

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: AMANDA MITCHELL, Petitioner v. UNITED STATES

CASE NO: 97-7541 Ct

PLACE: Washington, D.C.

DATE: Wednesday, December 9, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AMANDA MITCHELL, :

4 Petitioner :

5 v. : No. 97-7541

6 UNITED STATES :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, December 9, 1998

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:05 a.m.

13 APPEARANCES:

14 STEVEN A. MORLEY, ESQ., Philadelphia, Pennsylvania; on
15 behalf of the Petitioner.

16 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
17 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 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-7541, Amanda Mitchell v. the United
5 States.

6 Mr. Morley.

7 ORAL ARGUMENT OF STEVEN A. MORLEY

8 ON BEHALF OF THE PETITIONER

9 MR. MORLEY: Mr. Chief Justice, and may it
10 please the Court:

11 The Fifth Amendment is clear in its language.
12 No person shall be compelled in any criminal case to be a
13 witness against himself, and yet in this criminal case the
14 district court used the defendant's silence, invoked to
15 protect her from risking an increase in her own sentence,
16 as a basis to fashion a sentence.

17 In doing so, the court fundamentally altered the
18 sentencing proceedings from that which had been
19 specifically promised to this defendant at the time of her
20 colloquy, and from that which is generally applicable in
21 criminal process.

22 QUESTION: Are there cases that tell us what the
23 authority and discretion of the trial court is in
24 inquiring as to the basis for the -- the factual basis for
25 the plea? At the plea stage, can the trial judge say,

1 now, I want you to tell me -- I'm not going to accept your
2 plea. I want you to tell me everything that you did, all
3 of the transactions, and if you don't I'm not going to
4 accept your plea. Can the trial judge say that?

5 MR. MORLEY: The trial judge has discretion to
6 make certain that there's a foundation for the guilty
7 plea, and certainly the trial judge can say to the
8 defendant, I'm not going to take your plea unless you tell
9 me everything, but then the trial judge has the
10 opportunity to say, I'm not going to take your plea, and
11 the defendant would also be given the opportunity to say,
12 judge, I'm willing to tell you enough that admits to the
13 essential elements of this offense, but I'm not getting
14 into any sentencing factors.

15 QUESTION: I'm surprised you can say -- suppose
16 you have three police officers, uncontradicted testimony,
17 overwhelming proof of the guilt, and they testified, and
18 the criminal defendant says, based on what you've heard I
19 plead guilty. Does the trial judge still have the
20 discretion to say, I want you to tell me everything that
21 happened or I won't accept the plea? Does he have that --
22 I would --

23 MR. MORLEY: I think the judge has a -- I'm not
24 sure the cases say that he can't accept the plea. I think
25 the -- the cases seem to say that the trial judge has the

1 authority to make sure that there's a factual foundation,
2 a factual statement, and that --

3 QUESTION: But once he does that, doesn't his
4 discretion end?

5 MR. MORLEY: Yes, it does, and I think under --

6 QUESTION: Because if it does, it seems to me to
7 make your case easier, although I haven't seen cases on
8 this.

9 MR. MORLEY: I haven't seen cases on that, but
10 think Libretti --

11 QUESTION: In a plea colloquy you're typically
12 told you're waiving a privilege against self-
13 incrimination.

14 MR. MORLEY: Typically that's true.

15 QUESTION: In this case, Judge Cahn told the
16 defendant that, I think.

17 MR. MORLEY: Well, Your Honor, actually what
18 Judge Cahn said -- and I refer to page 45 of the joint
19 appendix toward the top -- Judge Cahn said, you have the
20 right at trial to remain silent under the Fifth Amendment
21 or at your option you can take the stand and tell the jury
22 your side of the controversy, so Judge Cahn specifically
23 limited the waiver of the Fifth Amendment to the right at
24 trial.

25 QUESTION: Well, you know, I don't know that one

1 would parse it quite that strictly, but I -- that's a
2 permissible point of view, certainly.

3 MR. MORLEY: But even beyond that, I still
4 believe that the cases point to the fact that one does
5 have a Fifth Amendment right at sentencing.

6 This comes really from two sources.

7 QUESTION: May I -- I'm sorry, I want to go back
8 to the plea colloquy before we get to the sentence.

9 Would you explain to me your understanding of
10 the difference between the waiver that is involved in
11 speaking to the judge during the plea colloquy and the
12 waiver, if there is a difference in the waiver that a
13 defendant makes on taking the stand at trial? Is there
14 any difference?

15 MR. MORLEY: Yes, there would be a difference in
16 that way.

17 QUESTION: What is it?

18 MR. MORLEY: In a plea colloquy the defendant is
19 really giving his or her admission to the essential
20 elements of the offense so that a legal conclusion can be
21 drawn right at that time to the effect that individual is
22 guilty. That is all that it's involved in.

23 At a trial, when a defendant takes the witness
24 stand --

25 QUESTION: Well now, just a minute. I think you

1 have to ask enough at the plea colloquy to satisfy
2 yourself as the trial judge that the facts that occurred
3 amount to a commission of the alleged offense.

4 MR. MORLEY: Precisely, and --

5 QUESTION: And presumably the judge could have
6 asked about the quantity of drugs.

7 MR. MORLEY: Well, this Court in Libretti made
8 clear that forfeiture is a sentencing issue, and therefore
9 need not be part of the factual understanding, the factual
10 statement under Rule 11.

11 QUESTION: What was the statute under which the
12 petitioner was charged here?

13 MR. MORLEY: This was a drug statute, 8 -- it
14 was the conspiracy statute. It was the 846 statute in
15 which drug quantities are not part of the -- not an
16 element of the offense, but they are part of the
17 sentencing.

18 QUESTION: And you conceive that the quantity of
19 the drugs is not an element of the offense here.

20 MR. MORLEY: Absolutely, it is not an element of
21 the offense.

22 QUESTION: And would it be an abuse of
23 discretion for the judge to say, I'm not going to take the
24 guilty plea if I have to go through all this thing on
25 sentencing. You have to tell me how much drugs were

1 involved.

2 MR. MORLEY: I would be willing to give a judge
3 that discretion. I'm not sure that it's an abuse of
4 discretion. I think our district court judges are by and
5 large well-founded in the --

6 QUESTION: Well then, the privilege you're
7 talking about is not as important as I thought it was from
8 your brief.

9 MR. MORLEY: Well, I -- perhaps I've conceded
10 too much, Justice Kennedy, but at any rate --

11 QUESTION: But then you're just making it a
12 later --

13 QUESTION: Well, let me --

14 QUESTION: You just said you can make the person
15 tell sooner but you can't make them tell later, and that
16 doesn't make a whole lot of sense.

17 QUESTION: Well, you haven't agreed that he
18 could make him tell.

19 MR. MORLEY: No.

20 QUESTION: You're just saying he may not enter
21 the plea unless you --

22 MR. MORLEY: Right. The judge, as far as -- I
23 mean, the judge can always say, I won't take this plea,
24 the defendant must go to trial.

25 QUESTION: Well, are you taking the -- going

1 back to the question that I started with or, it seems to
2 me what you're saying is that the essential difference
3 between the waiver and when the individual stands up at
4 the Boykin hearing and the waiver when the individual
5 takes the stand is that the only waiver that's being given
6 in the Boykin hearing is the waiver that in fact is made
7 with each individual representation of fact by the
8 defendant for purposes of entering the plea, and that's as
9 far as the waiver goes.

10 MR. MORLEY: That's as -- exactly, that's as far
11 as the waiver goes, and --

12 QUESTION: And you're saying that the judge can
13 condition his acceptance of the plea upon the defendant's
14 yielding a constitutional right that the judge has no
15 power to demand that he yield. Doesn't this violate the
16 doctrine of unconstitutional conditions? I'll accept this
17 plea, but only if you give up your constitutional right
18 not to tell me this.

