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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, that is notice, 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 notice for all sentences outside the Guidelines. This is the correct result. Because it's only -- only through notice can the sentencing court subject the defendant's sentence to the thorough adversarial testing contemplated by Federal sentencing procedure.

That quote comes from Rita and relies upon

1 rules 32(f), (h), (i), and the 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: Well, you may not
6 have had notice of the issue of whether or not an
7 alternative procedure and medication and all that would
8 help, but you certainly knew that future dangerousness
9 was going to be on the table. And if you had a response
10 to that, which is, well, if he took his medication, it
11 wouldn't be a problem, I assume you would have prepared
12 for that.

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

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

1 would have thought that would have been one of the first
2 things a sentencing judge would look at.

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

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

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

25 It's simply a ground of disagreement, I would

1 suppose. Why shouldn't we hold that 32(h) simply --
2 simply has no -- no application under the new system?
3 Or at least hold that all it applies to are departures
4 within the meaning of the old mandatory guidelines
5 system? Which is a much narrower category of
6 departures.

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

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

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

1 is not what we're calling a variance, a non-Guidelines
2 sentence is not a pure exercise in policy even in
3 Kimbrough.

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

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

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

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

22 MR. MADDEN: I remember that system.

23 The -- I think the -- the answer is that --
24 that it -- it's important -- the requirement is essential
25 for purposes of advocacy on the issues. And Burns --

1 Burns reflects the Court's understanding then of what
2 Congress intended in the Sentencing Reform Act. They
3 said Congress intended notice and litigation.

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

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

12 Would that be adequate notice?

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

15 JUSTICE GINSBURG: What would have been?

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

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

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

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

1 that -- that he would continue to be a threat regardless
2 of the supervision we are under. And that -- that was
3 the key.

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

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

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

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

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

24 JUSTICE KENNEDY: So why wouldn't --

25 JUSTICE GINSBURG: That's a complex answer.

1 And I -- this seemed to me to be a clear case of what was
2 in the judge's mind. She said I have a record here of
3 repeated e-mails to this woman, threatening to kill her,
4 threatening to kill her new husband, threatening to kill
5 her mother. He did it again and again and again.

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

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

12 What notice is the defendant lacking?

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

20 If that was the -- now this isn't the written,
21 formal -- this is during the context of the sentencing --
22 this is the way it comes up, then the response would be
23 something like, "Judge, there's -- there is psychiatric
24 evidence or psychological evidence that's developed that
25 I'd like to put on bearing on that issue in light of the

1 report from Butner, the new report that just came into
2 the record right before the sentencing, that goes
3 directly to the issue of amenability to treatment; and
4 you're concerned that only maximum incapacitation will
5 address the issue."

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

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

11 MR. MADDEN: The --

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

14 MR. MADDEN: Yes.

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

21 MR. MADDEN: Yes, and that goes to the
22 timing question. When she said that, the next -- in the
23 same paragraph, was -- and, therefore, it's a
24 60-month sentence.

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

1 notice didn't --

2 JUSTICE SOUTER: So it's not the question of
3 notice; it's the question of time to respond.

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

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

11 MR. MADDEN: Usually.

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

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

21 MR. MADDEN: Yes, sir.

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

1 MR. MADDEN: All right. I think in -- in the
2 vast majority of cases -- and the government concedes
3 this in the brief or acknowledges this -- there -- while
4 there are an infinite number of variables that lurk in
5 every case, practically, there are not that many that are
6 actually there. Those are usually identified in the
7 pre-sentence report which you have way in advance or in
8 advance.

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

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

14 MR. MADDEN: Yes. And that's typically the
15 way you --

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

19 MR. MADDEN: No.

20 JUSTICE SCALIA: Okay.

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

1 And the bar is actually getting better at
2 that than when this occurred in picking up on 3553(a)
3 factors; I think the problem is actually going to
4 become lesser over time.

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

11 CHIEF JUSTICE ROBERTS: Does the defendant
12 have an obligation to give notice, both to the
13 government and I suppose to the judge, saying at the
14 pre-sentence -- at the sentencing hearing, we're going
15 to say this, so the judge can get ready for it, or the
16 government can get ready for it?

