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IN THE SUPREME COURT OF THE UNITED STATES

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LOUIS McINTOSH, AKA LOU D,)
Petitioner,)

v.) No. 22-7386

UNITED STATES,)
Respondent.)

- - - - -

Washington, D.C.

Tuesday, February 27, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

STEVEN Y. YUROWITZ, ESQUIRE, New York, New York; on behalf of the Petitioner.

MATTHEW GUARNIERI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-7386, McIntosh versus United States.

MR. YUROWITZ: Mr. Chief --

CHIEF JUSTICE ROBERTS: Mr. Yurowitz.

ORAL ARGUMENT OF STEVEN Y. YUROWITZ

ON BEHALF OF THE PETITIONER

MR. YUROWITZ: Mr. Chief Justice, and may it please the Court:

Rule 32.2(b) states in unequivocal terms that a district court must enter a preliminary order of forfeiture prior to sentencing. In this case, no one disputes no such order was entered, and there's also no dispute why not, as the Second Circuit found, because the government did not submit one. Indeed, none was entered until three years after sentencing.

Petitioner contends that Rule 32.2(b) is a mandatory claims-processing rule and the failure to enter the preliminary order of forfeiture is fatal to the government's ability to seek forfeiture.

1 Such a reading is consistent with the
2 plain language of the rule, its structure and
3 purpose. The plain language requires entry of a
4 preliminary order prior to sentencing. This
5 Court has never interpreted the term "must" to
6 mean a mere time-related directive.

7 Such an interpretation is also
8 consistent with the rule's comprehensive
9 structure pursuant to which forfeiture must be
10 addressed. Those directives start from the
11 beginning of the case, continue through verdict,
12 then prior to sentencing, at sentencing, and
13 after sentencing. This highly calibrated
14 structure confirms the mandatory nature of the
15 need to enter the preliminary order of
16 forfeiture.

17 The purpose of Rule 32.2(b)'s
18 requirement to enter the preliminary order prior
19 to sentencing also reflects the goal of
20 procedural due process and finality, all of
21 which are indicative of a prophylactic mandatory
22 claim-processing rule.

23 Finally, Rule 32.2(b)'s requirement to
24 enter a preliminary order of forfeiture is
25 nothing like those rules which this Court has

1 held were mere time-related directives. Those
2 cases involved either administrative rules and
3 the concern of imposing mandatory conditions on
4 bureaucratic agencies or rules designed to
5 protect third parties, not before the court,
6 such as the victims in Dolan and the public in
7 Montalvo-Murillo.

8 This Court should conclude that Rule
9 32.2(b) is a mandatory claim-processing rule.

10 I invite the Court's questions.

11 JUSTICE THOMAS: But didn't your
12 client -- didn't Petitioner have actual notice
13 that the government was going to seek
14 forfeiture?

15 MR. YUROWITZ: He had notice in the --
16 in the indictment in the bill of particulars
17 from -- but, from that point on, the government
18 was silent. There was no notice -- the
19 government provided no indication after verdict
20 that it was going to be seeking forfeiture until
21 literally the 11th hour, 59th minute, when the
22 court said it was about to impose sentencing.

23 JUSTICE THOMAS: So how exactly was he
24 prejudiced by what the government did here?

25 MR. YUROWITZ: He was prejudiced by a

1 loss of value on the car, and there were
2 third-party rights, third-party claimants that
3 are also prejudiced because, until a preliminary
4 order of forfeiture is entered, third-party
5 claimants cannot litigate their rights.

6 JUSTICE THOMAS: Were there any
7 third-party claimants, though?

8 MR. YUROWITZ: The car was titled in
9 his mother's name. She presumably would have
10 been a third-party claimant. And she -- she
11 didn't get -- my understanding is she didn't
12 even get notice.

13 JUSTICE GORSUCH: How does the
14 harmless error rule apply here? I understand
15 you just indicated to Justice Thomas that your
16 client is prejudiced, but does a court have an
17 obligation to assess the harmlessness of -- of
18 this rule violation? Rule 52 would normally
19 require that.

20 MR. YUROWITZ: So Dolan set -- set
21 forth three potential rules for -- three
22 potential buckets, a jurisdictional rule, a -- a
23 mandatory claim-processing rule, and a
24 time-related directive. None of them --

25 JUSTICE GORSUCH: I -- I'm sorry, just

1 to orient the discussion a little more
2 precisely, we're dealing here with the Federal
3 Rules of Criminal Procedure, which have a
4 harmless error rule built into them and say that
5 they apply with respect to all of the other
6 rules.

7 So what about that?

8 MR. YUROWITZ: So this -- even -- in
9 this Court in Eberhart, when it was construing
10 Rule 33, it didn't look to a harmless error rule
11 because it held that it was a mandatory
12 claim-processing rule. This Court has never
13 really looked to harmless error when -- in the
14 context of a mandatory claim-processing rule
15 even when they're rules, federal rules.

16 JUSTICE GORSUCH: So even though the
17 federal rules themselves say all of these rules
18 are subject to a harmless error analysis, you
19 would have us effectively carve out Rule 32?

20 MR. YUROWITZ: It's not just -- I
21 would carve -- I think this Court could carve
22 out all mandatory claim-processing rules.

23 JUSTICE GORSUCH: Okay. Thank you.

24 JUSTICE JACKSON: So I have a
25 question. I understand the merits of your

1 argument, and I -- I want to know, if we agree
2 with you that what we have here is a
3 claims-processing rule, you say that the result
4 of that is that the Petitioner is entitled to
5 enforce -- enforce it. And so what I'm trying
6 to understand is, what does enforcement look
7 like in this context? What does it mean to
8 enforce a deadline regarding this kind of
9 preliminary rule of forfeiture?

10 MR. YUROWITZ: When -- when -- when a
11 preliminary order of forfeiture is not entered
12 as it should be prior to sentencing, then the
13 government loses its right to forfeiture.

14 JUSTICE JACKSON: But -- but I thought
15 -- I thought the order -- the -- the response
16 was going to be that you just get a do-over. In
17 other words, I mean, it's a -- it's a procedural
18 rule that occurs prior to the sentencing.
19 That's what you've argued, right? You have to
20 issue this preliminary order of forfeiture.

