IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD IRIZARRY, :

Petitioner :

v. : No. 06-7517

UNITED STATES. :

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Washington, D.C.

Tuesday, April 15, 2008

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

APPEARANCES:

ARTHUR J. MADDEN, III, ESQ., Mobile, Ala.; on behalf of the Petitioner.

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

PETER B. RUTLEDGE, ESQ., Washington, D.C.; for amicus curiae, support of the judgement below; Appointed by this Court.

C O N T E N T S

P R O C E E D I N G S

(11:11 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 06-7517, Irizarry versus United States. Mr. Madden.

ORAL ARGUMENT OF ARTHUR J. MADDEN, III

ON BEHALF OF PETITIONER

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

This is a sentencing process case. The first step of the sentencing process described by the Court in Rita, as noticed, broke down in this case. The Petitioner first learned that the district court contemplated a non-Guideline sentence when it was pronounced. The grounds for that statutory maximum sentence were not noticed and the issues were, therefore, not litigated.

The government here agrees that the lack of notice was error and advocates notices for all sentences outside the Guidelines. This is the correct result. Because it's only through notice can the sentencing court subject a defendant's sentence to the thorough adversarial testing contemplated by Federal sentencing procedure.

That quote comes from Rita and relies upon

rules 32(f), (h), (i), and a decision of this Court in United States versus Burns. That law controls the decision in this case.

The position of the Amicus --

CHIEF JUSTICE ROBERTS: You may not have had notice of the issue of whether or not an alternative procedure and medication audit would help, but you certainly knew that future dangerousness was going to be on the table. And if you had a response to that, which is, well, if he took his medication, it wouldn't be a problem, I assume you would have prepared for that.

MR. MADDEN: The -- the -- the notice that suggested -- the Guidelines departure which is suggested in the last paragraph of the pre-sentence report, is very specific. It is directed toward the 4A1.3 departure. The concerns raised by that are completely different than the grounds on which the court departed. So, no, that wasn't adequate notice.

CHIEF JUSTICE ROBERTS: Well, yeah, I -- but in terms of what issues might suggest themselves to a judge sentencing this particularly defendant, I would have thought future dangerousness. I mean, you have an individual who has leveled particular threats with some degree of certainty that he intends to pursue them, I would have thought that would have been one of the first

things a sentencing judge would look at.

MR. MADDEN: Well, it was looked at in the context of the sixth level enhancement for intent to carry out the threat, and it did come up in the context of acceptance of responsibility. But both look at different issues than the ground that the sentence was ultimately -- the -- the upward non-Guideline sentence was ultimately imposed on.

JUSTICE SCALIA: Well, you know this -- this provision 32(h), really doesn't -- does simply not work with post-Booker guidelines. You either have to say it was designed for a different regime, and therefore, has no effect now after Booker, or else you have to expand it beyond what it says, because may depart from the applicable sentencing range on a ground not identified, under the mandatory guidelines, they were identified grounds for departure.

And you had some -- the court could look at those and say, gee, am I going to pick one of these, if so I'll let him know. But you can depart now simply on the ground that you don't agree with the -- with what the Guidelines say as -- is that what you would call a ground of departure?

It's simply a ground of disagreement, I would suppose. Why shouldn't we hold 32(h) simply.

Simply has no -- no application under the new system? Or at least hold that all it applies to are departures within the meaning of the old mandatory guidelines system? Which is a much narrower category of departures.

MR. MADDEN: Yes, sir. I think first it would seem to make -- it would not make sense to demand notice for a finite range of factors, but no notice for a potentially broader one. That seems counter-intuitive. But --

JUSTICE SCALIA: I don't think it is counter-intuitive to provide -- to -- to require notice when the number of grounds is finite. But if the number of grounds is infinite, I'm much less inclined to read it as even applicable to the situation.

MR. MADDEN: But the -- the decision of -- in Burns, I think, answers the question because unless there's -- if a party is not focused -- and generally the parties' papers and the PSR will focus the issues. But in the few cases where -- where an extraneous sentencing consideration that's important enough to drive the sentence up or down is raised, in order to have adversarial testing of that important issue, there has to be some kind of notice. And it's not -- variance is not what we're calling a variance, a non-Guidelines

sentence is not a pure exercise in policy even in Kimbrough.

That was a policy disagreement but it was driven by facts, and the defendant in that case, the appellant, gave notice that they were going to be challenging it, and -- and there was a factual presentation. So the record was in the right shape to make the policy determination.

JUSTICE SCALIA: Post-Booker the guidelines are advisory, and the district judge has discretion as to the sentence.

Now, in the bad old days, when the statute said 20 to 40, and the judge decided to give you 40, he didn't have to give you notice of why he was giving you the highest sentence.

And now that we've returned to a system that is closer to that, why should we interpret 32(h) as imposing a very difficult to comply with requirement that didn't exist under the -- under the pre-pre-Booker system?

MR. MADDEN: I remember that system.

I think the -- the answer is that -- that it -- it's important -- the requirement is essential for purposes of advocacy on the issues. Burns -- Burns reflects the Court's understanding again of what

Congress intended in the Sentencing Reform Act. They said Congress intended notice and litigation.

Now, this Court had to make some excisions on Sixth Amendment grounds in what Congress -- what Congress could do, but their intent hasn't changed.

JUSTICE ALITO: Suppose the district court in this case had said I'm considering an above-Guidelines sentence based on facts that are in the record in the pre-sentence report to protect the public from further crimes of the defendant.

Would that be adequate notice?

MR. MADDEN: No. Not on the grounds here. It's close. It's closer.

JUSTICE GINSBURG: What would have been?

MR. MADDEN: I think -- I think --

JUSTICE GINSBURG: And how much time -- this is two questions; time question and the content question.

