

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: JOSEPH LIBRETTI, Petitioner v.
UNITED STATES.
CASE NO: No. 94-7427
PLACE: Washington, D.C.
DATE: Tuesday, October 3, 1995
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOSEPH LIBRETTI, :

4 Petitioner :

5 v. : No. 94-7427

6 UNITED STATES. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, October 3, 1995

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 1:00 p.m.

13 APPEARANCES:

14 SARA SUN BEALE, ESQ., Durham, North Carolina; on behalf of

15 the Petitioner.

16 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor

17 General, Department of Justice, Washington, D.C.; on

18 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 JUSTICE STEVENS: We'll hear argument in Number
4 94-7427, Libretti v. United States.

5 Ms. Beale.

6 ORAL ARGUMENT OF SARA SUN BEALE

7 ON BEHALF OF THE PETITIONER

8 MS. BEALE: Justice Stevens, and may it please
9 the Court:

10 This case raises two important questions about
11 the procedural rights afforded to defendants who tender
12 guilty pleas, including criminal forfeiture.

13 The two questions are: first, whether Rule
14 11(f) of the Federal Rules of Criminal Procedure requires
15 the district court to find a factual basis for the
16 defendant's guilty plea to the criminal forfeiture, and
17 second, whether a defendant who waives -- excuse me, a
18 defendant who pleads guilty waives his right to a jury
19 verdict on forfeiture if he was not advised of that right
20 and never expressly waived it.

21 Briefly, the facts are as follows: in exchange
22 for the prosecutor's agreement to recommend a 20-year
23 sentence on one count, and to drop the remaining counts,
24 petitioner pled guilty to violating 21 U.S.C. section 848,
25 and he signed an agreement containing three paragraphs

1 regarding criminal forfeiture.

2 As construed by the court of appeals, paragraph
3 10 of that agreement forfeited all of petitioner's
4 property, including legitimately acquired property.

5 The district court accepted petitioner's plea
6 without making a finding that there was a factual basis
7 for this forfeiture.

8 QUESTION: Excuse me, but the court of appeals
9 said it included legitimately acquired property?

10 MS. BEALE: The court of appeals said it
11 included all of petitioner's property of every kind --

12 QUESTION: Right, but it didn't say that it
13 included legitimately acquired property. It simply
14 amounted to, in the court of appeal's view, an
15 acknowledgement that none of his property was legitimately
16 acquired.

17 MS. BEALE: Oh, I think that's not correct, Your
18 Honor. I think everyone in the case concedes that the
19 property, some of the property involved was acquired
20 legitimately. There were findings to that effect in the
21 district court.

22 For example, some of the --

23 QUESTION: By which you mean not properly
24 forfeitable?

25 MS. BEALE: No. I think that there's a

1 distinction to be drawn here. In the first instance, how
2 was the property acquired, and that there was some which
3 was legitimately acquired as opposed to property, let's
4 say, that would be the proceeds of a criminal offense.

5 QUESTION: Ah, I see.

6 MS. BEALE: All right, and so --

7 QUESTION: You mean legitimately acquired with
8 the proceeds.

9 MS. BEALE: I mean legitimately acquired. For
10 example, before it's alleged that the conduct in question
11 occurred. So he had property that was acquired by him as
12 a child which was involved in forfeiture here, for
13 example. I think everyone concedes that that property was
14 legitimately acquired. The two bank accounts, for
15 example, from the Chicago area which were opened first
16 when he was in grade school and never had any deposits
17 after at least 1981 in the case of both accounts. Also,
18 his salary from General Chemical in Green River, Wyoming.

19 QUESTION: And the court of appeals conceded
20 this, said this.

21 MS. BEALE: It's accepted by all parties. I'm
22 not sure if there's a sentence in the court of appeals'
23 opinion, but it --

24 QUESTION: But that's what you said. You said
25 the court of appeals said that he agreed to a -- that by

1 reason of his agreement, he forfeited properly,
2 legitimately acquired property, is what you said.

3 MS. BEALE: That's correct.

4 QUESTION: Where does it say that?

5 QUESTION: Wouldn't it be more accurate to say
6 that they said he forfeited everything he owned on the
7 assumption some of it might have been legitimately
8 acquired? Even if some was legitimately acquired, under
9 their reading he would have forfeited it.

10 MS. BEALE: That's correct, and -- I mean, that
11 would be another proper reading. I think --

12 QUESTION: Does their reading -- is there an
13 indication that their reading was that the legitimately
14 acquired property was also nonforfeitable?

15 MS. BEALE: Well, I believe that gets to the nub
16 of the point.

17 QUESTION: You make that claim, but --

18 MS. BEALE: It's not a question --

19 QUESTION: -- has anyone made that express
20 assumption? I take it the court of appeals did not state
21 that assumption.

22 MS. BEALE: I think the point is that
23 property -- property gets --

24 QUESTION: No, but what's the answer to my
25 question? The court of appeals didn't state that

1 assumption, did it?

2 MS. BEALE: I don't think you'll find that
3 sentence as such. Perhaps it would be helpful --

4 QUESTION: Okay, and the district court was in
5 fact holding hearings that would have been relevant to
6 that determination, but they were the hearings without
7 jurisdiction, so we can't depend on that.

8 MS. BEALE: That is correct.

9 I believe the court of appeals' opinion is quite
10 clear that their point is that petitioner entered into an
11 agreement that would forfeit all property without any
12 determination whether it was or was not, for example,
13 proceeds, and -- period. And I think everyone concedes
14 that some of the property here was not acquired as
15 proceeds. I believe the Government's position is it could
16 become forfeitable, not that it was not legitimately
17 acquired, but it could become forfeitable, let's say, as a
18 substitute asset.

19 QUESTION: Mm-hmm.

20 MS. BEALE: Right, so there was no finding, for
21 example, that that property in the district court level or
22 at the court of appeals level, that it was forfeitable
23 because it was proc -- because it was not legitimately
24 acquired, and so the point merely is that it would take
25 some factual -- set of factual assumptions to show that

1 legitimately acquired property is, in fact, subject to
2 forfeiture. It could become subject to forfeiture,
3 depending upon the facts that were shown, and the district
4 court never made those factual findings in the first
5 instance, so if I can clarify that.

6 The district court also accepted petitioner's
7 plea without advising him that he had a right to a special
8 jury verdict on the question of what property, if any, was
9 subject to forfeiture, although he had a right, and it
10 would have been possible for him to plead guilty, and
11 nonetheless contest on the section 848 charge, and
12 nonetheless contest forfeiture before the jury. He was
13 not advised of that right, and he never expressly waived
14 it.

15 QUESTION: Suppose the district judge had told
16 Libretti how it would play out if he stood trial, exactly
17 what would have to be proved, so he knew all that when he
18 entered his plea. Would that have been enough to satisfy
19 the legal requirements, if the judge had told him, just as
20 he tells him with respect to his substantive offense, now,
21 if you stand trial, there will be a jury trial on these
22 assets, and there will be this special verdict, told him
23 exactly what would happen if he stood trial, and he says,
24 Your Honor, I want this plea, and then at the end he says
25 what he did here, I want proof made with respect to these

1 assets --

2 MS. BEALE: Well, there are really two
3 requirements that we're talking about, and it's important
4 for me to distinguish those.

5 One of the issues before the Court is the
6 question of the waiver standard that's applicable to the
7 jury trial right, and on that point, for example, if the
8 judge had clearly indicated to Mr. Libretti not simply
9 that the jury won't find you guilty or innocent, which is
10 what he told Mr. Libretti, but had said, the jury won't
11 find you guilty or innocent, and you have a right to have
12 that determination, and the jury won't make any
13 determination of what assets are forfeitable, and you have
14 a right to that determination as well, now, do you want to
15 plead guilty, that would have taken care of the waiver of
16 the jury trial right.

