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1992]

CRIMINAL LAW—NEW STANDARDS UNDER THE SENTENCING
GUIDELINES

United States v. Kikumura (1990).

I. INTRODUCTION

In the federal courts, criminal sentences are determined under the United States Sentencing Guidelines (Guidelines).¹ The Guidelines prescribe a sentencing range in which a defendant must be sentenced as a general rule.² In limited circumstances, the government may seek an upward departure and obtain a sentence greater than that prescribed by the Guidelines.³ In either case, however, a defendant is only entitled to the procedural protections generally available at sentencing hearings.⁴

In *United States v. Kikumura*,⁵ the United States Court of Appeals for the Third Circuit strengthened the procedural protections available to defendants in the sentencing context.⁶ More specifically, the *Kikumura* court established new standards to guide the district courts in sentencing hearings where the government seeks an "extreme departure" from existing sentencing guidelines.⁷ These new, more protective standards for determining appropriate sentences relate to the following issues: 1) the burden of proof in factfinding, 2) the admission of hearsay evidence and 3) the method for determining the reasonableness of departures from the sentencing guidelines.⁸

II. FACTS

On the morning of April 12, 1988, a New Jersey State Trooper stopped a vehicle for reckless driving at a service area on the New Jersey

1. See UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (rev. ed. 1988) [hereinafter GUIDELINES]. See generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988) ("Since November 1987, the new Federal Sentencing Guidelines have been law.").

2. For a further discussion of the sentencing procedures under the Guidelines, see *infra* note 20.

3. For a further discussion of permissible departures from the Guidelines, see *infra* note 21.

4. See *United States v. Kikumura*, 918 F.2d 1084, 1099-1101 (3d Cir. 1990). For a further discussion of the procedural protections available at sentencing hearings, see *infra* notes 29-36 and accompanying text.

5. 918 F.2d 1084 (3d Cir. 1990).

6. *Id.* at 1098-1119.

7. For a discussion of the Third Circuit's *Kikumura* opinion, see *infra* notes 29-84 and accompanying text.

8. For a discussion of the *Kikumura* court's holdings regarding these three issues, see *infra* notes 29-84 and accompanying text.

(1050)

Turnpike.⁹ When the trooper approached the car, he observed a cardboard box containing three red cylindrical objects with black tape and wires in the passenger compartment.¹⁰ He asked the driver what the objects were and the driver replied: "Souvenirs. Go ahead, check it out."¹¹ The trooper discovered that the objects were home-made explosives and he arrested the driver, Yu Kikumura.¹² Kikumura, an internationally trained terrorist, was driving toward New York City to carry out a bombing at a navy and marine recruiting center.¹³

Kikumura was charged with various crimes, including the violation of a federal law that prohibits transporting explosives in interstate commerce "with the knowledge or intent that [the explosives] will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or real or personal property."¹⁴ After the trial court denied his suppression motion, Kikumura stipulated to all the essential facts of the charged offenses and waived his right to a jury trial.¹⁵ However, Kikumura denied that he had intended to injure or kill any individuals with his explosives.¹⁶ He only conceded that he had intended to damage or destroy property.¹⁷ After a pro forma bench trial on the stipulated facts, Kikumura was convicted of all counts.¹⁸

Kikumura's sentence was governed by the Sentencing Reform Act of 1984 and the Guidelines promulgated thereunder.¹⁹ Under the

9. *Kikumura*, 918 F.2d at 1090.

10. *Id.*

11. *Id.*

12. *Id.* The Third Circuit affirmed the district court's finding that Kikumura had consented to the search of his car. *Id.* at 1093. According to the court, a determination that consent was voluntary is a finding of fact. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). Therefore, the finding is subject only to clearly erroneous review. *Id.* (citing *United States v. Kelly*, 708 F.2d 121, 126 (3d Cir.), *cert. denied*, 464 U.S. 916 (1983)).

13. *Id.* at 1095. The police discovered a map of New York City in Kikumura's car. *Id.* The map was marked at a spot one half block from a navy and marine recruiting center. *Id.* At Kikumura's sentencing hearing, a detective speculated that Kikumura intended to detonate the bombs at the recruiting office. *Id.*

14. *Id.* at 1094 (quoting 18 U.S.C. § 844(d) (1988)). Kikumura was also charged with one count of transporting explosives without a license, (18 U.S.C. § 842(a)(3)(A) (1988)), one count of possessing a firearm as an illegal alien, (18 U.S.C. § 922(g)(5) (1988)), three counts of possessing unregistered firearms, (26 U.S.C. § 5861(d) (1988)), three counts of possessing firearms without serial numbers, (26 U.S.C. § 5861(i) (1988)), and three passport and visa offenses, (18 U.S.C. §§ 1543-1544, 1546(a) (1988)). *Kikumura*, 918 F.2d at 1094 n.6.