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

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

23 And the rule says -- rule 32(h) only speaks
24 to the judge. But I think the parties in their
25 positions are required by the local rule in the Southern

1 District of Alabama and the Federal rule generally to
2 put their -- their positions in writing in advance of
3 the hearing. I think our rule, I believe, is seven
4 days.

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

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

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

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

24 There's -- there are -- the reasons for
25 notice I think are in -- notice is important not only

1 for the individual defendant but there's institutional
2 interests as well.

3 It's a -- it's a fairly rarely occurring
4 phenomenon where rule 32(h) comes into play. The rule
5 as written doesn't demand any changes. It is a matter
6 of interpretation. And the Sentencing Commission itself
7 defines a departure as any nine-Guide -- nine --
8 non-Guidelines sentence.

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

12 JUSTICE SCALIA: It's not what it meant when
13 32(h) was promulgated.

14 MR. MADDEN: Well, the Court in Rita, which
15 was after Booker, discussed and said: "The sentencing
16 courts, applying the Guidelines in individual cases may
17 depart either pursuant to the Guidelines or, since Booker,
18 by imposing a non-Guidelines sentence." The word
19 "departure" --

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

24 MR. MADDEN: It -- it had a narrower meaning
25 but -- but the rule 32(h) was to implement the structure

1 of rule 32, that's what Burns said. And --

2 JUSTICE GINSBURG: Why should we put into
3 rule 32(h), as Justice Scalia suggests, the 3553(a)
4 factors, when we know that the rulemakers did make a
5 change in 2007? That is they put 3553(a) into
6 32(d)(2)(F); so they made a change there and they said
7 the judge could ask to have these things included in the
8 pre-sentence report, but they left (h) looking like it's
9 dealing just with the Guidelines. Why shouldn't the
10 Court say, well, they didn't put 3553 in (h), and so it's
11 not there?

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

16 The provision that came in in December of
17 '07 that says you -- the court can request other factors,
18 I think is just an authorization to the probation
19 officer to look at -- to look at other factors and to
20 think more broadly.

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Roberts.

3 ORAL ARGUMENT OF MATTHEW D. ROBERTS
4 ON BEHALF OF THE RESPONDENT

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

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

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

21 Now, applying 3553(a) in this situation
22 raises different problems, and there are issues
23 regarding the specificity of the notice that's required
24 and the timing of the notice. Why shouldn't this be
25 dealt with by further rulemaking when those -- where

1 those things can be handled in a comprehensive way
2 rather than by the haphazard development of case law by
3 the courts of appeals if we agree with your position?

4 MR. ROBERTS: Well, first of all, as enacted
5 rule 32(h) required notice of all deviations from the
6 Guidelines range, and by its plain terms it continues to
7 do that. But --

8 JUSTICE ALITO: Are you saying that they had
9 in mind --

10 MR. ROBERTS: Either way the court --

11 JUSTICE ALITO: Are you saying that they
12 had in mind at the time that Booker might be coming down
13 the road --

14 MR. ROBERTS: No.

15 JUSTICE ALITO: -- and that there would be
16 non-Guidelines variances from the Sentencing Guidelines?

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

1 CHIEF JUSTICE ROBERTS: The Rules Advisory
2 Committee is currently considering whether or not to
3 change this, right?

4 MR. ROBERTS: Yes. It --

5 CHIEF JUSTICE ROBERTS: And nobody in that
6 process has suggested, well, it's too bad you've already
7 decided this in 32(h)?

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

10 One of the things that the advisory
11 committee stated that it was going to consider was --
12 was lower-court decisions on the question -- on the
13 question of whether notice -- the current text of rule
14 32(h) requires notice to be given.

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

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

25 MR. ROBERTS: That's true. Some judges did

1 object to that. But others -- as I said, there were
2 other -- some judges expressed support for that
3 interpretation, and there were varying reasons that were
4 motivating different people in the conference to take
5 the position that the conference should wait.

