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 FOR PETITIONER

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QUESTION PRESENTED

Whether a district court must provide a criminal defendant notice of the contemplated grounds for a sentence above the range recommended by the Sentencing Guidelines.

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The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 458 F.3d 1208 and is reprinted in the Joint Appendix ("J.A.")[1] at 392-400. The district court's orders are unreported but are reprinted at J.A. 260-71, 277-84, 288-90, and 381-91.

JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

The judgment of the court of appeals was entered on August 1, 2006. The petition was filed on October 26, 2006, and granted on January 4, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISION, STATUTE, AND RULES INVOLVED

The constitutional provision, statutory provision, and rules of criminal procedure involved in the case are set forth in the appendix to this brief at 1sa-10sa. *See* S. Ct. Rule 24.1(f).

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[1] The Joint Appendix comprises three volumes, the third of which contains material filed under seal.

STATEMENT OF THE CASE

A. Statutory Background

1. The Sentencing Reform Act of 1984 (SRA), 18 U.S.C. § 3551-3742 and 28 U.S.C. § 991-998, "revolutionized" criminal sentencing in federal courts by establishing the United States Sentencing Commission and charging it with the development of a system of Sentencing Guidelines based on factors set forth in 18 U.S.C. § 3553(a). *Burns v. United States*, 501 U.S. 129, 132-33 (1991). Under the SRA, district courts were required to impose a sentence within the applicable Guidelines range unless they found "that there exist[ed] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration" by the Guidelines. 18 U.S.C. § 3551(b)(1) (Supp. IV 2004). The Sentencing Commission specified a number of permissible grounds for departure from the Guidelines range, *see* U.S. Sentencing Guidelines Manual (U.S.S.G.) ch. 5, pt. K, but it also explained that the list was "not exhaustive" and that district courts were free to depart "on grounds not mentioned in the guidelines" in an appropriate case. U.S.S.G. ch. 1, pt. A4(b) (1991).

The SRA also amended Federal Rule of Criminal Procedure 32 to "provide[] for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence." *Burns*, 501 U.S. at 134. Among other provisions, Rule 32 directs the probation officer to prepare a presentence report addressing

matters relevant to the defendant's sentence. Fed. R. Crim. P. 32(c).

In *Burns*, this Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." 501 U.S. at 138.

2. In *United States v. Booker*, 543 U.S. 220 (2005), the Court held that the SRA violated the Sixth Amendment right to a jury trial. *Id.* at 244. As a remedy, the Court severed the provision of the Act that made the Guidelines mandatory. *Id.* at 245 (severing two provisions, including 18 U.S.C. § 3553(b)(1) (Supp. IV 2004)). As a result of *Booker*, the Guidelines are "effectively advisory," and a district court is now free to impose any sentence within the range permitted by statute, based on the factors set forth in Section 3553(a). *Booker*, 543 U.S. at 245; *see also Gall v. United States*, 128 S. Ct. 586, 594 (2007).

B. Factual Background

1. Petitioner Richard Irizarry suffers from a borderline personality disorder with paranoid and antisocial features. J.A. 128, 267.[2] His symptoms include emotional volatility, recurrent ideations of

[2] Mr. Irizarry has consistently denied that he is affected by any mental illness or defect. On appeal he accepts, for the sake of argument, the contrary findings of the district court. *See* J.A. 267.

suicide, and frantic efforts to avoid real or imagined abandonment. *Id.* at 128-30. Most prominently, he suffers from "transient stress-related paranoid ideations, especially suspiciousness," that are global and pervasive. *Id.* at 130. Because of his mental illness, without any "justifiable basis" he harbors suspicions of exploitation and infidelity, doubts the loyalty of friends and family members, and persistently bears grudges. *Id.* at 131.

Despite the seriousness of his condition, Mr. Irizarry has only "a modest history of mental health treatment." *Id.* at 133. He has undergone two "brief psychiatric hospitalizations," once in 2000 and again in September 2002, but both times he was treated only with antidepressant medications, which did not target his paranoia. *Id.* at 133-34. Later, while incarcerated, he initially took antidepressants but discontinued the treatment on his own. *Id.* at 134.

2. Mr. Irizarry and his ex-wife, Leah Smith, were married in 1995 and have two children. In 2000, she left him, took the children, and moved from California to South Carolina. In 2001, she obtained a divorce and a restraining order against him in a South Carolina court. J.A. 394.

After she left, Mr. Irizarry developed a number of paranoid fantasies about his ex-wife. He became convinced that she had hacked the computer systems of the Ku Klux Klan, that she was sending him threatening letters, and that she was physically abusing the children by whipping them, forcing them to sleep outside, and ripping

out their toenails with pliers. J.A. 42, 45, 51, 53, 66-67, 70-71, 157. In 2001, he drove to South Carolina and was jailed for 30 days for violating the restraining order. *Id.* at 394. In his car, police found a hammer, rope, tarps, and duct tape. *Id.* The actions of the South Carolina police, he maintains, are part of "a conspiracy to destroy evidence that might help [him]." *Id.* at 79-80, 102. His ex-wife remarried and moved to Mobile, Alabama, with the children. *Id.* at 394.

