

Supplemental opening brief by panel attorney Heather MacKay in *People v. John Parras* (F044512)

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIFTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

JOHN BORREGO PARRAS

Defendant and Appellant.

No. F044512

Fresno County
Sup. Court
No.F02676237

APPELLANT'S SUPPLEMENTAL BRIEF

ARGUMENT

**I.IMPOSITION OF THE UPPER TERM VIOLATED
APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO
PROOF BEYOND A REASONABLE DOUBT AND A JURY TRIAL
BECAUSE THE AGGRAVATING FACTORS WERE NOT FOUND
BY A JURY.**

On June 24, 2004, the Supreme Court of the United States decided *Blakely v. Washington* (No. 02-1632, June 24, 2004) 524 U.S. _____, 2004 WL 1402697, 2004 DJDAR 7581. The Court's decision in *Blakely* effectively renders unconstitutional portions of California's determinate

sentencing scheme. The provisions that are affected include Penal Code section 1170, subdivision (b), which authorizes judges, not juries, to make factual findings in connection with aggravating factors used to impose the upper term and California Rules of Court, rule 4.420, subdivision (b), which allows circumstances in aggravation to be established by a preponderance of the evidence.

The sentencing court in the current case imposed the upper term based upon factual findings which were neither admitted by appellant nor found by a jury. The sentencing court also failed to apply the proof beyond a reasonable doubt standard to its factual findings. Thus, appellant's sentence was imposed in violation of his federal constitutional rights to a jury trial and proof beyond a reasonable doubt. (U.S. Const., Amends. V, VI, XIV.)

A. Background Facts.

After reviewing the probation report and hearing oral arguments, the trial court sentenced appellant on December 3, 2003, to the high term of 11 years in state prison for voluntary manslaughter. (C.T. 309, 317; R.T. 628.) In accord with the California Rules of Court, rules 4.420 and 4.421, the trial judge made additional findings of fact and cited aggravating factors supporting the upper term. Specifically, after

discussing proffered mitigating factors,¹ the court determined that two aggravating factors supported imposition of the upper term:

And it seems to me, and I agree with the People, that the probation department wholly failed to note the most serious aggravating factor in this case, which is the level of violence that was involved in the commission of this crime. And the Court finds that based on all the evidence I have heard, that it involved great violence and a high degree of viciousness. And another factor in aggravation is your prior record, not only criminal record, but the evidence that was presented before this Court, in part to mitigate your conduct in this matter, shows a history of violent conduct that represents a danger to society, sir. And I find that those factors in aggravation greatly outweigh any mitigating factors that I know about this case or heard about them.

(R.T. 629.)

B. Appellant Had a Federal Constitutional Right to a Jury Trial and Proof Beyond a Reasonable Doubt with Respect to Facts Underlying the Aggravating Factors Used to Impose the Upper Term.

In the seminal case of *Apprendi v. New Jersey* (2000) 530 U.S. 466, the Supreme Court of the United States held that there is a federal constitutional right to a jury trial and proof beyond a reasonable doubt

¹ At the sentencing hearing, trial counsel noted that Mr. Parras's criminal record prior to this offense consisted only of misdemeanors related to his alcohol problem. (R.T. 609-610.) In agreement, the court found that Mr. Parras's relatively minor prior criminal record was a factor in mitigation. (R.T. 626.) The court rejected two other proffered mitigating factors – Mr. Parras's alcohol addiction and crime-free life during the 13 years between the offense and his arrest. (R.T. 626-627.)

“for any fact (other than prior conviction) that increases the maximum penalty for a crime.” (*Apprendi*, 530 U.S. at 476 (quoting *Jones v. United States* (1999) 526 U.S. 227, 243, fn. 6.) In light of *Blakely*, it is now apparent that there is a federal constitutional right to a jury trial and proof beyond a reasonable doubt on non-recidivist aggravating factors used to impose the upper term under the DSL. Because the aggravating facts in the current case were not presented to or considered by a jury, the trial judge had no authority to impose the upper term. Thus, imposition of the upper term in this case violated appellant’s Sixth Amendment right to a jury trial and proof beyond a reasonable doubt.

