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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. )

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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 -- 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  
22 mandatory 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 -- I -- I -- my understanding is she  
12 didn't even get notice.

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

20 MR. YUROWITZ: So Dolan set -- set  
21 forth three potential rules for -- the -- to --  
22 three potential buckets, a jurisdictional rule,  
23 a -- a -- a mandatory claim-processing rule, and  
24 a 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 mandatory claim-processing rule even  
15 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 -- it -- it's not  
21 just -- I -- I would carve -- I think this Court  
22 could carve out all mandatory claim-processing  
23 rules.

24 JUSTICE GORSUCH: Okay. Thank you.

25 JUSTICE JACKSON: So I have a



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

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

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

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

1 the argument that they need -- that the district  
2 court needs to do it over?

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

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

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

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

23 JUSTICE KAGAN: But -- but that --

24 CHIEF JUSTICE ROBERTS: Well, it's not  
25 -- I was just going to say the -- the -- in

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

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

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

23           This is -- forfeiture is an element of  
24 sentencing, and there's -- there's an element of  
25 finality to it, and that's one of the objectives

1 that the rule is designed to -- to foster.

2 It -- it also is designed to benefit  
3 third-party claimants because, until you have --  
4 until you have entry of an order, third-party  
5 claimants can't even be litigated, which, in  
6 this case, there was no -- there was no notice  
7 served until 12 years after.

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

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

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

25 JUSTICE KAGAN: I -- I -- I guess I'm

1 not understanding. If the person objects at the  
2 time of sentencing, and then the court says, you  
3 know, you're right, I should enter a preliminary  
4 order and enters a preliminary order, then you  
5 have no complaint?

6 MR. YUROWITZ: Right.

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

16 MR. YUROWITZ: So -- we would take the  
17 position that the time to object is at the time  
18 a preliminary order of forfeiture. Rule 32.2  
19 places no obligations on the -- on the  
20 defendant.

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

1 moving.

2           If at the time a -- when -- if when it  
3 came back to the district court in this case and  
4 the government submitted their preliminary order  
5 of forfeiture and the defendant had kept quiet,  
6 yes, he waived it. But, up until then, there  
7 was no waiver.

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

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

20           MR. YUROWITZ: Gonzalez versus Thaler  
21 and Santos-Zacaria are both obligations that are  
22 placed on the court. A -- a -- a preliminary  
23 order -- it's an order. It's an order of the  
24 court. It could only be entered on the -- by  
25 the court, but at the end of the day, it's the

1 government that's seeking the deprivation of the  
2 property, so they're going to have to provide  
3 the court with the -- the information to enter  
4 that order.

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

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

25 But it looks from the procedural

1 history as though the court of appeals vacated  
2 that forfeiture order and that you're actually  
3 here today pursuant to your client's case that  
4 is now relevant to the second forfeiture order.

5 Do you understand what I'm saying?

6 MR. YUROWITZ: Yes.

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

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

18 Can you help me with that?

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



1 appeal, which is that the government waived  
2 their right to -- lost their right to  
3 forfeiture.

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

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

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

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

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

13           JUSTICE JACKSON: So what remedy can  
14 we give you today?

15           MR. YUROWITZ: That the government is  
16 prohibited from imposing -- seeking forfeiture.

17           JUSTICE JACKSON: With respect to the  
18 second order?

19           MR. YUROWITZ: With -- with respect to  
20 -- with respect to this case.

21           JUSTICE ALITO: Can I go back to your  
22 -- your prior answer when you spoke about  
23 Santos-Zacaria and Gonzalez versus Thaler?  
24 In -- in the latter case, Gonzalez versus  
25 Thaler, the provision said a certificate of

1 appealability may issue only if the applicant  
2 has made a substantial showing of the denial of  
3 a constitutional right. So that put a duty on  
4 the applicant, not the court.

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

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

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

25 The -- the court's ability to enter a

1 preliminary order of forfeiture is based on the  
2 government requests indicating that they're  
3 going to be seeking forfeiture and they're  
4 providing the court with the information.

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

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

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

25 JUSTICE SOTOMAYOR: Justice Alito was

1 asking you that -- about what other example you  
2 had of a mandatory jurisdictional rule, and as  
3 you pointed out, there really aren't.

4 But I'm wondering how I can view this  
5 rule as a -- mandatory jurisdictional view when  
6 it has the biggest carveout I've ever seen. It  
7 says you have to -- the court has to file a  
8 preliminary order before sentencing "unless  
9 doing so is impractical."

10 So why can't it do it an hour before  
11 the sentencing?

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

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

24 But my point is, who decides that?  
25 Meaning you go up on appeal, the court of

1 appeals now has to hold a hearing to see why the  
2 district court judge didn't issue the order a  
3 month before, two months before, three months  
4 before? I guess my point is, generally, when we  
5 think of mandatory rules, they set a fixed goal,  
6 a fixed deadline, something that you can know  
7 and meet without discretion being involved.

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

11 JUSTICE SOTOMAYOR: But, again, an  
12 hour is inconvenient, but how about a day? How  
13 about two? How about three? That -- my whole  
14 point is that once you build in discretion, how  
15 can you call it mandatory in the -- in the sense  
16 of it being jurisdictional?

