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

2 (11:11 a.m.)

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

6 ORAL ARGUMENT OF ARTHUR J. MADDEN, III

7 ON BEHALF OF PETITIONER

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

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

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

25 That quote comes from Rita and relies upon

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

4 The position of the Amicus --

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

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

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

1 things a sentencing judge would look at.

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. MADDEN: I remember that system.

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

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

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

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

11 Would that be adequate notice?

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

14 JUSTICE GINSBURG: What would have been?

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

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

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

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

1 supervision we are under. That was the key.

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

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

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

16 JUSTICE ALITO: Is that what you're asking?

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

22 JUSTICE ALITO: But why would the --

23 JUSTICE GINSBURG: That's a complex answer.

24 And I -- this seems to me to be a clear case of what was
25 in the judge's mind. She said I have a record here of

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

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

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

10 What notice is the defendant lacking?

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

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

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

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

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

9 MR. MADDEN: The --

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

12 MR. MADDEN: Yes.

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

19 MR. MADDEN: Yes, and that goes to the
20 timing question. When she said that, the next -- in the
21 same paragraph, was -- and, and therefore, it's a
22 60-month sentence.

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

25 JUSTICE SOUTER: So it's not the question of

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

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

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

9 JUSTICE SCALIA: And there's --

10 MR. MADDEN: Usually.

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

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

20 MR. MADDEN: I --

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

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

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

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

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

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

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

16 MR. MADDEN: No.

17 JUSTICE SCALIA: Okay.

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

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

1 become lesser over time.

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

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

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

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

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

1 days.

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

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

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

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

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

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

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

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

8 JUSTICE SCALIA: It's not what it meant when
9 32(h) was promulgated.

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

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

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

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

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

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

12 The provision that came in in December of
13 '07 that says that the court can request other factors,
14 I think is just that an authorization to the probation
15 officer to look at -- to look at other factors and to
16 think more broadly.

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

23 Mr. Roberts.

24 ORAL ARGUMENT OF MATTHEW D. ROBERTS

25 ON BEHALF OF THE RESPONDENT

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

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

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

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

25 MR. ROBERTS: First of all, as enacted rule

1 32(h) requires notice of all deviations from the
2 Guidelines range, and by its plain terms it continues to
3 do that. But --

4 JUSTICE ALITO: Are you saying --

5 MR. ROBERTS: Either way --

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

9 MR. ROBERTS: No.

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

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

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

23 MR. ROBERTS: Yes. It --

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

1 decided this in 32(h)?

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

4 One of the things that the advisory
5 committee stated that it was going to consider was --
6 was lower court decisions on the question -- on the
7 question of whether notice -- the current text of rule
8 32(h) requires notice to be given.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. ROBERTS: That's required.

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

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

12 MR. ROBERTS: The parties can --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 knew from the PSR what she was going to say.

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

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

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

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

1 hearing would pretty much --

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

7 MR. ROBERTS: Well, judges --

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

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

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

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

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

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

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

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

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

22 JUSTICE ALITO: Well, what was required
23 here?

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

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

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

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

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

18 And to get back to something earlier as well
19 that we're were talking about, the key fact is rule
20 32(h) does indisputably require notice for traditional
21 departures. And a notice requirement for variances is
22 essential to prevent evisceration of that notice
23 requirement because a court can always impose the
24 same -- use a variance to impose the same sentence that
25 it could have imposed as a Guidelines departure.

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

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

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

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

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

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

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

9 MR. ROBERTS: That's how it works. Well, I
10 think the lawyer probably could have said we have -- we
11 have treatments and they work. But then the judge said
12 --

13 JUSTICE STEVENS: But wouldn't --

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

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

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

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

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

1 JUSTICE STEVENS: No, I understand.

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

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

11 MR. ROBERTS: But --

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

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

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

4 JUSTICE STEVENS: In your --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: I suppose we'll have
15 --

16 MR. ROBERTS: -- involving variance.

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

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

23 CHIEF JUSTICE ROBERTS: Yes. This may be --

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Continue. Finish.

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

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

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

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Rutledge.

15 ORAL ARGUMENT OF PETER B. RUTLEDGE

16 FOR AMICUS CURIAE,

17 IN SUPPORT OF THE JUDGMENT BELOW

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

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

1 future dangerousness against his amenability to
2 alternative methods of treatment.

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

10 JUSTICE GINSBURG: But then it would be easy
11 for a district judge to escape any obligation to give
12 32(h) notice because he could simply say: Oh, yeah,
13 before I would have ranked this as a Sentencing
14 Guidelines matter, but now I'm treating it as a 3553(a)
15 factor, so I don't have to bother with 32(h) anymore.

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

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

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

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

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

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

25 JUSTICE ALITO: But didn't the decision that

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

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

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

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

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

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

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

10 MR. RUTLEDGE: Well, it may well be the
11 case, Justice Alito, that as this Court's Booker
12 jurisprudence unfolds, that the concept of a departure
13 declines in importance, in addition with respect to the
14 32(h) obligation for notice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 to be heard.

2 And we believe that, particularly in light
3 of the recent amendment to section 32(d)(2)(F), that's
4 going to include the possibility of the 3553 factors --
5 3553, a factor in the presentence report, that the
6 parties are going to have the opportunity to come to the
7 hearing with the ability to engage in full adversarial
8 testing.

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

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

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

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

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

4 JUSTICE KENNEDY: That is an abuse of
5 discretion standardized?

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

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

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

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

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

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

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

22 We know, for example --

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

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

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

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

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

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

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

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

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

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

15 They formed that subcommittee for two
16 reasons. The first reason was whether in light of this
17 Court's decisions in Gall and Kimbrough a notice
18 requirement was still necessary; and second was the
19 consideration that in light of the breadth of the
20 3553(a) factors a notice requirement should be removed
21 altogether. The more prudent course either for the
22 narrow grounds suggested by Chief Justice Roberts or the
23 broader grounds suggested by Justice Scalia is to affirm
24 the judgment below.

25 If the Court has no further questions I

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

2 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

3 Mr. Madden, you have two minutes remaining.

4 REBUTTAL ARGUMENT OF ARTHUR J. MADDEN, III

5 ON BEHALF OF PETITIONER

6 MR. MADDEN: Thank you.

7 I think Justice Breyer is correct that rule
8 32(e) is -- requires that the parties have an
9 opportunity to comment on matters appropriate to the
10 sentencing. That opportunity extends to not only
11 Guidelines departures but also what has been called
12 variances. There are two reasons why it's important
13 that that -- that right comes with a notice requirement.
14 The first is that fairness for the individual defendant,
15 the ability to litigate the issues that are going to
16 make a difference in his sentencing.

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

1 lost.

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

16 MR. MADDEN: Thank you.

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

22 The case is submitted.

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

25

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