Criminal Law—Minnesota Sentencing Guidelines: Plea Agreements Are Not Sufficient Justification for Departure

Kimberly K. Hall

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol23/iss1/10
CRIMINAL LAW—MINNESOTA SENTENCING GUIDELINES: PLEA AGREEMENTS ARE NOT SUFFICIENT JUSTIFICATION FOR DEPARTURE

State v. Givens, 544 N.W.2d 774 (Minn. 1996)

I. INTRODUCTION ................................................................................ 189
II. BACKGROUND .................................................................................. 190
   A. Indeterminate Sentencing ............................................................ 190
   B. The Emergence of Sentencing Guidelines ................................. 191
      1. Development in Minnesota .................................................... 192
      2. How the Guidelines Function ............................................... 193
   C. Plea Bargains as a Reason for Departure from the Guidelines ...... 194
III. STATE V. GIVENS ........................................................................... 196
   A. The Facts ..................................................................................... 196
   B. The Court's Holding and Reasoning ............................................ 197
IV. ANALYSIS OF THE GIVENS DECISION ........................................ 198
   A. Return to Disparity in Sentences ............................................... 199
   B. Straining Judicial Resources ..................................................... 199
V. CONCLUSION ...................................................................................... 202

I. INTRODUCTION

When the Minnesota Sentencing Guidelines Commission promulgated the Minnesota Sentencing Guidelines in 1980, it significantly changed criminal sentencing practices by demanding greater uniformity. This quest for uniformity in sentencing destroyed the plenary sentencing discretion that judges once enjoyed. However, in an attempt to retain flexibility within the guidelines scheme, the Commission created “departures,” which allow judges to depart from the guidelines’ presumptive sentences when particular defendants have displayed atypical behavior. Although

1. MINN. SENTENCING GUIDELINES & COMMENTARY § 1 (1996).
2. Under the indeterminate sentencing system, judges could impose any sentence from probation to the maximum prison term that the law authorized. Richard S. Frase, The Uncertain Future of Sentencing Guidelines, 12 LAW & INEQ. J. 1, 7 (1993); see also infra notes 6-9 and accompanying text (describing indeterminate sentencing in greater detail).
3. See DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF
the Commission considered many factors which would warrant a departure from the guidelines, it did not address whether plea agreements constitute sufficient justification for departure.

In *State v. Givens*, the Minnesota Supreme Court considered whether compliance with the terms of a plea agreement warrants a departure from the guidelines. The supreme court, in reversing the court of appeals' decision, held that a plea agreement provided sufficient justification for departing from the guidelines — provided the defendant enters into the plea agreement voluntarily, knowingly, and intelligently.

This Case Note explores the issues that arise when a sentencing court departs from the guidelines based upon a plea agreement. Part II of this Case Note discusses indeterminate sentencing, the promulgation of Minnesota's sentencing guidelines, and plea agreements as a justification for departing from the guidelines. Next, Part III sets forth the facts and procedural history of *Givens*. Part IV analyzes the effects the decision will have on the criminal justice system. This Case Note concludes that *Givens* will create disparities in sentencing. In turn, the decision will reduce a defendant's incentive to enter into a plea bargain, thus burdening already strained judicial resources. Finally, this Case Note argues that the Commission should formulate plea agreement guidelines to shield against the negative ramifications of *Givens*.

