No. 00-6567

In the Supreme Court of the United States

LARRY DEAN DUSENBERY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the United States satisfied the notice requirements of the Due Process Clause by sending a federal prisoner notice of an administrative forfeiture proceeding by certified mail addressed to the prisoner at the prison where he was incarcerated.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 67-71) is reported at 223 F.3d 422. The order of the district court (J.A. 55-66) is reported at 34 F. Supp. 2d 602. A prior opinion of the court of appeals (J.A. 31-35) is unpublished, but the decision is noted at 97 F.3d 1451 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2000. A petition for rehearing was denied on August 25, 2000. The petition for a writ of certiorari was filed on October 16, 2000, and was granted on February 26, 2001. 121 S. Ct. 1186 (2001). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

Title 21, United States Code, Section 881 (1988), provided in relevant part at the time of this dispute:

> **(a) Subject property**
>
> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * * *
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.
>
> * * * * *
>
> **(d) Other laws and proceedings applicable**
>
> The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws * * * shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof.

Title 19, United States Code, Section 1607(a) (1988), provided in relevant part at the time of this dispute:

> If– (1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $100,000; * * * the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

STATEMENT

The United States may seize and subject to forfeiture money and other property obtained through, or used to facilitate, violation of the federal controlled substance laws. See 21 U.S.C. 881(a) (1994 & Supp. V 1999). After petitioner's conviction on a federal drug charge, the government issued notice, in accordance with 21 U.S.C. 881(d) and the notice requirements of 19 U.S.C. 1607 (1994 & Supp. V 1999), that it intended to initiate administrative forfeiture of $21,939 in cash seized at the time of petitioner's arrest. Following the forfeiture, petitioner brought suit seeking return of the cash on the ground that he did not receive actual notice of the forfeiture proceeding. The district court granted the government's motion for summary judgment, J.A. 55-66, and the court of appeals affirmed, J.A. 67-71.

1. Section 881 of Title 21, United States Code, authorizes the United States to seek civil forfeiture of funds that are the proceeds of, or are used to facilitate,

unlawful transactions in controlled substances. See 21 U.S.C. 881(a) (1994 & Supp. V 1999). Section 881(d) further provides that the government may proceed through the forfeiture procedures set out in the customs laws. 21 U.S.C. 881(d). Those laws, which are found in 19 U.S.C. 1600 *et seq.*, authorize the government to conduct administrative forfeitures. See 19 U.S.C. 1607(a) (1994 & Supp. V. 1999). The administrative forfeiture process allows the government to determine whether property in its custody is unclaimed and, if it is, to take ownership without unnecessary judicial forfeiture proceedings. See *Small* v. *United States*, 136 F.3d 1334, 1335 (D.C. Cir. 1998).[1]

Congress has provided that notice of a proposed administrative forfeiture "be sent to each party who appears to have an interest in the seized article" and also that notice be published, as provided by regulation, for at least three successive weeks. 19 U.S.C. 1607(a) (1994 & Supp. V. 1999). See 21 C.F.R. 1316.75(a) (requiring publication "in a newspaper of general circulation in the judicial district in which the processing for forfeiture is brought"). At the time of the forfeiture at issue in this case, claimants had a period of 20 days from the date of first publication of the notice in which to file a claim. 19 U.S.C. 1608. If a claim was filed within the prescribed period, the government was entitled to seek forfeiture of the property only through judicial proceedings. *Ibid.* If no claim was filed within the prescribed period, the government could declare the property forfeited. 19

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[1] At the time of the forfeiture at issue here, property valued at $100,000 or less was subject to administrative forfeiture. 19 U.S.C. 1607(a) (1988). Under current law, property valued at $500,000 or less is subject to administrative forfeiture. 19 U.S.C. 1607(a) (1994 & Supp. V. 1999).

U.S.C. 1609. That general statutory framework remains in place. See 21 C.F.R. 1316.71 *et seq.*[2]

2. In April 1986, petitioner was arrested on drug and possession of firearms charges at his residence near Cleveland, Ohio. J.A. 1, 32, 56. He pleaded guilty to a drug charge and, on July 15, 1986, was sentenced to a term of 12 years' imprisonment, to be followed by a six-year term of special parole. J.A. 1-2. During a search of petitioner's residence at the time of his arrest, law enforcement agents seized $21,939 in cash, as well as drugs, drug paraphernalia, firearms, an automobile, and other property. See J.A. 32-33; Dist. Ct. Mem. Op. App. 1 (Oct. 5, 1995) (R. 218-223) (inventory).

In November 1988, the Federal Bureau of Investigation (FBI) initiated administrative forfeiture proceedings against the $21,939, pursuant to 21 U.S.C. 881(a)(6). The FBI provided notice of the proposed forfeiture in accordance with 19 U.S.C. 1607(a) (1988), as in effect at that time. The FBI placed the required three-week publication in a major Cleveland

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[2] Congress modified the procedures applicable to civil forfeiture proceedings through the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202, to be codified at 18 U.S.C. 981 *et seq.* (2000). The changes enacted in the CAFRA apply only to forfeiture proceedings commenced on or after August 23, 2000. See Pub. L. No. 106-185, § 21, 114 Stat. 225. Among other changes, the CAFRA lengthens the period within which a claim may be filed. See 18 U.S.C. 983(a)(2)(B) (2000). The new legislation also directs that "notice shall be sent in a manner to achieve proper notice as soon as practicable," see 18 U.S.C. 983(a)(1)(A)(i) (2000). While the CAFRA does not expressly prescribe any particular form or manner of providing notice, the CAFRA does contemplate that notice may be provided by letters mailed to potential claimants, see 18 U.S.C. 983(a)(2)(B) (2000) (providing that a time limit for filing claims runs the date a "personal notice letter" is mailed).

newspaper, the *Plain Dealer*, during November and December 1988. J.A. 24-30. On November 7, 1988, the FBI additionally sent written notice of the forfeiture action by certified mail, return receipt requested, to petitioner. See J.A. 18-20. The FBI mailed the written notice to petitioner at the Federal Correctional Institution (FCI) in Milan, Michigan, where petitioner was then incarcerated as a result of his drug conviction. J.A. 21. That notice set out the basis for the forfeiture, explained the procedure for contesting the forfeiture of the funds, and specified that any claim to the property must be filed by December 19, 1988, six weeks from the date of the letter. See J.A. 18-21.[3]

