

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner v. GUY JEROME URSERY;
and UNITED STATES, Petitioner v. \$405,089.23 IN
UNITED STATES CURRENCY, ET AL.

CASE NO: 95-345 & 95-346

PLACE: Washington, D.C.

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3 the Respondent Ursery.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-345, United States v. Guy Jerome Ursery,
5 and Number 95-346, United States v. \$405,000 and some
6 change, consolidated for argument. 7

7 Mr. Dreeben.

8 ORAL ARGUMENT OF MICHAEL R. DREEBEN

9 ON BEHALF OF THE PETITIONER

10 MR. DREEBEN: Mr. Chief Justice, and may it
11 please the Court:

12 From the earliest years of this Nation, Congress
13 has authorized the Government to seek parallel in rem
14 civil forfeiture actions and criminal prosecutions based
15 on the same underlying events.

16 Until recently, the pursuit of such parallel
17 actions was deemed to raise no question under the Double
18 Jeopardy Clause. Two recent decisions of this Court,
19 however, United States v. Halper and Austin v. United
20 States, prompted the courts of appeals in these two cases
21 to conclude that the cumulative remedies of in rem civil
22 forfeiture and criminal prosecution violated the multiple
23 punishments doctrine under the Fifth Amendment.

24 These holdings are incompatible with the long
25 tradition and practice in this country, and are incorrect

1 for four reasons. First, civil forfeiture is not
2 categorically punitive within the meaning of the Fifth
3 Amendment, and the forfeitures in this case were not
4 punishment.

5 Second, an in rem forfeiture action is not a
6 jeopardy that can give rise to the protection of the Fifth
7 Amendment when the Government seeks to prosecute the owner
8 of the forfeited property for a criminal violation.

9 Third, civil forfeiture of property under 21
10 U.S.C. 881 is not the same offense as the criminal
11 prosecution of the owner of the property for having
12 violated the narcotics laws and, finally, parallel
13 contemporaneous civil forfeiture actions and criminal
14 prosecutions shall be deemed to constitute a single
15 proceeding within the meaning of the Fifth Amendment and
16 therefore not to violate the Double Jeopardy Clause.

17 Now, the overriding question that is presented
18 in both of these cases and in many others that are being
19 litigated in the lower courts is whether in rem civil
20 forfeiture should be deemed to be punishment. Both of the
21 courts below adopted a categorical rule that the
22 forfeiture that is accomplished by application of section
23 881 should be categorically deemed punishment.

24 QUESTION: Now, do you think, Mr. Dreeben, that
25 the civil forfeiture could be punitive for purposes of the

1 Excessive Fines Clause and yet not multiple punishment
2 within the meaning of double jeopardy?

3 MR. DREEBEN: Yes, Justice O'Connor, I do. The
4 question that this Court has considered in determining
5 whether civil forfeitures should be subjected to analysis
6 under the Excessive Fines Clause is really an issue of
7 whether it is sufficiently punitive to trigger the
8 threshold applicability of that clause, and this Court
9 held in the Austin decision that civil forfeiture does
10 have such a punitive component both historically and in
11 its contemporary applications, but civil forfeiture has
12 never been deemed so punitive when considered in light of
13 its simultaneous remedial aims as to constitute either a
14 prosecution or a punishment under the Double Jeopardy
15 Clause, and we submit that that is the correct analysis
16 here.

17 In Halper itself, the Court applied a case-by-
18 case analysis to determine whether a particular sanction
19 applied in a particular case constituted an impermissible
20 punishment. The Court's conclusion in Austin that
21 categorically civil forfeiture warrants analysis under the
22 Eighth Amendment does not dictate that all civil
23 forfeitures applied in all cases at all times should be
24 deemed punishment with the rather radical consequences
25 that were accomplished by the courts below.

1 QUESTION: So you think Halper maybe could be
2 viewed as a multiple prosecution case and not a multiple
3 punishment case.

4 MR. DREEBEN: I think that Halper, analyzed in
5 the terms that the Court analyzed it, was a multiple
6 punishments case, but it is nonetheless true that under
7 Halper, there is some confusion about the exact test that
8 the Court adopted in that case due to different
9 formulations.

10 But our reading of Halper is that a sanction
11 that is rationally related and can be explained by
12 reference to underlying remedial purposes is not to be
13 deemed punishment for purpose of the Double Jeopardy
14 Clause even if there may be some element of punishment
15 associated with that sanction.

16 QUESTION: And even though it's considered such
17 for purposes of the Excessive Fines Clause?

18 MR. DREEBEN: That is correct, Justice Scalia.

19 QUESTION: Why? I can't understand why somebody
20 who would write a Constitution would think that a
21 punishment is a punishment for one purpose but not
22 another. I mean, if it's punishment enough that you can't
23 make it excessive, why isn't it punishment enough that you
24 shouldn't get it twice? What policy reason is there?

25 MR. DREEBEN: The answer to that question goes

1 in part back to the roots and origins of the Double
2 Jeopardy Clause itself. That clause was an embodiment of
3 common law protections that were accorded to finality in a
4 criminal judgment, and they were accorded to the criminal
5 judgment in very specific contexts that this Court has
6 developed over time in a series of rather intricate and
7 complicated rules.

8 It has never been the case, though, that the
9 pursuit of an in rem action against property and the
10 criminal prosecution of the owner of the property for
11 separate violations would be deemed to constitute an
12 impermissible multiple punishment.

13 QUESTION: But you're saying -- I'm sorry.

14 QUESTION: I say, I suggest that's only because
15 it was never applied to multiple punishments, period, of
16 any sort. I mean, greater includes the lesser, to be
17 sure, but once we are on the track that double punishment,
18 as opposed to double jeopardy, is covered by the Double
19 Jeopardy Clause, I don't see why all punishment deemed
20 punishment by the Constitution shouldn't qualify.

21 MR. DREEBEN: Well, I think the answer, Justice
22 Scalia, is that to the extent that there is protection
23 against multiple punishments that has been recognized in
24 this Court's cases as subsumed by the Fifth Amendment,
25 that protection has been limited and defined in very

1 specific contexts, and has never been a freestanding
2 doctrine that would invalidate any and all simultaneous or
3 contemporaneous pursuit of two actions that had some
4 punitive component to it.

5 And what the courts below did, I think, is take
6 to the absolute logical limits the principle that was in
7 part reflected in Halper, recognizing a prohibition
8 against multiple punishments, and have taken that
9 principle and extended it so that it overrides very
10 familiar common law practices that were well known to the
11 Framers and that have been reflected throughout the
12 history of this country --

13 QUESTION: But isn't the different with, or at
14 least a difficulty with the historical argument that
15 you're making that some of the forfeiture in this case, or
16 in these cases, just do not have common law pedigrees?
17 It's one thing, for example, perhaps to forfeit a vehicle
18 on the theory that it stands in the same, or is in the
19 same position of, you know, the boat that was used for
20 smuggling and so on?

21 It seems to me quite another thing, though, to
22 apply that same rule and to invoke history to apply the
23 same rule when we're talking about the forfeiture of all
24 equity in a house that was used to dry some marijuana, and
25 so I don't see how your historical argument, even if I

1 accepted it, could get you all the way through these
2 cases.

3 MR. DREEBEN: I agree, Justice Souter, that
4 history is not the entire answer to this problem.

5 To take, for example, the issue of proceeds
6 forfeitures, which are authorized under title 21 and were
7 not part of the common law of forfeiture, we are not
8 claiming here that the historical pedigree of forfeiting
9 the proceeds of crimes is what explains why that
10 forfeiture is not punishment.

11 It's our submission that, analyzed as a matter
12 of reason and logic, and in light of the common law
13 principle that unjust enrichment included gaining funds or
14 moneys through illegal means, and that it was not a
15 punishment to take those profits away from the wrongdoer,
16 we --

17 QUESTION: But Mr. Dreeben, if we stick with the
18 house where marijuana was dried, I thought, based on your
19 answer to Justice O'Connor, that you would say that should
20 be treated the way Austin was treated, as an excessive
21 fine case, but doesn't belong -- wasn't that the problem
22 in Austin, that what was --

23 MR. DREEBEN: Right, that's correct. I think in
24 Austin all forfeitures of facilitating property, property
25 that can be used to facilitate or to commit a crime, are

1 subject to analysis under the Excessive Fines Clause
2 because the Court concluded that they represent some
3 punishment to the owner of the property at least in part,
4 but the Court did not conclude that all forfeitures that
5 are accomplished of facilitating property, or all
6 forfeitures that are carried out under these statutes,
7 will be punitive such that that is the only explanation
8 for the sanction, which is the test in Halper.

9 QUESTION: Okay. How about applying the house
10 example, though, as it were, to Justice Scalia's question?
11 I take it we really don't have a historical pedigree that
12 we can rely on there. We don't have an unjust enrichment
13 principle. We've got a kind of forfeiture that goes
14 beyond, I think, what the common law knew.

15 Why, in a case like that, should it be
16 punishment for excessiveness purposes or potentially
17 punishment for excessiveness purposes but not for double
18 jeopardy purposes?

19 MR. DREEBEN: Well, let me first put in the
20 historical context the forfeiture of facilitating property
21 and apply it to the real estate in this case.

22 The common law recognized in a wide variety of
23 contexts the potential for forfeiting property that was
24 used in the commission of a crime, and your example of
25 boats that were used for importing goods without

1 declaration I think is a salient example. There were
2 many, many others.

3 At least since 1868, however, Congress has
4 provided for by statute the forfeiture of real estate that
5 was involved in the commission of crimes particularly with
6 respect to failure to pay tax on liquor.

7 QUESTION: Well, that may be, but that doesn't
8 help you out, I think, in a historical argument, which
9 essentially is they understood at the time these clauses
10 were enacted as part of the original Bill of Rights that
11 there could be both these procedures, the criminal
12 prosecution and the forfeiture.

13 Once you get into sort of later statutory
14 amendments, whether its 1878 or 1978, that argument goes,
15 and it seems to me that's the point at which Justice
16 Scalia's question attains a very sharp focus.

