DUE PROCESS / EX POST FACTO ISSUES IN *SANDOVAL* REMEDY

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In *People v. Sandoval* (2007) 41 Cal.4th 825, the California Supreme Court reformed the California Determinate Sentencing Law along the lines of Senate Bill 40,[1] in order to address the United States Supreme Court's holding in *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856], holding that the DSL violates *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 542 U.S. 296. The main feature now is that there is no longer a presumption in favor of the middle term. A defendant convicted of a crime carrying a determinate sentence is automatically eligible for the upper term (or lower term) even if the judge does no additional fact-finding. The judge still must give reasons for the decision (including the middle term) on the record, and that decision is reviewable for abuse of discretion, but the decision-making process no longer requires a recitation of specific aggravating or mitigating facts and a finding of whether one kind outweighs the other.

Sandoval also decreed that the reformed system would be applied to Sandoval and all other defendants whose acts occurred before SB 40. It rejected the argument that retroactive application of its reformation would violate due process in the manner of an ex post facto law.[2]

For the sake of precision, the constitutional prohibitions against ex post facto laws (U.S. Const., art. I, § 9, cl. 3; art. I, § 10, cl. 1; Cal. Const., art. I, § 9) apply only to statutes, not judicial decisions. But a judicial decision that has the effect of an ex post facto law may violate due process. (*Bouie v. Columbia* (1964) 378 U.S. 347.)

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[1]Statutes 2007, chapter 3, amending Penal Code section 1170, subdivisions (b) and (c), among other things. It became effective March 30, 2007. Related sentencing rules 4.405 through 4.452, California Rules of Court, were amended effective May 23, 2007.

[2]*Booker v. United States* (2005) 543 U.S. 220, 268, on which *Sandoval* modeled its reformation, ordered application of its remedy (on which *Sandoval* purported to base its own remedy) to cases pending on appeal, but only as a routine acknowledgment of the normal principles of retroactivity established in *Teague v. Lane* (1989) 489 U.S. 288 and *Griffith v. Kentucky* (1987) 479 U.S. 314. Neither the majority nor the dissent even mentioned ex post facto or due process issues. Cases are not authority for propositions not considered. (*People v. Dillon* (1983) 34 Cal.3d 441, 473-474; *In re Tartar* (1959) 52 Cal.2d 250, 258.)

A. Detrimental Changes Effected by *Sandoval*

The classical explanation of an ex post facto law was delineated early in the history of the Constitution in *Calder v. Bull* (1798) 3 U.S. (3 Dallas) 386, 390, as:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Within the meaning of *Calder*'s categories, the revisions effected in *Sandoval* and SB 40 make the DSL less favorable than the original version (the one applicable to all crimes committed before March 30, 2007, the date SB 40 took effect), in a number of considerably overlapping ways:

1. Elimination of aggravating facts that outweigh mitigating fact as requirement for, and thus element of, upper term

Before the reformation, an upper term could be imposed only on a finding of one or more facts in aggravation that outweighed facts in mitigation; under *Apprendi-Blakely*[3] such a finding is constitutionally considered to be an *element* of the upper term. The new law eliminates that element. Eliminating an element of an offense, broadening the scope of acts that fall under an element, or making an element easier to prove is a classic ex post facto violation. (*Marks v. United States* (1977) 430 U.S. 188, 191-196 [Supreme Court decision making element of obscenity offense easier to prove cannot be applied retroactively]; *People v. Sakarias* (2000) 22 Cal.4th 596, 622, and *Moss v. Superior Court* (1998) 17 Cal.4th 396, 430 [eliminating defense]; *People v. Martinez* (1999) 20 Cal.4th 225 [making asportation element of kidnapping easier to prove]; *People v. Morante* (1999) 20 Cal.4th 403, 431-432, *Moss v. Superior Court*, *supra*, 17 Cal.4th 396, 430, *People v. Davis* (1994) 7 Cal.4th 797, 811-812, *People v. Farley* (1996) 45 Cal.App.4th 1697, 1707-1708, and *In re Baert* (1988) 205 Cal.App.3d 514, 518-520 [eliminating element of offense].)

