

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff and Respondent,) Crim. No. S125677
)
 v.) (Court of Appeal No. B166312)
) (Sup.Ct.No. PA040926)
)
 SHAWN TOWNE)
)
 Defendant and Appellant.)
 _____)

**APPELLANT’S SUPPLEMENTAL
BRIEF ON THE MERITS**

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ARGUMENT

I.

**THE DECISION IN *UNITED STATES V. BOOKER*
CONFIRMS THAT THE PROVISIONS FOR
IMPOSING THE UPPER TERM IN CALIFORNIA
VIOLATE THE FEDERAL CONSTITUTION**

In *United States v. Booker* (2005) 543 U.S. ____ [2005 LEXIS 628; 2005 Daily Journal D.A.R. 410], the Court addressed whether the Federal Sentencing Guidelines [Guidelines] operated to violate the Sixth Amendment right to a jury trial. The Court, following *Blakely v. Washington* (2004) 540 U.S. ____ [159 L.Ed.2d 403, 415-416; 124 S.Ct. 2531] and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 474 [147 L.Ed.2d 435; 120

S.Ct. 2348], held that they did. In so doing, the Court reaffirmed its previous statements and clarified that neither labels, nor promulgating authorities, nor statutory sources of the particular law in question matter to the analysis. Rather, if facts are necessary by law to support a sentence greater than that otherwise authorized by the facts established by the guilty plea or jury verdict, they must be admitted by the defendant or proved to a jury beyond a reasonable doubt. (*United States v. Booker, supra*, 543 U.S. at p. ____ [2005 Daily Journal D.A.R. at pp. 413-417].)

In the case of the Guidelines, they were promulgated by a federal sentencing commission at the direction of Congress rather than by Congress itself and, while called Guidelines, they are more than mere suggestions and created differing sentencing ranges based upon judicial findings of fact. Moreover, the federal sentencing statute mandated that they be followed by the sentencing courts. The Court held that, because these Guidelines were mandatory and directed the sentencing court to impose a sentence in a specific range that was determined, not by the verdict alone, but based upon additional facts found by the sentencing judge by a preponderance of the evidence, they were unconstitutional. (*Id.*, at p. ____ [*Id.*, at pp. 413-417].)

This holding in *Booker* makes clear that the provision in Penal Code section 1170 subdivision (b) that requires the sentencing court to impose the midterm unless it finds additional facts in aggravation makes the midterm the maximum sentence permitted by the verdict for purposes of *Blakely* analysis. It matters not that the three potential terms are outlined in the statutes directly related to the crime, that the mandate for the middle term is

found in a separate statute, or that the higher sentence is called the upper term instead of an upward departure or an enhancement. (See *Ibid.*; see also *Jones v. United States* (1999) 526 U.S. 227, 232, 244, 251.) The fact remains that without additional findings of aggravating factors that cannot be based on anything found by the jury in reaching its verdict on the crime or any imposed enhancement, the sentencing court in California must impose the middle term. (See Pen. Code, § 1170, subd. (b); *People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785.) The middle term, then, is “the maximum authorized by the facts established” by the verdict. (*United States v. Booker, supra*, 543 U.S. at p. ____ [2005 Daily Journal D.A.R. at p. 417].)

Booker further makes clear that it is unconstitutional to let the sentencing court find the aggravating factors by a mere preponderance of the evidence. (*Id.*, at p. ____ [*Id.*, at p. 413-417].) “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.” (*Ring v. Arizona* (2002) 536 U.S. 584, 602 [153 L.Ed.2d 556, 122 S.Ct. 2428]; see also *United States v. Booker, supra*, 543 U.S. at p. ____ [2005 Daily Journal D.A.R. at p., 413.] While the Court continued to acknowledge, as it had in *Apprendi*, that sentencing courts can make certain factual findings in exercising sentencing discretion, they must be made in the context of selecting a sentence within the already authorized range. (*Id.*, at ____ [*Id.*, at 414]; see also *Williams v. New York* (1949) 337 U.S. 241, 246-252 [constitutionally permissible to allow the judge to

engage in fact-finding related to determining whether to follow the jury's recommendation to *reduce* the otherwise mandatory death sentence]; *Blakely v. Washington, supra*, 540 U.S. at p. ____ [159 L.Ed.2d at 414, 124 S.Ct. at p., 2538]; *Harris v. United States* (2002) 536 U.S. 545, 560 [allowing the judge to find facts that established a mandatory minimum sentence was constitutional as the resulting sentence was “a sentence the judge could have imposed absent the finding.”].) In such a context, the aggravating factors are not being used to “swell the penalty” above what the law has provided, but ““are interposed merely to check the judicial discretion in the exercise of the permitted mercy.”” (*Id.*, at p. 561-562 [internal citation omitted].) Because in California the middle term is mandatory without additional findings of fact, the judicial finding of aggravating factors *is* being used to “swell the penalty,” not inform an exercise of mercy. Accordingly, Penal Code section 1170 subdivision (b)'s provision for imposition of the upper term based upon judicial fact-finding is unconstitutional.