**II. BACKGROUND**

**A. Indeterminate Sentencing**

From the nineteenth century until the late 1970s, all of this nation's states had "indeterminate" criminal sentencing systems. A typical indeterminate system called for the sentencing judge to impose a minimum and maximum incarceration term upon the offender based on the judge's opinion of how long it would take to rehabilitate the criminal. Under this system, judges were given broad discretion to determine minimum and maximum incarceration terms. After the offender served his or her

---

**MINNESOTA'S SENTENCING GUIDELINES 122-23 (Daniel J. Freed ed., 1988); see also infra notes 35-37 and accompanying text (discussing aggravating and mitigating factors).**


5. See id.


7. See id. The indeterminate system is based on a rehabilitative rationale — i.e., the primary purpose of incarceration is to rehabilitate, not punish, offenders. See id. § 4.1, at 70.

minimum term, a parole board determined if the offender had undergone sufficient rehabilitation. When the offender was able to substantiate that he or she had reformed, the individual was released before serving his or her maximum term.9

Despite its long history, the indeterminate system received a great deal of criticism during the mid-1970s.10 Critics perceived two primary flaws in the system. One was the glaring disparity in the lengths of offenders' prison sentences, which stemmed from the broad discretion vested in sentencing courts.11 The other major drawback was the uncertainty that resulted from a parole commission's authority to reduce sentences arbitrarily.12 These criticisms led most states to reexamine their criminal sentencing practices and to develop the systems employed today.13

B. The Emergence of Sentencing Guidelines

In response to the aforementioned criticisms, states began to adopt determinative sentencing systems in the late 1970s.14 Determinative sentencing systems differ from indeterminate systems in two important ways.15 First, the sentencing judge imposes a single term instead of a minimum and maximum term as in the indeterminate system.16 Second, there is no

9. See CAMBELL, supra note 6, §1.3, at 9.
11. See Ilene H. Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. CRIM. L. & CRIMINOLOGY 883, 896 (1990). Studies have revealed large disparities in the sentences given to similarly-situated defendants. See id. at 895. For example, a study of judges from the Second Circuit indicated that for a case where a defendant was convicted of nine counts of extortionate credit transactions and related tax violations but had no previous similar convictions, the disparity of sentences from those judges surveyed ranged from twenty years imprisonment and a $65,000 fine to three years imprisonment and no fine. See ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY 6 (1974).
12. See Nagel, supra note 11, at 896.
14. See id. § 4.4, at 78.
15. See id.
16. See id.
subsequent parole board decision to release the prisoner earlier than the imposed term, since determinate sentencing eliminates the need for parole boards.\footnote{17}

1. Development in Minnesota

Minnesota pioneered the determinative sentencing system.\footnote{18} In 1978, the Minnesota Legislature created a specialized administrative body, the Minnesota Sentencing Guidelines Commission, to develop and implement a new criminal sentencing system.\footnote{19} The Commission’s primary goal was to establish a system that would produce greater uniformity in sentencing, thereby assuring that similarly-situated individuals, convicted of the same crime, would receive comparable sentences.\footnote{20}

The Commission began working in the spring of 1978.\footnote{21} The first issue the Commission had to resolve was how to develop the guidelines.\footnote{22} The emerging literature suggested two methods – the descriptive method and the prescriptive method.\footnote{23} The first alternative, the descriptive method, predicates future sentences on past practices.\footnote{24} This model’s premise is that any disparity in sentencing practices will quickly dissipate by bringing future sentences close to the model practice of the past.\footnote{25} The descriptive system would “embody undesirable as well as desirable features of past sentencing practice[s].”\footnote{26} Under the second alternative, the prescriptive method, the designated body establishes guidelines for future sentences by referring to those values it identifies as important.\footnote{27} Strictly applying these guideline standards would reduce sentence disparity.\footnote{28}

Ultimately, the Commission decided to use the prescriptive method in formulating the guidelines.\footnote{29} Recognizing “[t]he prescriptive guide-

\footnote{17. See id. § 4.4, at 78-79. “Only credit for time served, good time, and work time, can reduce the term imposed on sentencing day.” Id.}
\footnote{18. See id. § 4.8, at 90.}
\footnote{20. See MINN. SENTENCING GUIDELINES & COMMENTARY § I (1996).}
\footnote{21. See PARENT, supra note 3, at 28.}
\footnote{22. See id. at 34.}
\footnote{23. See id.}
\footnote{24. See id.}
\footnote{25. See id.}
\footnote{26. Id.}
\footnote{27. See PARENT, supra note 3, at 34.}
\footnote{28. See id. at 35.}
\footnote{29. See id. at 37. The Commission developed the guidelines using an open access method, whereby any interested members of the community could attend Commission meetings. See id. at 46. The open access method gave the public and
lines are dynamic rather than static," the Commission agreed to "assess the goals in operation and modify them as deemed necessary."