19 QUESTION: Well, you give up the constitutional
20 right to trial, the constitutional right to -- you give up
21 a lot of constitutional rights when you plead guilty,
22 don't you?

23 MR. MORLEY: Yes, precisely.

24 But if I could get back to Mr. Justice Souter's
25 question about the difference at a trial, at a trial, the

1 waiver concept there is where a defendant would testify,
2 and in that sense would be giving up his entire right
3 because he is testifying, and that the -- and the
4 Government would have the opportunity to cross-examine him
5 on that testimony, and really what underlies that waiver
6 is a rule of fairness.

7 We're not going to let a defendant get up in
8 front of a jury, testify as to facts, and then cut off
9 cross-examination to matters that are relevant at trial.

10 In the guilty plea context the sentencing issue
11 is simply not relevant. Sentencing factors are not
12 relevant to the waiver of the --

13 QUESTION: Well, suppose -- suppose the --

14 QUESTION: Well --

15 MR. MORLEY: -- of that -- of the rights that --
16 for the -- because they do not relate to the essential
17 elements of the offense.

18 QUESTION: No, but they can. It seems to me
19 that it -- and I -- this doesn't happen in every case, of
20 course, but it seems to me that it may very well be open
21 to a judge to say the following at the Boykin hearing.

22 Number 1, this is not an Alford plea. You're
23 not standing here saying, look, I really didn't do it, but
24 you know, there's a reason for pleading and so on, so
25 your -- the premise of your plea is that you really did do

1 the things that were charged.

2 I, the judge, sort of believe that truth inheres
3 in the details, and I'm not going to be satisfied that the
4 basis is being given for this upon which I'm going to
5 premise a knowing and voluntary waiver unless you go
6 beyond conclusory details saying yes, I had drugs, or
7 what-not. I want the details to assure me that you're
8 really telling me the truth, something that's worthy of my
9 belief. Certainly that is within a judge's discretion at
10 the plea hearing.

11 MR. MORLEY: I don't believe so, Your Honor. I
12 think what's important at the plea hearing --

13 QUESTION: Then it would be a -- I don't want to
14 cut you off, but you then say, it would be an abuse of
15 discretion for him --

16 MR. MORLEY: Yes. I would --

17 QUESTION: -- to refuse to accept the plea under
18 those circumstances?

19 MR. MORLEY: I would say it would be an abuse of
20 discretion in that sense.

21 What I think happens -- what's important at the
22 plea hearing is that the defendant understand the
23 consequences. That's what the cases say, and in that
24 sense what the judge can do is say --

25 QUESTION: Well, but he's got to understand the

1 consequences to which he is legitimately open by virtue of
2 his conduct, and that involves an appreciation not only of
3 theoretical legal consequences but of the actual conduct,
4 too, so that's the justification for the judge's inquiry.

5 MR. MORLEY: Except the judge can achieve that,
6 as Judge Cahn did in this case, by engaging in a colloquy
7 that lays out, you've reserved for sentencing the drug
8 quantity analysis which will drive your sentence. The
9 Government says it's more than 5 kilograms, and if they
10 are able to prove it you'll be subject to this kind of
11 sentence.

12 QUESTION: But --

13 MR. MORLEY: On the other hand, you've saying --

14 QUESTION: If you say, Mr. Morley, that what
15 happens at sentencing is not really an element of the
16 offense at all, then why is it subject to the privilege
17 against self-incrimination?

18 MR. MORLEY: I would say two things. Well,
19 first -- first, it's subject to the rules of the
20 constitutional privilege of self-incrimination because of
21 the language of the Constitution itself. No person shall
22 be compelled in any criminal case to be a witness against
23 himself.

24 Sentencing is part of the criminal case, and it
25 is an accusatorial, adversarial proceeding in which the

1 Government has the burden of proof.

2 What we're saying here is that the Government
3 can come into a court armed with a lower standard of
4 proof. They can take hearsay, they can take all sort and
5 manner of evidence, but the one place they cannot take it
6 is from the mouth of the defendant.

7 QUESTION: But when the defendant has pleaded
8 guilty in a case and actually been sentenced, there's no
9 question that particular defendant could not again invoke
10 the privilege against self-incrimination.

11 MR. MORLEY: As to this -- as to that
12 individual, incriminatory -- exactly.

13 QUESTION: That particular element.

14 MR. MORLEY: Yes.

15 QUESTION: And what do you do in your analysis,
16 if you say this is subject to the privilege against self-
17 incrimination, with cases like Brown v. Walker and Blau v.
18 United States, which says, once you've started to say
19 something, once you've started to tell your story that
20 would incriminate you, you can't stop wherever you want
21 to?

22 MR. MORLEY: Those cases really derive from a
23 factual setting, a hearing, an evidentiary hearing of some
24 manner or form. They are really -- what's grounded behind
25 those rules of, once you start talking you cannot stop, is

1 a sense of fairness. We're not going to let a witness cut
2 off inquiry, at a guilty plea colloquy defendant is
3 frequently a monosyllabic response, yes I agree that
4 that --

5 QUESTION: I don't think Blau, the language in
6 Blau doesn't say sense of fairness.

7 MR. MORLEY: No, it doesn't, but it's what under
8 underlies Blau.

9 QUESTION: Well, how do you know that? Are you
10 doing some mind-reading?

11 MR. MORLEY: No, Your Honor.

12 QUESTION: Well then, how do you know it?

13 MR. MORLEY: I think that that's what -- well,
14 that's the way I read Blau and read Brown v. Walker.

15 QUESTION: Well, let's assume there's a general
16 principle that you can't testify as to part of a subject
17 and then refuse to answer further questions on that
18 subject. Let's assume that's a general rule, which I
19 thought it was under Rogers and cases that the Chief
20 Justice cited.

21 Suppose at the sentencing hearing the defendant
22 said, well, I did some drugs, or whatever this statement
23 was, would that be a waiver?

24 MR. MORLEY: No, Your Honor. That was a --
25 that -- that statement --

1 QUESTION: So you can make a self-serving
2 statement?

3 MR. MORLEY: That statement is --

4 QUESTION: And then rely on the Fifth Amendment
5 to refuse to answer questions to explore the accuracy of
6 that statement?

7 MR. MORLEY: Judge, that statement that
8 Ms. Mitchell made was her right of allocution, which the
9 judge specifically granted to her. It was just a final
10 statement to the court not meant to -- not meant to be
11 testimonial in that sense.

12 QUESTION: May I ask, was the defendant sworn
13 either at the sentencing -- at the plea colloquy or at the
14 sentencing hearing, either one?

15 MR. MORLEY: She was sworn at the plea colloquy.
16 I believe she was sworn at the sentencing.

17 QUESTION: And at the plea colloquy was when she
18 said, I did some of those things?

19 MR. MORLEY: No. That was at -- when she said I
20 did some drugs --

21 QUESTION: Yes.

22 MR. MORLEY: -- but I couldn't do everything
23 they said I did, that was her right of allocution at the
24 conclusion of the sentencing hearing.

25 QUESTION: At the conclusion of the sentencing.

1 QUESTION: You were appealing a little earlier
2 to what you saw as a kind of a judicial fairness
3 rationale. I would suppose that would work against your
4 position here, because when someone accepts -- makes a
5 plea agreement the defendant is making the agreement
6 because it's a good deal.

7 The -- supposedly the sentencing risk is at
8 least reduced to something that the individual can accept,
9 and the individual avoids, in fact, the very messy details
10 of trial which can affect a judge a great deal in the
11 discretionary sentence.

12 If the defendant is going to get what we presume
13 is a comparatively good deal by making the -- by entering
14 the plea on the fairness criterion and I suppose the
15 person ought to be forthcoming about the specific facts
16 that might bear on sentence when you get to the sentencing
17 hearing.

