

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: THOMAS BRAXTON, Petitioner V. UNITED STATES

CASE NO: 90-5358

PLACE: Washington, D.C.

DATE: March 18, 1991

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WASHINGTON, D.C. 20543

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 THOMAS BRAXTON, :

4 Petitioner :

5 v. : No. 90-5358

6 UNITED STATES :

7 - - - - -X

8 Washington, D.C.

9 Monday, March 18, 1991

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:01 a.m.

13 APPEARANCES:

14 STEPHEN J. CRIBARI, ESQ., Baltimore, Maryland; on behalf  
15 of the Petitioner.

16 STEPHEN J. MARZEN, ESQ., Assistant to the Solicitor  
17 General, Department of Justice, Washington, D.C.;  
18 on behalf of the Respondent.

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On behalf of the Petitioner	

1 PROCEEDINGS

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear now in  
4 argument No. 90-5358, Thomas Braxton v. The United States.  
5 Mr. Cribari.

6 ORAL ARGUMENT OF STEPHEN J. CRIBARI

7 ON BEHALF OF THE PETITIONER

8 MR. CRIBARI: Mr. Chief Justice, and may it  
9 please the Court:

10 This is a sentencing guidelines case of some  
11 consequence to criminal defendants and practitioners of  
12 criminal law. As you know the sentencing guidelines  
13 implement a charge offense system of sentencing. Under  
14 the guidelines a defendant expects to be sentenced on the  
15 offense or offenses for which he is convicted.

16 There are defined exceptions to that general  
17 rule, and the guideline at issue in this case contains one  
18 of those exceptions. The exception is that when a  
19 defendant enters a guilty plea containing a stipulation  
20 which establishes an offense more serious than the offense  
21 of conviction, that defendant can expect his base offense  
22 level or, if you will, his presumptive sentence, to be  
23 based on the stipulated offense, not the offense of  
24 conviction.

25 The issue in Mr. Braxton's case is whether the



1 technical term "stipulation" can be so broadly interpreted  
2 that a defendant who refuses to stipulate, who makes it  
3 clear on the record that he does not intend the  
4 stipulation, denies committing the more serious offense,  
5 and keeps in issue an essential element of that offense  
6 may nevertheless be found to have stipulated because he  
7 acknowledges the Government's factual proffer on the  
8 offenses to which he intends to plead guilty.

9 QUESTION: How is the Government -- how does the  
10 Government's factual proffer come up in this case? Was it  
11 to show the voluntariness of the plea?

12 MR. CRIBARI: It came up in the extremely  
13 ordinary fashion of turning to the Government at the  
14 appropriate time during the Rule 11 inquiry and asking for  
15 the factual basis for the plea. The Government proffered  
16 what its facts would be -- had -- would the case go to  
17 trial, and Mr. Braxton acknowledged those facts as acts  
18 that he did.

19 At the same time he maintained that he did not  
20 intend to kill anybody. It is clear in the statement of  
21 facts that the Government proffered, that Mr. Braxton, who  
22 has been on a community release from a mental hospital,  
23 had stopped reporting for his medication. The marshals  
24 had been dispatched to bring him back. When they  
25 identified who they were and why they were there, he then

1 threatened them. He refused to go back. And when they  
2 kicked his door open, he fired shots at the door.

3 I think it's important to bear in mind factually  
4 that Mr. Braxton -- and the evidence would be clear on  
5 this -- did not fire through the opening of the door at  
6 the people outside. The bullets lodged in the outside of  
7 the door. So that when the door was kicked open, shots  
8 were fired across toward the open door, hitting the  
9 outside of the door. The door then closed.

10 QUESTION: I don't really get exactly -- perhaps  
11 you should be more explicit about it.

12 MR. CRIBARI: About how that happened?

13 QUESTION: Well, was the door open when he fired  
14 the shots?

15 MR. CRIBARI: The door had a chain guard on it.  
16 And one of the marshals kicked the door open so that it  
17 snapped open into the apartment. The shots were then  
18 fired and lodged in the -- what would be the front of that  
19 door -- which they could only do had the shots been fired  
20 across the front of the apartment toward what was now the  
21 open face of the door. In other words, they were fired  
22 perpendicularly to the opening of the door.

23 QUESTION: But none were fired before the door  
24 was kicked open?

25 MR. CRIBARI: None were fired before the door

1 was kicked open. The words were exchanged. And when the  
2 door was kicked open, the shots were fired.

3 QUESTION: So he intended to assault the door?

4 MR. CRIBARI: Well, I think it's clear he  
5 intended to assault the marshals by this act to frighten  
6 them away -- to say, I am not going back to the mental  
7 hospital. If you -- he went to so far as to threaten, if  
8 you come in, I'll kill you. I mean, there were overt  
9 threats made. But at the time the proffer was made by the  
10 Government, what Mr. Braxton said and what he said at  
11 sentencing was, I did not intend to kill those people. I  
12 intended not to go back to St. Elizabeth's. I intended to  
13 frighten them. I did not intend killing.

14 Now --

15 QUESTION: Mr. Cribari, based on the facts that  
16 were admitted at the plea hearing, could the sentencing  
17 judge have imposed the same sentence by enhancing the  
18 sentence under the guidelines and reach the same result  
19 that he reached here?

20 MR. CRIBARI: Justice O'Connor, I think it's  
21 certainly possible, but what's at issue is the manner of  
22 doing it. And under the guidelines, the manner of doing  
23 it is crucial.

24 QUESTION: But on these facts he could have  
25 achieved the same result by another mechanism.

1 MR. CRIBARI: I hesitate to say, categorically,  
2 yes. The answer is he could do it. But the answer also  
3 is that in doing so, he would have to engage in a  
4 departure analysis. And engaging in a departure analysis,  
5 the courts have been fairly clear that all departures,  
6 upward or downward, have to be structured. We've  
7 developed the term "guided departures." At --

8 QUESTION: Well, if you were correct on the  
9 proposition that you bring to us, at the very least I  
10 suppose we should remand to let the trial judge determine  
11 if the same sentence should be imposed on another basis.

12 MR. CRIBARI: We would happily take that  
13 hearing, Your Honor. I think that that's the correct  
14 procedure that has to happen. You have to start from the  
15 base offense level for the aggravated assault, and you  
16 have to engage in discussion as to why the next level is  
17 not appropriate, why the next level -- and why this  
18 sentence would be acceptable.

19 QUESTION: Now, would you tell us what the  
20 Sentencing Guidelines Commission's position is at present  
21 on the interpretation of this provision?

22 MR. CRIBARI: This stipulation provision?

23 QUESTION: Yes.

24 MR. CRIBARI: Your Honor, I think the sentencing  
25 guidelines interpretation is fairly clear. Under 1B1.2 in



1 the commentary, the Sentencing Commission cites to a House  
2 report which is the subject of some discussion in the  
3 briefs that refers to stipulations of this nature being  
4 contained in plea agreements. There's not a specific  
5 discussion that they should be in writing necessarily, but  
6 that they should be part of a plea agreement.

7 QUESTION: Mr. Cribari, does -- has the  
8 Sentencing Commission taken any -- after issuing the  
9 guidelines, do they take positions on their interpretation  
10 of what they've issued? I mean, any other agency that we  
11 review we especially give great deference to their  
12 interpretation of their own rules. And this is sort of  
13 like a rule of the guidelines. I just don't know how to  
14 handle it. Do they take any positions on interpretation  
15 or is the only thing they can do is reenact a different  
16 guideline? They have this under consideration right now,  
17 don't they?

18 MR. CRIBARI: They do. They have under  
19 consideration a proposed amendment to this guideline  
20 questioning whether it should be made specifically clear  
21 in the guideline as part of the black letter law that --

22 QUESTION: And what if they do? Is that  
23 retroactive? Do we treat that as though it's an agency's  
24 interpretation of its own -- of its own regulation? Or is  
25 like Congress' enactment of a new statute?