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[3] *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 542 U.S. 296.

2. Increase in potential punishment the for bare offense, i.e., the sentence that can be imposed after jury's verdict without additional findings

Under the old law, the statutory maximum sentence for the bare offense (based only on the facts found by the jury) was the middle term; the upper term required *additional* findings. The reformed law essentially makes the upper term the statutory maximum for the bare offense and thus increases the punishment for that offense. Retroactively making the consequences of a given act more severe is a classic ex post facto violation. (*Lynce v. Mathis* (1997) 519 U.S. 433 [cancellation of early release credits]; *Miller v. Florida* (1987) 482 U.S. 423 [increasing presumptive term and requiring that judge justify any lower sentence]; *Weaver v. Graham* (1981) 450 U.S. 24, 28 [reducing conduct credits]; *Calder v. Bull*, *supra*, 3 U.S. (3 Dallas) 386, 390; *People v. Blakeley* (2000) 23 Cal.4th 82 [increasing crime from involuntary to voluntary manslaughter]; *People v. King* (1993) 5 Cal.4th 59, 80 [increasing enhancements]; *People v. Weidert* (1985) 39 Cal.3d 836, 849-851 [creating new special circumstance].)

3. Elimination of beneficial presumption

Under the old law, the defendant had the benefit of a presumptive middle term, which protected against imposition of an upper term without specific findings. Under the reformed law, there is no such presumption. Eliminating a beneficial presumption as to punishment is a classic ex post facto violation.

Miller v. Florida, *supra*, 482 U.S. 423 is closely analogous. At the time defendant committed the crime, the state's sentencing guidelines called for a presumptive sentence of 3 ½ - 4 ½ years. By the time of sentencing, guidelines had been revised and now called for a presumptive sentence of 5 ½ - 7 years in prison. Under both systems, the trial court was required to state clear and convincing reasons for a sentence outside the presumptive range. The trial court applied the guidelines in effect at the time of sentencing and prescribed a term of seven years without explanation. The Supreme Court held that application of the revised guidelines violated ex post facto principles. It rejected arguments that the defendant was on notice the law "might" be changed, or that he could not show he definitively would have received a lesser sentence under the former system, or that the change was merely procedural. It found he was "substantially disadvantaged" by the changes and those changes were substantive within the meaning of ex post facto law. (See also *Lindsey v. Washington* (1937) 301 U.S. 397 [eliminating possibility of release before expiration of maximum term]; *People v. Delgado* (2006) 140 Cal.App.4th 1157 [making probation length three years instead of "no greater than" four and requiring probation conditions that had previously been discretionary]; *People v. Williams* (1987) 196 Cal.App.3d 1157 [statutory amendment nullifying Supreme Court opinion that trial

court had discretion to dismiss serious prior allegation; "[b]y making mandatory what was previously discretionary, the Legislature has changed the standard by which punishment will be imposed"]; *People v. Hoze* (1987) 195 Cal.App.3d 949 [same].)

Similarly, at the time of Sandoval's acts, the presumptive sentence was the middle term, and any higher sentence required specific justification. When he is resentenced under the reformed law, he is automatically subjected to the entire sentencing range, including the possibility of an upper term, and the reasons to be stated for the upper term no longer require findings that there are facts in aggravation and those outweigh the facts in mitigation.

4. Reduction of burden of proof for aggravating facts from preponderance of the evidence to nothing

Under the old law, the judge had to find aggravating facts by a preponderance of the evidence – an unconstitutionally *low* standard. Under the new law, the judge does not have to find any aggravating facts. Thus the burden of proof is now *nothing*. Lowering the burden of proof is – you guessed it – a classic ex post facto violation. (*Carmell v. Texas* (1999) 529 U.S. 513 [reducing quantum of evidence by eliminating corroboration requirement]; *Cummings v. Missouri* (1867) 71 U.S. 277, 328 [lowering or reversing burden of proof]; *Moss v. Superior Court*, *supra*, 17 Cal.4th 396, 430, and *People v. Simon* (1995) 9 Cal.4th 493 [increasing burden of proving defense]; *People v. Delgado*, *supra*, 140 Cal.App.4th 1157; *People v. Williams*, *supra*, 196 Cal.App.3d 1157; *People v. Hoze*, *supra*, 195 Cal.App.3d 949.)