What would she have had to say to comply with the rule as you read it?

MR. MADDEN: Yes, Your Honor. Reading it backward from what the comment -- the explanation of the sentence at the end backwards to what the grounds were and the notice should have been, her finding was that -- that he would continue to be a threat regardless of the

supervision we are under. That was the key.

To say if there is nothing other than maximum incapacitation which will prevent him from being a danger in the future, if that was the issue, if the question is: Is there any lesser sentence than maximum extra incapacitation, then everyone could have litigated, that would have been the issue that was on the table.

JUSTICE ALITO: You seem to be requiring a very specific kind of notice, almost as if the district court has to say this is the sentence that I'm considering, and these are the exact reasons that I'm considering; now what do you have to say about that.

MR. MADDEN: Yes. And I think that goes with the Justice's second question.

JUSTICE ALITO: Is that what you're asking?

MR. MADDEN: -- content -- it needs to be specific -- it needs to be specific enough so that the facts that get litigated are the ones that are ultimately recited by the court for the reason for the non-Guidelines sentence.

JUSTICE ALITO: But why would the --

JUSTICE GINSBURG: That's a complex answer. And I -- this seems to me to be a clear case of what was in the judge's mind. She said I have a record here of

repeated e-mails to this woman, threatening to kill her, threatening to kill her new husband, threatening to kill her mother. He did it again and again and again.

I have seen this person, he appeared before me. It is my educated prediction that he will do it again. So I'm going to put him away for as long as I can.

That's -- her reasoning process is not at all mysterious.

What notice is the defendant lacking?

MR. MADDEN: I think if -- if she would have said something to the effect that -- and this sometimes happens during the course of a sentencing, that's a different issue -- but here's what's on my mind. I'm concerned that only extra prison time, incapacitation for as long as I can give him, will do the job of protecting society. What do you have to say about that?

If that was the -- now isn't the written, formal, this is during the context of the sentencing -- the way it comes out, then the response would be something like, "Judge, there's -- there is psychiatric evidence or psychological evidence that's developed that I'd like to put on bearing on that issue in light of the report from Buttner, the new report that just came into the record right before the sentencing, that goes

directly to the issue of amenability to treatment; and you're concerned that only maximum incapacitation will address the issue.

I think that's how that -- that's how it should have played out.

JUSTICE SOUTER: Why -- why isn't that an equally response to what Justice Ginsburg just gave as a recitation of what the what the judge had said.

MR. MADDEN: The --

JUSTICE SOUTER: She quoted and summarized the judge saying he's going to do it again.

MR. MADDEN: Yes.

JUSTICE SOUTER: Anybody knows that what the judge is getting at is I'm going to put him away as long as I can put him away. Isn't that just as much notice or just as much a -- a stimulus to the response that you want to give, as your reformulation of the -- of the issue?

MR. MADDEN: Yes, and that goes to the timing question. When she said that, the next -- in the same paragraph, was -- and, and therefore, it's a 60-month sentence.

That -- that discussion didn't occur -- the notice didn't --

JUSTICE SOUTER: So it's not the question of

notice; it's the question of time to respond.

MR. MADDEN: At that point it was explanation, it explanation of what she was doing, not notice of what she was going to do at a time when it would have made a difference.

JUSTICE SCALIA: What is she supposed to do? Usually there -- there's just one sentencing hearing, right?

JUSTICE SCALIA: And there's --

MR. MADDEN: Usually.

JUSTICE SCALIA: -- a pre-sentence report which both parties have. And sometimes there are witnesses who come in. Sometimes the injured parties or the relatives of the deceased party come in; and -- and usually the sentence is imposed at the end of that proceeding.

Now when is -- when is the judge supposed to be so precise as to what particular matters induce her to -- to raise this sentence here?

MR. MADDEN: I --

JUSTICE SCALIA: Are you going to have a recess? Or maybe reschedule the sentencing for -- for a week later so that the judge can decide in detail what particular factors motivate her?

MR. MADDEN: I think in -- in the vast

majority of cases, and the government concedes this in the brief or acknowledges it, that while there are infinite number of variables that lurk in every case, practically, there are not that many that are actually there. Those are usually identified in the pre-sentence report which you have way in advance or in advance.

There are -- the parties have a duty to identify the issues that are going to be litigated; and that's done.

JUSTICE SCALIA: Now if it is in the pre-sentence report, is that enough notice?

MR. MADDEN: Yes. And that's typically --

JUSTICE SCALIA: So long as it is in the pre-sentence notice the judge doesn't have to say I plan to rely on this aspect of the pre-sentence report?

MR. MADDEN: No.

JUSTICE SCALIA: Okay.

MR. MADDEN: No, because in the vast majority of cases that's what occurs. And then the parties have a duty to interject issues that they think ought to drive the Guidelines or non-guidelines either way.

And the bar is actually getting better at that than when this occurred in picking up on 3553(a) factors, and I think the problem is actually going to

become lesser over time.

So only in the extraordinary cases -- and Burns was an extraordinary case -- where an issue that is important to the judge isn't flagged in the papers -- does the duty arise to let -- let the parties know what considerations they should focus their attention on, so that they can be litigated.

CHIEF JUSTICE ROBERTS: Does the defendant have an obligation to give notice, both to the government and I suppose to the judge, saying at the -- at the sentencing hearing, we're going to say this? So the judge can get ready for it? Or the government can get ready for it?

MR. MADDEN: Usually, the interests, of course, are different.

The -- the interests of the defendant in -- in a lower sentence, I think, is different than defending against a higher -- a higher sentence; but yes, I think it is appropriate.

And the rule says -- rule 32(h) only speaks to the judge. But I think the parties in their positions are required by the local rule in the Southern District of Alabama and the Federal rule generally to put their -- their positions in writing in advance of the hearing. I think our rule, I believe, is seven

days.