II.

ASSUMING THAT PENAL CODE SECTION 1170 SUBDIVISION (B) CAN BE SAVED BY REFORMATION OR SEVERANCE, THE REMEDY MUST PRESERVE THE LEGISLATIVE GOAL TO PROMOTE UNIFORM SENTENCING BY GRANTING ONLY LIMITED DISCRETION TO THE SENTENCING JUDGE

The question remains what remedy this Court should adopt to rectify the unconstitutional procedure. In *Booker*, the Court opted to sever and excise the provision that made the Guidelines mandatory. (*Id.*, at p. ____ [*Id.*, at p.417-423].) It did so based upon the federal rules of statutory construction and reformation and the conclusion that the Congress would have preferred this remedy over all others. (*Ibid.*) Whatever may be the case with respect to the federal system, a similar remedy would be inappropriate in California.

As appellant argued in the Appellant's Reply Brief on the Merits (ARBM)¹, this Court should undertake to reform the statute or sever provisions only in a manner that will satisfy as closely as possible the primary legislative goals behind the statute. (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661.) Here, the primary goal is to promote uniformity in the sentencing of offenders committing the same offense. (Pen. Code, § 1170 subd. (a)(1); *People v. Simon* (1983) 144 Cal.App.3d 761, 765; Parnas & Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing*

^{1/} In the ARBM, appellant discussed potential remedies at length and urged this Court to either read a requirement for a jury determination of aggravating factors into the statute or sever the provisions for imposing any upper term from the statutes. Appellant will not reiterate all of the arguments here, but continues to assert them and restates them briefly.

Law in California (1978) 11 U.C. Davis L.Rev. 29, 31-32, 39-40.) A key component of the plan to promote such uniformity was to grant only very limited, well regulated discretion to the sentencing court. (Pen. Code, § 1170, subd. (a)(1); *People v. Martin* (1986) 42 Cal.3d 437, 442-443 [“the movement to promote uniformity in sentencing... was in no small part a movement to *diminish* judicial discretion.” (Emphasis added.)])

This desire to restrict judicial discretion is demonstrated by the fact that instead of a sentencing range for the lower, middle and upper term, the Legislature gave only a single fixed term for each. It also required that the court consider certain aggravating factors laid out in the Penal Code (Pen. Code, §§ 1170.7, 1170.71, 1170.72; 1170.73, 1170.74, 1170.75, 1170.76, 1170.78, 1170.8, 1170.81, 1170.82, 1170.84, 1170.85, 1170.86, 1170.89), provided that the court otherwise follow the rules of the Judicial Council, and required that the court identify the factors it was using on the record. (Pen. Code, § 1170, subd. (b).) Additionally, the Legislature created many sentence enhancements that had to be tried to the jury and found beyond a reasonable doubt. Thus, unlike the federal government, the California Legislature did not leave findings on such things as great taking, weapon use or even recidivism up to the trial judge alone. (See Pen. Code, §§ 666.5, 1025, 1170.1, subd. (e); 12022, 12022.6.)

Given the Legislature’s clear desire to strictly limit judicial discretion, it would be wholly inappropriate for this Court to remedy the constitutional problem by severing the limitation on judicial power and giving the sentencing court unfettered discretion to

impose the upper term that the Legislature has not determined to be the appropriate sentence in most cases. (*Kopp v. Fair Pol. Practices Com.*, *supra*, 11 Cal.4th at p., 660-661, 670-671.) There is nothing unconstitutional in the limitation itself. And, presumably, even if the Legislature were to opt to give the court unlimited discretion as to any of the terms described, it may reconsider whether the upper end of the range is really appropriate in most instances. This is a legislative determination that this Court should not undertake. (See *Metromedia v. San Diego* (1982) 32 Cal.3d 180, 187; *Arp v. Workers' Compensation Appeals Board* (1977) 19 Cal.3d 395, 409-411.)

