No. 26-___

IN THE

Supreme Court of the United States

CHRISTOPHER ANTHONY PONZO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under this Court's decision in *McIntosh v. United States*, 601 U.S. 330 (2024), a district court has authority to enter a final order of forfeiture against a defendant where, in violation of Fed. R. Crim. P. 32.2(b)(4)(B):

(1) the first time the government specified the amount it sought to forfeit was at the sentencing hearing;

(2) the order of forfeiture was not orally pronounced "at sentencing";

(3) the district court granted the government's post-sentencing motion for forfeiture without allowing the defendant to respond;

(4) the defendant had no opportunity to present evidence or be heard before $13.2 million was ordered forfeited; and

(5) the forfeiture order entered outside of the defendant's presence?

PARTIES TO THE PROCEEDINGS

The parties are petitioner Christopher Anthony Ponzo and respondent the United States of America. In the district court and at the First Circuit Court of Appeals, Christopher Ponzo's case was consolidated with his brother Joseph Ponzo's case. However, only Christopher's forfeiture claims are at issue in this Court. Joseph Ponzo is not a party to this proceeding.

RELATED PROCEEDINGS

United States of America v. Ponzo et al., No. 1:22-cr-100094-CMG-2, 772 F. Supp. 3d 101 (D. Mass. Mar. 19, 2025)

United States of America v. Christopher Ponzo; Joseph Ponzo, Nos. 25-1203, 25-1259, 25-1327, 171 F.4th 507 (1st Cir. Apr. 1, 2026)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Ponzo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is available at 171 F.4th 507. The opinion of the United States District Court for the District of Massachusetts is available at 772 F. Supp. 3d 101.

JURISDICTION

The First Circuit entered judgment on April 1, 2026. Pet. App. 1a. On June 4, 2026, Justice Jackson extended the time to file this petition for a writ of certiorari to and including August 31, 2026. *See* No. 25A1338. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF RULE 32.2

Federal Rule of Criminal Procedure 32.2 provides:

> (b) Entering a Preliminary Order of Forfeiture.
>
> (1) Forfeiture Phase of the Trial.
>
> (A) Forfeiture Determinations. As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute.

…

(2) Preliminary Order.

…

(B) Timing. Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

…

(4) Sentence and Judgment.

(A) When Final. At sentencing--or at any time before sentencing if the defendant consents--the preliminary forfeiture order becomes final as to the defendant.

…

(B) Notice and Inclusion in the Judgment. The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing.

INTRODUCTION

Federal Rule of Criminal Procedure 32.2 governs the procedure district courts must adhere to before the government can deprive a criminal defendant of his property. The Rule sets forth a multistep process that encodes the Due Process Clause's mandate that an individual must receive notice and an opportunity to be heard before the government takes his property away.

In Christopher Ponzo's case, as the Court of Appeals for the First Circuit acknowledged, almost every step in this process was skipped. In the end, the district court ordered forfeiture of $13.2 million of Ponzo's property after he had already been sentenced, outside of his presence, and without allowing him an opportunity to be heard. Among other parts of Fed. R. Crim. P. 32.2, the district court violated Rule 32.2(b)(4)(B), which states that "[t]he court must include the forfeiture when orally announcing the sentence[.]"

The First Circuit acknowledged that these "process-based errors" were "all true," but nonetheless affirmed the district court's ruling, holding that the errors did not "matter" and were "harmless." Pet. App. 21a. But this Court only recently suggested that these errors do matter and that harmless error review may not apply in the context of these violations.

In *McIntosh v. United States*, 601 U.S. 330, 340-41 & n.5 (2024), this Court held that violations of Rule 32.2(b)(2)(B)—concerning the procedural prerequisites for entering a *preliminary* forfeiture order—could be reviewed for harmless error. But the Court reserved judgment on the requirements for entry of a *final* forfeiture order under Rule 32.2(b)(4)(B)—at issue here—noting the Government's concession that "Rule 32.2(b)(4)(B)'s requirement that forfeiture be imposed at sentencing" raised "a harder set of issues." *Id.* (*quoting* Tr. of Oral Arg. 34-36).

That harder set of issues is squarely presented by this petition. The First Circuit's decision resolves the question this Court reserved in highly cursory fashion, and, in doing so, deepens an existing circuit split concerning how courts should deal with violations of

Rule 32.2(b)(4)(B). The discord among the circuits is longstanding and growing. Shortly after the First Circuit decided this case, in July of 2026, the Sixth Circuit in *United States v. Harrell*, 180 F.4th 888 (6th Cir. 2026), explicitly recognized the existing split on violations of Rule 32.2(b)(4)(B). As discussed below, the First and Sixth Circuits agree on one aspect of Rule 32.2(b)(4)(B) violations, contrary to five other circuits, but disagree on yet another, indicating a compounding and growing number of points of disagreement and confusion among the circuits.

The confusion and disagreement that exist in the absence of an answer to the question *McIntosh* reserved causes enormous uncertainty and, at least in Mr. Ponzo's case, due process violations for criminal defendants. This Court should grant review, reverse the First Circuit's judgment, and determine that Rule 32.2(b)(4)(B) is a claim-processing rule. Even if the Court determines that Rule 32.2(b)(4)(B) is a time-related directive, violations of which are subject to harmless error review, it should clarify that an error that deprives a defendant of a meaningful opportunity to be heard and present evidence is not harmless, and thus reversal is warranted here in any case.

STATEMENT OF THE CASE

I. Factual background

This case centers on Christopher Ponzo's involvement in the "Mass Save" program, a state-facilitated program that supports energy efficiency projects throughout Massachusetts. Pet. App. 2a. Under the program, utilities exact monthly energy efficiency surcharges from rate payers and redirect the monies collected through "lead vendors" who offer energy efficiency upgrades to participating customers at no or virtually no cost. First Circuit Appendix filed by Christopher Ponzo ("CA1A") at 0093.

The lead vendor, in this case CLEAResult, a for-profit company that markets and sells energy efficiency services, then finds and pays subcontractors—such as Ponzo—to perform those energy-efficiency upgrades at participating commercial and residential properties. CA1A0093.

What was unusual about the program was CLEAResult's policy that a participating subcontractor such as Ponzo was allowed, entitled, and indeed strongly encouraged to find and produce his own customers. CA1A0479-81. Under this policy, the more customers a subcontractor "self-generated," the more CLEAResult earned, without having to generate any customers itself. CA1A0480-81.

A. Mr. Ponzo's business

Ponzo was first approved as a Mass Save contractor in 2011, and partnered with a master electrician to start his own company, CAP Electric, Inc., in 2016. CA1A0478. Ponzo, acting through CAP Electric, installed energy-efficient lighting fixtures. *Id*.

Ponzo would cold-call property managers at large development companies in Massachusetts about Mass Save. He sold these property managers and eventually many of the largest property management companies in the state on the benefits of using the Mass Save program to outfit some, many, or all of their properties with energy-efficient lighting that would save them money on their monthly electric bills. CA1A0478-79. Ponzo established strong relationships with many of these companies, many of which insisted on using Ponzo exclusively for all Mass Save-related work at their properties.

This was the typical model for CLEAResult: a subcontractor like Ponzo "self-generated" customers, and CLEAResult would review, price, and approve the project, with the originating subcontractor entitled to work the resulting job as a matter of CLEAResult policy. CA1A0480-81. The contractor would be paid according to a schedule included in CLEAResult's contracts with the utility companies for each lighting fixture installed. CA1A0480. CLEAResult would then be paid an "audit fee" of between $60 to $70 for each unit in which improvements were made, plus a project management fee on either a monthly or percentage basis. *Id.*

B. Payments to CLEAResult employees

Every new customer had to be processed by a CLEAResult project manager before the subcontractor could begin work. The project manager would tally and report how many and what type of electrical fixtures were needed. Paid modestly, neither Eric Darlington nor Peter Marra, the two managers whom Ponzo paid, was compensated by CLEAResult for the time and work needed to cope with the deluge of new customers that Ponzo's success brought. Ponzo began to pay them generously to resolve the "red tape" he needed to get through in order to begin working on the projects he brought in. *Id.*

Apart from a small number of jobs that came to CLEAResult through other means, all of the contracts which Darlington and Marra approved were contracts which Ponzo himself generated and which he was entitled as a matter of CLEAResult policy to work. CA1A0483. Overwhelmingly, Ponzo brought in his own customers and primarily paid Darlington and Marra to work harder and process paperwork faster.

Ultimately, over a decade, CLEAResult paid CAP Electric $36 million for work performed between 2013 and 2022, with about $13 million of that amount representing income to CAP Electric. CA1A0102. As the district court judge found, there was "no calculable loss amount" for purposes of the sentencing guidelines because all involved parties, including the victim, CLEAResult, profited from the conduct for which Ponzo was convicted. CA1A1167. As found by the Probation Officer, whose findings the district court accepted, "[t]here is no evidence to indicate that CLEAResult, Eversource, National Grid, consumers, or any other individual or entity, suffered an actual financial loss." Sealed Supplemental Appendix filed by Christopher Ponzo ("SCA1A") at SA015. Indeed, CLEAResult, the only victim identified by the government in this case, made considerable profits over this period thanks to Ponzo's work. CA1A0729.

II. Procedural background

A. Mr. Ponzo is charged and pleads guilty

Ponzo was charged on April 28, 2022. The operative indictment charged Ponzo with one count of "Conspiracy to Commit Honest Services Wire Fraud, 18 U.S.C. § 1349"; twenty-four counts of "Honest Services Wire Fraud; Aiding and Abetting, 18 U.S.C. §§ 1343, 1346, and 2"; and one count of "False Statements, 18 U.S.C. § 1001(a)(2)". CA1A0001.

The indictment set forth the "Object and Purpose of the Conspiracy and Scheme to Defraud" specifically, alleging that Ponzo and his brother "pa[id] bribes and kickbacks to [Darlington] and [Marra] **in exchange for [their] assistance … in obtaining Mass Save contracts and receiving [CLEAResult's] payments**[.]" CA1A0005 (emphasis added). The indictment also contained a "Forfeiture Allegation" that stated both Ponzo brothers "shall forfeit … any property, real or personal, which constitutes or is derived from proceeds traceable to the offenses." CA1A0035.

On November 6, 2024, Ponzo pleaded guilty on all counts. CA1A0041. There was no plea agreement. CA1A0048.

B. The forfeiture process

After Ponzo pleaded guilty, the government had the burden to prove by a preponderance of the evidence that any property it sought to forfeit was directly traceable to Ponzo's unlawful conduct and would not have been obtained ***but for*** that conduct. *See* Pet. App. 18a.

No preliminary forfeiture order was entered or requested. While the government included a general forfeiture allegation in the indictment and stated at the Rule 11 hearing that "[t]here is forfeiture as set forth in the indictment," the issue was not raised again until Ponzo's sentencing hearing. CA1A0049. In its sentencing memorandum, the government requested "forfeiture" but specified no property or dollar amount or explained how any monies sought to be forfeited were traceable to the offense. CA1A0123.

At the sentencing hearing, Ponzo conceded that he had committed honest services fraud by providing managers with money and gifts in order to incentivize them to work faster and process the contracts he was bringing to CLEAResult more efficiently, in violation of company rules. However, he pointed out that only a very small number of contracts were ever assigned to him by any CLEAResult employee. Indeed, in his sentencing memorandum Ponzo produced uncontroverted evidence that he had personally procured 93 percent of the contracts, measured by revenue, that he worked. CA1A1048.

In response to this evidence, the government put aside its central theory that Ponzo's object and purpose was to pay bribes in exchange for contracts. Instead, at the sentencing hearing the government claimed that even if Ponzo had legally obtained contracts, he had paid for the CLEAResult project managers to "manipulate" the contracts in ways that deceived the company to increase their value. CA1A1170-72. Although this theory comprised the vast majority of the government's argument at sentencing, the prosecutor marshaled virtually no evidence in support. *Id*. The government failed to cite any corroborating testimony from the managers who were immunized government witnesses and available to the prosecution. Even in its sentencing memorandum, almost all evidence ushered to support a contract manipulation theory pertained to Joseph Ponzo, while as to Chris, the government only surmised that it was "***likely*** that similar contract adjustments were being made for CAP Electric." CA1A0110 (emphasis added). At the same time, the government explicitly noted that "it is impossible now to determine exactly when and to what degree such contract manipulation occurred." CA1A0111.

Throughout the sentencing hearing, the government made no mention of forfeiture nor any argument about what monies were and were not traceable to unlawful payments. Until the close of the sentencing proceeding, Ponzo therefore had no reason to anticipate that the government would seek, or that the district court would authorize, forfeiture of everything he had earned in ten years of work as a contractor. The government did not address Ponzo's evidence that he had personally garnered 93 percent of his revenue.