At the time that the FBI sent the forfeiture notice to the Milan FCI, the prison had in place standard practices for handling inmate mail. See J.A. 36-37. The FCI sent mail room employees to the City of Milan post office to pick up mail for the prison, including mail addressed to prisoners. J.A. 36. While at the post office, the employees signed return receipts for certified mail, including certified mail addressed to inmates, and they then brought the mail to the Milan FCI mail room. *Ibid.* At the prison mail room, the prison employees recorded all certified mail in a mail room log book. J.A. 37. An employee assigned to the inmate's housing unit then delivered the mail to the inmate. *Ibid.* Before removing certified mail from the mail room, the employee signed the log book to acknowledge

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[3] The FBI also mailed the written notice to two other addresses, including petitioner's residence at the time of his arrest. J.A. 22-23. The Postal Service returned one of the latter two notices as unclaimed, while the receipt for the other was returned bearing the signature "Edward F. Clouse." See *ibid.*

receipt of the individual piece of certified mail. *Ibid.* See J.A. 46-54, 60 n.6.[4]

In the case of the FBI forfeiture notice sent to petitioner at the Milan FCI, Inmate Systems Officer James Lawson, a mailroom employee, signed the return receipt at the Milan post office. J.A. 36, 49-50. Lawson, who submitted an affidavit and testified by deposition in this case, identified his signature on the return receipt, and he described the Milan FCI's procedure for recording and delivering certified mail. J.A. 36-38, 46-53. By the time of Lawson's 1997 deposition, the mail room log book pertaining to the delivery of the 1988 forfeiture notice no longer existed. J.A. 37, 51-52, 60 n.6 (noting that under prison policy, the log books were generally destroyed after one year). Lawson attested, however, that, "pursuant to the business practices of FCI Milan [the 1988 forfeiture notice for the currency] should have been received by the inmate." J.A. 37, 52.

Petitioner did not respond to the forfeiture notice. On January 27, 1989, in accordance with 21 U.S.C. 881(a)(6), the currency was declared administratively forfeited to the government. See J.A. 15.[5]

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[4] Petitioner raised the question in the district court proceedings whether an additional log book was maintained to record the final delivery of the certified mail to the inmate, but neither petitioner nor the government introduced evidence on that matter. See J.A. 52.

[5] During the time that petitioner was imprisoned, he continued to manage a drug distribution network. That conduct resulted in a separate conviction in 1994 of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848, and in the forfeiture of additional property. See *United States* v. *Dusenbery*, No. 94-3804, 1996 WL 306517, 89 F.3d 836 (Table) (6th Cir.) (unpublished decision affirming petitioner's continuing criminal enterprise conviction), cert. denied, 519 U.S. 956 (1996). The court of appeals later rejected petitioner's challenge to the validity of the

3. On November 12, 1993—more than six years after the FBI seized the currency and almost five years after the declaration of forfeiture—petitioner sought return of the cash and other property seized at the time of his 1986 arrest. Petitioner sought relief under Rule 41(e) of Federal Rules of Criminal Procedure, which provides in relevant part:

> A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court * * * for the return of the property on the ground that such person is entitled to lawful possession of the property.

Fed. R. Crim. P. 41(e). The court determined through briefing by the parties that the FBI had initiated forfeiture proceedings, that the defendant had failed to respond to the notice of forfeiture, and that the cash at issue in this case had been administratively forfeited. See Dist. Ct. Mem. Op. 1-9 (Oct. 5, 1995) (R. 207-215).

After ascertaining those facts, the district court denied petitioner's motion on jurisdictional grounds. See Dist. Ct. Mem. Op. 9-11 (R. 215-217). The court ruled that Rule 41(e) does not confer authority to resolve whether a claimant received adequate notice of a civil forfeiture. *Id.* at 9-10 (R. 215-216) (citing Fed. R. Crim. P. 54(b)(5) (stating that the Federal Rules of Criminal Procedure "are not applicable to * * * civil forfeiture of property for violation of a statute of the United States")).

Petitioner appealed, and the court of appeals vacated the district court's order and remanded for further

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forfeitures associated with that 1994 conviction, and this Court denied review. *United States* v. *Dusenbery*, 201 F.3d 763 (6th Cir.), cert. denied, 121 S. Ct. 301 (2000).

proceedings. J.A. 31-35. The court of appeals agreed that petitioner could not pursue his claim under Rule 41(e), but it concluded that the district court should have allowed petitioner to go forward with his action by construing petitioner's Rule 41(e) motion as a civil complaint seeking equitable relief. J.A. 32.

4. On remand, the district court allowed petitioner to conduct discovery and ultimately granted the government's motion for summary judgment. J.A. 55-66. The district court concluded that the government had provided petitioner with sufficient notice of the forfeiture proceeding for the $21,939 by sending notice by certified mail to petitioner at the Milan FCI where he was incarcerated. J.A. 59-62. The district court specifically credited the affidavit and deposition of James Lawson, the Milan FCI mail room employee who had signed the return receipt for the forfeiture notice and who had described the procedure at the Milan FCI for delivery of certified mail to inmates. J.A. 60-61.[6]

5. The court of appeals affirmed the district court's judgment. J.A. 67-71. The court agreed with the district court that there was no genuine issue that the government had mailed the forfeiture notice respecting the cash to petitioner at the Milan FCI, that a prison employee had signed the return receipt, and that the prison had a process for forwarding such mail to the inmate. J.A. 70. The court rejected petitioner's contention that the government was required "to show

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[6] The district court rejected petitioner's argument that notice was defective because the address on the notice mistakenly specified P.O. Box 100 for the Milan FCI, rather than P.O. Box 1000. As the court recognized, Lawson's declaration and testimony identifying his signature on the return receipt established that the Postal Service had placed the notice in the correct post office box. J.A. 59-61.

that the mail actually reached an inmate in order to satisfy requirements of due process." J.A. 70. Rather, the government must provide notice "reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Ibid.* (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). "Because adequate notice was given, [petitioner] is not entitled to relief on this claim." *Ibid.*[7]

SUMMARY OF ARGUMENT

The United States satisfied the notice requirements of the Due Process Clause by sending petitioner written notice of the administrative forfeiture proceeding by certified mail addressed to the prison where he was incarcerated. That mode of providing notice satisfied due process because it provided notice "reasonably calculated" to apprise an interested party of the proceedings. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). See also *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 482 (1988); *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 795 (1983); *Greene* v. *Lindsey*, 456 U.S. 444, 449-450 (1982).

This Court has repeatedly stated, in a series of decisions spanning half a century and a wide variety of proceedings, that ordinary mail is a constitutionally adequate means of delivering notice to parties whose addresses are known. See, *e.g.*, *Tulsa Prof'l Collection Servs.*, 485 U.S. at 490 (probate creditor claims);

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[7] The court of appeals also affirmed the district court's rejection of petitioner's claims respecting other property seized at the time of petitioner's 1986 arrest. J.A. 70-71. The disposition of petitioner's claims regarding that property is not within the scope of the question before this Court.

