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IN THE SUPREME COURT OF THE UNITED STATES

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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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C O N T E N T S

ORAL ARGUMENT OF	PAGE
THEODORE B. OLSON, ESQ.	
On behalf of the Petitioner	3
STEVEN F. HUBACHEK, ESQ.	
On behalf of the Respondent	25
REBUTTAL ARGUMENT OF	
THEODORE B. OLSON, ESQ.	
On behalf of the Petitioner	52

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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.

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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A		
abeyance 45:6	agreement 4:23 5:3,4 6:3,14,23 8:5 15:12,14 29:11 31:9 44:4	armed 18:17
ability 53:3	agreements 8:2	arose 39:11
able 10:23 28:14,21 30:10	agrees 41:21	around 41:10 43:15
about 4:22 5:20 8:20 11:6,23 12:14 14:14,15 15:7,9 17:11,12,18 19:4,7 19:11 20:7,9 24:4 28:10,23 30:10 32:13,15 33:6 37:2 38:6,9 39:2 41:9 45:23 49:18 51:14 52:20,22 53:13 54:3,7,11,14	Agurs 4:12 41:1	articulate 7:16
above-entitled 1:10 55:15	ahead 51:24	articulated 6:13 7:1
absolute 45:9	Ake 26:1	aside 21:9
absolutely 17:10 20:6	Alford 16:8 27:2 29:17 32:18 34:21 35:6,8	asked 15:16,17 44:9 50:18
accelerate 54:12	alibi 15:3	asking 28:18 30:3 36:24 41:6 49:24 50:4
accept 32:1,4,7 33:20 41:9	alleviates 10:21	aspect 41:8
acceptance 44:13 45:3	allow 22:9 43:20	aspects 4:22
access 29:24 33:3	allows 26:19	asserting 28:10 29:4
accident 35:18	already 4:24 7:9 26:5 28:18 50:1	assertion 16:10
accompanied 43:4	although 8:1 53:18	assessment 49:19,23
accomplish 19:10	Amendment 41:23,23 42:1,18,20 47:2,20,21,23 54:23 55:1	assistance 38:4,9 55:1,2
account 3:16 10:5 18:15 32:10	Amendments 47:19	assume 22:17 39:12
accuracy 26:1,2	amount 10:21	assuming 8:10 16:14
accused 3:21 4:8	ample 22:21	assurances 22:21
acknowledge 16:1	analogy 47:9	attach 47:24
acknowledged 20:18	analysis 45:20 50:1,4	attaches 47:22
acquitted 15:2	ancestry 50:13	attack 3:15
across 11:2 36:6	ANGELA 1:6	attempt 53:12
Act 40:10	Angliker 47:10	attorney 38:14
acting 33:12	announced 11:25	Attorneys 13:18
action 20:15 42:17	another 6:6 35:19 44:3	authority 45:9
actual 29:24	answer 5:21 8:22 10:15 17:1 18:10 25:9 45:21	available 33:8 43:9
actually 35:20 39:21 49:23 54:19	answered 18:11	avoid 45:15
add 40:18	anticipated 51:17	avoidance 4:7
additional 21:3	anyone 16:11,12	aware 48:12,14
address 52:18	anything 8:16 15:6 24:17 32:13,15 49:6 53:12	away 16:17 30:19
addressed 15:16 47:11	anyway 24:21 30:23	a.m 1:12 3:2
addressing 43:15	apace 31:11 53:23	
adequately 10:5 17:4	appeal 8:7	
administration 3:19 55:8	appeals 45:8,12 46:21,21	
admitted 31:17	APPEARANCES 1:13	
adopt 19:15 33:21 49:24	appeared 27:23	
adopted 24:2 34:9 41:3 52:9 53:20	appendix 5:7,9,13 11:23 22:3	
adopts 39:7	applicable 6:11	
advantage 44:18	application 50:17	
adversarial 20:3	applied 5:25 6:9 36:19,19 50:14	
adversary 4:17 16:23	apply 14:21 17:13 37:25 50:18 51:12	
advice 15:23 32:25 36:14 38:22	applying 5:24	
advising 12:22	approach 39:9 47:11 51:18	
affect 39:2 41:8,14 55:9	appropriate 20:3 22:9	
after 22:7 35:3 37:7 53:15	appropriateness 11:6	
again 21:7 22:23 24:12 32:19 34:9 52:18	approximately 3:16	
against 3:5 17:9	April 1:9	
agent 43:6	argue 31:18 46:12 53:18	
agree 38:16 44:6,11 48:6 49:22	argued 37:10 53:5	
agreeing 44:16	arguing 37:18	
	argument 1:11 2:2,7 3:4,7 4:21 17:19 18:8,20 25:13 28:25 34:18,18,20,21 39:6 41:20 43:14 48:3,5,5 52:5	
		B
		B 1:14 2:3,8 3:7 52:5
		back 6:15 31:14 34:16 48:25,25 50:12 50:21
		bad 26:7
		Bagley 4:16 16:22 41:2
		balance 17:8 18:19 21:10 25:10 40:5 40:8
		balances 18:3,3 21:16
		balancing 17:19
		bank 21:23
		bar 41:10
		bargain 15:5 16:2,18
		bargaining 24:10,12 41:6 55:7
		bargains 3:18
		barred 9:7
		based 13:22 15:3 29:8 36:24 41:20
		basic 17:19 18:19
		basis 11:8 13:20,21 14:7,10 15:14 22:16,24 26:24 27:3,5 32:19
		before 1:11 12:10,10 20:23 25:19 29:1 35:16 36:2 37:11,13 39:10 40:12 42:2 51:13
		beginning 29:2 34:25
		behalf 1:15,17 2:4,6,9 3:8 25:14 29:4