By the end of the hearing, the district court had not addressed forfeiture or ordered forfeiture of any property in any amount, so Ponzo had nothing to object to or argue against. Nothing happened until the district court asked if there was any reason why the sentence should not be imposed. The prosecutor then recalled she had "a couple of points that [she] forgot to make earlier." CA1A1215. The second of those points was that, "for the record, the government does move for forfeiture pursuant to 18 U.S.C 981(a)(1)(C) and 28 U.S.C. 2461 as set forth in the indictment and as raised at the Rule 11 hearing. We would ask that the Court defer ruling on forfeiture until our Asset Recovery Unit has time to make a motion, **and the defendant obviously would have time to respond to that**." *Id.* (emphasis added). Then, at the very end after imposing the sentence, the court asked the government if it had anything to add, at which point the government announced **for the first time** that it "would seek approximately 13.2 million in forfeiture." CA1A1222.

C. The forfeiture decision

After the sentencing hearing, Ponzo awaited the government's forfeiture motion, which was filed on February 7, 2025. CA1A1228. Under the local rules for the District of Massachusetts, Ponzo had fourteen days to respond. D. Mass. Local R. 7.1(b)(2). Yet, just six days later, on February 13, the district court granted the government's motion. CA1A1241.

Caught unawares, Ponzo filed an objection and opposition on February 19, 2025, still prior to the fourteen-day response period to which he was entitled. Ponzo explicitly stated that the district court had "failed to announce the amount of the forfeiture judgment to be imposed either at or before the defendant's sentencing" and "failed to afford the defendant a proper opportunity to respond to the proposed forfeiture." CA1A1256-79. The district court did not act on Ponzo's objection or opposition. No hearing was held. The government produced no evidence contradicting Ponzo's sentencing memorandum.

The district court paid no attention to the defendant's objection until he sought a stay of the forfeiture order pending appeal. The court denied the request and, in a total of four sentences, disregarded Ponzo's assertion "that he self-generated 93% of the revenue that he earned" and referred to his objection as "ludicrous." CA1A1317.

D. The First Circuit affirms

The First Circuit affirmed in the precedential opinion *United States v. Ponzo*, 171 F.4th 507 (2026).

Most importantly, the First Circuit found it was of no consequence that Ponzo never had an opportunity to challenge the forfeiture or be heard. The court readily acknowledged that "(1) The government didn't file a forfeiture motion before sentencing. (2) The government didn't specify until sentencing the exact amount he should forfeit. (3) The judge didn't enter a preliminary forfeiture order before sentencing. And (4) Chris didn't get to oppose the government's post-sentencing hearing forfeiture motion until after the forfeiture order entered." Pet. App. 21a. As the court of appeals put it, "That's all true." *Id*.

But, the court reasoned, "we excuse any error as harmless," because, in its view, an opportunity to contest forfeiture prior to entry of the order "wouldn't have mattered." *Id*. at 21a-22a. Its reasoning, applying a circular logic, was that because the district court found Ponzo's arguments against forfeiture "unconvincing," actually *ludicrous*, in denying his motion for stay of the order pending appeal, a hearing or any of the additional procedural steps required by Rule 32.2 would have changed nothing. *Id*. at 22a.

Indeed, the First Circuit simply held that, despite not having a chance to present them to the district court or develop any relevant evidence, Ponzo's forfeiture arguments "ha[d] no oomph." Pet. App. 19a. In so ruling, the court discarded (as had the government at the sentencing hearing) the original underlying theory of the prosecution—money for contracts—and chose to ignore the significance of Ponzo's self-generation of 93 percent of the revenue he took in. Instead, the court relied on the prosecutor's conjectural statements made at the sentencing hearing that Ponzo and the CLEAResult employees he paid had inflated and manipulated numbers, reports, or job approvals—arguments made for the first time at the sentencing hearing, which were unsupported by evidence and not even cited in the government's motion for forfeiture. To the extent that this theory of contract manipulation—and not contract attainment—was the basis for forfeiture, Ponzo never had an opportunity to address it or provide contrary evidence. Nonetheless, the First Circuit refused to reverse, because, in its mind, "holding otherwise would turn the crime-doesn't-pay principle on its head." Pet. App. 20a (*citing Kaley v. United States*, 571 U.S. 320, 323 (2014)).

REASONS FOR GRANTING THE WRIT

There are four overlapping reasons why this Court should grant certiorari in this case.

First, the question presented here can only be answered by this Court, where it is precisely the one this Court left open in *McIntosh*. Specifically, this case centers on, among other clear violations of Fed. R. Crim. P. 32.2, the requirement that a forfeiture order be orally announced at sentencing under Rule 32.2(b)(4)(B). Rule 32.2(b)(4)(B) protects a criminal defendant's rights, under the Due Process Clause and Federal Rules, to be present for, notified in advance of, and afforded a chance to defend against a forfeiture order that deprives him of his property. Because these rights and this rule are of the highest importance and a source of constant violations for district courts, this Court's intervention is needed.

Second, the subpart of Rule 32.2 most implicated by Ponzo's case, Rule 32.2(b)(4)(B) has created at least two circuit splits as to how courts should deal with violations of it.

Third, this case presents an excellent vehicle for resolution of the question this Court left open, as Ponzo only challenges his forfeiture and there is no dispute about the procedural deficiencies that occurred.

Fourth, the First Circuit's decision is egregiously wrong under any rational view of the applicable law, and resulted in the deprivation of $13.2 million in property without Ponzo receiving a shred of meaningful process.

I. The question this Court left open in *McIntosh* can only be resolved by this Court.

A. Rule 32.2(b)(4)(B) protects fundamental constitutional rights. Rule 32.2(b)(4)(B) has clear requirements: "The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing." But why, and if it fails to do so, what happens?

The right to due process before being deprived of property. Answering this question necessarily begins with understanding Rule 32.2's fundamental purpose: to protect criminal defendants' due process rights. *See McIntosh*, 601 U.S. at 344. Indeed, the rule is not simply a complicated series of formalities or boxes for the government and district court to check off; it is a constellation of requirements that guarantees, per the Fifth Amendment of the United States Constitution, that a criminal defendant receive a meaningful opportunity to contest any attempt to deprive him of his property.

"The right to prior notice and a hearing is central to the Constitution's command of due process." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v.*

Eldridge, 424 U.S. 319, 333 (1976) (*quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Rule 32.2 protects this right by mandating a strict sequence of events, beginning with notice of forfeiture in the indictment—32.2(a)—a preliminary order of forfeiture immediately after a verdict or plea—32.2(b)(1)(A)—an evidentiary hearing if that order is contested—32.2(b)(1)(B)—and then, of crucial importance here, oral pronouncement of the *final* forfeiture "at sentencing"—32.2(b)(4)(B). These steps combine to afford the defendant the *meaningful* opportunity to be heard that the Constitution affords him.

If a court determines that Rule 32.2 guarantees less than what due process itself does, that decision cannot stand, as the rule must yield to clear constitutional commands. That is precisely what the First Circuit did here, however, when it agreed with Ponzo that he received no prior notice or opportunity to be heard but still permitted forfeiture. In the absence of this Court's decree as to what Rule 32.2(b)(4)(B) requires, lower courts will continue to permit due process violations on the assumption that the rule's procedures are flexible, rather than to be strictly followed as a constitutional safeguard.

The right to be present at sentencing. Clearly, the Rule also relates to the right—under both the United States Constitution and Fed. R. Crim. P. 43(a)(3)—that a defendant has to be present when he is sentenced.[1] *See, e.g., United States v. Rivera-*

[1] Fed. R. Crim. P. 43(a)(3) states, in relevant part, "Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at: … sentencing."

Figueroa, No. 24-431, 2025 WL 3749826, at *1 (2d Cir. Dec. 29, 2025) ("Federal Rule of Criminal Procedure 32.2(b)(4)(B) expands on that general right of presence at sentencing [under Rule 43(a)(3)], by requiring that the sentencing court 'include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing.'"); *United States v. Songer*, 842 F.2d 240, 244 (10th Cir. 1988) ("We hold that the district court's imposition of the sentence of forfeiture under 21 U.S.C. § 853 in Mr. Songer's absence violates Rule 43(a) of the Federal Rules of Criminal Procedure.").

As the Sixth Circuit recently pointed out, violations of Rule 32.2(b)(4)(B) for failure to announce or impose forfeiture at sentencing are violations of both a defendant's "Fifth Amendment Due Process right to be present at sentencing" *and* Fed. R. Crim. P. 43(a), which is even more strict than the Due Process Clause and "*requires* presence," even when the defendant's "absence [does not] frustrate the fairness of the proceedings." *United States v. Harrell*, 180 F.4th 888, 904-06 (6th Cir. 2026) (quotations and citations omitted). *See also United States v. Parrish*, 427 F.3d 1345, 1348 (11th Cir. 2005) ("other circuits have noted that the right to be present under the Due Process Clause is narrower than the right to be present under Rule 43").

And yet the Rule also states that a district court may fail to announce forfeiture so long as it "otherwise ensure[s] that the defendant knows of the forfeiture at sentencing." Courts have routinely concluded that what 32.2(b)(4)(B) requires a defendant to "know" *at* sentencing is different from what a defendant is entitled to know about his *potential* forfeiture *before* sentencing, and that knowledge of the *precise amount* to be forfeited is what Rule 32.2(b)(4)(B) demands. *See, e.g., Harrell*, 180 F.4th at 898 ("It would contravene logic and the presumption against surplusage to find that Rule 32.2(b)(4)(B) requires only notice of the possibility of forfeiture when such notice is already required by Rule 32.2(a)."); *United States v. Petix*, 767 F. App'x 119, 121 (2d Cir. 2019) ("There would be no need for Rule 32.2(b)(4)(B) if those previous warnings sufficed to ensure notice at sentencing."). In other words, the defendant must walk away from his sentencing hearing knowing what he has lost and why. Here, Ponzo walked away from his sentencing without knowing either.

The constitutional dimensions of Rule 32.2 make this case cert-worthy. Constitutional questions which cause discord among the circuits are the best candidates for this Court's review. *See Maryland v. King*, 567 U.S. 1301, 1302-03 (2012). This case exemplifies why. The widespread confusion that plagues lower courts in addressing Rule 32.2(b)(4)(B) procedure and violations originates, in part, because of the rule's unclear relationship with the Due Process Clause and a total absence of clarity as to which parts of Rule 32.2 are and are not indispensable in order to ensure a defendant receives due process. The First Circuit's decision magnifies this confusion substantially and, along with other circuits with which its decision accords, threatens to turn Rule 32.2 and, with it, the Due Process Clause, into a dead letter.

B. This case was predicted by this Court in *McIntosh* and lower courts need guidance on the question this Court reserved. The Court's decision in *McIntosh* provided sorely needed certainty with respect to one critical component of Rule 32.2. Specifically, the Court clarified that the requirement that a district court enter a preliminary forfeiture order "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final" is "a time-related directive," noncompliance with which "is a procedural error subject to harmlessness review." *Id*. at 344-45. *See* Fed. R. Crim. P. 32.2(b)(2)(B).

Of particular salience here, however, the Court announced what it was *not* doing: it was not deciding anything that was not "implicate[d]" by McIntosh's case, namely "Rule 32.2(b)(4)(B)'s requirement that forfeiture be imposed at sentencing." *Id*. at 341 n.5.

The government acknowledged during the *McIntosh* oral argument that that case had no bearing on Rule 32.2(b)(4)(B) and that "the requirements relating to the final order's entry raise 'a harder set of issues.'" *See* 601 U.S. at 341 n.5. Indeed, the issues have proven extremely difficult to resolve.

As set forth in greater detail below, district and circuit courts have been left to navigate the complicated forfeiture process, have often committed or been faced with errors in that process, and have come up with widely different responses to those errors. Resolving the confusion about Rule 32.2(b)(4)(B)'s requirements, and how to deal with violations thereof, will greatly enhance judicial economy by giving district and circuit courts clear guidance on the procedure that forfeiture requires and on how violations should be treated.

The cases that comprise the circuit splits outlined below are as varied as they are messy. Almost uniformly, though, they involve both the government and district court missing deadlines and belated attempts to forfeit property weeks, months, or years after a defendant has been found guilty. There is often total confusion about how forfeiture must proceed, with numerous steps at which errors might and do occur. As in *McIntosh*, this can result in *preliminary* forfeiture orders entering years after a defendant has been sentenced, or, as in Ponzo's case, *final* forfeiture orders entering in the total absence of preliminary forfeiture orders and days after forfeiture was raised for the first time at the sentencing hearing, without any chance to be heard. Courts of appeals are then tasked with disentangling numerous rule violations, and often come to differing results.