1. The Right to a Jury Trial Applies to Facts Used to Impose a Sentence Above the Statutory Maximum.

In *Apprendi*, the United States Supreme Court held that the defendant had a constitutional right to a jury trial on the factual findings underlying the New Jersey hate-crime enhancement applied to his sentence. That enhancement raised the maximum possible sentence from 10 years to 20 years upon a finding that the offense was committed with the intent to intimidate because of the victim’s race, color, gender, handicap, and various other statuses. (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466 at 468-469.) Two years later, in *Ring v. Arizona* (2002) 536 U.S.

584, 592-593 and n.1, the Court “applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors.” (*Blakely*, slip op. at 6, 2004 WL 1402697 at 4, 2004 DJDAR at 7582.) Thus, in *Apprendi* and in *Ring*, the Court “concluded that the defendant’s constitutional rights have been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding.” (*Blakely*, slip op. at 6-7, 2004 WL 1402697 at 4, 2004 DJDAR at 7582 [citing *Apprendi*, 530 U.S. at 491-497; *Ring*, 536 U.S. at 603-609].)

In applying these precedents to the state sentencing guidelines at issue in *Blakely*, the Court clarified 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.*” (*Id.*, slip op. at 7, 2004 WL 1402697 at 4, 2004 DJDAR at 7582 [emphasis in original].) Stated another way, “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Ibid.* [emphasis in orig.]

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2. Under California’s DSL, the Applicable “Statutory Maximum” is the Middle Term.

Under California’s determinate sentencing law, the maximum sentence a judge may impose without any additional findings is the middle term: “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.” (Pen. Code § 1170, subd. (b) [emphasis added]; see also Cal. Rules of Court, rule 4.420, subds. (a) & (b); cf., e.g., *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360.) Because the middle term is the maximum term that may be imposed without the additional findings, the upper term may not be imposed where, as in this case, the aggravating factors were neither admitted by the defendant nor found by a jury.²

The notion that there is a constitutional right to a jury trial for aggravating factor fact-finding may come as a surprise. But the Court in *Blakely* made clear that *Apprendi* identified a “bright-line rule” and

² Appellant does not contend, for purposes of this argument, that he is entitled to a jury trial and proof beyond a reasonable doubt on mitigating factors. Under Penal Code section 1170, subdivision (b), the absence of mitigating factors requires imposition of the middle term. In that sense, the middle term appears to operate like a mandatory minimum sentence which is imposed in the absence of mitigating factors. In *Harris v. United States* (2002) 536 U.S. 545, 563, the Court held that there is no constitutional right to a jury trial on facts used to impose a minimum mandatory sentence.

rejected the notion that the jury trial right should depend on some assessment of the degree of judicial fact-finding in the sentencing process, such as whether the statutory scheme went “too far” or allowed “the tail to wag the dog.” (*Blakely*, slip op. at 12, 2004 WL 1402697 at 7, 2004 DJDAR at 7583.) “As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to the jury all facts legally essential to the punishment.” (*Id.* at 17, 2004 WL 1402697 at 9, 2004 DJDAR at 7584 [emphasis in original].) While the *Blakely* majority rejected the notion that its holding would imperil the very concept of “determinate sentencing,” the opinion implies that, to pass muster, a determinate sentencing scheme must rely upon jury fact-finding:

Determinate judicial-fact-finding schemes entail less judicial power than indeterminate schemes, but more judicial power than determinate jury-fact-finding schemes. Whether *Apprendi* increases judicial power overall depends on what States with determinate judicial-fact-finding schemes would do, given the choice between the two alternatives.

(*Id.* at 13, 2004 WL 1402697 at 7, 2004 DJDAR at 7584 [emphasis in original].)