31:16 52:6 behavior 22:18 being 9:13 13:21 15:24 18:5 19:5 44:10 50:18 belief 13:13 believe 13:20 25:7 53:15 believed 52:24 believing 13:22 benefit 10:22 31:22 40:5 42:15 44:10 benefits 12:18 24:11,12 best 19:1 21:1 22:23 better 30:5 31:25 34:25 36:10 between 38:13 beyond 13:23 40:13 binds 13:14 bit 6:3 blah 43:25,25,25 blanket 17:12 block 49:11 blocks 8:21 10:14 blow 35:15 blowout 35:17 border 11:2 both 5:22 11:17 27:1 31:22 42:17 47:11 bothering 45:5 bottom 34:12 Brady 4:2,2,4,6,9,11,22,22,25 11:12 11:13,13 12:2,14 17:15 18:12,14 21:12 22:8 23:13,13,17 29:12 34:6 36:24,24 37:1,1,6,8,19 38:16,17 42:6 45:18 47:4,6,7,8,12 48:18,24 50:6,8 51:25 Brady's 4:17 16:22,23 Breyer 18:21 31:2 41:18 44:6 54:7 brief 21:23 22:4 27:17 35:12 39:19 49:11 52:12 54:10 bring 13:19 17:24 41:7 bringing 15:19 broad 11:17 41:2 brought 13:21 47:8 54:2 burdens 12:19 busy 10:25 30:8,8	17:12 18:12,24 20:16,23 21:11 22:18 23:3,23 24:16,18 25:19 26:25 27:24 28:25 29:3,6,19,23 31:23 35:19,19,23 37:6,15,23 38:4,25 39:2 39:5 40:6 43:5,19 44:2,8,24 45:7,10 47:8 48:12,23 49:15 51:24 52:2,11 52:15 53:7,25 54:4,17,22 55:5,13,14 caseload 31:4 cases 4:8 16:10 17:8,15,20 23:15,19 23:20,20,21,21 24:6 26:5 27:1,3,11 27:16,19 29:25 31:4 35:13 36:3 45:23 49:4 52:12 54:2,2,5,25 category 34:21 cause 6:1 55:6 cert 5:5 46:8 certain 18:22,23 21:8 23:19 53:13 certainly 33:10 38:16 43:23 46:15,17 49:22 certiorari 5:14 11:23 challenging 46:11 chance 15:2 16:19 50:24 chances 14:18 18:5 19:1,8 21:8 change 30:3,22 41:12,18 45:14,15 54:9,9,11 changed 49:20 changing 35:21 charge 17:25 19:7 charged 27:21 35:24 Chief 3:3,9 6:22 7:15 18:11 25:15 46:17 47:8 52:7 55:11 choice 15:1 36:10 choices 17:16 circuit 3:11,21 5:23 6:7,11,16 7:1,9 8:22,23 9:6,11,17,21,23 10:1 11:7 11:16 14:12 19:10 20:21 21:3 23:7 23:13 26:25 29:20 34:6,9,13 36:18 37:25 39:8 46:12 47:3 52:9,24 53:5 53:6,11,11,17,21,24 Circuit's 4:1 7:11 11:22 18:24 36:8,8 39:8 45:20 46:11 47:9 circumstance 10:4 11:5 16:6 circumstances 9:14 10:18 18:1 50:15 53:17 cite 52:12 cited 27:16 35:12 claim 47:2 49:8 claims 51:13 Clause 25:17 clear 5:24 6:8,15 9:21 11:10,13 33:19 45:22 46:5 clearly 53:19 client 15:24 28:22 29:3,4 31:17 33:4 43:16,16 client's 28:24 cocaine 12:24,25 collapse 34:25 collar 23:21	collateral 3:15 colloquy 16:1 combination 22:11 come 14:13 21:25 22:1 34:10 46:10 49:2 51:5 comes 23:3 27:24 37:2 38:24 43:6 coming 11:2 41:13 comment 45:2 committed 12:23 13:14 common 27:14 50:13 compelled 44:8 competence 54:24 competent 13:6 21:7 54:24 complementary 42:17 complicate 3:15 complicated 24:6 complying 54:4 component 3:19 compromise 23:20 concealed 29:23 conceivably 38:12 concept 12:13 14:21 40:4 concern 4:3 33:2 47:11 54:3,15 concerned 11:18 14:14,15 52:22 concerns 40:7 49:13 concludes 49:15 conclusion 23:6 conduct 47:7,11,14 confessions 3:15 confidence 37:4 42:5 confront 13:5 confrontation 22:13 Congress 54:17 consciously 54:18 consequence 44:5 considerable 22:5 55:6 consideration 10:17 12:20 55:10 considered 42:14 43:25 consistent 44:24 consisting 8:8 conspiracy 23:20 Constitution 3:13 13:4 23:5 30:23 constitutional 3:12 4:3,13,20 9:12 13:24,25 17:3 22:12,13 23:4,6 29:20 31:24 34:12 41:7,13 43:14 55:2 constitutionalizing 54:8 consultation 22:7 contemplating 20:13 contends 11:19 content 8:17 context 8:6 22:22 37:5 38:10 50:2 51:8,15 continue 25:3 contradictory 33:18 convicted 15:4,25 16:17 18:5 conviction 13:22 42:13 47:19 convictions 3:17 26:1,3
C		
C 2:1 3:1 California 1:17 7:25 31:3 53:23 call 47:14 called 54:19 came 1:10 capacity 53:3 car 15:19 35:16,16 cards 36:9 care 13:2,3 carefully 53:16 case 4:24 5:19,23,25 7:9 9:15 11:25 12:17,18 13:19,21 15:15 16:14,21		

<p>correct 38:5 40:23 43:11 couched 12:4,6 counsel 13:6,7 14:2 15:12,18 21:8 22:7,13 33:8 37:23 38:4,9 39:14 41:24 42:2,9,12 45:2 47:22 48:11 49:3,16 50:2,20 54:24,25 55:1 counseled 17:4 count 17:23 country 7:21 55:9 courier 29:24 course 13:11 32:23 court 1:1,11 3:10,18 4:6,12 6:12,20 7:15 9:7,15,20 11:18,24 12:16,22 13:9 14:9,19 16:22 17:17 20:2,2,19 21:6,15,17 22:17,22 23:3,6 24:3,13 25:16 26:6 37:12 39:7 41:3 43:24 44:1,8,9 45:12,19 46:21,21 47:4 51:13 52:20,25 53:1,2 courts 14:5 27:17 45:8 49:25 court's 3:13 9:24 11:12,21 14:1 16:7 23:5 36:11 44:12 45:1 cover 21:20 39:17,22 covered 7:12 10:17 covers 49:13 craftsmanship 40:14 crazy 20:1 create 52:14 created 3:11 54:1 creates 18:18 23:12,16 crime 13:11 17:23 23:21 crimes 11:2 17:22 criminal 4:4 12:18 13:8 15:10 18:15 22:2 23:12 26:1 54:25 55:8 crossed 35:16 52:13 current 42:8 cut 24:14</p>	<p>21:15,21 22:4,6,9,21,24 23:8,8,9,10 24:2,3,18 30:13 32:16 33:11 34:19 36:3,12 37:13 39:1 41:21 42:14,24 43:1 47:25 49:7 54:23 defendants 20:5 24:11 30:25 39:9 defendant's 15:12 16:9 19:5 23:15,16 24:1 38:14 defending 51:24 defense 12:17 33:6,7,7,25 34:1 35:22 37:23 38:19 39:14 40:25 41:24 42:8 50:2 definitely 21:1 definition 50:15 degree 10:4 denial 4:15 15:3 denied 44:10 49:8 depart 8:9,11,12,14,17 43:17,19,20 44:8,9,15,22 45:10 53:3 departed 45:13 departing 9:8 Department 1:14 departure 8:18 29:8 44:2 depend 16:6 49:19 deprive 4:19 