In early 1980, the newly-formulated guidelines, using the prescriptive method, were put into operation.

2. How the Guidelines Function

The Minnesota Sentencing Guidelines determine whether a convicted felon should be sentenced to prison or probation, and if so, for how long. The severity of the convicted offense and the nature of the felon's prior criminal history are the two major variables that are used to derive a convicted felon's presumptive sentence. The felon's offense and criminal history each receive a numerical score. The judge then locates these two numbers on a sentencing grid, which provides the presumptive sentence.

The guidelines allow the sentencing judge to depart from the presumptive sentence only if there are mitigating or aggravating factors.

members of the criminal justice system an opportunity to present information and to influence policy-making. See id. In addition, the open access process "informed the public and enhanced the acceptability of the emerging guidelines." Id. at 48.

30. Id. at 35.


33. Id.

34. Id. To determine a defendant's offense score, the judge consults the "Offense Severity Reference Table," which groups felonies according to their severity. Id. The individual offender's criminal history is of secondary importance to the severity of the offense. See id. § II.B.01 commentary at 5. The criminal history score takes into account the individual's prior felony record, custody status at the time of the current offense, prior misdemeanor record, and, for young adult felons, prior juvenile record. See id. § II.B.1-4 commentary at 6-17. The criminal history score is computed by allocating "points" to these categories. See id. § II.B at 5.

35. State v. Hennum is a case where mitigating factors justified a downward departure from the guidelines' presumptive sentence. 441 N.W.2d 793 (Minn.
The guidelines provide a non-exclusive list of mitigating and aggravating factors which may warrant a departure. A "downward dispositional departure" occurs when the guidelines indicate the defendant should be sentenced to prison, but the judge sentences the defendant to probation. Similarly, an "upward durational departure" would occur when the guidelines indicate that the defendant should be imprisoned for thirty-six months, but the judge instead sentences the defendant to forty-eight months.

C. Plea Bargains as a Reason for Departure from the Guidelines

Even though the guidelines' list of departure factors is extensive and thorough, it does not address whether plea bargains are sufficient justification for departing from the presumptive sentence. The Commission did not begin working on departure standards until late in the process.

In Hennum, the defendant was convicted of second-degree felony murder in the shooting death of her husband. Id. at 794. Over the course of the defendant's marriage, she had been physically and mentally abused by the victim. Id. at 795. On the night of the murder, the victim came home drunk and physically abused the defendant. Id. at 795-96. The supreme court reduced the defendant's sentence from 102 months to 54 months, stating that the repeated physical abuse mitigated the defendant's culpability. Id. at 801.

State v. Schantzen is a case where aggravating factors justified an upward departure from the guidelines' presumptive sentence. 308 N.W.2d 484 (Minn. 1981). In Schantzen, the defendant, who was convicted of aggravated robbery, received the maximum 20-year term instead of the presumptive sentence of 40 months in prison. Id. at 485-86. The trial court justified the departure because just before fleeing the scene of the robbery, the defendant sprayed a chemical irritant in the victims' faces while they lay handcuffed on the floor. Id. The supreme court concluded that the victims were treated with particular cruelty because the defendant's conduct "was of a kind not usually associated with the commission of the offense in question." Id. at 487.

The listed mitigating factors include: (1) whether the victim was an aggressor in the incident; (2) whether the offender played a minor or passive role; (3) whether the offender became involved under circumstances of coercion or duress; (4) whether the offender lacked substantial capacity for judgment because of physical or mental impairment; and (5) other substantial grounds that tend to excuse or mitigate the offender's culpability, although not amounting to a defense. Id. § II.D.2.a.

