

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v. ROBERT E. HYDE

CASE NO: 96-667

PLACE: Washington, D.C.

DATE: Tuesday, April 15, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 96-667

ROBERT E. HYDE :

- - - - -X

Washington, D.C.

Tuesday, April 15, 1997

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

APPEARANCES:

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JONATHAN D. SOGLIN, ESQ., Oakland, California; on behalf of the Respondent.

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1 PROCEEDINGS

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-667, United States v. Hyde.

5 In this case, Justice Kennedy is unable to
6 participate in the oral argument. He will, however, hear
7 the tapes of oral argument and participate in the
8 disposition of the case.

9 Mr. Feldman.

10 ORAL ARGUMENT OF JAMES A. FELDMAN

11 ON BEHALF OF THE PETITIONER

12 MR. FELDMAN: Mr. Chief Justice, and may it
13 please the Court:

14 This case arises from respondent's attempt to
15 withdraw from his guilty plea. Pursuant to a plea
16 agreement in which the Government agreed to drop certain
17 charges against him, respondent plead guilty -- pleaded
18 guilty to mail fraud and the receipt of stolen property in
19 four counts.

20 When -- at the Rule 11 plea proceeding, the
21 district court ascertained that respondent knew the nature
22 of the charges that were brought against him, that he knew
23 of the rights that he would be waiving by pleading guilty,
24 that he knew the maximum sentence that he could face, that
25 the court also ascertained that his guilty plea was

1 entirely voluntary and uncoerced, and the court
2 ascertained the facts of the crime as narrated both by
3 respondent and as narrated by the prosecutor, and then he
4 found out -- he ascertained that the respondent agreed
5 with the prosecutor's account.

6 The court stated at that point, after having
7 gone through that proceeding, that it would -- that it
8 accepted the guilty plea and that it would defer the
9 decision about whether to accept or reject the plea
10 agreement.

11 One month later, respondent attempted to
12 withdraw from his guilty plea. The court, the district
13 court refused, finding that respondent had advanced no
14 fair and just reason for doing so.

15 The court of appeals reversed that decision,
16 holding that the respondent could withdraw from his guilty
17 plea at will for any reason or for no reason, as the court
18 stated, and reversed the district court.

19 Now, our position is that respondent could
20 withdraw from his guilty plea only if he had a fair and
21 just reason for doing so under Rule 32(e) of the Federal
22 Rules of Criminal Procedure. Because he had no fair and
23 just reason in this case, the district court properly
24 declined to permit him to withdraw.

25 Permitting the withdrawal of an accepted guilty

1 plea at the free option of the defendant is inconsistent
2 with the Federal Rules of Criminal Procedure. Rule 32(e)
3 provides that before sentence a district court may permit
4 a defendant to withdraw from a guilty plea if he shows a
5 fair and just reason.

6 Now, the courts -- courts that in -- the courts
7 that have to determine whether to accept a plea agreement
8 ordinarily will do just what the district court did here,
9 which is postpone a decision on the plea agreement until
10 at or near the time of sentencing, when they've had a
11 chance to review the presentence report. Under the -- and
12 accept the guilty plea at the time of the Rule 11 hearing.

13 Under the Ninth Circuit's rule in this case, the
14 Rule 32(e) standard, the fair and just reason standard,
15 would have virtually no application at all. It would
16 apply only for the minutes or hours or maybe days from the
17 time that the district court has reviewed the presentence
18 report and can make a decision about whether to accept or
19 reject the plea agreement and the time of sentencing,
20 which is really no time at all.

21 QUESTION: Mr. Feldman, there seems to be a
22 certain amount of interchangeability of these terms in
23 appellate opinions, acceptance of a plea, or acceptance of
24 a plea agreement.

25 In fact, until this case came along I don't

1 think I had ever focused on the fact that there might be a
2 difference in the two. We tend to think of a plea as a
3 plea agreement, and vice versa. How often is it that
4 these two are separated, the entry of a plea and a
5 subsequent plea agreement, if you will?

6 MR. FELDMAN: I think -- Your Honor, I haven't
7 been able to get -- let me put it this way. They are
8 always separate in cases -- virtually always separate in
9 cases where a district court has to make a decision on a
10 plea agreement, which is not in all guilty plea cases but
11 is in a great many of them.

12 QUESTION: Well, and how often is it that the
13 district court has to separate the decision?

14 MR. FELDMAN: As I said, I think it's in every
15 case in which the Government agrees to drop certain
16 charges in response for the defendant's -- in exchange for
17 the defendant's guilty plea, and when you have that kind
18 of a plea agreement, under the Sentencing Guideline --
19 under the Federal Rules of Procedure the district court is
20 permitted to defer a decision on whether to accept that
21 plea agreement, and under the guidelines it says that the
22 district court is required to do so.

23 In virtually all of those cases, and I'll tell
24 you in a minute why I say virtually -- in virtually all of
25 those cases the district court will do just what the

1 district court did here, which is accept the guilty plea
2 in accordance with the rules for accepting a guilty plea
3 in Rule 11, and defer a decision on a plea agreement.

4 The only reason I say virtually all and not all
5 is, there are two circumstances under which that won't
6 happen in those charge-bargaining types of cases. One
7 circumstance is where the district court defers decision
8 on whether to accept the plea itself. This is a very rare
9 occurrence, but we cited a couple of cases in our brief
10 where it happened.

11 The district court sees the -- listens to the
12 guilty plea, thinks there may be something wrong -- I'm
13 not sure -- it doesn't really explain why the district
14 court chose to do that, but there's nothing in the Federal
15 Rules of Procedure that requires a district court to
16 accept a guilty plea at the time it's tendered, and so if
17 the guilty -- if the court defers decision on whether to
18 accept it, then everything may happen at once, usually at
19 around the time of sentencing, both the acceptance of the
20 plea and of the plea agreement.

21 The other category of cases, which is also rare
22 but not quite as rare as those, is cases where for some
23 reason there was a preplea presentence report prepared.
24 In those case the district court already has the
25 presentence report at the time the plea is -- the plea

1 colloquy occurs under Rule 11 and therefore once again the
2 district court can take care of everything at once, and
3 there's no period of time during -- between the time of
4 accepting the plea and a decision on whether to accept or
5 reject the plea agreement.

6 But aside from those cases, this procedure that
7 happened here I think is exactly by the book. It's
8 exactly what's envisioned by the Rules of Procedure, and
9 it will happen in the majority of guilty plea cases.

10 QUESTION: And if at the end of the day the
11 judge decides not to accept the plea agreement by virtue
12 of what the judge reads in the presentence report, the
13 rules permit the defendant to withdraw from the plea.