17 MR. YUROWITZ: At -- at -- at that  
18 point, if the defend -- nothing -- none of this  
19 happens in a vacuum. The government, had they  
20 done their jobs -- job properly, they would have  
21 come to the court saying we're seeking  
22 forfeiture in this case. They would have  
23 provided the information.

24 Now it may be that the district court  
25 couldn't get to it because it was impractical,

1 but there would be notice to the defendant that  
2 there was going to --

3 JUSTICE SOTOMAYOR: Thank you,  
4 counsel.

5 JUSTICE JACKSON: So can I just -- I'm  
6 sorry. So are you asserting that there was  
7 something wrong with the preliminary order of  
8 forfeiture that the district court issued on  
9 April 23, 2023, before the resentencing?

10 MR. YUROWITZ: The -- the -- what was  
11 wrong is that the government shouldn't have been  
12 entitled. There -- there's nothing -- there's  
13 no -- I -- I wouldn't point to any errors in  
14 that order. It -- it --

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

22 MR. YUROWITZ: I -- I -- I -- I don't  
23 believe that the -- the defense counsel at that  
24 time did, but this was still a case that was in  
25 a direct appeal.

1 JUSTICE JACKSON: All right. Final  
2 question from me at least.

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

5 MR. YUROWITZ: That the -- the -- the  
6 forfeiture order be vacated.

7 JUSTICE JACKSON: Which forfeiture  
8 order?

9 MR. YUROWITZ: Right now, the only one  
10 that's pending is the -- the -- the most recent  
11 one that was entered in April 2020.

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

14 MR. YUROWITZ: It -- it has a defect  
15 in that it was entered when -- in violation of a  
16 mandatory claim-processing rule.

17 JUSTICE JACKSON: Okay.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Just to follow up on Justice  
21 Sotomayor's questions about impractical, it's  
22 not only impractical, but the qualification  
23 requirement has to be sufficiently in advance.  
24 And that's sort of another layer of broad  
25 discretion.



1           I know yours is years, so that  
2       wouldn't be covered, but in the typical case, it  
3       not only has to be impractical, but all you have  
4       to do is sufficiently. It seems that there's a  
5       lot of wiggle room throughout the rule that  
6       seems inconsistent with the general notion of  
7       mandatory requirements.

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

15           This -- this Court held that it was a  
16      -- a mandatory claim-processing rule. So the  
17      notion that there's flexibility doesn't  
18      undermine the fact that it's a -- a  
19      claim-processing rule.

20           The point is it's a rule that's  
21      designed to provide a -- a -- a -- a litigant  
22      with protections because the government is  
23      seeking to deprive him of his property. A  
24      hundred and fifty years ago, this Court already  
25      said in French versus Edwards, where there's a

1 rule that's designed to govern protections for  
2 somebody whose property is going to be deprived  
3 and there's a potential for prejudice, that's a  
4 mandatory rule.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 Justice Thomas, anything further?

7 Justice Alito?

8 Justice Sotomayor?

9 Justice Jackson, anything further?

10 Thank you, counsel.

11 MR. YUROWITZ: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Guarnieri.

13 ORAL ARGUMENT OF MATTHEW GUARNIERI

14 ON BEHALF OF THE RESPONDENT

15 MR. GUARNIERI: Mr. Chief Justice --  
16 excuse me. Mr. Chief Justice, and may it please  
17 the Court:

18 The timing requirement in Rule  
19 32.2(b)(2)(B) is mandatory, not discretionary,  
20 but characterizing that requirement as mandatory  
21 doesn't answer the question presented in this  
22 case. The question here is, what follows when a  
23 district court violates the rule? What are the  
24 consequences?

25 Now our basic submission in this case

1 is that a violation of Rule 32.2(b)(2)(B) should  
2 be treated like any other garden-variety  
3 procedural error in the sentencing process.  
4 When a court commits a procedural error at  
5 sentencing, the normal thing to do is to apply  
6 Rule 52, which is the provision in the Federal  
7 Rules that codifies principles of harmless error  
8 and plain error.

9 Under Rule 52(a), if an error does not  
10 affect the defendant's substantial rights, it  
11 must be disregarded as harmless. Petitioner  
12 tries to avoid the application of harmless error  
13 principles by characterizing this particular  
14 requirement as a mandatory claim-processing  
15 rule.

16 Rule 32.2(b)(2)(B) is not such a rule  
17 for all the reasons that this Court identified  
18 in Dolan with respect to the analogous timing  
19 requirement in the Mandatory Victims Restitution  
20 Act.

21 Let me just emphasize three of the  
22 considerations that the Court stressed in Dolan:  
23 text, context, and purpose.

24 Textually, the rule here imposes an  
25 obligation on the court, not the litigants, and

1 it does not specify any sanction for the court's  
2 violation. That text operates in the broader  
3 context of a statutory framework that makes  
4 clear that criminal forfeiture is a mandatory  
5 consequence of conviction and that forfeiture is  
6 part of the sentence imposed for the offense.

7           The purpose of requiring the entry of  
8 a preliminary order before sentencing is to  
9 ensure that the forfeiture that is actually  
10 imposed at the sentencing itself is accurate and  
11 complete.

12           Accordingly, when a district court  
13 neglects to enter a preliminary order of  
14 forfeiture before sentencing, in violation of  
15 Rule 32.2(b)(2)(B), the court may nonetheless  
16 proceed to order forfeiture at the sentencing  
17 itself as long as the court's violation was  
18 harmless.