Between August and December of 2003, while living in California, Mr. Irizarry sent a series of e-mail messages to his ex-wife in Alabama. In the messages, he explicitly threatened to kill his ex-wife, her husband, her mother, and several of her acquaintances. J.A. 273-75, 394. The e-mail messages also stated that he was in contact with two governors, that a district attorney had assured him he could bring a federal case against his ex-wife for abusing the children, and that he was traveling to various destinations in the United States and Canada simultaneously, in some cases with a group of "ex-guerilla warfare soldiers." *Id.* at 177; *see* J.A. 420-48.

Mr. Irizarry was arrested in December 2003, and in an interview with the FBI he repeated his threats. J.A. 394. In his vehicle, police found computer printouts, dated more than a year earlier, suggesting that he had planned to travel to Mobile to find his ex-wife and children. J.A. 394; *see id.* at 330-31. He maintained that he intended to commit a federal crime and to be apprehended, for the purpose of launching an FBI investigation

into "all the things" his ex-wife had done. J.A. 74. Specifically, his goal in getting caught was to "expose [his ex-wife's] involvement with the Klan . . . and her abuse of the children." *Id.* at 108-09. He says that the plan "backfired." *Id.* at 74. He has alleged that the FBI is withholding information "as part of a conspiracy to let [his] ex-wife win." *Id.* at 105; *see id.* at 177.

C. Procedural History

1. Mr. Irizarry was indicted by a grand jury in the United States District Court for the Southern District of Alabama on fifteen counts of transmitting electronic communications containing threats to kill or injure, in violation of 18 U.S.C. § 875(c). J.A. 19-21. A federal public defender was appointed to represent him. He entered a plea of not guilty and gave notice of his intent to raise an insanity defense. *Id.* at 11. The district court ordered Mr. Irizarry to undergo an examination to determine, *inter alia*, whether he was suffering from a mental disease or defect that rendered him unable to understand the nature and consequences of the proceedings against him and to assist in his defense. *Id.* at 16.

The district court conducted a competency hearing and heard testimony from expert witnesses for the defense and prosecution. J.A. 25-258. The government's forensic psychologist testified that Mr. Irizarry suffers from an anxiety disorder and a borderline personality disorder with paranoid and antisocial features. *Id.* at 126-28. He testified that Mr. Irizarry's condition is characterized by "instability in pretty much every do-

main," *id.* at 128, and involves global and pervasive paranoid ideations, *id.* at 130. The district court agreed with the government's expert that Mr. Irizarry was "suffering from a mental condition," but that he was competent to stand trial. J.A. 267.

Because the scope of the hearing was limited to competency, however, the court did not consider Mr. Irizarry's future dangerousness or whether his condition was treatable.[3] In fact, at one point in the hearing, the court specifically cut off testimony about the risk that Mr. Irizarry would pose a danger in the future. When the expert witness for the defense began to discuss "concerns about the potential dangerousness," noting that "[t]he best statistical predictor of dangerousness is a history of having been dangerous," J.A. 188, the district court interrupted, asking "how is this relevant to what I have to determine right now?" *Id.* Defense counsel stated that she wanted to present testimony about "third-party risk." *Id.* The district court replied, "I know. But how does that relate to his competency to stand trial?" *Id.* at 189. In light of the court's ques-

[3] Mr. Irizarry indicated a willingness to undergo treatment. J.A. 257-58. The government's psychologist also testified that there are medications that "could mitigate" even serious delusional symptoms, noting the availability of antipsychotic drugs that "would work . . . particularly well" on "delusions or hallucinations, these thinking and perceptual disturbances." *Id.* at 146. Both experts suggested that the antidepressant medications he had taken in the past had little effect. *Id.* at 133-34, 193.

tions, counsel said, "I'll change course, Your Honor." *Id.*

2. Mr. Irizarry pleaded guilty to one count of the indictment, and the government dismissed the remaining counts. J.A. 272-76, 393. In a factual resume, he admitted that he sent a threatening e-mail message through interstate commerce to his ex-wife. He further admitted that the message was "intended . . . to be a true threat to kill or injure" his ex-wife and her new husband, and that his "intention was that [they] take the threat seriously." *Id.* at 274-75. He also admitted that, since the divorce, he had sent "dozens of other similar e-mails" and that he did so in violation of the South Carolina restraining order. *Id.* at 275. The court accepted the guilty plea and set a date for sentencing. *Id.* at 277-78.

One week later, defense counsel made a motion for Mr. Irizarry to be hospitalized pursuant to 18 U.S.C. § 4244 so that he could receive mental health treatment prior to sentencing. J.A. 285-87. In ruling, the court noted that, although the psychologists testifying at the competency hearing "disagreed on the diagnosis, all opined that Mr. Irizarry is suffering from a mental condition," and so granted the relief "[b]ased on the motion and the court's knowledge of Mr. Irizarry from the proceedings in this case." *Id.* at 288-90. Shortly thereafter, his attorney moved to withdraw as counsel, citing information she received from third parties and professional ethical considerations. J.A. 291-92. The court granted the motion and appointed Arthur Madden as new counsel.

On January 19, 2005, one week after this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the probation office filed its presentence investigation report (PSR). The PSR calculated a Guidelines sentencing range of 41 to 51 months, based on a category I criminal history and an adjusted offense level of 22. J.A. 415. The offense level reflected enhancements for "conduct evidencing an intent to carry out [the] threat," *see* U.S.S.G. § 2A6.1(b)(1), for making multiple threats, *see* U.S.S.G. § 2A6.1(b)(2), and for violating a court protection order, *see* U.S.S.G. § 2A6.1(b)(3). J.A. 407. The PSR recommended that there be no downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. J.A. 406.