17 MR. DREEBEN: Well, I don't think the argument
18 completely goes, Justice Souter, because the same
19 rationales and justifications for the forfeiture of
20 property that is used to facilitate a crime also are
21 present in the forfeitures of property that were known to
22 the common law, and the fact that the principle is being
23 applied in the new context to respond to new problems that
24 the common law hadn't faced does not mean that it is
25 something that would be unfamiliar to the Framers, and I

1 think that --

2 QUESTION: Mr. Dreeben, what was the basis in
3 the Prohibition era when the distillery was taken? Was
4 that a different kind of -- that was, I think, the most
5 common instance of, you have a prosecution against the
6 manufacturer, a criminal prosecution, and you take the
7 property. Was that under a civil forfeiture, or --

8 MR. DREEBEN: Yes, that was under a civil
9 forfeiture, and what that led to was this Court's decision
10 in Various Items v. United States in 1931, in which the
11 Court examined a claim that's virtually indistinguishable
12 from the claim that's being made here today that the
13 forfeiture of property following a criminal conviction of
14 the owner of property constituted a violation of the
15 Double Jeopardy Clause, and the Court rejected that
16 contention by reference to the very ancient traditions of
17 in rem forfeiture which had been recognized by this Court
18 in a variety of cases such as the Palmyra and the Brig
19 Malek in the 19th Century, that that supported the
20 treatment of such forfeitures as not sufficiently punitive
21 as to trigger the Double Jeopardy --

22 QUESTION: Suppose, Mr. Dreeben -- suppose,
23 Mr. Dreeben, you had a case in which there was a
24 forfeiture against the owner of a property because the
25 property had been used for a drug transaction but the

1 owner was not criminally liable. The owner, say, was
2 culpable in that it knew what was going on, but was not
3 criminally liable.

4 Would the excessive fines analysis of Austin
5 apply in that case?

6 MR. DREEBEN: Yes.

7 QUESTION: Could the owner of the property say,
8 this is excessive because, what, you are punishing the
9 other person --

10 MR. DREEBEN: Well --

11 QUESTION: -- excessively, or you're punishing
12 me excessively compared to what the use of the property
13 was?

14 MR. DREEBEN: This Court has not articulated
15 what the proper test or measure of excessiveness is under
16 the Eighth Amendment. The Government's position is that
17 the proper approach to analyzing that question is as
18 stated in Justice Scalia's concurrence in Austin. Namely,
19 to look at the depth and extensiveness of involvement of
20 the property in the offense.

21 QUESTION: But my question is, do we apply that
22 analysis at all to the owner who's not guilty of a crime
23 but who nevertheless is sufficiently aware of the drug
24 proceeding so that the forfeiture is being permitted --

25 MR. DREEBEN: Yes --

1 QUESTION: -- assuming that culpability is
2 required.

3 MR. DREEBEN: I think that that is the necessary
4 consequence of Austin, that there is Eighth Amendment
5 analysis that can be invoked at the behest of the owner of
6 the property, who is the only one who has any real
7 property stake in the forfeiture itself, and that that
8 person --

9 QUESTION: Even though that owner did not commit
10 any crime at all.

11 MR. DREEBEN: That's correct. That's correct.

12 Well, the purpose of the forfeiture, both
13 historically and as applied today, is in rem. It is an
14 action against the property, and the theory of it is that
15 the property has been used sufficiently substantially in
16 the commission of the offense such that forfeiture is
17 justified for three historical reasons that are equally
18 applicable here.

19 The first is that it does encourage property
20 owners to take care in the use of their property. The
21 second is that the forfeiture can serve to abate a
22 nuisance.

23 If, for example, there is a house being used
24 extensively for the dealing of crack cocaine, the
25 Government can move in and, through civil forfeiture,

1 bring an action against the property and abate that
2 nuisance, and the third goal is to provide indemnity to
3 injured parties. In this case, the injured party through
4 these violations of the law is the Government itself.

5 QUESTION: But of course, the Government can do
6 all of those things consistently with a double jeopardy
7 analysis if it does them, as it were, at the right time,
8 so this is not a case in which you say, well, if you apply
9 the punishment analysis here and say the cause applies,
10 these historical objectives of the Government are
11 precluded, because they're not.

12 MR. DREEBEN: Well, they are in a very practical
13 sense, Justice Souter. Criminal forfeiture is not an
14 adequate substitute for the civil forfeiture remedies that
15 we use, and I would add --

16 QUESTION: No, but you simply have to bring them
17 in a coordinated proceeding.

18 MR. DREEBEN: Well, and I would submit that we
19 have done so in these cases.

20 QUESTION: Well, that may be, but I mean, the
21 only -- my only point is that there -- you don't have here
22 a case in which, if we -- if our position on this point
23 does not prevail, these objectives are in effect
24 precluded, because that -- all I'm saying is, they're not.

25 MR. DREEBEN: Well --

1 QUESTION: But you may have just such a case if,
2 in fact, the Court were to decide that these were not
3 parallel proceedings. If you're ruled against on both
4 points, then I think your point would be taken.

5 MR. DREEBEN: Well, then I think we would have a
6 very, very significant practical problem if we were not
7 permitted to use the alternative remedies, because
8 criminal forfeiture is no substitute for civil forfeiture.

9 QUESTION: It's rather new, isn't it? We
10 haven't had criminal forfeitures.

11 MR. DREEBEN: That's correct. In this country
12 there was no tradition of criminal forfeiture, criminal in
13 personam forfeiture until 1970.

14 The major difference in these kinds of actions
15 is that the in rem action brought civilly is against the
16 property. The Government does not need to know
17 specifically who the owner of it is.

18 QUESTION: Mr. Dreeben, mechanically, how does
19 it work out in the district courts and the U.S. Attorney's
20 Office?

21 I don't know of any proceeding in the United
22 States, although certainly it's common abroad, where a
23 civil claim gets tried together with a -- with a criminal
24 case, even in the division of labor that we now have.

25 Who attends to the forfeiture? Is it the people

1 in the Criminal Division or the Civil Division?

2 MR. DREEBEN: Forfeitures can be handled out of
3 either as an administrative matter, and in some U.S.
4 Attorney's Offices the Criminal Division does it and
5 coordinates it extensively with the criminal case. In
6 other U.S. Attorney's Offices it's handled out of the
7 Civil Division, still with a general view to coordination
8 with the criminal case.

9 QUESTION: Does the DOJ have guidelines for when
10 it will pursue criminal as opposed to civil forfeiture?

11 MR. DREEBEN: We do not. We have extensively
12 been turning to criminal forfeiture in the wake of the
13 decisions in these cases and decisions following them
14 because the double jeopardy problems that have surfaced as
15 a result of these rulings are truly enormous. We --

16 QUESTION: If you wanted to proceed by criminal
17 forfeiture and there were one criminal defendant but two
18 owners of the property, could the -- is there some
19 intervenor procedure where the noncriminal defendant can
20 somehow be involved in the criminal proceeding? I don't
21 see how that would work.

22 MR. DREEBEN: I think it would not work, because
23 when we initiate the civil forfeiture action we bring it
24 against the property.

25 We give notice both to the world and to anyone

1 who we believe is an owner, and those persons can then
2 come into the case and attempt to establish either that we
3 haven't shown probable cause, or that they have an
4 innocent owner defense, but civil forfeiture enables us to
5 move in in situations where we really don't know who the
6 owner is.

7 For example, if we break up a substantial drug
8 ring and we recover numerous bank accounts, cars, nominee
9 securities accounts, other means of transportation that
10 may be titled in nominee's names, we're not entirely sure
11 who all the owners of it are. We can go in, seize the
12 property, initiate an in rem action, give notice to the
13 world, and allow the owners to come in.

14 If we were attempting to use criminal forfeiture
15 for the same purpose, we could have a serious problem when
16 we do not have a good faith basis to go to a grand jury
17 and say, we think that this individual is the owner of the
18 property and that we should include a count in the
19 indictment that would authorize forfeiture of it, so there
20 is a very significant drawback that we have.

21 QUESTION: For criminal forfeiture you have to
22 have an indictment?

23 MR. DREEBEN: Yes. The Federal Rules of
24 Criminal Procedure require that the forfeiture be alleged
25 and set out in the indictment, and this Court discussed in

1 the Libretti case earlier this term some of the
2 requirements that follow from that.

3 But at the end of the day, in an in personam
4 criminal forfeiture, what we are entitled to get is the
5 interest owned by the defendant. We cannot go in and
6 bring, through a criminal action, what is the equivalent
7 of an in rem action to quiet title as against the world,
8 because the owner of the property whose interest can be
9 forfeited is only the defendant himself.

10 So if we do come across, for example, a house
11 that's being extensively used for drug dealing and for
12 traditional remedial aims, we want to go in and shut it
13 down. We can't do that at all through criminal forfeiture
14 in any kind of an expeditious way.

15 Criminal forfeiture helps us largely at the end
16 of the process, when it can truly be imposed as a
17 punishment for punitive purposes, but the in rem tradition
18 has typically been viewed as serving very substantial
19 remedial, legitimate aims of the civil law and it
20 therefore is not sufficiently punitive to be characterized
21 as punishment under --

22 QUESTION: On that reason, what are the aims?
23 The aims in the case of instrumentalities, you forfeit an
24 instrumentality because --

25 MR. DREEBEN: There are three reasons --

1 QUESTION: Yes, well, three, the same three
2 reasons apply for the purposes of criminal punishment. It
3 sounded as if you were talking about deterrence,
4 incapacitation, and then something that you called
5 restitution, but it's a little hard to see how it's
6 restitution when you're giving a house that somebody
7 owned, say to the Government of the United States.

8 The United States never owned that house before,
9 so I suppose that in that case it's just the first two,
10 and those are also aims of criminal punishment.

11 MR. DREEBEN: Well, I don't -- there are
12 purposes that are served by both civil and criminal law,
13 and I don't think that any purposes are --

14 QUESTION: Yes. Yes, of course, that's
15 exactly -- exactly, so that being so, if this looks just
16 like a punishment, taking the person's house away, perhaps
17 for good reason, and what, then, is the reason not to
18 treat it like punishment? Is it -- punishment for double
19 jeopardy purposes. Is it solely historic?

