

Justices Suggest New Sentencing System is Likely

By Richard Willing

During arguments in two cases that test the guidelines used to sentence 1,200 convicts a week, most of the nine justices seemed to concede that the guidelines are likely to be struck down, or significantly changed, in light of the high court's ruling in June that invalidated similar sentencing rules in Washington State.

In a 5-4 decision that threw federal courts across the nation into disarray, the Supreme Court said in June that Washington State's guidelines were unconstitutional because under the Sixth Amendment, juries and not judges must decide on the facts that lead to longer sentences.

The decision led courts to question the constitutionality of the federal guidelines, which have been in place since 1987. Congress designed the guidelines to bring uniformity to federal sentencing by reining in judges who strayed wildly from a minimum-maximum range.

Several states have copied the federal rules, which require judges to increase sentences beyond a minimum level if there are aggravating factors involved in a crime, such as a large amount of drugs or a particularly vulnerable victim.

Since the high court's ruling in June, some federal judges have continued to apply the guidelines, others have not, and some have postponed sentencing until they receive some guidance from the Supreme Court.

In a reflection of the urgency of the matter, the court scheduled an unusual afternoon session on the first day of its 2004-2005 term. The justices heard arguments in cases that involved two men convicted of federal drug offenses - one whose sentence was increased by a judge, another whose sentence was reduced in light of the Supreme Court's ruling in the Washington state case.

During Monday's arguments, much of the discussion was in line with a suggestion by Justice Antonin Scalia: that whatever the court decides in the cases is likely to be an "interim solution" that will be replaced by new sentencing laws written by Congress.

Rosemary Scapicchio, attorney for a Maine man whose reduced sentence for a drug offense has been challenged by the U.S. government, agreed. "It's very likely to be an interim solution," she said. "The Legislature will tell us what they really want."

Scapicchio represents Ducan Fanfan, who was convicted of conspiring to distribute cocaine. The judge in Fanfan's case planned to sentence him to 16 years in prison, based on the alleged quantities of drugs in the case and Fanfan's role in drug trafficking. But after the court's ruling in June, Fanfan's sentence was cut to 6 1/2 years.

Paul Clement, the acting solicitor general, argued that the U.S. guidelines should not be scrapped. He said that unlike Washington State's rules, the U.S. guidelines are administered by a panel that is part of the judicial branch.

Scalia, who wrote the opinion in the Washington state case, seemed unconvinced. "What's the difference to me (as a defendant), if my sentence is increased by 10 years?" he asked.

Scalia was joined in the opinion in June by fellow conservative Clarence Thomas and three of the court's liberals: John Paul Stevens, David Souter and Ruth Bader Ginsburg. Monday, all but Thomas, who rarely speaks during oral arguments, asked questions that suggested they believed the federal guidelines should be struck down.

Justice Stephen Breyer, another liberal, said the Constitution could be satisfied if the guidelines were interpreted as suggestions rather than rules. Breyer, a dissenter in the ruling in June, helped draft the federal guidelines during the mid-1980s.

Stevens suggested that facts critical to sentencing could be determined by the same juries that decide guilt.

He said it would be necessary in a "small minority" of federal criminal cases because nearly 97% are resolved by plea bargain.