17 There's an independent requirement, however,
18 under Rule 11(f) for a factual basis, and I think that's
19 clear if you imagine a case -- laying forfeiture to one
20 side, if you imagine a case as a bank robbery case.

21 QUESTION: So --

22 MS. BEALE: In that instance there would be both
23 a requirement that the defendant waive his right to a jury
24 trial, and also a requirement that a factual basis be
25 shown for his plea to the bank robbery offense. So it's

1 true --

2 QUESTION: Your answer to my question is -- your
3 answer is no, it would not have been enough to tell him
4 exactly how this would play out if he stood trial. He
5 would still have a right to insist on some kind of a
6 showing with respect to each piece of property.

7 MS. BEALE: That's correct, and the reason for
8 that is that it's exactly parallel to the requirements for
9 a plea of guilty on the offenses that are charged.

10 The purpose of the factual basis requirement
11 really is to ensure that there's a match between the
12 evidence in the case on the one hand and the legal
13 requirements of the charge on the other hand, and if there
14 are five or six counts in the indictment, there's got to
15 be --

16 QUESTION: Well, suppose that not all of the
17 property had yet been identified. We know that a
18 substantial forfeiture is going to occur, but we don't
19 know quite where the bank accounts are, what the amount
20 is, where the location of the real property is, then how
21 would you proceed? Could you not take the plea agreement?

22 MS. BEALE: Well, I think, Your Honor, that the
23 situation is --

24 QUESTION: Pardon me, not take the plea.

25 MS. BEALE: I think the situation is just

1 parallel to that, where -- that the Government doesn't
2 have its proof in order yet on some of the -- have proof
3 in order on some counts, for example, in the indictment,
4 and not others. If it couldn't make at least a factual
5 basis showing on those other counts, then it wouldn't be
6 able to resolve that part of that case, that's correct.

7 Now, the standard is not --

8 QUESTION: Well, under your view the court
9 couldn't even take the plea.

10 MS. BEALE: That's correct to the extent that
11 it's a dependent part of that plea. Now, there might be
12 other charges that could be entirely resolved.

13 In our view, the requirements of Federal law do
14 make the forfeiture charge a substantive charge. As the
15 Court is aware, Federal rules require it to be charged in
16 the indictment, proved to the jury with a special jury
17 verdict, and embodied in the judgment.

18 Those are very substantial requirements that
19 effectively make forfeiture a unique hybrid. It is a
20 substantive charge in the indictment, and the plea by
21 definition has to resolve the charges in the indictment.
22 You plead to those charges in the indictment, and Federal
23 law makes that a substantive charge.

24 Now, it's not an element of the offense of a
25 violation, let's say, of section 848, the crime that the

1 defendant was accused of here, but it does, under Federal
2 law, have this unique character of a substantive charge in
3 the indictment which must be responded to. There are only
4 two ways to resolve the charge.

5 QUESTION: Ms. Beale, can I ask you a question
6 about the relief that's prompted by Justice Kennedy's
7 question and your answer that if there are two counts,
8 there was no factual basis for one, a guilty plea might
9 stand as to one count, I guess?

10 Is it your view that if there's no factual basis
11 for the forfeiture but there is an adequate factual basis
12 for the guilt of the offense charge, that the guilty plea
13 would remain in effect and the judgment of guilt could
14 stand even though the forfeiture is improper?

15 MS. BEALE: Well, in this case, Your Honor, as
16 opposed to in general would it ever be possible --

17 QUESTION: Well, first in general, and then in
18 this case.

19 MS. BEALE: All right. In general, I believe
20 that it might be possible to resolve the underlying -- the
21 question of the underlying guilt and take the plea to
22 that, and leave unresolved for the moment the forfeiture
23 charge and the -- whether that would be ultimately
24 resolved by a jury determination of that, or whether that
25 might also be resolved by a plea on the forfeiture with a

1 factual basis and with the necessary waiver.

2 QUESTION: Could the court then enter a judgment
3 of conviction on the guilty plea of the charge and reserve
4 for further hearings what to do --

5 MS. BEALE: That's correct, in the same way.
6 Typically -- now, that was not done in this case, but
7 typically the way these indictments are drawn up is to
8 include the forfeiture charge in a separate count.

9 QUESTION: I see.

10 MS. BEALE: And you would literally plead to
11 count 2 and not 3, 4, 5, and so forth, and I think that
12 would be certainly possible that the parties would agree
13 to resolve it that way and the court would be willing to
14 accept the guilty plea under those circumstances. Now --

15 QUESTION: All right. Then, going to this case,
16 what could be done in this case --

17 MS. BEALE: Exactly.

18 QUESTION: -- if we should agree with you?

19 MS. BEALE: Well, exactly.

20 Now, in this case, it appears that the parties
21 had a kind of interwoven or interrelated agreement. As I
22 said, in return for the prosecutor's agreement to
23 recommend a 20-year sentence and not to proceed with the
24 other counts, then petitioner agreed to plead guilty, and
25 I think that where the resolution of the counts is

1 interrelated as a matter of plea-bargain and the parties'
2 understanding, then the court may indeed need to accept or
3 reject, resolve all at one time, otherwise the parties may
4 not in fact be tendering that agreement to the court.

5 Now -- well --

6 QUESTION: Can I have one other question, then
7 I'll be covered everything I had at the back of my mind.

8 What if the agreement were totally ambiguous,
9 and I think I read the court of appeals opinion the way
10 you do, too, saying that even if some of the property
11 might not be forfeitable, nevertheless we construe the
12 agreement as an undertaking to forfeit everything.

13 Assume it's clear that that's what the agreement
14 was in exchange for a somewhat lesser sentence, would that
15 agreement be enforceable, in your view?

16 MS. BEALE: It depends, so that if the factual
17 basis showing was that in fact, let's say, substitute
18 assets would reach even with legitimately acquired
19 property --

20 QUESTION: No, some of the property that he
21 agreed to forfeit, the Government would have no valid
22 claim to.

23 MS. BEALE: We think it's clear that the court
24 cannot accept a plea on that basis and enter a sentence
25 any more than it could accept petitioner's agreement to

1 serve a 30-year sentence if the statutory maximum were 20
2 years, even if he was willing to agree to that, even if he
3 might, for example, be willing to agree to that to avoid
4 the prosecution of his wife, or his child, or to preserve
5 a uniquely valuable asset.

6 There are policy-based outer limitations on the
7 court's sentencing authority, and those clearly have to be
8 observed or the sentence itself is illegal, and we
9 think --

10 QUESTION: Does the case depend -- does your
11 argument depend on whether we characterize this as
12 sentencing enhancement or an element of the offense?

13 MS. BEALE: Well --

14 QUESTION: Is that a pivotal point in the
15 analysis?

16 MS. BEALE: I think that the characterization of
17 the criminal forfeiture itself is exactly the pivotal
18 point. What I would not --

19 QUESTION: If it's enhancement of the offense,
20 then what happens to your case, if it's an enhancement of
21 punishment?

22 MS. BEALE: We concede that forfeiture operates
23 as a penalty, so in that sense, sentencing enhancement
24 would be one way of describing that penalty, that there's
25 a period of imprisonment plus this enhanced penalty of

1 forfeiture.

2 What we don't accept is the notion that there
3 are only two possibilities. There are the elements of the
4 offense on the one hand, and mere matters of sentencing on
5 the other hand.

6 We think what Congress did was, in reviving
7 criminal forfeiture and then the rules promulgated first
8 by the advisory committee, then adopted by this Court and
9 Congress, what they did was create something, quite
10 properly, that is a unique hybrid, that is not, strictly
11 speaking, an element of any particular offense but is
12 plainly not treated like any other matter of sentencing,
13 so it operates as a penalty, but it has far different
14 procedural characteristics associated with it that reflect
15 a different -- a quite different weighting of the
16 interests that are involved there.

