

1           IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - x

3   RICHARD IRIZARRY,                                   :

4                           Petitioner                                   :

5                   v.   :   No. 06-7517

6   UNITED STATES.                                   :

7   - - - - - x

8   Washington, D.C.

9   Tuesday, April 15, 2008

10

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

14   APPEARANCES:

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

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

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

23

24

25

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	ARTHUR J. MADDEN, III, ESQ.	
4	On behalf of the Petitioner	3
5	MATTHEW D. ROBERTS, ESQ.	
6	On behalf of the Respondent	17
7	PETER B. RUTLEDGE, ESQ.	
8	As amicus curiae, support of the	
9	judgement below	37
10	REBUTTAL ARGUMENT OF	
11	ARTHUR J. MADDEN, III, ESQ.	
12	On behalf of the Petitioner	50
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(11:11 a.m.)

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

ORAL ARGUMENT OF ARTHUR J. MADDEN, III  
ON BEHALF OF PETITIONER

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

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

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

That quote comes from Rita and relies upon

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

4 The position of the Amicus --

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

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

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

1 things a sentencing judge would look at.

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. MADDEN: I remember that system.

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

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

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

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

11 Would that be adequate notice?

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

14 JUSTICE GINSBURG: What would have been?

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

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

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

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



1 supervision we are under. That was the key.

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

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

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

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

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

22 JUSTICE ALITO: But why would the --

23 JUSTICE GINSBURG: That's a complex answer.

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

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

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

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

10 What notice is the defendant lacking?

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

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

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

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

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

9 MR. MADDEN: The --

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

12 MR. MADDEN: Yes.

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

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

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

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

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

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

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

9 JUSTICE SCALIA: And there's --

10 MR. MADDEN: Usually.

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

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

20 MR. MADDEN: I --

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

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

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

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

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

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

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

16           MR. MADDEN: No.

17           JUSTICE SCALIA: Okay.

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

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

1 become lesser over time.

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

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

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

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

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

1 days.

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

23 Mr. Roberts.

24 ORAL ARGUMENT OF MATTHEW D. ROBERTS

25 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

4 JUSTICE ALITO: Are you saying --

5 MR. ROBERTS: Either way --

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

9 MR. ROBERTS: No.

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

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

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

23 MR. ROBERTS: Yes. It --

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

1 decided this in 32(h)?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. ROBERTS: That's required.

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

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

12 MR. ROBERTS: The parties can --

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

1 hearing would pretty much --

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

7 MR. ROBERTS: Well, judges --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 JUSTICE STEVENS: But wouldn't --

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

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

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

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

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

1 JUSTICE STEVENS: No, I understand.

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

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

11 MR. ROBERTS: But --

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

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



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

4 JUSTICE STEVENS: In your --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. ROBERTS: -- involving variance.

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

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Continue. Finish.

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

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

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

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

15 ORAL ARGUMENT OF PETER B. RUTLEDGE

16 FOR AMICUS CURIAE,

17 IN SUPPORT OF THE JUDGMENT BELOW

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE ALITO: But didn't the decision that

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 to be heard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22           We know, for example --

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

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

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

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

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

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

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



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

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

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

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

25 If the Court has no further questions I

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

2 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

3 Mr. Madden, you have two minutes remaining.

4 REBUTTAL ARGUMENT OF ARTHUR J. MADDEN, III

5 ON BEHALF OF PETITIONER

6 MR. MADDEN: Thank you.

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

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

1 lost.

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

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

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

15           CHIEF JUSTICE ROBERTS: Thank you, Counsel.

16           MR. MADDEN: Thank you.

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

22           The case is submitted.

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

25

<p style="text-align: center;"><b>A</b></p> <p><b>ability</b> 32:20 44:7 47:10 50:15</p> <p><b>able</b> 23:17 30:16</p> <p><b>above-entitled</b> 1:11 51:24</p> <p><b>above-Guideli...</b> 8:8 30:11</p> <p><b>abuse</b> 45:4,6</p> <p><b>accept</b> 44:9,13 44:16</p> <p><b>acceptance</b> 5:5</p> <p><b>acknowledges</b> 13:2</p> <p><b>act</b> 8:1 21:6 43:22 46:18 50:25 51:5</p> <p><b>actual</b> 32:20</p> <p><b>addition</b> 26:2 36:20,24 41:13</p> <p><b>additional</b> 40:13</p> <p><b>address</b> 11:3 15:12 30:10,13 30:14 35:5,7 35:20,22</p> <p><b>adequacy</b> 35:18 36:5,11 46:12 46:15</p> <p><b>adequate</b> 4:18 8:11 26:8 35:25 37:24 39:15 46:19 47:11,16</p> <p><b>adequately</b> 30:22</p> <p><b>adjustment</b> 26:3</p> <p><b>admittedly</b> 38:21</p> <p><b>adopt</b> 20:11,17</p> <p><b>adopted</b> 16:17 18:13 37:10</p> <p><b>advance</b> 13:6,6 14:24 23:21 25:9 27:9,9,13 27:14</p> <p><b>adversarial</b> 3:23</p>	<p>6:23 24:19 25:6 28:17 30:6,18 37:25 43:17 44:7</p> <p><b>adversary</b> 24:8</p> <p><b>advise</b> 33:23</p> <p><b>advisory</b> 7:10 19:20 20:4 38:9 39:2,3 45:25 46:25 49:5,9</p> <p><b>advisory-guid...</b> 42:24</p> <p><b>advocacy</b> 7:24 15:16</p> <p><b>advocates</b> 3:19</p> <p><b>affect</b> 39:17</p> <p><b>affirm</b> 37:21 48:24 49:23</p> <p><b>affirming</b> 38:3</p> <p><b>afterward</b> 27:18</p> <p><b>after-the-fact</b> 24:17</p> <p><b>aggregate</b> 15:18 50:20</p> <p><b>aggrieved</b> 48:13</p> <p><b>agree</b> 5:21 18:24 43:17</p> <p><b>agrees</b> 3:18</p> <p><b>Ala</b> 1:15</p> <p><b>Alabama</b> 14:23</p> <p><b>Alito</b> 8:6 9:9,16 9:22 18:11 19:4,6,10 28:10,22 38:5 39:25 40:8,23 41:11 45:23</p> <p><b>allocution</b> 26:24 26:24</p> <p><b>allow</b> 41:18</p> <p><b>alluded</b> 43:16</p> <p><b>alternative</b> 4:6 37:21 38:2,3 48:13</p> <p><b>alternatively</b> 49:1</p> <p><b>altogether</b> 49:21</p>	<p><b>amenability</b> 11:1 38:1 48:12</p> <p><b>amend</b> 21:3</p> <p><b>amendment</b> 8:4 20:11,13 21:1 44:3 46:3</p> <p><b>amendments</b> 40:14 48:23</p> <p><b>amicus</b> 1:20 2:8 4:4 37:16 51:18</p> <p><b>analysis</b> 40:7</p> <p><b>animated</b> 42:22</p> <p><b>answer</b> 7:22 9:23 24:22 39:5 47:13</p> <p><b>answers</b> 6:17 17:9</p> <p><b>anti-psychotic</b> 37:9</p> <p><b>Anybody</b> 11:13</p> <p><b>anymore</b> 38:15</p> <p><b>anyway</b> 41:8</p> <p><b>apparently</b> 31:16</p> <p><b>Appeal</b> 39:10</p> <p><b>appeals</b> 18:24 35:18 44:25 46:9</p> <p><b>APPEARAN...</b> 1:14</p> <p><b>appeared</b> 10:4</p> <p><b>appellant</b> 7:5</p> <p><b>appellate</b> 35:19 35:22 45:2 47:14 50:18 51:11</p> <p><b>appendage</b> 41:9</p> <p><b>applicable</b> 5:15 6:15 21:25 43:25</p> <p><b>application</b> 6:1</p> <p><b>applies</b> 6:2 29:13</p> <p><b>apply</b> 16:16 19:19 34:10,13</p>	<p>35:13 42:15</p> <p><b>applying</b> 16:12 18:17 42:10</p> <p><b>Appointed</b> 1:21</p> <p><b>appointment</b> 51:19</p> <p><b>appropriate</b> 14:19 28:4 30:16 41:20 50:9</p> <p><b>appropriateness</b> 45:1</p> <p><b>April</b> 1:9</p> <p><b>architecture</b> 51:5</p> <p><b>argued</b> 51:18</p> <p><b>argument</b> 1:12 2:2,10 3:3,6 17:24 32:19 37:4,5,15 49:7 50:4</p> <p><b>arises</b> 45:18</p> <p><b>arson</b> 23:8</p> <p><b>ARTHUR</b> 1:15 2:3,11 3:6 50:4</p> <p><b>asked</b> 24:10,21</p> <p><b>asking</b> 9:16 27:18,22</p> <p><b>aspect</b> 13:15</p> <p><b>assignment</b> 51:21</p> <p><b>assistance</b> 40:16</p> <p><b>Assistant</b> 1:17</p> <p><b>assume</b> 4:11</p> <p><b>attempt</b> 38:18 48:10</p> <p><b>attention</b> 14:6</p> <p><b>attorneys</b> 41:18</p> <p><b>audit</b> 4:7</p> <p><b>authorization</b> 17:14</p> <p><b>authorized</b> 19:13,14</p> <p><b>available</b> 19:17 24:5 31:6,19 32:24</p> <p><b>await</b> 20:14</p>	<p><b>awaiting</b> 49:13</p> <p><b>a.m</b> 1:13 3:2</p> <hr/> <p style="text-align: center;"><b>B</b></p> <p><b>B</b> 1:20 2:7 37:15</p> <p><b>back</b> 21:13 29:18 30:19 45:21 48:14 50:1</p> <p><b>backward</b> 8:22</p> <p><b>backwards</b> 8:23</p> <p><b>bad</b> 7:12 19:25</p> <p><b>balance</b> 17:20 50:1</p> <p><b>bar</b> 13:23</p> <p><b>base</b> 45:2</p> <p><b>based</b> 8:8 18:5,6 28:2,3 29:1 30:15 31:14 32:16 48:8</p> <p><b>basic</b> 42:22 45:22 47:25</p> <p><b>basically</b> 30:2</p> <p><b>basis</b> 40:20 44:11 45:21</p> <p><b>bearing</b> 10:23</p> <p><b>behalf</b> 1:15,19 2:4,6,12 3:7 17:25 50:5</p> <p><b>belief</b> 24:2</p> <p><b>believe</b> 14:25 23:7 40:9 44:2 48:21</p> <p><b>believes</b> 45:17</p> <p><b>benefit</b> 35:12</p> <p><b>best</b> 34:17,17 46:13</p> <p><b>better</b> 13:23</p> <p><b>beyond</b> 5:14</p> <p><b>bit</b> 28:15 39:1 48:2</p> <p><b>bodily</b> 40:17</p> <p><b>Booker</b> 5:13 16:11,13 19:7 30:17 39:1 40:9 41:1,11 43:14</p>
--	---	--	---	---