The listed aggravating factors include: (1) whether the victim's vulnerability was known or should have been known by the offender; (2) whether the victim was treated with particular cruelty; (3) whether the victim was injured; (4) whether the offense was a "major economic offense"; (5) whether the offense was a major controlled substance offense; (6) whether the offender committed, for hire, a crime against the person; (7) whether the offender is a "patterned sex offender"; and (8) whether the offender committed the crime as part of a group of three or more persons who all actively participated in the crime. Id. § II.D.2.b.

MINN. SENTENCING GUIDELINES & COMMENTARY § IV (1996).

Id.
because it found departure issues difficult to consolidate.\textsuperscript{40} In particular, the Commission found that the plea agreement issue created a great deal of controversy. The Commission recognized that, on one hand, plea agreements play an integral part in the criminal justice system.\textsuperscript{41} On the other hand, plea agreements have the potential to subvert the guidelines’ purpose of like sentences for like offenses.\textsuperscript{42} Therefore, the Commission declined to make any changes regarding the plea bargaining process in the initial guidelines.\textsuperscript{43} The Commission thought it was best first to implement the guidelines and then to study plea agreements within the guidelines scheme.\textsuperscript{44} The Commission, in effect, deferred to the courts on the issue of whether plea agreements warrant departures from the guidelines.

Historically, Minnesota courts have not permitted plea bargains to serve as a justification for departing from the guidelines.\textsuperscript{45} In State v. Garcia, the state supreme court addressed for the first time whether compliance with the terms of a plea agreement warrants a departure from the guidelines.\textsuperscript{46} The court held that

\textsuperscript{40} See Parent, supra note 3, at 168.
\textsuperscript{41} See id. at 209.
\textsuperscript{42} See id.
\textsuperscript{43} See Martin, supra note 19, at 281. It is a difficult task to draft plea agreement guidelines which are both meaningful and enforceable. See Richard S. Frase, Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent’s Structuring Criminal Sentences: The Evolution of Minnesota’s Sentencing Guidelines, 75 Minn. L. Rev. 727, 752 (1991). The task of drafting plea agreement guidelines requires a large database. Such databases did not exist in 1980, see id., and do not exist today, Telephone Interview with Debra Dailey, Director, Minnesota Sentencing Guidelines Commission (Nov. 19, 1996).
\textsuperscript{45} See e.g., State v. Garcia, 302 N.W.2d 643, 647 (Minn. 1981) (holding that a negotiated plea purportedly concerning the sentence to be imposed “does not create a 'substantial and compelling' circumstance which may be relied upon as justifying departure from the guidelines”), overruled in part by State v. Givens, 544 N.W.2d 774, 777 n.4 (Minn. 1996); State v. Pearson, 479 N.W.2d 401, 404-05 (Minn. Ct. App. 1991); State v. Pendzimas, 379 N.W.2d 247, 248 (Minn. Ct. App. 1986); State v. Theison, 363 N.W.2d 867, 869 (Minn. Ct. App. 1985).
\textsuperscript{46} 302 N.W.2d at 647. Garcia entered into a plea negotiation with the prosecutor after his arrest for forcing a woman into his car at gunpoint, kidnapping her, and sexually assaulting her for two hours. Id. at 645. He agreed to plead guilty to kidnapping, and in exchange, the prosecutor dropped a second charge of criminal sexual conduct and recommended that the court impose a sentence of no more than 50 months. Id. The kidnapping charge carried a presumptive sentence of 26 months probation. See id. After the judge sentenced Garcia to 45 months in prison, Garcia appealed the upward departure from the presumptive sentence. Id.
an attempt such as this by the parties to limit sentence duration does not create a substantial and compelling circumstance which may be relied upon as justifying a departure from the guidelines. Only the court, acting in accordance with the guidelines, and not the parties, has the authority to determine the appropriate sentence.47