Under the heading "Factors That May Warrant Departure," the PSR stated that "[p]ursuant to Guidelines 4A1.3 (Adequacy of Criminal History Category), the Court may consider whether or not the defendant's criminal history category adequately reflects the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." J.A. 417. "If not," the PSR continued, "the Court may consider imposing a sentence departing from the otherwise applicable Guidelines range." *Id.*

Mr. Irizarry filed written objections to the PSR challenging, among other conclusions, its description of his criminal history and its application of enhancement for conduct evidencing an intent to carry out the threat. J.A. 295-96, 418. The government did not object to the PSR and did not re-

quest an above-Guidelines sentence. *Id.* at 293-94, 418.

D. Sentencing Hearing

On March 17, 2005, the district court conducted a sentencing hearing. It heard victim impact testimony from Ms. Smith, Petitioner's ex-wife, who said that she was "certain" that he would "not stop terrorizing" her family. J.A. 320. The court also heard from Mr. Irizarry's former cellmate, who testified that even after the arrest, Mr. Irizarry threatened to kidnap his children and kill his ex-wife's mother. *Id.* at 335-37. The cellmate testified that Petitioner experienced massive mood swings while in jail, during which he would fly into "a rage" and "beat his head against the wall." *Id.* at 335. Mr. Irizarry testified that he knew his conduct was wrong and that he accepted responsibility for his actions. J.A. 348. He testified that, contrary to statements in the e-mail messages, he had never purchased any bombs, guns, or knives, or other "stuff like that." *Id.* at 351-52.

The court overruled Mr. Irrizary's objections and accepted the PSR's calculation of the Guidelines range. J.A. 372. When it announced the sentence, however, it also indicated for the first time that it intended to impose a sentence above the Guidelines range, finding that "the Guidelines range is not appropriate in this case." J.A. 374. The court based its upward variance from the Guidelines on Mr. Irizarry's future dangerousness:

> I find Mr. Irizarry'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 is 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 guideline range, I think, is not high enough.

Id. at 374-75. The court announced a sentence of 60 months of imprisonment, the statutory maximum, to be followed by three years of supervised release. *Id.* at 375.

Defense counsel immediately objected that "the sentence constitutes an upward departure from what the court found to be the applicable Guidelines range" and "[w]e didn't have notice of its intent to upwardly depart." J.A. 377. The court flatly stated that no such notice is required: "I think the law on that is out the window." *Id.* Defense counsel repeated his objection "to [the] failure to give notice of the court's intention to upwardly depart." *Id.*

E. Proceedings on Appeal

Mr. Irizarry appealed, arguing that the district court erred in failing to provide notice of the contemplated grounds for its *sua sponte* departure from the Guidelines range as required by *Burns v. United States*, 501 U.S. 129 (1991) and codified in Federal Rule of Criminal Procedure 32(h). The Government conceded that the district court had erred in failing to provide notice, but argued that

the error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 22-24 (1967). Gov't C.A. Br. 11, 17-18.

The court of appeals affirmed, finding no error, and thus not reaching the question of harmlessness. J.A. 392-400. It agreed that the district court had issued a sentence longer than the advisory Guidelines range "because of the likelihood Irizarry would continue to threaten his wife." *Id.* at 392; *see id.* at 396. It also recognized that, under this Court's holding in *Burns*, "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." *Id.* at 397 (quoting *Burns*, 501 U.S. at 138); *see* Fed. R. Crim. P. 32(h).

Nonetheless, the court held that no error occurred because "the above-guidelines sentence . . . in this case was a variance, not a guidelines departure." J.A. 398. Rather than departing on a ground specified in Chapters 4 and 5 of the Sentencing Guidelines, the district court had considered the sentencing factors set forth in 18 U.S.C. § 3553(a), including the need "to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C), and exercised its discretion under *Booker* to impose an above-Guidelines sentence. *Id.* at 398-99 & n.2. No notice is required under those circumstances, the court explained, because "[a]fter *Booker*, parties are inherently on notice

that the sentencing guidelines range is advisory" and that any of the Section 3553(a) factors may justify a non-Guidelines sentence. *Id.* at 399-400. The court therefore concluded that "the district court was not required to give Irizarry advance notice" of its contemplated grounds for varying from the Guidelines. *Id.* at 400. It acknowledged that its holding conflicted with the decisions of several other courts of appeals. *Id.* at 399 n.4.

SUMMARY OF ARGUMENT

1. In *Burns*, this Court held that Rule 32 imposes a requirement that the district court provide reasonable notice before departing from the Guidelines range. The notice requirement was driven by three considerations. The text of Rule 32 guarantees the parties an opportunity to comment on the factors relevant to sentencing, an opportunity that necessarily requires notice of the grounds for departing. Notice was also required to ensure focused adversarial testing of the grounds for the sentence. Moreover, a notice requirement permitted the Court to avoid the "serious" constitutional question of whether due process requires notice under the circumstances.

Each of those reasons applies with equal or greater force to above-Guidelines sentences under *Booker* and Section 3553(a). Just as a defendant needs notice to meaningfully "comment" on a sentence that departs under the Guidelines, parties need notice to comment on a non-Guidelines sentence. Furthermore, Rule 32(h) was enacted in 2002 as a codification of the holding in *Burns* and requires reasonable notice of the contemplated

grounds for "departures" from the Guidelines. The plain meaning of the term "departures" easily includes a post-*Booker* "variance" sentence that departs from the standards set out in the now "effectively advisory" Guidelines.