6 The fact is -- and so the Court shouldn't
7 construe from the failure to enact an amendment just
8 like the Court is reluctant to construe from the failure
9 to amend a statute that the current provision doesn't
10 require notice.

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

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

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

25 But however you interpret the current

1 rule -- and the question before you is what the current
2 rule requires. However you interpret that, it doesn't
3 circumvent the rulemaking process that the Judicial
4 Conference --

5 JUSTICE KENNEDY: May I ask you this
6 question about the rule: It says "before the court may
7 depart from the applicable sentencing range on a ground
8 not identified for departure." Can a pre-sentence report
9 say possible grounds for departure are as follows, and
10 then list them? Or does this, in your view, mean that
11 "identified for departure" means "as recommended by the
12 pre-sentencing report"?

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

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

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

1 JUSTICE KENNEDY: Would future
2 dangerousness -- future dangerousness be something that
3 could be put in the report and that would cover this --
4 these --

5 MR. ROBERTS: Yes. It -- it -- it certainly
6 could, Your Honor. And the PSR here includes some --
7 closely related to that.

8 JUSTICE KENNEDY: -- thing we're talking
9 about very much.

10 MR. ROBERTS: That's required.

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

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

21 MR. ROBERTS: The parties can --

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

25 MR. ROBERTS: The parties -- the parties

1 would be able to focus on that and try to inform the
2 judge's decision on that. But that's not the only kind
3 of -- that's not the only kind of ground on which a
4 court might vary, and that may not be one for which
5 advance notice would be particularly helpful, but there
6 are many on which it is.

7 If I can give an example of a case that we
8 recently confronted, for example? We had a case in
9 which a judge imposed probation on a defendant who was
10 convicted of soliciting child pornography because the
11 judge was under the belief that prison couldn't provide
12 the necessary treatment.

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

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

24 MR. ROBERTS: You could -- we could
25 certainly do that. But that's an after the -- you know,

1 that would be an after-the-fact situation. What -- what
2 rule 32 is trying to do is to set up a procedure so that
3 in every case -- in every case you get the adversarial
4 presentation on the grounds --

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: How can that be?
25 They're talking about an expert and all that. He's not

1 going to be hanging around the courthouse.

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

7 Second of all, the Petitioner's future
8 dangerousness was central to the victim impact testimony
9 of his wife who he had notice was going to testify. He
10 knew from the PSR what she was going to say.

11 In addition, it was central to disputes over
12 potential adjustments to the Guidelines' range. So, his
13 future dangerousness was clearly at issue.

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

18 MR. ROBERTS: No, Your Honor. But I think
19 in this circumstance, for example, it would be --
20 another example would be often if the victim impact
21 testimony -- there hadn't been identified as a potential
22 ground for departure on it, but say the judge heard
23 victim impact testimony, but the defendant knew the
24 victim was going to testify, had the general sense of
25 it and this was --the judge when it heard -- when she

1 heard it decided, wow, you know, this really makes me
2 think I should take it out of the sentence. I think
3 that because the -- because the defendant knew that the
4 testimony was going to be there, knew the gist of it
5 and was prepared to respond to it, would probably be
6 sufficient to give notice at that time then.

7 For instance, if the judge relied on remorse
8 in allocution -- lack of remorse in allocution, that's
9 another example where I think, you know, notice at the
10 hearing would pretty much --

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

16 MR. ROBERTS: Well, judges --

17 JUSTICE SCALIA: Can't do that. Going to
18 have to decide it a week in advance. I don't -- do
19 judges do that, decide a week in advance? I doubt it.

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

1 CHIEF JUSTICE ROBERTS: Well, but you're
2 really asking them to decide -- you know, sentence
3 first and hearing afterward.