18 MR. MORLEY: That might be true if there were a
19 plea agreement, but in this case this is a -- this was an
20 open -- open plea.

21 QUESTION: Oh, was this a -- this was an open
22 plea. --

23 MR. MORLEY: There was no plea agreement. My
24 client pled guilty, open to the court, specifically
25 reserving for sentence purpose the drug quantity analysis,

1 and that was a condition of a -- it was a conditional
2 guilty plea, in that sense.

3 QUESTION: In a typical case, not necessarily
4 yours, where there was a specific reservation, but in a
5 typical case the judge has to satisfy himself that there
6 is a factual basis for the plea and, in doing that, I
7 guess the defendant either might specifically or through
8 an admission to someone else's recitation of the facts
9 either state or imply that it was a small amount of drugs
10 and, in fact, when we get to the sentencing hearing
11 there's -- the pre-sentence report says, no, no, it was a
12 large amount.

13 Now, the defendant there would have really made
14 a suggestion of the sort that in a trial you would permit
15 cross-examination about and I guess the Government's
16 concern here is that it would present one side of the
17 argument in any such case, and there may be quite a few
18 such cases, and so it's simpler and clearer to just say, a
19 waiver is a waiver.

20 Now, I want --

21 MR. MORLEY: That certainly would be simpler.
22 the problem is, we have an accusatorial system of justice,
23 not an inquisitional one. That's what our Fifth Amendment
24 cases tell us.

25 QUESTION: Right, I --

1 MR. MORLEY: And given that, what happens at a
2 sentencing hearing, where the Government has the burden of
3 proof, is that they will start calling defendants as
4 witnesses to extract from them what it is, in fact, they
5 did, if this court deems a guilty plea to be a waiver.

6 QUESTION: Do you think defendants, by and
7 large, would be ill-advised to go in and testify if the
8 judge suggests I would like to know what happened here?

9 MR. MORLEY: I think it's a case-by-case basis.
10 I think --

11 QUESTION: I mean, I'd just be surprised --

12 MR. MORLEY: I think --

13 QUESTION: -- that this would be invoked very
14 often.

15 MR. MORLEY: Well, I think that --

16 QUESTION: It might be.

17 MR. MORLEY: I think that -- I think that
18 there --

19 QUESTION: What happens, in fact? You probably
20 know. I don't. What -- are there many cases where, when
21 we're trying to sentence, the defendant says, by the way,
22 judge, I'm not going to tell you my side of the story.

23 MR. MORLEY: I think in cases, in drug cases
24 particularly, where the Government is relying heavily upon
25 the testimony of cooperating individuals whose credibility

1 is suspect, as it was in this case, it is very -- it is
2 not unusual for a defendant to say, I'm not going to
3 testify.

4 I'm going to rely upon whether or not the
5 Government has established, by a preponderance of the
6 evidence, extrapolating the drug quantities from the
7 testimony as to whether or not he's -- that they've
8 established sufficient drug quantities to meet the various
9 sentencing guidelines and mandatory minimums.

10 QUESTION: Mr. Morley, how often would there be
11 a reservation such as occurred here concerning the
12 testimony of the defendant at sentencing.

13 MR. MORLEY: I think this happens quite
14 frequently because of the nature of drug -- particularly
15 in drug prosecutions. Because of the nature of the drug
16 prosecution, with its extrapolation, with its reliance
17 upon informants, and witnesses who are subject to
18 questionable credibility, it's not at all unusual for
19 defendant to take --

20 QUESTION: Well, there are any number of
21 statements in cases from this Court to the effect that if
22 someone enters a plea of guilty they've waived any Fifth
23 Amendment protections.

24 MR. MORLEY: Those statements, taken at face
25 value, certainly support the Government's position, but if

1 you look behind those statements a little bit more and
2 look more closely, they really go to the elements of the
3 offense, the fact of incrimination of an offense.

4 In Estelle, this Court -- in Estelle v. Smith,
5 this Court ruled --

6 QUESTION: But that was a death penalty case.

7 MR. MORLEY: That was a death penalty case.

8 QUESTION: And we have distinguished the
9 sentencing proceedings in death penalty cases.

10 MR. MORLEY: Frequently this Court has done so.
11 However --

12 QUESTION: We have, and I -- and we held it to
13 that, I think.

14 MR. MORLEY: Well, Estelle first of all --

15 QUESTION: There was no guilty plea in Estelle,
16 was there?

17 MR. MORLEY: There was no guilty plea in
18 Estelle.

19 If I might address the capital sentencing
20 aspect, Your Honor, because I think it's important, while
21 Estelle was a capital sentencing case, it did not ground
22 itself on the fact that it was a capital case. It rose
23 out of that factual setting in the same way one might say
24 Miranda rose out of a death penalty case.

25 QUESTION: Yes, but I think this Court in

1 subsequent cases has made a point of that.

2 MR. MORLEY: I don't read the subsequent cases
3 as limiting Estelle in that way and, in fact, Estelle's
4 based upon the broad principles of the Fifth Amendment,
5 Gault, which is a juvenile case.

6 And if you look closely at some of the death
7 penalty cases, this Court is looking at -- when it says
8 death is different, looking at the sense of -- searching
9 for more reliability in those cases, permitting a more
10 flexible sense of due process, saying we're going to have
11 a higher standard of due process in a death penalty case.
12 We want to be more reliable. We want to be more sure,
13 because of the different nature of the death penalty.

14 The Fifth Amendment compulsion against self-
15 incrimination does not go to issues of reliability. It
16 goes to issues of -- that -- it goes to issues that ensure
17 a particular form of justice, an accusatorial versus an
18 inquisitional form of justice.

19 QUESTION: Are you saying that --

20 QUESTION: Mr. Morley, can I agree with you that
21 there's no right to compel a person who's made a guilty
22 plea to testify concerning the details of the crime, but
23 yet not agree with you that if the person does not testify
24 about the details at sentencing, the judge can draw a
25 negative inference from failure to testify?

1 MR. MORLEY: No, judge, I think -- no, Your
2 Honor. I don't think that that can be done.

3 QUESTION: Why?

4 MR. MORLEY: The negative inference language
5 is -- is a way that this Court has given voice to
6 violations of the Self-Incrimination Clause of the Fifth
7 Amendment.

8 QUESTION: How recent is that line of our
9 jurisprudence? Does that go way back, or is that
10 relatively new?

11 MR. MORLEY: Well, Griffin is a 1967 decision,
12 so it's about 30 years.

13 QUESTION: Do I have to extend that demand that
14 the jury do what it is very difficult for any reasonable
15 person to do, do I have to extend that to the sentencing
16 proceeding as well?

17 MR. MORLEY: The cases that address -- I don't
18 think it's so much a matter of extension, but I think if
19 you want to look at it that way, yes, you do, because this
20 Court's cases that have looked at the right of a judge or
21 prosecutor to take a negative inference from the
22 invocation of the Fifth Amendment have done so along a
23 particular divide, and that divide is a civil-criminal
24 divide.

25 One looks at Ward, U.S. v. Ward. That's a civil

1 penalty case, a negative inference is permitted there.

2 QUESTION: But we have -- certainly in analogous
3 situations we have drawn a different kind of line. In
4 Callandra, for example, we said we're not going to apply
5 some of the exclusionary rules to grand jury proceedings,
6 even though they would be applied to court proceedings.

7 MR. MORLEY: Your Honors --

8 QUESTION: One could draw a dichotomy between
9 the actual trial, where the elements are proved, and the
10 sentencing proceeding.

