SUPREME COURT OF THE UNITED STATES

No. 06–7517

RICHARD IRIZARRY, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 12, 2008]

JUSTICE BREYER, with whom JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

Federal Rule of Criminal Procedure 32(h) says:

> "Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure."

The question before us is whether this Rule applies when a sentencing judge decides, pursuant to 18 U. S. C. §3553(a) (2000 ed. and Supp. V), to impose a sentence that is a "variance" *from* the advisory Guidelines, but is not a "departure" *within* the Guidelines. The Court says that the Rule does not apply. I disagree.

The Court creates a legal distinction without much of a difference. The Rule speaks specifically of "departure[s]," but I see no reason why that term should not be read to encompass what the Court calls §3553(a) "variances." The Guidelines define "departure" to mean "imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence." United States Sentencing Commission, Guidelines Manual (USSG), §1B1.1, comment., n. 1(E) (Nov. 2007). So-called variances fall comfortably within this

definition. Variances are also consistent with the ordinary meaning of the term "departure." See, *e.g.*, Webster's Third New International Dictionary 604 (1993) (defining "departure" to mean a "deviation or divergence esp. from a rule" (def. 5a)). And conceptually speaking, the substantive difference between a "variance" and a "departure" is nonexistent, as this Court's opinions themselves make clear. See, *e.g.*, *Gall* v. *United States*, 552 U. S. ___, ___–___ (2007) (slip op., at 7—8) (using the term "departure" to describe any non-Guideline sentence); *Rita* v. *United States*, 551 U. S. ___, ___–___ (2007) (slip op., at 10) (stating that courts "may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence)").

Of course, when Rule 32(h) was written, its drafters had *only* Guidelines-authorized departures in mind: Rule 32(h) was written after the Guidelines took effect but before this Court decided *United States* v. *Booker*, 543 U. S. 220 (2005). Yet the language of a statute or a rule, read in light of its purpose, often applies to circumstances that its authors did not then foresee. See, *e.g.*, *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79–80 (1998).

And here, the purpose behind Rule 32(h) requires that the Rule be construed to apply to variances. That Rule was added to "reflect" our decision in *Burns* v. *United States*, 501 U. S. 129 (1991). See Advisory Committee's Notes on Fed. Rule Crim. Proc. 32, 18 U. S. C. App., p. 1141 (2000 ed., Supp. II). (2002 Amendments). In *Burns*, the Court focused upon "the extraordinary case in which the district court, on its own initiative and contrary to the expectations both the defendant and the Government, decides that the factual and legal predicates for a departure are satisfied." 501 U. S., at 135. The Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing sub-

mission by the Government . . . the district court [must] give the parties reasonable notice that it is contemplating such a ruling." *Id.*, at 138.

Our holding in *Burns* was motivated, in part, by a desire to avoid due process concerns. See 501 U. S., at 138 ("[W]ere we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause"). That is perhaps why the majority today suggests that "[a]ny expectation subject to due process protection at the time we decided *Burns*" failed to survive *Booker*. *Ante*, at 5. But the due process concern was not the only reason for our holding in *Burns*, nor was it even the primary one. Rather, the Court principally based its decision upon Rule 32's requirement that parties be given "'an opportunity to comment upon . . . matters relating to the appropriate sentence.'" 501 U. S., at 135 (citing then-Rule 32(a)(1)). "Obviously," the Court said, whether a *sua sponte* departure was warranted was a "matter relating to the appropriate sentence." *Ibid.* (internal quotation marks omitted). To deprive the parties of notice of such a departure would thus "rende[r] meaningless" their right to comment on "matters relating to the appropriate sentence." *Id.*, at 136 (internal quotation marks omitted). Notice, the Court added, was "essential to assuring procedural fairness." *Id.,* at 138.