California's “dual use” rule underscores the fact that the middle term is the “statutory maximum” term that can be imposed unless additional facts are found. A court cannot base an upper term on a fact which is either an element of the underlying offense or the basis for an

enhancement. (Pen. Code § 1170, subd. (b); Cal. Rules of Court, rule 4.420, subds. (c) & (d).) The aggravating circumstances authorizing an upper term, thus, are necessarily facts beyond those determined by the jury in adjudicating whether a defendant is guilty of the charged offense. It is only a finding of some additional aggravating circumstance which can “expose” a defendant to an upper term. As with the sentencing scheme examined in *Blakely*, “The judge acquires that authority [to impose an upper term] only upon finding some additional fact. [Fn.]” (*Blakely*, at 9, 2004 WL 1402697 at 5, 2004 DJDAR at 7583.) Consequently, under the Sixth Amendment reasoning of *Blakely* and *Apprendi*, a defendant is entitled to jury determination of any such aggravating circumstance used to impose an upper term. Additionally, those findings must be subject to a reasonable doubt standard of proof (see *id.* at 5, 15, 2004 WL 1402697 at 4, 9, 2004 DJDAR at 7582, 7584), rather than the preponderance standard currently applied under California law (Cal. Rules of Court, rule 4.420, subd. (b)).

3. The Fact-Finding Used to Impose the Upper Term in This Case is Analogous to the Fact-Finding Used to Apply the Exceptional Sentence in *Blakely*.

The similarity between this case and *Blakely* goes beyond the fact that both involved sentences that were aggravated on the basis of a

sentencing-hearing finding of cruelty. California's DSL and Washington's guidelines both unconstitutionally allow judges to impose sentences above a statutory maximum on the basis of facts neither found by a jury nor admitted by virtue of the defendant's guilty plea. In all pertinent respects, California's sentencing scheme – and its application in the current case – suffer from the same defects as the Washington scheme that the Court struck down.

In *Blakely*, the defendant had pled guilty to second-degree kidnaping and also admitted a firearm enhancement. As a “class B felony,” second-degree kidnaping was subject to an absolute maximum of 10 years. But the “standard range” for second-degree kidnaping with a firearm was 49 to 53 months. Washington statutory law provided that a court could impose a sentence greater than the “standard range” (but still within the 10-year cap) only if it found “substantial and compelling reasons justifying an exceptional sentence.” The statute provided a non-exhaustive list of “aggravating factors” which could justify such a “departure” from the “standard range.” The trial court imposed an “exceptional sentence” of 90 months – 37 months above the standard range – based upon the judge's finding that Blakely acted with “deliberate cruelty,” one of the enumerated aggravating factors. (*Blakely*, slip opn., at 2-3, 2004 WL 1402697 at 2-3, 2004 DJDAR at 7581-7582.)

The Supreme Court held that the trial court's finding of that aggravating factor violated *Apprendi's* rule entitling a defendant to jury determination of any fact exposing a defendant to greater punishment than the "maximum" otherwise allowable for the underlying offense. The Court rejected the state's assertion that the relevant "maximum" was the 10-year cap for a "class B felony. Instead, the majority treated the top end of the "standard range" (53 months) as the relevant "statutory maximum, because that was the greatest sentence Blakely could receive based solely on the facts admitted by his plea. (*Blakely*, slip op. 7-8, 2004 WL at 4-5, 2004 DJDAR at 7582-7583.)

As with the "standard range" in *Blakely*, the mid-term under California's DSL is the presumptive sentence. And, as with the "exceptional sentence" in *Blakely*, a California court lacks statutory authority to impose an upper term unless it finds "aggravating circumstances" beyond the elements inherent in the offense itself. (Cal. Rules of Court, rule 4.420, subd. (d).) Like the Washington statutes, the California rules provide a list of enumerated aggravating circumstances (Cal. Rules of Court, rule 4.421), but the list is not exclusive and a court may rely upon a non-enumerated circumstance "reasonably related" to the sentencing decision. (Cal. Rules of Court, rule 4.408, subd. (a); see e.g., *People v. Garcia* (1989) 209 Cal.App.3d 790, 794-795; compare *Blakely*,

slip op. at 3, 2004 WL at 2, 2004 DJDAR at 7582.) As with the Washington scheme, the court must make explicit factual findings. (Pen. Code § 1170, subd. (c); rule 4.420(e); compare *Blakely*, slip op. at 3, 2004 WL at 2, 2004 DJDAR at 7582.)