20 MR. DREEBEN: It is not solely --

21 QUESTION: Or is there anything other than
22 historic?

23 MR. DREEBEN: It is not solely historic.

24 QUESTION: I'm not saying just that. I want to
25 know if there's anything other than history.

1 MR. DREEBEN: I think that there is.

2 QUESTION: What?

3 MR. DREEBEN: I think that there is reason
4 itself. The primary aim of the criminal law is to -- is
5 retribution and deterrence. Those are its primary aims.

6 When one speaks about abating a nuisance, that,
7 of course, also can be analogized in some way to
8 incapacitation, but it's really quite different from
9 incapacitation, particularly when the object of the action
10 is property itself that is being misused in a certain
11 fashion.

12 QUESTION: And then that's why we put people in
13 prison, because they're misusing themselves, and so they
14 can't do it again while they're there, and we want people
15 to take good care of the property, so we deter them -- I
16 mean, it sounds awfully similar to me, and also it's so
17 natural to say, taking the house away from the person and
18 giving it to the Government is a punishment, but I don't
19 know that that ends your case, and even if that's so, you
20 have -- and I just want to get out from you all the
21 possible differences. One is --

22 MR. DREEBEN: Well --

23 QUESTION: -- is the purposes. I got that. The
24 other is the history. Is there anything else?

25 MR. DREEBEN: I think that once you are talking

1 about the purposes and the history, and this Court's
2 cases, you are essentially covering the issue, but it's
3 not to be lost sight of that this Court said as recently
4 as the Bennis decision that deterrence is an aim distinct
5 from any punitive purpose, and it has always been true in
6 civil forfeiture law that deterrence has been a recognized
7 purpose and aim.

8 In the Brig Malek decision in 1844, Justice
9 Story, describing the purposes of civil forfeiture, said
10 that it was to suppress a wrong or offense, and to provide
11 indemnity to the injured parties, and those purposes are
12 equally parallel to this case.

13 The Government loses substantial funds both in a
14 sense of investigating and detecting and prosecuting
15 funds, prosecuting crime, that it cannot otherwise recover
16 easily from criminal defendants.

17 QUESTION: Mr. Dreeben --

18 QUESTION: But deterrence is also, you know, the
19 purpose of any punishment. I mean, that doesn't
20 distinguish this from other punishments.

21 MR. DREEBEN: I think that --

22 QUESTION: Almost any punishment I can think of
23 has a deterrence purpose.

24 MR. DREEBEN: Punishment will always have a
25 deterrent purpose, but merely having a deterrent purpose

1 is not sufficient to brand a sanction as punitive for
2 purposes of the Double Jeopardy Clause. anything out of
3 commission QUESTION: Mr. Dreeben, tell me if my fix is seeds
4 this is wrong, but I thought that part of the old idea was
5 not just that you reify the thing, but that you arrest the
6 thing so it's no longer accessible to anybody, and that's
7 the Prohibition era. You stopped the still, the eds of
8 distillery. tivity, and therefore when you take it away

9 that about The criminal process is going to take a long
10 time, but if stopping the still means that you can't go and
11 forward with the criminal prosecution, that certainly
12 changes things, so -- but you didn't mention that as one
13 of the reasons for the forfeiture is to stop the use of
14 the facilities by the person who will then be prosecuted.

15 when he goes MR. DREEBEN: Well, I meant to do that, Justice
16 Ginsburg, in stating that it serves the traditional drug
17 purpose of abating a nuisance, of preventing the ongoing
18 commission of the crime, which is quite similar to what
19 this Court described as the purpose of the forfeitures in
20 Bennis, and was quite similar to the purposes of the
21 forfeitures that were imposed in the common law era, and
22 then later pursuant to statutes in this country. effect, to

23 restore to QUESTION: But of course, that doesn't help you
24 out in a proceeds case, because the Government is going to
25 put the proceeds right back in circulation. is that you are

1 MR. DREEBEN: Well, I -- that's right.

2 QUESTION: You're not putting anything out of
3 commission there. I suppose your argument on the proceeds
4 case -- I didn't mean to get into this, but I suppose your
5 argument in the proceeds case is something akin to
6 contraband that you don't have a right -- no one should be
7 deemed constitutionally to have a right to proceeds of
8 criminal activity, and therefore when you take it away
9 that should not be regarded as punishment.

10 MR. DREEBEN: Exactly right, Justice Souter, and
11 although that had not been traditionally accomplished
12 through forfeiture, it had been traditionally recognized
13 as no issue under the Fourth Amendment whatsoever for the
14 Government to seize the proceeds that a robber derives
15 when he goes into a bank and comes out with money.

16 QUESTION: But that's different from the drug
17 sale proceeds, though, because in the robber case you're
18 going to give the money back to the bank, as Justice
19 Breyer said. You really are engaging in a restitution.

20 MR. DREEBEN: One would hope.

21 QUESTION: Yes, we do hope it gets back there,

22 But I mean, here, there's no way, in effect, to
23 restore the proceeds to individuals. In fact, they were
24 not taken in the -- by -- in any way that bears analogy to
25 the bank. Your argument, as I understand, is that you are

1 restoring the proceeds to society, but that is not like
2 restitution, and I just think the analogy is closer to the
3 contraband than it is to restitution.

4 MR. DREEBEN: I think that both analogies work,
5 although the concept that I was trying to describe is that
6 of simply that depriving the wrongdoer of the ill-gotten
7 gains that he has derived from criminal activity is not
8 punishment. It simply restores the status quo ante of
9 that person had he not engaged in the criminal activity at
10 all.

11 QUESTION: If it's not punishment, then does
12 that mean it's not for an offense?

13 MR. DREEBEN: It could be conceived of as not
14 being for an offense, but I think --

15 QUESTION: Or is the better argument that it's
16 not the same offense?

17 MR. DREEBEN: I think that strictly speaking, as
18 proceeds, the reason why it's not punishment is that the
19 owner of money derived from crime has no right to retain
20 them at all.

21 But it is also our position that, even if one
22 takes this as a straightforward Blockburger case and
23 applies normal double jeopardy rules, that the in rem
24 forfeiture is not the -- it's not an offense at all, and
25 it is not the same offense as the underlying criminal

1 indictment of the owner of the property.

2 I think that's so most simply for the following
3 reason. If in rem forfeiture is conceived of being an
4 offense by a person, it can only be the owner of the
5 property who must be viewed as the nominal defendant.

6 The question, then, that has to be asked is,
7 what do we have to prove in an in rem action in order to
8 sustain our burden of taking the property with respect to
9 that individual, and the answer is nothing. We do not
10 have to prove that that person engaged in a crime or did
11 anything wrong. All we have to do is show that the
12 property was used in the criminal activity.

13 And so to take the facts of this case, where
14 Mr. Ursery and his wife and his son were all
15 coconspirators in manufacturing marijuana, we could have
16 taken the property in our forfeiture action based on his
17 son's activities, without proving anything as to him, and
18 there is therefore no necessary requirement that we prove
19 any culpable action or any state of mind as to the owner
20 of the property in the in rem action.

21 In contrast, that is the whole ball of wax in
22 the criminal case. We must prove that the defendant in
23 the criminal case engaged in the act with the requisite
24 mental state.

25 QUESTION: Mr. Dreeben --

1 QUESTION: So on that line of reasoning, it's
2 not the same offense.

3 MR. DREEBEN: That is correct.

4 QUESTION: Even conceding it's an offense.

5 MR. DREEBEN: That's right.

6 QUESTION: Which you don't concede.

7 MR. DREEBEN: That's right.

8 QUESTION: Mr. Dreeben, isn't the -- I think I
9 follow what you're saying.

10 The difficulty I have with it is that that
11 doesn't seem to be the way the Court analyzed the problem
12 in Brown and Ohio, because in Brown and Ohio, if -- the
13 Court in effect said, well, you look to the way it was
14 proved in this case, and in this case it was the owner of
15 the property, and in fact all of the elements except for
16 the further additional element that is raised by the
17 forfeiture proceedings were shown.

18 If we follow a Brown and Ohio kind of double
19 jeopardy analysis, then I think we have to go the other
20 way.

21 MR. DREEBEN: I think Brown v. Ohio, Justice
22 Souter, really addresses a quite distinct problem.

23 In a Brown v. Ohio situation, the Government is
24 necessarily going to have to prove that the defendant in
25 that case committed some felony which was then aggravated

1 by the death resulting, and as a result the crime is
2 called felony murder.

3 And this Court's holdings is that, even though
4 felony murder subsumes all of the different felonies that
5 that defendant may have committed, it doesn't matter which
6 one the Government proves, it's as if there are as many
7 separate crimes in the criminal code as there are
8 predicate felonies, each one aggravated if death results.

9 Whereas in the civil forfeiture case, we never
10 have any burden of proof with respect to the owner of the
11 property, the person who is supposedly punished by this
12 "offense," and as a result, it seems very strange to say
13 that it is a -- the same violation that would be proved by
14 the Government in a criminal case brought specifically in
15 personam against that defendant.

16 QUESTION: But Mr. Dreeben, isn't that only half
17 of the Blockburger test? The forfeiture does not include
18 an element that's necessary to be proved in the criminal
19 case, but what does the criminal case include -- I mean,
20 but it doesn't work the other way around, does it?

21 MR. DREEBEN: Well, it does, Justice Stevens,
22 because we aren't required to prove that any property was
23 used in a violation in order to obtain a conviction. What
24 we are required to prove is that the defendant did the
25 act. In the forfeiture case --

1 QUESTION: Where the act involves the use of
2 property.

3 MR. DREEBEN: No, the act does not necessarily
4 involve the use of --

5 QUESTION: No, it involves the possession of the
6 drugs, or possession of proceeds, whatever the case may
7 be.

8 MR. DREEBEN: Well, I --

9 QUESTION: The money that is laundered, or
10 whatever the case may be. You can't prove an offense
11 without proving some sort of possession.

12 MR. DREEBEN: No, I think that you can --

13 QUESTION: But you're saying that you don't have
14 to prove that the act was committed on a particular piece
15 of property.

16 MR. DREEBEN: We don't have to prove any
17 particular piece of property, and in fact, ironically
18 enough, in this very case Urser's criminal conviction
19 arose out of his manufacture of marijuana on somebody
20 else's property, and thus, even looking at the question of
21 whether the same offense exists on the very facts of the
22 case, the civil forfeiture in this case and the criminal
23 violation were not the same offense.

