *United States v. Needham*, 604 F.3d 673, 680 (2d Cir. 2010) (abrogated on other grounds).

The evidence shows that Rizzatti was engaged in two informal businesses affecting interstate commerce: selling ice cream wholesale that was manufactured in and purchased from New Jersey, and loaning money to people in New York who used it for out-of-state contracts. McIntosh specifically sought to steal the cash Rizzatti used in conducting these enterprises, thus depleting the assets and affecting Rizzatti's ability to purchase more ice cream manufactured in New Jersey and to extend additional loans. *See Needham*, 604 F.3d at 680.

McIntosh responds that the government did not produce evidence that the money robbed would have been used in the furtherance of either business. But a "very slight effect" on one's informal businesses is an inevitable result of unexpectedly losing a significant amount of money. McIntosh also argues that

Rizzatti's testimony that his ice cream came from out of state was inadequate because he based this claim on a 1980s visit to a New Jersey manufacturing facility. McIntosh analogizes this to cases holding that evidence of a time when federal deposit insurance covered a bank could not be used to infer earlier or subsequent coverage. *See United States v. Sliker*, 751 F.2d 477, 484 (2d Cir. 1984); *United States v. Ali*, 266 F.3d 1242, 1244 (9th Cir. 2001); *United States v. Shively*, 715 F.2d 260, 265 (7th Cir. 1983). Rizzatti testified, however, that he believed the ice cream was sourced from New Jersey at the time of the robbery, and no contrary evidence was introduced. In the cases cited by McIntosh, no testimony was provided about contemporaneous coverage. As a result, they are inapposite.

The government brought the Lynbrook robbery charges in a proper venue and sufficiently established the interstate element. Thus, we affirm McIntosh's conviction on Counts Seven and Eight.

b. The Forfeiture and Restitution Orders

Finally, McIntosh advances three arguments for why the forfeiture and restitution orders imposed as part of his final judgment should be vacated. In our accompanying opinion, we deal with the third argument—that the district court's failure to comply with a procedural deadline prohibits entry of the forfeiture order. McIntosh's other two points are addressed here.

As the government points out, McIntosh's argument that his presence was required at the imposition of the orders is moot. This summary order remands the case for resentencing, and so he will be present for the imposition of the new judgment.

McIntosh also argues that the restitution and forfeiture amounts should have been calculated beyond a reasonable doubt. McIntosh acknowledges, however, that this argument is foreclosed by binding Second Circuit case law. *See United States v. Stevenson*, 834 F.3d 80, 86 (2d Cir. 2016) (affirming that a forfeiture amount need not be proven beyond a reasonable doubt); *see also United States v. Bengis*, 783 F.3d 407, 412 (2d Cir. 2015) (holding the same in the relevant restitution context). We affirm the district court on this point.

III. The Government's Cross Appeal

Counts Five and Six of the indictment charged McIntosh with attempting to rob drug dealers at a dice game on Cliff Street in Yonkers and using a firearm in the process. The jury convicted him on these counts, but the district court overturned the verdict in a January 17, 2014 judgment. The court determined that the evidence was insufficient to establish that McIntosh had "intended to rob" the dealers, as opposed to just assaulting them.

In our original summary order, we accepted the government's argument that the evidence was sufficient and that the district court erred in acquitting McIntosh on these counts. That analysis remains true, but only as to Count Five.

When reviewing a verdict, we are required to uphold the jury's finding if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In making this determination, "we must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's fa-

vor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (quotation marks omitted).

Sufficient evidence supported the jury's finding that McIntosh possessed the required intent to rob the drug dealers. The jury heard testimony from three witnesses directly supporting this finding. One witness, Terrence Duhaney, stated that Ramirez and McIntosh "was [sic] saying the whole plan was to rob the dice game." J.A. at 355. Another, Hibah Lee, testified that McIntosh later told him that he went to his truck "to get the shotgun to go in [Biggs's] pocket and teach him a lesson," which meant to "rob him." *Id.* at 372. And, finally, Edward Ramirez stated that McIntosh was "talking about how . . . we went over [to Cliff Street] to catch jerks, which in street terms means a robbery, and we didn't get nothing." *Id.* at 327.