derived 36:11 derives 50:9,10 described 3:18 deserve 28:16 design 19:24 despite 34:23 determination 51:20 determine 23:3 determined 6:12 determining 23:24 develop 23:15 developed 7:8,24 40:10 devolve 38:1 dice 12:10 14:17,21 48:16,19 Diego 1:17 7:25 different 10:7 12:13 46:16 47:3 50:5 50:6,15 51:25,25 difficult 49:23 direct 41:17 direction 6:4 9:16 disagree 37:21 disclose 12:2 24:1 disclosure 4:4 25:17,24 35:9 36:21 37:20 51:3 discourage 19:20 discouraging 3:24 discover 49:16 discovery 15:11 21:19,20 22:5,14 39:13,16,21,21 40:19 43:4 45:18 54:9,12 discretion 44:15,25 52:20,22 53:4 discretionary 8:12 discuss 46:3</p>	<p>discussed 26:5 29:6 49:12 discussing 37:23 dismiss 46:20 dismissed 54:3 dispense 49:5 displace 4:17 16:23 district 7:25 9:7,15 10:18,23 11:5 31:3 44:7,9,12,14 45:1 52:20,25 53:1,2 districts 10:25 disturbs 37:4 divorced 48:5 documents 23:22 43:25 doing 34:22,23 41:5 done 47:15 54:5 doubt 13:23 down 16:2 27:25 30:5 34:11 37:2 draft 6:23 drafted 20:22 drafting 20:21 draftsman 40:9 drain 16:2 driver 52:13 driving 35:18 drug 17:22,22 23:21 30:17 31:4 drugs 30:1,1 32:12 Due 25:17 during 42:18 duty 4:13 D.C 1:8,15</p>
<hr/>		
<p>D</p>		
<p>D 3:1 Dallas 29:25 damaging 24:11 deal 7:8 28:5 dealing 38:25 48:11,17,18,19 death 21:14 debate 41:1 decide 6:5 decided 7:10 44:1 53:5,16 deciding 55:3 decision 4:7 5:22,23 6:13,25 7:11 9:24 12:7 16:8 28:3 29:12 32:11 36:11 42:3 46:4 48:1 53:24 54:17 decisions 3:14 11:13 14:1,17 23:5 51:22,23 defendant 4:19 5:17,18 6:1,1,4,7 8:15 9:13,14 12:2,5,6,7,22 13:5 14:8,22 14:23 15:16,17,17,20,21 16:11,12 16:15 17:4,16 18:25 20:17 21:9,14</p>		
<hr/>		
<p>E</p>		
<p>E 2:1 3:1,1 earlier 6:25 52:14 54:16 easier 50:17 51:21 easy 45:21 48:24 52:23 effect 3:14 17:6 36:21 38:1 40:12 48:20 49:8 51:3 effective 55:1,2 effectiveness 49:3 effort 7:1 efforts 54:11 either 15:1 16:6 49:1 51:2,9,9 54:6 elaborate 14:6 15:11 40:11 elements 12:23 13:10 elsewhere 41:10 empirical 35:10 52:15 enable 33:15,21 enables 19:16 enactment 40:10 encourage 19:24 20:4,8 21:1 33:17 encouraged 24:13 encourages 19:15 26:14,18 end 25:4 enforce 10:24 engage 24:7 engraft 23:14</p>		

<p>enormous 31:3 ensure 4:5 25:25 enter 3:22 24:9 29:17 34:21 entered 8:15 35:9,11 entering 10:20 entire 24:23 35:7 37:6,14 51:16 entirely 49:2,5 entitled 21:9 29:1,2 40:25 41:21 entrapment 32:14 33:7 entry 10:3 enunciating 6:9 erroneously 9:15 especially 22:22 ESQ 1:14,17 2:3,5,8 essential 3:19 25:25 essentially 37:20 38:11 40:21 42:6 47:6 48:17 49:17 establish 28:24 establishing 5:16 European 30:21 evaluations 12:19 even 4:10 6:12 8:6 20:13 23:8 26:14 26:18 28:4 32:11 33:16 36:15,15 37:16,19,19 42:14 43:9,19 44:22 53:12 ever 8:14 17:2 26:14 29:24 every 17:14 26:25 31:23 45:9,11 everybody 26:7 everyone 41:21 everything 19:20 20:9 24:5 45:6 48:23 evidence 3:23 11:24 13:23 15:2 19:6 22:20 27:19 30:12 31:7,7 33:3,6 34:2 35:2 36:22 37:4,6,16,17,18,24 38:1,11,18 39:10 41:22,25 42:2,10 42:12 48:14 49:20 50:20,23 51:4,6 51:15 52:15,16 53:25 54:6 evidentiary 37:14 51:16 exactly 12:15 16:3 40:1 50:1 example 32:11 39:25 Except 51:21 exculpate 49:6 exculpatory 5:25 6:6,9 7:13 19:1 25:25 27:19 28:19 35:2 37:16,24 38:10 39:10 41:22,24 42:2,9,12 48:2 49:16 50:3 excuse 47:21 exercise 52:21 exercised 9:23 exhaustive 13:8 21:19 exist 38:20 existed 27:19 29:21 exists 28:18 36:4 expand 40:22,23 expanded 4:9 expansion 40:20 expected 54:25</p>	<p>explain 14:8 explained 4:9 50:9 explicit 4:6 explicitly 17:17 expose 3:15 expressed 52:25 53:1 extension 4:2 extensive 39:16 extent 14:13,14 eyewitnesses 14:23</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>F 1:17 2:5 25:13 face 15:2 34:24 faced 20:20 facilitate 27:25 fact 4:5 6:24 10:17 12:12,15 13:21 15:10,15 21:8,13 26:25 28:17 32:17 34:25 35:8 36:13 37:7,8 39:20 43:16 47:25 50:13 52:19 54:1,6,11 facts 18:2 38:11 52:11 factual 5:16 14:10,16 15:14 22:15,24 26:24 27:3,5 32:18 factually 25:8 failing 49:16 50:2 fails 37:23 42:9 failure 12:1 38:10 47:5 fair 4:5,15,19 18:4 23:17,18 fairly 15:11 21:19 fairness 4:3 17:19 18:9,19 faith 13:13,20 22:18 false 27:6 far 7:11,11 11:14 fashion 40:24 fast 10:3 29:8,9 40:5 42:23,25 43:10 44:10 favorable 49:7 favours 31:19 FDIC 21:24 Federal 3:17 13:7 14:6,9 15:10 17:14 20:19 22:2 40:20 feel 53:2 feels 44:1 felt 9:7,12,17,20,21 10:1 Fifth 26:25 41:22 42:17,19 47:2,18,20 47:22 figure 15:7,9 file 43:1 files 24:5 fill 8:17 finality 55:9 find 8:16 9:9 14:9 20:4 22:5 37:24 41:24 42:9 43:19 47:4,22 50:2,20 finish 54:21 first 3:22 8:23 18:11 24:3 26:23,23 31:1 focus 34:18</p>	<p>footnote 52:11 force 23:14 form 7:19 8:2 43:4 formulating 