

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, No. 126182
Court of Appeal No.
F042592
Tulare County
No. 79557

Plaintiff and Respondent,

vs.

KEVIN MICHAEL BLACK,

Defendant and Appellant.

APPELLANT’S SUPPLEMENTAL OPENING BRIEF

ARGUMENT

UNITED STATES V. BOOKER (2005)
___ U.S. ___, 125 S. CT 738, 2005 LEXIS
628, REAFFIRMED THAT THE SIXTH
AMENDMENT REQUIRES A JURY FINDING
AND PROOF BEYOND OF REASONABLE
DOUBT OF FACTS USED TO IMPOSE A
SENTENCE BEYOND THE STATUTORY
MAXIMUM, BUT THE COURT’S REMEDY
HAS NO CONSTITUTIONAL SIGNIFICANCE
AS APPLIED TO CALIFORNIA’S

DETERMINATE SENTENCING LAW

A. Introduction

Pursuant to this Court's order of January 19, 2005, Mr. Black submits this supplemental brief addressing the effect of *United States v. Booker* ["Booker"] (2005) ___ U.S. ___, 125 S. CT 738, 2005 LEXIS 628 on his case. The *Booker* court reaffirmed that the Sixth Amendment applied to facts used to aggravate a sentence beyond the statutory maximum as defined in *Apprendi v. New Jersey* (2000) 530 U.S. 466 ["Apprendi"] and *Blakely v. Washington* (2004) ___ U.S. ___, 124 S.Ct. 2531 ["Blakely"]. In a separate opinion, the *Booker* court determined that Congress would have preferred making the Federal Sentencing Guidelines advisory, thereby increasing the discretion of sentencing courts to sentence a defendant within the statutory range.

Although this solution may be viable when considering Congressional intent, Mr. Black asserts that the same is not true in California. A review of the history of California's indeterminate and determinate sentencing laws reveals that by enacting the DSL, California intended to diminish rather than expand the trial court's discretion in order to promote uniformity in sentencing.

Furthermore the DSL differs from the Federal Sentencing Guidelines in key respects: 1) The DSL limits the trial court's choice to three specified terms while the Guidelines permitted the court to sentence a defendant

within a range of months or years; 2) California's statutory scheme mandates pleading and proof beyond a reasonable doubt of many sentencing enhancements while the Guidelines considered those enhancing facts to be merely sentencing factors which could be decided by the court under a preponderance standard; and 3) Even absent the Federal Sentencing Guidelines, Congress set forth statutory standards for federal sentencing (18 U.S.C. § 3553) no similar provision exists in California statutes.

The differences in the schemes necessitate different solutions. Mr . Black notes that federal decisions in the post-*Booker* world have advocated differing positions on what courts must consider on sentencing criminal defendants, what is the maximum range in which the court is permitted to exercise discretion and the weight to be given to the now defunct Guidelines. Such disparity cannot further California's goal of uniform sentences. Accordingly, Mr. Black believes that unlike *Booker*, the California Legislature would prefer to invalidate the DSL or engraft a requirement that the jury find aggravating facts to Penal Code sections 1170 and 669 rather than strike the portions of Penal Code section 1170 and make the Rules of Court advisory.

Nonetheless, should this Court choose a solution that alters the statute in a way that removes the necessity of a jury finding beyond a reasonable doubt on aggravating facts, due process requires that the Court's holding operate prospectively.

B. The Holding In *Booker* and *Fanfan*

Booker was convicted of possessing with intent to distribute at least 50 grams of crack cocaine. (21 U.S.C. §841(a)(1).) The statutory range for that offense was 10 years to life. (21 U.S.C. §841(a)(1)(iii).) Under the Federal Sentencing Guidelines which considered Bookers criminal history and the quantity of drugs found by the jury, the trial court was required to impose a prison sentence of 210 to 262 months. However, the court held a post-trial sentencing proceeding and concluded by a preponderance of the evidence that Booker possessed an additional 566 grams of cocaine and was guilty of obstructing justice. On the basis of this additional finding, the Guidelines mandated a sentence of 360 months to life. The district court imposed a 30-year sentence.

