

Justices show inclination to scrap sentencing rules

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WASHINGTON - By the time the first day of the new Supreme Court term ended on Monday, there seemed little doubt that criminal sentencing in the United States was about to change. But what form the change might take, how drastic it might be, and whether defendants or prosecutors would benefit more remained very much open to question as the court heard arguments on the constitutionality of federal sentencing guidelines that have been in effect for 17 years.

A series of Supreme Court decisions, culminating in June with the invalidation of the sentencing guidelines in Washington state, established the principle that juries, and not judges, must rule on the facts that are the building blocks of a criminal sentence.

In the June case, *Blakely vs. Washington*, the court said that the Sixth Amendment right to trial by jury requires that any fact, like the quantity of drugs in a narcotics case, that leads to a sentence greater than the maximum the defendant could otherwise receive must be proved to a jury beyond a reasonable doubt.

Most of the justices on Monday appeared prepared to apply that decision to the federal guidelines, despite the vigorous effort of Paul Clement, acting solicitor general, to convince the court otherwise. The Washington guidelines were set by statute, Clement observed, while the federal guidelines were the product of the U.S. Sentencing Commission, a judicial agency that lacks the power to set the statutory maximum sentences with which the court has been concerned in the recent series of cases.

"The defendant in the courtroom is going to suffer the same effect, whether it's a rule, a guideline or a statute," Justice David Souter responded to Clement.

"Why should that make any difference under the Sixth Amendment?"

And Justice Ruth Bader Ginsburg told the government lawyer, "The distinction you're making really doesn't stand up."

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