17 QUESTION: Let me --

18 QUESTION: Then --

19 QUESTION: Go on.

20 QUESTION: No, you. I'm sorry.

21 QUESTION: That's all right.

22 QUESTION: Maybe I misunderstood you before. If
23 that is so, why does it matter -- why is it crucial to
24 characterize it?

25 MS. BEALE: Well, I think that the

1 characterization is just a shorthand way of summing up
2 those attributes, so I'm not so sure that it matters what
3 --

4 QUESTION: Well, but it's a shorthand way, in
5 effect, of obfuscating this hybrid character.

6 MS. BEALE: Well --

7 QUESTION: Let me make this suggestion to you.
8 Let's assume for the sake of argument there is in fact a
9 Sixth Amendment right to the determination with respect to
10 the forfeiture. I don't know whether there is or not, but
11 I mean, there's an argument for it. And let's assume
12 also, for the sake of argument, that the Boykin
13 requirements are in fact constitutionally mandated and not
14 merely our choices of the best way to get from here to
15 there.

16 If you make those two assumptions, then I
17 suppose you would argue that the statement of factual
18 basis was constitutionally mandated, wouldn't you?

19 MS. BEALE: We could certainly argue that. I
20 think that we are hampered --

21 QUESTION: And you'd argue that, and you'd say
22 well that argument is sound or not regardless of whether
23 you characterize this as element, or whether you
24 characterize this as penalty enhancement.

25 MS. BEALE: Well, I think that's right. I think

1 that we felt somewhat --

2 QUESTION: Then why don't you make some such
3 argument here? Why don't you say, for example, in order
4 to avoid having to grapple with these constitutional
5 issues about the Sixth Amendment requirement of jury
6 verdict on forfeiture and the exactly mandatory character
7 of Boykin, the way to avoid those issues is to read
8 Rule 11(f) to require the statement of factual basis, and
9 why don't you make that argument, which would not require
10 a characterization one way or the other? We could leave
11 that issue in limbo.

12 MS. BEALE: We mean to be making that argument
13 Your Honor, and if we haven't made it clearly, let me
14 endorse that now.

15 QUESTION: But if you're making that argument,
16 you don't have to make the characterization on an either-
17 or basis, do you?

18 MS. BEALE: I was using the characterization
19 only as a way to draw attention to those features, so
20 that's right. We don't require a head-in. We only need
21 to draw attention to those crucial characteristics.

22 QUESTION: If you make those arguments, then
23 you're saying not only that what I put to you initially
24 wouldn't be good enough, to tell the defendant exactly how
25 it would play out if he didn't enter the plea, but you are

1 also saying that what this district judge tried to do at
2 the end was also not enough.

3 That is, the district judge, instead of saying,
4 Government, come forth and show us something as to each
5 piece of property to link it with the forfeiture right,
6 instead, this district judge said, defendant, I'm giving
7 you an opportunity to tell me which pieces of property in
8 this collection are not subject to forfeiture. Your
9 answer would have to be, that is not enough, either.

10 MS. BEALE: Well, the link-up, the factual basis
11 can come from either the defendant or the Government.
12 Oftentimes, a district court will inquire of the
13 defendant, do you admit the various facts that would then
14 add up to be the elements of the offense or the --

15 QUESTION: But if the Government has to make a
16 showing, then how can it be enough for the district judge
17 to say, here's this big pot of everything you have. You
18 show me which of these items should be taken out. It's
19 quite different than putting a burden on the Government to
20 show that each and every asset is in some way connected
21 with the criminal activity.

22 MS. BEALE: Right. That's correct. Rule 11(f)
23 itself doesn't identify the Government as the party who
24 has the burden of identifying the factual basis. What it
25 says to the judge is that you must be satisfied that there

1 is a factual basis, and I think that reflects the
2 constitutional imperative of the inquiry to determine that
3 the plea is in fact knowing, intelligent, and voluntary,
4 that there's a match-up, so it can come from either side,
5 either the defense side or the Government. If we have a
6 sufficient factual basis, then that portion of the case is
7 taken care of.

8 Now, where we got into difficulties in front of
9 the district court I think was that the judge indicated he
10 was not satisfied with what the Government had come
11 forward on the one hand, that even though they argued
12 substitute assets he said, I don't think you've proven
13 that yet.

14 QUESTION: I don't think the Government came
15 forward with anything. The Government's position was, we
16 have a plea, and it's good.

17 Now, I'm just trying to see how this fits in
18 with the elements of the offense itself. The Government
19 has to make some kind of showing. It's the Government's
20 burden. Here, this district judge put the burden quite
21 plainly on the defendant and said, you show me which of
22 those pieces of property should be taken out.

23 MS. BEALE: There are two points in time.
24 Initially, when the Government simply assumed that the
25 plea itself was enough, that was when the plea was

1 entered, and the second point in time where the district
2 judge said to the defendant, you show me -- I'm ready to
3 hear your evidence, show me what pieces of property you
4 think are not forfeitable. That was 3 months later, in
5 the ancillary third party hearing, after the notice of
6 appeal had been filed, and the judge realized the scope of
7 the forfeiture rule.

8 QUESTION: Yes, but I'm asking you what the
9 Rule 11 requires.

10 MS. BEALE: And Rule 11 does not put the burden
11 specifically on the Government. It simply says the court
12 must find a factual basis.

13 Now, note that that's in the context where the
14 defendant and the Government come forward together, and
15 where the defendant himself is tendering a guilty plea, so
16 it's really quite different from the context of --

17 QUESTION: Well, why don't you tell me what you
18 think are the marching orders for the district judge.

19 MS. BEALE: The district judge needs to --
20 without regard to which party it comes from, he needs to
21 identify a proffer of facts that would link up specific
22 pieces of property or categories of property with a
23 factual reason why those pieces of property are forfeited
24 under Federal law.

25 QUESTION: Ms. Beale, do you get that from

1 Rule 11(f)? I mean, if you're making a constitutional
2 argument, I suppose we can discuss Boykin, but how do you
3 find that in Rule 11(f), which speaks of notwithstanding
4 the acceptance of a plea of guilty, a guilty plea, doesn't
5 it?

6 MS. BEALE: That's correct, and we believe the
7 defendant --

8 QUESTION: Not an agreement to forfeiture, but a
9 plea of guilty of the offense, presumably. The court
10 should not enter a judgment upon such plea, that is, the
11 plea of guilty, without making such inquiry as shall
12 satisfy that there is a factual basis for the plea.

13 MS. BEALE: That's correct, and --

14 QUESTION: Presumably, the plea of guilty.

15 MS. BEALE: That's right, and we believe --

16 QUESTION: And the court did that here, didn't
17 it?

18 MS. BEALE: That's correct, and we believe that
19 the plea of guilty -- that there are two pleas of guilty,
20 in essence, if you charge it in, as they ordinarily do, in
21 a separate count of the indictment to resolve the charge
22 of forfeiture.

23 QUESTION: You're guilty of forfeiture?

24 MS. BEALE: That's right. You plead innocent or
25 guilty --

1 QUESTION: You're not guilty of forfeiture,
2 you're punished with forfeiture for being guilty of the
3 crime.

4 MS. BEALE: Well, with all respect, Your Honor,
5 that's not the way the rules are set up. The rules are
6 set up that this is something that the Government must
7 literally charge in the indictment, charge against the
8 defendant in the indictment, and either prove to the jury
9 as a charge -- and the Senate report I think describes
10 this in a way that we have found helpful. It's an in
11 personam --

12 QUESTION: As a condition of imposing that
13 penalty the Government must do that, but that does not
14 make that a plea of guilty. I mean, what a plea of guilty
15 means, it means, I did the crime, not, I'm subject to
16 forfeiture.