Mennonite Bd. of Missions, 462 U.S. at 798 (tax sale of real property); *Greene*, 456 U.S. at 455 (forcible entry and detainer proceedings); *Schroeder* v. *City of New York*, 371 U.S. 208, 213 (1962) (condemnation of real property); *Walker* v. *City of Hutchinson*, 352 U.S. 112, 116 (1956) (condemnation of real property); *City of New York* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293, 296-297 (1953) (bankruptcy creditor claims); *Mullane*, 339 U.S. at 317 (settlement of interests of beneficiaries in a common trust account).

Petitioner does not contend that providing notice of a forfeiture proceeding by mail is generally impermissible. Rather, petitioner's due process claim depends entirely on his conjecture that, while prisons receive mail on behalf of inmates, they do not reliably convey that mail to inmates. But petitioner has offered no evidence, apart from his assertion that he did not receive the government's notice in this case, that prison mail systems are unreliable. And the BOP's current mail procedures and the record in this case convincingly demonstrate that mailing a forfeiture notice to the inmate at his prison is "reasonably calculated" to reach the inmate. The courts below were therefore justified in rejecting petitioner's due process claim.

Petitioner's proposed rule that the government must prove actual receipt of notice is contrary to this Court's decisions, which have "adhered unwaiveringly to the principle" that due process is satisfied if the method of notice is "reasonably calculated" to reach the interested party. *Mennonite Bd. of Missions*, 462 U.S. at 797. The *Mullane* standard provides concrete and workable guidance in this case. There is no need or precedent for applying a balancing test under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). In any event, application of the *Mathews* balancing test would not support a new due

process rule, uniquely applicable to prisoners, requiring proof of actual receipt. Petitioner's proposed rule is not only unnecessary and anomalous, but it would require the Court to become directly involved in formulating prison policy respecting the handling of inmate mail.

Petitioner is also mistaken in arguing that the supposedly inadequate notice here rendered the forfeiture "void" and entitled him to return of the forfeited property. His argument respecting the proper remedy if the Court finds the notice insufficient was not addressed by the courts below, was not included in the question on which this Court granted the petition for writ of certiorari, and is not properly before the Court. Petitioner is incorrect on the merits as well—if a claimant did not receive proper notice, his remedy is restoration of the right to contest the forfeiture. In any event, Congress has prospectively resolved that issue through the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, and there is consequently no need for the Court to decide the matter.

ARGUMENT

THE UNITED STATES PROVIDES A PRISONER WITH ADEQUATE NOTICE OF AN ADMINISTRATIVE FORFEITURE PROCEEDING BY SENDING WRITTEN NOTICE OF THE PROCEEDING BY CERTIFIED MAIL ADDRESSED TO THE PRISONER AT THE PRISON WHERE HE IS INCARCERATED

Petitioner contends that the United States violated the Due Process Clause of the Fifth Amendment by failing to ensure that he actually received notice of the proceeding that the government had instituted to forfeit drug trafficking proceeds seized at the time of his arrest. The court of appeals correctly rejected that

contention. The notice requirements of the Due Process Clause are satisfied if the government provides notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The government's practice of sending a prison inmate notice by certified mail at the inmate's prison address is sufficiently reliable to satisfy the Due Process Clause.[8]

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[8] This issue has generated a conflict among the decisions of the courts of appeals. The First, Ninth, and Tenth Circuits, in addition to the court below in the present case, have ruled that sending notice by certified mail to an inmate at his place of incarceration is sufficient to meet the constitutional notice requirement for forfeitures and have not required the government to prove that the inmate actually received the notice. See *Whiting* v. *United States*, 231 F.3d 70, 76-77 (1st Cir. 2000); *United States* v. *Real Prop. (Lido Motel)*, 135 F.3d 1312, 1315-1316 (9th Cir. 1998); *United States* v. *Clark*, 84 F.3d 378, 381 (10th Cir. 1996); see also *Krecioch* v. *United States*, 221 F.3d 976, 980 (7th Cir.) (concession that notice mailed to inmate's place of incarceration was sufficient), cert. denied, 121 S. Ct. 599 (2000). The Third Circuit has held that mailing to an inmate's place of incarceration is sufficient if the government establishes that there are adequate delivery procedures within the prison. *United States* v. *One Toshiba Color Television*, 213 F.3d 147 (2000) (en banc); see also *United States* v. *Minor*, 228 F.3d 352, 357-358 (4th Cir. 2000) (dicta endorsing holding in *One Toshiba Color Television*). The Second and Eighth Circuits have ruled that certified mail notice to a federal prisoner of a forfeiture proceeding is constitutionally insufficient in the absence of proof of actual receipt of the notice. *Weng* v. *United States*, 137 F.3d 709, 712-715 (2d Cir. 1998); *United States* v. *Five Thousand Dollars in U.S. Currency*, 184 F.3d 958, 960 (8th Cir. 1999).

A. The Due Process Clause Requires Notice Reasonably Calculated, Under The Circumstances, To Apprise A Claimant Of The Forefeiture Proceeding

The Due Process Clause generally requires that the government provide individuals with "notice and an opportunity to be heard" before depriving them of property. *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). *E.g.*, *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 482 (1988). This Court established the controlling principle in *Mullane*, *supra*:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

339 U.S. at 314 (emphasis added). Accord, *e.g.*, *Tulsa Prof'l Collection Servs.*, 485 U.S. at 482; *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 795 (1983); *Greene* v. *Lindsey*, 456 U.S. 444, 449-450 (1982).

The Court's decision in *Mullane* makes clear that the criterion for adequate notice is reasonableness:

> The notice must be of such nature as reasonably to convey the required information, * * * and it must afford a reasonable time for those interested to make their appearance * * *. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements,

> having reference to the subject with which the statute deals."

Mullane, 339 U.S. at 314-315. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is itself reasonably certain to inform those affected." *Id.* at 315.

The core issue in this case, accordingly, is whether the government's practice of sending a prison inmate written notice of forfeiture proceedings by certified mail addressed to the prison where the inmate is incarcerated is a reasonable means for informing the inmate of the proceeding. This Court's decisions, common experience, and the record in this case, all show that it is.

B. The Government's Practice Of Sending A Prison Inmate Written Notice Of Forfeiture Proceedings By Certified Mail Addressed To The Prison Where The Inmate Is Incarcerated Is A Reasonable Means For Informing The Inmate Of The Proceeding

This Court has recognized on a number of occasions that issuing notice of a government action or proceeding through publication of the notice in a newspaper provides a constitutionally adequate means of notifying potentially interested persons whose identity or interests are not known or readily ascertainable. *E.g.*, *Tulsa Prof'l Collection Servs.*, 485 U.S. at 491; *Mennonite Bd. of Missions*, 462 U.S. at 798; *Mullane*, 339 U.S. at 317. The Court has ruled, however, that more specific notice is required when the identity and address of a potentially interested party can be determined through reasonable means. In a long series of

decisions spanning half a century and a wide variety of proceedings, the Court has consistently endorsed ordinary mail as a constitutionally adequate means of delivering notice to parties whose addresses are known. Although the Court is well aware that mailing does not guarantee receipt, the Court has never required proof of actual receipt of a notice that is properly mailed.