<p><b>bother</b> 38:15  <b>bottom</b> 42:24  <b>Boudean's</b>  44:10  <b>Boudin</b> 15:10  <b>Boudin's</b> 43:19  <b>breadth</b> 49:19  <b>Breyer</b> 41:15  42:19 43:4  50:7  <b>bridge</b> 39:1  <b>brief</b> 13:2 44:23  47:12  <b>briefed</b> 51:18  <b>bring</b> 31:5,25  33:1,7,8,15  48:14  <b>broad</b> 21:8  <b>broader</b> 6:9  49:2,23  <b>broadly</b> 17:16  <b>broke</b> 3:12  <b>building</b> 23:8  <b>burdensome</b>  27:16 29:14,15  <b>burdensomen...</b>  29:14  <b>Burns</b> 4:2 6:17  7:24,24 14:3  16:22 30:7  41:21 42:5,23  42:24 43:12,16  <b>Buttner</b> 10:24</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>C</b> 2:1 3:1  <b>calculation</b> 39:7  39:16  <b>call</b> 5:22  <b>called</b> 41:21  50:11  <b>calling</b> 6:25  <b>carefully</b> 15:11  21:7  <b>carry</b> 5:4  <b>case</b> 3:4,10,12  4:3 7:4 8:7</p>	<p>9:24 13:3 14:3  16:7 18:23  23:23,24 24:19  24:19 25:12  28:16 32:9  34:13,14 35:2  35:3,22 36:2,8  39:22,23 40:3  40:4 41:5,7,11  41:21 42:5  43:19 47:17  51:18,22,23  <b>cases</b> 6:20 13:1  13:19 14:2  16:12 25:9,10  27:2 28:6,8  32:19 35:10  41:1 44:15,24  50:20,22 51:11  <b>category</b> 6:4  <b>central</b> 25:24  26:2 36:25  <b>cert</b> 49:14  <b>certain</b> 22:15  32:19 35:6  38:21  <b>certainly</b> 4:8  22:22 24:5,16  25:13 42:19  47:5  <b>certainty</b> 4:24  <b>certiorari</b> 35:6  <b>challenging</b> 7:6  <b>change</b> 17:1,2  19:22 37:12  <b>changed</b> 8:5  <b>changes</b> 16:2  <b>characteristics</b>  28:20  <b>Chief</b> 3:3,8 4:5  4:19 14:8 15:9  15:10 17:22  18:1 19:20,24  20:16 21:5  25:15 26:5  27:17,20 29:4  32:8,12 35:14</p>	<p>35:17,23 36:1  36:23 37:13,18  37:22 43:18,18  44:9,9,14 49:1  49:22 50:2  51:15,17  <b>child</b> 24:1  <b>chose</b> 37:6  <b>circuiting</b> 21:11  <b>circuits</b> 35:10  51:12  <b>circumstance</b>  21:17 26:10  39:23  <b>circumstances</b>  28:19 38:22  <b>circumvent</b>  21:22  <b>claim</b> 45:18  <b>clear</b> 9:24 18:13  39:7,14  <b>close</b> 8:13  <b>closer</b> 7:17 8:13  <b>come</b> 5:4 12:13  12:14 15:12,17  27:22 28:9  33:19,23 34:15  36:6 43:8,22  44:6 51:9,10  <b>comes</b> 3:25  10:20 16:1  50:13  <b>coming</b> 19:7  <b>comment</b> 8:22  41:19,22 50:9  <b>Commission</b>  16:3 40:13,20  <b>commit</b> 29:3  <b>committee</b>  19:21 20:5  49:9  <b>committees</b> 21:8  <b>competent</b>  32:14  <b>complete</b> 49:7  <b>completely</b> 4:16  40:2</p>	<p><b>complex</b> 9:23  <b>comply</b> 7:18  8:19 22:14  <b>comprehensive</b>  18:22  <b>concedes</b> 13:1  <b>conceive</b> 30:12  <b>concept</b> 41:12  <b>concern</b> 20:13  38:17 45:11,15  46:11 48:20  <b>concerned</b> 10:15  11:2 46:4  <b>concerns</b> 4:16  43:13  <b>concluded</b> 35:11  <b>concluding</b>  40:25  <b>condign</b> 23:15  <b>conduct</b> 29:2  <b>conference</b>  20:10,14,23,24  <b>confront</b> 36:14  <b>confronted</b>  23:24  <b>confronts</b> 42:21  <b>Congress</b> 8:1,2  8:4,5 50:25  <b>consider</b> 20:5  41:1 42:20  <b>consideration</b>  6:21 39:11  49:19  <b>considerations</b>  14:6  <b>considering</b> 8:7  9:12,13 19:21  20:12 46:24  <b>consist</b> 16:18  <b>consisted</b> 16:18  <b>consistent</b> 42:12  <b>construe</b> 21:1,2  <b>construed</b> 30:4  <b>consult</b> 39:10  <b>consulting</b> 39:8  <b>consults</b> 49:11  <b>contemplated</b></p>	<p>3:14,23 18:15  <b>contemplating</b>  24:7 28:25  46:3 47:2  <b>content</b> 8:17  9:17 34:23  <b>context</b> 5:3,4  10:19 29:11  34:11 35:13  46:19  <b>context-specific</b>  25:4 46:16  <b>continuance</b>  24:12 44:22  45:2,13,17  <b>continue</b> 8:25  36:22,23 40:21  <b>continues</b> 19:2  19:19  <b>control</b> 44:23  <b>controls</b> 4:2  <b>convicted</b> 24:1  <b>correct</b> 3:20  50:7  <b>counsel</b> 15:12  17:22 28:5  32:19 37:3,13  50:2 51:15  <b>counter-evide...</b>  33:1  <b>counter-intuit...</b>  6:10,12  <b>course</b> 10:13  14:15 39:13  48:24 49:21  <b>court</b> 1:1,12,22  3:9,12,13,22  4:1,17 5:18 8:3  8:6 9:11,20  16:6,10,12  17:6,13 18:2,3  20:6,15,25  21:2,15,24  23:20 24:6,23  28:13 29:7,23  30:7 34:18,25  35:4,7,22 36:8</p>
--	---	---	--	---

