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## Pleas, Plain Language and Precedent: Applicability of Rules 11(F) and 31(E) to Criminal Forfeiture Provisions

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## PLEAS, PLAIN LANGUAGE AND PRECEDENT: APPLICABILITY OF RULES 11(F) AND 31(E) TO CRIMINAL FORFEITURE PROVISIONS

**United States v. Libretti, 116 S. Ct. 356 (1995)**

### I. INTRODUCTION

In *United States v. Libretti*,<sup>1</sup> the United States Supreme Court held that the factual basis requirement of Rule 11(f) of the Federal Rules of Criminal Procedure does not apply to a forfeiture provision of a guilty plea. In addition, the Court clarified the standard for what constitutes an effective waiver of a defendant's Rule 31(e) right to a special jury verdict.<sup>2</sup>

This Note examines the purposes of Rules 11(f) and 31(e) and the significant role that each plays in securing the rights of criminal defendants during the pleading process. This Note further analyzes the Court's holding regarding the applicability of both rules to a plea agreement containing a forfeiture provision. This Note then argues that the Court properly concluded that the plain language, precedents and congressional intent show that neither Rule is applicable to a forfeiture provision included in a plea agreement. However, by summarily dismissing the defendant's claims that forfeiture requires a heightened procedural standard, the Supreme Court failed to adequately address the policy considerations behind forfeiture provisions contained in plea agreements.<sup>3</sup>

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<sup>1</sup> 116 S. Ct. 356 (1995).

<sup>2</sup> *Id.* at 368-69.

<sup>3</sup> Forfeiture is the "government's uncompensated confiscation of property that is implicated in a crime. The property may be used to commit the crime, be its product, or be obtained by its fruits." LEONARD W. LEVI, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY ix (1996). The government can only require a defendant to forfeit his or her property if such forfeiture is authorized by statute. Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241 (1994). Criminal forfeiture statutes deter criminal activity in two important ways. These statutes implement a form of monetary punishment for engaging in criminal activity. *Id.* at 250. In addition, they remove the financial base of criminal activity, thereby eliminating funds that can be used to continue criminal activity. *Id.* An additional goal of

## II. BACKGROUND

## A. FEDERAL RULE OF CRIMINAL PROCEDURE 11(F)

Rule 11(f) of the Federal Rules of Criminal Procedure provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."<sup>4</sup> The Federal Rules Committee enacted Rule 11 primarily to codify existing common law on pleas of guilty, not guilty, and *nolo contendere*<sup>5</sup> and to reiterate the court's duty to "ascertain that [a] plea of guilty is intelligently and voluntarily made."<sup>6</sup> Reiterating the original purpose of Rule 11 to ensure that defendants' pleas are intelligent and voluntary, the 1966 Amendment adopting section (f) provides general guidelines as to what measures a court should take in order to determine the accuracy of a defendant's plea.<sup>7</sup> Neither the Federal Rules Committee nor the Supreme Court has made any substantive changes to Rule 11(f) since its adoption through the 1966 Amendment.<sup>8</sup>

1. *The Supreme Court's Interpretation of Rule 11(f)*

In *Libretti*, the Supreme Court interpreted the applicability of Rule 11(f) to a guilty plea containing a criminal forfeiture provision.<sup>9</sup> However, in examining the applicability of Rule 11(f) to guilty pleas in general, the Supreme Court has emphasized the important role that Rule 11(f) plays in ensuring that defendants make knowing, voluntary and intelligent guilty pleas.<sup>10</sup> Shortly after the 1966 Amend-

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criminal forfeiture is to provide a source of funds, in the form of both money and property, for law enforcement agencies. See, e.g., LEVI, *supra*, at 1.

<sup>4</sup> FED. R. CRIM. P. 11(f).

<sup>5</sup> See *id.* advisory committee's note ("This rule is substantially a restatement of existing law and practice.").

<sup>6</sup> *Id.* (citing *Fogus v. United States*, 34 P.2d 97 (Cal. Ct. App. 1944)).

<sup>7</sup> FED. R. CRIM. P. 11 advisory committee's note.

The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.

<sup>8</sup> The 1974 Amendment did, however, clarify the policy rationale behind Rule 11(f) and took note of the fact that Rule 11(f) fails to specify what type of inquiry is sufficient to satisfy a court that a factual basis for the plea exists. The Amendment also offered several suggestions as to what may constitute a sufficient inquiry, including "having the accused describe the conduct that gave rise to the charge" and making an inquiry of the "defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case." FED. R. CRIM. P. 11 advisory committee's note (citing ABA STANDARDS RELATING TO PLEAS OF GUILTY § 1.6 (Approved Draft, 1968)).

<sup>9</sup> *United States v. Libretti*, 116 S. Ct. 356, 362 (1995).

<sup>10</sup> See, e.g., *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("[A] plea of guilty is more

ment to Rule 11, the Court examined Rule 11 in the context of a plea agreement made by a defendant charged with tax evasion.<sup>11</sup> Emphasizing the serious nature of a guilty plea, the Court explained that a guilty plea is "an admission of all the elements of a formal criminal charge" and by pleading guilty a defendant "waives several constitutional rights."<sup>12</sup> The Court further held that the consequences of a trial court's failure to comply with provisions of Rule 11 were that the reviewing court could set aside the plea, and remand the case in order to provide the defendant with an opportunity to "plead anew."<sup>13</sup>

The Supreme Court has historically recognized the important role that Rule 11(f) plays in protecting the rights of criminal defendants who plead guilty.<sup>14</sup> Thus, the source of contention in *Libretti* is determining what a court should consider as being part of a "plea of guilty."<sup>15</sup> The Court has construed a "plea of guilty" as containing two components: the first component consists of "a defendant's admission of guilt of a substantive criminal offense as charged in an indictment" and the second includes a defendant's "waiver of the right to a jury determination on that charge."<sup>16</sup> One of the disputed Rule 11(f) issues that surfaced in *Libretti* is whether a defendant's stipulated forfeiture of assets contained in a guilty plea constitutes a "substantive criminal offense" and whether it must be subjected to a factual basis inquiry.<sup>17</sup> The Court in *Libretti* noted that its "precedents have . . . characterized criminal forfeiture as an aspect of punishment imposed following conviction of a substantive criminal offense."<sup>18</sup>

## 2. *The Split in the Circuits*

Although *Libretti* presents the first occasion in which the Supreme Court has interpreted Rule 11(f) in the context of a forfeiture provi-

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than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment." Thus, a trial judge's acceptance of a guilty plea "without an affirmative showing that it was intelligent and voluntary" constitutes reversible error.; see also *North Carolina v. Alford*, 400 U.S. 25, 38 n.10 (1970).

<sup>11</sup> *McCarthy v. United States*, 394 U.S. 459, 461 (1969).

<sup>12</sup> *Id.* at 1171.

<sup>13</sup> *Id.* at 1172.

<sup>14</sup> See, e.g., *United States v. Broce*, 488 U.S. 563, 570 (1989); *Santobello v. New York*, 404 U.S. 257, 264 (1971) (commenting on the importance of Rule 11 in ensuring that pleas are voluntary and knowing).

<sup>15</sup> *United States v. Libretti*, 116 S. Ct. 356, 362-63 (1995).

<sup>16</sup> *Id.* at 362 (citing *Broce*, 488 U.S. at 570); see also *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (holding that by pleading guilty, defendant also waives constitutional privileges against compulsory self-incrimination and the right to confront his or her accusers).

<sup>17</sup> *Libretti*, 116 S. Ct. at 362-63.

<sup>18</sup> *Id.* at 363 (citing *Alexander v. United States*, 509 U.S. 544 (1993) ("criminal forfeiture authorized by the RICO forfeiture statute 'is clearly a form of monetary punishment . . .')").

sion, several circuit courts previously considered the issue.<sup>19</sup> Before the *Libretti* decision, circuit courts were divided as to whether a forfeiture provision contained in a plea agreement fell within the ambit of Rule 11(f).<sup>20</sup> The Court therefore granted certiorari primarily to resolve this dispute among the circuits.<sup>21</sup> Circuit courts have focused on a combination of policy arguments and statutory interpretations of relevant criminal statutes in order to justify their jurisdictions' view on the applicability of Rule 11(f) to a forfeiture provision contained in a plea agreement.

For example, in *United States v. Roberts*,<sup>22</sup> the Seventh Circuit examined the accuracy of a defendant's plea of guilty to violations of the Racketeering Influenced and Corrupt Organizations Act (RICO).<sup>23</sup> In *Roberts*, the defendant pled guilty to counts of mail fraud and RICO violations.<sup>24</sup> The plea agreement contained a provision requiring the defendant to forfeit, *inter alia*, a \$30,000 automobile presumably on the basis that the defendant purchased the automobile with assets of the illegal enterprise.<sup>25</sup> On appeal, the defendant argued that because the automobile was a personal asset and he paid most of the

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<sup>19</sup> See, e.g., *United States v. Boatner*, 966 F.2d 1575, 1581 (11th Cir. 1992); *United States v. Reckmeyer*, 786 F.2d 1216, 1222 (4th Cir. 1986).

<sup>20</sup> See *Libretti*, 116 S. Ct. at 362 (discussing the split among the circuits).

<sup>21</sup> *Id.*

<sup>22</sup> 749 F.2d 404 (7th Cir. 1984).

<sup>23</sup> *Id.* at 406. RICO states, in pertinent part:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . .

18 U.S.C. § 1962 (1970).

(a) Whoever violates any provision of section 1962 . . . shall be fined . . . or imprisoned . . . or both, and shall forfeit to the United States . . . (1) any interest the person has acquired or maintained in violation of section 1962; (2) any— (A) interest in; (B) security of; (C) claim against; or (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of . . . ; and (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . .

18 U.S.C. § 1963 (1994).

<sup>24</sup> 749 F.2d at 406.