B. Test for Whether a Judicially Created Change in the Law Can Be Applied Retroactively

Sandoval does not address these objections point by point. Instead it sweeps aside the entire argument with the observations (1) that as a whole its changes do not substantially "disadvantage" a defendant and (2) that anyway judicial decisions violate ex post facto-type principles only if they are "unexpected and indefensible." (*People v. Sandoval*, *supra*, 41 Cal.4th 825, 855-857.) Both of these analyses misstate the principles of ex post facto/due process law.

1. Irrelevance of *Sandoval*'s "relative advantages and disadvantages" test

As to *Sandoval*'s first prong, the ex post facto doctrine does not involve a weighing process – the advantages of a new law versus the disadvantages. "Ex post

facto" is a term of art, a "technical," formalistic doctrine[4] that asks whether the law has one of the proscribed effects set forth in the classic case of *Calder v. Bull*, *supra*, 3 U.S. 386, 390. (*Collins v. Youngblood* (1990) 497 U.S. 37, 41, 46; see also *Carmell v. Texas*, *supra*, 529 U.S. 513, 521-522; *California Department of Corrections v. Morales* (1995) 514 U.S. 499, 506, fn. 3 ["the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable"].) Under *Calder*, a law that has these effects is considered to be ex post facto: it makes an act criminal that was not criminal when performed; it makes the act more serious than when it was committed; it increases the punishment for the act; it lowers the burden of proof.

As just shown, the reformation of the DSL falls into multiple *Calder* categories: it eliminates an element of the upper term, increases the penalty for the bare offense, eliminates a beneficial presumption, and reduces the burden of proof. The changes wrought by *Sandoval* are not merely procedural, but substantive, affecting what and how much the state must prove in order to justify an increased punishment. No *statutory* changes of the same type could be applied retroactively.

2. Inapplicability of "unexpected and indefensible" change test when new judicial decision is changing explicit, established law

The second prong of *Sandoval*'s analysis is that judicial decisions are not subject to ex post facto law but rather only to the broad due process limitation that they not make "unexpected and indefensible" changes. That formulation comes from *Bouie v. Columbia*, *supra*, 378 U.S. 347, 353-354, in which the South Carolina Supreme Court had interpreted a trespass statute in a way inconsistent with its commonsense meaning and unforeseeable to the average person. *Bouie* said a state court interpretation of a law violates due process if it is "unexpected and indefensible." (*Bouie v. Columbia*, *supra*, 378 U.S. 347, 353-354; see also *Douglas v. Buder* (1973) 412 U.S. 430, 432, per curiam.)

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[4]Although grounded in the notion of fairness, in that it requires due notice of the criminality of the act before it is committed, ex post facto doctrine is not an inquiry into actual reliance. Based on the (largely fictional) hypothesis that a defendant will consult the law before performing a criminal act, it in effect requires notice to "the world." (*McBoyle v. United States* (1931) 283 U.S. 25, 27.)

a. Distinction between interpreting and changing law

Bouie was attempting to accommodate the tension between normal common law processes and fair notice to individuals. In most situations, a new case interpreting an ambiguous statute or applying it to a particular situation for the first time binds the defendant in that case and others who may have committed their acts before the case was decided. The rationale for retroactive application is that reasonable persons would have understood from the face of the statute or the existent case law that the rule of the new case *might* apply to particular conduct, even though no court had yet said that it *did* apply. Thus it is appropriate to hold that persons who engage in such conduct do so at their risk. This in fact is the typical process of common law, the development of particularized meaning through case by case determinations.