1 MR. CRIBARI: Well, I think the Commission take  
2 the position that these would clarifying amendments which  
3 would be effective at the time anyone would be sentenced  
4 under them and would have no retroactive effect in --

5 QUESTION: Would not be retro --

6 MR. CRIBARI: Well, if it's a clarifying  
7 amendment, all it's doing is making more clear what once  
8 was the case.

9 QUESTION: So it would have a retroactive  
10 effect?

11 MR. CRIBARI: Excuse me, Your Honor?

12 QUESTION: So it would have a retroactive  
13 effect?

14 MR. CRIBARI: It would have a retroactive effect  
15 in the sense that --

16 QUESTION: But would not be retroactive? Right.  
17 I know what you mean.

18 MR. CRIBARI: Well, Your Honor, I think it would  
19 have a retroactive offense -- effect in the sense that it  
20 is making clear what has always been the case. But I  
21 don't think people who have already been sentenced could  
22 have all of their sentences reheard because some -- the  
23 law had been changed in a way that would have a benefit to  
24 those people.

25 QUESTION: What --

1 QUESTION: What precisely is the amendment that  
2 the Commission is considering?

3 MR. CRIBARI: The Commission's amendment reads  
4 as follows, and it's extremely short: proposed amendment  
5 to 1B1.2, regard -- which regards stipulations to more  
6 serious offense should be amended to provide expressly  
7 that such stipulation must be part of a formal plea  
8 agreement.

9 QUESTION: And that is what it is considering  
10 but has not acted upon?

11 MR. CRIBARI: That is what it is soliciting  
12 comment on doing.

13 QUESTION: Is this a formal plea agreement?

14 MR. CRIBARI: There was no plea agreement in  
15 this case, Your Honor. There was no plea agreement of any  
16 kind.

17 QUESTION: Does formal plea agreement mean  
18 written, in your view?

19 MR. CRIBARI: Well, I think the better practice  
20 is written, and I think the rules -- at least the local  
21 rules of the district court in Maryland would require in  
22 the felony situation that we have a written agreement.  
23 I'm not sure it needs to be written. I think the Second  
24 Circuit in McCall has said that, whether written or oral,  
25 it must be formal and must be part of a plea agreement.

1           Of course, what's ultimately at issue is will a  
2 defendant be sentenced presumptively to a base offense  
3 level for an offense that he does not acknowledge  
4 committing.

5           QUESTION: Mr. Cribari, am I correct that if the  
6 Commission adopts what they have proposed to adopt, your  
7 client would -- would win? Is that -- is that right?

8           MR. CRIBARI: That's accurate. Since --

9           QUESTION: Now, what if -- what if we -- what if  
10 we find against your client, and then the Commission  
11 adopts what it has proposed to adopt?

12          MR. CRIBARI: Your Honor, that puts me in the  
13 awkward position of saying perhaps my client then should  
14 file some kind of 2255 alleging my ineffectiveness for not  
15 foreseeing that that would be the case for him.

16          QUESTION: Oh, but you think we would win  
17 though?

18          MR. CRIBARI: Well, I -- you would have a  
19 situation where the Commission will have changed the  
20 guidelines, or -- sorry -- where the Commission will have  
21 clarified guidelines in a way opposite to what this Court  
22 could do in this case.

23          Certainly, you have a situation where that would  
24 be concededly unfair to a defendant. And hopefully there  
25 could be some kind of review.



1 QUESTION: Well, why not --

2 MR. CRIBARI: But if the Commission's adoption  
3 would be a clarifying amendment --

4 QUESTION: Why not treat the Commission in such  
5 a situation like we had -- treat Congress? Congress can  
6 always overrule some statutory interpretation.

7 MR. CRIBARI: Well, certainly the Commission --  
8 if this Court found a -- in the Government's favor in this  
9 case -- the Commission could enact the guideline or  
10 reenact the guideline or amend the guideline to make it  
11 consistent with my position. The question is what happens  
12 to Mr. Braxton in the meantime?

13 QUESTION: He goes to jail.

14 MR. CRIBARI: Well, he's already there, and I  
15 think he stays there.

16 QUESTION: Uh-huh.

17 MR. CRIBARI: And I don't think he gets the  
18 benefit of -- of the Commission's amending a guideline  
19 once this Court concludes this case against him, if it  
20 were to do that. But to conclude this case against Mr.  
21 Braxton, the Court is going to have to say that Mr.  
22 Braxton, who proclaimed his innocence of a stipulated  
23 offense, nevertheless stipulated to that offense. I --

24 QUESTION: Counsel, does -- was there any  
25 attempt to take this Court en banc in the Fourth Circuit?

1 MR. CRIBARI: There was not, Your Honor. I'll  
2 be happy to say why. We had won one portion of the appeal  
3 in this case. On the acceptance of responsibility issue  
4 the trial court had ruled that Mr. Braxton could not get  
5 it to a level of reduction for acceptance of  
6 responsibility because he frankly was insane -- could not  
7 show remorse for his actions. Remorse was necessary to  
8 show rehabilitation, and rehabilitation was necessary to  
9 get the benefit of acceptance of responsibility.

10 The Fourth Circuit ruled that that's not true,  
11 that rehabilitation has nothing to do with incarceration,  
12 and at least in the incarceration sentence a defendant  
13 need not show a step toward rehabilitation to show that he  
14 accepts responsibility.

15 QUESTION: Well, you've got a divided vote here.  
16 It would have been interesting to know where Judge Wilkins  
17 stood.

18 MR. CRIBARI: Well, it would have, Your Honor.  
19 I think you can get that from his low review article. And  
20 I think you can understand where Judge Wilkins stands from  
21 the proposed amendment, which was proposed after the  
22 Fourth Circuit's decision in Braxton, and certainly he  
23 would not have been ware of that sitting on that court.

24 QUESTION: Do we give special weight to those  
25 courts that have members of the Commission on them? Is

1       that the --

2               MR. CRIBARI: Well, Your Honor, I -- we tried  
3       that in Mistretta I think.

4               QUESTION: Yes, I see.

5               MR. CRIBARI: And -- and it was not particularly  
6       availing. I think you give weight to expert judges in  
7       light of what their expertise is. I don't think you can  
8       say just because Judge Wilkins wrote a law review article,  
9       taking a certain position, that therefore that's the  
10      position of the Commission, and this is a pronouncement  
11      that you must defer to. But you certainly can be aware of  
12      who Judge Wilkins is and what the law review article is  
13      all about.

14              QUESTION: Could I ask the inverse situation of  
15      the question I asked before? Suppose we find, not against  
16      your client, but for your client. And then the Commission  
17      does not adopt its proposed clarification, but -- well --  
18      either two questions. Either it doesn't adopt the  
19      proposed clarification. It does nothing. Or else it  
20      adopts just the opposite clarification. Then -- then what  
21      would happen?

22              MR. CRIBARI: Then --

23              QUESTION: Would that apply retroactively to  
24      your client, and he would be deprived of the victory that we  
25      have given him?

1 MR. CRIBARI: No, I don't think so at all.

2 QUESTION: So it's sort of a one-way street.

3 MR. CRIBARI: At that point I think it is. I  
4 think that's really no different than the cases where this  
5 Court says you cannot be convicted of bank robbery by  
6 intimidation with a gun, and then use -- or hand gun  
7 offense and bank robbery by armed robbery. And then  
8 Congress turns around and changes it. I'm not sure that  
9 people in the interstices get any benefit one way or the  
10 other.

11 QUESTION: Well, you do agree they should be  
12 treated like Congress and not like an agency? They're --

13 MR. CRIBARI: Well, they are laws.

14 QUESTION: -- not just interpreting their  
15 guidelines. They are issuing a new guideline essentially,  
16 right?

17 MR. CRIBARI: They are not?

18 QUESTION: They are not just interpreting a  
19 guideline the way an agency does. They are issuing a new  
20 guideline. It's a -- it's a new enactment.

21 MR. CRIBARI: To the extent that they issue a  
22 new guideline, they -- I mean, there's a period where they  
23 would have to be -- could be vetoed and so forth. But to  
24 the extent that they merely clarify, I wonder if they're  
25 issuing in fact a new substantive law or whether they're



1 just clarifying an old one.