The jury also received circumstantial evidence supporting the conclusion that McIntosh planned to rob the dealers. First, the jury heard testimony that McIntosh gave his co-conspirators a "look" during the dice game, which they understood to mean that "it was going to be something." *Id.* at 325. After the "look," his co-conspirators began discussing "who was going to rob who for what," suggesting that McIntosh intended more than an assault. *Id.* Second, the jury received evidence showing that McIntosh initially went to Cliff Street to commit a different robbery, but that attempt was abandoned because too many people were inside the house. Although evidence of that planned robbery does not, by itself, establish McIntosh's intent to rob the dice game, it reinforces

the conclusion that McIntosh decided to seize an opportunity to rob the dice game instead.

The district court, in finding this evidence inconclusive, emphasized that the "look" and the initial plan to commit a different robbery are insufficient to establish McIntosh's intent beyond a reasonable doubt. The court also noted that the section of Ramirez's testimony quoted above could refer to the initial intention to commit a different robbery. The district court then concluded that the testimony of Duhaney and Lee, on its own, is not enough to establish McIntosh's intent. The district court's analysis thus separated the individual pieces of evidence, reasoning that no one piece meets the burden of proof. When reviewing a jury's finding, however, the court must take account of "the totality of the government's case" and not restrict its analysis "to each element, as each fact may gain color from others." *United States v. Riggi*, 541 F.3d 94, 108 (2d Cir. 2008) (quotation mark omitted). When assessing the evidence holistically, we believe that a rational trier of fact could have found McIntosh guilty.

In his brief, McIntosh reiterates the district court's reasoning and raises several issues with the trustworthiness and consistency of the witnesses' testimony. Such arguments, however, go to the credibility and weight of the evidence, as to which we defer to the jury. *See Coplan*, 703 F.3d at 62. The district court erred when it overturned the jury's verdict as to Count Five.

As to Count Six, using a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c), we must affirm the district court's dismissal, because, regardless of the sufficiency of the evidence,

the Supreme Court held in *Taylor v. United States*, 142 S. Ct. 2015 (2022) that attempted robbery—the predicate offense for Count Six—is not a crime of violence under 18 U.S.C. § 924(c).

Accordingly, the district court's January 17, 2014 judgment is reversed as to Count Five and is affirmed as to Count Six.

* * *

McIntosh's conviction on Count Two is VACATED. The district court's judgment dismissing Count Five is REVERSED. The district court's judgment dismissing Count Six is AFFIRMED. The district court is AFFIRMED on Counts Seven and Eight. The district court's forfeiture order is VACATED as to the issue of joint and several liability. As explained in the precedential opinion filed simultaneously with this order, the district court is AFFIRMED on the issue of the deadline under Federal Rule of Criminal Procedure 32.2 and on Counts Twelve through Fourteen. The case is REMANDED to the district court for resentencing consistent with this order.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

[SEAL]

SOUTHERN DISTRICT OF NEW YORK

[filed Apr. 19, 2023]

UNITED STATES OF AMERICA, -v.- LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," Defendant.	**PRELIMINARY ORDER OF FORFEITURE AS TO SPECIFIC PROPERTY/MONEY JUDGMENT** S3 11 Cr. 500 (SHS)

WHEREAS, on or about January 18, 2012, LOUIS MCINTOSH, a/k/a "Lou D.," a/k/a "Lou Diamond," a/k/a "G," (the "Defendant"), among others, was charged in a fifteen-count Indictment, S3 11 Cr. 500 (KMK) (the "Indictment"), with conspiring to commit robbery, in violation of Title 18, United States Code, Section 1951 (Count One); with the use, carrying, and possession of firearms during and in relation to a crime of violence, to wit, the robbery conspiracy charged in Count One, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(iii) and 2 (Count Two); with committing robberies, and attempting to do so, in violation of Title 18, United States Code, Sections 1951 and 2 (Counts Five, Seven, and Nine); with the use, carrying, and possession of firearms during and in relation to a crime of violence, to wit, the attempted robbery charged in Count Five, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(iii), 924(c)(1)(C)(i), and 2 (Count Six); with the use, carrying, and possession of firearms, which were brandished during and in relation to a crime of violence, to wit, the robbery charged in

