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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
UNITED STATES, :  
Petitioner :  
v. : No. 01-595  
ANGELA RUIZ. :  
- - - - -X

Washington, D.C.  
Wednesday, April 24, 2002

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

APPEARANCES:

THEODORE B. OLSON, ESQ., Solicitor General, Department of  
Justice, Washington, D.C.; on behalf of the  
Petitioner.

STEVEN F. HUBACHEK, ESQ., San Diego, California; on behalf  
of the Respondent.

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

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear -- we'll  
4 hear argument next in No. 01-595, the United States  
5 against Ruiz.

6 General Olson.

7 ORAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF THE PETITIONER

9 MR. OLSON: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 The Ninth Circuit has created a new  
12 constitutional rule for guilty pleas that is neither  
13 required by the Constitution nor warranted by this Court's  
14 previous decisions. Its inevitable effect would be to  
15 complicate and expose to collateral attack confessions of  
16 guilt which -- which account for approximately 95 percent  
17 of all convictions in the Federal system and to stifle the  
18 market for plea bargains, which this Court has described  
19 as an essential component of the administration of  
20 justice.

21 The Ninth Circuit held that an accused cannot  
22 enter a valid guilty plea unless he is first given all  
23 evidence in the prosecutor's possession which would have a  
24 reasonable probability of discouraging him from pleading  
25 guilty.

1           The Ninth Circuit's rule, new rule, is not a  
2           logical extension of the Brady -- Brady v. Maryland, which  
3           is premised on concern over the constitutional fairness of  
4           criminal trials. Brady and its progeny require disclosure  
5           only when necessary to ensure a fair trial. In fact, in  
6           Brady itself, the Court was explicit to point out that it  
7           -- that decision was premised on the avoidance of an  
8           unfair trial to the accused. The subsequent cases, which  
9           have expanded upon or interpreted or explained Brady, have  
10          been even more specific with respect to the limitations on  
11          the scope of Brady.

12                 In U.S. v. Agurs, the Court said the prosecutor  
13          will not have violated his constitutional duty unless his  
14          omission is of sufficient significance to result in the  
15          denial of a fair trial.

16                 Something similar was said in U.S. v. Bagley.  
17          Brady's purpose is not to displace the adversary system as  
18          the primary means by which truth is uncovered. If it did  
19          not deprive a defendant of a fair trial, there is no  
20          constitutional violation.

21                 QUESTION: Can we get to your main argument  
22          about Brady, that is, Brady in all its aspects is a trial  
23          right, not a pretrial right, in view of the plea agreement  
24          in this case, which represents that you have already  
25          turned over the prime Brady material and the only question

1 is the impeaching material?

2 MR. OLSON: Yes, Justice Ginsburg. The  
3 agreement to which Justice Ginsburg is referring is set  
4 out -- the two paragraphs of that agreement --

5 QUESTION: 45a and 46a of the petition for cert.

6 MR. OLSON: Yes, and I also have it on -- on  
7 page 12 of the joint appendix.

8 QUESTION: What -- what --

9 MR. OLSON: Page 12 of the joint appendix. It's  
10 the --

11 QUESTION: -- the petition.

12 MR. OLSON: It's -- it's on page 14a of the  
13 petition -- of the appendix to the petition for  
14 certiorari.

15 QUESTION: It's the Government's representation  
16 that any information establishing the factual innocence of  
17 the defendant known to the prosecutor has been turned over  
18 to the defendant. And so my question is, isn't that, at  
19 least in this case, a moot issue? You do have the  
20 question about the impeaching material.

21 MR. OLSON: The answer to that, Justice  
22 Ginsburg, is that both in the Sanchez decision and in this  
23 case, the Ruiz decision, the Ninth Circuit went further  
24 and made it clear that it was applying the rule that it  
25 applied in this case to all exculpatory material which, if

1 known to the defendant, might cause the defendant not to  
2 plead guilty. Now, the undertaking that was made in the  
3 particular proposed agreement here went a little bit  
4 further in the direction of the defendant, which often  
5 happens. Prosecutors frequently will decide, for one  
6 reason or another, to give exculpatory information of some  
7 sort to a defendant. But the Ninth Circuit went further  
8 than that and made it clear that the rule that it was  
9 enunciating applied to all exculpatory material, including  
10 impeachment material, and that is the rule that's going to  
11 be applicable in the Ninth Circuit.

12 So, even if this Court determined to limit its  
13 decision to the -- the narrower scope, as articulated in  
14 the second paragraph of that proposed agreement, we'd be  
15 back here next year because it's quite clear what the  
16 Ninth Circuit intends to do with its rule.

17 QUESTION: I -- I don't --

18 QUESTION: The statement referred to on page  
19 14a, the Government represents -- that -- that was not  
20 pursuant to any court order, I take it, the Government  
21 turning that over?

22 MR. OLSON: No, it was not, Mr. Chief Justice.  
23 This was a -- simply a -- a draft agreement which was, in  
24 fact, prepared in response -- as a result of and in  
25 response to the earlier Sanchez decision, which -- which

1 the Ninth Circuit had articulated. This was an effort by  
2 the prosecutor --

3 QUESTION: I was -- I was going to ask why --  
4 why is that second paragraph there? It wouldn't have  
5 occurred to me to --

6 MR. OLSON: It's -- it's not in the record,  
7 Justice Scalia, but it's my understanding that it's  
8 something that is -- is developed particularly to deal  
9 with the Sanchez case which the Ninth Circuit had already  
10 decided, and the presumption that the Ninth -- the Ninth  
11 Circuit's Sanchez decision went so far and not as far as  
12 the -- that that covered the impeachment material, but not  
13 other exculpatory material in the reverse.

14 So, however inartful this is, it was not in  
15 response, Mr. Chief Justice, to a court order or any other  
16 legal requirement, nor does it purport to articulate what  
17 the law is. It purports to undertake what the prosecutor  
18 voluntarily was willing to do with respect to this  
19 particular form of plea --

20 QUESTION: Has this been used throughout the  
21 country --

22 MR. OLSON: No.

23 QUESTION: -- or just --

24 MR. OLSON: This is -- this was developed just  
25 in the San Diego -- the Southern District of California,

1 although other versions in other places, but there's no  
2 standard national form for plea agreements.

3 QUESTION: I -- I know what you'd like is that  
4 we reach the question of this impeachment material and say  
5 there is no such right in a -- in a plea agreement  
6 context. But how would I even get there? They only get  
7 an appeal here if there's a violation of law. I never  
8 heard of a violation of law consisting of a judge refusing  
9 to depart.

10 And then assuming that there is some violation  
11 of law in his refusal to depart, which I thought was  
12 discretionary, how could he possibly depart? And this is  
13 important to you. Because I don't see at the moment how  
14 it would ever be a justification to depart, that a  
15 defendant has entered into this program. I mean, I can't  
16 find anything in the guidelines where it says "you can  
17 depart for a reason such as," and then fill in the content  
18 of the program to get a two-level departure.

19 So, how -- how do we get to your issue and what  
20 do I do about those two things which seem tremendous  
21 blocks?

22 MR. OLSON: The Ninth Circuit -- let me answer  
23 the jurisdictional point first. The Ninth Circuit  
24 perceived that it had jurisdiction under 18 U.S.C.  
25 3742(a)(1).



1 QUESTION: That's violation of law.

2 MR. OLSON: A -- that the sentence was imposed  
3 or the --

4 QUESTION: Yes, in violation of law. So, I  
5 would ask them. I'd say, what law?

6 MR. OLSON: And -- and that the Ninth Circuit  
7 perceived that the district court felt that it was barred  
8 by law from departing --

9 QUESTION: There isn't much I can find in this  
10 record that says that.

11 MR. OLSON: And -- and that the Ninth Circuit  
12 felt that because this was a constitutional right that the  
13 defendant was -- had that was being withheld from the  
14 defendant because of the -- of the circumstances of this  
15 case, that the -- the district court erroneously presumed  
16 that it was prevented from going in a -- in a direction  
17 that the Ninth Circuit felt that it could go.