Courts followed the Garcia precedent from 1981 through 1995.48 However, in 1996, the Minnesota Supreme Court departed from Garcia and its progeny in State v. Givens.49

III. STATE V. GIVENS

A. The Facts

In December 1992, Steven Givens robbed seventy-four-year-old Clara Gullikson.50 Pursuant to a plea agreement with a Hennepin County prosecutor, Givens pled guilty to the charge of first-degree burglary.51 In exchange, the prosecutor dismissed an additional charge of simple robbery and submitted a sentencing recommendation to the district court.52 The court sentenced Givens to ninety-six months, two times the mandatory presumptive sentence for first-degree burglary under the guidelines.53 The court stayed execution of the sentence and placed Givens on probation for seven years.54 The imposed sentence was thus a “downward dispo-

47. Id. (internal quotation omitted).
48. See supra note 45 (citing cases).
49. 544 N.W.2d 774 (Minn. 1996).
50. Id. at 775. Givens entered Gullikson’s apartment building, signed in at the security desk, and falsely stated he had videotapes to deliver. Id. The record contained no evidence as to why Givens selected Gullikson’s apartment. Id. When Gullikson answered the door, Givens grabbed her cane, pushed her to the floor, and took her purse. Id.
51. Id. Minnesota’s first-degree burglary statute provides in pertinent part: Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building, commits burglary in the first degree and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more the $35,000 or both, if . . . the burglar assaults a person within the building or on the building’s appurtenant property. MINN. STAT. § 609.582, subd. 1(c) (1996).
52. Givens, 544 N.W.2d at 775. The prosecutor recommended that the district court depart upward from the presumptive sentence mandated by the guidelines, but stay the sentence and order Givens to enter chemical dependency treatment. Id.
53. See State v. Givens, No. C2-95-36, 1995 WL 130621, at *1 (Minn. Ct. App. Mar. 28, 1995). The form of first-degree burglary committed by Givens had an offense severity score of seven and Givens’ criminal history score was zero. Thus, according to the guidelines, the presumptive sentence was a prison term of 48 months. See id.
54. See id.
sitional departure” and an “upward durational departure.”55 In both types of departures, the district court must provide written reasons for forgoing the presumptive sentence.56

In 1994, Givens violated his probation, and the district court imposed Givens’ ninety-six-month stayed sentence.57 The Minnesota Court of Appeals reversed the district court’s decision,58 concluding there were no aggravating factors justifying the upward durational departure.59 Appealing the intermediate court’s decision, the State asked the Minnesota Supreme Court to establish a rebuttable presumption, whereby a defendant who has agreed to a sentence departure as a part of a plea bargain is deemed to have waived his or her right to be sentenced under the guidelines.60

B. The Court’s Holding and Reasoning

In Givens, the Minnesota Supreme Court held that a plea agreement is sufficient justification for departing from the guidelines’ presumptive

