

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
JOSEPH H. RODRIGUEZ
JUDGE

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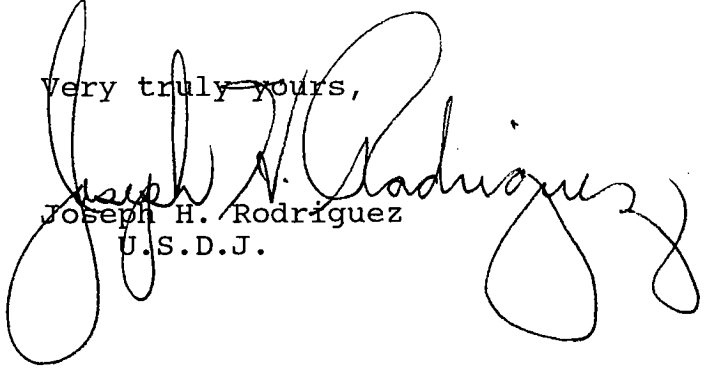
November 26, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Attention: Communications Director

I have considered the request contained in your letter of September 27, 1990 and find that my primary concern is ably expressed in Judge Rosenn's concurring opinion in United States of America v. Yu Kikumura, No. 89-5129, filed November 2, 1990, which I have enclosed.

Very truly yours,


Joseph H. Rodriguez
U.S.D.J.

JHR:sm

Filed November 2, 1990

UNITED STATE COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5129

UNITED STATES OF AMERICA

v.

KIKUMURA, YU,

Appellant

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Crim. No. 88-166)

Argued: September 7, 1989

Before: BECKER, COWEN and ROSENN,
Circuit Judges

(Filed November 2, 1990)

RONALD L. KUBY (Argued)
WILLIAM M. KUNSTLER (Argued)
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Attorneys for Appellant

SAMUEL A. ALITO, JR. (Argued)
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ROSENN, *Circuit Judge*, concurring.

I concur in the court's holding that a sentencing judge may not make extreme departures from the sentencing guidelines without abiding by standards of procedural fairness more stringent than those which usually apply in sentencing hearings.¹ I also concur in the court's analysis under the guidelines and in the sentence imposed upon Kikumura. I write separately, however, to express my concern that the Government's manipulation of Kikumura's charge and sentencing illustrates the problem reported by many courts that the sentencing guidelines have replaced judicial discretion over sentencing with prosecutorial discretion. In so doing, it may have violated Kikumura's right to due process.

The labyrinthian course which the sentencing guidelines require courts to navigate in reaching their decisions might obscure one salient feature of Kikumura's prosecution and sentencing: Kikumura was not convicted of attempted murder and yet that is the crime upon which the court relied most heavily in sentencing him. The original indictment handed down by the grand jury charged Kikumura in count two with transporting explosives with the "intent that it will be used to kill, injure, and intimidate one or more individuals." Before trial, the Government deliberately deleted that phrase from the indictment, allowing Kikumura to stipulate to the facts and be convicted of the remaining charges, the most serious of which involved Kikumura's

1. The Sentencing Commission's commentary expressly authorizes the sentencing court to "determine the appropriate procedure in light of the nature of the dispute." Commentary to Guidelines § 6A1.3, eff. Oct. 1987.

knowledge or intent that the bombs would be used to damage property.² See *United States v. Kikumura*, 706 F. Supp. 331, 334 (D.N.J. 1989). Thus, the court did not convict Kikumura of the intent to kill, injure, and intimidate one or more individuals, an offense of which Kikumura consistently protested he was innocent. The Government then proceeded at sentencing under guideline § 2K1.6(a)(2) which permitted consideration of Kikumura's alleged intent to kill people with his bombs.

This strategy, of course, made the Government's burden of proving such felonious intent much lighter. For example, prior to the sentencing hearing, the Government was not compelled to furnish Kikumura with the evidence against him to assure an informed and able cross-examination, and at the hearing, the Government was not burdened by the Federal Rules of Evidence and the responsibility to prove each fact beyond a reasonable doubt.

The sentencing guidelines no doubt encouraged this strategy. The guidelines permit the sentencing court to consider relevant conduct not charged in the indictment, including evidence of the defendant's intent in committing the offense. See Guidelines § 1B1.3(a)(4), eff. Oct. 1987.³ Indeed,

2. At Kikumura's *pro forma* trial, the Government stated its intention to prove at sentencing that Kikumura intended to commit murder. Thus, the trial court was fully aware that this most serious charge was being "reserved" by the Government for the sentencing hearing. *United States v. Kikumura*, 706 F.Supp. 331, 334, n. 2 (D.N.J. 1989).