18 And I think that then ties in with your second  
19 -- your second question with respect to the sentencing  
20 guidelines and section 5K2. The -- the court felt -- the  
21 Ninth Circuit felt -- and it's not very clear, but -- and  
22 -- and the Government is not objecting to the -- the way  
23 the Ninth Circuit exercised jurisdiction at this point and  
24 is not opposing the court's decision with respect to  
25 jurisdiction at this point.

1           The Ninth Circuit felt that under section 5K2 of  
2 the sentencing guidelines, this would be a -- mitigate --  
3 the -- the entry into the so-called fast track program was  
4 a mitigating circumstance of a kind or a degree not  
5 adequately taken into account by the guidelines in  
6 formulating the guidelines. It should result in a  
7 sentence different --

8           QUESTION: Those are supposed to be individual  
9 things. I mean, in other words --

10          MR. OLSON: Well, but -- yes.

11          QUESTION: -- I -- I see -- normally you could  
12 say, okay, the Government doesn't oppose it. We'll get to  
13 the main issue. But these look like tremendous  
14 jurisdictional blocks to me.

15          MR. OLSON: It -- it -- I think the answer to  
16 that latter point with respect to the individual  
17 consideration is covered by the fact that this particular  
18 program, under the circumstances of this district, are --  
19 they may be -- it may be frequently occurring, but it's  
20 individualistic in the sense that entering into this  
21 program alleviates a substantial amount of work and -- and  
22 provides a substantial benefit to the prosecutor in that  
23 district without which the prosecutor may not be able to  
24 enforce the law on all of the responsibilities of the law.

25                 This is one of the most busy districts of the

1 United States because of the tremendous number of  
2 narcotics crimes coming in across the border, multiplied  
3 in a sense by the number of immigration violations that  
4 take place. So that this was an individualized  
5 circumstance in that district.

6 Now, one could quibble about the appropriateness  
7 of that, but that's how the Ninth Circuit perceived it.  
8 It perceived that it had jurisdiction on that basis, and  
9 we're not objecting to it.

10 It seems clear that not only, therefore, that  
11 not -- that this right is not required by or implicit  
12 within Brady, but that the language of the Court's  
13 decisions interpreting Brady make it clear that Brady is  
14 not supposed to go that far, that it only has to do with  
15 the rights at -- at trial.

16 Furthermore, the solution that the Ninth Circuit  
17 proposed with respect to this is both overly broad and  
18 underly inclusive. If the Court was concerned, as it said  
19 it was and as the respondent contends it should be, with  
20 the potential of innocent persons pleading guilty, the  
21 test itself, which is set out in the court's -- the -- the  
22 Ninth Circuit's opinion on page -- I think it's 15a of the  
23 appendix to the petition for certiorari. About midway  
24 through the page, the court says, the evidence is material  
25 under the test announced in this case if there is a

1 reasonable probability that but for the failure to  
2 disclose the Brady material, the defendant would have  
3 refused to plead and would have gone to trial.

4 In other words, the test is not couched in terms  
5 of the potential innocence of the defendant or the risk  
6 that a defendant was -- was innocent. It's couched in  
7 terms of the tactical decision a defendant might make with  
8 respect to whether or not to go trial.

9 QUESTION: He should know what the house odds  
10 are before he -- before he rolls the dice by pleading  
11 guilty.

12 MR. OLSON: Precisely. In fact --

13 QUESTION: Which is sort of a different concept  
14 from -- from what Brady was about.

15 MR. OLSON: Exactly, Justice Scalia. In fact,  
16 this Court has frequently said that -- that there are lots  
17 of risks involved in the -- in the defense of a case, a  
18 criminal case, and -- and there are risks and benefits and  
19 burdens and evaluations that must be taken into  
20 consideration.

21 QUESTION: What is the Government's obligation  
22 with respect to advising the defendant or the court that  
23 the elements of an offense have -- have been committed? I  
24 -- in all these hypotheticals, the cocaine supposedly --  
25 there was supposed to be cocaine. It's really talcum

1 powder or something, and the Government knows that. What  
2 -- is this all taken care by rule 11 or --

3 MR. OLSON: Well, I think it's taken care of in  
4 several ways. If the -- the Constitution gives the  
5 defendant a right to trial or a right to confront  
6 witnesses, a right to counsel, reasonably competent,  
7 informed counsel. Rule 11 of the Federal Rules of  
8 Criminal Procedure require a relatively exhaustive  
9 procedure where the court makes sure that the guilty plea  
10 is voluntary and intelligent and that the elements of the  
11 crime, of course, are involved in whether or not --

12 QUESTION: Well, does the Government have to  
13 have a good faith belief that an offense has been  
14 committed? Is there -- is there some standard that binds  
15 the prosecution?

16 MR. OLSON: The standard -- the standards for  
17 prosecutors in the United States -- for the United States  
18 are set forth in the -- the U.S. Attorneys Manual. It  
19 requires prosecutors not to bring a case unless they  
20 believe in good faith that there is a reasonable basis for  
21 the case that's being brought, in fact a reasonable basis  
22 for believing that there could be a conviction based upon  
23 evidence beyond a reasonable doubt. That's not a  
24 constitutional standard, Justice Kennedy.

25 The constitutional standard is set forth in the

1 -- this Court's decisions with respect to the right to  
2 counsel, the right to trial, the right to intelligent  
3 information with respect to that.

4 Rule 11, which is a -- which is a joint product  
5 of the courts and the -- and the legislature, sets out  
6 elaborate procedures pursuant to which a Federal judge  
7 will inquire with respect to the basis for the plea,  
8 explain the rights that the defendant has violated, and  
9 specifically requires the Federal court to find that  
10 there's a factual basis for the plea.

11 Now, so that what I was saying was that is the  
12 remedy, the so-called remedy, that the Ninth Circuit has  
13 come up -- is -- is under-inclusive to the extent that if  
14 it's concerned about -- it's over-inclusive to the extent  
15 that it's concerned about innocent people pleading guilty  
16 because it doesn't go to the -- the factual innocent. It  
17 goes to the tactical decisions, the rolling of the dice,  
18 with respect to what are the chances of winning or losing  
19 in court.

20 QUESTION: Is this true, Mr. Solicitor General,  
21 that the rolling of the dice concept can apply to an  
22 innocent defendant as well? Supposing the -- the  
23 defendant and his lawyer know there are three eyewitnesses  
24 who were going to identify him. They also know he wasn't  
25 there, but there was somebody there who looks a lot like

1 him. And so they've got a choice of either taking the  
2 chance of getting acquitted, in the face of that evidence  
3 and based on their own denial -- he doesn't have an alibi  
4 -- and if he gets convicted, he has a very long sentence.  
5 And he gets an offer of a plea bargain, a very short  
6 sentence. I don't suppose there's anything unethical  
7 about the lawyer trying to figure out what the odds are.

8 MR. OLSON: Well, no, there's nothing unethical  
9 about the lawyer trying to figure out what the odds are.  
10 In fact, rule 16 of the Federal Rules of Criminal  
11 Procedure give fairly elaborate rights of discovery to the  
12 defendant's counsel. And at that plea agreement, the  
13 judge will inquire with respect to whether there's a  
14 factual basis for the plea agreement.

15 In fact, the judge in this case specifically  
16 addressed that question to the defendant, asked the  
17 defendant is it, indeed, true -- asked the defendant and  
18 then the counsel interceded and said, yes, she was  
19 bringing in her car 60 -- 60 pounds of marijuana. And  
20 then the judge turned to the defendant and said, is that  
21 true? And the defendant said, yes, I knew that it was --

22 QUESTION: What is the lawyer -- what kind of  
23 advice is the lawyer to give? Hypothetically we have an  
24 innocent client who has a very severe risk of being  
25 convicted, and the lawyer would tell him there's going to

1 be a plea colloquy here, and if you don't acknowledge  
2 this, the plea bargain will go down the drain. Now, I  
3 guess he shouldn't tell him what -- I don't know exactly  
4 what the lawyer is supposed to do there.