The Court of Appeals for the Seventh Circuit found pursuant to *Apprendi, supra*, 530 U.S. 466 and *Blakely, supra*, 524 U.S. ____, 124 S.Ct. 2531, that the Sixth Amendment prohibited a sentence beyond the statutory maximum without the necessary jury findings and remanded the action to the district court with instructions to either sentence Booker within the Guideline range supported by the jury findings or to hold a sentencing hearing before a jury.

Similarly, in a case consolidated with *Booker's*, Fanfan was convicted of conspiracy to distribute and to possess with intent to distribute

500 or more grams of cocaine. (21 U.S.C. §§ 846, 841 (a)(1) and 841(b)(1)(B)(ii).) Based on the jury findings alone, Fanfan's conviction supported a sentence of 78 months. Again the court held a sentencing hearing and found that Fanfan was responsible for a greater quantity of drugs and that he was a leader in the criminal enterprise. Thus, Fanfan was subjected to a Guidelines sentence of 15 – 16 years. Nonetheless, the trial court held that such a sentence was prohibited by *Blakely* and sentenced Fanfan to a term based on the jury findings alone.

The United States Supreme Court granted certiorari in both cases to determine whether an enhanced sentence under the Guidelines based on facts not found by the jury violated the Sixth Amendment and if so, whether any part of the Guidelines could be salvaged. The opinion produced two majority opinions and four separate dissents.

The first majority opinion reaffirmed the High Court's opinions in *Apprendi* and *Blakely* and found that they applied to the federal sentencing guidelines. Therefore, the Sixth Amendment guarantee of a trial by jury and a defendant's right to proof beyond a reasonable doubt (see *In re Winship* (1970) 397 U.S. 358, 364) prohibited a trial judge from finding facts by a preponderance of the evidence that exposed a defendant to a term longer than the defined statutory maximum regardless of whether a defendant is sentenced in a federal or state proceeding. (*Booker, supra*, at pp. *22, 26.) The court held, however, that if the Guidelines were not mandatory they

would not offend the Constitution because a trial judge may constitutionally exercise his or her discretion to sentence a defendant within a defined range. (*Id.*, at p. 27.)

In the second part of the opinion a different majority determined that by severing two provisions of the Sentencing Reform Act of 1984 [“Act”] that made the federal Guidelines mandatory, the rest of the statutory scheme could be preserved. Specifically, the court excised 18 U.S.C. 3553 (b)(1), which made the Guidelines mandatory and 18 U.S.C. § 3742 (e), which provided for a de novo standard of review. As modified, the Guidelines became advisory and trial courts were given complete discretion - limited only by the standard of “reasonableness”- to sentence a defendant within the statutory range.

The Supreme Court looked to Congressional intent to answer the remedial question: Would Congress have preferred grafting a jury trial requirement on to the statutory scheme, excising the mandatory provisions of the Act or totally invalidating the Act? (*Booker, supra*, at pp. *48-49.) The Court recognized that any remedy would fundamentally alter the system that Congress designed. (*Id.*, at pp. *49 – 50.)

Looking first to the possibility of adding a requirement of a jury trial on sentencing facts to the Act, the High Court determined that such a requirement would so transform the scheme that Congress would not have intended the Act to stand. The Supreme Court found that provisions of the

Act that referred to court sentencing of a defendant could be interpreted only to mean the judge alone and could not be interpreted to include the jury. (*Id.*, at pp. *54 – 55.)

Second, the court determined that the congressional goal of diminishing sentencing disparity could be successful only if a judge was permitted to base an offender's punishment on the real conduct underlying the crime, and that Congress intended that the trial judges would make this decision. This was especially important in the federal system, where the statutory definitions of crimes encompass a wide range of conduct.

To engraft the Court's constitutional requirement onto the sentencing statutes, however, would destroy the system. It would prevent a judge from relying on a presentence report for factual information, relevant to sentencing, uncovered after the trial. In doing so, it would, even compared to pre-Guidelines sentencing, weaken the tie between a sentence and the offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.

