

## Supreme Court Considers Federal Sentencing Guidelines After 'Blakely'

*By Tony Mauro*

On the first day of its fall term, the Supreme Court appeared to be poised to find the 17-year-old federal sentencing guideline system unconstitutional.

The Court on Monday also denied review in hundreds of cases filed during its summer recess, and it gave Attorney General John Ashcroft time to introduce to the justices Acting Solicitor General Paul Clement, who replaced Theodore Olson in the position in July. The Court is starting its 11th term with the same membership, the longest period of stability since the early 1800s.

Ever since its June decision in *Blakely v. Washington*, which struck down a Washington state sentencing scheme, lower federal courts have been in turmoil over how -- or whether -- to apply the 5-4 *Blakely* decision to the similar federal system. Many of the more than 200 appellate and district court rulings on the issue since June have found that federal guidelines suffer from the same flaw that proved fatal in *Blakely*: that judges, rather than juries, make factual findings to increase sentences, in violation of the Sixth Amendment right to a trial by jury.

The Court had expedited arguments in two cases that posed the question of *Blakely*'s impact on the federal system: *United States v. Booker* and *United States v. Fanfan*. But judging by the tenor of the arguments in those cases Monday afternoon, most of the justices seemed almost to assume that *Blakely* applies to the federal guidelines. The focus instead was on what happens next and how large the impact will be on federal sentencing.

Clement, speaking for an hour without referring to notes, warned that defendants would get a "huge sentencing windfall" if the guidelines were scrapped and prosecutors were forced to prove to the jury all the facts that result in higher sentences. In his opening sentence, he reminded the Court of the 1,200 criminal sentences that are handed down in federal court each week, and later he spoke of the "carnage and wreckage" that would occur if the guidelines were struck down.

Clement tried to distinguish the federal system from the system struck down in Washington state, noting that federal guidelines are set by the U.S. Sentencing Commission, part of the judicial branch, while the Washington guidelines were passed by the state legislature.

But Justice Antonin Scalia, who wrote the *Blakely* decision, said repeatedly that the distinction made no difference. "How does that eliminate the jury trial problem?" Scalia asked at one point.

Clement tried again to make the point, but then shifted his focus to admonitions about how various proposals for a post-guideline system would work.

The most prevalent proposal discussed Monday was to "*Blakely-ize*" the federal guidelines, which would mean requiring that all the facts that go into setting a sentence be included in the indictment, forcing prosecutors to prove all those facts to a jury. That, Clement warned, would turn 12-line sentencing forms into 20-page questionnaires, confusing jurors.

As an example, he said a prosecution for telemarketing fraud would become hopelessly complex if prosecutors had to prove, one by one, the harm caused to the hundreds or thousands of fraud victims alleged in the indictment.

"You don't think that could be proven based on two or three victims?" asked Justice John Paul Stevens dubiously. "I'm not persuaded."

But one exchange between Stevens and Clement seemed to give the justice pause. Stevens appeared surprised to hear that as much as 65 percent of all federal sentences pose Blakely-related issues. "I thought the unconstitutional departures were quite few," Stevens said.

If that high percentage gives Stevens second thoughts because of how widespread an impact a ruling against the guidelines would have, Stevens might seek out a middle path.

The most ardent advocate for the guidelines during oral argument appeared to be Justice Stephen Breyer, who was a member of the Sentencing Commission from 1985 to 1989. Some judicial ethics experts have suggested that because of his participation in drafting the original guidelines, Breyer has a personal stake in the outcome of Booker and Fanfan that should have led him to recuse. But Breyer remained in the case and was an active questioner, even making several references to his membership on the commission.

If prosecutors are forced to prove to a jury all the facts that go into sentence, Breyer said, then large numbers of sentencing appeals will surge through the courts, including the Supreme Court, in effect turning the high court into the Sentencing Commission -- a *deja vu* prospect he did not relish.

Apparently sensing that the Court was unlikely to preserve the guidelines, Breyer suggested that they could be made advisory, rather than mandatory, for judges.

Clement said that was acceptable to him, but Justice Sandra Day O'Connor threw cold water on the idea: "That seems so contrary to what Congress intended, I think it's a real stretch."

T. Christopher Kelly of Kelly & Habermehl in Madison, Wis., who was the lawyer for Freddie Booker, and Rosemary Scapicchio, the lawyer for Ducan Fanfan, both argued for less than their allotted half-hour. Both held to the basic Sixth Amendment argument against the judicial role in federal sentencing.

One example of the injustice of the current system, Kelly said, is that prosecutors base their indictments on the aspect of a crime that is easiest to prove, and "save the hardest part of the case for the sentencing." Judges need to find facts that increase sentences only by a preponderance of the evidence -- rather than the jury burden of "beyond a reasonable doubt" -- giving prosecutors an incentive to circumvent the jury.

Defendant Freddie Booker of Racine, Wis., was found guilty by a jury on drug distribution charges, based on the fact that he was carrying a duffel bag containing 92.5 grams of crack cocaine. But since he separately admitted to police that he had sold more than 500 additional grams to others, the judge increased the offense level used to calculate his sentence.

That determination by the judge increased Booker's sentence to 30 years -- more than eight years more than he would have received based solely on the jury's findings.

After the Blakely decision, Booker's lawyers appealed the sentence, and it was given expedited review by the 7th U.S. Circuit Court of Appeals. A decision authored by influential Judge Richard Posner reversed the sentence because of the Blakely ruling.

Posner rejected the government's argument that the federal guidelines are different in kind from those struck down in Blakely because they were promulgated by a judicial branch agency -- the Sentencing Commission -- rather than by the legislature, as was the case in Blakely. "The commission is exercising power delegated to it by Congress," Posner wrote.

Maine resident Ducan Fanfan was convicted on drug distribution charges based on the jury's finding that he had more than 500 grams of cocaine in his possession. At sentencing, the judge considered additional quantities found on him as "relevant conduct," as well as a determination that Fanfan was an organizer or leader of the distribution enterprise.

Those factors would have raised Fanfan's sentence from five years to 15 years, but the judge decided on the lower sentence when Blakely was handed down. The U.S. government appealed the case to the Supreme Court even before the 1st Circuit ruled on it.

Also on Monday, the Court denied review in hundreds of cases, including:

-- Mastercard International v. United States and Visa v. United States, in which the credit card giants challenged a ruling by the 2nd Circuit that found the companies' efforts to keep member banks from issuing competitors' cards violated the Sherman Act.

-- State Farm Mutual Automobile Insurance Co. v. Campbell, an effort by the insurance company to challenge, once again, a Utah Supreme Court punitive damages finding that State Farm argued was excessive. Business litigants were hoping for further guidance from the Court on constitutional limits for punitive damages.

-- Moore v. Judicial Inquiry Commission of the State of Alabama, an effort by Roy Moore to regain his position as chief justice of the Alabama Supreme Court. He was ousted for refusing to obey federal judges' orders to remove a Ten Commandments display from the state judicial building. He claimed that his removal amounted to a "religious test" for holding office, which violates the Constitution. Several other cases involving Ten Commandments displays on public property in Texas and Kentucky are still pending before the Supreme Court.