5 MR. OLSON: Well, I don't -- I'm not sure  
6 either. It would all depend upon the circumstance. There  
7 is -- there is a possibility that this Court's recognized  
8 in the Alford decision a possibility of making a plea  
9 which is -- which is not incompatible with a defendant's  
10 assertion of innocence. But I think that in most cases  
11 the defendant is the one who will know more than anyone,  
12 the prosecutor or anyone else, whether the defendant is  
13 guilty.

14 QUESTION: Right, but I'm assuming a case in  
15 which the defendant knows he's not guilty, and  
16 nevertheless, there's a risk that, because the odds are so  
17 heavy if you get convicted, you go away for 20 years. If  
18 you have a 16-month plea bargain, you may want to not take  
19 the chance.

20 MR. OLSON: Well, I understand that, Justice  
21 Stevens. That may happen in a particular case. This  
22 Court said in Bagley that Brady's primary purpose is not  
23 to -- Brady's purpose is not to displace the adversary  
24 system as the primary means by which truth is -- as the  
25 primary means by which truth is uncovered. And I think



1 that the answer to your question is that this system, no  
2 system is perfect or ever will be perfect, but we do have  
3 a panoply of constitutional rights. We insist that the  
4 defendant be adequately counseled. We insist that the  
5 judge through rule -- through rule 16 --

6 QUESTION: So that in effect you're saying there  
7 may be a hypothetical situation out there, but we've got  
8 millions of cases. Also, we've got to balance the two,  
9 one against the other.

10 MR. OLSON: Absolutely. And I must -- I must  
11 say that with respect to -- we're not talking about that  
12 case here. We're talking about a blanket rule which would  
13 apply in 57 -- you know, 57,000-some guilty pleas in the  
14 Federal system every year.

15 QUESTION: Well, the McMann and Brady cases too  
16 said that a defendant may have to make some hard choices.

17 MR. OLSON: The Court said that explicitly.

18 QUESTION: Well, if we're talking about  
19 balancing and basic fairness, I guess their argument would  
20 be with 57,000 cases going -- that's 85 percent or 90  
21 percent of all people plead guilty. Most of those are  
22 drug crimes. When the prosecutor sits there with a drug  
23 crime, he says, you plead guilty to a telephone count,  
24 it's 8 months, or I bring you to a mandatory minimum  
25 charge in trial and it's a minimum of 5 years. And under

1 those circumstances, the person is quite tempted to plead  
2 guilty irrespective of the facts. And therefore, it  
3 balances. As you were saying, it balances the system and  
4 it makes it somewhat more fair in that mine run situation  
5 to understand what are the chances of being convicted if I  
6 do go to trial.

7 MR. OLSON: Well --

8 QUESTION: That would be the argument, I think,  
9 the other way in terms of fundamental fairness.

10 MR. OLSON: And I would answer that in two ways.  
11 In the first place, I think the Chief Justice answered it  
12 by referring to the Brady v. United States case.

13 QUESTION: So, you'd have to say that you're  
14 right, that that isn't what Brady said. But in taking --  
15 taking into account the reality of the criminal justice  
16 system, where 85 percent of the people plead guilty, and  
17 the prosecutor is armed with this tremendous don't plead  
18 guilty or else sentencing system, that this creates a kind  
19 of basic balance that -- in terms of fairness -- I'm  
20 trying to get the argument out.

21 MR. OLSON: I understand, Justice Breyer, I  
22 understand what you're saying. And there's a certain --  
23 there's a certain logic to it. But if that is -- if that  
24 was the case, then the Ninth Circuit's rule is under-  
25 inclusive because if the defendant really wants to know

1 what the best chances are, rather than the exculpatory  
2 material or the impeachment material, what he is going to  
3 want to know is the inculpatory material. And you made  
4 the point about the other -- other prosecutions that are  
5 being held over the defendant's head. He's going to want  
6 to know what -- well, what evidence do they have on the  
7 greater offense that they're about to charge me with,  
8 because I'm going to take my chances now and plead to this  
9 lesser included offense.

10 So, if the Ninth Circuit wanted to accomplish  
11 what you're talking about as the thrust of your question,  
12 it would have gone -- and I suspect that it will --

13 QUESTION: Well, you -- you wouldn't want it to  
14 go further, would -- would you, General Olson? You -- you  
15 would not want us to adopt a rule that encourages -- that  
16 enables innocent people to more intelligently plead guilty  
17 when they're innocent?

18 MR. OLSON: No. I'm not --

19 QUESTION: I mean, it seems to me we should do  
20 everything to discourage people who are innocent from  
21 pleading guilty.

22 MR. OLSON: I -- I --

23 QUESTION: What kind of a legal system is this  
24 where we're going to design our rules to encourage guilty  
25 people to plead -- or innocent people to plead guilty?

1 It's crazy.

2 MR. OLSON: This Court -- this Court has said  
3 that it's perfectly appropriate in the adversarial system  
4 for the prosecutor to find legitimate ways to encourage  
5 guilty defendants to plead guilty.

6 Now, we -- you're absolutely right. It's --

7 QUESTION: We're worrying here about innocent  
8 people, and we're trying to encourage them to plead guilty  
9 so that -- if they know everything about what the  
10 Government has. I mean, there's something wrong with a  
11 legal system that -- that --

12 MR. OLSON: But there's --

13 QUESTION: -- is even contemplating such --

14 MR. OLSON: -- Justice Scalia --

15 QUESTION: -- such action, it seems to me.

16 MR. OLSON: -- nothing in this case that  
17 involves that issue at all. We have a guilty defendant  
18 who has acknowledged under oath -- I think it was under  
19 oath. Usually it is, in the Federal court systems -- that  
20 this person was guilty. So, you are faced with the  
21 possibility of drafting a rule -- or the Ninth Circuit  
22 drafted a rule for a hypothetical situation not involving  
23 the case before it, which was over-inclusive because it  
24 includes the vast number of people that are indeed guilty,  
25 and under-inclusive because it doesn't provide a remedy --

1 the best remedy which we would definitely not encourage,  
2 but I would suggest would be the next step, possibly from  
3 the same circuit, with respect to giving additional  
4 information.

5 And it would be inconsistent not only with that,  
6 but it would be inconsistent with what this Court has said  
7 over and over again with respect to the value of competent  
8 counsel, the fact that certain chances have to be taken,  
9 that a defendant is not entitled to set aside a plea  
10 because he may have misconstrued the weight or balance of  
11 the prosecution's case, or there may have been mistakes of  
12 law. In one -- in -- in Brady v. the United States, in  
13 fact, it was a misconstruction of whether or not the  
14 defendant would -- could be -- could be put to death if  
15 the defendant went to trial. So, this Court has  
16 recognized that there are those balances in the system.

17 But what the -- what we urge upon the Court is  
18 that there are so many protections, including the  
19 discovery right, the fairly exhaustive --

20 QUESTION: The discovery right would cover --  
21 you did say there were some things that a defendant  
22 perhaps would not know, and one of them you mentioned in  
23 your -- in your brief is if you rob a bank and you don't  
24 know whether it's FDIC insured. That kind of information.  
25 How would that -- how would that come out pretrial?

1                   MR. OLSON: That would -- that would come out  
2 through rule 16 of the Federal Rules of Criminal  
3 Procedure, which is set out in the appendix, I think 3a to  
4 5a, of our brief on the merits. The defendant is given  
5 pretrial considerable discovery rights to find out those  
6 sorts of things, and if the defendant is not sure and,  
7 after consultation with his counsel, wishes to go to  
8 trial, there's -- the Brady rights do kick in at an  
9 appropriate time to allow the defendant to prepare for  
10 trial.