(*Booker, supra*, at pp. *58 – 59.)

Third, citing concerns with pleading and proving sentencing facts such as firearm use and great bodily injury, the Court thought that grafting a Sixth Amendment requirement unto the statutory scheme would make it vastly more complex than Congress intended and perhaps unworkable. (*Id.* at pp. 62 – 63.)

Fourth, the Court opined that the requirement of a jury finding would diminish a trial court's ability to promote uniformity in sentencing by accepting or rejecting a plea agreement because the sentencing court would no longer have an opportunity to learn about the defendant's "real conduct" by reading a presentence report. (*Id.* at pp. *65 – 66.)

Finally, the Court found that Congress would not have enacted a system that made it more difficult to adjust sentences upward than to adjust them downward. (*Id.*, at p. *68.) The Court believed that Congress would

have preferred total invalidation of the Act, rather than adding the constitutional mandate of jury findings.

Next, the Supreme Court considered whether it could sever the offending portions of the Act. The Court determined that most of the Act was constitutional and functioned independently even if the Court excised the mandatory provisions of the Act. (*Booker, supra*, at pp. *70 – 72.) Deleting the provision of the Act that set forth that standard of review was not overly problematic because a standard of “reasonableness” could be implied. (*Id.*, at pp. *73 – 74.)

The Court recognized that Congress intended to create a mandatory Guidelines system. But given the alternatives, the court determined that a discretionary system most approximated Congress’ intent and passed the ball to Congress to enact a new constitutional system if the High Court’s holding was unacceptable. (*Id.*, at p. *82.)

The Supreme Court held that Booker’s sentence was unconstitutional because the district court had imposed a sentence higher than that permitted by jury verdict and remanded Booker’s case for resentencing. Since Fanfan’s sentence was based only on facts authorized by the jury verdict, the court remanded that action to permit either party to seek resentencing under the new advisory system.

In addition, the Court held that their decision applied retroactively to all cases on direct review. (*Id.* at p. *86.)

C. *Booker* Reaffirms The 6th Amendment Requirement That Facts Necessary to Impose A Sentence In Excess Of The Statutory Range As Defined in *Apprendi*, *Blakely* And *Booker* Must Be Found By A Jury Beyond A Reasonable Doubt

By now it is clear that California may no longer tolerate judicial fact-finding by a preponderance standard to sentence an offender to a term exceeding the maximum authorized by a plea of guilty or by jury verdict. (*Booker, supra*, at pp. 45 – 56.) The *Booker* decision also invalidates an argument advanced by the Attorney General (see Ans. at pp. 28 – 29) and accepted by some trial courts (see e.g. *People v. Picado* (2004) 123 Cal.App.4th 1216, 1237, depublished on January 19, 2005) – that a trial court may exercise its discretion and sentence a defendant to the upper limit of California’s tripartite statutory range identified in the charging statute without violating the Sixth Amendment.

In fact, the top of the statutory range to which Booker was subjected was life imprisonment. (21 U.S.C. §841(a)(1)(iii).) Yet, the United States Supreme Court looked to the maximum term as defined by the Sentencing Guidelines rather than the statute and found that the district court’s sentence violated the Sixth Amendment because it was higher than the maximum authorized by jury verdict. (*Booker, supra*, at p. *85.) Like the situation in

Booker, in California the charging statute does not control. Rather, one must look to Penal Code sections 1170, subdivision (b) and 669, and the Rules of Court to determine what the statutory maximum is for *Apprendi* and *Blakely* purposes.

D. Following *Apprendi*, *Blakely* and *Booker*, This Court Must Invalidate The Determinate Sentencing Law Or Bring It Into Constitutional Compliance

Mr. Black has maintained that under California’s Determinate Sentencing Law [“DSL”], he was subjected to the use of unconstitutional fact-finding when he was sentenced to both an aggravated and consecutive term. Assuming that this Court so holds, it will be necessary for the Court to determine whether the Legislature would prefer that it invalidate the DSL or bring it into constitutional compliance. To answer this question, Mr. Black first looks to the intent of the California Legislature when enacting the DSL and why the Legislature chose to overhaul the indeterminate sentencing scheme that preceded it.