2 QUESTION: Well, do you have to concede that  
3 what they are doing is a clarification?

4 MR. CRIBARI: For my case I do not. I think for  
5 this case --

6 QUESTION: I mean, why can't you argue it to  
7 this -- to us, well, this would be a new guideline?

8 MR. CRIBARI: Well, we could. It could be a new  
9 guideline. It could be a clarification, but it's going to  
10 affect the people in the future. For this case, I don't  
11 think it's going to affect Mr. Braxton one way or the  
12 other once this Court decides this case, if for no other  
13 reason there's no procedural vehicle to get him back into  
14 court once this Court decides the case. For the people in  
15 the future, there will be notice. It will be there. It  
16 can be read, and proceedings can be -- can happen  
17 accordingly.

18 QUESTION: Well, of course there's -- what's the  
19 time table for the Commission to act?

20 MR. CRIBARI: I think comment is due by -- I  
21 think it's by May 1st, and there would be amendments  
22 probably in June. It's possible the Commission could pass  
23 an amendment while this Court is considering this case.

24 QUESTION: It's possible we might wait for them.

25 MR. CRIBARI: It's very possible. I understand

1 that.

2 QUESTION: Do you suggest we do? I would think  
3 you would at least, rather than hold against you.

4 (Laughter.)

5 MR. CRIBARI: Your Honor, given -- given the  
6 legislative history and Judge Wilkins' comments, I -- it  
7 would not trouble me if the Court waited for that  
8 amendment. I don't think the Commission will take the  
9 position. I think it would be unexpected for the  
10 Commission to take the contrary position, saying that the  
11 decision in Braxton is what the law ought to be, in  
12 effect, telling the Second Circuit, the Fifth Circuit, and  
13 the other circuits that you don't need formal  
14 stipulations.

15 I think the word stipulation in 1B1.2 is a  
16 formal, technical term. It doesn't say a plea in which  
17 the defendant agrees to certain facts. It doesn't say a  
18 plea in which a defendant acknowledges an offense greater  
19 than the offense at conviction. It says, "a plea in which  
20 the defendant stipulates." And I think -- even in the  
21 Government's brief -- I don't think there's any dispute  
22 between the parties as to what a stipulation is. It is a  
23 -- certainly an agreement, and it is an agreement between  
24 the parties -- that's the Government and the defense.

25 I think Judge Sprouse was correct in the Fourth

1 Circuit when he said, the stipulation envisions an  
2 agreement between the defendant and the Government.  
3 Without that agreement -- without that assurance that the  
4 defendant knows he is admitting to greater offense conduct  
5 -- you can't turn around and say your presumptive sentence  
6 is based on an offense you deny committing.

7 QUESTION: Well, when you say that a stipulation  
8 is a word of art meaning an agreement between the  
9 Government and the defendant, do you mean that it can't be  
10 entered into by attorneys?

11 MR. CRIBARI: Well, the -- the attorneys  
12 representing the parties could certainly do it. I think  
13 being an attorney on behalf of the defendant and the  
14 attorney representing the Government --

15 QUESTION: So what -- what then is your point  
16 when you say that it's an agreement between the defendant  
17 and the Government?

18 MR. CRIBARI: My point is that without a formal  
19 agreement between the parties or between the lawyers  
20 representing the parties, the Government should not be a  
21 position of coming to court, making its factual proffer,  
22 having a defendant acknowledge, that's what I did for  
23 purposes of what I want to plead guilty to, and then find  
24 out he stipulated to greater offense conduct.

25 QUESTION: You say that what happened here with

1 the Government making a proffer for the voluntariness  
2 purposes, the judge asking the defendant if he agreed, he  
3 says that is not an agreement between the parties.

4 MR. CRIBARI: No, not after the parties  
5 discussed plea agreements and rejected them. I mean,  
6 there's a -- it's a clear statement in the record even  
7 from the Government: we do not have a plea agreement, and  
8 we're going to wait and see what sentence you give. And  
9 if we like it, fine. If we don't like it, we may  
10 reevaluate this case and take the attempted murder charge  
11 to trial or whatever.

12 QUESTION: Well, how --

13 MR. CRIBARI: The only agreement was that the  
14 Government would do what it wants to do.

15 QUESTION: I don't suppose if there -- if there  
16 had been a plea agreement in this case, what -- what do  
17 you think it would have been about? You -- that I agree  
18 to plead guilty to -- to assault, but I don't -- I'm not  
19 pleading to a -- to attempted murder. But I stipulate to  
20 these facts for purposes of -- now, would the case be any  
21 different then?

22 MR. CRIBARI: I think it would be very  
23 different. I think if there had been that plea agreement  
24 with the stipulation to the greater offense conduct --

25 QUESTION: Yes --



1 MR. CRIBARI: -- Mr. Braxton could not have --

2 QUESTION: I know, but what if Mr. Braxton said,  
3 I'm not pleading guilty to the -- either in the agreement  
4 or in open court, he says, I didn't plead guilty to  
5 attempted murder. And I didn't commit attempted murder.

6 MR. CRIBARI: Then, in fact --

7 QUESTION: I do not -- I do not agree that I  
8 committed it.

9 MR. CRIBARI: Then either that would be a  
10 violation of a plea agreement or that -- there would be no  
11 plea agreement. That's why we did what we did.

12 QUESTION: Why would that be a violation of the  
13 plea agreement?

14 MR. CRIBARI: Because if the -- the plea  
15 agreement -- assuming the plea agreement had proceeded --  
16 excuse me -- assuming the plea agreement represented the  
17 Government's position in this case, there would have been  
18 a stipulation to conduct that established the greater  
19 offense of attempted murder that would have been required  
20 in the plea agreement.

21 QUESTION: I know, but the plea agreement  
22 probably would have required the Government to dismiss the  
23 attempted murder charge.

24 MR. CRIBARI: In return for the defendant's  
25 agreement that he committed an attempted murder.

1 QUESTION: Yes.

2 MR. CRIBARI: Without that quid pro quo, the  
3 plea agreement would have broken down. If we had -- if we  
4 had signed such an agreement, and then in open court said,  
5 by the way, we don't agree we committed attempted murder.  
6 The Government certainly could have said, well, then  
7 there's no plea agreement. It's broken; we withdraw.

8 QUESTION: Yes.

9 MR. CRIBARI: And we would be where we are.

10 QUESTION: It's a red herring then. There never  
11 would have been a plea agreement that would have been  
12 relevant.

13 MR. CRIBARI: Not in this case. Only unless the  
14 defendant would have agreed to the higher-base offense  
15 level. What defendants says is -- the defendant's action  
16 in effect say, I will not agree to acknowledge an  
17 attempted murder. I will agree to acknowledge use of the  
18 hand gun and the assault on the Federal officers. We are  
19 left with two choices. Go to trial or the choice given us  
20 by the guidelines -- proceed to be sentenced for  
21 aggravated assault and try to minimize any damage from the  
22 lurking attempted murder charge. That was taken away from  
23 the case by the trial court, using the base offense level  
24 for the higher offense.

25 QUESTION: Well, if the -- if the court had

1 proceeded to achieve this result by another way, would you  
2 be making your same argument that -- that the stipulate --  
3 or the agreement as to these facts would not justify the  
4 court in enhancing the sentence?

5 MR. CRIBARI: No.

6 QUESTION: Would you say there still would have  
7 to be a formal stipulation?

8 MR. CRIBARI: No, I would not be making this  
9 argument. If -- if the trial court had established the  
10 base offense level for the aggravated assault and then  
11 said, I now think I'm going to depart upward. And here is  
12 why I am going to do what I'm going to do. And take an  
13 argument on the extent of the departure and the nature of  
14 the departure. Then we would not be saying, well, there's  
15 no stipulation, you can't depart, because the judge could  
16 use what he believed the actual conduct of the case was as  
17 a ground for departure.

18 But significantly, the appellate review is very  
19 different. The appellate review of establishing the base  
20 offense level is a clearly erroneous standard. The  
21 appellate review of a departure is much more stringent.  
22 Was there a ground for a departure? Do the facts support  
23 the departure and was the extent of the departure  
24 reasonable? That's what we envisioned would happen from  
25 the beginning of this case, that we would have a base

1 offense level for aggravated assault and we would engage  
2 in a departure analysis where the defense would try to  
3 constrain and restrict the upward departure and then argue  
4 in favor of a downward one.

5 QUESTION: But you're saying -- choosing the  
6 baseline is a -- would be affirmed unless it was clearly  
7 erroneous?