<sup>25</sup> *Id.* at 409. The defendant had paid \$26,000 toward the purchase price of the automobile "before the time of any of the illegal activity mentioned in either the indictment or the plea agreement." *Id.* However, the defendant paid the final amount of the purchase price with a corporation check. *Id.* at 406. The court noted that the government did not claim that the amount the defendant paid prior to the RICO violation was "derived from the illegal activity." *Id.* at 409.

purchase price before the RICO violations, "the automobile falls outside the forfeiture provisions of the RICO statute."<sup>26</sup> Citing Rule 11(f), the court concluded that in determining the accuracy of a plea agreement containing a forfeiture provision, the trial court has a "special burden" to ensure that a factual basis for the plea exists.<sup>27</sup> The court emphasized that "[t]he mere fact that the defendant has agreed that an item is forfeitable, in a plea agreement, does not make it so . . ."<sup>28</sup> Thus, the court reasoned, "[a] defendant's waiver of his right to trial cannot be said to have a factual basis, where a forfeiture of property is involved, unless the property is in fact subject to forfeiture . . . . [T]he trial court must satisfy itself that this condition is satisfied."<sup>29</sup>

In addition, the Fourth Circuit, in *United States v. Reckmeyer*,<sup>30</sup> also concluded that Rule 11(f) requires a trial court to ensure that a factual basis for forfeiture exists.<sup>31</sup> The court agreed with the Seventh Circuit's position in *Roberts* that in order to comply with Rule 11(f), the court must base its decision to institute a forfeiture action on something more than a defendant's mere agreement that assets are forfeitable.<sup>32</sup> Nonetheless, the Fourth Circuit ultimately held that the trial court record indicated that a factual basis existed for the forfeiture of the defendant's assets,<sup>33</sup> and that evidence presented at trial was sufficient to satisfy the Rule 11(f) factual basis requirement.<sup>34</sup>

Finally, in *United States v. Crumbley*,<sup>35</sup> the Eleventh Circuit "as-

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* The court nonetheless noted that a defendant "cannot be allowed to protect assets by claiming that, although they were purchased with corporation funds, the assets were really purchased for personal use." *Id.* at 410. Thus, the court concluded that based on concessions made in the plea agreement, the automobile was forfeitable under RICO. *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 786 F.2d 1216 (4th Cir. 1986).

<sup>31</sup> *Id.* at 1222 (holding that the trial court should have determined whether a factual basis existed for a plea agreement in which the defendant pled guilty to a Continuing Criminal Enterprise count under 21 U.S.C. § 848 and agreed to forfeit drug related assets).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* Evidence presented to the trial court established that the defendant had "insignificant legitimate income during the decade of his drug operations." Moreover, the indictment exempted residential positions valued at less than \$1,000, presumably because the defendant could have purchased these items with legitimate income. In addition, the defendant disputed neither the government's claims of his insignificant income, nor its claims that drug related activities accounted for a significant portion of his income. The court's focus on the defendant's failure to dispute the government's claims suggests the defendant has an affirmative duty to contest the forfeiture provision at some point during the proceeding. *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 872 F.2d 975 (11th Cir. 1989).

sum[ed] without deciding that Rule 11(f) has some application to the forfeiture part of a plea agreement.”<sup>36</sup> In *Crumbley*, the defendant pled guilty to a state murder charge and federal charges of engaging in a continuing criminal enterprise and filing a false tax return; he thus agreed to forfeit certain assets under 21 U.S.C. § 853.<sup>37</sup> In exchange, the state agreed not to seek the death penalty and the federal prosecutor recommended dismissal of the federal counts.<sup>38</sup> The government conceded that a forfeiture provision of a plea agreement “requires proof of a factual basis for the forfeiture beyond a mere consent to it in the agreement.”<sup>39</sup> Nonetheless, the court concluded that neither *Roberts* nor *Reckmeyer* held that Rule 11(f) “requires the same level of proof of the factual basis for a forfeiture as with the factual basis for guilt.”<sup>40</sup> Moreover, the court determined that the policy rationales requiring a court to determine a factual basis for guilt are “far more compelling than those underlying the need of a factual basis for property forfeiture.”<sup>41</sup> The court held that based on the evidence in the record before the district court, the district court properly concluded that a factual basis existed for forfeiture of the defendant’s assets.<sup>42</sup>

Conversely, other circuit courts have held that Rule 11(f) does not require a trial court to determine whether a factual basis exists for a defendant’s guilty plea. In *United States v. Bachynsky*,<sup>43</sup> the Fifth Circuit concluded that the Rule 11(f) factual basis requirement does not apply to a forfeiture provision of a guilty plea agreement.<sup>44</sup> The defendant in *Bachynsky* pled guilty to RICO and tax fraud counts and agreed to forfeit certain assets.<sup>45</sup> The court held that in order to satisfy the factual basis requirement of Rule 11(f), a prosecutor must “present evidence to the subjective satisfaction of the district court which indicates that a defendant actually committed the offense to which he is pleading guilty.”<sup>46</sup> The court determined that the witness testimony, the plea agreement, the indictment and statements by the defendant satisfied this requirement.<sup>47</sup> Although the court acknowledged the holding in *Reckmeyer* that a defendant’s agreement to forfeit

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<sup>36</sup> *Id.* at 976. The 11th Circuit subsequently rejected this view. See *infra* notes 50-56.

<sup>37</sup> *Id.* For the text of the statute, see *infra* note 116.

<sup>38</sup> *Crumbley*, 872 F.2d at 976.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 977.

<sup>42</sup> *Id.*

<sup>43</sup> 949 F.2d 722 (5th Cir. 1991).

<sup>44</sup> *Id.* at 730.

<sup>45</sup> *Id.* at 723.

<sup>46</sup> *Id.* at 730.

<sup>47</sup> *Id.*

ture "does not make it so," the court emphasized the fact that a "defendant's affirmative answers to the court's questions at the plea hearing . . . impose a 'heavy burden' to overcome."<sup>48</sup> The court also noted that the defendant neither objected to the forfeiture provision at sentencing, nor provided evidence to contradict the government's claim that all specifically listed assets were subject to forfeiture.<sup>49</sup>

In *United States v. Boatner*,<sup>50</sup> the defendant pled guilty to distributing narcotics in violation of 21 U.S.C. § 841(a)(1)<sup>51</sup> and entered into a plea agreement whereby he forfeited \$50,000 of assets pursuant to 21 U.S.C. §§ 853 (a)(1) and (2).<sup>52</sup> The Eleventh Circuit rejected its previous holding in *Crumbley* and decided that neither "*Reckmeyer* nor *Roberts* is persuasive."<sup>53</sup> The court reasoned that forfeiture is a "consequence of a defendant's drug activity" and a "sanction to which the parties agree as a result of the defendant's plea."<sup>54</sup> According to the Eleventh Circuit, forfeiture was not, as the *Reckmeyer* and *Roberts* decisions claim, either "a determination of [the defendant's] culpability" or "a plea to a substantive charge."<sup>55</sup> Thus, concluded the court, Rule 11(f) does not require a trial court to "determine whether there is a factual basis for a defendant's concession to a criminal forfeiture pursuant to his plea bargain with the government."<sup>56</sup>

#### B. FEDERAL RULE OF CRIMINAL PROCEDURE 31(e)

Rule 31(e) provides that "[i]f the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."<sup>57</sup> The Federal Rules Committee adopted subdivision (e) in 1972 through an amendment to the original 1944 version of Rule 31.<sup>58</sup> The primary purpose of subdivision (e) was to "provide procedural implementation" of the criminal forfeiture

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<sup>48</sup> *Id.* at 730-31.

<sup>49</sup> *Id.*

<sup>50</sup> 966 F.2d 1575 (11th Cir. 1992).

<sup>51</sup> 21 U.S.C. § 841(a)(1) provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

<sup>52</sup> 21 U.S.C. § 841(a)(1) (1994).

<sup>53</sup> See statute cited *infra* note 116.

<sup>54</sup> *Boatner*, 966 F.2d at 1581.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> FED. R. CRIM. P. 31(e).

<sup>59</sup> *Id.* advisory committee's note.



provisions of the Organized Crime Control Act of 1970 and the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>59</sup>

1. *The Supreme Court's and Circuit Courts' Interpretations of Rule 31(e)*

As with Rule 11(f), circuit courts were previously divided as to whether Rule 31(e) establishes a right to a jury determination of the forfeitability of a defendant's assets.<sup>60</sup> While circuit courts agreed that a defendant can waive the right to have a jury determine what property is subject to forfeiture, circuits disagreed as to the requisites for waiver of that right and to the effects of an invalid waiver.<sup>61</sup>

For example, in *United States v. Zang*,<sup>62</sup> the Tenth Circuit considered the adequacy of criminal defendants' waiver of the Rule 31(e) special verdict right.<sup>63</sup> In *Zang*, a jury convicted the defendants of conspiracy, mail fraud, wire fraud and racketeering.<sup>64</sup> The court subsequently sentenced the defendants on each count and entered a forfeiture order.<sup>65</sup> On appeal, the Tenth Circuit rejected the defendants' claim that they were "wrongfully denied a special verdict" pursuant to Rule 31(e).<sup>66</sup> The court held that no "plain error" ensued by the use of a general verdict at trial because the defendants "waive[d] their right to a special verdict by not making a timely request."<sup>67</sup>

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<sup>59</sup> *Id.* The Advisory Committee notes that the "assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved." *Id.* (citing FED. R. CRIM. P. 7(c)(2) advisory committee's note). Rule 7(c)(2) states that "[n]o judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture." FED. R. CRIM. P. 7(c)(2). Rule 7(c)(2) was also adopted by a 1972 Amendment in order to "provide procedural implementation" of forfeiture provisions of the Organized Crime Control and Comprehensive Drug Abuse Prevention and Control Acts. *Id.* advisory committee's note. In addition, Rule 7(c)(2) incorporates the notice element of the common law provision that a defendant in a criminal forfeiture proceeding was "entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction." *Id.*

<sup>60</sup> See *United States v. Libretti*, 116 S. Ct. 356, 362 (1995) (discussing the dispute among the circuits).