1. The Indeterminate Sentencing Law Of 1917

First enacted in 1917, California’s sentencing scheme as set forth in Penal Code section 1168 did not permit the trial court to determine the term or duration of the period of imprisonment. (*In re Lee* (1918) 177 Cal. 690, 691.) Instead, that authority rested with the governing board of the prison, which determined the prisoner’s sentence based upon the prisoner’s conduct and rehabilitative efforts and was limited only by the minimum and maximum terms set by statute. (*In re Lee, supra*, 177 Cal. 690, 692.) The purpose of the indeterminate sentencing law was to reform the offender and mitigate the punishment that might otherwise be imposed. (*Ibid.*)

The *Lee* court found no separation of powers problem in permitting an administrative body to execute a sentence. The judicial acts were complete with the pronouncement of judgment. (*Id.*, at p. 959.)

Under the indeterminate sentencing scheme, the nature of the offender rather than the nature of the offense was the primary factor in determining the length of a sentence. Once a prisoner no longer presented a danger to society, incarceration served no purpose. (*Review of Selected 1976 California Legislation, “Criminal Procedure”*, 8 Pacific Law Journal 282, 284-285 (1977).) Although the goal of prisoner rehabilitation was theoretically viable, it didn’t work well in practice because the Adult Authority lacked both the expertise and methods to treat offenders. As a result, the sentencing scheme was characterized as arbitrary, excessive and unfair. (*Senate Bill 42 – The End Of The Indeterminate Sentence*, 17 Santa Clara Law Rev. 133, 139 (1977).) In addition, there was criticism of the Legislature’s undirected and unchecked grant of power to the Adult Authority to set prison terms. (*Senate Bill 42 – The End Of The*

Indeterminate Sentence, 17 Santa Clara Law Rev. 133, 134, n.6.) Under this system, “California had the longest average sentences in the United States and perhaps the world.” (*Id.* at p. 146.) Furthermore, the prisoner’s uncertainty regarding the length of his incarceration was a source of prison unrest. (*Review of Selected 1976 California Legislation, “Criminal Procedure”*, 8 Pacific Law Journal 282, 291 (1977).)

In 1975, this Court held that a sentence imposed under the indeterminate sentencing law must consider both the circumstances of the offense and of the offender in setting a sentence, and that a prison term was subject to the qualification that the maximum sentence could not be disproportionate to the individual prisoner’s offense. (*In re Rodriguez* (1975) 14 Cal.3d 639, 652, *In re Wingo* (1975) 14 Cal.3d 169; U.S. Const., 8th Amend; Cal. Const., art. I, § 17.)

2. The Determinate Sentencing Law

Given the problems with the Indeterminate Sentencing Law and the unsuccessful attempt of the Adult Authority to promote uniform sentences (see *In re Stanley* (1976) 54 Cal.App.3d 238, 248), the Legislature was forced to step in. The enactment of the Determinate Sentencing Law [“DSL”] in 1976 rejected rehabilitation as a goal of imprisonment and instead expressly focused on the objectives of punishment and the uniformity of sentences. (Pen. 1170, subd. (a).) Furthermore, the Legislature sought to achieve uniformity by specifying the conditions under which a court could impose a sentence, thereby limiting its discretion. Penal Code section 1170, subdivision (a)(1) states:

The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

Although initially the DSL substantially reduced the minimum and maximum statutory terms as compared with the Indeterminate Sentencing Law, since 1976 the Legislature has increased the length of prison terms by enacting or increasing the terms of a number of enhancements or alternative sentencing schemes. (See e.g. The Three-Strikes Law [Pen. Code § 1170.12]; The One-Strike Law [Pen. Code § 667.61, subds. (d) & (e)]; Pen. Code § 12022.53 [increased sentence for use of a firearm in specified

felonies]; Pen. Code § 12022.7 [increased sentence for inflicting great bodily injury].) In addition, the Legislature has continued to restrict judicial discretion. For example, in 1998 the Legislature repealed Penal Code section 1170, subdivision (h), which permitted the court to strike the punishment for certain listed enhancements. (Stats. 1997, ch. 750, § 9.)¹ Then a trial court's discretion to strike some enhancements was completely eliminated (see e.g. *People v. Thomas* (1992) 4 Cal. 4th 206 [court may not strike Penal Code section 12022.5's gun use enhancement]) or limited to the "furtherance of justice" standard of Penal Code section 1385 (see e.g. *People v. Meloney* (2003) 30 Cal. 4th 1145 [court may strike on bail enhancement of Penal Code section 12022.1 in the interest of justice].)