14 MR. FELDMAN: That's right. The judge must at
15 that point, under Rule -- I think 11(e)(4), I believe.
16 The rule -- once the judge rejects the plea agreement, at
17 that point what -- the goal is to put the parties in the
18 same position they would have been in if nothing had
19 happened, if none of this had happened, because the
20 agreement can't be carried out. A condition subsequent to
21 the agreement is -- has now failed.

22 And so what you would do is the same thing as
23 you would do in ordinary contract cases when that kind of
24 situation occurs. You give the defendant the option of
25 withdrawing his guilty plea, and the Government, of

1 course, at that point is no longer bound to carry out any
2 commitments it has under the plea agreement, and --

3 QUESTION: Do we take this case on the
4 assumption that there was no fair and just reason for the
5 withdrawal within the meaning of the rule?

6 MR. FELDMAN: That's right. That's -- that was
7 what -- the court of appeals specifically held that the
8 defendant was permitted to withdraw for any reason or for
9 no reason. The district court held that the reasons that
10 were advanced by the respondent were not fair and just
11 reasons, and that hasn't been challenged in this Court, so
12 I think that we definitely -- the case definitely comes
13 before the Court in that posture.

14 QUESTION: Mr. Feldman, there's one difference.
15 Your opponent argues -- I don't know how significant it
16 is -- that in the scenario you give, the difference is the
17 judge will have seen the presentence report before the
18 trial, which normally is not desirable.

19 MR. FELDMAN: Right. I mean, that actually will
20 happen also in any case in which he rejects the plea
21 agreement.

22 QUESTION: That's right.

23 MR. FELDMAN: I mean, that's contemplated by the
24 rules that that's going to happen. If it looks as if
25 there's likely to be some prejudice that might result from

1 that, the judge could -- can recuse himself if the case
2 ends up going to trial.

3 In fact, it is rare that judges reject the
4 agreements. Usually those are the agreements of the
5 parties. They're subject to a number of constraints and
6 just don't ordinarily reject them, but that is something
7 that could happen, and that would have to be taken care of
8 that way.

9 QUESTION: How does it work with the Government?
10 That is -- I understand -- let's -- in the case of a (B)
11 agreement this is irrelevant really. I see that. Let's
12 imagine it's a (C), which is pretty rare, but it's clearer
13 conceptually. All right, you say judge, the defendant and
14 I have agreed that it's going to be 5 years. The
15 defendant says I like that. I plead guilty.

16 I'm the judge. I say, I'm going to get the
17 presentence report. So I go read it, and I then, having
18 read it, I say it's okay with me. Everybody's bound. Or
19 I might say, no, I want to give him 10 years, in which
20 case the defendant can go and withdraw and go -- I
21 understand that.

22 Between those two times of him having pled, I'm
23 guilty, and me, the judge, having read the report, suppose
24 the Government says, we don't want to go through with this
25 deal. Nobody's told us in the briefs that obvious

1 question, and you would think what's sauce for the goose
2 is sauce for the gander.

3 What you're saying is that during those periods
4 of time the defendant, if he wants to get out of this deal
5 before I can say I accept it, the defendant has to show
6 some cause. Well, I assume absolutely the same is true of
7 the Government, isn't it?

8 MR. FELDMAN: I would agree, and actually I
9 think respondent in his brief agrees that the Government
10 would be free to withdraw during that period of time.

11 QUESTION: Oh, wait -- the opposite.

12 MR. FELDMAN: I beg your pardon?

13 QUESTION: Oh, I -- yes, but your position --

14 MR. FELDMAN: And we also --

15 QUESTION: -- is the Government is not free to
16 withdraw during that time.

17 MR. FELDMAN: Our position is that neither party
18 is free to withdraw --

19 QUESTION: Okay. I just want to be sure -- I
20 just want to be sure it works both ways.

21 QUESTION: What is it in the rules that prevents
22 the Government from withdrawing during that period of
23 time?

24 MR. FELDMAN: I don't think there's any thing in
25 the rules -- there certainly is nothing in the rules that

1 addresses the Government's attempt to with --

2 QUESTION: So why shouldn't the Government be
3 free to withdraw if there's nothing in the rules that
4 addresses it?

5 MR. FELDMAN: I think it's really just based on
6 the contract analogy of plea-bargaining that the Court has
7 referred to a number of times and the rule in Santabello
8 that the Government does have to --

9 QUESTION: Santabello wasn't a Federal case.

10 MR. FELDMAN: That's correct, but generally the
11 Government does have to fulfill the undertakings that it
12 assumes in connection with a plea agreement.

13 QUESTION: Why is it a contract analogy? Why
14 isn't it just a contract? There's consideration on both
15 sides, it seems to me. The Government's made a promise.
16 The defendant's made a promise. And if you're right about
17 the fact that this guilty plea is not withdrawable, it's
18 detriment that can't be undone.

19 MR. FELDMAN: I think -- yes, and I think in
20 fact even aside from whether there's detriment or not
21 there's been an exchange of promises on both sides, and I
22 think it's just as binding on both sides but --

23 QUESTION: It seems to me you're overlooking one
24 thing. The defendant can withdraw with fair and just
25 reason to do so. Why couldn't the Government come in and

1 say, we have a fair and just reason. We found out this
2 guy's much worse than we thought he was.

3 MR. FELDMAN: I think generally the
4 Government's -- I tell you, things work out -- I think
5 things work out a little bit differently. That's a
6 possible position, and of course that's not raised by this
7 case and the Government rarely does attempt to withdraw
8 from plea agreements, but --

9 QUESTION: But all I'm suggesting is if it's an
10 equal balance, both rights are the same, the Government
11 does have some right to withdraw, then.

12 MR. FELDMAN: The Government may be able to
13 withdraw under those circumstances.

14 I think a better way to look at that kind of a
15 case, though, is where there's been a charge-bargain plea
16 agreement the district court, at the time when it's called
17 upon to accept the agreement or not, is supposed to look
18 and see whether the charges that remain are commensurate
19 with what the defendant did, whether this agreement is in
20 the public interest.

21 So a better way to look at I think what happens
22 in those kinds of cases would be that the district court
23 would reject the plea agreement and, indeed, the
24 Government might point out to the district court reasons
25 why it should reject the plea agreement, but if the

1 district court doesn't -- and it's really up to the
2 district court.

3 If the district court disagrees and says, you
4 know, this seems like a perfectly -- there's nothing that
5 contravenes public policy, or the interests of the public,
6 or the application of the guidelines in this plea
7 agreement, then the district court will hold both parties
8 to it --

9 QUESTION: I'm a little puzzled as to your
10 position. Are you saying that at the time when the judge
11 makes his ruling on whether to accept it or not the
12 Government is -- open to the Government to argue you
13 should reject this agreement?