19           And we think that's what occurred  
20 here. The district court orally ordered  
21 Petitioner to forfeit the proceeds of his Hobbs  
22 Act robberies and a car that he purchased with  
23 those proceeds, despite the absence of a  
24 preliminary order before sentencing. That error  
25 was harmless.

1 I -- I welcome the Court's questions.

2 JUSTICE THOMAS: Counsel for  
3 Petitioner said that the government should be  
4 held to -- when it takes a person's property, to  
5 cross its T's and dot its I's. How do you  
6 respond to that?

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

15 And to your broader point, Justice  
16 Thomas, I -- I -- I think the -- the principal  
17 protection for defendants in criminal forfeiture  
18 is that the obligation is on the United States  
19 to prove beyond a reasonable doubt that the  
20 defendant committed the offenses for which  
21 Congress specified criminal forfeiture as a  
22 penalty.

23 So Petitioner here and defendants  
24 generally are entitled to all of the myriad  
25 protections in the criminal process. We were

1 required to meet the beyond-a-reasonable-doubt  
2 standard. There was a jury trial in this case.  
3 We presented nine days' worth of testimony  
4 establishing that Petitioner committed these  
5 robberies. And forfeiture is a consequence of  
6 the defendant's violation of the Hobbs Act.

7 JUSTICE GORSUCH: Counsel, you  
8 mentioned Rule 52 in your opening. I -- I was a  
9 little surprised, though, in reading your brief,  
10 it didn't appear until page 42.

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

21 MR. GUARNIERI: Well, you -- you are  
22 not, Justice Gorsuch. We are trying to  
23 triangulate from the Court's existing precedent.  
24 The Court has indicated in other cases that  
25 there are provisions in the Federal Rules of

1 Criminal Procedure that are best characterized  
2 as mandatory claim-processing rules.

3 And violations of those other rules  
4 are not subject to harmless error analysis. And  
5 the key case there, I think, is Eberhart  
6 addressing Rule 33, which is the rule specifying  
7 the time limits for moving for a new trial after  
8 conviction.

9 I think the same analysis would apply  
10 to Rule 35, which is the provision that  
11 specifies the time limits for correcting a  
12 sentence after it has been imposed.

13 Those are mandatory and inflexible  
14 deadlines. And a district court does --  
15 generally cannot ignore those deadlines if a  
16 party seeks strict adherence to them. Rule  
17 32.2(b)(2)(B) is -- is not --

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

20 MR. GUARNIERI: Yes, I think that's  
21 right.

22 JUSTICE GORSUCH: Okay.

23 MR. GUARNIERI: It's -- and I think  
24 that's a useful way to think about the case.  
25 And, indeed, that's the -- the framing that I

1 was trying to establish in -- in my opening  
2 here.

3 Really, it's Petitioner who's seeking  
4 to avoid the application of what the default  
5 framework here would be by characterizing this  
6 as a mandatory claims-processing rule.

7 JUSTICE GORSUCH: Just one more  
8 question. So, if -- if we agree with that, are  
9 you asking us to apply the harmless error  
10 standard ourselves in this case, or is a remand  
11 appropriate for a court to assess that question?

12 MR. GUARNIERI: Well, I think the  
13 Second Circuit already determined that any error  
14 here was harmless, as did the district court.  
15 Both of those courts considered what we think  
16 are the right factors in this context, and that  
17 is did the defendant have notice of the  
18 forfeiture and was he given an opportunity to  
19 contest it before the court ordered the  
20 forfeiture as part of the sentencing process.

21 And Petitioner had both of those  
22 things here. He was on notice that the  
23 government was seeking this forfeiture both  
24 through the indictment, the bill of particulars.

25 JUSTICE GORSUCH: So you're not asking



1 us to do a harmless error analysis. You're  
2 asking us to say that it's already been done.  
3 Is that -- is that the gist of it?

4 MR. GUARNIERI: Yes. We are asking  
5 this Court to affirm the judgment below, which  
6 itself -- in -- in -- in which the Second  
7 Circuit itself established that there was no  
8 prejudice to the defendant here.

9 JUSTICE GORSUCH: Thank you.

10 JUSTICE SOTOMAYOR: Counsel, you  
11 talked about this being a court obligation, and  
12 I agree, but the government has an important  
13 role. Here, the government promised to or was  
14 asked to prepare orders and I think at least  
15 twice failed to do so.

16 A ruling in your favor that this is a  
17 time-related directive seems to me is an  
18 inducement to encourage the government not to  
19 respond to a district court order.

20 I have to say I read this and I  
21 thought to myself this is a very strange  
22 district court. If a government lawyer had ever  
23 done that to me as a district court judge, I  
24 don't think I would have been very kind.

25 But what inducements are we creating

1 by not calling this a -- if not mandatory, a  
2 claim-processing rule as opposed to a  
3 time-related directive?

4 MR. GUARNIERI: Well, Justice  
5 Sotomayor, I don't think characterizing this  
6 provision as a time-related directive would  
7 encourage violations of the rule if -- if that  
8 is Your Honor's concern. There are going to be  
9 substantial incentives for the government to  
10 encourage the district court to comply with this  
11 rule.