<p>37:4,7,19,20 38:25 39:7,19 40:24,24 41:4 41:22 42:21 44:24 45:14 46:14 49:7,11 49:25 51:3,19 <b>courthouse</b> 25:17 <b>courts</b> 18:24 20:12,15 21:15 35:9,20 36:13 36:17 39:9 46:8 <b>court's</b> 7:25 39:13 40:9 41:11 43:8 44:25 47:24 49:13,17 50:21 <b>cover</b> 22:21 <b>created</b> 39:2 <b>crimes</b> 8:10 29:3 <b>Criminal</b> 38:5 49:10 <b>criteria</b> 43:25 <b>crossed</b> 39:1 <b>curiae</b> 1:21 2:8 37:16 51:18 <b>current</b> 20:7 21:3,19,20 <b>currently</b> 19:21</p> <hr/> <p style="text-align: center;"><b>D</b></p> <p><b>D</b> 1:17 2:5 3:1 17:24 <b>danger</b> 9:4 <b>dangerousness</b> 4:8,22 22:20 22:20 25:24 26:4 36:25 38:1 47:19 48:10 <b>day</b> 25:9 <b>days</b> 7:12 15:1 24:24 46:7 <b>deal</b> 35:1 46:20 <b>dealing</b> 17:5</p>	<p>32:16 47:9 <b>dealt</b> 18:12,21 <b>deceased</b> 12:14 <b>December</b> 17:12 49:9 <b>decide</b> 12:23 16:6 27:8,9 45:16 46:18 <b>decided</b> 7:13 20:1 26:16 <b>decision</b> 4:1,3 6:16 23:18 38:20,20 39:13 39:25 41:3 42:23 43:8,19 44:25 47:24 49:13 50:21 <b>decisions</b> 20:6 48:1 49:17 <b>declines</b> 41:13 <b>decrease</b> 42:17 <b>defendant</b> 4:21 7:4 8:10 10:10 14:8,16 15:23 23:25 26:14,19 42:7 47:18,20 48:12 50:14 <b>defendant's</b> 3:22 28:20 37:25 48:9 <b>defending</b> 14:18 <b>defense</b> 37:8 <b>defined</b> 18:9,10 <b>defines</b> 16:4 <b>definition</b> 40:4 41:6 <b>degree</b> 4:24 48:2 <b>delay</b> 34:6 <b>delusional</b> 37:9 <b>demand</b> 6:7 16:2 <b>demonstrated</b> 47:10 <b>denying</b> 45:1 <b>depart</b> 5:14,20 16:13 21:25 <b>departed</b> 4:17</p>	<p><b>Department</b> 1:18 <b>departs</b> 39:20 <b>departure</b> 4:13 4:16 5:17,23 16:4,15,16,18 18:4,6,9,13 22:1,2,4,14 25:22 26:13 29:11,25 30:3 36:7 38:19,22 39:6,12,16 40:3,7,10,25 41:6,12 42:9 <b>departures</b> 6:2,5 17:19 19:13,19 27:16 29:21 36:9 40:2,15 40:19 41:3 42:10 50:11 <b>depend</b> 48:2 <b>depends</b> 28:15 <b>described</b> 3:11 <b>designed</b> 5:12 51:6 <b>detail</b> 12:23 <b>determination</b> 7:8 23:14 27:4 27:23 39:21,22 40:10 41:19 48:9 <b>developed</b> 10:22 15:18 50:19 <b>development</b> 18:23 <b>deviations</b> 19:1 19:17 <b>diagnosis</b> 37:8 37:10 <b>dictionary</b> 18:9 <b>difference</b> 12:5 37:3 50:16 <b>different</b> 4:17 5:6,12 10:14 14:15,17 18:18 20:23 29:17 36:5 38:6 43:3</p>	<p><b>difficult</b> 7:18 46:5 <b>directed</b> 4:15 <b>directly</b> 11:1 <b>disagree</b> 29:4 35:19 <b>disagreement</b> 5:24 7:3 <b>discharging</b> 51:20 <b>discomfort</b> 48:22 <b>discretion</b> 7:10 39:4 43:24 45:5,7 <b>discretionary</b> 43:21 46:18 <b>discussed</b> 16:11 30:22 <b>discussing</b> 36:15 <b>discussion</b> 11:23 <b>disorder</b> 37:11 <b>disparities</b> 51:4 <b>dispositive</b> 41:4 <b>dispute</b> 26:2 <b>dissuaded</b> 31:24 <b>distinct</b> 42:25 <b>district</b> 3:13 7:10 8:6 9:10 14:23 18:3 37:4,7 38:11 38:18 39:4,5,7 39:20,20 43:10 44:17 45:16,20 46:1,6,17,20 47:20 48:6,21 <b>doing</b> 12:3 21:9 27:12 35:7 <b>doubt</b> 27:10 <b>drafted</b> 38:6 <b>drive</b> 6:22 13:21 <b>driven</b> 7:4 50:23 <b>dropped</b> 43:13 <b>drug</b> 40:17 <b>drugs</b> 37:10 <b>duty</b> 13:7,20 14:5</p>	<p><b>D.C</b> 1:8,18,20</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>E</b> 2:1 3:1,1 <b>earlier</b> 29:18 <b>easier</b> 42:9 <b>easy</b> 35:21 36:2 38:10 <b>educated</b> 10:5 <b>effect</b> 5:13 10:12 42:21 <b>effective</b> 32:6 50:18 <b>Eighth</b> 39:9 <b>either</b> 5:11 13:21 16:13 19:5 30:10 42:8 47:13 48:25 49:21 <b>eliminate</b> 51:6 <b>emerged</b> 49:3 <b>emergency</b> 40:16 <b>enable</b> 22:18 <b>enact</b> 21:1 <b>enacted</b> 18:25 <b>encourage</b> 47:25 <b>engage</b> 37:24 39:6,15 43:21 44:7 46:17 <b>engaging</b> 48:3,6 <b>enhance</b> 39:4 <b>enhancement</b> 5:3 <b>ensure</b> 28:17 <b>entail</b> 40:17 <b>entered</b> 45:19 <b>entitled</b> 39:21 <b>equal</b> 34:10 <b>equally</b> 11:7 <b>era</b> 38:6,6,9 42:24 43:3,3 <b>erroneously</b> 35:11 <b>error</b> 3:19 26:6 34:14,19 35:1 35:8,10</p>
---	---	--	---	---