17 MS. BEALE: Well, with all respect, Your Honor,
18 we believe that that's not the logical consequence of the
19 combined change wrought by the statutory revival of
20 forfeiture and the implementation of that forfeiture
21 requirement in the Federal Rules.

22 QUESTION: Ah.

23 MS. BEALE: Treating it as a charge, and indeed,
24 incorporating it -- notice there has to be a judgment. It
25 is not merely a matter of sentencing. You have to resolve

1 that charge either by proof to the jury or, alternatively,
2 by a plea. There's no other way to resolve such a charge,
3 and although the language takes some getting used to -- I
4 think there's some initial reluctance to see that as what
5 we would describe as a guilty plea -- we believe that's
6 the logical consequence of the way the rules are set out.

7 QUESTION: Why do you want to rely on 6(f)? I
8 mean, it seems to me you have your finger on a problem
9 that bothered the Sentencing Commission for several years
10 which we couldn't resolve, and why you want to rely on (f)
11 I don't know, because the language doesn't fit it, nor
12 does the fact that forfeiture appears in the U.S. Code
13 under the term "sentencing," nor to about five other
14 things, including I never heard this one made, but that
15 doesn't destroy your point.

16 What I want to know is, is what I think you're
17 actually trying to argue, and you don't have to jump to
18 the Constitution, you're trying to argue that the
19 sentencing statutes require, before a judge accepts a
20 sentence -- and that would apply to forfeiture and five
21 other things, but you don't argue it -- before he does
22 that, that he establish that there is some basis for the
23 statutory requirements or guideline requirements for that
24 sentencing existing, that that's what you want to say.

25 And I can tell you exactly why the Sentencing

1 Commission danced around it, which I'm -- first of all, if
2 you say that's part of the Constitution, if it is, the
3 sentencing practices of 50 States are really in trouble,
4 including -- and moreover, if you say it's part of the
5 code, what normally happens in many sentences will no
6 longer exist in the entire Federal system.

7 All right, so I want to know what to do here.
8 That is, the argument isn't made squarely. It's made in a
9 context where the language and five other things are
10 against it, but the argument's a serious one, and as you
11 well know, in the guidelines, Chapter 6, the Commission
12 dances around it by saying that the judge may, after
13 deciding that the facts are not such, decide to impose the
14 true sentence irrespective of what the parties agree, but
15 it doesn't say must.

16 Now, that's what I would like you to address,
17 because I quite honestly don't know exactly what to do
18 about this.

19 MS. BEALE: Well, we were not in a position
20 to -- given the grant of cert to argue --

21 QUESTION: No, I'm not interested particularly
22 in your reasons. I'm interested in what you think we
23 should do.

24 MS. BEALE: I believe the Court should hold that
25 a factual basis is required under 11(f). That's the

1 easiest way, I think, to resolve this. It doesn't --

2 QUESTION: And if not, if I don't think the
3 language or anything else really fits, then what? We just
4 say, we'll decide this another time, or what?

5 MS. BEALE: Well, I think that one could
6 conclude that in parallel with the general requirements of
7 sentencing, and in parallel with the requirement of 11(f)
8 as to the substantive offense, that the appropriate
9 disposition of a plea would require the showing of a
10 factual basis, whether it falls --

11 QUESTION: What do you rely on besides the test
12 of 11(f)? I mean, what other sentencing statute leads you
13 to that conclusion, unless it's 11 --

14 MS. BEALE: Well, I believe Justice Breyer is
15 correct in saying that the whole scheme of the sentencing
16 guidelines, the statutes that underlie that, require a
17 factual basis for the determination --

18 QUESTION: But not under 11(f), and if you do --
19 can I --

20 MS. BEALE: No.

21 QUESTION: The only difference I can see is if
22 you choose 11(f) and you win this case, there has to be a
23 new trial. I don't see how you avoid the fact that the
24 guilty plea is void and your client goes right to trial.
25 If, however, these other statutes are what requires it,

1 then the remedy is a new sentence.

2 MS. BEALE: Well, I believe, Your Honor, that
3 the remedy sought -- that it's not so clear as you
4 imagine, that in this case the result will be that there's
5 a trial. I believe the proper remedy is to remand to the
6 district court, and to go back to status quo ante, and in
7 fact there may be a showing of a factual basis. It may
8 depend a bit on the breadth of the Government's claim of
9 forfeiture.

10 In fact, the indictment is narrower, the charge
11 in the indictment is narrower than the courts -- as
12 construed, paragraph 10 of the agreement. If the Court
13 finds that there's a textual basis --

14 QUESTION: Ms. Beale, I think you've given an
15 answer that differs from one you gave me earlier. I asked
16 you what the right result was, and you said you can pro
17 tanto sustain the plea to the crime, to the offense, but
18 said aside only that portion which would support the
19 forfeiture judgment.

20 Now you're saying you go back to the status quo
21 ante, which would mean withdrawal of the plea, entire
22 plea.

23 MS. BEALE: Well, we did discuss both the in
24 general and the in this case.

25 QUESTION: Right.

1 MS. BEALE: And in this case, if we find a
2 factual basis on remand, then presumably there is no
3 difficulty.

4 QUESTION: Well, supposing we find a factual
5 basis for the offense, but no factual basis for the
6 forfeiture. Then what do you do?

7 MS. BEALE: Then in this case I do believe it's
8 interwoven, and at that point the parties have some
9 choice. The Government may restrict the forfeiture that
10 it requests in order that the entire agreement may stand
11 on a proper footing.

12 If, for example, the Government determines that
13 it has sought to forfeit property that it didn't perhaps
14 even realize --

15 QUESTION: Right.

16 MS. BEALE: -- was not subject to forfeiture, it
17 may restrict the nature of its claim.

18 QUESTION: But does that require -- I'm still
19 trying to find out, do you go back to status quo ante and
20 set aside the guilty plea, or do you merely modify the
21 judgment insofar as it affects forfeiture. Which do you
22 think is correct?

23 MS. BEALE: Well, when I said status quo ante, I
24 meant --

25 QUESTION: Forget what you said before. Tell me

1 what you think now.

2 MS. BEALE: I believe you go back in the first
3 instance -- in the first instance to the very moment of
4 the Rule 11 colloquy itself, and so you determine whether
5 there is a factual basis for the plea.

6 QUESTION: I still don't know which is the
7 right -- which are you saying they must do, set aside the
8 entire plea, or just the part that relates to forfeiture?

9 MS. BEALE: If they find no Rule -- no factual
10 basis, then petitioner is perfectly prepared to accept the
11 possibility --

12 QUESTION: I'm not --

13 MS. BEALE: -- the plea falls apart. I'm not
14 sure that that's the agreement that the Government and the
15 petitioner will --

16 QUESTION: I'm trying to find out from you what
17 you think the district court must do. If he finds that
18 there is a factual basis for the plea of guilty of the
19 offense but not for any forfeiture, what must he do?

20 MS. BEALE: He should ordinarily reject the
21 plea, if there's no factual basis --

22 QUESTION: He should set aside the entire plea.

23 MS. BEALE: In this case, where it's a single
24 interrelated plea, that's correct.

25 QUESTION: Thank you.

1 MS. BEALE: Now, it's possible, again, that the
2 parties would resubmit a more narrowly tailored agreement
3 that would reflect on a factual basis.

4 QUESTION: Thank you.

5 Mr. Stewart.

6 ORAL ARGUMENT OF MALCOLM L. STEWART

7 ON BEHALF OF THE RESPONDENT

8 MR. STEWART: Justice Stevens, and may it please
9 the Court:

10 As to the applicability of Rule 11(f), I think
11 the questions asked by Justice Scalia and Justice Breyer
12 really pinpoint the weakness of petitioner's argument.
13 That is, Rule 11, by its terms, applies only to pleas of
14 guilty, and it requires the district court to find only
15 that there is a factual basis for the plea.