12 JUSTICE SOTOMAYOR: What are the  
13 incentives?

14 MR. GUARNIERI: Well, the entry of a  
15 preliminary order of forfeiture before  
16 sentencing can be a basis for seizing property.  
17 And so the government in many cases is going to  
18 have an interest in ensuring that it has legal  
19 authority to seize and maintain assets that  
20 should be subject to forfeiture or that will be  
21 subject to forfeiture at the conclusion of the  
22 case. So I think that's one substantial  
23 incentive.

24 Another, we often have an incentive to  
25 ensure that the Court enters a preliminary order

1 of forfeiture in compliance with Rule 32.2  
2 because that can provide notice to third parties  
3 that some particular specific asset is going to  
4 be subject to forfeiture. It helps us to --

5 JUSTICE SOTOMAYOR: That didn't happen  
6 here.

7 MR. GUARNIERI: -- defeat arguments  
8 later in the proceeding that some third party  
9 comes in and claims that it was a bona fide  
10 purchaser of the assets if they were transferred  
11 during the course of the criminal case.

12 So, I mean, we -- we -- there are good  
13 reasons here that it is Department of Justice  
14 policy to encourage district courts to enter  
15 preliminary orders of forfeiture before  
16 sentencing -- as Rule 32.2(b)(2)(B) requires.

17 JUSTICE SOTOMAYOR: I have one last  
18 question. Do you take a position on the Seventh  
19 Circuit's suggestion in U.S. versus Lee that you  
20 have to at least announce a forfeiture at  
21 sentencing, that you can't just not say anything  
22 and then later order one? And they said that  
23 might be jurisdictional.

24 MR. GUARNIERI: Your Honor --

25 JUSTICE SOTOMAYOR: We don't have to

1 address that here, but --

2 MR. GUARNIERI: That -- that's right.

3 JUSTICE SOTOMAYOR: -- do you see a  
4 ruling here as permitting courts to do that as  
5 well?

6 MR. GUARNIERI: As I understand the  
7 Seventh -- the Seventh Circuit's decision in  
8 Lee, the court suggested that although Rule  
9 32.2(b)(2)(B), the provision that is at issue in  
10 the proceeding before this Court, is best  
11 characterized as a time-related directive,  
12 perhaps the timing requirements with respect to  
13 the entry of the final order of forfeiture at  
14 the sentencing hearing itself, perhaps those  
15 requirements should be treated as mandatory  
16 claim-processing rules.

17 That was not directly at issue in Lee.  
18 We haven't briefed that issue here. I don't  
19 think anything that the Court says here about  
20 32.2(b)(2)(B) would necessarily dictate an  
21 answer with respect to what is Rule  
22 32.2(b)(4)(B).

23 And -- and so I don't think the Court  
24 needs to address it. We haven't taken a  
25 position. I -- I would say, in general, I think

1 that's a harder case for us, and it's a harder  
2 case for some of the reasons that the dissenting  
3 Justices identified in Dolan.

4 And that is, in general, the rule here  
5 contemplates that the court will announce the  
6 forfeiture as part of imposing sentence on the  
7 defendant. And if the court purports to act  
8 after sentencing, if it fails to address  
9 forfeiture at sentencing and it's acting after  
10 the sentencing proceeding, then we have a -- a  
11 harder set of issues. I mean, that's not just a  
12 Rule 32.2 problem. It can also be a problem  
13 under the various statutes that specify that  
14 forfeiture shall be ordered at sentencing.

15 And -- as I was alluding to earlier in  
16 my colloquy with Justice Gorsuch, there are  
17 constraints under, in particular, Rule 35 on a  
18 district court's authority to alter or correct a  
19 sentence after it's been imposed. So there are  
20 a lot of other extrinsic considerations that  
21 could come into play with respect to the final  
22 order at sentencing.

23 But those things don't support  
24 Petitioner's position here. This case is  
25 limited to just the asserted error of failing to

1 enter a preliminary order of forfeiture before  
2 the original sentencing proceeding.

3 JUSTICE SOTOMAYOR: Thank you,  
4 counsel.

5 JUSTICE JACKSON: So the government  
6 focuses right in on the merits, which, you know,  
7 is totally understandable, can I -- but can I  
8 get your thoughts on my concerns about the  
9 threshold, potential for a threshold procedural  
10 defect that actually inhibits our ability to  
11 reach the merits in this case?

12 MR. GUARNIERI: Justice Jackson, I --  
13 I think the way that would work under Article  
14 III, the question would be whether a judgment in  
15 Petitioner's favor is capable of granting him  
16 any kind of effectual relief.

17 JUSTICE JACKSON: Yes.

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

21 JUSTICE JACKSON: Tell me how.

22 MR. GUARNIERI: I -- I -- well, it is  
23 true that there is now a new legally operative  
24 forfeiture order in this case as a result of the  
25 remand for unrelated reasons, but that order is

1 currently pending appeal in the Second Circuit.

2           If this Court adopts Petitioner's view  
3 that this is a mandatory claim-processing rule,  
4 his position as I understand it is that  
5 violation of that rule is, I -- I think he said  
6 this morning, fatal to the government's ability  
7 to obtain criminal forfeiture. And so I think  
8 the case would go back to the Second Circuit,  
9 and the Second Circuit could then entertain his  
10 argument that even the now operative new  
11 forfeiture order should be vacated because it is  
12 the result of a series of proceedings that never  
13 should have occurred under his understanding of  
14 how the rule works. We --

15           JUSTICE JACKSON: Right. But, under  
16 his own argument, didn't he forfeit that claim?  
17 I mean, he says that if it's a claim processing  
18 rule, if you don't raise it, you lose it. And  
19 at the time of the second forfeiture order, he  
20 didn't raise it.