11                   What I'm saying is that -- that the combination  
12 of the constitutional rights to trial and -- and  
13 confrontation, the constitutional rights to counsel, the  
14 -- the statutory rights to discovery, the statutory  
15 obligations on a judge to make sure there's a factual  
16 basis for the guilty plea, the obligations -- and we have  
17 to assume under -- as this Court suggested in the  
18 Mezzanatto case, a -- a good faith behavior by our public  
19 officials that a prosecutor is not going to withhold  
20 evidence in -- on -- where it knows that the -- this is an  
21 innocent defendant. Those are ample assurances,  
22 especially in the context, as this Court has said over and  
23 over again, that the best person to know whether there's a  
24 factual basis for a plea of guilty is the defendant  
25 himself or herself.

1           I will say one more thing that is -- that seems  
2 to me important with respect to the -- this -- the posture  
3 in which this case comes. If this Court were to determine  
4 that there is a constitutional right -- and we think that  
5 neither this Court's decisions nor the Constitution would  
6 lead the Court to that conclusion -- the constitutional  
7 right could be waived. The Ninth Circuit said that a  
8 defendant cannot, even if the defendant wanted to, plead  
9 guilty. Knowing that the defendant was guilty, the  
10 defendant could not waive the right.

11           Now, that has several implications. It -- it  
12 creates problems for the criminal justice system. The  
13 Brady -- the Brady right that the Ninth Circuit would  
14 engraft on the system here would force prosecutors to  
15 develop cases and use resources at the defendant's  
16 initiative, on the defendant's time table. It creates --  
17 turns Brady -- the right, from a fair trial right into a  
18 fair trial preparation right.

19           With respect to certain types of cases, it would  
20 compromise conspiracy cases, racketeering cases, organized  
21 crime drug cases, white collar cases where there may be  
22 substantial warehouses full of documents. In other words,  
23 many prosecutors won't be preparing their case for  
24 determining what witnesses they're going to use until  
25 they're ready to go to trial. Once they -- if they had to

1 disclose this information on the defendant's time table,  
2 which the defendant -- if this rule were adopted by this  
3 Court, the first thing a defendant would do is offer --  
4 say, "I'm thinking about pleading guilty. Give me  
5 everything in your files."

6 Now, a prosecutor in complicated cases is not going  
7 to want to do that and -- and will refuse to engage in  
8 that process or will -- once -- once it does so, there's  
9 no more incentive for the -- for the prosecutor to enter  
10 into the plea bargaining process. So, it could be  
11 damaging to the benefits of the defendants over and over  
12 again that's received the benefits of the plea bargaining  
13 system, which this Court has sanctioned and encouraged.

14 QUESTION: I don't want to cut into your -- your  
15 reserve time. Just one question. If you prevail in this  
16 case, what happens? Does she get a longer supervised time  
17 of relief? Or is there anything that's still live in this  
18 case as to this defendant?

19 MR. OLSON: The --she -- she --

20 QUESTION: Or has she served the full time  
21 anyway?

22 MR. OLSON: -- she -- I don't -- I don't know  
23 whether she's served the entire -- the sentence that was  
24 given to her was 18 months in incarceration and a 3-month  
25 -- a 3-year --



1 QUESTION: 3 years.

2 MR. OLSON: -- probationary period. I think  
3 that that would continue to go on. That was at the very  
4 low range, low end of the guideline sentence.

5 QUESTION: So there is still some -- something  
6 at stake here?

7 MR. OLSON: Yes, I believe so, Justice Kennedy,  
8 but I'm not sure, 100 percent sure, factually I know the  
9 answer to that.

10 If I may reserve the balance of my time.

11 QUESTION: Very well, General Olson.

12 Mr. Hubachek, we'll hear from you.

13 ORAL ARGUMENT OF STEVEN F. HUBACHEK

14 ON BEHALF OF THE RESPONDENT

15 MR. HUBACHEK: Mr. Chief Justice, and may it  
16 please the Court:

17 The Due Process Clause requires the disclosure  
18 of materials --

19 QUESTION: Before you get going, is the case  
20 moot? Is there something left on the 3-year probation  
21 period?

22 MR. HUBACHEK: Yes, there is, Justice O'Connor.

23 QUESTION: Thank you.

24 MR. HUBACHEK: Now, the -- the disclosure of  
25 material exculpatory information is essential to ensure

1 the accuracy of criminal convictions. And Ake indicates  
2 there's a societal and individual interest in the accuracy  
3 of such convictions that's paramount.

4 The system that we have now, as has been  
5 discussed already this morning funnels cases into plea  
6 negotiations, and the -- the Court has said that's not a  
7 bad thing, but it -- still, it funnels everybody, the  
8 guilty and the innocent, into the same sort of result.  
9 Innocent people are provided the same substantial and  
10 legitimate incentives to plead guilty as guilty people  
11 are.

12 And if I could return to Justice --

13 QUESTION: No. I -- I object to that. I -- I  
14 don't think our system ever encourages or, indeed, even  
15 permits an innocent person to plead guilty. Our rules  
16 require the judge to -- to interrogate the person pleading  
17 guilty to make sure that, indeed, the person is guilty.  
18 There is nothing in our system that encourages or even  
19 allows an innocent person to -- to plead guilty. And I  
20 would be horrified if -- if there were something like  
21 that.

22 MR. HUBACHEK: Well, Justice Scalia, the -- the  
23 system does not -- first of all, I guess the first  
24 protection would be a rule 11 type factual basis. That's  
25 not required in every case. In fact, the Fifth Circuit

1 cases that the Solicitor General relies upon, both of  
2 those were nolo or Alford type pleas. So, there was no  
3 factual basis provided at all in those cases. Individuals  
4 who don't know whether they're innocent or guilty -- they  
5 don't have to provide a factual basis that's -- that's  
6 incorrect or false.

7 QUESTION: How many individuals don't know  
8 whether they're innocent or guilty?

9 MR. HUBACHEK: Your Honor, there are some.  
10 I've --

11 QUESTION: I'm sure there may be rare cases, but  
12 it -- it is rare. Is it not?

13 MR. HUBACHEK: I'm sure that it's not  
14 tremendously common, but the important thing is -- is that  
15 individuals who are innocent do receive the same  
16 incentives to plead guilty. And I've cited some cases  
17 from various State courts at pages 10 to 11 of the brief  
18 where individuals pled guilty where substantial material  
19 exculpatory evidence existed, several cases like Justice  
20 Stevens' hypothetical involving identification testimony  
21 where an individual was charged with an offense and was  
22 told that there had been an identification made by what  
23 appeared to be an otherwise unimpeachable witness --

24 QUESTION: So -- so that's what your case comes  
25 down to? You want us to facilitate the pleading of guilty

1 by innocent people. You -- you want us to set up a system  
2 that will make -- will make that a more intelligent  
3 decision so that we can put in jail a lot of people who  
4 plead guilty even though they're innocent because it's a  
5 good deal for them.

6 MR. HUBACHEK: No, Your Honor, not -- not at  
7 all. I --

8 QUESTION: I thought that's what you're saying.  
9 I don't know what other -- for the guilty person, you're  
10 not worried about it. You're -- you're asserting the  
11 rights of the innocent.

12 MR. HUBACHEK: Right. It's the innocent person  
13 who needs to receive this --

14 QUESTION: Who needs to be able to plead guilty  
15 so he'll -- he'll serve a sentence that he doesn't  
16 deserve.

17 MR. HUBACHEK: Well, Your Honor, the fact that  
18 that happens exists already. The rule that I'm asking for  
19 is to provide material exculpatory information to  
20 individuals who are not guilty which will, when they are  
21 able to --

22 QUESTION: But your client is guilty, and I  
23 don't understand why what we're talking about is some  
24 hypothetical. You have to establish your client's right  
25 and the argument is, if the case is going to go to trial,

1 you're entitled, before the trial starts, to get this  
2 stuff, but you're not entitled to get it in the beginning  
3 of the case. And you are representing a guilty client and  
4 asserting that right on behalf of your guilty client.

5 MR. HUBACHEK: Well, Justice Ginsburg, the --  
6 the posture of the case, as has been discussed, is that  
7 there -- this is a sentencing issue where there's a  
8 request for a departure based upon the -- this fast track  
9 program. Ms. Ruiz didn't participate in the fast track  
10 program because she objected to the term of the plea  
11 agreement which required her to surrender her rights under  
12 the -- the Brady decision.

