BLAKELY AND *BOOKER* IN CALIFORNIA: THE NEXT GENERATION

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INTRODUCTION

The U.S. Supreme Court has now issued its much-anticipated decision on *Blakely*'s application to the federal sentencing guidelines and, equally important, the "remedy" to bring federal sentencing into compliance with the Constitution. (*United States v. Booker* (Jan. 12, 2005) __ U.S. __, 2005 WL 50108.) The *Apprendi-Blakely* majority (Justices Stevens, Scalia, Souter, Thomas & Ginsburg) stuck together for the "merits" decision. In an opinion by Justice Stevens, that majority agreed that the guidelines violated the Sixth Amendment because the judge made additional factual findings which authorized a sentence higher than the maximum allowable based solely on the findings reflected in the jury's verdict (or the defendant's admissions in a plea). But, in a surprising and unexplained development, Justice Ginsburg "defected" from that group and joined the *Apprendi-Blakely* dissenters (Justices Breyer, O'Connor, Rehnquist & Kennedy) to form a quite different majority for the "remedy."

Justice Breyer – one of the original architects of the federal guidelines and an ardent critic of the *Apprendi* and *Blakely* holdings – wrote the "remedial" decision. The "remedial" majority rejected the option of simply according the Sixth Amendment *Blakely* rights – charging in the indictment, jury determination, proof beyond a reasonable doubt – to any additional factual allegations which the Government intended to assert as a basis for a sentence higher than the maximum authorized by the jury's verdict on the substantive counts. Instead, as discussed later in these materials (*infra*, pp. 8-9), the Court undertook a "reformation" of the relevant statutes. The Court "severed" and "excised" the "mandatory" provisions, which had strictly bound federal judges to conform to the guidelines. The removal of those provisions converted the guidelines into an "advisory" regimen, leaving greater sentencing discretion in the hands of federal judges.

So what does all this mean for California? These materials (written in the immediate wake of *Booker*) represent a very preliminary attempt to fathom *Booker*'s implications for the basic *Blakely* questions (upper terms, etc.) which have been litigated in California appellate courts over the past 7 months and for the broader questions (including "remedy") now pending before the California Supreme Court in *People v. Towne*, S125677, and *People v. Black*, S126182.[1]

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[1] On January 19, 2005, as these materials were going to press, the California Supreme Court solicited supplemental briefing in *People v. Black*, concerning the impact of *Booker*. But, at least according to the Court's docket, it does not seem to have issued a similar directive in *People v.*

"UPPER TERM" *BLAKELY* ARGUMENTS AFTER *BOOKER*.

The primary focus of *Blakely* litigation to date has been judicial determination of aggravating factors (other than the proverbial "fact of a prior conviction") used to impose an upper term. Although there remains a split of authority, "The emerging majority view is that under *Blakely,* the midterm is the statutory maximum, absent the fact of a prior conviction, the jury's finding of an aggravating factor, or the defendant's admission of one. Under this view, the maximum penalty the court can impose under California law without making additional factual findings is the middle term. [Fn.]" (*People v. Harless* (Dec. 20, 2004) __ Cal.App.4th __, 22 Cal.Rptr.3d 625, 645.)[2]

Nothing in *Booker* should alter this "emerging majority view." The *Booker* "merits" opinion reiterates the crucial holding of *Blakely* which is the lynchpin of the challenge to California upper terms:

> That [Sixth Amendment] right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." [Citation.]. ..... [U]nder Washington law, the judge was *required* to find additional facts in order to impose the greater 90-month sentence. Our precedents, we explained, make clear "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" [Citation.] (*Booker*, Stevens opn., 2005 WL 50108 at * 8, emphasis in original.)[3]

Towne. This may suggest that the Court has decided to use *Black*, rather than *Towne*, as its "lead case" to resolve the California *Blakely* issues – possibly because *Black* presents both the upper term and consecutive sentencing questions, while *Towne* poses only the upper term issue.

[2] Compare, e.g., *People v. Picado* (2004) 123 Cal.App.4th 1216, review gr. Jan. 19, 2005 (S129826), in which a divided panel (1st Dist., Div. 5) took the position that California's DSL involves only "discretionary" sentencing choices and does not come within *Blakely*. (A word of caution is in order about <u>all</u> the appellate opinions cited in these materials. As it has done in *Picado*, the California Supreme Court has been "granting and holding" all published cases on *Blakely* issues, pending its own determination of those issues in *Black* and/or *Towne*. Consequently, the entire first batch of California *Blakely* opinions (those decided from September through early November 2004) have been taken off the books. (Cal. Rules of Court, rule 976(d).) While the more recent opinions noted here remain citable for the time being, those opinions are not yet final are almost certain to meet the same fate. Although the grant-and-hold opinions are no longer citable under the rules, these materials refer to a few of them to illustrate appellate courts' different approaches to recurring *Blakely* issues.

[3] Due to the quite different "merits" and "remedial" majorities, Justices Stevens and Breyer each wrote both an opinion "for the Court" and a dissenting opinion. Unless otherwise indicated, references here are to their respective majority opinions for the Court. All internal page citations to

The same characteristic of the federal guidelines was dispositive in *Booker*:

> To reach [Booker's] sentence, *the judge found facts beyond those found by the jury*: namely, that Booker possessed 566 grams of crack in addition to the 92.5 grams in his duffel bag. The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just as in *Blakely,* "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." [Citation.] (*Id.* at *10, emphasis added.)