Considering the historical perspective of California's sentencing laws and the Legislature's express intent, this Court must now determine which alternative would further the Legislative aims in enacting and subsequently modifying the DSL.

E. Either Invalidating the Law Or Engrafting The Requirement of A Jury Determination of Aggravating Or Enhancing Facts Would Best Serve The Legislative Purposes Of Uniformity In Sentencing And Limiting The Trial Court's Discretion

In *Booker, supra*, the High Court found that Congress would have preferred making the Guidelines advisory rather than completely invalidating the law or engrafting a requirement for the jury determination of facts used to enhance a sentence above the statutory maximum as defined by *Apprendi* and *Blakely*. Nonetheless, nothing in *Booker* or the constitution requires this Court to fashion the same solution and the differences between the federal and California sentencing scheme necessitate a different result. Furthermore, such a fix appears contrary to our Legislature's intent to limit the authority of the trial court to impose undefined sentences.

First, Mr. Black asserts that it would not be constitutionally permissible to substantially rewrite Penal Code section 1170, subdivision (b) to achieve a result that the Legislature neither intended nor anticipated. Any fix that would reform section 1170, subdivision (b), either by following the *Bookers* lead and making the Rules of Court advisory or by defining the upper term as the statutorily permissible maximum, would violate the separation of powers doctrine because this Court would be

¹ Former section 1170, subdivision (h) stated in pertinent part: "Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided" in 13 of the 16 enhancement sections set forth in section 1170.1, subdivision (d), "if it determines that there are circumstances in mitigation of the additional punishment. . . ."

legislating rather than interpreting the statute. (*Younger v. Superior Court of Sacramento County*, 21 Cal. 3d 102, 117 – 118; Cal. Const., art. III, § 3.)

Mr. Black stands by the position that he asserted in his Reply Brief on the Merits – that the Legislature must restructure California’s DSL in a way to respect the Sixth Amendment because the provisions of the DSL are so entwined that severance of selected provisions of the DSL would undermine the purpose of the statute. (See e.g. *In re King* (1970) 3 Cal.3d 226, 237 quoting *Danskin v. San Diego Unified School Dist.* (1946) 28 Cal.2d 536, 555.) “If elimination of objectionable parts of a statute requires a wholesale rewriting, a court's attempt to do so transgresses both the legislative intent and the judicial function.” (*In re King, supra*, 3 Cal.3d 226, 237 citing *Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18, 25; *People v. Stevenson* (1962) 58 Cal.2d 794, 798; *City of Los Angeles v. Lewis* (1917) 175 Cal. 777, 781.) Should this Court disagree that invalidating the DSL is the preferred remedy, Mr. Black asserts that the Legislature would have chosen to reform the statute by engrafting a requirement that the jury find facts necessary to impose the aggravated and consecutive terms rather than increasing judicial discretion in sentencing. (See e.g. *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661.) Mr. Black reaches this conclusion based on 1) the Legislative purpose in adopting a determinate sentencing scheme over an indeterminate one; 2) the subsequent actions of the Legislature limiting judicial discretion in sentencing; 3) the California Legislature’s apparent preference for jury fact finding in contrast to the federal system; and 4) because *Booker’s* solution of making the Guideline’s advisory have left federal courts free to apply the guidelines in a disparate manner, thereby diluting the uniformity in prison terms that the California Legislature sought to promote. Finally, some of the concerns that the *Booker* Court addressed in rejecting a requirement of jury fact-finding are simply inapplicable to the California sentencing scheme.