21 And so let's say the court doesn't do
22 that. You say that the individual should be
23 entitled to enforce it. And I guess what I'm
24 asking is, isn't the scope of the enforcement
25 the argument that they need -- that the district

1 court needs to do it over?

2 MR. YUROWITZ: The -- when you are
3 construing a mandatory claim-processing rule,
4 the effect of it is that if you don't stick to
5 it -- if you don't -- if you don't carry out the
6 duty, you lose the right.

7 JUSTICE JACKSON: But that's -- but
8 you say that's a jurisdictional rule. On page 2
9 of your brief, you say most deadlines have
10 consequences. A missed jurisdictional deadline
11 prevents the court from permitting or taking the
12 action to which the statute attached the
13 deadline.

14 So, if the same consequence applies to
15 the claims-processing rule, I guess I'm
16 confused.

17 MR. YUROWITZ: But the difference
18 between a jurisdictional rule and a
19 claims-processing rule is a jurisdictional can
20 never be waived. A mandatory claim-processing
21 rule could be waived or forfeited.

22 JUSTICE KAGAN: But -- but that can --

23 CHIEF JUSTICE ROBERTS: Well, it's not
24 -- I was just going to say the -- the -- in
25 terms of the benefit of the rule, I would assume

1 what they would do is just, okay, here's -- now
2 we're giving you notice, here's the preliminary
3 order, and it'll be -- you know, sentencing will
4 be in another week as opposed to that.

5 If you think that what the rule is
6 about is -- is allowing notice to the defendant
7 so it's prepared for whatever the final order is
8 going to say, it seems to me that that's -- even
9 if it's jurisdictional, as you say, that means
10 you can't rely on the existing order to give
11 notice, but it doesn't mean you can't just give
12 notice, you know, a week later, give him the
13 same benefit that he would get if the rule were
14 complied with.

15 MR. YUROWITZ: If -- if the notice
16 came before sentencing and it was entered before
17 sentencing, then there's not a problem. The
18 problem is, in this case, there was no order
19 entered until three years after, at which point
20 you're disrupting the finality of the sentence.

21 This is -- forfeiture is an element of
22 sentencing, and there's -- there's an element of
23 finality to it, and that's one of the objectives
24 that the rule is designed to -- to foster.

25 It also is designed to benefit

1 third-party claimants because, until you have --
2 until you have entry of an order, third-party
3 claimants can't even be litigated, which, in
4 this case, there was no -- there was no notice
5 served until 12 years after.

6 JUSTICE KAGAN: But the -- a mandatory
7 claims-processing rule is subject to waiver,
8 unlike a jurisdictional rule. So a person would
9 have to object to the failure of the court.

10 And once the person objects, won't the
11 court just do what the court does, and what
12 would be the difference?

13 MR. YUROWITZ: It -- it's our position
14 that the -- the time to object is when the --
15 when the preliminary order of forfeiture is
16 entered. The government is equivocal as to what
17 precise time, but if -- it's not too much to ask
18 the government to, if they're seeking to deprive
19 someone of property, to dot their I's, cross
20 their T's, raise this issue before sentencing
21 and -- and have the court address it.

22 JUSTICE KAGAN: I -- I -- I guess I'm
23 not understanding. If the person objects at the
24 time of sentencing, and then the court says, you
25 know, you're right, I should enter a preliminary

1 order and enters a preliminary order, then you
2 have no complaint?

3 MR. YUROWITZ: Right.

4 JUSTICE KAGAN: So isn't that just
5 what's going to happen even if the court fails
6 to enter a preliminary order prior to
7 sentencing? A person in your client's position
8 will have to object. Then the court will enter
9 a preliminary order. And I -- I guess what I'm
10 saying is that the rule you're asking for will
11 make no difference in the end in 99 percent of
12 the cases.

13 MR. YUROWITZ: We would take the
14 position that the time to object is at the time
15 a preliminary order of forfeiture. Rule 32.2
16 places no obligations on the -- on the
17 defendant.

18 What the government is seeking to do
19 here is to shift the burden to the defendant.
20 It's the government's obligation. They're the
21 ones who are seeking to deprive a defendant of
22 property. They're the ones who should be
23 moving.

24 If at the time a -- when -- if it came
25 back to the district court in this case and the

1 government submitted their preliminary order of
2 forfeiture and the defendant had kept quiet,
3 yes, he waived it. But, up until then, there
4 was no waiver.

5 JUSTICE ALITO: The -- and the typical
6 mandatory claims-processing rule tells one of
7 the parties to the case that if you want to
8 assert a particular claim, you have to raise it.
9 It puts the -- it imposes a duty on one of the
10 parties.

11 But Rule 32.2 places a burden --
12 places a duty on the judge. Do you have any
13 examples of cases in which we have held that
14 something is a mandatory claims-processing rule
15 where the duty is placed on the court and not on
16 one of the parties?

17 MR. YUROWITZ: Gonzalez versus Thaler
18 and Santos-Zacaria are both obligations that are
19 placed on the court. A -- a -- a preliminary
20 order -- it's an order. It's an order of the
21 court. It could only be entered on the -- by
22 the court, but at the end of the day, it's the
23 government that's seeking the deprivation of the
24 property, so they're going to have to provide
25 the court with the -- the information to enter

1 that order.

2 JUSTICE JACKSON: So I asked you about
3 remedy because I guess I'm -- I think there's
4 actually a deeper kind of procedural concern
5 here that is making me wonder whether we can
6 actually reach the merits of the question that
7 you're asking in this case, and it comes from
8 the fact that as I look at the procedural
9 history of this case, your client actually was
10 resentenced and procedurally resentenced
11 properly.

12 So this is what I mean, that you --
13 you are raising concerns right now about the
14 process that the district court undertook to
15 issue the first forfeiture order in this case.
16 And you say the district court failed to issue
17 the preliminary order of forfeiture before that
18 sentence, and two years later, when it did issue
19 a preliminary order of forfeiture with respect
20 to that sentence, that was too late, that the
21 first forfeiture order was invalid.

22 But it looks from the procedural
23 history as though the court of appeals vacated
24 that forfeiture order and that you're actually
25 here today pursuant to your client's case that

1 is now relevant to the second forfeiture order.

2 Do you understand what I'm saying?

3 MR. YUROWITZ: Yes.

4 JUSTICE JACKSON: So we now have a new
5 forfeiture order, and with respect to that
6 forfeiture order, before resentencing, the
7 district court filed a preliminary order of
8 forfeiture and you didn't object, sentenced your
9 client.