The process would not work if subject to repeated ex post facto-type attacks against retroactively applied judicial decision-making. (See *Rogers v. Tennessee* (2001) 532 U.S. 451, 461 [state court ruling was "an act of common law judging," part of "the incremental and reasoned development of precedent that is the foundation of the common law system"); see also *United States v. Lata* (1st Cir. 2005) 415 F.3d 107, 111 ["underlying problem is one of reconciling the continuing mutability of judicial doctrine with concerns about reliance and notice"]; cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1073 ["we are not retroactively enlarging a criminal statute but merely *interpreting* one" (emphasis original) and *distinguishing* prior cases, not overruling them].) The "unexpected and indefensible" test protects the process by confining due process / ex post facto prohibitions to cases where the judicial interpretation is so completely unpredictable and inexplicable that a reasonable person would not have been on notice that the particular conduct violated, or even might have violated, the law.

The test must be read and understood, however, in the context of the specialized narrowing purpose it serves. It is a total misfit when the judicial decision is *changing explicit existing law in a way directly contradictory to what the law was at the time of the act*. When the law is merely ambiguous, persons are on notice that certain conduct *might* be deemed a violation of law and thus may properly be required to act at their own risk. When the law is quite explicit (as was the California DSL), however, they have the right to rely on it. They need not be prescient and divine that the Supreme Court is going to reverse gears in the future.

This is true whether or not the change is "unexpected and indefensible." Although a change may have been *foreseeable* in the sense, for example, the previous law had been heavily criticized, nevertheless one is entitled to rely on the law *as it actually existed* at the time of the offense. Similarly, the reversal of prior law may also be wholly *defensible*, in the sense that the former law was ill-conceived or outmoded or, as in the

case of the DSL under *Cunningham*'s holding, violative of the federal Constitution; presumably, courts would not change the law unless they thought the change appropriate. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 827 ["when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent'"].) Nevertheless, a citizen is not required to fathom an explicit existing rule is untenable, but is entitled to rely on it as authoritative.[5] Any other principle would introduce intolerable instability into the law: citizens would be held responsible for their acts, not only under the law as it is, but also under the law as it is going to be. (See *Miller v. Florida*, *supra*, 482 U.S. 423 ["constitutional prohibition against ex post facto laws cannot be avoided merely by adding to a law notice that it might be changed"]; *Moss v. Superior Court*, *supra*, 17 Cal.4th 396, 429 ["[w]e are unwilling to assume . . . [defendant] should have known in advance of our decision today"]; *People v. King*, *supra*, 5 Cal.4th 59, 80 [rejecting argument that controversy surrounding earlier decision gave fair warning the court might reconsider it; "[t]he mere possibility that this court might reconsider its own precedent is not the equivalent of actually overruling it"].)

b. ***Marks v. United States***

Marks v. United States, *supra*, 430 U.S. 188, exemplifies the distinction between mere interpretation and affirmative change. In that case the defendants were convicted of transportation and conspiracy involving obscene materials. The governing Supreme Court precedent at the time the offense was committed had given a highly restrictive definition of what constitutes obscenity. By the time of trial, the court had overruled that decision and adopted a broader definition. The jury was instructed under the new decision. Reversing, the court held retroactive application of its more recent decision would violate due process in a manner akin to an ex post facto law. The defendants were not given fair warning that their conduct might be criminal because the newer decision overruled an extant opinion; the older decision, although decided by a fractured court and

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[5]Justice Scalia's dissent in *Rogers v. Tennessee*, *supra*, 532 U.S. 451 makes the distinction offered here between decisions that merely interpret a law and those that change existing law. (*Id.* at pp. 469-471, dis. opn. of Scalia, J.) Under *Bouie*, retroactive holdings in *accord* with prior cases are consistent with due process, but not those "that clearly depart from prior cases." (*Id*. at p. 470.) *All* changes in the latter category are impermissible, not just "unexpected and indefensible" ones. (*Id*. at p. 471.) Fair warning of a legislature's intent to change the law, for example, does not insulate the change from ex post facto challenge; even though the bill has passed and the executive is sure to sign it, a law cannot be applied until it is formally effective. "It follows from the analysis of *Bouie* that 'fair warning' of impending change cannot insulate retroactive judicial criminalization either." (*Ibid.*)

heavily criticized, was "the law" when the criminal acts were committed. (*Id*. at p. 194.) Although mentioning the *Bouie* test, the court did not even discuss whether the new case was "indefensible." (Presumably, one must assume, it viewed its most recent decision on obscenity as reasonable and quite defensible, indeed.) The court's silence confirms the position argued here, that the question is irrelevant when a new rule directly changes established law.