That holding, resting directly on the language of *Blakely*, should leave the California *Blakely* challenge exactly where it was before *Booker*. If anything, the willingness of the *Apprendi-Blakely* majority to take the politically sensitive step of invalidating the federal guidelines underscores that those justices meant what they said in *Blakely*. Nonetheless, California prosecutors, as well as some law professors, have been quoted in press reports as suggesting that *Booker* may assist in the state's defense of California's DSL as a "discretionary" sentencing system not implicating the Sixth Amendment. It's true that, throughout the "merits" opinion, Justice Stevens emphasizes the "mandatory" character of the federal guidelines – in particular, that it is difficult and in some cases impossible for a judge to "depart" from the guidelines range established by the additional findings. Also, the opinion does expand upon the somewhat elusive concept of permissible factfinding as part of a "discretionary" sentencing regimen:

> *If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range*. [Citations.] Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges; it is that circumstance that makes the Court's answer to the second question presented possible. For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant. (*Booker*, Stevens opn. at *8, emphasis added.)

Presumably, the state intends to argue that California's DSL is a benign "discretionary" system because a finding of an aggravating factor does not <u>mandate</u> an upper term and the trial court's balancing of aggravating and mitigating factors and ultimate selection of the term are considered discretionary. However, that reading of *Booker* would treat the federal guidelines' role in cutting off a judge's ability to impose a term <u>lower</u> than the guidelines range as the key to the decision. Yet, that cannot be the case because **the *Apprendi* rights apply only to findings which <u>increase the maximum</u> authorized punishment; *Apprendi* does not apply to "mandatory minimums."** (*Harris*

Booker are to the Westlaw pagination (2005 WL 50108).

v. United States (2002) 536 U.S. 545.) The federal sentencing guidelines function in both ways: Particular factual findings increase the maximum sentence beyond that authorized by the minimum elements of the statutory offense (as with the Washington guidelines in *Blakely*), and those findings can also "raise the floor" by precluding a judge from imposing a sentence at the lower range of that otherwise authorized for that offense. But *Harris* should leave no doubt that it is only the guidelines' former characteristic – the additional findings' authorization of a higher *maximum* term – which implicates the Sixth Amendment under *Apprendi* and *Blakely*.

In that respect, California's DSL is every bit as "mandatory" as the federal guidelines. The status of California upper term determinations under *Blakely* and *Booker* continues to come down to the first sentence of Pen. Code § 1170(b): "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime*." (Emphasis added.) As several post-*Blakely* appellate opinions have held, under the plain language of that statute, the sentencing court cannot impose an upper term unless it finds at least one aggravating circumstance. Unless there is such an additional factual finding (beyond the minimum statutory elements of the offense), the court lacks discretion to select an upper term, and the middle term is the true "statutory maximum" for *Apprendi-Blakely* purposes. (See, e.g., *People v. White* (2004) 124 Cal.App.4th 1417 {and prior cases discussed there}.)

Indeed, *Booker* appears to rebut at least one of the defenses of California's DSL. The majority opinion in *People v. Picado*, *supra*, 123 Cal.App.4th 1216, lays out in some depth the case for exempting upper term aggravating factors from *Blakely*. The *Picado* majority asserts that the entire triad of terms of a California statutory offense establishes the "range" in which a California court exercises "discretion" in choosing the term. According to that view, the upper term, not the mid-term, is the statutory maximum for *Apprendi-Blakely* purposes. The *Picado* majority repeatedly emphasizes that the statute establishing the charged offense (in that case, Pen. Code § 245(a)) states the three available terms. "Looking first at section 245, subdivision (a)(1), the Legislature has prescribed an upper term of four years, and nothing in that statute requires the finding of an additional fact to impose this four-year term. *Blakely* is not invoked on the basis of the charging statute itself." (*Picado*, *supra*, at pp. 1237-1238.) Under that view, the more general sentencing statute, requiring a middle term unless there are aggravating or mitigating circumstances (§ 1170(b)), "is intended to do nothing more than guide the sentencing judge in exercising the discretion authorized by the charging statute itself." (*Id*. at p. 1238.) To the extent that *Picado* relies on the grounds that the upper term is within the range authorized by the "charging statute" and that the requirement of an aggravating finding is found in a separate statute providing sentencing guidance, those putative distinctions are of no moment. **The same was true of the federal sentencing scheme struck down in *Booker*.** The sentence in *Booker* was well within the very broad range established by the "charging statute" – i.e., the statute establishing the conviction offense – and the rules requiring additional findings for imposition of higher sentences within that range were found in separate sentencing statutes (provisions of the Sentence Reform Act) and in the guidelines themselves (promulgated by the U.S. Sentencing Commission). Hence, under *Blakely* and *Booker*, it is not essential that the prerequisite of additional findings be found in the statute establishing the offense. It is enough that

the relevant statutes and rules, taken together, establish a requirement of such findings in order for a court to impose a higher term.