10 You, I think, agreed to the forfeiture
11 order at that point, so I guess I don't
12 understand how we have the ability now to say
13 anything about potential defects with respect to
14 the first forfeiture order.

15 Can you help me with that?

16 MR. YUROWITZ: Yeah. So I -- I didn't
17 represent the Petitioner at that sentence
18 because of a quirk of CJA rules, but the -- that
19 -- that forfeit -- entry of the preliminary
20 forfeiture at the subsequent resentencing was
21 always subject to the appeal that was pending
22 then through the appellate process, his direct
23 appeal, which is that the government waived
24 their right to -- lost their right to
25 forfeiture.

1 JUSTICE JACKSON: No, I understand.
2 But -- but that order doesn't exist anymore. So
3 how -- how do -- how do we give you a remedy --
4 even if you're right about what you're saying in
5 this case, I guess I don't understand how we're
6 in a position to give you any remedy today.

7 That order has been vacated. And what
8 you're arguing is that order was defective
9 because there was no preliminary order of
10 forfeiture. So, fine, that order doesn't exist
11 anymore. What -- so what -- what can we do
12 about that now?

13 MR. YUROWITZ: It -- it -- it's --
14 it's the same -- it's the same defendant who's
15 subject to sentencing. It's what -- the
16 Petition -- the Petitioner's position is that
17 the government has lost that right, whether it's
18 this particular order or a later order. If
19 they've lost their right to sentencing, they've
20 lost --

21 JUSTICE JACKSON: Did he object to the
22 new forfeiture order, the second one, on this
23 basis?

24 MR. YUROWITZ: He was continuing -- he
25 was still -- his appeal was still in -- in the

1 appellate process. Obviously, because the
2 Second Circuit had held at that point that
3 the for -- the government's ability to collect
4 forfeiture was still pending, he was going to
5 negotiate -- work with them on a number which
6 was substantially lower, but at the same time,
7 his -- the appeal process was still -- was still
8 going. And, matter of fact, we filed this cert
9 petition objecting to the government's ability
10 to collect on forfeiture.

11 JUSTICE JACKSON: So what remedy can
12 we give you today?

13 MR. YUROWITZ: That the government is
14 prohibited from imposing -- seeking forfeiture.

15 JUSTICE JACKSON: With respect to the
16 second order?

17 MR. YUROWITZ: With -- with respect to
18 -- with respect to this case.

19 JUSTICE ALITO: Can I go back to your
20 -- your prior answer when you spoke about
21 Santos-Zacaria and Gonzalez versus Thaler?
22 In -- in the latter case, Gonzalez versus
23 Thaler, the provision said a certificate of
24 appealability may issue only if the applicant
25 has made a substantial showing of the denial of

1 a constitutional right. So that put a duty on
2 the applicant, not the court.

3 Santos-Zacaria, the statute said a
4 court may review a final order of removal only
5 if the alien has exhausted all administrative
6 remedies available to the alien as a right. It
7 put a duty on the alien, not on the court.

8 So do you have any other examples of
9 cases where we have said that something is a
10 mandatory claims-processing order, provision,
11 I'm sorry, a mandatory claims-processing
12 provision where the duty is on the court and not
13 on one of the parties who wants to process the
14 claim?

15 MR. YUROWITZ: I -- I -- I don't, but,
16 Justice Alito, even in those cases, the ultimate
17 responsibility, for example, in Gonzalez, it was
18 the court that had to issue the court -- the --
19 the -- the COA. So it was the court -- it was
20 the court's action. It was based on a
21 litigant's conduct, but it's the same thing in
22 this -- in this instance.

23 The -- the court's ability to enter a
24 preliminary order of forfeiture is based on the
25 government's request indicating that they're

1 going to be seeking forfeiture and they're
2 providing the court with the information.

3 JUSTICE KAVANAUGH: What do you do
4 about the different language of 32.2(A), which
5 does say a court must not enter a judgment of
6 forfeiture in a criminal proceeding unless the
7 indictment contains notice? In other words, the
8 specific consequence is set forth in the rule
9 there, but it's not in the rule at issue here.

10 MR. YUROWITZ: I -- I think there's a
11 specific reason why in A it had to specify the
12 consequence, because it's based on the
13 underlying statute. And in the underlying
14 statute, it talks in permissive terms. The word
15 used is the government may -- may file a bill of
16 particulars. And the rules wanted to take it
17 further, so, therefore, they wanted to make it
18 mandatory, so they indicated a consequence.

19 When it comes to (b)(1)(A), that --
20 that concern doesn't apply.

21 JUSTICE SOTOMAYOR: Justice Alito was
22 asking you that -- about what other example you
23 had of a mandatory jurisdictional rule, and as
24 you pointed out, there really aren't.

25 But I'm wondering how I can view this

1 rule as a mandatory jurisdictional view when it
2 has the biggest carveout I've ever seen. It
3 says you have to -- the court has to file a
4 preliminary order before sentencing "unless
5 doing so is impractical."

6 So why can't it do it an hour before
7 the sentencing?

8 MR. YUROWITZ: So, Justice Sotomayor,
9 impractical does not mean in -- inconvenient.
10 It -- it -- dictionaries define it as incapable.
11 It -- that exception doesn't give the court the
12 ability to -- to impose an order at any --

13 JUSTICE SOTOMAYOR: Well, having been
14 a district court judge and having hundreds of
15 sentences on my docket at one point, sometimes
16 it's not really inconvenient. It's almost
17 impossible to keep up with those things, and you
18 do -- you do do it a little bit later.

19 But my point is, who decides that?
20 Meaning you go up on appeal, the court of
21 appeals now has to hold a hearing to see why the
22 district court judge didn't issue the order a
23 month before, two months before, three months
24 before? I guess my point is, generally, when we
25 think of mandatory rules, they set a fixed goal,

1 a fixed deadline, something that you can know
2 and meet without discretion being involved.

3 MR. YUROWITZ: So Rule 32.2(b) imposes
4 that same firm deadline. That's sentencing.
5 The impractical exception is only that --

6 JUSTICE SOTOMAYOR: But, again, an
7 hour is inconvenient, but how about a day? How
8 about two? How about three? My whole point is
9 that once you build in discretion, how can you
10 call it mandatory in the -- in the sense of it
11 being jurisdictional?