<p><b>escape</b> 38:11  <b>ESQ</b> 1:15,17,20                  2:3,5,7,11  <b>essence</b> 33:3  <b>essential</b> 7:23                  29:22 47:23  <b>essentially</b> 37:3                  48:20  <b>event</b> 48:6  <b>evidence</b> 10:22                  10:22 24:4,13                  32:20 33:16                  37:1  <b>evisceration</b>                  29:22  <b>evolution</b> 15:19                  50:19  <b>exact</b> 9:12  <b>example</b> 23:23                  23:24 25:12                  26:10,11,25                  30:14,20 34:13                  34:17 46:22  <b>examples</b> 32:22  <b>excisions</b> 8:3  <b>exempt</b> 50:21  <b>exercise</b> 7:1                  43:23  <b>exist</b> 7:19  <b>existing</b> 34:9  <b>expand</b> 5:13  <b>expectation</b> 43:6                  43:9  <b>experience</b>                  32:16 33:6  <b>expert</b> 25:16                  33:22 37:5,8  <b>experts</b> 33:7,9  <b>expert's</b> 37:10  <b>explain</b> 31:5                  32:3  <b>explained</b> 28:5                  39:19 46:2  <b>explanation</b>                  8:22 12:3,3  <b>explication</b>                  48:11</p>	<p><b>expressed</b> 20:13                  20:21 48:22  <b>extend</b> 38:9  <b>extended</b> 42:23                  49:4  <b>extending</b> 46:4                  51:13  <b>extends</b> 50:10  <b>extent</b> 43:12  <b>extra</b> 9:6 10:15                  48:14  <b>extraneous</b> 6:20  <b>extraordinary</b>                  14:2,3  <b>extremely</b> 15:15                  51:7  <b>ex-wife</b> 47:10  <b>e-mails</b> 10:1</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>fact</b> 16:11 19:15                  20:25 29:2,7                  29:19 31:3                  36:21,24 44:20  <b>factor</b> 28:14,16                  28:18 32:21                  38:15 44:5  <b>factors</b> 6:8                  12:24 13:25                  15:12 16:25                  17:11,13,15                  18:7 22:13                  27:21 28:12                  40:5 41:7 44:4                  49:20  <b>facts</b> 7:4 8:8                  9:19 29:11                  31:17  <b>factual</b> 7:6  <b>failure</b> 21:1,2,6                  25:20  <b>fairly</b> 15:25  <b>fairness</b> 50:14  <b>fall</b> 18:8  <b>far</b> 51:7  <b>Federal</b> 3:23                  14:23 38:5</p>	<p>40:16  <b>feel</b> 38:25  <b>feeling</b> 23:14  <b>Fifth</b> 39:9  <b>find</b> 27:21  <b>finding</b> 8:24  <b>finds</b> 41:5  <b>Finish</b> 36:23  <b>finite</b> 6:8,13  <b>first</b> 3:11,13                  4:25 6:6 18:25                  25:21 27:18                  35:5 37:22                  38:25 44:13                  49:16 50:14  <b>fits</b> 16:5  <b>Five</b> 51:12  <b>flagged</b> 14:4                  51:8  <b>focus</b> 6:19 14:6                  23:17 27:6                  28:17  <b>focused</b> 6:18                  15:16 19:12                  30:6  <b>follows</b> 22:2  <b>food</b> 40:16  <b>force</b> 34:10  <b>form</b> 49:12  <b>formal</b> 10:19  <b>formed</b> 49:10,14                  49:15  <b>forms</b> 48:13  <b>forth</b> 31:1 33:23  <b>forward</b> 33:1  <b>fraud</b> 40:15  <b>frequently</b> 51:9                  51:10  <b>Friday</b> 40:12  <b>fulfill</b> 40:21  <b>full</b> 24:24 30:3                  37:25 43:17                  44:7 48:10  <b>fully</b> 30:20  <b>fundamental</b>                  45:24  <b>further</b> 8:10</p>	<p>18:12,21 20:15                  49:8,25  <b>futility</b> 47:21  <b>future</b> 4:8,22                  9:4 22:19,20                  25:23 26:4                  29:3 36:18,25                  38:1 47:18                  48:9</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>G</b> 3:1  <b>Gall</b> 49:17  <b>gee</b> 5:19  <b>general</b> 1:18                  26:15 42:18  <b>generally</b> 6:18                  14:23 22:8                  33:25 42:9  <b>getting</b> 11:14                  13:23 15:2                  27:13  <b>Ginsburg</b> 8:14                  8:16 9:23 11:7                  16:23 24:10,21                  34:12,20 37:22                  38:10,16 43:16                  45:23 46:23                  47:6  <b>gist</b> 26:20  <b>give</b> 7:13,14                  10:16 11:17                  14:9 23:9,23                  25:5,20 26:21                  31:24 34:22,22                  38:11  <b>given</b> 20:8 24:23                  25:1 30:3                  45:13 46:19  <b>giving</b> 7:14                  23:10 46:9  <b>go</b> 27:25 30:19                  33:13,18 40:7                  45:20  <b>goal</b> 50:24  <b>goes</b> 9:14 10:25                  11:19 26:5,6</p>	<p><b>going</b> 4:8 5:19                  7:5 10:6 11:11                  11:14 12:4,21                  13:8,25 14:11                  15:16 20:5                  23:10 25:17,25                  26:1,8,15,19                  28:1,6,8,9,20                  29:7,13 30:2                  30:13 32:15,20                  32:21 33:11                  34:2,4,4,6 36:3                  36:7,14 41:7                  44:4,6,11                  46:15,25 47:2                  47:3,14,15                  50:15,21,22,23                  51:9  <b>good</b> 23:10 32:9  <b>government</b>                  3:18 13:1                  14:10,12 31:1                  37:10 41:18                  44:22 46:14  <b>grant</b> 34:20  <b>granted</b> 35:6                  49:14  <b>granting</b> 45:1  <b>great</b> 46:20  <b>greater</b> 39:21  <b>ground</b> 5:6,15                  5:21,23,24                  18:5 21:25                  23:4,6,19 24:7                  25:22 26:13                  28:8 34:4 38:3                  38:22,23 40:25                  48:16,17,18,19                  48:25  <b>grounds</b> 3:15                  4:17 5:17 6:13                  6:14 8:4,12,23                  22:2,13 24:20                  28:7 30:8,12                  32:23 37:21                  39:12,14 40:15                  49:2,22,23</p>
---	--	--	---	---

<p><b>guess</b> 38:18 42:8  <b>guidance</b> 20:15              35:9 36:17              46:20  <b>guideline</b> 17:19              38:9  <b>guidelines</b> 3:20              4:13 5:11,16              5:22 6:3 7:9              13:21 15:20              16:12,13 17:5              18:4,10,14              19:2,11,13              23:3,7 26:3              29:25 36:9              38:7,14 39:2,3              39:8,11,20              40:1,2,3,5,14              40:19 41:5              45:25 46:25              47:8 49:4,5              50:11,20  <b>gun</b> 21:10  <b>gut</b> 23:14</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>h</b> 4:1 17:4,6,11  <b>half</b> 35:10  <b>handled</b> 18:22  <b>hanging</b> 25:17  <b>haphazard</b>              18:23  <b>happens</b> 10:13  <b>happy</b> 50:1  <b>harmless</b> 25:21              26:6 34:14,19              35:1,8,10  <b>harmlessness</b>              36:15,20  <b>Hawaii</b> 42:14,16  <b>hear</b> 3:3  <b>heard</b> 26:13,16              26:16 44:1  <b>hearing</b> 12:7              14:11,25 24:11              24:25 25:10,13              26:8 27:1,6,18</p>	<p>27:21,23,25          28:1 30:22,23          31:3 33:12          34:1 43:5,9,22          44:7,21 46:8          46:10  <b>hearings</b> 27:15              33:12 34:6  <b>heartland</b> 39:24  <b>heightened</b> 15:4  <b>held</b> 46:9  <b>help</b> 4:7  <b>helpful</b> 23:21  <b>high</b> 50:24  <b>higher</b> 14:18,18  <b>highest</b> 7:15  <b>history</b> 41:17  <b>hold</b> 5:25 6:2  <b>home</b> 27:4  <b>Honor</b> 8:21 20:3              22:23 25:19              26:9  <b>husband</b> 10:2</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> 20:17  <b>ideas</b> 42:22  <b>identifications</b>              28:3  <b>identified</b> 5:15              5:16 13:5 15:4              18:5 22:1,4,17              25:21 26:12  <b>identify</b> 13:8              22:10 28:7,14              45:14  <b>III</b> 1:15 2:3,11              3:6 50:4  <b>illustrate</b> 34:17              47:13  <b>illustration</b>              35:12  <b>imagine</b> 36:2  <b>impact</b> 25:24              26:11,14  <b>implement</b>              16:21</p>	<p><b>importance</b>              41:13  <b>important</b> 6:21              6:23 7:23 14:4              15:22 30:17              32:21,21 50:12  <b>impose</b> 29:23,24  <b>imposed</b> 5:8              12:15 23:25              29:25  <b>imposes</b> 48:8  <b>imposing</b> 7:18              16:14 33:17  <b>impossible</b> 27:3  <b>impracticability</b>              45:11  <b>impracticalities</b>              45:9  <b>incapacitation</b>              9:3,6 10:15              11:2  <b>incentive</b> 39:15  <b>inclined</b> 6:14  <b>include</b> 30:4              39:11 44:4  <b>included</b> 17:3  <b>includes</b> 22:23              41:23,25  <b>including</b> 18:6              40:15 42:10  <b>independent</b>              51:2  <b>indicates</b> 29:2              44:22  <b>indisputably</b>              29:20  <b>individual</b> 4:23              15:23 16:12              47:9 50:14  <b>induce</b> 12:18  <b>inferring</b> 21:5  <b>infinite</b> 6:14              13:3  <b>influence</b> 24:14  <b>inform</b> 23:17  <b>information</b>              21:9 34:5 46:7</p>	<p><b>infrequently</b>              15:8  <b>inject</b> 40:15  <b>injured</b> 12:13  <b>injury</b> 40:18  <b>inside-the-adv...</b>              48:3  <b>instance</b> 26:23              32:22  <b>instances</b> 44:18  <b>institutional</b>              15:23 50:18  <b>instruct</b> 46:14  <b>intended</b> 8:1,2  <b>intends</b> 4:24  <b>intent</b> 5:3 8:5  <b>interest</b> 15:4  <b>interesting</b>              33:11  <b>interestingly</b>              47:11  <b>interests</b> 14:14              14:16 15:24  <b>interject</b> 13:20  <b>interpret</b> 7:17              21:19,21  <b>interpretation</b>              16:3 20:22  <b>interpreted</b>              29:10 39:10  <b>inviting</b> 51:4  <b>involved</b> 31:3  <b>involving</b> 35:16  <b>Irizarry</b> 1:3 3:4              49:13,14  <b>irrelevant</b> 40:2              40:11 41:4  <b>issue</b> 4:6 6:23              9:4,7 10:14,23              11:1,3,18 14:3              30:18,21 33:25              36:15 50:18  <b>issues</b> 3:16 4:20              5:6 6:19 7:24              13:8,20 15:3,6              18:18 50:15              51:8,9</p>	<hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>J</b> 1:15 2:3,11 3:6              50:4  <b>job</b> 10:16  <b>judge</b> 4:21 5:1              7:10,13 10:21              11:8,11,14              12:17,23 13:14              14:4,10,12,21              15:2,10 17:3              23:25 24:2,11              24:11 26:13,15              26:23 27:8,22              28:25 30:24              31:2,5,11,16              31:19,24 32:4              32:10,15,18,23              33:17,23 34:3              34:21 38:11              39:4,15,20,22              43:10,18,23              44:10 45:16,20              46:17,21,24              47:1,7,20 48:3              48:6  <b>judgement</b> 1:21              2:9  <b>judges</b> 20:16,19              20:21 27:3,7,9              27:11 33:7,8,8              33:10,11 35:1              38:18 39:6,8              43:21 44:18              46:1,1,6 47:15              48:1,21  <b>judge's</b> 9:25              23:14,18 39:21  <b>judgment</b> 37:17              37:21 38:4              48:24 49:24              51:19  <b>jumping</b> 21:10  <b>jurisprudence</b>              40:10 41:12  <b>Justice</b> 1:18 3:3              3:8 4:5,19 5:9              6:11 7:9 8:6,14</p>
--	---	--	---	---