In short, the case for application of *Blakely* to aggravating findings used to support an upper base term (under Pen. Code § 1170(b)) or an upper term of an enhancement triad (Cal. Rules of Court, rule 4.428(b)) is the same as it was before *Booker*. Because *Booker* does not appear to curtail or limit *Blakely*, that argument should be at least as strong as before.[4]

THE *ALMENDAREZ-TORRES* EXCEPTION, HARMLESS ERROR, AND OTHER RECURRING ISSUES.

Booker did not expressly address some of the issues which have proven most contentious in California appeals. Most California *Blakely* appeals seem to have involved questions on the [recose scope of "the *Almendarez-Torres* exception." (*Almendarez-Torres v. United States* (1998) 523 U.S. 224.) That is, assuming that *Blakely* applies to California upper term decisions in general, which specific aggravating factors are subject to Sixth Amendment rights and which come within the exception for the "fact of a prior conviction."

"Fact of a prior conviction." A number of opinions have rejected the Attorney General's bids to exempt all so-called "recidivist" factors (i.e., all the offender-related factors listed in Rule 4.421(b)) from the *Apprendi-Blakely* rights. "[W]e do not perceive the phrase 'the fact of a prior conviction' to have a broad meaning including all recidivist circumstances." (*People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1586.) But the exact parameters of that exception remain unsettled, and courts have drawn very fine distinctions among the aggravating factors. For example, opinions have held that service of a prior prison term (subd. (b)(3)) and probation *status* at the time of the current offense (subd. (b)(4)) are within the exception because those facts are ordinarily established by the same judicial records as the existence of the prior conviction judgment itself. (*People v. Vu* (2004) 124 Cal.App.4th 1060, 1068-1069.) But some of those same panels have held that such factors as *unsatisfactory probation or parole performance* (subd. (b)(5)) and dangerousness to the community (subd. (b)(1)) do not come within the exception because they require extraneous factual findings beyond the bare "fact of a prior conviction." (E.g., *Vu, supra*, at p. 1069; *People v. George* (2004) 122 Cal.App.4th 419, review gr. Dec. 15, 2004 (S128582).)[5] The *Booker* opinion casts no light on

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[4] *Booker*'s potential application to *other* kinds of *Blakely* claims, such as challenges to consecutive sentences, may be more problematic. But, to date, every appellate panel – including those which have supported *Blakely*'s application to upper term factors – has already rejected attempts to extend those rights to consecutive sentencing decisions. (E.g., *People v. White* (2004) 124 Cal.App.4th 1417.) As noted in many of those opinions, there is no substantive statutory mandate, comparable to § 1170(b), stating a express presumption for concurrent terms or explicitly conditioning the availability of consecutive terms upon additional aggravating factors.

[5] Most courts have viewed the factor of prior convictions or juvenile adjudications which are "numerous or of increasing seriousness" (rule 4.421(b)(2)) as the classic example of a "prior

any of those questions because both *Booker* itself and its companion case, *United States v. Fanfan*, turned on findings regarding aspects of the current offense, such as drug quantity.

The proper framework for harmless error analysis. The other recurring controversy in California *Blakely* appeals has been the applicability and the proper framework for harmless error analysis. *Booker* touches on that subject only indirectly – and in a very confusing fashion. In *Booker* itself, the Seventh Circuit had found a Sixth Amendment violation under *Blakely* and had remanded the case for resentencing proceedings. (*United States v. Booker* (7th Cir. 2004) 375 F.3d 505.) The Supreme Court affirmed that disposition – including the remand for resentencing – without discussing whether the violation there could be excused or cured by some form of harmless error analysis. But it would be dangerous to read too much into that aspect of *Booker*. The *Booker* case itself does not appear to have been susceptible to any *Chapman* analysis because the evidence establishing the higher drug quantity *was never even presented to the jury*; the judge made those findings in a separate post-trial proceeding. Additionally, the case did not involve anything comparable to the common situation which has proven most vexing in California appeals – a sentencing court's reliance on a combination of invalid aggravating factors (i.e., factors to which the jury right attached) and valid circumstances (factors within the *Almendarez-Torres* exception or facts admitted by the defendant or established by the jury's verdicts). Consequently, the *Booker* opinion provides no guidance on the proper framework for reviewing "mixed factor" cases such as these.

The final paragraph of Justice Breyer's opinion does offer the following Delphic advice:

> As these dispositions indicate, we must apply today's holdings--both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act--to all cases on direct review. [Citations.] .... That fact does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the "plain-error" test. *It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine.* (*Booker*, Breyer opn. at *29, emphasis added.)

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conviction" factor within the *Almendarez-Torres* exception. (E.g., *Vu*, *supra*, at p. 1068 [finding this factor not subject to *Blakely*, even when it rests on juvenile adjudications on which defendant would not have had jury trial right in prior proceeding].) But, in several unpublished opinions, Division Two of the First District has taken the position that this factor implicates *Blakely* (even when it is based only on adult convictions) because the assessment of whether the priors are "numerous" or of "increasing seriousness" "requires additional findings which are not only factual, but subjective." (See, e.g., *People v. Gaitan* (Oct. 4, 2004; A102560) 2004 WL 2212089 at p. *11, review gr. Dec. 15, 2004 (S128970); *People v. Haynes* (Oct. 25, 2004; A103248) 2004 WL 2378393 at p. *9.)

