No. 06-7517

IN THE

Supreme Court of the United States

RICHARD IRIZARRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* URGING AFFIRMANCE OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether in light of *United States v. Booker*, 543 U.S. 220 (2005), Federal Rule of Criminal Procedure 32 requires a district court to provide notice to the parties before imposing a sentence outside the applicable advisory Sentencing Guidelines range based upon the considerations set forth in 18 U.S.C. § 3553(a).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTORY AUTHORITIES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

Legal Background

1. Prior to the enactment of the Sentencing Reform Act of 1984, federal district judges enjoyed nearly total discretion in matters of noncapital sentencing. *Koon v. United States*, 518 U.S. 81, 92 (1996); *Williams v. New York*, 337 U.S. 241, 246 (1949). Such broad judicial discretion—complemented by parole officers exercising similar discretion concerning prison release dates—was viewed as necessary to ensure that sentences could be tailored to the rehabilitative prospects and progress of each offender. *See generally* Kate Stith & Jose A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9-22 (1998). Sentencing was viewed as a distinctive enterprise requiring the exercise of reasoned judgment; sentencing judges and parole officers, aided by information about offenders and largely unfettered discretionary authority, were expected to craft individualized sentences "almost like a doctor or social worker excercising clinical judgment." *United States v. Mueffelman*, 327 F.Supp.2d 79, 83 (D. Mass. 2004).

During this period, this Court stressed that procedural flexibility was essential to facilitate the sound exercise of discretionary sentencing judgment: "[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Williams*, 337 U.S. at 247. *Accord Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13, 16 (1979) (refusing to mandate rigid procedural requirements

for parole release determinations because, "much like a sentencing judge's choice," a parole board's discretionary judgment "is necessarily subjective in part and predictive in part"). While a district judge might have invited the parties to make recommendations regarding the appropriate sentence or held an evidentiary hearing in a particular case, nothing in federal law obligated her to do so. Appellate review was limited: provided that the sentence fell within the applicable statutory range and did not rest on misinformation of constitutional magnitude, the district judge's sentence could not be disturbed. *See Dorszynski v. United States*, 418 U.S. 424, 440-41 (1974); *United States v. Tucker*, 404 U.S. 443, 447 (1972).

The Sentencing Reform Act of 1984 (SRA) revolutionized sentencing law and procedures in federal courts. *Mistretta v. United States*, 488 U.S. 361, 363-66 (1989). Among other things, that Act established the United States Sentencing Commission, whose primary function was to promulgate and periodically revise "a sentencing guideline system that is intended to treat all classes of offenses committed by all categories of offenders consistently." S. Rep. No. 98-225, 98th Cong., 1st Sess. at 41, 51 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3224, 3234. The U.S. Sentencing Guidelines, which have grown in length and complexity over the past two decades, call upon judges to work through a multi-step, fact-oriented sentencing process, culminating in the determination of an offender's applicable "sentencing range" within a 258-box grid called the "Sentencing Table." Congress clearly intended the Guidelines to be binding on federal courts, and the Guidelines instructed district judges to find all the facts essential to the determination and application

of sentencing ranges set forth therein. Congress also originally provided that, in order to depart from the sentencing range set forth in the Guidelines, the judge had to find "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b).

In elaborating upon judges' statutory departure authority, the Guidelines suggested that sentencing courts "treat each guideline as carving out a 'heartland' [in the form of] a set of typical cases embodying the conduct that each guideline describes," and then consider a departure only when confronted with "an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm." U.S. Sentencing Guidelines Manual (U.S.S.G.) § 1A1.1, Introductory Cmt. 4(b). In other words, the Commission suggested that a sentencing court's departure decision should involve a fact-intensive inquiry to determine if a particular case involved offense conduct or offender circumstances that made the case factually atypical. *See Koon*, 518 U.S. at 95 (explaining that departure decisionmaking requires a court to examine "[w]hat features of this case, potentially, take it outside the Guidelines 'heartland' and make of it a special, or unusual, case") (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993) (Breyer, C, J.)).

This formalized sentencing system, centered around mandatory Guidelines, necessitated more formalized sentencing procedures. The Sentencing Reform Act structured the gathering of offense facts and offender information relevant to the sentencing

judge's Guidelines calculations. Notably, the Sentencing Commission stressed in the Guidelines that "reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing." U.S.S.G. § 6A, Introductory Cmt. An entire Chapter of the Guidelines (Chapter 6) was directed toward the articulation of appropriate sentencing procedures; in this Chapter, the Sentencing Commission explained the importance of the preparation and timely disclosure of presentence reports. This Chapter of the Guidelines also urged judges to give parties "an adequate opportunity" to address matters "reasonably in dispute," and it instructed judges only to rely on factual information with "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a).

In a typical case, the Guidelines require probation officers to prepare a presentence investigative report following a guilty plea or trial conviction. These reports—which are often quite lengthy and strive to be factually comprehensive—provide the parties and the sentencing judge with information about the crime, the defendant's criminal history and other relevant facts. They also identify potential grounds to depart from the range otherwise mandated by the Guidelines.

Federal law set forth procedures for how this information was used to determine a sentence under the mandatory Guidelines. Under Federal Rule of Criminal Procedure 32, the primary rule governing procedures in federal sentencing, probation officers must provide the parties a copy of the presentence investigative report at least 35 days prior to sentencing. Fed R. Crim P. 32(e)(2). The parties then lodge objections to the report, and the probation

officer then prepares a detailed response to these objections.

While Congress contemplated a system of gathering and disseminating relevant information prior to sentencing, neither the SRA nor the Federal Rules of Criminal Procedure originally required a district judge to give the parties formal advance notice of the sentence that he was inclined to impose or whether that sentence might depart from the otherwise mandatory Guidelines range. Instead, as part of the package of reforms to Rule 32, Congress amended then-Rule 32(a)(1) to provide, in relevant part, that "[a]t the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, §215, 98 Stat. 2014-15.

Soon after the start of mandatory sentencing under the Guideline system, some federal defendants challenged the unfair surprise they perceived when a district court decided, *sua sponte* and without adequate notice, to depart above the Guidelines. In *Burns v. United States*, 501 U.S. 129, 138-39 (1991), this Court issued a 5-4 decision that sought to address this concern by construing the language from Rule 32(a)(1) (currently codified at Rule 32(i)(1)(C)) to require a sentencing judge to provide the parties notice of his intent to depart from the Guidelines range where the presentence investigative report indicated that no factors warranted a departure and such factors were not apparent from the record. In 2002, this holding was codified in Rule 32(h).

In 2005, this Court's constitutional decision in *United States v. Booker*, 543 U.S. 220, resulted in another major modification of federal sentencing law and practice. In an opinion by Justice Stevens, the Court held that mandatory application of the federal sentencing Guidelines violated the Sixth Amendment of the United States Constitution because it required judges to increase sentences based on facts that had neither been found by a jury nor admitted by the defendant. *Id*. at 244. In a separate opinion by Justice Breyer ("the *Booker* remedial opinion"), the Court excised two sections from the Sentencing Reform Act—Section 3553(b) (which required sentencing courts to impose a sentence within in the Guidelines range) and Section 3742(e) (which required appellate courts to review sentences *de novo*) in order to render the Guidelines "effectively advisory." *Id.* at 245. While the Guidelines are still to be consulted and considered, district judges are now bound at sentencing only by applicable statutory ranges and the instructions set forth in Section 3553(a).

Following *Booker*, the Advisory Committee on the Federal Rules of Criminal Procedure considered a new package of amendments to the Rules. Among the proposals, discussed in greater detail *infra* at 45-46, the Advisory Committee considered amending Rule 32(h) to specify that its notice requirement also applied to so-called "variances," *i.e*. sentences imposed outside the advisory guidelines range based on the considerations set forth in 18 U.S.C. § 3553(a). Memo from the Honorable Susan C. Bucklew, Advisory Committee on Federal Rules of Criminal Procedure to the Honorable David F. Levi, Chair of the Standing Committee on Rules of Practice and

Procedure (Dec. 8, 2005). That proposal, however, was never adopted.

The Standing Committee on Rules of Practice and Procedure (the body that ultimately recommends rule changes to the Judicial Conference of the United States and this Court) declined to accept this proposed change based on the reactions of various groups to the proposed rule. Standing Committee on Rules of Practice and Procedure, Report to the Chief Justice of the United States and Members of the Judicial Conference, Agenda Item E-19 at 32 (Sept. 2006). In particular, federal judges expressed "significant concern" that the proposed rule would limit judicial sentencing discretion, could often require postponement of sentencing hearings and would enhance delays in sentencing proceedings. Minutes of the Oct. 26-27, 2006 Meeting of the Advisory Committee on Criminal Rules at 4-5. Recently, the Advisory Committee referred the matter to a subcommittee, asking it to consider, among other things, the "feasibility of providing notice, given the breadth of the statutory factors under § 3553(a) and the possibility that victims will raise new issues at the sentencing hearing." Report of the Honorable Richard C. Tallman, Chair of the Advisory Committee on Federal Rules of Criminal Procedure, to the Honorable Lee H. Rosenthal, Chair of the Standing Committee on Rules of Practice and Procedure at 4 (Dec. 12, 2007). Since that time, no further action has been taken.