13 QUESTION: But she -- she pled guilty  
14 nonetheless.

15 QUESTION: She said she's guilty.

16 MR. HUBACHEK: Yes, she did.

17 QUESTION: And she didn't enter an Alford plea.

18 MR. HUBACHEK: No, Justice Souter, she did not.  
19 But the -- the way that the case was presented to the  
20 Ninth Circuit was that she had a constitutional right to  
21 this information, if it existed. I mean, there are  
22 situations where the -- the marijuana, for instance, in  
23 this case is concealed. It's unlikely that an individual  
24 who's merely a courier would ever have actual access to  
25 it. There is a recent spate of cases in Dallas where the

1 drugs that were seized turned out not to be drugs.

2 QUESTION: That's all true, but this is --  
3 you're asking for a really major change in the system. I  
4 mean, what the Government says -- and maybe it would be a  
5 better system, but the Government says, once we go down  
6 this path, here's what's going to happen. And they sound  
7 right to me.

8 The prosecutors, who are very busy -- very busy  
9 -- and have a little time with the witnesses and they go  
10 in and start talking about a plea, will now not be able to  
11 do that. They'll have to look into their witnesses, get  
12 all the evidence together, get the impeachment stuff, give  
13 it to the defendant, and 80 percent of them or maybe only  
14 30 percent will say, the hell with this. We'll go to  
15 trial. I'm not going to do it. We'll go to trial.

16 And under the present system, particularly in  
17 drug offenses, what that means for many, many, many  
18 people, guilty and innocent -- let's say guilty -- they're  
19 going to go away for very long times. And therefore,  
20 we're transforming this system into something like a  
21 European system where you can't take guilty pleas, and  
22 it'd be somewhere in the middle. That's a major change.  
23 And, anyway, the Constitution doesn't requirement --  
24 require it and it would work out the worse, they say, for  
25 a lot of defendants.

1                   MR. HUBACHEK: Well, first of all, Justice  
2 Breyer, the -- this system has been in place in the  
3 Southern District of California, which has this enormous  
4 caseload and all these drug cases, for the past year. The  
5 term --

6                   QUESTION: Have they been giving all the  
7 evidence, the impeachment evidence and so forth?

8                   MR. HUBACHEK: Right. The term that -- that Ms.  
9 Ruiz objected to has been removed from the plea agreement.  
10 It's been going on for a year. The pleas are proceeding  
11 apace.

12                  QUESTION: The same way?

13                  MR. HUBACHEK: The same way, Your Honor. The --

14                  QUESTION: But let's -- let's go back perhaps to  
15 Justice Ginsburg's question, that you say you're here on  
16 behalf of innocent people who want to plead guilty. But  
17 your own client admitted that she was -- had 50 or 60  
18 pounds of marijuana. Surely, you've got to argue for a  
19 rule that favors something like that who is not an  
20 innocent person.

21                  MR. HUBACHEK: Well, the rule that I'm proposing  
22 would, indeed, benefit both non-innocent and innocent  
23 individuals. But that's the case with every  
24 constitutional protection.

25                  QUESTION: Well, wouldn't it be better to just

1 say we don't accept guilty pleas from innocent people?  
2 That's our policy.

3 MR. HUBACHEK: Well, the -- I don't think that  
4 any judge or any prosecutor wants to accept guilty pleas  
5 from innocent people.

6 QUESTION: And indeed may not do so. That's the  
7 rule. You -- you won't accept a guilty plea from someone  
8 who's innocent.

9 MR. HUBACHEK: Well, the protections that are in  
10 place don't fully account for innocence. For -- for  
11 example, even in a rule 11 decision -- in a rule 11 plea,  
12 if you ask someone, did you sell the drugs or did you, you  
13 know, shoot the person, that doesn't say anything about  
14 whether or not there's entrapment. It doesn't say  
15 anything at all about whether or not there's self-defense.  
16 If a defendant pleads guilty in ignorance of that kind of  
17 information, then in fact an innocent person could plead  
18 guilty. In Alford pleas or nolo pleas, there's no factual  
19 basis provided at all. And again --

20 QUESTION: Wait a minute. I don't understand.  
21 The person doesn't understand that there's a -- this  
22 person doesn't have a lawyer who tells him, you know, if  
23 you shot the person in self-defense, of course, you're not  
24 guilty. Is -- is that the hypothetical you're positing,  
25 somebody who has such poor legal advice and he doesn't



1 know there's a right of self-defense?

2 MR. HUBACHEK: The -- the concern here, Justice  
3 Scalia, is not evidence that the lawyer has access to and  
4 simply misadvises the client. I understand that you have  
5 to take the risk in many situations. What I'm talking  
6 about is evidence that would support such a defense, an  
7 entrapment defense, or a self-defense defense that's not  
8 available to counsel but is in the possession of -- of the  
9 prosecution.

10 QUESTION: Well, it would certainly be in  
11 possession of the defendant. I mean, it -- it's  
12 impossible for him not to know whether he was acting in  
13 self-defense. The -- the only possible reason for -- for  
14 giving him, this innocent person, this information is to  
15 enable him to make an intelligent judgment to plead guilty  
16 even though he's innocent. And I don't think we're -- I  
17 don't think we're supposed to encourage that.

18 I mean, we would have contradictory policies.  
19 Other provisions of our laws make it very clear that we  
20 are not to accept guilty pleas from innocent people, and  
21 you want to adopt a system that will enable innocent  
22 people more intelligently to plead guilty.

23 MR. HUBACHEK: Well, perhaps -- what I'm saying  
24 is -- is that if information that supports the self-  
25 defense theory that is not in the possession of the

1 defense but is in the possession of the prosecution, if  
2 that evidence is turned over, that will make it more  
3 likely that the innocent person will go to trial --

4 QUESTION: Okay. Let's --

5 QUESTION: Is there -- is there any precedent  
6 outside the Ninth Circuit that says Brady is an immediate  
7 turnover right and not a preparation for trial right?

8 MR. HUBACHEK: Yes, there is. The Second  
9 Circuit has adopted this rule since 1988, and again, while  
10 the Solicitor General has come forward and indicated there  
11 are numerous potential down sides to this type of  
12 constitutional rule, the bottom line is -- is it --

13 QUESTION: The Second Circuit has for impeaching  
14 material as well?

15 MR. HUBACHEK: Yes, Your Honor.

16 QUESTION: Let me go back to a variant of  
17 Justice Scalia's question. It seems to me that your  
18 strongest argument is the argument that does focus on the  
19 -- the supposedly innocent defendant. And -- and the  
20 argument that I think is strongest with respect to that  
21 category is the argument that those who enter Alford pleas  
22 obviously are not doing so because they want to plead  
23 guilty, despite their protest of innocence, they're doing  
24 it because they think they face such terrible odds that,  
25 in fact, it's better for them to collapse at the beginning

1 and get it over with. And if these people are presented  
2 with exculpatory, including impeachment evidence, they are  
3 less likely to do just what Justice Scalia says we, after  
4 all, as a system don't want them to do.

5 My question is, do you have any indication that  
6 there is such a rash of unintelligent Alford pleas going  
7 on that we should modify the entire system to respond to  
8 this risk of Alford pleas that, in fact, would not be  
9 entered if the disclosure that you ask for were given?

10 MR. HUBACHEK: I don't have an -- an empirical  
11 study that shows how many such guilty pleas are entered.  
12 I've cited on pages 10 to 11 of the respondent's brief a  
13 number of cases in which there are potentially innocent  
14 people who have pled guilty, individuals who didn't know,  
15 for instance, that a witness saw the tire blow out on the  
16 car before the car crossed over the median, indicating  
17 that that person -- that the tire blowout, not the  
18 person's driving was responsible for the accident.

19 Another case, the Gibson case, where the  
20 prosecutor was actually told by the main identification  
21 witness that she was changing her story, and that wasn't  
22 turned over to the defense.