It is tempting to parse this last sentence as a declaration that harmless error analysis should apply *only* when there has been no Sixth Amendment violation. That seems unlikely in light of the suggestions throughout *Apprendi*, *Blakely* and *Booker* that sentencing-enhancing factors are the functional equivalent of additional "elements" of offenses. (See *Booker*, Stevens opn. at *7.) But the Supreme Court has firmly held that removal of an element of an offense (such as through defective jury instructions) is subject to *Chapman* review, albeit a rigorous form of such review. (*Neder v. United States* (1999) 527 U.S. 1.) A literal reading of the final sentence of the Breyer opinion would also lead to the paradoxical result that "harmless error" review would apply only to sentencings in which there was no error in the first place, or at least no error of constitutional magnitude. It is probably more sensible to read *Booker* as simply not addressing the applicability or proper framework for harmless error analysis of *Blakely* error and leaving that issue to resolution in future cases.

Assuming that some form of harmless error review does apply, that still begs the question of the proper framework for conducting that assessment. Many California reviewing courts have fashioned an approach which is a curious hybrid of federal *Chapman* review and the state *Watson* test: The reviewing court initially applies *Chapman* in determining whether the particular aggravating factor(s) can be salvaged – that is, whether the appellate court can determine beyond a reasonable doubt that "a jury would have made findings to support the aggravating factors" cited by the sentencing court. (*E.g.*, *People v. Butler* (2004) 122 Cal.App.4th 910, review granted, Dec. 15, 2004 (S129000).) Often at the end of that *Chapman* review, the appellate court is left with a combination of valid and invalid factors.[6] The crucial lesson of *Butler* (and the several subsequent appellate opinions which have adopted the same approach) is **that the presence of one or more "valid" factors "does not end our analysis."** (*People v. Vu* (2004) 124 Cal.App.4th 1060, 1070.) The reviewing court must still assess the effect of the inclusion of invalid factors on the sentencing court's ultimate selection of the term. For that part of the analysis, the appellate courts have applied *Watson*: "Although *Blakely* error is evaluated under the *Chapman* test, under California law, '[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen the lesser sentence had it known that some of its reasons were improper.' [Citations.]" (*Butler*, *supra*, at pp. 919-920; accord, e.g., *Vu*, *supra*, at p. 1070.) Much like review of other kinds of defects in sentencing reasons (e.g., dual use violations), that assessment requires consideration of *mitigating circumstances*, as well as aggravating factors, to evaluate whether the sentencing court would have struck the same balance if some of the aggravating factors were to be removed.

Contrary to the *Butler* approach, the Attorney General has insisted that, regardless of how many aggravating factors were tainted by *Blakely* error, the presence of a single valid factor ends the inquiry, because a single factor is theoretically sufficient to support an upper term. While a few cases appear to have adopted that approach (with little analysis) (e.g., *People v. Jaffe* (2004)122

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[6] The valid aggravating circumstances may be factors within the *Almendarez-Torres* exception, facts admitted by the defendant or found under other aspects of the jury's verdict, or factors, otherwise subject to *Blakely*, which were deemed harmless under *Chapman* because the jury would necessarily have made the same findings.

Cal.App.4th 1559, 1587-1588), most have not and have proceeded to consider the effect of the error on the choice of the upper term, as in *Butler* and *Vu*. As explained in another recent opinion: "The relevant question is not whether we can conceive of a legitimate way for the trial court to have arrived at the [upper term]. The question is whether the trial court would have exercised its discretion to impose the upper term ... if it knew that one or more of the factors relied on were invalid. This is a question that can only be answered on a case-by-case basis. [Citations.]" (*People v. White* (2004) 122 Cal.App.4th 1417 [22 Cal.Rptr.3d 586, 604].)

POSSIBLE IMPLICATIONS OF THE *BOOKER* REMEDY FOR CALIFORNIA.

As most observers anticipated (and as Justice Breyer and the other *Blakely* dissenters had predicted), *Blakely* made the demise of the federal sentencing guidelines (at least in their existing form) all but certain. Consequently, most of the suspense surrounding *Booker* concerned what the Court would do with the guidelines and how federal sentencing would proceed in the future. Indeed, the Supreme Court took the unusual step of allotting two hours, rather than the conventional one hour, for the *Booker-Fanfan* oral arguments, with the second hour to be devoted to the proper "remedy" in the event the guidelines were found unconstitutional.

As summarized earlier, the *Booker* "remedial" majority (led by Justice Breyer) performed an unusual judicial surgery on the federal statutes underpinning the guidelines – the Sentencing Reform Act (SRA) of 1984 and subsequent amendments. The remedial majority viewed jury factfinding on what it deemed as traditional sentencing considerations as so inimical to Congressional intentions, that it divined that Congress would have preferred to relax the guidelines' binding effect on judges rather than turn those determinations over to juries. Applying federal principles of "severability" and "reformation" of constitutionally defective statutes, the Court "excised" the specific statutes which made conformity to the guidelines mandatory and instead converted them into "advisory" recommendations. "[T]hrough severance and excision of two provisions," the Court's solution "makes the Guidelines system advisory while maintaining a strong connection between the sentence imposed an the offender's real conduct." (*Booker*, Breyer opn., at *16.) "Without the 'mandatory' provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. [Citation.] The Act nonetheless requires judges to consider the Guidelines 'sentencing range established for ... the applicable category of offense committed by the applicable category of defendant,' [citation]," but federal judges will have greater flexibility. (*Id*. at *24.) As in the pre-*Blakely* days, there will still be no jury factfinding on guidelines factors beyond the elements of the substantive counts, and judges will continue to make findings regarding drug quantities, "leadership" roles and other guidelines factors in setting the sentence – but as part of a "discretionary" process less rigidly bound to the elaborate matrix established by the guidelines.