Factual Background

2. On March 15, 2003, Petitioner sent the first of at least "dozens" of threatening emails to his ex-wife (who had obtained a divorce and a protective order

from Petitioner following allegations that he had abused her and their children). (JA 275). Volume 3 of the Joint Appendix reproduces these emails. Petitioner later was charged in a superseding indictment with fifteen counts of sending an electronic communication containing threats to kill or injure his ex-wife, her relatives and others in violation of 18 U.S.C. § 875(c). (JA 19-22). Each count carried a maximum term of five years imprisonment, exposing Petitioner to a potential sentence of up to 75 years of prison time.

Following his indictment, Petitioner pled guilty to one count of violating Section 875(c). Rather than enter into a formal plea agreement with the Government, Petitioner signed a "factual resume" in which he admitted to the allegations contained in Count 13 of the superseding indictment. (JA 272-76). Specifically, he admitted sending an email, the contents of which included the following passages:

> Books have you read any lately? I have one in particular on how to make bombs for who knows if I have reason to level something. I am here and think it over for when the gun is aim and the blood begins to pour it is then to late . . . Leah [the ex-wife] or whom ever are you willing to die for what you believe as i am? Well, will you give me a chance to talk or what? I promise you [the couple's children] that you will soon be with your true Irizarry family and possibly Elaine [the ex-wife's mother]. I see the future i have wanted to avoid now but this is the only way. No parents is what you children will have . . . Leah i hope you have a better plan for i am coming and you will answer. You and Kim [her new husband] crying

> before me and we will see which of you chooses who over the other when I take aim! (JA 273-74)

In the resume, Petitioner also admitted that he intended this email to be a "true threat to kill or injure the person" of Petitioner's ex-wife and her new husband, and that he had sent "dozens of other similar emails . . . for a prolonged period of time . . . [and] acted knowingly and willfully." (JA 274-75).

Following submission of the guilty plea, the parties and the probation officer prepared for sentencing pursuant to a standing order issued by the Chief Judge of the district court (who also happened to be the sentencing judge in this case). (JA 278-84). The probation officer first prepared a thorough and detailed pre-sentence report ("PSR"). The PSR noted the maximum prison term for the offense to which Petitioner pled guilty (5 years). (JA 404 ¶3). The PSR also indicated that, after Petitioner had pled guilty to the offense, he allegedly approached a cellmate about killing his ex-wife's new husband. (JA 405 ¶11). The report calculated a total offense level of 22, reflecting a base offense level of 12 plus three enhancements based on offense-related conduct. (JA 407). The PSR further explained why, even though Petitioner had several prior convictions for crimes including violation of the protective order for his ex-wife, Petitioner was to be placed in criminal history category of I, the lowest possible under the Guidelines. (JA 408-10). Synthesizing these facts and Guideline data points, the PSR calculated an advisory guidelines range of 41-51 months. (JA 415). The final paragraph of the PSR indicated that the sentencing court might consider an upward departure from the applicable guidelines range on the ground that criminal history category I—the category

applicable to true first offenders—did not "adequately reflect[] [Petitioner's] past criminal conduct, or the likelihood that [Petitioner] will commit other crimes." (JA 417 ¶ 78). Consistent with the standing order, the probation officer prepared this report approximately two months before the scheduled sentencing hearing. (JA 417).

The parties then prepared their responses to the PSR. In a pleading filed over one month before the sentencing hearing, the Government stated that it had no objections to the presentence report and also disclosed that it intended to call Petitioner's ex-wife at the sentencing hearing. (JA 293-94). Petitioner's counsel raised two material objections to the report—he objected to the six-level enhancement in the base offense level for the probation officer's factual finding that Petitioner intended to carry out his threat; he also objected, in passing, to the probation officer's refusal to recommend a reduction in the base offense level for acceptance of responsibility. (JA 295-96). Petitioner's counsel did not indicate that he intended to call any witnesses at the sentencing hearing. Consistent with the standing order, Petitioner's pleading was filed ten days before the sentencing hearing. (JA 297). Three days later, on March 10, the probation officer filed a revised presentence report which included an addendum responding to Petitioner's counsel's objections. (JA 297).

3. The sentencing hearing took place on March 17, 2005 (approximately two months after this Court decided *Booker*).

The Government first called Petitioner's ex-wife, whose testimony it had previously disclosed over a month earlier in its response to the presentence report. Petitioner's ex-wife testified pursuant to the

Crime Victims' Rights Act, a law enacted by Congress in 2004 that, among other things, guarantees a crime victim the right to be present and heard at any hearing affecting the defendant, including a sentencing hearing, 18 U.S.C. § 3771. During her testimony, Petitioner's ex-wife explained how Petitioner had "terrorized" her and her family and wanted to be sure that the court understood what had happened "and what could happen." (JA 304). She confirmed that both she and her son had suffered physical abuse at Petitioner's hand (JA 306-07). She explained that she had been suffering from posttraumatic stress disorder, that she had moved to Alabama because Petitioner had located her in South Carolina (in violation of the restraining order) and that she and her relatives were presently concerned for her (and her son's) safety. (JA 311-14). She also indicated that Petitioner had called her and had sent her a Christmas card postmarked from Mobile, Alabama (the city where she lived, whereas Petitioner lived in California). (JA 315-18). Though given the opportunity, Petitioner's counsel did not cross examine Petitioner's ex-wife. (JA 322).

Two other witnesses also testified for the Government, Michael Eubanks (a special agent with the FBI) and Jack Garris (Petitioner's former cellmate). Though the Government had not disclosed these witnesses in its response to the presentence report, Petitioner's counsel did not object to their testimony at the sentencing hearing. Among other things, Agent Eubanks testified about certain items found in Petitioner's automobile at the time he was taken into custody. Specifically, law enforcement officers found maps of Mobile, Alabama "with various notes circled regarding possible whereabouts of [Petitioner's ex wife], her children's schools and the workplace of her

current husband." (JA 327). He also testified about an interview of Petitioner during which Petitioner indicated that he would kill people for his kids, that he would "take a machete and whack their heads off," and that he would "leave a trail of blood from here to Alabama" in order to protect his children. (JA 329-30). Mr. Garris testified that, while he was Petitioner's cellmate, Petitioner was obsessed with the idea of killing his ex-wife's new husband and his ex-wife's mother. (JA 333-39). Petitioner's counsel cross-examined both of these witnesses. (JA 330-32, 339-445).

Petitioner's counsel then was given an opportunity to present evidence. After being noncommittal at the start of the hearing whether he would put on any evidence, (JA 302), defense counsel decided to call Petitioner as his only witness. (JA 347). Petitioner testified that he accepted responsibility for his conduct, that he did not intend to harm his wife, that the information found in his automobile had an innocent explanation, and that various allegations about his violent proclivities were lies. (JA 348-51).

After these presentations, both counsel were given the opportunity to argue about the significance of the testimony presented at the hearing. Petitioner's counsel urged the Court to consider Petitoner's mental condition, including a mental health report prepared about Petitioner. (JA 365, 368). While conceding that Petitioner threatened his ex-wife and that she perceived Petitioner's emails as threats, Petitioner's counsel argued that the six-level enhancement to the base offense level was unjustified because Petitioner lacked the necessary intent to carry out the threats. (JA 366). He also urged the Court to reduce the base offense level in light of

Petitioner's acceptance of responsibility and tried to downplay the significance of the testimony from Petitioner's cellmate. (JA 366-67). Petitioner's counsel did not directly address the testimony from Petitioner's ex-wife or Agent Eubanks. During this presentation, Petitioner's counsel appeared to acknowledge that the Guidelines operated only "in an advisory capacity." (JA 367). Following this presentation, the prosecutor briefly responded. (JA 367-68).

The sentencing judge, Chief Judge Callie V.S. Granade, then ruled on the parties' disagreements over the presentencing report. In both respects, she rejected Petitioner's contentions. Chief Judge Granade found that the six-level enhancement to the base-offense level was appropriate and that Petitioner did not qualify for a reduction based on acceptance of responsibility. (JA 370-72).

Reminding Petitioner's counsel that the Guidelines were now advisory—a fact that Petitioner's counsel again acknowledged—Chief Judge Granade asked whether counsel had anything further to say. (JA 372-73) Counsel declined but Petitioner, with the trial judge's approval, briefly spoke on his own behalf.

Chief Judge Granade then announced the sentence and explained her reasoning:

> I've considered all of the evidence presented today, I've considered everything that's in the presentence report, and I've considered the statutory purpose of sentencing and the sentencing guideline range. I find the guideline range is not appropriate in this case. I find [Petitioner's] conduct most disturbing. I am

> sincerely convinced that he will continue, as his ex-wife testified, in this conduct regardless of what this court does and regardless of what kind of supervision he's under. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guidelines range, I think, is not high enough. (JA 374-75)

She sentenced Petitioner to sixty months imprisonment, nine months higher than the term recommended by the Guidelines (taking into account the enhancements) and the maximum period for the single count to which Petitioner pled guilty (out of the fifteen counts originally charged). (JA 375). She recommended that the Bureau of Prisons place Petitioner "at an institution where mental health treatment is available." (JA 383). She also sentenced him to three years of supervised release, including participation "in a program of mental health treatment and/or counseling." (JA 384).