21           MR. GUARNIERI: I -- I think we would  
22 have reasonable arguments that, in fact, he has  
23 forfeited it even if it is a mandatory  
24 claim-processing rule, but I think those would  
25 go to the merits. I don't think that those

1 would deprive this Court of Article III  
2 authority to adjudicate the dispute that's  
3 before the Court today.

4 JUSTICE GORSUCH: Do you think there  
5 are some mandatory claim-processing rules that  
6 are directed to courts or executive agencies  
7 rather than to parties?

8 MR. GUARNIERI: Petitioner has yet to  
9 identify an example of such a rule. I mean,  
10 there are rules, for example, the provision of  
11 the INA that was at issue in Santos-Zacaria,  
12 which my friend mentioned this morning, that are  
13 phrased in terms of action by the court but  
14 clearly are designed to impose on the parties an  
15 obligation to take some step, such as exhausting  
16 administrative remedies.

17 We're not aware of and Petitioner has  
18 not identified another example of a rule like  
19 this where the obligation rests squarely on the  
20 judicial officer. And -- and that's one of the  
21 reasons that this case is similar to Dolan.

22 The -- the other case that I think is  
23 -- is directly on point here is  
24 Montalvo-Murillo, which is the case involving a  
25 provision of the Bail Reform Act that imposed on



1 the magistrate, on the judicial officer, an  
2 obligation to hold a pretrial detention hearing  
3 within a specified time, and the Court said that  
4 even if a -- if the judicial officer violates  
5 that deadline, it doesn't mean that the  
6 defendant walks free. You can have a later  
7 pretrial detention hearing because the error was  
8 harmless.

9 JUSTICE GORSUCH: Is there something  
10 significant about that line that we might  
11 emphasize here? The statute, after all, says  
12 that there shall be forfeiture, right? I mean,  
13 that -- that's Congress's directive to us.

14 And often government agencies and  
15 perhaps courts miss deadlines. But Dolan kind  
16 of recognized what I'll call a -- a  
17 better-late-than- never rule in complying with  
18 congressional directives. Thoughts?

19 MR. GUARNIERI: Justice Gorsuch, I --  
20 I think that's right, and -- and to -- to return  
21 to an exchange that we had earlier, I mean, we  
22 have approached this case through the lens of  
23 Dolan. And Dolan, one of the considerations the  
24 Court emphasized in Dolan was that the statutory  
25 obligation in that case was placed on the court,

1 not on the litigants, which is a sign that this  
2 might be something other than a mandatory  
3 claim-processing rule.

4 Another consideration that the Court  
5 stressed in that case was that, as the name of  
6 that statute suggests, the -- the restitution  
7 was mandatory. And so too here criminal  
8 forfeiture is mandatory. Those are both  
9 important components of our argument.

10 If you think about this, when -- when  
11 you arrive at the sentencing proceeding, the  
12 district court who has failed to enter a  
13 preliminary order of forfeiture faces a kind of  
14 dilemma because, on the one hand, you have a  
15 perceived violation of Rule 32.2(b)(2)(B),  
16 assuming the impracticality exception doesn't  
17 apply, and on the other hand, you have numerous  
18 interlocking statutes that direct the court,  
19 command the court, to order forfeiture when the  
20 prerequisites are satisfied.

21 And so I think all of that -- that  
22 surrounding mandatory framework is another very  
23 important piece of the puzzle here. And if the  
24 Court accepts that and accepts that those are  
25 two of the considerations that support treating

1 this as a mandatory -- excuse me -- as a  
2 time-related directive rather than a mandatory  
3 claims-processing rule, that would suggest some  
4 outer limits if -- if that was the -- the --

5 JUSTICE GORSUCH: Yeah, I'm wondering  
6 what --

7 MR. GUARNIERI: -- impetus for the  
8 question.

9 JUSTICE GORSUCH: -- you know, how are  
10 we going to reconcile -- I mean, we now have  
11 three buckets, right, jurisdictional, mandatory  
12 claims processing, and this Dolan thing. And  
13 I'm wondering, what are the outer limits of the  
14 Dolan thing? And that's what I'm trying to  
15 explore with you, and is the government  
16 comfortable with a rule that it -- it -- those  
17 are matters directed to the court by statute and  
18 have mandatory directives?

19 MR. GUARNIERI: I -- I think that's  
20 right. I think those are the two key  
21 considerations here. There are -- there are  
22 other considerations that I think also support  
23 treating this case the same way the Court  
24 treated -- rather, treating this rule the same  
25 way the Court treated the statute in Dolan, but

1 those are certainly the two principal ones that  
2 we emphasize in our brief.

3 JUSTICE JACKSON: Is it the  
4 government's position that this is the kind of  
5 situation that if he's -- that -- that he's  
6 right or wrong about his argument that if a  
7 court blows the deadline, there can never be  
8 another forfeiture in the case?