So that when the judge, before getting ready to sentence, looks at the issues, the people with the heightened interest in them have already identified what they are.

So the only -- it's only the residual issues that are picked up by rule 32. It occurs very infrequently in practice.

CHIEF JUSTICE ROBERTS: What about the point made by Chief Judge Boudin in his recent opinion, is that now that we look more carefully at the 3553 factors, counsel has to come in prepared to address all of those?

MR. MADDEN: It is -- you know, as a practical matter, it is extremely wasteful. It does not promote focused advocacy. The sentences that are going to come out of that kind of system won't be on a developed record. The sentences in the aggregate will be less reliable for purpose of evolution of the guidelines.

There's -- there are -- the reasons for notice I think are in -- notice is important not only for the individual defendant but there's institutional interests as well.

It's a -- it's a fairly rarely occurring

phenomenon where rule 32(h) comes into play. The rule as written doesn't demand any changes. It is a matter of interpretation. And the Sentencing Commission itself defines a departure as any non-Guidelines sentence.

That fits within the literal language of rule 32(h). This Court doesn't have to decide this case.

JUSTICE SCALIA: It's not what it meant when 32(h) was promulgated.

MR. MADDEN: Well, the Court in Rita, which was after Booker, discussed in fact, the sentencing court, applying the Guidelines in individual cases, may depart either pursuant to the Guidelines or since Booker by imposing a non-Guidelines sentence. The word departure --

JUSTICE SCALIA: You could apply departure to post-Booker; but at the time this rule was adopted, departure did not consist of that; it consisted of something much more narrow.

MR. MADDEN: It -- it had a narrower meaning but -- but the rule 32(h) was to implement the structure of rule 32, that's what Burns said. And --

JUSTICE GINSBURG: Why should we put into rule 32(h), as Justice Scalia suggests, the 3553(a) factors, when we know that the rule makers did make a

change in 2007? That is they put 3553(a) into 32(d)(2)(F); so they made a change there and they said the judge could ask to have these things included in the pre-sentence report; but they left (H) looking like it's dealing just with the guidelines. Why couldn't the Court say well, we didn't put 3553 in (h), and so it's not there?

MR. MADDEN: Well, I don't think that that answers the question, because under the prior structure of the rule, the pre-sentencing was supposed to set out all of the factors and (h) was just -- just a stopgap.

The provision that came in in December of '07 that says that the court can request other factors, I think is just that an authorization to the probation officer to look at -- to look at other factors and to think more broadly.

But I don't think that should be read as limiting the scope of 32(h) simply to what would be traditional guideline departures.

If I could, I'd reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Roberts.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE RESPONDENT

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

Rule 32 requires the district court to provide notice before any departure from the Guidelines range based on a ground not previously identified by the PSR of the parties, including a departure based on the factors in section 3553(a). Non-Guideline sentences under section 3553(a) fall squarely within the term departure, both as defined in the dictionary and as defined in the Guidelines.

JUSTICE ALITO: Well, why shouldn't this rule be dealt with by further rulemaking? It is very clear that when 32(h) was adopted, departure had a specific meaning under the Guidelines. And what we're talking about now was not contemplated at all by the rulemakers at that time.

Now, applying 3553(a) in this situation raises different problems, and there are issues regarding the specificity of the notice that's required and the timing of the notice. Why shouldn't this be dealt with by further rulemaking when those -- where those things can be handled in a comprehensive way rather than by the haphazard development of case law by the courts of appeals if we agree with your position.

MR. ROBERTS: First of all, as enacted rule

32(h) requires notice of all deviations from the Guidelines range, and by its plain terms it continues to do that. But --

JUSTICE ALITO: Are you saying --

MR. ROBERTS: Either way --

JUSTICE ALITO: Are you saying that if they had in mind at the time that Booker might be coming down the road.

MR. ROBERTS: No.

JUSTICE ALITO: There would be non-Guidelines variances from the Sentencing Guidelines.

MR. ROBERTS: No. They were focused on Guidelines authorized departures because those were the only ones that were legally authorized at the time. But the fact is that they required notice of all -- that -- that -- that they were requiring notice of all deviations that were available. Now they should require notice -- at a minimum, rule 32(h) is still there and it continues to apply to traditional departures.

CHIEF JUSTICE ROBERTS: The rules advisory committee is currently considering whether or not to change this, right?

MR. ROBERTS: Yes. It --

CHIEF JUSTICE ROBERTS: Nobody in that process has suggested, well, it's too bad you've already

decided this in 32(h)?

MR. ROBERTS: Well, yes. One of the -- they have, Your Honor.

One of the things that the advisory committee stated that it was going to consider was -- was lower court decisions on the question -- on the question of whether notice -- the current text of rule 32(h) requires notice to be given.

So that might have been one of the reasons that some people in the conference were reluctant to adopt an amendment. Another reason was that they knew that the courts were considering the question, and many people expressed concern that an amendment was premature, that the -- that the conference should await further guidance from the courts and from this Court.

CHIEF JUSTICE ROBERTS: A lot of judges objected to the idea they would adopt the position you're urging here.

MR. ROBERTS: That's true. Some judges did object to that. But others -- as I said, there were other -- some judges expressed support for that interpretation, and there were varying reasons that were motivating different people in the conference to take the position that the conference should wait.

The fact is -- and so the Court shouldn't

construe from the failure to enact an amendment just like the Court is reluctant to construe from the failure to amend a statute that the current provision doesn't require notice.

CHIEF JUSTICE ROBERTS: It's not inferring from the failure to act. It is just a recognition that these things are looked at very carefully by the rules committees and they look at it in a broad way and take in all the information. We know they're doing that now. And we would be kind of jumping the gun and short circuiting that process.