Following imposition of this sentence, Petitioner's counsel objected on the ground that the sentence "constitute[d] an upward departure . . . [and that Petitioner] didn't have notice of [the judge's] intent to upwardly depart." (JA 377). Chief Judge Granade rejected these objections, noting that Petitioner's counsel "had notice that the guidelines were only advisory and that the court could sentence anywhere within the statutory range as defined by the United States Code." (JA 377). The court then dismissed the fourteen other counts against Petitioner. (JA 378).

4. The United States Court of Appeals for the Eleventh Circuit unanimously affirmed the judgment. (JA 392-400). Taking the position adopted (or eventually adopted) by five other federal courts of

appeals, the Eleventh Circuit held that Federal Rule of Criminal Procedure 32(h) did not require a district court to provide notice to a defendant prior to imposing a sentence outside the range recommended by the advisory Guidelines based on the considerations set forth in Section 3553(a). The Eleventh Circuit's ruling was based on two main rationales.

First, the appellate court concluded that Chief Judge Granade imposed a variance from the advisory Guidelines range, not a departure, because she had based the sentence principally on the considerations set forth in Section 3553(a) (rather than atypical facts that might justify a traditional departure under the Guidelines). Since Rule 32(h) explicitly speaks only in terms of departures (not variances), continued the Eleventh Circuit, the district judge's sentencing decision did not trigger its extra procedural requirements.

Second, the appellate court noted that, in the wake of this Court's decision in *Booker*, "parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum." (JA 399-400). As explained by the Eleventh Circuit, *Booker* eliminated the concerns of "unfair surprise or inability to present informed comment" that animated this Court's earlier decision in *Burns*, rendered at a time when application of the Guidelines was mandatory. (JA 400).

Petitioner filed a timely petition for a writ of *certiorari*, which this Court granted on January 4, 2008. (JA 401).

SUMMARY OF THE ARGUMENT

Federal Rule of Criminal Procedure 32 does not require a district court to provide notice prior to imposing a sentence outside the range recommended by the advisory Guidelines based on the factors set forth in 18 U.S.C. § 3553(a). Neither provision of Rule 32 relied upon by Petitioner—Rule 32(h) or Rule 32(i)(1)(C)—supports a notice requirement in this context.

Petitioner's reading of Rule 32(h) cannot be squared with the rule's plain language, with speaks repeatedly and exclusively in terms of departures. Departures and variances are fundamentally different sentencing devices: departures depend on facts not adequately taken into account by the Sentencing Commission; variances depend on reasoned judgments based on the considerations set forth in Section 3553(a) by Congress. In light of the fundamental distinction between a departure and a variance, the notice rule for departures has never been, and should not now be, extended to variances.

Rule 32(i)(1)(C) should not be interpreted to require notice prior to the imposition of a variance. By its plain terms, the rule does not require notice at all. While this Court in *Burns* interpreted the rule to require notice for departures, this Court's decision in *Booker* changed the legal landscape of federal sentencing. A notice rule would impose a significant burden on trial judges. It would prompt judges to gravitate back to the guidelines range in contravention of *Booker* and its progeny.

Regardless of the textual hook, Petitioner's proposed rule would circumvent and undermine the carefully designed process for amendments to the

federal procedural rules. Tellingly, that process considered and rejected the very rule Petitioner seeks. A critical reason for that rejection was the strenuous objection by federal judges on many of the grounds that *amicus* identifies here.

The canon of constitutional doubt does not support Petitioner's rule. Neither provision of Rule 32 is sufficiently ambiguous to support the canon's application. Even if they were, the Due Process Clause does not entitle a criminal defendant to notice prior to the imposition of a variance. Historically, criminal defendants were not legally entitled to special notice prior to the district court's imposition of a sentence. Even if history is not dispositive, the balancing test sometimes used in this Court's procedural due process jurisprudence does not support Petitioner's rule.

ARGUMENT

I. FEDERAL RULE OF CRIMINAL PROCEDURE 32, AS PRESENTLY DRAFTED, DOES NOT REQUIRE A DISTRICT COURT TO PROVIDE NOTICE OF ITS INTENT TO IMPOSE A SENTENCE OUTSIDE THE RANGE RECOMMENDED BY THE ADVISORY GUIDELINES WHEN BASED ON THE CONSIDERATIONS SET FORTH IN 18 U.S.C. § 3553(A).

This is a case about interpretation, so the relevant text provides the proper starting point for the analysis. *See e.g.*, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Critically, no provision of the United States Code or the Federal Rules of Criminal Procedure expressly or even implicitly requires a federal district judge, whenever she ultimately concludes that Section 3553(a) demands a

sentence outside the range recommended by the advisory Guidelines, to provide notice to the parties of any and all reasons she believes a variance may be appropriate.[1]

Just as "Congress has shown that it knows how to direct sentencing practices in express terms," *Kimbrough v. United States*, 128 S. Ct. 558, 571 (2007), so too has it shown that it knows how to direct sentencing procedures, including notice requirements as to the terms of punishment, *see, e.g.*, 18 U.S.C. §§ 3552(d), 3553(d), 3664. Tellingly, more than three years after *Booker*, Congress has not enacted the kind of notice requirement that Petitioner urges here, and the Standing Committee on Rules of Practice and Procedure has to date declined to recommend such a notice requirement to this Court. *See* Standing Committee on Rules of Practice and Procedure, Report to the Chief Justice of the United States and Members of the Judicial Conference, Agenda Item E-19 at 32 (Sept. 2006).

Finding no support for his claims in the text of the United States Code or the Federal Rules, Petitioner suggests (Brief at 19-20) that the reasoning behind

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[1] *Amicus* reluctantly uses the term "variance" to describe a non-Guideline sentence justified on the basis of considerations set forth in Section 3553(a) so that the briefs use a consistent vernacular. While "variance" offers a convenient shorthand, the term inappropriately suggests that sentences recommended by the advisory Guidelines should be a normative baseline from which other sentences are said to "vary." However, as this Court has made abundantly clear in recent rulings, though a district judge must consult the Guidelines, she may *not* view any sentence recommended by the advisory Guidelines as presumptively appropriate or reasonable. *See Rita v. United States*, 127 S.Ct. 2456, 2465 (2007); *Gall v. United States*, 128 S.Ct. 586, 595 (2007).

this Court's pre-*Booker* decision in *Burns* supports reading a notice requirement into one of two rules—Rule 32(h) or Rule 32(i)(1)(C). But neither rule should be read to extend or expand a formal notice requirement limiting the authority of district judges to impose sentences outside the Guidelines pursuant to Section 3553(a) considerations. Petitioner's proposed extension of the current sentencing rules would circumvent the typical rulemaking process which, critically, has so far resisted a formal change along the lines urged by Petitioner (due, in part, to the concerns strongly expressed by federal judges who recognize the legal and practical problems it would create). Nor does the canon of constitutional doubt require rewriting the current rules as Petitioner urges.

A. Rule 32(h) Does Not Require Notice That A Court Is Contemplating A Section 3553(a) Sentence Outside The Advisory Guidelines Because Such A Sentence Is Not A "Departure."

Federal Rule of Criminal Procedure 32(h) provides:

> Before the court may *depart* from the applicable sentencing range on a ground not identified for *departure* either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a *departure*. The notice must specify any ground on which the court is contemplating a *departure*. (emphases added)

As the highlighted language indicates, the rule speaks repeatedly—and exclusively—in terms of "departures." Departure, contrary to Petitioner's suggestion (Brief at 28), is "a term with a precise

legal meaning." *United States v. Vega-Santiago*, No. 06-1558, 2008 WL 451813 at *1 (1st Cir. Feb. 21, 2008) (*en banc*). Before *Booker* excised parts of the SRA to make the Guidelines "effectively advisory," district judges were only allowed to depart from the mandatory Guidelines after finding "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *see also Burns*, 501 U.S. at 133 (noting that Section 3553(b) is "[t]he only circumstance in which the district court can disregard the mechanical dictates of the Guidelines"). Implementing this statutory limitation on departure authority, the Sentencing Commission instructed federal courts to "treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." U.S.S.G. § 1A1.1(b). The Commission's Guidelines also specified prohibited departure factors (such as a defendant's race, U.S.S.G. § 5K2.0(d)(1)), discouraged departure factors (such as a defendant's family ties, U.S.S.G. § 5H1.6), and encouraged departure factors (such as disruption of a government function, U.S.S.G. § 5K2.7). *See Koon*, 518 U.S. at 95-96.

As this Court emphasized in *Booker*, "departures are *not* available in every case, and in fact are unavailable in most." 543 U.S. at 234 (emphasis added). This is because, in all mine-run cases with typical offense facts and offender circumstances, "as a matter of law, the Commission will have adequately

taken all relevant factors into account, and no departure will be legally permissible [and thus] the judge is bound to impose a sentence within the Guidelines range." *Id.* at 235. Indeed, as this Court stressed in *Booker*, this critical legal reality prevented traditional departure authority from salvaging the constitutionality of a mandatory guideline system built around judicial fact-finding.