1. The Legislature Switched From A Discretionary Sentencing Authority And To Promote Uniformity In Sentencing

As Mr. Black has discussed in section D, ante, in 1976 when the Legislature enacted the DSL, it moved from a rehabilitative model to one of punishment but sought to decrease sentences and promote uniformity in sentencing by limiting judicial discretion. Therefore, unlike the Federal Guidelines, which permit the sentencing court to impose a term within a range of months or years after considering the offense level and the criminal history category (see USSG, *Guidelines Manual* (Nov. 2004) at p. 376), the court’s discretion under California’s Determinate Sentencing Law is strictly proscribed and limited to one of three specified terms.

Therefore, it appears that the California Legislature intended to strictly limit the court's discretion in order to promote its goal of uniformity of sentences and would prefer to graft an addition of fact-finding by the jury rather than giving the courts complete discretion to sentence a defendant within the full statutory range. (See *People v. Martin* (1986) 42 Cal.3d 437, 442-443 ["Thus the movement to promote uniformity in sentencing . . . was in no small part a movement to diminish judicial discretion."].)

2. The California Legislature Has Indicated a Preference for Jury Fact-Finding

Unlike the Congressional scheme set forth in the Federal Sentencing Guidelines, the California Legislature has indicated a preference for a jury's determination of facts that form the bases of sentence enhancements. For example, the Federal Sentencing Guidelines permit a trial court to find facts which subject an offender to an increased sentence including "offense characteristics" such as the use of a gun or infliction of great bodily injury (see e.g. USSG § 2A2.2), or relevant conduct factors such as the possession of a specified quantity of drugs (see e.g. USSG § 1B1.3), while California considers the factors of gun use and great bodily injury to be enhancements and therefore subject to a statutory requirement of pleading and proof by the finder of fact. (Pen. Code § 1170.1, subd. (e).)

The California Legislature has indicated a preference for jury fact-finding in other situations, as well. For example, to subject a defendant to the punishment prescribed by Penal Code section 667.61, a jury must find the underlying facts such as great bodily injury, mayhem or torture, the use of a deadly weapon, tying or binding, or administration of a controlled substance by force ... (Pen. Code § 667.61, §§ (d)(e) & (i).) In a Three-Strikes Case, a defendant's prior conviction must be pleaded and proved. (Pen. Code § 1170.12, subd. (a).) The facts that permit enhancements of punishments for violating various drug laws must also be pleaded and proved. (See e.g. Health & Saf. Code §§ 11353.1, subd. (b); 11353.4, subd. (c); 11353.6, subd. (e).)

Because California already provides a statutory requirement of a jury trial for many enhancing factors when no concomitant right exists in the Guidelines, it appears that the *Booker* Court's fear that including Sixth Amendment requirements "would create a system far more complex than Congress would have intended" (*Booker, supra*, at p. *32) is inapplicable to the California DSL. Furthermore, any increase in jury trials on sentencing factors in California is likely to be minimal because the requirement would affect very few cases. In 1999, only 2% of criminal cases were tried to a jury. (*Examining the Work of State Courts, 1999 - 2000* at p. 10; www.ncsconline.org/D_Research/csp/1999-2000_Files/1999-2000_Criminal_Section.pdf.)

Moreover, in *Blakely, supra*, 124 S.Ct. 2431, the Court acknowledged that a defendant could waive his Sixth Amendment right and consent to judicial fact-finding either as part of a plea-agreement or as part of a bifurcated trial (*Id.*, at p. 2541.) As a practical matter, this procedure is often utilized in California courtrooms. For example, although a defendant has a statutory right to a trial by jury on his prior convictions (Pen. Code §1025; *People v. Kelii* (1999) 21 Cal. 4th 452), defendants often waive that right or admit the priors. Accordingly, there is little chance that requiring aggravating facts to be tried to a jury will unduly burden the criminal justice system.