The Supreme Court's transformation of the federal guidelines from a "mandatory" to an "advisory" regimen will inevitably raise the question whether California's DSL is susceptible to a similar *Booker*-type "remedy" (assuming that it's found to violate *Blakely* in its current form). Interestingly, while there's been considerable litigation in the appellate courts over harmless error, there's been none on the subject of "remedy." For the most part, those appellate decisions which have

found reversible error have "remanded" without specifying what exactly is supposed to happen on remand. There certainly have not been discussions of such questions as whether a trial court has the power to conduct mini-jury trials on aggravating factors in the absence of any express statutory authorization. Nor have there been any appellate decisions (e.g., arising on writ petitions) addressing how trial courts are supposed to comply with *Blakely* in cases currently awaiting trial or sentencing. (There apparently has been preliminary litigation on these questions in some superior courts).

However, the "remedy" question has been briefed in the pending California Supreme Court cases, *Towne* and *Black*. The Attorney General's office is proposing a *Blakely* fix for California very similar to the one the U.S. Supreme Court has now adopted in *Booker*.

> If this Court should conclude that [Pen. Code] section 1170 is unconstitutional because *Blakely* precludes the trial court from making the necessary findings to impose an upper term sentence, respondent respectfully requests *that this Court construe section 1170, for prospective application, as allowing the trial court the discretion to impose the upper term without the requirement of any additional factfinding.* This construction of the statute would preserve a tripartite sentencing scheme that has worked effectively for more than a quarter-century, and would be fully consistent with the Legislature's intent to provide trial courts the discretion to impose an upper term in the appropriate circumstances.
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> .....
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> In other words, the section should be construed *to eliminate any requirement that a trial court must find facts before it could impose any term other than the middle term*. (*People v. Towne*, S125677, Answer Br. on Merits (ABM) (10/4/04), pp. 49-50, emphasis added.)[7]

The state is certain to tout *Booker*'s conversion of the federal guidelines from "mandatory" to "advisory" as reason for the California Supreme Court to adopt a similar solution for the DSL. The state proposed "reformation" of section 1170 poses two sets of questions:

Is California's DSL susceptible to a *Booker*-type fix, such as proposed by the Attorney General? As debated in Justice Breyer's *Booker* opinion and Justices Stevens' and Scalia's respective dissents, "reformation" of a constitutionally defective statute is an unusual judicial exercise. The Court selectively "excises" or rewrites portions of a statutory scheme and necessarily arrives at a result different than the one the legislature actually preferred. Rather than give effect to the actual legislative intent, as in an ordinary statutory construction case, the Court attempts to divine "what 'Congress would have intended' in light of the Court's constitutional holding" striking down the portions of the statute as written. (*Booker*, Breyer opn., at *16.)

Even assuming that the Breyer-led majority got that question right – i.e., that Congress would

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[7] Much of the briefing in both *Towne* and *Black* is available on the "*Blakely* page" of FDAP's website: http://www.fdap.org/blakely4.html.

have preferred elimination of the guidelines' mandatory effect (thereby increasing judges' sentencing discretion) to the dissenters' solution of simply affording jury trial rights on guidelines factors – that does not settle the question of the appropriate remedy for California's DSL. *Booker*'s analysis does not answer whether the California courts have a similar power to rewrite statutes or, assuming they do, whether the California Legislature would have preferred elimination of section 1170's mandate of additional factual findings as a prerequisite to imposition of the upper term.

California's standards for "reformation" of statutes do look to similar criteria as the federal standards debated in *Booker*: "[A] court may reform-i.e., 'rewrite'-a statute in order to preserve it against invalidation under the Constitution, *when we can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute*." (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661, emphasis added.) As noted in the appellant's briefing in *Towne*, "while the Legislature did intend that a greater term might be imposed if additional factors were present, *it did not intend to give the trial court unfettered discretion to impose the upper term without them.*" Consequently, "[t]his Court must not just write out the limitations imposed." (*People v. Towne*, S125677, Appellant's Reply Br. on Merits (10/20/04), p. 31, emphasis added.) The *Towne* briefing addresses the intent underlying the DSL and a number of alternative "reformation" solutions at some length (including the possibility of affording jury trial rights on aggravating factors), and we will not attempt to repeat that analysis in these materials. (See *id*. at pp. 13-22.)

As noted earlier, until now the "remedy" question has not even been raised in Court of Appeal cases. But, in light of *Booker*, the Attorney General may begin arguing in court of appeal cases that the remedy should be reformation of section 1170(b) (rather than adding a jury trial right). But the Court of Appeal need not reach that difficult question, which will be decided shortly by the California Supreme Court in *Black* or *Towne*. As discussed in greater detail in the next section, any such reformation could not be applied to any case now pending in the Court of Appeal: Because the proposed reformation would remove a current limitation on imposition of an upper term (the necessity of finding one or more aggravating factors), due process considerations forbid the retroactive application of such a construction to offenses committed prior to the decision reforming the statute. (See pp. 11-15, *infra*.)