<sup>61</sup> Compare *United States v. Zang*, 703 F.2d 1186, 1194-95 (10th Cir. 1982) ("parties can waive their right to a special verdict by not making a timely request") with *United States v. Robinson*, 8 F.3d 418, 421 (7th Cir. 1993) (holding that a defendant's waiver of the Rule 31(e) right is valid only if "knowingly and voluntarily made").

<sup>62</sup> 703 F.2d 1186 (10th Cir. 1982).

<sup>63</sup> *Id.* at 1194-95.

<sup>64</sup> *Id.* at 1189.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1194.

<sup>67</sup> *Id.* At trial, the defendants failed to make objections when the court asked the parties to review the jury verdict form. After the jury had begun deliberations, defendants brought the special verdict provision to the court's attention. When the court offered to communicate the special verdict procedures to the jury during deliberation, defendants objected on the grounds that bringing the special verdict to the jury's attention during

In *United States v. Garrett*,<sup>68</sup> however, the Eleventh Circuit determined that a defendant has a constitutional right to a jury determination as to whether particular property is forfeitable.<sup>69</sup> Consequently, a defendant must specifically waive that right in writing.<sup>70</sup> In *Garrett*, the trial court ordered that the defendant forfeit certain assets derived from the defendant's illegal narcotics activity.<sup>71</sup> In response, defense counsel stated that he did not object to the judge resolving the issue of forfeiture after the jury returned a verdict on the issue of guilt.<sup>72</sup> On appeal, defendant claimed that a jury determination as to whether particular assets are forfeitable can only be waived by a defendant's written statement of waiver, not by counsel's oral statement.<sup>73</sup>

Finally, in *United States v. Libretti*,<sup>74</sup> the Tenth Circuit analyzed Rule 31(e) in the context of a case where a defendant pled guilty to violating provisions of 21 U.S.C. § 848.<sup>75</sup> The court here stated that the "defendant has the burden of proving that he did not exercise a valid waiver of his right."<sup>76</sup> The court held that the defendant failed to meet that burden since the plea agreement was "unambiguous" and the defendant's plea was "knowing and voluntary."<sup>77</sup> Moreover, the defendant failed to show that he wanted a jury trial on the forfeiture issue.<sup>78</sup> This failure, coupled with the fact that the language of the plea agreement "waived the right to a jury trial without specific men-

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deliberations "would bring undue emphasis" on the count that invoked the forfeiture provision, thereby causing "reversible error and prejudic[e]." *Id.*

<sup>68</sup> 727 F.2d 1003 (11th Cir. 1984).

<sup>69</sup> *Id.* at 1012.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1007.

<sup>73</sup> *Id.* at 1012.

<sup>74</sup> 38 F.3d 523 (10th Cir. 1994).

<sup>75</sup> *Id.* at 525. 21 U.S.C. § 848 ("Continuing criminal enterprise") provides, in pertinent part:

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual . . . and to the forfeiture prescribed in section 853 of this title . . . (c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources.

21 U.S.C. § 848 (1994).

<sup>76</sup> *Libretti*, 38 F.3d at 530.

<sup>77</sup> *Id.* at 531.

<sup>78</sup> *Id.*

tion of forfeiture," constituted a valid waiver of the defendant's Rule 31(e) special verdict right.<sup>79</sup>

## 2. The Sixth Amendment and Rule 31(e)

In broad terms, the Sixth Amendment provides criminal defendants with a right to trial by jury.<sup>80</sup> Recently, in *United States v. Gaudin*,<sup>81</sup> the Supreme Court reiterated the important role that the Sixth Amendment plays in protecting the rights of criminal defendants.<sup>82</sup> In *Gaudin*, the Court held that the Sixth Amendment provides a defendant with a constitutional right to demand a jury determination of his or her guilt or innocence with regard to elements of a crime.<sup>83</sup> Despite the importance of the Sixth Amendment, the Court has nonetheless recognized that the Sixth Amendment right to a jury trial has certain limitations. Specifically, the Sixth Amendment does not afford a criminal defendant with the right to a jury determination of the appropriateness of a sentence imposed subsequent to such a determination.<sup>84</sup>

The Rule 31(e) special verdict requirement applies specifically to criminal forfeiture.<sup>85</sup> Since the Court in *Libretti* determined that forfeiture is a part of the sentence, not part of the substantive offense, the Rule 31(e) special verdict right is not equivalent to a defendant's Sixth Amendment right to a jury determination of guilt.<sup>86</sup>

## III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 22, 1992, a grand jury indicted defendant Joseph V. Li-

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<sup>79</sup> *Id.*

<sup>80</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

<sup>81</sup> 115 S. Ct. 2310 (1995).

<sup>82</sup> *Id.* at 2314 (stating that the Sixth Amendment "gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged").

<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986) ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.").

<sup>85</sup> See Fed. R. Crim. P. 31(e).

<sup>86</sup> *United States v. Libretti*, 116 S. Ct. 356, 368 (1995). But see FED. R. CRIM. P. 31 advisory committee note ("The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved.").

bretti, Jr. on eleven counts of violating federal firearms, drug and money laundering laws.<sup>87</sup> The multicount indictment also alleged that Libretti operated a continuing criminal enterprise (CCE).<sup>88</sup> The alleged CCE was a cocaine and marijuana distribution organization that the defendant operated in Wyoming and Colorado from 1984 to 1992<sup>89</sup> in violation of 21 U.S.C. § 848.<sup>90</sup> Libretti's trial began on September 28, 1992.<sup>91</sup> During Libretti's one week trial, the Government called eighteen witnesses to establish the defendant's involvement in the possession and distribution of narcotics.<sup>92</sup> Nine witnesses testified that they had purchased cocaine from the defendant.<sup>93</sup> Five witnesses were drug dealers who testified that the defendant supplied them with narcotics and advised and assisted their operations while he was living in Colorado and Wyoming.<sup>94</sup> In addition, the government presented evidence that Libretti purchased a home, automobile and numerous weapons<sup>95</sup> during a period when the court determined Libretti's annual income was between \$20,000 to \$50,000.<sup>96</sup>

After one week of trial, Libretti entered into a plea agreement whereby he pled guilty to the CCE count and agreed to specific forfeiture provisions detailed in three paragraphs of the plea agreement.<sup>97</sup> Pursuant to Paragraph 2 of the plea agreement, Libretti agreed to the "forfeiture of all known assets as prescribed in 21 U.S.C. § 853 and

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<sup>87</sup> Brief for the Petitioner at 2, *Libretti v. United States*, 116 S. Ct. 356 (1995) (No. 94-7427). The 11 counts were conspiring to possess cocaine and marijuana with intent to distribute (Count 1); using or carrying firearms and silencers during and in relation to a drug trafficking felony (Count 2); traveling in interstate commerce to facilitate drug trafficking (Count 3); unlawful possession of a machine gun (Count 4); investment of illegal drug proceeds in a business (Count 5); money laundering (Counts 7 and 8); obstruction of justice (Counts 9 and 10); and possession of cocaine with intent to distribute (Count 11).

<sup>88</sup> *Id.* Operating a CCE (Count 6). Count 6 required Libretti to forfeit "all property of any kind constituting or derived from proceeds" obtained from the CCE and "all property of any kind" used or intended for use to facilitate the enterprise." *Id.* at 2-3.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* See statute cited *supra* note 75.

<sup>91</sup> Brief for the United States at 4, *Libretti v. United States*, 116 S. Ct. 356 (1995) (No. 94-7427).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 5. Libretti purchased a \$200,000 home with a \$100,000 down payment; an automobile with a \$19,000 check; and \$243,000 worth of automatic and semi-automatic weapons. *Id.*

<sup>96</sup> *Id.* at 8. The Presentence Report (PSR) indicated that the following sources constituted Libretti's legitimate income: \$20,000 per year as a restaurant and grocery store manager (1985 to 1986); commission-only income as a stockbroker and income as a thrift store manager (1987); involvement in a real estate transaction that resulted in a loss (1988); \$50,000 operating a firearms business (1989); various legitimate activities resulting in approximate annual income of \$40,000 (1989 to 1991).

<sup>97</sup> *United States v. Libretti*, 116 S. Ct. 356, 360 (1995).

assets which are discovered at any later time up to \$1,500,000.”<sup>98</sup> In addition to the forfeiture penalty, Paragraph 2 also described additional maximum statutory penalties for the offense, which included “life imprisonment, not more than a \$2,000,000 fine, or both, and a \$50 mandatory special assessment.”<sup>99</sup> Under Paragraph 9 of the plea agreement, Libretti also agreed to “identify all assets that were used to facilitate his criminal activity” and to “provide complete financial disclosure forms requiring the listing of assets and financial interests.”<sup>100</sup> Paragraph 10 of the plea agreement required Libretti to agree to the following:

transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, travelers checks [sic] and funds of any kind.<sup>101</sup>

Finally, as part of the plea agreement, Libretti acknowledged “that by pleading guilty to Count 6 of the Indictment, he waive[d] various constitutional rights, including the right to a jury trial.”<sup>102</sup> In return for Libretti's guilty plea and asset forfeiture, the Government recommended the mandatory minimum sentence for a CCE conviction, twenty years imprisonment, and agreed not to pursue other criminal charges against him.<sup>103</sup>

Following the plea agreement, the district court held a hearing during which the judge advised Libretti of his rights, including his right to a jury trial, “clarified the consequences of Libretti's plea,” and further questioned Libretti to ensure that his plea was voluntary and factually based.<sup>104</sup> In response to the district judge's comments and clarifications at the hearing, Libretti questioned only the provision in Paragraph 2 of the plea agreement involving the future forfeiture of assets up to \$1,500,000.<sup>105</sup> The district judge assured Libretti that the future forfeiture provision applied only to subsequently discovered

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<sup>98</sup> *Id.*

<sup>99</sup> Petitioner's Brief at 3, *Libretti* (No. 94-7427).