8:16 9:9,16,22 9:23 11:6,7,10 11:13,25 12:6 12:9,11,21 13:10,13,17 14:8 15:9 16:8 16:16,23,24 17:22 18:1,11 19:4,6,10,20 19:24 20:16 21:5,23 22:11 22:19,24 23:6 23:13 24:10,21 25:15 26:5 27:2,17,20 28:10,22 29:4 30:19 31:7,13 31:15,21 32:1 32:8,12 33:4,6 33:10,21 34:12 34:20 35:14,17 35:23 36:1,23 37:13,18,22,22 38:4,5,10,16 39:25 40:8,23 41:11,15 42:19 43:4,16,18 44:9,14 45:4,8 45:11,23 46:23 47:6 49:2,22 49:23 50:2,7 51:15,17 <b>Justices</b> 45:23 <b>Justice's</b> 9:15 49:1 <b>justified</b> 40:5 <b>justify</b> 47:21	15:17 21:10 23:18,19 33:7 36:5 43:21 <b>kinds</b> 42:9 <b>knew</b> 4:8 20:11 26:1,14,19,20 <b>know</b> 5:9,20 14:5 15:14 16:25 21:9 23:13 24:16 26:17,25 27:5 30:8 31:23 32:3,4,6,18,22 33:24 34:2 35:5 42:6 46:6 46:22 47:24 <b>knowing</b> 43:24 <b>known</b> 40:2 43:24 <b>knows</b> 11:13 32:2,3	<b>list</b> 22:3,12 <b>listed</b> 22:16 <b>literal</b> 16:5 <b>litigate</b> 50:15 <b>litigated</b> 3:17 9:7,19 13:8 14:7 <b>litigation</b> 8:2 <b>little</b> 28:15 39:1 45:19 48:2 <b>local</b> 14:22 <b>long</b> 10:6,16 11:14 13:13 33:12,19 <b>longer</b> 40:7 <b>longstanding</b> 37:12 <b>look</b> 5:1,5,18 15:11 17:15,15 21:8 <b>looked</b> 5:2 21:7 <b>looking</b> 17:4 41:16 50:20 <b>looks</b> 15:3 <b>lost</b> 51:1 <b>lot</b> 20:16 27:2 35:10,18 <b>low</b> 23:9,10,11 23:11,11 50:24 <b>lower</b> 14:17 20:6 35:9 36:17 <b>lurk</b> 13:3	13:19 25:8 28:5 <b>makers</b> 16:25 <b>man</b> 47:3 <b>mandate</b> 40:21 <b>mandatory</b> 5:16 6:3 38:7 40:1 49:4 <b>margin</b> 50:24 <b>material</b> 27:12 27:13 <b>materials</b> 28:2 <b>matter</b> 1:11 15:15 16:2 38:14 42:7 44:11 51:24 <b>matters</b> 12:18 33:22 41:20 50:9 <b>MATTHEW</b> 1:17 2:5 17:24 <b>maximum</b> 3:15 9:3,5 11:2 <b>mean</b> 4:22 22:3 22:15 23:11 33:12 34:16 42:17 <b>meaning</b> 6:3 16:20 18:14 <b>meaningless</b> 30:2 <b>means</b> 22:4 25:5 42:9 <b>meant</b> 16:8 <b>mechanism</b> 44:23 45:13 <b>mechanisms</b> 44:19 <b>medication</b> 4:7 4:10 <b>meeting</b> 49:12 <b>methods</b> 38:2 <b>midst</b> 44:21 <b>mind</b> 9:25 10:14 19:7 27:25 47:7 <b>minimum</b> 19:18	28:13 <b>minute</b> 30:20 <b>minutes</b> 33:20 49:11 50:3 <b>misunderstan...</b> 31:17 <b>Mobile</b> 1:15 <b>morning's</b> 27:6 <b>mother</b> 10:3 <b>motion</b> 44:21 <b>motivate</b> 12:24 <b>motivating</b> 20:23 <b>mysterious</b> 10:9
<hr/> <b>L</b> <hr/>	<hr/> <b>L</b> <hr/>	<hr/> <b>M</b> <hr/>	<hr/> <b>N</b> <hr/>	
<b>Kennedy</b> 21:23 22:11,19,24 45:4,8,11 <b>key</b> 9:1 29:19 <b>kill</b> 10:1,2,2 <b>Kimbrough</b> 7:2 39:14,19 49:17 <b>kind</b> 6:24 9:10	<b>lack</b> 3:18 26:24 <b>lacking</b> 10:10 <b>language</b> 16:5 42:11 <b>latest</b> 22:24 <b>law</b> 4:2 18:23 35:3 41:25 <b>laws</b> 40:17 <b>lawyer</b> 31:7,10 31:21 <b>learned</b> 3:13 <b>leaves</b> 42:6 <b>left</b> 17:4 <b>legal</b> 43:25 <b>legally</b> 19:14 <b>lesser</b> 9:5 14:1 <b>level</b> 5:3 <b>leveled</b> 4:23 <b>light</b> 10:23 36:16 38:8 43:7 44:2 49:16,19 <b>liked</b> 31:4 <b>limiting</b> 17:18	<b>Madden</b> 1:15 2:3,11 3:5,6,8 4:12 5:2 6:6,16 7:21 8:12,15 8:21 9:14,17 10:11 11:9,12 11:19 12:2,10 12:20,25 13:12 13:16,18 14:14 15:14 16:10,20 17:8 24:21 50:3,4,6 51:16 <b>majority</b> 13:1	<b>N</b> <b>N</b> 2:1,1 3:1 <b>narrow</b> 16:19 48:25 49:22 <b>narrower</b> 6:4 16:20 <b>nature</b> 28:19 <b>necessarily</b> 44:16 47:14 <b>necessary</b> 24:3 30:5 45:17 49:18 <b>need</b> 40:6 <b>needs</b> 9:17,18 <b>new</b> 6:1 10:2,24 33:12 36:11,12 40:15 <b>night</b> 27:4 <b>non-amenabil...</b> 48:12 <b>non-Guideline</b> 3:14 5:7 18:7 <b>non-guidelines</b> 6:25 9:21 13:21 16:4,14 19:11 30:9 41:8 <b>notice</b> 3:19,21 4:6,12,18 6:8,8 6:12,24 7:5,14 8:2,11,24 9:10 10:10 11:15,24	