MR. ROBERTS: I don't think so, because they've -- they've referred it back to the subcommittee and said they want to wait and see what -- what this Court does and what the courts to.

So, they're waiting for you. Doesn't seem like in that circumstance it makes sense for you to wait for them.

But however you interpret the current rule -- and the question before you is what the current rule requires. However you interpret that it doesn't circumvent the rulemaking process --

JUSTICE KENNEDY: May I ask you this question about the rule: It says before the court may depart from the applicable sentencing range on a ground

not identified for departure. Can a pre-sentence report say possible grounds for departure are as follows, and then list them? Or does this, in your view, mean that "identified for departure" means as recommended by the pre-sentencing report?

MR. ROBERTS: No. I think that the pre-sentence report doesn't actually have to recommend it. The pre-sentence report -- and they generally have a section that does this although, although often they don't identify --

JUSTICE KENNEDY: Well, could the pre-sentencing report just list a series of -- a whole series of factors saying these are possible grounds for departure? Would that comply with the rule?

MR. ROBERTS: I mean, at a certain point it wouldn't, but if it listed more than one as a possible ones and they were identified with sufficient specificity to enable --

JUSTICE KENNEDY: Would future dangerousness -- future dangerousness be something that could be put in the report and that would cover these --

MR. ROBERTS: Yes. It -- it -- it certainly could, Your Honor. And the PSR here includes --

JUSTICE KENNEDY: That's the latest thing we're talking about very much.

MR. ROBERTS: That's required.

No. But what -- what it does show is that this is a possibility that an out of Guidelines sentence is a possibility and this is the ground on which it is a possibility.

JUSTICE SCALIA? What if the ground is I just simply believe that the Guidelines' recommendation for arson when there are people in the building is simply too low? Okay? You give notice of that. What good is giving notice of that going to do? Is too low. Isn't too low. Is too low. Isn't too low. I mean --

MR. ROBERTS: The parties can --

JUSTICE SCALIA: It's almost, you know, a determination of the judge's gut feeling of what is condign punishment for a particular --

MR. ROBERTS: The parties -- the parties would be able to focus on that and try to inform the judge's decision on that. But that's not the only kind of -- that's not the only kind of ground on which a court might vary, and that may not be one for which advance notice would be particularly helpful, but there are many on which it is.

If I can give an example of a case we recently confronted, for example? We had a case in which a judge imposed probation on a defendant who was

convicted of soliciting child pornography because the judge was under the belief that prison couldn't provide the necessary treatment.

We hadn't presented any evidence on available treatment programs, but we certainly would have done that if we had had notice that the court was contemplating varying on that ground. And because we didn't do that, there was no adversary presentation of that.

JUSTICE GINSBURG: Couldn't you have asked at the hearing, couldn't you ask the judge: Judge, please have a continuance here because you have taken us by surprise and we'd like to offer some evidence that you -- that might influence you?

MR. ROBERTS: You could -- we could certainly do that. But that's an after the -- you know, that would be an after-the-fact situation. What -- what rule 32 is trying to do is set up a procedure so that in every case, in every case you get the adversarial presentation on the grounds --

JUSTICE GINSBURG: When? I asked Mr. Madden and didn't get a precise answer: When does this notice have to be given? We're told that the court itself did not get the full sentencing packet until seven days before the hearing.

So when must this notice be given and how much does it have to say?

MR. ROBERTS: Well, it's -- it's a context-specific question. The question is, is the notice reasonable, which means it has to give the parties enough time to present the adversarial process on the question.

Now, in the vast majority, all but the most unusual cases notice a day or two in advance would be specific. And in many cases, notice that the hearing itself would be sufficient.

I think in this case, for example, notice that the hearing itself would certainly have been sufficient; but -- but the --

CHIEF JUSTICE ROBERTS: How can that be? They're talking about an expert and all that. He's not going to be hanging around the courthouse.

MR. ROBERTS: Well, several reasons; for all the reasons, Your Honor, that we said that the -- that it's failure to give notice of a variance here was harmless. First of all, the PSR had already identified a possible departure on a very similar ground.

Second of all, the Petitioner's future dangerousness was central to the victim impact testimony of his wife who had notice was going to testify. He

knew from the PSR what she was going to say.

In addition, it was central to dispute -- potential adjustment to the Guidelines' range. So, his future dangerousness was --

CHIEF JUSTICE ROBERTS: Well, that all goes -- that all goes to the harmless error question. Is that the only time in which notice at the sentencing hearing is going to be adequate?

MR. ROBERTS: No, Your Honor. But I think in this circumstance, for example, there would be -- another example would be often if the victim impact testimony -- there hadn't been identified as a potential ground for departure on it, but the judge heard victim impact testimony, but the defendant knew the victim was going to testify, had the general sense it and the judge when it heard -- when she heard it decided, wow, you know, this really makes me think I should take it out of the sentence, I think that because the -- because the defendant knew that the testimony was going to be there, knew the gist of it and was prepared to respond to it, would probably be sufficient to give notice at that time then.

For instance, if the judge relied on remorse in allocution -- lack of remorse in allocution that's another example where I think, you know, notice at the

hearing would pretty much --

JUSTICE SCALIA: In a lot of cases, though, it will be impossible for judges to make their determination the night before, take home the pre-sentence report, and, you know, stuff from the trial and focus on the next morning's sentencing hearing.

MR. ROBERTS: Well, judges --

JUDGE SCALIA: -- decide it a week in advance. Do judges do that, decide a week in advance? I doubt it.