10:6 forth 13:18,25 31:7 forward 34:10 found 47:3 framing 45:17 frequently 6:5 10:19 12:16 from 3:24 9:8,13,16 12:14,14 19:20 21:2 23:17 25:12 27:17 31:9 32:1,5 32:7 33:20 36:11 41:14 42:22 47:19 48:5 49:11 50:6,9,11 51:25 full 23:22 24:20 fully 32:10 44:24 fundamental 18:9 funnels 26:5,7 further 5:23 6:4,7 19:14 36:21 38:22 Furthermore 11:16</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 General 1:14 3:6 14:20 19:14 25:11 27:1 34:10 36:7,17 37:10 39:13 45:16 46:10 52:4 55:11 gets 15:4,5 getting 15:2 36:6 Gibson 35:19 Ginsburg 5:2,3,22 29:5 Ginsburg's 31:15 give 6:6 15:11,23 24:4 30:12 36:9 44:21 given 3:22 22:4 24:24 35:9 gives 13:4 giving 21:3 31:6 33:14 global 37:20 gloss 36:19 37:19 go 9:17 11:14 12:8 14:16 16:2,17 18:6 19:14 22:7 23:25 25:3 28:25 30:5,9 30:14,15,19 31:14 34:3,16 36:20 38:22 40:13 50:12,21 51:3,24 goes 14:17 going 6:10 7:3 9:16 14:24 15:25 17:20 19:2,5,8,24 22:19 23:24 24:6 25:19 28:25 30:6,15,19 31:10 35:6 36:16 36:16,19,20 37:8 42:10,19 44:18 45:11 48:15,15 50:21 gone 12:3 19:12 36:13 good 13:13,20 22:18 28:5 Government 6:19,20 9:22 10:12 13:1 13:12 20:10 30:4,5 44:16 46:10 47:23 Government's 5:15 12:21 54:10 granted 46:9 grasp 41:15 greater 19:7 guess 16:3 17:19 26:23 36:6 53:7</p>
--	---	---

guideline 25:4 guidelines 8:16 9:20 10:2,5,6 guilt 3:16 guilty 3:12,22,25 6:2 11:20 12:11 13:9 14:15 16:13,15 17:13,21,23 18:2,16,18 19:16,21,24,25 20:5,5,8 20:17,20,24 22:16,24 23:9,9 24:4 26:8,10,10,15,17,17,19 27:4,8,16,18 27:25 28:4,9,14,20,22 29:3,4,13,15 30:18,18,21 31:16 32:1,4,7,16,18,24 33:15,20,22 34:23 35:11,14 38:12 39:5,7,10 40:12 42:10,22 48:1 50:21 55:3,9	<hr/> I <hr/> identical 50:14 identification 27:20,22 35:20,25 identify 14:24 ignorance 32:16 illustrated 52:10 immediate 34:6 immigration 11:3 impeach 49:7 impeaching 5:1,20 34:13 impeachment 6:10 7:12 8:4 19:2 30:12 31:7 35:2 37:16 impermissible 47:7,10,14,16,18 implication 51:10,11 implications 23:11 implicit 11:11 implies 51:12 imply 36:16 37:9 import 36:7 important 8:13 23:2 27:14 55:8,10 impose 52:21 imposed 9:2 impossible 33:12 improvidently 46:9 inartful 7:14 inartfully 52:25 incarceration 24:24 incentive 24:9 incentives 26:10 27:16 included 19:9 51:2 includes 20:24 including 6:9 21:18 35:2 inclusive 11:18 18:25 incompatible 16:9 incompletely 53:1 inconsistent 21:5,6 incorrect 27:6 39:9 inculpatory 19:3 36:22 37:17 51:4,6 indeed 15:17 20:24 26:14,17 31:22 32:6 37:13 indicate 44:22 indicated 34:10 47:5 indicates 26:1 indicating 35:16 indication 35:5 indictment 43:3 individual 10:8,16 26:2 27:21 29:23 35:24 individualistic 10:20 individualized 11:4 individuals 27:3,7,15,18 28:20 31:23 35:14 43:8 ineffective 38:3,9 inevitable 3:14 information 5:16 6:6 14:3 21:4,24 24:1 25:25 28:19 29:21 32:17 33:14	33:24 38:22 39:17 40:24 43:8,11 47:6,20,22 48:2 49:17 50:3 informed 13:7 54:1 initial 43:5 initiative 23:16 injustice 40:7 innocence 5:16 12:5 16:10 32:10 34:23 innocent 11:20 12:6 14:15,16,22 15:24 19:16,17,20,25 20:7 22:21 26:8,9,15,19 27:4,8,15 28:1,4,11,12 30:18 31:16,20,22 32:1,5,8,17 33:14 33:16,20,21 34:3,19 35:13 39:1 42:22 47:19 inquire 14:7 15:13 insist 17:3,4 inspectors 43:6 instance 29:22 35:15 39:23 45:9 instances 45:11 insured 21:24 intelligent 13:10 14:2 28:2 33:15 intelligently 19:16 33:22 51:1 intends 6:16 interceded 15:18 interest 26:2 42:20 interpretation 44:14 interpreted 4:9 interpreting 11:13 interrogate 26:16 interrogation 43:7 involved 12:17 13:11 involves 20:17 involving 20:22 27:20 54:22 irrespective 18:2 issue 5:19 8:19 10:13 20:17 29:7 45:7 45:15,18,18 53:19 issues 45:18 it'd 30:22
<hr/> H <hr/> hand 40:6 happen 16:21 30:6 happened 50:22 happens 6:5 24:16 28:18 43:2 hard 17:16 41:8 having 49:23 head 19:5 hear 3:3,4 25:12 heard 8:8 hearing 36:2 heavy 16:17 held 3:21 19:5 hell 30:14 her 15:19 24:24 29:11,11 35:21 39:7 herself 22:25 he'll 28:15,15 highest 42:21 Hill 36:11,12 37:22,23 38:3,3,7,9 47:10 48:8,10 49:11,13,14 50:1,10 50:19 51:19,21 52:2 54:22 him 3:24 14:24 15:1,25 16:3 32:22 33:12,14,15 36:1 43:20 himself 22:25 hold 45:6 holding 45:24 Honor 27:9 28:6,17 31:13 34:15 38:5 49:14 Honors 49:24 horrified 26:20 house 12:9 Hubachek 1:17 2:5 25:12,13,15,22,24 26:22 27:9,13 28:6,12,17 29:5,16,18 31:1,8,13,21 32:3,9 33:2,23 34:8,15 35:10 36:23 37:21 38:5,8,16 39:4,15 39:23 40:1,15,22 41:17 42:25 43:11 44:6 45:1,16,22,25 46:8,14,17,24 47:1,17 48:7 49:10 50:8,16 51:18 52:2,3 hypothetical 17:7 20:22 27:20 28:24 32:24 Hypothetically 15:23 hypotheticals 12:24	<hr/> J <hr/> jail 28:3 Jencks 40:10 54:9,14 joint 5:7,9 14:4 judge 8:8 14:6 15:13,15,20 17:5 22:15 26:16 32:4 43:17,18 44:9 45:10 48:9 52:20 judged 51:7 judgment 33:15 37:2,5 46:21 48:22 51:14 judgments 37:6 judicial 40:13 jurisdiction 8:24 9:23,25 11:8 45:23 45:24 46:6,13,22 53:14 jurisdictional 8:23 10:14 46:3 52:19 just 7:23,24 24:15 31:25 35:3 37:9 40:11 43:14 44:18,20,23 45:6 47:14 justice 1:15 3:3,9,20 5:2,3,21 6:22	