In any event, the state courts are free to reject a *Booker*-like remedy for reasons similar to those stated by Justice Stevens and Justice Scalia in their dissents in *Booker*. Regardless of what Congress may or may not have intended, the California Legislature did not necessarily share its putative hostility to any possibility of jury adjudication of sentencing-enhancing factors. After all, even before *Apprendi*, the California Legislature had accorded a right to jury trial on most conventional enhancements, many of which parallel the factual questions posed by aggravating factors (e.g., weapon use, bodily injury, drug quantities, etc.). Conversely, the "advisory" solution – elimination of the requirement for aggravating findings – would undermine the Legislative intent in California as it would take some of the "determinative" out of determinate sentencing. Assuming a judicial "reformation," rather than action by the Legislature itself, is even authorized or feasible, the

Legislative intent would better served by retaining the current statutory language and adding a jury trial right. This approach would preserve the legislative bar on imposition of upper terms without aggravating factors. (Of course, as discussed below (see p. 15, *infra*), depending on the posture of the case, defense counsel may not *want* the prospect submission of those factors to a jury and may prefer to take the position that, until the Legislature fashions a solution, those factors are simply "off the table.")

Due process limitations on retroactive application of an "advisory" regimen to pre-*Towne/Black* offenses. While there are sound objections to the form of "reformation" proposed by the Attorney General, there is a distinct possibility that the California Supreme Court will follow the example of *Booker* and adopt a remedy along those lines. That is, that to spare the DSL from unconstitutionality, the Supreme Court may declare that henceforth the rules requiring findings of aggravating factors for imposition of an upper term (or mitigating factors for choice of a lower term) will be deemed "advisory" rather than "mandatory." But any such "remedy" would pose a further question of vital concern to our current appellate clients: **Which defendants could be sentenced under the "reformed" sentencing regimen?** Neither the various opinions in *Booker* nor the briefing thus far in *Towne* and *Black* have addressed the constitutional implications of applying an "advisory" incarnation of the DSL (or, for that matter, the "advisory" federal regimen adopted in *Booker*) to defendants currently in the system.

The Attorney General's briefing states that the California Supreme Court should make its decision "prospective,." But, under the state's view of that concept: "By 'prospective application,' respondent means this suggested interpretation of section 1170 should apply to *any sentencing hearings occurring after this Court issues its decision in this case*." (*Towne* ABM*, supra*, at p. 50 fn. 12, emphasis added.) Under that proposal, all defendants currently awaiting trial or sentencing would be sentenced under the new "advisory" regimen; those standards would presumably also apply to any *resentencings* ordered by appellate courts in light of *Blakely* errors at the original sentencing. However, while this proposal might well fix the Sixth Amendment *Blakely* problem, its application to currently pending California cases would result in a different – and more glaring – constitutional violation:

Application of the state's proposed reformation to currently pending cases would violate due process/retroactively principles as an unforeseeable judicial increase in punishment, comparable to an ex post facto violation. To survive constitutional muster, a transformation of the DSL into an advisory regimen could only be applied to offenses committed after the finality of the California Supreme Court's ultimate opinion in *Towne* or *Black*.

The ex post facto clause itself applies only to legislative amendments. But the due process clause imposes similar retroactivity constraints on judicial actions which are tantamount to rewriting a statute, as "reformation" of a statute surely is. If a judicial decision results in an enlargement of criminal liability or increases punishment, the new rule cannot be applied retroactively to an offense occurring before that decision if that construction was not reasonably foreseeable at the time of the defendant's conduct. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 352-353; *Marks v. United*

States (1977) 430 U.S. 188, 191-195; *Douglas v. Bruder* (1973) 412 U.S. 430, 432; *Rogers v. Tennessee* (2001) 532 U.S. 451, 456.)

The California Supreme Court has a solid record of applying this limitation. "[A] judicial enlargement of a criminal statute that is not foreseeable, 'applied retroactively, operates in the same manner as an ex post facto law. []' [Citations.]" (*People v. Morante* (1999) 20 Cal.4th 403, 431.) The Court has frequently given prospective effect only (tied to the date of the *offense*) to its own rulings when it has overruled previous caselaw in a way which effectively expands the scope of criminal liability, curtails a defense, or otherwise results in greater punishment. (*Id*. at pp. 430-432; see also, e.g., *People v. Davis* (1994) 7 Cal.4th 797, 811-812; *People* v. *Blakeley* (2000) 23 Cal.4th 82, 91; *People* v. *Martinez* (1999) 20 Cal.4th 225, 238-241; *People* v. *King* (1993) 5 Cal.4th 59, 79-80; *People* v. *Johnson* (1993) 6 Cal.4th 1, 44-45; *People* v. *Escobar* (1992) 3 Cal.4th 740, 752.)

There is no question that a *Booker*-type reformation along the lines proposed by the Attorney General would represent an unforeseeable construction of the DSL within the meaning of *Bouie v. City of Columbia* and its California progeny. Indeed, a "reformation" of a statute is still less foreseeable than the judicial decisions at issue in most other due process/retroactivity case. The Court would not merely be reinterpeting statutory language but would openly "rewrite" it by striking or "excising" particular provisions. Instead, the more important question here would be whether the proposed conversion of section 1170 to a more "advisory" rule actually results in greater punishment.