55. Givens, 544 N.W.2d at 775; see also supra notes 38-39 and accompanying text.
56. See Givens, 544 N.W.2d at 775. The district court cited the victim’s vulnerability due to age, an aggravating factor from the guidelines’ non-exclusive list, as the reason for the upward durational departure. Id. The district court did not give a reason for the downward dispositional departure. Id.
57. Id.
58. Id. at 776. Givens argued that the facts necessary to support the district court’s durational departure were absent in this case. See id. Givens asserted that in order for the court to depart from the presumptive sentence based on an aggravating factor, a defendant must take advantage of that factor. See id. at 775.
59. See id. The court of appeals held that “in order for vulnerability due to age to be an aggravating factor, a defendant must exploit that vulnerability to commit the offense.” Id. No evidence suggested that Givens knew Gullikson was 74 years old when he chose to knock on her door, that he would not have attempted to steal from anyone who opened the door. Thus, the court reasoned, it could not assume Givens “exploited” Gullikson’s age in order to grab her purse. See id. An upward durational departure was not warranted, because aggravating circumstances did not exist. See id.
60. Id. The State argued that it is disingenuous for a defendant to agree to a particular sentence as part of a plea agreement and subsequently challenge the validity of that sentence. Petitioner’s Brief at 6, State v. Givens, 544 N.W.2d 744 (Minn. 1996) (No. C2-95-36). Therefore, the State proposed “that when a defendant freely and voluntarily enters into a plea which encompasses an agreement on sentencing . . . [the] agreement [sh]ould create a rebuttable . . . presumption of the validity of that sentence.” Id. at 7. Even though the State’s argument may make sense, the negative consequences of such a presumption far outweigh any concerns of disingenuity. See infra notes 68-85 and accompanying text. Furthermore, the court does not have the authority to decide whether or not plea agreements are sufficient justification for departing from the guidelines. Only the legislature, through the sentencing commission, has the authority to make this decision. See PARENT, supra note 3, at 242.
sentencing scheme. The court first reasoned that "it has long been settled law that courts will honor a defendant's lawful 'intentional relinquishment or abandonment of a known right or privilege.'" In addition, the court recognized that defendants waive their right to a jury trial by entering into plea agreements. The court saw "no reason not to allow" a defendant to relinquish another right pursuant to a plea agreement. Therefore, the court concluded, a defendant who enters into a plea bargain may relinquish his rights under the guidelines, and no further justification for departure is needed.

After concluding that a plea agreement may extinguish a defendant's rights under the guidelines, the court made a qualifying statement: a plea agreement will operate as a waiver and justification for departure only if the defendant has been advised of: (1) his or her right to be sentenced under the guidelines, (2) the possibility of departure if the plea agreement is signed, and (3) the opportunity to consult counsel. However, the court never inquired into the propriety of Givens' plea agreement, because it found aggravating circumstances to support the trial court's departure.

IV. ANALYSIS OF THE GIVENS DECISION

The Givens decision is the first case in Minnesota to allow a departure from the guidelines based on a defendant's decision to enter into a plea agreement. This decision is troubling for two reasons. First, Givens is inconsistent with the guidelines' purpose of like sentences for like offenses. Second, Givens will discourage defendants from entering into plea agreements. Consequently, a decrease in plea agreements will strain judicial resources.

61. Givens, 544 N.W.2d at 777.
62. Id. (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
63. Id.; see also Brown v. State, 449 N.W.2d 180, 184 (Minn. 1989) (explaining that a defendant who knowingly and understandingly enters into a plea agreement waives his right to a jury trial); State v. Ford, 397 N.W.2d 875, 880 (Minn. 1986) (stating that a guilty plea by a defendant who is represented by counsel has traditionally operated, in Minnesota and in other jurisdictions, as a waiver of the right to a jury trial); Saliterman v. State, 443 N.W.2d 841, 844 (Minn. Ct. App. 1989) (holding that a defendant who enters into a plea agreement may waive his right to a jury trial).
64. Givens, 544 N.W.2d at 777.
65. Id.
66. Id.
67. Id. Specifically, the court concluded that the trial court acted reasonably in departing upward from the guidelines, since Givens exploited the victim's vulnerability. Id. at 776.
68. See infra notes 70-73 and accompanying text.
69. See infra notes 74-80 and accompanying text.
A. Return to Disparity in Sentences

The *Givens* decision will increase disparity in sentences because it is, in effect, a return to indeterminate sentencing in plea agreement situations. A pre-guidelines judge was not required to provide reasons for a sentence and was free to impose any sentence he or she desired within a broad statutory range. In contrast, under the guidelines, a judge must find either an aggravating or mitigating factor before departing from the guidelines. The *Givens* court, however, removed the requirement that judges must provide a reason for departing from the guidelines when a defendant enters into a plea agreement. Therefore, under *Givens*, a judge once again may impose any sentence desired simply by stating that the defendant waived his or her rights under the guidelines.