Moreover, a rule that required reasonable notice only for Guidelines departures—but not for above-Guidelines sentences under Section 3553(a)—would contravene the purpose of Rule 32 to provide focused adversarial testing of the grounds for the sentence. The Court in *Burns* was concerned that a lack of notice would lead to wasteful, scattershot argument by parties trying to anticipate every conceivable ground for departure, or to resignation in the face of that daunting task. Those concerns apply fully to post-*Booker* sentences under Section 3553(a). Indeed, because *Booker* expanded the discretion of district courts and the universe of permissible reasons for a non-Guidelines sentence, the need for reasonable notice is even more acute after *Booker* than before. A notice requirement that turns on an artificial distinction between Guidelines departures and non-Guidelines sentences under *Booker* would also pose problems of administrability.

Importantly, the same serious constitutional question that the Court avoided in *Burns* is present in this setting. Without reasonable notice of the grounds for a non-Guidelines sentence, there is a serious concern that the defendant's right to notice and fair opportunity to comment on the grounds for his incarceration would be violated. This serious constitutional concern supplies an

additional reason to construe Rule 32 to impose a requirement of reasonable notice for all non-Guidelines sentences.

2. In this case, the failure to provide notice affected Mr. Irizarry's substantial rights and necessitates a new sentencing hearing. Although the Government has suggested that the error in this case was harmless (Gov't Br. in Opp. 13), this Court need not address that question in the first instance and should instead follow its usual practice of remanding to the court of appeals for harmless error review. Moreover, a remand to the court of appeals would permit this Court to avoid resolving the due process question not reached in *Burns*. On this record, the Government cannot possibly carry its burden of excusing a constitutional error by showing that the failure to provide notice was harmless beyond a reasonable doubt. And application of any lesser standard of review would, of course, require resolution of the constitutional question avoided in *Burns*. The better course is to remand the matter to the court of appeals.

If the Court chooses to address the question, the record makes clear that the failure to provide notice in this case was not harmless. The district court entered the statutory maximum sentence based on an assumption about Mr. Irizarry's future dangerousness. That assumption was not tested at the sentencing hearing, however, because defense counsel was never informed of the contemplated grounds for an above-Guidelines sentence. The record in this case demonstrates

that, had counsel received reasonable notice, he would have introduced expert testimony challenging the court's assumption about future dangerousness by showing that Mr. Irizarry's symptoms could be successfully treated through antipsychotic medications and psychotherapy. He also would have shown that alternative forms of supervision would be preferable to incarceration, which was likely to *increase* his delusional ideations. Evidence of all of this was readily available to defense counsel because it had been prepared for the competency hearing, but the testimony was cut short by the district court. A new hearing is required so that the district court can impose a sentence after a process by which the adversarial process has tested the district court's assumptions about Mr. Irizarry and his future dangerousness.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO PROVIDE REASONABLE NOTICE BEFORE IMPOSING AN ABOVE- GUIDELINES SENTENCE UNDER *BOOKER*

The district court erred in concluding that it had authority to enter a sentence above the Guidelines range without providing reasonable notice of the contemplated grounds for that action. As this Court explained in *Burns v. United States*, 501 U.S. 129 (1991), the text and purposes of Rule 32, the proper functioning of the adversarial process, and serious due process concerns compel the conclusion that a district court must

provide reasonable notice to a criminal defendant before imposing a sentence greater than that suggested by the Guidelines. Nothing in this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), alters that analysis. To the contrary, by expanding the discretion of the sentencing court, *Booker* made the requirement of reasonable notice *more* rather than less important to the full and fair adversarial testing of the grounds for the sentence.

A. Rule 32 Compels A Sentencing Court To Provide Reasonable Notice Of The Contemplated Grounds For An Above-Guidelines Sentence Based On Section 3553(a)

1. In *Burns*, this Court considered whether a district court was authorized to depart from the then-mandatory Guidelines range "without first notifying the parties that it intend[ed] to depart." 501 U.S. at 131. There, the government had not requested a departure before the hearing, and the PSR stated that there were "no factors that would warrant departure from the guideline sentence." *Id.* Notwithstanding the absence of a provision "expressly obliging the district court to announce that it is contemplating to depart *sua sponte*," the Court held that, for three reasons, such a requirement was implicit in Rule 32 of the Federal Rules of Criminal Procedure. *Id.* at 136.

First, the Court identified a textual basis for the notice requirement. It observed that Rule 32(a)(1), now codified as Rule 32(i)(1)(C), provides both parties with an opportunity to comment on

the PSR and other matters related to the proper sentence. *Burns*, 501 U.S. at 132; Fed. R. Crim. P. 32(i)(1)(C) ("At sentencing, the court . . . must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence."). It would make no sense, the Court reasoned, "to impute to Congress an intent that a defendant have the right to *comment on* the appropriateness of a *sua sponte* departure but not the right to be *notified* that the court is contemplating such a ruling." *Burns*, 501 U.S. at 135-36 (emphasis added).

