

No. 07-1215

In the Supreme Court of the United States

RENE RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court committed reversible plain error when it imposed a sentence outside the advisory Sentencing Guidelines range, based on the criteria in 18 U.S.C. 3553(a), without having given petitioner notice of its intention to do so.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted in 258 Fed. Appx. 269.¹

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2007. The petition for a writ of certiorari was filed on March 5, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹ The pages of the appendix to this petition are unnumbered. For the convenience of the Court, we will cite to the appendix as if the document were continuously paginated.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of one count of health care fraud, in violation of 18 U.S.C. 1347. He was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. He was also ordered to pay \$2,215,285.12 in restitution. Pet. App. 1-2; Dist. Ct. J. in a Crim. Case 1-3, 5. The court of appeals affirmed his sentence. Pet. App. 1-5.

1. In August 2005, petitioner incorporated an entity called DC Medical Services, Inc. (DC Medical) under the laws of the State of Florida. Petitioner named himself president of the company, and he controlled its financial and business activities. DC Medical purported to supply durable medical equipment to patients, most of whom were beneficiaries of the Medicare program. Petitioner applied for and obtained a Medicare supplier number that enabled the company to submit claims for reimbursement by Medicare. Gov't Dist. Ct. Statement of Facts Pursuant to Fed. R. Crim. P. 11(b)(3), ¶¶ 1-3 (Statement of Facts).

Between January and July 2006, petitioner caused DC Medical to submit false claims to Medicare seeking reimbursement for durable medical equipment and services purportedly ordered by doctors for their patients and provided by DC Medical. The claims totaled approximately \$4.4 million. In fact, no such equipment or services had been ordered from or provided by DC Medical. Medicare paid DC Medical \$2,215,285.12 on those false claims. Pet. App. 2; Gov't C.A. Br. 2-3; Plea Tr. 16-19; Presentence Investigation Report ¶¶ 11-20, 64 (PSR); Statement of Facts ¶ 4.

2. On November 2, 2006, petitioner entered into a plea agreement. Petitioner agreed to waive indictment and plead guilty to an information charging one count of health care fraud, and the government agreed to recommend a three-level reduction in his offense level for acceptance of responsibility, see Sentencing Guidelines § 3E1.1. Plea Agreement ¶¶ 1, 6. Petitioner acknowledged in the plea agreement and at the plea hearing that he understood that the Guidelines range was only advisory, and that the district court had authority to impose a sentence below or above it. *Id.* ¶¶ 2-3, 13; Plea Tr. 7, 13-14. The district court accepted petitioner's guilty plea. *Id.* at 19-20.

3. At sentencing, the district court determined that petitioner's advisory Guidelines sentencing range was 30-37 months of imprisonment, based on a total offense level of 19 (after a three-level reduction for acceptance of responsibility) and a criminal history category of I. Sent. Tr. 2-3.² The PSR did not identify any factors that might warrant a departure from the advisory Guidelines range. PSR ¶ 93.

Petitioner argued in his sentencing memorandum that the sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. V 2005) justified a variance below the Guidelines range. In particular, he argued that the Guidelines' loss table overstated the amount of the loss and therefore

² The total offense level reflected a base offense level of 6 (Sentencing Guidelines § 2B1.1(a)(2)) with a 16-level increase for a loss of more than \$1 million but not more than \$2.5 million (*id.* § 2B1.1(b)(1)(I)). PSR ¶¶ 24-32. The PSR did not recommend a reduction for acceptance of responsibility because petitioner's urine had twice tested positive for marijuana. *Id.* ¶ 23. Petitioner objected, and, with the government's agreement, the district court applied a three-level reduction for acceptance of responsibility. Sent. Tr. 3.

the seriousness of the offense. Pet. Addendum to PSR 5-7; *id.* at 4 (“a short period of incarceration” would satisfy Section 3553); see Sent. Tr. 5-6. In response, the government emphasized the seriousness of petitioner’s offense, but recommended a sentence of 30 months of imprisonment, at the low end of the applicable Guidelines range. Government’s Memo. in Aid of Sent. 3-7, 10.