In sum, *Givens* restores a judge's discretionary power to that of a pre-guidelines judge, who was not required to give reasons for his or her sentence and who was constrained only by broad statutory penalty ranges. The disparity seen in sentences during pre-guidelines practice will return. As the disparity in sentencing increases, the primary goal of the guidelines - like sentences for like offenses - will be completely subverted.

B. Straining Judicial Resources

Not only will *Givens* subvert the purpose of the guidelines, but it will also reduce the total number of defendants who are willing to enter into plea agreements. Thus, *Givens* will further strain a system that is already struggling to meet the demands placed upon it. A defendant who enters into a plea bargain is a rational decision-maker seeking to minimize his sentence and avoid risk. As a rational actor, a defendant evaluates a pro-

---

70. See supra notes 6-9 and accompanying text; infra notes 81-82 and accompanying text.
71. See MINN. SENTENCING GUIDELINES & COMMENTARY § II.D.2.a-b (1996); see also supra notes 35-37 and accompanying text. Evidence suggests that the guidelines have successfully reduced sentencing disparity. See, e.g., Frase, supra note 43, at 736-37.
72. See State v. Givens, 544 N.W.2d 774, 777 (Minn. 1996).
73. See MINN. SENTENCING GUIDELINES & COMMENTARY § 1 (1996) (stating the purpose and principles of the guidelines).
75. See Tung Yin, Comment, Not a Rotten Carrot: Using Charges Dismissed Pursu-
posed plea bargain by calculating the punishment expected under the plea agreement. The defendant then compares the plea agreement punishment with the expected punishment from a guilty verdict, multiplied by the probability that he would be convicted if the case went to trial. If the plea agreement leads to a more certain, less severe punishment, the defendant probably will plead guilty. Givens, however, eliminates the element of certainty, thus raising the defendant's risk.

Under Givens, a defendant's incentive to enter into a plea bargain will decrease because the judge's broad sentencing discretion makes the actual sentence uncertain. For example, the defendant possibly could receive the statutory maximum sentence, and the judge would not have to provide a reason for the sentence. If, on the other hand, a defendant proceeds to trial, he or she can easily calculate the likely sentence by referring to the guidelines. Furthermore, under the guidelines, the probability of receiving the statutory maximum sentence is small. Only if extreme aggravating circumstances exist would a court impose such a sentence. The judge would have to detail the circumstances before sentencing a defendant to the statutory maximum. Therefore, a rational defendant, trying to avoid risk, likely would proceed to trial, because the calculated sentence is quite certain and the possibility of a severe sentence is small.

Ultimately, the decrease in incentives to enter a plea bargain will have a severe effect on judicial resources. "Because nearly ninety percent of all criminal cases are settled in plea bargains . . ., a small decrease in the number of pleas would represent a proportionately much larger increase

ant to a Plea Agreement in Sentencing Under the Federal Guidelines, 83 CAL. L. REV. 419, 458 (1995). "Rationality consists of three characteristics: (1) stable preferences, (2) constrained choices, and (3) self-maximization." Id. at 457 n.274 (citing ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 234 (1988)). "Thus rationality merely assumes that the defendant knows his preferences and acts to achieve the best results for himself." Id.

76. See id. at 458.

77. See id.

78. See id. In debating whether to accept plea bargains, defendants also consider other relevant factors, such as defense costs, the time involved for a trial, and time spent in pretrial detention. Steven Klepper et al., Discrimination in the Criminal Justice System: A Critical Appraisal of the Literature, in 2 RESEARCH ON SENTENCING, supra note 10, at 55, 83. Although these other factors play a role in a defendant's decision to enter into a plea agreement, all of the aforementioned factors are secondary to the defendant's primary objective – reducing the severity of his or her sentence. See id.

