

# High Court to Act Soon on Sentencing

The justices in October will take up two cases central to confusion over federal guidelines.

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WASHINGTON — In an unusual midsummer order, the Supreme Court said Monday that it would seek to rule quickly on whether thousands of federal prison sentences were unconstitutional because a judge, not the jury, had decided key facts that called for more time behind bars.

The federal criminal courts were thrown into "disarray" by a high court ruling in late June that cast doubt on the traditional way of imposing punishment. Bush administration lawyers complained in an appeal.

About 64,000 criminals are sentenced in the federal courts each year, the U.S. said, an average of about 1,200 per week.

Until recently, the conventional rule was that a jury decided whether a criminal was guilty, and the judge decided on the punishment. But the Supreme Court now says the jury must decide "any fact which increases the penalty for a crime."

In a 5-4 ruling, the court voided part of a Washington state man's nearly eight-year prison term for kidnapping his ex-wife. That crime called for about four years in state prison, but the judge added three years to Ralph Blakely's term because he had displayed "deliberate cruelty" in carrying out the crime.

In *Blakely vs. Washington*, Justice Antonin Scalia spoke for an unusual liberal-conservative coalition in saying that the extra prison time imposed by the judge violated the defendant's right to a jury trial.

"The judge exceeds his proper authority," Scalia said, when he or she decides the facts that increase the prison term beyond what is called for in the law.

That ruling instantly cast doubt on the federal sentencing guidelines, which call for judges to decide an array of such facts before imposing punishment. In July, several U.S. judges ruled that the federal sentencing guidelines were unconstitutional under the *Blakely* ruling.

On Monday, the justices agreed to hear two cases in October to decide two questions: Are the 20-year-old federal sentencing guidelines unconstitutional? And, if so, what is the solution?

Most lawyers assume that the court will declare the federal sentencing rules unconstitutional in whole or in part. The real debate is likely to focus on how to comply with the court's demand that juries decide the key facts.

One approach would require a criminal indictment to include all the main facts at the start of the trial. For example, accused drug dealers are often charged with possessing the quantity of illegal drugs found with them when they are arrested. But once a defendant is found guilty, prosecutors often tell the judge of other drug sales by the dealer, which can be the basis for increasing the prison term.

Scalia's opinion suggests that prosecutors must include these extra drug sales in their original indictment if they plan to use the evidence to seek a longer term. A second option would be to have a jury decide on extra facts that might call for a longer sentence.

One of the two cases to be heard involves Duan Fanfan, a convicted drug dealer from Maine. Last summer, he was arrested with more than 500 grams of cocaine, and a jury later convicted him of conspiring to sell that amount of the drug. The crime called for a sentence of roughly six years in prison. He came up for sentencing on June 28 of this year, four days after the high court's *Blakely* ruling.

U.S. District Judge D. Brock Hornby said he was convinced that Fanfan was the leader of a drug gang and that he had sold large quantities of crack cocaine. These additional facts warranted a prison term of 16 years under the guidelines, the judge said. But the Supreme Court had changed the rules, he added. He then sent Fanfan to prison for 6½ years based on the jury's verdict, not the longer term stipulated by federal guidelines.

The Justice Department filed an appeal in the cases of *U.S. vs. Fanfan* and *U.S. vs. Booker* from Wisconsin. Government lawyers said these cases showed how the *Blakely* ruling "could produce absurdly low sentences for very serious criminal conduct."