8 MR. CRIBARI: Exactly, Your Honor. That's what  
9 the Fourth Circuit said. I think that's --

10 QUESTION: Well, do you agree with that? It  
11 sounds like a questionable call to me.

12 MR. CRIBARI: Well, if it's a question of fact,  
13 I have to agree with it, because the Fourth Circuit's  
14 standard is that questions of -- determinations of fact  
15 will be given great deference and will be overturned only  
16 if clearly erroneous.

17 QUESTION: Yeah, surely. Is that what's  
18 involved in choosing another baseline?

19 MR. CRIBARI: That's what should be involved  
20 because choosing the baseline is very simple. You look it  
21 up. According to 1B1.1 and 1B1.2, you take the offensive  
22 conviction and you look it up. And if there's more than  
23 one given, you use 1B1.3 to choose between them.

24 There was only one given here, and it wasn't  
25 looked up. Rather, what the trial court said was, you



1 have not stipulated to any greater offense. Nevertheless,  
2 because I think you attempted a murder, I'm going to give  
3 you the base offense level for the higher offense. That  
4 puts the defense in the position of having to create a  
5 downward departure from a base (inaudible) that shouldn't  
6 be done.

7 QUESTION: (Inaudible) view of that, that  
8 doesn't sound like a question of fact. It doesn't sound  
9 like --

10 MR. CRIBARI: Well, what the Fourth Circuit  
11 determined was that since the base offense level set in  
12 this case was based upon a stipulation, it's really just a  
13 finding of fact. But the Fourth Circuit had to find a  
14 stipulation in the face of the defendant's denial of the  
15 crime to which he was now being found does stipulate.

16 QUESTION: Okay, do ahead.

17 MR. CRIBARI: I think the appellate review of  
18 departures is a significant difference from appellate  
19 review of base offense levels. I think that the standard  
20 of proof for a departure, while much less, triggers the  
21 more extensive appellate review. For a base offense level  
22 to be set on stipulated conduct, there's really no doubt  
23 that the conduct occurred, because the defendant is saying  
24 I committed this greater conduct. And I agreed to do it,  
25 and I agree to the effect of doing it.

1 QUESTION: I take it there's a difference as to  
2 whether or not the elements of the offense were  
3 established by the facts that were conceded.

4 MR. CRIBARI: Well, I think that's -- that's a  
5 great help in this case for the defense. And I think that  
6 it's a strong point for the defense, because there is no  
7 concession to intent to murder. And the legislative  
8 history of 11.14 indicates you need that.

9 But the argument would be the same even if that  
10 were not the case. I would make the same argument if the  
11 defendant acknowledged all of the essential elements of  
12 the offense but still said, I refuse to stipulate. What  
13 that tells the trial court is, if you want to sentence me  
14 from my actual conduct, you're going to have to depart to  
15 do it. And it might be very easy to do that departure. I  
16 am not, however, going to agree to a base offense level  
17 for the greater offense.

18 Now, it may seem like a small point, but the  
19 Second Circuit certainly recognized in the McCall case  
20 that being sentenced under the wrong base offense level is  
21 the denial of a fundamental right under the guidelines.  
22 Guideline sentencing hinges on the establishment of a base  
23 offense level and triggers procedures to move away from  
24 it. The base offense level is the safe place.

25 QUESTION: Well, the -- did the Government -- I

1     suppose the Government could have tried you for attempted  
2     murder -- tried your client?

3             MR. CRIBARI: Absolutely. We could have -- we  
4     could have gone to trial for attempted murder.

5             QUESTION: Yes. You say if you want to sentence  
6     me for -- find me guilty of attempted murder and sentence  
7     me for that, let's -- try me.

8             MR. CRIBARI: That's exactly right.

9             QUESTION: But the Government dismissed it?

10            MR. CRIBARI: The Government got the attempted  
11     murder sentence. Why would it go to trial for attempted  
12     murder?

13            QUESTION: Yes, well --

14            MR. CRIBARI: But it should not have.

15            QUESTION: But anyway it dismissed it.

16            MR. CRIBARI: It did.

17            QUESTION: When?

18            MR. CRIBARI: After sentencing. After  
19     sentencing and after it had determined it got the sentence  
20     -- in fact it got a sentence through much higher than the  
21     sentence it was looking for.

22            QUESTION: So did you anticipate that -- that  
23     you were going -- that you'd plead guilty to assault and  
24     then were going to stand trial for attempted murder?

25            MR. CRIBARI: I anticipated that was a possible

1 outcome, because the only other alternative was to go to  
2 trial on everything. But it seems to me that it was worth  
3 the tactics of the case to say, if we can plead guilty to  
4 the two charges we would even acknowledge at trial, and  
5 try to limit the sentence, based upon the offense level  
6 for the aggravated assault, if we can reach a point that's  
7 acceptable to the defense and the Government decides not  
8 to go forward on the attempted murder, we may have saved  
9 Mr. Braxton a certain number of years in jail. And it was  
10 worth that attempt.

11 And the guidelines gave us the right to do that,  
12 and it gave us the procedure to do it. And the trial  
13 court acknowledged that you didn't stipulate to the  
14 greater offense. You should not have the base offense  
15 level set for that according to the guidelines.  
16 Nevertheless, that's what happened. We were not dealing  
17 with a departure case.

18 I would I think like to reserve the rest of my  
19 time for rebuttal. If there are other questions at this  
20 time, I would certainly answer them.

21 QUESTION: You don't think it would be enough  
22 then in this case I -- if the -- if the judge said, I  
23 would like your stipulation of these facts to be made  
24 formally?

25 MR. CRIBARI: We would have said we're not doing



1 that. We refuse to make a stipulation to these facts  
2 formally, because we are not stipulating to them. And if  
3 the trial court then said, I refuse to take a plea without  
4 a formal stipulation of facts, we would have said, fine.  
5 Let's go to trial. But that seems to me less judicially  
6 economical than taking --

7 QUESTION: Well, let's just assume that you --  
8 that you said, okay, judge, I'm -- put it in writing and  
9 I'll sign it. And so they write out the facts and the  
10 last -- I hereby stipulate to these facts. You would not  
11 have signed that? Is that it?

12 MR. CRIBARI: We would not have signed that,  
13 because we could not stipulate to the facts of attempted  
14 murder because Mr. Braxton denied he committed an  
15 attempted murder. If we would have done that, we would  
16 have entered the plea agreement. But we rejected all of  
17 that.

18 In summation at this point, I would simply say  
19 that the guidelines must be interpreted strictly. They  
20 mean what they say. A stipulation is a formal agreement  
21 between the parties. If you can extract that -- that  
22 agreement during plea negotiation, you can get a higher  
23 base offense level set for a crime of conviction. Without  
24 that stipulation, you must -- you must -- you must use the  
25 departure procedure, which is a different procedure, which

1 has different benefits and pitfalls for the defense. But  
2 that that's a choice the parties can make, and the right  
3 to pick one of those procedures is, as you can see in this  
4 case, uniquely within the control of the defendant.

5 Thank you.

6 QUESTION: Do you wish to reserve the balance of  
7 your time, Mr. Cribari?

8 MR. CRIBARI: Yes, sir.

9 QUESTION: Very well. Mr. Marzen, we'll hear  
10 now from you.

11 ORAL ARGUMENT OF STEPHEN J. MARZEN

12 ON BEHALF OF THE RESPONDENT

13 MR. MARZEN: The guidelines provide defendants  
14 who want to plead guilty two ways to respond to the  
15 Government's factual proffer. First, if the proffer is  
16 accurate, they can agree to it. If they come clean, they  
17 will most likely get a two --

18 QUESTION: When -- when you say to respond to  
19 the Government's factual proffer, what stage of the  
20 proceedings are you talking about? The -- the Rule 11?

21 MR. MARZEN: Yes, sir, Rule 11, basically the  
22 satisfaction of the requirement in Rule 11(f) that there  
23 be a factual basis for the plea. It's -- the defendant  
24 can of course himself state the facts that support the  
25 plea, but it's often the case that the district court will

1 ask the Government what it would be able to prove if it  
2 went to trial. And that's the situation that arose in  
3 this case.

