No. 06-1381

IN THE

Supreme Court of the United States

OMAR MEJIA-HUERTA, ANASTACIO PANTOJA-ARELLANO, JOSE ANDRES DEHUMA-SUAREZ, ANTONIO CRUZ-MARTINEZ, LUIS ESTRADA, AND TABRODRICK DESHAUN CRADDOCK,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Though technically styled a Brief for the United States In Opposition, in substance the United States has all but acquiesced to certiorari. The petition presents two grounds for further review: (1) There is an acknowledged, deep circuit split on the question whether the notice requirement in Federal Rule of Criminal Procedure 32(h) survives *United States v. Booker*, 543 U.S. 220 (2005), and (2) The question of whether Rule 32(h)'s notice requirement survives *Booker* is an issue of urgent practical importance well presented by the sentences at issue here. The government agrees with the first claim, conceding there is a circuit split and, inadvertently, pointing out that the petition presents a second related question that also divides the circuits. The government cannot refute the immense practical importance of the basic rules governing criminal sentencing procedures. Review is warranted.

I. THERE IS AN ACKNOWLEDGED, DEEP CIRCUIT SPLIT ON THE QUESTION WHETHER RULE 32(H)'S NOTICE REQUIREMENT SURVIVES *BOOKER*

1. The petition identified a 5-5 circuit split on the question of the effect of *Booker* on Rule 32(h)'s notice requirement. Pet., at 16-22. The United States concedes, as it must, that "there is a conflict among the courts of appeals" on the question presented. U.S. Br., at 8. See also U.S. Br., at 12 ("the courts of appeals have reached differing conclusions on whether notice is required"); *id.* at 13 ("conflict among the courts of appeals"). The United States also agrees with the petition's description of the circuit disarray. As the United States notes, the "Second, Fourth, Sixth, Ninth, and Tenth Circuits have held that notice is required." U.S. Br., at 13. "The Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held to the contrary." U.S. Br., at 13.

Indeed, since the filing of the petition, circuit case law has cemented the split. *See, e.g., United States v. McClung*, 483 F.3d 273 (4th Cir. 2007) (notice of variances is required post-*Booker*); *United States v. Brooks*, No. 06-4696, 2007 WL 2004864 (4th Cir. Jul. 9, 2007) (same); *United States v. Garcia-Renteria*, No. 06-50410, 2007 WL 1219232 (9th Cir. Apr. 25, 2007) (same); *United States v. Flanders*, No. 05-6379, 2007 WL 1894419 (10th Cir. July 3, 2007) (same). *Cf. United States v. Johnson*, No. 05-61073, 2007 WL 1548990 (5th Cir. May 29, 2007) (no notice required for variances post-*Booker*); *United States v. Braxton*, No. 06-14852, 2007 WL 1198447 (11th Cir. Apr. 24, 2007) (failure to give notice of intent to vary upward is not error post-*Booker*); *United States v. Morris*, No. 06-16138, 2007 WL 1198445 (11th Cir. Apr. 24, 2007) (notice required only for departures, not variances); *United States v. Santos-Hernandez*, No. 06-16218, 2007 WL 1484521 (11th Cir. May 22, 2007) (same); *United States v. Rivero*, No. 06-14030, 2007 WL 1455761 (11th Cir. May 18, 2007) (same).

2. The petition also explains that Rule 32(h)'s notice requirement does in fact apply post-*Booker*, and that the decision below is erroneous. Pet., at 22-26. The petition points out that the text of the rule applies to sentences outside of the Guidelines range. Pet., at 23. The petition also shows that the purpose of the notice requirement applies to such sentences. Pet., at 23. If a district court intends to impose a non-Guidelines sentence, the parties need notice in order to present relevant evidence and argument. Pet., at 23.

Again, the United States agrees: "In the government's view, Rule 32's notice requirement applies" to non-Guidelines sentences. U.S. Br., at 10. As the government explains, "the parties need notice of the grounds on which the court is considering imposing a non-Guidelines sentence in order to ensure the full airing of the issues that will determine the sentence." U.S. Br., at 12. So too, the government

recognizes that the text of Rule 32(h) applies here. U.S. Br., at 10.

3. Furthermore, the government's brief inadvertently identifies a second circuit split presented by this case. In the government's view, three of the petitioners are entitled to relief "only if they could show plain error." U.S. Br., at 13. Of course, even if the error is not plain as to some defendants, the government does not dispute that several defendants properly preserved the issue. But in any event, the question of whether the failure to give Rule 32(h) notice to a non-Guidelines sentence post-*Booker* constitutes plain error itself implicates a circuit split warranting this Court's review.