11 MR. MORLEY: One could do that, except here, to
12 do that would do violence to the basic principle here of,
13 in any criminal case, and we still have --

14 QUESTION: Only if you think it's so much of a
15 coercion that it violates the Fifth Amendment, and it
16 really doesn't seem to be that much of a coercion. It's
17 certainly reasonable for the sentencing judge to say, my
18 goodness, I don't know how much of the drug she had, but
19 she's unwilling to tell me how much she had. You know,
20 that makes me think she had the maximum amount that they
21 assert she had.

22 That's perfectly reasonable --

23 MR. MORLEY: The --

24 QUESTION: -- and I find it frankly quite
25 fanciful to think that this is a coercion of her --

1 drawing this rational inference is a coercion of her Fifth
2 Amendment right.

3 MR. MORLEY: The problem with doing that, Your
4 Honor, is that it burdens the Fifth Amendment right, and
5 Griffin and its line of cases don't rest upon the fact
6 that there are jury trials. They rest upon the fact that
7 it's an impermissible burden on the Fifth Amendment.

8 QUESTION: Well, can the judge say, I'm not
9 going to draw the inference, but I am going to increase
10 the sentence for noncooperation?

11 MR. MORLEY: In that case, Your Honor --

12 QUESTION: Noncooperation being defined as
13 nontestifying.

14 MR. MORLEY: As nontestifying. That would be an
15 impermissible burden on the defendant.

16 QUESTION: Same question as Justice Scalia's.

17 MR. MORLEY: It would be an impermissible burden
18 on the Fifth Amendment for him to increase the sentence.

19 QUESTION: How about acceptance of
20 responsibility? A judge can give credit, as I understand
21 it, at sentencing for a person --

22 MR. MORLEY: Certainly.

23 QUESTION: -- who says, Your Honor, I did it,
24 and I was really bad, boy, am I sorry, and this is what
25 I'm going to do. The person who stands silent is not

1 accepting responsibility.

2 So my question is very similar to Justice
3 Kennedy's, but putting it in terms of something
4 affirmative that a defendant must do to get acceptance of
5 responsibility for --

6 MR. MORLEY: I think a judge could deny
7 acceptance of responsibility in those terms because of the
8 breadth of the sentencing guideline on acceptance of
9 responsibility, which includes all the conduct within the
10 offense.

11 QUESTION: Well, that's a burden on --

12 MR. MORLEY: That's a burden on the Fifth
13 Amendment, but it's not in the same sense, because the
14 defendant in that case is required to make an affirmative
15 choice. He is to come forward and say, I want something
16 from this Court. I want acceptance of responsibility.

17 QUESTION: That's a hard issue --

18 MR. MORLEY: Yes.

19 QUESTION: -- but can I ask a practical question
20 I'm not clear on yet? You're now at the sentencing stage.

21 MR. MORLEY: Yes.

22 QUESTION: And the judge is reading the pre-
23 sentence report, and it gives an account of the amount of
24 the drugs, et cetera, it really is at variance with what
25 the plea colloquy suggested, implied, said, et cetera.

1 All right. Now -- so the judge now -- is the --
2 what's the judge supposed to do about what the judge has
3 learned previously in the plea colloquy? Is he supposed
4 to just put that out of his mind? What's he supposed to
5 do about that?

6 MR. MORLEY: He's supposed to take the evidence.

7 QUESTION: Well, does that count as part of the
8 evidence or not? After all, that's the factual basis for
9 the plea.

10 MR. MORLEY: Well, the pre-sentence report is
11 done subsequent to the --

12 QUESTION: I know that, but he's sitting there,
13 and he's also heard what is called the factual basis for
14 the plea, and so my question is, what is the judge
15 supposed to do about that set of facts which he heard
16 earlier during the Rule 11 proceeding, and it was called
17 the factual basis for the plea, and it may well be that
18 the defendant had a little bit to contribute there.
19 What's the judge supposed to do about that when he's
20 considering what happened?

21 He has the pre-sentence report, and it's
22 different in respect to drugs than what was earlier
23 implied. What's he supposed to do?

24 MR. MORLEY: He's supposed to evaluate the
25 evidence that comes before him.

1 QUESTION: Does that include the Rule 11 part,
2 or not?

3 MR. MORLEY: It can.

4 QUESTION: Fine.

5 MR. MORLEY: It can include that.

6 QUESTION: I thought so, too.

7 MR. MORLEY: I think he has the discretion to do
8 that.

9 QUESTION: And as soon as you say that -- as
10 soon as you say that, you suddenly realize that he may be
11 hearing one side of the story from the defendant during
12 that Rule 11 colloquy, when it was just barely relevant,
13 so we didn't go into it, and now it becomes relevant, and
14 he's not going to be able to get the other side out of the
15 defendant, or he's not going to be able to look into it in
16 any depth because the defendant won't testify.

17 MR. MORLEY: Can I retract my answer?

18 QUESTION: Yes.

19 (Laughter.)

20 QUESTION: You know what is the true --

21 MR. MORLEY: I think the true answer is, at a
22 sentencing hearing is a separate stand-apart hearing, and
23 the sentencing --

24 QUESTION: All right, so your answer is, he
25 should not take into account --

1 MR. MORLEY: He should not take into account
2 what he heard at the plea. He should take into account
3 the evidence that's presented to him as a separate stand-
4 apart sentencing hearing.

5 QUESTION: Okay, but it seems to me --

6 QUESTION: A judge can certainly at a sentencing
7 hearing decide on the basis of a defendant's conduct and
8 testimony at the trial that he has perjured himself, can't
9 he, or that he's lied?

10 MR. MORLEY: Yes, a judge can take that into
11 consideration.

12 QUESTION: And can't the judge also say, look,
13 I've heard from these people at the sentencing hearing who
14 say that the quantity was so much. You haven't taken the
15 stand, and I therefore am forced to decide on the basis of
16 the only evidence that I have, and naturally I find the
17 evidence of the people who have testified more persuasive
18 than silence. I mean, that's -- I can't help that.

19 That would have been permissible. So that if
20 that's permissible, then the only thing that we're dealing
21 with here is the judge's form of words when he said, well,
22 I'm going to hold that against you.

23 MR. MORLEY: Well, in that sense we are
24 taking -- we are taking that differently. In that sense
25 that in this case what the judge said is, I'm taking this

1 against you, I'm drawing a negative inference, and if I'm
2 wrong, the appellate courts will send it back to me and
3 I'll take another look at the credibility of the witnesses
4 who testified against you.

5 QUESTION: But he could have said, I'm simply
6 going to draw a positive inference from the testimony that
7 I did receive.

8 MR. MORLEY: He could certainly have done that,
9 and said based on what's before me, the Government has met
10 its burden of proof.

11 QUESTION: Pretty fine line.

12 MR. MORLEY: It is a fine line, but in this
13 case, what the court did was, take a negative inference
14 against my client, use that and fashion it as part of her
15 sentence, and expressly say, I'll reevaluate the
16 credibility of those witnesses if I'm wrong.

17 QUESTION: Let me ask you one question that may
18 or may not go to something peculiar in this case. You
19 pointed out that at the rule 11 colloquy the judge
20 referred to the waiver of the Fifth Amendment right as
21 being the waiver of the right to silence at trial. I
22 think the word, at trial, was used.

23 Is it fair to say that once, then, the defendant
24 says yes, is it fair to say that once the plea is taken,
25 the waiver is as complete as the waiver would have been if

1 the individual had, in fact, waived at trial?

2 MR. MORLEY: If the waiver was --

3 QUESTION: He says, look, your waiving the same
4 right you would have to waive at trial. Defendant says
5 yes, I know that.

6 Judge finishes the question, says, you know, I
7 make the appropriate findings, I accept the plea. At that
8 point, isn't the waiver as complete as it would have been
9 if the individual had, in fact, taken the stand at trial?