These complicated and protracted cases will continue to bog down district and circuit courts if not resolved by this Court.

II. There is an entrenched circuit split over whether Rule 32.2(b)(4)(B) is a mandatory claim-processing rule and a newly developing circuit split over how harmless error should be measured.

The importance and complexity of the questions presented by Ponzo's case are not an abstract matter, but have been revealed by the intense confusion and division courts have created in applying Rule 32.2. Indeed, the operative part of Rule 32.2(b)(4)(B) is short and strongly worded: "The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing." There is no consensus on what it means, however.

The primary point of confusion in the Rule is the meaning and import of the word "must." There is no doubt that this means oral announcement of forfeiture is required at a defendant's sentencing hearing. The problem is what happens when that requirement is not met. Some courts treat this failure as requiring automatic reversal, because 32.2(b)(4)(B) is a mandatory claim-processing rule, and others conduct a harmless error analysis, because they deem the Rule a time-related directive. It was this question that this Court resolved with respect to Rule 32.2(b)(2)(B) in *McIntosh*, 601 U.S. at 337-38, but for which there is no clear answer and, instead, pronounced circuit discord in the context of 32.2(b)(4)(B).

Further, there is another emergent split concerning how a court should measure whether Rule 32.2 violations were harmless, particularly because of the First Circuit's decision in this case, which sharply conflicts with other circuits' existing law.

The situation is now untenable. There is no predictability or uniformity in handling violations of Rule 32.2(b)(4)(B), and this Court's intervention is needed.

A. Mandatory claim-processing rule, i.e., automatic reversal. A mandatory claim-processing rule, while not jurisdictional, provides for automatic reversal on appeal if a party brings the rule to the attention of the district court, and the rule is nonetheless not followed. As this Court has explained, "If the affected party alerts the court to the deadline and invokes its protection, the relevant action cannot be taken after the deadline has passed." *McIntosh*, 601 U.S. at 337. Five circuits treat Rule 32.2(b)(4)(B) as one such rule.

The Seventh Circuit. This Court recognized in footnote 5 of *McIntosh* that the Seventh Circuit has taken the most explicit position concerning Rule 32.2(b)(4)(B)'s character as a "claim-processing rule." In *United States v. Lee*, 77 F.4th 565, 576-77 (7th Cir. 2023), the district court failed to enter a preliminary forfeiture order, but subsequently held two separate sentencing hearings that dealt with forfeiture—the second of which was wholly dedicated to it and "was a thorough airing of the parties' positions regarding the applicable forfeiture amount." Still, at the second hearing, the court orally ruled on the forfeiture but "failed to mention forfeiture" in "the written judgment." *Id*. at 576. Because "the court orally announced the forfeiture as part of its judgment," *Lee* concerned only the preliminary order requirement, which the Seventh Circuit deemed a time-related directive and thus subject to harmless error review. *Id*. at 583.

Crucially, the Seventh Circuit concluded that "[t]he final order is another matter" and that "[t]he requirement that it must be included in the oral judgment of the court has the character of a claims-processing rule. In other words, if the defendant objects to the failure to include forfeiture in the judgment, the court must enforce the rule." *Id*. at 582-83.

The Seventh Circuit reiterated this rule in a case extremely similar to Ponzo's, *United States v. Skaggs*, 78 F.4th 990, 993 (7th Cir. 2023), holding again in vacating a forfeiture order that on direct appeal "the lack of a preliminary order d[oes] not deprive the court of the power to enter forfeiture against [a defendant], but, [where a defendant] objected, the lack of an oral pronouncement at sentencing d[oes].”

The Second Circuit. The Second Circuit has also enforced Rule 32.2(b)(4)(B) as a mandatory claim-processing rule. In *Petix*, 767 F. App'x at 120, the district court entered a preliminary order of forfeiture, ordered briefing and held two sentencing hearings that dealt with the forfeiture dispute, but concluded the second sentencing hearing without announcing an oral order of monetary forfeiture. *Id*. Two days later, the district court entered a final order of monetary forfeiture equal to the amount in the preliminary forfeiture order previously entered. *Id*.

The Second Circuit reversed. “Simply put, Petix did not receive notice of monetary forfeiture at his November 1, 2017, sentencing[.] … That failure violated Rule 32.2(b)(4)(B).” *Id*. at 122. This was true even though the district court entered a preliminary forfeiture order and the court had adjourned the original sentencing hearing specifically “to permit the Government and Petix to brief several issues, including both the correct “‘loss amount’ and whether Petix's failure to object to the preliminary forfeiture order should bar him from a later challenge.” *Id*. at 120. Notwithstanding ample notice of forfeiture and opportunity to contest it, the Second Circuit held that the oral pronouncement of forfeiture controlled, and therefore the court remanded “for entry of a corrected judgment that removes monetary forfeiture altogether from Petix's sentence.” *Id*. at 123. The court's holding was unambiguous: noncompliance with Rule 32.2(b)(4)(B) precluded entry of a forfeiture order.

Post-*McIntosh* decisions in the Second Circuit have not called the rule into question and have actually reinforced it, including recently where the court determined that where an oral pronouncement of supervised condition terms differs from the final judgment, the former controls. *See, e.g., United States v. Maiorana*, 153 F.4th 306, 310 (2d Cir. 2025).

The Fifth Circuit. In *United States v. Brooks*, 804 F. App'x 219, 221 (5th Cir. 2020), "[t]he district court never orally pronounced forfeiture, but the written judgment ordered forfeiture consistent with the superseding indictment." The court concluded that the sentence must be vacated, because Rule 32.2(b)(4)(B) is "mandatory." *Id*. at 224 (*quoting United States v. Marquez*, 685 F.3d 501, 509 (5th Cir. 2012)). This was true even though the defendant had already "stipulated in his plea agreement that the property [at issue] was forfeitable." *United States v. Brooks*, 78 F.4th 138, 141 (5th Cir. 2023).

The Ninth Circuit. In *United States v. Cereceres*, 771 F. App'x 803, 803-04 (9th Cir. 2019), the court held that a district court's failure to enter a preliminary forfeiture order "was completely harmless" and rejected the defendant's argument that a statement made by the district court at sentencing as to what assets would be forfeited should control over the written judgment ordering forfeiture, which included additional property to forfeit. The court was clear, however, that "as a general matter [] an oral ruling on forfeiture at the sentencing hearing would control over a later written forfeiture order," but nonetheless concluded that the statement the defendant focused on "did not constitute a final order of forfeiture" because "the district court revised its statement and requested that the government file a written order of forfeiture that would be subject to objection from [the defendant] and final approval by the court." *Id*. at 803.

More recently, the Ninth Circuit reiterated the primacy of the oral pronouncement in determining that "a defendant has a due process right to be present for sentencing" *whenever* that condition is not mandatory and automatically imposed. *United States v. Montoya*, 82 F.4th 640, 651 (9th Cir. 2023). Because "the defendant has a due process right to be present to defend against" any sentence term that is ultimately imposed on him, failure to pronounce that term orally, *or* incorporate it by reference if previously disclosed, means "we **must** remand to the district court." *Id*. at 650, 655 (emphasis added). This is true not only because due process requires that the defendant have an opportunity to object to a term of sentence that is imposed, but because 18 U.S.C. § 3742(f)(1) clearly states that "if the court of appeals determines that … the sentence was imposed in violation of law …, the court **shall** remand the case." *Montoya*, 82 F.4th at 655 (emphasis added).

The Eight Circuit. The Eighth Circuit has not had occasion to rule on Rule 32.2(b)(4)(B) since *McIntosh* was decided. The last case that addressed the requirement included, as many others do, "wholesale violations of Rule 32.2(b)," including *both* failure to enter a preliminary forfeiture order and "no judicial pronouncement of what specific property would be forfeited." *United States v. Shakur*, 691 F.3d 979, 988 (8th Cir. 2012). There, the court determined that these "violations were prejudicial legal errors, not clerical errors," such as failure to include properly imposed forfeiture in the written judgment, which can be amended at any time, and that therefore there "c[ould] be no criminal forfeiture in this case." *Id*. at 989.

While *McIntosh* abrogated so much of *Shakur* that determined that preliminary forfeiture order violations automatically necessitated reversal, *see McIntosh*, 601 U.S. at 336 n.3, it clearly did not affect *Shakur's* ruling with respect to Rule 32.2(b)(4)(B), and no subsequent case in the Eighth Circuit has either. As it stands, the Eighth Circuit's mandatory view of Rule 32.2(b)(4)(B) still applies.

B. Time-related directive, i.e., harmless error. Five circuits have determined that Rule 32.2(b)(4)(B) is a time-related directive, violation of which is subject, on appeal, to harmless error review.

The First and Sixth Circuits. The First and Sixth Circuits are the only to address violations of Rule 32.2(b)(4)(B) post-*McIntosh*. And while this Court affirmatively stated that it was not deciding anything regarding this subpart to Rule 32.2 in the *McIntosh* decision, both of these circuits have determined that this Court's decision necessarily means Rule 32.2(b)(4)(B) violations are subject to harmless error review. The First Circuit took this for granted, simply "excus[ing] any error as harmless" and citing *McIntosh* as "discussing harmless error in a similar situation." *Ponzo*, 171 F.4th at 519. The court offered no explanation as to why this standard applied or whether it considered any other.

The Sixth Circuit conducted a lengthier analysis and concluded "the reasoning of *McIntosh*" commanded the same result. *Harrell*, No. 25-5556, 2026 WL 1906437, at *6.

The Third, Fourth, and Eleventh Circuits. As the Sixth Circuit pointed out in *Harrell*, these three circuits have suggested, both prior to and after *McIntosh*, that Rule 32.2's requirements are time-related directives. *Harrell*, 180 F.4th at 901-02 (collecting cases). While the Sixth Circuit's invocation of *United States v. Cammarata*, 145 F.4th 345, 382 (3d Cir. 2025), is arguably inapposite, where that case involved application of Rule 32.2(b)(5)(A), it is undeniable that these courts view Rule 32.2 requirements with more leniency than the circuits reviewed above.

C. The First Circuit has created new conflict among the circuits in evaluating harmless error. In addition to crystallizing a longstanding split on what type of rule 32.2(b)(4)(B) is, the First Circuit's decision creates conflict where little previously existed: what harmless error means when Rule 32.2 has been violated. Indeed, the first two post-*McIntosh* decisions, *Harrell* and *Ponzo*, are in deep conflict with one another on this question, further underscoring the need for this Court's intervention.

The new split created by the First Circuit's decision concerns whether the harmlessness of Rule 32.2 violations should be evaluated according to whether an appellate court simply believes, notwithstanding the violations, that the challenged forfeiture was merited, or whether an appellate court must first determine, irrespective of its views on the merits of forfeiture, if the minimum process guaranteed by due process and Rule 32.2 to oppose and adjudicate forfeiture was afforded to a criminal defendant.

In *Harrell*, the Sixth Circuit took the latter approach, which is almost universally accepted by other circuits. Indeed, the court was confident that its ruling would not widely jeopardize due process because harmless error would nonetheless be measured by whether "(1) the defendant had fair notice that the government would seek forfeiture and in what amount and (2) the defendant had the full opportunity to contest the forfeiture." 180 F.4th at 903 (*quoting United States v. Mincey*, 800 F. App'x 714, 728 (11th Cir. 2020)).

The First Circuit's decision treats harmless error in the opposite way. The court excused as harmless that "[t]he government didn't specify until sentencing the exact among [Ponzo] should forfeit" and that he "didn't get to oppose the government's post-sentencing hearing forfeiture motion until after the forfeiture order entered." *Ponzo*, 171 F.4th at 519. These are precisely what the Sixth Circuit held were necessary components of Rule 32.2 that, when missing, are never viewed as harmless: advance, i.e., fair, notice of what the government sought to forfeit and in a specific amount and a ***full***, not after-the-fact, opportunity to contest that request.

In almost any other circuit, the government and district court's combined disregard for Rule 32.2 here would have been considered harmful and reversible error. In the Seventh Circuit, "[a] key inquiry when evaluating a Rule 32.2 violation is whether the proceedings were marred by minor hiccups or a wholesale disregard of the Rule." *Skaggs*, 78 F.4th at 994. Error cannot be harmless in the latter instance, including where a defendant "otherwise never received a chance to contest forfeiture" and "[t]he court exchanged only a few words with [the defendant] on the matter at his sentencing hearing and later granted the government's motion for a preliminary order without waiting for a written response from [the defendant]." *Id*.