<p>12:1,4 13:11                  13:14 14:9                  15:22,22 18:4                  18:19,20 19:1                  19:15,16,18                  20:7,8 21:4                  23:9,10,21                  24:6,22 25:1,5                  25:9,10,12,20                  25:25 26:7,21                  26:25 27:15                  28:10 29:5,7,9                  29:15,20,21,22                  30:1,23 34:18                  34:22,23 35:12                  35:18,25 36:5                  36:8,21 37:24                  38:12 41:14,23                  42:1 44:12,17                  45:18,25 46:9                  46:12,18 47:16                  47:18,20 48:16                  48:17,18 49:17                  49:20 50:13,22                  51:3,13  <b>noticed</b> 3:12,16  <b>notices</b> 3:19                  30:5  <b>number</b> 6:13,13                  13:3  <b>numerous</b> 33:2</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>O</b> 2:1 3:1  <b>object</b> 20:20  <b>objected</b> 20:17  <b>obligation</b> 14:9                  38:11 39:10                  41:14,16  <b>observation</b>                  49:6  <b>obviously</b> 28:20                  35:5  <b>occur</b> 11:23  <b>occurred</b> 13:24  <b>occurring</b> 15:25  <b>occurs</b> 13:19</p>	<p>15:7  <b>offense</b> 28:19  <b>offer</b> 24:13                  38:24  <b>officer</b> 17:15                  41:19  <b>Oh</b> 33:11 38:12  <b>Okay</b> 13:17 23:9  <b>old</b> 6:3 7:12  <b>once</b> 42:4  <b>ones</b> 9:19 19:14                  22:17 33:2  <b>open</b> 27:25  <b>opening</b> 36:10                  36:12  <b>open-ended</b>                  28:18  <b>operating</b> 31:16                  34:3  <b>opinion</b> 15:10                  39:2  <b>opportunity</b>                  31:2,25 43:25                  44:6 45:14,20                  50:9,10  <b>oral</b> 1:11 2:2 3:6                  17:24 37:15  <b>order</b> 6:22  <b>ordinarily</b> 34:25  <b>ought</b> 13:21                  51:3  <b>outside</b> 3:20                  39:23 46:25                  47:2,8  <b>outside-the-ad...</b>                  48:4  <b>outside-the-G...</b>                  47:22 48:7  <b>outweighing</b>                  37:25  <b>overcome</b> 46:11  <b>overlap</b> 38:23  <b>overlooked</b> 31:2</p> <hr/> <p style="text-align: center;"><b>P</b></p> <p><b>P</b> 3:1  <b>packet</b> 24:24</p>	<p><b>packets</b> 46:7  <b>page</b> 2:2 44:22  <b>pages</b> 47:12  <b>papers</b> 6:19 14:4                  51:8  <b>paragraph</b> 4:14                  11:21 37:23  <b>parallel</b> 29:12  <b>part</b> 44:13  <b>particular</b> 4:23                  12:18,24 23:15                  28:16 30:23                  34:1 35:2,13  <b>particularly</b>                  4:21 23:21                  32:9 38:8 43:7                  44:2  <b>parties</b> 6:19                  12:12,13 13:7                  13:20 14:5,21                  18:6 23:12,16                  23:16 25:6                  28:3,6 30:8                  37:24 41:18                  43:5,8,22 44:6                  44:21 45:13                  48:15 50:8  <b>party</b> 6:18 12:14                  48:13  <b>passed</b> 42:14  <b>pathway</b> 43:20  <b>people</b> 15:3                  20:10,13,23                  23:8 31:5                  32:24  <b>Period</b> 47:4  <b>permanently</b>                  32:25  <b>permits</b> 50:17  <b>person</b> 10:4  <b>personality</b>                  37:11  <b>pertinent</b> 27:22  <b>PETER</b> 1:20 2:7                  37:15  <b>petition</b> 47:17  <b>Petitioner</b> 1:4</p>	<p>1:16 2:4,12 3:7                  3:13 29:5                  35:19 37:1,8                  37:11 46:13                  50:5  <b>Petitioner's</b>                  25:23 28:5                  29:2 47:12,17  <b>phenomenon</b>                  16:1  <b>pick</b> 5:19  <b>picked</b> 15:7  <b>Pickett</b> 44:25  <b>picking</b> 13:24  <b>plain</b> 19:2  <b>plan</b> 13:14  <b>planning</b> 30:24  <b>play</b> 16:1  <b>played</b> 11:5  <b>pleadings</b> 48:15  <b>please</b> 3:9 18:2                  24:12 37:19  <b>point</b> 12:2 15:9                  22:15 32:10                  34:2 41:9                  45:20,22  <b>policy</b> 7:1,3,8  <b>poor</b> 34:13  <b>pornography</b>                  24:1  <b>position</b> 4:4                  18:24 20:17,24                  45:16  <b>positions</b> 14:22                  14:24  <b>possibility</b> 23:3                  23:4,5 30:10                  38:17 44:4  <b>possible</b> 22:2,13                  22:16 25:22                  30:12 39:11                  40:22  <b>posted</b> 40:13  <b>post-Booker</b>                  5:11 7:9 16:17                  40:9 43:2,7                  47:25</p>	<p><b>potential</b> 26:3                  26:12 28:7                  30:8,15  <b>potentially</b> 6:9  <b>practical</b> 15:15  <b>practically</b> 13:4  <b>practice</b> 15:8                  51:10  <b>precise</b> 12:18                  24:22  <b>precisely</b> 42:4,8                  48:23  <b>prediction</b> 10:5  <b>premature</b>                  20:14  <b>premise</b> 39:3                  44:14  <b>prepared</b> 4:11                  15:12 26:20  <b>present</b> 25:6                  32:20 33:16  <b>presentation</b> 7:7                  24:8,20 28:18  <b>presented</b> 24:4                  37:2  <b>presentence</b>                  37:23 44:5  <b>presents</b> 45:11  <b>presume</b> 43:10  <b>pretty</b> 27:1  <b>prevent</b> 9:3                  29:22  <b>previously</b> 18:5  <b>pre-Booker</b> 43:3                  43:4  <b>pre-pre-Booker</b>                  7:19  <b>pre-sentence</b>                  4:14 8:9 12:11                  13:5,11,14,15                  17:4 22:1,7,8                  27:5  <b>pre-sentencing</b>                  17:10 22:5,12                  48:15  <b>prior</b> 17:9  <b>prison</b> 10:15</p>
---	---	---	--	--

<p>24:2 30:15,25 32:5 <b>probably</b> 26:21 31:10 <b>probation</b> 17:14 23:25 33:17 41:19 <b>problem</b> 4:11 13:25 31:16 47:23 49:11 51:13 <b>problems</b> 18:18 46:11 <b>procedure</b> 3:24 4:7 24:18 38:6 <b>proceeding</b> 12:16 46:2 <b>process</b> 3:10,11 10:8 19:25 21:11,22 25:6 38:8 <b>program</b> 33:18 <b>programs</b> 24:5 31:6 32:3,5,5 32:13 33:23 <b>promote</b> 15:16 <b>promulgated</b> 16:9 <b>pronounced</b> 3:15 <b>proposed</b> 40:14 48:22 <b>protect</b> 8:9 <b>protecting</b> 10:17 <b>provide</b> 6:12 18:4 24:2 30:16 35:8 36:17 39:15 40:21 46:20 48:1,10 <b>provides</b> 43:19 <b>providing</b> 30:15 <b>provision</b> 5:10 17:12 21:3 <b>prudent</b> 48:24 49:21 <b>PSR</b> 6:19 18:6</p>	<p>22:23 25:21 26:1 28:6 36:21 <b>psychiatric</b> 10:21 <b>psychological</b> 10:22 <b>psychologically</b> 32:25 <b>public</b> 8:9 <b>punishment</b> 23:15 <b>pure</b> 7:1 <b>purpose</b> 15:19 27:21 <b>purposes</b> 7:24 <b>pursuant</b> 16:13 <b>pursue</b> 4:24 <b>put</b> 10:6,23 11:14,15 14:24 16:23 17:1,6 22:21 37:23 42:20 46:16 47:18,19 <b>p.m</b> 51:23</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>qualified</b> 41:5 <b>qualify</b> 40:3 <b>question</b> 6:17 8:17,18 9:5,15 11:20,25 12:1 17:9 20:6,7,12 21:20,24 25:4 25:4,7 26:6 34:21 35:6,8 41:2 42:22 43:1,17 47:7 47:13 49:1 <b>questions</b> 8:17 36:4,6,11,12 36:13,16 49:3 49:8,25 <b>quite</b> 42:12 46:5 <b>quote</b> 3:25 47:19 <b>quoted</b> 11:10</p> <hr/> <p style="text-align: center;"><b>R</b></p>	<p><b>R</b> 3:1 <b>raise</b> 12:19 <b>raised</b> 4:16 6:22 48:21 <b>raises</b> 18:18 <b>random</b> 30:11 <b>range</b> 5:15 6:8 18:5 19:2 21:25 26:3 43:24 <b>ranked</b> 38:13 <b>rare</b> 44:15 51:7 <b>rarely</b> 15:25 <b>rationale</b> 43:13 <b>read</b> 6:14 8:20 17:17 <b>Reading</b> 8:21 <b>ready</b> 14:12,13 15:2 <b>really</b> 5:10 26:17 27:17 28:18 29:16 34:8 36:5 <b>reason</b> 9:20 20:11 29:16 30:7 34:7,8 38:7 39:6,17 43:4 45:12 46:24 47:1 49:16 51:3 <b>reasonable</b> 25:5 <b>reasonableness</b> 43:10 <b>reasonably</b> 32:14 <b>reasoned</b> 48:1 <b>reasoning</b> 10:8 42:25 43:15 48:2,11 <b>reasons</b> 9:12 15:21 20:9,22 25:18,19 34:10 34:19 49:16 50:12 <b>REBUTTAL</b> 2:10 50:4 <b>recasting</b> 38:19</p>	<p><b>receive</b> 46:6 <b>recess</b> 12:22 <b>recitation</b> 11:8 <b>recite</b> 28:11 <b>recited</b> 9:20 <b>recognition</b> 21:6 <b>recommend</b> 22:7 <b>recommendat...</b> 23:7 <b>recommended</b> 22:4 <b>reconsider</b> 45:21 <b>record</b> 7:7 8:9 9:25 10:25 15:18 28:16 45:21 50:19 <b>referred</b> 21:13 <b>reflects</b> 7:25 <b>Reform</b> 8:1 50:25 51:5 <b>reformulation</b> 11:17 <b>regarding</b> 18:19 35:24 <b>regardless</b> 8:25 <b>regime</b> 5:12 <b>rejected</b> 37:7 <b>relating</b> 41:20 <b>relatively</b> 45:19 <b>relatives</b> 12:14 <b>relevant</b> 28:14 40:19 41:16 <b>reliable</b> 15:19 <b>relied</b> 26:23 <b>relies</b> 3:25 <b>reluctant</b> 20:10 21:2 <b>rely</b> 13:15 29:8 <b>relying</b> 45:12 <b>remain</b> 40:19 <b>remaining</b> 50:3 <b>remedial</b> 39:1 <b>remedy</b> 44:17 <b>remember</b> 7:21 <b>remorse</b> 26:23</p>	<p>26:24 <b>removed</b> 49:20 <b>repeated</b> 10:1 <b>reply</b> 47:12 <b>report</b> 4:14 8:9 10:24,24 12:11 13:6,11,15 17:4 22:1,5,7,8 22:12,21 27:5 32:13 37:23 44:5 48:15 <b>request</b> 17:13 <b>require</b> 6:12 19:17 21:4 29:10,15,20 35:11 51:3 <b>required</b> 14:22 18:19 19:15 23:1 28:15,21 28:22 29:5,8 34:18 44:12 <b>requirement</b> 7:18,23 27:15 29:9,21,23 30:1 33:3 34:9 49:18,20 50:13 50:22 51:14 <b>requires</b> 18:3 19:1 20:8 21:21 30:7 50:8 <b>requiring</b> 9:9 19:16 <b>reschedule</b> 12:22 <b>reserve</b> 17:20 <b>residual</b> 15:6 <b>resolve</b> 34:21 <b>resolves</b> 36:8 <b>respect</b> 39:21 41:13 43:2 <b>respond</b> 12:1 26:20 <b>Respondent</b> 1:19 2:6 17:25 <b>response</b> 4:9 10:20 11:7,16</p>
---	--	--	---	--