7:7,15 12:15 13:24 16:20 18:11,15 18:21 20:14 23:12 25:7,15,22 26:12 26:22 27:19 29:5,18 31:1,15 33:2 34:17 35:3 39:18 40:1 41:17 44:6 46:18 47:8 49:10 52:7 54:7 55:9,11 justification 8:14	locate 38:10 42:2 Lockhart 36:11 37:22 47:10 48:8,10 49:11,13,15 50:1,10,19 51:19 54:22 Lockhart's 36:12 logic 18:23 logical 4:2 long 15:4 30:19 53:13 longer 24:16 look 10:13 30:11 48:25 50:19,21 looking 48:24 53:16 looks 14:25 losing 14:18 lot 14:25 28:3 30:25 37:15 lots 12:16 low 25:4,4	Mezzanatto 22:18 middle 30:22 midway 11:23 might 6:1 12:7 52:13,14 Miller 47:10 millions 17:8 mine 18:4 minimum 17:24,25 51:4 minute 32:20 43:15 minutes 52:4 misadvises 33:4 miscarriages 39:18 misconstruction 21:13 misconstrued 21:10 misidentified 36:1 misstated 36:7 mistake 43:22,24 mistakes 21:11 mitigate 10:2 mitigating 10:4 modify 35:7 moment 8:13 months 17:24 24:24 moot 5:19 25:20 more 4:10 16:11 18:4 19:16 23:1 24:9 28:2 33:22 34:2 37:16 41:2,9 46:6 49:22 morning 26:5 most 10:25 16:10 17:21 motions 43:1 motivated 40:9 much 9:9 41:1 54:15 multiplied 11:2 must 12:19 17:10,10 40:9
<hr/> K <hr/> Kennedy 13:24 25:7 key 50:20,23 kick 22:8 kind 10:4 15:22 18:18 19:23 21:24 32:16 37:3 48:14,19 knew 15:21 know 8:3 12:9 14:23,24 16:3,11 17:13 18:25 19:3,6 20:9 21:22,24 22:23 24:22 25:8 27:4,7 28:9 32:13,22 33:1,12 35:14 36:9 37:13,14,15,17 44:24 47:13 48:23 51:1,22 knowing 23:9 41:9 51:23 known 5:17 6:1 knows 13:1 16:15 22:20 Kyles 50:9	<hr/> M <hr/> made 5:24 6:2,8 19:3 27:22 37:5,7 42:3 43:3 47:3 51:22 54:17 main 4:21 10:13 35:20 major 30:3,22 45:14 make 11:13 12:7 17:16 22:15 26:17 28:2,2 33:15,19 34:2 36:10 42:3 47:25 48:3,4,22 49:23 51:14 makes 13:9 18:4 48:13 making 16:8 39:5 51:19 mandatory 17:24 Manual 13:18 many 21:18 23:23 27:7 30:17,17,17 33:5 35:11 marijuana 15:19 29:22 31:18 market 3:18 Maryland 4:2 material 4:25 5:1,20,25 6:9,10 7:12 7:13 8:4 11:24 12:2 19:2,2,3 25:25 27:18 28:19 34:14 37:24 38:10 39:22 41:22,24 42:2,9,11 48:1 49:16 51:8 materiality 37:2,3 41:1,4 48:5,8,9 49:2,5 50:7,9,10 52:1 materials 25:18 matter 1:10 40:13 43:17 55:15 may 3:10 10:19,19,23 16:18,21 17:7 17:16 21:10,11 23:21 25:10,15 27:11 32:6 50:13 maybe 30:4,13 McMann 17:15 mean 8:15 10:9 19:19 20:10 29:21 30:4 33:11,18 37:1 44:18,21 46:9 47:15 48:10 50:5 52:19 53:8,10 means 4:18 16:24,25 30:17 37:15 38:15 51:2,4 median 35:16 mentioned 21:22 mentioning 49:14 merely 29:24 merits 22:4	<hr/> N <hr/> N 2:1,1 3:1 narcotics 11:2 narrow 40:17,23 narrower 6:13 national 8:2 necessarily 50:6 necessary 4:5 51:10 needs 28:13,14 negotiations 26:6 neither 3:12 23:5 never 8:7 nevertheless 16:16 new 3:11 4:1 49:2 next 3:4 6:15 21:2 Ninth 3:11,21 4:1 5:23 6:7,11,16 7:1 7:9,10,10 8:22,23 9:6,11,17,21,23 10:1 11:7,16,22 14:12 18:24 19:10 20:21 23:7,13 29:20 34:6 36:8,8,18 37:24 39:8 45:20 46:11,12 47:9 52:9 52:24 53:5,6,11,16,21,24 nolo 27:2 32:18

<p>nonetheless 29:14 nonexistent 52:10 nonmateriality 49:9 non-innocent 31:22 normally 10:11 nothing 15:8 20:16 26:18 39:1 45:23 46:4 notion 41:1,20 notwithstanding 53:23,24 number 11:1,3 20:24 35:13 51:2,4 numerous 34:11</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 oath 20:18,19 object 26:13 objected 29:10 31:9 objecting 9:22 11:9 obligation 12:21 38:7,20 obligations 22:15,16 obstacle 46:7 obviously 34:22 occasional 40:6 occurred 7:5 occurring 10:19 odd 38:24 odds 12:9 15:7,9 16:16 34:24 offense 12:23 13:13 19:7,9 27:21 35:24 offenses 30:17 offer 15:5 24:3 43:3,3 44:13 45:3 officials 22:19 often 6:4 51:22 oftentimes 39:16 oh 37:1 43:21 okay 10:12 34:4 45:6 Olson 1:14 2:3,8 3:6,7,9 5:2,6,9,12,21 6:22 7:6,22,24 8:22 9:2,6,11 10:10 10:15 12:12,15 13:3,16 15:8 16:5,20 17:10,17 18:7,10,21 19:14,18,22 20:2,12,14,16 22:1 24:19,22 25:2,7 25:11 52:4,5,7,18,23 53:10,15 55:12 omission 4:14 once 23:25 24:8,8 30:5 54:4 one 6:5 10:25 11:6 16:11 17:9 21:12 21:22 23:1 24:15 36:5 40:4,6 41:8 45:21 51:2,9,13 only 4:5,25 8:6 11:10,14 21:5 30:13 33:13 37:5 40:23 43:18 44:12 48:22 open 41:6 opinion 11:22 opinions 45:22 opportunity 51:5 oppose 10:12 opposing 9:24 oral 1:10 2:2 3:7 25:13 order 6:20 7:15 48:3 50:25 51:12</p>	<p>organized 23:20 other 7:13,15 8:1,1 10:9 12:4 17:9 18:9 19:4,4 23:22 28:9 33:19 38:14 43:8 51:9 52:15 53:18 otherwise 27:23 47:6 53:5 out 4:6 5:4 11:21 14:5 15:7,9 