In *Mullane*, the Court held that publication alone was insufficient under the Constitution to provide notice to beneficiaries of a common trust whose identities and addresses were known to the trustee, but it rejected the argument that personal service was required. 339 U.S. at 318-319. Applying a standard of reasonableness, the Court concluded that "ordinary mail to the record addresses" would be sufficient as it constituted "a serious effort" to inform the beneficiaries of the proceeding. *Id.* at 318. The Court stated that the mails "are recognized as an efficient and inexpensive means of communication." *Id.* at 319.[9]

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[9] Although this Court determined in *Mullane* that constitutionally adequate notice may be provided through "ordinary mail," *Mullane*, 339 U.S. at 318, the government follows the practice of sending forfeiture notices to prisoners by certified mail. The government's use of certified mail, although ordinary mail would suffice, demonstrates its commitment to provide notice "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315. See *Whiting*, 231 F.3d at 76 ("The mail is a well-recognized means of communicating important information, * * * and certified mail has further safeguards (*i.e.*, signature of recipient upon delivery and return of the signed receipt card)."). Petitioner disputes whether certified mail provides a more reliable means to accomplish the desired goal of providing forfeiture notice to prospective claimants, arguing that certified mail is no more likely to reach its destination than ordinary mail. Pet. Br. 18. But even if ordinary mail and certified mail are equally likely to reach their destinations, the return

The Court reached the same conclusion in *City of New York* v. *New York, New Haven & Hartford Railroad*, 344 U.S. 293 (1953). That decision overturned an order forfeiting New York City's liens on certain railroad property in a bankruptcy proceeding because the city received notice only by publication. As in *Mullane*, the Court found the procedure implemented inadequate because notice had not been mailed to the city. *Id.* at 296-297. "When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment." *Ibid.*[10]

The Court concluded in *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956), that newspaper publication notice alone was insufficient to advise a known homeowner of a condemnation proceeding, but indicated that mailing a notice would have sufficed. *Id.* at 116 ("Even

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receipt feature of certified mail documents whether the mail has indeed arrived. The return receipt therefore provides useful information for verifying delivery of notice to the prison, even though the ultimate recipient is a federal prisoner and, for obvious reasons of prison security, is not allowed to visit the post office and personally sign for the item of mail.

[10] Petitioner characterizes *Covey* v. *Town of Somers*, 351 U.S. 141 (1956), as an example of a case from the same time period in which "mailed notice [was] inadequate in circumstances presented." Pet. Br. 24. In that case, the Town of Somers attempted to foreclose on property of a mentally incompetent person. The Court found that notice was inadequate in that case, not because mailing the notice was an unreliable means of delivery, but because the recipient was known to be incompetent and unable to understand the contents of the delivered notice. 351 U.S. at 146-147. Petitioner does not claim to be mentally incompetent and *Covey* is therefore inapposite to the issue presented here. See, *e.g.*, *Whiting*, 231 F.3d at 76 (noting that *Covey* is clearly distinguishable from the inmate notice situation).

a letter would have apprised him that his property was about to be taken."). The Court considered a similar condemnation proceeding in *Schroeder* v. *City of New York*, 371 U.S. 208 (1962). It held that published notices, even when supplemented by posting notices near the affected property, constituted a constitutionally insufficient manner for notifying property owners. *Id.* at 211-214. But the Court adverted to the constitutional sufficiency of mailed notice, stating that "[w]here the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 213. The Court stated that the city had failed in its constitutional obligation to "make at least a good faith effort to give [the information] personally to the appellant—an obligation which the mailing of a single letter would have discharged." *Id.* at 214.

In *Greene*, *supra*, the Court found that posting a copy of a notice of forcible entry and detainer proceedings on the subject premises did not satisfy the minimum standards for constitutionally adequate notice described in *Mullane*. 456 U.S. at 453-454. While the Court did not prescribe the form of notice that should be adopted, *id.* at 455 n.9 ("we hold only that posted notice pursuant to [the Kentucky statute] is constitutionally inadequate"), it explained that "the mails provide an 'efficient and inexpensive means of communication' * * * upon which prudent men will ordinarily rely in the conduct of important affairs," *id.* at 455.

The Court also endorsed mailing as a constitutionally adequate manner of providing notice in *Mennonite Board of Missions*, *supra*. The Court concluded that publication, posting, and mailing solely to the property owner were insufficient means to provide a mortgagee

with notice of a pending tax sale. 462 U.S. at 798-799. Rather, when the mortgagee is identified in the public record, "constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." *Id.* at 798.[11]

Most recently, in *Tulsa Professional Collection Services, Inc.*, *supra*, the Court ruled that publication alone was an insufficient method of providing notice if used to extinguish the claims of known creditors of a decedent's estate. 485 U.S. at 485-490. The Court concluded that ordinary mailing of a notice to creditors would be constitutionally sufficient to meet the requirements of due process, stating that "[w]e have repeatedly recognized that mail service is an inexpensive and efficient

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[11] Petitioner suggests that the Court found simple mailing sufficient in *Mennonite* only because that case involved a "sophisticated" creditor with "ability to take steps to safeguard its interests." Pet. Br. 25 (citing *Mennonite*, 462 U.S. at 799). To the contrary, the Court's discussion of sophisticated creditors in *Mennonite* involved the rejection of a claim that some form of notice *less* than mailing would be sufficient because mortgagees were supposedly sophisticated creditors. The court noted that mortgagees are not necessarily sophisticated creditors, but went on to state generally that mailing, or other means as likely to ensure receipt of notice, is a constitutional means of providing notice to a party whose address is known:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

Mennonite, 462 U.S. at 800.

mechanism that is reasonably calculated to provide actual notice." *Id.* at 490.[12]

The Court's recognition of the adequacy of notice by mail comports with common experience. Mailing is a means of communication "upon which prudent men will ordinarily rely in the conduct of important affairs." *Greene*, 456 U.S. at 455. It is unquestionably a means of providing notice "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. Indeed, the record in this case bears out that mail remains a generally reliable means of transmitting information: The FBI's mailing to petitioner at petitioner's prison address was received at the prison, notwithstanding a typographical error in the address. See note 6, *supra*. In any event, a prisoner is not entitled to more due process than other citizens, who must also face a minimal prospect that the mail might be lost or de-