The Eleventh Circuit recently affirmed its harmless error test in a case where a district court had "erred by failing to enter a preliminary order of forfeiture in advance of sentencing." *United States v. Alexander*, 170 F.4th 1303, 1317 (11th Cir. 2026). There, the government moved for a preliminary order on April 19, 2023, the day before sentencing, and the defendant's counsel asked the court to postpone the forfeiture portion of the hearing. *Id*. at 1316. The defendant filed a response to the government's motion on May 3, 2023, and "the forfeiture and restitution hearing was held on June 27, 2023." *Id*. Because the defendant "had specific notice of the forfeiture amount," which was elicited earlier during trial, and "was given a full opportunity to contest this amount at the hearing" the court subsequently held, the "procedural error was harmless." *Id*. at 1317.

In addition to the Seventh and Eleventh, this two-prong test for measuring harmless error is accepted and applied in the Sixth, Ninth, Fifth, Tenth, and Fourth Circuits: when the defendant has pre-sentencing notice of the *amount* that is to be forfeited and a *full* opportunity to contest it, the error is harmless. *See, e.g., Harrell*, 180 F.4th at 903; *Cereceres*, 771 F. App'x at 803-04 (failure to enter preliminary forfeiture order "was completely harmless" where defendant did not object in district court, indictment specified property to be forfeited, and prior to district court's order forfeiting $3,939.99 as substitute property defendant "was given the opportunity to brief any objections"); *United States v.*

Berry, 795 F. App'x 229, 233, 241 (5th Cir. 2019) (error harmless where government moved on July 31 for a preliminary forfeiture order and sentencing held on August 23, at which "the court … considered argument concerning forfeiture"); *United States v. Dahda*, 852 F.3d 1282, 1297 (10th Cir. 2017) (failure to enter a preliminary forfeiture order harmless because defendant "had notice of a potential forfeiture in the amount" ultimately ordered, "he objected before the hearing," and his "only objection was addressed to his satisfaction at the sentencing"); *United States v. Martin*, 662 F.3d 301, 309 (4th Cir. 2011) (errors harmless where "there is no dispute that Appellants were fully aware of both the pending forfeiture itself and … the exact amount" and "district court held multiple, comprehensive hearings on forfeiture").

The First Circuit has adopted a radical approach by contrast. Its decision was guided not by the safeguards uniformly used in other circuits, but by the maxim "'[t]he simplest way' to handle an issue 'is often the best' way." *Ponzo*, 171 F.4th at 519 (*citing Stor/Gard, Inc. v. Strathmore Ins. Co.*, 717 F.3d 242, 248 (1st Cir. 2013)). The court thus concluded, simply, that even though Ponzo did not have any pre-sentencing knowledge of the amount the government sought to forfeit, and even though his first opportunity to be heard came after the district court had already granted the government's post-sentencing forfeiture motion, an opportunity to know or be heard "sooner wouldn't have mattered." *Ponzo*, 171 F.4th at 520. The only "reason" the First Circuit had for this conclusion was the district court's four-sentence ruling on Ponzo's motion for stay of forfeiture pending appeal. *Id*.

The First Circuit thus completely upended harmless error analysis in the context of Rule 32.2 violations: it begins with the district court's decision not to alter its erroneously entered order of forfeiture as *evidence* that the error was harmless, regardless of how the court arrived at that decision. All other courts do the opposite: they look to the process that unfolded in the case and ask whether the defendant had what due process entitles him to—at bottom, sufficient notice of what he stands to forfeit and an opportunity to be heard on it. *See, e.g., Harrell*, 180 F.4th at 903 ("Harrell also had a full and fair opportunity to contest the government's forfeiture request. … Thus, the district court's failure to impose forfeiture at sentencing or include forfeiture in the judgment was harmless."); *Berry*, 795 F. App'x at 239 ("Error is prejudicial if there is a reasonable probability that the [outcome] would have been different but for the error. … In that regard, "[p]rocedural due process requires that an individual receive adequate notice and procedures to contest the deprivation of property rights."). Here, Ponzo had neither, which the First Circuit recognized but disregarded, in total derogation of due process's commands.

III. This case provides an excellent vehicle for reviewing the question presented.

This case presents a rare opportunity for the Court to address a discrete legal issue that it raised in one of its recent opinions and that is the subject of intense and recent disagreement among lower courts.

This case presents that issue in the cleanest way possible: only the forfeiture issues remain in this case, as Ponzo no longer challenges the other parts of his sentence. Moreover, this case involves, as the First Circuit recognized, violation of almost every part of the Rule 32.2 procedure, offering a unique opportunity for this Court to provide comprehensive clarity on a rule that has been vexing circuit and district courts for years.

Most importantly, this Court has the opportunity to resolve the exact questions that *McIntosh* left open related to Rule 32.2(b)(4)(B). There are no factual disputes about when the forfeiture amount was specified or whether the defendant received an opportunity to be heard.

Contrary to any possible suggestions by the government or First Circuit, there are not any issues concerning waiver or "invited error" either. Courts are in agreement that a defendant cannot waive or forfeit his right to be present under Rule 32.2 while being sentenced where the district court fails to impose a term of his sentence, such as forfeiture, orally and in his presence. *See Harrell*, 180 F.4th at 896 ("invited error does not apply because the district court itself caused the error"). By definition, a defendant cannot object to a term of sentence—such as the $13.2 million in forfeiture here—that the district court does not impose. *See Montoya*, 82 F.4th at 646 ("We reject the government's argument that Montoya forfeited her challenge to the district court's failure to make an oral pronouncement of the standard conditions of supervised release by not objecting during the sentencing hearing. Because Montoya did not know that the district court intended to impose the standard conditions of supervised release until after she received the written judgment, Montoya did not have any real opportunity to object to the district court's failure to make an oral pronouncement of those conditions during the sentencing proceedings.") (quotations omitted). Further, it was the government's assurance that "the defendant obviously would have time to respond to" its proposed forfeiture motion that staved off any objection at the hearing itself. CA1A1215. When the district court entered a forfeiture order before hearing one word from the defendant, he promptly objected, including to the failure to pronounce the forfeiture order in his presence. CA1A1257. The Rule 32.2(b)(4)(B) violation is therefore directly and discretely presented.

IV. Whichever way Rule 32.2(b)(4)(B) violations are treated, the First Circuit's decision is egregiously wrong and has sanctioned a forfeiture of $13.2 million with no process at all.

A. Rule 32.2(b)(4)(B) is a mandatory claim-processing rule. The First Circuit offered no meaningful explanation for its decision to apply harmless error review, which makes sense, because *McIntosh* and this Court's precedents command the opposite result.

Unlike Rule 32.2(b)(2)(B), 32.2(b)(4)(B) does not "contemplate[] flexibility regarding the timing" of the oral pronouncement. *McIntosh*, 601 U.S. at 340. "The court must include the forfeiture when orally announcing the sentence[.]" Fed. R. Crim. P. 32.2(b)(4)(B). While the rule does provide that the court may "otherwise ensure that the defendant knows of the forfeiture," that provision is clear with respect to the prescribed time for doing so: "at sentencing." *Id*. In other words, *at sentencing*, a defendant must have or be guaranteed a meaningful opportunity to defend against the government's forfeiture request, including advance notice and a meaningful forum to contest it.

Second, while 32.2(b)(4)(B) also does not specify a consequence for noncompliance, it provides a clue as to whether such violations are correctable or mandatory. *See McIntosh*, 601 U.S. at 341. While the rule clearly provides that the court must include "the forfeiture order" in the written judgment, it notes that "failure to do so may be corrected at any time under Rule 36." Notably, however, there is no similar clause allowing for correction if the requirement that forfeiture be included in the oral announcement of the sentence is not met.

Third, although 32.2(b)(4)(B) governs the conduct of the district court and not the parties, which this Court has held generally suggests that a rule is a time-related directive, this general principle does not apply here. First, Rule 32.2(b)(4)(B) possesses the features of a mandatory claim-processing rule because, as due process and Rule 43(a)(3) require, it acts to ensure that a "certain procedural step[,]" imposition of a sentence term, is taken at a "certain specified time[,]" at sentencing and in the defendant's presence. *McIntosh*, 601 U.S. at 341 (*quoting Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

Moreover, as the Ninth Circuit recognized in *Montoya*, 82 F.4th at 655, a sentence that contains a term that was not orally imposed at sentencing *must* be vacated and remanded on appeal under 18 U.S.C. § 3742(f)(1), which provides that if a sentence was "imposed in violation of law," the court of appeals "shall remand the case." There can be no doubt that the requirements of Rule 32.2 qualify as "law" and that the court of appeals is *mandated* thus to remand the case if any part of the sentence, including forfeiture, was imposed in violation of any law, including Rule 32.2(b)(4)(B). Courts are divided on whether forfeiture even *can* be imposed if it was not a part of the oral sentence. *See, e.g., Petix*, 767 F. App'x at 123 (remanding "for entry of a corrected judgment that removes monetary forfeiture altogether from Petix's sentence" where oral pronouncement excluded forfeiture).

B. If harmless error review applies, the district court's errors were undoubtedly harmful. Even if this Court ultimately concludes that 32.2(b)(4)(B) is a time-related directive, which it should not, this case requires reversal. Simply put, the First Circuit's new test for harmless error review in the context of Rule 32.2 violations would not only cause, if allowed to stand, a brand-new front for circuit discord to ensue, but also it would entirely defeat the purpose of the rule and its encoding of constitutional protections.

Harmless error can only be measured by whether, notwithstanding Rule 32.2's clear directives, a defendant still received, functionally, the notice, process, and opportunity to be heard that the rule meticulously provides. Here, the First Circuit openly admitted that Ponzo received none but still affirmed.

The failure to provide any meaningful process ultimately shows up in the superficiality of the First Circuit's holding on the merits of Ponzo's forfeiture challenge, in which he argued that because he self-generated the contracts he worked, the revenue and profit from those contracts was not obtained but for his payments to Darlington and Marra. *Ponzo*, 171 F.4th at 518-19. The First Circuit held this argument "ha[d] no oomph," because in any case "a CLEAResult operative like Darlington or Marra had to scope and approve the proposal for there to be a contract. And for another still, the Ponzos kept bribing Darlington and Marra for special favors even after contracts got awarded." *Id*.

But this analysis does not apply the but-for causation test that it must, and it cannot, because the government never provided any evidence that the contracts Ponzo generated entirely on his own would not have been scoped or approved without his payments. Even if there were any evidence of contract manipulation, which there was not, under the applicable but-for causation standard, the government would only be entitled to forfeit those profits which resulted from manipulation, *not* every cent of profit Ponzo made from CLEAResult in a decade. In fact, it was CLEAResult's policy to scope and approve and encourage all contracts that Ponzo brought in. There is no evidence to support the forfeiture request or order because the government's first attempt to establish that all $13.2 million Ponzo earned through the Mass Save program was forfeitable came at the last second of the sentencing hearing, and no argument or evidence was offered to support the request. The government's motion for forfeiture simply incorporated its sentencing memorandum, which only generally mentioned forfeiture, and made no argument as to traceability. CA1A1229.

Where the government offered no evidence to support its forfeiture theory, and Ponzo had no opportunity to rebut that theory, or put on his own evidence, there was simply no plausible basis for the

First Circuit to conclude that the district court's errors were harmless. Due process was flagrantly violated, and the conclusion that adhering to proper procedures "wouldn't have mattered" anyway is fully unsupported. Pet. App. 22a.

C. The government deprived Mr. Ponzo of $13.2 million without even attempting to prove its claims. At bottom, this case involves a large deprivation of property, imposed as a criminal sentence, in violation of clear rules and outside of the defendant's presence. While the First Circuit and district court essentially reduced this disturbing series of constitutional violations to "harmless" mishaps and dismissed Ponzo's protestations as "ludicrous," the Constitution guarantees better than that.

Rule 32.2 exists for a reason: to make the government, before it takes away everything a man has earned, prove that those earnings were ill-gotten. The rule requires the government and the court to provide notice of what a defendant stands to lose, a forum in which to prove otherwise, and the dignity of being told to his face that, viewing all the evidence, he is wrong. Here, that rule was treated as a footnote—a mere suggestion. That is grievously wrong and unjust.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 31, 2026

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED APRIL 1, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 25-1203, 25-1259, 25-1327

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTOPHER PONZO; JOSEPH PONZO,

Defendants, Appellants.

Filed April 1, 2026

OPINION

Appeals from the United States District Court
for the District Of Massachusetts
Hon. Nathaniel M. Gorton, *U.S. District Judge*

Before Gelpi, Thompson, and Montecalvo, *Circuit Judges.*

Thompson, *Circuit Judge.*

OPENING

Meet the Ponzo brothers, Chris and Joe (we use first names — as their briefs sometimes do — not out of disrespect but for clarity). A while back they pled guilty (without plea agreements) to felonies arising from a bribery scheme involving "Mass Save," a state-mandated program (funded by surcharges on utility bills) that supports energy-conservation projects.[1] The copped-to charges covered (for both brothers) conspiracy and substantive honest-services wire fraud, lying to federal agents, and (for Joe only) aiding and assisting false tax returns. *See respectively* 18 U.S.C. § 1349, §§ 1343 and 1346, and § 1001(a)(2) and 26 U.S.C. § 7206(2). A district judge then sentenced them each to 27 months in prison (an above-guidelines term for Chris but a within-guidelines stint for Joe), and ordered Chris to forfeit $13.2 million and Joe to forfeit $3.6 million.