24 QUESTION: No, but the basis for your forfeiture
25 of the house was that he was in fact using the house, his

1 own property, in drying the marijuana. You're --

2 MR. DREEBEN: That is the basis of the
3 forfeiture.

4 QUESTION: Neither the forfeiture nor the
5 criminal offense had anything to do with the fact that the
6 marijuana was being grown across the property line.

7 MR. DREEBEN: No, the criminal offense had
8 everything to do with the fact that the marijuana was
9 being grown on somebody else's property.

10 QUESTION: Why?

11 MR. DREEBEN: That was the basis of the criminal
12 case.

13 The civil case had to do with the property's
14 use --

15 QUESTION: You mean there was a separate offense
16 of growing marijuana on someone else's property?

17 MR. DREEBEN: Yes, and that is exactly what the
18 indictment charged.

19 QUESTION: Literally, there is? I didn't
20 realize that.

21 MR. DREEBEN: Well, the --

22 QUESTION: Mr. Dreeben, I thought you were
23 indicting him criminally for only part of the conduct that
24 was involved in the forfeiture. That's what I understood.

25 MR. DREEBEN: I think that's exactly correct,

1 Justice Ginsburg.

2 That's simply on the facts of this very case,
3 but I think that it does illustrate that in the criminal
4 case we do not need to prove anything about his ownership
5 of property, or his use of any particular property, and I
6 think the Blockburger point is even more clear in the
7 proceeds cases, because in those cases we're required to
8 show that the defendants conspired to or did engage in
9 substantive drug violations, but we're not required to
10 show how much money they made, what property they used in
11 those violations, or anything else, and the moneys --

12 QUESTION: The money laundering case, however,
13 even on your analysis, that would be different.

14 MR. DREEBEN: A money laundering case would be
15 different to that extent, yes, but it would still not be
16 the same offense as the forfeiture offense for the reasons
17 that I've described.

18 QUESTION: Manufacturing?

19 MR. DREEBEN: Excuse me?

20 QUESTION: Manufacturing? Suppose the crime is
21 manufacturing. You'd not have to show what he used to
22 manufacture?

23 MR. DREEBEN: No, and you don't have to show
24 that he used any particular property, or that he owned the
25 property that was involved in the offense.

1 The more fundamental reason why we think that it
2 is inappropriate to regard the forfeiture as a greater
3 offense which can preclude a subsequent criminal
4 prosecution is that that turns the entire notion of what a
5 greater offense is on its head.

6 Normally, when the Government brings a criminal
7 charge for a greater offense and fails to prove the
8 additional element that makes it a greater offense, the
9 court can reduce a conviction to the crime of the lesser
10 offense, or the jury could be instructed to return a
11 verdict on the lesser offense.

12 That plainly cannot happen in any case in which
13 the Government brings a civil in rem forfeiture action,
14 and it underscores the oddity of characterizing civil
15 forfeiture as a greater offense that can have this very
16 dramatic consequence of barring any criminal prosecution
17 of the property's owner based on the same underlying
18 facts.

19 And finally, I would like to return again to the
20 fact that we do also argue that the two proceedings that
21 were brought in each of the cases before the Court were
22 sufficiently contemporaneous so that they should not be
23 viewed as successive proceedings that invaded any
24 legitimate expectation of finality that the defendants in
25 these cases have.

1 When this Court in Halper prescribed a new rule
2 that had not really been recognized in any prior case law
3 that forbid multiple punishments from being pursued in
4 separate proceedings by the Government, it explained that
5 the reason why two proceedings is important is that it was
6 to prevent the Government from seeking the second sanction
7 because it was dissatisfied with the outcome of the first.

8 That cannot be said of any of the proceedings in
9 these cases. The Government in the 405 case out of the
10 Ninth Circuit brought the criminal indictment and the
11 civil forfeiture complaint within 5 days of each other.
12 It brought the civil forfeiture complaint in the Sixth
13 Circuit case within 4 months of the criminal prosecution,
14 and the civil forfeiture action was settled by Mr. Ursery
15 before he went to trial on the criminal offense.

16 The Government clearly had made evident its
17 intent to seek both of these familiar, traditional,
18 parallel remedies against the defendants from the very
19 outset of these proceedings, and the defendants never
20 could have had any expectation that they would not be
21 subject to the full range of authorized sanctions that
22 were provided in Federal law.

23 QUESTION: What about the argument that the
24 other side made that if that is a sound argument you could
25 make the same argument with respect to two parallel

1 criminal prosecutions?

2 MR. DREEBEN: In a criminal case what would
3 emerge to prevent that is the protection against
4 successive prosecutions. The Government cannot, once
5 jeopardy has attached in a case, pursue a separate
6 criminal offense based on the same underlying offense
7 against the defendant, because the rule of successive
8 prosecutions would prevent that, and I think that that
9 underscores that what the respondent --

10 QUESTION: That assumes that in the civil case
11 there isn't a successive prosecution within the meaning of
12 those terms --

13 MR. DREEBEN: That's correct.

14 QUESTION: -- because it's not punitive.

15 MR. DREEBEN: That -- no, I think it assumes
16 that because the successive prosecutions rule has always
17 been limited to two criminal cases, and what the
18 respondents --

19 QUESTION: That gets us right back to Justice
20 Scalia's question. Where is the principle of coherence in
21 saying that, number 1, there is punishment for purposes of
22 one clause but not of another? Translated into this
23 particular instance, where is the coherence of saying that
24 something, the object of which is punishment, is criminal
25 for one purpose but not for the other?

1 MR. DREEBEN: Justice Souter, the Court's
2 conclusion in Austin that civil forfeiture was
3 sufficiently punitive to be judged under the Eighth
4 Amendment specifically and explicitly recognized that
5 civil forfeiture was not and never had been recognized as
6 a criminal proceeding.

7 If it was, we would have a very serious double
8 jeopardy problem, but it would have been one that the
9 Framers themselves had dictated in statutes that were
10 enacted shortly after the Constitution and shortly after
11 the Bill of Rights, and that had escaped everyone's notion
12 for 200 years until United States v. Halper came down.

13 QUESTION: But doesn't that leave us -- I mean,
14 Halper has come down, and doesn't it leave us, on your
15 reasoning, in a position of incoherence, of saying, on the
16 other hand, yes, it is punitive, but not for purposes of
17 defining the prosecution or the action in which it is
18 going to be enforced as a criminal action?

19 MR. DREEBEN: I think that Halper does --

20 QUESTION: That strikes me as just
21 intellectually incoherent.

22 MR. DREEBEN: Halper does produce a variety of
23 very strange results, and that is why this Court should --

24 QUESTION: But wasn't it itself a hybrid? The
25 Court didn't say this is a criminal proceeding. It says,

1 this is in part civil. It's only to the extent that it
2 was too much.

3 MR. DREEBEN: That is correct, and it did that
4 in the context --

5 QUESTION: But we're talking about the extent to
6 which it is too much.

7 MR. DREEBEN: I think that the question in
8 Halper was to specifically note it as a rule for the rare
9 case. What the courts below have done is transform it to
10 a rule for the general case.

11 If I could reserve the remainder of my time --

12 QUESTION: Very well, Mr. Dreeben.

13 Mr. Finer, we'll hear from you.

14 ORAL ARGUMENT OF JEFFRY K. FINER

15 ON BEHALF OF THE RESPONDENTS \$405,089.23, ET AL.

16 MR. FINER: Mr. Chief Justice, and may it please
17 the Court:

18 Two decades ago Congress passed really what was
19 the first ever proceeds forfeiture statute, and before
20 this time, forfeitures were handled either against
21 contraband in a remedial fashion because the item was
22 either inherently dangerous or its use was criminal in and
23 of itself, or the forfeitures were against property used
24 to facilitate a crime.

25 The proceeds statute, the new one, takes the

1 money that's either used for an illegal transaction and
2 gained from its transaction or money that's merely
3 intended to be used for the transaction.

4 Nevertheless, there are similarities, and I
5 wanted to start with those. Like the predecessor
6 forfeiture statutes, the 1978 proceeds statute was labeled
7 civil, and it invoked a fiction of in rem jurisdiction,
8 and this Court has provided us with clear direction in the
9 last decade what we do with those labels and what we do
10 with those fictions. We look at underlying --

11 QUESTION: Mr. Finer --

12 MR. FINER: Yes.

13 QUESTION: -- the Government argues here and it
14 argued in its brief that our 1931 decision in Various
15 Items is controlling. You do not even mention that case
16 in your brief, and I don't believe your colleague does,
17 either.

18 MR. FINER: That's correct. The 1931 --

19 QUESTION: Would you tell me why?

20 MR. FINER: Yes, I can. The Government argued
21 just moments ago at the podium that the decision in the
22 1931 case was that the forfeiture was so -- was not so
23 punitive as to invoke double jeopardy, and that is not the
24 holding of Various Items.

25 Various Items got to the actual point that the

1 Court was at when it reached Halper, but Various Items
2 stopped, Justice Sutherland stopped and said, but this
3 penalty, this punishment is in rem, and I point out to the
4 Court, in Various Items, the Court in 1931 had no problem
5 saying this tack -- excuse me, this still, the taking of
6 it, had punitive aspects, but it was in rem, and on that
7 label the Court stopped.

8 The modern Court --

9 QUESTION: A civil forfeiture --

10 MR. FINER: Civil forfeiture.

11 QUESTION: -- just like the Government has
12 brought here.

13 MR. FINER: Oh, I do not disagree that they are
14 remarkably analogous cases.

15 QUESTION: But then, why didn't you mention it
16 in your brief?

17 MR. FINER: In part because the modern test does
18 not even address the labels, Your Honor. The test devised
19 by this Court in two unanimous decisions --

20 QUESTION: Well, but Various Items was a
21 unanimous decision, too, and neither Halper nor Austin
22 made any reference to it with a sense of overruling it.

23 MR. FINER: That's correct, and in fact did not
24 seem to use it for support, either, and so we see no
25 support for the argument either way.

1 If any case is undermined in the modern
2 jurisprudence, if any single case can be undermined, I
3 would concede it is Various Items, but that issue has been
4 dealt with clearly in Halper by rejecting the labels
5 jurisprudence.