9 MR. GUARNIERI: Well, I think that's  
10 another significant way in which our approach  
11 differs from Petitioner's approach. I -- I  
12 think that, like other procedural errors, if  
13 there is a harmful violation of Rule  
14 32.2(b)(2)(B) or a non-harmless violation, the  
15 remedy should be that the defendant in that case  
16 then gets the forfeiture proceedings that Rule  
17 32.2 is supposed to provide.

18 So, if you arrive at sentencing or the  
19 case goes up on appeal and there's been a  
20 violation of the requirement to enter a  
21 preliminary order of forfeiture beforehand, the  
22 result should not simply be that the defendant  
23 in that case is absolved of what is supposed to  
24 be a mandatory part of the sentence for the  
25 defendant's offense. The result should be a

1 remand to the district court to -- to get it  
2 right.

3 JUSTICE JACKSON: What have we said in  
4 other claims-processing scenarios? And is that  
5 consistent with what normally happens if there  
6 is a claims-processing rule?

7 MR. GUARNIERI: I -- I -- I am not  
8 aware of an example in which the Court has  
9 identified something as a mandatory  
10 claim-processing rule but nonetheless found that  
11 a violation of that mandatory rule could be  
12 remedied by a redo of the proceedings in the  
13 district court.

14 Ordinarily, mandatory  
15 claims-processing rules are -- and it's a  
16 category that is adjacent to jurisdictional  
17 rules. These are inflexible rules that impose  
18 on the parties some obligation that if they fail  
19 and the other party objects, the rule can be  
20 strictly enforced.

21 And Rule 32.2(b)(2)(B), like other  
22 requirements that attend the sentencing process,  
23 it doesn't really make sense to treat the rule  
24 that way.

25 JUSTICE JACKSON: And why is that?

1           MR. GUARNIERI: Well, because it would  
2           make Rule 32.2(b)(2)(B) a kind of aberrational  
3           part of sentencing. If the district court fails  
4           to take the very steps that are identified in  
5           Rule 32 with respect to the sentencing process,  
6           the -- the ordinary remedy for that is that you  
7           redo the sentencing.

8           Indeed, even with respect to errors  
9           that this Court has identified as structural,  
10          meaning they are not amenable to harmless error  
11          principles, the remedy for a structural -- error  
12          is that you have a retrial or you have a  
13          resentencing.

14          It doesn't mean that the defendant is  
15          simply -- can -- cannot be convicted of the  
16          offense or cannot be subject to a penalty that  
17          Congress has otherwise specified for that  
18          offense.

19          CHIEF JUSTICE ROBERTS: Well, but  
20          there are situations in which it does mean that.  
21          So just because it doesn't in this particular  
22          situation, there are others, like the situation  
23          in Dolan. You're putting an awful lot of weight  
24          on a sharply divided opinion in Dolan.

25          MR. GUARNIERI: Well, Mr. Chief

1 Justice, I -- I recognize that the dissenting  
2 Justices in Dolan had some very compelling and  
3 persuasive things to say. One point I would  
4 make, and -- and we make this point in our  
5 brief, this case is one step removed from Dolan  
6 in the sense that here, the error is with  
7 respect to a part of the process that is  
8 antecedent to the sentencing itself.

9 And so, here, the district court  
10 failed to enter a preliminary order of  
11 sentencing beforehand, but it did orally order  
12 the forfeiture of the property and -- and orally  
13 order a forfeiture money judgment at the  
14 sentencing itself.

15 And that's unlike the situation in  
16 Dolan, in which the -- the -- the sentencing  
17 court in that case left open the precise amount  
18 of restitution and then acted well after the  
19 90-day deadline in the Mandatory Victims  
20 Restitution Act.

21 CHIEF JUSTICE ROBERTS: Well, just  
22 because it doesn't have any serious  
23 consequences, if you're right that you just have  
24 a, you know, start over again a second time, I  
25 mean, there are situations where it would.

1                   And I'm wondering if -- to what extent  
2 we should be concerned about the remedial aspect  
3 of it simply because it sort of could be a  
4 harmless foul in this case?

5                   MR. GUARNIERI: Well, I mean, if  
6 you're thinking about this case in terms of, you  
7 know, what is the appropriate remedy for a  
8 violation of this rule, I do think we have the  
9 better argument on the equities there.

10                   I mean, this is a mandatory component  
11 of the sentence. It is in that sense akin to a  
12 -- a statutory minimum sentence. If the  
13 district court commits an error in the process  
14 of imposing that mandatory sentence, it would be  
15 anomalous to conclude that the result is that  
16 the defendant is simply absolved of a -- of a  
17 consequence that Congress has made mandatory for  
18 that particular offense. It would really -- I  
19 mean, it would, as I said, make Rule  
20 32.2(b)(2)(B) stick out like a thumb in the  
21 sentencing process.

22                   I think the other thing I would say is  
23 that our approach here, which has stressed  
24 harmless error, means that -- I mean, the -- the  
25 delta between that approach and a -- a mandatory



1 claims-processing approach, you're -- talking  
2 about the small class of errors in which --  
3 excuse me, the -- the -- the -- the set of cases  
4 in which the error is harmless.

5 And we think, if the error is  
6 harmless, I mean, by definition, that means that  
7 any procedural error did not affect the  
8 defendant's substantial rights, there is no good  
9 reason if the error is harmless for the court to  
10 lack the authority to just proceed at the  
11 sentencing proceeding itself to order the  
12 forfeiture of the property that Congress has  
13 made subject to forfeiture.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Anything further?