79. See supra notes 6-9 and accompanying text (describing the wide discretion afforded judges under the indeterminate sentencing system).

80. See supra notes 35-37 and accompanying text (discussing the circumstances under which judges may depart from the guidelines' presumptive sentences).
in the number of trials." Although the extent of the decrease in plea bargains cannot be predicted with certainty, even a subtle increase in the number of trials would produce troublesome effects that would reverberate throughout the system.  

The *Givens* decision poses a threat to judicial resources and to the guidelines' purpose of like sentences for like offenses. These threats must be addressed. The Commission has the authority to amend the guidelines and to correct the negative implications of *Givens* through the exercise of its delegated police power. The Commission should therefore formulate plea agreement guidelines providing that plea bargains are insufficient justification for departure from presumptive sentences. If, however, the Commission feels insufficient data exist to formulate such guidelines, it should, at the very least, require judges to provide written explanations.


82. See id. A slight change in the number of plea bargains could have a significant effect on the judicial system. See Warren E. Burger, *The State of the Judiciary*, 56 A.B.A. J. 929, 931 (1970) ("A reduction from 90 percent to 80 percent in guilty pleas requires the assignment of twice the judicial manpower and facilities – judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 percent trebles this demand.").

Suppose there are 100 convictions in a given court. See id. According to statistics, 90 would be settled by plea bargain and 10 by trial. See id. If the percentage of guilty pleas drops by 10%, then of the 100 convictions, 81 would be settled by plea bargain and 19 by trial. See id. The number of trials nearly would double from 10 to 19. See id. Statistics collected by the federal government place this hypothetical into context. In 1992, there were 893,630 state court felony convictions. See BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS – 1995, at 489 (1996). Of those convictions, plea bargains accounted for 820,662 of the dispositions while only 72,968 went to trial. If the percentage of guilty pleas drops by 10%, then of the 820,662 convictions in 1992, 738,595 would have been settled by plea bargain while courts would have had to hold 155,034 trials. See id. Thus, what may, at first glance, appear to produce a mere 10% increase in the number of trials would more than double the number of trials (from 72,978 to 155,034) held annually in this country. See id. This effect would certainly evaporate the judiciary’s precious resources.

83. See PARENT, supra note 3, at 242. The Commission specifically chose a prescriptive method in formulating the guidelines, so it could amend them in response to case law. See id.

84. See id. at 217. Parent argues that plea agreement guidelines are feasible and useful. Id. Parent also suggests that states should give their commissions enough time to formulate plea agreement guidelines at the outset. Id. at 209. Federal sentencing guidelines incorporate language that discusses plea agreements. See U.S. SENTENCING GUIDELINES MANUAL § 6B (1995). While no states currently have explicit plea agreement guidelines, the “Washington legislature [has] required its sentencing commission to promulgate charging and plea bargaining guidelines to govern prosecutorial discretion.” PARENT, supra note 3, at 179 n.2.

85. See Frase, supra note 43, at 752.
when they depart from the guidelines’ presumptive sentences under the guise of a plea agreement.

V. CONCLUSION

The sentencing system that Minnesota pioneered in the late 1970s will lose all meaning under the *Givens* decision. *Givens* will increase disparity in sentences by allowing plea agreements that are inconsistent with the Minnesota Sentencing Guidelines. *Givens* will also decrease the number of defendants willing to enter into plea agreements, since a sentence under the guidelines is more certain. Such a decrease in plea agreements will seriously strain judicial resources.

The Minnesota Sentencing Guidelines Commission has the authority to avert the negative ramifications of *Givens*. The Commission specifically chose to employ a prescriptive sentencing system so it could amend the guidelines in response to case law. The Commission should create plea agreement guidelines which state that plea bargains alone cannot justify departure from the guidelines’ presumptive sentences – before the negative implications of *Givens* are felt throughout the entire criminal justice system.

*Kimberly K. Hall*
The Honorable John B. Sanborn, Jr.