The district court rejected petitioner’s contention. To the contrary, it determined that, in light of the Section 3553(a) factors, “the guideline sentence is an inadequate sentence.” Sent. Tr. 6. The court twice described petitioner’s fraud as “audacious,” and it noted that petitioner had done “a lot of harm.” *Id.* at 5-6. The court added that petitioner’s conduct “calls out for deterrence,” that “this community is plagued with Medicare fraud,” and that “the only thing that’s available to us are significant sentences.” *Id.* at 6-7. The court then called upon defense counsel for a response. *Id.* at 7. Following a brief colloquy, the court concluded that 48 months of imprisonment would be “a reasonable sentence.” *Id.* at 8.³

The court then sentenced petitioner to 48 months of imprisonment and ordered him to pay \$2,215,285.12 in restitution to the Medicare Part B Trust Fund. Sent. Tr. 8-9. The court asked if petitioner or his attorney objected to its findings of fact or to the manner in which

³ See also Statement of Reasons 3 (indicating that the sentence imposed was “outside the advisory guideline system” and “above the advisory guideline range,” and that the reasons for the sentence were “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. 3553(a)(2)(A)),” as well as “to afford adequate deterrence to criminal conduct (18 U.S.C. 3553(a)(2)(B))”).

sentence was pronounced. Defense counsel answered, “Yes,” without elaboration. *Id.* at 12.

4. The court of appeals affirmed, holding that petitioner’s above-Guidelines sentence was reasonable. Pet. App. 1-5.⁴ Petitioner also argued for the first time on appeal that the district court had violated Fed. R. Crim. P. 32(h) by not giving prior notice of its intent “to upwardly depart.” Pet. App. 9. Petitioner conceded that his lack-of-notice claim was foreclosed by binding circuit precedent, but stated that he raised the claim to preserve it for further review. *Ibid.* The court of appeals did not address that belated claim.

DISCUSSION

Petitioner renews only his contention that the district court violated Fed. R. Crim. P. 32(h) when it failed to give him notice of its intention to impose a sentence above the advisory Sentencing Guidelines range. Pet. 14.⁵ That rule provides that the district court, before it “depart[s] from the applicable sentencing range on a ground not identified for departure either in the pre-sentence report or in a party’s prehearing submission, * * * must give the parties reasonable notice” of “any ground on which the court is contemplating a depar-

⁴ In the plea agreement, petitioner waived his right to appeal any sentence imposed, “unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the Guideline range that the Court establishes at sentencing.” Plea Agreement ¶ 12. Although the sentence imposed reflected an upward variance rather than an upward departure, the government did not rely on the waiver of appeal in the court of appeals.

⁵ As the court of appeals recognized, petitioner’s 48-month sentence was an out-of-Guidelines variance based on the criteria in Section 3553(a), not an upward departure within the Guidelines. See Pet. App. 2-4; see also Statement of Reasons 2-3.

ture.” Fed. R. Crim. P. 32(h). This Court has granted review in *Irizarry v. United States*, No. 06-7517 (argued Apr. 15, 2008), to decide whether Rule 32(h) applies to out-of-Guidelines sentences based upon the criteria in Section 3553(a).

Petitioner, however, did not preserve a Rule 32(h) objection. His omnibus objection to his sentence (“THE COURT: * * * [D]oes the defendant or his counsel object * * * ? [DEFENSE COUNSEL]: Yes,” Sent. Tr. 12) was too general to alert the court to any specific concern about lack of notice. As petitioner notes, the court of appeals did not address his lack-of-notice claim. Pet. 14. But, had the issue been addressed, petitioner would have been entitled to relief only if he had demonstrated that the lack of notice was a plain error that affected his substantial rights and that the error had seriously affected the fairness, integrity, or public reputation of the sentencing proceedings. Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732 (1993).

Petitioner has not even attempted to meet those requirements in the court of appeals or in this Court. He does not suggest any additional argument that he would have made, nor any mitigating evidence that he might have adduced, had the district court provided advance notice of its intention to sentence him above the Guidelines range. Nor is it likely that petitioner could articulate any such argument. Before the district court, he argued for a below-Guidelines sentence on the ground that the Guidelines range overstated the seriousness of the offense. Petitioner had every incentive at that time to present all mitigating evidence and argument, if any were available.

This Court’s decision in *Irizarry* may nonetheless shed light on whether petitioner might have been able to

satisfy the plain-error standard, because the Court may address not only whether notice of a Section 3553(a) variance is required but also whether any error affected Irizarry's substantial rights. Accordingly, the Court should hold the petition for a writ of certiorari pending the Court's decision in *Irizarry* and then dispose of the petition as appropriate in light of the Court's resolution of that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Irizarry v. United States*, No. 06-7517, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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MAY 2008