

THOMAS, J., concurring

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 THOMAS, concurring.

Earlier this Term, I explained that because “there is no principled way to apply the *Booker* remedy,” it is “best to apply the statute as written, including 18 U. S. C. §3553(b), which makes the [Federal Sentencing] Guidelines mandatory.” *Kimbrough v. United States*, 552 U. S. ___, ___ (2007) (slip op., at 3) (dissenting opinion) (referencing *United States v. Booker*, 543 U. S. 220, 258–265 (2005)); see also *Gall v. United States*, 552 U. S. ___ (2007) (slip op., at 1) (THOMAS, J., dissenting) (applying the Guidelines as mandatory). Consistent with that view, I would hold that the District Court committed statutory error when it imposed a sentence at “variance” with the Guidelines in a manner not authorized by the text of the Guidelines, which permit sentences outside the Guidelines, or “departures,” only when certain aggravating or mitigating circumstances are present. See United States Sentencing Commission, Guidelines Manual §1B1.1 (Nov. 2007). But the issue whether such post-*Booker* “variances” are permissible is not currently before us.

Rather, we are presented with the narrow question whether Federal Rule of Criminal Procedure 32(h) requires a judge to give notice before he imposes a sentence outside the Guidelines on a ground not identified in the presentence report or in a prehearing submission by the Government. I agree with the Court that neither Rule

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32(h) nor *Burns v. United States*, 501 U. S. 129 (1991), compels a judge to provide notice before imposing a sentence at “variance” with the post-*Booker* advisory Guidelines, *ante*, at 8. Each addresses only “departures” under the mandatory Guidelines and does not contemplate the drastic changes to federal sentencing wrought by the *Booker* remedy. For this reason, I join the Court’s opinion.