Turning to the current case, the DSL provides that the low, medium and high terms for voluntary manslaughter are three, six and eleven years. (Pen. Code § 193, subd. (a).) The court’s selection of the high term increased appellant’s punishment by 5 years based on two aggravating factors that were not found true beyond a reasonable doubt and not determined by a jury. The sentencing court first found that Mr. Parras’s crime “involved great violence and a high degree of viciousness.”³ (R.T. 629.) This clearly is a factor based on aspects of the crime that were not considered or found by the jury. Indeed, it is identical to the factor struck down in *Blakely*. The sentencing court further found that, “another factor in aggravation is your prior record, not only criminal record, but the evidence that was presented before this Court, in part to mitigate your conduct in this matter, shows a history of violent conduct that represents a

³ This aggravating factor is described in Cal. Rules of Court, rule 4.421, subd. (a)(1): “The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.”

danger to society, sir.”⁴ (R.T. 629.) The evidence referred to by the court was trial witness testimony regarding several incidents when Mr. Parras had behaved violently while drunk and then could not remember what he had done; this evidence had been offered in support of Mr. Parras’s defenses that he was acting in an alcohol-induced stupor and did not intend to kill the victim. (See R.T. 304-306, 311-313, 317.) It is clear that the court’s finding on this issue was not based on Mr. Parras’s prior criminal convictions as the court had explicitly found that Mr. Parras’s prior record was not particularly serious or violent and determined that the lack of a prior serious criminal record was a mitigating factor. (R.T. 626.) Thus, both of the aggravating factors rested upon matters that were not adjudicated by a jury applying a proof beyond a reasonable doubt standard. Both of those aggravating factors, and the high term based upon them, are therefore invalid under *Blakely*.

Nor is there any argument that the jury necessarily found these facts to be true. It is fair to look to the jury instructions, as well as the verdicts and any enhancement findings, to determine which facts the jurors necessarily found. But it would not be appropriate to look to additional

⁴ This factor is described in Cal. Rules of Court, rule 4.421, subd. (b)(1): “The defendant has engaged in violent conduct which indicates a serious danger to society.”

matters seemingly apparent from the trial transcript *which were not the subject of instructions and verdicts*. Under the terms of the majority opinion, “*Blakely* error” is simply one form of *Apprendi* error.

Consequently, an aggravating circumstance which was not the subject of a specific jury finding must be subjected to the same scrutiny as imposition of an enhancement which was never submitted to the jury. An imposition of a weapon or GBI enhancement would represent *Apprendi* error if those enhancements were not submitted to the jury, even if the trial revolved entirely around identity issues and there was never any true dispute about weapon use or GBI. Similarly, the inquiry into aggravating factors should focus strictly upon a comparison of the jury instructions and verdicts with the aggravating circumstances later cited by the court. Here, the facts underlying the aggravating factors were not found by the jury and the high term was imposed in violation of *Blakely*.

Moreover, the sentencing was conducted in an unconstitutional fashion because the court decided the facts under a preponderance standard, instead of under a reasonable doubt standard. Although the sentencing court did not expressly state what standard of proof it was applying, this Court must presume that it applied the preponderance of the evidence standard set forth in rule 4.420(b) of the California Rules of Court. (See *People v. Scott* (1994) 9 Cal.4th 331, 349 (preponderance

standard applies).) Because appellant had a constitutional right to a jury trial on the aggravating factors, the sentencing court erred in applying the lesser standard of proof. (See *United States v. Velasco-Heredia* (9th Cir. 2003) 319 F.3d 1080, 1085 [*Apprendi* error occurred when trial court used preponderance standard at sentencing to determine drug quantity].)

In sum, the parallels between this case and *Blakely* affirm that the *Apprendi/Blakely* doctrine applies to California's determinate sentencing scheme. Moreover, the application of the DSL in this case violated the principles of the Sixth Amendment as set forth in *Apprendi/Blakely*.