Count Seven, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii), 924(c)(1)(C)(i), and 2 (Count Eight); with the use, carrying, and possession of firearms, one of which was discharged, during and in relation to a crime of violence, to wit, the robbery charged in Count Nine, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(iii), 924(c)(1)(C)(i), and 2 (Count Ten); and with possession of a firearm, which previously had been shipped and transported in interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2) (Counts Twelve through Fourteen);

WHEREAS, the Indictment included a forfeiture allegation with respect to Counts One, Five, Seven and Nine of the Indictment, seeking forfeiture to the United States, pursuant to Title 18, United States Code, Section 98l(a)(1)(C) and Title 28, United States Code, Section 2461, of all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offenses alleged in Counts One, Five, Seven, and Nine of the Indictment, including but not limited to a sum of United States currency representing the amount of proceeds obtained as a result of the offenses alleged in Counts One, Five, Seven, and Nine of the Indictment;

WHEREAS, on or about February 2, 2012, the Government filed a Bill of Particulars identifying the following property as being subject to forfeiture as a result of the offenses alleged in Counts One, Five, Seven, and Nine of the Indictment:

a. One Grey BMW 528, VIN# WBANF33506CS35810 (the "Specific Property");

WHEREAS, on or about August 22, 2013, the Defendant was found guilty, following a jury trial, of Counts One, Two, Five through Ten, and Twelve through Fourteen of the Indictment;

WHEREAS, on or about May 23, 2014, the Defendant was sentenced and ordered to forfeit to the United States, a sum of money equal to $95,000 in United States currency, representing the amount of proceeds obtained as a result of the offenses alleged in Counts One, Five, Seven, and Nine of the Indictment, and all right, title, and interest of the Defendant in the Specific Property;

WHEREAS, on or about August 8, 2017, following his appeal, the Defendant was re-sentenced and ordered to forfeit to the United States, a sum of money equal to $75,000 in United States currency, representing the amount of proceeds obtained as a result of the offenses alleged in Counts One, Five, Seven, and Nine of the Indictment, and all of his right, title, and interest in the Specific Property;

WHEREAS, on or about August 8, 2017, the Court entered a Preliminary Order of Forfeiture as to Specific Property/Money Judgment (the "Preliminary Order of Forfeiture") which ordered the forfeiture to the United States of: (i) a sum of money equal to $75,000 in United States currency, representing the amount of proceeds obtained as a result of the offenses alleged in Counts One, Five, Seven, and Nine of the Indictment; and (ii) all of the Defendant's right, title, and interest in the Specific Property;

WHEREAS, on or about August 22, 2017, the Defendant appealed his conviction and sentencing;

WHEREAS, on or about January 25, 2023, the United States Court of Appeals for the Second Circuit, *inter alia,* vacated the Preliminary Order of Forfeiture and remanded the case to this Court for resentencing;

WHEREAS, the Government asserts that $28,000 in United States currency represents property constituting, or derived from, proceeds traceable to the commission of the offenses charged in Count One, Five, Seven and Nine of the Indictment that the Defendant personally obtained;

WHEREAS, the Government seeks the entry of a money judgment in the amount of $28,000 in United States currency representing the amount of proceeds traceable to the offenses charged in Counts One, Five, Seven, and Nine of the Indictment that the Defendant personally obtained;

WHEREAS, the Government further seeks the forfeiture of all of the Defendant's right, title and interest in the Specific Property, which constitutes proceeds traceable to the offenses charged in Counts One, Five, Seven, and Nine of the Indictment that the Defendant personally obtained;

WHEREAS, the Court finds that, as a result of acts and/or omissions of the Defendant, the proceeds traceable to the offenses charged in Counts One, Five, Seven, and Nine of the Indictment that the Defendant personally obtained cannot be located upon the exercise of due diligence, with the exception of the Specific Property; and

