After *Irizarry*:
(1) Due Process Requires Notice and Adversarial Testing of Aggravating Facts
(2) Object and Seek a Continuance if Surprised By Aggravating Facts
(3) Argue that the Reason is a "Departure"

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Rule 32(h) of the Federal Rules of Criminal Procedure states: "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."

On June 12, 2008, the Supreme Court held that this requirement applies only to the judge's contemplation of a "departure" but not to the judge's contemplation of a "variance." *See Irizarry v. United States*, 553 U.S. __, 128 S. Ct. 2198 (2008).

The four-justice plurality gave the following reasons: (1) the guidelines are no longer mandatory or presumptive, so there is no longer an expectation of a sentence within the guideline range that is protected by the Due Process Clause, (2) "departure" is a "term of art" that covers only a "narrow category of cases," but there is no comparable limit on variances, (3) the defendant has a right to "to speak and present mitigation testimony" at sentencing, which may affect the judge's sentencing decision, (4) a notice requirement may create unnecessary delays and continuances even when notice of the judge's intent would not affect the parties' presentation of argument or evidence, and (5) if any prejudicial facts come as a surprise, the judge can and should grant a continuance upon request. *Id*. at 2202-03 & n.2. Justice Thomas concurred based on the text of Rule 32(h).

The four dissenting justices argued that (1) there is no difference between a "departure" and a "variance," (*but see Booker*, 220 U.S. at 234 ("availability of a departure in specified circumstances does not avoid the constitutional issue"), (2) if the goal is focused adversarial testing, the post-*Booker* expansion of grounds for outside-guideline sentences is an additional reason in favor of, not against, notice of the judge's intent, and (3) *if* the presentence report included a section on potential variances under § 3553(a), it would reduce the small number of instances in which a ground for a non-guideline sentence is not identified before the sentencing hearing. *Id*. at 2206-07 (Breyer, J., dissenting).

I. While the Judge Need Not Give Advance Notice of Her Subjective Contemplation of a Variance, Due Process Requires, and Rule 32 Provides For, Notice and Adversarial Testing of Aggravating Facts.

Irizarry did not modify the requirement under the Due Process Clause and Rule 32 that the defendant receive notice of all facts relevant to sentencing and that all such

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facts be subjected to adversarial testing. If notice is not given in advance of the hearing, a continuance should be granted if sought.

In *Burns v. United States*, 501 U.S. 129 (1991), the Supreme Court found that Rule 32, apart from subsection (h), which was added only after *Burns*, "provides focused, adversarial development of the factual and legal issues relevant to determining the appropriate . . . sentence." *Id*. at 134. The *Irizarry* plurality said: "We have confidence in the ability of district judges and counsel-especially in light of Rule 32's other procedural protections-to make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made." *Id*. at 2203-04. The Court listed some of Rule 32's other procedural protections as follows:

> Rule 32 requires that a defendant be given a copy of his PSR at least 35 days before sentencing, Fed. Rule Crim. Proc. 32(e)(2). Further, each party has 14 days to object to the PSR, Rule 32(f)(1), and at least 7 days before sentencing the probation officer must submit a final version of the PSR to the parties, stating any unresolved objections, Rule 32(g). Finally, at sentencing, the parties must be allowed to comment on "matters relating to an appropriate sentence," Rule 32(i)(1)(C), and the defendant must be given an opportunity to speak and present mitigation testimony, Rule 32(i)(4)(A)(ii).

Id. at 2203 n.2. In addition, the court may permit the parties to introduce evidence, and Rule 26.2(a)-(d) and (f) applies if a witness testifies. *See* Rule 32(i)(2). Further, the court must resolve any disputed portion of the PSR or other controverted matter unless it will not affect the sentence or the court will not consider it. *See* Rule 32(i)(3)(B). In other words, the defendant must receive notice of the facts at some point, and a reasonable opportunity to challenge them.