c. ***Rogers v. Tennessee***

In support of its conclusion, *Sandoval* relied on *Rogers v. Tennessee*, *supra*, 532 U.S. 451. In *Rogers*, the Tennessee Supreme Court had repudiated the common law "year and a day" rule, which provided that a defendant could not be convicted of murder unless the victim had died from the defendant's act within a year and a day of the act. The United States Supreme Court rejected the defendant's contention that applying the change retroactively to him violated provisions against ex post facto laws. The court expressed concern that a rule prohibiting retroactive application of court decisions interpreting or clarifying law, especially prior judicially created law, "would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system." (*Id*. at p. 461.) Accordingly, the court concluded, "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" (*Id*. at p. 462, quoting *Bouie*.)

Although some of the broad language in *Rogers* suggests the "unexpected and indefensible" test is the *only* applicable one in dealing with judicial interpretations, the case itself is distinguishable from *Sandoval*. First, on a point the court found "perhaps most important[]," it noted the doctrine had a tenuous foothold, if any, in the state. It had never been the basis for a murder prosecution and had been mentioned only in dicta in three court opinions. (*Id*. at pp. 464-466.) It is doubtful the Tennessee Supreme Court changed "the law" at all; instead, it repudiated a doctrine that had existed only in theory. Since judicial dicta are not "law" (*Tyler v. Cain* (2001) 533 U.S. 656, 663, fn. 4, citing *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 67), defendants could not reasonably place firm reliance on that doctrine. The California DSL, in contrast, had been set forth in explicit statutory and rule provisions, had been interpreted in a consistent way in judicial opinions for 30 years, and had been applied directly thousands of times.

Second, even if the "year and a day" doctrine had been well established, it is difficult to see how any defendant could, even theoretically, commit a criminal act in detrimental reliance on it. Laws setting out the elements of offenses, the sanctions attached to them, burdens of proof, etc. – the classic stuff of ex post facto law – could in

theory guide a hypothetical "calculating" defendant in deciding before the fact whether to commit a criminal act. The "year and a day" doctrine, however, dealt with a matter (date of the victim's death) that occurred long *after* the defendant made the decision whether to act and that was *beyond his control*. Abolition of the doctrine did not involve a substantial fair notice problem: no defendant could reasonably rely in the first place on the expectation the victim would die too late for him to be charged with murder. *Sandoval*'s reformation, in contrast, would defeat reasonable expectations. It would alter the rules under which defendants made the original decision to act by working after-the-fact, detrimental changes in the consequences of given conduct and the standards under which those consequences are to be determined.

3. Judiciary's lack of authority to construe or reform a statute in a way that would be unconstitutional if done by the Legislature

The principle properly applicable to *Sandoval*'s reformation of the DSL is: If a state legislature is barred by the ex post facto clause from passing a law, a state supreme court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. (E.g., *Marks v. United States*, *supra*, 430 U.S. 188, 191; *Bouie v. Columbia*, *supra*, 378 U.S. 347, 353-354; see also *People v. Blakeley*, *supra*, 23 Cal.4th 82, 91-92; *People v. Martinez*, *supra*, 20 Cal.4th 225, 238; *People v. Escobar* (1992) 3 Cal.4th 740, 752; *People v. Weidert*, *supra*, 39 Cal.3d 836, 850; *Keeler v. Superior* (1970) 2 Cal.3d 619, 634-635; *In re Baert*, *supra*, 205 Cal.App.3d 514, 518.)