15. *Id.* at 1094.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* The court applied the October 1988 Guidelines in sentencing Kikumura. *Id.* at 1094 n.7. According to federal law, a sentencing court must consider:

The kinds of sentence and the sentencing range established for the ap-

Guidelines, the district court could have sentenced Kikumura to serve between twenty-seven to thirty-three months in prison.²⁰ However, the government moved for an “upward departure” because of the seriousness of Kikumura’s conduct.²¹ Granting the government’s motion, the district court imposed a sentence of thirty years imprisonment—“apparently the largest departure from an applicable guideline range, in absolute or percentage terms, since the sentencing guidelines became effective.”²²

Kikumura appealed the sentence, and the Third Circuit’s decision in *United States v. Kikumura*²³ established important precedent for deciding five critical issues: (1) the appropriate standard of proof governing factfinding in cases which depart significantly from the sentencing range set forth in the Guidelines; (2) the admissibility, for sentencing purposes, of hearsay statements made by a confidential informant; (3) whether the Sentencing Commission sufficiently considered a situation such as Kikumura’s in fashioning the Guideline range;²⁴ (4) the stan-

plicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 944(a)(1) and that are in effect on the date the defendant is sentenced.

18 U.S.C. § 3553(a)(4) (1988).

20. *Kikumura*, 918 F.2d at 1094. Under the Guidelines, the sentencing court uses a series of calculations to determine a defendant’s sentence. See GUIDELINES, *supra* note 1, § 1B1.1. First, the court determines which Guideline section is most analogous to the statute of conviction. *Id.* § 1B1.1(a). Second, the court uses the Guidelines to determine a “base offense level,” and then adjusts that level by applying specific characteristics from the defendant’s offense. *Id.* § 1B1.1(b). Third, the court may make additional adjustments to the offense level based upon the identity of the victim of the crime, the defendant’s role in the crime, and the defendant’s obstruction of justice. *Id.* § 1B1.1(c). Fourth, if the defendant has been convicted of multiple counts, the court repeats the process and groups the calculated offense levels. *Id.* § 1B1.1(d). Fifth, the court applies the defendant’s acceptance of responsibility, if any, to the previously calculated offense level to determine the total offense level. *Id.* § 1B1.1(e). Sixth, the court determines the criminal history category of the defendant. *Id.* § 1B1.1(f). The criminal history category considers a defendant’s prior criminal conduct. *Id.* at 201. Finally, the court applies the appropriate Guideline range corresponding to the total offense level and criminal history category. *Id.* § 1B1.1(g).

21. *Kikumura*, 918 F.2d at 1094. The government relied on the following provision in the Guidelines:

The [Sentencing] Commission intends the sentencing courts to treat each guideline as carving out a “heartland,” a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

GUIDELINES, *supra* note 1, at 6.

22. *Kikumura*, 918 F.2d at 1089.

23. 918 F.2d 1084 (3d Cir. 1990).

24. *Id.* at 1089. A district court is required to sentence a defendant within an applicable guideline range “unless the court finds that there exists an aggra-

dards applied to determine the reasonableness of departures; and (5) the reasonableness of the actual sentence imposed on Kikumura.²⁵

The Third Circuit concluded that: (1) the government must meet a clear and convincing standard of proof in establishing the facts when there is an "extreme departure" from a sentencing range prescribed by the Guidelines; (2) because they were based on corroborating evidence, the hearsay statements were sufficiently reliable to be admissible against Kikumura for sentencing purposes; (3) "the circumstances of Kikumura's offense were not adequately contemplated by the Sentencing Commission and hence an upward departure was permitted;"²⁶ (4) the reasonableness of departures can be determined by analogizing the defendant's offense to existing Guidelines;²⁷ and (5) under the facts of *Kikumura*, a sentence of 360 months was unreasonable, but a sentence of up to 262 months would be reasonable.²⁸

III. DISCUSSION

A. *Burden of Proof in Factfinding*

In *Kikumura*, the Third Circuit acknowledged that the procedural protections guaranteed to defendants at sentencing are significantly less than those guaranteed at trial.²⁹ For example, a criminal defendant has

vating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." *Id.* at 1098 (quoting 18 U.S.C. § 3553(b) (1988)). "This provision is mandatory." *Id.* (quoting *United States v. Uca*, 867 F.2d 783, 786 (3d Cir. 1989)). If the lower court departs from the Guidelines in a situation where the factors were adequately considered by the Sentencing Commission, then the reviewing court must reverse. *Id.* (citing 18 U.S.C. § 3742(f)(1) (1988)). The scope of review of this issue is plenary. *Id.* (citing *United States v. Ryan*, 866 F.2d 604, 610 (3d Cir. 1989)).

25. *Id.* at 1089. Upon determining that a departure is permitted, the court must decide whether the actual sentence is reasonable. *Id.* The court's decision must take into account "(A) the factors to be considered in imposing a sentence, as set forth in [18 U.S.C. § 3553(a)]; and (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)." *Id.* at 1098 (quoting 18 U.S.C. § 3742(e)(3) (1988)). The *Kikumura* court required that the factors relied upon by the sentencing court and the degree of departure from sentencing guidelines be "appropriate." *Id.* The scope of review at this stage is deferential. *Id.* (citing *United States v. Ryan*, 866 F.2d 604, 610 (3d Cir. 1989)).