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

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

9 MR. ROBERTS: That -- it is true that they
10 go into the hearing with an open mind, but it's also
11 true that before the hearing, they're going to have some
12 sense based on the written materials that they've
13 reviewed and based on the parties' identifications of
14 what they think the appropriate sentence is. As
15 Petitioner's counsel explained, in the vast majority of
16 cases, the PSR, the parties are already going to
17 identify the potential grounds for a variance, and so
18 it's very few cases that there's going to be a ground
19 that's going to come up --

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

23 MR. ROBERTS: Well, at a minimum, the court
24 would have to identify the relevant 3553(a) factor. I
25 think then what more is required depends a little bit on

1 the particular factor, the record in the case. Again,
2 the test is to ensure that they focus adversarial
3 presentation. If it's a really open-ended factor,
4 like the nature and circumstances of the offense and the
5 defendant's characteristics, obviously more is going to
6 be required.

7 JUSTICE ALITO: What was required
8 here?

9 MR. ROBERTS: Here I think it would have
10 been sufficient for the judge to say: I'm contemplating
11 a variance under section 3553(a)(2)(C), based on the
12 fact that Petitioner's conduct indicates that he is
13 likely to commit future crimes.

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

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

22 The same situation, the parallel thing
23 applies here. As I was going to say before on the
24 burdensomeness, it hasn't been burdensome, unduly
25 burdensome, to require notice for traditional

1 departures, and there isn't really any reason to
2 think that it would be different for here.

3 And to get back to something earlier as well
4 that we were talking about, the key fact is rule
5 32(h) does indisputably require notice for traditional
6 departures. And a notice requirement for variances is
7 really essential to prevent evisceration of that notice
8 requirement because a court can always impose the
9 same -- use a variance to impose the same sentence that
10 it could have imposed as a Guidelines departure.

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

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

1 being able to provide the appropriate treatment.

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

4 JUSTICE STEVENS: Could we go back to that
5 example for just a minute? I want to be sure I fully
6 understand it. Why couldn't that issue have been
7 adequately discussed at a hearing in which there was no
8 particular notice, but at the end of the hearing the
9 judge said, this is what I'm planning to do because I'm
10 worried that they won't get treatment in prison and so
11 forth? Wouldn't the government have had an
12 opportunity to then say: Say, judge, you've overlooked
13 this fact? And wouldn't all involved in the hearing?

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

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

19 MR. ROBERTS: This is how it works. Well, I
20 think the lawyer probably could have said we have -- we
21 have treatments and they work. But the judge said
22 --

23 JUSTICE STEVENS: But wouldn't --

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

25 JUSTICE STEVENS: -- that solve the

1 problem because the judge apparently was operating under
2 a misunderstanding of facts.

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

6 JUSTICE STEVENS: And the lawyer says
7 you're wrong.

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

11 JUSTICE STEVENS: No, I understand.

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

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

21 MR. ROBERTS: But --

22 CHIEF JUSTICE ROBERTS: If you can see what
23 the last report about these programs was like, you
24 wouldn't think that. And I think a reasonably competent
25 judge is not going to say, I don't want to see it. Or

1 maybe he will based on his own experience in dealing
2 with those types of --

3 MR. ROBERTS: The judge is -- you know,
4 counsel can make the argument. But in certain cases,
5 the ability to present actual evidence on it is going to
6 be an important -- is going to be an important factor.
7 There's, you know, other examples: For instance, if the
8 judge varies on grounds that there's no treatment
9 available for other things or that people have been
10 permanently psychologically scarred, and the other side
11 wants to bring forward counter-evidence and testimony.
12 There are numerous ones. That's the -- that's the
13 essence of what the requirement --

14 JUSTICE KENNEDY: In your --

15 MR. ROBERTS: -- and the rules are designed
16 to get at.

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

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

21 JUSTICE KENNEDY: Well, judges allow -- do
22 judges allow -- they go: "Oh, this is very interesting;
23 I'm going to have a new hearing"? I mean, how long do
24 these hearings go on?

25 MR. ROBERTS: We would have -- if -- I think

1 that we would -- could bring in someone and testify
2 about -- to present evidence on that for sure, if the
3 judge was thinking of imposing probation because there
4 was no treatment program. It wouldn't have to go on for
5 very long, but we could have someone come in for a few
6 minutes and -- and do that.