12 MR. YUROWITZ: At that point, if the
13 defendant -- nothing -- none of this happens in
14 a vacuum. The government, had they done their
15 jobs -- job properly, they would have come to
16 the court saying we're seeking forfeiture in
17 this case. They would have provided the
18 information.

19 Now it may be that the district court
20 couldn't get to it because it was impractical,
21 but there would be notice to the defendant that
22 there was going to --

23 JUSTICE SOTOMAYOR: Thank you,
24 counsel.

25 JUSTICE JACKSON: So can I just -- I'm

1 sorry. So are you asserting that there was
2 something wrong with the preliminary order of
3 forfeiture that the district court issued on
4 April 23, 2023, before the resentencing?

5 MR. YUROWITZ: The -- the -- what was
6 wrong is that the government shouldn't have been
7 entitled. There -- there's nothing -- there's
8 no -- I wouldn't point to any errors in that
9 order. It -- it --

10 JUSTICE JACKSON: All right. Did you
11 object at the time of that preliminary order?
12 Did you say the government should not be
13 entitled to get a forfeiture because 10 years
14 ago, when they sent -- when I was previously
15 sentenced, the -- the district court didn't
16 issue a preliminary order of forfeiture?

17 MR. YUROWITZ: I -- I don't believe
18 that the -- the defense counsel at that time
19 did, but this was still a case that was in a
20 direct appeal.

21 JUSTICE JACKSON: All right. Final
22 question from me at least.

23 If you win this case today and you go
24 back on remand, what is the remedy?

25 MR. YUROWITZ: That the -- the

1 forfeiture order be vacated.

2 JUSTICE JACKSON: Which forfeiture
3 order?

4 MR. YUROWITZ: Right now, the only one
5 that's pending is the -- the most recent one
6 that was entered in April 2020.

7 JUSTICE JACKSON: And that one doesn't
8 have the defect that you've identified, correct?

9 MR. YUROWITZ: It -- it has a defect
10 in that it was entered when -- in violation of a
11 mandatory claim-processing rule.

12 JUSTICE JACKSON: Okay.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Just to follow up on Justice
16 Sotomayor's questions about impractical, it's
17 not only impractical, but the qualification
18 requirement has to be sufficiently in advance.
19 And that's sort of another layer of broad
20 discretion.

21 I know yours is years, so that
22 wouldn't be covered, but in the typical case, it
23 not only has to be impractical, but all you have
24 to do is sufficiently. It seems that there's a
25 lot of wiggle room throughout the rule that

1 seems inconsistent with the general notion of
2 mandatory requirements.

3 MR. YUROWITZ: Even this Court in
4 Eberhart, when it was dealing with Rule 33, it
5 has the same ability for a judge to extend the
6 deadline. Defense counsel could make a motion
7 saying probably it's -- I can't do it
8 sufficiently in time, and the rule permits a
9 court to extend it.

10 This Court held that it was a
11 mandatory claim-processing rule. So the notion
12 that there's flexibility doesn't undermine the
13 fact that it's a claim-processing rule.

14 The point is it's a rule that's
15 designed to provide a -- a litigant with
16 protections because the government is seeking to
17 deprive him of his property. A hundred and
18 fifty years ago, this Court already said in
19 French versus Edwards, where there's a rule
20 that's designed to govern protections for
21 somebody whose property is going to be deprived
22 and there's a potential for prejudice, that's a
23 mandatory rule.

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas, anything further?

1 Justice Alito?

2 Justice Sotomayor?

3 Justice Jackson, anything further?

4 Thank you, counsel.

5 MR. YUROWITZ: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Guarnieri.

7 ORAL ARGUMENT OF MATTHEW GUARNIERI

8 ON BEHALF OF THE RESPONDENT

9 MR. GUARNIERI: Mr. Chief Justice --
10 excuse me. Mr. Chief Justice, and may it please
11 the Court:

12 The timing requirement in Rule
13 32.2(b)(2)(B) is mandatory, not discretionary,
14 but characterizing that requirement as mandatory
15 doesn't answer the question presented in this
16 case. The question here is, what follows when a
17 district court violates the rule? What are the
18 consequences?

19 Now our basic submission in this case
20 is that a violation of Rule 32.2(b)(2)(B) should
21 be treated like any other garden-variety
22 procedural error in the sentencing process.
23 When a court commits a procedural error at
24 sentencing, the normal thing to do is to apply
25 Rule 52, which is the provision in the Federal

1 Rules that codifies principles of harmless error
2 and plain error.

3 Under Rule 52(a), if an error does not
4 affect the defendant's substantial rights, it
5 must be disregarded as harmless. Petitioner
6 tries to avoid the application of harmless error
7 principles by characterizing this particular
8 requirement as a mandatory claim-processing
9 rule.

10 Rule 32.2(b)(2)(B) is not such a rule
11 for all the reasons that this Court identified
12 in Dolan with respect to the analogous timing
13 requirement in the Mandatory Victims Restitution
14 Act.

15 Let me just emphasize three of the
16 considerations that the Court stressed in Dolan:
17 text, context, and purpose.

18 Textually, the rule here imposes an
19 obligation on the court, not the litigants, and
20 it does not specify any sanction for the court's
21 violation. That text operates in the broader
22 context of a statutory framework that makes
23 clear that criminal forfeiture is a mandatory
24 consequence of conviction and that forfeiture is
25 part of the sentence imposed for the offense.

1 The purpose of requiring the entry of
2 a preliminary order before sentencing is to
3 ensure that the forfeiture that is actually
4 imposed at the sentencing itself is accurate and
5 complete.

6 Accordingly, when a district court
7 neglects to enter a preliminary order of
8 forfeiture before sentencing, in violation of
9 Rule 32.2(b)(2)(B), the court may nonetheless
10 proceed to order forfeiture at the sentencing
11 itself as long as the court's violation was
12 harmless.

13 And we think that's what occurred
14 here. The district court orally ordered
15 Petitioner to forfeit the proceeds of his Hobbs
16 Act robberies and a car that he purchased with
17 those proceeds, despite the absence of a
18 preliminary order before sentencing. That error
19 was harmless.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Counsel for
22 Petitioner said that the government should be
23 held to -- when it takes a person's property, to
24 cross its T's and dot its I's. How do you
25 respond to that?