6 QUESTION: Mr. Finer, the decision that you're
7 defending started out on a very candid note. It said, 10
8 years ago the law was clear civil forfeiture was not
9 punishment for double jeopardy purposes. Do you agree
10 with Judge Reinhardt as to that?

11 MR. FINER: I agree that civil forfeiture was
12 not. I do agree with that. Other types of penalties had
13 been addressed by this Court and deemed --

14 QUESTION: But all of these things are called
15 civil forfeitures.

16 MR. FINER: That's correct.

17 QUESTION: Halper was called that. Austin was
18 called that.

19 MR. FINER: I agree.

20 QUESTION: Various Items dealt with
21 instrumentalities. I take it Halper did not deal with
22 instrumentalities, or proceeds.

23 MR. FINER: That is correct.

24 QUESTION: Well, does that matter, because
25 traditionally, I take it the Government traditionally, the

1 civil forfeiture has been against proceeds or
2 instrumentalities, and does that fact mean that we
3 shouldn't take Halperin as really undermining Various
4 Items?

5 MR. FINER: Well, let me correct that.
6 Traditionally, civil forfeiture has not been used against
7 proceeds. The only thing even remotely close to it have
8 been the --

9 QUESTION: Instrumentalities.

10 MR. FINER: The instrumentalities. There have
11 been cases applying a tax, in effect. In fact, the case
12 decided the same day as Various Items, which is LaFranca,
13 was a fixed tax which the Court quickly said, this may be
14 called a tax, but the label's not important, it is a
15 penalty.

16 QUESTION: My thought is, if the Government's
17 claim is primarily historical, and also based on precedent
18 and history, then we look to the later cases and we'll
19 have to say, are they consistent or inconsistent, and then
20 I suddenly did notice, and don't know what to make of it,
21 that the Halperin, et cetera, is not -- is not the
22 historical context. It was a civil remedy against some
23 fraud.

24 MR. FINER: That's correct, in 18 --

25 QUESTION: Right, and so I wonder what to make

1 of that, in your opinion.

2 MR. FINER: I think what we make of that is,
3 when we have a statute such as the one used in Halper,
4 which was the False Claim Act, that dates from roughly
5 1863, a Civil War era action to deter and punish those who
6 might excessively defraud the Government, and in that case
7 the Court did not have a historical precedent to look at.

8 This was not historical forfeiture. This was a
9 brand new statute, and in that setting, Justice, the Court
10 applied the analysis that I would urge it to apply today,
11 the one applied unanimously in 1989, and that is, first
12 look, what was the historical setting? Forfeitures in the
13 historical setting have been to punish.

14 That's the first step, but it's not the last
15 one. The next step is, well, historically punishing,
16 what's this one for, and Halper and Austin together show
17 us the next line of inquiry. Is it tied to the commission
18 of an offense? Well, it is.

19 QUESTION: Mr. Finer, I don't quite grasp that,
20 because the flavor of the two cases seems to be remarkably
21 different. Halper says this is a rule for the
22 extraordinary case, for the rare case.

23 MR. FINER: Yes.

24 QUESTION: For the one of a kind.

25 MR. FINER: Yes.

1 QUESTION: And then Austin seems to be a rule
2 for every case.

3 MR. FINER: And yet they are entirely
4 harmonious, for this reason. In Halper, the Court was not
5 dealing with a historical punitive statute. The False
6 Claims Act was historically remedial, and so there is a
7 test for that circumstance. When it is historically
8 remedial, you go to Halper.

9 The rare case may be so disproportionate as to
10 be a punishment, but in the modern case of forfeiture, we
11 know that it is not inherently remedial. It springs from
12 a root that has been punishment for at least the last 200
13 years.

14 QUESTION: Well, certainly in Bennis we said
15 that there can be a deterrent or a remedial purpose.

16 MR. FINER: Yes, and in Bennis the deterrence --
17 the language is very interesting, because clearly there
18 are different types of deterrence. There is general and
19 specific, and the Court --

20 QUESTION: Why do you say there's general and
21 specific deterrence? We certainly never said that in
22 Bennis.

23 MR. FINER: You -- that -- those words are not
24 used, and yet the flavor of deterrence that's described in
25 Bennis, the remedial form, makes sense only if that

1 decision is made, and for this reason: deterrence is a
2 forward-looking concept. There's no sense of deterring
3 what's already occurred.

4 One deters future conduct, and in that sense
5 deterrence is a remediation, it's to prevent a future
6 matter, but deterrence in the specific sense, Chief
7 Justice Rehnquist, is to aim at the one who has violated,
8 and it has a backward component. It has a component --

9 QUESTION: Well, you can't deter him in the
10 sense you used in the first -- putting a person in jail
11 may deter him in the future, but it doesn't do anything
12 about his past conduct.

13 MR. FINER: No, and because it does not do
14 anything about its past, the special deterrence case is
15 punitive, and that's why deterrence comes up in the cases.

16 QUESTION: Well, but that simply isn't what
17 Bennis said.

18 MR. FINER: That's true.

19 QUESTION: And I think your extrapolation out of
20 it -- is it based on some case that we have decided?

21 MR. FINER: No. I'm trying to harmonize the
22 language in Bennis about deterrence with this Court's
23 language in other cases which were unanimously decided, in
24 which the term punishment has been described --

25 QUESTION: What are those cases?

1 MR. FINER: Well, Austin, for instance.

2 QUESTION: Well, Austin wasn't unanimously
3 decided.

4 MR. FINER: That -- no, I beg your pardon, Chief
5 Justice. In which the term deterrence has been linked
6 inexorably in instance after instance with the concept of
7 retribution, and those two concepts are the definition of
8 punishment.

9 QUESTION: Mr. Finer, with respect to Bennis, it
10 seems to me that your argument goes this way. The car was
11 forfeited. Then John Bennis was prosecuted. He should
12 have moved to dismiss on double jeopardy grounds, and he
13 would have been successful under your argument.

14 MR. FINER: I'm not clear he would have been --

15

16 QUESTION: Why not?

17 MR. FINER: -- and for this reason. In -- this
18 Court in the Bennis decision made a point of adopting the
19 State's highest court's determinations.

20 What was the character of that statute? Now,
21 the statute that took the car was considered as an
22 abatement, an equitable statute, and when that's the case,
23 well, that Court has ruled.

24 This Court has said, at least as to 881(a)(4)
25 and (a)(7), that we're dealing with punishments and, in

1 fact, forfeitures are dealing with -- dealt with --

2 QUESTION: Then there's a question of what label
3 you put on it?

4 MR. FINER: No --

5 QUESTION: It seems to me taking that car was
6 not so different from taking one Plymouth whatever, or one
7 Ford Victoria.

8 MR. FINER: I completely agree, and from the
9 subjective standpoint it feels the same, I'm sure.
10 However, the authorizing statute springs from a
11 congressional purpose, and it springs from a particular
12 history.

13 Now, in Michigan the purpose was an abatement,
14 and that is remedial, and I have no qualm with that.

15 QUESTION: If you had a forfeiture under the
16 Federal statutes of an automobile and the judge gave some
17 erroneous instructions, could the Government appeal if it
18 lost in the case?

19 MR. FINER: I'm not clear. Instructions in the
20 forfeiture case?

21 QUESTION: Yes. The Government --

22 MR. FINER: Ah.

23 QUESTION: I take it a forfeiture case is tried
24 by a jury --

25 MR. FINER: Yes.

1 QUESTION: -- a civil forfeiture case?

2 MR. FINER: Yes. I understand the question.

3 Would the Government have a right of appeal, or would the
4 jury's verdict be sacrosanct against even --

5 QUESTION: Yes.

6 MR. FINER: -- court error? An interesting
7 hypothetical, and I think the question would be the
8 Government could, because this is not the case where we
9 are arguing that Sixth Amendment essential criminal
10 properties, or essential criminal protections apply.

11 We're not suggesting that the Kennedy-Ward
12 pervasively penal test applies here, and consequently --

13 QUESTION: But that's the next logical step. I
14 mean, if you move in the direction of saying that every
15 civil forfeiture, every so-called civil forfeiture is, in
16 fact, punitive, the next step is to apply the proof beyond
17 a reasonable doubt and the other requirements for
18 prosecuting criminal actions?

19 QUESTION: And in fact, in the case I put to you
20 it is really a double jeopardy concept.

21 MR. FINER: Yes, where you could not be tried
22 again after the jury's acquittal.

23 QUESTION: Yes.

24 QUESTION: Nor can the Government appeal from a
25 jury's acquittal in a criminal case.

1 MR. FINER: I quite understand.

2 QUESTION: So why do you say it could appeal in
3 a civil forfeiture case?

4 MR. FINER: If it were taken as a double
5 jeopardy analysis, and if I understand the Justice's
6 question at this stage, Justice Kennedy, I would change
7 the answer, and it's not a hypothetical --

8 QUESTION: No, no --

9 MR. FINER: -- and I have to agree.

10 QUESTION: -- it's a civil forfeiture
11 proceeding.

12 MR. FINER: Right.

13 QUESTION: But I think it follows from your
14 argument that the Government could not appeal.

15 MR. FINER: If we agree that the error by the
16 trial court presents a second jeopardy, then I do agree,
17 and the test we have used in preparing --

18 QUESTION: Has that ever been held in any case
19 in the --

20 MR. FINER: In a civil case?

21 QUESTION: Yes.

22 MR. FINER: I'm not aware of any case that so
23 holds.

24 There have been civil sanctions throughout this
25 Court's history that are held to be penalties and held to

1 invoke the Double Jeopardy Clause, but I've not seen the
2 circumstance you've described.

3 QUESTION: So what, then, is the harm? I'm
4 finding -- what I find difficult is, I understand how one
5 might label this punishment, fine, but I'm not certain
6 that's conclusive. :

7 What's the actual harm caused to individuals if
8 the Court were to continue in the case of
9 instrumentalities and proceeds to follow or to permit
10 under the Constitution a basically civil approach?

11 After all, you don't object to having this
12 proceeding taking place quite near the time -- does it
13 have to be in the same courtroom? Can it be that
14 afternoon? I mean, what's the difference to an
15 individual, as long as it's basically a single model,
16 whether it's that afternoon, or 3 weeks later, or the day
17 before?