<sup>100</sup> *Id.* at 3-4.

<sup>101</sup> *Libretti*, 116 S. Ct. at 360.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 361.

<sup>105</sup> Respondent's Brief at 6, *Libretti* (No. 94-7427). In response to the question of whether he understood the consequences of the plea agreement, Libretti stated, “There is only one part I didn't understand. They said that they can take up to one and a half million dollars from me at any time. Let's say 20 years from now I get a job, I get a paycheck. They can come and take that?” *Id.*

drug-tainted assets, not legitimate income.<sup>106</sup>

Prior to the sentencing hearing, the Government prepared a Prosecutor's Statement detailing Libretti's illegal activities and describing assets that Libretti purchased with proceeds from such activities.<sup>107</sup> The Prosecutor's Statement concluded that because Libretti used illegal proceeds to purchase these assets, these assets were forfeitable.<sup>108</sup> Following review of this information, the district court sentenced Libretti to twenty years imprisonment and five years of supervised release.<sup>109</sup> The court also imposed a \$5,000 fine, a mandatory \$50 assessment and 500 hours of community service.<sup>110</sup> At the conclusion of the hearing, Libretti objected to what he considered "a failure to find any factual basis for the whole forfeiture."<sup>111</sup> In spite of Libretti's objection, the district court entered a forfeiture order for specific assets.<sup>112</sup> Shortly thereafter, Libretti filed an appeal from the forfeiture order.<sup>113</sup> While pending on appeal, the district court modified the forfeiture order to return certain property to third-party claimants, and to include a statement that "it may be unjust to enforce the specific forfeiture provisions in the plea agreement."<sup>114</sup>

On appeal, the Tenth Circuit rejected Libretti's challenges to the forfeiture and affirmed the district court's forfeiture order.<sup>115</sup> The court of appeals determined that criminal forfeiture under 21 U.S.C. § 853<sup>116</sup> is part of the sentence, not part of the substantive offense.<sup>117</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 8 n.3.

<sup>108</sup> *Id.* Purchases described in the Prosecutor's Statement included a \$72,000 home in Colorado, a \$20,000 mortgage certificate, \$243,000 worth of firearms, cashier's checks, automobiles, real property, and other investments. The Statement also claimed that Libretti earned and stored hundreds of thousands of dollars in safety deposit boxes, storage lockers and bank accounts of relatives. The government estimated Libretti's drug profits to be over \$1,000,000. *Id.*

<sup>109</sup> *Libretti*, 116 S. Ct. at 361.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *United States v. Libretti*, 38 F.3d 523, 525 (10th Cir. 1994).

<sup>116</sup> 21 U.S.C. § 853, "Criminal forfeitures," provides, in relevant part:

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States . . . (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise. . . .

Moreover, the court of appeals explained that the district court took adequate measures to ensure that Libretti's guilty plea was both voluntary and factually based.<sup>118</sup> Finally, the court rejected Libretti's argument that "he was not advised of and did not waive his right to a jury trial on forfeiture issues."<sup>119</sup>

The United States Supreme Court granted certiorari<sup>120</sup> on March 27, 1995 to "resolve disagreement among the Circuits as to the applicability of Rule 11(f) to asset forfeiture provisions contained in plea agreements and the requisites for waiver of the right to a jury determination of forfeitability under Rule 31(e)."<sup>121</sup>

#### IV. SUMMARY OF OPINIONS

##### A. THE MAJORITY OPINION

Writing for the majority,<sup>122</sup> Justice O'Connor affirmed the Tenth Circuit Court of Appeal's decision and held that Rule 11(f) does not require a district court to determine whether a factual basis exists for a stipulated forfeiture of assets in a plea agreement.<sup>123</sup> Moreover, Justice O'Connor argued that Libretti adequately waived his Rule 31(e) right to a jury determination of the forfeiture of his assets.<sup>124</sup>

In Part II-A of the opinion, the Court identified the role that Rule 11(f) plays in the judicial process. Specifically, in analyzing Rule 11(f), Justice O'Connor clarified the fact that "[b]y its plain terms, the Rule applies only to a 'plea of guilty.'"<sup>125</sup> Citing well-established Supreme Court precedent, Justice O'Connor defined a guilty plea as a "defendant's admission of guilt of a substantive criminal offense as charged in an indictment and his waiver of the right to a jury determination on that charge."<sup>126</sup> Conversely, Justice O'Connor defined forfeiture as "an element of the sentence imposed following . . . a plea of

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21 U.S.C. § 853 (1994).

<sup>117</sup> *Libretti*, 38 F.3d at 528.

<sup>118</sup> *Id.* at 529.

<sup>119</sup> *Id.* at 530.

<sup>120</sup> *United States v. Libretti*, 115 S. Ct. 1398 (1995).

<sup>121</sup> *United States v. Libretti*, 116 S. Ct. 356, 362 (1995).

<sup>122</sup> Chief Justice Rehnquist and Justices Kennedy and Breyer joined in all parts of the opinion. Justices Scalia and Thomas joined in parts I, II-A, III and IV of the opinion. Both Justices Souter and Ginsburg concurred in the judgment and Parts I, II-A, II-B and II-C of the majority opinion.

<sup>123</sup> Discussed in Parts II-A, II-B and II-C of the majority opinion.

<sup>124</sup> Discussed in Part III of the majority opinion.

<sup>125</sup> *Libretti*, 116 S. Ct. at 362.

<sup>126</sup> *Id.* (citing, e.g., *United States v. Broce*, 488 U.S. 563, 570 (1989) ("By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime."); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)).

guilty.”<sup>127</sup> Thus, in essence, forfeiture is analogous to any other type of sentence handed down as punishment for a crime.<sup>128</sup> Consequently, Justice O'Connor distinguished a guilty plea from a forfeiture provision and reasoned that by definition a forfeiture provision in a plea agreement “falls outside the scope of Rule 11(f).”<sup>129</sup> In addition to well-established Supreme Court precedents, the Court cited congressional intent<sup>130</sup> as well as the plain language<sup>131</sup> and legislative history<sup>132</sup> of specific criminal statutes as further evidence of the fact that forfeiture is a punishment and/or sentence, not a “separate substantive offense.”<sup>133</sup>

In Part II-B, the Court briefly reviewed and quickly rejected Libretti's policy arguments that Rule 11(f) is necessary to ensure that a defendant's forfeiture is knowing and voluntary, to protect defendants against government overreaching and to protect the rights of third-party claimants.<sup>134</sup> While the Court acknowledged that the purpose of Rule 11(f) is to ensure the voluntariness of a guilty plea,<sup>135</sup> the Court once again reiterated the important distinction between a guilty plea and a forfeiture provision.<sup>136</sup> Moreover, the Court reasoned that the “relevant inquiry” concerning the voluntariness of a defendant's concession to a sentence is whether the defendant was informed or coerced into stipulating to the sentence, not whether the sentence is “factually sound.”<sup>137</sup>

The majority found Libretti's second policy argument “equally unavailing.”<sup>138</sup> The majority reasoned that 21 U.S.C. § 853 inherently prevents government overreaching by requiring the government to prove that the defendant used “drug-tainted” funds to obtain the for-

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<sup>127</sup> *Id.* at 363.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (“Congress conceived of forfeiture as punishment for the commission of various drug and racketeering crimes.”).

<sup>131</sup> *Id.* (“A person convicted of engaging in a continuing criminal enterprise ‘shall be sentenced . . . to the forfeiture prescribed in section 853.’” (quoting 21 U.S.C. § 848(a)); (“Forfeiture is imposed ‘in addition to any other sentence.’” (quoting 21 U.S.C. § 853(a))).

<sup>132</sup> *Id.* (citing S. REP. NO. 98-225, at 193 (1983) (legislative history of the Comprehensive Crime Control Act of 1984) (“criminal forfeiture ‘is imposed as a sanction against the defendant upon his conviction’”)).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 364.

<sup>135</sup> *Id.* (Rule 11 is “designed to facilitate a more accurate determination of the voluntariness of [a] plea”) (citing *McCarthy v. United States*, 394 U.S. 459, 472 (1969)).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*



feited assets.<sup>139</sup> While the majority recognized that since such forfeitures provide revenue to the government—the government may have an interest in encouraging forfeitures—the Court nonetheless determined that lower courts are well equipped to handle cases involving potential governmental abuse.<sup>140</sup> Moreover, additional procedural safeguards, such as the revised Department of Justice instructions, limit governmental abuse and protect the interests of criminal defendants.<sup>141</sup> For example, pursuant to the Department of Justice guidelines, the forfeiture agreement “must be in writing and the defendant himself must concede facts supporting the forfeiture” in order to ensure the validity of the forfeiture agreement.<sup>142</sup> The Court similarly dismissed Libretti’s final policy argument that Rule 11(f) is necessary to protect the rights of third-party claimants whose assets are included in a forfeiture provision.<sup>143</sup> The Court stated that 21 U.S.C. § 853(n), not Rule 11(f), is the proper “means by which third-party rights must be vindicated.”<sup>144</sup>

In Part II-C, the final section of Justice O’Connor’s opinion on the forfeiture issue, the Court reasoned that “the District Court did not rest its forfeiture order on nothing more than Libretti’s stipulation that certain assets were forfeitable.”<sup>145</sup> The Court concluded that the witness testimony, Presentence Report (PSR) and Prosecutor’s Statement were adequate bases for the district court to determine the validity of the forfeiture provision.<sup>146</sup> Moreover, the indictment itself specified which of Libretti’s personal property and financial assets would be subject to forfeiture.<sup>147</sup> The district court judge heard substantial witness testimony that helped establish Libretti’s involvement in numerous drug transactions and provided further proof of Libretti’s financial assets and property.<sup>148</sup> In addition, the district court partially based its decision on the PSR, which summarized Libretti’s legitimate annual income from 1985 to 1991 and indicated that this legitimate income was insufficient to pay for all of Libretti’s assets and investments.<sup>149</sup>

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 365 (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989)).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (quoting U.S. DEP’T. OF JUSTICE, REVISED POLICY REGARDING FORFEITURE BY SETTLEMENT AND PLEA BARGAINING IN CIVIL AND CRIMINAL ACTIONS, DIRECTIVE 94-7 (1994)).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 365-66.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 366.