16 As this Court recognized in *McCarthy v. United*
17 *States*, a plea of guilty is an admission that the
18 defendant committed the acts charged, and a willingness to
19 forego trial on those charges. A concession that a
20 particular --

21 QUESTION: Can I ask you a preliminary question
22 to kind of narrow the issue?

23 Supposing -- the reason for it is so that the
24 court should not enter judgment upon the plea unless
25 there's a factual basis. Supposing the maximum sentence

1 authorized by statute is 10 years, and there's a plea
2 agreement that will accept 12 years, could he enter a 12-
3 year judgment?

4 MR. STEWART: No. I mean, that would not be as
5 a result of Rule 11(f), but we agree --

6 QUESTION: At least he couldn't do it.

7 MR. STEWART: He couldn't do it.

8 QUESTION: And secondly, supposing there is
9 clear -- that there's no factual basis for a forfeiture,
10 but there's an agreement by the defendant, I'll forfeit
11 \$10 million because I'm going to get a 5-year sentence,
12 but there's no statutory legal basis for a forfeiture,
13 could that agreement be enforced?

14 MR. STEWART: No. If the defendant was pleading
15 guilty to a crime for which forfeiture was not an
16 available penalty --

17 QUESTION: No. Forfeiture is an available
18 penalty, but the facts would not support forfeiture, and
19 everybody agrees to that.

20 MR. STEWART: If everybody agrees to that, then
21 the sentence would be an illegal one. The way we would
22 interpret --

23 QUESTION: And what if that is shown after the
24 judgment is entered, then what happens?

25 MR. STEWART: Well, typically the responsibility

1 of the judge would be to determine in one way or the other
2 that he was satisfied that the sentence was a lawful one
3 under the applicable statute, and we're not saying --

4 QUESTION: Is it sufficient satisfaction to say
5 that I've got an agreement in front of me in which the
6 defendant says, I agree to forfeit X dollars?

7 MR. STEWART: If the defendant has conceded that
8 the property is forfeitable, and if there is no record
9 evidence that casts doubt upon that proposition, and if
10 that agreement is --

11 QUESTION: Does he have to concede particular
12 assets are forfeitable, or just that a certain amount of
13 money is forfeitable.

14 MR. STEWART: No. I think the -- and in this
15 case the defendant in essence conceded that all his assets
16 met the statutory requirements for forfeiture. Now, if --

17 QUESTION: If one doesn't read the agreement
18 that way, one merely reads it as an agreement to forfeit
19 everything I own, which one could read it, would the judge
20 be permitted to enter this judgment?

21 MR. STEWART: I think the judge would have to,
22 again to satisfy himself that this was a lawful sentence,
23 and if the judge --

24 QUESTION: He'd have to satisfy himself there
25 was a factual basis for it.

1 MR. STEWART: Well, he would have to satisfy
2 himself that there were facts supporting it, but one of
3 the bits of evidence he could look to, and I think one of
4 the primary pieces of evidence, would be the parties'
5 agreement --

6 QUESTION: Sure.

7 MR. STEWART: -- that it was so, and I think one
8 highly relevant portion of the colloquy at the sentencing
9 hearing --

10 QUESTION: In other words, he has to find in the
11 agreement a factual basis for concluding the assets are
12 forfeitable.

13 MR. STEWART: He has to find -- he has to be
14 satisfied that the property is forfeitable under the
15 statute, and typically one of the ways that judges resolve
16 potential factual disputes is by agreement or stipulation
17 of the parties.

18 QUESTION: Right, so you're saying he does not
19 have to satisfy himself personally of the factual basis.
20 It is enough if he receives from the defendant a
21 concession that a factual basis exists.

22 MR. STEWART: That is corr -- he --

23 QUESTION: But if no concession that a factual
24 basis exists is there, then he may have to conduct some
25 other inquiry.

1 MR. STEWART: That is correct.

2 QUESTION: But I think you're going beyond that.
3 I thought you said that there would -- well, maybe you
4 didn't say there would be a sufficient basis. You said it
5 would be a relevant factual basis that this agreement had
6 been made. If that argument was sound, then that would be
7 a relevant factual basis that an agreement to plead guilty
8 had been made, yet that's not sufficient under the rule.

9 MR. STEWART: I think that's correct, and I
10 think in *McCarthy v. United* --

11 QUESTION: It's correct that that's what you
12 said, or it's correct that that would not be enough.

13 MR. STEWART: Both, and --

14 QUESTION: Okay.

15 QUESTION: That would be enough under the rule,
16 but I thought you're saying the rule doesn't apply here.

17 MR. STEWART: That's correct. Let me explain --

18 QUESTION: But you were suggesting that there
19 was an independent obligation on the part of the judge.

20 MR. STEWART: I'm suggesting in the context of
21 guilty pleas under Rule 11(f) that in essence the plea of
22 guilty cannot form its own factual basis.

23 QUESTION: All right. Now, what about the claim
24 of the right to forfeiture. Can a stipulation that he
25 will but he agrees to forfeit be a sufficient factual

1 basis?

2 MR. STEWART: Yes. I believe the stipulation
3 would ordinarily be construed as --

4 QUESTION: Now, why the difference? Why is it
5 enough on forfeiture, but it's not enough on guilt or
6 innocence?

7 MR. STEWART: I --

8 QUESTION: Is it the fact that the rule applies
9 on guilt or innocence and the rule doesn't apply on
10 forfeiture?

11 MR. STEWART: That is correct, and I think --

12 QUESTION: But you have said -- I apologize in a
13 way for keeping cutting you off like this. I promise you
14 I'll let you run as long as you want in a second, but I
15 understood you to say that even without the rule, the
16 judge has an obligation to assure himself that there is
17 some factual basis to believe that the forfeiture was not
18 a wholly illegal forfeiture.

19 MR. STEWART: That's correct, and ord --

20 QUESTION: What's the source of that obligation?

21 MR. STEWART: The courts have recognized through
22 the years that the judge has an independent obligation to
23 impose a sentence that is authorized by law and indeed,
24 the plea agreement in this case contained a term stating
25 that the judge was not bound by the parties' agreement but

1 would impose the sentence that he deemed --

2 QUESTION: Does that get you to the equivalent
3 of Rule 11, then?

4 MR. STEWART: I don't believe so, and let me
5 explain by reference to McCarthy v. United States.

6 In McCarthy v. United States, the Government
7 made, with respect to guilty pleas, something very similar
8 to the argument that I'm making with regard to sentencing
9 stipulations. That is, the Government argued the mere
10 fact that McCarthy entered a plea of guilty is a
11 sufficient reason for us to conclude that he must have
12 committed the crime, and the Court said, that's not good
13 enough, and it pointed to rule -- what at that time was
14 Rule 11, it hadn't been recodified as Rule 11(f), and said
15 the rule specifically requires in the context of guilty
16 pleas that the judge look beyond the party's plea, and the
17 Court stated that the reasons for this requirement are
18 specific to the context of guilty pleas. That is
19 precisely because a plea of guilty to a criminal offense
20 has such severe consequences, because a criminal
21 conviction is thought to be such a significant step, the
22 court has an obligation with respect to pleas of guilty
23 that is not imposed with respect to concessions or
24 stipulations generally.

25 The Court did not say in McCarthy, in the area

1 of criminal law generally there is an obligation for the
2 court to look beyond the parties' agreement to see whether
3 they are accurate. The Court said, guilty pleas are
4 different.

5 QUESTION: Where in this plea agreement did the
6 defendant acknowledge the factual basis for his giving up
7 his title to all his property?

8 MR. STEWART: The plea agreement contained only
9 a term stating that the defendant agrees to transfer title
10 to all his assets.

11 QUESTION: I think your case would be a lot
12 stronger if you said the defendant agrees that all of
13 these assets are properly forfeitable at law, and he
14 agrees to transfer them all to the Government. All it
15 says, however, is he agrees to transfer them to the
16 Government.