7 JUSTICE KENNEDY: But you're saying that,
8 routinely in sentencing matters, you have experts who
9 come in and advise the judge of programs and so forth?

10 MR. ROBERTS: Not routinely, but, you know,
11 generally that's not an issue. That's why we didn't do
12 it in this -- in this particular sentencing hearing.
13 The point is that, you know, we're not going to do that.
14 And so a judge that's operating under that and that's
15 going to vary on that ground isn't going to get that
16 information because we're -- as you say -- we're not
17 going to just want to delay all the hearings for that
18 reason.

19 And so that is really the reason that
20 the requirement in the existing rule is there, and the
21 reasons behind that apply with equal force in the
22 variance context.

23 JUSTICE GINSBURG: But you think that this
24 case is a poor example because you're urging us to apply
25 the harmless error rule and say this case would have

1 come out the same way --

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

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

10 And -- but now you're urging us to say --
11 to do something that ordinarily this Court doesn't do,
12 that trial judges do, to deal with harmless error, which
13 would be spending our time on this very particular case
14 setting no law for no other case.

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

25 CHIEF JUSTICE ROBERTS: I suppose we'll have

1 --

2 MR. ROBERTS: -- involving variance.

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

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

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

10 MR. ROBERTS: -- regardless of whether the
11 notice was adequate, it was --

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

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

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

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

6 Turning to the harmlessness, in addition to
7 the fact that the PSR gave notice -- if I -- do you want
8 me to continue?

9 CHIEF JUSTICE ROBERTS: Continue. Finish.

10 MR. ROBERTS: Sure. In addition to the fact
11 that future dangerousness was central to sentencing,
12 it's also true that the evidence that Petitioner now
13 says he wouldn't have presented wouldn't have made a
14 difference because his counsel essentially made the same
15 argument to the district court, and he could have used
16 the expert testimony to support that argument, but he
17 chose not to.

18 The district court had already rejected the
19 defense expert's diagnosis the Petitioner was
20 delusional and could be treated with anti-psychotic
21 drugs and adopted the government expert's diagnosis the
22 Petitioner had a personality disorder that was
23 longstanding and not likely to change.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Rutledge.

1 ORAL ARGUMENT OF PETER B. RUTLEDGE
2 FOR AMICUS CURIAE,
3 IN SUPPORT OF THE JUDGMENT BELOW

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

6 The Court has before it today two
7 alternative grounds to affirm the judgment below. The
8 first is suggested by Justice Ginsburg and Chief Justice
9 Roberts that paragraph 78 of the pre-sentence report put
10 the parties on adequate notice that they could engage in
11 a full adversarial testing outweighing the defendant's
12 future dangerousness against his amenability to
13 alternative methods of treatment.

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

21 JUSTICE GINSBURG: But then it would be easy
22 for a district judge to escape any obligation to give
23 32(h) notice because she could simply say: Oh, yeah,
24 before I would have ranked this as a Guidelines matter,
25 but now I'm treating it as a 3553(a) factor, so I don't

1 have to bother with 32(h) anymore.

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

7 And, admittedly, there are certain
8 circumstances in which the ground for a departure on
9 rule 32(h) has some overlap with the ground for a
10 variance under 3553(a), but I would offer several
11 responses. My first response is I feel that the Court
12 crossed that bridge a little bit in the Booker remedial
13 opinion when it created an advisory Guidelines system.
14 The whole premise of the advisory Guidelines system was
15 to enhance the discretion of the district judge.

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

24 Of course, this Court's decision in
25 Kimbrough made clear that even if those two grounds

1 don't provide the judge adequate incentive to engage in
2 a departure calculation, that there is yet another
3 reason; and that is because it may affect the
4 scrutiny of reasonableness review.

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

11 JUSTICE ALITO: But didn't the decision that
12 the Guidelines are not mandatory make what used to be
13 known as Guidelines departures completely irrelevant? A
14 case that would qualify for a Guidelines departure
15 would, by definition, be a case in which the 3553(a)
16 factors justified a sentence other than a Guidelines
17 sentence. So I don't understand why there's any need to
18 go through the departure analysis any longer at all.