23 In the Lee case, a situation where the  
24 individual was charged with an offense and told that there  
25 was an identification, and it turns out that the -- the

1 witness misidentified him and that then the -- the witness  
2 was later shown, before a preliminary hearing, a picture  
3 of the defendant. So, there are cases out there in which  
4 this risk exists.

5           And if I could, I think that the -- one of the  
6 problems I guess in getting across the point is that I  
7 think the Solicitor General has misstated the import of  
8 the Ninth Circuit's test. The Ninth Circuit's test is not  
9 solely a -- you know, we want to give you all the cards so  
10 you can make a better strategic choice. The -- the test  
11 is derived from the Court's decision in Hill v. Lockhart,  
12 and Hill v. Lockhart's test says would the defendant have  
13 gone to trial if, in fact, he had received the proper  
14 advice. But then it says that --

15           QUESTION: Well, but even -- even if you're  
16 going to imply -- if -- if that's going to be your  
17 standard, it seems to me that the Solicitor General has  
18 got a point when he says if the Ninth Circuit test is  
19 going to be applied and applied with your gloss, it can't  
20 stop where it is now. It's going to have to go the  
21 further step and, in effect, require disclosure of all the  
22 inculpatory evidence. What's your response to that?

23           MR. HUBACHEK: My response to that is -- is that  
24 we're asking for a right based on Brady, and Brady doesn't  
25 provide for --

1                   QUESTION: Oh, but Brady -- I mean, Brady  
2 ultimately comes down to a judgment about materiality, and  
3 -- and materiality in the sense of -- of the kind of  
4 evidence that disturbs confidence in the verdict is a  
5 judgment that can only be made in the context of the  
6 entire evidence of the case. Brady judgments ultimately  
7 are made after the fact. And I don't see why that -- that  
8 very fact if we're -- if Brady is going, ultimately, to be  
9 our standard here, doesn't imply just what the Solicitor  
10 General argued.

11                   Before we can tell that there has been a  
12 violation of the rule that you propose, a court would have  
13 to know -- and indeed, before that, a defendant presumably  
14 would have to know -- the -- the entire evidentiary world  
15 of that case. And that means you've got to know a lot  
16 more than impeachment evidence or even exculpatory  
17 evidence. You've got to know what the inculpatory  
18 evidence is. So, it seems to me that what you're arguing  
19 for, even with your gloss and even starting with Brady, is  
20 essentially a global disclosure rule.

21                   MR. HUBACHEK: Well, I'd respectfully disagree.  
22 I think that the Hill v. Lockhart test, when specifically  
23 the Hill case was discussing when defense counsel fails to  
24 -- to find material exculpatory evidence, that the Ninth  
25 Circuit test would apply at that point, but that that test

1 will ultimately devolve into what effect this evidence  
2 would have at trial. So --

3 QUESTION: Hill -- Hill was an ineffective  
4 assistance of counsel case, wasn't it?

5 MR. HUBACHEK: That's correct, Your Honor.

6 QUESTION: So, we're not talking about any  
7 obligation of the prosecutor in Hill.

8 MR. HUBACHEK: No. I understand. But -- but  
9 Hill talked about ineffective assistance of counsel in the  
10 context of the failure to locate material exculpatory  
11 evidence, essentially the same facts that -- that could  
12 conceivably result in the withdrawal of the guilty plea.

13 QUESTION: Yes, but the relationship between a  
14 defendant's attorney and the prosecutor on the other side  
15 are by no means the same.

16 MR. HUBACHEK: I agree. And Brady certainly  
17 doesn't suggest that they're the same. Brady in trial  
18 requires that the prosecutor turn over the evidence but  
19 not to tell the defense lawyer how to use it. Well, we're  
20 positing that the same sort of obligation should exist at  
21 the pretrial stage. The prosecutor has to turn over the  
22 information but not go any further and provide advice as  
23 to how it should be used.

24 QUESTION: It's so odd that it comes to us in a  
25 case where there's no suggestion that we're dealing here

1 with an innocent defendant. We're -- we're told nothing  
2 about what's out there that would affect this case, are  
3 we?

4 MR. HUBACHEK: I -- I understand that this is a  
5 case where there's a guilty plea and we're not making an  
6 argument that she -- that Ms. Ruiz should be permitted to  
7 withdraw her guilty plea. However, if the Court adopts a  
8 rule that the Ninth Circuit and the Second Circuit's  
9 approach is incorrect, then defendants will not receive  
10 exculpatory evidence before they plead guilty and  
11 situations such as arose in the various --

12 QUESTION: Well, I -- I assume there is, as the  
13 Solicitor General suggests, some pretrial discovery right  
14 that a defense counsel has.

15 MR. HUBACHEK: Well, there's some pretrial  
16 discovery right, but it's not extensive and oftentimes it  
17 doesn't cover the types of information that has led to  
18 potential miscarriages of justice, as I set out in the  
19 brief.

20 QUESTION: And in fact, the -- the relevant  
21 discovery rule actually prohibits, as I read it, discovery  
22 of some material that you say this rule would cover.

23 MR. HUBACHEK: Right. For instance, the --  
24 the --

25 QUESTION: Statements of witnesses, for example.

1                   MR. HUBACHEK: Exactly. Justice Stevens,  
2 your --

3                   QUESTION: Which is -- which is a troubling  
4 concept because one of the things we're sort of trying to  
5 do here is balance the system-wide benefit of an -- a fast  
6 track program, on the one hand, with the occasional case  
7 where there's a risk of injustice that -- that concerns  
8 you. And it's that very balance that, it would seem to  
9 me, must have motivated the draftsman of rule 16 and the  
10 enactment of the Jencks Act that have developed some  
11 rather elaborate rules as to just what rights you do have  
12 before you plead guilty, and you're, in effect, saying  
13 well, we should go beyond those as a matter of judicial  
14 craftsmanship.

15                   MR. HUBACHEK: Well, the rule that we're  
16 proposing would not supplant all of those rules. This is  
17 a narrow range --

18                   QUESTION: It would add to them, and that's it.  
19 There's -- there's a limited right of discovery under the  
20 Federal rules, and you are urging an expansion of that  
21 right essentially.

22                   MR. HUBACHEK: It -- it would expand it. That's  
23 correct. However, it would expand it in only a narrow  
24 fashion because the information that we would -- that the  
25 defense would be entitled to would be limited by the



1 notion of materiality. Much of the debate in Agurs and  
2 Bagley was whether or not a more broad rule should be  
3 adopted, but ultimately the -- the Court settled on the  
4 materiality standard.

5 QUESTION: What we're doing is -- is you're  
6 asking us to open up the plea bargaining process and  
7 piecemeal to bring in a constitutional rule that would  
8 affect one aspect of it. Now, it's -- it's hard for me to  
9 accept that, at least without knowing more about what are  
10 the proposals around in the bar and elsewhere as to how  
11 that process should be regularized. Are there rules  
12 suggestions, rules change suggestions, statutory  
13 suggestions? Where does this constitutional rule coming  
14 in, in a sense, out of -- from somewhere suddenly affect  
15 this -- the whole process? Can I get a grasp of that by  
16 reading something?

17 MR. HUBACHEK: I -- I can't direct you, Justice  
18 Breyer, to any particular rule change proposals that are  
19 out there.

20 Our argument is based upon the notion that  
21 everyone agrees that the defendant is entitled to -- to  
22 material exculpatory evidence at trial under the Fifth  
23 Amendment and also that the -- that the Sixth Amendment  
24 requires defense counsel to find material exculpatory  
25 evidence to use at trial.

1           Now, the -- the Sixth Amendment also requires  
2     counsel to locate material exculpatory evidence before the  
3     decision to make a plea is -- is made. And the reason  
4     that is is so that it will be a plea that's worthy of  
5     confidence. And that's -- ultimately the standard under  
6     Brady is -- is essentially the same as under Strickland.  
7     We want a -- a proceeding that's reliable.

