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WINDFALL JUSTICE: SENTENCES AT THE MERCY OF HYPERTECHNICALITY

Jack Nordby[†]

Once upon a time (a time not so remote as to be beyond the memories of many of us who still toil in the vineyards of justice), the severity of a criminal sentence was determined largely at the whim of the trial judge, who was guided only by vague considerations of suitability. Non-premeditated murder, for example, might be punished by anything from probation to forty years in prison.[1] A parole board exercised a similarly subjective power to temper the term with early release.[2] Then, about a quarter century ago, the legislature created a commission to establish sentencing "guidelines," said to be "advisory," to assist trial judges in devising sentences that would provide greater uniformity than had emerged under the earlier system.[3] This resulted in classification of offenses according to severity which, cross-referenced to the defendant's criminal record, yielded a "presumptive" sentence.[4] Now, in the case of the murderer mentioned above, instead of a range of zero to forty years, the scope would be 299–313 months.[5] The range of the judge's discretion, in other words, was abruptly pruned from forty years to fourteen months.

Although described as "advisory," the guidelines rather quickly became more nearly mandatory. Any deviation from the prescribed sentence must be justified as a "departure" under an incredibly complex and evolving set of often vague rules found in

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1. MINN. STAT. § 609.19 (2002).
2. *See* MINN. STAT. § 243.12, *repealed by* 1983 Minn. Laws 274.
3. *See* MINN. STAT. § 244.09 (2002).
4. MINN. SENTENCING GUIDELINES COMM'N, MINN. SENTENCING GUIDELINES AND COMMENTARY 19-23 (revised Aug. 1, 2004), *available at* http://www.msgc.state.mn.us/Guidelines/guide04.DOC.
5. *Id.* at 49. This assumes defendant has a clear prior record. *Id.*

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the guidelines themselves[6] (as interpreted, refined, and confused by innumerable appellate opinions).

Well-intended systems of governance (especially those designed to be flexible) have an apparently irresistible tendency to evolve into mechanisms of unforgiving rigidity. The "advisory" guidelines became "presumptive." The "presumptive" guidelines became all but mandatory. The bases for departure matured from helpful suggestions to indispensable elements to be proved, pronounced, and entered on the record at a precisely appointed time.

The apotheosis (or nadir) of this formulaic and ossifying pedantry was reached recently in *State v. Geller*.[7] Mr. Geller committed a burglary and fled from police in a high-speed chase, throwing marijuana and guns from the car before crashing it.[8] He pled guilty.[9] The judge announced he was considering an upward departure and solicited memoranda on the matter.[10] At sentencing, he imposed an upward departure, but neglected to state the reasons for it on the record.[11] The court of appeals remanded to provide an opportunity to remedy this omission under *Williams v. State*,[12] where the necessity of stating grounds to justify a departure had been emphasized.[13]

The Minnesota Supreme Court in turn reversed, holding that there is no remedy for such an oversight.[14] The opinion provides neither legal authority nor persuasive reasons why so draconian a result should flow from a judge's momentary lapse, or why a simple remand is not the obvious way to correct it. The opinion is a pure exercise of power, a flexing of minatory judicial muscle, so to speak, to "warn district courts."[15] The court takes no account of: (1) the unfairness to prosecutors of reducing sentences judges have

6. *Id.* at 24-31.
7. 665 N.W.2d 514 (Minn. 2003).
8. *Id.* at 515.
9. *Id.* at 515-16.
10. *Id.* at 516.
11. *Id.*
12. 361 N.W.2d 840, 844 (Minn. 1985). A number of court of appeals opinions had in similar circumstances simply and sensibly remanded. *See* State v. McAdory, 543 N.W.2d 692, 698 (Minn. Ct. App. 1996); State v. Garrett, 479 N.W.2d 745, 749 (Minn. Ct. App. 1992); State v. Sundstrom, 474 N.W.2d 213, 216 (Minn. Ct. App. 1991); State v. Pieri, 461 N.W.2d 398, 401 (Minn. Ct. App. 1990).
13. *Williams*, 361 N.W.2d at 843-44.
14. *Geller*, 665 N.W.2d at 517.
15. *Id.*

found justified; (2) more importantly perhaps, the unfairness to victims, whose violators may receive extraordinary windfalls in the form of early release; (3) the unfairness to the sentencing judge, whose moment of forgetfulness is elevated humiliatingly and unnecessarily to an irremediable defect;[16] or (4) the damage to the integrity and perception of the justice system itself, whose aspirations toward carefully considered sentences tailored to the myriad interests of particular cases are thus defeated. And—it bears repeating—no constitutional provision, no statute, no rule, no precedent required this outcome.

Thus can the tail come to wag the dog.

But any degree of certainty the *Geller* court might have thought it was injecting into sentencing must now be viewed in light of *Blakely v. Washington*.[17] In *Blakely*, the United States Supreme Court effectively rendered *Geller* obsolete by holding that *juries*, not judges (no matter how punctually articulate about their reasons), must find the facts justifying departures.[18] The opinion extended *Apprendi v. New Jersey*,[19] which had required jury findings of any facts used to raise a sentence beyond the prescribed maximum, by holding that *guideline sentences are such maximums*.[20] Thus, for those constitutional purposes, the maximum intentional murder sentence in Minnesota is not the forty-year outside figure of the statute, but the 299–313 months in the guidelines.

It is surely ironic, and not altogether a bad thing, that just as the guideline system was reaching a point of atrophy in some respects, hyper-complexity in others, and petrifaction in at least the *Geller* example, it should in effect be disemboweled by a single bolt from on high. For *Blakely* presages a revolution in sentencing; it is the epitaph to the guidelines system as we know it. Decisions such as this from time to time provide salutarily humbling experiences for courts (or should do so). Rarely has an opinion made nonsense

16. Within a few days of reading the *Geller* opinion and writing a commentary on it, I presided at a sentencing where I imposed a departure and forgot to state the reasons. I have done the same thing two or three times since. Although this may be attributable to shortcomings unique to myself, I doubt it.

17. 124 S. Ct. 2531 (2004).

18. *Id.* at 2538-39. Unless the defendant waives the right to jury trial on the allegations supporting a departure, and either stipulates to them or submits them to the judge for decision, they must be proved beyond a reasonable doubt to the jury. The decision rests on the federal constitutional right to jury trial and thus is binding on the states.

19. 530 U.S. 466 (2000).

20. *Id.* at 490.

(or at any rate greatly diminished sense) out of so many appellate opinions, trial court orders, statutes, commentaries, and other earnest and confident judicial pronouncements. For it tells us we have failed for so long to understand an important aspect of so familiar, rudimentary, and essential a thing as the right to trial by jury.

One hopes that in starting anew, as we must, we may rescue from the twenty-five year experiment what is valuable and constitutional, and eliminate what is not. [21]

21. The options appear to be these: (1) Jury findings of departure factors, but this would result in a great deal of highly damaging evidence, otherwise inadmissible, coming into the trial; (2) Bifurcated trials, with the departure evidence heard by the jury at the second or sentencing phase; (3) Bifurcated trials with a jury waived for the sentencing phase, which would then be heard only the judge; (4) Stipulations by defendants to the departure factors, eliminating the need for evidence; (5) Legislation providing precise sentences for all crimes; or (6) A return to discretionary sentencing within broad limits. It is likely the third and fourth options will, for practical reasons, be used in a majority of cases until a new system is devised.