3. The Commission has since deleted the specific reference to the defendant's intent from this section of the Guidelines and replaced it with "any other information specifically in the

this comports with the former practice of sentencing judges who traditionally have considered collateral information affecting the level of a defendant's culpability. However, because of the extreme departure involved here for the separate offense of attempted murder, it seems evident that the Government and the sentencing judge did not consider Kikumura's attempt to kill as collateral but *primary*. In such a case, Kikumura should have been charged and tried for that offense. Failure to do so should preclude the Government from relying upon the separate crime of attempted murder as the vehicle for the drastic enhancement of the defendant's sentence.

A number of courts and the recent Federal Courts Study Committee have noted that one unintended effect of the sentencing guidelines has been to replace traditional judicial discretion over sentencing with prosecutorial discretion. In its final report, the Study Committee noted that "we have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system." Report of the Federal Courts Study Committee, April 1990 at 138.

In its earlier tentative recommendations, the Committee aptly observed, "Instead of achieving the congressional purpose of limiting and regulating sentencing discretion, the guidelines

applicable guideline." Guidelines § 1B1.3(a)(4), eff. Nov. 1, 1990. The Government, in this case, applied guideline 2K1.6(a)(2) which specifically permits consideration of the defendant's intent. The court sentenced the defendant on February 10, 1989.

have actually had the perverse effect of transferring discretion from the court to the prosecutor, who then exercises the discretion outside the system" Federal Courts Study Committee Tentative Recommendations for Public Comment, December 22, 1989 at 62, cited in *U.S. v. Holland*, 729 F. Supp. 125, 133-32 (D.D.C. 1990). See also *U.S. v. Roberts*, 726 F. Supp. 1359, 1363 (D.D.C. 1989) ("the de facto transfer of much of the responsibility for sentencing from impartial judges to prosecutors has had the effect of disturbing the due process balance essential to the fairness of criminal litigation"); *U.S. v. Boshell*, 728 F. Supp. 632, 637 (E.D. Wash. 1990) ("Congress has thus shifted discretion from persons who have demonstrated essential qualifications to the satisfaction of their peers, . . . to persons who may be barely out of law school with scant life experience and whose common sense may be an unproven asset").

Such prosecutorial control, although not unconstitutional *per se*, if left unchecked by the courts could be applied in a manner which encroaches upon the constitutional rights of defendants. Indeed, district courts have already found such constitutional violations. See *U.S. v. Roberts*, 726 F. Supp. 1359, 1368 (D.D.C. 1989). In *Roberts* the district judge found a due process violation where the prosecutor regularly transferred certain drug cases pending in D.C. Superior Court to federal court. The court noted,

Simply by selecting out some defendants from among the many in Superior Court for prosecution in this Court, the U.S. Attorney is able to ensure that these particular defendants will be sentenced to imprisonment for a

minimum of five or ten years, while others, not so selected but otherwise similarly situated, will, upon conviction, be sentenced under the discretionary sentencing provisions available in Superior Court to a small fraction of that time.

Roberts, 726 F. Supp. at 1372.

I am concerned that the Government's tactic in obtaining Kikumura's long sentence comes into conflict with the Constitution. What the Government appears to have done is to deliberately collateralize at the charge and trial stage the most critical element for this sentencing, Kikumura's specific intent in transporting the explosives. A hypothetical prosecution may illustrate the perceived misconduct. Suppose the police apprehend a man who is driving recklessly with the intention to meet others in a robbery conspiracy. State officials only charge and convict the man with violating traffic ordinances, but at the man's sentencing hearing argue that the underlying motive for the man's speeding was participation in a robbery at another end of town. The sentencing judge finds the state's evidence convincing and sentences the defendant as if he had been convicted of conspiracy to commit a robbery. I believe that in a federal habeas corpus proceeding attacking the constitutionality of the conviction, we would conclude such conduct violated the man's right to have the most serious crime specifically charged and proven at a trial which included the full panoply of procedural protection. Here, the Government's analogous conduct in manipulating the charge and sentence of Kikumura is no less offensive simply because it

has occurred within the shadow of the sentencing guidelines.

Because Kikumura himself did not raise these objections on appeal and the Government had no opportunity to respond, I concur rather than dissent. For this reason, I believe that we are precluded from reversing on the ground that the Government's conduct here infringed upon Kikumura's right to due process. However, I believe that if the Government had proceeded properly and introduced the evidence of Kikumura's intent to kill at trial, the record at trial probably would have justified his conviction of that charge and sentencing as determined by this court.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*