MR. ROBERTS: The judges are reviewing the material. I don't think they are doing it a week in advance. They're getting the material a week in advance. They are reviewing it before the sentencing hearings. And the notice requirement has not been unduly burdensome for traditional departures --

CHIEF JUSTICE ROBERTS: But you're really asking them to sentence first and hearing afterward.

MR. ROBERTS: No, they don't --

CHIEF JUSTICE ROBERTS: Maybe the whole purpose of the hearing is to find out what factors are pertinent and all that. You're asking the judge to come to that determination before the hearing.

MR. ROBERTS: That -- it is true that they go into the hearing with an open mind, but it's also

true that before the hearing, they're going to have some sense based on the written materials that they've reviewed and based on the parties' identifications of what they think the appropriate sentence is. As Petitioner's counsel explained, in the vast majority of cases, the PSR, the parties are already going to identify the potential grounds for a variance, and so it's very few cases that there's going to be a ground that's going to come out --

JUSTICE ALITO: How specific does the notice have to be? I take it it's not enough just to recite one of the 3553(a) factors.

MR. ROBERTS: Well, at a minimum, the court would have to identify the relevant 3553(a) factor. I think then what more is required depends a little bit on the particular factor, the record in the case. Again, the test is to ensure that they focus adversarial presentation. If it's a really an open-ended factor, like the nature and circumstances of the offense and the defendant's characteristics, obviously more is going to be required.

JUSTICE ALITO: Well, what was required here?

MR. ROBERTS: Here I think it would have been sufficient for the judge to say. I'm contemplating

a variance under section 3553(a)(2)(C), based on the fact that Petitioner's conduct indicates that he is likely to commit future crimes.

CHIEF JUSTICE ROBERTS: So you disagree with the Petitioner on the specificity of notice required?

MR. ROBERTS: Yes. We don't think that notice of the specific fact on which the court is going to rely is required. That would start to make the notice requirement unworkable, but I don't think that's how it's been interpreted, to require the very specific facts in the departure context.

The same situation, the parallel thing applies here. As I was going to say before on the burdensomeness, it hasn't been burdensome, unduly burdensome, to require notice for traditional, and there really isn't any reason to think that it would be different for here.

And to get back to something earlier as well that we're were talking about, the key fact is rule 32(h) does indisputably require notice for traditional departures. And a notice requirement for variances is essential to prevent evisceration of that notice requirement because a court can always impose the same -- use a variance to impose the same sentence that it could have imposed as a Guidelines departure.

So that notice requirement, which is still in the rule, is going to basically become meaningless unless the word "departure" is given it full scope and construed to include variances.

And notices of variances is also necessary for the focused adversarial testing that rule 32 requires for the reason the Court said in Burns. If the parties don't know what the potential grounds for a non-Guidelines sentence are, then what they're likely to do is either address the possibility of an above-Guidelines sentence in a random and wasteful way by trying to conceive of every possible grounds or they're just not going to address it at all, like in the example that I gave before when we just didn't address the potential variance based on prison not providing -- being able to provide the appropriate treatment.

And it's still important, even after Booker, to have adversarial testing of that issue.

JUSTICE STEVENS: Could we go back to the example for just a minute? I want to be sure I fully understand it. Why couldn't that issue have been adequately discussed at a hearing in which there was no particular notice, but at the end of the hearing the judge said, this is what I'm planning to do because I'm worried that they won't get treatment in prison and so

forth? Well, wouldn't the government have had an opportunity to then say, Judge, you overlooked this fact? And wouldn't all involved in the hearing?

MR. ROBERTS: Well, what we would have liked to do is bring in people to explain to the judge these are the programs that are available. This is --

JUSTICE STEVENS: Couldn't the lawyer have done that?

MR. ROBERTS: That's how it works. Well, I think the lawyer probably could have said we have -- we have treatments and they work. But then the judge said --

JUSTICE STEVENS: But wouldn't --

MR. ROBERTS: -- well, based on this --

JUSTICE STEVENS: Well, that solves the problem because the judge apparently was operating under a misunderstanding of facts.

MR. ROBERTS: Well, I think that what the judge thought was that there were no available treatments that would work. And it --

JUSTICE STEVENS: And the lawyer could say you're wrong.

MR. ROBERTS: That -- you know, it might have dissuaded the judge there, but it didn't give us the opportunity to bring in somebody who --

JUSTICE STEVENS: No, I understand.

MR. ROBERTS: -- who knows how it -- you know, who knows what the programs are, to explain it. Whatever the judge said, yes, I know you have these programs, but the programs that you can do in prison -- you know, I just don't think that those are effective. And --

CHIEF JUSTICE ROBERTS: Well, if you think you have a particularly good case that they are, again you make that point to the judge.

MR. ROBERTS: But --

CHIEF JUSTICE ROBERTS: If you can see what the last report about these programs was like, you wouldn't think that. And I think a reasonably competent judge is not going to say, I don't want to see it. Or maybe he will based on his own experience in dealing with those types of --

MR. ROBERTS: The judge is -- you know, counsel can make the argument. But in certain cases, the ability to present actual evidence on it is going to be an important -- is going to be an important factor. There's, you know, other examples: For instance, if the judge varies on grounds that there's no treatment available for other things or that people have been permanently psychologically scarred, and the other side

wants to bring forward counter-evidence and -testimony. There are numerous ones. That's the -- that's the essence of what the requirement --

JUSTICE STEVENS: In your --

MR. ROBERTS: -- and the rules get at.

JUSTICE STEVENS: In your experience, do judges often bring in experts on this kind of stuff?

MR. ROBERTS: Judges -- do judges bring in experts?

JUSTICE STEVENS: Well, not judges -- do judges say, "Oh, this is very interesting; I'm going to have a new hearing"? I mean, how long do these hearings go on?