SB 40 could not be constitutionally applied to acts committed before its effective date. As pointed out above, it would eliminate an element of the upper term, increase the sentence for the bare act (without aggravating facts), eliminate a beneficial presumption, and lower the burden of proof for imposing the upper term. Even the Attorney General did not contend in *Sandoval* that SB 40 applied retroactively. But *Sandoval*'s remedy, which has the same provisions as SB 40, effectively does that. Judicial reformation of a statute is a quasi-legislative act and must be subject to the same constitutional limitations as a Legislature, not just generalized principles such as the "unexpected and indefensible" test. To uphold *Sandoval*'s remedy would to adopt an extraordinary and anomalous precept – that the *judiciary's* power to alter the Penal Code is greater than the *Legislature's*.

The principle that if the legislature could not change the law retroactively, the judiciary cannot, either – even if the change was neither unexpected nor indefensible – was applied directly in *Marks v. United States*, *supra*, 430 U.S. 188. Holding the Supreme Court's most recent definition of obscenity could not be applied to criminal acts committed when an older case, more favorable to the defendants, was still the governing precedent, the Supreme Court stated:

> [T]he principle on which the [Ex Post Facto] Clause is based – the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty. . . . As such, that right is protected against judicial action by the Due Process Clause . . . .
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> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law. . . . 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 pp. 191-192, quoting *Bouie*, *supra*, 378 U.S. at pp. 353-354.)

Sandoval's ruling on the due process/ex post facto argument took no account of numerous rulings by the California Supreme Court declining to apply retroactively a judicial decision that changed the law by eliminating a former requirement for an offense or made an element easier to prove. (E.g., *People v. Blakeley*, *supra*, 23 Cal.4th 82, 91-92 [intent to kill, in unreasonable self-defense context, for voluntary manslaughter]; *People v. Morante*, *supra*, 20 Cal.4th 403, 431-432 [requirement of attempt to commit object offense within state, for conspiracy]; *People v. Martinez*, *supra*, 20 Cal.4th 225, 238-241 [specific distances of asportation, for kidnapping of child under 14]; *Moss v. Superior Court*, *supra*, 17 Cal.4th 396, 430 [ability to pay, for child support contempt finding]; *People v. Davis*, *supra*, 7 Cal.4th 797, 811-812 [viability requirement, for fetal murder]; see also *People v. King*, *supra*, 5 Cal.4th 59, 80 ["[r]efusing to apply *Culbreth*[6] here would make the punishment for [defendant's] crimes more burdensome after he committed them"]; *People v. Weidert*, *supra*, 39 Cal.3d 836, 849-851 [requirement that killing be to prevent testimony in *criminal*, as opposed to *juvenile* case, for special circumstances murder]; *Keeler v. Superior Court*, *supra*, 2 Cal.3d 619, 634-639 [requirement of live birth, for homicide]; see also *People v. Farley*, *supra*, 45 Cal.App.4th 1697, 1704-1710 [intent to aid and abet perpetrator at or before time of entry, for burglary]; *In re Baert*, *supra*, 205 Cal.App.3d 514, 518-520 [intent to kill requirement, for felony-murder special circumstance].)

Unlike all of these cases, the California Supreme Court did not confine *Sandoval*'s changes to criminal acts that took place after that case was decided. Indeed, that would have been superfluous, since such cases would be governed by SB 40. The whole point

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[6] *In re Culbreth* (1976) 17 Cal.3d 330, 333, overruled in *King*.

of the remedial changes was make SB 40's provisions applicable to cases where the acts had already been committed before it was enacted.

C. Conclusion

The *Sandoval* reformation to section 1170, subdivision (b) eliminated elements required to impose the upper term, increased the maximum sentence for the bare offense from the middle to the upper term, eliminated a beneficial presumption (the middle term) of long standing, and reduced the burden of proving aggravating circumstances from an unconstitutionally low preponderance standard to nothing. A legislative enactment effecting such changes could never be applied retroactively under state and federal constitutional prohibitions against ex post facto law. The California Supreme Court has no greater power to achieve such results through judicial pronouncement. Its reformation, expressly intended to operate retroactively, is a violation of due process.