<sup>149</sup> *Id.* at 366-67.

Finally, in Part III of the Court's opinion, Justice O'Connor addressed the adequacy of Libretti's waiver of the Rule 31(e) jury determination of the forfeitability of his property.<sup>150</sup> The Court held that Libretti's voluntary and factually based plea agreement, coupled with the plea colloquy, constituted a waiver of "Libretti's right to insist on a jury determination of forfeitability under Rule 31(e)."<sup>151</sup> Despite Libretti's claims to the contrary, the Court determined that there is neither a requirement that the plea agreement specifically reference Rule 31(e), nor a requirement that the court "specifically advise a defendant that a plea of guilty will result in waiver of the Rule 31(e) right."<sup>152</sup> To reach this conclusion, Justice O'Connor relied primarily on the Rule 11(c) requirements regarding the information the court must communicate to a defendant in order to ensure the validity of a guilty plea.<sup>153</sup> Since Rule 31(e) is not specifically mentioned in the Rule 11(c) information requirements, the Court concluded that district courts are not required to specifically address Rule 31(e) in the plea colloquy.<sup>154</sup>

Similarly, Justice O'Connor rejected Libretti's argument that the Rule 31(e) right to a jury determination of forfeitability has a constitutional basis in the Sixth Amendment right to a jury determination of a defendant's guilt or innocence.<sup>155</sup> In analyzing Libretti's challenge to the constitutionality of his plea agreement, the Court distinguished Rule 31(e)'s jury trial right from that of the Sixth Amendment by reiterating the fact that forfeiture is part of the sentence.<sup>156</sup> Consistent with established case law, the majority explained that a defendant does not have a "constitutional right to a jury determination as to the appropriate sentence to be imposed."<sup>157</sup> Thus, by not having the forfeiture provision of the plea agreement reviewed and/or approved by a jury, Libretti suffered neither a constitutional nor a statutory deprivation of his rights.<sup>158</sup>

Finally, Justice O'Connor noted that Libretti clearly indicated that he "fully understood the nature and consequences of his guilty plea and was prepared to be sentenced in accordance with the plea agreement."<sup>159</sup> Moreover, neither Libretti nor his attorney objected

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<sup>150</sup> *Id.* at 367.

<sup>151</sup> *Id.* at 369.

<sup>152</sup> *Id.* at 368.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 367.

<sup>156</sup> *Id.* at 367-68.

<sup>157</sup> *Id.* at 368.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

to the lack of a jury determination of the forfeiture provision.<sup>160</sup> Justice O'Connor noted the district court's basic responsibility of providing advice mandated by Rule 11(c) and ensuring that the defendant is not misled or confused about the provisions of the forfeiture agreement.<sup>161</sup> She concluded that the defendant's attorney, not the court, should provide any information above and beyond these requirements.<sup>162</sup>

#### B. JUSTICE SOUTER'S CONCURRENCE

While agreeing with the majority that Rule 11(f) was inapplicable to a forfeiture provision embodied in a plea agreement, Justice Souter wrote a separate, concurring opinion to discuss the Rule 31(e) right to a jury determination of forfeiture of assets.<sup>163</sup> Justice Souter suggested that the majority opinion went too far in determining whether the Sixth Amendment right to a jury trial requires a court to inform a defendant of any and all jury trial rights he or she may have.<sup>164</sup> Such a determination was unnecessary, argued Justice Souter, due to the Rule 11(c) information requirement imposed on the district court.<sup>165</sup> This requirement, coupled with the fact that the defendant had an ample opportunity to read and review the indictment, constituted sufficient notice of the defendant's right to a jury determination of forfeiture.<sup>166</sup>

#### C. JUSTICE GINSBURG'S CONCURRENCE

Justice Ginsburg also wrote separately due to the majority's handling of the Rule 31(e) jury trial issue.<sup>167</sup> Justice Ginsburg argued that the right to a jury trial afforded by the Sixth Amendment is not analogous to the "unusual jury-trial right on criminal forfeiture provided by Rule 31(e)."<sup>168</sup> Consequently, "waiver of the extraordinary jury-trial right on forfeiture should turn on the defendant's awareness of the right his plea will override."<sup>169</sup> Justice Ginsburg argued that this level of "awareness" required a district court to do something more than merely provide the defendant with a "bare reading of the

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 369 (Souter, J., concurring).

<sup>164</sup> *Id.* (Souter, J., concurring).

<sup>165</sup> *Id.* (Souter, J., concurring).

<sup>166</sup> *Id.* (Souter, J., concurring).

<sup>167</sup> *Id.* at 369-70 (Ginsburg, J., concurring).

<sup>168</sup> *Id.* at 370 (Ginsburg, J., concurring).

<sup>169</sup> *Id.* (Ginsburg, J., concurring).

forfeiture clause in the indictment."<sup>170</sup> Justice Ginsburg assured district courts that they can "easily achieve" such "clarity" by "routinely apprising defendants, at plea hearings, of Rule 31(e)'s atypical special-verdict requirement."<sup>171</sup> Therefore, applying this standard to Libretti's case, Justice Ginsburg determined that Libretti was "carefully and comprehensively informed" of the Rule 31(e) waiver by the court's discussion of the special-verdict form and during voir dire.<sup>172</sup> Thus, Justice Ginsburg concluded that Libretti could not claim "ignorance" of the special jury-trial rights afforded by Rule 31(e).<sup>173</sup>

#### D. THE DISSENTING OPINION

Justice Stevens, the sole dissenting member of the Court,<sup>174</sup> criticized the majority for failing to "emphasize the underlying proposition that the law—rather than any agreement between the parties—defines the limits on the district court's authority to forfeit a defendant's property."<sup>175</sup> Justice Stevens emphasized that the law, not Rule 11(f), places a "legal obligation" on the district court "to determine that there is a factual basis for the judgment entered upon a guilty plea."<sup>176</sup> Since Rule 11(f) provides a procedural, not a substantive, right to protect a defendant's right to receive a legally sanctioned sentence, "pre-existing substantive limits" placed on courts ensure that guilty pleas are factually based.<sup>177</sup> Finally, Justice Stevens observed that the "record does not provide a factual basis"<sup>178</sup> for the "sweeping forfeiture"<sup>179</sup> of defendant's property authorized by the district court.<sup>180</sup>

#### V. ANALYSIS

At first glance, the Court's holding that Rule 11(f) does not apply to a forfeiture provision of a guilty plea appears rather straightforward. The plain language of Rule 11(f) refers only to a "plea of

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<sup>170</sup> *Id.* (Ginsburg, J., concurring).

<sup>171</sup> *Id.* (Ginsburg, J., concurring).

<sup>172</sup> *Id.* (Ginsburg, J., concurring).

<sup>173</sup> *Id.* (Ginsburg, J., concurring).

<sup>174</sup> *Id.* at 370-72 (Stevens, J., dissenting). Although dissenting, Justice Stevens expressed his agreement with the majority's conclusion that Rule 11(f) does not require a court to determine the existence of a factual basis for forfeiture.

<sup>175</sup> *Id.* at 370 (Stevens, J., dissenting).

<sup>176</sup> *Id.* (Stevens, J., dissenting).

<sup>177</sup> *Id.* at 371 (Stevens, J., dissenting).

<sup>178</sup> *Id.* (Stevens, J., dissenting).

<sup>179</sup> *Id.* (Stevens, J., dissenting).

<sup>180</sup> *Id.* (Stevens, J., dissenting). Here, Justice Stevens referred to a bank account the defendant opened as a child and the fact that the prosecutor could not classify all of Libretti's assets as "substitute assets."

guilty.”<sup>181</sup> Moreover, the Court’s review and analysis of its precedents interpreting forfeiture provisions in general, and circuit court precedents interpreting Rule 11(f)’s applicability to forfeiture provisions in particular suggest that Rule 11(f) applies only to guilty pleas.

However, upon a more in-depth analysis, certain aspects of the majority’s decision in *Libretti* become subject to criticism. The Court’s lengthy discussion explaining that a factual basis existed for the defendant’s forfeiture in the case *sub judice*, coupled with the policy rationale behind both Rule 11(f) and statutorily prescribed criminal forfeiture, suggests that there is more to the Court’s decision than is first apparent.

This Note argues that the Supreme Court properly concluded that the plain language of Rule 11(f) and precedent defining criminal forfeiture as a sentence and/or punishment show that Rule 11(f) does not require a trial court to determine whether a factual basis exists for a forfeiture provision. However, the Court did not properly address the special nature of a defendant’s rights involved in criminal forfeiture and the special jury trial right provided by Rule 31(e).

A. THE SUPREME COURT PROPERLY CONCLUDED THAT RULE 11(F) DOES NOT REQUIRE A TRIAL COURT TO DETERMINE WHETHER A FACTUAL BASIS EXISTS FOR A GUILTY PLEA

Based on the plain language, Congressional intent and Supreme Court and circuit court precedents interpreting Rule 11(f) and criminal forfeiture, the Supreme Court correctly concluded that Rule 11(f) does not apply to a forfeiture provision included in a plea agreement.<sup>182</sup> General rules of statutory construction require a court to consider the plain language of a statute in interpreting whether the statute applies to a particular case.<sup>183</sup> By its plain language, Rule 11(f) applies only to “a plea of guilty.”<sup>184</sup> In past cases,<sup>185</sup> the Supreme

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<sup>181</sup> FED. R. CRIM. P. 11(f).