17:7 18:20 21:25 22:1,3,5 30:1,24 35:15 35:25 36:3 39:2,18 41:14,19 48:13 outcome 49:20 outside 34:6 over 4:3,25 5:17 6:21 19:5 21:7,7 22:22,23 24:11,11 34:2 35:1,16,22 38:18,21 47:6,23 54:5,15 overlap 42:19 overly 11:17 over-inclusive 14:14 20:23 own 15:3 31:17 O'Connor 25:22</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 5:7,9,12 6:18 11:22,24 49:10 54:10 pages 27:17 35:12 52:12 panoply 17:3 paragraph 6:14 7:4 paragraphs 5:4 paramount 26:3 part 44:3 49:19 participate 29:9 particular 6:3 7:19 10:17 16:21 41:18 particularly 7:8 30:16 past 31:4 path 30:6 people 14:15 17:21 18:16 19:16,20,25 19:25 20:8,24 26:9,10 28:1,3 30:18 31:16 32:1,5 33:20,22 35:1,14 perceived 8:24 9:7 11:7,8 53:11 percent 3:16 17:20,21 18:16 25:8 30:13,14 perfect 17:2,2 perfectly 20:3 perhaps 21:22 31:14 33:23 46:8 period 25:2,21 permits 26:15 permitted 39:6 person 18:1 20:20 22:23 26:15,16,17 26:19 28:9,12 31:20 32:13,17,21,22 32:23 33:14 34:3 35:17 persons 11:20 person's 35:18 petition 5:5,11,13,13 11:23 Petitioner 1:4,16 2:4,9 3:8 52:6 picture 36:2 piece 42:9,11 50:3,20,23 piecemeal 41:7 place 11:4 18:11 31:2 32:10</p>	<p>places 8:1 play 53:21 plea 3:18,22 4:23 7:19 8:2,5 13:9 14:7 14:10 15:5,12,14 16:1,2,8,18 21:9 22:16,24 24:10,12 26:5 29:10,17 30:10 31:9 32:7,11 38:12 39:5,7 41:6 42:3,4,10,18 50:19 52:2 55:7 plead 6:2 12:3 17:21,23 18:1,16,17 19:8,16,25,25 20:5,8 23:8 26:10,15 26:19 27:16 28:4,14 31:16 32:17 33:15,22 34:22 39:10 40:12 48:1 50:21 55:3 pleading 3:24 11:20 12:10 14:15 19:21 24:4 26:16 27:25 42:22 pleads 32:16 pleas 3:12 17:13 27:2 30:21 31:10 32:1,4,18,18 33:20 34:21 35:6,8,11 53:22 55:10 please 3:10 25:16 pled 27:18 29:13 35:14 point 4:6 8:23 9:23,25 10:16 19:4 36:6 36:18 37:25 46:3 47:17 49:4 policies 33:18 policy 32:2 poor 32:25 positing 32:24 38:20 position 46:16 possession 3:23 33:8,11,25 34:1 42:13 possibility 16:7,8 20:21 possible 33:13 possibly 8:12 21:2 post 50:17 posture 23:2 29:6 potential 11:20 12:5 34:11 39:18 potentially 35:13 54:5 pounds 15:19 31:18 powder 13:1 pre 42:18 43:2 precedent 34:5 Precisely 12:12 preclude 47:12 prediction 49:19 prejudice 49:2 preliminary 36:2 premised 4:3,7 preparation 23:18 34:7 prepare 22:9 prepared 6:24 preparing 23:23 present 30:16 47:25 presented 29:19 35:1 53:19 presumably 37:13 presumed 9:15 presumption 7:10 pretrial 4:23 21:25 22:5 38:21 39:13 39:15</p>
---	---	--

<p>prevail 24:15 50:24 prevented 9:16 previous 3:14 pre-indictment 43:3 primary 4:18 16:22,24,25 prime 4:25 probability 3:24 12:1 probably 53:17 probation 25:20 probationary 25:2 problem 49:17 52:10,14,17,19 54:1 problems 23:12 36:6 55:7 procedure 13:8,9 15:11 22:3 procedures 14:6 proceeding 31:10 42:7 53:23 process 24:8,10 25:17 41:6,11,15 produced 54:16,19 product 14:4 progeny 4:4 program 8:15,18 10:3,18,21 29:9,10 40:6 42:23 43:1,10 prohibits 39:21 proper 36:13 44:2,20,23 53:7 proposals 41:10,18 propose 37:12 proposed 6:3,14 11:17 proposing 31:21 40:16 42:16 52:8 proposition 43:23 45:8 propriety 45:20 prosecution 13:15 33:9 34:1 42:13 55:3 prosecutions 19:4 prosecution's 21:11 prosecutor 4:12 5:17 7:2,17 10:22,23 16:12 17:22 18:17 20:4 22:19 24:6,9 32:4 35:20 38:7,14,18,21 51:19 prosecutors 6:5 13:17,19 23:14,23 30:8 prosecutor's 3:23 protect 42:21 47:19 protecting 42:22 protection 26:24 31:24 protections 21:18 32:9 protest 34:23 provide 20:25 27:5 28:19 36:25 38:22 provided 26:9 27:3 32:19 43:12 provides 10:22 provision 43:20 44:12 provisions 33:19 public 22:18 purport 7:16 purports 7:17 purpose 4:17 16:22,23 pursuant 6:20 14:6 put 21:14 28:3 51:7 53:8 p.m 55:14</p>	<p style="text-align: center;">Q</p> <p>question 4:21,25 5:5,8,11,15,18,20 6:17,18 7:3,20,23 8:3,4 9:1,4,9,19 10:8,11 12:9,13,21 13:12 14:20 15:16,22 16:14 17:1,6,15,18 18:8,13 19:11,13,19,23 20:7,13,15 21:20 24:14,15,20 25:1,5,11,19,23 26:13 27:7,11,24 28:8,14,22 29:13,15,17 30:2 31:6,12,14,15,25 32:6,20 33:10 34:4,5,13,16,17 35:5 36:15 37:1 38:3,6,13,24 39:12,20,25 40:3,18 41:5 42:23 43:9,13 44:17,20 45:5,13 45:21 46:2,12,15,19,23 47:13 48:3,9 48:19,20 50:5,12,12,25 51:21 52:3 52:18 53:7,12 questions 45:17 54:7 quibble 11:6 quite 6:15 18:1 49:4 54:18 quote 49:11 quoted 43:23</p> <p style="text-align: center;">R</p> <p>R 3:1 racketeering 23:20 raised 54:7 range 25:4 40:17 54:24 rare 27:11,12 rash 35:6 rather 19:1 40:11 reach 8:4 read 39:21 43:22,24 reading 41:16 ready 23:25 reality 18:15 really 12:25 18:25 30:3 44:17 49:12 reason 6:6 8:17 33:13 42:3 54:20 reasonable 3:24 12:1 13:20,21,23 50:23 reasonably 13:6 reasons 54:13 REBUTTAL 2:7 52:5 receive 27:15 28:13 39:9 47:20 received 24:12 36:13 