14 MR. FELDMAN: No. No.

15 QUESTION: Because I thought you suggested --

16 MR. FELDMAN: I think what the Government is --
17 I think the Government has always an obligation to the
18 court to be frank, and to bring to the court any facts
19 that may have come to its attention that maybe it didn't
20 even know before.

21 Now, plea agreements come in many different
22 shapes, and some of them do limit the kinds of things --
23 the Government makes commitments about the kinds of things
24 it will say to the district court. It won't oppose a
25 certain sentence, or it won't comment on this or that, and

1 whether the Government's comments at that point might be a
2 breach of the agreement is really another question.

3 It depends on what the agreement says. There
4 may be an agreement where it's not at all, where the
5 Government says, we will bring to the court, and we're not
6 committing ourselves to telling the court anything in
7 particular.

8 But in any event, whatever the Government agreed
9 to I think it always has an obligation to the court to
10 inform it of the relevant facts that the court should know
11 in order to pass its judgment.

12 QUESTION: Can you go back for a second to
13 Justice O'Connor's question, because this is another point
14 I'm not certain about from the briefs, and from having
15 read this.

16 Imagine we're in an (A) type bargain. That's a
17 charge bargain. Initially there weren't supposed to be
18 very many of those, because it wasn't supposed to make a
19 difference to the sentence, but I guess for it to make a
20 difference to the sentence you have to be in a drug case,
21 what, where there's a mandatory minimum, or where you're
22 going to a telephone count from a possession, so there are
23 some where it makes a difference.

24 MR. FELDMAN: That's correct.

25 QUESTION: Okay. So we're in one of those

1 circumstances.

2 Now, you, the Government, say the defendant is
3 pleading to a telephone count. Do you do that, defendant?
4 Yes. Now time passes, and I'm the judge, and I've read
5 the presentence report. I say, I don't accept it. What
6 does that mean? What does that mean, I don't accept it.
7 He's pleaded guilty. Does it mean you're free to
8 reinstate the indictment?

9 MR. FELDMAN: I think it contemplates --

10 QUESTION: Now, if you decide we're not going to
11 reinstate the indictment, that's your decision. Is that
12 right?

13 MR. FELDMAN: The -- actually, the one --

14 QUESTION: So you can make me take the telephone
15 count by changing the indictment and going -- can't you?

16 MR. FELDMAN: I guess ordinarily the --

17 QUESTION: Yes.

18 MR. FELDMAN: -- dismissal of the indict -- of
19 the charges doesn't occur until after sentencing.

20 QUESTION: Yes.

21 MR. FELDMAN: So ordinarily the charges are
22 still there at the time the judge may reject the plea
23 agreement.

24 QUESTION: Right. So Cordova's wrong. That
25 Ninth Circuit case is wrong.

1 MR. FELDMAN: No. Cordova is -- I don't think
2 Cordova is wrong.

3 QUESTION: Right.

4 MR. FELDMAN: Cordova's reasoning, I think, is
5 wrong, but the result --

6 QUESTION: The reasoning is wrong because it
7 said they could force the defendant to change. They can't
8 force the defendant to change. The correct thing to say
9 is, defendant, if you want to plead guilty to the
10 telephone count, fine. That's your business. But the
11 Government's free to go ahead and indict you to the
12 possession with intent.

13 MR. FELDMAN: That's exactly our position.

14 QUESTION: That's the position. Okay. Thank
15 you -- thank you.

16 MR. FELDMAN: Not to indict, but to continue to
17 trial on the charges that were already --

18 QUESTION: Well --

19 MR. FELDMAN: Under which you're already
20 indicated.

21 QUESTION: Well, what happens, Mr. Feldman, if
22 the Government decides under a type (A) move for dismissal
23 of other charges that it no longer wants to go through
24 with that? The defendant has pleaded guilty but the trial
25 court hasn't accepted the plea, and so it simply either

1 refuses to dismiss or recharges. What can the court do
2 about that?

3 MR. FELDMAN: Our position is the Government
4 under -- the court under appropriate circumstances I think
5 could order specific performance of that promise. It
6 would really depend --

7 QUESTION: And what -- do you have any judicial
8 authority for that?

9 MR. FELDMAN: Well, the authority I would have
10 is just the cases where some problem has arisen after a
11 plea bargain where the Government has breached a plea
12 agreement, and where the Government does that,
13 generally -- in fact, I think this was true in Santabello
14 itself, but it's also been true in the way the courts of
15 appeals have dealt with Federal cases, that the case goes
16 back for a determination of what the appropriate remedy
17 might be. It might be permitting the defendant to
18 withdraw from his end of the bargain, and withdraw the
19 plea.

20 QUESTION: Yes. That would presumably be a just
21 reason under the rule.

22 MR. FELDMAN: Right, or --

23 QUESTION: But you're arguing for so much here
24 that the rules simply don't address.

25 MR. FELDMAN: It's true the rules don't address

1 it, and I think you fill in the background of --

2 QUESTION: Will they, Mr. Feldman? The Rules
3 Advisory Committee in October instructed the Reporter to
4 propose amendments to Rule 11 in response to this very
5 case and another one. Has there been any proposal,
6 proposed revision of Rule 11?

7 MR. FELDMAN: Not yet, and I really don't
8 know -- actually that was going to happen this month.

9 QUESTION: It was supposed to happen in --

10 MR. FELDMAN: He was supposed to report back
11 this month. I don't know --

12 QUESTION: I think it was earlier in this -- I
13 think it was around April 8 the Reporter was --

14 MR. FELDMAN: I honestly am not aware of what's
15 actually become of that. It's possible that after this
16 Court granted cert that -- whether he continued to work on
17 that or not, I don't know.

18 QUESTION: So you don't know whether any of
19 the --

20 MR. FELDMAN: But it's our position --

21 QUESTION: -- questions that the Chief has
22 raised have been addressed in the proposed --

23 MR. FELDMAN: I don't know, but I'd like to say
24 I may be mentioning a number of things that aren't in the
25 rules, because you do use contract, the law of contract to

1 kind of fill in the gaps in plea bargaining.

2 But the basic result in this case, I think, is
3 determined by the rules, because if I said under the Ninth
4 Circuit's rule -- first of all under Rule 32(e) the fair
5 and just reason business would have been really entirely
6 illusory. It would apply for a matter of a few minutes.

7 And it's obvious if you look at that rule itself
8 and the purposes behind it and what the advisory committee
9 said when it added that in 1983, that was a rule -- that
10 was an important step. It was intended to bolster the
11 respect and the dignity of plea proceedings.

12 Plea proceedings are governed by Rule 11, which
13 has in (A), (B), (C), and (D) of that rule has extensive
14 provisions about exactly how a plea has to be taken, all
15 the steps the judge has to take, which, in fact, the judge
16 took here, and that once the defendant has gone through
17 all of that, nobody should have the illusion that they're
18 just free to walk away from it with no consequences at
19 all, especially if they don't have a fair and just reason
20 to do so.