The proposed reformation would not merely represent a procedural alteration, but would effect a substantive change in the DSL and, in particular, the standards for imposition of an upper term. By the Attorney General's own description, the proposal would "eliminate any requirement that a trial court must find [additional] facts before it could impose any term other than the middle term." (*Towne* ABM, *supra*, p. 50.) That is, it would allow imposition of an upper term *without the necessity of any finding of aggravating facts* distinguishing the immediate offense from other convictions of the same crime. A statutory revision which alters sentencing guidelines to give a court greater flexibility to impose a term higher than the presumptive sentence in effect at the time of the offense violates the ex post facto clause. (*Miller v. Florida* (1987) 482 U.S. 423.) The same is true of a revision which effectively eliminates the necessity for a certain form of evidence or otherwise "reduces the quantum of evidence" necessary for conviction of a particular offense. (*Carmell v. Texas* (2000) 529 U.S. 513.) The proposal for making the aggravation requirement "advisory" increases punishment in both respects. Like the sentencing guidelines revision in *Miller*, it give a sentencing court authority to impose an upper term (rather than the presumptive mid-term) under circumstances which would not suffice under current law. And, as in *Carmell*, it would eliminate the requirement of additional evidence – aggravating facts – for imposition of an upper term.

Put another way, in view of *Blakely*, California courts have come to recognize that the middle term is the true "statutory maximum," where the crime consists only of the bare elements necessary to establish the statutory offense. The excision of the crucial first sentence of section 1170 – the state's proposed remedy – would make the upper term the statutory maximum because a court could theoretically impose that term without any additional findings. Consequently, the proposal *would*

increase the statutory maximum. Under *Miller*, *Carmell*, and other authorities, a legislative rewriting of the statute in this fashion would plainly violate the ex post facto clause. By the same token, a judicial "reformation" of the statute which accomplishes the same result necessarily implicates the due process/retroactivity rules of *Bouie.*

The Attorney General is likely to emphasize that the U.S. Supreme Court imposed no such limitation on its "reformation" of the federal statutes. On the contrary, it remanded both Booker's and Fanfan's cases to the respective district courts for resentencing under the new "advisory" incarnation of the guidelines. (*Booker*, Breyer opn. at *29.) There is a simple answer to the suggestion that the California courts should simply follow the federal lead and apply a "reformed" DSL to all future sentencing hearings, without regard to the date of the offense: The due process/retroactivity question was not briefed, argued, or discussed in any of the opinions in *Booker*/*Fanfan*.[8] As *Booker* itself vividly demonstrates, cases are not authority for propositions not considered. For that reason, the several prior opinions in which the Supreme Court had upheld sentences under the federal guidelines in the face of *other* constitutional challenges were irrelevant to the constitutionality of the guidelines under *Apprendi* and *Blakely* because none of those cases had concerned the Sixth Amendment right to jury trial. (See *Booker*, Stevens opn. at *12-*15.) Also, there are enough structural differences between the federal guidelines and California's DSL that it is less clear that federal sentencing under the *Booker* remedy will necessarily pose due process/retroactivity problems in all cases. Unlike California's relatively simple "triads," the federal guidelines establishes elaborate matrices. In addition to identifying aggravating or mitigating criteria, the guidelines effectively assign different weights to particular factors. There is no close California analog to that aspect of the guidelines. In the federal system, it may be more appropriate to address potential due process violations on a sentence-by-sentence basis. In contrast, in California, the elimination of the current preclusion of an upper term without findings of aggravation is the entire object of the Attorney General's proposal. For this reason too, the remand dispositions in *Booker* and *Fanfan* cannot be read as giving a green light to sentencing California defendants under a more punitive regimen than the one in effect at the time of their offenses.

If the California Supreme Court does adopt this proposed remedy (which, with the example of *Booker*, is quite possible), it must make that revision truly "prospective": **Only offenses committed after the finality date of the yet-to-be-issued opinion(s) in *Towne* or *Black* can be sentenced under the new advisory regimen.** Any defendant whose crime predates *Towne/Black* must still receive the protection of section 1170(b)'s current requirement of additional aggravating facts as a prerequisite for imposition of the upper term.

The different retroactivity standards applicable to *Blakely* itself and to any *Booker*-type

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[8] Booker's and Fanfan's respective briefs on the merits are available on the ABA's web site (among other sites): http://www.abanet.org/publiced/preview/briefs/oct04.html#usbooker. Though the briefs raised other objections, both practical and constitutional (e.g., double jeopardy), to conversion of the guidelines into "advisory" standards, neither defendant invoked *Bouie v. City of Columbia* or other due process/retroactivity authorities.

transformation of the DSL may create a "window" in which a substantial number of California defendants may be able to obtain reduced sentences. Any defendant whose case was not yet "final" for federal purposes as of June 24, 2004, is entitled to the benefit of the Sixth Amendment holding in *Blakely*. Because the definition of "finality" for *Teague* retroactivity purposes includes the period in which a defendant could have petitioned for certiorari (even if there was no such petition), this means that any case in which the California Supreme Court denied review on or after March 26, 2004, is subject to *Blakely*.[9] Meanwhile, however, any such defendant whose crime occurred before the finality date of the California Supreme Court's adoption (in *Towne* or *Black*) of a *Booker*-type "advisory" regimen could not be sentenced under the new system. (Note that, for due process retroactivity purposes, the California Supreme Court has usually measured the finality of its own opinions under state rather than federal standards. Consequently, the *Towne* or *Black* opinion will be deemed final as of (1) 30 days after the Supreme Court's opinion (Cal. Rules of Court, rule 29.4(b)(1))); or (2) the date on which the Court denies a rehearing petition (if it extends the finality period in order to consider the petition) (*id*., rules 29.4(b)(1)(B), 29.5(c)).)