17 Anything further?

18 MR. GUARNIERI: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you.

20 Rebuttal, Mr. Yurowitz?

21 REBUTTAL ARGUMENT OF STEVEN Y. YUROWITZ

22 ON BEHALF OF THE PETITIONER

23 MR. YUROWITZ: So -- I -- I'd just  
24 like to go back to Justice Gorsuch's question  
25 about harmless error. The reason why there's no

1 harmless error analysis is because this Court  
2 has never really applied harm -- harmless error  
3 in the context of either a mandatory  
4 claim-processing rule or -- or time-related  
5 directives.

6           Indeed, in Dolan, Chief Justice --  
7 Justice Roberts pointed out that it's a rule  
8 with no consequence because the majority said,  
9 even in unlikely instances where the delay does  
10 cause the defendant prejudice, the defendant  
11 remains free to ask the court to take that  
12 account.

13           There's no obligation on the court to  
14 take that into account. So this Court has never  
15 really applied harmless error analysis in this  
16 context. And I think the reason why the -- why  
17 these mandatory claim-processing rules are  
18 treated different and why Rule 32.2(b) should be  
19 within that bucket is because it's not simply  
20 the defendant that's before the court whose  
21 rights are being affected.

22           There are third-party claimants'  
23 rights who are being affected who -- the -- at  
24 the time when the court is conducting any  
25 analysis, they're not even there before the

1 court, and their rights are just being put to  
2 the side because they're not before the court.

3 Dolan's finding of a time-related  
4 directive was a very small slice. It -- it's  
5 just -- it's a -- it's a -- generally, it  
6 involves administrative action where, obviously,  
7 the court is reluctant and recognizes that  
8 administrative agencies, they're saddled with a  
9 lot of obligations, and they may not be able to  
10 keep their -- their obligations in a timely  
11 manner.

12 There are only really two exceptions,  
13 and that's in the bail context, where there's a  
14 public safety issue, and there's a pending case  
15 that's ongoing, unlike Rule 32.2(b), which is  
16 sentencing -- the final -- there's a finality  
17 element to sentencing, and there's Dolan itself,  
18 which involved victims. Victims are not the  
19 beneficiaries of Rule 32.2(b).

20 So I think that's why harmless error  
21 should not apply, because there is this category  
22 of a mandatory claim-processing rule. My friend  
23 characterized it in terms that both -- that  
24 there's no rule in terms of the -- where a  
25 mandatory claim processing is imposed on the --

1 on the court. He said -- but, you know, the --  
2 I think the two cases, the Santos-Zacaria and  
3 Gonzalez versus Thaler, he said those were an  
4 obligation on the party.

5           It's the same thing here. A district  
6 court coming in to impose forfeiture could do  
7 nothing without the government providing them  
8 the ammunition, and the first thing is the  
9 government coming in and saying post-verdict,  
10 pre-sentencing, we are going to seek forfeiture  
11 in this matter.

12           The government certainly has the  
13 right, even though they filed a bill of  
14 particulars, even though they put it in the  
15 indictment, they don't have to continue on that  
16 forfeiture. They could -- they could -- they  
17 have the discretion. They may have felt in the  
18 facts of this case the defendant is getting  
19 sentenced to 60 years, he's going to be the rest  
20 of his life in prison, we're not going to  
21 proceed with forfeiture.

22           And certainly not an obligation on the  
23 defendant to say: Hey -- are you really --  
24 you're -- are you letting me off the hook? It  
25 was the government's obligation to come in.

1 There was not a word from the government in this  
2 case post-verdict, in the sentencing memo --  
3 memorandum, when they got up to argue at  
4 sentencing. There was not a word about -- at  
5 sentencing.

6 So, in that terms, the -- the -- it's  
7 the government -- the -- it's the government  
8 that really bore the burden. And, yes, the  
9 court -- it's an obligation on the court.  
10 The -- the court needs the government to come  
11 forward with that.

12 So, in that sense, it's both -- it's  
13 like -- it's -- it's -- it's the same situation  
14 as Gonzalez versus Thaler, where there's an  
15 obligation on the court to indicate in the COA  
16 what -- what the constitutional basis is. And  
17 if anything, in -- in that case, it was more of  
18 an obligation on the Court because the Court had  
19 an independent basis to decide that there was  
20 a -- a constitutional basis.

21 And -- and the other -- the point  
22 about the -- the fact that the forfeiture is  
23 mandatory and the -- and the statute makes it  
24 mandatory, but it also in the same breath says  
25 it's going to be subject to the Federal Rules of

1 Criminal Procedure, which is Rule 32.2.

2 And matter of fact, even those  
3 forfeiture is mandatory. If the government  
4 fails to allege it in the indictment, there's no  
5 -- even the government doesn't dispute that they  
6 cannot receive forfeiture.

7 So the rules could impose more  
8 obligations on the government -- on -- on the  
9 court than specified in the -- in the -- in  
10 the -- in the statute and it doesn't undermine  
11 the mandatory nature of -- of the obligation.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 The case is submitted.

15 (Whereupon, at 10:55 a.m., the case  
16 was submitted.)