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[12] In the *Tulsa* decision, the Court referred to notice by mail as providing "actual notice," but the Court by no means implied that notice by mail is ineffective unless actually received. See 485 U.S. at 489-490. Rather, the Court used that term to distinguish notice by mail from notice by publication, which is commonly described as a form of "constructive notice." *Mennonite*, 462 U.S. at 798. See *Tulsa*, 485 U.S. at 491 ("the Due Process Clause requires that appellant be given '[n]otice by mail or other means as certain to ensure actual notice'" (quoting *Mennonite*, 462 U.S. at 800)). See also *One Toshiba Color Television*, 213 F.3d at 155 n.3; cf. *Weigner* v. *City of New York*, 852 F.2d 646, 651 n.6 (2d Cir. 1988) (addressing ambiguity in references to "actual notice"), cert. denied, 488 U.S. 1005 (1989). Petitioner, along with some courts, see, *e.g.*, *Minor*, 228 F.3d at 358, uses the term "actual notice" to refer not to mailing alone but to the actual receipt of the notice by the intended recipient or to a standard requiring proof of that receipt. Because of the potential ambiguity, we have avoided use of the term "actual notice" in addressing the issue presented here.

livered to the wrong address. Hence, petitioner's claim that mailing a forfeiture notice to a prisoner is constitutionally inadequate hinges entirely on his conjecture that the prisons do not reliably convey inmate mail to the inmates. See Pet. 14. That conjecture is without foundation.

C. Petitioner's Conjecture That Prisons Receive Inmate Mail, But Do Not Deliver It To Inmates, Is Unfounded

Petitioner contends that notice by mail violates due process because there is a "significant risk that notice mailed to a jail or prison will not reach the inmate." Pet. Br. 14. But petitioner has offered no evidence, apart from his own assertion that he did not receive the government's notice in this case, that the mail system where he is incarcerated was unreliable. Petitioner's individual claim of non-receipt, even if true, falls far short of establishing a constitutional violation.

As we have explained, the question is whether the government has adopted a means of notice "reasonably calculated" to apprise petitioner of pending proceedings. *Mullane*, 339 U.S. at 314. As the courts below correctly recognized, the government is not required to show that an individual piece of mail "actually reached an inmate in order to satisfy requirements of due process." See J.A. 60, 70. Rather, the government is entitled to defend its notification procedure "on the ground that it is in itself reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315. See *Whiting* v. *United States*, 231 F.3d 70, 76 (1st Cir. 2000) (*Mullane*'s "reasonably calculated" standard requires "likelihood, not certainty.").

The government demonstrated in the proceedings below that it was justified in relying on prison procedures for delivering mail to inmates. A Milan FCI

mail room employee described the prison's procedure for distributing mail at the time that the government mailed the notice in this case. See J.A. 36-37, 47-52. He explained how prison employees picked up prison mail at the post office, recorded receipt of certified mail, and delivered the mail to the prisoner. The government's uncontroverted evidence demonstrates that the government was entitled to expect that certified mail addressed to the prisoner at his prison address would reach the prisoner. See J.A. 37 ("based upon the attached certified receipt, the letter was delivered to FCI Milan, and pursuant to the business practices of FCI Milan it should have been received by the inmate").[13]

Petitioner seeks support for his assertion that a substantial mail delivery problem exists in penal facilities by a reference to decisions addressing claims that prisoners failed to receive forfeiture notices. Pet. Br.

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[13] Petitioner makes much of the fact that the Milan FCI log books are no longer in existence to refute his claim of non-receipt. Pet. Br. 15 n.4. The FCI's mail delivery procedures in effect at the time of the forfeiture here were designed to assure delivery of mail and not to refute possible claims on non-delivery made many years later. Hence, log books that recorded the receipt and distribution of certified mail were not retained for an extended period. See J.A. 37, 51-52 (FCI log books were destroyed one year after they are "closed."). Petitioner also points out that the government did not produce a prison employee who remembered delivering the notice to petitioner. Pet. Br. 15 n.4. It is hardly surprising that prison employees would not recollect delivering a particular piece of mail to an individual many years after the fact. "Given the temporal gap that may separate a forfeiture from a due process challenge to the proceedings, it is easy to imagine situations in which proof of the delivery of notice may be unavailable, even if such notice was properly served." *One Toshiba Color Television*, 213 F.3d at 155.

14-15. Petitioner's citation to a modest number of cases is unconvincing when measured against a 1999 federal prison population of more than 135,000 inmates. See Bureau of Justice Statistics, *Bulletin: Prisoners in 1999* (8/00 NCJ 183476) (*available at* www.ojp.usdoj.gov/bjs/abstract/p99.htm.). Moreover, the decisions that petitioner cites involve only *claims* that notice was not received—claims often made long after the fact and not subject to verification. As Judge Boudin observed in *Whiting*, *supra*, a prisoner's claim in such a matter is not necessarily true:

> It is well to be realistic about the situation: given the incentives, inmate denials that mailed notice was actually received are doubtless much more common than misdelivery, and knowledge is probably widespread among defendants in drug cases that the government does look to harvest assets from drug dealers incident to criminal cases.

231 F.3d at 77. See *United States* v. *One Toshiba Color Television*, 213 F.3d 147, 159-160 (3d Cir. 2000) (en banc) (Alito, J., concurring and dissenting) (noting the lack of evidence of any systemic problem with delivery of mail sent to jails or prisons and observing that "[t]he mere fact that [the claimant] and a handful of other federal prisoners and detainees *have claimed* that they did not receive notice sent by mail to their facilities is hardly enough to show the existence of a serious problem").

Petitioner has provided no persuasive evidence that prison mail systems are unreliable. To the contrary, the Bureau of Prisons (BOP) has established standard procedures governing delivery of inmate mail, including certified mail, to ensure reliable delivery. See BOP Program Statement 5800.10 (Nov. 3, 1995) (*available at*

www.bop.gov). The BOP's current practices demonstrate the government's commitment to providing inmates with reliable mail service and provide reasonable certainty that inmates, like the general public, will receive properly posted mail.