<p>38:25  <b>responses</b> 38:25  <b>responsibility</b>                      5:5  <b>rested</b> 42:24                      43:12  <b>result</b> 3:20  <b>resume</b> 49:3  <b>returned</b> 7:16  <b>review</b> 34:21                      39:18 45:2                      50:18  <b>reviewed</b> 28:3  <b>reviewing</b> 27:11                      27:14 45:1  <b>RICHARD</b> 1:3  <b>right</b> 7:7 10:25                      12:8 19:22                      38:8 41:22,23                      42:1,4,8,12                      50:13  <b>risk</b> 40:17  <b>Rita</b> 3:12,25                      16:10 39:7                      43:8 47:24  <b>road</b> 19:8  <b>Roberts</b> 1:17 2:5                      3:3 4:5,19 14:8                      15:9 17:22,23                      17:24 18:1,25                      19:5,9,12,20                      19:23,24 20:2                      20:16,19 21:5                      21:12 22:6,15                      22:22 23:1,12                      23:16 24:15                      25:3,15,18                      26:5,9 27:7,11                      27:17,19,20,24                      28:13,24 29:4                      29:6 31:4,9,14                      31:18,23 32:2                      32:8,11,12,18                      33:5,8,14,24                      34:16 35:4,14                      35:16,17,21,23                      35:24 36:1,4</p>	<p>36:23,24 37:13                      37:23 43:18                      44:9,14 49:22                      50:2 51:15,17  <b>routinely</b> 33:22                      33:24  <b>rule</b> 8:20 14:20                      14:20,22,23,25                      15:7 16:1,1,6                      16:17,21,22,24                      16:25 17:10                      18:3,12,25                      19:18 20:7                      21:20,21,24                      22:14 24:18                      29:19 30:2,6                      34:9,14 35:5                      35:11 36:7                      38:5,9,19,23                      42:21 45:9,25                      46:3,4 48:23                      50:7 51:9,14  <b>rulemakers</b>                      18:16  <b>rulemaking</b>                      18:12,21 21:22                      38:8 46:2  <b>rules</b> 4:1 19:20                      21:7 33:5                      49:10  <b>run</b> 38:19  <b>Rutledge</b> 1:20                      2:7 37:14,15                      37:18 38:16                      40:8 41:10                      42:19 44:13                      45:6,10 47:5                      51:17</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 2:1 3:1  <b>safety</b> 44:10  <b>saw</b> 51:12  <b>saying</b> 11:11                      14:10 19:4,6                      22:13 33:21  <b>says</b> 5:14 14:20</p>	<p>17:13 21:24                      37:2 41:17,22                      47:1  <b>Scalia</b> 5:9 6:11                      7:9 12:6,9,11                      12:21 13:10,13                      13:17 16:8,16                      16:24 23:6,13                      27:2,8 38:4                      49:23  <b>Scalia's</b> 49:2  <b>scarred</b> 32:25  <b>scope</b> 17:18 30:3  <b>scrutiny-of-re...</b>                      39:18  <b>second</b> 9:15                      25:23 39:5,9                      43:15 49:18  <b>section</b> 18:7,8                      22:9 29:1 44:3  <b>see</b> 21:14 32:12                      32:15 41:17  <b>seen</b> 10:4  <b>seize</b> 48:14  <b>sense</b> 6:7 21:17                      26:15 28:2  <b>sentence</b> 3:14,16                      3:22 5:6,7 6:22                      7:1,11,15 8:8                      8:23 9:5,11,21                      11:22 12:15,19                      14:17,18 15:3                      16:4,14 23:3                      26:18 27:18                      28:4 29:24                      30:9,11 40:5,6                      41:8,20 43:6                      43:11 45:19                      48:4,5,7  <b>sentences</b> 3:19                      15:16,18 18:7                      50:23  <b>sentencing</b> 3:10                      3:11,21,23                      4:21 5:1,15                      6:21 8:1 10:13                      10:19,25 12:7</p>	<p>12:22 14:11                      16:3,11 19:11                      21:25 24:24                      26:7 27:6,14                      33:22 34:1                      36:25 38:13                      40:13,14,22,24                      43:5,9,24 46:7                      46:8,9 47:8,22                      48:1 50:10,16                      50:25 51:4,5  <b>series</b> 22:12,13  <b>serious</b> 40:17                      46:11  <b>set</b> 17:10 24:18                      36:12  <b>setting</b> 35:3  <b>seven</b> 14:25                      24:24 46:7  <b>shape</b> 7:7  <b>shed</b> 36:16  <b>shoes</b> 46:17  <b>short</b> 21:10  <b>show</b> 23:2  <b>side</b> 32:25 42:20  <b>similar</b> 25:22  <b>simple</b> 45:12  <b>simply</b> 5:10,20                      5:24,25 6:1                      17:18 23:7,9                      38:12  <b>sir</b> 6:6  <b>situation</b> 6:15                      18:17 24:17                      29:12  <b>sixth</b> 5:3 8:4                      39:9  <b>society</b> 10:17  <b>soliciting</b> 24:1  <b>Solicitor</b> 1:17  <b>solves</b> 31:15  <b>somebody</b> 31:25  <b>sorry</b> 36:1  <b>sort</b> 45:22  <b>sought</b> 50:25  <b>Souter</b> 11:6,10                      11:13,25 45:23</p>	<p><b>Southern</b> 14:22  <b>speaks</b> 14:20  <b>specific</b> 4:15                      9:10,18,18                      18:14 25:10                      28:10 29:7,10                      41:25  <b>specificity</b> 18:19                      22:18 29:5  <b>spending</b> 35:2  <b>sprung</b> 44:20  <b>squarely</b> 18:8  <b>stalk</b> 47:10  <b>standard</b> 46:15  <b>standardized</b>                      45:5  <b>start</b> 29:8 48:25  <b>started</b> 48:25  <b>State</b> 42:14  <b>stated</b> 20:5  <b>statement</b> 48:11                      48:14  <b>States</b> 1:1,6,12                      3:4 4:2 41:22  <b>statute</b> 7:12 21:3  <b>statutory</b> 3:15  <b>step</b> 3:11  <b>STEVENS</b>                      30:19 31:7,13                      31:15,21 32:1                      33:4,6,10,21  <b>stimulus</b> 11:16  <b>stop</b> 47:3  <b>stopgap</b> 17:11  <b>straitjacketed</b>                      44:17  <b>strand</b> 43:15  <b>strands</b> 42:25  <b>stretch</b> 42:11  <b>structure</b> 16:21                      17:9  <b>strung</b> 47:15  <b>study</b> 49:10  <b>stuff</b> 27:5 33:7  <b>subcommittee</b>                      21:13 49:10,12                      49:15</p>
--	--	--	---	--