4 So that in this circumstance he had under the  
5 guidelines two options. He could agree to that factual  
6 proffer --

7 QUESTION: Well, why do the guidelines have  
8 anything to do with a proffer for a Rule 11 purpose?

9 MR. MARZEN: The guidelines don't have any --  
10 don't dictate the procedure at a Rule 11 hearing. They do  
11 have different consequences -- different consequences  
12 attach depending on what the defendant does at the Rule 11  
13 hearing. The --

14 QUESTION: Well, I -- I don't -- I didn't see  
15 anything in the guidelines about what a defendant did at a  
16 Rule 11 hearing.

17 MR. MARZEN: With respect, I think guide -- the  
18 language of guideline 1B1.2 does have that effect, and in  
19 particular the proviso. Guideline 1B1.2 requires the  
20 sentencing to -- determination generally to be based on  
21 the offense --

22 QUESTION: Is that --

23 MR. MARZEN: -- of conviction except in one  
24 case. And that case is the so-called proviso, which  
25 applies when three conditions are met. First, there has

1 to be a plea, a plea of guilty or nolo contendere, which  
2 implies that, you know, the requirements of Rule 11 have  
3 been satisfied. Second, that there has to be a  
4 stipulation. That --

5 QUESTION: It says -- it says a plea containing  
6 a stipulation that's specifically established.

7 MR. MARZEN: Right. The plea has to contain a  
8 stipulation, and that's where Rule 11 ties in. At the --

9 QUESTION: You -- I -- I think you're assuming  
10 something when you bring Rule 11 in there.

11 MR. MARZEN: Well --

12 QUESTION: I mean -- well, go ahead.

13 MR. MARZEN: Okay. What I was about to say is  
14 that the plea of guilty or nolo contendere has to, as you  
15 state, contain the stipulation. And it's for that reason  
16 that at the plea hearing and not later -- for example --  
17 at the sentencing hearing, it has to be at the plea  
18 hearing there has to be the agreement to the facts,  
19 setting up the more serious offense.

20 It -- what the guidelines forbid is at the  
21 sentencing hearing, the defendant saying, I did X, Y, and  
22 Z. And then that the district court saying, well, I think  
23 that's attempted murder and that's what I'm going to  
24 sentence you on. It's got to be at the plea hearing  
25 specifically. What --



1           QUESTION: Mr. Marzen, if the Sentencing  
2 Guidelines Commission were to adopt its proposed revision  
3 to the guidelines, would you be making -- taking the same  
4 position in this case?

5           MR. MARZEN: If the Sentencing Commission  
6 required a plea agreement, we would not. It would be --  
7 it would be clear that --

8           QUESTION: Is it clear that that is what they  
9 are proposing to adopt?

10          MR. MARZEN: No, and that's the second --

11          QUESTION: No?

12          MR. MARZEN: -- part I'd like to say. There's  
13 no explicit language that has been proposed with respect  
14 to any amendment of Rule 1B1.2. They're asking for  
15 comments whether they should expressly provide that  
16 they'll be a plea agreement. In other words, there's been  
17 no determination at this stage that a majority of the  
18 members of the Sentencing Commission want to amend the  
19 current guideline to require that a plea agreement be a  
20 predicate for application of the proviso.

21          There's one additional fact that the Court  
22 should note. I had been informed within the past week or  
23 so that the Commission has in a public meeting voted to  
24 defer consideration of any amendment to the proviso  
25 pending the Court's decision in this case.

1 (Laughter.)

2 What that means -- by statute under 28 U.S.C.  
3 994, there are certain statutory time limits the  
4 Commission has to operate under. They have to submit all  
5 of their amendments, if they have any this year, by May  
6 1st. So if the Court makes no decision by May 1st,  
7 effectively what that means is that there will be no  
8 amendment to the guidelines this year. That may influence  
9 some decision you may want to take.

10 Under the guideline as it's currently written,  
11 what petitioner Braxton had was two choices. One choice  
12 was to agree to the Government's factual proffer, agree  
13 that he took personal and affirmative responsibility for  
14 his criminal conduct. And in all likelihood he would have  
15 gotten a 2-point reduction for acceptance of  
16 responsibility.

17 Go -- it goes along with that acceptance of the  
18 Government's facts, that if those facts established a more  
19 serious offense, the relevant guideline for calculation of  
20 his sentence would have been the more serious offense --  
21 in this case, the guideline for attempted murder.

22 If petitioner had wanted to avoid the higher  
23 guideline, he had a second choice under the guidelines.  
24 He could simply have said, Government, I don't agree with  
25 that factual proffer. Or I don't have time to read the in

1 and out of it now, but I don't agree with it. And here's  
2 my own version of what the facts were.

3 QUESTION: Mr. Marzen, why did the stipulation,  
4 using it in your sense, the statement of facts that the  
5 Government had proffered, why did that, within the meaning  
6 of the guidelines, specifically establish the more serious  
7 offense? Did -- did that stipulation establish intent to  
8 kill?

9 MR. MARZEN: I think it is. But at this -- at  
10 this stage that's the most difficult thing to -- to talk  
11 about, because the legal arguments why it didn't appear  
12 for the most part for the first time in the reply brief.  
13 But let me respond to your question, because I do think  
14 they did for two reasons.

15 First of all, the facts showed a specific intent  
16 to murder. And in this case, I need to correct one  
17 factual misstatement on petitioner's side. And that is  
18 that the shots were fired at the marshals, at chest and  
19 head level, through the opening in the doorway.

20 Petitioner's submission is basically that he was only  
21 trying to use the gunshots to frighten the marshals away,  
22 sort of firing in the air and say, don't come into my  
23 apartment.

24 The problem is that no threats were made of  
25 don't come into my apartment before the shots were fired.

1 The marshals kicked open the door and at that point, page  
2 17 of the joint appendix indicates, and I quote, "A  
3 gunshot was fired through the door opening." And later on  
4 in the same page, quote, "A second gunshot was fired,  
5 again through the door opening." You don't fire a warning  
6 shot at someone's head or chest. It's -- the warning is  
7 fatal basically.

8 Second, even if you credit the --

9 QUESTION: How do you suppose he missed?

10 MR. MARZEN: You know, he must have been a  
11 horrible shot, Justice Stevens. Because it's true that  
12 the marshal --

13 QUESTION: But your theory is he -- he did aim  
14 at him and failed to hit him?

15 MR. MARZEN: Yes, because --

16 QUESTION: And that's clear beyond a reasonable  
17 doubt? Or what is the standard for establishing? Is it  
18 something that the judge might find or must find?

19 MR. MARZEN: I think -- I think it must -- it  
20 must be a must find, if you will. And that --

21 QUESTION: And he must find that he was a poor  
22 marksman rather than he did not intend to hit him?

23 MR. MARZEN: Yes, and in this case the district  
24 court, as a matter of fact, found that the facts compelled  
25 a finding of attempted murder and that finding by the



1 district court was upheld on a -- on appeal. It --

2 QUESTION: Well, but a finding is really quite  
3 different than an agreement or stipulation, isn't it? I  
4 mean, if the district court has to make a finding, doesn't  
5 that perhaps negate the existence of a stipulation?

6 MR. MARZEN: I don't think so, and I think again  
7 the language of guideline -- the -- specifically the  
8 proviso provides the answer to your question. The point  
9 -- the part we're talking about now -- now is not the  
10 stipulation part. It's the part that requires that the  
11 stipulation be one that, quote, "specifically establishes  
12 a more serious offense than the offense of conviction."  
13 It doesn't --

14 QUESTION: Well, it doesn't -- nothing like --  
15 he never agreed that he intended to kill. You just have  
16 to infer it from the other facts.

17 MR. MARZEN: Well, it's more than --

18 QUESTION: You say you don't aim at somebody  
19 without intending to kill them. Well, but you have to --  
20 you have to -- he didn't agree though with that inference.

21 MR. MARZEN: True. He didn't agree with that  
22 conclusion. What he -- what in fact is happening in this  
23 case is petitioner is trying to have it both ways in this  
24 sense. He's trying to agree to all the facts of his  
25 conduct and get a two-level reduction for acceptance of

1 responsibility but say that those facts can't be used to  
2 apply a higher guideline.