The current procedures specifically address the distribution of certified mail. They require prison employees handling certified mail to sign a written acknowledgment of possession of the mail before delivering it to the inmate. See BOP Program Statement 5800.10.409. Prison employees must not only record the receipt of the certified mail and its distribution, but the prisoner himself must sign a log book acknowledging delivery. BOP Program Statement 5800.10.409A ("A log shall be maintained which the inmate shall be required to sign prior to delivery, thus completing the chain of receipts."); see also BOP Operations Memorandum 035-99 (5800) (July 19, 1999) (providing additional guidance on handling of certified mail). Petitioner has provided no basis for doubting that BOP mail room employees, like postal employees, follow the prescribed procedures governing delivery of certified mail.[14]

In the face of the BOP's current policies and the record in this case, petitioner has failed to show a serious risk that inmates will not receive certified mail at prison. Petitioner has shown only that BOP's past

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[14] The proceedings below did not resolve whether, in 1988, the the Milan FCI followed a policy of requiring the inmate to sign a log book to acknowledge receipt of certified mail. See J.A. 52. The existence of such log books cannot be conclusively determined because, under BOP's policy at that time, the FCI retained log books for one year and then destroyed them. *Ibid.* In 1999, BOP instituted a policy requiring retention of the log books for 30 years. See BOP Operations Memorandum 035-99 (5800) (July 19, 1999), as extended.

record retention policies are insufficient to refute conclusively his claim that he did not receive the notice at issue in this case. Given the absence of a sound foundation for petitioner's assertions about the risk of non-delivery of mail in federal penal facilities, there is no basis for imposing special due process requirements for notifying prisoners of forfeiture proceedings. Indeed, the government's practice of notifying inmates by certified mail addressed to the prison where they are incarcerated provides a *higher guarantee* of receiving notice than due process requires.[15]

D. Petitioner's Proposed Rule That The Government Must Prove Actual Receipt Of Notice Finds No Support In This Court's Decisions And Is Not Warranted By Petitioner's Policy Justifications

Petitioner posits that this Court's due process jurisprudence not only requires the government to utilize a means of notice that is reasonably calculated to apprise the inmate of a forfeiture proceeding, but also requires the government to prove that the inmate in fact received notice. Pet. Br. 11. Petitioner's position, however, is not only squarely inconsistent with this Court's decisions, but it has been rejected by a majority

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[15] See note 9, *supra*. The government did not rely only on the prison mail system in this case, but also provided notice by publication and by mailing the forfeiture notice to petitioner's pre-incarceration addresses. Petitioner argues that those means of notice were unlikely to reach an inmate. Pet. Br. 13-14. But those means were not the only ones used. Cf. *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972) (a forfeiture notice mailed solely to the prisoner's home address is not "reasonably calculated" to apprise the prisoner of a forfeiture proceeding). The government's use of those means of notice provided a supplement to the notice mailed to the prison address and increased the probability that petitioner would receive notice.

of the courts of appeals and is neither necessary nor desirable as a matter of sound policy.

As an initial matter, petitioner can point to no decision of this Court holding that the Due Process Clause not only requires the government to provide notice through means "reasonably calculated" to reach the recipient, *Mullane*, 339 U.S. at 314, but also requires the government to prove that the intended recipient actually received the notice. Every decision of this Court since *Mullane* has stated that the Due Process Clause is satisfied if the means of notice meets *Mullane*'s "reasonably calculated" standard. See pp 13-15, *supra*.[16]

Petitioner seeks to avoid this Court's contrary precedent by urging that the Court evaluate his entitlement to notice under the formula that the Court set out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), for resolving due process challenges to the adequacy of administrative procedures affecting private interests. See Pet. Br. 12. This Court, however, does not apply the *Mathews* formula to all due process challenges. See, *e.g.*, *Medina* v. *California*, 505 U.S. 437, 443 (1992). When determining whether a means of notice complies with due process, the Court has consistently applied the

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[16] Indeed, the rule petitioner urges would go beyond what the Federal Rules of Civil Procedure require for initiating a civil lawsuit. Rule 4(d) of those Rules generally requires personal service of process initiating a lawsuit, but that Rule does not require the plaintiff to prove that the intended recipient personally received the summons and complaint. Rule 4(e) of those Rules provides that service may be effected by leaving copies of the summons and complaint "at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." Fed. R. Civ. P. 4(e). Petitioner has not questioned the constitutionality of that Rule.

Mullane standard, which specifically focuses the due process inquiry on whether the method of notification is "reasonably calculated" to reach interested parties. See, *e.g.*, *Mennonite Bd. of Missions*, 462 U.S. at 797 ("this Court has adhered unwaiveringly to the principle announced in *Mullane*").

This Court should not replace the workable and well focused *Mullane* standard, which concentrates attention on whether the means of notice is likely to be effective, with the more general—and accordingly less certain—*Mathews* balancing test. But even if the Court were to do so here, the result would be the same. The *Mathews* analysis generally requires consideration and weighing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. The government's provision of notice through certified mail comports with due process when considered in light of those three factors.

First, the private interest at stake here—ownership of $21,939 in currency—is by no means insignificant. But the fact that the proceedings involve property of significant value does not mean that mailing is an inadequate means of notice. This Court has repeatedly recognized that notice may be provided by ordinary mail without regard to the value of the property at stake. See, *e.g.*, *Tulsa Prof'l Collection Servs.*, 485 U.S.

at 479 (notice of creditor claims against a decedent's estate, regardless of value); *Mennonite Bd. of Missions*, 462 U.S. at 798 (notice to mortgagees of tax sale of real property).[17]

Second, as previously discussed, petitioner has failed to establish that notifying inmates by certified mail at their prison address poses a significant risk of erroneous deprivation of property. See pp. 21-25, *supra*. There is correspondingly little probable value, from a due process perspective, in imposing additional or substitute procedural safeguards, such as petitioner's suggestion that the government "send the notice to a prison official, with a request that a prison employee watch the prisoner open the notice, cosign a receipt, and mail the signed paper back to the agency from which it came." Pet. Br. 17.

Third, petitioner's proposal subjects the government to significant and unnecessary fiscal, administrative, and security burdens. The BOP is charged with managing a prison population of more than 100,000 persons who receive a substantial amount of mail, including certified mail. Those inmates receive a significant number of legal notices, including notices of administrative forfeiture.[18] As noted previously, the BOP has

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[17] The actual value of the creditor claim in *Tulsa* appears to have been $14,657.55, out of an original hospital bill of over $142,000, most of which was paid by insurance. See *In re Estate of Pope*, 808 P.2d 640, 641-642 n.3 (Okla. 1990). The Court's decision in *Mennonite* indicates that the amount of the mortgage due in that case was $8237.19. *Mennonite*, 462 U.S. at 794.