Additionally, the Legislature's decision to require a jury finding for most enhancements demonstrates its readiness to submit aggravating circumstances to the jury. Thus, as appellant posited in the ARBM, it may be that this Court could reform the statute to add a jury trial requirement for all aggravating factors. (ARBM 25-26) On the other hand, because the determination of whether to change the sentencing scheme or the procedures at a criminal trial and how to do so is properly a legislative function, this Court should not undertake this "wholesale rewriting of the statute." (*City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, 272; see also *Metromedia v. San Diego*, *supra*, 32 Cal.3d at p. 187; *Arp v. Workers' Compensation Appeals Board*, *supra*, 19 Cal.3d at pp., 409-411; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 344.)

This Court should instead, as suggested in the ARBM, sever the only aspect of the statute that is unconstitutional, the provisions conferring upon the sentencing judge the

power to impose the upper term based on factual findings made by the judge alone on the basis of a preponderance of the evidence. This solution keeps the basic sentencing scheme intact with minimal disturbance, while the Legislature considers what other changes it may want to make in the system that would both serve its purposes and comply with the Constitution of the United States. (ARBM 26-30)

Additionally, as even respondent recognizes, if this Court were to adopt respondent's suggestion of construing the provision mandating the midterm out of the statute to give the sentencing court unfettered discretion to impose the upper term, it could only apply such a remedy prospectively. (See *Bouie v. City of Columbia* (1964) 378 U.S. 347, 352-354; Answer Brief on the Merits p. 50 [requesting prospective application of the interpretation].) Federal due process prohibits the retroactive application of a judicial enlargement of a criminal statute in a manner that would operate like an ex post facto law. (*Bouie v. City of Columbia* (1964) 378 U.S. at pp., 352-354.) "An ex post facto law has been defined by [the United States Supreme] Court as one . . . 'that aggravates a crime, or makes it greater than it was when it was committed.' [Citation] If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." (*Id.*, at p. 353-354.) This Court has also held that an unforeseeable expansion of criminal liability based upon judicial interpretation cannot be applied retroactively. (*People v. Morante* (1999) 20 Cal.4th 403, 430-432; *People v. King*

(1993) 5 Cal.4th 59, 79-80; see also, e.g., *People v. Blakeley* (2000) 23 Cal.4th 82, 91; *People v. Martinez* (1999) 20 Cal.4th 225, 238-241; *People v. Davis* (1994) 7 Cal.4th 797, 811-812; *People v. Escobar* (1992) 3 Cal.4th 740, 752.)

Clearly, removing the mandate that the middle term be imposed unless aggravating factors were found and giving the sentencing court discretion to impose the upper term upon a finding of guilt alone without finding factors in aggravation would increase the penalty beyond that in effect at the time appellant committed his crime. Such an increase in sentence would violate ex post facto provisions. (See *People v. King, supra*, 5 Cal.4th at p., 79-80; *Collins v. Youngblood* (1990) 497 U.S. 37, 42 [111 L.Ed.2d 30, 38-39, 110 S.Ct. 2715]; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1707.) Moreover, the aggravating factors are “elemental” in that the upper term cannot be imposed without them. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 486, 490-494 [147 L.Ed.2d 435; 120 S.Ct. 2348].) Thus, removing them is “analogous to expanding [appellant’s] criminal liability . . . by eliminating a required element of the offense” and thus would violate ex post facto if such a change was unforeseeable. (See *People v. Morante* (1999) 20 Cal.4th 403, 430-432.) Given that Penal Code section 1170 subdivision (b) has for nearly 30 years mandated the middle term unless there were findings of additional factors, removing that mandate would be unforeseeable. Accordingly, such a remedy would have to be applied prospectively only and could not be applied to appellant.

CONCLUSION

For the most part, California's sentencing scheme requires facts that increase a sentence be tried to a jury and found beyond a reasonable doubt. Thus, the *Blakely* line of cases may have limited impact on California. But, in certain limited instances, the Legislature has unconstitutionally provided that the sentencing court may increase a sentence beyond that permitted by the verdict alone upon the finding of additional facts by a mere preponderance of the evidence. The imposition of the upper term is one such instance. As this delegation of fact-finding authority to the judge instead of the jury violates the Sixth and Fourteenth Amendments of the federal constitution, this provision cannot stand. (*United States v. Booker, supra*, 543 U.S. at p. ____ [2005 Daily Journal D.A.R. at pp., 413-417]; *Blakely v. Washington, supra*, 540 U.S. at p. ____ [159 L.Ed.2d at 413-414, 124 S.Ct. at 2537].)

Dated: February 2, 2005

RESPECTFULLY SUBMITTED

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