Second, the Court held that failing to provide notice of a *sua sponte* departure would be "inconsistent with Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." *Id.* at 137. In the absence of a notice requirement, the Court explained, "[a]t best" the parties might "address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative," while "[a]t worst, and more likely, the parties will not even try to anticipate such a development," leaving the contemplated grounds for departure untested by the adversarial process. *Id.*

Third, the Court's construction of Rule 32 avoided "the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138. For those reasons, the Court held that "before a district court can depart up-

ward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." *Id.*

Each of the reasons that justified a notice requirement for Guidelines departures in *Burns* applies with equal or greater force in the case of an above-Guidelines sentence based on the Section 3553(a) factors.

2. There are two textual bases for a requirement of reasonable notice under these circumstances. Rule 32 was amended in 2002 to include paragraph (h), which provides that:

> 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.

Fed. R. Crim. P. 32(h). The new provision was intended to codify the holding of *Burns*. Fed. R. Crim. P. 32 advisory committee notes (2002 amendments) ("Rule 32(h) is a new provision that reflects *Burns* . . . ."). Although the term "departure" often refers to a non-Guidelines sentence imposed on grounds specified in Chapters 4 and 5 of the Guidelines, Rule 32(h) uses that term only because it was promulgated before this Court's

decision in *Booker* and reflects the terminology of the then-mandatory Guidelines regime. There is no reason to believe that the Court in *Burns* or the drafters of Rule 32(h) intended to *exclude* any above-Guidelines sentences from the notice requirement. See also note 4 *infra*.

In addition, Rule 32 continues to afford parties an opportunity "to comment" on the PSR "and other matters relating to an appropriate sentence." Fed. R. Crim. P. 32(i)(1)(C). As this Court reasoned in *Burns*, a right to comment implies a right to make *informed* comment, and that right would have "little reality or worth" without giving counsel reasonable notice of the grounds on which the district court is contemplating an above-Guidelines sentence based on Section 3553(a). 501 U.S. at 136 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see United States v. Anati*, 457 F.3d 233, 236 (2d Cir. 2006) ("[T]he same reasoning that persuaded the Supreme Court [in *Burns*] to apply the comment opportunity . . . to sua sponte departures under the mandatory Guidelines regime" applies to a "non-Guidelines sentence under the advisory Guidelines regime.").

3. Further, a failure to provide reasonable notice of the contemplated grounds for an above-Guidelines sentence based on the Section 3553(a) factors would contravene the purpose of Rule 32 to promote the focused, adversarial testing of those grounds. *Burns*, 501 U.S. at 137.

The Guidelines continue to play a crucial role in the sentencing process after *Booker*. Because

Section 3553(a)(4) requires that the district court consider the Guidelines range in every case, *Booker*, 543 U.S. at 246, a district court "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 128 S. Ct. 586, 596 (2007). A district court must also "give serious consideration to the extent of any departure from the Guidelines" and must provide "sufficient justifications" for the sentence imposed. *Id.* at 594. Although a sentencing court may not presume that a Guidelines sentence should apply, *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007), *rehearing denied*, 128 S. Ct. 19 (2007), "[a]s a matter of administration and to secure nationwide consistency," the Guidelines serve as "the starting point and the initial benchmark" in every case. *Gall*, 128 S. Ct. at 596.

The concerns articulated by the Court in *Burns* therefore apply with equal force to sentences above the Guidelines range under *Booker*. Rule 32 was designed to "promot[e] focused, adversarial resolution of the legal and factual issues" at sentencing. *Burns*, 501 U.S. at 137. As the Court explained in *Burns*, without notice of the contemplated grounds for departure, "[a]t best . . . parties will address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative." *Id.* "At worst, and more likely," the Court warned, "the parties will not even try to anticipate such a development" and the contemplated grounds for deviating from the Guidelines will go entirely untested. *Id.* Without

notice of the contemplated grounds for an above-Guidelines sentence based on Section 3553(a), the same potential exists that the parties will waste their efforts by shooting in the dark or that they will abandon the effort entirely. *United States v. Evans-Martinez,* 448 F.3d 1163, 1167 (9th Cir. 2006) (because a district court after *Booker* "has the discretion to sentence both above and below the range suggested by the Guidelines," the parties "must receive notice the court is contemplating such a possibility in order to ensure that issues with the potential to impact sentencing are fully aired") (internal citations omitted).

4. Construing Rule 32(h) to require notice of a Guidelines departure — but not an above-Guidelines sentence based on Section 3553(a)— would also create an artificial distinction. Factors that have long served as grounds for Guidelines departures, such as the inadequacy of the defendant's criminal history, U.S.S.G. § 4A1.1, or the defendant's extreme conduct, U.S.S.G. § 5K2.8, can now be reformulated as grounds for a non-Guidelines sentence under Section 3553(a). *See* 18 U.S.C. § 3553(a)(1) (requiring that the sentencing court consider "the nature and circumstances of the offense and the history and characteristics of the defendant"). Because the same ground can justify the same above-Guidelines sentence under either the Guidelines or Section 3553(a), it would make no sense for the notice requirement to turn on the district court's characterization of the basis for its sentence.

The distinction would create administrability problems as well. Last year, district courts imposed approximately 8,535 sentences outside the Guidelines range. More than half of those sentences (57.5%, or 4,906 sentences) were based on *Booker* or the Section 3553(a) factors, and fewer than one-quarter (22.4%, or 1,916 sentences) were Guidelines departures. In the remaining cases, however, the district court either relied on *both* the Guidelines and *Booker* or Section 3553(a) (11.8%, or 1,007 sentences), or specified *neither* basis (8.3%, or 706 sentences).[4] Under a rule that limits Rule 32(h) to departures under the Guidelines, if the district court fails to specify the basis for its sentence or purports to have imposed both a Guidelines departure and a sentence under *Booker*, the parties would have no way of knowing whether they were entitled to notice. In such cases, Rule 32(h) would be of "little reality or worth." *Burns*, 501 U.S. at 136 (quoting *Mullane*, 339 U.S. at 314).