8           Under the current state of the law, if defense  
9     counsel fails to find a piece of material exculpatory  
10    evidence, that guilty plea is then, therefore, going to be  
11    unreliable. But if the same piece of -- of material  
12    exculpatory evidence is unavailable to counsel, but in the  
13    possession of the prosecution, that conviction is  
14    considered to be reliable even if the defendant doesn't  
15    get the benefit of it.

16           So, what we're proposing is -- is that there is  
17    a complementary action of -- of both the Fifth and Sixth  
18    Amendment rights pre plea and during the trial and that if  
19    there is going to be an overlap in the Fifth and Sixth  
20    Amendment rights it's got to be at -- where the interest  
21    that those rights protect is at its highest, and that is,  
22    protecting the innocent from pleading guilty.

23           QUESTION: Under the fast track program, does  
24    the defendant have to waive rule 16 rights?

25           MR. HUBACHEK: The -- under the fast track

1 program, the defendant can't file any motions at all, but  
2 the -- what happens is -- is that there is a pre-  
3 indictment offer that's made and the pre-indictment offer  
4 is usually accompanied by discovery in the form of -- in a  
5 case like Ms. Ruiz's, the reports of the initial  
6 inspectors and then the special agent who comes in and  
7 does the interrogation and does the -- sort of a summary  
8 of the other individuals' information.

9 QUESTION: So, those are available even under  
10 the fast track program.

11 MR. HUBACHEK: That's correct. That information  
12 is provided.

13 QUESTION: Suppose you're right on your  
14 constitutional argument. I'd just like you to spend 1  
15 minute addressing what I do not see how we get around the  
16 simple fact that you have a client and your client is  
17 saying that, as a matter of law, the judge had to depart.  
18 And not only am I unaware of any law that says the judge  
19 has to depart, but in this case, I can't even find a  
20 provision that would allow him to depart.

21 And -- and I -- they've said, oh, well, he was  
22 under a mistake of law. So, I've read the three sentences  
23 quoted for that proposition, and I certainly don't see any  
24 mistake of law there. He says, the court has read and  
25 considered the -- the documents, blah, blah, blah, and

1 I've decided this is -- the court feels that this is not a  
2 proper case for departure. So?

3 And in another part of the record, he says -- he  
4 says, if you didn't sign an agreement, you have to live  
5 with the consequence.

6 MR. HUBACHEK: I -- I agree, Justice Breyer,  
7 that there's no rule that you can say that a district  
8 court is compelled to depart in any case. The -- the  
9 district court judge, when asked to depart because Ms.  
10 Ruiz was being denied the fast track benefit because she  
11 refused to agree to what she thought was an  
12 unconstitutional provision -- the district court's only  
13 response was -- is that was acceptance and offer. The --  
14 and the interpretation of that is -- is the district  
15 thought it didn't have discretion to depart unless the  
16 Government was agreeing --

17 QUESTION: That's really not what he said. I  
18 mean, he just said you're not going to get advantage of  
19 this because you didn't sign it.

20 QUESTION: He said it's just not proper. I  
21 mean, I wish he'd give us language that -- that would  
22 indicate that he thought he couldn't depart, even if he  
23 wanted to. He just said it's not, in his view, a proper  
24 case, but that's -- you know, that's fully consistent with  
25 his discretion.

1                   MR. HUBACHEK: The -- the district court's  
2 comment related to whether or not -- he said to counsel  
3 that there was offer and acceptance and -- and that's it.  
4 And that --

5                   QUESTION: What's bothering me is this, that you  
6 could say, okay, let's just hold everything in abeyance,  
7 get to the issue. If we do that, why wouldn't this case  
8 stand for the proposition that courts of appeals have  
9 absolute authority to review every instance in which a  
10 trial judge refuses to depart? In which case there will  
11 be tens of thousands of such instances every year going  
12 right up to the court of appeals for review of the  
13 question whether he should have departed. Now, that's a  
14 major change in the law, I think. And how -- how could I  
15 avoid that change and yet get to the issue?

16                   MR. HUBACHEK: Well, the Solicitor General  
17 hasn't been framing the questions related solely to the  
18 discovery issues, the Brady issue and the waiver issue.  
19 So, I don't think that the Court would be ruling on the  
20 propriety of the -- of the Ninth Circuit's analysis --

21                   QUESTION: Your -- your answer is an easy one,  
22 Mr. Hubachek. Our -- our opinions are very clear that in  
23 cases where we say nothing about jurisdiction, there is no  
24 holding on jurisdiction.

25                   MR. HUBACHEK: That's -- that's what I was --

1 (Laughter.)

2 QUESTION: If we simply didn't -- if we -- if we  
3 simply didn't discuss the jurisdictional point, our -- our  
4 decision would stand for nothing. But it's not very  
5 responsible to do that where it's very clear where there's  
6 that there's no jurisdiction. That's -- that's the more  
7 serious obstacle.

8 MR. HUBACHEK: Well, perhaps cert was -- was  
9 improvidently granted. I mean, the -- Mr. Solicitor  
10 General has come up and said that the -- the Government is  
11 not challenging the -- the Ninth Circuit's ruling.

12 QUESTION: Did you argue in the Ninth Circuit  
13 that there was jurisdiction?

14 MR. HUBACHEK: Yes.

15 QUESTION: Then I take it you certainly don't  
16 take a different position here.

17 MR. HUBACHEK: No, certainly not, Mr. Chief  
18 Justice.

19 QUESTION: But our remedy would not be to  
20 dismiss the writ. Our remedy would be to vacate the  
21 judgment of the court of appeals if the court of appeals  
22 did not have jurisdiction.

23 QUESTION: You don't want that.

24 MR. HUBACHEK: No, I don't.

25 (Laughter.)

1           MR. HUBACHEK: With respect to the -- the --  
2 with respect to the Fifth and Sixth Amendment claim that  
3 we've made, the Second Circuit has also found a different  
4 theory under which the -- the Court could find a Brady  
5 violation, and they've indicated that the failure to turn  
6 over Brady information is essentially otherwise  
7 impermissible conduct under the Brady v. United States  
8 case. So, Mr. Chief Justice brought up Brady v. United  
9 States, and I think that the Ninth Circuit's analogy to  
10 Hill v. Lockhart and the Miller v. Angliker impermissible  
11 conduct approach has both addressed the concern that  
12 United States v. Brady would preclude.

13           QUESTION: But -- but, you know, to say we'll  
14 just call it impermissible conduct because we want to get  
15 it done isn't very satisfactory. I mean, you have to say  
16 why it's impermissible.

17           MR. HUBACHEK: Right. And our -- our point is  
18 -- is that it's impermissible because the Fifth and Sixth  
19 Amendments together protect the innocent from conviction.  
20 When the Fifth Amendment right to receive the information  
21 -- excuse me. When the Sixth Amendment right to have  
22 counsel find this information attaches, then the Fifth  
23 Amendment right to have the Government turn it over should  
24 also attach because the same source of unreliability would  
25 be present if, in fact, the defendant were to make the

1 decision to plead guilty without receiving material  
2 exculpatory information.

3 QUESTION: But in order to make that argument,  
4 as I understand it, you have to make an unreliability  
5 argument divorced from a materiality argument. Do you  
6 agree?

7 MR. HUBACHEK: No. No, I don't because there is  
8 a materiality requirement in Hill v. Lockhart.

9 QUESTION: How do we judge that materiality at  
10 -- I mean, in Hill and Lockhart, when -- when you're  
11 dealing with counsel, you can at least say, well, if -- if  
12 they had been aware -- regardless of how the case would  
13 have turned out, there's a way in which it makes sense to  
14 say that if they had been aware of this kind of evidence,  
15 they would have said we're going to trial. We're going to  
16 roll the dice.

17 When you're dealing with -- with essentially a  
18 -- a Brady rule, you're not dealing with a will they roll  
19 the dice or will they not kind of question; you're dealing  
20 ultimately with the question of what was its effect on the  
21 -- the soundness of the verdict, the soundness of a  
22 result. And the only way you can make that judgment is to  
23 know everything that would be in the case. In a sense  
24 that's easy in a Brady situation because you're looking  
25 back. Here you can't look back.