Taken together, these rules mean there is a large cohort of defendants who: (1) are entitled to the benefit of *Blakely*'s Sixth Amendment holding, but (2) cannot be sentenced under a "reformed" California system which eliminates the current protection against imposition of an upper term in the absence of additional aggravating facts. This group includes all defendants whose cases are currently pending at either the trial court or the appellate level, as well as future defendants whose offenses occur between now and the finality date of *Towne* or *Black*. It also includes post-affirmance defendants whose cases became final early in this "*Blakely* window" (e.g., where review was denied less than 90 days before *Blakely*).

Regardless of whether the case involves an original sentencing hearing or a resentencing following an appellate remand or a habeas petition, the question arises of how the court can proceed with sentencing without offending either *Blakely* and the Sixth Amendment on one hand or due process retroactivity limits on the other. The two principal options would be: (a) limiting the sentencing or resentencing to those aggravating factors which do not implicate *Blakely* rights (i.e., facts admitted by the defendant or established by other aspects of the jury's verdict and factors within the scope of the *Almendarez-Torres* "fact of a prior conviction" exception); or (b) allowing jury adjudication of any asserted aggravating factors within *Blakely* (the option rejected by the Breyer-led "remedial" majority in *Booker*). The former approach would effectively take all current conduct

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[9] This assumes that *Blakely* itself is deemed a "new rule" but not the kind of rare "'watershed' ... implicating ... fundamental fairness and accuracy," which could be applied retroactively to cases which were already final. (*Teague v. Lane* (1989) 489 U.S. 288.) That seems the most likely characterization of *Blakely* in light of the Supreme Court's refusal (on the same date as the *Blakely* opinion) to give retroactive effect to *Ring v Arizona* (2002) 536 U.S. 584 (right to jury trial on aggravating facts necessary for death penalty). (*Schiro v. Summerlin* (2004) ___ U.S. ___, 124 S.Ct. 2519.) Of course, if *Blakely* were to be deemed nothing more than an application of *Apprendi*, then *Blakely* would also apply to cases going back to 2000 – as Justice O'Connor warned in her *Blakely* dissent.

factors and many recidivist aggravating factors "off the table" in most cases. That, of course, would be a highly favorable result for defendants because it could deprive sentencing courts of the authority to impose upper terms in many cases which would otherwise be viewed as aggravated. But, for that same reason, courts might well reject this solution as frustrating the Legislature's objective of preserving the upper term option in such cases. However, the jury trial option has problems of its own – most notably, there is no statutory authority for empaneling a jury to determine aggravating facts (or for submitting such facts to the jury as part of the case-in-chief). Consequently, like other aspects of a reviewing court's leeway to "reform" a constitutionally defective statute, any such feat of "judicial legislation" could pose separation of powers problems. Additionally, conducting mini-sentencing trials on cases which have already been tried to a jury verdict would pose double jeopardy questions. Arguably, it would be tantamount to trying a defendant for a greater degree of an offense after a jury has already convicted him of a lesser offense.

There has been no appellate litigation in California on double jeopardy or related issues posed by such an approach. Those subjects are beyond the scope of these materials, which represent only a "first take" on how *Booker* may affect the course of *Blakely* issues in California.

It is likely – and entirely appropriate – that defense attorneys may take different positions on the legitimacy of particular "remedies" in light of the different positions of their clients.[10] For example, pre-trial defendants have every reason to oppose the efforts of some District Attorneys' offices to charge aggravating factors and submit them to the jury as part of the trial in chief. For those defendants, it is crucial to assert the lack of statutory authorization and other potential objections to submission of those factors to the jury because, since the trial hasn't yet occurred, the prosecutors are sure to take advantage of that opportunity to obtain findings on such factors. But the theoretical possibility of jury adjudication of aggravators may pose less of a risk to post-trial defendants awaiting sentencing and to appellants seeking resentencing remands. As a practical matter, prosecutors and trial judges may be unwilling to expend the resources to empanel a jury and conduct a mini-trial simply to be able to add one year onto a sentence (which is the difference between middle and upper terms in most non-strike cases).

In any event, assuming that the California Supreme Court agrees with the majority of appellate panels on the basic question of *Blakely*'s application to California upper terms, the various facets of the "remedy" issues are likely to represent the "next generation" of sentencing issues.

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[10] Indeed, in the *Towne* briefing, the defendant-appellant and CACJ have taken conflicting positions – Towne has suggested judicial extension of jury rights to adjudication of aggravating factors as one possible solution, while CACJ has argued that the DSL is fatally defective and only the Legislature, not the courts, can enact a solution.