The Court's decision in *Burns* also relied on what the Court described as Rule 32's overall purpose of "provid[ing] for focused, adversarial development of the factual and legal issues" related to sentencing. *Id.,* at 134. This could be gleaned, *inter alia*, from the requirement that parties be given an opportunity to file responses or objections to the presentence report and from the requirement that parties be given an opportunity to speak at the sentencing proceeding. *Ibid.* Construing Rule 32 not to require notice of *sua sponte* departures, the Court rea-

soned, would be "inconsistent with Rule 32's purpose of promoting focused, adversarial resolution" of sentencing issues. *Id.*, at 137.

The primary grounds for the Court's decision in *Burns* apply with equal force to the variances we consider here. Today, Rule 32(i)(1)(C) provides a virtually identical requirement that the district court "allow the parties' attorneys to comment on the probation officer's determinations *and other matters relating to an appropriate sentence*." (Emphasis added.) To deprive the parties of notice of previously unidentified grounds for a variance would *today* "rende[r] meaningless" the parties' right to comment on "matters relating to [an] appropriate sentence." *Burns*, 501 U. S., at 136 (internal quotation marks omitted). To deprive the parties of notice would *today* subvert Rule 32's purpose of "promoting focused, adversarial resolution" of sentencing issues. In a word, it is not fair. *Id.*, at 137.

Seeking to overcome the fact that text, purpose, and precedent are not on its side, the majority makes two practical arguments in its defense. First, it says that notice is unnecessary because "there is no longer a limit comparable to the one at issue in *Burns*" as to the number of reasons why a district court might *sua sponte* impose a sentence outside the applicable range. *Ante,* at 6. Is that so? Courts, while now free to impose sentences that vary from a Guideline-specified range, have *always* been free to depart from such a range. See USSG ch. 1, pt. A, §4(b) (Nov. 1987), reprinted in §1A1.1 comment., editorial note (Nov. 2007) (suggesting broad departure authority). Indeed, even *Burns* recognized that "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure." 501 U. S., 136–137 (citing USSG ch. 1, pt. A, §4(b) (1990)). Regardless, if *Booker* expanded the number of grounds on which a district court may impose a non-Guideline sentence, that would seem to be an additional argument *in favor of*, not *against*, giving

the parties notice of the district court's intention to impose a non-Guideline sentence for some previously unidentified reason. Notice, after all, would promote "focused, adversarial" litigation at sentencing. *Burns*, *supra*, at 134, 137.

Second, the majority fears that a notice requirement would unnecessarily "delay" and "complicate" sentencing. *Ante*, at 7, 8. But this concern seems exaggerated. Rule 32(h) applies only where the court seeks to depart on a ground *not* previously identified by the presentence report or the parties' presentencing submissions. And the Solicitor General, after consulting with federal prosecutors, tells us that "in the vast majority of cases in which a district court imposes a sentence outside the Guidelines range, the grounds for the variance have previously been identified by the [presentence report] or the parties." Brief for United States 32.

In the remaining cases, notice does not necessarily mean delay. The parties may well be prepared to address the point and a meaningful continuance of sentencing would likely be in order only where a party would adduce additional evidence or brief an unconsidered legal issue. Further, to the extent that district judges find a notice requirement to complicate sentencing, those judges could make use of Rule 32(d)(2)(F), which enables them to require that presentence reports address the sentence that would be appropriate in light of the §3553(a) factors (including, presumably, whether there exist grounds for imposing a non-Guidelines sentence). If a presentence report includes a section on whether a variance would be appropriate under §3553(a), that would likely eliminate the possibility that the district court would wind up imposing a non-Guidelines sentence for some reason *not previously identified*.

Finally, if notice *still* produced some burdens and delay, fairness justifies notice regardless. Indeed, the Government and the defendant here—the parties most directly

affected by sentencing—both urge the Court to find a notice requirement. Clearly they recognize, as did the Court in *Burns*, that notice is "essential to assuring procedural fairness" at sentencing. 501 U. S., at 138.

I believe that Rule 32(h) provides this procedural safeguard. And I would vacate and remand to the Court of Appeals so that it could determine whether the petitioner received the required notice and, if not, act accordingly.

I respectfully dissent.