The *Booker* Court also worried that in the context of plea agreements, the district court would be unable to consider the presentence report to determine “real conduct” and therefore the court would be limited to the prosecutor’s charging discretion in order to determine the applicable sentencing range. (*Booker, supra*, at pp. *66 – 67.) However, as the dissent pointed out, prosecutors already wield considerable bargaining power in plea negotiations and in fact, that discretion would be tempered by the necessity of having to prove sentencing facts beyond a reasonable doubt. (*Booker, supra*, at pp. 121- 122; Stevens, J. dissent.) Furthermore in California, prosecutors would retain the discretion to seek longer sentences by pleading aggravating factors while courts would retain the discretion to impose the upper term by the use of those facts.

3. Creating A Solution The Makes The Rules of Court Advisory Would Leave Sentencing Courts Without Any Clear Guidance

A significant difference between the federal sentencing scheme and California’s DSL is that the California statute does not independently state factors that a trial court must consider in imposing a sentence. (Pen. Code § 1170.) Compare the federal statute. 18 U.S.C. § 3553, which states in pertinent part:

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;...

Indeed, since the *Booker* court made the Guidelines advisory, federal courts have looked to the provisions of 18 U.S.C. § 3553 for guidance in formulating a sentence. (See subdivision 4, post.)

Penal Code section 1170 contains no comparable guidelines. Absent statutory guidelines to ensure uniform sentencing, the California Legislature would not prefer the remedy that the *Booker* Court created.

4. District Court's Differing Interpretations Of The Supreme Court's Holding In *Booker* Reveals That More Structure Is Necessary To Promote Uniformity In Sentencing

Since the High Court's decision in *Booker*, federal courts have attempted to apply *Booker's* mandates with varying results. Mr. Black discusses these cases not as precedent, but rather to illustrate the courts' struggles to decipher what may turn out to be a barely workable scheme.

In *United States v. Wilson*, Case No. 2:03-CR-00882 (D. Utah Jan. 13, 2005), the court determined that it must give "great weight" to the sentencing guidelines and only depart from the guidelines in unusual cases for clearly identified and persuasive reasons. Only by following the guidelines could the court achieve a "just punishment" that served crime control purposes and provided adequate deterrence. Because the Guidelines were the only standards available, their use was necessary to achieve uniformity in sentencing.

Soon after *Wilson*, the Eastern District of Wisconsin weighed in with a different approach for imposing a sentence lower than formally permitted by the Guidelines. (*United States v. Ranum*, Case No. 04-CR-31 (E.D. Wis.

Jan. 19, 2005) The *Ranum* court agreed that the it must seriously consider the Guidelines and provide a written decision if its sentence was outside of the Guideline range. Nonetheless, it held that the Guidelines were not binding. The court stated:

Sentencing will be harder now than it was a few months ago. District courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel and sentence the person before them as an individual. *Booker* is not an invitation to do business as usual.

In *United States v. Myers*, (S.D. Iowa. Jan. 26, 2005) ___ F. Supp. 2d. ___, 2005 WL 165314 , the court agreed that the Guidelines were not presumptive and decided to follow the statutory criteria set forth in 18 U.S.C. § 3553 (a).

In *United States v. Huerta-Rodriguez*, Case No. 8:04CR365 (D. Neb. Feb. 1, 2005), the court attempted to reconcile *Booker's* majority and remedial opinions. The court determined that post-*Booker* sentencing required consideration of both the factors set forth in 18 U.S.C. § 3553 (a), and the now-advisory Guidelines to determine what sentence is reasonable. The reasonableness standard, rather than the statutory maximum, determined the top of the range within which the court could exercise its discretion. Sentencing a defendant above that range required the prosecution to prove additional facts to the jury beyond a reasonable doubt. Although the defendant could waive his Sixth Amendment right to a trial by jury, the court found that the defendant could not waive his Fifth Amendment right to proof beyond a reasonable doubt. Accordingly, the court held that facts used to enhance a sentence to any significant degree had to be pleaded by indictment or information and proven beyond a reasonable doubt.