10 It wasn't earlier in the plea colloquy, but once
11 the plea is taken, isn't it complete then?

12 MR. MORLEY: It's complete -- yes, it is
13 complete at that point.

14 QUESTION: Thank you, Mr. Morley.

15 Mr. Dreeben, we'll hear from you.

16 ORAL ARGUMENT OF MICHAEL R. DREEBEN

17 ON BEHALF OF THE RESPONDENT

18 MR. DREEBEN: Mr. Chief Justice, and may it
19 please the Court:

20 A plea of guilty is an admission of a crime, and
21 therefore inherently constitutes self-incrimination. The
22 effect of a guilty plea that has been entered by a court
23 is therefore to waive the privilege against self-
24 incrimination with respect to the conduct underlying the
25 charge to which the defendant has admitted, and it follows

1 from that that a court may at sentencing draw an adverse
2 inference from the defendant's failure to amplify and
3 explain the conduct in which she engaged that underlies
4 the crime.

5 QUESTION: Could the court at sentencing say,
6 I'm calling the defendant to the stand, and then just
7 examine the defendant?

8 MR. DREEBEN: Yes, Justice Kennedy, under the
9 principle --

10 QUESTION: I think you'd have to say that.

11 MR. DREEBEN: I think that under the waiver
12 analysis of a guilty plea the judge could do that at least
13 as to the events that underlie the very count of
14 conviction to which the defendant has admitted guilt.
15 That --

16 QUESTION: I take it that -- and this is just to
17 explore the separate proceeding, stand-alone proceeding
18 effort.

19 I take it that I'm right -- correct me if I'm
20 wrong -- if the target of the investigation testifies at
21 the grand jury, that's not a waiver if there's a
22 subsequent indictment and a trial.

23 MR. DREEBEN: That's the majority rule. There
24 is at least one decision of this --

25 QUESTION: And I take it what the petitioner is

1 doing here is to say that same sort of analogy applies
2 between the plea stage Rule 11 proceeding and the
3 sentencing.

4 MR. DREEBEN: That's right. The petitioner is
5 attempting to construct two wholly separate proceedings
6 and apply a rule that has developed in the lower courts
7 that says that a waiver of the Fifth Amendment is
8 applicable only for one proceeding.

9 QUESTION: Well, Mr. Dreeben, here we have a
10 special circumstance, because in addition to the guilty
11 plea this defendant expressly reserved the right to
12 contest the amount of cocaine that she was responsible
13 for. She did.

14 MR. DREEBEN: And that --

15 QUESTION: And the judge said, fine, I'll take
16 your plea, and that's the deal we're going to make.

17 MR. DREEBEN: That's true, but that's not --

18 QUESTION: Does that change the situation, then,
19 on the waiver, because there was an express reservation
20 that the judge apparently went along with.

21 MR. DREEBEN: No, I don't think that it changes
22 it, Justice O'Connor. She didn't reserve any privilege
23 against self-incrimination with respect to the conduct
24 that she admitted to committing in the charged conspiracy.
25 What she reserved was the right to challenge the

1 Government's proof at sentencing.

2 QUESTION: The question is not whether she
3 reserved it, but whether she waived it.

4 MR. DREEBEN: Well, our position is that she
5 inherently waives it when she stands before the court and
6 says, I am guilty of this charged offense. I admit that
7 what the Government has alleged is a violation of the law
8 that I committed.

9 QUESTION: That's all she admitted. She didn't
10 admit, you know, how much of the drug she had. She
11 violated this statute, but she didn't admit all of the
12 sentencing elements.

13 MR. DREEBEN: She did not.

14 QUESTION: So why must she admit it now? I do
15 not see the parallel that you seek to draw between taking
16 the stand in a criminal trial at the guilt stage, and
17 whereupon you can be examined about anything related to
18 the crime, and this situation, because where a person
19 takes a stand in a criminal trial, that person is using
20 his or her testimony as a sword, attacking the Government
21 with it.

22 Whereas, where the person has pleaded guilty,
23 the person is not using his testimony -- in fact, he's
24 using -- not only is it a shield, he's using it as a sword
25 against himself, and you're saying he has to push the

1 sword in further than he has agreed to.

2 It seems to me they're totally different
3 situations, and I do understand why when a person takes
4 the stand the prosecution ought to be able to get
5 everything out of them, but where the person has pleaded
6 guilty, I don't know why the prosecution must have a right
7 to insist that that person plunge the sword in still
8 further. The two situations are not parallel.

9 MR. DREEBEN: They are not exactly parallel,
10 Justice Scalia, and I'm not suggesting to the Court that
11 they are exactly parallel.

12 What occurs when this Court has examined the
13 question of what is the scope of a waiver when a defendant
14 takes the stand is, the Court asks, what is reasonably
15 going to be furthered as a policy matter by saying the
16 privilege either goes this far or it ends, and it's
17 concluded that in a criminal trial, or in any trial, when
18 a witness testifies, the fairness of the proceeding
19 requires that all matters that are relevant to cross-
20 examination be deemed to be waived.

21 In this context, there are also very strong
22 reasons to consider the scope of the waiver to be at the
23 minimum all of the conduct that is bound up in the offense
24 to which the defendant pleads guilty.

25 Let me highlight two of the reasons, apart from

1 the generic reason that the plea of guilty itself is an
2 admission that the defendant has engaged in conduct that
3 violates the law.

4 The first is that, at the Rule 11 colloquy, the
5 judge does have a obligation to make sure that the
6 defendant is fully aware of the facts that are alleged to
7 constitute a violation of the law, and agrees that his
8 conduct constitutes that violation.

9 To perform that responsibility adequately, the
10 judge must have the authority to say, look, you know, I've
11 heard what this charge is, it's, for example, murder, but
12 I want to hear you tell me in your own words what you did.

13 Now, the defendant may have killed a person with
14 a gun, and the defendant may also be a felon, and thereby
15 admitting that the defendant had a gun would also
16 implicate the defendant in an independent crime, a section
17 922 violation.

18 Now, the defendant can't realistically say, I'm
19 going to tell you, judge --

20 QUESTION: Oh, he can't realistically, but
21 legally he has the right to say to the judge, the reason
22 I'm not going to tell you more is, it may incriminate me
23 in another offense. He could legally do that.

24 MR. DREEBEN: Well, I think that --

25 QUESTION: Could he not?

1 MR. DREEBEN: Yes, and the judge at that point
2 could say, thank you, but the rule 11 colloquy is over.

3 QUESTION: I'm going to take -- accept your
4 plea.

5 MR. DREEBEN: That's right.

6 QUESTION: That's right.

7 MR. DREEBEN: And that's why our position is,
8 it's the entry and acceptance of the plea that effectuates
9 the waiver with respect to the conduct underlying the
10 plea.

11 The defendant who wants to plead guilty and
12 spare society the burden of a trial, and perhaps obtain
13 whatever sentencing benefits flow from it, must be
14 prepared to come and tell the court exactly what he did
15 with respect to the charged offense.

16 Now, the first distortion is therefore -- it's
17 going to undercut the judge's ability to carry out the
18 Rule 11 colloquy.

19 QUESTION: Wait. I haven't followed you this
20 far. You want to go further. I haven't followed you this
21 far.

22 I understand why the judge can insist that the
23 defendant say this or else not enter the Rule 11 order,
24 but I don't understand why, if he hasn't asked the
25 defendant to come out with it and enters the Rule 11

1 order, it amounts to a voluntary agreement to give up this
2 information by the defendant.

3 MR. DREEBEN: I think the question that the
4 Court has to answer is, what are the necessary and
5 inherent consequences of the guilty plea, and I think that
6 in answering that question, the Court ought to look at the
7 consequences of going with either petitioner's rule or
8 with our rule.

9 QUESTION: And that has nothing to do with the
10 Rule 11 situation, it seems to me. All we have to ask
11 ourselves are, what are the necessary consequences of the
12 guilty plea, and it seems to be perfectly reasonable to
13 say, I agree that I'm guilty of the crime, and I say
14 nothing about what the various sentencing factors happen
15 to be.