Booker, of course, changed both the scope of district court discretion and the terms of the sentencing debate. The term "variance" has generally been adopted to describe the exercise of the new form of discretion created by the *Booker* remedial opinion. This term also has "a precise legal meaning" quite different from "departure." A variance is a sentence set outside the range recommended by the advisory guidelines (after considering any departures encouraged or discouraged by the Guidelines), and it is a sentence that reflects the considerations Congress set forth in Section 3553(a).

As recent rulings clarify, a district judge still should start the sentencing process by accurately calculating the applicable Guidelines range (including any traditional departure considerations). *See Kimbrough*, 128 S. Ct. at 570; *Gall v. United States*, 128 S. Ct. 586, 596 (2007); *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007). But unlike the pre-*Booker* sentencing world, Guideline-centered adjustments and departure calculations do not end the sentencing inquiry. After completing the fact-finding and basic math required to determine an applicable Guideline range, the district judge must then exercise her independent "reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors," *Rita*, 127 S. Ct. at

2469—factors such as "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct," "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," and "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(2)(B) & (a)(6)-(7). In doing so, a district judge may not treat the sentencing range recommended by the advisory Guidelines as presumptively reasonable, *Rita*, 127 S. Ct. at 2465, and the judge must set forth "a statement of reasons . . . [sufficient] to satisfy the appellate court that [the judge] has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Rita*, 127 S. Ct. at 2468. When conducting appellate review, circuit courts must apply "a deferential abuse-of-discretion standard" and may not treat an outside-the-Guidelines sentence as presumptively unreasonable. *Gall*, 128 S. Ct. at 591.

The distinction between "departure" and "variance" is critical to a proper resolution of this case. Departures are justified on the basis of distinct facts that may make a case atypical; variances are justified on the basis of reasoned judgments *about* facts in light of the statutory commands Congress set forth in Section 3553(a). *See Gall*, 128 S. Ct. at 597. Both the text of the SRA and this Court's constitutional jurisprudence reinforce this important distinction between fact-based departures and judgment-oriented variances.[2] *See generally* Douglas A. Berman,

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[2] *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 490-91 (2000) (stressing that facts (other than prior conviction) that increase an applicable statutory maximum must be proved to a jury beyond a reasonable doubt but that judicial fact-finding implicit

Conceptualizing Booker, 38 ARIZ. ST. L.J. 387 (2006). Governing sentencing statutes—which now mandate that judges consider the needs of deterrence, incapacitation, retribution and rehabilitation, while also seeking to avoid unwarranted disparities, all in the course of imposing a sentence that is "sufficient, but not greater than necessary"—require federal sentencing judges to exercise reasoned judgment guided by the provisions of Section 3553(a) after they have calculated a Guidelines range through Guideline-structured fact-finding. This was most recently confirmed in *Kimbrough*, where this Court upheld a district judge's sentencing determination, even where his reasoned policy judgment contravened the express terms of the Guidelines. 128 S. Ct. at 564.

As highlighted above, departure authority was once subject to a statutory precondition requiring a judicial finding that the Sentencing Commission has not adequately taken some factor into consideration in formulating the applicable guideline, 18 U.S.C.

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in discretionary sentencing regimes presents no constitutional problems); *Blakely v. Washington*, 542 U.S. 296, 303, 313 (2004) (reiterating the constitutionality of an "indeterminate-sentencing regime that allow[s] a judge (but did not compel him) to rely on facts outside the trial record" and then clarifying that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment"); *Cunningham v. California*, 127 S. Ct. 856, 868 (2007) (describing how aggravating circumstances authorizing enhanced sentences under California law present Sixth Amendment problems because they "depend on facts found discretely and solely by the judge"), *Booker*, 543 U.S. at 233 ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

§ 3553(b), and departures are still governed by Guideline provisions that may forbid, discourage or encourage adjustments to the otherwise applicable Guideline range because of a case's atypical facts. By contrast, variances are subject to a higher authority—the still mandatory provisions of Section 3553(a)—and they do not require any sort of anterior finding. Indeed, this Court's instructions in *Gall* and *Rita* that district courts may not treat the advisory Guidelines range as presumptively reasonable indicate that sentencing determinations pursuant to Section 3553(a) cannot and should not be completely subservient to the advice in the Guidelines. *See Gall*, 128 S. Ct. at 595; *Rita*, 127 S. Ct. at 2465.

In short, departures still serve as the means for sentencing courts to give sensible consideration to factually atypical cases, "within the Guidelines framework," while variances serve as the means for sentencing court to implement the (now constitutionally essential) requirement to exercise reasoned judgment at sentencing. *Rita*, 127 S. Ct. at 2461. Thus, variances and departures are "distinct sentencing mechanism[s]," and Federal Rule of Criminal Procedure 32(h)—which speaks solely in terms of "departures"—simply cannot be stretched to require notice for the type of sentence that the district judge imposed in this case. *United States v. Atencio*, 476 F.3d 1099, 1109 (10th Cir. 2007) (Murphy, J., dissenting from denial of rehearing *en banc*).

Petitioner's rejection of this analysis rests on the premise that any different rules for departures and variances would "create an artificial distinction." (Brief at 22). That premise is incorrect. Presentencing notice in the context of traditional departures is justified and administratively feasible

because a presentence report and/or the district court should and sensibly can alert the parties to whatever distinctive case *facts* may seem atypical. Then the parties can assess these noticed facts and can contest their accuracy and atypicality. Moreover, as this Court emphasized in *Booker*, traditional "departures are *not* available in every case, and in fact are unavailable in most." 543 U.S. at 234 (emphasis added).

In sharp contrast, the considerations set forth in Section 3553(a) that can justify a variance apply in every case; notice of potential variance considerations is provided in all cases to all parties directly through the provisions of Section 3553(a), the presentence report and the parties' responses thereto. The parties can and should come to a sentencing hearing fully aware that the sentencing court must give reasoned (and Guideline-independent) consideration to the sentencing objectives and considerations set forth by Congress in the statutory text of the Sentencing Reform Act.

Treating variances and departures differently does not create an "artificial distinction." Rather it gives real meaning and import to this Court's recent constitutional jurisprudence, to the *Booker* remedy, and to the still-mandatory provisions of the Sentencing Reform Act. This Court should reinforce the critical conceptual distinction between variances and departures and, consequently, decline to apply Rule 323(h) to variances.

B. Rule 32(i)(1)(C) Should Not Be Extended To Require Notice Prior To Imposing A Section 3553(a) Sentence Outside The Range Recommended By The Advisory Guidelines.

Rule 32(i)(1)(C) provides in relevant part that, "[a]t sentencing, the court . . . . must allow the parties' attorneys to comment on . . . other matters relating to an appropriate sentence." By its plain terms, this Rule does not require a district judge to provide the parties with any formal pre-hearing advanced notice at all. *See Burns*, 501 U.S. at 141 (Souter, J., dissenting). Nonetheless, the Court in *Burns*, recognizing it confronted an "extraordinary case in which the district court, on its own initiative and contrary to the expectations of both the defendant and the Government, decide[d] that the factual and legal predicates for a departure [were] satisfied," 501 U.S. at 135, concluded that "Congress, in enacting the Sentencing Reform Act, intended that" a district judge provide some form of advance notice before departing *sua sponte* from the recommended Guidelines range. *Id.* Writing for the Court and making much of congressional intent surrounding the passage of the Sentencing Reform Act, Justice Marshall emphasized "Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to *fixing Guidelines sentences*." *Burns*, 501 U.S. at 137 (emphasis added).

Petitioner urges (Brief at 20) that the reasons underpinning *Burns* justify extending Rule 32(i)(1)(C) to variances. For several reasons, Petitioner's proposed extension of *Burns* is ill-advised.

1. After *Booker*, the parties have to understand and expect that district judges must take into consideration all the Section 3553(a) factors and not just the Guidelines.

This Court's decision in *Burns*, written at a time when the Guidelines were mandatory, focused on an "extraordinary case" in which the parties clearly had come to the sentencing hearing expecting a Guideline sentence to be imposed because neither the pre-sentence report nor the parties had suggested any grounds for a departure. Within the pre-*Booker* mandatory Guideline system, if a presentence report and the parties had concluded that a case was factually typical and required a within-Guideline sentence, a sentencing judge's unexpected conclusion that the case was factually atypical and merited a departure would disrupt the settled sentencing expectations that had prevailed throughout the entire pre-sentencing process. In other words, within a mandatory Guideline system in which departures were "unavailable in most" cases, *Booker*, 543 U.S. at 234, concerns about unjust surprise from *sua sponte* departures were well-founded. Against this back-drop, the *Burns* decision, relying heavily on con-gressional intent, interpreted the criminal rules to require judges to give the parties some advance notice of what factors, in the judge's view, made the case at hand atypical.