26. *Id.* at 1089. For a discussion of the test used to determine whether a factor was adequately taken into consideration by the Sentencing Commission, see *supra* note 24.

27. For a discussion of the court's methodology for determining the reasonableness of departures, see *infra* notes 67-77 and accompanying text.

28. *Kikumura*, 918 F.2d at 1089. For a discussion of the reasonableness of the actual departure, see *infra* notes 78-84 and accompanying text.

29. *Kikumura*, 918 F.2d at 1099; see also *United States v. Palma*, 760 F.2d 475, 477 (3d Cir. 1985) (although defendant must be afforded some degree of

the right to trial by jury; however, there is no such right at sentencing.³⁰ At trial, each element of a charged offense must be proven beyond a reasonable doubt;³¹ however, at sentencing those elements need only be established by a preponderance of the evidence.³²

In addition, at sentencing, the defendant does not benefit from the protections of the Federal Rules of Evidence and the Confrontation Clause as he or she does at trial.³³ The Confrontation Clause³⁴ prevents the use of admissible hearsay unless the evidence is supported by a "firmly rooted hearsay exception" or other "particularized guarantees of trustworthiness."³⁵ At sentencing, however, due process only requires that hearsay "bear 'some minimal indicium of reliability beyond mere allegation.'"³⁶

According to the *Kikumura* court, the diminished procedural protections available at sentencing are ordinarily justified.³⁷ The court noted, however, that these diminished protections are not adequate in all cases.³⁸ In *Kikumura*, the Third Circuit considered the sentencing hearing "a tail which wags the dog of the substantive offense."³⁹ In such an extreme situation, "a court [must not] reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations."⁴⁰ Instead, the prosecutor must establish the facts underlying any departure from the Guidelines by clear and convincing evidence.⁴¹

due process at sentencing hearing, same degree of due process as at trial is not required).

30. *Kikumura*, 918 F.2d at 1099 (citing *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (holding no right to jury at sentencing)).

31. *Id.* (citing *In re Winshop*, 397 U.S. 358, 364 (1970) (holding right to proof beyond a reasonable doubt at trial)).

32. *Id.*

33. *Id.* at 1099-1100. The Federal Rules of Evidence provide that "[t]hese rules govern proceedings in the courts of the United States . . ." FED. R. EVID. 101. However, Rule 1101 provides that "[t]he rules . . . do not apply in . . . sentencing." FED. R. EVID. 1101(d)(3).

34. See U.S. CONST. amend. VI, cl. 3. The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." *Id.*

35. *Kikumura*, 918 F.2d at 1099-1100 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

36. *Id.* (quoting *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982)).

37. *Id.*

38. *Id.*

39. *Id.* at 1100-01 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)). The court noted that it was dealing with a departure "that would increase *Kikumura's* sentence from about 30 months to 30 years—the equivalent of a 22-level increase in his offense level." *Id.* at 1100.

40. *Id.* at 1101.

41. *Id.* Except in these extreme circumstances, the Third Circuit rejected the idea that a defendant could have greater or lesser procedural protections depending on the nature of the case by stating that "procedural protection can-

The court distinguished *Kikumura* from the weight of authority in other circuits which hold that the prosecutor need only prove Guideline factors by a preponderance of the evidence.⁴² The *Kikumura* court noted that none of the other cases involved a departure as extreme as that in *Kikumura*.⁴³ Specifically, the Guidelines prescribed a sentence of twenty-seven to thirty-three months for *Kikumura*'s conduct, while the district court sentenced him to thirty years imprisonment.⁴⁴ This departure was apparently the largest in the history of the Guidelines.⁴⁵ Accordingly, the Third Circuit determined that for such an extreme departure from the Guidelines, the government should bear a more onerous burden in establishing the facts supporting a departure than for a typical case.⁴⁶

B. Admissibility of Hearsay Evidence

The Third Circuit also departed from its usual standard for determining the admissibility of hearsay evidence in the sentencing phase.⁴⁷ The *Kikumura* court declined to follow the standard set forth in *United States v. Baylin*.⁴⁸ In *Baylin*, the Third Circuit concluded that a court can consider hearsay statements as a basis for sentencing as long as they are at least minimally reliable.⁴⁹ According to the *Kikumura* court, however, cases of "extreme" departures from the Guidelines require an examination of "the totality of the circumstances, including other corroborating evidence, and [a] determin[ation of] whether the hearsay declarations

not be calibrated on a sliding-scale, case-by-case basis." *Id.* at 1100. The court noted that "if proof by a mere preponderance is sufficient to justify a two-level increase for willfully impeding an investigation, then proof by that identical standard is appropriate in order to justify . . . a four-level increase for organizing an offense; or a six-level increase for unlawfully receiving explosives that one knows to be stolen." *Id.* For a description of how offense levels are determined under the Guidelines, see *supra* note 20.