21 It's also our position that Rule 11 itself
22 dictates this result in the circumstances of this case.
23 Rule 11 in (A), (B), (C), and (D), talks about the plea
24 and about accepting the plea. It doesn't, I don't think,
25 mention the plea agreement, or if it does it talks about

1 plea agreements. It's quite clear it's talking about
2 pleas.

3 It gets to (E), which is entitled Plea Agreement
4 Procedure, and (E) was the provision that was added to
5 deal with plea agreements, and the rule makes perfect
6 sense and is perfectly consistent in its very precise
7 differentiation between those provisions that have to do
8 with acceptance of a guilty plea, which has to do with the
9 defendant's confession in open court as to what he did,
10 and those provisions that have to do with the plea
11 agreement, which is an entirely different question, which
12 has to do with the nature of the bargain and is treated in
13 the (E) provision.

14 And indeed, in Rule 11(e)(4), the provision that
15 we -- that was mentioned earlier, where it says that the
16 court -- that if the court rejects the plea agreement the
17 defendant shall be permitted to withdraw his plea, the
18 whole notion there that the defendant can withdraw the
19 plea I think has as its underlying assumption that there's
20 been a valid, binding plea entered at that point, and
21 there has been.

22 So I think the result that we're urging here is
23 dictated by the Federal rules. I also think the result
24 we're urging here is dictated by the law of contracts. I
25 think this is a fairly straightforward situation of a

1 contract involving an exchange of a performance by the
2 defendant for a promise by the Government to do something
3 later, subject to a later condition, and everybody's bound
4 to that unless the condition -- once the plea is
5 accepted -- once the plea is accepted by the district
6 court, unless the later condition doesn't occur.

7 I think that if there -- under the Ninth
8 Circuit's rule there would be a great deal of instability
9 ejected into the plea-bargaining process. A defendant at
10 any time during the several months that it takes to
11 prepare the presentence report can just say, I changed my
12 mind. I don't want to go ahead and do this. At that
13 point, everything stops.

14 Well, that is a process that's at the unilateral
15 whim of the defendant that's open to manipulation. It's
16 open to a defendant who wants to obtain severance from
17 codefendants to plead guilty and then just change his mind
18 later. It's open to the possibility that a defendant
19 who's just trying to delay an inevitable imprisonment
20 could do that.

21 It's even open to a defendant who sees that the
22 Government -- in this case, for example, the guilty plea
23 was taken at the morning of trial, which is not at all
24 uncommon. Once -- you see that the Government has
25 assembled all of its witnesses once. A couple of months

1 later there may be some witnesses who are unavailable.
2 There may be witnesses who are no longer in the
3 jurisdiction, or even, in a sufficiently extreme case, a
4 defendant might take steps to see to it that those things
5 happen.

6 All of those things can happen if you give the
7 defendant this free window of several months after the
8 plea to just change his mind, and I think if the advisory
9 committee had proposed that kind of a rule, I think it
10 clearly would have been rejected because of the
11 instability it lends to the process.

12 Another consequence it can have is that the
13 preparation of the presentence report itself ordinarily
14 requires the cooperation of both the defendant and the
15 Government.

16 Now, presumably if both parties are free to just
17 withdraw at whim during this period between the guilty
18 plea proceedings and the -- basically and sentencing, it
19 would be -- it's very hard for the parties to lend the
20 kind of cooperation to the probation officer that they
21 would have to do, since neither is sure that the
22 information that they're providing wouldn't ultimately
23 be -- they're now revealing it to a party who could
24 easily, at that party's own whim, become the opposing
25 party at a trial, and I think it would make preparation of

1 those reports very difficult.

2 And again, in this case, in fact, the
3 preparation of the presentence report was delayed while
4 all of this -- proceedings were going on in the district
5 court, because respondent wasn't cooperating with the
6 probation officer during that period.

7 Finally, I think that it's inconsistent with the
8 dignity and respect that judicial proceedings should have
9 that a formal Rule 11 proceeding in open court should
10 have -- should basically be able to be rendered a nullity
11 by the defendant's unilateral action.

12 A defendant -- if you read -- I think it's worth
13 looking at the plea proceeding here, which is in the joint
14 appendix, and it was all gone through very carefully with
15 the defendant. He knew what he was doing. He knew the
16 nature of the charges and the possible sentence, and
17 all -- he shouldn't be able to walk out of the courtroom
18 and then say, well, I haven't decided yet whether I'm
19 going to plead guilty.

20 It's true I just, under oath, told the court
21 about the facts of the case. I confessed, I went through
22 all this, but I may change my mind and I'll make up my
23 mind in a couple of months.

24 QUESTION: Mr. Feldman, do you happen to know
25 off the top of your head what percentage of convictions in

1 the Federal system are on guilty pleas and how many after
2 trial?

3 MR. FELDMAN: It's in the 90-percent range.

4 QUESTION: It's over 90 percent still, isn't it?

5 MR. FELDMAN: It's in that range.

6 QUESTION: Yes.

7 MR. FELDMAN: If there are no further questions,
8 I'd like to reserve the balance of my time.

9 QUESTION: Very well, Mr. Feldman.

10 Mr. Soglin.

11 ORAL ARGUMENT OF JONATHAN D. SOGLIN

12 ON BEHALF OF THE RESPONDENT

13 MR. SOGLIN: Mr. Chief Justice, and may it
14 please the Court:

15 The determinative question in this case is
16 whether the district court can accept a guilty plea before
17 it approves the plea agreement upon which it depends. In
18 this case and in its earlier suit in Cordova-Perez, the
19 court of appeals correctly recognized that a plea and a
20 plea agreement are so inextricably bound up together that
21 deferral of acceptance of one carries with it the deferral
22 of acceptance of the other.

23 QUESTION: Well, do you have to go against the
24 text of Rule 11(e) to do that, to take your position, and
25 the reason I ask the question is this. I'm reading -- I'm

1 actually reading from the rule as it's set out on 4a of
2 the back of the Government's brief.

3 QUESTION: Whereabouts, Justice Souter?

4 QUESTION: The first paragraph, right at -- it's
5 the carryover paragraph at the beginning.

6 If the agreement is of the charge-bargaining or
7 the definite sentence type, the court may accept or reject
8 the agreement, or may defer its decision until there's
9 been an opportunity to accept the presentence report.
10 It's clear from that that the court does accept the
11 agreement, may, and effectively may under the rule,
12 without waiting. Isn't that correct?

13 MR. SOGLIN: That's correct.

14 QUESTION: Okay, and under the -- in the
15 following sentence, if the agreement is of the type
16 specified in subdivision (B), the court may advise --
17 shall advise the defendant that if the court does not
18 accept the recommendation -- i.e., that which is part of
19 the agreement -- the defendant nevertheless has no right
20 to withdraw.