WHEREAS, pursuant to Title 21, United States Code, Section 853(g), and Rules 32.2(6)(3), and 32.2(6)(6) of the Federal Rules of Criminal Proce-

dure, the Government is now entitled, pending any assertion of third-party claims, to reduce the Specific Property to its possession and to notify any and all persons who reasonably appear to be a potential claimant of their interest herein;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. As a result of the offenses charged in Counts One, Five, Seven, and Nine of the Indictment, to which the Defendant was found guilty, a money judgment in the amount of $28,000 in United States currency (the "Money Judgment"), representing the amount of proceeds traceable to the offenses charged in Counts One, Five, Seven, and Nine of the Indictment that the Defendant personally obtained, shall be entered against the Defendant.

2. As a result of the offenses charged in Counts One, Five, Seven, and Nine of the Indictment, to which the Defendant was found guilty, all of the Defendant's right, title and interest in the Specific Property is hereby forfeited to the United States for disposition in accordance with the law, subject to the provisions of Title 21, United States Code, Section 853.

3. Pursuant to Rule 32.2(b)(4) of the Federal Rules of Criminal Procedure, this Preliminary Order of Forfeiture as to Specific Property/Money Judgment is final as to the Defendant LOUIS MCINTOSH, and shall be deemed part of the sentence of the Defendant, and shall be included in the judgment of conviction therewith.

4. All payments on the outstanding Money Judgment shall be made by postal money order, bank

or certified check, made payable to the United States Marshals Serv ice, and delivered by mail to the United States Attorney's Office, Southern District of New York, Attn: Money Laundering and Transnational Criminal Enterprises Unit, One St. Andrew's Plaza, New York, New York 10007 and shall indicate the Defendant's name and case number.

5. The United States Marshals Service is authorized to deposit the payments on the Money Judgment in the Assets Forfeiture Fund, and the United States shall have clear title to such forfeited property.

6. Upon entry of this Preliminary Order of Forfeiture as to Specific Property /Money Judgment, the United States (or its designee) is hereby authorized to take possession of the Specific Property and to hold such property in its secure custody and control.

7. Pursuant to Title 21, United States Code, Section 853(n)(1), Rule 32.2(b)(6) of the Federal Rules of Criminal Procedure, and Rules G(4)(a)(iv)(C) and G(5)(a)(ii) of the Supplemental Rules for Certain Admiralty and Maritime Claims and Asset Forfeiture Actions, the United States is permitted to publish forfeiture notices on the government internet site, www.forfeiture.gov. This site incorporates the forfeiture notices that have been traditionally published in newspapers. The United States forthwith shall publish the internet ad for at least thirty (30) consecutive days. Any person, other than the Defendant, claiming interest in the Specific Property must file a Petition within sixty (60) days from the first day of publication of the Notice on this official government internet web site, or no later than thirty-five (35)

days from the mailing of actual notice, whichever is earlier.

8. The published notice of forfeiture shall state that the petition (i) shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the Specific Property, (ii) shall be signed by the petitioner under penalty of perjury, and (iii) shall set forth the nature and extent of the petitioner's right, title or interest in the Specific Property, the time and circumstances of the petitioner's acquisition of the right, title and interest in the Specific Property, any additional facts supporting the petitioner's claim, and the relief sought, pursuant to Title 21, United States Code, Section 853(n).

9. Pursuant to 32.2 (b)(6)(A) of the Federal Rules of Criminal Procedure, the Government shall send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding. All Specific Property forfeited to the United States under a Final Order of Forfeiture shall be applied towards the satisfaction of the Money Judgment.

10. Upon adjudication of all third-party interests, this Court will enter a Final Order of Forfeiture with respect to the Specific Property pursuant to Title 21, United States Code, Section 853(n), in which all interests will be addressed. All Specific Property forfeited to the United States under a Final Order of Forfeiture shall be applied towards the satisfaction of the Money Judgment.

11. Pursuant to Title 21, United States Code, Section 853(p), the United States is authorized to seek forfeiture of substitute assets of the Defendant

up to the uncollected amount of the Money Judgment.

12. Pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, the United States Attorney's Office is authorized to conduct any discovery needed to identify, locate or dispose of forfeitable property, including depositions, interrogatories, requests for production of documents and the issuance of subpoenas.

13. The Court shall retain jurisdiction to enforce this Preliminary Order of Forfeiture as to Specific Property/Money Judgment, and to amend it as necessary, pursuant to Rule 32.2 of the Federal Rules of Criminal Procedure.

SO ORDERED:
[handwritten signature]
HONORABLE SIDNEY H. STEIN
UNITED STATES DISTRICT JUDGE

April 19, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed May 3, 2023]

(NOTE: Identify Changes with Asterisks (*))

UNITED STATES OF AMERICA **v.** LOUIS MCINTOSH **Date of Original Judgment:** 05/27/2014 (Or Date of Last Amended Judgment	**AMENDED JUDGMENT IN A CRIMINAL CASE** Case Number: 01:11-Cr-00500-1 (SHS) USM Number: 65254-054 Camille M. Abate Defendant's Attorney

THE DEFENDANT:

☐pleaded guilty to count(s)

☐pleaded nolo contendere to count(s)
which was accepted by the court.

☒was found guilty on count(s) 1, 5, 7, 8, 9, 10, 12, 13, and 14 in the (S3) Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 1951	Conspiracy to Commit Hobbs Act Robbery	12/31/2011	1
18 U.S.C. 925(c)(1)(A)(iii)	Use of a Firearm in Furtherance of a Crime of Violence	12/31/2011	8, 10

18 U.S.C. 1951	Hobbs Act Robbery	10/28/2010	7, 9

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐The defendant has been found not guilty on count(s) *Def's conviction on Counts 2 and 6 were vacated by Court of Appeals.
☒Count(s) Open counts & underly. indict. ☐is ☒are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this di strict within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

4/19/2023
Date of Imposition of Judgment

[handwritten signature]
Signature of Judge

Sidney H. Stein, U.S.D.J.
Name and Title of Judge

May 3, 2023
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm	6/14/2011	12, 13, 14

18 U.S.C. § 1951 and 2	Attempted Robbery	4/30/2010	5

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

*300 months as follows: 96 months on each count to run concurrently, plus 84 months on Count 8 and 120 months on Count 10 to run consecutively.

☒The court makes the following recommendations to the Bureau of Prisons:

*1. That defendant be transferred from the MDC to a permanent facility as soon as possible.

*2. That defendant be housed in a medium security FCI if otherwise consistent with BOP requirements.

☐The defendant is remanded to the custody of the United States Marshal.

☐The defendant shall surrender to the United States Marshal for this district:

☐at __________ ☐a.m. ☐p.m. on ___________.

☐as notified by the United States Marshal.

☐The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐before 2 p.m. on ___________.

☐as notified by the United States Marshal.

☐as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _______ to __________ at ________ with a certified copy of this judgment.

UNITED STATES MARSHAL

By ______________
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Three years on each count to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)

4. ☐You must make restitution in accordance with I 8 U.S.C. § 3663 and 3663A or any other statute authorizing a sentence of restitution.

5. ☒You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)

7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the

probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at

least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these

conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature____________ Date ___________

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

2. The defendant shall provide the probation officer with access to any requested financial information.

3. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

4. The defendant shall continue to make restitution payments at the rate of 15% of his gross monthly earnings.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

Assessment	Restitution	Fine	AVAA Assessment	JVTA Assessment**

TOTALS $200.00 $4,598.00* $0.00 $0.00 $0.00

☐The determination of restitution is deferred until____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss*** **	**Restitution Ordered**	**Priority or Percentage**
Clerk of Court, U.S. District Court, S.D.N.Y. 500 Pearl Street New York, NY 1007-1312 (For disbursement to the victims as set forth in the Schedule of Victims.)		$4,598.00	

TOTALS $0.00 $4,598.00

☐Restitution amount ordered pursuant to plea agreement $___________

☐The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the

date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐the interest requirement is waived for ☐fine ☐restitution