<sup>182</sup> All members of the Court, including Justice Stevens, agreed that Rule 11(f) on its face does not require a court to determine the existence of a factual basis. *See id.* at 370 (Stevens, J., dissenting) (agreeing with majority’s conclusion that Rule 11(f) “does not create a duty to determine that there is a factual basis for a forfeiture of assets”).

<sup>183</sup> *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (“In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute’s meaning, in all but the most extraordinary circumstance, is finished.”) (citing *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)).

<sup>184</sup> FED. R. CRIM. P. 11(f).

<sup>185</sup> In an apparent break from tradition, the Court in *Caplin & Drysdale, Chartered v. United States* held that “forfeiture is a substantive charge in the indictment against defendant.” 491 U.S. 617, 628 n.5 (1989). In an attempt to reconcile this apparently contradictory holding with that of *Libretti*, the Court distinguished *Caplin* on the grounds that the

Court has defined a guilty plea as a defendant's admission of guilt of a substantive criminal offense.<sup>186</sup> Thus, technically a defendant forfeits property only after a court or jury determines that a defendant is guilty, or in the alternative, after a defendant pleads guilty to a substantive criminal offense.<sup>187</sup> Similarly, the Continuing Criminal Enterprise statute, which provided the basis for Count 6 of the indictment and to which Libretti pled guilty, also clearly indicates that Congress intended for forfeiture to be a punishment and sentence for individuals who engaged in a continuing criminal enterprise.<sup>188</sup> Indeed, the circuit court and the Supreme Court noted that the defendant himself stipulated that criminal forfeiture "is a part of the sentence, not a part of the substantive offense."<sup>189</sup> Since "forfeiture is an element of the sentence imposed following a plea of guilty," not an admission of guilt, the Supreme Court properly concluded that forfeiture "falls outside of Rule 11(f)'s scope."<sup>190</sup>

Justice O'Connor's classification of forfeiture as a sentence and/or punishment is also consistent with the "weighty authority"<sup>191</sup> of legislative history and Supreme and circuit court precedents.<sup>192</sup> Indeed, Congress enacted forfeiture provisions in order to serve as a form of monetary punishment.<sup>193</sup>

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defendant's claim was an invalid attempt to "escape an otherwise appropriate forfeiture sanction by pointing to his need for counsel to represent him on the underlying charges." *Libretti*, 116 S. Ct. at 363. The Court then quickly noted that in other sections of the case, it recognized that forfeiture was a criminal sanction imposed as a sentence, not a substantive charge. *Id.*

<sup>186</sup> See, e.g., *United States v. Broce*, 488 U.S. 563, 570 (1989).

<sup>187</sup> The criminal forfeiture statute at issue in *Libretti* states that a defendant's property may be forfeited only after the defendant is "convicted" of the proscribed act. 21 U.S.C. § 853(a) (1994).

<sup>188</sup> "Any person who engages in a continuing criminal enterprise shall be sentenced . . . to the forfeiture prescribed in section 853 of this title . . ." 21 U.S.C. § 848(a) (1994) (emphasis added).

<sup>189</sup> *Libretti*, 116 S. Ct. at 363; *Libretti*, 38 F.3d at 528.

<sup>190</sup> *Libretti*, 116 S. Ct. at 363.

<sup>191</sup> *Id.* at 364.

<sup>192</sup> See, e.g., *Alexander v. United States*, 509 U.S. 544, 558-59 (1993) (stating that criminal forfeiture authorized by RICO is a form of punishment); *Wood v. United States*, 863 F.2d 417, 421 (5th Cir. 1989) (stating that in the civil forfeiture context the "[f]orfeiture cannot seriously be considered anything other than an economic penalty for drug trafficking . . . [T]he forfeiture provision was designed to reach drug traffickers where it hurts the most . . . and to augment the traditional criminal sanctions of fines and imprisonment.").

<sup>193</sup> See S. REP. NO. 98-225, at 193 (1983) (stating that criminal forfeiture "is imposed as a sanction against the defendant upon his conviction"); *Alexander*, 509 U.S. at 558-59.

B. THE COURT DID NOT ADEQUATELY ADDRESS THE POLICY RATIONALE  
AND UNIQUE NATURE OF CRIMINAL FORFEITURE

The majority's decision in *Libretti* is based primarily on a technical examination of the plain language of Rule 11(f) and forfeiture as defined and analyzed in past Supreme Court opinions, circuit court cases and criminal statutes.<sup>194</sup> However, by taking such a textual<sup>195</sup> approach to defining criminal forfeiture, the Court ignores the important procedural safeguards established for defendants in criminal forfeiture cases.<sup>196</sup>

In an attempt to reject a textual approach that strictly categorizes forfeiture as either a substantive charge or a punishment, the defendant argued that criminal forfeiture is in essence "a hybrid that shares elements of both."<sup>197</sup> In support of this argument, the defendant noted that Rules 7(c)(2),<sup>198</sup> 31(e)<sup>199</sup> and 32(d)(2)<sup>200</sup> "establish the procedural framework for criminal forfeiture . . . and reflect a decision to treat forfeiture as a substantive charge or element of criminal liability, not merely as a matter of sentencing."<sup>201</sup> *Libretti* argued that these three Rules read together provide "heightened procedural safeguards for criminal forfeiture."<sup>202</sup> Thus, Rule 11(f), the only other provision of the Federal Rules of Criminal Procedure that addresses criminal forfeiture, also provides a "heightened procedural safeguard for criminal forfeiture."<sup>203</sup>

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<sup>194</sup> See *Libretti*, 116 S. Ct. at 363.

<sup>195</sup> Some commentators have suggested that while plain language is important in a court's interpretation of a statute, courts should not take a purely linguistic approach to interpreting a statute. See, e.g., Christina Egan, *Level of Scierter Required for Child Pornography Distributors: The Supreme Court's Interpretation of "Knowingly" in 18 U.S.C. § 2252*, 86 J. CRIM. L. & CRIMINOLOGY 1341, 1369 (1996).

<sup>196</sup> The defendant argued that "procedural safeguards are 'of particular importance' in the forfeiture context because of the government's 'direct pecuniary interest in the outcome of the proceeding.'" Brief for the Petitioner at 27, *Libretti* (No. 94-7427) (quoting *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 502 (1993)).

<sup>197</sup> *Libretti*, 116 S. Ct. at 363.

<sup>198</sup> FED. R. CRIM. P. 7(c)(2) ("[n]o judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture").

<sup>199</sup> FED. R. CRIM. P. 31(e) ("[i]f the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the nature of the interest or property subject to forfeiture, if any").

<sup>200</sup> FED. R. CRIM. P. 32(d)(2) ("[w]hen a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper").

<sup>201</sup> Petitioner's Brief at 11, *Libretti* (No. 94-7427).

<sup>202</sup> *Id.* Indeed, even the majority recognized that the Federal Rules of Criminal Procedure "attach heightened procedural protections to imposition of criminal forfeiture as punishment for certain types of criminal conduct." *Libretti*, 116 S. Ct. at 364.

<sup>203</sup> Petitioner's Brief at 11, *Libretti* (No. 94-7427). As the defendant points out, rules

The defendant also offered three policy arguments in support of his contention that Rule 11(f) applies to criminal forfeiture provisions of a plea agreement.<sup>204</sup> Despite the majority's claim to the contrary, each of these policy arguments has merit when considered in the context of the policy rationale behind Rule 11(f) and the procedural safeguards afforded to criminal defendants.

The defendant's strongest argument is that Rule 11(f)'s factual basis inquiry is "essential to ensuring that a forfeiture agreement is knowing and voluntary."<sup>205</sup> In responding to the defendant's claim, Justice O'Connor reiterated her previous conclusion that forfeiture is a part of the sentence.<sup>206</sup> She also argued that the "relevant inquiry" a court must make is to ensure that the defendant's stipulation to a particular sentence, i.e. forfeiture, is "informed and uncoerced."<sup>207</sup> The court is not required to determine whether the sentence is "factually sound."<sup>208</sup> Although Justice O'Connor does not cite any authority here, her argument apparently hinges on the structure of Rule 11.

Rule 11 of the Federal Rules of Criminal Procedure addresses two specific characterizations of pleas that are implicated in *Libretti*: a guilty plea<sup>209</sup> and the plea agreement procedure.<sup>210</sup> The guilty plea

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7(c)(2), 11(f), 31(e) and 32(d)(2) are the only rules that specifically address the procedural requirements for criminal forfeiture. *Id.* Considering the rule of statutory construction that statutes *in pari materia* "should be read, construed and applied together," the defendant's framework argument has merit. See BLACK'S LAW DICTIONARY 791 (6th ed. 1990). However, the majority's implicit rejection of an *in pari materia* argument may stem from the fact that the canon only applies if the statute is ambiguous. As Justice O'Connor states throughout her opinion, Rule 11(f) does not apply to forfeiture. Nonetheless, the defendant's argument that the Court should construe these rules together is the better reasoned one. For example, in rejecting the defendant's claim, the majority rebuts only the defendant's argument that the Advisory Committee's Note to Rule 31(e) assumes that "the amount of interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved." FED. R. CRIM. P. 31(e) advisory committee's note. However, the defendant actually argued that *all three* rules, read together, shed light on the proper interpretation of the applicability of the Rule 11(f) factual basis requirement to forfeiture provisions contained in plea agreements. See Petitioner's Brief at 11, *Libretti* (No. 94-7427).