5. This Court's decision in *Rita v. United States* confirms that Rule 32(h) applies equally to Guidelines departures and *Booker* variances. In describing the order of operations at sentencing after *Booker*, the Court emphasized that a district court "as a matter of process" must "subject[] the

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[4] United States Sentencing Commission, FY2007 4th Quarterly Sentencing Update, at Table 1 & nn.1-5 (Dec. 5, 2007), http://www.ussc.gov/sc_cases/Quarter_Report_ 4th_ 07.pdf. These figures reflect sentences from October 1, 2006, to September 30, 2007. They include both above- and below-Guidelines sentences, but exclude government-sponsored departures. *See id.* n.6.

defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 127 S. Ct. at 2465. It expressly relied on Rule 32(h), Rule 32(i)(1)(C), and *Burns*, which underscore the "importance of notice and [a] meaningful opportunity to be heard at sentencing." The Court's invocation of notice as a prerequisite to the mandatory adversarial testing of a post-*Booker* sentence subject to reasonableness review suggests that notice remains mandatory for both departures and variances under the current Sentencing Guidelines regime.

6. Finally, allowing the district court to impose a non-Guidelines sentence without reasonable notice to the defendant would raise precisely the "serious" due process question that the Court in *Burns* sought to avoid. 501 U.S. at 138. The Fifth Amendment guarantee of due process requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane*, 339 U.S. at 313. The right to notice and a hearing continues at trial and at sentencing. *Gardner v. Florida*, 430 U.S. 349, 356, 358 (1977) (plurality opinion) (holding that the failure to provide defense counsel access to evidence violates due process by depriving the defendant of an "opportunity . . . to challenge the accuracy or materiality" of the information).

This Court has held that due process requires the district court to provide the defendant with an opportunity to correct misinformation that may serve as a basis for the sentence. *Townsend v.*

Burke, 334 U.S. 736, 741 (1948). In *Townsend*, the sentencing court relied on two prior convictions from cases where the defendant, in fact, had been acquitted. *Id.* at 740. Justice Jackson's opinion for the Court held that the sentence violated due process because it is "a requirement of fair play" that the sentence is "not predicated on misinformation." *Id.* at 741. Consistent with that requirement, the Federal Rules of Criminal Procedure guarantee that the parties receive notice throughout the sentencing process. *See* Fed. R. Crim. P. 32(c), (d)(1)(D)(ii), (d)(1)(E), (e)(2), (f), (i)(1)(C). Section 3553(a) also imposes a statutory requirement that the district court impose a sentence "sufficient, but not greater than necessary" to comply with the purposes set forth in Section 3553(a)(2).

B. The Court Of Appeals Erred In Holding That No Notice Is Required For Non-Guidelines Sentences Under Section 3553(a)

1. The court of appeals held that Rule 32 imposes no notice requirement for *Booker* variances because, after *Booker*, parties are "inherently on notice" of all potential grounds for a non-Guidelines sentence under Section 3553(a). J.A. 399-400. That holding echoed the district court's conclusion that Rule 32 is "out the window" after *Booker*. *Id.* at 377. Of course, the court of appeals was correct that the defense counsel and the prosecutor "know" that there are hundreds or thousands of factors that might lead a district judge to choose a sentence outside the Guidelines

range. But the same was true under the mandatory Guidelines regime, and it was precisely that situation that led to this court's decision in *Burns*. In that case, the defendant was "inherently" on notice of Chapters 4 and 5 of the Sentencing Guidelines, which set out a wide range of permissible grounds for departure. *United States v. Atencio*, 476 F.3d 1099, 1104 (10th Cir. 2007) (although defendants are "constructively 'on notice' of § 3553(a) factors post-*Booker*," they were "equally aware of the specified circumstances for departure under the Guidelines" under the pre-*Booker* regime); *United States v. Cousins*, 469 F.3d 572, 580 (6th Cir. 2006). Such generalized notice did not sway the Court in *Burns*, and it should not alter the analysis here.

To the contrary, the need for notice is even more acute after *Booker* because that decision exponentially expanded the universe of reasons that a district court may give for sentencing outside the Guidelines range. In *Burns*, the Court reasoned that "[b]ecause the Guidelines place essentially no limit on the number of potential factors that may warrant a departure, no one is in a position to guess when or on what grounds a district court might depart, much less to 'comment' on such a possibility in a coherent way." 501 U.S. at 136-37 (citation omitted). After *Booker*, however, a district court's discretion is even broader. Section 3553(a) lists broad factors such as "the nature and circumstances of the offense," the "history and characteristics of the defendant," and the need "to protect the public," 18 U.S.C. § 3553(a)(1), (a)(2)(C) (2008), which serve as

springboards to a wide range of relevant sentencing considerations. In addition, after *Booker*, a district court is free to impose a non-Guidelines sentence based on factors such as age, education, or family ties, that were generally discouraged under the Guidelines, *Rita*, 127 S. Ct. at 2473, and on "policy considerations, including disagreements with the Guidelines," *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007).