As a result of the *Booker* remedial opinion, the legal regime and the parties' settled sentencing expectations are now significantly different. Even in a completely typical case, a district court may not presume that a sentence within the advisory Guidelines range is appropriate. Rather, as this

Court repeatedly and recently has stressed, a district judge must hear the parties arguments for whatever sentence they believe appropriate and then independently "exercis[e] his own legal decisionmaking authority" according to the statutory instructions set forth by Congress in Section 3553(a). *Rita*, 127 S. Ct. at 2468; *see also Gall*, 128 S. Ct. at 596-97. Consequently, the parties now have to understand and expect that district judges are obliged to take into consideration all the Section 3553(a) factors along with the Guidelines; the entire post-*Booker* legal structure provides the parties with notice that district courts are now principally tasked with imposing a sentence "sufficient, but not greater than necessary" to achieve congressional sentencing purposes.

2. Extending *Burns* to variances would erect a burdensome and problematic procedural impediment to the district court's exercise of the discretion deemed constitutionally essential by *Booker* and its progeny.

This Court's recent federal sentencing decisions have (1) emphasized the added sentencing discretion district judges must have now that the Guidelines are "effectively advisory," and (2) clarified that judges are authorized to sentence outside the range recommended by the advisory Guidelines on the basis of the judgment-oriented factors set forth in Section 3553(a). *See Kimbrough*, 128 S. Ct. at 564; *Gall*, 128 S. Ct. at 596-97. To preserve the exercise of this discretion and to avoid the constitutional problems that could arise if the Guidelines were to lose their advisory status, this Court has frowned upon judicially created procedural requirements that would

unduly encourage district courts to sentence within the range recommended by the advisory Guidelines. *See Gall*, 128 S. Ct. at 595. This Court's decisions in *Rita* and *Gall* are particularly instructive on this point. *Rita* made clear that district courts may not treat the range recommended by the advisory Guidelines as presumptively reasonable. 127 S. Ct. at 2465. *Gall* made clear that circuit courts may not treat sentences outside the advisory Guidelines range as presumptively unreasonable. 128 S. Ct. at 595. These holdings made eminent sense in light of *Booker*, for contrary rules could have given more weight to the Guidelines than *Booker* allows.

The rule urged by Petitioner seeks through enhanced procedural requirements again to endow the Guidelines with heightened legal significance—which risks creating an excessive "gravitational pull" back toward the Guidelines, *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting), and placing an inappropriate "thumb on the scales," *Kimbrough*, 128 S. Ct. at 577 (Scalia, J., concurring). Though the judicial creation of a procedural requirement for sentencing outside the Guidelines differs formally from presumptions in favor of the Guidelines, they can both problematically burden a district judge's exercise of the added discretion resulting from the *Booker* remedial opinion. Under Petitioner's notice rule, imposition of a within-Guidelines sentence spares the judge any obligation to provide notice in advance of the sentencing hearing. By contrast, a sentence outside that range, though expressly contemplated by *Booker* and subject already to a general requirement that judges provide a fuller account of the reasons for the sentence, carries potentially much higher practical costs for the judge.

District judges are very busy, and sentencing caseloads in some jurisdictions can be staggering. In 2006, approximately 474 total cases per authorized district judgeship were pending in the federal district courts. *See* Administrative Office of the United States Courts, 2006 Judicial Facts and Figures Table 6.1, *available at* http://www.uscourts.gov/judicial factsfigures/2006/Table601.pdf (last visited Mar. 19, 2008); *see also* 2007 Year-End Report on the Federal Judiciary 10, 12 (Jan. 2008) (noting that over 250,000 cases, including 68,413 criminal cases, were filed in the federal district courts in 2007). On average, a district judge sentences slightly more than two criminal defendants per week and just under ten per month, *see Gall*, 128 S. Ct. at 598 n.7 (citing Administrative Office of the United States Courts, 2006 Federal Court Management Statistics 167); in busier districts, judges are sometimes required to sentence dozens of defendants in a typical week. *See Immigration Crisis Tests Federal Courts on Southwest Border*, The Third Branch: Newsletter of the Federal Courts, June 2006 (noting that judges in border districts carry huge felony caseloads and quoting a judge who "has sentenced 50 [defendants] in a week").

While managing these large caseloads, district judges will often receive a complete package of sentencing materials only days before the sentencing hearing. In this case, for example, Chief Judge Granade had a complete packet of sentencing papers only seven days before the sentencing hearing. (JA 419). Realistically, busy district judges can be expected to review the parties' sentencing filings only days before, sometimes perhaps even only hours before, a scheduled sentencing hearing.

Any rigid procedural sentencing requirements such as Petitioner's notice rule will impose substantial new burdens on already overburdened district judges. Consider the plight of a district judge who, after reviewing the presentence report's discussion of the defendant's criminal history the day before a scheduled sentencing hearing, is contemplating a variance based on the "protect the public" consideration of Section 3553(a)(2)(C) in a sentencing universe governed by the Petitioner's proposed rule. In this universe, the defendant and his counsel already know about the defendant's criminal history and about the instructions of Section 3553(a), but apparently the district judge is now expected to provide some additional notice about her sentencing thoughts. Would the judge need to immediately provide notice to the parties and still be able to go forward with the scheduled sentencing hearing the next day? Or would only seven or ten days advance notice suffice? Would the judge have to grant a motion to continue the proceeding for weeks or months if counsel responded to the notice by saying he believed he should now seek an expert report on the topic noticed? Such "infirmities of application" counsel against Petitioner's proposed rule. *Gall*, 128 S. Ct. at 595.

Even if this Court were to design a set of benchmarks for timely notice, Petitioner's proposed rule entails other "administrability problems." (Brief at 23). It still leaves uncertain what amount of notice suffices. Is a single sentence indicating a concern about the adequacy of the advisory Guideline range enough? Would a citation to precise facts and materials from the presentencing or trial record be required? Must the judge specify the particular subsections of Section 3553(a) she thinks might

support the variance? Must she indicate how she plans to balance these factors? Faced with these burdens and uncertainties—which grow exponentially if a case involves multiple defendants or complicated Guideline calculations—busy district judges would understandably (perhaps sometimes unconsciously) retreat to the safety of the Guidelines range (in contravention of *Booker*, *Gall* and *Rita*).

Moreover, a district judge often may not have a strong inkling prior to the sentencing hearing whether she plans to impose a variance. Indeed, the whole purpose of the sentencing hearing is so that the judge can approach the matter with an open mind, can consider the evidence presented at that hearing, and can impose a just and effective sentence based on her view of that evidence. As Chief Judge Boudin, speaking for the First Circuit *en banc*, recently explained:

> The district judge draws on information from the trial, the pre-sentence report and the parties' commentary, the defendant's allocution, victims' statements, letters, its own review of these materials before the sentencing hearing and whatever is added during the hearing. Throughout the hearing, the judge may well be revising his views depending on what is presented and how counsel respond to questions. This is a fluid and dynamic process and the court itself may not know until the end whether a variance will be adopted, let alone on what grounds.

United States v. Vega-Santiago, 2008 WL 451813, at *3.

Petitioner's proposed rule would encourage a judge to approach sentencing hearings with a closed mind. If a district judge decides to impose a sentence

outside the advisory Guidelines range based on something that she learns at the sentencing hearing, a notice rule effectively forces her to continue the sentencing proceeding or to hold another hearing, further adding to the judge's workload and contrary to her charge to sentence promptly. *See* Fed. R. Crim. P. 32(b)(1).

The Crime Victims' Rights Act (CVRA) acutely illustrates the incompatibility of Petitioner's proposed rule with Congress's conception of the purpose of a sentencing hearing. The CVRA, enacted in 2004, grants crime victims the right "to be reasonably heard at any public proceeding in the district court involving . . . sentencing." 18 U.S.C. § 3771(a)(4). Most courts have interpreted this language to entitle a victim to testify at the sentencing hearing, a trend exemplified by the district court's decision in this case allowing Petitioner's ex-wife to testify. (JA 301). *See generally* Douglas E. Beloof, *Judicial Leadership at Sentencing under the Crime Victims' Rights Act: Judge Kozinski in* Kenna *and Judge Cassell in* Degenhardt, 19 FED. SENTENCING REP. 36 (2006). The victim's right to testify would be hollow if it could not affect the district court's view about the proper sentence, at least in some cases. Yet Petitioner's proposed rule either saps a victim's CVRA right of much value or turns it into a procedural nightmare. In order to impose a non-Guidelines sentence at the end of a hearing in which a victim testifies, a district court effectively must ignore (or pretend to ignore) the victim's testimony and justify the sentence on other grounds; alternatively, if the district court chooses to rely on something that the victim related during the hearing, then again the district court must continue the sentencing proceeding and presumably hold another hearing (at which the victim

presumably again would be entitled to testify). Surely Congress did not envision creating an enforceable right for victims to testify at sentencing hearings only to have that right turned into an empty exercise by judicial creation of a notice requirement appearing nowhere in federal law or the federal rules.

