IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 01-595

ANGELA RUIZ. :

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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.

C O N T E N T S

P R O C E E D I N G S

(11:01 a.m.)

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

General Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

is the impeaching material?

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

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

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

QUESTION: What -- what --

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

QUESTION: -- the petition.

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

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

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

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

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

QUESTION: I -- I don't --

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

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

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

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

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

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

QUESTION: Has this been used throughout the country --

MR. OLSON: No.

QUESTION: -- or just --

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

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

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

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

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

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

QUESTION: That's violation of law.

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

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

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

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

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

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

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

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

MR. OLSON: Well, but -- yes.

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

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

This is one of the most busy districts of the

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

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

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

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

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

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

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

MR. OLSON: Precisely. In fact --

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

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

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

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

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

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

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

The constitutional standard is set forth in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. OLSON: The Court said that explicitly.

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

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

MR. OLSON: Well --

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

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

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

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

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

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

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

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

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

MR. OLSON: I -- I --

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

It's crazy.

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

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

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

MR. OLSON: But there's --

QUESTION: -- is even contemplating such --

MR. OLSON: -- Justice Scalia` --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Or has she served the full time anyway?

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

QUESTION: 3 years.

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

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

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

If I may reserve the balance of my time.

QUESTION: Very well, General Olson.

Mr. Hubachek, we'll hear from you.

ORAL ARGUMENT OF STEVEN F. HUBACHEK

ON BEHALF OF THE RESPONDENT

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

The Due Process Clause requires the disclosure of materials --

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

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

QUESTION: Thank you.

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

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

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

And if I could return to Justice --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: But she -- she pled guilty nonetheless.

QUESTION: She said she's guilty.

MR. HUBACHEK: Yes, she did.

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

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

drugs that were seized turned out not to be drugs.

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

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

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

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

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

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

QUESTION: The same way?

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

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

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

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

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

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

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

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

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

know there's a right of self-defense?

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

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

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

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

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

QUESTION: Okay. Let's --

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

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

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

MR. HUBACHEK: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Statements of witnesses, for example.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HUBACHEK: The -- under the fast track

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

MR. HUBACHEK: Yes.

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

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

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

QUESTION: You don't want that.

MR. HUBACHEK: No, I don't.

(Laughter.)

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

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

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

decision to plead guilty without receiving material exculpatory information.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

materiality.

MR. HUBACHEK: Hill is a plea case.

QUESTION: Thank you, Mr. Hubachek.

General Olson, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Thank you, General Olson.

The case is submitted.

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