C. *Blakely* Applies to this Case and the Issue was not Waived by Lack of an Objection in the Trial Court.

First, *Blakely* governs the current case. As stated in another *Apprendi*-related opinion issued the same day as *Blakely*: "When a decision of this Court results in a 'new rule,' the rule applies to all criminal cases still pending on direct review. [Citation.]" (*Schiro v. Summerlin* (No. 03-526, June 24, 2004) 542 U.S. ____, slip. op. 3, 2004 WL 1402732 at 3, 2004 DJDAR at 7569, 7570.) The *Blakely* decision – which invalidated portions of Washington's sentencing code and will likely lead to drastic revisions of federal and state sentencing schemes – clearly resulted in a new rule and a new application of the *Apprendi* doctrine. Under this standard, *Blakely* unquestionably applies to Mr. Parras's currently-pending

appeal.

Second, the error in this case was not waived, even though defense counsel made no objection to the high term on *Apprendi* grounds.⁵ A sentencing court's imposition of an upper term based on an aggravating circumstance not reflected in the jury's verdict or admitted by the defendant should *not* come within the usual rule requiring a contemporaneous objection to preserve appellate review of defects in sentencing reasons. In several cases over the past decade, the California Supreme Court has held that a failure to object cannot waive "certain fundamental constitutional rights," such as double jeopardy *and the right to jury trial*, even though that omission may forfeit appellate review of related state statutory claims. In *People v. Saunders* (1993) 5 Cal.4th 580, the Court applied that distinction to a defendant's failure to object to the discharge of the jury, prior to the adjudication of charged priors. That omission did not waive the right to raise fundamental claims of double jeopardy and jury trial. "Defendant's failure to object also would not preclude his asserting on appeal that he was denied his constitutional right

⁵ Although no objection was made on *Apprendi* grounds, it should be noted that defense counsel argued vigorously that appellant should receive the middle term. In doing so, counsel argued both that there were several mitigating factors and that the purported aggravating factors were unsubstantiated and of little weight. (R.T. 609-615.)

to a jury trial. [Citations.]” (*Id.* at 589 n. 5; see also 592 [same holding re double jeopardy claim]; accord *People v. Valladolid* (1996) 13 Cal.4th 590, 606 [refusing to find waiver of double jeopardy claim].) As the Court summarized in a later opinion:

Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (See *Saunders*, 5 Cal.4th at 592 [plea of once in jeopardy]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [constitutional right to jury trial]; cf. *People v. Walker* [(1991)] 54 Cal.3d [1013,] 1022-1023 [nonconstitutional nature of claim that trial court failed to advise of consequences of guilty plea subjects defendant's claim to rule that error is waived absent timely objection].) (*People v. Vera* (1997) 15 Cal.4th 269, 276 -277.)

Because appellant’s *Blakely* claim contests the denial of the Sixth Amendment right to a jury trial on the aggravating factors necessary to expose a defendant to an upper term, it should come within the *Saunders-Vallodoli-Vera* rule: A lack of objection should not forfeit appellate review of denial of this “fundamental constitutional right.”

Moreover, failure to object should not waive the error because such an objection would have been futile at the time. (See, e.g. *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649.) The futility exception should apply where the statutory or case law binding the lower court at the time would have precluded the

claim. (Cf. *People v. Birks* (1998) 19 Cal.4th 108, 116 n.6 [no waiver where lower court was bound by higher court on issue].) Until June 24, 2004, it would have been pointless to demand a jury trial or a reasonable doubt standard on DSL aggravating circumstances, since California statutory and case law unequivocally prescribed judicial factfinding under a preponderance standard. (Cal. Rules of Court, rule 4.420, subd. (b); *People v. Jackson* (1987) 196 Cal.App.3d 380, 391.) Even in the context of evidentiary claims (where the courts have generally enforced waiver rules most strictly), the California Supreme Court has allowed review of unraised claims based on a significant supervening change in the law: “Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]” (*People v. Turner* (1990) 50 Cal.3d 668, 703.) This is such a case, and a finding that the is was waived would therefore be inappropriate.

D. The State Cannot Prove the Error Harmless.

The disposition in *Blakely* was a remand to the Washington appellate court “for proceedings not inconsistent with this opinion.” (*Blakely*, slip op. at 18, 2004 WL at 10, 2004 DJDAR at 7585.) The

opinion did not address whether the error automatically required reversal of the sentence or was susceptible to harmless error review. However, under either view, reversal is required in this case.