18 What's the basic harm that you're worried about?

19 MR. FINER: It goes to the actual harm that the
20 text of the clause is intended to protect.

21 QUESTION: When you are twice, in some parallel
22 or serial fashion, put in, some way, a separate
23 proceeding, when you're twice put in jeopardy of some
24 punishment --

25 MR. FINER: Let me take it as a practical

1 matter.

2 QUESTION: Yes, but you are -- that's my point.
3 You are twice put in jeopardy. The main trial's in the
4 morning, the civil forfeiture is in the afternoon. That's
5 twice, and you don't object to that, and so why does it
6 matter if, instead of it being the proceeding that
7 afternoon, the proceeding was held 3 weeks later, or
8 6 weeks later, or 2 days earlier?

9 MR. FINER: Justice Breyer, I'm not sure I would
10 object if they were separate cases, whether they were --

11 QUESTION: Oh, so now it all has to be in the
12 single case, and they have to have -- in other words, it
13 just has to be in front of the same judge, you're saying.

14 MR. FINER: I'm not even sure the test is
15 whether it's the same judge, but let me provide what I
16 think the test is.

17 QUESTION: What.

18 MR. FINER: The test seems to be a single
19 verdict test. If you're going to put my client through
20 two verdicts -- two factfinders or not, if you're going to
21 force my client to two verdicts, and in the preparation
22 for the two verdicts, in one case you take all his
23 property, which is what was done to my clients, and you do
24 not provide counsel for that --

25 QUESTION: We don't even have that rule in

1 respect to sentencing. The sentencing process takes place
2 after the verdict is in. think we do, and for this reason.

3 MR. FINER: Quite right. as an element that the

4 other one QUESTION: Yes.

5 MR. FINER: From a single verdict. From a
6 single verdict. test, and we would prov: the analysis

7 that's ev But in this case, what the Government is doing,
8 and has done to my clients and many like them, is put them
9 to jeopardy in two verdicts. If it were a single verdict,
10 and Your Honor, it is -- Justice Breyer, it is a single
11 verdict when you go to court in a criminal forfeiture
12 proceeding, which frankly feels pretty rough to my
13 clients, but it's not the same. of all their property for

14 the exact QUESTION: Well, it -- actually, the sentencing
15 often involves issues of great significance that were not
16 present in the liability phase. n't necessary to prove that

17 offense to MR. FINER: Absolutely, and in fraud cases, for
18 instance, you don't even get to the fine part of the fraud
19 case. You don't even have evidence, necessarily, of the
20 actual losses until after the verdict, and so I agree,
21 there is an analogy, but what's different here is, there
22 are going to be two verdicts unless you capitulate.

23 QUESTION: Mr. Finer, what --

24 QUESTION: With the same elements? With the
25 same elements? Do you need the same elements in each

1 case?

2 MR. FINER: We think we do, and for this reason.

3 QUESTION: Neither one has an element that the
4 other one doesn't?

5 MR. FINER: Well, yes. We think it does under
6 the Blockburger test, and we would provide the analysis
7 that's even more fundamental than Blockburger.

8 Let me illustrate it with what occurred in this
9 case, although I would say it may be generalized to many
10 cases just like it.

11 My clients were serving a life sentence for
12 conspiracy to manufacture methamphetamine, and they
13 were -- they suffered forfeiture of all their property for
14 the exact same activity, the same offense, the conspiracy
15 to --

16 QUESTION: But it wasn't necessary to prove that
17 offense to get the forfeiture. You could have proved any
18 offense to get the forfeiture.

19 MR. FINER: It may have --

20 QUESTION: Using Blockburger correctly,
21 Blockburger requires that the charge be a charge which
22 would require the same offense.

23 MR. FINER: Yes --

24 QUESTION: Not simply that factually it happened
25 to be the same one.

1 example - MR. FINER: I quite agree. When, in
2 Blockburger, you are comparing two different offenses,
3 then you compare their elements to see if they are
4 functionally the same, or lesser included.

5 QUESTION: Right.

6 MR. FINER: But in Blockburger you have to have
7 two offenses. We don't have two offenses.

8 QUESTION: That's right, and just as in the
9 Double Jeopardy Clause you don't have any mention of
10 punishment.

11 MR. FINER: Well --

12 QUESTION: You started to talk about the text of
13 the Double Jeopardy Clause. That's why we've been led
14 into this difficulty. You're bringing in two cases in
15 which you are not put in jeopardy for the same thing, not
16 in the sense of Blockburger, but you're just saying you
17 can't be punished twice.

18 MR. FINER: To the extent that your question,
19 Justice Scalia, is whether there is a risk of conviction,
20 that's correct.

21 However, in Ex Parte Lange, and as recently as 2
22 weeks ago in Rutledge, it is not whether there is a
23 conviction question -- the \$50 assessment fine in Rutledge
24 was a punishment, and it --

25 QUESTION: Mr. Finer, can I give you a specific

1 example --MR. FINER: Because it's a disgorgement of a
2 profit in MR. FINER: Please. is not what the --

3 QUESTION: It was one that Justice Scalia
4 suggested in his Kurth Ranch defense -- dissent.

5 A broker commits violations of the law, and he's
6 first administratively sanctioned with a fine, and his
7 license is suspended, or he's told he can never be a
8 commodities broker again. ve you a case of -- which is not
9 unusual. Then there's a criminal prosecution against him
10 for the identical conduct. Under your reasoning, I take
11 it that the criminal prosecution can't get brought, or it
12 can? is meant to be punishing.

13 MR. FINER: It can, Your Honor, because I would
14 add -- QUESTION: But it's in a civil setting. Then,

15 prosecuted QUESTION: Because the first one is not penal?

16 MR. FINER: It would not be, because it would be
17 seen as remedial. It would be the Halper rare case model.
18 You would only ask, was the fine excessive?

19 The analogy to our case would be some fine or
20 penalty that was traditionally, and as a practical matter,
21 as Congress intended it now -- text of the clause, while

22 it does not QUESTION: Why would it be seen as remedial? limb

23 phrase has MR. FINER: It's a -- to mean a punishment, and

24 the jeopard QUESTION: Because that gives you the right
25 answer? And so in your hypothetical, Justice Ginsburg,

1 MR. FINER: Because it's a disgorgement of a
2 profit in that setting, which is not what the --

3 QUESTION: No, it's a fine.

4 QUESTION: No.

5 QUESTION: It's an administrative sanction.

6 It's a fine.

7 MR. FINER: All right.

8 QUESTION: I gave you a case of -- which is not
9 unusual. Somebody is --

10 MR. FINER: I misunderstood.

11 QUESTION: Is both disbarred and fined, and the
12 fine is meant to be punishing.

13 MR. FINER: I understand.

14 QUESTION: But it's in a civil setting. Then,
15 prosecuted for the securities fraud or whatever.

16 MR. FINER: I would agree, then, the subsequent
17 prosecution for the same offense would be barred.

18 QUESTION: On the --

19 MR. FINER: It would be a punishment, and a
20 second punishment, or rather the jeopardy of the second
21 punishment, yes, and under the text of the clause, while
22 it does not say punishment in its terms, the life and limb
23 phrase has been long understood to mean a punishment, and
24 the jeopardy part refers to risk.

25 And so in your hypothetical, Justice Ginsburg,

1 yes, the fine, if it's punishment followed by a attempt to
2 prosecute --

3 QUESTION: Well, the fine doesn't have -- come
4 self-identifying. We have to put a label on it, and it is
5 meant not to return money to a specific pocket --

6 MR. FINER: So it's --

7 QUESTION: -- but it's a fine if you did
8 something bad.

9 MR. FINER: It would not be a label, it would be
10 an analysis that leads to a conclusion. The analysis is
11 Austin. What's its historical basis? Is it any
12 different --

13 QUESTION: Austin is one case.

14 MR. FINER: Yes.

15 QUESTION: What I -- the example that I brought
16 up, which is not original, is something that I think is
17 pervasive in our system.

18 MR. FINER: I understand --

19 QUESTION: We have an administrative agency that
20 licenses and sanctions, and then you can have a criminal
21 prosecution for the identical conduct.

22 MR. FINER: I agree, and I would use the
23 analysis from that one case, Austin, because the analysis
24 is very workable.

25 You first look historically, was it historically

1 used as a sanction -- may I finish?

2 QUESTION: No. Your time has expired.

3 Mr. Robbins, we'll hear from you.

4 ORAL ARGUMENT OF LAWRENCE S. ROBBINS

5 ON BEHALF OF THE RESPONDENT URSERY

6 MR. ROBBINS: Thank you, Mr. Chief Justice, and
7 may it please the Court:

8 In 1991 and 1992, Guy Jerome Ursery maintained
9 six plots of marijuana plants about 250 to 150 feet
10 outside the premises of his property, a 10-acre home in
11 rural Michigan.

12 He harvested the plants, processed them, and
13 apparently smoked them in his house, and that was his
14 offense, and for that offense of manufacturing
15 marijuana -- which, by the way, does not turn on whether
16 it was on another piece of property. You can take a look
17 at title 21 and you will find that it does not turn in the
18 slightest on the fact that it was on another piece of
19 property.

20 For that offense, he was first subjected to a
21 forfeiture of half the equity in his property under
22 881(a)(7), the very statute this Court construed in
23 Austin, which permits the forfeiture of property used to
24 commit a narcotics felony.

25 And as the parties were readying themselves for

1 trial in the civil forfeiture, he was then indicted in a
2 single count prosecution, which again charged the
3 manufacture of marijuana, precisely the predicate in the
4 881(a)(7) forfeiture. This time he was convicted and
5 sentenced to 63 months in jail.

6 The Sixth Circuit held that the civil forfeiture
7 under 881(a)(7) was punishment, the prosecution was a
8 second punishment, and it was for the same offense and in
9 a separate proceeding, and accordingly was barred by the
10 Double Jeopardy Clause and, in our view, each and every
11 step of that analysis is not only correct, but squarely
12 controlled by this Court's cases.

13 QUESTION: Well, you, like Mr. Finer, didn't
14 mention Various Items in your brief, Mr. Robbins.

15 MR. ROBBINS: Well, I think with all respect,
16 Mr. Chief Justice, I believe Various Items is self-
17 distinguishing.