In *Rita*, the Court said that "the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure." *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007), citing in support "Rules 32(f), (h), (i)(C) and (i)(D)" and "*Burns v. United States*, 501 U.S. 129, 136, (1991) (recognizing importance of notice and meaningful opportunity to be heard at sentencing)." In *Gall*, the Court listed "selecting a sentence based on clearly erroneous facts" as one form of "procedural error." *Gall v. United States*, 128 S. Ct. 586, 597 (2007).

Note that *Irizarry* said that "[a]ny expectation subject to due process protection at the time we decided *Burns* that a criminal defendant would receive a sentence within the presumptively applicable guideline range did not survive our decision in" *Booker*. *Irizarry*, 128 S. Ct. at 2202. However, even in the pre-Guidelines era when a sentence could be based on any reason or no reason at all, the defendant had rights under the Due Process Clause to notice, hearing and counsel on offender characteristics that could raise the sentence, *Specht v. Patterson*, 386 U.S. 605 (1967), not to be sentenced based on facts that were not disclosed, *Gardner v. Florida*, 430 U.S. 349 (1977), and not to be sentenced on "misinformation" or facts that were "materially untrue." *United States v. Tucker*, 404

U.S. 443, 447 (1972), *Townsend v. Burke*, 334 U.S. 736, 741 (1948). *Burns* also recounted what the Due Process Clause requires before a person may be deprived of liberty or property: notice, a meaningful opportunity to be heard, the right to confront adverse witnesses and evidence, and the right to a full, formal, adversarial-style hearing. *Burns*, 501 U.S. at 137-38.

After *Irizarry*, the court is required to ensure that "the parties have had a full opportunity to present their evidence and their arguments." 128 S. Ct. at 2203.

> Sound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues. We recognize that there will be some cases in which the factual basis for a particular sentence will come as a surprise to a defendant or the Government. The more appropriate response to such a problem is . . . for a district judge to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial.

Id..

The holding in *Burns* confirms that the notice at issue in *Irizarry* was only the notice of the judge's subjective intent to "depart," not notice of the factual basis for the sentence. In *Burns*, the issue was whether the court could rely on facts that were in the presentence report to impose an upward departure where the parties did not know beforehand that it was contemplating a departure. 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 submission by the Government, Rule 32 requires that the district court give the parties reasonable *notice that it is contemplating* such a ruling." 501 U.S. at 138 (emphasis added). The only difference that *Burns* and the subsequent addition of Rule 32(h) made was the requirement that the court disclose its subjective intent, *i.e.*, that it is contemplating a "departure," based on facts disclosed. *Irizarry* says that after *Booker*, because § 3553(a) and not the guidelines control the sentence, the parties are always on notice that the district court may impose a sentence that is neither within the guideline range nor a "departure," and thus express notice of that possibility is not required. *Id*. at 2202-03. It did not, however, modify the requirements under Rule 32 and the Due Process Clause that a defendant receive notice of the *facts* upon which the Court may rely to impose sentence in sufficient time to challenge them.

In short, *Irizarry* means that the court is not required to notify the parties that it is contemplating a "variance," but the parties must receive notice of the relevant facts in enough time to "confront and debate the relevant issues." 128 S. Ct. at 2203. If any new factual matter would be "prejudicial" or "affect the parties' presentation of argument and evidence," a continuance should be sought and granted. *Id*.

Relying on Rule 32((i)(1)(C) and *Irizarry*, the Ninth Circuit recently held that the district court erred in "failing to provide Warr with any notice whatsoever before relying

on [a recidivism] study" and "should have notified Warr of it before the sentencing hearing," because the study "amounted to relevant and factual information" and was "[o]ne of the reasons the district court sentenced Warr to a term well beyond the guidelines range." *United States v. Warr*, 530 F.3d 1152, 1162-63 & n.8 (9th Cir. 2008).