1 MR. GUARNIERI: Well, Justice Thomas,
2 we take our obligations to the court seriously
3 in this context. And, certainly, the government
4 has an important role to play in ensuring that
5 district courts comply with the strictures of
6 Rule 32.2, including Rule 32.2(b)(2)(B). But
7 that specific provision imposes an obligation on
8 the court, not -- not on the government.

9 And to your broader point, Justice
10 Thomas, I -- I -- I think the -- the principal
11 protection for defendants in criminal forfeiture
12 is that the obligation is on the United States
13 to prove beyond a reasonable doubt that the
14 defendant committed the offenses for which
15 Congress specified criminal forfeiture as a
16 penalty.

17 So Petitioner here and defendants
18 generally are entitled to all of the myriad
19 protections in the criminal process. We were
20 required to meet the beyond-a-reasonable-doubt
21 standard. There was a jury trial in this case.
22 We presented nine days' worth of testimony
23 establishing that Petitioner committed these
24 robberies. And forfeiture is a consequence of
25 the defendant's violation of the Hobbs Act.

1 JUSTICE GORSUCH: Counsel, you
2 mentioned Rule 52 in your opening. I was a
3 little surprised, though, in reading your brief,
4 it didn't appear until page 42.

5 Can -- can you explain -- and I --
6 I -- I'm not being critical. I'm -- I'm just
7 wondering, is there a nuance here I'm missing?
8 But, you know, this Rule 32 is a rule. It's not
9 a statute. It's a rule. And all of the rules
10 are subject to harmless error analysis. And I
11 would have thought that would have been like the
12 straightest, narrowest shot through this case,
13 but I'm wondering whether I'm missing something.

14 MR. GUARNIERI: Well, you -- you are
15 not, Justice Gorsuch. We are trying to
16 triangulate from the Court's existing precedent.
17 The Court has indicated in other cases that
18 there are provisions in the Federal Rules of
19 Criminal Procedure that are best characterized
20 as mandatory claim-processing rules.

21 And violations of those other rules
22 are not subject to harmless error analysis. And
23 the key case there, I think, is Eberhart
24 addressing Rule 33, which is the rule specifying
25 the time limits for moving for a new trial after

1 conviction.

2 I think the same analysis would apply
3 to Rule 35, which is the provision that
4 specifies the time limits for correcting a
5 sentence after it has been imposed.

6 Those are mandatory and inflexible
7 deadlines. And a district court generally
8 cannot ignore those deadlines if a party seeks
9 strict adherence to them. Rule 32.2(b)(2)(B) is
10 not --

11 JUSTICE GORSUCH: The default is that
12 all the rules are subject to harmless error?

13 MR. GUARNIERI: Yes, I think that's
14 right.

15 JUSTICE GORSUCH: Okay.

16 MR. GUARNIERI: It's -- and I think
17 that's a useful way to think about the case.
18 And, indeed, that's the -- the framing that I
19 was trying to establish in my opening here.

20 Really, it's Petitioner who's seeking
21 to avoid the application of what the default
22 framework here would be by characterizing this
23 as a mandatory claims-processing rule.

24 JUSTICE GORSUCH: Just one more
25 question. So, if -- if we agree with that, are

1 you asking us to apply the harmless error
2 standard ourselves in this case, or is a remand
3 appropriate for a court to assess that question?

4 MR. GUARNIERI: Well, I think the
5 Second Circuit already determined that any error
6 here was harmless, as did the district court.
7 Both of those courts considered what we think
8 are the right factors in this context, and that
9 is did the defendant have notice of the
10 forfeiture and was he given an opportunity to
11 contest it before the court ordered the
12 forfeiture as part of the sentencing process.

13 And Petitioner had both of those
14 things here. He was on notice that the
15 government was seeking this forfeiture both
16 through the indictment, the bill of particulars.

17 JUSTICE GORSUCH: So you're not asking
18 us to do a harmless error analysis. You're
19 asking us to say that it's already been done.
20 Is -- is that the gist of it?

21 MR. GUARNIERI: Yes. We are asking
22 this Court to affirm the judgment below, which
23 itself -- in -- in which the Second Circuit
24 itself established that there was no prejudice
25 to the defendant here.

1 JUSTICE GORSUCH: Thank you.

2 JUSTICE SOTOMAYOR: Counsel, you
3 talked about this being a court obligation, and
4 I agree, but the government has an important
5 role. Here, the government promised to or was
6 asked to prepare orders and I think at least
7 twice failed to do so.

8 A ruling in your favor that this is a
9 time-related directive seems to me is an
10 inducement to encourage the government not to
11 respond to a district court order.

12 I have to say I read this and I
13 thought to myself this is a very strange
14 district court. If a government lawyer had ever
15 done that to me as a district court judge, I
16 don't think I would have been very kind.

17 But what inducements are we creating
18 by not calling this a -- if not mandatory, a
19 claim-processing rule as opposed to a
20 time-related directive?

21 MR. GUARNIERI: Well, Justice
22 Sotomayor, I don't think characterizing this
23 provision as a time-related directive would
24 encourage violations of the rule if -- if that
25 is Your Honor's concern. There are going to be

1 substantial incentives for the government to
2 encourage the district court to comply with this
3 rule.

4 JUSTICE SOTOMAYOR: What are the
5 incentives?

6 MR. GUARNIERI: Well, the entry of a
7 preliminary order of forfeiture before
8 sentencing can be a basis for seizing property.
9 And so the government in many cases is going to
10 have an interest in ensuring that it has legal
11 authority to seize and maintain assets that
12 should be subject to forfeiture or that will be
13 subject to forfeiture at the conclusion of the
14 case. So I think that's one substantial
15 incentive.

16 Another, we often have an incentive to
17 ensure that the Court enters a preliminary order
18 of forfeiture in compliance with Rule 32.2
19 because that can provide notice to third parties
20 that some particular specific asset is going to
21 be subject to forfeiture. It helps us to --

22 JUSTICE SOTOMAYOR: That didn't happen
23 here.

24 MR. GUARNIERI: -- defeat arguments
25 later in the proceeding that some third party

1 comes in and claims that it was a bona fide
2 purchaser of the assets if they were transferred
3 during the course of the criminal case.