In short, it is essential, especially in light of this court's decision in *Booker*, to preserve flexibility for district judges to exercise their sentencing discretion soundly and in a reasoned and explicit manner. This is hardly controversial. Judges routinely make all sorts of very consequential decisions affecting substantial rights—both in criminal and civil settings—without providing elaborate prior notice to the parties of the exact ground upon which the judge plans to base her decision. *See* Brief for the United States in *Burns v. United States*, No. 89-7260, *available at* 1990 WL 505508. In some cases, judges will balance the factors in a multifactor balancing test differently than the parties. *See, e.g.*, 18 U.S.C. § 3142 (bail determination). In other cases, judges may connect the facts to the statutory considerations in a manner other than the parties propose. *See, e.g., Planned Parenthood v. Casey*, 510 U.S. 1309, 1310-11 (1994) (Souter, J., in chambers) (application to stay mandate). While the parties' positions set forth in their pleadings help to frame the debate, they certainly do not define the outer boundaries of the judge's discretionary authority. Sometimes, judges resolve cases before them on grounds proposed by neither party. *See, e.g., Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 540 (1999) ("The Court has not always confined itself to the set of issues addressed by the parties."). Indeed, in the *Booker* remedial opinion which had the potential to affect tens of thousands of

sentences, this Court took a severance approach to the SRA that none of the parties had proposed. 543 U.S. at 266-67; *id*. at 272 (Stevens, J., dissenting in part); *id*. at 309 (Scalia, J., dissenting in part). Viewed against this background, Petitioner's proposed rule challenges the very act of judging.

Not only does a notice requirement complicate the district court's already daunting sentencing tasks, it also risks undermining appellate review. Appellate courts now review sentences for both procedural and substantive reasonableness. *See Gall*, 128 S. Ct. at 598-600; *Rita*, 127 S. Ct. at 2468-69; *Booker*, 543 U.S. at 260-61. To facilitate that review, *Gall* and *Rita* exhort district judges to be explicit and detailed in their reasons for their chosen sentences, especially where those sentences deviate significantly from the advisory Guidelines range. *Gall*, 128 S. Ct. at 594; *Rita*, 127 S. Ct. at 2468; *see also* 18 U.S.C. § 3553(c)(2) (instructing that, if a sentence is imposed outside the Guideline range, the court must state its reasons "for its imposition of the particular sentence . . . with specificity in the written order of judgment and commitment"). An advance notice requirement could make district judges fearful of "adequately explaining" their sentencing decisions. *Gall*, 128 S. Ct. at 597. Whenever a district judge provides the sort of detailed reasoned opinion that was praised in *Gall*, an aggrieved party can scour the judge's sentencing opinion and claim inadequate notice of every jot and tittle of the district court's reasoning. Alternatively, if the district judge describes his reasons in more general terms (such as the heinousness of the offense), an aggrieved party can claim that the judge's decision is not sufficiently reasoned and an appellate court will have to speculate whether

the judge has sufficiently disclosed the "true" reasons for a sentence.

All of these "[p]ractical consideations" counsel against Petitioner's proposed notice rule. *Gall*, 128 S. Ct. at 597. That rule will compound the workload of district judges, prolong sentencing proceedings, and complicate appellate review. Confronted by these challenges, judges understandably will prefer the safe harbor of the Guidelines—one that may reduce procedural burdens and simplify appellate review, but ultimately revives a sentencing system in which the Guidelines are no longer "effectively advisory."

3. A criminal defendant receives adequate notice under the existing presentencing process, and other mechanisms can address rare cases of truly unfair surprise.

Petitioner argues (Brief at 26) that *Booker* actually enhances the need for notice. According to Petitioner, following *Booker*, district judges enjoy greater discretion at sentencing than they did at the time of *Burns*, thereby enhancing the need for a notice rule. The existing presentencing procedural structure already provides a defendant with adequate notice about relevant sentencing considerations governing sentencing decisionmaking. Consequently, there is no need to superimpose a universal notice rule burdening district judges in every case in which a variance might be contemplated.

As soon as the defendant pleads or is found guilty, the defendant and his attorney are on notice of (1) the statutory range within which the district court must sentence the defendant, (2) the Guideline and Section 3553(a) factors which can influence the

sentence within that statutory range, and (3) the process by which the district court will render a sentence. Moreover, the process of preparing and reviewing the presentence report with the Probation Office and with opposing counsel necessarily provides parties with considerable notice of the key facts and arguments that are potentially relevant to the Section 3553 factors. Chief Judge Boudin, speaking for the First Circuit *en banc*, succinctly summarized the soundness of this system:

> In the normal case a competent lawyer—and for incompetence other remedies are available—will anticipate most of what might occur at the sentencing hearing—based on the trial, the presentence report, the exchanges of the parties concerning the report, and the preparation of mitigation evidence. Garden variety considerations of culpability, criminal history, likelihood of re-offense, seriousness of the crime, nature of the conduct and so forth should not generally come as a surprise to trial lawyers who have prepared for sentencing.

Vega-Santiago, 2008 WL 451813 at *3. In addition to these protections, recent amendments to the Federal Rules of Criminal Procedure, approved by this Court, authorize district judges to require probation officers to consider Section 3553(a) factors in their presentence report, which the defendant receives long before sentencing and to which the defendant may respond. *See* Fed. R. Crim. P. 32(f)(2)(A). Collectively, these procedures ensure the "thorough adversarial testing" of the sentencing issue without the need for Petitioner's notice rule. *Rita*, 127 S. Ct. at 2745.

Admittedly, there may be rare cases in which a district judge imposes a sentence based on facts or information that the parties neither expect nor can reasonably anticipate. *See United States v. Hamad*, 495 F.3d 241 (6th Cir. 2007) (reversing a sentence increased on the basis of letters the judge had received in chambers and kept confidential). Existing procedural mechanisms can and already do address concerns about unfair surprise in rare cases involving these sorts of exceptional circumstances. *See Vega-Santiago*, 2008 WL 451813, at *4. If the district judge indicates an intention to sentence on the basis of "surprise" facts outside the parties' ken, the potentially prejudiced parties can request a continuance (reviewable on appeal) or request the opportunity to provide supplemental briefing. *See Morris v. Slappy,* 461 U.S. 1, 26 (1983); *Pickett v. United States*, 216 U.S. 456, 461 (1910). Moreover, the parties also can file a motion to correct the sentence (also renewable on appeal). *See* 18 U.S.C. § 3582(c)(1)(B); Fed. R. Cr. P. 35(a); 3 Wright *et al*. Fed. Practice & Procedure § 588 (rev. ed. 2008). Finally, if the judge supplies a poor or opaque reason for his sentencing decision, an appellate court can vacate the sentence as unreasonable. *See Rita*, 127 S. Ct. at 2468-69; *Koon*, 518 U.S. at 97-100. These sorts of narrowly tailored remedies eliminate unfair surprises and ensure a sound sentencing process without straitjacketing district judges in the vast majority of cases.

4. An approach combining a notice requirement with harmless error analysis would be unworkable.

The Government's Brief in Opposition and its litigating position in recent reported appellate cases

suggests that it prefers a different approach. Under that approach, district courts must provide notice, yet their failure to do so is subject to harmless error review (or plain error review in cases where defendants did not preserve the notice objection). Such an approach carries all the attendant burdens of Petitioner's notice rule and, in several respects, will compound problems with post-*Booker* appellate review of sentences.

First, the sort of harmless error inquiry suggested by the Government will be difficult to conduct on appeal. Typically, the error underlying a harmless error inquiry is an erroneous evidentiary admission or an erroneous jury instruction. *See, e.g., Neder v. United States*, 527 U.S. 1, 9-10 (1999); *Brecht v. Abrahamson*, 507 U.S. 619, 628-29 (1993). In those cases, an appellate court is to decide, based on the entire record, whether the jury (or decisionmaker) would have reached same result. Here the error is of a different breed. It involves the failure to give adequate notice of likely sentencing considerations, which may or may not be expected to trigger a response or change of plans by counsel preparing for sentencing. Any appellate inquiry about the harmlessness of a notice error, therefore, is inherently more speculative. The appellate court cannot simply examine the record to determine whether the result below would be have been the same. Rather, as this case demonstrates well, the parties will be arguing over matters they claim they *would have presented* had they been given notice, matters which often will not be present in the record and may not be subject to sensible appellate scrutiny.

Second, the nature of the judgment in this context differs fundamentally from the typical harmless

error cases. Harmless error typically involves the application of legal elements to facts. For example, when a reviewing court determines that evidence was erroneously admitted in violation of the Fourth Amendment, it then considers whether the decision-maker would have determined that the remaining facts in the record satisfied the elements of the underlying offense. Harmless error inquiry is possible because the error may "be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991). By contrast, in this context, the harmless error inquiry requires the reviewing court to speculate about a multifaceted sentencing judgment made by the district court applying the judgment-oriented considerations set forth in Section 3553(a). It is hard to conceive how the appellate court can undertake this task except by either substituting its own sentencing judgments or by engaging in blind speculation about how a district court might have balanced applicable sentencing considerations differently if it had provided notice and the parties had responded in the ways they now claim on appeal.