42. *Kikumura*, 918 F.2d at 1101-02. See, e.g., *United States v. Wilson*, 900 F.2d 1350, 1354 (9th Cir. 1990) (holding preponderance of evidence sufficient proof of monetary value of goods in mail fraud scheme); *United States v. Frederick*, 897 F.2d 490, 493 (10th Cir.) (holding preponderance of evidence sufficient proof of noncharged criminal activity for use in computing sentence), *cert. denied*, 111 S. Ct. 171 (1990); *United States v. Guerra*, 888 F.2d 247, 250-51 (2d Cir. 1989)(same), *cert. denied*, 494 U.S. 1090 (1990).

43. *Kikumura*, 918 F.2d at 1102.

44. *Id.* at 1089.

45. *Id.*

46. *Id.* at 1102. "We hold that the clear and convincing evidence standard is, under these circumstances, implicit in the statutory requirement that a sentencing court 'find' certain considerations in order to justify a departure [from the Guidelines]." *Id.*

47. *Id.*

48. 696 F.2d 1030 (3d Cir. 1982).

49. *Id.* at 1040. In *Baylin*, the district court used the government's agreement not to prosecute the defendant to infer that the defendant may have engaged in illegal activities. *Id.* at 1035. The *Baylin* court, however, concluded that reliance upon such an agreement was impermissible in sentencing. *Id.* at 1042.

are reasonably trustworthy.”⁵⁰ Thus, a sentencing court should apply an intermediate standard, stricter than that set forth in *Baylin* for ordinary sentencing, but less strict than the standard applicable at trial.⁵¹

The *Kikumura* court also refused to adopt the reasoning of the Eighth Circuit in *United States v. Fortier*.⁵² In *Fortier*, the Eighth Circuit utilized the standard for the admissibility of hearsay at trial to review a district court's reliance upon a hearsay statement to increase a defendant's sentence.⁵³ The Eighth Circuit reasoned that the Confrontation Clause required this test.⁵⁴ However, the Third Circuit disagreed, noting that the intermediate standard it adopted in *Kikumura* “satisfies the reliability concerns that undergird *Fortier*, while at the same time avoiding the doctrinal pitfalls that would accompany [applying the Confrontation Clause to sentencing hearings].”⁵⁵

C. Permissibility of Departure

The Third Circuit then examined whether the departure from the Guidelines was permissible in *Kikumura*.⁵⁶ A district court can only de-

50. *Kikumura*, 918 F.2d at 1103. In addition, the *Kikumura* court noted that in assessing the reliability of a hearsay statement, the sentencing court's inquiry is not limited to “circumstances that surround the making of the statement.” *Id.* at 1103 n.21 (quoting *Idaho v. Wright*, 110 S. Ct. 3139 (1990)). Indeed, where there is an extreme departure from the Guidelines, a court is required to consider other evidence that substantiates the proffered hearsay statement. *Id.*

The *Kikumura* court found that the proffered hearsay evidence, the informant's testimony regarding *Kikumura*'s activities in a terrorist camp, met this more stringent standard because the testimony was verified by corroborative evidence. *Id.* at 1103-04.

51. *Id.* at 1102-03. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court set the standard for admitting hearsay evidence at trial. *Id.* at 66. The Court held that the Confrontation Clause of the United States Constitution forbids consideration at trial of all admissible hearsay unsupported by “a firmly rooted hearsay exception” or other “particularized guarantees of trustworthiness.” *Id.*

52. 911 F.2d 100 (8th Cir. 1990). In *Fortier*, the district court had relied upon the defendant's pre-sentence report to conclude that the defendant had possessed cocaine. *Id.* at 102. The pre-sentence report, however, contained triple hearsay. *Id.* at 104. According to the Eighth Circuit, using this report violated the defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. *Id.* For the text of the Confrontation Clause, see *supra* note 34.

53. *Fortier*, 911 F.2d at 103; see also *Kikumura*, 918 F.2d at 1103 n.19.

54. *Fortier*, 911 F.2d at 104. The Eighth Circuit relied upon the applicability of the Confrontation Clause to hearsay statements. *Id.* at 103-04.

55. *Kikumura*, 918 F.2d at 1103 n.19. According to the *Kikumura* court, “[a]s a textual matter, the sixth amendment, which refers to ‘criminal prosecutions,’ arguably applies only at trial.” *Id.* at 1102. Therefore, the court was reluctant to apply the Confrontation Clause to the sentencing process. *Id.*

56. *Id.* at 1103-09. Before deciding whether the extreme departure from the Guidelines was permissible on the facts of *Kikumura*, the Third Circuit upheld the district court's finding that *Kikumura* intended to use his bombs to injure people. *Id.* at 1104. *Kikumura* claimed that he had not intended to use

part from the sentencing range set forth in the Guidelines if it finds an aggravating or mitigating circumstance that the Sentencing Commission did not sufficiently consider in formulating the Guidelines.⁵⁷ The circumstance "should result in a sentence different from that described."⁵⁸ This requirement is mandatory.⁵⁹ In addition, in making this determination, the sentencing court "shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."⁶⁰

Kikumura was sentenced under six Guidelines.⁶¹ He contended that the Sentencing Commission considered, and factored into the base level, the defendant's intent to commit murder in three of the Guidelines under which he was sentenced: the explosives⁶² Guideline as well

his bombs to injure people. *Id.* at 1094. He claimed that he only intended to destroy property. *Id.*

57. *Id.* at 1098 (citing 18 U.S.C. § 3553(b)).