How the Ponzos became crooks and what they want from us is kind of a long story. But here's the short version (with more to come soon).

Chris owned CAP Electric, Inc., a business specializing in energy-conservation work. In 2013 he began bribing people at CLEAResult, a firm that picked and oversaw contractors on Mass Save projects. He later pulled Joe into the scheme, with Chris and CLEAResult employee Eric Darlington helping Joe (and his wife) set up an air-sealing company called Air Tight Solutions, LLC as a Mass Save contractor (air-sealing — as its name

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1. As is our practice in guilty-plea appeals, we take the facts from the operative indictment, the uncontested parts of the presentence reports, the transcripts of key court hearings, and the sentencing record. *See, e.g.*, *United States* v. *Diaz-Serrano*, 77 F.4th 41, 44 (1st Cir. 2023).

suggests — blocks air, making buildings less drafty). Doing next to no work for the company (and without telling CLEAResult), Joe subcontracted the air-sealing projects to Chinasa Construction Services, Inc. and falsely claimed Chinasa employees were Air Tight employees — the Ponzos even created fake email addresses for the Chinasa staffers to make it look like they worked at Air Tight.[2] To cover his share of the payola, Joe sent money from Air Tight to Chris and CAP Electric and labeled it "subcontractor" business expenses. Chris then bought off CLEAResult employees. From 2013 to 2017, for example, he gave Darlington $1,000 cash every week and bought him expensive things like an Apple MacBook, a John Deere tractor, bathroom fixtures, and outdoor lights. And after CLEAResult fired Darlington in 2017, the brothers began bribing CLEAResult employee Peter Marra — sending him cash and gift cards for special favors like getting heads-ups on inspections and audits. All told, CAP Electric took in about $36 million from CLEAResult and Air Tight received about $7.4 million.

Life was good for the millionaire brothers. But the government eventually caught on. And arrests, indictments, guilty pleas, sentencings, and forfeitures followed. Which brings us to today's appeals, where the Ponzos attack the sentences and the forfeitures from many angles. Read on to see why we affirm across the board (credit where credit is due — our basic analysis tracks that of the government).

2. A brief word about the Chinasa-employees/email stuff. The government put all that front and center in its brief, piecing together info from several sentencing exhibits, with no rebuttal from the Ponzos in their reply briefs.

SENTENCES

Broadly speaking, the Ponzos argue (either individually or collectively) that the judge procedurally erred — first by miscalculating the tax loss attributable to Joe in setting the base-offense level for his tax crimes, then by misapplying guidelines enhancements to their sentences, and finally by misstating how much money they made from their misdoings.[3] But none of their arguments work.[4]

Base-Offense Level

Joe claims that the judge plainly erred by accepting the presentence report's calculation of the tax loss at $115,528.[5] Because $115,528 is more than $100,000 but

3. A defendant can ask us to review a sentence's procedural reasonableness, substantive reasonableness, or both. *See, e.g.*, *United States* v. *Denson*, 689 F.3d 21, 26 (1st Cir. 2012). Procedural reasonableness focuses on *how* the judge arrived at the sentence (for example, whether the judge improperly calculated the sentencing range, relied on clearly erroneous facts, or inadequately explained the sentence). *See, e.g.*, *Gall* v. *United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). Substantive reasonableness focuses on the sentence's *length* (whether the judge was too harsh or too lenient, for instance). *See, e.g.*, *United States* v. *Rivera-Berríos*, 902 F.3d 20, 26 (1st Cir. 2018).

4. The brothers' briefs could be read as faulting the judge for not following probation's "conclusions." If so, we give that claim no never mind because the judge wasn't bound by probation's conclusions. *See United States* v. *Robinson*, 433 F.3d 31, 36 (1st Cir. 2005).

5. The judge used the 2024 edition of the sentencing guidelines (which is also the edition we use in this appeal). *See*

less than $250,000, the judge then set the base-offense level at 16 per the tax table at USSG § 2T4.1. Joe thinks that the government misled the judge by saying in its sentencing memo that he "and his wife purchased almost $300,000 in gift cards . . . to disguise their personal purchases as deductible business expenses" — misled, because (according to Joe) the exhibit mentioned in the memo "included only $118,919.83 worth of gift card purchases" and so "supports a tax loss amount of no more than $47,092.25," generating a base-offense level of 14.

Assuming Joe forfeited the argument (as he implies) rather than waived it (as the government insists), we hold that he hasn't shown plain error — an exacting standard that requires him to prove not just an error but an obvious error that affected both his substantial rights and the fairness of the sentencing process. *See, e.g.*, *United States* v. *Fargas-Reyes*, 125 F.4th 264, 270 (1st Cir. 2025). We say that because the $115,528 tax loss is an "IRS calculated" number (per the presentence report), a number Joe didn't "refute" with "any information" (per probation) below or here.[6] If anything, the judge-accepted tax loss *undervalued* the true amount because it included only gift-card purchases, not other purchases Joe made using Air Tight accounts (like synthetic turf he bought for *his* house) — a point the government made in its brief without correction from Joe in his reply brief.

United States v. *Yoon*, 167 F.4th 556, 564 (1st Cir. 2026); *United States* v. *Mehanna*, 735 F.3d 32, 67-68 (1st Cir. 2013).

6. The government's sentencing memo excerpted lines from an IRS report explaining the "$296,084.25" in gift-card purchases and $9,542.60 in gift-card activation fees.

Enhancements

The brothers (sometimes together, sometimes separately) object to the judge's use of sentencing enhancements for sophisticated means under USSG § 2B1.1(b)(10)(C) (Chris and Joe) and USSG § 2T1.4(b)(2) (Joe); obstruction of justice under USSG § 3C1.1 (Chris and Joe); and aggravating role under USSG § 3B1.1(c) (Chris).[7] They also insist that the judge didn't adequately explain the findings supporting these enhancements. All agree — or at least don't dispute (and we have no reason to doubt) — that the brothers preserved these enhancements below. So we review for abuse of discretion, reversing *only if* the brothers show a legal error, a clearly erroneous factual finding, or an obvious error of judgment. *See, e.g.*, *United States* v. *Reyes-Torres*, 979 F.3d 1, 7 (1st Cir. 2020); *United States* v. *Leahy*, 668 F.3d 18, 21 (1st Cir. 2012). *See generally United States* v. *Rodriguez*, 115 F.4th 24, 49 (1st Cir. 2024) (recognizing that "[t]he government bears the burden of proving any sentencing enhancement by a preponderance of the evidence").

Sophisticated Means

The Ponzos first dispute the 5-level sophisticated-means enhancements under USSG § 2B1.1(b)(10)(C).[8] This

7. This will all become much clearer shortly.

8. That provision provides for a 2-level enhancement for sophisticated means — unless "the resulting offense level is less than level 12," in which case it calls for an "increase to level 12." USSG § 2B1.1(b)(10)(C) (bolding omitted). And because the judge

enhancement applies to "especially complex" or "especially intricate" efforts to commit or conceal a crime. USSG § 2B1.1 cmt. n.9(B). "[H]iding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts" are examples of what "ordinarily" constitutes "sophisticated means." *Id.* This list isn't "exhaustive." *United States* v. *Foley*, 783 F.3d 7, 25 (1st Cir. 2015). And "'the enhancement properly applies to conduct less sophisticated' than the examples" given. *Id.* (quoting *United States* v. *Jennings*, 711 F.3d 1144, 1147 (9th Cir. 2013)).

Arguing in unison, the brothers claim that the judge could apply the enhancement *only* if Air Tight was a "shell company" with no business operations or assets — something they say Air Tight *wasn't* because it "was engaged in the business of performing air sealing work under contract with CLEAResult." But the shell-company example listed above is just that — an *example*. Which the brothers wrongly portray as dispositive. Anyway, the two formed Air Tight — creating phony email accounts, falsifying employees, using the enterprise to funnel bribe money to Chris, wrongly classifying those payments as business expenses, *etc.* — to make the "scheme more effective and difficult to thwart." *See Foley*, 783 F.3d at 26 (quoting *United States* v. *Evano*, 553 F.3d 109, 113 (1st Cir. 2009)). And those elaborate steps attest to sophisticated means. *See id.* (holding that the defendant's use of "fraudulent" documents, "fictitious down payments," and

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initially set the Ponzos' base offense levels at 7, he then hit them with a 5-level enhancement to put them at level 12.

"fake checks," taken together, constituted sophisticated means); *see also Evano*, 553 F.3d at 113 (stressing that a "scheme may be sophisticated even if the individual elements taken alone are not").

Joe also attacks the 2-level sophisticated-means enhancement under USSG § 2T1.4(b)(2). As before, "sophisticat[ion]" signifies "especially complex" or "especially intricate" efforts to commit or conceal tax fraud. USSG § 2T1.4 cmt. n.3. This includes, just as before, conduct like "hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts." *Id.*

Joe sees "nothing sophisticated about the ways in which [he] reported personal expenses as business expenses." But viewing the scheme in its entirety, we see his multi-part effort of using Air Tight accounts to buy *hundreds of thousands* of dollars' worth of gift cards from stores, then using them to make *personal* purchases, and then reporting those outlays as *business*-expense deductions on his tax returns. Ultimately, this conduct (which lowered his tax liability while also making it seem like Air Tight was a legit business incurring regular business expenses) suffices to sustain the enhancement — a point the government made in its brief with no comeback from Joe in his reply brief. *See generally United States* v. *Thorndike*, 563 F. App'x 71, 74 (2d Cir. 2014) (summary order) (observing that while it's possible that "each step in the scheme was not elaborate, the total scheme was sophisticated in the way all the steps were linked together" (quoting *United States* v. *Jackson*, 346 F.3d 22, 25 (2d Cir. 2003))).

Aggravating Role

Chris questions the 2-level aggravating-role enhancement under USSG § 3B1.1(c). A defendant qualifies for that adjustment if "the criminal activity involved at least two, but fewer than five, complicit individuals (the defendant included)" *and* that "in committing the offense, the defendant exercised control over, managed, organized, or superintended the activities of at least one other participant." *United States* v. *Ilarraza*, 963 F.3d 1, 13 (1st Cir. 2020) (quoting *United States* v. *Al-Rikabi*, 606 F.3d 11, 14 (1st Cir. 2010)). The supporting evidence "may be wholly circumstantial, and need only show that he exercised authority or control over [one other] participant on one occasion." *United States* v. *Grullon*, 996 F.3d 21, 34-35 (1st Cir. 2021) (alteration in original) (quoting *United States* v. *Cortés-Cabán*, 691 F.3d 1, 28 (1st Cir. 2012)). *See generally* USSG § 3B1.1 cmt. n.4 (explaining that factors for applying the enhancement include the defendant's decision-making authority, the nature of his participation, his control over others, his role in recruitment and planning, the scope of his illegal endeavor, and his share of the crime's fruits).

Insisting, for instance, that he never "commanded" Darlington or Marra "to produce customers," Chris protests that "*no* evidence" showed that he "'exercised authority or control' over his co-conspirators" (emphasis added). Not so, we say. Consider just two record-supported examples that the government highlighted below. Chris told Joe to create fake emails for Chinasa employees. And Joe did. Chris also told Joe to send money to CAP Electric to cover bribes. And Joe did. The government spotlighted these enhancement-supporting examples in its brief without any contradiction from Chris in his reply brief. On top of all this, it's not lost on us that Chris recruited Joe into the scheme in the first place. *See United States* v. *Savarese*, 686 F.3d 1, 20 (1st Cir. 2012) (reiterating that recruitment, "by itself, constitutes a 'managerial function' under" § 3B1.1, and that recruitment is about "the demonstration of individual authority necessary to bring a new member into the fold" (quoting *United States* v. *Joyce*, 70 F.3d 679, 682 (1st Cir. 1995))).

Obstruction of Justice

The brothers next contest the 2-level enhancements for obstruction of justice under USSG § 3C1.1. That section applies if a "defendant willfully obstructed or impeded . . . the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction."