MR. ROBERTS: We would have -- if -- I think that we would -- could bring in someone and testify about -- to present evidence on that for sure, if the judge was thinking of imposing probation because there was no treatment program. It wouldn't have to go on for very long, but we could have someone come in for a few minutes and -- and do that.

JUSTICE STEVENS: But you're saying that, routinely in sentencing matters, you have expert who come in and advise the judge of programs and so forth?

MR. ROBERTS: Not routinely, but, you know, generally that's not an issue. That's why we didn't do

it in this -- in this particular sentencing hearing. The point is that, you know, we're not going to do that. And so a judge that's operating under that and it's going to vary on that ground isn't going to get that information because we're -- as you say -- we're not going to just want to delay all the hearings for that reason.

And so that -- it's really the reason that the requirement in the existing rule is there, and the reasons behind that apply with equal force in the variance context.

JUSTICE GINSBURG: But you think that this case is a poor example because you're urging us to apply the harmless error rule and say this case would have come out the same way --

MR. ROBERTS: Yes -- I mean, it's not the best -- it's not the best example to illustrate to the Court why notice is required because here we do think that the error was harmless for various reasons.

JUSTICE GINSBURG: If we -- if we grant the review so we can resolve the question, does the judge have to give notice or not? And if she has to give notice, what time? What content?

But now you're urging us to say -- to do something that ordinarily this Court doesn't do, that

trial judges do, to deal with harmless error, which would be spending our time on this very particular case setting no law for any other case?

MR. ROBERTS: Well, we think the Court should, you know, first obviously address the rule 32 question on which it granted certain certiorari, but after doing that, we think the Court should address the harmless error question because that will provide useful guidance to the lower courts. There are likely to be a lot of harmless error cases because half of the circuits have erroneously concluded that the rule doesn't require notice, and they could benefit from an illustration of how to apply it in this particular context --

CHIEF JUSTICE ROBERTS: I suppose we'll have --

MR. ROBERTS: -- involving variance.

CHIEF JUSTICE ROBERTS: I suppose we'll have a lot of appeals about the adequacy of the notice. You and the Petitioner disagree on that, and appellate courts will have to address that as well.

MR. ROBERTS: Well, I think this is an easy case for an appellate court to address because --

CHIEF JUSTICE ROBERTS: Yes. This may be --

MR. ROBERTS: -- regarding whether the notice would be adequate --

CHIEF JUSTICE ROBERTS: I'm sorry. This may be an easy case, but you can imagine others that aren't going to be.

MR. ROBERTS: Yes, but the questions about adequacy of notice are really no different in kind than the same questions that come up for the traditional departure rule. It's still going to be there, however this Court resolves the case for the notice of Guidelines departures.

So I don't think that you're opening a -- whole new questions about adequacy, just as like you're not opening up a whole set of new questions about timing. Those questions are there, and the courts are going to have to confront them.

But in discussing the harmlessness issue here, you could shed some light on those questions that can provide some guidance for the lower courts that will be useful to them in the future. And we would urge you to do that.

Turning to the harmlessness, in addition to the fact that the PSR gave notice -- do you want me to continue?

CHIEF JUSTICE ROBERTS: Continue. Finish.

MR. ROBERTS: Sure. In addition to the fact that future dangerousness was central to sentencing,

it's also true that the evidence that Petitioner now says he wouldn't have presented wouldn't have made a difference because his counsel essentially made the same argument to the district court, and he could have used the expert testimony to support that argument, but he chose not to.

The District Court had already rejected the defense of expert diagnosis the Petitioner was delusional and could be treated with anti-psychotic drugs and adopted the government expert's diagnosis that Petitioner had a personality disorder that was longstanding and unlikely to change.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Rutledge.

ORAL ARGUMENT OF PETER B. RUTLEDGE

FOR AMICUS CURIAE,

IN SUPPORT OF THE JUDGMENT BELOW

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

The Court has before it today two alternative grounds to affirm the judgment below. The first is suggested by Justice Ginsburg and Chief Justice Roberts that paragraph 78 of the presentence report put the parties on adequate notice that they could engage in a full adversarial testing outweighing the defendant's

future dangerousness against his amenability to alternative methods of treatment.

The alternative ground for affirming the judgment below is that suggested by Justice Scalia and Justice Alito, namely: That Federal Rule of Criminal Procedure 32(h) was drafted for a different era, an era of mandatory guidelines. And there is no reason, particularly in light of the right rulemaking process, to extend rule 32 to an advisory guideline era.

JUSTICE GINSBURG: But then it would be easy for a district judge to escape any obligation to give 32(h) notice because he could simply say: Oh, yeah, before I would have ranked this as a Sentencing Guidelines matter, but now I'm treating it as a 3553(a) factor, so I don't have to bother with 32(h) anymore.

MR. RUTLEDGE: Justice Ginsburg, I understand your concern about the possibility that district judges might, I guess in theory, attempt to do an end run around rule 32(h) by recasting a departure decision as a variance decision.

And, admittedly, there are certain circumstances in which the ground for a departure on rule 32(h) has some overlap with the ground for a variance under 3553(a), but I would offer several responses. My first response is that I feel the Court

crossed that bridge a little bit in the Booker remedial opinion when it created an advisory guidelines system. The whole premise of the advisory guidelines system was to enhance the discretion of the district judge.

My second answer would be that district judges still have a reason to engage in the departure calculation. As this Court made clear in Rita, district judges must begin by consulting the guidelines. And the Second, Third, Fifth, Sixth, Eighth, and Tenth Courts of Appeal all have interpreted that obligation to consult the Guidelines to include consideration of possible grounds for departure.

Of course, this Court's decision in Kimbrough made clear that even if those two grounds don't provide the judge adequate incentive to engage in a departure calculation, that there is yet another reason; and that is because it may affect the scrutiny-of-reasonableness review.