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

23 Indeed, just this last Friday, the
24 Sentencing Commission posted on its website additional
25 proposed amendments to the Sentencing Guidelines that

1 would inject new grounds for departures including fraud
2 for emergency assistance and violations of Federal food
3 and drug laws that entail a risk of serious bodily
4 injury.

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

9 JUSTICE ALITO: I just don't understand
10 that. You're not -- a court -- a sentencing court,
11 after concluding that there is no ground for a departure
12 under Booker and the later cases, then has to consider
13 the 3553(a) question.

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

21 MR. RUTLEDGE: Well, it may well be the
22 case, Justice Alito, that as this Court's Booker
23 jurisprudence unfolds, that the concept of a departure
24 declines in importance, in addition with respect to the
25 32(h) obligation for notice.

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

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

10 And so all that 32(h) did was to take what
11 was already the law and make specific that it includes a
12 right to notice. I take it that was what they were up
13 to.

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

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

22 That's not a stretch of the language. It is
23 quite right it is not consistent with what they thought
24 they were up to, but not -- it is -- maybe before -- if
25 they had passed this before Hawaii became a State, you

1 could say: Well, they didn't think it would apply in
2 Hawaii.

3 So what? I mean would you address that
4 general assessment?

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

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

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

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

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

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

13 And we believe that, particularly in light
14 of the recent amendment to section 32(d)(2)(F), that's
15 going to include the possibility of the 3553 actors --
16 3553, a factor in the pre-sentence report, that the
17 parties are going to have the opportunity to come to the
18 hearing with the ability to engage in full adversarial
19 testing.

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

24 MR. RUTLEDGE: I accept the first part of
25 that premise, Chief Justice Roberts: That there may

1 be rare cases of truly unfair surprise.

2 What I don't necessarily accept is that
3 notice has to be the straitjacketed remedy for district
4 judges in all of those instances.

5 There may be other mechanisms such as if
6 the -- if the fact is, if you will, sprung on the
7 parties in the midst of the hearing, a motion for a
8 continuance, as the government indicates on page 44 of
9 its brief, may be a mechanism to control against those
10 cases of truly unfair surprise. And then a court of
11 appeals under this Court's decision in Pickett,
12 reviewing the appropriateness of granting or denying the
13 continuance, can base its appellate review on whether or
14 not unfair surprise --

15 JUSTICE KENNEDY: That is an
16 abuse-of-discretion standard, I assume?

17 MR. RUTLEDGE: That is an
18 abuse-of-discretion standard.

19 JUSTICE KENNEDY: I'm just wondering if
20 that's really just as unworkable or has just as many
21 impracticalities as the rule.

22 MR. RUTLEDGE: I -- I don't think that it
23 presents a concern of impracticability, Justice Kennedy,
24 for one simple reason; and that is by relying on a
25 mechanism such as the continuance, the parties are given

1 the opportunity to identify for the court whether or not
2 there's a concern of unfair surprise; and if there is,
3 the district judge is in the position to decide whether
4 or not she believes that the continuance is necessary.

5 If the notice claim only arises at the time
6 that the sentence is entered, there's relatively little
7 opportunity at that point for the district judge to go
8 back and reconsider the record on the basis of unfair
9 surprise. And that sort of takes me to the basic point
10 that Justices Souter, Alito and Ginsburg all talked
11 about which, is the fundamental unworkability of
12 the notice rule in an advisory system.

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

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

25 The best that the Petitioner and the

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

9 We know, for example --

10 JUSTICE GINSBURG: Why isn't it just
11 whatever is the reason that the judge is considering
12 going outside the advisory Guidelines, whatever that
13 reason is, just say it. So the judge says -- could say
14 here, "I'm contemplating going outside because I don't
15 think that this man is going to stop these threats."
16 Period. That's all.