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## Official

<p style="text-align: center;"><b>1</b></p> <p><b>10</b> [1] 22:18  <b>10:05</b> [2] 1:15 3:2  <b>10:55</b> [1] 53:15  <b>11th</b> [1] 5:21  <b>12</b> [1] 11:7</p>	<p>7 39:25 46:20  <b>acted</b> [1] 46:18  <b>acting</b> [1] 36:9  <b>action</b> [4] 9:13 18:22 39:13 50:6  <b>actual</b> [1] 5:12  <b>actually</b> [6] 14:7,9,12 15:2 27:9 37:10</p>	<p><b>apply</b> [8] 6:14 7:5 19:24 26:5 30:9 31:9 41:17 50:21  <b>approach</b> [5] 43:10,11 47:23,25 48:1  <b>approached</b> [1] 40:22  <b>appropriate</b> [2] 31:11 47:7  <b>April</b> [2] 22:9 23:11  <b>aren't</b> [1] 20:3  <b>argue</b> [1] 52:3  <b>argued</b> [1] 8:20  <b>arguing</b> [1] 16:11  <b>argument</b> [16] 1:14 2:2,5,8 3:4,8 8:2 9:1 25:13 37:20 38:10,16 41:9 43:6 47:9 48:21  <b>arguments</b> [2] 34:7 38:22  <b>arrive</b> [2] 41:11 43:18  <b>Article</b> [2] 37:13 39:1  <b>aspect</b> [1] 47:2  <b>assert</b> [1] 13:11  <b>asserted</b> [1] 36:25  <b>asserting</b> [1] 22:6  <b>assess</b> [2] 6:17 31:11  <b>asset</b> [1] 34:3  <b>assets</b> [2] 33:19 34:10  <b>Assistant</b> [1] 1:20  <b>assume</b> [1] 10:2  <b>assuming</b> [1] 41:16  <b>attached</b> [1] 9:13  <b>attend</b> [1] 44:22  <b>authority</b> [4] 33:19 36:18 39:2 48:10</p>	<p>13  <b>bit</b> [1] 20:23  <b>blows</b> [1] 43:7  <b>bona</b> [1] 34:9  <b>bore</b> [1] 52:8  <b>both</b> [7] 13:21 31:15,21,23 41:8 50:23 52:12  <b>breath</b> [1] 52:24  <b>brief</b> [4] 9:10 29:9 43:2 46:5  <b>briefed</b> [1] 35:18  <b>broad</b> [1] 23:24  <b>broader</b> [2] 27:2 28:15  <b>bucket</b> [1] 49:19  <b>buckets</b> [2] 6:22 42:11  <b>build</b> [1] 21:14  <b>built</b> [1] 7:4  <b>burden</b> [2] 12:22 52:8  <b>bureaucratic</b> [1] 5:4</p>	<p>17 50:25  <b>claim-processing</b> [23] 4:22 5:9 6:23 7:12,14,22 9:4,21 23:16 24:16,19 26:14 30:2 33:2 35:16 38:3,24 39:5 41:3 44:10 49:4,17 50:22  <b>claimant</b> [1] 6:10  <b>claimants</b> [5] 6:2,5,7 11:3,5  <b>claimants'</b> [1] 49:22  <b>claims</b> [2] 34:9 42:12  <b>claims-processing</b> [15] 3:22 8:4 9:16,20 11:9 13:9,17 18:12,13 31:6 42:3 44:4,6,15 48:1  <b>class</b> [1] 48:2  <b>clear</b> [1] 27:4  <b>clearly</b> [1] 39:14  <b>client</b> [4] 5:12 6:16 14:12 15:12  <b>client's</b> [2] 12:10 15:3  <b>COA</b> [2] 18:21 52:15  <b>codifies</b> [1] 26:7  <b>collect</b> [2] 17:5,12  <b>colloquy</b> [1] 36:16  <b>come</b> [4] 21:21 36:21 51:25 52:10  <b>comes</b> [3] 14:10 19:23 34:9  <b>comfortable</b> [1] 42:16  <b>coming</b> [2] 51:6,9  <b>command</b> [1] 41:19  <b>commits</b> [2] 26:4 47:13  <b>committed</b> [2] 28:20 29:4  <b>compelling</b> [1] 46:2  <b>complaint</b> [1] 12:5  <b>complete</b> [1] 27:11  <b>compliance</b> [1] 34:1  <b>complied</b> [1] 10:16  <b>comply</b> [2] 28:11 33:10  <b>complying</b> [1] 40:17  <b>component</b> [1] 47:10  <b>components</b> [1] 41:9  <b>comprehensive</b> [1] 4:8  <b>concern</b> [4] 5:3 14:8 19:24 33:8  <b>concerned</b> [1] 47:2  <b>concerns</b> [2] 14:16 37:8  <b>conclude</b> [2] 5:8 47:15  <b>conclusion</b> [1] 33:21  <b>conditions</b> [1] 5:3  <b>conduct</b> [1] 18:23  <b>conducting</b> [1] 49:24  <b>confirms</b> [1] 4:14  <b>confused</b> [1] 9:17  <b>Congress</b> [4] 28:21 45:17 47:17 48:12  <b>Congress's</b> [1] 40:13  <b>congressional</b> [1] 40:18  <b>consequence</b> [8] 9:15 19:10,15,22 27:5 29:5 47:17 49:8  <b>consequences</b> [3] 9:11</p>
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