17 Now, how do you find what you say is the
18 necessary factual concession in that?

19 MR. STEWART: I think the strongest indication
20 that this was the interpretation the parties placed upon
21 the agreement is on page 149 of the Joint Appendix, which
22 is the colloquy at the sentencing hearing, and
23 petitioner's counsel -- petitioner's then-counsel is
24 addressing the court, and counsel states -- the second,
25 the first full paragraph, second paragraph -- your Honor,

1 of course --

2 QUESTION: On what page?

3 MR. STEWART: Page 149 of the Joint Appendix.
4 Counsel states, Your Honor, of course that's all for
5 naught, because as a result of this, meaning the crime,
6 the forfeiture is going to take regular money and illegal
7 money under the substitute assets.

8 Maybe all those years that he's worked, maybe
9 that which he's loved most dearly next to his family,
10 those dollars for whatever reason are going to be taken
11 from him by the Government. Mr. Libretti has a lot of
12 questions about that. It's a harsh law. Both the CCE law
13 and the forfeiture law is a harsh law. It's a bitter pill
14 dealt by Congress, but it's a pill we must swallow.

15 And I think implicit in this discussion is,
16 first, counsel's recognition that all of the property was
17 to be forfeited pursuant to the agreement, and that there
18 was to be no further hearing to determine which property
19 would be forfeited and which would not, but I think
20 second, and equally significant --

21 QUESTION: That paragraph doesn't say all his
22 property is covered by it.

23 MR. STEWART: He says --

24 QUESTION: It says it may be some regular money
25 and some illegal money.

1 MR. STEWART: He says, regular money and illegal
2 money under the substitute assets. The substitute --

3 QUESTION: It doesn't say that the substitute
4 assets would eat up his entire estate.

5 MR. STEWART: Well, he says both the CCE law and
6 the forfeiture law is a harsh law. It's a bitter --

7 QUESTION: Well, it is.

8 MR. STEWART: -- pill dealt by Congress.

9 QUESTION: But it's still not the same as saying
10 he gets 100 percent of his estate, even if the forfeitable
11 assets plus the substitute assets don't equal the total.
12 It doesn't say that.

13 MR. STEWART: Well, at the hearing itself the
14 Government made a motion for forfeiture that listed all
15 the assets that were subsequently encompassed in the
16 district court's order forfeiture, and defense counsel
17 made no objection to that motion, and this is the portion
18 of the colloquy that most directly addresses the issue of
19 forfeiture, and it seems to us not to be an
20 acknowledgement not simply that all of the property would
21 be forfeited pursuant to the agreement --

22 QUESTION: But that all of it was forfeitable.

23 MR. STEWART: Exactly.

24 QUESTION: But I don't think the court of
25 appeals read it that way. If you look at page 325 of the

1 Joint Appendix, they seemed to say, in exchange for
2 forfeiting all of his property. That seems to include
3 forfeitable as well as nonforfeitable. He made his deal.

4 MR. STEWART: If you look at page 324 of the
5 court of appeals, at the very bottom of the page, the
6 fifth line from the bottom, the court of appeals states,
7 he intended to forfeit all of his property without
8 requiring the Government to prove the assets were
9 forfeitable. The plea agreement requires forfeiture
10 pursuant to section 853, which includes forfeitable assets
11 under 853(a) and substitute assets under section 853(p).

12 We would certainly agree that if the plea
13 agreement had been drafted more artfully some of these
14 questions would have disappeared. We think on the whole
15 the courts below and petitioner's then trial counsel
16 placed the construction on the agreement that we place
17 here. In any event, it's certainly irrelevant to the
18 11(f) question. That is, the concession either is or is
19 not a plea of guilty.

20 QUESTION: Well, is it irrelevant -- what if the
21 agreement made it perfectly clear that half of his assets
22 were forfeitable properly, but the agreement nevertheless
23 provided for forfeiture of all of his assets, so there was
24 a clear, factual basis for saying that everything covered
25 by the agreement is not authorized to be forfeited. What

1 would happen then?

2 MR. STEWART: Well, if the agreement were clear
3 on its face that the other half of the assets were not
4 forfeitable under the statute but the parties were
5 nevertheless agreeing to forfeit them, I think the
6 district court's obligation would be to reject that aspect
7 of the agreement --

8 QUESTION: Because --

9 MR. STEWART: -- just as if the Government and
10 the defendant had agreed that the defendant would consent
11 to a prison sentence in excess of that authorized by law.

12 QUESTION: And what if the plea agreement says
13 nothing at all --

14 QUESTION: Yes.

15 QUESTION: -- about whether it is properly
16 forfeitable or improperly, it just says, he agrees to
17 forfeit all his assets?

18 MR. STEWART: I think probably the obligation
19 of -- probably the better practice on the part of the
20 district court would be to inquire as to --

21 QUESTION: I'm not talking about --

22 QUESTION: What about his obligation?

23 QUESTION: -- I'm talking about what he has to
24 do.

25 QUESTION: Wouldn't he do exactly what the judge

1 is trying to do in this case?

2 MR. STEWART: No. I think what went on at the
3 sentencing colloquy was what ought to have happened. That
4 is --

5 QUESTION: Never mind that. Answer my question,
6 would you. What does the judge have to do when he gets a
7 plea agreement that says nothing more than he agrees to
8 forfeit all his assets, period, and there's no colloquy
9 with counsel which you contend suggests that there's an
10 acknowledgement that they are all forfeitable? There's no
11 acknowledgement at all that they are forfeitable, just he
12 agrees to forfeit all of them. Is that an adequate plea
13 agreement?

14 MR. STEWART: I think that the -- precisely
15 because the parties cannot stipulate to an illegal
16 sentence, the judge could construe that as a concession
17 that all of the property was forfeitable.

18 QUESTION: He could.

19 MR. STEWART: Yes.

20 QUESTION: So he would not have to make any
21 further inquiry?

22 MR. STEWART: He would not. Again, if the --

23 QUESTION: Well, suppose that's not a reasonable
24 way to construe the agreement, but that after the plea is
25 accepted, he then holds a complete forfeiture hearing, is

1 the plea still invalid?

2 It seems to me that you're conceding more than
3 you should. It seems to me that you're saying that he has
4 to make either a finding that there's a factual basis, or
5 at least construe a concession or an agreement that way,
6 for the plea to be valid.

7 MR. STEWART: No. We're saying to impose the
8 sentence of forfeiture. Not for the plea to be valid, but
9 to order forfeiture in accordance with the agreement, the
10 judge would have to feel --

11 QUESTION: But the plea stands, and then the
12 question is just the adequacy of the post plea procedures.
13 That's all we're talking about.

14 MR. STEWART: That's correct, but for --

15 QUESTION: Under your view of the case.

16 MR. STEWART: That's correct, but pursuant to
17 the agreement, if the parties -- if the defendant had
18 stipulated that all the assets were forfeitable, the judge
19 would be perfectly justified in -- and that agreement was
20 plausible on its face --

21 QUESTION: This -- sorry.

22 MR. STEWART: The judge would be justified in
23 ordering forfeiture on that basis alone without conducting
24 additional proceedings, and certainly the point, from the
25 Government's perspective of entering into this agreement,

1 was precisely to obviate the need for an elaborate hearing
2 on the question of forfeitability.

3 QUESTION: What is the right form of words in
4 your opinion? Where we are, as I take it, is, forget
5 about 11(f). That has to do with guilty pleas. We're now
6 talking about Justice Stevens' question, which is that a
7 judge is never free to impose an illegal sentence, and
8 here we have a forfeiture statute, we also have a statute
9 that governs in very great detail sentences of all sorts
10 and shapes, and one of the major questions is the extent
11 to which parties can stipulate to facts relevant to
12 sentencing which aren't true.