58. *Id.* (quoting 18 U.S.C. § 3553(b) (1988)).

59. *United States v. Uca*, 867 F.2d 783, 786 (3d Cir. 1989) (interpreting 18 U.S.C. § 3553(b) (1988)).

60. 18 U.S.C. § 3553(b) (1988).

61. *Kikumura*, 918 F.2d at 1104 (citing GUIDELINES, *supra* note 1). Specifically, the court looked to guidelines §§ 2K1.3 (unlawfully trafficking in, receiving, or transporting explosives), 2K1.6 (shipping, transporting, or receiving explosives with felonious intent or knowledge; using or carrying explosives in certain crimes), 2K2.1 (receipt, possession, of transportation of firearms and other weapons by prohibited persons), 2K2.2 (receipt, possession, or transportation of firearms and other weapons in violation of National Firearms Act), 2L2.2 (fraudulently acquiring evidence of citizenship or documents authorizing entry for own use) and 2L2.4 (fraudulently acquiring or improperly using a United States passport). *Id.* Kikumura conceded that §§ 2K1.3, 2L2.2, and 2L2.4 did not consider his intent to commit murder. *Id.* at 1104. In addition, Kikumura conceded that his previous arrest for similar offenses supported an offender-related departure under § 4A1.3. *Id.* Section 4A1.3 authorizes a departure "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct" GUIDELINES, *supra* note 1, § 4A1.3.

62. Section 2K1.6, the explosives guideline, provides in relevant part: *Shipping, Transporting, or Receiving Explosives with Felonious Intent or Knowledge; Using or Carrying Explosives in Certain Crimes*

(a) Base Offense Level (Apply the greater):

(1) 18; or

(2) If the defendant committed the offense with intent to commit another offense against a person or property, apply § 2X1.1 (Attempt or Conspiracy) in respect to such other offense.

GUIDELINES, *supra* note 1, § 2K1.6.

Kikumura was mistakenly sentenced under § 2K1.6(a)(1). *Kikumura*, 918 F.2d at 1106 n.27. The Third Circuit noted that 18 U.S.C. § 844(d) (1988) covers two classes of offenders: "those who transport explosives *themselves* intending to harm people and damage property, and those who transport explosives *themselves* with intent or knowledge that *others* will or might use them to harm people or damage property." *Id.* at 1105. In the court's view, if a defendant intended to kill people, he should be sentenced under § 2K1.6(a)(2). However, if he did not intend to kill people, he should be sentenced under § 2K1.6(a)(1). *Id.* at 1105-06. Because Kikumura was sentenced under

as the two firearms⁶³ Guidelines.⁶⁴ However, the court disagreed and found that under the specific language of these Guidelines, the Sentencing Commission had not adequately considered intent to murder into the base level.⁶⁵ Therefore, the trial court's departure in sentencing was permissible.⁶⁶

D. *The Reasonableness of the Departure*

The *Kikumura* court then considered whether the magnitude of the departure itself was reasonable.⁶⁷ According to the court, Congress expressly directs that courts of appeals should affirm "all departures that

§ 2K1.6(a)(1), which did not consider his intent to commit murder, the district court's departure was permissible. *Id.*

63. Section 2K2.1 provides in relevant part:

Receipt, Possession, or Transportation of Firearms and Other Weapons by Prohibited Persons

- (a) Base Offense Level: 9
- (b) Specific Offense Characteristics

.....

(2) If the defendant obtained or possessed the firearm solely for sport or recreation, decrease by 4 levels.

(c) Cross Reference

(1) If the defendant used the firearm in committing or attempting another offense, apply the guideline in respect to such other offense, or § 2X1.1 (Attempt or Conspiracy) if the resulting offense level is higher than that determined above.

GUIDELINES, *supra* note 1, § 2K2.1.

Section 2K2.2 provides in relevant part:

Receipt, Possession or Transportation of Firearms and Other Weapons in Violation of National Firearms Act

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristics

.....

.....

(3) If the defendant obtained or possessed firearm solely for sport, recreation, or collection, decrease by 6 levels.

(c) Cross Reference

(1) If the defendant used the firearm in committing or attempting another offense, apply the guideline for such other offense or § 2X1.1 (Attempt or Conspiracy), if the resulting offense level is higher than that determined above.