3 QUESTION: Well, suppose you had this -- the  
4 concession -- we won't call it a stipulation -- the  
5 concession that you had here with one added element. The  
6 defendant said, and I do not stipulate or concede that I  
7 had an intent to murder. What result in that case?

8 MR. MARZEN: I don't think that would change the  
9 result in this case because it doesn't change the  
10 agreement to the historical facts. It may well be that  
11 the facts in this case are insufficient. I shouldn't say  
12 may well be. I think the district court was right to find  
13 that these facts compelled a finding of malice of  
14 forethought.

15 If you disagreed with that --

16 QUESTION: Well, that's a rather odd -- odd  
17 reading of specifically establish a defense. If you say I  
18 want to make very clear I do not stipulate of had the  
19 intent to commit this crime.

20 MR. MARZEN: Well --

21 QUESTION: And you say, well, what you've said  
22 specifically establishes this.

23 MR. MARZEN: I think it's important the language  
24 you quote says specifically establish and not -- and it  
25 does not say stipulate to the offense. The guideline

1 makes pretty clear that the stipulation need only  
2 specifically establish the offense and not be a -- an  
3 agreement to the conclusion that I did commit the offense.

4 QUESTION: But what does specifically establish  
5 a more serious offense mean if it doesn't mean stipulate  
6 to the elements of the offense?

7 MR. MARZEN: It means either -- that's exactly  
8 right. It means a stipulation to the facts or the  
9 elements of the offense.

10 QUESTION: But those are -- those are -- are  
11 they the same thing -- the facts or the elements?

12 MR. MARZEN: Yes, Chief Justice. Application  
13 note 2 uses those interchangeably. It talks about  
14 application of the proviso to cases in which either the  
15 facts prove the more serious offense or the elements of  
16 the more serious offense are established. So it -- yes,  
17 it does. It uses those synonymously.

18 QUESTION: Well, would the -- as I understand  
19 your opponent, it wouldn't have -- unless it was the plea  
20 -- formal plea agreement, it wouldn't have done him any  
21 good -- it wouldn't have done the Government any good even  
22 if he -- you had included in your statement of facts that  
23 he intended to kill and he agreed to that. It would still  
24 say it has to be a formal plea agreement?

25 MR. MARZEN: That's a -- that is a correct

1 interpretation of their position. In fact, his last --  
2 petitioner's counsel's last comments before sitting down  
3 were that even if he agreed to all the elements of the  
4 offense that that would not be sufficient to trigger  
5 application of the higher guideline. What you have then  
6 is the case where someone is able to go before a district  
7 court and say, I agree there's an offer. There's  
8 consideration, and there's acceptance, and I should get a  
9 two-level reduction for accepting that those were the  
10 facts of the arrangement. But you can't make your -- any  
11 determination on the basis that there was a contract here.

12 QUESTION: Is there any difference between  
13 stipulation and admission?

14 MR. MARZEN: For this purpose? No. And I think  
15 petitioner --

16 QUESTION: Well, wasn't there an admission in  
17 this case?

18 MR. MARZEN: There was indeed, Justice Marshall.  
19 And that's why --

20 QUESTION: Well, why do you need a stipulation?

21 MR. MARZEN: They're the same thing, Justice  
22 Marshall. We agree with that. And the definition that  
23 petitioner provides in both the opening and reply brief is  
24 one --

25 QUESTION: So, in that point you agree with the



1 petitioner?

2 MR. MARZEN: That's absolutely right, that the  
3 definition of a stipulation, according to Black's Law  
4 Dictionary, the ordinary definition, is the name, quote,  
5 "the name given to any agreement made by attorneys  
6 regulating any matter incidental to the proceedings."  
7 Petitioner agrees that stipulation means an agreement and  
8 that he agreed to the Government's factual proffer. At  
9 page 19 in the joint appendix he says, quote, "Your Honor,  
10 we agree", close quote, that the Government's factual  
11 proffer is accurate, with two exceptions.

12 QUESTION: The Government's factual proffer  
13 leaves you short on the element of -- on the issue of  
14 intent. The -- the -- you say the judge had to deduce  
15 that, and it was a permissible reduction from the  
16 stipulation. But I -- is that enough under this rule?

17 MR. MARZEN: Justice Rehnquist, if it was just a  
18 deduction -- if it was just something that a jury would be  
19 permitted to conclude, it is not enough. Specifically  
20 establish means it's got to be conclusive, necessary, or  
21 in the words of the district court, compelled. I think  
22 the facts in this case compelled it. And I was only able  
23 to give one of my reasons why. The second reason was even  
24 -- you don't have to assume that --

25 QUESTION: Which one --

1 QUESTION: Well, let him finish the answer.  
2 QUESTION: All right, go ahead. Go ahead.  
3 MR. MARZEN: You don't have to indulge the  
4 assumption that Mr. Braxton is a poor marksman. The  
5 common law has also allowed as an interpretation of malice  
6 of forethought the sort of -- the so-called depraved heart  
7 theory of intent -- just reckless disregard. And firing  
8 two shots through an open doorway, behind which marshals  
9 stood, is at the very least in reckless disregard.  
10 QUESTION: Well, how do you -- how do you fire  
11 through an open doorway and still have the marshal  
12 standing behind the door? And where did these shots hit?  
13 Do you -- do you agree that this door was flung open and  
14 do you agree with the petitioner as to where the bullets  
15 hit the door?  
16 MR. MARZEN: Yes, sir, Justice White.  
17 QUESTION: Well, then -- and then they weren't  
18 fired through an open doorway?  
19 MR. MARZEN: Well, actually --  
20 QUESTION: They hit the door after it was open.  
21 MR. MARZEN: There are two points here. One is  
22 where petitioner aimed the shots, and the second is where  
23 the shots landed. Petitioners and his counsel agreed to  
24 the proffer which says that those shots were basically  
25 aimed through the doorway but lodged in the door.

1 Remember the door was being kicked open at the time the  
2 shots were fired. So we have in this case, as I quoted,  
3 the record establishes that the shots were fired --

4 QUESTION: Well, if the door -- if the shots hit  
5 the door where he said it did, the door -- the door  
6 certainly opened awfully fast if the bullets hit where he  
7 says they hit.

8 MR. MARZEN: It's -- it's true.

9 QUESTION: They hit on the side of the door that  
10 before it was opened the officers were standing behind.

11 MR. MARZEN: The first bullet did. The second  
12 bullet did not. The second bullet lodged approximately 5  
13 feet high in the door and --

14 QUESTION: After it was -- after it was open and  
15 it was on the outside of the door?

16 MR. MARZEN: The record doesn't establish  
17 whether the second shot hit on what was the inside door of  
18 the apartment or the outside. The record only indicates  
19 that the first bullet hit on the outside of the door after  
20 it had been kicked open.

21 QUESTION: Well, the second one must have.

22 QUESTION: The first I could understand. But  
23 how could the first one hit the outside and the second one  
24 hit the inside?

25 MR. MARZEN: Because the record also shows --

1 shows that the door was kicked open the first time with  
2 such force that it snapped shut. The marshal --

3 QUESTION: Ah, yes.

4 MR. MARZEN: -- the proffer indicated that the  
5 deputy had to kick it open a second time.

6 QUESTION: Well, in that event, certainly the --  
7 the bullet wasn't fired through an open doorway.

8 (Laughter.)

9 MR. MARZEN: Well, when the marshal kicked open  
10 the door the second time, the -- the initial proffer  
11 anyway was that the Government -- that another shot was  
12 fired.

13 What this indicates though is that these kinds  
14 of factual determinants are probably best committed to the  
15 discretion of the district court who was there and could  
16 tell --

17 QUESTION: Did the district court advise this  
18 defendant of the elements of count 1, which was attempted  
19 murder?

20 MR. MARZEN: No, he did not.

21 QUESTION: And did he advise the defendant of  
22 the baseline offense level for attempted murder?

23 MR. MARZEN: No, the proffer was given at the  
24 Rule 11 hearing, Justice Kennedy, and the Rule 11 now  
25 requires that one advise -- that the judge advise the



1 defendant that the guidelines apply but not the specific  
2 range or any of the particular points.

