

Clerk
Supreme Court
State of California
for delivery to the Honorable Chief Justice Ronald George
and Associate Justices of the Court

RE: *People v. Shawn Towne*
Supreme Court No. S125677

To the Honorable Chief Justice Ronald George and Associate Justices of the Court:

Appellant requests leave to file this supplemental letter brief to address issues of legislative intent based upon documents obtained from the state archives relating to the bills enacting Penal Code section 1170¹ in 1975-1976 and amending it in 1977-1978. The issues presented in this case require consideration of whether the Legislature meant for the middle term to be mandatory in the absence of judicial factfinding and whether the statute may be interpreted or reformed to avoid unconstitutionality. (See AOBM 22-25; ARBM 8-10, 13-32) The legislative history casts light on whether the Legislature intended to make the middle term mandatory and informs the remedy this Court can employ upon finding some provisions of Penal Code section 1170 unconstitutional.

Respondent has argued that the Legislature merely established a “preference” for the middle term and that legislative intent was merely to make the middle term average or usual, but that the defendant has no entitlement or right to the middle term upon conviction. (RBM 33) The statutory language and the legislative history of the statute belie this conclusion.

As initially drafted in Senate Bill 42, Penal Code section 1170 did not include the current subdivision (b) with its requirement that the middle term be imposed unless the court found additional factors justifying departure from it. (See Sen. Bill No. 42 (1975-1976, Reg. Sess.) § 273.) Rather, it merely stated that the trial court shall sentence the defendant to one of the three terms absent a grant of new trial or probation. (*Ibid.*) In the August 7, 1975 version of the bill, subdivision (b) was added, providing for the mandatory imposition of the middle term absent additional findings and laying out

¹Appellant is filing concurrently herewith a Request for Judicial Notice of the documents that are part of the legislative history of Assembly Bill 476 from 1977, the bill that amended the then newly enacted Penal Code section 1170. For the Court’s convenience copies of the referenced documents are attached to the Request for Judicial Notice as exhibits. Citation to the documents in this letter are by the exhibit numbers assigned to them in the request.

various procedural rules for doing so. (See Assem. Amend to Sen. Bill No. 42 (1975-1976, Reg. Sess.) Aug. 7, 1975, p. 111-113.) While those procedures were later amended by Assembly Bill 476 to permit finding of the factors at a single sentencing hearing and without a motion by the parties, the requirement that the court “shall” impose the middle term unless it made additional findings and stated the reasons for the departure on the record was never eliminated. (See Assem. Bill 476 (1977-1978, Reg. Sess.) § 15.)

Additionally, in 1977, when AB 476 was being drafted to amend the newly enacted determinate sentencing law as passed in SB 42, the San Diego District Attorney’s Office urged the Legislature to give the sentencing court more discretion and reduce the emphasis on a “narrow uniformity.” (See Exh. B, Suggested Modification of SB 42 - Tentative Draft, pg. 4.)² It further argued to this end that, “[t]he middle term should be viewed as the norm, but not made mandatory; . . .” (*Id.*, at pg. 4.) The proposal went on to suggest that: (1) the requirement of a special hearing on aggravation or mitigation should be eliminated; (2) the choice of term should be left to the sound discretion of the court; (3) the Judicial Council’s sentencing guidelines should be merely “taken into consideration” instead of mandatorily applied; and (4) the court should be able to use a wide range of information, including the probation report. (*Id.*, at 4-7.)

The same office also wrote to the Chairman of the Assembly Committee for Criminal Justice, the Honorable Kenneth L. Maddy, to withdraw its support of the bill because its proposed amendments, which included those mentioned above, had not been adopted. (See Exh. A) Subsequently, the Legislature did follow some of these suggestions as they related to Penal Code section 1170, such as combining the hearing on aggravating or mitigating factors with the sentencing hearing and permitting consideration of the probation officer’s reports. (See Pen. Code, § 1170 as enacted in 1977; see also Exh. C, D, E.) But, despite the earlier direct request that the Legislature not make the middle term mandatory, but rather “the norm” (or “the preference” as respondent has suggested), the Legislature retained the mandatory “shall.” It further continued to mandate that the trial court follow the rules laid out by the Judicial Council.

This retention of the mandatory language as to the imposition of the middle term demonstrates a clear legislative intent to require the sentencing court to impose the middle term unless additional facts were found. (Cf., *Kusior v. Silver* (1960) 54 Cal.2d 603, 618

²This was provided to Assemblyman Kenneth L. Maddy by Legislative Counsel in April 1977. In its opening paragraph, it explained that the San Diego District Attorney’s Office believed that the determinate sentencing act needed modification and that this document was a tentative draft of suggested modifications. It was sent to this office from the Legislative Archives, and, for this Court’s convenience, a copy of it is attached to the request for judicial notice of the archived materials as Exh. B.

[“failure to make changes in a given statute in a particular respect when the subject is before the Legislature, and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect.”]; *Madrid v. Justice Court* (1975) 52 Cal.App.3d 819, 825-826.) The Legislature plainly rejected the suggestion of expanding the trial court’s discretion to enable it to impose any of the three terms at will. Neither did it permit the trial court to ignore the rules of the Judicial Council in making its findings on aggravating or mitigating factors.

The fact that, in 1977, the Legislature declined the district attorney’s invitation to alter the statute to give the trial court the option of imposing the upper term without a finding of any additional facts also undercuts respondent’s argument that this Court could reform Penal Code section 1170 to do just that. The rejection of the suggestion in 1977 demonstrates clearly that such a solution was contrary to the intent of the Legislature. As a result, this Court should not now do what the Legislature has already opted against. (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 661.) Therefore, this Court should reject respondent’s argument that the statute can be reformed by removing the requirement of additional findings to justify imposition of the upper term. (RABM 50-53)

Additionally, as the Legislature did not adopt the proposal of making the middle term and the rules of the Judicial Council mere suggestions for the trial court, it is clear that its primary goal was, as the district attorney had asserted, to promote uniformity of sentences. (See Exh. B, pp. 2-5.) Thus, this Court should also reject respondent’s argument that the statute can be reformed to permit imposition of the upper term based only upon factors that may survive *Blakely*. (RABM 39-49) As appellant urged in his Reply Brief on the Merits, this Court should not interpret or reform the statute in a manner that would skew the sentencing by permitting upper terms based on only a limited number of aggravating factors that by chance or dubious exception to the *Blakely* rule survive after the provision for judicial factfinding has been stricken as unconstitutional. (See ARBM 17-25)

Respectfully submitted,

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