21 So in each of those instances, the (A), the (B),
22 and the (C) instance, the rule provides explicitly, as I
23 read it, for acceptance of the plea without regard to what
24 may ultimately happen to the terms of the agreement.

25 There are, of course, further provisions in the

1 (A) and (B) type, and there's a further provision, just
2 cause, for the -- (A) and (C) type and just cause
3 provision for the (B) type, but the text seems to me very
4 clear that the court may operatively accept the agreement
5 right then and there, and isn't that inconsistent with
6 your argument?

7 MR. SOGLIN: I don't think so. I think the rule
8 permits the judge to accept the agreement at the time of
9 the plea hearing, Rule 11 hearing, or may defer its
10 decision until later.

11 QUESTION: Yes.

12 MR. SOGLIN: Whether it's going to do that is
13 going to depend on the information available at that time,
14 and the petitioner has argued that deferral is required in
15 these cases, type (A) charge-bargain, or type (C) sentence
16 stipulation agreements, such that where there's deferral
17 in all of these cases, that in none of those cases can the
18 judge accept the agreement earlier and thus Rule 32(e)'s
19 fair and just standard disappears for that period of time.

20 That's not necessarily required. The rules,
21 particularly Rule 32, permits the judge in fact to
22 sentence a defendant without a presentence report, and
23 there's certainly authority the judge can accept the plea
24 agreement. The rules permit it without the presentence
25 report, and at that time, if the presentence report is not

1 needed the judge can say, I accept your plea agreement,
2 and at that time the defendant is bound.

3 QUESTION: Well, is it your point that the court
4 has got to use the magic word, accept? Is that what you
5 think the case turns on, as distinct from the rule that
6 the Ninth Circuit employed?

7 MR. SOGLIN: I think what it turns on is when
8 the judge can accept the plea, as opposed to the plea
9 agreement.

10 QUESTION: Well, let me ask a different
11 question. Do you defend the rule that the Ninth Circuit
12 applied?

13 MR. SOGLIN: Yes.

14 QUESTION: Well, the rule, as I understand it,
15 applied by the Ninth Circuit was that until the final
16 determination is made as to whether or not the terms of
17 the plea agreement will be honored, there is, in fact,
18 nothing binding upon the defendant, and the defendant can
19 simply either withdraw or say, oh, well, it doesn't mean
20 anything. Are you defending that position?

21 MR. SOGLIN: Yes.

22 QUESTION: How is that position consistent with
23 the text that we just went over from (e), which seems to
24 me to say quite clearly that the plea can be accepted by
25 the court even though the terms of the plea agreement may

1 or may not be honored, and there being various
2 consequences that follow if they are not, but the text of
3 the rule seems very clear that the court may accept the
4 plea, even though we don't yet know what's going to happen
5 to the terms of the plea agreement.

6 MR. SOGLIN: Justice Souter, I think I would
7 disagree that the rule says that the court could accept
8 the plea in that section.

9 QUESTION: It says, may accept or reject, in the
10 one sentence and in the other it says, the court shall
11 advise the defendant that if the court does not accept the
12 recommendation or request of the defendant, the defendant
13 nevertheless has no right to withdraw the plea. Aren't
14 those pretty clear indications that the court may accept
15 the plea regardless of what happens later to the terms of
16 the plea agreement?

17 MR. SOGLIN: Only with the type (B) agreements.
18 In the first sentence that you referred to it refers to,
19 the court may accept or reject the agreement. With type
20 (A) and type (C) agreements -- those are the charge-
21 bargain agreements and sentencing stipulation
22 agreements -- those are the types the court may defer
23 acceptance to the agreement.

24 With the type (B) agreements that are referred
25 to in the second sentence, there is no moment for the

1 judge to approve of the agreement. Approval of the plea
2 carries with it approval of the agreement in a case of the
3 type (B) sentencing recommendation agreement.

4 QUESTION: So you would say in the (A) and (C)
5 cases, even if the judge says in open court I accept the
6 plea, but I will determine later on whether I will accept
7 the agreement, and I will wait until after the sentence
8 report, the judge's statement in that case simply is not
9 effective.

10 MR. SOGLIN: It's not effective to the extent
11 the judge purports to bind the defendant to that plea. It
12 may be effective to the extent the judge has made findings
13 that the plea has been entered knowingly and voluntarily.
14 The judge has gone through the litany of determining
15 whether it's knowing and voluntary.

16 QUESTION: Mr. Soglin, I thought Rule 32 had
17 some bearing on the case, that says if a motion to
18 withdraw a plea of guilty is made before sentence is
19 imposed, the court may permit the plea to be withdrawn if
20 the defendant shows any fair and just reason. Why doesn't
21 that govern what happens here?

22 MR. SOGLIN: For a couple of reasons. First of
23 all, the petitioner has agreed -- and this is referred to
24 in their reply brief on page 9 -- that that rule, that
25 standard in Rule 32(e) only applies, or applies where

1 there is a tendered and accepted plea.

2 We've argued that there has been no accepted
3 plea, although the judge purported to do so. Her
4 label --

5 QUESTION: Well, the judge said he'd accepted
6 the plea but he hasn't made a decision on the plea
7 agreement, and the Government says there's a difference
8 between the two. You say there's no difference between
9 the two.

10 MR. SOGLIN: There's certainly a difference
11 between a plea and an agreement. You can have plea
12 without an agreement, but my argument is that you can't
13 accept one without the other, and this is based on the
14 structure of Rule 11.

15 That rule was amended in 1974. For the first
16 time that rule provided that the court could do what we've
17 just described, which is defer approval of the agreement
18 pending review of the presentence report.

19 To make that review possible, Rule 32 was also
20 amended to permit review of the presentence report prior
21 to a conviction. Rule 32 had already allowed the review
22 of the presentence report submitted to the judge, reviewed
23 by the judge, where there had been a finding of guilt,
24 whether by a guilty plea or a conviction before a trial,
25 jury trial.

1 If the judge could accept the plea but not the
2 agreement, there would have been no need to amend Rule 32
3 to permit that early review of the presentence report.

4 QUESTION: I mean, but you can square it a
5 little bit with the language, but my goodness, I've never
6 seen anything like this before, where the -- I've never
7 seen this, what the Ninth Circuit has done before.

8 I thought that the basic idea of this whole
9 procedure is that the defendant pleads guilty, the judge
10 then calls for the presentence report, everybody gets a
11 chance to look at it, you know, and then of course the
12 defendant's bound if the judge accepts it.

13 Imagine the contrary. The contrary would be the
14 defendant would sit there, he'd say, I plead guilty, but
15 it wouldn't mean anything. Now I'm going to get a really
16 good chance to see the evidence against me. I'm going to,
17 moreover, get a perfect chance to know what every witness
18 has said. This is a fabulous discovery, and I know what
19 the prosecution will have said, and I know what my -- I
20 know everything.