The judge hit Chris with this enhancement for three independent reasons: (*1*) Because Chris stands convicted under § 1001 for lying to federal agents, the enhancement automatically applied. (*2*) Chris's lies impeded the investigation. And (*3*) Chris tried to get co-conspirator Darlington to lie. The record indicates that the judge thought that independent reasons (*1*) and (*2*) also supported the enhancement against Joe (*i.e.*, Joe stands convicted under § 1001 for lying to federal agents, and Joe's lies impeded the investigation) — as Joe and the government agree. But Chris's and Joe's lead briefs *only* challenge independent reason (*2*) (the "lies impeded the investigation" reason), *not* the others. Which won't secure reversal on this issue. *See Oliveras-Villafañe* v. *Baxter Healthcare SA*, 140 F.4th 29, 33 (1st Cir. 2025) (holding that we can "affirm the district court's decision on an independent ground that Appellants have left unchallenged"); *see also Miller* v. *Jackson*, 152 F.4th 258, 271 (1st Cir. 2025); *United States* v. *Henry*, 848 F.3d 1, 7 (1st Cir. 2017).[9]

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9. Joe may think that a sentence in his opening brief — that *Isabel* v. *United States*, 980 F.2d 60, 61 (1st Cir. 1992), holds "the enhancement . . . does not apply unless the false statement 'significantly obstructed or impeded the official investigation or prosecution of the instant offense'" — constitutes engagement with reason (*1*). We see this as a possibility because he believes *Isabel* "establishe[s] . . . that a conviction for obstructive conduct *alone* is insufficient to warrant" the adjustment. An application note to the guidelines states that "making false statements, not under oath, to law enforcement officers," unless such statements "significantly obstructed or impeded the official investigation," "ordinarily" (notice the adverb) won't merit the enhancement. *See* USSG § 3C1.1 cmt. n.5(B) (first quote); *id.* § 3C1.1 cmt. n.4(G) (second quote); *id.* § 3C1.1 cmt. n.5 (third quote). But there's a caveat: "if the defendant *is convicted* of a separate count for such conduct" — like Chris and Joe were — then the "adjustment *will apply*." *See id.* § 3C1.1 cmt. n.5 (emphases added). And nothing in *Isabel* addresses — let alone bars — the caveat's application here. *See generally United States* v. *Figueroa*, No. 24-1008, 2025 WL 289426, at *3 (2d Cir. Jan. 24, 2025) (summary order) (holding that a conviction "for making false statements to federal law enforcement agents" "mandated" the obstruction enhancement's "imposition"); *see also generally United States* v. *Richardson*, 732 F. App'x 822, 829-30 (11th Cir. 2018) (per curiam) (similar); *United States* v. *Davist*, 481 F.3d 425, 427 (6th Cir. 2007) (similar).

Explanation

The Ponzos then complain that the judge didn't sufficiently explain the enhancement-supporting findings. Neither Chris nor Joe made this claim below, however — despite having chances to do so. *See generally Puckett* v. *United States*, 556 U.S. 129, 134, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (noting that timely objections allow district courts to fix any possible errors as they arise). Which requires them to show plain error. *See, e.g.*, *United States* v. *Reda*, 787 F.3d 625, 630-31 (1st Cir. 2015). But they don't even try to satisfy that tough test, thus waiving the issue. *See, e.g.*, *United States* v. *Cruz-Ramos*, 987 F.3d 27, 40 (1st Cir. 2021); *United States* v. *Rivera-Carrasquillo*, 933 F.3d 33, 49 n.15 (1st Cir. 2019).

Even setting waiver aside — and there's *no* need to — we see no obvious error with the judge's explanations. The parties fought over the enhancements in their sentencing memos. The judge read them. Chris and the government continued the fight at his sentencing. And the judge "agree[d] with the government['s]" take. Plus the judge at Joe's later-held sentencing "accept[ed]" the government's "recommendation" about "the enhancements" that Joe "vigorously contested." All this is very important because controlling precedent lets us infer the judge's reasoning from what the parties argued. *See, e.g.*, *United States* v. *D'Angelo*, 110 F.4th 42, 49 (1st Cir. 2024); *Ilarraza*, 963 F.3d at 12; *United States* v. *Zehrung*, 714 F.3d 628, 631 (1st Cir. 2013). Which is precisely what we do here.

Money Made

Chris argues that the judge imposed the above-guidelines sentence based on a mistaken belief that he had made "multimillions" from the scheme, "apparently somewhere around [$]13 million" (he pulled that quote from the judge's sentencing analysis). Contending that "this was not supported by any evidence," he claims the "sentencing record establishe[s]" that he "generated virtually all of the Mass Save jobs which CAP Electric performed through CLEAResult."[10] Darlington or Marra, he continues, "assigned" him "only 1.2% of [the] jobs," leading to "$164,786 in net income" for him (Chris) — *not* multimillions.

Sounding a similar theme, Joe argues that the judge picked the within-guidelines sentence based on an incorrect view that he made "in the neighborhood of $10 million" (a number, he notes, that's different from the $3.6 million figure the judge ordered him to forfeit). To his mind, the $10 million number is off because almost all "of Air Tights' revenue during this period was attributable to contracts originated by" Chris and not from the bribes. And, he writes, based on the contracts assigned by Darlington or Marra,

10. By "generate" Chris means he "br[ought] in the potential customer." And "[h]ow did Chris generate this work," counsel rhetorically asked the judge at sentencing. "He knocked on doors and he made cold calls selling property managers on [the] benefits of the Mass Save program. He was persistent and he got people to listen."

"the amount of tainted proceeds is limited to approximately $151,800."[11]

The government claims that Chris must run the plain-error gauntlet because he didn't "object when the [judge] stated the finding he now claims" lacked evidentiary support. We agree. While Chris thinks that his sentencing memo said enough to preserve this procedural-reasonableness argument, he didn't "object to the alleged error when it occurred at the sentencing hearing." *See United States* v. *Rivera-Rivera*, 146 F.4th 59, 88 (1st Cir. 2025). Which means plain-error review applies. *See id.* But by not attempting to show plain error, "he has waived our review of this claim." *See id.*[12]

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11. We can assume without deciding that the Ponzos are right that Chris "f[ou]nd[ ] and recruit[ed] virtually all of the customers."

12. Quoting *Holguin-Hernandez* v. *United States* (but adding alterations), Chris's reply brief argues that plain error does not apply because "where a criminal defendant advocates for a sentence shorter than the one ultimately imposed . . . [n]othing more is needed to preserve the claim that a longer sentence is unreasonable." *See* 589 U.S. 169, 173-74, 140 S.Ct. 762, 206 L.Ed.2d 95 (2020). *Holguin-Hernandez* held that a defendant who argues for a particular sentence "communicates to the trial judge his view that a longer sentence is 'greater than necessary'" and so preserves a *substantive*-reasonableness claim. *See id.* at 174-75, 140 S.Ct. 762. Chris, however, makes a *procedural*-reasonableness claim involving a (supposedly) "clearly erroneous" finding — something he stressed in his lead brief (he quoted *Gall*'s point that a sentence based on "clearly erroneous facts" is *procedurally* unreasonable). *See id.* at 175, 140 S.Ct. 762 (clarifying that the Court wasn't deciding "what is sufficient to preserve a claim that

As for Joe, he concedes that the plain-error standard governs. But he's still out of luck. Echoing Chris's argument, his theory rises or falls with the idea that it matters whether Chris "generated" nearly all the contracts. It doesn't, at least not on this record.

But don't just take our word for it — take Chris's and Joe's. They admitted key facts at their guilty-plea hearing. Like how Darlington and Marra "participated in the recommendation, the selection, and [the] oversight of contractors" — including the Ponzos. Like how Darlington helped Air Tight become an approved CLEAResult contractor, a necessary step for Air Tight to get money from CLEAResult. Like how Darlington and Marra helped CAP Electric and Air Tight "with pricing, billing, invoicing and receiving payments from CLEAResult." And like how Marra gave the Ponzos other "preferential treatment" in "assessing properties, creating cost estimates," and tipping them off before "inspections and audits." Chris also told the judge at sentencing that he wanted Darlington (and presumably also Marra) "to work fast and be there whenever" he "needed" help with "assessments and processing the jobs."

And there's more. The evidence shows that Darlington and Marra jiggered contract specifications to boost the brothers' profits. As an example, CLEAResult found that Darlington had overestimated projects' costs by about $2 million. And the evidence proves that the Ponzos had

a trial court used improper *procedures* in arriving at its chosen sentence"). So *Rivera-Rivera* controls the preservation issue before us.

"worked the *majority* of" those projects (emphasis added) — meaning they had worked on lots of "contracts" inflated by Darlington's and Marra's fake numbers (to quote the prosecutor at sentencing, as she parried the brothers' claim that "these contracts were not inflated"). As another example, Marra said in an email that he could "*juice*" a contract price "up" if Joe asked him to (emphasis added).[13]

Darlington and Marra *indisputably* did all this (and more still) while taking the Ponzos' bribes.[14]

Ultimately, Joe's argument is its own undoing. And that's because he identifies no binding precedent that the judge unquestionably erred *in the context of this record* by saying that money made from contracts tainted by bribes

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13. The prosecutor put it nicely below:

> Now, [Chris] makes much of the fact that he purportedly brought in a bunch of referrals, but once those referrals are brought in, they still have to be approved. Somebody has to go to that job site and say, yeah, this makes sense, we need to do energy efficiency work here.
>
> That's where Darlington and Marra came in. They approved jobs that didn't need to be approved. And even if they should have been approved, then they were creating contracts based on false numbers.

14. The judge observed that it would make zero sense for the brothers to pay well over a "[m]illion [d]ollars" in bribes (something they also admitted to at the change-of-plea hearing) if they only made "less than $200,000" each as they claim (what the judge meant is that common sense suggests bribers don't repeatedly dole out that kind of money to score such relatively low returns).

— regardless of who had generated the jobs — resulted from the crimes he'd pled guilty to. *See, e.g.*, *United States* v. *Galíndez*, 999 F.3d 60, 71 (1st Cir. 2021) (holding that "a plain error is an error that is *indisputable* under current law" (emphasis added)).

FORFEITURES

We now turn to Chris's and Joe's problems with the orders requiring them to forfeit $13.2 million and $3.6 million respectively. Sort of borrowing from a just-rejected argument, the brothers say that the orders flop because they're "comprised almost entirely of untainted proceeds . . . not derived from the fraudulent activity." Chris adds that miscues in the process denied him his right to contest the forfeiture. And he also argues that the order is an unconstitutionally excessive fine. Reviewing any legal questions de novo and any fact issues for clear error (as the parties agree), we reject each challenge. *See United States* v. *George*, 886 F.3d 31, 39 (1st Cir. 2018) (charting the standard of review).

Proceeds

"Forfeitures help to ensure that crime does not pay: [t]hey at once punish wrongdoing, deter future illegality, and lessen the economic power of criminal enterprises." *Kaley* v. *United States*, 571 U.S. 320, 323, 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014) (citation modified). The forfeiture statute here — 18 U.S.C. § 981 (applicable to criminal offenses via 28 U.S.C. § 2461) — makes property forfeitable if it "constitutes or is derived from proceeds traceable to" the crimes. *See* 18 U.S.C. § 981(a)(1)(C) (mentioning 18 U.S.C. § 1956(c)(7), which in turn mentions crimes listed in 18 U.S.C § 1961(1), which include § 1343 (relating to wire fraud)). For cases like this one — "involving . . . lawful services . . . sold or provided in an illegal manner" — "proceeds" means the "amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services." *See* 18 U.S.C. § 981(a)(2)(B).

Courts use a "but for" test to see if property is forfeitable. *See United States* v. *Angiulo*, 897 F.2d 1169, 1213 (1st Cir. 1990). "But for" means that if one thing hadn't occurred then another thing wouldn't have occurred. *See Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 656, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020). And under "this test, funds are considered proceeds and therefore deemed forfeitable if a person would not have the funds *but for* the criminal offense." *United States* v. *Farkas*, 474 F. App'x 349, 360 (4th Cir. 2012) (citation modified).

The government must prove the but-for nexus between the crimes and the forfeitable proceeds by a "preponderance of the evidence." *United States* v. *Robertson*, 162 F.4th 209, 253 (1st Cir. 2025). "Preponderance" means that the evidence makes a fact or a conclusion "more likely true than not." *United States* v. *Marino*, 833 F.3d 1, 8 (1st Cir. 2016). And declining to close our eyes to reality, we add that calculating forfeiture is hardly "an exact science" — even in the best of circumstances. *See United States* v. *Treacy*, 639 F.3d 32, 48 (2d Cir. 2011).