<b>subject</b> 3:22	<b>talking</b> 18:15	50:7	<b>try</b> 23:17	36:18
<b>submit</b> 51:2	22:25 25:16	<b>thinking</b> 33:17	<b>trying</b> 24:18	<b>useless</b> 41:9
<b>submitted</b> 51:22	29:19	42:7 47:8	30:12	<b>usually</b> 12:7,10
51:24	<b>Tenth</b> 39:9	<b>Third</b> 39:9	<b>Tuesday</b> 1:9	12:15 13:5
<b>sufficient</b> 22:17	<b>term</b> 18:8	<b>thorough</b> 3:22	<b>Turning</b> 36:20	14:14
25:11,14 26:21	<b>terms</b> 4:20 19:2	<b>thought</b> 4:22,25	<b>turns</b> 46:19	<hr/>
28:25	46:14	31:19 42:12	<b>two</b> 8:17 25:9	<b>V</b>
<b>suggest</b> 4:20	<b>terribly</b> 51:10	<b>threat</b> 5:4 8:25	37:20 39:14	<b>v</b> 1:5 41:21
<b>suggested</b> 4:13	<b>test</b> 28:17	<b>threaten</b> 47:10	42:25 48:17,18	<b>valve</b> 44:10
4:13 19:25	<b>testify</b> 25:25	<b>threatening</b>	49:15 50:3,12	<b>variables</b> 13:3
37:22 38:4	26:15 33:15	10:1,2,2	<b>type</b> 40:21	<b>variance</b> 6:24,25
49:1,2,22,23	<b>testimony</b> 25:24	<b>threats</b> 4:23	<b>types</b> 32:17	25:20 28:7
<b>suggests</b> 16:24	26:12,14,19	47:3	<b>typically</b> 13:12	29:1,24 30:15
<b>summarized</b>	33:1 37:5	<b>three</b> 48:19	<hr/>	34:11 35:16
11:10	<b>testing</b> 3:23 6:23	<b>time</b> 8:16,17	<b>U</b>	38:20,24 44:11
<b>supervision</b> 9:1	30:6,18 37:25	10:15 12:1,4	<b>ultimately</b> 5:7,8	48:17
<b>support</b> 1:21 2:8	43:17 44:8	14:1 16:17	9:20	<b>variances</b> 19:11
20:21 37:5,17	<b>text</b> 20:7	17:21 18:16	<b>understand</b>	29:21 30:4,5
51:18	<b>thank</b> 17:22	19:7,14 25:6	30:21 32:1	46:4 50:12
<b>suppose</b> 5:25 8:6	37:13 50:2,6	26:7,21 34:23	38:17 40:6,23	51:14
14:10 35:14,17	51:15,16,20	35:2 43:22	<b>understanding</b>	<b>varies</b> 32:23
<b>supposed</b> 12:6	<b>theory</b> 38:18	45:18 49:3,4	7:25	<b>various</b> 34:19
12:17 17:10	43:23,23	50:1	<b>undertaking</b>	<b>vary</b> 23:20 34:4
47:20	<b>thing</b> 22:24	<b>timeliness</b> 46:10	51:20	<b>varying</b> 20:22
<b>Supreme</b> 1:1,12	29:12	<b>timely</b> 46:10	<b>unduly</b> 27:16	24:7
<b>sure</b> 30:20 33:16	<b>things</b> 5:1 17:3	<b>timing</b> 11:20	29:14	<b>vast</b> 12:25 13:18
36:24	18:22 20:4	18:20 36:13	<b>unfair</b> 43:1,13	25:8 28:5
<b>surprise</b> 24:13	21:7 32:24	<b>today</b> 37:20	44:15,24 45:3	<b>Vega-Santiago</b>
43:1,13 44:12	<b>think</b> 6:6,11,17	<b>told</b> 24:23	45:15,21	43:19
44:15,24 45:3	7:22 8:15,15	<b>traditional</b>	<b>unfolds</b> 41:12	<b>versus</b> 3:4 4:2
45:15,22	9:14 10:11	17:19 19:19	<b>uniform</b> 40:22	<b>victim</b> 25:24
<b>system</b> 6:1,4	11:4 12:25	27:16 29:15,20	<b>uniformity</b>	26:11,13,14
7:16,20,21	13:20,25 14:17	36:6	50:24	<b>view</b> 22:3
15:17 39:2,3	14:19,21,25	<b>trap</b> 48:8	<b>United</b> 1:1,6,12	<b>violations</b> 40:16
45:25	15:22 17:8,14	<b>treated</b> 37:9	3:4 4:2 41:21	<b>vision</b> 47:25
<hr/>	17:16,17 21:12	<b>treating</b> 38:14	<b>unpack</b> 47:15	<hr/>
<b>T</b>	22:6 25:12	<b>treatment</b> 11:1	<b>unusual</b> 25:9	<b>W</b>
<b>T</b> 2:1,1	26:9,17,18,25	24:3,5 30:16	<b>unworkability</b>	<b>wait</b> 20:24 21:14
<b>table</b> 4:9 9:8	27:12 28:4,15	30:25 32:23	45:24	21:17
<b>take</b> 20:23 21:8	28:24 29:6,9	33:18 38:2	<b>unworkable</b>	<b>waiting</b> 21:16
26:17 27:4	29:16 31:10,18	47:21 48:13	29:9 45:8	<b>walking</b> 48:8
28:11 41:24	32:6,8,14,14	<b>treatments</b>	<b>upward</b> 5:7	<b>want</b> 11:17
42:1	33:14 34:12,18	31:11,20	<b>urge</b> 36:18	21:14 30:20
<b>taken</b> 24:12	35:4,7,21	<b>trial</b> 27:5 35:1	<b>urging</b> 20:18	32:15 34:6
<b>takes</b> 39:23,23	36:10 42:15	<b>true</b> 20:19 27:24	34:13,24	36:21
45:22	43:2 45:10	28:1 37:1	<b>use</b> 29:24	<b>wants</b> 33:1
<b>talk</b> 45:24	47:3,12 48:23	<b>truly</b> 44:15,24	<b>useful</b> 35:8	<b>warranted</b> 41:7
				<b>Washington</b> 1:8

1:18,20 <b>wasn't</b> 4:18 <b>wasteful</b> 15:15 30:11 <b>way</b> 10:20 13:6 13:22 18:22 19:5 21:8 30:11 34:15 42:8 <b>website</b> 40:13 <b>week</b> 12:23 27:8 27:9,12,13 <b>we'll</b> 3:3 35:14 35:17 <b>we're</b> 6:25 14:11 18:14 22:25 24:23 29:19 34:2,5,5 50:21 <b>we've</b> 7:16 <b>wife</b> 25:25 <b>within-Guidel...</b> 43:6,11 <b>witnesses</b> 12:13 <b>woman</b> 10:1 <b>word</b> 16:14 30:3 <b>words</b> 44:10 <b>work</b> 5:10 31:11 31:20 46:15 <b>workability</b> 46:12 47:23 48:20 51:7,13 <b>works</b> 31:9 <b>world</b> 47:25 <b>worried</b> 30:25 <b>wouldn't</b> 4:10 22:16 31:1,3 31:13 32:14 33:18 37:2,2 <b>wow</b> 26:16 <b>wrestled</b> 47:6 <b>writing</b> 14:24 <b>written</b> 10:18 16:2 28:2 <b>wrong</b> 31:22	<hr/> <b>Y</b> <hr/> <b>yeah</b> 4:19 38:12 <b>yield</b> 50:1 <hr/> <b>0</b> <hr/> <b>06-7517</b> 1:5 3:4 <b>07</b> 17:13 <hr/> <b>1</b> <hr/> <b>11:11</b> 1:13 3:2 <b>12:09</b> 51:23 <b>126</b> 47:12 <b>15</b> 1:9 <b>17</b> 2:6 <hr/> <b>2</b> <hr/> <b>20</b> 7:13 <b>2007</b> 17:1 49:9 <b>2008</b> 1:9 <b>23</b> 47:12 <hr/> <b>3</b> <hr/> <b>3</b> 2:4 <b>32</b> 15:7 16:22 18:3 24:18 30:6 35:5 38:9 <b>32(d)(2)(F)</b> 17:2 44:3 <b>32(e)</b> 50:8 <b>32(f)</b> 4:1 <b>32(h)</b> 5:10,25 7:17 14:20 16:1,6,9,21,24 17:18 18:13 19:1,18 20:1,8 29:20 38:6,12 38:15,19,23 41:14,15,24 42:3,20 46:3 48:23 51:9,14 <b>32(i)(C)</b> 41:17 42:4 <b>32(i)(1)(C)</b> 42:21 <b>3553</b> 15:11 17:6 44:4,5 <b>3553(a)</b> 13:24 16:24 17:1	18:7,8,17 28:12,14 38:14 38:24 40:4 41:2,7 49:20 <b>3553(a)(2)(C)</b> 29:1 <b>37</b> 2:9 <hr/> <b>4</b> <hr/> <b>4A1.3</b> 4:15 <b>40</b> 7:13,13 <b>44</b> 44:22 <hr/> <b>5</b> <hr/> <b>50</b> 2:12 <hr/> <b>6</b> <hr/> <b>60-month</b> 11:22 <hr/> <b>7</b> <hr/> <b>78</b> 37:23		
<hr/> <b>X</b> <hr/> <b>x</b> 1:2,7				