Batman and the Penguin Eat Blakely

The Supreme Court term opens with strange bedfellows

By Dahlia Lithwick

I can think of at least four reasons why the government is in trouble long before the unusual two-hour oral argument starts this afternoon in two cases meant to clarify last summer's bombshell decision in Blakely v. Washington. But the most compelling is that the man forced to argue United States v. Booker and United States v. Fanfan today faces a rarely constituted dream team of Justices Antonin Scalia and John Paul Stevens. While these two formidable humans are almost always on opposing sides of an issue, when they conspire to use their superpowers toward the same ends, it's like watching worlds collide. Batman teams up with the Penguin.

There are other reasons the case is a tough sell. For one thing, these cases are supposed to determine whether the constitutional infirmities the court found in the Washington state guidelines in Blakely also exist in the Federal Sentencing Guidelines. But since the flaws in both systems are substantially the same, it's a matter of nitpicking, moon-walking, and hand-jiving to suggest the former are unconstitutional while the latter are fine. For another, five of the nine justices pretty much made up their minds on this issue last term, and it's evident almost instantly this afternoon that no one is budging. The final problem is that the great defender of the Federal Sentencing Guidelines today is Justice Stephen Breyer, who's at least somewhat compromised by the fact that he served on the same U.S. Sentencing Commission that drafted the guidelines. It's been suggested that Breyer should have recused himself from the case since his baby is on the block. I am not so sure. At no point today did he weep.

In a 5-4 decision last June, the court found a man in Washington had been deprived of his Sixth Amendment right to a jury trial when a judge increased what would have been a 49- to 53-month sentence for kidnapping his estranged wife to a 90-month sentence. The judge ratcheted up Blakely's jail time, finding that his actions—the kidnapping included duct tape, a fake coffin, and their young son—had been committed with "deliberate cruelty." The court insisted that when judges enhance criminal sentences by finding facts that are not pleaded to by the defendant or proved beyond a reasonable doubt before a jury, the right to a jury trial is violated.

This summer saw a national legal meltdown as federal courts reached stunningly different conclusions about whether Blakely obliterated the federal rules as well as Washington's. (The high court demurely refused to speak to that issue.) So some determined that Blakely gutted the federal rules, some decided the federal rules still applied, some cobbled together other methods to get sentencing facts before a jury, others produced strange alternate sentences, and still others simply delayed sentencing criminals until the Supreme Court sorted the mess out. The high court fast-tracked these two cases to finally pronounce on the constitutionality of the Federal Sentencing Guidelines.

The best argument the government can muster is that the federal guidelines are different from Washington's since they were promulgated not by a legislature but an arm of the judiciary: the sentencing commission.

Paul Clement, the acting solicitor general, starts by explaining that approximately 1,200 criminal sentencings take place in federal court each week, and they are all doomed if the guidelines are

unconstitutional. Scalia points out that the problem with the government argument is that whether the Federal Sentencing Guidelines are promulgated by a legislature or by a "quasi-judicial-entity" is immaterial. The purpose of the jury isn't to protect defendants against courts as opposed to legislatures; it's to protect them against judges. "This is the role of the jury," he says, "to find precisely the facts necessary to put you in jail."

Justice Ruth Bader Ginsburg points out that the sentencing commission isn't a judicial body since Congress weighs in on its rules. Notes Justice David Souter: "What is the difference in effect? That's the trouble I am having. The defendant in a courtroom is going to suffer the same effect [an enhanced sentence] whether this is a rule, a statute, or a guideline."

Clement offers a pragmatic argument—the guidelines are just too complicated to try every fact before a jury. And Souter replies: "Surely you can't be arguing that because the guidelines are complicated, the Sixth Amendment just evaporates?" Justice Stevens piles on, hammering away at Clement's claim that vast numbers of potential cases raise these types of issues.

When Clement insists that there would be a "tremendous impact" to gutting the guidelines, Scalia interrupts. "This may have a significant one-shot impact for cases not decided with Blakely in mind," he says. Judges would then arrange for juries to find the facts necessary to increase sentences. "What is the problem with that?"

Clement starts to explain that in some cases this is terrifically complicated. He tries to hypothesize a messy fraud case, but Stevens cuts him off. "Keep it simple," he says. "There are usually not a host of enhancing factors—just the drug quantity and a gun." Clement tries to return to his fraud prosecution, but again Stevens stops him: "Use the example I've given you," he hisses. With the gun.

Clement is undeterred. "Let me use my fraud example, and you may see a difference," he pleads. He argues that if there are thousands of victims of a telemarketing scheme, the jury could not find the sentence-enhancing number of crimes unless "they called in every one of the 2,000 individuals who had been defrauded."

Stevens doesn't buy it. "You don't think that could be proven with two or three witnesses? I'm not persuaded." To which Scalia gleefully adds, "Is it better if the judge is just guessing?"

Breyer steps forth with a list of "four categories of things that are difficult to prove to a jury," including No. 2, misconduct, like a defendant's perjury that occurred during trial; and No. 4, things "too difficult to explain to a jury," among which he includes "brandishing." But Breyer also seems to realize that the guidelines are doomed, so he shifts to a pragmatic resolution to the problem of what to do next. He suggests reading the rules "so that 'shall' would mean 'may,' and the guidelines thus become 'permissive.' "Permissive means the guidelines would become, er, "guidelines" rather than definitive rules. He wonders, "What would be wrong with that approach?"

"Nothing," says Clement.

Breyer interrupts him—"I thought of something else that may be wrong," he says. If judges were all interpreting permissive guidelines differently and appealing those decisions, "We would become

the sentencing commission." Breyer sighs. Comic pause for two beats, then, "I thought I'd escaped."

Justice Sandra Day O'Connor, the Jeremiah of the dissenters in Blakely, speaks very little today. What she does say is telling: "This is so contrary to what Congress intended," she sighs. "There is no evidence they wanted the guidelines to be advisory." The guidelines were supposed to create uniformity in sentences and reduce judicial discretion. If they become Helpful Hints for Judges, that broad discretion is inevitable.

Christopher Kelly from Madison, Wis., has 30 minutes to argue for his client, Freddie Booker, whose drug case was reversed and remanded by the 7th Circuit. Breyer unloads more than a decade's worth of anguish: His first hypothetical involves at least four parts and is posed at least three times.

Justice Breyer really likes those guidelines.

Rosemary Scapicchio from Boston argues for Duncan Fanfan, and, like Souter, her New England twang warms the heart. "Law" becomes "Lawr." It's a beautiful thing. Scapicchio does a slightly better job with Breyer's anguish and a much better job explaining that the court needn't eviscerate the guidelines altogether—it must only ensure that juries, not judges, decide sentence enhancements. As she argues, it becomes clear that these advocates aren't here to persuade the court of anything. Scalia and Stevens are pile-driving Breyer and the chief justice, and one can only imagine who'll have who in a headlock when conference is over.

The problem is not really a constitutional one anymore; it's pragmatic. And as O'Connor suggests, that's probably for Congress to work out. More than one justice takes comfort in the fact that whatever solution they opt for is "interim" because Congress will fix the court's fixes anyhow.

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