3 QUESTION: But he didn't advise him of the  
4 elements of attempted murder --

5 MR. MARZEN: That's --

6 QUESTION: -- so he had no real basis to know  
7 that he was stipulating to attempted murder, because he  
8 wasn't -- at least under Rule 11 because he wasn't advised  
9 of the elements of that offense.

10 MR. MARZEN: I think I see where you're driving.  
11 The fear I guess is that the defendant might be agreeing  
12 to something without knowing the consequences.

13 QUESTION: Well, that's the whole purpose of  
14 this -- of this rule, isn't it? So the defendant has a  
15 certain amount of notice. He specifically stipulates that  
16 he's committed a higher offense.

17 MR. MARZEN: That's right. And I think that  
18 notice -- the defendant had sufficient notice in this case  
19 for two reasons. One, he -- petitioner Braxton was  
20 represented by a very able counsel who knew the guidelines  
21 and also knew, as indicated on page 22 of the joint  
22 appendix, that the facts of attempted murder might well be  
23 used to determine the guideline applicable. In other  
24 words, to determine that the attempted murder guideline  
25 applied.

1           QUESTION: Well, I think the sophisticated  
2 counsel might have been very interested to know that the  
3 judge was going to consider the higher baseline offense,  
4 and that was never advised in open court until the  
5 sentence was pronounced.

6           MR. MARZEN: It was never advised that he would,  
7 but defense counsel was certainly on notice that he could.  
8 And that's -- and that gave him the ability to go into the  
9 Rule 11 hearing and either agree or disagree with the  
10 stipulation with his eyes open. Second -- and this is  
11 also important -- defendants in general are not going to  
12 lightly agree to aggravating circumstances as part of  
13 satisfying the factual basis for a guilty plea because  
14 other things turn on it besides deciding which guideline  
15 applies.

16           The sentencing judge in all cases will still  
17 have the decision where within the guideline's range to  
18 sentence the defendant. That is an enormous incentive  
19 right there to make -- to not agree to aggravating  
20 circumstances because you want your client to see the  
21 sentence at the low end of the guideline.

22           In addition, if the aggravating circumstances in  
23 the Government's factual proffer are grave enough, they  
24 might well form the basis for a departure later at the  
25 sentencing hearing. That would be another reason why, if

1 anything, defense counsel would want to minimize the  
2 admission to any facts that don't necessarily prove that  
3 he committed a worse offense.

4 QUESTION: Mr. Marzen, suppose we took no action  
5 on this case or suppose we found in your favor and the  
6 Guidelines Commission later adopted an amendment that  
7 would favor the defendant here, would -- would that  
8 amendment be able to be applied to the defendant, or is  
9 this the end of the road?

10 MR. MARZEN: I think the answer turns on whether  
11 there is -- this case is still kicking around the courts.  
12 If the sentence is still open, I think it would be a  
13 procedural amendment and would well apply retroactively.  
14 If the sentence has already been meted out and the time  
15 for appeal has passed, I'm not sure there's any procedural  
16 mechanism to get a different sentence, I think. So I  
17 think, yes, the sentencing --

18 QUESTION: Well, what do you mean by kicking  
19 out? Suppose -- suppose -- suppose the case were  
20 dismissed as improvidently granted, what -- would the case  
21 still be kicking about or would that be the end of it?

22 MR. MARZEN: That would be the end of it. The  
23 district court on remand from the court of appeals  
24 judgment has already determined that because of  
25 petitioner's agreement to the facts that -- of the

1 criminal conduct -- he was entitled to a two-point  
2 reduction. The only issue left is the issue of what is  
3 the definition of stipulation.

4 QUESTION: 2255. We didn't decide what the rule  
5 meant. And he wanted us to decide what the rule meant.  
6 You know, why couldn't he go to 2255 and say, look, the  
7 district -- the court of appeals was just wrong?

8 MR. MARZEN: I --

9 QUESTION: And furthermore, I can prove it,  
10 because now the Sentencing Commission has interpreted it's  
11 own rule.

12 MR. MARZEN: I must confess -- confess I'm not  
13 sure that under 2255 that you're -- the defendant is  
14 entitled to the benefit of every procedural updating of a  
15 sentencing guideline. It would be a rather dangerous  
16 thing for this Court --

17 QUESTION: Well, suppose the -- suppose the --  
18 suppose the Sentencing Commission hadn't done anything at  
19 all. Can you -- can you -- can you use a 2255 to  
20 challenge an alleged misinterpretation of the guideline?

21 MR. MARZEN: Not to my knowledge. I haven't  
22 seen any judicial decision which has used it in that way.  
23 The usual mechanisms for correcting it are an appeal  
24 within 10 days or a post-sentencing hearing motion in the  
25 district court, and that's about it.



1 QUESTION: Rule 35 one year?

2 MR. MARZEN: Yes.

3 Petitioner's principal submission in the briefs  
4 and in this Court is that the stipulation requires a plea  
5 agreement. And I'd like to address that.

6 First, the proviso specifies the scope of the --  
7 of the proviso. It applies, quote, "in a case of a  
8 conviction by plea of guilty or nolo contendere --

9 QUESTION: Contendere.

10 MR. MARZEN: -- contendere -- I apologize.  
11 Petitioner has to add a word, the word "agreement," to the  
12 proviso in order to effect the interpretation he proposes  
13 to this Court, which is a fairly significant reason  
14 counseling that that is not what the guideline means.

15 In the --

16 QUESTION: Well, in petitioner (inaudible) argue  
17 that that the phrase containing a stipulation is a clause  
18 modifying the earlier clause?

19 MR. MARZEN: The word containing I think is  
20 consistent with the -- yes, it does modify the word  
21 "plea." And I think supports our interpretation.

22 Black's Law Dictionary defines plea of guilty to  
23 include not just the plea itself, guilty, not guilty, nolo  
24 contendere, but also to include the, quote, "confession of  
25 guilt." Petitioner's confession, his agreement to the

1 Government's factual proffer, may contain a stipulation to  
2 a more serious offense. If you --

3 QUESTION: You say the plea of guilty itself  
4 doesn't have to contain it?

5 MR. MARZEN: No, the plea of guilty does have to  
6 contain it, but the plea includes more than just the  
7 formal guilty, not guilty, or nolo contendere. It also  
8 includes the confession of guilt or the factual basis for  
9 the plea in common legal parlance. If you --

10 QUESTION: That is a stipulation?

11 MR. MARZEN: Yes, sir.

12 QUESTION: A stipulation between the Government  
13 and the defendant?

14 MR. MARZEN: Yes. The -- I don't --

15 QUESTION: It seems like a unilateral act in  
16 many ways.

17 MR. MARZEN: Well, it's a -- it is -- it should  
18 be a unilateral act in that it should be coming clean with  
19 what criminal conduct you did.

20 QUESTION: But then if it's a unilateral act,  
21 how can it be an agreement?

22 MR. MARZEN: You -- oh, I see. You can have a  
23 unilateral act and have it still be an agreement even  
24 though there's no consideration for it. It doesn't have  
25 to be a bargain for exchange in other words. The

1 defendant can agree to what -- that he committed the  
2 offense for which he was indicted and agree that the facts  
3 satisfied the -- a factual basis for that without the  
4 Government having to specifically propose something on the  
5 other side.

6 QUESTION: How is an agreement to be guilty a  
7 stipulation? It's only one party involved.

8 MR. MARZEN: Well, Justice Marshall, it's  
9 usually more --

10 QUESTION: Can one party stipulate?

11 MR. MARZEN: No. In this case, though --

12 QUESTION: But in this case, yes. Well --

13 (Laughter.)

14 MR. MARZEN: Well, in -- for purposes of the  
15 proviso, the stipulation has benefits for the Government  
16 and benefits for the defendant.

17 QUESTION: For purposes of conviction, it's  
18 okay.

19 MR. MARZEN: Well, if you want to view it in  
20 contractual terms, it's sort of like a -- the -- there's  
21 sort of a unilateral contract where you -- where you  
22 specifically give out an offer without anyone specific --

23 QUESTION: I can't help it. It sounds to me  
24 like a trap.

25 MR. MARZEN: Well, I don't think it's a trap,

1 because the defendant knows that if he provides a factual  
2 basis for the plea that establishes a more serious offense  
3 that certain sentencing consequences will attach. He  
4 also, by doing so gets the benefit of other sentencing  
5 consequences, namely the two-level reduction for  
6 acceptance of responsibility.