13 So this governs quite a lot, and the issue, I
14 take it, is what's the right form of words for this Court
15 to write as to the duty imposed on a Federal district
16 judge to determine independently what the facts are in
17 respect to a fact relevant to sentencing to which the
18 parties have agreed?

19 Now, there are two guideline sections written on
20 this, and neither answers that question, so what is the
21 Government's view, because I don't see how to write this
22 case without taking a view on that, though it isn't fully
23 argued.

24 MR. STEWART: Oh, I think the Government's view
25 would be that, again, leaving aside for the question --

1 for the moment the question of interpretation of the
2 agreement, if it were clear that the agreement was a
3 concession that certain assets were forfeitable under the
4 statute, I think the ordinary principles governing --

5 QUESTION: Yes, right. If they had said right
6 here, as your directive, I guess, of November 1994 now
7 tells everybody to say, the defendant should stipulate as
8 to what the facts are, that if that were clear, there
9 wouldn't be a problem. You could just say, yes, there's
10 enough here.

11 Or alternatively, if there were nothing, I guess
12 it wouldn't be a problem. We could say there's nothing
13 here. What is -- but we might have to be in that
14 ambiguous area where it would be useful to have a standard
15 as to what there has to be, and that's why I'm asking what
16 in your opinion -- and I think it's quite difficult to
17 answer, but we may have to answer it. What, in your
18 opinion, is the correct form of words to describe -- I'd
19 be repeating myself. You've taken it in, right?

20 MR. STEWART: The correct form of words for
21 the --

22 QUESTION: The correct form of words to describe
23 the duty of a sentencing judge in the Federal system
24 independently to determine the extent to which a fact
25 relevant to sentencing is true --

1 MR. STEWART: I think --

2 QUESTION: -- given that there is a stipulation.
3 Maybe there is no independent duty, but maybe there is
4 some. Maybe you have to look at the presentence report.
5 Was there a presentence report here?

6 MR. STEWART: There --

7 QUESTION: Maybe you have to ask some questions.
8 I'm asking to get your opinion on that, if there is one
9 that you have.

10 MR. STEWART: I think as a general matter the
11 district court's -- the district court could enter an
12 order of forfeiture in accordance with the agreement if
13 the agreement was plausible on its face, and if it were
14 not squarely contradicted by other record evidence. That
15 is --

16 QUESTION: And that also would hold for
17 stipulations as to how much drugs there were, stipulations
18 as to the proper guideline level, stipulations as to the
19 amount of the fine, stipulations as to -- you know. I
20 mean, I take it there's no way to differentiate the one
21 from the other.

22 MR. STEWART: Well, at least as between the
23 things are mentioned, some are purely factual
24 determinations, some are purely legal determinations, and
25 some are mixed questions of fact and law. The court would

1 more often feel justified in saying that a stipulation as
2 to a pure question of law was implausible.

3 QUESTION: But is it correct that that issue has
4 to be reached by this Court when we write the case? The
5 issue is the validity of the plea and whether a jury was
6 waived as to the forfeiture determination, that's all.

7 MR. STEWART: Certainly --

8 QUESTION: I mean, those are the questions as I
9 read them.

10 MR. STEWART: Certainly it isn't necessary to
11 resolve this question to decide whether Rule 11(f) imposes
12 upon the district court an obligation to find a factual
13 basis for the plea.

14 QUESTION: Can you or do you take the position
15 that if the judge takes appropriate action to determine
16 forfeitability after the entry of the plea, that the plea
17 is valid?

18 MR. STEWART: Oh, that's correct, and in
19 general --

20 QUESTION: All right, and that's the first
21 question.

22 Now, what about the waiver of the right of a
23 jury to determine forfeitability? Does the entry of a
24 guilty plea waive the right of a jury to determine
25 forfeitability at the sentencing stage?

1 MR. STEWART: That is somewhat unclear. As a
2 practical matter, this is a situation that virtually never
3 arises. That is, the Government hardly ever enters, or
4 virtually never enters into plea agreements in which
5 issues of forfeitability remain unresolved because part of
6 the point of a plea agreement from our standpoint is to
7 obviate the need for that kind of prolonged evidentiary
8 proceeding.

9 QUESTION: But Mr. Stewart --

10 QUESTION: I'm actually surprised at that. It
11 would seem to me that there are many issues of
12 forfeitability that are somewhat difficult -- the tracing
13 of assets and so forth -- that are going to take a
14 subsequent hearing after the plea's entered.

15 MR. STEWART: I mean, typically --

16 QUESTION: You know the cases better than I do,
17 but I'm surprised at your answer.

18 MR. STEWART: As far as Department of Justice
19 practice goes, typically if we were going to enter in --
20 you're right that often when a case is tried to a jury
21 there will be elaborate, difficult issues of
22 forfeitability remaining, but when the Government enters
23 into a plea agreement, typically there is an insistence
24 upon obtaining stipulations or concessions as to
25 forfeiture as well so that we don't essentially have to

1 try the case despite the entry of the plea agreement.

2 Now, it's very clear that the defendant could
3 simply plead guilty without an agreement and preserve his
4 right to contest the forfeitability of assets.

5 QUESTION: Mr. Stewart, let me go back to the
6 question I asked Ms. Beale, that this defendant was not
7 told by the district judge going in about this most
8 unusual kind of a jury determination that he would be
9 entitled to if he didn't plead guilty. That is, the
10 special verdict and all of that.

11 Doesn't he, to waive that right to the jury
12 determination on the forfeiture, at least have to know
13 about this extraordinary -- a special verdict in a
14 criminal case is really extraordinary procedure, isn't it,
15 and not one word was said about that.

16 MR. STEWART: We agree, but we don't believe
17 that the knowing relinquishment standard of Johnson v.
18 Zerbst would apply. That is, by pleading guilty, the
19 defendant obviously gave up a host of rights that he could
20 have asserted at a trial had he insisted --

21 QUESTION: But under Rule 11 he's told about
22 those rights, or many of them. He's certainly not told
23 about this unusual right.

24 MR. STEWART: He's told about a small set of
25 fundamental constitutional rights. He's not required

1 under Rule 11 to be told about any statutory rights, and
2 we believe that Rule 31(e) is not a constitutional
3 dimension.

4 Moreover, he was told at the plea colloquy that
5 he had the right to be tried by a jury. I think part --
6 in a sense, petitioner's argument presumes that on the one
7 hand the right to a jury determination on forfeiture is
8 part and parcel of the Sixth Amendment right to jury
9 trial, but that on the other hand for purposes of the
10 Rule 11 colloquy they are two different things, so the
11 advice that you have the right to be tried by a jury
12 doesn't encompass the right -- the advice that you have
13 the right to be tried to a jury on forfeiture.

14 In general, the Rule 11 colloquy would not
15 involve an elaborate parsing out of the functions that
16 judge and jury would play at trial, so even if a defendant
17 received a perfectly adequate Rule 11 colloquy, he might
18 still be uncertain as to whether particular issues would
19 have been resolved by the judge or by the jury.

20 QUESTION: I'm not asking you anything abstract.
21 I'm asking you about, this is a peculiar kind of a jury
22 trial right. Does defendant waive that even though he has
23 no notion that it exists because nobody told him about it?

24 MR. STEWART: Yes. We know that he was not told
25 by the court. We don't know whether he was told by his

1 counsel, but he could waive it regardless of whether he
2 had actual knowledge, and the court has --

3 QUESTION: I -- the notion of an unknowing,
4 unconscious waiver is disturbing. I can see you say,
5 well, he doesn't -- he's really not entitled to know about
6 it, so it doesn't matter that he wasn't told.