Which takes us to the Ponzos' familiar-sounding argument that because Chris "self-generated" nearly all of the contracts their companies performed for CLEAResult, the money they made from those projects isn't criminal "proceeds" — even though they admitted paying CLEAResult staffers bribes related to the contracts. Their claim has no oomph. For one, Air Tight wouldn't have worked on *any* contracts without the bribes to Darlington because without the bribes Air Tight wouldn't have become an official CLEAResult contractor. For another, *no matter* who generated a job, a CLEAResult operative like Darlington or Marra had to scope and approve the proposal for there to be a contract. And for another still, the Ponzos *kept bribing* Darlington and Marra for special favors even *after* contracts got awarded — recall the audit and inspection tip-offs, as just two examples.

A judge "shall order" forfeited all proceeds of the defendant's criminal scheme. *See* 28 U.S.C. § 2461(c); *see also United States* v. *Cox*, 851 F.3d 113, 127-28 (1st Cir. 2017) (holding that the judge didn't err in requiring the defendant to forfeit "*all* proceeds [he] received from the convicted transactions . . . as well as *all* proceeds [he] received from uncharged relevant conduct" considered part of the criminal plot (emphases added)). *See generally United States* v. *Monsanto*, 491 U.S. 600, 607, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989) (noting in a related context that "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"). The bottom line is that the government proved a but-for connection between the Ponzos' bribery crimes and the forfeited proceeds by a preponderance of the evidence (a relatively low standard).[15] And holding otherwise would turn the crime-doesn't-pay principle on its head. *See Kaley*, 571 U.S. at 323, 134 S.Ct. 1090.[16]

Process

Fed. R. Crim. P. 32.2 governs criminal forfeiture. Streamlining things a bit (but without affecting the analysis), a judge "must determine the amount of money that the defendant" will pay "[a]s soon as practical after" a guilty plea "is accepted." *Id.* 32.2(b)(1)(A). "Unless doing so is impracticable, the [judge] must [then] enter [a] preliminary order [of forfeiture] sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final." *Id.* 32.2(b)(2)(B). And "[i]f the forfeiture is contested, on either party's request the [judge] must conduct a hearing." *Id.* 32.2(b)(1)(B).

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15. Joe's reply brief argues that the forfeiture order can't stand because "there was no financial loss in this case" (bolding and capitalization omitted). We needn't get into the nitty-gritty of that argument. It's enough to say that he waived it by not raising it until the reply brief. *See Lawless* v. *Steward Health Care Sys., LLC*, 894 F.3d 9, 25 (1st Cir. 2018) (repeating that an "argument not advanced in appellant's opening brief but raised only in reply brief" is "waived").

16. If anything, Chris's $13.2 million forfeiture figure may be *underinclusive* because it's limited to proceeds from 2014 to 2020 and doesn't include any proceeds from 2013, 2021, or 2022 — even though the scheme ran during those years too.

After noting these rules, Chris focuses on a series of process-based errors: (*1*) The government didn't file a forfeiture motion before sentencing. (*2*) The government didn't specify until sentencing the exact amount he should forfeit. (*3*) The judge didn't enter a preliminary forfeiture order before sentencing. And (*4*) Chris didn't get to oppose the government's post-sentencing hearing forfeiture motion until after the forfeiture order entered. That's all true. But knowing that "[t]he simplest way" to handle an issue "is often the best" way, *see Stor/Gard, Inc.* v. *Strathmore Ins. Co.*, 717 F.3d 242, 248 (1st Cir. 2013) (citation modified), we excuse any error as harmless, *see McIntosh* v. *United States*, 601 U.S. 330, 337, 344-45, 144 S.Ct. 980, 218 L.Ed.2d 307 (2024) (discussing harmless error in a similar situation).

Chris doesn't dispute that the government made clear in the indictment and at the guilty-plea hearing that it sought forfeiture of all proceeds traceable to his crimes. More (and contrary to what he claims), the government's sentencing memo mentioned forfeiture — right after noting that "the Mass Save program" paid him "to the tune of over $13 million in personal profit."[17] More still, he didn't

17. The government's brief points to its sentencing memo, where the prosecutors raised the "over $13 million" sum in discussing USSG § 2B1.1 — a provision that escalates the defendants' "offense level[s] based on the amount of loss attributable to [their] fraud." *See Robertson*, 162 F.4th at 246 (quoting *United States* v. *Kumar*, 112 F.4th 30, 36 (1st Cir. 2024)); *see also* USSG § 2B1.1(b)(1) n.(B) (signaling that "loss" could even mean "the gain that resulted from the offense" if "there is a loss but it reasonably cannot be determined"). Forfeiture and loss (by

object when the government orally moved at sentencing for him to forfeit "approximately [$]13.2 million" or when the judge asked the government to file a formal forfeiture motion "[w]ithin one week."[18] Even more, despite his not getting a chance to contest the government's motion until after the forfeiture order entered, the record indicates that his raising those arguments sooner wouldn't have mattered. The reason is that he did file an opposition with his motion for reconsideration (along with a motion to stay the forfeiture ruling), an opposition the judge considered and rejected as unconvincing — as we do today as well. Tellingly, the government identified these signs of harmlessness in its answering brief without any persuasive pushback from Chris in his reply brief.[19]

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and large) share some similarities, though (importantly) the two require distinct calculations. *See Robertson*, 162 F.4th at 255. But Chris makes no argument that we can't use the sentencing memo's "over $13 million" statement for harmless-error purposes.

18. Chris writes that the prosecutor told the judge "that she 'forgot' about forfeiture" (only the part in single quotation marks is from her remarks). But what the prosecutor said is that she wanted "to make a couple of points that [she] forgot to make earlier" (meaning earlier *in the hearing*), one of which concerned moving for forfeiture.

19. Speaking of his reply brief, Chris writes there that "the *government* [hasn't] agreed to this day that [he] was entitled to a hearing on traceability" (emphasis added). But this isn't an argument that the *judge* erred on this score (his opposition (filed with his reconsideration motion) didn't say — in Rule 32.2(b)(1)(B) lingo — that he "request[ed]" a forfeiture hearing and that the judge denied that request). And if he thinks it is, he waived the argument for at least two reasons: first, by not raising it "squarely

Fine

Chris lastly argues that the $13.2 million forfeiture order is an excessive fine under the Eighth Amendment to our Constitution.[20] But to get anywhere, he must show that the forfeiture "is grossly disproportional to the gravity of [his] offense." See Bajakajian, 524 U.S. at 334, 118 S.Ct. 2028. And the factors that go into the proportionality analysis are: "(*1*) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (*2*) other penalties authorized by the legislature (or the Sentencing Commission); and (*3*) the harm caused by the defendant." *Heldeman*,

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and distinctly," *see Alston* v. *Town of Brookline*, 997 F.3d 23, 41 (1st Cir. 2021) (citation modified); *see also Rodríguez* v. *Mun. of San Juan*, 659 F.3d 168, 175 (1st Cir. 2011) (holding that "we consider waived arguments confusingly constructed" (citation modified)); and second, by debuting it in his reply brief, *see Braintree Lab'ys, Inc.* v. *Citigroup Glob. Mkts. Inc.*, 622 F.3d 36, 43-44 (1st Cir. 2010) (holding that claims cursorily made in an opening brief are waived, adding that "[t]he slight development in [a] reply brief does nothing to help matters" because claims "raised there for the first time come too late to be preserved on appeal").

20. "Forfeitures are subject to the Eighth Amendment's excessive fines clause 'if they constitute punishment for an offense.'" *United States* v. *Heldeman*, 402 F.3d 220, 223 (1st Cir. 2005) (quoting *United States* v. *Bajakajian*, 524 U.S. 321, 328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998)). And "[h]ere, forfeiture was 'imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony'" and so "was punishment for the offense." *Id.* (quoting *Bajakajian*, 524 U.S. at 328, 118 S.Ct. 2028).

402 F.3d at 223 (citing *Bajakajian*, 524 U.S. at 337-40, 118 S.Ct. 2028).[21]

For starters, Chris's conduct places him at the *dead center* of the class of persons at whom the honest-services statutes he pled guilty to are directed (factor (*1*)) — given how he paid bribes for special treatment that led to his making millions (and we do mean *millions*) in profits. And that's so regardless of how (to quote his brief) "generous" he was with "people in need" after "he began to do very well."

What's more (as we consider factor (*2*)), "judgments about the appropriate punishment for an offense belong

21. The government argues that this circuit's rule is that forfeiture of all proceeds "is *never* excessive" (emphasis added). Quoting *United States* v. *Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999), the government writes: "[F]orfeiture of the full amount of the proceeds of their criminal offense . . . does not constitute an unconstitutionally excessive fine" (alterations by the government). But the actual quote reads: "*It is well-established that criminal defendants are jointly and severally liable for* forfeiture of the full amount of the proceeds of their criminal offense, and that the imposition of such a forfeiture judgment does not constitute an unconstitutionally excessive fine." *Id.* (emphasis added to highlight language the government omitted). *See generally United States* v. *Elias*, 154 F.4th 56, 68-69 (2d Cir. 2025) (discussing whether the reasoning of *Honeycutt* v. *United States*, 581 U.S. 443, 137 S.Ct. 1626, 198 L.Ed.2d 73 (2017) (holding that 21 U.S.C. § 853(a)(1) bars joint and several liability for forfeiture judgments), applies to 18 U.S.C. § 981(a)(1)(C)). Context always matters. *See United States* v. *Torres-Meléndez*, 28 F.4th 339, 342 (1st Cir. 2022). And *Candelaria-Silva*'s context undermines the government's *Candelaria-Silva*-centric argument.

in the first instance to the legislature." *See Bajakajian*, 524 U.S. at 336, 118 S.Ct. 2028; *see also United States* v. *Carpenter*, 941 F.3d 1, 11 (1st Cir. 2019). And pertinently, the top fine for Chris's crimes is "not more than . . . twice the *gross* gain." *See* 18 U.S.C. § 3571(d) (emphasis added). Doubling the roughly $36 million in *gross* proceeds produces a $72 million ceiling. *See Carpenter*, 941 F.3d at 11 (repeating that "[w]e give great weight to this statutory judgment by Congress"). And the challenged $13.2 million forfeiture — capturing Chris's *net* gains for *some* of the years the scheme lasted — is well below the $72 million ceiling.[22] *See generally United States* v. *Segal*, 495 F.3d

22. As Chris points out, a footnote in *United States* v. *Beras* says "that the maximum penalties provided under the [g]uidelines should be given greater weight than the statute because the [g]uidelines take into consideration the culpability of the individual defendant." *See* 183 F.3d 22, 29 n.5 (1st Cir. 1999). And he tells us with no disagreement from the government that "the maximum guidelines fine" for him "is $75,000." *See* USSG § 5E1.2(c)(3). But *Beras*'s "caution does not mean that any fine exceeding the [g]uidelines, yet within the statutory maximum, becomes *per se* unconstitutional." *United States* v. *Facteau*, 89 F.4th 1, 45 (1st Cir. 2023). The guidelines say that the Sentencing "Commission envisions that for most defendants, the maximum of the guideline fine range . . . will be at least *twice the amount of the gain* . . . resulting from the offense." USSG § 5E1.2 cmt. n.4 (emphasis added). And when that's "not the case, the [g]uidelines state that 'an upward departure from the fine guideline may be warranted.'" *Carpenter*, 941 F.3d at 11 n.8 (quoting USSG § 5E1.2 cmt. n.4). Relying on this language, *Carpenter* "ultimately upheld a forfeiture of $14 million, which dwarfed the maximum guideline[s] [fine] of $100,000." *Facteau*, 89 F.4th at 45 (discussing *Carpenter*). And just like in *Carpenter*, "the statutory scheme is a better guide to whether the forfeiture order is excessive." *See* 941 F.3d at 11 n.8.

826, 840 (7th Cir. 2007) (applying *Bajakajian* and holding that "[w]hen a defendant commits a multimillion-dollar crime, he can be required to forfeit assets also running into the millions").

Chris claims (on the factor-(*3*) front) that "[e]veryone affected by" his crimes "was enriched" by his work (or to use his alternative phrasing, no one suffered "financial loss") — especially "CLEAResult, the supposed victim." But (without opining one way or the other on the enrichment issue) his crimes corrupted the Mass Save program in at least three ways: by damaging the utilities' confidence in the companies approving and overseeing the projects; by corroding CLEAResult's faith in its workers; and by eroding the public's trust in the program — points the government makes in its brief without any denial from Chris in his reply brief.

CLOSING

We *affirm* the sentences and the forfeitures.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED APRIL 1, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 25-1203

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTOPHER PONZO,

Defendant, Appellant.

Filed April 1, 2026

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's sentence and forfeiture order are affirmed.

By the Court:

Anastasia Dubrovsky, Clerk

APPENDIX C — MEMORANDUM & ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED MARCH 19, 2025

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal Action No. 22-10094

UNITED STATES OF AMERICA,

v.

CHRISTOPHER PONZO, ET AL.,

Defendants.