4 So, I mean, we -- we -- there are good
5 reasons here that it is Department of Justice
6 policy to encourage district courts to enter
7 preliminary orders of forfeiture before
8 sentencing, as Rule 32.2(b)(2)(B) requires.

9 JUSTICE SOTOMAYOR: I have one last
10 question. Do you take a position on the Seventh
11 Circuit's suggestion in U.S. versus Lee that you
12 have to at least announce a forfeiture at
13 sentencing, that you can't just not say anything
14 and then later order one? And they said that
15 might be jurisdictional.

16 MR. GUARNIERI: Your Honor --

17 JUSTICE SOTOMAYOR: We don't have to
18 address that here, but do you see a ruling here
19 as permitting courts to do that as well?

20 MR. GUARNIERI: As I understand the
21 Seventh -- the Seventh Circuit's decision in
22 Lee, the court suggested that although Rule
23 32.2(b)(2)(B), the provision that is at issue in
24 the proceeding before this Court, is best
25 characterized as a time-related directive,

1 perhaps the timing requirements with respect to
2 the entry of the final order of forfeiture at
3 the sentencing hearing itself, perhaps those
4 requirements should be treated as mandatory
5 claim-processing rules.

6 That was not directly at issue in Lee.
7 We haven't briefed that issue here. I don't
8 think anything that the Court says here about
9 32.2(b)(2)(B) would necessarily dictate an
10 answer with respect to what is Rule
11 32.2(b)(4)(B).

12 And -- and so I don't think the Court
13 needs to address it. We haven't taken a
14 position. I -- I would say, in general, I think
15 that's a harder case for us, and it's a harder
16 case for some of the reasons that the dissenting
17 Justices identified in Dolan.

18 And that is, in general, the rule here
19 contemplates that the court will announce the
20 forfeiture as part of imposing sentence on the
21 defendant. And if the court purports to act
22 after sentencing, if it fails to address
23 forfeiture at sentencing and it's acting after
24 the sentencing proceeding, then we have a harder
25 set of issues. I mean, that's not just a Rule

1 32.2 problem. It can also be a problem under
2 the various statutes that specify that
3 forfeiture shall be ordered at sentencing.

4 And as -- as I was alluding to earlier
5 in my colloquy with Justice Gorsuch, there are
6 constraints under, in particular, Rule 35 on a
7 district court's authority to alter or correct a
8 sentence after it's been imposed. So there are
9 a lot of other extrinsic considerations that
10 could come into play with respect to the final
11 order at sentencing.

12 But those things don't support
13 Petitioner's position here. This case is
14 limited to just the asserted error of failing to
15 enter a preliminary order of forfeiture before
16 the original sentencing proceeding.

17 JUSTICE SOTOMAYOR: Thank you,
18 counsel.

19 JUSTICE JACKSON: So the government
20 focuses right in on the merits, which, you know,
21 is totally understandable, can I -- but can I
22 get your thoughts on my concerns about the
23 threshold, potential for a threshold procedural
24 defect that actually inhibits our ability to
25 reach the merits in this case?

1 MR. GUARNIERI: Justice Jackson, I --
2 I think the way that would work under Article
3 III, the question would be whether a judgment in
4 Petitioner's favor is capable of granting him
5 any kind of effectual relief.

6 JUSTICE JACKSON: Yes.

7 MR. GUARNIERI: And I -- I think the
8 answer is yes. That's why we have not raised a
9 mootness argument in this case.

10 JUSTICE JACKSON: Tell me how.

11 MR. GUARNIERI: I -- I -- well, it is
12 true that there is now a new legally operative
13 forfeiture order in this case as a result of the
14 remand for unrelated reasons, but that order is
15 currently pending appeal in the Second Circuit.

16 If this Court adopts Petitioner's view
17 that this is a mandatory claim-processing rule,
18 his position as I understand it is that
19 violation of that rule is, I think he said this
20 morning, fatal to the government's ability to
21 obtain criminal forfeiture. And so I think the
22 case would go back to the Second Circuit, and
23 the Second Circuit could then entertain his
24 argument that even the now operative new
25 forfeiture order should be vacated because it is

1 the result of a series of proceedings that never
2 should have occurred under his understanding of
3 how the rule works.

4 JUSTICE JACKSON: Right. But, under
5 his own argument, didn't he forfeit that claim?
6 I mean, he says that if it's a claim processing
7 rule, if you don't raise it, you lose it. And
8 at the time of the second forfeiture order, he
9 didn't raise it.

10 MR. GUARNIERI: I -- I think we would
11 have reasonable arguments that, in fact, he has
12 forfeited it even if it is a mandatory
13 claim-processing rule, but I think those would
14 go to the merits. I don't think that those
15 would deprive this Court of Article III
16 authority to adjudicate the dispute that's
17 before the Court today.

18 JUSTICE GORSUCH: Do you think there
19 are some mandatory claim-processing rules that
20 are directed to courts or executive agencies
21 rather than to parties?

22 MR. GUARNIERI: Petitioner has yet to
23 identify an example of such a rule. I mean,
24 there are rules, for example, the provision of
25 the INA that was at issue in Santos-Zacaria,

1 which my friend mentioned this morning, that are
2 phrased in terms of action by the court but
3 clearly are designed to impose on the parties an
4 obligation to take some step, such as exhausting
5 administrative remedies.

6 We're not aware of and Petitioner has
7 not identified another example of a rule like
8 this where the obligation rests squarely on the
9 judicial officer. And -- and that's one of the
10 reasons that this case is similar to Dolan.

11 The -- the other case that I think is
12 -- is directly on point here is
13 Montalvo-Murillo, which is the case involving a
14 provision of the Bail Reform Act that imposed on
15 the magistrate, on the judicial officer, an
16 obligation to hold a pretrial detention hearing
17 within a specified time, and the Court said that
18 even if a -- if -- if the judicial officer
19 violates that deadline, it doesn't mean that the
20 defendant walks free. You can have a later
21 pretrial detention hearing because the error was
22 harmless.

23 JUSTICE GORSUCH: Is there something
24 significant about that line that we might
25 emphasize here? The statute, after all, says

1 that there shall be forfeiture, right? I mean,
2 that -- that's Congress's directive to us.

3 And often government agencies and
4 perhaps courts miss deadlines. But Dolan kind
5 of recognized what I'll call a better-late-than-
6 never rule in complying with congressional
7 directives. Thoughts?