[18] The Department of Justice Consolidated Asset Tracking System (CATS) reports that, with respect to seizures in fiscal year 2000, the FBI and the Drug Enforcement Administration (DEA) sent out a total of more than 9000 administrative forfeiture notices to incarcerated individuals. Other agencies that conduct asset for-

developed detailed procedures for handling inmate mail, and it has developed policies respecting certified mail delivery that are adequate to ensure that inmates promptly and efficiently receive those notices. See BOP Program Statement 5800.10.409. There is no warrant for imposing, as a matter of constitutional law, additional burdensome requirements that have not been shown to be necessary.[19]

The *Mathews* balancing test accordingly does not support petitioner's contention. Rather, petitioner's invocation of that balancing test simply highlights that a departure from the *Mullane* standard would require the Court to become directly engaged in formulating prison policies respecting the handling of inmate mail. This Court has previously acknowledged that prison officials have considerable expertise in such matters

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feiture programs, such as the Customs Service, may also have occasion to send notices to inmates. Furthermore, petitioner's theory might well require that various other types of notices affecting property interests, such as tax delinquency notices and foreclosure notices, would be subject to the same additional requirements he proposes.

[19] The FBI and the DEA have adopted practices that already go far beyond what due process requires in ensuring that inmates receive administrative forfeiture notices. For example, BOP's procedures currently provide that certain types of mail, including appropriately marked congressional, judicial, law enforcement, and attorney correspondence, may be marked as "special mail" and opened only in the inmate's presence (but not by the inmate). See 28 C.F.R. 540.12(c); BOP Program Statement 5800.10.305. The FBI and the DEA inform us that, in recent years, those agencies have followed a practice of marking administrative forfeiture notices as "special mail." The Due Process Clause does not, however, require federal and state agencies and prisons to follow that practice, and it should not be imposed as a matter of constitutional law.

and that "the judiciary is 'ill-equipped' to deal with the difficult and delicate problems of prison management." *Thornburgh* v. *Abbott*, 490 U.S. 401, 407-408 (1989) (quoting *Procunier* v. *Martinez*, 416 U.S. 396, 404-405 (1974)). The Court has accordingly "afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world." *Id.* at 408. See *Greene*, 456 U.S. at 455 n.9 ("It is not our responsibility to prescribe the form of service that the [government] should adopt.").

The courts of appeals that have addressed the constitutional issue presented here have uniformly applied the *Mullane* standard, and most have concluded that the government's mailing of notice by certified mail to the inmate's prison address satisfies due process. See note 8, *supra* (collecting cases). See J.A. 70; *Whiting*, 231 F.3d at 76-77; *United States* v. *Real Prop. (Lido Motel)*, 135 F.3d 1312, 1315-1316 (9th Cir. 1998); *United States* v. *Clark*, 84 F.3d 378, 381 (10th Cir. 1996). Those courts have quite properly recognized that they are not empowered to formulate government procedures respecting notice, but instead are to ascertain "the bare minimum required by the Constitution." *Whiting*, 231 F.3d at 76; accord *One Toshiba Color Television*, 213 F.3d at 159 (Alito, J., concurring and dissenting); see *Weigner* v. *City of New* York, 852 F.2d 646, 650 (2d Cir. 1988) ("in deciding what the Constitution requires, we are not free to select forms of notice simply because they are advantageous"), cert. denied, 488 U.S. 1005 (1989).

The two courts of appeals that have required the government to prove actual receipt of notice have purported to apply the *Mullane* standard, but they have not relied on any documentation that prison mail

delivery is unreliable; rather, they have based their decisions on ad hoc pronouncements of "fundamental fairness" and the absence of agency "hardship." See *United States* v. *Five Thousand Dollars in U.S. Currency*, 184 F.3d 958, 960 (8th Cir. 1999) ("if the government is incarcerating the property owner when it initiates forfeiture proceedings, we have consistently held that fundamental fairness requires that the property owner or his or her counsel receive actual notice of the forfeiture in time to decide whether to compel the government to proceed by judicial condemnation"); *Weng* v. *United States*, 137 F.3d 709, 714-715 (2d Cir. 1998) ("where the owner is in federal custody on the very charges that justify a federal agency in seeking the forfeiture, there is no undue hardship to the agency in insuring that the owner-prisoner actually receive the legally required notification").

Even if it were permissible for courts to approach the due process issue here as a matter of what is "fair" or workable, the result the Second and Eighth Circuits have reached is neither. As the Third Circuit has pointed out, a new standard requiring proof of actual delivery is likely to reduce, rather than increase, the fairness and workability of administrative forfeiture proceedings:

> The real difficulty with the *Weng* rule lies not in requiring the government to demonstrate actual notice, but rather [in] the evidentiary burden that such a standard could impose after the passage of time. Given the temporal gap that may separate a forfeiture from a due process challenge to the proceedings, it is easy to imagine situations in which proof of the delivery of notice may be unavailable, even if such notice was properly served. An overly

> strict notice requirement, therefore, could lead to unsettling the outcome of completed proceedings based on nothing but bare allegations of a party who had lost property.

One Toshiba Color Television, 213 F.3d at 155; accord *United States* v. *Minor*, 228 F.3d 352, 358 (4th Cir. 2000). As we have explained, petitioner has failed to show any persuasive reason to doubt the reliability of the prison mail delivery system at the Milan FCI. His failure to carry his burden on that score should be dispositive of his due process claim.

Petitioner has identified three additional "factual circumstances" that he believes should "dictate the outcome here" (Pet. Br. 11): (1) the government knows where the petitioner is located; (2) the government has the ability to ensure actual delivery because it controls the prisoner's physical location; and (3) the government stands to gain financially by not providing adequate notice. See Pet. Br. 16-17, 19, 21-22. Those "factual circumstances"—which are more accurately described as policy arguments—do not warrant a requirement that the government prove that an inmate has actually received notice of a forfeiture proceeding.

The first of the petitioner's "factual circumstances"—the government's knowledge of the inmate's location—provides no basis for a special "inmate" rule. The Court has repeatedly indicated that notice by publication is insufficient, but notice by ordinary mail is sufficient, if a claimant's address is known or reasonably ascertainable. See, *e.g.*, *Tulsa Prof'l Collection Servs.*, 485 U.S. at 491; see also cases discussed at pp. 15-20, *supra*. Hence, the fact that the forfeiting agency can locate the inmate's address warrants notice by mail, but it does

not warrant the additional step, unprecedented in this Court's decisions, of requiring proof of actual receipt.

Petitioner's second factual circumstance—the government's control over the inmate's location—— distinguishes inmates from most other interested parties, but not in a way that is relevant to the due process issue posed here. There is no reason why the government's control over the inmate's location logically implicates a need for the government to prove actual receipt of notice. The question under *Mullane* is whether the notice is "reasonably calculated" to reach the inmate. If, as we have shown (pp. 21-25, *supra*), the mails are a reliable means of reaching the inmate, it is of no relevance to the *Mullane* inquiry that the inmate is reachable at a location that the government chose.