18 QUESTION: Well, but ordinarily we expect
19 counsel, when there's a case that is called to their
20 attention that bears on it, and particularly -- to deal
21 with it in some way.

22 MR. ROBBINS: Well, again, Mr. Chief Justice,
23 I'm happy --

24 QUESTION: You felt it was just so far wide of
25 the mark that it didn't even deserve any mention?

1 MR. ROBBINS: Well, if I may, Your Honor, my
2 view is that a reading of the case makes clear why it
3 doesn't control and, indeed, has made clear to this Court
4 why it didn't control in the cases that this Court has
5 looked at since that case was decided, and after all,
6 there were a great many cases cited in the Government's
7 59-page brief. We deal with as many as we thought were
8 most germane, but --

9 QUESTION: In what cases subsequent that have
10 distinguished Various Items would you -- are you referring
11 to?

12 MR. ROBBINS: Well, no, I think quite the
13 contrary. I don't think this Court has had occasion to
14 revisit Various Items and tell us whether it's
15 distinguishable or it's not, but I'm prepared to do so,
16 because it seems to me that what Various Items tells us is
17 that where a forfeiture, as in Various Items, does not
18 turn in the slightest on the innocence of the owner of the
19 property, then, in that event, it's a civil forfeiture
20 which cannot -- to which one cannot ascribe a punitive
21 dimension.

22 But of course, my statute, 881(a)(7), has an
23 explicit exception for innocent owners which is, of
24 course, the very distinction that this Court in 92 Buena
25 Vista Avenue said makes this statute different from the

1 historical forfeitures, including the one that was at
2 issue in Various Items, the very fact that persuaded this
3 Court in Austin to say that 881(a)(7) is punishment for
4 purposes of the Eighth Amendment, something which at
5 common law I think would have been as surprising to the
6 Framers as some of the hypotheticals suggested by the
7 Government.

8 QUESTION: Are you suggesting that Various
9 Items, if only it had had an innocent owner exception,
10 would have come out differently?

11 MR. ROBBINS: No, I --

12 QUESTION: Then it would have been double
13 jeopardy?

14 MR. ROBBINS: Well, let me say that's not the
15 only distinction. I think that's one important
16 distinction, one that this Court has pointed to in
17 several -- in a couple of its recent cases, but I also
18 think this --

19 QUESTION: So you have to be really old-
20 fashioned, and then you escape the double jeopardy
21 problem, but once you put in an innocent owner exception,
22 then you are in this bind where the forfeiture proceeding
23 will mean you can't bring the criminal action?

24 MR. ROBBINS: Well, no, actually Justice
25 Ginsburg, I don't think that's the complete answer.

1 QUESTION: Well, you said that putting in the
2 innocent owner exception types that statute as punishment
3 in a way it wouldn't if you just take it away from any old
4 person, innocent or not.

5 MR. ROBBINS: Well, surely that is a point of
6 distinction. I -- by no means, however, is that the only
7 thing that makes this statute punitive. Indeed, it was
8 not -- it was only one of several factors that the Austin
9 court, in a portion of its opinion that wasn't fact-
10 unanimous, concluded turned 881(a)(7), my statute, the
11 statute under which Mr. Urser's property was forfeited,
12 into punitive -- into a punitive sanction.

13 But apart from that, I think it's also the case,
14 Justice Ginsburg, if I may, that Various Items was decided
15 in an era in which the fiction of in rem proceedings was
16 taken, if I may say so, more seriously, and given a sort
17 of -- a treatment that sort of abstracted away from the
18 fact that there is a real person whose property is being
19 taken, and I think frankly Various Items might not come
20 out the same way if viewed in the light of certain of this
21 Court's decisions since then that have said --

22 QUESTION: Like Bennis?

23 MR. ROBBINS: Well, you know, I think, if I may,
24 I don't think Bennis really turns on the same fact -- you
25 know, the same issues that are at stake here. To me,

1 Bennis is a question of whether the Due Process Clause
2 requires, as a substantive matter, that an owner of
3 property have an innocent owner defense, and the Court,
4 you know, hearkening back to the long line of cases, said
5 that it's not required, but when it's present, surely
6 that's some indication that you have a punitive sanction.

7 QUESTION: That seems to me very strange that
8 you would say that a statute that is trying to be modern
9 have an innocent owner exception gets you into the double
10 jeopardy bind, but if it's like the Bennis statute that
11 didn't give you that exception, then you're -- then the
12 Government is okay.

13 MR. ROBBINS: Well, again, let me say, I am by
14 no means suggesting that that is the only feature -- what

15 QUESTION: And the other --

16 MR. ROBBINS: -- in the statute that --

17 QUESTION: In answer to Justice Ginsburg, what
18 the other being -- look, the QED analysis, formal (7) has
19 analysis, Various Items deals with instrumentalities,
20 Halper didn't deal with instrumentalities, several times in
21 instrumentalities have a pedigree historically, the other
22 didn't, and therefore the other cases deal with excessive
23 punishment, not double jeopardy, so draw the dots, follow
24 the dots, it's never been overruled, and that's the end of
25 the instrumentalities. Proceeds are an easier case for

1 the Government, possibly.

2 And your response to that is?

3 MR. ROBBINS: My --

4 QUESTION: Because you said one was the innocent
5 owner, and the other is --

6 MR. ROBBINS: Well --

7 QUESTION: You're going to make, which is what I
8 want to hear.

9 MR. ROBBINS: Well, not -- I think the answer is
10 that 881 (a) (7) has a variety of features that render it
11 punitive. Apart from innocent owner, the fact that it is
12 tied to the commission of an offense, it embodies the word
13 violation and, just as this Court referred to in One 1958
14 Sedan, where the requirement to prove illegality was what
15 persuaded the Court in that case to imply the Fourth
16 Amendment exclusionary rule to an otherwise civil
17 forfeiture, is also present here.

18 The fact that the forfeiture under 881(a) (7) has
19 such a -- it has sort of random relationship to the
20 underlying harm, a point this Court made several times in
21 Austin, the fact that what you forfeit may bear only the
22 mere -- a mere happenstance relationship to the social
23 cost -- if you have the Taj Mahal on your property, it is
24 entirely forfeited, or if you have a hobo's hovel on your
25 property.

1 purposes. QUESTION: Excessive punishment.

2 MR. ROBBINS: It -- well, excessive punishment
3 is one implication, but I think it is also a factor that
4 historically has persuaded this Court in a variety of
5 cases -- U.S. Coin and Currency, the opinion for the Court
6 by Mr. Justice Harlan said, you know, again, if there is a
7 tie to a criminal offense, if there is a random
8 relationship between the fine and what your -- what the
9 social costs are, this is another barometer of what is
10 punitive.

11 The bottom line for us is this --

12 QUESTION: The thing that's bothering me in all
13 this is, fine, call it a punishment.

14 MR. ROBBINS: Yes.

15 QUESTION: It's a special kind of punishment,
16 and so it somewhat begs the question just to call it a
17 punishment. If you want to go and -- so that's what I'm
18 looking for, the historical basis, et cetera.

19 Suppose I believe it's a special kind of
20 punishment. Does the jeopardy clause apply or not?

21 Now, I have the QED, and your distinction is
22 what you've been saying.

23 MR. ROBBINS: Well, my distinction is that it is
24 hard to see how it could be punishment for Eighth
25 Amendment purposes and not punishment for Fifth Amendment

1 purposes.

2 I don't see how it could be -- or, more to the
3 point, Justice Breyer, I don't see how it can be punitive
4 for purposes of the Self-Incrimination Clause of the Fifth
5 Amendment but not punitive for the Double Jeopardy Clause
6 of the Fifth Amendment. These were, after all, enacted
7 the same day.

8 QUESTION: How about something being nonpunitive
9 for purposes of the procedure, like taking One Plymouth,
10 but being criminal for purposes of applying the Fourth
11 Amendment?

12 MR. ROBBINS: Well, I --

13 QUESTION: That is not a hypothetical case.

14 MR. ROBBINS: No, I understand. You mean, could
15 you make a distinction between what is sufficiently
16 punitive for one constitutional provision or another? I
17 think the answer to that --

18 QUESTION: But that's a case in the forfeiture
19 context.

20 MR. ROBBINS: Yes.

21 QUESTION: And it was recognized as a civil
22 forfeiture.

23 MR. ROBBINS: Mm-hmm.

24 QUESTION: The police got the evidence to show
25 that contraband had been carried through an unlawful

1 search and seizure. They had no warrant, they had no
2 probably cause, they just took the liquor from the car,
3 and then they said, well, now we're going to prove that
4 this car had been proved to carry contraband, and here's
5 the liquor that we illegally seized.

6 When the court said, sorry, the Fourth Amendment
7 applies to that, it by no means said, and you can't,
8 Government, bring these proceedings as civil forfeitures
9 anymore.

10 MR. ROBBINS: Well, that's true, but that's for
11 the, I think quite different reason that it isn't so
12 overwhelmingly punitive --

13 QUESTION: But it was --

14 MR. ROBBINS: -- as to trigger Sixth
15 Amendment --

16 QUESTION: It was penal for one purpose --

17 MR. ROBBINS: Yes.

18 QUESTION: -- for the Fourth Amendment. It was
19 not penal for all purposes.

20 MR. ROBBINS: Well, of course, in One 1958 Sedan
21 the Court was not called upon to decide whether it's
22 punitive for one purposes and not for another. The only
23 question presented was a Fourth Amendment claim.

24 The only question presented in One 1958 Sedan
25 was a self-incrimination question, but it strikes me as

1 really quite odd to say that something that we have --
2 that the Court unanimously concluded was punishment under
3 the Excessive Fines Clause will not be punishment in all
4 relevant respects --

5 QUESTION: But Austin was one case.

6 MR. ROBBINS: Yes.

7 QUESTION: And as against that you have 200-odd
8 years of history, and a whole Prohibition era where this
9 was standard operating procedure.

10 MR. ROBBINS: Well, Justice Ginsburg, if I
11 might, I really do believe that this is an instance where
12 a volume of logic is actually better than a page of --

13 QUESTION: And -- and a label of excessive fine.

14 MR. ROBBINS: I'm sorry?

15 QUESTION: Is there any implication in Austin
16 itself that the Court understood that that excessive fine
17 decision was going to be carried over into the double
18 jeopardy area?