The error is a “structural defect,” not amenable to harmless error review, because the wrong entity, the judge rather than the jury, has adjudicated the aggravating factor and has applied the wrong standard of proof. (Cf. *Sullivan v Louisiana* (1993) 508 U.S. 275.) In *Sullivan*, Justice Scalia explained that the error in that case – misinstruction on the definition of proof beyond a reasonable doubt – was structural error because there was jury verdict based upon proof beyond a reasonable doubt. Harmless error analysis, under *Chapman v. California* (1967) 386 U.S. 18, 24, examines, not what effect the constitutional error might generally be expected to have a upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. (*Sullivan*, 508 U.S. at 279.) Because the error with respect to the reasonable doubt instruction meant, “there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent.” (*Id.* at 280.) In this case, as in *Sullivan*, there is no verdict – by judge or jury – based upon reasonable doubt. “‘There is no object, so to speak, upon which harmless-error scrutiny can operate’ and reversal is mandatory.” (*Ibid.*; see also *People v. Orellano* (2000) 79 Cal.App.4th 179, 186 [“Since we have

no way of knowing whether the jury applied the correct burden of proof, the convictions must be reversed ... so that appellant can be retried before a properly instructed jury”].)

It is true that the failure to instruct a jury on a single element is subject to *Chapman* harmless error analysis and is not per se reversible. (*Neder v. United States* (1999) 527 U.S. 1; *People v. Flood* (1998) 18 Cal.4th 470.) But in both *Neder* and *Flood*, a jury was seated and reached verdicts, and only one element/fact was not decided by the jury because of misinstruction. (*Neder*, 527 U.S. at 4; *Flood*, 18 Cal.4th at 475.) In this case, no jury at all was seated for appellant’s sentencing – which, under *Blakely*, is now better described as a penalty trial – and none of the aggravating facts were decided by a jury. Because appellant was denied a jury verdict on both of the two aggravating factorss (cruelty/viciousness and conduct which indicates a serious danger to society), the error is structural and automatically reversible.

Even if the error is not structural, reversal is required because it was not harmless. The California Supreme Court and federal courts have held that conventional *Apprendi* errors on enhancements are subject to the *Chapman* standard. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1209-1211; *United States v. Garcia-Guizar* (9th Cir. 2000) 234 F.3d 483, 488-489.) Under *Chapman*,

the state must prove that the error is harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at 24.) When applying this standard in the context of an error affecting the right to a jury trial on elements or enhancements, a reviewing court cannot simply ask whether there was “overwhelming evidence” supporting the finding in question. A more rigorous form of *Chapman* analysis, focusing on what facts the fact-finder necessarily found in reaching a decision is required and the error is not harmless if the omitted element is susceptible to dispute:

If, at the end of that examination, the [reviewing] court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless.

(*Neder, supra*, 527 U.S. at 19.)

In this case, there were no properly determined aggravating factors and no way of saying that a jury would have necessarily found the aggravating factors to be true beyond a reasonable doubt. Mr. Parras contested the application of the aggravating factors and whether there was evidence to support them and his defense counsel argued vigorously that he should receive the middle term. In doing so, counsel argued both that there were several mitigating factors and that the purported aggravating factors were unsupported and of little weight. (R.T. 609-615.) Whether

evidence supported the aggravating factors was a close call. For example, in convicting Mr. Parras of voluntary manslaughter rather than murder, the jury had already indicated that it believed (at least to some extent) Mr. Parras's defense that he did not intend to kill Ms. Lombera and was not in control of himself, contradicting the likelihood that they would find he acted with cruelty or viciousness. The question of whether the aggravating factors outweighed the mitigating factors was also close. Although it found two aggravating factors, the court also acknowledged that, "[I]t is true, as your counsel has argued, that there are factors in mitigation. There clearly are factors in mitigation here." (R.T. 626.) Given these facts, this Court cannot conclude beyond a reasonable doubt that the outcome would have been the same absent the error, and the error cannot be deemed harmless.

CONCLUSION

Based on the foregoing, appellant's sentence should be vacated.

DATE:

Respectfully submitted,

Heather J. MacKay
Attorney for Appellant
John Borrego Parras