receiving 48:1 recent 29:25 recognized 16:7 21:16 record 7:6 9:10 44:3 51:16 52:16 53:25 referred 6:18 referring 5:3 18:12 refusal 8:11 refuse 24:7 refused 12:3 44:11 refuses 45:10 refusing 8:8 regardless 48:12</p>	<p>regularized 41:11 REHNQUIST 3:3 55:11 rejected 54:13 related 45:2,17 relationship 38:13 relatively 13:8 relevant 39:20 reliable 42:7,14 relief 24:17 49:8 relies 27:1 remaining 52:4 remedy 14:12,12 20:25 21:1 46:19,20 removed 31:9 reports 43:5 representation 5:15 representing 29:3 represents 4:24 6:19 request 29:8 require 4:4 13:8 26:16 30:24 36:21 required 3:13 11:11 26:25 29:11 55:6 requirement 7:16 30:23 48:8 54:22 requirements 54:12 requires 13:19 14:9 25:17 38:18 41:24 42:1 50:2 51:19 reserve 24:15 25:10 resources 23:15 respect 4:10 7:18 9:19,24 10:16 11:17 12:8,22 14:1,3,7,18 15:13 17:11 21:3,7 23:2,19 34:20 47:1,2 53:19 54:21 respectfully 37:21 respond 35:7 51:11 respondent 1:18 2:6 11:19 25:14 52:8 53:22 respondent's 35:12 52:12 response 6:24,25 7:15 36:22,23 44:13 responsibilities 10:24 responsible 35:18 46:5 result 4:14 6:24 10:6 26:8 38:12 48:22 51:23 return 26:12 reverse 7:13 review 45:9,12 reviewing 51:13 right 4:23,23 8:5 9:12 11:11 13:5,5,6 14:1,2,2 16:14 18:14 20:6 21:19,20 23:4,7,10,13,17,17,18 28:12,24 29:4 29:20 30:7 31:8 33:1 34:7,7 36:24 39:13,16,23 40:19,21 43:13 45:12 47:17,20,21,23 51:11 53:17 55:1,2 rights 11:15 14:8 15:11 17:3 22:5,8 22:12,13,14 28:11 29:11 40:11 42:18,20,21,24 risk 12:5 15:24 16:16 33:5 35:8 36:4 40:7 risks 12:17,18</p>
---	---	---

rob 21:23 roll 48:16,18 rolling 14:17,21 rolls 12:10 Ruiz 1:6 3:5 5:23 29:9 31:9 39:6 44:10 Ruiz's 43:5 rule 3:12 4:1,1 5:24 6:8,10,16 13:2,7 14:4 15:10 17:5,5,12 18:24 19:15 20:21,22 22:2 24:2 26:24 28:18 31:19,21 32:7,11,11 34:9,12 37:12 37:20 39:8,21,22 40:9,15 41:2,7,13 41:18 42:24 44:7 48:18 49:25 51:12 52:10 54:4,8 55:5 rules 13:7 15:10 19:24 22:2 26:15 40:11,16,20 41:11,12 54:9 ruling 45:19 46:11 run 18:4	served 24:20,23 set 5:3 11:21 13:18,25 21:9 22:3 28:1 39:18 sets 14:5 settled 41:3 several 13:4 23:11 27:19 severe 15:24 shoot 32:13 short 15:5 shot 32:23 51:24 show 52:16 shown 36:2 shows 35:11 side 38:14 sides 34:11 sign 44:4,19 significance 4:14 51:15 significant 52:17 similar 4:16 simple 43:16 simply 6:23 33:4 46:2,3 since 34:9 sits 17:22 situation 17:7 18:4 20:22 35:23 48:24 50:19 52:24 situations 29:22 33:5 39:11 Sixth 41:23 42:1,17,19 47:2,18,21 54:23,25 societal 26:2 solely 36:9 45:17 Solicitor 1:14 14:20 27:1 34:10 36:7 36:17 37:9 39:13 45:16 46:9 solution 11:16 solve 52:10 some 6:6 8:10 13:14 17:16 21:21 25:5 27:9,16 28:23 39:13,15,22 40:10 52:12,13 54:7 somebody 14:25 32:25 someone 32:7,12 something 4:16 7:8 13:1 20:10 25:5 25:20 26:20 30:20 31:19 41:16 somewhat 18:4 somewhere 30:22 41:14 sort 6:7 12:13 26:8 38:20 40:4 43:7 sorts 22:6 sound 30:6 soundly 54:13 soundness 48:21,21 source 47:24 Souter 29:18 49:10 Southern 7:25 31:3 so-called 10:3 14:12 spate 29:25 special 43:6 specific 4:10 specifically 14:9 15:15 37:22 spend 43:14	stage 38:21 stake 25:6 stand 45:8 46:4 standard 8:2 13:14,16,24,25 36:17 37:9 41:4 42:5 49:3,5,9 50:6,7,8,11 51:25 53:20 54:14 standards 13:16 start 30:10 starting 37:19 starts 29:1 state 27:17 42:8 51:5,11 statement 6:18 statements 39:25 54:16,18 States 1:1,3,11 3:4 11:1 13:17,17 18:12 21:12 47:7,9,12 statutory 22:14,14 41:12 step 21:2 36:21 STEVEN 1:17 2:5 25:13 Stevens 16:21 27:20 40:1 stifle 3:17 still 24:17 25:5 26:7 50:17 stop 36:20 story 35:21 strategic 36:10 Strickland 42:6 50:10,11 strongest 34:18,20 study 35:11 stuff 29:2 30:12 submitted 55:13,15 subsequent 4:8 substantial 10:21,22 23:22 26:9 27:18 suddenly 41:14 sufficient 4:14 suggest 21:2 38:17 53:25 suggested 22:17 suggestion 38:25 suggestions 41:12,12,13 suggests 39:13 summary 43:7 supervised 24:16 supplant 40:16 support 33:6 supports 33:24 49:8 suppose 15:6 43:13 53:8 supposed 10:8 11:14 12:25 16:4 33:17 supposedly 12:24 34:19 Supposing 14:22 Supreme 1:1,11 sure 13:9 16:5 22:6,15 25:8,8 26:17 27:11,13 Surely 31:18 surrender 29:11 suspect 19:12 system 3:17 4:17 16:24 17:1,2,14 18:3,16,18 19:23 20:3,11 21:16
--	---	---