16 QUESTION: And your position, Mr. Dreeben, would
17 be exactly the same no matter what happened at the Rule 11
18 proceeding --

19 MR. DREEBEN: It is. That's right.

20 QUESTION: -- as I understand it. You'd say
21 it's inherent in the guilty plea.

22 MR. DREEBEN: That's right, because it has the
23 effect of prescribing to a rule that all the defendant has
24 to do is come up and to say, bare bones, I'm going to say
25 each element, yes, I agree to that. I did a minimal act

1 that amounts --

2 QUESTION: May I ask in that connection, Mr. --
3 either in this Rule 11 colloquy where the judge is very
4 careful on page 45 to state the nature of the waiver --
5 you give up your right at trial to remain silent.

6 He did not go on and say, you also will not have
7 a right to remain silent if there's a controversy about
8 amount at the sentencing hearing.

9 In your experience, has there ever been a
10 Rule 11 colloquy when the judge explained to him the
11 theory the Government is now espousing?

12 MR. DREEBEN: I doubt it, Justice Stevens.

13 QUESTION: I do, too.

14 MR. DREEBEN: But the judge also doesn't explain
15 to the defendant that upon entry of a final judgment of
16 conviction you may be subpoenaed to testify at a grand
17 jury with respect to all of the facts and details
18 surrounding the offense to which you pleaded guilty.

19 QUESTION: No, but this is a routine sequence.
20 You first have the Rule 11, and later you have a
21 sentencing hearing, and if your position is correct, it
22 would seem to me that the ordinary colloquy ought to
23 include an explanation of this consequence, which it
24 doesn't.

25 MR. DREEBEN: It does not, because the purpose

1 of the colloquy is to determine whether the defendant is
2 pleading guilty voluntarily.

3 QUESTION: And knows what rights he's waiving,
4 because that's why you have this paragraph in here.

5 MR. DREEBEN: Well, he knows -- he knows certain
6 of the rights that he's waiving, and certain of the
7 consequences of the plea --

8 QUESTION: Well, suppose you have this sequence,
9 Rule 11 hearing, guilty plea. Then the defendant is
10 subpoenaed by the Government to testify in another related
11 criminal case. His sentencing hasn't occurred yet, and at
12 sentencing there's going to be a big problem with
13 contesting the amount of drugs.

14 Under your view, I take it the Government can
15 require the defendant to testify about everything relating
16 to the transaction, even though his sentencing is pending.

17 MR. DREEBEN: Justice Kennedy, we have not taken
18 the position that the defendant can be required to testify
19 in some other case. There -- that is not a question --

20 QUESTION: Well, if there -- if he has no Fifth
21 Amendment right --

22 MR. DREEBEN: Well --

23 QUESTION: -- and if it's waived, what's the
24 basis for his declining?

25 MR. DREEBEN: Well, the normal rule that has

1 been evolving in the lower courts -- this Court has never
2 squarely addressed it -- is that waivers of Fifth
3 Amendment rights are specific to the case in which they're
4 entered.

5 QUESTION: Ah, so now this is just a limited
6 waiver we're talking about that's implied from your guilty
7 plea.

8 MR. DREEBEN: That's right, and I don't think
9 that that's inconsistent with the rule that in your own
10 criminal case, when you have come forward and stood before
11 the court and said, I'm guilty, you've effectuated a full
12 waiver of the conduct underlying that transaction in your
13 own case.

14 Now, the other distortion that can occur besides
15 the distortion of the Rule 11 colloquy is that it gives
16 the defendant who is supposed to be coming forward into
17 court and admitting his guilt a tremendous incentive to
18 minimize his culpability, to conceal facts, and otherwise
19 to hope to skate by during the Rule 11 colloquy with an
20 absolutely bare bones admission of what he has done, and
21 that consequence will similarly undermine one of the
22 societal functions of a guilty plea, which is to get
23 somebody who's willing to come into court and acknowledge
24 what they did to --

25 QUESTION: But Mr. Dreeben, that's so far from

1 this case, where she said, I don't -- I do want to contest
2 the amount of drugs, and the judge said, fine, we'll leave
3 that over.

4 I think from what she was told, one is, you are
5 waiving any right that you would have had if you stood
6 trial, and fine, you can contest at sentencing the amount.

7 There seems to be close to an element of a trap
8 for the unwary there, and if the purpose of the Rule 11
9 colloquy -- I thought the purpose of it was to make sure
10 the defendant is informed and uncoerced.

11 Here, she is certainly not informed, because
12 from what was told to her the reasonable inference is,
13 okay, the judge told me I can contest the amount of drugs
14 at sentencing, and all he said about the Fifth Amendment
15 was, trial.

16 MR. DREEBEN: Justice Ginsburg, there is a
17 potentially separate concern that I think your question
18 goes to about adequacy of notice, and whether you were
19 required to legally be given notice of every right that
20 would be waived by your guilty plea before the waiver can
21 be complete.

22 I don't think that this Court's cases have ever
23 said that any right that might be waived or affected by a
24 guilty plea beyond those rights that are specified in
25 Rule 11 needs to be spelled out.

1 If there were a case-specific claim of
2 entrapment, as Your Honor put it, that would be a separate
3 kind of due process claim. It does not go to the
4 fundamental question of what the legal effect and
5 consequence of the guilty plea is with respect to Fifth
6 Amendment rights.

7 QUESTION: Well, frankly, if I were the trial
8 judge and I heard her say, I reserve the right to contest
9 the amount of the drugs, I would have thought she intended
10 to come up and testify at the sentencing proceeding and
11 say, no, I only had, you know, the lesser amount of the
12 drugs.

13 I don't know that he was put on notice that she
14 reserved the right not to say anything. To the contrary.

15 MR. DREEBEN: Well, I think that that's right.
16 I think that what she reserved was the right to say, there
17 weren't so many drugs.

18 QUESTION: But as long as she reserved it, as
19 long as -- we're talking about something, a fact that she
20 says is in dispute, and she -- it's not an element of the
21 crime, so it really doesn't have to do with the factual
22 basis for the plea, and I take it it's also the case that
23 in the later sentencing hearing what she said about this
24 at the plea, since it didn't concern an element of the
25 crime, is really beside the point. I mean -- all right.

1 So given that, you were about to list, and maybe
2 you were doing it, the bad consequences that would flow
3 from accepting petitioner's view, what are they?

4 So far I've heard you say, well, we couldn't go
5 into the sentence in great detail, we wouldn't find out
6 all the facts, and that's true. Of course that's true.
7 That's also true when he goes to trial and doesn't waive
8 anything. I mean, it's always true if you have a Fifth
9 Amendment right, so is there any other bad consequence
10 that would flow from accepting his view?

11 I mean, I absolutely agree with you that a judge
12 couldn't go into -- by definition couldn't go and find out
13 from the person who's asserting the right what happened,
14 but I think that's true whether they plead guilty or not.

15 MR. DREEBEN: Well, I think that that is a
16 sufficiently --

17 QUESTION: Is there any other -- is there any
18 other bad thing that would flow from accepting his view of
19 the case?

20 MR. DREEBEN: I think there are really three.
21 One -- and I have tried to cover them, Justice Breyer, so
22 I'm not suggesting I have a new one.

23 One is that I think it's inherently inconsistent
24 with what society expects in a guilty plea, that a
25 defendant will come forward, acknowledge the conduct that

1 they did, and admit that it's a violation of the law, and
2 society can accept that as a method of resolution of a
3 criminal case rather than a trial because there is a value
4 to having somebody acknowledge it.

5 Second is that it will distort Rule 11
6 proceedings by limiting the judge's ability to find out
7 what the defendant exactly did.