☐the interest requirement for the ☐fine ☐restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒Lump sum payment of $200.00 due immediately, balance due

☐not later than ______, or

☐in accordance with ☐C, ☐D, ☐E, or ☐F below; or

B ☐Payment to begin immediately (may be combined with ☐C, ☐D, or ☐F below); or

C ☐Payment in equal ______ (e.g., weekly, monthly, quarterly) installments of $______ over a period of ______ (e.g., months or years), to commence ______ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐Payment in equal ______ (e.g., weekly, monthly, quarterly) installments of $ ______ over a period of ______ (e.g., months or years), to commence ______ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐Payment during the term of supervised release will commence within ______ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒Special instructions regarding the payment of criminal monetary penalties:

If the defendant is engaged in a BOP non UNICOR work program, the defendant shall pay $25 per quarter toward the criminal financial penalties. However, if the defendant participates in the BOP's UNICOR program as a grade 1 through 4, the defendant shall pay 50% of his monthly UNICOR earnings toward the criminal financial penalties, consistent with BOP regulations at 28 C.F.R. § 545.11. The Court is informed that defendant has paid $700 of the special assessment originally imposed of $900.00.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal

Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒Joint and Several

Case Number Defendant and Co-Defendant Names ***(including defendant number)***	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**
With any other defendant ordered to make restitution in this matter.*	$4,598.00		

☐The defendant shall pay the cost of prosecution.

☐The defendant shall pay the following court cost(s):

☒The defendant shall forfeit the defendant's interest in the following property to the United States:

A BMW and $28,000 in U.S. currency.

Payments shall be applied in the following order: (I) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed May 18, 2023]

UNITED STATES OF AMERICA,

v. 11 Cr. 500 (SHS)

LOUIS McINTOSH,

Defendant.

Resentence
New York, N.Y.
April 19, 2023
11:30 a.m.

Before:

HON. SIDNEY H. STEIN,
District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the Southern District of New York
BY: BENJAMIN D. KLEIN
Assistant United States Attorney

CAMILLE M. ABATE
Attorney for Defendant

* * *

[3] MR. KLEIN: I would just note that the government has submitted orders of forfeiture and restitution that I understand have been agreed to by the defense.

THE COURT: Thank you.

* * *

[26] THE COURT: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that the defendant, Louis McIntosh, is committed to the custody of the Bureau of Prisons to be imprisoned for a term of 300 months consisting of 96 months plus 84 months mandatory consecutive—that's on Count Six—plus 120 months mandatory consecutive on Count Eight for a total of 300 months.

Upon release from imprisonment, Mr. MacInsosh shall be placed on supervised release for a term of three years on each [27] count to be served concurrently.

Upon release from imprisonment, Mr. MacInsosh shall be placed on supervised release, as I say, for three years concurrent on each count, and he will serve that term of supervised release with the mandatory conditions set forth on page 28 of the presentence investigation report, revised on May 1, 2014.

In addition, Mr. MacInsosh shall comply with standard conditions 1 through 12, plus the special conditions that are set forth on page 28 of the presentence investigation report, revised on May 1, 2014.

Those special conditions are providing the probation officer with access to all requested financial information, not incurring additional lines of credit with-

out the approval of the probation officer, and the search condition.

Within 72 hours of release from the custody of the Bureau of Prisons, Mr. MacInsosh shall report in person to the probation office in the district to which he is released.

I'm not imposing a fine because I find that Mr. MacInsosh lacks the ability to pay a fine after taking into account the presentence report and his lack of assets and his limited earning ability.

A proposed order of restitution has been presented to me by the parties, and I have signed it. It provides for restitution in the amount of $4,598 with joint and several [28] liability with any other defendant ordered to make restitution for the offenses in this matter.

In addition, I've been presented with an agreed-upon preliminary order of forfeiture as to specific property and a money judgment providing for forfeiture of specific property of one gray BMW 528, as well as $95,000 in United States currency, and I have signed that forfeiture order.

I've considered all of the factors in 18 U.S. Code, Section 3664(f)(2) in imposing restitution, including the loss sustained by the victims and the financial resources of Mr. MacInsosh.