Filed March 19, 2025

MEMORANDUM & ORDER

Gorton, United States District Judge

Pending before the Court are two motions related to sentencing in this case: 1) the government's motion for forfeiture against defendant Joseph Ponzo ("Joseph") and the motion of defendant Christopher Ponzo ("Christoper") for release and a stay of forfeiture pending appeal. For the reasons that follow, the government's motion will be allowed, and Christopher's motion will be denied.

I. Background

In November, 2024, brothers Christopher and Joseph Ponzo (collectively, "defendants") pled guilty to multiple fraud charges in connection with a bribery and kickback scheme involving the "Mass Save" program, which collects surcharges on Massachusetts utility bills to fund energy conservation projects.

Christopher was the owner of CAP Electric, Inc., ("CAP Electric") an electrical contracting company that performed energy conservation work. Beginning in 2013, he engaged in a scheme to secure Mass Save contracts by paying bribes to employees at CLEAResult, a company that administered the Mass Save program by approving, selecting and overseeing contractors to work on the energy conservation projects. In 2014, Christopher entangled his brother, Joseph, in the scheme. Christopher and Eric Darlington ("Darlington"), a CLEAResult employee whom Christoper was bribing, helped Joseph establish Air Tight Solutions, LLC ("Air Tight") as a Mass Save contractor despite Joseph's lack of experience in air sealing work.

Both Christopher and Joseph bribed CLEAResult employees in return for Mass Save contracts and favorable treatment. To cover his portion of the bribes, Joseph made payments from Air Tight to Christopher and CAP Electric and categorized them as "subcontractor" business expenses. Christopher would then coordinate the payments to the CLEAResult employees. From 2013 to 2017, Christopher made weekly $1,000 cash payments and provided additional high-value items, including a John Deere tractor, bathroom fixtures, outdoor light fixtures and electrical work at Darlington's home. After Darlington was fired from CLEAResult in 2017, defendants moved on to bribe another CLEAResult employee, Peter Marra ("Marra"). Defendants bribed Marra with cash and gift cards in exchange for preferential treatment, such as advance notice of inspections and audits.

In total, CAP Electric and Air Tight received approximately $36 million and $7.4 million in Mass Save contract revenue, respectively.

II. Motion for Forfeiture

The government moves that this Court enter a forfeiture money judgment order, pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c) and Fed. R. Crim. P. 32.2(b), in the amount of $3,600,000. That amount was determined to constitute the net profit earned by Joseph Ponzo's company, Air Tight, between 2015 and 2019.

The subject statute renders real or personal property subject to forfeiture if it "constitutes or is derived from proceeds traceable to" a defendant's crimes. The First Circuit Court of Appeals ("First Circuit"), like other circuits, applies a "but-for" test to determine if property constitutes forfeitable "proceeds" of a defendant's crimes. *United States* v. *Anguilo*, 897 F.2d 1169, 1213 (1st 1990) ("[F]orfeitures are limited to property interests that would not have been acquired or maintained but for the defendant's [criminal] activities."). Like other factors at sentencing, the government must prove the but-for nexus between defendant's crimes and the forfeitable assets by a preponderance of the evidence. *United States* v. *Keene*, 341 F.3d 78, 85-86 (1st Cir. 2003).

Defendant contends that the government has not met its burden of proving that all of Air Tight's net income represents "proceeds" of unlawful activity. He also argues that the large size of the forfeiture money order requested violates the Excessive Fines clause of the Eighth Amendment.

The Court concludes that the government has more than satisfied the low threshold of proving, by a preponderance of the evidence, that Air Tight would not have generated those proceeds but for defendants' unlawful activity.

At his Rule 11 hearing, defendant agreed that the government would have been able to prove certain facts if the case had proceeded to trial, including that he had bribed CLEAResult employees in exchange for their "assist[ance] in having CLEAResult select Air Tight as an approved contractor for Mass Save projects." Docket No. 133 at 16. But for the bribes, Air Tight would not have won any Mass Save contracts because without the bribes, Air Tight would not have been approved as a CLEAResult contractor. The bribes did not stop after Air Tight was approved: CLEAResult continued to award Mass Save contracts to Air Tight and, in return, Joseph continued to send money to Christopher to contribute his portion of the bribes. As such, the government has shown, by a preponderance of the evidence, that but for Joseph's bribing of Darlington and Marra, Air Tight would not have been selected for the Mass Save projects that brought in $7.4 million in revenue.

With respect to defendant's Eighth Amendment claim, he contends that the $3.6 million sought is "grossly disproportional to the gravity of [his] offense." *United States* v. *Bajakajian*, 524 U.S. 321, 328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). This Circuit, in agreement with its sister circuits, has held that forfeiture of the proceeds of criminal activity does not constitute an unconstitutionally excessive fine. *United States* v. *Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999); *see, e.g.*, *United States* v. *Sum of $185,336.07*, 731 F.3d 189, 194 (2d Cir. 2013); *United States* v. *Jamal*, 499 F.3d 347, 354-55 (4th Cir. 2010); *United States* v. *Betancourt*, 422 F.3d 240, 250-51 (5th Cir. 2005); *United States* v. *22 Santa Barbara Drive*, 264 F.3d 860, 874 (9th Cir. 2001); *United States* v. *Funds on Deposit at Bank One*, 393 F. App'x 391, 392 (7th Cir. 2010). That is because an order of forfeiture of the proceeds of one's crimes is not punitive but rather simply "parts the owner from the fruits of the criminal activity." *United States* v. *Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994). The money judgment sought is directly proportional to defendant's crimes. There is no Eighth Amendment violation.

III. Motion for Release and Stay of Forfeiture Pending Appeal

Defendant. Christopher Ponzo seeks release pending appeal pursuant to 18 U.S.C. § 3143(b). That provision requires a defendant to establish, *inter alia*, that his appeal "raises a substantial question of law or fact" likely to result in reversal or a more favorable sentence. The relevant provision of § 3143(b)

> breaks down into two distinct requirements: (1) that the appeal raise a substantial question of law or fact and (2) that if the substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or [a more favorable sentence].

United States v. *Bayko*, 774 F.2d 516, 522-23 (1st Cir. 1985). Christopher identifies legal questions sufficient to satisfy the first requirement but not the second.

Defendant challenges this Court's findings at his sentencing that certain specific offense characteristics apply, thereby increasing his total offense level and his guideline range. Even an erroneous guidelines calculation, however, does not constitute reversable error if "the district court or the record make clear that the court found the sentence appropriate despite the Guidelines range." *United States* v. *D'Angelo*, 110 F.4th 42, 53 (1st Cir. 2024) (citing *United States* v. *Monson*, 72 F.4th 1, 14 (1st Cir. 2023)).

Here, the Court found on the record that even if specific offense characteristics were not applicable, an upward variance would be warranted because the crimes committed were more egregious than what was reflected in defendant's calculated total offense level.

Defendant maintains that the Court's decision to upwardly vary was grounded solely in its erroneous belief that defendant accrued more than $13 million from his scheme. His mistaken reading of the sentencing transcript ignores the Court's expressed reasoning for what would justify an upward variance, i.e., defendant's central role in orchestrating the bribery scheme, his lies to federal investigators, the duration of the scheme and, finally, the extraordinary amount of ill-gotten gains. Even if those gains were less than calculated by the district judge, an upward variance would have been warranted under the circumstances. *See United States* v. *Martin*, 520 F.3d 87, 91 (1st Cir. 2008) (A federal court's explanation for a variance must be "rooted either in the nature and circumstances of the offense or the characteristics of the offender; . . . add up to a plausible rationale; and . . . justify a variance of the magnitude in question.").

Finally, defendant argues that this Court should stay the forfeiture order pursuant to Fed. R. Crim. P. 32.2(d). One factor that would justify such a stay would be a likelihood of success on appeal but, for the reasons elaborated herein, the Court finds no such likelihood.

Defendant asserts that he self-generated 93% of the revenue that he earned from the Mass Save projects and is therefore entitled to it, notwithstanding the fact that he paid the bribes. He admits he paid bribes of over One Million Dollars but would have the Court believe that it was in exchange for less than $200,000 worth of contracts. That is ludicrous. A stay of the forfeiture order is unwarranted.

Appendix C

ORDER

For the foregoing reasons,

- the government's motion for forfeiture (Docket No. 164) is **ALLOWED**; and

- the motion of defendant Christopher Ponzo for release and stay of forfeiture pending appeal (Docket No. 172) is **DENIED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Court

Dated: March 19, 2025

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED FEBRUARY 13, 2025

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case 22-cr-10094-NMG

UNITED STATES OF AMERICA

s.

2. CHRISTOPHER PONZO,

Defendant.

Filed February 13, 2025

ORDER OF FORFEITURE (MONEY JUDGMENT)

GORTON, D.J.

WHEREAS, on January 26, 2023, a federal grand jury sitting in the District of Massachusetts returned a thirty-one-count Superseding Indictment, charging defendant Christopher Ponzo (the "Defendant"), and another, with Conspiracy to Commit Honest Service Wire Fraud, in violation of 18 U.S.C. § 1349 (Count One), Honest Services Wire Fraud, Aiding and Abetting in violation of 18 U.S.C. §§ 1343, 1346, 1349 and 2 (Counts Two through Twenty-Five), and False Statements in violation of 18 U.S.C. 1001(a)(2) (County Thirty-One);

WHEREAS, the Superseding Indictment also included a forfeiture allegation, pursuant to U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), which provided notice that the United States intended to seek the forfeiture, upon conviction of the Defendant of one or more of the offenses alleged in Counts One and Two through Twenty Five of the Superseding Indictment, of any property, real or personal, that constitutes, or is derived from, proceeds traceable to the commission of the offense;

WHEREAS, the Superseding Indictment further provided that, if any of the above-described forfeitable property, as a result of any act or omission by the Defendant, (a) cannot be located upon the exercise of due diligence; (b) has been transferred or sold to, or deposited with, a third party; (c) has been placed beyond the jurisdiction of the Court; (d) has been substantially diminished in value; or (e) has been commingled with other property which cannot be divided without difficulty, the United States is entitled to seek forfeiture of any other property of the Defendant, up to the value of such assets, pursuant to 21 U.S.C. § 853(p), as incorporated by 28 U.S.C. § 2461(c);

WHEREAS, on November 6, 2024, at a hearing pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the Defendant pled guilty to Counts One, Two through Twenty-Five, and Thirty-One of the Superseding Indictment;

WHEREAS, the Court accepted the Defendant's guilty plea;

WHEREAS, during the hearing, the United States gave a recitation of the facts, to which the Defendant did not object, and advised the Defendant of the forfeiture as set forth in the Superseding Indictment;

WHEREAS, as stated by the government in its factual recitation during the Rule 11 hearing, and as reflected in the Defendant's Pre-Sentence Investigation Report ("PSR"), the Defendant's company obtained approximately $36 million in connection with the offenses of conviction;

WHEREAS, as set forth in the government's sentencing memorandum at pp. 26-27 & n.8, the government determined that the Defendant's company's net income from the scheme was approximately $13.2 million from 2014 to 2020;

WHEREAS, this is the amount that the government seeks as a forfeiture money judgment;

WHEREAS, based on the Defendant's guilty plea on November 6, 2024, the United States is entitled to an Order of Forfeiture consisting of a personal money judgment against the Defendant, in an amount up to the proceeds related to his violations of U.S.C. §§ 1343, 1346 and 1349, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c);

WHEREAS, this amount represents the proceeds of the Defendant's crimes;

WHEREAS, on February 5, 2025, the Defendant was sentenced to 27 months incarceration, two years supervised release, a fine in the amount of $300,000, and a special assessment in the amount of $2,600;

WHEREAS, at the hearing, the Court deferred the issue of forfeiture;

WHEREAS, the government hereby seeks a forfeiture money judgment against the Defendant in the amount of $13,200,000.00;

WHEREAS, this amount represents the proceeds of the Defendant's offenses.

ACCORDINGLY, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Defendant shall forfeit to the United States the sum of $13,200,000.00 pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

2. This Court shall retain jurisdiction in the case for the purpose of enforcing this Order.

3. The United States may, at any time, move pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure to amend this Order to substitute property having a value not to exceed the amount set forth in Paragraph | to satisfy the money judgment in whole or in part.

4. The United States may, at any time, conduct pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure and U.S.C. § 853(m) , as incorporated by 28 U.S.C. 2461, any discovery to identify, locate or dispose of forfeitable property or substitute assets, including, but not limited to, depositions and requests for documents, electronically stored information, and tangible things.

5. Pursuant to Rule 32.2(b)(4), this Order shall be included and imposed by the Court in the criminal judgment entered by this Court against the Defendant.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: February 13, 2025