8 MR. GUARNIERI: Justice Gorsuch, I
9 think that's right, and -- and to -- to return
10 to an exchange that we had earlier, I mean, we
11 have approached this case through the lens of
12 Dolan. In Dolan, one of the considerations the
13 Court emphasized in Dolan was that the statutory
14 obligation in that case was placed on the court,
15 not on the litigants, which is a sign that this
16 might be something other than a mandatory
17 claim-processing rule.

18 Another consideration that the Court
19 stressed in that case was that, as the name of
20 that statute suggests, the -- the restitution
21 was mandatory. And so too here criminal
22 forfeiture is mandatory. Those are both
23 important components of our argument.

24 If you think about this, when -- when
25 you arrive at the sentencing proceeding, the

1 district court who has failed to enter a
2 preliminary order of forfeiture faces a kind of
3 dilemma because, on the one hand, you have a
4 perceived violation of Rule 32.2(b)(2)(B),
5 assuming the impracticality exception doesn't
6 apply, and on the other hand, you have numerous
7 interlocking statutes that direct the court,
8 command the court, to order forfeiture when the
9 prerequisites are satisfied.

10 And so I think all of that -- that
11 surrounding mandatory framework is another very
12 important piece of the puzzle here. And if the
13 Court accepts that and accepts that those are
14 two of the considerations that support treating
15 this as a mandatory -- excuse me -- as a
16 time-related directive rather than a mandatory
17 claims-processing rule, that would suggest some
18 outer limits if -- if that was the -- the --

19 JUSTICE GORSUCH: Yeah, I'm wondering
20 what --

21 MR. GUARNIERI: -- impetus of the
22 question.

23 JUSTICE GORSUCH: -- you know, how are
24 we going to reconcile -- I mean, we now have
25 three buckets, right, jurisdictional, mandatory

1 claims processing, and this Dolan thing. And
2 I'm wondering, what are the outer limits of the
3 Dolan thing? And that's what I'm trying to
4 explore with you, and is the government
5 comfortable with a rule that it -- those are
6 matters directed to the court by statute and
7 have mandatory directives?

8 MR. GUARNIERI: I think that's right.
9 I think those are the two key considerations
10 here. There are -- there are other
11 considerations that I think also support
12 treating this case the same way the Court
13 treated -- rather, treating this rule the same
14 way the Court treated the statute in Dolan, but
15 those are certainly the two principal ones that
16 we emphasize in our brief.

17 JUSTICE JACKSON: Is it the
18 government's position that this is the kind of
19 situation that if he's -- that he's right or
20 wrong about his argument that if a court blows
21 the deadline, there can never be another
22 forfeiture in the case?

23 MR. GUARNIERI: Well, I think that's
24 another significant way in which our approach
25 differs from Petitioner's approach. I think

1 that, like other procedural errors, if there is
2 a harmful violation of Rule 32.2(b)(2)(B) or a
3 non-harmless violation, the remedy should be
4 that the defendant in that case then gets the
5 forfeiture proceedings that Rule 32.2 is
6 supposed to provide.

7 So, if you arrive at sentencing or the
8 case goes up on appeal and there's been a
9 violation of the requirement to enter a
10 preliminary order of forfeiture beforehand, the
11 result should not simply be that the defendant
12 in that case is absolved of what is supposed to
13 be a mandatory part of the sentence for the
14 defendant's offense. The result should be a
15 remand to the district court to -- to get it
16 right.

17 JUSTICE JACKSON: What have we said in
18 other claims-processing scenarios? And is that
19 consistent with what normally happens if there
20 is a claims-processing rule?

21 MR. GUARNIERI: I am not aware of an
22 example in which the Court has identified
23 something as a mandatory claim-processing rule
24 but nonetheless found that a violation of that
25 mandatory rule could be remedied by a redo of

1 the proceedings in the district court.

2 Ordinarily, mandatory
3 claims-processing rules are -- and it's a
4 category that is adjacent to jurisdictional
5 rules. These are inflexible rules that impose
6 on the parties some obligation that if they fail
7 and the other party objects, the rule can be
8 strictly enforced.

9 And Rule 32.2(b)(2)(B), like other
10 requirements that attend the sentencing process,
11 it doesn't really make sense to treat the rule
12 that way.

13 JUSTICE JACKSON: And why is that?

14 MR. GUARNIERI: Well, because it would
15 make Rule 32.2(b)(2)(B) a kind of aberrational
16 part of sentencing. If the district court fails
17 to take the very steps that are identified in
18 Rule 32 with respect to the sentencing process,
19 the -- the ordinary remedy for that is that you
20 redo the sentencing.

21 Indeed, even with respect to errors
22 that this Court has identified as structural,
23 meaning they are not amenable to harmless error
24 principles, the remedy for a structural err --
25 error is that you have a retrial or you have a

1 resentencing.

2 It doesn't mean that the defendant is
3 simply -- cannot be convicted of the offense or
4 cannot be subject to a penalty that Congress has
5 otherwise specified for that offense.

6 CHIEF JUSTICE ROBERTS: Well, there
7 are situations in which it does mean that. So
8 just because it doesn't in this particular
9 situation, there are others, like the situation
10 in Dolan. You're putting an awful lot of weight
11 on a sharply divided opinion in Dolan.

12 MR. GUARNIERI: Well, Mr. Chief
13 Justice, I -- I recognize that the dissenting
14 Justices in Dolan had some very compelling and
15 persuasive things to say. One point I would
16 make, and -- and we make this point in our
17 brief, this case is one step removed from Dolan
18 in the sense that here, the error is with
19 respect to a part of the process that is
20 antecedent to the sentencing itself.

21 And so, here, the district court
22 failed to enter a preliminary order of
23 sentencing beforehand, but it did orally order
24 the forfeiture of the property and orally order
25 a forfeiture money judgment at the sentencing

1 itself.

2 And that's unlike the situation in
3 Dolan, in which the -- the sentencing court in
4 that case left open the precise amount of
5 restitution and then acted well after the 90-day
6 deadline in the Mandatory Victims Restitution
7 Act.

8 CHIEF JUSTICE ROBERTS: Well, just
9 because it doesn't have any serious
10 consequences, if you're right that you just have
11 a, you know, start over again a second time, I
12 mean, there are situations where it would.