II. Object and Seek a Continuance if Surprised by Aggravating Facts.

In *Warr*, the Ninth Circuit reviewed for plain error because the defense did not object to the court's unnoticed use of the recidivism study, which was not even in the record on appeal. *Warr*, 530 F.3d at 1162. Warr argued on appeal that he was prejudiced because if he had had notice of the study, he could have disputed its premises or methodology or introduced other studies. *Id*. at 1163. The Ninth Circuit rejected this attempt to show prejudice because (1) the study showed only "the well-known, common sense proposition that younger offenders are more likely to recidivate," (2) even the defense psychologist "acknowledged the general truth of this empirical evidence" during his testimony, and (3) "we have no doubt that, even without the study, the district court would have imposed the same sentence." *Id*. at 1163. Warr was a borderline psychopathic pyromaniac who set some 20 fires. However, a continuance (with the opportunity to develop countervailing evidence, prepare witnesses, and make a better record) would have been more likely to produce a different result than attempting to show prejudice on appeal on a plain error standard.

The need to object and request a continuance can be especially acute when a victim or a person claiming to be a victim stands up and asks to be "heard" at sentencing. The same notice protections apply to information about victim impact and restitution as apply to information provided by the government or any other witness. *See* Fed. R. Crim. P. 32(d)(2)(B), (D); 18 U.S.C. § 3664(a), (b), (e). Moreover, even to determine whether the person is a victim as defined in the Crime Victims Rights Act may require extensive briefing and argument. *See, e.g., United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (lengthy opinion concluded that woman who wished to speak at sentencing based on her claim that her boyfriend had mistreated her as a result of smoking marijuana he purchased from the defendant was not a "victim" of defendant's marijuana trafficking offense within the meaning of the CVRA).

III. If the Court Fails to Give Notice of its Subjective Intent to Impose an Above-Guideline Sentence, Argue that the Reason is a "Departure."

In *United States v. Evans-Martinez*, 530 F.3d 1164 (9th Cir. 2008), the Ninth Circuit reversed because the district court failed to give notice of its intent to sentence above the guideline range based on "the disturbing nature of the case," which was a "departure" subject to Rule 32(h), not a "variance" subject to *Irizarry*.

Most reasons for a sentence *above* the guideline range are easily characterized as upward "departures" under USSG §§ 5K2.0(a)(1)-(3) (any circumstance of a kind or to a degree not adequately taken into consideration), 4A1.3(a) (seriousness of criminal history or likelihood defendant will commit further crimes), 5K2.1 (death), 5K2.2 (physical

injury), 5K2.3 (extreme psychological injury), 5K2.4 (abduction or unlawful restraint), 5K2.5 (property damage or loss), 5K2.6 (weapons and dangerous instrumentalities), 5K2.7 (disruption of governmental function), 5K2.8 (extreme conduct), 5K2.9 (facilitate or conceal another offense), 5K2.14 (public welfare), 5K2.17 (semiautomatic firearms), 5K2.18 (violent street gangs), 5K2.21 (dismissed and uncharged conduct), 5K2.24 (unauthorized or counterfeit insignia or uniform).

In contrast, most reasons for a sentence *below* the guideline range are not easily characterized as "departures," because the Commission has placed so many mitigating circumstances off limits for "departure," *see* USSG §§ 5H1.1-5H1.7, 5H1.11-5H1.12, 5K2.0(a)(4), 5K2.0(b), 5K2.0(c), 5K2.0(d), 5K2.19, 5K2.22, has limited the extent of downward "departures" for other reasons, *see* USSG §§ 4A1.3(b)(2)(A), 4A1.3(b)(3), and has restricted other downward "departures" to narrow circumstances, *see* USSG §§ 5K2.10, 5K2.12, 5K2.13, 5K2.16, 5K2.20, 5K3.1.

Thus, while the Court said that the term "departure" applies only to "a narrow category of cases," *Irizarry*, 128 S. Ct. at 2202, this is correct only as to downward departures. The category of upward departures is broad.