The greater number of permissible reasons for imposing a non-Guidelines sentence makes it even more difficult for counsel to "guess" the district court's contemplated grounds and to offer "coherent" commentary on those grounds at sentencing. *See United States v. Davenport*, 445 F.3d 366, 371 (4th Cir. 2006) (reasoning that "[t]he need for such notice is as clear now as before *Booker*" because "[t]here is 'essentially no limit on the number of potential factors that may warrant a departure' or a variance") (quoting *Burns*, 501 U.S. at 136-37).

A recent amendment to Rule 32 confirms the error of the court of appeals' view. On December 1, 2007, Rule 32(d)(2)(F) was amended to provide that a district court may "require[]" the probation officer to ensure that the PSR contains "information relevant to the factors under 18 U.S.C. § 3553(a)." Under the court of appeals' approach, however, such information should never be necessary in the PSR because the defendant is already "inherently" on notice of every imaginable ground for an above-Guidelines sentence under *Booker*. As amended, Rule 32 therefore presupposes that

Section 3553(a) does not, of its own force, provide constructive notice to criminal defendants of how the factors might apply in their case.

2. Other courts have reasoned that Rule 32(h) cannot extend to non-Guidelines sentences under *Booker* because the term "departure" refers only to sentences calculated using the explicit "departure" provisions of Chapters 4 and 5 of the Guidelines. *See, e.g.*, *United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir. 2007), *petition for cert. filed*, No. 06-1381 (Apr. 18, 2007). That contention is mistaken.

By its terms, Rule 32(h) applies to every "departure" from the Guidelines. That word ordinarily means any divergence or deviation from a rule.[5] Because a sentence above the Guidelines range after *Booker* fits that definition, it falls within the ordinary meaning of Rule 32(h).

It is true that, at the time *Burns* was decided and Rule 32(h) was enacted, the term "departure" generally referred to a non-Guidelines sentence imposed for a reason specified in the Guidelines themselves. *See* U.S.S.G. ch. 5, pt. K. The Sentencing Commission had made clear, however, that because its list of possible grounds for departure was "not exhaustive," there were "different

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[5] *See* Webster's Third New International Dictionary of the English Language 604 (1993) (defining "departure" as a "deviation or divergence esp. from a rule, course of action, plan, or purpose"); American Heritage Dictionary of the English Language 487 (4th ed. 2000) (defining "departure" as "[a] divergence or deviation, as from an established rule, plan, or procedure").

kinds of departure," including a category of "unguided" departures based on "grounds not mentioned in the guidelines." U.S.S.G. ch. 1, pt. A4(b). It was this category of departure that led the Court in *Burns* to conclude that "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure." 501 U.S. at 136. Against that backdrop, there is no reason to believe that, by using the term "departure," the Court in *Burns* or the drafters of Rule 32(h) intended to *exclude* from the notice requirement any category of non-Guidelines sentence—least of all on the theory that it was "not mentioned in the guidelines." As this Court observed in *Burns*, "not every silence is pregnant." 501 U.S. at 136 (quoting *State of Illinois Dept. of Pub. Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)).

II. THE DISTRICT COURT'S FAILURE TO PROVIDE REASONABLE NOTICE BEFORE IMPOSING AN ABOVE-GUIDELINES SENTENCE REQUIRES A NEW SENTENCING HEARING

The Government concedes that the district court erred by failing to provide reasonable notice of the contemplated grounds for its above-Guidelines sentence. Gov't Br. in Opp. 13. It contends, however, that the error was harmless because it "had no impact on the outcome of petitioner's sentencing proceeding." *Id.* The court of appeals did not reach that question, and this Court should remand rather than consider it in the first instance.

In any event, the Government's contention is mistaken. As the transcript of the competency hearing indicates, defense counsel had available expert evidence challenging the sole basis for the district court's decision to enter a sentence above the Guidelines range, and he would have introduced that evidence at sentencing if he had received reasonable notice.

1. Because the court of appeals held that the district court committed no error, J.A. 399, it did not reach the question whether the lack of notice was prejudicial to Mr. Irizarry. Under those circumstances, this Court's "normal practice" is to "remand th[e] case to the Court of Appeals for it to consider in the first instance whether the . . . error was harmless." *Neder v. United States*, 527 U.S. 1, 25 (1999); *see Carella v. California*, 491 U.S. 263, 266-67 (1989). The Court followed that approach in *Burns*, where the parties briefed the harmless-error question, *see* Br. for Petitioner, *Burns v. United States*, No. 89-7260, at 37-42, but the Court elected to remand for further proceedings without deciding whether the error was prejudicial, *see Burns*, 501 U.S. at 133.[6]

Remand is particularly appropriate in this case because otherwise this Court would have to resolve precisely the due process question it sought to avoid in *Burns*. In this case, Mr. Irizarry promptly objected to the lack of notice, J.A.

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[6] The court of appeals in *Burns* then vacated the sentence and remanded to the district court for resentencing. *United States v. Burns*, 946 F.2d 1567 (D.C. Cir. 1991) (Table).