23:12,14 24:13 26:4,14,18,23 28:1 30:3,5,16,20,21 31:2 33:21 35:4,7 55:7 systems 20:19 system-wide 40:5	together 30:12 47:19 told 27:22 35:20,24 39:1 track 10:3 29:8,9 40:6 42:23,25 43:10 44:10 transforming 30:20 tremendous 8:20 10:13 11:1 18:17 tremendously 27:14 trial 4:5,8,15,19,22 11:15 12:3,8 13:5 14:2 17:25 18:6 21:15 22:8,10,12 23:17,18,25 28:25 29:1 30:15,15 34:3,7 36:13 38:2,17 41:22,25 42:18 45:10 48:15 49:21,24 50:17,22,24 51:1,13,16,22 54:19 trials 4:4 troubling 40:3 true 14:20 15:17,21 30:2 truth 4:18 16:24,25 trying 15:7,9 18:20 20:8 40:4 turn 38:18,21 47:5,23 turned 4:25 5:17 15:20 30:1 34:2 35:22 48:13 turning 6:21 turnover 34:7 turns 23:17 35:25 two 5:4 8:20 17:8 18:10 51:5 two-level 8:18 type 26:24 27:2 34:11 49:17 types 23:19 39:17	unreliability 47:24 48:4 unreliable 42:11 until 23:24 54:19 unworkable 52:9 urge 21:17 urging 40:20 use 23:15,24 38:19 41:25 used 7:20 38:23 usually 20:19 43:4 U.S 4:12,16 13:18 U.S.C 8:24
<hr/> T <hr/> T 2:1,1 table 23:16 24:1 tactical 12:7 14:17 take 6:20 11:4 16:18 19:8 30:21 33:5 46:15,16 taken 10:5 12:19 13:2,3 21:8 taking 15:1 18:14,15 talcum 12:25 talked 38:9 54:10 talking 17:11,12,18 19:11 28:23 30:10 33:5 38:6 49:18 54:14 telephone 17:23 tell 15:25 16:3 37:11 38:19 51:6 tells 32:22 tempted 18:1 tendency 49:6 tens 45:11 term 29:10 31:5,8 terms 12:4,7 18:9,19 terrible 34:24 test 11:21,25 12:4 36:8,8,10,12,18 37:22,25,25 49:12 50:18 51:10 testimony 27:20 tests 50:14 Thank 3:9 25:23 52:3,7 55:11 their 15:3 17:19 23:23 30:11 34:23 THEODORE 1:14 2:3,8 3:7 52:5 theoretically 52:13 theory 33:25 47:4 thing 23:1 24:3 26:7 27:14 things 8:20 10:9 21:21 22:6 40:4 think 9:18 10:15 11:22 13:3 16:10,25 18:8,11 20:18 22:3 23:4 25:2 26:14 32:3 33:16,17 34:20,24 36:5,7 37:22 45:14,19 47:9 49:12 50:11,16 52:23 52:24 thinking 24:4 though 28:4 33:16 thought 8:11 28:8 44:11,15,22 thousands 45:11 three 14:23 43:22 through 11:24 17:5,5 22:2 throughout 7:20 thrust 19:11 ties 9:18 time 22:9 23:16 24:1,15,16,20 25:10 30:9 times 30:19 tire 35:15,17 today 49:14 53:21	<hr/> U <hr/> ultimately 37:2,6,8 38:1 41:3 42:5 48:20 49:14,18 unavailable 42:12 unaware 43:18 unconstitutional 44:12 uncovered 4:18 16:25 under 8:24 10:1,18 11:25 17:25 18:24 20:18,18 22:17 29:11 30:16 40:19 41:22 42:5,6,8,23,25 43:9,22 47:4,7 53:3,17 54:23 underly 11:18 undermine 55:7 understand 16:20 18:5,21,22 28:23 32:20,21 33:4 38:8 39:4 48:4 understanding 7:7 undertake 7:17 49:25 undertaking 6:2 under-inclusive 14:13 20:25 undesirable 52:9 unethical 15:6,8 unfair 4:8 unimpeachable 27:23 unintelligent 35:6 United 1:1,3,11 3:4 11:1 13:17,17 18:12 21:12 47:7,8,12 unless 3:22 4:13 13:19 44:15 unlikely 29:23	<hr/> V <hr/> v 1:5 4:2,12,16 18:12 21:12 36:11,12 37:22 47:7,8,10,10,12 48:8 49:11,13 49:14 50:1,10,19 51:19 54:22 vacate 46:20 valid 3:22 value 21:7 variant 34:16 various 27:17 39:11 vast 20:24 verdict 37:4 48:21 versions 8:1 very 9:21 15:4,5,24 25:3,11 30:8,8,19 33:19 37:8 40:8 45:22 46:4,5 47:15 50:15 54:13,15 view 4:23 44:23 violated 4:13 14:8 violation 4:20 8:7,8,10 9:1,4 37:12 47:5 violations 11:3 voluntarily 7:18 voluntary 13:10
		<hr/> W <hr/> Wait 32:20 waive 23:10 42:24 waived 23:7 waiver 45:18 want 16:18 19:3,5,13,15 24:7,14 27:25 28:1 31:16 33:21 34:22 35:4 36:9 42:7 46:23 47:14 wanted 19:10 23:8 44:23 wants 18:25 32:4 warehouses 23:22 warranted 3:13 Washington 1:8,15 wasn't 14:24 35:21 38:4 way 9:22 18:9 29:19 31:12,13 48:13 48:22 49:7 51:9 53:8,18 54:6 ways 13:4 18:10 20:4 Wednesday 1:9 weight 21:10 well 10:10 13:3,12 14:22 15:8 16:5,20 17:15,18 18:7 19:6,13 25:11 26:22 28:17 29:5 31:1,21,25 32:3,9 33:10

33:23 34:14 36:15 37:21 38:19 39:12,15 40:13,15 43:21 45:16 46:8 48:11 49:10 50:8,12,16,22 53:22 55:10 went 5:23 6:3,7 7:11 21:15 were 14:24 18:3 21:21 23:3 24:2 26:20 27:2 30:1 35:9 47:25 we'll 3:3,3 10:12 25:12 30:14,15 47:13 51:6 we're 11:9 17:11,12,18 19:24 20:7,8 28:23 30:20 33:16,17 36:24 37:8 38:6,19,25 39:1,1,5 40:4,15 41:5 42:16 48:15,15 49:18,24 50:3,18,21 we've 17:7,8 47:3 51:1 53:16 54:13 while 34:9 white 23:21 whole 41:15 51:16 willing 7:18 winning 14:18 wish 44:21 wishes 22:7 withdraw 39:7 withdrawal 38:12 withheld 9:13 withhold 22:19 witness 27:23 35:15,21 36:1,1 54:19 witnesses 13:6 23:24 30:9,11 39:25 54:16 words 10:9 12:4 23:22 work 10:21 30:24 world 37:14 worried 28:10 worrying 20:7 worse 30:24 worthy 42:4 wouldn't 7:4 19:13 31:25 45:7 53:8 writ 46:20 wrong 20:10	12:02 55:14 14a 5:12 6:19 15a 11:22 16 15:10 17:5 22:2 40:9 42:24 49:10 16-month 16:18 18 8:24 24:24 1988 34:9	
	2	
	20 16:17 2002 1:9 24 1:9 25 2:6 26 54:10	
	3	
	3 2:4 25:1 3a 22:3 3-month 24:24 3-year 24:25 25:20 30 30:14 3742(a)(1) 8:25	
	4	
	4 52:4 45a 5:5 46a 5:5	
	5	
	5 17:25 5a 22:4 5K2 9:20 10:1 50 31:17 52 2:9 57 17:13 57,000 17:20 57,000-some 17:13	
	6	
	60 15:19,19 31:17	
	8	
	8 17:24 80 30:13 85 17:20 18:16	
	9	
	90 17:20 95 3:16	
X		
X 1:2,7		
Y		
year 6:15 17:14 31:4,10 45:11 years 16:17 17:25 25:1		
0		
01-595 1:5 3:4		
1		
1 43:14 10 27:17 35:12 100 25:8 11 13:2,7 14:4 26:24 27:17 32:11,11 35:12 11:01 1:12 3:2 12 5:7,9		