The traditional plain error standard requires as a threshold (1) an error, (2) that is plain, and (3) that affects the defendant's substantial rights. *United States v. Olano*, 507 U.S. 725 (1993). The court only has discretion to notice such error and remand the case if (4) the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

Applying this standard, three circuits correctly find that failure to give notice can be plain error that does in fact affect the fairness of the proceeding such that remand is proper. *See, e.g., United States v. Gilmore*, 471 F.3d 64 (2d Cir. 2006) *later proceeding at* 470 F. Supp. 2d 233 (E.D.N.Y. 2007) (finding that failure of the sentencing court to give notice of variance from Guidelines seriously affected the fairness, integrity, or public reputation of the sentencing proceeding and was plain error). *See also United States v. Cousins*, 469 F.3d 572, 581 (6th Cir. 2006), *later proceeding at* 2007 U.S. Dist. LEXIS 36254 (N.D. Ohio May 17, 2007) (finding that failure to give notice of a variance was noticeable plain error because defense counsel, with notice, could have prepared argument and evidence to persuade judge to give a within-Guidelines sentence); *United States v. Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006) (failure to

give notice under Rule 32(h) for out-of-Guidelines sentence was noticeable plain error because issues with potential to affect sentencing must be fully aired and tested by the adversarial process).[1]

In contrast to these three circuits, the First and Fifth Circuits have ruled that failure to give notice post-*Booker* may not rise to the level of plain error. In *United States v. Jones*, 444 F.3d 430 (5th Cir. 2006), the Fifth Circuit ruled that the error of not giving notice of an upward departure was not plain because "the record indicate[d] that it [was] equally plausible that the district court would have imposed the same sentence as it is plausible that the court would not have." *Id.* at 443. So too, the First Circuit ruled that failure to give notice is not plain error because that circuit has yet to decide whether notice is required post-*Booker*. *United States v. Mateo*, 179 Fed. App'x. 64, 65 (1st Cir. 2006). *Mateo* reasoned that because the law is not clear until the circuit or Supreme Court has ruled on the notice requirement, the error cannot be plain. *Id.*

Rather than a basis for denying review, the government's emphasis on the plain error issue relevant to some of the defendants serves to provide an additional rationale for granting certiorari. Review in this case will allow the Court to resolve both whether the notice requirement survives *Booker* and, if so, whether the failure to give notice is plain error. The circuits are split on both issues.

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[1] The Eleventh Circuit does find noticeable plain error when a court fails to notify the parties of its intention to *depart* from the Guidelines, *see United States v. Florez*, 163 Fed. App'x 806 (11th Cir. 2006), but does not require notice of the intention to *vary* from them and thus would find no error when variances are imposed without notice.

II. WHETHER RULE 32(H)'S NOTICE REQUIREMENT SURVIVES *BOOKER* IS AN ISSUE OF URGENT PRACTICAL IMPORTANCE WELL PRESENTED BY THIS CASE

1. By its silence, the government concedes the great practical importance of the question presented. The petition points out that in the two and a half years since *Booker*, ten courts of appeals have issued published decisions on whether a district court must provide notice prior to issuing non-Guidelines sentences. Pet., at 27. The petition explains that this rapid and extensive appellate attention reflects the great importance the issue presents to the administration of the criminal justice system. Pet., at 27. The government does not respond to either claim.

Indeed, the facts of petitioners' cases here well illustrate the practical necessity of providing counsel with notice of an intent to apply a non-Guidelines sentence. For example, the petition noted that one defendant (Dehuma-Suarez) was sentenced to a term of imprisonment that was almost *8 years* greater than the recommended range. Pet., at 10. Although the district court claimed that the sentence was based on the petitioner's criminal record, the district court's failure to provide notice rendered the district court ill-informed about that criminal history. Thus, while the criminal history indicated convictions for Driving While Intoxicated and Assault Causing Bodily Injury, the district court did not know the potentially exonerating relevant facts. Had counsel known that the district court was planning to impose an increase of 8 years prison time based on this record, counsel could have contacted the step-children he supported for their testimony, spoken to his priest to attest to his five years of sobriety, and asked his co-workers and employers for testimony regarding his work ethic. Counsel could also have compared the con-

templated variance to the statistics on similar offenses maintained by the United States Sentencing Commission to determine what is customary in the same circumstances.

The same holds true for all the other petitioners, all but one of whom received sentences that were at least double the term recommended by the Sentencing Commission. In each instance, the district court punished the defendant on the basis of a terse written criminal history that may not have accurately represented his true past. Had the district court notified defense counsel of an intention to issue such sentences, there are numerous efforts counsel could have engaged in—such as investigating exonerating details of any listed crimes and interviewing relatives and others who may have compelling testimony about the social contributions of the defendant—to provide the court with a more accurate picture of the defendant's criminal history.