Petitioner's third factual circumstance—that the government would potentially gain financially if it could conduct forfeitures without providing adequate notice —similarly makes no logical sense. Petitioner implies, without foundation, that the government has a motivation to deprive petitioner of property without due process of law. The government is entitled to a presumption that it will act lawfully. But even if that were not so, the government's method of providing notice through certified mail is "reasonably calculated" to provide actual notice. See pp. 15-25, *supra*. Accordingly, there is no need for special precautions to prevent government malfeasance. The government has itself chosen means of providing notice that would defeat the government's supposed design to deprive individuals of their property without due process.

In short, petitioner has provided no persuasive reasons for this Court to depart from the *Mullane* standard of notice "reasonably calculated" to reach an interested party and to require the government to

prove actual receipt of notice. The Court has never invoked the Due Process Clause as a basis imposing an actual receipt requirement, and to do so here would introduce a anomalous departure from settled law.

E. Petitioner Is Mistaken In Claiming That Inadequate Notice Would Render A Forfeiture "Void" And Entitle Him To Return Of Forfeited Property

Petitioner argues that if this Court were to determine the government failed to meet the notice requirements of the Due Process Clause, the 1988 forfeiture of the currency at issue here would be "void" and the government would be barred by 19 U.S.C. 1621, the five-year statute of limitations relating to forfeitures, from reinstituting forfeiture proceedings. Pet. Br. 26-29. Petitioner further asserts that "the forfeiture is not only void, but the motion for return of property must be granted." *Id.* at 27. Under petitioner's view, if the Court determined that notice here was inadequate, he would be entitled to the $21,939 without regard to whether the money was derived from his drug trafficking activity.[20]

Petitioner's argument fails at the outset because it is not fairly subsumed within the question on which the petition for a writ of certiorari was granted, which

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[20] Petitioner admitted at a district court evidentiary hearing that he had not been employed since 1983 and that, at the time of the April 1986 seizure, "most of my money" came from sales of illegal drugs. Tr. 15-16 (7/23/97) (District Court Docket Entry No. 147); see J.A. 64 (petitioner's admission that his 1985 automobile purchase was "probably" made with cash from cocaine sales); J.A. 63-64 (admissions that seized personal property was purchased with "drug money"); J.A 65, 71 (holdings of the courts below that personal property and automobile seized from petitioner were obtained with drug trafficking proceeds).

petitioner phrased as follows: "Should this court grant certiorari to resolve the split among the circuits as to whether a prisoner must receive 'actual notice' regarding a forfeiture notification?" Pet. ii. Petitioner's argument does not in any way address adequacy of notice to prisoners or, for that matter, to non-prisoners; it instead presents questions of remedy and procedure, applicable to prisoners and non-prisoners alike, that the courts below had no occasion to reach.

The court of appeals found that the notice to petitioner complied with the due process requirements of *Mullane*, and it therefore affirmed the district court's grant of summary judgment in favor of the government. J.A. 70. Accordingly, it did not address the appropriate disposition of petitioner's equitable claim for return of the currency in the event the notice had been constitutionally inadequate. If the ruling of the court of appeals on the notice question is reversed, further proceedings would be required in the courts below to determine in the first instance the appropriate disposition of petitioner's request for return of the currency.

But even if the question were properly before this Court, petitioner's contention is mistaken. If a defect in providing notice deprives a claimant of the right to contest the validity of a forfeiture, the claimant is entitled to restoration of the right lost, namely, the right to contest the forfeiture. See *Boero* v. *DEA*, 111 F.3d 301, 305-307 (2d Cir. 1997) (where the government fails to provide adequate notice and thereby deprives a claimant of the right to be heard, the "remedy is to restore his right to seek a hearing in district court"); accord *United States* v. *Dusenbery*, 201 F.3d 763, 768 (6th Cir.) ("Like the Second Circuit, we think that inadequate notices should be treated as voidable, not

void, and that the proper remedy is simply to restore the right * * * timely * * * notice would have conferred on the claimant: the right to judicially contest the forfeiture and to put the Government to its proofs under a probable cause standard."), cert. denied, 121 S. Ct. 301 (2000); *Small* v. *United States*, 136 F.3d 1334, 1338 (D.C. Cir. 1998) (where notice was found inadequate, case was remanded to the district court to grant the claimant a hearing on the merits of the forfeiture).

Some courts of appeals have agreed with petitioner's view that a forfeiture defective on grounds of inadequate notice is void. See, e.g., *Foehl* v. *United States*, 238 F.3d 474, 480-481 (3d Cir. 2001) (collecting cases). But, even where the statute of limitations has run, it does not appear that those courts would preclude all possible defenses to the return of the seized property. For example, in *One Toshiba Color Television*, the Third Circuit endorsed the view that a judgment issued without proper notice to a potential claimant is void, but it observed that a holding that a forfeiture was void "does not equate to a ruling that he is entitled to a return of the property or monetary relief from the government." 213 F.3d at 156-157 (noting that further proceedings were required in which the government could invoke defenses); see *Clymore* v. *United States*, 164 F.3d 569, 574 (10th Cir. 1999) (statute of limitations allowed to operate "subject, of course, to any available government arguments against it"); see also *Clymore* v. *United States*, 245 F.3d. 1195 (10th Cir. 2001) (prescribing procedures for "deficient notice" cases); cf. *United States* v. *Minor*, 228 F.3d at 360 (noting differing circuit rules as to applicable remedy where for-

feiture is not supported by constitutionally adequate notice).[21]

In any event, there is no continuing need for this Court to address the additional question raised by petitioner because the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, has resolved the issue with respect to forfeitures initiated after August 23, 2000. See note 2, *supra*. The current version of 18 U.S.C. 983(e)(1) (2000), enacted as part of that legislation, provides that "[a]ny person entitled to written notice in" an administrative forfeiture action "who does not receive such notice" may move to set the declaration of forfeiture aside. Section 983(e)(2)(A) further specifies that a finding that adequate notice was not provided is not fatal to the forfeiture, because "[n]otwithstanding the expiration of any applicable statute of limitations," a court granting such a motion must do so "without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party." 18 U.S.C. 983(e)(2)(A) (2000). Congress's prospective resolution of the issue eliminates any need for this Court to decide a matter that is not properly before it.

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[21] This Court has indicated that equitable tolling of the statute of limitations is appropriate where a party "actively pursue[s]" his rights before the statute runs, even if he does so by defective means, such as by filing a complaint in the wrong court. See *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1991). Here, the government actively pursued its rights through the administrative forfeiture process Congress established by statute in 19 U.S.C. 1607(a) (1994 & Supp. V. 1999). It mailed notices to petitioner at three different locations and published notice in the newspaper. When petitioner failed to file a timely objection, the government duly entered a declaration of forfeiture, as it was entitled to do. See 19 U.S.C. 1609.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 2001