Do either Ms. Abate or the government know whether the $900 special assessment has been paid?

Government?

MS. ABATE: According to my client, it was, your Honor.

MR. KLEIN: I'm not aware, your Honor.

THE COURT: Let me impose $900 special assessment, unless it has already been paid. That's what the order will say, unless it has already been paid since the original sentencing.

MS. ABATE: Your Honor, excuse me. According to my client, the Bureau of Prisons is not going to recognize that, and they'll impose it again.

So if I can—I don't know if there's proof.

[29] One second, Judge.

THE COURT: Yes. Of course.

MS. ABATE: Because the Bureau of Prisons in their infinite wisdom—

THE COURT: My deputy tells me that that should be available from the cashier's office, the information.

We'll try to find out now while you're looking through those records, Ms. Abate. We certainly don't want him to have to pay an extra $900.

MS. ABATE: I know that the bureaucracy of the Bureau of Prisons sometimes—

THE COURT: Why don't you look at those records and see if you can see what they say. And meanwhile, my deputy will try to find out from the cashier here.

MS. ABATE: Your Honor, I'm handing up a page—and I'll show it to the government as well—from document 375 which is I think the August presentence report, page 36 of 50, which indicates that there was an assessment of $900, a balance of $500 payable immediately, and that the status was it expired.

My client thinks that means it was paid. In other words, they've been taking it from him as he has been incarcerated.

Your Honor, while we're waiting, can I also say that my understanding was that the restitution was—not the [30] restitution. The money judgment was supposed to be $28,000, not $95,000.

MR. KLEIN: I believe that's correct, your Honor. I believe, your Honor, they've been referring to the "Whereas" clause.

THE COURT: I'm sorry. Let me look at that order.

You're quite right. Absolutely. I was looking at the "Whereas" clause in what the forfeiture is. Thank you for bringing that to my attention, Ms. Abate. Let me take a look.

(Pause)

THE COURT: The forfeiture for money judgment is $28,000, not $95,000. And the specific property I believe is still that car. Again, the forfeiture is $28,000, not $95,000. Thank you.

I see that the restitution order does not have a percentage of gross monthly earnings to be paid in restitution.

Have the parties discussed that?

MS. ABATE: Your Honor, they've been taking it quarterly.

THE COURT: I'll make it 10 percent. It may already have been taken out.

You can be seated, Mr. MacInsosh.

(Pause)

THE COURT: We're going into the older records. This is a resentencing.

[31] I'll make the restitution 15 percent, which is what it was in the original judgment in the amended judgment.

Ms. Abate, you may want to follow up to make sure that they're not starting the restitution again.

MS. ABATE: Okay.

THE COURT: In other words, to the extent that either restitution or the special assessment has been paid, this defendant should not have to pay it again.

(Pause)

THE COURT: We're informed by the cashier's office of the Southern District of New York that the defendant has already paid $700 of the $900 special assessment. Apparently the Bureau of Prisons has been taking it out of his account, $25 each month.

I'm not quite sure how to enter the judgment, but I think what we should do is put it in as $200. And then I'll explain that there was originally a $900 special assessment and we're informed that the defendant has paid $700 of that. We'll get it in the judgment.

All right, Mr. MacInsosh, if you would rise again.

This sentence is significantly below the guideline range and less than half of what Mr. MacInsosh was originally sentenced to. I do think it's appropriate. I can't ignore the fact of the violence of the underlying crimes here.

Mr. MacInsosh was the leader of a gang that went on an [32] extremely violent spree of felonies—the at-

tempted Cliff Street robbery where Mr. MacInsosh struck a victim with a shotgun and fired the shotgun, the Lindbrook robbery. I remember that. It was actually most likely a loanshark who had substantial cash in the ceiling, and he was tasered. He was duct taped.

And the Poughkeepsie robbery where victims were robbed at gun point. Mr. MacInsosh had a handgun. He hit a victim in the head with a pistol. Throughout this, he possessed a variety of firearms. So the underlying crimes were violent, but they were a considerable period of time ago.