7 MR. STEWART: Well, in --

8 QUESTION: How can you waive something that you
9 don't know you have a right to?

10 MR. STEWART: Well, the Court has recognized in
11 a variety of circumstances that as a general matter a
12 defendant's rights, even constitutional rights, can be
13 waived simply by the failure to assert them at the proper
14 time, so it can often happen during the course of a
15 criminal trial --

16 QUESTION: Well, yes, but here, if we make the
17 assumption for the sake of argument that this particular
18 right, the jury determination with respect to forfeiture,
19 is of constitutional dimension, then it would be very odd
20 to say that the same guilty plea which waives the right to
21 a trial on guilt and innocence should be treated
22 differently from the guilty plea insofar as it waives the
23 jury determination with respect to the forfeiture.

24 I mean, why would you draw that distinction?
25 There's no pragmatic reason to do so. It's not that you

1 would be interfering with the relationship between counsel
2 and client, or what-not. Why would you ever draw that
3 distinction if you assume that in fact it is of
4 constitutional -- that the determination on forfeiture is
5 of constitutional significance?

6 MR. STEWART: Well, I think in fashioning
7 Rule 11 the drafters didn't state that the defendant had
8 to be advised of all the constitutional rights that --

9 QUESTION: No, but just why -- just -- my
10 question is, why would you want to draw that distinction?
11 What would make that a rational and sensible distinction
12 to draw?

13 MR. STEWART: Well, my answer may sound as
14 though it's questioning your premise that this falls
15 within the Sixth Amendment, but the fact is that the
16 procedural protections available at a criminal trial as a
17 prerequisite to a determination of guilt or innocence have
18 always been given a higher status than procedural
19 protections available at sentencing.

20 QUESTION: That does sound as though you're
21 rejecting my premise.

22 (Laughter.)

23 QUESTION: And if you don't reject my premise,
24 what's your answer? Why would you draw that distinction?

25 MR. STEWART: I guess we would say, first we

1 would draw that distinction because we think that the
2 drafters of Rule 11 drew that distinction. They referred
3 to the right to be tried by a jury, they placed it in the
4 context of other rights that were clearly going to be
5 asserted at a trial rather than at a sentencing
6 proceeding.

7 And the second point we would make is, again, if
8 this is part and parcel of the Sixth Amendment right to be
9 tried by a jury he was told, you have the right to be
10 tried by a jury, and he waived it.

11 QUESTION: Well, he was told that, and yet in
12 the colloquy which is in -- which has been already
13 adverted to, the judge as part of that colloquy then went
14 on to say, now, if you plead guilty, that's going to be
15 the end of it and so on, and he says, the jury is not
16 going to decide whether you're guilty or not. That
17 suggests to me, would suggest to me if I were the
18 defendant standing there, that my jury trial right goes to
19 guilt or innocence.

20 It would not suggest to me that I had a jury
21 trial right with respect to the forfeiture, and even if I
22 assume for the sake of argument that the -- that a mere
23 statement or an unqualified statement saying you waive
24 your right to jury trial, of all matters charged against
25 you, or what-not, would be sufficient, it seems to me,

1 going back to Justice Ginsburg's question, what happened
2 here is the judge seems to have modified that later in the
3 colloquy to indicate that the jury trial right just goes
4 to guilt or innocence.

5 MR. STEWART: Well, certainly that statement --
6 I think the judge was primarily focusing on the right to
7 jury trial on guilt or innocence, because that's the thing
8 that's generally at issue.

9 QUESTION: So if you were standing there
10 listening, wouldn't you draw the conclusion that you had a
11 jury trial right on guilt and innocence, and likewise
12 conclude that you didn't have a jury trial right on
13 anything else?

14 MR. STEWART: I think that's probably the most
15 likely inference, and our position has never been --

16 QUESTION: But normally you don't have a jury
17 trial on the sentence, so what I don't understand is that
18 here is a hybrid, as Ms. Beale called it. It has to be
19 charged. You have a right to a jury trial with a special
20 verdict, and to say that a defendant -- a judge doesn't
21 even have the obligation to tell the judge -- the
22 defendant with respect to this forfeiture in the absence
23 of a plea agreement there would be a jury trial right, and
24 the jury would have to make special findings on each item
25 of property --

1 MR. STEWART: I mean, in -- the Rule 11 really
2 encompasses two categories of information that have to be
3 conveyed to the defendant. One is information about what
4 will happen to you if you plead guilty, what's the minimum
5 and maximum sentence, and so forth, and the other category
6 of information is, what rights would you be able to insist
7 on if you didn't plead guilty and insisted upon a trial,
8 and the idea is to allow the defendant in some rough sense
9 to compare the options available to him.

10 I think one thing that's noteworthy about the
11 second category of information -- what would happen to you
12 if you insisted upon a right to trial -- is that it
13 doesn't include any information about sentencing. That
14 is, the defendant is not required to be told, this would
15 be your minimum and maximum sentence if you insisted upon
16 a right to trial.

17 Indeed, in *Brady v. United States*, the Court
18 held that a defendant's guilty plea was voluntary even
19 though he reasonably believed that he would be subject to
20 a sentence of death if he insisted upon trial and was
21 convicted.

22 It turned out that that was not the case, that
23 that statutory capital provision was invalid, and
24 therefore the defendant pleaded guilty under the
25 misapprehension that he would be subject to a capital

1 sentence if he contested the charges, so the rule simply
2 doesn't require the same quantum of information as to what
3 would happen if you contested the charges as it would --

4 QUESTION: Mr. Stewart, can I ask you -- your
5 time is about to expire -- two questions about this
6 particular case?

7 Am I correct that the only issue before the
8 court of appeals was the order of forfeiture, not the plea
9 of guilt or innocence?

10 MR. STEWART: That's correct.

11 QUESTION: And secondly, is it your reading of
12 the court of appeals opinion that the post plea
13 proceedings on forfeiture that the district judge was
14 conducting cannot be conducted under the holding of the
15 court of appeals?

16 MR. STEWART: The court of appeals said that the
17 district court retained jurisdiction to adjudicate third
18 party claims to the property, but that the district court
19 did not retain jurisdiction to entertain the petition.

20 QUESTION: The defendant could not make any
21 further claims.

22 MR. STEWART: That's correct, and the court of
23 appeals essentially treated that aspect of the post
24 judgment proceedings as a nullity.

25 QUESTION: Okay, thank you.

1 QUESTION: Was there a presentence report?

2 MR. STEWART: There was a presentence report.

3 QUESTION: And did the presentence report go
4 into any of these facts?

5 MR. STEWART: The presentence report contains
6 information regarding the legitimate income that
7 petitioner had earned over the years which would be
8 relevant in determining the plausibility of the
9 Government's claim that assets would be forfeitable under
10 the substitute assets provision. The presentence report
11 also notes forfeiture as an available sanction but does
12 not go into --

13 QUESTION: My point is, is there anything in
14 that that would add to the quantum of information that the
15 sentencing judge had if the obligation is on the
16 sentencing judge to determine whether there is a basis for
17 the forfeiture that he ordered?

18 MR. STEWART: To the extent that the presentence
19 report discusses petitioner's legitimate --

20 QUESTION: Does it help, or doesn't it help?

21 MR. STEWART: It does help.

22 QUESTION: Do we have it here? We should get
23 it.

24 MR. STEWART: Okay. I'm not sure if it's in the
25 record. The presentence report included information both

1 about legitimate earnings and about the extent of
2 petitioner's unlawful conduct, both of which would have
3 been relevant in determining the plausibility of the
4 concession that all the property was forfeitable under the
5 statute.

6 QUESTION: Okay.

7 JUSTICE STEVENS: Thank you, Mr. Stewart. The
8 case is submitted.

9 (Whereupon, at 2:00 p.m., the case in the above-
10 entitled matter was submitted.)
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CERTIFICATION

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

JOSEPH LIBRETTI, Petitioner v. UNITED STATES.

CASE NO: 94-7427

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BY *Ann Marie Federico*

(REPORTER)