21 Maybe that's as it should be, but this is still
22 something of a change, wouldn't it be, to have the total
23 presentence report available to everybody prior to the
24 defendant actually being bound?

25 MR. SOGLIN: If --

1 QUESTION: Maybe that's a good idea. I don't
2 know. Or maybe it's not. But it would represent a
3 considerable change, wouldn't it, in most places?

4 MR. SOGLIN: If that were the response, if the
5 response to the decision were to produce a presentence
6 report prior to the Rule 11 hearing, prior to the
7 defendant being bound, that would be a change.

8 QUESTION: And then why isn't that your -- why
9 doesn't your --

10 MR. SOGLIN: That's not necessarily the
11 response.

12 QUESTION: Why isn't that the interpretation?
13 Why isn't that what would happen if we accepted your view
14 of the law?

15 MR. SOGLIN: That's one possibility. Another
16 possibility is that the district court could make its
17 decision on whether to accept the plea without a
18 presentence report.

19 QUESTION: Oh, well, the guidelines are very
20 much against that, aren't they? I mean, it's very hard to
21 ask a judge to do that without knowing the underlying
22 circumstances, isn't it?

23 MR. SOGLIN: That's correct. I think at the
24 time the Rule 11 hearing is held, though, a great deal of
25 information is known. Presumably the Government has

1 investigated their case --

2 QUESTION: Yes, that's true.

3 MR. SOGLIN: -- and produced discovery, and
4 there's a great deal known about the seriousness of the
5 offense.

6 In this case, Mr. Hyde is charged with eight
7 counts of fraud. He pled guilty to four counts of fraud.

8 QUESTION: How do you feel about the opposite,
9 because I guess if the defendant is free to withdraw, so
10 could the Government, and now what the Government's going
11 to do is get a really nice look not only at its own
12 evidence but get quite a nice look at what the defendant's
13 going to go and present to the probation officer, you
14 know, by way of excuse, mitigation, and everything.

15 Then the Government reads all that and says, oh,
16 by the way, we changed our mind. I take it that would
17 not be something you'd particularly like, but again, sauce
18 for the goose, sauce for the gander. You'd have to --

19 MR. SOGLIN: I would not like it. I'm not sure
20 that that's the required result.

21 If you look at it purely as two equally
22 bargaining parties, that would be the logical result of
23 the argument, but it's not necessarily really what you
24 have. Defendants are not your true, equally or fully
25 capably negotiating parties. They're --

1 QUESTION: Well, how would you reason through
2 the result you want, that if the defendant is not bound by
3 the plea, as you say, that the Government nonetheless is.

4 MR. SOGLIN: There are -- first of all, there is
5 no parallel provision to Rule 32(e) -- or, I'm sorry,
6 to -- yes, to Rule 32(e), which allows defendant to
7 withdraw without a fair and just reason. There's no
8 parallel provision for that for the Government.

9 There's a recognition in that that there's a
10 little more freedom available to a defendant withdrawing
11 than there is for the Government. The Government's going
12 to need to show some sort of breach or fraud.

13 QUESTION: Well, unless you say that since it
14 says -- the rule says nothing about the Government being
15 bound, that perhaps the Government should be able to
16 withdraw regardless of a just reason. The rules simply
17 don't address that.

18 MR. SOGLIN: Rule 32 doesn't address that
19 squarely. I think there are some lower court decisions
20 that --

21 QUESTION: Well, but those aren't rules, are
22 they?

23 MR. SOGLIN: That's correct.

24 When a defendant is offered the plea, there's
25 been some sort of partial performance whether that's

1 accepted by the court or not. The defendant has come into
2 court and said, I'm willing to waive some very important
3 constitutional rights. And on top of that, defendant
4 admits the conduct that's alleged. To that extent,
5 defendant has to some degree relied on the agreement.

6 There may not be the same sort of reliance by
7 the Government at that stage. The Government very often
8 does not have to perform what it's promised until
9 sentencing.

10 QUESTION: Well, how has he relied, on your
11 view? It seems to me his reliance is absolutely free on
12 your view, because he can withdraw, and I presume you're
13 not conceding that anything he had said in the plea
14 colloquy can be used against him.

15 MR. SOGLIN: It could be used in limited
16 circumstances in a trial under perjury, but that's not the
17 primary concern. The petitioner has recognized

18 QUESTION: Well then, he hasn't given up much.

19 MR. SOGLIN: Well, petitioner recognizes -- this
20 is in the reply brief in footnote 8 -- that such
21 information could be used in other ways. Even if it can't
22 be used at a trial, it could be used to have -- let the
23 Government think about other investigations, open the door
24 to other avenues.

25 QUESTION: Deny him Government employment,

1 perhaps.

2 MR. SOGLIN: Perhaps.

3 (Laughter.)

4 QUESTION: Mr. --

5 QUESTION: So your -- is it your argument that
6 what the defendant has partially performed is sort of the
7 equivalent of what the Government would be disclosing in
8 the presentence report, so that therefore it's perfectly
9 fair for the defendant to be able to wait until the
10 presentence report is in to decide whether or not he wants
11 to withdraw his plea? Is that your argument?

12 MR. SOGLIN: Well, the reason the defendant's
13 free to withdraw is --

14 QUESTION: No, but is that your argument? I
15 just want to know if I'm understanding your point.

16 MR. SOGLIN: That's right. If you could
17 rephrase it --

18 QUESTION: Well, the question that Justice
19 Breyer raised was, if the defendant may withdraw at will
20 under a rule like the Ninth Circuit rule, then the
21 defendant can sit back and wait for a presentence report,
22 which is in fact going to be there before the judge
23 sentences in almost every case, and if the deal is not
24 final by the time he reads the report, he could simply
25 withdraw his plea.

1 And I thought that you -- and the implication
2 being that would be a very strange system for the rules to
3 provide, because that would give the defendant a terrific
4 advantage in discovery, and I thought your argument was,
5 well, the defendant is partially performing simply by
6 standing up and going through the plea colloquy.

7 The defendant is giving the Government something
8 which it might use as a lead to further investigation and
9 so on, and so therefore it's perfectly fair for the
10 defendant to get the benefit of the plea agreement if the
11 Government gets the benefit of this partial performance,
12 and I thought that was the ultimate point that you were
13 making. Is -- do I understand you correctly?

14 MR. SOGLIN: That was the point I was making. I
15 don't think that's the most fair situation. Truly, that
16 is not what is presented by the facts of this case. This
17 is not something that the Court necessarily has to reach
18 in deciding this case, whether the Government would be
19 free to withdraw if there's been some sort of reliance by
20 the defendant.