It appears that *Booker's* myriad of opinions produced more confusion than clarity and did little to advance a Legislative goal of uniformity of sentences. This is not the path that California should follow. Accordingly, Mr. Black suggests that either this Court declare California's Sentencing Scheme invalid and defer to the Legislature to bring the scheme into constitutional compliance or require that aggravating facts be pleaded in the information and decided by a jury beyond a reasonable doubt.

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F. Should This Court Find That Reformation of Penal Code Sections 1170, Subdivision (b) And 669 Is Permissible and Advisable And Alters The Statute In A Way To Remove The Necessity of A Jury Finding Beyond A Reasonable Doubt On Aggravating Facts, Due Process Requires That The Court's Holding Operate Prospectively

Reforming Penal Code section 1170, subdivision (b) and section 669 in a manner that permits the imposition of the aggravated term and consecutive terms without a jury finding of aggravating circumstances beyond a reasonable doubt enlarges the criminal statutes and requires prospective application of the Court's holding. Such a reformation would permit the imposition of the aggravated term under circumstances not currently permitted. Unforeseeable judicial enlargement of a criminal statute violates constitutional due process guarantees.

A statute " 'which makes more burdensome the punishment for a crime, after its commission' " violates article I, section 9, clause 3, of the United States Constitution as an ex post facto determination of criminal liability (*Collins v. Youngblood* (1990) 497 U.S. 37, 42 [111 L.Ed.2d 30, 38-39, 110 S.Ct. 2715], quoting *Beazell v. Ohio* (1925) 269 U.S. 167, 169-170 [70 L.Ed. 216, 217,218, 46 S.Ct. 68]), as well as its California counterpart, article I, section 9 of the state Constitution (*Tapia v. Superior Court* (1991) 53 Cal.3d 282 [279 Cal.Rptr. 592, 807 P.2d 434]). Correspondingly, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates in the same manner as an ex post facto law. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 354 [12 L.Ed.2d 894, 900, 84 S.Ct. 1697]; see also *People v. Escobar* (1992) 3 Cal.4th 740, 752 [837 P.2d 1100]; *People v. Wharton* (1991) 53 Cal.3d 522, 586 [280 Cal.Rptr. 631, 809 P.2d 290].)

(*People v. Davis* (1994) 7 Cal.4th 797, 811.)

It is a violation of due process guarantees under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 7 of the California Constitution for court to interpret existing laws and impose unexpected criminal penalties in a manner that the defendant could not have foreseen at the time of his or her criminal conduct. (*People v. Blakely* (2000) 23 Cal.4th 82, 91 – 92; *United States v. Lanier* (1997) 520 U.S. 259, 266 – 267.)

In analogous situations, the United States Supreme Court has recognized that statutory revisions that give a court greater flexibility to impose a higher term than the presumptive sentence at the time of the

offense or reduces the “quantum of evidence” necessary to convict violates the ex post facto clause. (*Miller v. Florida* (1987) 482 U.S. 423; *Carmell v. Texas* (2000) 529 U.S. 513; see U.S. Const. Art. I, § 9, cl. 3; Art. I, § 10, cl. 1.)

Since the United States Supreme Court’s holdings in *Apprendi* and *Blakely*, which mandated a jury finding on facts proven beyond a reasonable doubt to be used to impose the upper term, a defendant could not have foreseen that this Court or the United States Supreme Court in *Booker* would enlarge the statute to eliminate such a requirement. Accordingly, should this Court choose this path, its holding must be applied prospectively.

CONCLUSION

For the foregoing reasons, Mr. Black asks this Court to declare Penal Code section 1170, subdivision (b) to be invalid or alternatively to reform sections 1170 and 669 to add a requirement of fact-finding by a jury beyond a reasonable doubt before a aggravated term or consecutive sentence may be imposed. Should this Court choose a solution that permits the imposition of aggravated and consecutive sentences without the Sixth Amendment requirements set forth in *Apprendi*, *Blakely*, and *Booker*, Mr. Black asks this Court to apply its holding prospectively.

Dated: February 2, 2005

Respectfully submitted,
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CERTIFICATION OF WORD COUNT

I certify that the foregoing petition contains 5938 words as counted by the program in Microsoft Word.

EILEEN S. KOTLER