8 QUESTION: Right. He says, you know, you'd
9 better tell me what you did. I don't know that there's a
10 factual basis for this plea. Please tell me.

11 Well, I can't imagine a defendant under those
12 circumstances who wants to plead guilty not telling him.

13 MR. DREEBEN: Well, a defendant --

14 QUESTION: I mean, the defendant might say,
15 okay, forget it, I'll go to trial, but --

16 MR. DREEBEN: Well, if the defendant had the --

17 QUESTION: -- if the judge says please tell me,
18 I mean, she's going to tell him.

19 MR. DREEBEN: Justice Breyer, if the defendant
20 has a Fifth Amendment right, as petitioner contends, then
21 the defendant will say, well, I don't have to tell you
22 those kinds of details.

23 QUESTION: Fine, he says, and I don't have to
24 accept your -- I don't have to accept your guilty plea.

25 MR. DREEBEN: Well, it's not clear to me on what

1 basis he would have to reject it.

2 QUESTION: I don't have the adequate factual
3 basis here under (f), 11(f) or whatever, 11 -- you know.
4 11(f), is it, whatever.

5 QUESTION: May I ask you, on the facts of this
6 case, where the woman said, I want to contest the amount,
7 and that implied to the judge she probably would be going
8 to get on the stand and testify, supposing at the
9 sentencing hearing the probation -- the pre-sentence
10 report said, we've looked at the evidence as best we can,
11 we thought we had some reliable witnesses who would
12 testify to X amount of drugs, but our witnesses don't
13 stand up, we don't know what the amount was.

14 Now, is it your view that the prosecutor could
15 say, well, we can't prove it, but we'd like to put her on
16 the stand and cross-examine her and see if we can't get
17 her to admit it? I think that's your view.

18 MR. DREEBEN: Yes. That -- the waiver analysis
19 that we have put forward suggests that at least as to the
20 facts surrounding the conspiracy to which she admitted,
21 the Government could do that, or -- and the court could
22 ask her to testify.

23 There is, of course, a narrower basis for
24 looking at this particular case, because that did not
25 happen here. What happened here is that the judge had a

1 substantial amount of very credible evidence before him,
2 and he concluded, the Government has given me this much,
3 you have given me nothing.

4 QUESTION: And of course, as Justice Souter
5 said, it's a very fine line. The judge could very well
6 have said, the evidence is uncontradicted, I'll accept it,
7 and I'll enter a sentence accordingly.

8 MR. DREEBEN: Well, that's right.

9 QUESTION: So the Government -- you don't lose a
10 lot if you don't -- if you are not able to draw the
11 negative inference, because you still have the affirmative
12 evidence of amount on which you can still rely.

13 MR. DREEBEN: That's true. I -- the Government
14 came to this sentencing prepared to prove up the facts
15 that supported the sentence.

16 QUESTION: Well, one senses that Judge Cahn
17 actually wanted to raise an issue that would go up to the
18 Third Circuit and perhaps here.

19 (Laughter.)

20 MR. DREEBEN: I think, Chief Justice Rehnquist,
21 that he perceived accurately that this would be a novel
22 question of law.

23 QUESTION: You had a third -- you said, number
24 1, it distorts the societal expectations, number 2 it
25 distorts the Rule 11 hearing, and number 3 --

1 MR. DREEBEN: It gives the defendant an
2 incentive to conceal and minimize his own criminal
3 conduct, so instead of the defendant coming into court and
4 being willing to make a fair statement of what he actually
5 did, you can envision a defendant thinking quite carefully
6 with counsel about what to admit and what to attempt to
7 get by.

8 QUESTION: All right, you know -- you may or may
9 not know this. It's just a factual, empirical matter, but
10 it still comes as a little bit of a surprise to me that
11 many defendants, when asked by the judge at the sentencing
12 hearing as to a contested matter what their side of the
13 story was, would say, I'm not going to tell you. I mean,
14 does that happen very often?

15 MR. DREEBEN: No. No, it does not, Justice
16 Breyer, but I think that that's consistent with our view
17 that --

18 QUESTION: All right. So this might be a
19 tempest in a teapot.

20 MR. DREEBEN: Well, if this Court holds that
21 there's a Fifth Amendment right with respect to sentencing
22 facts that do not relate strictly to the elements of the
23 offense in the closest way, I think a great many
24 defendants may --

25 QUESTION: Why?

1 MR. DREEBEN: -- seek to exploit that.

2 QUESTION: You know, but the -- exploit it.

3 They would be losing the opportunity, as here, the woman
4 seemed to say, which I think Justice Scalia said, that
5 maybe she's going to present some evidence later on.

6 MR. DREEBEN: Well --

7 QUESTION: She wants to deny what the pre-
8 sentence report's saying.

9 Do you think they will? Why do you think that?

10 MR. DREEBEN: Well, simply because it will
11 deprive the sentencing court and the Government of just
12 that particular piece of evidence that may be relevant
13 both to the crime and sentencing.

14 QUESTION: Yes, but why isn't the answer to that
15 and the answer to the distortion of the Rule 11 argument
16 that the judge simply has to make it clear at the time
17 that the plea is taken that if the plea is accepted the
18 right is being waived not only with respect to testimony
19 at trial, which was the term he used here, I guess, but at
20 sentencing?

21 All he's got to do is add a couple of words, and
22 there will then be no question about the scope of the
23 waiver.

24 It's true we might have a question later
25 whether, when the person said, well, I won't waive it as

1 to sentencing, whether the judge can then refuse to take
2 the plea, but that's unlikely, too, so why isn't that
3 fairly simple answer dispositive of your concerns?

4 MR. DREEBEN: I don't have any objection,
5 Justice Souter, to a judge accurately informing a
6 defendant of more consequences of a guilty plea than are
7 required by the current version of Rule 11.

8 QUESTION: Well, he's simply making explicit to
9 a lay person what in fact is being done. I mean, the
10 reason for the Boykin hearing is to make sure the
11 defendant who is not a lawyer knows what the consequences
12 will be, and all you're doing if you add the reference to
13 waiver as to sentencing hearing is just being complete,
14 whereas under the colloquy that took place in this case it
15 was not totally complete on your view.

16 MR. DREEBEN: Well, Justice Souter, that
17 amendment of Rule 11, or the Rule 11 colloquy, is
18 consistent with our position that that's the effect of the
19 guilty plea.

20 The Rule 11 in its -- colloquy in its current
21 form should not drive the constitutional conclusion that
22 this Court reaches. If the guilty plea constitutes a
23 waiver of the privilege with respect to at least the
24 conduct that is subsumed in the count of conviction, then
25 there's nothing wrong --

1 QUESTION: Well, but if we take the view that
2 all the guilty plea does under a colloquy like this is
3 deal with the elements of the crime, not something that's
4 purely a sentencing factor, I can envision a statute where
5 the quantity is an element.

6 But that wasn't this one, apparently, and under
7 those circumstances, I guess a prosecutor could say to the
8 defendant, we're not going to take a plea unless the plea
9 makes clear that at sentencing it's a waiver of any Fifth
10 Amendment privilege that you might want to assert at
11 sentencing as well.

12 MR. DREEBEN: That is true --

13 QUESTION: I mean, a prosecutor could do that.

14 MR. DREEBEN: That's true, Justice O'Connor, and
15 a defendant could similarly say, I want to enter a plea of
16 guilty, but I want the Government to agree that it will
17 shoulder the load at sentencing.

18 QUESTION: Well --

19 QUESTION: Yes, but you could say, fine, then we
20 won't agree.

21 MR. DREEBEN: That's right. This then will
22 establish --

23 QUESTION: End of story.

24 MR. DREEBEN: -- a baseline from which parties
25 can enter into plea agreements.

1 QUESTION: Is it entirely consensual? I mean,
2 if the petitioner is right that where you deal separately
3 with the elements of a crime, you've pleaded guilty, you
4 waive the plea there, but you don't with respect to
5 sentencing, then can -- could either the prosecutor or the
6 judge simply condition their acceptance of a plea on a
7 further waiver without being charged with burdening the
8 privilege against self-incrimination such as we've said in
9 some other cases?