As the Court explained in Kimbrough, when a district judge departs from the Guidelines, the district judge's determination may be entitled to greater respect when the judge makes the determination that a case takes -- that a circumstance takes the case outside of the heartland.

JUSTICE ALITO: But didn't the decision that

the Guidelines are not mandatory make what used to be known as Guidelines departures completely irrelevant? A case that would qualify for a Guidelines departure would, by definition, be a case in which the 3553(a) factors justified a sentence other than a Guidelines sentence? So I don't understand why there's any need to go through the departure analysis any longer at all.

MR. RUTLEDGE: Justice Alito, I don't believe that this Court's Booker and post-Booker jurisprudence has made the departure determination irrelevant.

Indeed, just this last Friday, the Sentencing Commission posted on its website additional proposed amendments to the Sentencing Guidelines that would inject new grounds for departures including fraud for emergency assistance and violations of Federal food and drug laws that entail a risk of serious bodily injury.

Departures remain relevant to the guidelines because they are the basis upon which the Commission can continue to fulfill its mandate to provide for the type of uniform sentencing that still is possible.

JUSTICE ALITO: I just don't understand that. You're not -- a court -- a sentencing court, after concluding that there is no ground for a departure

under Booker and the later cases, then has to consider the 3553(a) question.

So the decision about the departures is irrelevant. It is not dispositive; and, if the court finds that the case qualified for a Guidelines departure, as I said before, by definition, that is going to be a case where the 3553(a) factors warranted a non-Guidelines sentence anyway. So it seems like a useless appendage at this point.

MR. RUTLEDGE: Well, it may well be the case, Justice Alito, that as this Court's Booker jurisprudence unfolds, that the concept of a departure declines in importance, in addition with respect to the 32(h) obligation for notice.

JUSTICE BREYER: Well, why is the 32(h) obligation relevant? That is, looking through the history of it, I see that in 32(i)(C) it says that the government has to allow the parties' attorneys to comment on the determination of the probation officer and other matters relating to an appropriate sentence.

Then, in a case called Burns v. United States, this Court says that that right to comment includes a right to notice.

And so all that 32(h) did was to take what was already the law and make specific that it includes a

right to notice. I take it that was what they were up to.

But even if you didn't have 32(h), you would have precisely the same right once you got 32(i)(C) together with the case of Burns.

So I don't know where that leaves me, except thinking it doesn't matter, because the defendant has precisely the same right either way. And I guess it's easier just to say "departure" means generally all kinds of departures including not applying it.

That's not a stretch of the language. It is quite right it is not consistent with what they thought they were up to, but not -- it is -- maybe before -- if they had passed this before Hawaii became a State, you could say: Well, they didn't think it would apply in Hawaii.

So what? I mean would you decrease that, General?

MR. RUTLEDGE: Certainly, Justice Breyer. If we were to put 32(h) to one side and consider the effect of rule 32(i)(1)(C), then the Court confronts the question whether the basic ideas that animated its decision in Burns should be extended in an advisory-guidelines era. And Burns, at bottom, rested on two distinct strands of reasoning.

One was the question of unfair surprise. And we think, with that respect, that the post-Booker era is different from the pre-Booker era. And the reason why, Justice Breyer, is because pre-Booker the parties came to the sentencing hearing with an expectation of a within-Guidelines sentence.

And post-Booker, particularly in light of this Court's decision in Rita, the parties cannot come to the sentencing hearing with that expectation because the district judge may not presume the reasonableness of the within-Guidelines sentence.

And so to the extent that Burns rested on concerns of unfair surprise, the rationale has dropped out after Booker.

Now, there is a second strand of reasoning to Burns which Justice Ginsburg alluded to, which is this question of full adversarial testing. And I agree with you, Chief Justice Roberts, that Chief Judge Boudin's decision in the Vega-Santiago case provides the pathway here.

Judges engage in this kind of discretionary act all the time. Parties come to the hearing with a theory, a theory of how the judge should exercise her sentencing discretion within a known range, and knowing the applicable legal criteria, and have an opportunity

to be heard.

And we believe that, particularly in light of the recent amendment to section 32(d)(2)(F), that's going to include the possibility of the 3553 factors -- 3553, a factor in the presentence report, that the parties are going to have the opportunity to come to the hearing with the ability to engage in full adversarial testing.

CHIEF JUSTICE ROBERTS: Do you accept Chief Judge Boudean's safety valve as well? In other words, if the basis for the variance is going to be a matter of surprise, then notice is required?

MR. RUTLEDGE: I accept the first part of that premise, Chief Justice Roberts: That they are may be rare cases of truly unfair surprise.

What I don't necessarily accept is that notice has to be the straitjacketed remedy for District Judges in all of those instances.

There may be other mechanisms such as if the -- if the fact is, if you will, sprung on the parties in the midst of the hearing, a motion for a continuance, as the government indicates on page 44 of its brief, may be a mechanism to control against those cases of truly unfair surprise. And then a court of appeals under this Court's decision in Pickett,

reviewing the appropriateness of granting or denying the continuance, can base its appellate review on whether or not unfair surprise --

JUSTICE KENNEDY: That is an abuse of discretion standardized?

MR. RUTLEDGE: That is an abuse of discretion --

JUSTICE KENNEDY: Unworkable or is there just as many impracticalities as the rule.

MR. RUTLEDGE: I -- I don't think that it presents a concern of impracticability, Justice Kennedy, for one simple reason; and that is by relying on a mechanism such as the continuance, the parties are given the opportunity to identify for the court whether or not there's a concern of unfair surprise; and if there is, the district judge is in the position to decide whether or not she believes that the continuance is necessary.