<sup>204</sup> *Libretti*, 116 S. Ct. at 364.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Rule 11 establishes the following procedural safeguards for defendants who offer guilty pleas. Before accepting the guilty plea,

the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands the following: (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances . . . ; and . . . (3) that the defendant has the right



refers to a defendant's admission of guilt to a crime. The plea agreement refers to the ultimate agreement reached by the prosecution and defendant with regard to the punishment and sentencing that results from the defendant's plea.<sup>211</sup>

The defendant next claimed that a factual basis inquiry protects against government overreaching.<sup>212</sup> Despite the majority's claims that such an argument was "unavailing,"<sup>213</sup> prosecutorial overreaching is one of the most significant concerns of criminal forfeiture critics.<sup>214</sup> The Court discussed other procedural safeguards a trial court should undertake in order to ensure a forfeiture provision is valid,<sup>215</sup> and claimed that these safeguards adequately ensure that the forfeiture provision is appropriate.

However, these procedures do not address the issue of whether a factual basis exists for forfeiture of the defendant's assets.<sup>216</sup> In addi-

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to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and (4) that if a plea of guilty . . . is accepted by the court there will not be a further trial of any kind, so that by pleading guilty . . . the defendant waives the right to a trial. . . .

FED. R. CRIM. P. 11(c). Rule 11 further provides, "The court shall not accept a plea of guilty . . . without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement . . . ." FED. R. CRIM. P. 11(d).

<sup>210</sup> Rule 11(e) provides:

(1) In General. The attorney for the government and the attorney for the defendant . . . may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty . . . to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following: (A) move for dismissal of other charges; or (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence . . . ; or (C) agree that a specific sentence is the appropriate disposition of the case. . . .

FED. R. CRIM. P. 11(e).

<sup>211</sup> *Id.*

<sup>212</sup> *Libretti*, 116 S. Ct. at 364-65.

<sup>213</sup> *Id.* at 364.

<sup>214</sup> The Court hastily dismissed *Libretti's* argument that the factual basis inquiry of Rule 11(f) applies to forfeiture in order to prevent government overreaching. This seems odd in light of the fact that one of the primary reasons that the Court has been hesitant to grant any government forfeiture without review is to prevent "unchecked government . . . [from] exercising its power by confiscating private property." Richard C. Reuben, *One Crime, Two Punishments: Asset Forfeiture Cases Offer Chance to Sort Out Double Jeopardy Issues*, 81 A.B.A. J. 38, 38 (1995).

<sup>215</sup> The Court noted that the Department of Justice provides standards to ensure the validity of a forfeiture provision. *Libretti*, 116 S. Ct. at 365 (citing U.S. DEP'T OF JUSTICE, REVISED POLICY REGARDING FORFEITURE BY SETTLEMENT AND PLEA BARGAINING IN CIVIL AND CRIMINAL ACTIONS, DIRECTIVE 94-7 (1994)). These standards include requirements that the forfeiture settlement be in writing and that the defendant "concede facts supporting the forfeiture." *Id.* In addition, the district court "may" accept, but is not required to accept the parties' agreement to a particular sentence. *Id.*

<sup>216</sup> Unlike other procedural safeguards, the factual basis requirement

tion, as the defendant stated, these procedural safeguards imposed on the court do not adequately combat the possibility of prosecutorial overreaching.<sup>217</sup> The Rule 11(f) factual basis requirement serves as a "procedural safeguard to ensure that criminal forfeiture does not exceed the broad authority of § 853 and confiscate property without legislative authority."<sup>218</sup> By the plain language of § 853, a defendant must only forfeit property derived from or property used to perpetuate a continuing criminal enterprise.<sup>219</sup> Thus, Libretti argued, allowing a prosecutor to require a defendant to forfeit legitimately acquired assets is in direct violation of the statute, and results in prosecutorial overreaching.<sup>220</sup>

In his final policy argument Libretti claimed that the factual basis requirement is essential to protect the rights of innocent third parties.<sup>221</sup> According to Libretti, the consequences of failing to protect third party rights are particularly egregious.<sup>222</sup> This is primarily due to the fact that without the Rule 11(f) factual basis requirement, innocent third parties do not have adequate procedural safeguards by which to protect their rights.<sup>223</sup> Although Libretti's argument has

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will provide the court with information necessary to ensure that the government has not exceeded its statutory forfeiture authority . . . [and] ensure that the defendant understands the scope of the forfeiture being sought and the facts necessary to support that forfeiture, and knowingly and voluntarily agrees to the forfeiture under those conditions.

Reply Brief for the Petitioner, *Libretti v. United States* at 7, 116 S. Ct. 356 (1995) (No. 94-7427).

<sup>217</sup> Libretti argued that a factual basis requirement would prevent "unlawful" and "unintended" forfeitures. Brief for the Petitioner at 31, *Libretti* (No. 94-7427). In addition, he claimed that the factual basis requirement would provide the court with information necessary to ensure that the government has not exceeded its statutory forfeiture authority. *Id.* at 31-32.

<sup>218</sup> *Id.* at 27.

<sup>219</sup> 21 U.S.C. § 853 (1994).

<sup>220</sup> The district court proceedings in *Libretti* exemplify this possibility. Libretti notes that,

[T]he government and the courts below interpreted the plea agreement as working a forfeiture of petitioner's entire estate without the necessity of showing any factual basis . . . [T]he agreement so construed covers many assets for which forfeiture is not authorized by section 853, and the district court's postverdict proceedings lend substantial support to his claims.

Petitioner's Brief at 32, *Libretti* (No. 94-7427).

<sup>221</sup> *Libretti*, 116 S. Ct. at 365. Some commentators suggest that perhaps this is the most critical issue in *Libretti*. See, e.g., Richard J. Troberman, *Double Jeopardy in Forfeiture Law: Keeping the Defense Bar's Winning Streak Alive*, 21 J. LEGIS. 197, 208-09 (1995). The issue of third-party rights is critical due to the fact that without the Rule 11(f) factual basis requirement, "the issue of ultimate forfeitability of the property [of third-party claimants] will never be determined by anybody." *Id.* (commenting that "[i]t will be a fait accompli if the court is not required—even when there is a guilty plea—to make a factual determination that the property is actually subject to forfeiture").

<sup>222</sup> Petitioner's Brief at 35, *Libretti* (No. 94-7427).

<sup>223</sup> *Id.*

some merit, the majority was correct in concluding that § 853(n),<sup>224</sup> not Rule 11(f), provides an adequate means to protect the rights of innocent third parties.<sup>225</sup> As Justice O'Connor accurately stated:

Whatever the merits of this argument as a matter of policy, Congress has determined that § 853(n), rather than Rule 11(f), provides the means by which third-party rights must be vindicated. Third-party claimants are not party to Rule 11(f) proceedings, and Libretti's assertion that their interests are best protected therein fits poorly within our adversary system of justice.<sup>226</sup>

Perhaps one of the most obvious criticisms of the majority's opinion is that its decision is unnecessary to arrive at the conclusion it reached.<sup>227</sup> The Court granted certiorari to resolve dispute among the circuits regarding applicability of Rule 11(f) to forfeiture provisions in plea agreements.<sup>228</sup> The Court claims Rule 11(f) does not apply to a guilty plea, but then states that if Rule 11(f) did apply, the district court established a factual basis for Libretti's forfeiture.<sup>229</sup> Such an apparently contradictory discussion sends a conflicting

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<sup>224</sup> If the forfeiture provision erroneously includes the property of innocent third-party claimants, the innocent third parties can protect their interests by following the procedures set forth in § 853. After entry of a forfeiture order, a person other than the defendant may "petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury." 21 U.S.C. § 853(n)(2) (1994). The petition "shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition . . . any additional facts supporting the petitioner's claim, and the relief sought." *Id.* § 853(n)(3). § 853(n) further provides that:

If . . . the petitioner has established by a preponderance of the evidence that—(A) the petitioner has a legal right, title, or interest in the property, and such right, title or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

*Id.* § 853(n)(6).

<sup>225</sup> *Libretti*, 116 S. Ct. at 365. The burden proposed by § 853(n)(6) is not as heavy as the defendant suggests. Third parties can prove their interests in forfeited property by satisfying the preponderance of the evidence standard. *See* 21 U.S.C. § 853(n)(6). By definition, this standard merely requires that a third party prove that it is more probable than not that the property is legally that of the third party, not the defendant. *See* BLACK'S LAW DICTIONARY, *supra* note 203, at 1182.

<sup>226</sup> *Libretti*, 116 S. Ct. at 365.

<sup>227</sup> *See* Steven Wisotsky, *Libretti Decision May Mean Parties Can Achieve by Stipulation That Which is Otherwise not Authorized by Law*, WEST'S LEGAL NEWS, May 3, 1996, available at 1996 WL 260506 (1996) (commenting that "it is possible to regard the entire decision as obiter dictum because on each point the Court's ruling is shown to be unnecessary to the result it reached").

<sup>228</sup> *Libretti*, 116 S. Ct. at 362.