Id. § 2K2.2. The Third Circuit noted that the firearms guidelines start with a presumption that when a defendant illegally possesses weapons, he intends to use them unlawfully. *Kikumura*, 918 F.2d at 1109. The court nevertheless concluded that a general intent to use the firearms unlawfully is sufficiently different from the intended unlawful use of shooting and killing someone that the consideration of intended unlawful uses generally in the base offense levels in §§ 2K2.1(a) and 2K2.2(a) did not preclude departure on the basis of an intent to commit murder. *Id.*

64. *Id.* at 1104.

65. *Id.* at 1109.

66. *Id.* at 1109.

67. *Id.* at 1110.

are not unreasonable.”⁶⁸ Thus, the district courts are entitled to “a substantial amount of discretion” in making this determination.⁶⁹ Quoting the First Circuit Court of Appeals, the *Kikumura* court noted:

District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier’s superior ‘feel’ for the case.⁷⁰

Following the lead of other courts of appeals, the Third Circuit concluded that a reviewing court must use objective standards to determine whether or not a departure is reasonable.⁷¹ The Third Circuit further found that the Guidelines themselves provide these objective standards, and that a reviewing court must analogize to the Guidelines to make this determination.⁷²

Moreover, the court reasoned that analogies to the Guidelines are useful for determining what offense level a defendant’s conduct resembles.⁷³ The court noted that there are two categories of analogies.⁷⁴ First, a court could analogize to aggravating conduct that would constitute a separate offense under a different Guideline.⁷⁵ Second, a court could analogize to an aggravating circumstance that constitutes a special offense characteristic in Guidelines other than those applied to the de-

68. *Id.* (citing 18 U.S.C. § 3742(f)(3) (1988)). Section 3742(f)(3) provides that unless a court of appeals finds that a sentence was imposed in violation of law or was imposed as a result of an incorrect application of the Guidelines, and thus is unreasonable, “it shall affirm the sentence.” 18 U.S.C. § 3742(f)(3) (1988).

69. *Kikumura*, 918 F.2d at 1110 (citing *United States v. Ryan*, 866 F.2d 604, 610 (3d Cir. 1989)).

70. *Id.* (quoting *United States v. Diaz-Villafane*, 874 F.2d 43, 49-50 (1st Cir.), *cert. denied*, 493 U.S. 862 (1989)).

71. *Id.* at 1110. The *Kikumura* court reasoned that “fidelity to the policy undergirding the guidelines requires us at least to strive for some principled basis for reviewing the reasonableness of departures.” *Id.* at 1110-11; *see also* *United States v. Ferra*, 900 F.2d 1057, 1062 (7th Cir. 1990) (requiring use of objective standards in evaluating departures or sentencing disparity will reappear), *cert. denied*, 112 S. Ct. 1939 (1992). Numerous circuits have looked to the Guidelines for sentencing standards. *See, e.g.*, *United States v. Landry*, 903 F.2d 334, 340-41 (5th Cir. 1990) (evaluating reasonableness of upward departure); *United States v. Ferra*, 900 F.2d 1057, 1061-63 (7th Cir. 1990) (evaluating reasonableness of upward departure); *United States v. Kim*, 896 F.2d 678, 684-85 (2d Cir. 1990) (evaluating reasonableness of upward departure).

72. *Kikumura*, 918 F.2d at 1111. The *Kikumura* court noted that “[t]he guidelines themselves prescribe such an approach with respect to offender related departures pursuant to § 4A1.3.” *Id.* In addition, “[a] similar approach is required by statute when a district court imposes sentence for an offense with no applicable guideline.” *Id.* at 1112.

73. *Id.*

74. *Id.* at 1112-13.

75. *Id.* at 1112.

fendant.⁷⁶ By using objective standards and analogies to the Guidelines, the *Kikumura* court concluded that departures from the Guidelines would more likely be upheld as "reasonable."⁷⁷

E. *The Application of the Methodology to Kikumura*

In applying the methodology described above, the Third Circuit considered each aspect of Kikumura's conduct to determine the appropriate analogies.⁷⁸ First, the court examined Kikumura's previous arrest and his involvement in a terrorist training camp abroad to analogize Kikumura to a repeat offender.⁷⁹ Second, the Third Circuit upheld the district court's finding that Kikumura had intended to kill people and, therefore, analogized him to a defendant sentenced under the attempted murder guideline.⁸⁰ Third, the court accounted for Kikumura's extensive planning and treated it as a specific offense characteristic.⁸¹

76. *Id.* at 1113.

77. *See id.*

78. *Id.* at 1114-19.