21 QUESTION: Mr. Soglin, can I take you back to
22 Rule 32(e)? Was it your assertion that the Government
23 concedes that that only applies when -- after the plea has
24 been accepted?

25 MR. SOGLIN: That's correct. The Government

1 is --

2 QUESTION: As opposed to the plea agreement.

3 MR. SOGLIN: Correct.

4 QUESTION: We're talking -- now we're dealing
5 with two separate things, a plea of guilty, and a separate
6 plea agreement.

7 MR. SOGLIN: Yes. I think there are actually
8 three things that could be meant by the term, plea of
9 guilty. It could be a defendant tendering a plea -- as
10 petitioner has stated there are circumstances that are
11 rare where a defendant tenders a plea and the judge --

12 QUESTION: Well, when you say tenders a plea,
13 does it talk about tendering a plea here? I mean, you
14 plead guilty. You either plead guilty or you don't plead
15 guilty. I don't know whether you tender it.

16 MR. SOGLIN: Where a defendant says I plead
17 guilty is what I've been referring to as a tendered plea.
18 An accepted plea, which is what petitioner has stated is
19 required before Rule 32(e) applies, is where the judge
20 says I accept the plea. Our argument --

21 QUESTION: And the judge said that here.

22 MR. SOGLIN: The judge said that here.

23 Our argument is simply that the judge did not
24 have legal authority to do that. Looking at the
25 structure --

1 QUESTION: But you say somehow the rules don't
2 permit a separation of a plea of guilty and a plea
3 agreement.

4 MR. SOGLIN: That's right.

5 QUESTION: But textually it clearly does in the
6 one instance. I mean, there's an express provision that
7 says the judge will tell him that if I don't ultimately
8 follow the recommendation -- i.e., in a (B) situation --
9 you still can't withdraw the plea, so clearly there is an
10 irrefutable textual basis for saying that he can accept
11 the plea leaving the plea agreement in limbo in that
12 circumstance, right? .

13 MR. SOGLIN: Precisely. I think that's not the
14 case here. This case involved charge dismissal
15 concessions by the Government as determining the plea,
16 such that there was a requirement the judge accept the
17 agreement.

18 With a type (B) agreement, there's no reason for
19 the judge to accept the agreement. The judge has
20 ultimately no -- there's no limitation on the judge's
21 sentencing discretion under a purely type (B) agreement,
22 where the prosecution only has to make a recommendation as
23 to the ultimate sentence.

24 QUESTION: But in an (A) and (C) situation the
25 defendant has an absolute right to withdraw his plea if,

1 in fact, the charge part of the agreement or the absolute
2 sentence part of the agreement is not kept, right?

3 MR. SOGLIN: If the promise is not kept.

4 QUESTION: That's right.

5 MR. SOGLIN: Defendant can withdraw it, correct.

6 QUESTION: And so doesn't that imply that in
7 those situations, too, the plea can operatively be
8 accepted? Otherwise there would be no need for those
9 provisions, I suppose.

10 MR. SOGLIN: The provision for acceptance of the
11 agreement?

12 QUESTION: The provisions for withdrawal of the
13 pleas if, in fact, the agreements are not accepted and
14 kept.

15 MR. SOGLIN: Well, the provision for withdrawal
16 of the plea in Rule 32(e) doesn't describe whether it's
17 talking about a tendered plea, an accepted plea, a plea
18 where both the plea and the agreement have been accepted.

19 QUESTION: And the answer to that may be, just
20 as Justice Scalia said, a plea is a plea, and once it's
21 there, it's operative unless, in fact, it is subject to
22 one of these withdrawal or reexamination provisions.

23 MR. SOGLIN: Well, again, the petitioner has
24 conceded that that's not the case, and I think the answer
25 may be in the Mabry case of this Court, where the Court

1 held that the agreement is not binding until accepted by
2 the court, and in that case it was a situation where the
3 Government had made an offer which defendant accepted.

4 The Government then attempted to withdraw. The
5 defendants sought enforcement of that offer, the withdrawn
6 offer, and the Court said no, you hadn't -- that offer had
7 not been approved by the court.

8 QUESTION: Mr. Soglin, if you look at the --
9 or -- you've witnessed Rule 11 pleas, and it was with all
10 due solemnity, and the district judge is telling the
11 defendant all of his rights, and the defendant pleads
12 guilty.

13 Now, one wouldn't perceive of that procedure in
14 court as something that's tentative, so there's something
15 that doesn't quite fit, and the rules are meticulous in
16 instructing the judge about advising the defendant of his
17 rights, and anyone who comes into a courtroom and sees
18 that that's how we do justice in the United States, and --
19 but then you say that this is just an ephemeral thing,
20 that it's not real, that when the judge says now, knowing
21 all that, do you plead guilty, and the defendant says yes,
22 and the judge says I accept it, that all that is kind of
23 make-believe.

24 MR. SOGLIN: It's not ephemeral if the judge
25 accepts the plea agreement, which the judge has discretion

1 to do.

2 QUESTION: But there is no agreement at that
3 point that the judge -- the judge hasn't been presented
4 with the agreement.

5 MR. SOGLIN: No, the rules do require that the
6 parties, when they come into the Rule 11 proceeding to
7 advise the court --

8 QUESTION: But he hasn't accepted it, because
9 he's waiting for the presentence report.

10 MR. SOGLIN: The rules permit the judge to
11 accept it earlier. With some types of agreements that's
12 very possible.

13 In this case, the judge's sentencing authority
14 was -- could hardly be said to have been limited by the
15 agreement. There was agreement to plead to four counts of
16 an eight-count indictment on a fraud case.

17 The maximum sentence under the charged offenses
18 was 50 years. The maximum sentence under the plea
19 agreement was 30 years. Under the rules, the guidelines
20 which this Court recognized in Watt as recently as this
21 year, the Court can consider nonconvicted conduct,
22 relevant conduct, so all of that conduct that was part of
23 this-- these counts can be considered at sentencing.

24 The judge's sentencing authority was not limited
25 in any respect by the plea agreement, so the judge could

1 accept that agreement without at all limiting his or her
2 sentencing authority without waiting for the presentence
3 report, and that may be the case in many, many cases.

4 If there are cases where there is reason to
5 think that his sentencing discretion is going to be
6 limited in some way, where there is a mandatory minimum
7 sentence that might be eliminated, or where there's a very
8 low maximum sentence in the charged or the pleaded-to
9 agreement or count, that there would be significant limits
10 on the judge's sentencing authority.

11 In those cases the judge would want to see --
12 may want to see the presentence report. It's possible to
13 have that presentence report prepared earlier. The rules
14 specifically provide for that.