7 So it's not -- it's not really a -- a trap in  
8 general. And it wasn't a trap in this case. Petitioner's  
9 counsel knew that there was lurking in the background an  
10 attempted murder and knew that those facts might well be  
11 used to choose the attempted murder guideline. That's in  
12 fact what happened. It may have been his worst fear, but  
13 he did get some benefits from that. He got a two-level  
14 reduction on remand.

15 QUESTION: Well, why didn't he stipulate if he  
16 knew all of this?

17 MR. MARZEN: Two reasons -- to achieve a two-  
18 level reduction for acceptance of responsibility. That's  
19 equivalent to a 20 to 30 percent decrease in his sentence.  
20 Second, it allowed him to limit his statutory exposure,  
21 the maximum offense to which he would -- could be  
22 sentenced, to 10 years rather than 20 years. Those were  
23 the -- those were the benefits he got.

24 QUESTION: But this didn't come up then. It  
25 came up way at the sentencing hearing.



1 MR. MARZEN: Well --

2 QUESTION: It didn't come up when he, quote,

3 "stipulated," end quote.

4 MR. MARZEN: That's true, and as my answer to

5 that, Justice --

6 QUESTION: It came up later on.

7 MR. MARZEN: Yes, that's -- that's true.

8 QUESTION: And I'd be awful wary about this now.

9 QUESTION: Mr. Marzen, can I ask you --

10 QUESTION: The defense counsel has to really be

11 wary.

12 QUESTION: Can I ask you a question about the

13 facts. Did -- I take it the presentence report was

14 prepared after the plea was entered --

15 MR. MARZEN: Yes, it was, Justice Stevens.

16 QUESTION: -- after the colloquy. And I notice

17 the presentence report, the author of that recommended

18 that he be sentenced on the basis of the attempted murder.

19 Had that recommendation been made by the prosecutor or

20 anyone else before the -- before it was filed in the pre-

21 sentence report?

22 MR. MARZEN: Had the recommendation of using the

23 attempted murder guideline?

24 QUESTION: Yes.

25 MR. MARZEN: Yes. The answer is yes, and it

1 appears in two ways. First, the prosecutor suggested that  
2 -- that there was a tacit plea bargain, and that if the  
3 attempted murder or -- if petitioner was sentenced based  
4 on the attempted murder, they would be induced to drop the  
5 charge.

6 Second, and perhaps since it's arisen so much,  
7 I'd just quote briefly the language on page 22, where  
8 petitioner's counsel states, "Nevertheless, we've  
9 explained to Mr. Braxton that you're going to consider all  
10 these facts in determining a sentence, both considering  
11 them under the guideline to determine the guideline" --  
12 i.e., the facts -- whether they established attempted  
13 murder to determine whether to use the attempted murder  
14 guideline.

15 QUESTION: This i.e. is what he said or what  
16 you're saying?

17 MR. MARZEN: I'm sorry, the alienation is mine.

18 QUESTION: I see.

19 MR. MARZEN: Everything up to the i.e.

20 QUESTION: Okay.

21 MR. MARZEN: Comma --

22 QUESTION: It's rather an important i.e.

23 (Laughter.)

24 MR. MARZEN: Yes, it would make my job a lot  
25 easier if it were in there.

1 (Laughter.)

2 MR. MARZEN: And --

3 QUESTION: Maybe I'd better follow along in the  
4 text here.

5 (Laughter.)

6 MR. MARZEN: Well, Justice Scalia, if you want  
7 to follow me, it's at page 22 of the joint appendix -- the  
8 first sentence in the second paragraph beginning on that  
9 page. "Nevertheless, we've explained to Mr. Braxton that  
10 you're going to consider all these facts in determining  
11 the sentence, both considering them under the guideline to  
12 determine the guideline, and considering them for any  
13 departures under the guideline."

14 QUESTION: And then what's the next sentence?  
15 That you could depart upward if you think he tried to  
16 murder the marshals?

17 MR. MARZEN: Yes. It --

18 QUESTION: Which hardly suggests that he thought  
19 you didn't have to depart upward if you thought he tried  
20 to murder the marshals.

21 MR. MARZEN: I read that sentence as expanding  
22 on the subordinate clause in the second part of the first  
23 sentence.

24 QUESTION: I see.

25 MR. MARZEN: No, he's -- petitioner certainly

1 would have like getting a sentence based on the assault  
2 guideline and not having a departure. But given the facts  
3 of the offense and how grave they were, that just wasn't  
4 the likely possibility. And in fact in this case, the  
5 district court said that he would in fact depart upward --  
6 not might, but would -- up to the exact same level that  
7 was dictated by the attempted murder guideline.

8 QUESTION: Do you think the court could have  
9 said, well, with these facts -- you've plead -- you've now  
10 plead guilty to attempted murder. I hereby find you  
11 guilty of attempted murder.

12 MR. MARZEN: No.

13 QUESTION: Thank you, Mr. Marzen.

14 Mr. Cribari, you have 1 minute remaining. Don't  
15 waste it.

16 (Laughter.)

17 REBUTTAL ARGUMENT OF STEPHEN J. CRIBARI

18 ON BEHALF OF THE PETITIONER

19 MR. CRIBARI: I think it is the Government who  
20 is trying to have it both ways, and I think that's clear  
21 from this case. Unable to extract a stipulation to  
22 greater offense conduct, the Government essentially says,  
23 well, we don't have to, we can get it anyway. Because  
24 once you acknowledge a factual proffer, not that compels a  
25 finding of attempted murder, but in the words of the



1 Fourth Circuit, that could support a finding of attempted  
2 murder --

3 QUESTION: You -- have you preserved that point  
4 or did you first raise it in your reply brief -- namely  
5 that this stipulation did not specifically establish a  
6 more serious offense. Have you preserved that?

7 MR. CRIBARI: Well, I think that's preserved  
8 from the beginning. I -- reading on page 22 before where  
9 Mr. Marzen started, "On behalf of Mr. Braxton, I state he  
10 is not admitting he attempted to specifically murder  
11 anyone." How you can say that and then in the same breath  
12 say, but I'm going to stipulate to attempted murder is not  
13 something that's fair. (Inaudible) preserved on appeal.

14 QUESTION: Mr. Cribari, I have no doubt that you  
15 did not stipulate to the intent, but have you preserved on  
16 appeal the fact that this sentence was invalid because the  
17 stipulation did not specifically establish the more  
18 serious offense?

19 MR. CRIBARI: Yes, Your Honor, because -- if I  
20 may answer the question. The trial court never engaged in  
21 any stipulation inquiry like the Fifth Circuit in Morton  
22 to determine the factual basis for the elements of the  
23 stipulation. Because you must remember the trial court  
24 found there was no stipulation. On page 77, the court's  
25 crystal clear. There is no stipulation.

1           QUESTION: Mr. Cribari, are there instances  
2 other than for raising the base offense level in which a  
3 client would want to stipulate that he committed a greater  
4 offense? Does this come up just in the context of the  
5 sentencing for the purposes of applying the guidelines or  
6 would there be other plea agreements whereby he would  
7 stipulate that he committed an offense?

8           MR. CRIBARI: He might stipulate he committed an  
9 offense if he were sure he were not going to have a  
10 sentencing damage for it for purposes of acknowledging  
11 full criminal conduct. I mean, there's no argument here  
12 that Mr. Braxton could not be sentenced for what he did.  
13 The argument is he a right to have the sentence  
14 calculation start at the lower level.

15           QUESTION: I understand.

16           QUESTION: Thank you, Mr. Cribari.

17           MR. CRIBARI: Thank you very much, Your Honor.

18           CHIEF JUSTICE REHNQUIST: The case is submitted.

19           (Whereupon, at 11:02 a.m., the case in the  
20 above-entitled matter was submitted.)  
21  
22  
23  
24  
25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that  
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*#90-5358 - THOMAS BRAXTON, Petitioner V. UNITED STATES*

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*and that these attached pages constitutes the original transcript  
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BY *Robert H. Hines*  
(REPORTER)