79. *Id.* at 1114-15. With no prior convictions in the United States, Kikumura was classified under the Guidelines as a Category I offender at the sentencing hearing. *Id.* at 1094. A Category I offender is the least serious classification under the Guidelines. *See* GUIDELINES, *supra* note 1, at 201-17. At Kikumura's sentencing, however, the government introduced evidence regarding his prior terrorist activities abroad. *Kikumura*, 918 F.2d at 1096. Kikumura had been arrested on May 1, 1986, at an airport in Amsterdam while attempting to smuggle over two pounds of TNT flakes into the Netherlands. *Id.* At the time of his arrest, Kikumura had six detonators skillfully concealed in a transistor radio he was carrying. *Id.* In addition, the FBI provided an affidavit detailing Kikumura's activities in a terrorist training camp in Lebanon. *Id.* at 1096-97. While at the camp, Kikumura trained other members of his organization, the Japanese Red Army (JRA). *Id.* at 1097. Based upon these activities, the Third Circuit thought it reasonable to analogize Kikumura to a Category VI offender. *Id.* at 1115. A Category VI offender is the most serious classification under the Guidelines. *See* GUIDELINES, *supra* note 1, at 201-17.

80. *Kikumura*, 918 F.2d at 1115-16. The *Kikumura* court concluded that the seriousness of Kikumura's activities warranted an analogy to the attempted murder guideline. *Id.* at 1115. In fact, the court thought it appropriate to treat Kikumura like an offender who had attempted six murders. *Id.* Under the Guidelines, attempting to kill six people would increase a defendant's offense level by five levels. *Id.* The Third Circuit noted that departing any higher than five levels would fail to comport with the clear and convincing evidence standard. *Id.* at 1116. For a further discussion of the Third Circuit's adoption of the clear and convincing evidence standard, see *supra* notes 29-46 and accompanying text.

81. *Kikumura*, 918 F.2d at 1116. The Third Circuit concluded: "[W]e think that Kikumura's extraordinarily meticulous planning makes . . . his conduct substantially more culpable than that of most defendants charged with attempted murder." *Id.* Accordingly, the Third Circuit found that the district court could reasonably have imposed a two-level increase on this ground. *Id.* (citing GUIDELINES, *supra* note 1, § 5K2.0).

The Third Circuit, however, rejected the district court's reliance on the Guideline for disrupting a governmental function. *Id.* at 1116. Under this Guideline, "the Commission intended to punish more harshly criminal conduct

Finally, the court examined Kikumura's extreme conduct and endangerment of public safety and analogized him to a defendant sentenced under that guideline.⁸² Based on these analogies, the Third Circuit found that the district court's departure from the Guidelines was unreasonable and remanded the case.⁸³ On remand, Kikumura was sentenced to 262 months, a three year term of supervised release, and a special assessment of \$600.⁸⁴

IV. POLICY CONSIDERATIONS

The *Kikumura* decision raises important policy questions concerning prosecutorial discretion. In his concurring opinion, Judge Rosenn discussed the government's manipulation of the charge and the sentencing.⁸⁵ According to Judge Rosenn, "the sentencing guidelines [may] have replaced judicial discretion over sentencing with prosecutorial discretion."⁸⁶ As an example, he pointed out that Kikumura was not convicted of attempted murder, but that was the Guideline the district court relied upon most when sentencing him.⁸⁷ The government, therefore, had a greater opportunity to obtain a severe sentence in *Kikumura* because, in a sentencing hearing, Kikumura was not afforded the same procedural protections that would have been provided if he had been charged and tried for multiple attempted murders.⁸⁸

that frustrates the normal, day-to-day operation of government." *Id.* at 1117. The Third Circuit decided that Kikumura's conduct did not rise to this level. *Id.*

82. *Id.* at 1118-19. The Third Circuit thought that an extreme conduct departure was justified due to the damage Kikumura's bombs would have caused. *Id.* The court noted that if the bombs were detonated in a crowded area, "it is almost a statistical certainty that some people would be killed instantly, others would escape largely unharmed, and still others would sustain permanent injuries or die slowly from their wounds." *Id.*

In addition, the court noted that the public safety departure considers that, had he successfully detonated his bombs in downtown Manhattan, Kikumura would have significantly endangered the safety and welfare of the general public. *Id.* Hence, the court concluded that, under guidelines §§ 5K2.8 and 5K2.14, "the maximum allowable upward departure for extreme conduct and endangerment of public safety would be five levels." *Id.* at 1119.

83. *Id.* at 1119. According to the Third Circuit, Kikumura's offense level was 32. *Id.* In addition, Kikumura was categorized as a Category VI offender. *Id.* The applicable guideline range for this category is between 210 and 262 months. *Id.* Therefore, the Third Circuit held that the district court's sentence of 360 months was unreasonable and set it aside. *Id.*

84. *United States v. Kikumura*, 947 F.2d 72, 75 (3d Cir. 1991).

85. *Kikumura*, 918 F.2d at 1119 (Rosenn, J., concurring).

86. *Id.* (Rosenn, J., concurring). The "[g]overnment'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." *Id.* (Rosenn, J., concurring).

87. *Id.* at 1120 (Rosenn, J., concurring). For a further discussion of the guidelines relied on by the district court, see *supra* notes 61-66 and accompanying text.