1           So, it seems to me that you've either got to  
2 come up with an entirely new materiality or prejudice  
3 standard, and the -- and the effectiveness of counsel  
4 cases don't seem to me quite on point there. Or you've  
5 got to dispense with a materiality standard entirely and  
6 say anything that would have had any tendency to exculpate  
7 or to impeach in a way favorable to the defendant, if  
8 denied, supports in effect a -- a claim for relief, which  
9 is a nonmateriality standard.

10           MR. HUBACHEK: Well, Justice Souter, on page 16  
11 of our brief, we have a block quote from Hill v. Lockhart,  
12 and I really think that the test that was discussed in  
13 Hill v. Lockhart covers the -- the concerns that Your  
14 Honor is mentioning today. And ultimately Hill v.  
15 Lockhart concludes by saying that in -- in the case of  
16 counsel failing to discover material exculpatory  
17 information, which is essentially the same type of problem  
18 that we're talking about here, it says that ultimately the  
19 assessment will depend in large part on a prediction  
20 whether the evidence likely would have changed the outcome  
21 of a trial.

22           Now, I certainly agree that it will be a more  
23 difficult assessment to make without there actually having  
24 been a trial, but we're asking that Your Honors adopt a  
25 rule in which you would be -- the courts would undertake

1 exactly the same analysis that Hill v. Lockhart already  
2 requires in the context of defense counsel failing to find  
3 a piece of exculpatory information. And -- so, we're not  
4 at all asking that this analysis --

5 QUESTION: But that is a different -- I mean, it  
6 necessarily is a different standard from the Brady  
7 standard of materiality which we have now. Is it not?

8 MR. HUBACHEK: Well, the Brady standard for  
9 materiality, as was explained in Kyles, derives from  
10 Strickland. Hill v. Lockhart also derives its materiality  
11 standard from Strickland. So, I think it's --

12 QUESTION: Well, let's go back to my question.  
13 They -- they may have a common ancestry, but in fact they  
14 are not identical tests because they are applied in  
15 circumstances that are by definition very different.

16 MR. HUBACHEK: Well, I -- I think that it's an  
17 easier application post trial, but it's still the same  
18 test that -- that's -- that we're being asked to apply in  
19 the plea situation because Hill v. Lockhart says, look, if  
20 counsel doesn't find the key piece of evidence and you  
21 plead guilty, then we're going to go back and look and  
22 see, well, what would have happened at a trial if you had  
23 that key piece of evidence. If there's a reasonable  
24 chance you would prevail at trial --

25 QUESTION: And in -- and in order to do that

1 intelligently, we've got to know what the trial would have  
2 included, won't we? And that either means, number one,  
3 that the disclosure has got to go to, in effect, the  
4 inculpatory evidence, or it means at the minimum, number  
5 two, that the State has an opportunity to come in and say,  
6 we'll tell you what the inculpatory evidence would have  
7 been. This is what we would have put in, and judged in  
8 this context, it's not material.

9           One way or the other, either -- either the  
10 necessary implication of your test or the -- the  
11 implication that the State would have a right to respond  
12 to it, it seems implies that in order to apply your rule  
13 before trial, a -- a court, reviewing one of your claims,  
14 would have to make a judgment about the -- the  
15 significance of the evidence in the context of -- of an  
16 entire trial, a whole evidentiary record that can be --  
17 that can -- can be anticipated.

18           MR. HUBACHEK: And that's the same approach that  
19 Hill v. Lockhart requires. But a prosecutor in making the  
20 determination --

21           QUESTION: Except in Hill it's easier because we  
22 know that trial decisions are -- are often made without  
23 knowing what the result would be. They are decisions to  
24 go ahead and have a shot at defending the case, and that's  
25 a different -- that's a different standard from Brady

1 materiality.

2 MR. HUBACHEK: Hill is a plea case.

3 QUESTION: Thank you, Mr. Hubachek.

4 General Olson, you have 4 minutes remaining.

5 REBUTTAL ARGUMENT OF THEODORE B. OLSON

6 ON BEHALF OF THE PETITIONER

7 MR. OLSON: Thank you, Mr. Chief Justice.

8 What the respondent is proposing and what the  
9 Ninth Circuit adopted is an unworkable and undesirable  
10 rule to solve a nonexistent problem. And it's illustrated  
11 by the facts of this case. The footnote or the -- the  
12 pages in the respondent's brief cite some cases in which  
13 theoretically it might be that some driver who crossed the  
14 line earlier might create a problem, but that is not this  
15 case. And there's no empirical evidence or any other  
16 evidence in the record that would show that there's a  
17 significant problem here. The --

18 QUESTION: Mr. Olson, would you address again  
19 the jurisdictional problem here? I mean, if -- if in fact  
20 the district court judge had discretion about what  
21 sentence to impose and could have -- and did exercise that  
22 discretion, do we have to be concerned about --

23 MR. OLSON: I think that is not an easy  
24 situation, but I think that the Ninth Circuit believed  
25 that however inartfully the district court expressed it or

1 incompletely the district court expressed it, that the --  
2 that the district court was saying it didn't feel that it  
3 had the capacity or the ability under the law to depart,  
4 that it didn't have the discretion to do so. That's what  
5 the Ninth Circuit decided. We argued otherwise to the  
6 Ninth Circuit --

7 QUESTION: I guess this is not a proper case  
8 could mean that, I suppose. I wouldn't put it that way,  
9 but it could --

10 MR. OLSON: It could mean that. That's how the  
11 Ninth Circuit -- Circuit perceived it.

12 QUESTION: I'd even attempt not to say anything  
13 about it, so long as I was not certain that there was no  
14 jurisdiction.

15 MR. OLSON: We -- we believe that we -- after  
16 looking at it carefully, we've decided that the Ninth  
17 Circuit probably was right under the circumstances,  
18 although you could argue it the other way, and that this  
19 -- this is an issue that is presented clearly with respect  
20 to the -- the legal standard that's been adopted to the --  
21 by the Ninth Circuit and which is in play today.

22 The -- the respondent says, well, pleas are  
23 proceeding apace in California notwithstanding -- or in  
24 the Ninth Circuit, notwithstanding the decision in this  
25 case. There is no evidence in the record to suggest that

1 this hasn't created a problem, and in fact, I'm informed  
2 that there are cases that have not been brought and cases  
3 that have been dismissed because of a concern about  
4 complying with the rule in this case, because once that's  
5 done, those cases are -- are potentially over with. But  
6 the fact is there's no evidence either way.

7 Justice Breyer, you raised some questions about  
8 whether we would be constitutionalizing a rule which would  
9 change Jencks and change the discovery rules. There --  
10 there -- on page 26 of the Government's brief, we talked  
11 about the fact that there have been efforts to change and  
12 accelerate the discovery requirements and that those have  
13 been soundly rejected for the very reasons we've been  
14 talking about here. And the Jencks standard is what it is  
15 because there's very much concern over the safety of  
16 witnesses when those statements are produced earlier in  
17 the case. And that's -- Congress has made that decision  
18 quite consciously that those statements don't have to be  
19 produced until the witness is actually called in trial for  
20 that reason.

21 Let me finish by saying that with respect to  
22 Hill v. Lockhart, that's a case involving a requirement  
23 that a defendant have, under the Sixth Amendment,  
24 competent counsel within the range of -- of competence  
25 expected for counsel in criminal cases. That's a Sixth

1 Amendment right to effective assistance of counsel. It is  
2 not a -- a constitutional right to effective assistance of  
3 the prosecution in deciding whether to plead guilty or  
4 not.

5 What we have in this case is a rule which is not  
6 required, which -- which would cause considerable  
7 problems. It would undermine the plea bargaining system,  
8 which is important to the administration of criminal  
9 justice in this country, and affect the finality of guilty  
10 pleas, which is an important consideration as well.

11 CHIEF JUSTICE REHNQUIST: Thank you, General  
12 Olson.

13 The case is submitted.

14 (Whereupon, at 12:02 p.m., the case in the  
15 above-entitled matter was submitted.)

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<b>A</b>		
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