15 And as Judge Stafford, the chief judge of the
16 Northern District of Florida stated in an article, most of
17 the information needed is available at that time, at the
18 time of the plea hearing, even without a presentence
19 report, so there are many instances when that could be
20 accepted.

21 QUESTION: But the guidelines say that the judge
22 really should wait, don't they?

23 MR. SOGLIN: That's correct.

24 QUESTION: He should get the presentence report.

25 MR. SOGLIN: The guidelines do. The guidelines

1 use mandatory language. The rules use permissive
2 language.

3 QUESTION: Right.

4 MR. SOGLIN: I think that this is something --
5 Rule 32, which talks about use of the presentence report
6 for sentencing as opposed to acceptance of the plea
7 agreement, recognizes you don't always need the
8 presentence report. The judge can rely on the record if
9 the judge states on the record that they find sufficient
10 information on the record to sentence. The same thing
11 would apply with a plea agreement the judge --

12 QUESTION: Mr. Soglin, you mentioned a law
13 review commentary about what is being done, and whether
14 you need a presentence report. Do you know -- I'm asking
15 you the question I asked Mr. Feldman -- since the Rules
16 Advisory Committee were alerted to the problem by the very
17 case that we're reviewing, and were going to take a look
18 at Rule 11 to see if they should make some proposed
19 alterations, do you know what kinds of alterations, or do
20 you know anything more than Mr. Feldman did about where
21 that sits?

22 MR. SOGLIN: I do not know whether they're
23 taking any action. I attempted to find out a couple of
24 weeks ago. I learned that the next meeting had not been
25 held yet. That will be coming up, I believe it was

1 April 8.

2 If I'm able to obtain that there is something
3 that the Rules Committee is taking up with that, I will
4 certainly, with the Court's permission, lodge that with
5 the Court after the hearing, but that does raise the
6 question that, can this be dealt with in some other way.

7 If the rule has not addressed the situation, if
8 the guidelines have in some way increased the frequency
9 with which judges defer approval of the agreement by using
10 mandatory language, perhaps the way to resolve the
11 conflict is to have the Sentencing Commission take another
12 look at this, the Sentencing Commission or the Rules
13 Committee through the rules amendment proceedings.

14 QUESTION: Oh, but that's not a possible
15 disposition. I mean we can affirm or we will reverse. We
16 can't say the Sentencing Commission should take another
17 look. We have to decide this one way or the other.

18 MR. SOGLIN: Or -- well, I mean, the other
19 option would be a dismissal, a finding that certiorari had
20 been improvidently granted on the ground that --

21 QUESTION: Or a reversal because we don't agree
22 with you.

23 MR. SOGLIN: That's their losses.

24 (Laughter.)

25 MR. SOGLIN: I just want to address for a moment

1 some of the floodgates arguments that the Government has
2 made.

3 As I stated, this is not -- does not apply to
4 all agreements. There are agreements that don't even fall
5 under the types addressed by the rules. There are
6 cooperation agreements that are not described in the
7 rules. Those do not require a deferral of acceptance of
8 agreements, so there are many agreements where the judge
9 can accept the agreement at the plea hearing.

10 There are also many disincentives for a
11 defendant to back out of an agreement the way the
12 Government has suggested will happen frequently, or to use
13 it for delay. Defendants want speedy trials. There
14 are -- of course, of course the Speedy Trial Act reflects
15 that there are -- is an interest for defendants to have
16 quick resolution of these cases.

17 If a defendant does seek to withdraw, and the
18 Government thinks this is for delay or it obstructs
19 justice in some way, that defendant upon going to trial
20 will get -- will lose acceptance of responsibility
21 reduction, which is a three-level reduction in sentence, a
22 two- or three-level reduction in sentence, sentencing
23 levels.

24 They could also face an enhancement for
25 obstruction of justice under the guidelines, or a separate

1 prosecution for obstruction of justice if they are using
2 this somehow to manipulate or to delay the proceedings so
3 that Government witnesses are lost.

4 The reality is --

5 QUESTION: The reality is that will never
6 happen. They're -- you're not even -- even perjury
7 prosecutions for obstruction of justice are pretty rare.
8 This won't happen.

9 MR. SOGLIN: They are rare. It is possible, and
10 I would rely more on the loss of acceptance of
11 responsibility, which is -- very often could be what
12 motivates the defendant to plead, is that reduction, which
13 can be significant, up to 20 percent, 30 percent reduction
14 in sentence, which they're not going to get if they go to
15 trial. That's a tremendous deterrent in defendants
16 withdrawing from these pleas.

17 The -- finally, the -- it's been mentioned
18 earlier that the rate of conviction by plea agreements, by
19 guilty pleas is 90 percent, or has been over 90 percent.
20 It has been that high for quite a bit of time, since -- at
21 least since the 1960's, and we cited some reference to
22 statistics like that, so there are -- there's a great deal
23 of stability in guilty pleas.

24 There is -- if something significant has been
25 offered to defendant they're going to plead guilty and

1 they're going to stick with that plea. It's going to be a
2 rare defendant who's going to want to back out of that.

3 It's -- a point of emphasis. The question here
4 is, truly, can the court do what it purported to do in
5 this case, which was accept the guilty plea at the time
6 that it did. The rules, the structure of the rules show
7 that they cannot. In that situation, Rule 32(e) does not
8 apply, and the defendant is free to withdraw.

9 If the Court has no further questions --

10 QUESTION: Thank you, Mr. Soglin.

11 Mr. Feldman.

12 REBUTTAL ARGUMENT OF JAMES A. FELDMAN

13 ON BEHALF OF THE PETITIONER

14 MR. FELDMAN: I just had one point I wanted to
15 make.

16 For purposes of this case -- this is in response
17 to Justice Scalia's question -- we have accepted that it's
18 the -- that at least at the latest time when the district
19 court accepts the plea the parties are bound.

20 Now, whether at some earlier point the parties
21 may be bound or not is really not something that arises
22 here, because it was done so carefully in this case, and
23 that -- we've said that in our brief.

24 QUESTION: What's the best textual support for
25 your position? What is the provision of the rules that

1 you think is the one --

2 MR. FELDMAN: I guess -- it's hard for me to
3 answer, because I do think there are several of them, but
4 I think 32(e) would be rendered a nullity in a -- most
5 cases if the Ninth Circuit's view were right, and I don't
6 think that rendering -- I think that that would be the
7 strongest one in my view.

8 I also think there are provisions of Rule 11, as
9 I mentioned before, that clearly distinguish between pleas
10 and plea agreements.

11 CHIEF JUSTICE REHNQUIST: Thank you,
12 Mr. Feldman.

13 The case is submitted.

14 (Whereupon, at 12:03 p.m., the case in the
15 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

UNITED STATES, Petitioner v. ROBERT E. HYDE
CASE NO. 96-667

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BY Ann Marie Fedilo-----

(REPORTER)