17 MR. RUTLEDGE: I -- certainly,
18 Justice Ginsburg. And I've wrestled with that own
19 question in my mind. If this judge were to have said:
20 "I'm thinking of sentencing outside the Guidelines
21 because I'm dealing with an individual who has a
22 demonstrated ability to stalk and threaten his ex-wife,"
23 would that have been adequate? And interestingly, I
24 think pages 23 and 26 of the Petitioner's reply brief
25 illustrate that either the answer to that question is

1 going to be "not necessarily," or otherwise appellate
2 judges are going to be strung up having to unpack
3 whether or not notice is adequate, because it is
4 Petitioner's position in this case that even if the
5 defendant had been put on notice as to the future
6 dangerousness, that that did not, quote, "put the
7 defendant on notice" that the district judge supposed
8 the futility of treatment might justify an
9 outside-the-Guidelines sentencing.

10 Here's the essential workability problem.
11 We know from this Court's decision in Rita that the
12 basic vision in the post-Booker world is to encourage
13 judges to provide reasoned sentencing decisions, where
14 the degree of reasoning may depend a little bit on
15 whether the judge is engaging an inside-the-advisory-
16 Guidelines sentence, or an outside-the-advisory-
17 Guidelines sentence.

18 In the event that a district judge engages
19 in an outside-the-Guidelines sentence, she is now
20 walking into a trap. Because if she imposes it based on
21 a determination about the defendant's future
22 dangerousness, and then in an attempt to provide a full
23 explication of her reasoning makes a statement about the
24 amenability or non-amenableity of the defendant to
25 alternative forms of treatment, the aggrieved party will

1 seize on that extra statement and bring it back to the
2 pre-sentencing report and the parties' pleadings and
3 said we may have had notice as to ground one to the
4 variance but we didn't have notice as to ground two. Or
5 we may have had notice as to grounds one and two, but we
6 didn't have any as to ground three.

7 This is the essential workability concern
8 that we believe that the district judges raised when
9 they expressed their discomfort with the proposed
10 amendment to rule 32(h); and precisely why we think the
11 more prudent course is to affirm the judgment below,
12 either on the narrow ground that I started with,
13 the Chief Justice's question suggested, or alternatively
14 on the broader grounds suggested by Justice Scalia's
15 question, that the rule that emerged at the time of
16 mandatory Guidelines should not be extended to the time
17 of advisory Guidelines.

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

21 In December of 2007, the Advisory Committee
22 on Criminal Rules formed a subcommittee to study this
23 problem. If the Court consults the minutes of that
24 meeting, they didn't form that subcommittee because they
25 were awaiting this Court's decision in Irizarry. They

1 formed that -- cert hadn't been granted in Irizarry.

2 They formed that subcommittee for two
3 reasons. The first reason was whether in light of this
4 Court's decisions in Gall and Kimbrough a notice
5 requirement was still necessary; and second was the
6 consideration that in light of the breadth of the
7 3553(a) factors a notice requirement should be removed
8 altogether. The more prudent course either for the
9 narrow grounds suggested by Chief Justice Roberts or the
10 broader grounds suggested by Justice Scalia is to affirm
11 the judgment below.

12 If the Court has no further questions I
13 would be happy to yield back the balance of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Madden, you have two minutes remaining.

16 REBUTTAL ARGUMENT OF ARTHUR J. MADDEN, III

17 ON BEHALF OF PETITIONER

18 MR. MADDEN: Thank you.

19 I think Justice Breyer is correct that rule
20 32(c) is -- requires that the parties have an
21 opportunity to comment on matters appropriate to the
22 sentencing. That opportunity extends to not only
23 Guidelines departures but also what's being called
24 variances. There are two reasons why it's important
25 that that -- that right comes with a notice requirement.

1 The first is that fairness for the individual defendant,
2 the ability to litigate the issues that are going to
3 make a difference in his sentencing.

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

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

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

24 Five circuits below have -- saw no
25 workability problem with extending the notice

1 requirement of rule 32(h) to variances as well.

2 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

3 MR. MADDEN: Thank you.

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

9 The case is submitted.

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

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