5. Alternatively, this Court should limit *Burns* to its facts.

Some lower courts have interpreted *Booker* to render obsolete the reasoning underpinning *Burns* and, in some cases, the very concept of departures. *See United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir. 2007); *United States v. Vampire Nation*, 451 F.3d 189, 195-96 (3d Cir. 2006); *United States v. Walker*, 447 F.3d 999, 1006 (7th Cir. 2006). These rulings might be viewed as a call for this Court

simply to overrule *Burns*. This Court certainly has the power to do so, *see Agostini v. Felton*, 521 U.S. 203, 236-37 (1997), and such a course certainly would resolve this case. Nonetheless, if this Court is not persuaded that *Burns* is entirely consistent with a regime under which district courts do not have to provide notice prior to imposing a variance, it should just limit *Burns* to its facts.

This Court routinely has adopted this course where subsequent legal developments have made it appropriate to cabin a decision's line of reasoning without overruling the decision. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977); *Johnson v. New Jersey*, 384 U.S. 719, 733-34 (1966); *Rutkin v. United States*, 343 U.S. 130, 138 (1952); *Salinger v. United States*, 272 U.S. 542, 549 (1926). This course is especially appropriate where "the principle on which [a] decision proceeded is not broader than the situation to which it was applied." *Salinger*, 272 U.S. at 549.

Such a course is appropriate here. *Booker* and its progeny have necessitated reexamination of sentencing law and procedure. Departures remain possible, and Rule 32(h) ensures that the *Burns* rule can play a role for that distinctive sentencing decision in the calculation of the advisory guideline ranges. Limiting *Burns* to its facts in light of *Booker* ensures that the reasoning of the case is not extended to other criminal (or civil) settings that differ from the system of mandatory guidelines analyzed in *Burns*.

C. To Read A Notice Requirement Into Rule 32 Would Effectively Circumvent The Rulemaking Process, Which Can Better Balance Competing Considerations In The Context Of Advisory Guidelines.

Congress has crafted a clear system for amending federal procedural rules. *See* 28 U.S.C. § 2072(a); *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14-15 (1941). In some cases, a federal statute expressly amends the rules. For example, as part of the Sentencing Reform Act of 1984, Congress amended Rule 32 so that parties had an opportunity to comment on matters relevant to sentencing. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, §215, 98 Stat. 1987, 2014-15. In other cases, this Court promulgates a package of amendments pursuant to the Rules Enabling Act which are adopted unless Congress rejects those rules within a specified period of time. *See Sibbach*, 312 U.S. at 15. For example, the recent amendment to Rule 32 granting district judges the discretion to have probation officers conduct a Section 3553(a) analysis in the presentence report was adopted in this manner. *See* Fed. R. Crim. P. 32(d)(2)(F). It is undisputed that neither of these processes has yet produced the rule that Petitioner (and the Government) urge this Court to adopt. Indeed, the second process (rulemaking) has, to date, expressly declined to adopt Petitioner's proposed rule. Under these circumstances, Petitioner's proposed judicial circumvention of the rulemaking process should be rejected.

Rulemaking provides a superior method, compared to litigation, for modifying the federal rules. Rulemaking enables this Court and its advisory

committees to consider empirical evidence and input from a broad array of constituencies through a notice and comment process. By contrast, litigation limits the Court to the input by the parties and, in some cases, *amici curiae*.[3] *See Kimbrough*, 128 S. Ct. at

[3] Petitioner's statistical arguments (Brief at 23) demonstrate the superiority of rulemaking, compared to litigation, as a process to resolve these issues. Citing various statistics, Petitioner intimates that courts sometimes do not specify whether they are engaging in a departure or a variance and, consequently, leave parties in the dark about their entitlement to notice. This argument misinterprets the data in several respects. First, the argument relies on *preliminary* data. *See* United States Sentencing Commission, FY 2007 Preliminary Quarterly Data Report. Elsewhere in that preliminary report, the Commission "caution[s]" that the data are subject to change and stresses that "quarterly data should not be considered final until publication of the Commission's *Sourcebook* and *Annual Report*." *Id.* at 2. The final data, admittedly unavailable by the deadline for Petitioner's brief, indicate that district courts imposed 42,504 sentences within the Guidelines range and 27,389 sentences outside the range. *See* United States Sentencing Commission, FY 2007 Final Quarterly Data Report Table 1 (Mar. 19, 2008). Second and more importantly, Petitioner's argument confuses the Commission's statisticians' coding decisions with the judge's reasons for a sentence. The notes accompanying the data indicate that the Commission's statisticians classified non-Guidelines sentences depending on whether the court indicated it was departing, citing *Booker* or citing Section 3553(a). *Id.* at nn. 2-4. After doing so, the Commission was left with a small group of sentences that "could not be classified." *Id.* Table 1 n.5 & App. A at A-2. Contrary to Petitioner's argument, this classification does not prove that sentencing judges are imposing a non-Guidelines sentence without giving reasons. Third, Petitioner's argument misreads the scope of this residual category. The Commission indicates that this category "includes cases in which no reason was provided for a sentence outside the Guideline range." *Id.* Table 1 n.5. Contrary to Petitioner's argument, this use of the term "includes" does not necessarily mean that this category consists

574. Rulemaking also enables judges, who are often most directly affected by the proposed rule, to provide input, based on their experience, about its likely consequences. *See Mistretta*, 488 U.S. at 389-91. By contrast, judges by virtue of their office, *see* 28 U.S.C. § 455(a), are effectively shut out from providing input on a rule change sought *via* litigation. Finally, rulemaking enables this Court and its advisory committees to consider the wisdom of a rule in light of a broader array of policy alternatives; *Cf. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764-65 (2004); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 864-66 (1984). By contrast, litigation only allows consideration of the narrow question presented by the litigants, irrespective of the competing policy alternatives for addressing an issue.

The issue in this case illustrates particularly well the importance of respecting the rulemaking process as the appropriate method for changing the federal rules. Following *Booker*, the Advisory Committee on the Federal Rules of Criminal Procedure considered and approved a package of three amendments to Rule 32. The first proposal amended Rule 32(d)(2)(F) so that district judges could require probation officers to address the Section 3553(a) factors in the presentence investigative report. As already noted, this Court has adopted that rule. The second proposal created a uniform judgment form for sentencing to facilitate data collection and analysis by the Sentencing Commission. This proposal was withdrawn after a congressional enactment obviated

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exclusively of such cases; it also could include cases in which the documents received by the Commission were incomplete or did not permit confident classification, *id.* Tables 27-28 & App. A at A-2-3.

it. *See* Memo from the Honorable Susan C. Bucklew, Advisory Committee on Federal Rules of Criminal Procedure to the Honorable David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure at 10 (May 20, 2006).

The third proposal, most central here, would have amended Rule 32(h) so that its notice requirement applied also to variances. Memo from the Honorable Susan C. Bucklew, Advisory Committee on Federal Rules of Criminal Procedure to the Honorable David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure (Dec. 8, 2005). That proposed amendment, however, sparked a vociferous reaction from federal judges, particularly district judges, who saw the proposed rule as inconsistent with *Booker* or as ill-advised policy. *See* Letter of the Honorable Stewart Dalzell to the Honorable Susan C. Bucklew (Nov. 15, 2005) (criticizing the proposed rule on the grounds that it "fundamentally rewrites Justice Breyer's opinion for the remedial majority in *Booker*" and "assures that many, if not most, sentencing hearings will have to take place at least twice, with consequent costs to the parties, victims and the public, who all have a right to attend such important proceedings"); Minutes of the Oct. 26-27, 2006 Meeting of the Advisory Committee on Criminal Rules at 5 (summarizing the opposition of several judges to proposed amendment). The rule was referred back to the advisory committee, which only recently formed a subcommittee to study the issue further.

Other rules in the post-*Booker* system may reduce the need for Petitioner's proposed rule. As noted above, Rule 32(d)(2)(F) now authoritizes district judges to require probation officers to include a

Section 3553(a) analysis in their presentence report. Time will reveal whether district judges avail themselves of that opportunity and whether that process regularly provides the parties with notice of possible grounds upon which a district judge might impose a sentence outside the advisory guidelines range.

To adopt Petitioner's proposal at this time would undercut the well-designed rulemaking process. It allows the litigants to circumvent that process and, thereby, deprives this Court of the benefits that come through careful consideration of empirical evidence and available alternatives. Such a risk is particularly acute where, as here, the Justice Department has altered its position, effectively aligning itself with Petitioner in support of a notice requirement. *See, e.g., United States v. Walker*, 447 F.3d 999, 1007 n.7 (7th Cir. 2006). The only way to ensure that other affected parties, particularly district judges, can "participate in an ongoing manner to improve the various sentencing schemes in our country" is to have the rulemaking process, rather than litigation, determine the wisdom of a new advanced notice requirement following *Booker*. *Cunningham*, 127 S. Ct. at 872 (Kennedy, J., dissenting). Therefore, out of respect for the integrity of this rulemaking process, the Court should decline Petitioner's invitation to expand Rule 32's notice requirements.

D. The Principle Of Constitutional Doubt Does Not Require Petitioner's Proposed Rule

Petitioner argues (Brief at 24-25) that the canon of constitutional doubt supports interpreting Rule 32 to require notice prior to the imposition of a Section

3553(a) sentence. Relying primarily on this Court's opinion in *Townsend v. Burke*, 334 U.S. 736 (1948), Petitioner appears to suggest that a contrary rule would run afoul of the Due Process Clause. Contrary to Petitioner's argument, the canon of constitutional doubt does not support the Petitioner's proposed rule for two main reasons.