13 And I'm wondering if -- to what extent
14 we should be concerned about the remedial aspect
15 of it simply because it sort of could be a
16 harmless foul in this case?

17 MR. GUARNIERI: Well, I mean, if
18 you're thinking about this case in terms of, you
19 know, what is the appropriate remedy for a
20 violation of this rule, I do think we have the
21 better argument on the equities there.

22 I mean, this is a mandatory component
23 of the sentence. It is in that sense akin to a
24 min -- a statutory minimum sentence. If the
25 district court commits an error in the process

1 of imposing that mandatory sentence, it would be
2 anomalous to conclude that the result is that
3 the defendant is simply absolved of a -- of a
4 consequence that Congress has made mandatory for
5 that particular offense. It would really -- I
6 mean, it would, as I said, make Rule
7 32.2(b)(2)(B) stick out like a thumb in the
8 sentencing process.

9 I think the other thing I would say is
10 that our approach here, which has stressed
11 harmless error, means that -- I mean, the delta
12 between that approach and a mandatory
13 claims-processing approach, you're talking about
14 the small class of errors in which -- excuse me,
15 the -- the -- the -- the set of cases in which
16 the error is harmless.

17 And we think, if the error is
18 harmless, I mean, by definition, that means that
19 any procedural error did not affect the
20 defendant's substantial rights, there is no good
21 reason if the error is harmless for the court to
22 lack the authority to just proceed at the
23 sentencing proceeding itself to order the
24 forfeiture of the property that Congress has
25 made subject to forfeiture.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Anything further?

4 Anything further?

5 MR. GUARNIERI: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you.

7 Rebuttal, Mr. Yurowitz?

8 REBUTTAL ARGUMENT OF STEVEN Y. YUROWITZ

9 ON BEHALF OF THE PETITIONER

10 MR. YUROWITZ: I -- I'd just like to
11 go back to Justice Gorsuch's question about
12 harmless error. The reason why there's no
13 harmless error analysis is because this Court
14 has never really applied harm -- harmless error
15 in the context of either a mandatory
16 claim-processing rule or -- or time-related
17 directives.

18 Indeed, in Dolan, Chief Justice --
19 Justice Roberts pointed out that it's a rule
20 with no consequence because the majority said,
21 even in unlikely instances where the delay does
22 cause the defendant prejudice, the defendant
23 remains free to ask the court to take that into
24 account.

25 There's no obligation on the court to

1 take that into account. So this Court has never
2 really applied harmless error analysis in this
3 context. And I think the reason why the -- why
4 these mandatory claim-processing rules are
5 treated different and why Rule 32.2(b) should be
6 within that bucket is because it's not simply
7 the defendant that's before the court whose
8 rights are being affected.

9 There are third-party claimants'
10 rights who are being affected who, at the time
11 when the court is conducting any analysis,
12 they're not even there before the court, and
13 their rights are just being put to the side
14 because they're not before the court.

15 Dolan's finding of a time-related
16 directive was a very small slice. It's just --
17 it's -- it's a -- generally, it involves
18 administrative action where, obviously, the
19 court is reluctant and recognizes that
20 administrative agencies, they're saddled with a
21 lot of obligations, and they may not be able to
22 keep their -- their obligations in a timely
23 manner.

24 There are only really two exceptions,
25 and that's in the bail context, where there's a

1 public safety issue, and there's a pending case
2 that's ongoing, unlike Rule 32.2(b), which is
3 sentencing -- the final -- there's a finality
4 element to sentencing, and there's Dolan itself,
5 which involved victims. Victims are not the
6 beneficiaries of Rule 32.2(b).

7 So I think that's why harmless error
8 should not apply, because there is this category
9 of a mandatory claim-processing rule. My friend
10 characterized it in terms that both -- that
11 there's no rule in terms of the -- where a
12 mandatory claim processing is imposed on the --
13 on the court. He said -- but, you know, the --
14 I think the two cases, the Santos-Zacaria and
15 Gonzalez versus Thaler, he said those were an
16 obligation on the party.

17 It's the same thing here. A district
18 court coming in to impose forfeiture could do
19 nothing without the government providing them
20 the ammunition, and the first thing is the
21 government coming in and saying post-verdict,
22 pre-sentencing, we are going to seek forfeiture
23 in this matter.

24 The government certainly has the
25 right, even though they filed a bill of

1 particulars, even though they put it in the
2 indictment, they don't have to continue on that
3 forfeiture. They could -- they could -- they
4 have the discretion. They may have felt in the
5 facts of this case the defendant is getting
6 sentenced to 60 years, he's going to be the rest
7 of his life in prison, we're not going to
8 proceed with forfeiture.

9 And certainly not an obligation on the
10 defendant to say: Hey, are you really -- you're
11 -- are you letting me off the hook? It was the
12 government's obligation to come in. There was
13 not a word from the government in this case
14 post-verdict, in the sentencing memorandum, when
15 they got up to argue at sentencing. There was
16 not a word about -- at sentencing.

17 So, in -- in that terms, the -- the --
18 it's the government -- it's the government that
19 really bore the burden. And, yes, the court --
20 it's an obligation on the court. The -- the
21 court needs the government to come forward with
22 that.

23 So, in that sense, it's both -- it's
24 like -- it's -- it's -- it's the same situation
25 as Gonzalez versus Thaler, where there's an

1 obligation of the Court to indicate in the COA
2 what -- what the constitutional basis is. And
3 if anything, in -- in that case, it was more of
4 an obligation on the Court because the Court had
5 an independent basis to decide that there was
6 a -- a constitutional basis.

7 And the other -- the point about
8 the -- the fact that the forfeiture is mandatory
9 and the -- and the statute makes it mandatory,
10 but it also in the same breath says it's going
11 to be subject to the Federal Rules of Criminal
12 Procedure, which is Rule 32.2.

13 And matter of fact, even those
14 forfeiture is mandatory. If the government
15 fails to allege it in the indictment, there's no
16 -- even the government doesn't dispute that they
17 cannot receive forfeiture.

18 So the rules could impose more
19 obligations on the government -- on -- on the
20 court than specified in the -- in the -- in
21 the -- in the statute and it doesn't undermine
22 the mandatory nature of -- of the obligation.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 The case is submitted.

1 (Whereupon, at 10:55 a.m., the case
2 was submitted.)
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