And Mr. MacInsosh has acquitted himself quite nicely in prison. He has taken a number of courses, and Ms. Abate has said that he has counseled a number of people. He was also quite articulate in expressing his extreme remorse here, which I credit.

So I'm sentencing him to a variance below the guideline range in light of the 17 years of mandatory minimums he must serve on Count Six and Count Eight, as well as his post-sentencing rehabilitation, the fact that he served his time during COVID, and the existence of family support.

Ms. Abate, are you aware of any legal reason why the sentence should not be imposed as I have stated it?

MS. ABATE: No, your Honor.

THE COURT: Mr. Klein?

[33] MR. KLEIN: No, your Honor. May I just clarify for the record that I believe your Honor was referring to the counts in the supplemental PSR which have been renumbered?

THE COURT: Yes. That's consistent throughout.

MR. KLEIN: That's correct, your Honor.

THE COURT: I hereby order the sentence to be imposed as I have stated it.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[filed Sept. 20, 2023]

UNITED STATES OF AMERICA, -v.- LOUIS MCINTOSH, Defendant.	**FINAL ORDER OF FORFEITURE** S3 11 Cr. 500 (SHS)

WHEREAS, on or about April 19, 2023, this Court entered a Consent Preliminary Order of Forfeiture as to Specific Property/Money Judgement (the "Preliminary Order of Forfeiture") (D.E. 409), which ordered the forfeiture to the United States of all right, title and interest of LOUIS MCINTOSH (the "Defendant") in the following property:

i. One Grey BMW 528, VIN WBANF33506CS5810 (the "Specific Property");

WHEREAS, the Preliminary Order of Forfeiture directed the United States to publish, for at least thirty (30) consecutive days, notice of the Preliminary Order of Forfeiture, notice of the United States' intent to dispose of the Specific Property, and the requirement that any person asserting a legal interest in the Specific Property must file a petition with the Court in accordance with the requirements of Title 21, United States Code, Sections 853(n)(2) and (3). Pursuant to Section 853(n), the United States could, to the extent practicable, provide direct written notice to any person known to have an alleged interest in

the Specific Property and as a substitute for published notice as to those persons so notified;

WHEREAS, the provisions of Title 21, United State Code, Section 853(n)(1), Rule 32.2(6)(6) of the Federal Rules of Criminal Procedure, and Rules G(4)(a)(iv)(C) and G(5)(a)(ii) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, require publication of a notice of forfeiture and of the Government's intent to dispose of the Specific Property before the United States can have clear title to the Specific Property;

WHEREAS, the Notice of Forfeiture and the intent of the United States to dispose of the Specific Property was posted on an official government internet site (www.forfeiture.gov) beginning on April 25, 2023, for thirty (30) consecutive days, through May 24, 2023, pursuant to Rule G(4)(a)(iv)(C) of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions and proof of such publication was filed with the Clerk of the Court on September 20, 2023 (D.E. 420);

WHEREAS, thirty (30) days have expired since final publication of the Notice of Forfeiture and no petitions or claims to contest the forfeiture of the Specific Property have been filed;

WHEREAS, the Defendant is the only person and/or entity known by the Government to have a potential interest the Specific Property;

WHEREAS, pursuant to Title 21, United States Code, Section 853(n)(7), the United States shall have clear title to any forfeited property if no petitions for a hearing to contest the forfeiture have been filed within thirty (30) days of final publication of notice of

forfeiture as set forth in Title 21, United States Code, Section 853(n)(2);

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. All right, title and interest in the Specific Property is hereby forfeited and vested in the United States of America and shall be disposed of according to law.

2. Pursuant to Title 21, United States Code, Section 853(n)(7) the United States of America shall and is hereby deemed to have clear title to the Specific Property.

3. The United States Marshals Service (or its designee) shall take possession of the Specific Property and dispose of the same according to law, in accordance with Title 21, United States Code, Section 853(h).

Dated: New York, New York
September 20, 2023

SO ORDERED:

[handwritten signature]
HONORABLE SIDNEY H. STEIN
UNITED STATES DISTRICT JUDGE