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Supreme Court to Decide the Limits of the Government's Forfeiture Power



The Supreme Court of the United States has [agreed](#) to review an apparent circuit split over how long after a criminal conviction the United States can forfeit a criminal defendant's property.

In [McIntosh v. United States](#) the Court will review whether a district court may enter a criminal forfeiture order long *after* criminal proceedings have ended. How the Court resolves this issue will be important to future forfeiture cases, including those involving cryptocurrencies—an asset that over the last decade has been increasingly in the crosshairs of the government's forfeiture powers.

Rule 32.2 of the Federal Rules of Criminal Procedure establishes the procedures for criminal forfeiture. As it provides, a district "court must determine what property is subject to forfeiture" "[a]s soon as practical after a verdict or finding of guilty." Fed. R. Crim. P. 32.2(b)(1)(A). In terms of *when* this must occur, the court "must promptly enter a preliminary order of forfeiture," "must enter the preliminary order sufficiently in advance of sentencing," and "must also include the forfeiture order . . . in the judgment." Fed. R. Crim. P. 32.2(b)(2)(A), (b)(2)(B), (b)(4)(B).

In *McIntosh*, although the defendant had notice of the government's intent to seek forfeiture, the government [conceded](#) that it "did not submit a preliminary order of forfeiture before or during sentencing." Indeed, despite the court at sentencing also ordering the government to submit a proposed order of forfeiture within one week, the government still did not do so. Only after the defendant appealed did the government realize its error and obtain on remand—more than *two years after sentencing*—an order of forfeiture. The defendant objected to the government obtaining a forfeiture order years after sentencing and, thus, outside the timeline mandated in Rule 32.2.

The Supreme Court has now agreed to review whether it was too late in *McIntosh*—and, generally, when it is too late—for the government to pursue criminal forfeiture. As framed by the parties, the Court will need to decide whether the timelines in Rule 32.2 are (i) jurisdictional deadlines (as held in Eighth Circuit), (ii) "claims

processing rules" (as held in the Sixth Circuit), or (iii) "time-related directives" (as held in the Second and Fourth Circuits).

If the rules are jurisdictional or claims-processing rules, as the defendant argues, then criminal defendants may object to untimely government requests for forfeiture. But if the Supreme Court agrees with the government that Rule 32.2 is merely a time-related directive, then it appears the government may be able to seek forfeiture *any time* after sentencing, subject to certain limited exceptions.

Allowing the government to seek untimely forfeiture could lead to a variety of new forfeiture activity by the government. For example, the government could seek forfeiture long after sentencing, after probation, or even after a defendant's release from incarceration. Assets that a defendant once considered safe could be subject to post-sentencing forfeiture. And harder-to-locate assets not included in the original forfeiture order would increasingly (and perhaps forever) be susceptible to forfeiture. All that turns on whether the Supreme Court concludes that Rule 32.2 sets guidelines about when the government *should* seek forfeiture, or sets a hard deadline for when it *must* do so.

The Court likely will issue its ruling sometime in early to mid-2024.

Authors

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