If the notice claim only arises at the time that the sentence is entered, there's relatively little opportunity at that point for the district judge to go back and reconsider the record on the basis of unfair surprise. And that sort of takes me to the basic point that Justices Souter, Alito and Justice Ginsburg all talk, about which is the fundamental unworkability of the notice rule and advisory guidelines system.

As the judges -- the district judges explained to us in the recent rulemaking proceeding contemplating a amendment to rule 32(h), they're concerned that extending this rule to variances will make it quite difficult.

We know that district judges often receive these packets of sentencing information only seven days before the sentencing hearing. Several courts of appeals have held that giving notice at the sentencing hearing is not timely. And even if the timeliness concern can be overcome, there are serious problems in workability as to the adequacy of the notice.

The best that the Petitioner and the government the instruct this Court on, in terms of how the adequacy standard is going to work, is that it has to be context-specific; and if we put ourselves in the shoes of a district judge that now has to engage in a discretionary act to decide whether or not the notice that I've given is adequate turns on the context, doesn't provide a great deal of guidance to the district judge.

We know, for example --

JUSTICE GINSBURG: Why isn't it just whatever is the reason that the judge is considering is going outside the advisory Guidelines, whatever that

reason is, just say it. So the judge says -- could say here, "I'm contemplating going outside because I don't think that this man is going to stop these threats." Period. That's all.

MR. RUTLEDGE: I -- certainly, Justice Ginsburg. And I've wrestled with that own question in -- in my mind. If this judge were to have said I'm thinking of sentencing outside the Guidelines because I'm dealing with an individual who has a demonstrated ability to stalk and threaten his ex-wife, would that have been adequate? And interestingly, I think pages 23 and 126 of the Petitioner's reply brief illustrate that either the answer to that question is going to be "not necessarily," or otherwise appellate judges are going to be strung up having to unpack whether or not notice is adequate, because it is Petitioner's petition in this case that even if the defendant had been put on notice as to the future dangerousness, that that did not, quote, "put the defendant on notice" that the district judge supposed the futility of treatment might justify an outside-the-Guidelines sentencing.

Here's the essential workability problem. We know from this court's decision in Rita that the basic vision in the post-Booker world is to encourage

judges to provide reasoned sentencing decisions, where a degree of reasoning may depend a little bit upon whether the judge is engaging an inside-the-advisory-Guidelines sentence, or an outside-the-advisory-Guidelines sentence.

In the event that a district judge engaging in an outside-the-Guidelines sentence, she is now walking into a trap. Because if she imposes it based on a determination about the defendant's future dangerousness, and then in an attempt to provide a full explication of her reasoning makes a statement about the amenability or non-amenability of the defendant to alternative forms of treatment, the aggrieved party will seize on that extra statement and bring it back to the pre-sentencing report and the parties' pleadings and said we may have had notice as to ground one to the variance but we didn't have notice as to ground two. Or we may have had notice as to ground one and two, but we didn't have any as to ground three.

This is the essentially workability concern that we believe that the district judges raised when they expressed their discomfort with the proposed amendments to rule 32(h); and precisely why we think the more prudent course is to affirm the judgment below, either on the narrow ground that I started start with,

the Chief Justice's question suggested, or alternatively on the broader grounds suggested by Justice Scalia's questions, that the resume that emerged at the time of mandatory Guidelines should not be extended to the time of advisory Guidelines.

And if I could make one last observation, and then I'll complete my argument unless the Court has further questions.

In December of 2007, the Advisory Committee on Criminal Rules formed a subcommittee to study this problem. If the Court consults the minutes of that meeting, they didn't form that subcommittee because they were awaiting this Court's decision in Irizarry. They formed that -- cert hadn't been granted in Irizarry.

They formed that subcommittee for two reasons. The first reason was whether in light of this Court's decisions in Gall and Kimbrough a notice requirement was still necessary; and second was the consideration that in light of the breadth of the 3553(a) factors a notice requirement should be removed altogether. The more prudent course either for the narrow grounds suggested by Chief Justice Roberts or the broader grounds suggested by Justice Scalia is to affirm the judgment below.

If the Court has no further questions I

would be happy to yield back the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Madden, you have two minutes remaining.

REBUTTAL ARGUMENT OF ARTHUR J. MADDEN, III

ON BEHALF OF PETITIONER

MR. MADDEN: Thank you.

I think Justice Breyer is correct that rule 32(e) is -- requires that the parties have an opportunity to comment on matters appropriate to the sentencing. That opportunity extends to not only Guidelines departures but also what has been called variances. There are two reasons why it's important that that -- that right comes with a notice requirement. The first is that fairness for the individual defendant, the ability to litigate the issues that are going to make a difference in his sentencing.

The other is that it permits as an institutional issue effective appellate review, if there's a developed record and evolution of the Guidelines by looking at the aggregate of cases. If the Court's decision is that we're going to exempt from notice requirement the cases that are going -- the sentences that are going to be driven towards the margin, high or low, the goal of uniformity that Congress sought in the Sentencing Reform Act would be

lost.

And I submit that that's an independent reason why the Court ought to require notice is because otherwise, it's inviting the sentencing disparities which the architecture of the Sentencing Reform Act is designed to eliminate.

As far as workability, it is extremely rare that the issues aren't flagged in the papers. It is not going to come up frequently. Rule 32(h) issues don't come up terribly frequently, at least in my practice in the appellate cases.

Five circuits below have -- saw no workability problem with extending the notice requirement of rule 32(h) to variances as well.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

MR. MADDEN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Rutledge, you briefed and argued the case as amicus curiae in support of the judgment below upon appointment by this Court, and we thank you for undertaking and discharging that assignment.

The case is submitted.

(Whereupon, at 12:09 p.m., the case in the above-entitled matter was submitted.)