377, so the error may be disregarded only if it did not affect his substantial rights. Fed. R. Crim. P. 52(a); *United States v. Olano*, 507 U.S. 725, 734 (1993). If "notice in this setting is mandated by the Due Process Clause"—an issue the Court in *Burns* scrupulously avoided, 501 U.S. at 138—then the error in this case is constitutional in nature, and the Government bears the burden of proving harmlessness beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).[7] As shown below, the Government cannot possibly prevail under the harmless beyond a reasonable doubt standard. And if the Court were to review the record for harmlessness under a less rigorous standard, it could only do so after resolving the serious constitutional question avoided in *Burns*. Rather than reaching out to resolve the due process question, this Court should remand for the court of appeals to consider in the first instance whether the failure to provide notice warrants a new sentencing hearing.

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[7] Indeed, two courts of appeals, including the court below, have held that because "the right to prior notice of the grounds for an upward departure implicates the due process clause of the Fifth Amendment," a violation of the rule announced in *Burns* is constitutional error subject to the standard articulated in *Chapman*. *United States v. Paslay*, 971 F.2d 667, 674 (11th Cir. 1992); *accord United States v. Lopreato*, 83 F.3d 571, 577 (2d Cir. 1996). Two other courts of appeals have reserved the question. *See United States v. Calzada-Maravillas*, 443 F.3d 1301, 1307 n.3 (10th Cir. 2006); *United States v. Himler*, 355 F.3d 735, 743 (3d Cir. 2004).

2. If the Court reaches the question, a new sentencing hearing is warranted because the record demonstrates that the lack of notice was prejudicial in this case. The district court entered the maximum possible sentence under the statute, outside the Guidelines range, based on a conclusion that Petitioner would continue "in this conduct regardless of what this court does and regardless of what kind of supervision he is under." J.A. 374. As the court of appeals recognized, future dangerousness was the sole basis for the district court's selection of a sentence above the Guidelines range. *Id.*; *see* 18 U.S.C. § 3553(a)(2)(C) (2008).

Yet the district court's conclusion about Mr. Irizarry's future dangerousness went entirely untested at the sentencing hearing. With reasonable notice of the contemplated grounds for sentencing above the Guidelines range, Mr. Irizarry's counsel could have introduced expert testimony demonstrating: (1) that Mr. Irizarry's threats against his ex-wife were fueled by his mental illness; (2) that his symptoms, including his paranoid ideations, could be successfully treated through antipsychotic medications and psychotherapy; and (3) that alternative forms of supervision—so long as they included long-term psychiatric treatment—would be preferable to incarceration, which is likely to *increase* his delusional ideations. The Court need not speculate about whether such evidence was available because those were precisely the conclusions reached by the expert witness for the defense, whose comments on future dangerousness at the competency

hearing were disallowed by the district court. J.A. 188-89. Because the record reveals that there was available evidence undermining the court's conclusion about Mr. Irizarry's future dangerousness, there is no doubt that with proper notice defense counsel would have challenged the sole ground for the district court's unannounced variance from the Guidelines.

The Government contends (Br. in Opp. 14) that the error is harmless because the PSR described Petitioner's conduct, and the district court relied on the offense conduct in determining future dangerousness. In *Burns*, however, there was no dispute that the PSR contained a full description of the offense conduct that served as the basis of the district court's upward departure. *See* Br. for Petitioner, *Burns v. United States*, No. 89-7260, at 37-38. This Court nonetheless held that notice of the particular grounds for departure is essential to the full and fair adversarial testing of the grounds for the sentence, emphasizing that counsel is in no position "to guess when or on what grounds a district court might depart." *Burns*, 501 U.S. at 136-37. Accordingly, courts of appeals have "reject[ed] the government's contention that, because the PSR contained a full recitation of the defendant's criminal conduct, this put defendant on notice of the factors on which the court relied for the upward departure." *United States v. Mangone*, 105 F.3d 29, 35 (1st Cir. 1997); *see Calzada-Maravillas*, 443 F.3d at 1301; *United States v. Carter*, 203 F.3d 187, 190-91 (2d Cir. 2000); *United States v. Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989).

The Government also attempts to gloss over the prejudice in this case by noting that the sentence was "only nine months higher than the top of the advisory Guidelines range." Br. in Opp. 14. Mr. Irizarry, however, is prejudiced by any erroneous increase in his prison sentence, even if it lasts "only" nine months. *See Glover v. United States*, 531 U.S. 198, 203 (2001) (rejecting the suggestion that "a minimal amount of additional time in prison cannot constitute prejudice"). Although the upward variance in this case was not especially large in absolute terms, it was significant relative to the Guidelines range and the statutory maximum. A rule that looked only to the size of the variance would have the effect of insulating sentencing errors from review in cases involving shorter sentences and low statutory maximums. Because the record demonstrates that Mr. Irizarry could have presented expert evidence challenging the sole basis for the district court's above-Guidelines sentence, the Government cannot demonstrate that the error in this case was harmless.

* * *

CONCLUSION

The judgment of the court of appeals should be reversed and remanded for further proceedings.

Respectfully submitted,

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February 21, 2008

STATUTORY APPENDIX

1. The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

2. Section 3553(a) of Title 18 of the United States Code provides in relevant part:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the Guidelines—

* * *

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission . . .

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

3. Rule 32 of the Federal Rule of Criminal Procedure provides in relevant part:

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General.

The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

* * *

(2) Interviewing the Defendant.

The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information. The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) Exclusions.

The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose.

Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or

disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice.

The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation.

By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) Time to Object.

Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) Serving Objections.

An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections.

After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report.

At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure From Sentencing Guidelines.

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.

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and dis-

cussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other contro-

verted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

Fed. R. Crim. P. 32(c)-(i).