88. *Kikumura*, 918 F.2d at 1120 (Rosenn, J., concurring). "[T]he Govern-

Judge Rosenn argued that the Guidelines encourage the government to engage in such a manipulative strategy.⁸⁹ He noted that the Guidelines permit the sentencing court to consider uncharged criminal conduct as well as the defendant's intent in committing the offense.⁹⁰ Instead of achieving uniformity in sentencing, the Guidelines "have actually had the perverse effect of transferring discretion from the court to the prosecutor, who then exercises . . . discretion outside the system. . . ."⁹¹ Although prosecutorial control is not unconstitutional per se, it is open to abuse and could be applied in such a way as to violate the defendant's due process rights.⁹²

V. CONCLUSION

Kikumura establishes important precedent in the Third Circuit. In light of *Kikumura*, criminal defense attorneys should realize that if the government is moving for an "extreme" upward departure from the Guidelines, a defendant is entitled to heightened procedural protections.⁹³ Namely, the government must prove sentencing facts by clear and convincing evidence and the sentencing court may consider hearsay only if it is reasonably trustworthy.⁹⁴ In addition, defense attorneys should realize that a reviewing court will make analogies to existing Guidelines in order to determine whether a departure is reasonable.⁹⁵ This procedure, however, may cause serious difficulties for defense attorneys because "the reasonableness of departure does not always de-

ment 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." *Id.* (Rosenn, J., concurring). For a discussion of the procedural protections available to defendants at trial and at sentencing, see *supra* notes 29-36 and accompanying text.

89. *Kikumura*, 918 F.2d at 1120 (Rosenn, J., concurring).

90. *Id.* (Rosenn, J., concurring). See GUIDELINES, *supra* note 1, § 1B1.3(a)(4) (conduct relevant to determining applicable guideline range includes "the defendant's state of mind, intent, motive and purpose in committing the offense").

91. *Kikumura*, 918 F.2d at 1120 (Rosenn, J., concurring) (quoting FEDERAL COURTS STUDY COMMITTEE TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT, 62 (Dec. 22, 1989)).

92. *Id.* at 1121 (Rosenn, J., concurring) (citing *United States v. Roberts*, 726 F. Supp. 1359, 1368 (D.D.C. 1989) (prosecution's selective transfer of certain cases from state to federal court violated due process), *rev'd sub nom.* *United States v. Doe*, 934 F.2d 353 (D.C. Cir.), *cert. denied*, 112 S. Ct. 959 (1991)). According to Judge Rosenn, "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." *Id.* (Rosenn, J., concurring).

93. For a discussion of these heightened protections, see *supra* notes 37-55 and accompanying text.

94. For a discussion of the factfinding and hearsay issues, see *supra* notes 29-55 and accompanying text.

95. For a discussion of departure from the Guidelines, see *supra* notes 56-84 and accompanying text.

pend on . . . mathematical precision.”⁹⁶

Although the *Kikumura* court’s method for determining the reasonableness of upward departures from the Guidelines is principled, its application may lead to sentencing disparity; a result that the Guidelines were intended to avoid.⁹⁷ For example, the *Kikumura* court conceded that its test for determining the reasonableness of departures is not precise.⁹⁸ Sometimes a district court will depart on the basis of conduct it views as constituting a separate offense under the Guidelines.⁹⁹ Other times, a district court will depart on the basis of aggravating conduct that resembles specific offense characteristics.¹⁰⁰ As the Third Circuit noted, “competing analogies . . . will be plausible, or a series of factors will be present that cannot be neatly disentangled from one another and analyzed component by component.”¹⁰¹ Thus, a danger exists that a departure may, in fact, reflect an exercise of a judicial discretion under the guise of an analogy to the Guidelines.¹⁰²

From the government’s perspective, prosecutors must be sensitive to avoid violating the due process clause by manipulating a charge to gain an advantage in sentencing.¹⁰³ Thus, if the government repeatedly charges specific crimes in the indictment and repeatedly departs from the Guidelines to take advantage of the lesser procedural protections available to a defendant at sentencing, the government may be violating the defendant’s due process rights.¹⁰⁴

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96. *Kikumura*, 918 F.2d at 1113 (quoting *United States v. Shuman*, 902 F.2d 873, 877 (11th Cir. 1990)). “We are dealing here with *analogies* to the guidelines, which are necessarily more open-textured than *applications* of the guidelines.” *Id.*

97. The Guidelines state that “Congress sought *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders.” GUIDELINES, *supra* note 1, at 2.

98. *Kikumura*, 918 F.2d at 1113.

99. *Id.*

100. *Id.*

101. *Id.*

102. For a discussion of judicial discretion under the Guidelines, see *supra* note 86.

103. See *United States v. Roberts*, 726 F. Supp. 1359, 1368 (D.D.C. 1989), *rev’d sub nom. United States v. Doe*, 934 F.2d 353 (D.C. Cir.), *cert. denied*, 112 S. Ct. 268 (1991).

104. See *Kikumura*, 918 F.2d at 1121 (Rosenn, J., concurring).