First, Rule 32 is unambiguous. This Court has repeatedly held that the canon of constitutional doubt does not apply to an unambiguous provision. *E.g., Miller v. French*, 530 U.S. 327, 341 (2000); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). In this case, Rule 32 on its face does not mandate notice prior to the imposition of a Section 3553(a) sentence and, as detailed above, the rule's structure, history and underlying policy do not provide the interpretive wiggle room necessary to support Petitioner's proposed construction.

Second, procedural due process does not require the notice rule that Petitioner seeks. As an initial matter, Petitioner's proposed rule lacks the necessary historical pedigree. *See* Brief for the United States in *Burns v. United States*, No. 89-7260, *available at* 1990 WL 505508. Historical practice can shed light on the requirements of due process. *See Cooper v. Oklahoma*, 517 U.S. 348, 356 (1996); *Medina v. California*, 505 U.S. 437, 446 (1992); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1856); *Godinez v. Moran*, 509 U.S. 399, 404 (1993) (Kennedy, J., concurring). While "the sentencing process . . . must satisfy the requirements of the Due Process Clause," *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion), this Court has

recognized few historical constraints on discretionary sentencing practices, at least in the noncapital context. *See, e.g., Williams v. New York*, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and the types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."); *Gall*, 128 S. Ct. at 605 & n.1 (Alito, J., dissenting) (describing discretionary system of sentencing that prevailed at the time the Bill of Rights was adopted); *Cunningham v. California*, 127 S. Ct. 856, 874 & n.1 (2007) (Alito, J. dissenting) (same). So long as the judge did not impose a sentence outside the permissible statutory maximum, *see Dorszynski v. United States*, 418 U.S. 424, 440-41 (1974), and did not impose a sentence predicated on inaccurate information, *see Townsend*, 334 U.S. at 741, neither the Constitution nor federal law meaningfully constrained the sentencing judge. As the history of Rule 32 indicates, the defendant's very entitlement to a presentence report is of relatively recent vintage. *See* 1966 and 1975 Notes of the Advisory Committee on the Federal Rules of Criminal Procedure. Likewise, the states historically did not observe the sort of pre-sentence notice requirement that Petitioner seeks. *See* Brief for the United States in *Burns v. United States*, No. 89-7260, *available at* 1990 WL 505508. Thus, to the extent history supplies the relevant reference point, the Due Process Clause does not support Petitioner's proposed rule.

History may well end the due process inquiry in this case. Although this Court sometimes analyzes procedural due process questions under the multi-

factor balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), Petitioner does not urge its application here (Brief at 24-25). Several of this Court's decisions expressly hold that the *Mathews* inquiry is inappropriate in certain contexts, including criminal cases. *See, e.g., Dusenbery v. United States*, 534 U.S. 161, 167-68 (2002); *Weiss v. United States*, 510 U.S. 163, 177 (1994); *Medina*, 505 U.S. at 442-45. *Medina* is especially instructive, for there the Court stressed that the *Mathews* inquiry was almost never suited to an assessment of procedural rules in a criminal case. 505 U.S. at 443 ("[T]he expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order."). While *Medina* arose in the context of a state criminal case, this fact was not essential to the Court's reasoning—understandably so, because the dual appearance of a due process guarantee in both the Fifth and the Fourteenth Amendments ensures that any judicial exposition on the requirements of due process will influence federal and state practice alike.

Federalism principles support *Medina*'s extension to this context. "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that [this Court] should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (citation omitted). Yet that is precisely what Petitioner's (and the Justice Department's) proposed notice rule would do. Several states employ discretionary sentencing systems that do not necessarily

require the trial judge to provide prior notice of his intended sentence. *See Cunningham*, 127 S. Ct. at 871 n.18. Requiring notice as a matter of constitutional law prior to the imposition of an unexpected noncapital sentence obviously would throw open state criminal sentences to a host of new and unprecedented challenges—such as whether notice was required; if so, was it timely, and if so, was it adequate. In short, they would usher in an era of litigation over the scope of these newly minted constitutionally required notice rules, clogging up state courts on direct appeal, this Court on direct review, and federal courts in habeas corpus review.

Even if *Mathews* applied, Petitioner's proposed rule would find no refuge in that doctrine. Under it, the Court considers three factors:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. *Accord Wilkinson v. Austin*, 545 U.S. 209, 224 (2005).

In this case, the private interest—namely a criminal defendant's interest in a Guideline sentence—is moderate at best. Criminal defendants obviously have a legitimate interest in the duration of their sentences. *Cf. Burns*, 501 U.S. at 148 (Souter, J., dissenting). Yet, after *Booker*, their interest in a

Guideline sentence is less compelling. Prior to *Booker*, defendants generally expected a sentence within a narrow range set forth by the Guidelines. *Id.* Following *Booker*, defendants and their counsel are inherently on notice that they can be sentenced anywhere within the statutory range and that the Section 3553(a) factors will guide the district judge's discretion. Moreover, the difference between the recommended range and the statutory maximum may be slight. Here, for example, the difference between the recommended range and the statutory maximum, ultimately imposed by the district judge, was only nine months. Thus, criminal defendants only have at best a moderate interest in a Guideline sentence, an interest less weighty following this Court's decision in *Booker*.

The Government's interest is weighty. This factor of the *Mathews* test entails a far broader array of governmental interests than simply those expressed in the Solicitor General's litigation position. *See Burns*, 501 U.S. at 149 (Souter, J., dissenting). A variety of governmental entities in this case, including Congress, probation officers, and especially federal district judges, have a significant interest in the "fiscal and administrative burdens" imposed by Petitioner's proposed notice rule. *See* Administrative Office of the United States Courts, Annual Report of the Director 35-36 (2006) (describing the financial and administrative impact of *Booker* on the workload of the federal judiciary); L. Ralph Mecham, *Report on the Impact of the* Booker *Case on the Workload of the Federal Judiciary* (June 2006) (same). Notice requirements sap judicial resources. *Burns*, 501 U.S. at 149 (Souter, J., dissenting). As detailed above, *supra* at 31-36, a notice rule likely will drag out the sentencing hearing and place an additional strain on

already stretched judicial resources. *See supra* at 34-35.

Synthesizing these factors of the *Mathews* test, therefore, the interest balance cuts against a notice requirement. Even if the interest balance is not conclusive, the procedural due process analysis then boils down to two basic questions: (1) how substantial is the risk of an erroneous deprivation of the defendant's interest in a Guideline sentence and (2) what is the probable value (if any) of an additional notice requirement. To frame this issue appropriately, it is necessary to consider the procedural guarantees that already accompany the sentencing hearing. *See generally United States v. Ausburn*, 502 F.3d 313, 322-27 (3d Cir. 2007). A criminal defendant already has notice of the range to which he can be sentenced (the statutory maximum). He has notice of the grounds upon which the judge will base the sentence (the Section 3553(a) factors). He receives a copy of the presentence report (which details the facts relevant to sentencing and can include an analysis of the Section 3553(a) factors). He has an opportunity to comment upon this report. He likely has advance notice of the witnesses that the prosecution will call at the sentencing hearing. Finally, he participates in the hearing where his counsel can present evidence and make arguments on matters relevant to the sentence.

Given the notice already available under current law, the constitutional question is whether yet another layer of notice is necessary. *See Greenholtz*, 442 U.S. at 14. Here, any "risk of an erroneous deprivation" of a defendant's liberty is minimal at best. Petitioner seems to suggest (Brief at 24-25) that notice here is necessary to reduce the risk

of a sentence based on inaccurate or misleading information. Yet Petitioner makes no showing that the nine month increase imposed by the district judge actually was based on any such misinformation. Thus, there is simply no indication that a notice rule would have served any meaningful error-correction function in Petitioner's case.

Even if Petitioner could point to more than a hypothetical risk of sentencing error, existing mechanisms can correct any error. *See Wilkinson*, 545 U.S. at 226-27 (opportunity for subsequent review of decision reduces risk of erroneous deprivation by original decisionmaker); *Gilbert v. Homar*, 520 U.S. 924, 934-35 (1997) (same). Under the recently adopted post-*Booker* revisions to Rule 32, a district judge can require the probation officer to include an analysis of facts relevant to the Section 3553(a) considerations, thereby reducing the risk of any unfair "surprise" at sentencing. Moreover, the district judge must give reasons for his sentence, with the required degree of reasoning correlated with the degree to which the sentence deviates from the recommended Guidelines range. *Rita*, 127 S. Ct. at 2468-69. Finally, under the appellate standard set forth by this Court in *Booker* and elaborated upon in *Rita* and *Gall*, appellate courts will continue to review the sentence for both procedural and substantive reasonableness. *See Gall*, 128 S. Ct. at 597. Thus, the marginal "error-correction" benefit of Petitioner's proposed rule is at best minimal.

For all of these reasons, the canon of constitutional doubt does not require interpreting Rule 32 to require notice prior to the imposition of a Section 3553(a) sentence outside the range recommended by the advisory guidelines.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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