19 MR. ROBBINS: Well, certainly nothing plain in
20 the text of the opinion. It would be quite odd if it
21 were, but --

22 QUESTION: Well, and in fact, didn't the Court
23 in Austin leave open the possible application in civil
24 cases of Excessive Fines Clause? I thought it did.

25 MR. ROBBINS: There is some -- there may be

1 some --

2 QUESTION: Well --

3 MR. ROBBINS: -- daylight in Footnote 14, but if
4 I --

5 QUESTION: Well, there's a statement leaving
6 that open. :

7 MR. ROBBINS: Yes, I think -- I think you can
8 read the last footnote that way, and obviously the
9 Government hangs its hat on that.

10 But I think that if the balance of the opinion,
11 precisely because it looks at a series of factors that
12 have always -- and here I'd like to recur to the tradition
13 of this Court's decisions that have always been regarded
14 as appropriate barometers of what is punishment? Is it
15 tied to a criminal offense? Does there -- is there an
16 innocent ownership? Is it disproportionate? Is there a
17 random relationship --

18 QUESTION: Well, of course, I think a punitive
19 damages award can be a punishment. I mean, that's my
20 view --

21 MR. ROBBINS: Yes --

22 QUESTION: -- and covered by the Excessive Fines
23 Clause, and so forth. That doesn't mean double jeopardy
24 applies.

25 MR. ROBBINS: Yes, although I guess I think for

1 the rather different reason that it's not imposed by the
2 Government, and obviously, you know, individual -- you
3 know, individual citizens, I suppose, with the possible
4 exception of KEYTAM litigation, cannot impose double
5 jeopardy on one another.

6 QUESTION: Well, certainly punitive damages are
7 imposed by the Government.

8 MR. ROBBINS: They can be, and I suppose --

9 QUESTION: Can you give me an example of where
10 they are -- where somebody other than the Government
11 imposes a judgment for punitive damages?

12 MR. ROBBINS: Well, obviously, in the final
13 analysis, it's imposed by virtue of a judgment enforceable
14 by a court, so I suppose under a sort of Shelley and
15 Kraemer analysis one would call that State action, but I
16 think --

17 QUESTION: But Mr. Robbins, many States now have
18 for punitive damages, part of the award goes to the State
19 Treasury. Part goes to the plaintiff, and part goes to
20 the State Treasury.

21 MR. ROBBINS: And I suppose that under Halper
22 there may come a day when it is so wildly disproportionate
23 that the court may ultimately want to revisit the
24 question, but mercifully, I don't have to defend that
25 today. I have the --

1 QUESTION: Or you're trying not to.

2 (Laughter.)

3 MR. ROBBINS: I mean, I have the sufficiently
4 difficult burden of trying to persuade the Court that this
5 is punishment for all the reasons that it unanimously held
6 it was punishment in Austin, and I guess, you know, for
7 want of a better talisman, I recur to the point that every
8 reason the Court advanced for calling it punishment in
9 Austin is present here. It's the same statute, it's the
10 same facts, and let me say, my case happens to illustrate
11 exactly why it's punishment.

12 QUESTION: But the question is whether or not
13 it's the same offense. Those --

14 MR. ROBBINS: Well --

15 QUESTION: Those are the terms that appear in
16 the Double Jeopardy Clause, and if --

17 MR. ROBBINS: Well --

18 QUESTION: The Government gave a hypothetical
19 something along the lines, if you have Smith and Jones in
20 Smith's car, and they're both dealing in marijuana, you
21 can convict the nonowner for the criminal offense, and
22 it's completely different elements in order to forfeit, in
23 order to forfeit the automobile.

24 MR. ROBBINS: Well, in my view --

25 QUESTION: So you have to confront the same

1 offense question.

2 MR. ROBBINS: And I think we can -- I think we
3 meet, we amply meet the Blockburger standard, and that a
4 lot of the arguments that I've heard this morning really
5 have nothing to do with Blockburger at all.

6 The fact is that 881(a)(7) incorporates
7 precisely the antecedent predicate act, because it
8 requires the proof of a violation. That is the word used
9 by the statute. The fact that you can prove a forfeiture
10 by showing that someone else did it strikes me as
11 ultimately begging the question.

12 The question is, this person has been punished
13 twice, forfeited on the one hand, convicted and sentenced
14 on the other, and now the Blockburger inquiry is, was it
15 for the same offense, so after all you need to look, as
16 the Court did in Whalen, Harris v. Oklahoma, and I would
17 suggest United States v. Dixon as well, at the elements
18 and ask, are they the same?

19 The fact is, 881(a)(7) couldn't be plainer that
20 it is embodying all of the elements of the underlying
21 violation.

22 Let me just say again, the suggestion by the
23 Government this morning, which I suspect they will disavow
24 on rebuttal, is that somehow the manufacturing charge
25 required proof that it was done on a neighbor's land. The

1 Court can look at the reproduction of the indictment in
2 the Joint Appendix, as well as the statute 841(a) --

3 QUESTION: I didn't understand the Government to
4 say that it required that proof. I just thought that they
5 were saying that the civil forfeiture was based on things
6 that were happening on their own land --

7 MR. ROBBINS: Well, I --

8 QUESTION: -- and the indictment charged a
9 particular transaction a particular day.

10 MR. ROBBINS: Well, it actually did not charge a
11 particular transaction. It charged on or about a
12 particular day --

13 QUESTION: Right.

14 MR. ROBBINS: -- which was, of course, a day
15 selected from within the 2-year period for which he'd
16 already had suffered a forfeiture, so it's -- I mean, it's
17 not a different day in any meaningful sense, and let me
18 say that if you read the record of the forfeiture
19 proceeding and the prosecution, you will find that the
20 forfeiture and the prosecution both turned on growing
21 marijuana off the premises, professing and smoking it on
22 the premises -- same facts, same theory, same witnesses,
23 same --

24 QUESTION: Yes, but it may be that they needed
25 different elements for the two different offenses. In

1 other words, they did not have to prove what happened in
2 the house to forfeit what happened elsewhere, and vice
3 versa.

4 MR. ROBBINS: Well, it sounds at that point,
5 Justice Stevens, that one is almost getting into the Grady
6 and Corbin problem of turning on particular pieces of
7 evidence.

8 QUESTION: Well, that's what Blockburger itself
9 was, too.

10 MR. ROBBINS: Well, I think we are -- we are
11 relying specifically on the elements, and again, to go
12 back to a question that Justice Scalia put, I believe,
13 perhaps to my cocounsel, this really is, in my view, just
14 like Whalen and Harris v. Oklahoma.

15 Yes, it's true, you could prove the forfeiture
16 by showing a different underlying crime. You could show
17 money laundering, you could show possession with intent to
18 distribute, but in this case, what they charged was
19 forfeiture based on manufacturing, and what they charged
20 in the indictment at Joint Appendix page 28 was
21 manufacturing as an offense, and this is in a sense a
22 compound crime that has a variety of predicates, just as
23 this Court said in Whalen.

24 QUESTION: Wasn't there also a conspiracy
25 charge?

1 MR. ROBBINS: I'm sorry, Your Honor? now, if it's

2 an extreme QUESTION: Wasn't there also a conspiracy --

3 question MR. ROBBINS: Oh, no, there was no. wildly

4 disproport QUESTION: There was not. the rare case.

5 MR. ROBBINS: It was a one-count manufacturing
6 indictment, the exact same allegation that constituted the
7 predicate in the forfeiture.

8 Let me just say a quick word about separate
9 proceedings, because I really don't -- to attack the second

10 prosecutio QUESTION: May I just -- I take it from what you
11 said that your answer to my broker case, or lawyer case,
12 you're disbarred first and you're fined -- it usually be
13 happens the other way around, but it could be that the
14 disciplinary committee gets you first, and you're no
15 longer a member of the State bar, and you've had to pay a
16 whopping fine for what you've done. Then you're
17 prosecuted for the very same conduct. the same --

18 Under your argument, I take it you could not
19 later be prosecuted.

20 MR. ROBBINS: No, quite the opposite. Under my
21 argument, you absolutely could. is so disproportionate as
22 to violate I don't -- to me, the fine is a form of
23 liquidated damages that probably take -- I mean, again --

24 better tha QUESTION: It has no relation to how much your
25 clients were out of pocket. me has expired, Mr. Robbins.

1 MR. ROBBINS: Well, if it's -- you know, if it's
2 an extreme enough fine, I suppose it would raise a
3 question under Halper as to whether it is so wildly
4 disproportionate that it really is the rare case.

5 QUESTION: But the defendant says, I don't care
6 about that disproportionate fine if it gets me off the
7 hook from going to jail --

8 MR. ROBBINS: Well --

9 QUESTION: -- so I'm going to attack the second
10 prosecution. The first one I'll leave alone.

11 MR. ROBBINS: Well, again, I don't want to beg
12 the hypothetical too much, because in all likelihood the
13 disbarment and disgorgement is by a State sovereign and
14 the prosecution is by -- if I understand you, by the
15 Federal --

16 QUESTION: No, no --

17 MR. ROBBINS: -- but if it's the same --

18 QUESTION: -- I don't want to bring sovereignty
19 into it.

20 MR. ROBBINS: If it's the same sovereign, my
21 position is that unless the fine is so disproportionate as
22 to violate Halper, it's a classic, it's a form of
23 liquidated damages even if it's not, you know, more -- any
24 better than rough justice.

25 QUESTION: Your time has expired, Mr. Robbins.

1 MR. ROBBINS: Thank you.

2 CHIEF JUSTICE REHNQUIST: Mr. Dreeben, you have
3 10 seconds remaining, which under the --

4 (Laughter.)

5 CHIEF JUSTICE REHNQUIST: Under the maxim of de
6 minimis non curat lex means the case is submitted.

7 MR. DREEBEN: Thank you.

8 (Whereupon, at 11:22 a.m., the case in the
9 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

UNITED STATES, Petitioner v. GUY JEROME URSERY; and UNITED STATES, Petitioner v. \$405,089.23 IN UNITED STATES CURRENCY, ET AL.
CASE NO: 95-345 & 95-346

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)

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