10 MR. DREEBEN: Chief Justice Rehnquist, the claim
11 would be made -- my response would be that a prosecutor
12 can exert considerable pressure on a defendant to waive
13 all sorts of constitutional rights in the course of a
14 guilty plea, and to give up statutory rights as well, and
15 there's nothing inherently unconstitutional in a procedure
16 in which there is that kind of give-and-take, so I don't
17 think that affirming the view that petitioner has put
18 forward would preclude the Government from trying to vary
19 it by contract.

20 But by the same token, if I am correct that the
21 plea does constitute a waiver, nothing would prohibit a
22 defendant from coming in to the prosecutor and saying, I
23 am willing to plead guilty and spare you a trial. I do
24 have a contest about the sentencing facts, and I think
25 that if you've got the evidence you ought to put it on. I

1 don't want to have my client testify.

2 And at that point the Government can decide, is
3 that an advantageous plea, or a disadvantageous plea
4 agreement, and the parties can set that ground rule.

5 This case will not preclude parties from
6 achieving legitimate goals that they might wish to achieve
7 through plea agreements.

8 QUESTION: A prosecutor can agree that a certain
9 witness will not appear before a Federal judge?

10 MR. DREEBEN: Justice Scalia --

11 QUESTION: A prosecutor can sort of arrange the
12 witness list for a Federal court, then?

13 MR. DREEBEN: He can certainly agree that he is
14 not going to call witnesses, or put on certain evidence.

15 QUESTION: If I were the judge, I would call
16 that witness myself, the witness most knowledgeable. If
17 that witness has no constitutional right not to testify on
18 the point, I just don't see how you could guarantee him
19 that he wouldn't be called.

20 MR. DREEBEN: You can't, but it could be written
21 into the plea agreement that if the court doesn't accept
22 that plea agreement term, it will reject the plea
23 agreement, and at which point the defendant has the option
24 of withdrawing the guilty plea and can go back to ground
25 zero with the prosecution and determine what the most

1 advantageous arrangement really is.

2 I agree with you that a Federal court would not
3 necessarily and inherently be bound to live within the
4 terms of the parties' arrangement, but the Federal Rules
5 of Criminal Procedure provide the outcome when the Federal
6 court concludes that it will not do that.

7 QUESTION: May I ask one other question?
8 Supposing this was a capital case, rather than this kind
9 of case, and the defendant wanted to make exactly the same
10 arrangement.

11 He would plead guilty to the murder, but he
12 wanted to contest the aggravating factors at sentencing,
13 and the same colloquy you had here. You take it he would
14 not have a -- he could be called to the stand and cross-
15 examined about aggravating factors because he pleaded
16 guilty to the crime?

17 MR. DREEBEN: Justice Stevens, presupposing that
18 some of the aggravating factors were bound up in the very
19 conduct. Not all aggravating factors are.

20 QUESTION: No.

21 MR. DREEBEN: But I -- yes.

22 QUESTION: You would draw a distinction between
23 those that were and those that were just prior criminal
24 record, or something like that?

25 MR. DREEBEN: Yes. I -- that would ultimately

1 depend on whether this Court wanted to create a special
2 rule for capital cases that would be distinct.

3 QUESTION: The logic of your position would
4 apply to that.

5 MR. DREEBEN: Yes. The logic of my position is
6 uniform as to the scope of the waiver that is achieved at
7 sentencing. There are various --

8 QUESTION: The waiver would just flow from the
9 plea of guilty.

10 MR. DREEBEN: It would.

11 QUESTION: But not the nature of the colloquy,
12 or anything like --

13 MR. DREEBEN: It would. Hardly any -- none to
14 my knowledge -- capital prosecutions are resolved by a
15 plea of guilty to the offense and trial on sentencing. It
16 is theoretically possible, but most jurisdictions put the
17 question to the trier of fact, and most capital defendants
18 will take their chance at acquittal or conviction of a
19 lesser offense rather than plead guilty and place all of
20 their bets in the sentencing hearing.

21 QUESTION: Oh, we've seen a fair number of
22 capital cases where they plead guilty and hope to get a
23 life sentence.

24 MR. DREEBEN: Yes. No, that's true, and at that
25 point they've avoided the possibility of a capital hearing

1 altogether, but if they plead guilty to a capital offense
2 and then stand capital sentencing, that would be quite an
3 extraordinary situation in my experience.

4 QUESTION: What would be the result if this had
5 been an Alford plea?

6 MR. DREEBEN: That would depend, Justice
7 Ginsburg, on how this Court ultimately resolved the
8 question of what an Alford plea really is.

9 In the Federal system, Alford pleas are
10 extraordinarily rare. They are susceptible of being
11 characterized as a plea of guilty, which the Court seems
12 to have done in the Alford case itself, but they are also
13 susceptible as being characterized as pleas of no contest
14 in which the defendant is admitting that these charges
15 have been made, the facts have been put before the court,
16 and I believe that I'm innocent, but I'm going to allow
17 the court to enter judgment against me.

18 If the Court categorized the Alford plea into
19 the basket of guilty pleas, then my position would be the
20 same. It is the legal effect of the guilty plea to
21 accomplish a waiver of the privilege within the zone of
22 facts encompassed by the plea.

23 If the Court instead viewed this as no -- it's
24 really more like a plea of nolo contendere in the
25 historical sense, then I don't think that it would

1 necessarily amount to an admission of commission of a
2 crime. It's really consent to the imposition of criminal
3 punishment.

4 QUESTION: So then the Fifth Amendment privilege
5 would have been retained at the sentencing.

6 MR. DREEBEN: I think that it's possible to
7 conclude that it would have been retained, at least on the
8 theory that we have articulated before the Court today.

9 Alford pleas are so anomalous in the standard
10 run of guilty pleas that it's tricky to say exactly what
11 they are, but the normal guilty plea unquestionably is a
12 full-fledged waiver of the privilege against compelled
13 self-incrimination.

14 Indeed, it is self-incrimination, and we simply
15 take the view that once one comes forward to the court to
16 do that, you cannot withhold the details of the offense to
17 which you have pleaded guilty.

18 QUESTION: Are you -- is your position different
19 from Judge Slovener, because as I recall she didn't put
20 Rule 11 into her analysis at all.

21 MR. DREEBEN: I think, Justice Ginsburg, that
22 the Third Circuit went back and forth between two
23 different rationales. One rationale begins with the
24 guilty plea analysis that we have stretched out in this
25 Court to articulate more factors.

1 The other part of the Third Circuit's rationale
2 seems to be the notion that there is no privilege against
3 self-incrimination with respect to facts that can serve to
4 enhance your sentence.

5 The logical implication of that position is
6 broader than the position that we've taken in this Court.
7 The logical implication of that position is that a
8 defendant who goes to trial and does not take the stand
9 and is convicted would then forfeit any Fifth Amendment
10 privilege with respect to the criminal sentencing.

11 The Third Circuit didn't have to confront that
12 situation, and I do not know what the Third Circuit would
13 have answered to that question, but there are enough
14 elements in the Third Circuit decision that are consistent
15 with our position, so I think it's fair to say that this
16 was and is a guilty plea case.

17 The essence -- thank you.

18 CHIEF JUSTICE REHNQUIST: Thank you,
19 Mr. Dreeben.

20 The case is submitted.

21 (Whereupon, at 12:05 p.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

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:

AMANDA MITCHELL, Petitioner v. UNITED STATES
CASE NO: 97-7541

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BY Donna M. Fedirko-----

(REPORTER)