Although the government concedes the general importance of providing notice so that parties can present relevant evidence, the government nonetheless suggests that such notice would have no possible effect on the outcome here. U.S. Br., at 14. And, to be sure, petitioners' counsel are under no illusion that this particular district court judge would have imposed anything but the same (unfair) non-Guidelines sentences even if the court had been fully informed. The district court said as much, repeatedly stating it would impose the "same sentence" regardless of what the evidence showed. U.S. Br., at 14. But the very foundation of Rule 32(h)'s notice requirement is that a district court will consider relevant evidence provided by the defendant. That the district court makes a mockery of the core purpose of the rule does not warrant granting the court an exception from the rule, a rule that properly assumes that district courts will engage in a good faith consideration of all relevant facts. As just explained, there is no question that notice of the departure here would have led defense counsel to undertake a series of steps

designed to provide the district court with relevant evidence and argument.[2]

2. Anticipating the government's stalling tactic, the petition urges that the time for this Court to grant review is now. Pet., at 27. The petition notes that postponing review until the anticipated decisions in *Rita v. United States*, No. 06-5754, and *Claiborne v. United States*, No. 06-5618, is not necessary because neither case would possibly disturb the settled law that the Guidelines are an important factor in sentencing and thus that notice is required. Pet., at 28. The petition also explained that the earliest the Judicial Conference could amend Rule 32(h) to resolve the split is 2010. Pet., at 28-30.

As predicted, this Court's decision in *Rita* did not at all remove the need for this Court to review whether Rule 32(h) requires notice for a non-Guidelines sentence. *Rita v. United States*, 177 F. App'x 357 (June 21, 2007). As the government states, "*Rita* noted that the Guidelines still generally provide the framework for the sentencing process." U.S. Br., at 12. And, while *Rita* properly emphasizes the need for adversarial testing in sentencing, *Rita* does not address, much less reject, the rationale of those circuits that have declined to require notice post-*Booker*. In the view of those courts, notice is required only when a district court "departs" under the Guidelines but not when the court uses its post-*Booker* discretion to impose a non-Guidelines sentence. Nothing in *Rita* calls that formalistic rationale into question. To the contrary, *Rita* makes clear that it is concerned with "an *appellate* court presumption," a presumption that "applies only

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[2] The evidence that could be presented by the provision of notice would serve a second purpose: it would form part of the evidentiary record for appellate review of the district court's sentencing decision. Thus, even if a sentencing judge refused to consider the evidence, that evidence would be part of the record in a subsequent appeal and could be used to reverse and remand on the bases of bias, procedural error, or the reasonableness of the sentence.

on appellate review." Slip Op., at 11. It has nothing to with the district court's conduct of the sentencing.

Undeterred by the obvious failure of *Rita* to resolve the conceded split, the government suggests that review would still be "premature at this juncture" (U.S. Br., at 17) because of the pending case, *Gall v. United States*, No. 06-7949 (June 11, 2007). As the government notes, that case—like *Claiborne* before its dismissal due to the death of petitioner—addresses the standard of review that courts of appeals should apply in assessing the reasonableness of out-of-Guidelines sentences. But, as with *Rita*, the case does not remotely bring into question the settled law that the Guidelines are an important factor in sentencing, does not implicate the formalistic rationale of the courts that refuse to require notice, and is addressed at appellate not district court actions. As with *Rita*, the decision in *Gall* will not resolve the question presented and thus provides no basis for delay.

In a last effort to avoid review, the government suggests that this Court wait until the Judicial Conference resolves the circuit split. U.S. Br., at 15. But, as the petition notes, the usual course is precisely the opposite: the Conference conforms the rules to decisions of this Court, and not the other way around. Pet., at 30. And even if the Conference was inclined to resolve this circuit split, it could not do so until *at the earliest* December 1, 2010. Pet., at 29 n.8. The government does not dispute the December 2010 timeframe. U.S. Br., at 15 ("assuming petitioners' calculations are correct"). Surely, the remote prospect of a change in the federal rules cannot suffice to justify this Court declining to resolve a deep circuit split on an issue of great practical consequence.

Specifically, from now until a rule change can possibly be put into place, district courts will sentence approximately 90,000 defendants to non-Guidelines sentences. In 2006, the

last year for which statistics are available, there were 70,187 defendants sentenced in federal district courts.[3] A very large number of these, 26,880, were sentenced outside of Guidelines range. Using these statistics as representative of future years, courts will sentence approximately 90,000 defendants between now and December 1, 2010 to sentences outside the Guidelines. Every one of those defendants is entitled to notice, not by the grace of the court but by virtue of the fundamental workings of the adversary process reflected in the plain text of the existing rule.

* * *

In sum, the government's brief confirms the need for further review here. The government agrees that there is a circuit split and agrees that the question is wrongly decided. The government cannot seriously dispute that the administration of the sentencing process raises an issue of great practical importance warranting prompt resolution. Indeed, the sentences here perfectly illustrate the need for notice so that counsel can conduct the additional investigation necessary to assure that the district court has all the relevant factual context before imposing lengthy non-Guideline sentences.

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[3] U.S. Sentencing Commission: Fiscal Year 2006 Guideline Sentences, National Data, *available at* http://www.ussc.gov/ANNRPT/2006/nat06.pdf.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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