<sup>229</sup> *Id.* at 365-67.

message to the circuit courts,<sup>230</sup> despite the Court's claim that its purpose of granting certiorari was to "resolve disagreement among the Circuits."<sup>231</sup>

In his dissent, Justice Stevens properly noted that application of the Rule 11(f) factual basis requirement to a forfeiture provision provides a procedural safeguard to ensure that the law, not a plea agreement between the prosecutor and the defendant, "defines the limits on the district court's authority to forfeit a defendant's property."<sup>232</sup> Considering that the very nature of a plea agreement containing a forfeiture provision results in a reduced sentence for the defendant and increased financial benefit for the government, it is not inconceivable that both parties may be concerned more about personal gain than the law. As Justice Stevens stated in his dissent, the majority's opinion could provide wealthy defendants with an opportunity to plead guilty, agree to forfeit large quantities of assets and receive favorable plea agreements in the way of reduced prison time, regardless of whether such asset were acquired by drug tainted funds.<sup>233</sup>

C. THE COURT DID NOT SUFFICIENTLY ADDRESS THE RULE 31(E)  
SPECIAL VERDICT RIGHT

The Court's Rule 31(e) holding, like its Rule 11(f) holding, focused primarily on an examination of the plain language of the Rule, rather than its policy considerations.<sup>234</sup> Justice O'Connor's opinion regarding the requisites for a defendant's waiver of his or her Rule

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<sup>230</sup> The Court's discussion leaves several important questions unanswered: Do trial courts have to engage in the very factual basis inquiry which the Court stated was unnecessary under Rule 11(f), but engaged in nonetheless? Can a trial court examine the PSR and conclude that the defendant made a voluntary and informed decision without determining whether facts of a case warrant a particular forfeiture provision? Does Rule 11(f) impose a heightened standard on prosecutors to ensure that a factual basis exists if the court is not required to conduct a separate review to guarantee that a factual basis of forfeiture exists? How courts will answer these questions remains to be seen. However, one commentator suggests that "federal forfeiture policy has changed since the lower courts considered *Libretti*, and now calls for prosecutors to suggest that trial courts find a factual basis for forfeitures." See Reuben, *supra* note 214, at 38. Although the author states no authority, there is probably some merit to this statement. For example, even in *Libretti*, the district court "determined that ownership of certain items of forfeited property was in dispute." *United States v. Libretti*, 38 F.3d 523, 526 (10th Cir. 1994). The court therefore intended to conduct a hearing to determine which of *Libretti*'s assets were actually "tainted" by criminal funds, and to examine the prosecutor's claims for substitute assets. *Id.* However, the government filed and was granted a motion to stay these proceedings pending appeal. *Id.*

<sup>231</sup> *Libretti*, 116 S. Ct. at 362.

<sup>232</sup> *Id.* at 370 (Stevens, J., dissenting).

<sup>233</sup> *Id.* at 370-71 (Stevens, J., dissenting) (criticizing this result and stating "[t]he mere fact the defendant has agreed that an item is forfeitable, in a plea agreement, does not make it so." (quoting *United States v. Roberts*, 749 F.2d 404, 409 (7th Cir. 1984))).

<sup>234</sup> See Wisotsky, *supra* note 227, at \*1.

31(e) right to a jury determination of forfeitability of assets was the primary source of disagreement among some members of the Court.<sup>235</sup> The majority rejected the defendant's argument that he did not adequately waive his Rule 31(e) right to a jury determination of the forfeitability of his assets.<sup>236</sup> The Court started its discussion with the conclusion it reached in the Rule 11(f) factual basis discussion, specifically that forfeiture is part of the sentence, not a substantive element of a crime.<sup>237</sup>

The right to trial by jury is one of the most fundamental constitutional rights afforded to a defendant.<sup>238</sup> However, through plea bargaining,<sup>239</sup> a defendant contemplates that the ultimate effect of an acceptable<sup>240</sup> guilty plea agreement is that the defendant waives his or her right to a jury determination of guilt or innocence<sup>241</sup> in exchange for a more favorable sentencing arrangement. In *Libretti*, the defendant argued that the Rule 31(e) right to a jury determination of forfeiture deserves heightened procedural protection similar to that provided by the Sixth Amendment right to a jury determination of guilt or innocence.<sup>242</sup> As Justice O'Connor accurately stated, Supreme Court precedents show that the Rule 31(e) right does not fall within the ambit of the Sixth Amendment's protection.<sup>243</sup>

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<sup>235</sup> Justice O'Connor's opinion with respect to Rule 31(e) was set forth in Part III of the Court's opinion. *Libretti*, 116 S. Ct. at 367-69. Justices Souter and Ginsburg filed separate opinions primarily to discuss faults in the majority's opinion with respect to the Rule 31(e) special verdict right. *Id.* at 369 (Souter, J., concurring); *Id.* at 369-70 (Ginsburg, J., concurring).

<sup>236</sup> *Id.* at 367.

<sup>237</sup> *Id.*

<sup>238</sup> See U.S. Const. amend. VI.

<sup>239</sup> Plea bargaining refers to the off-the-record, out-of-court negotiations between prosecution and defense for a mutually beneficial trade: the defendant waives all of his rights to trial by jury, the right not to incriminate himself by pleading guilty, and the right to cross-examine witnesses against him; he pleads guilty in exchange for a more lenient sentence for reduced charges. The prosecutor avoids the many problems inherent in a trial, saves the public a lot of time and money, and disposes of the case with another conviction notched on his record.

LEVI, *supra* note 3, at 196-97.

<sup>240</sup> Rule 11(e)(3) makes the disposition of the judgment and sentence of the plea agreement contingent upon acceptance of the agreement by the court. FED. R. CRIM. P. 11(e)(3).

<sup>241</sup> See *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (noting that when a criminal defendant pleads guilty, the defendant waives the right to trial by jury). *Libretti* acknowledged that by pleading guilty to the CCE count, he waived his right to trial by jury. *Libretti*, 116 S. Ct. at 368.

<sup>242</sup> Brief for the Petitioner at 45, *Libretti* (No. 94-7427).

<sup>243</sup> *Libretti*, 116 S. Ct. at 368 ("Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed.") (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986) ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.")).

To support the claim that the trial court erred in holding that Libretti's waiver was adequate, the defendant also focused on the importance of the jury in ensuring that a defendant's forfeiture is legally permissible.<sup>244</sup> In support of his position, the defendant argued that the "Sixth Amendment guarantees a jury trial in cases where that safeguard would have been available at common law."<sup>245</sup> The defendant further argued that at common law, juries "served as a safeguard against . . . governmental oppression" that resulted from the "potential for raising enormous revenues by forfeiture."<sup>246</sup> The defendant correctly argued that the Court went too far in distinguishing the Rule 31(e) jury trial right from the jury trial right provided by the Sixth Amendment.<sup>247</sup> In essence, the purpose of both procedural safeguards is to ensure that the entire judicial process is "fair" to the defendant (i.e. protection of defendants' rights relative to the court, prosecution and/or government).<sup>248</sup> As does the Rule 11(f) factual basis requirement, the Rule 31(e) special verdict requirement serves as a means of preventing prosecutorial overreaching and ensuring that a judge is not "compliant" or "biased."<sup>249</sup> Justice Souter claimed that since the defendant had a copy of and heard and read the indictment, "he will naturally understand that his right to jury trial covers a verdict on the forfeiture claim."<sup>250</sup> Whether or not a defendant will "naturally understand" this right is debatable. This uncertainty is particularly apparent where the court conveying the Rule 31(e) jury trial information to the defendant does so in such a way that the court unintentionally misleads or confuses the defendant.<sup>251</sup>

In contrast, however, Justice Ginsburg pointed out that the Rule 31(e) jury trial right "must be known in order to be given up voluntarily."<sup>252</sup> Nonetheless, Justice Ginsburg concluded that although the trial court did not inform Libretti of his Rule 31(e) right at trial, the court's reference to the special verdict right on two pretrial occasions

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<sup>244</sup> Petitioner's Brief at 45, *Libretti* (No. 94-7427).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 44.

<sup>247</sup> *See id.* at 44-45.

<sup>248</sup> *See id.*

<sup>249</sup> *Id.* at 44 ("The purpose of the right to trial by jury is 'to prevent oppression by the Government' and to provide a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.'" (citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968))).

<sup>250</sup> *United States v. Libretti*, 116 S. Ct. 356, 369 (1995) (Souter, J., concurring).

<sup>251</sup> The court informed Libretti that "if you plead guilty . . . the jury is not going to decide whether you're guilty or not." *See id.* (Souter, J., concurring). Justice Souter noted that "there is some reason to argue that the court's colloquy with the defendant . . . was misleading." *Id.*

<sup>252</sup> *Id.* (Ginsburg, J., concurring).

barred *Libretti* from "plead[ing] ignorance" of the Rule 31(e) right to a jury trial.<sup>253</sup> Justice O'Connor failed to explain why she was hesitant to require, as opposed to permit, a court to specifically inform a defendant of his or her Rule 31(e) jury right. Imposing such a requirement is not unduly burdensome.<sup>254</sup> Indeed, the benefits of requiring a trial court to ensure that the defendant understands this right outweigh the burdens of requiring a court to take steps to inform the defendant.

## VI. CONCLUSION

In *Libretti*, the Supreme Court properly concluded that Rule 11(f) does not require a court to determine whether a factual basis exists for a forfeiture provision in a guilty plea. However, by focusing primarily on a technical examination of the plain language, and interpretation of court precedents, the Court failed to adequately address the policy considerations of forfeiture provisions. In addition, the Court missed an important opportunity to encourage lower courts to use the Rule 11(f) factual basis requirement as a means of preventing potential abuse of the criminal forfeiture and plea agreement procedures. In light of the importance of both criminal forfeiture and the plea process, the Court should have taken the approach advocated by Justice Stevens and "emphasize[d] the underlying proposition that the law—rather than any agreement between the parties—defines the limits on the district court's authority to forfeit a defendant's property."<sup>255</sup>

Similarly, the Court properly concluded that the procedural rights and protections provided by the Rule 31(e) special verdict right are not equivalent to those provided by the Sixth Amendment. Thus, a defendant does not have the same procedural rights to a Rule 31(e) jury determination of forfeiture as he or she has to a jury determination of guilt or innocence. The Court nonetheless failed to recognize that Rule 31(e) and the Sixth Amendment are both necessary and important means of protecting the rights of defendants in criminal forfeiture cases.

ANGELA CRAWFORD

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<sup>253</sup> *Id.* at 369-70 (Ginsburg, J., concurring).

<sup>254</sup> The Tenth Circuit Court of Appeals engaged in such an analysis when it determined that the trial court established facts sufficient to have apprised the defendant of that right. See Wisotsky, *supra* note 227, at \*3.

<sup>255</sup> *Libretti*, 116 S. Ct. at 370 (Stevens, J., dissenting).