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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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**SUPPLEMENTAL STATEMENT OF THE CASE**

Appellant's Opening Brief was filed on January 9, 2004. On June 24, the United States Supreme Court decided *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_ [124 S.Ct. 2531], holding that any factor upon which a judge relies when imposing an aggravated sentence must have been found to be true beyond a reasonable doubt by the jury. A motion for leave to file a supplemental opening brief discussing *Blakeley v. Washington* has been filed with this supplemental brief.

**ARGUMENT**

**IMPOSING CONSECUTIVE SENTENCES IN THIS  
CASE VIOLATED APPELLANT'S RIGHT TO A JURY  
TRIAL AS GUARANTEED BY THE SIXTH  
AMENDMENT**

**A. Introduction**

Appellant was convicted of multiple charges stemming from a single incident, and was sentenced pursuant to the Three Strikes Law. At sentencing, the trial court imposed a term of 25-years-to-life for Count One, plus one year pursuant to section 12022, subdivision (a)(1). Consecutive terms of 25-years-to-life were imposed for Counts Two, Five, and Eight, plus an additional year was for Count Five pursuant to section 12022,

subdivision (b)(1). A consecutive term of 28-years-to-life was imposed for Count 10. Four, five-year terms were imposed pursuant to Penal Code section 667, subdivision (a). Remaining charges were stayed or ordered to be served concurrent. Appellant's total term of imprisonment is 150 years to life. (2 C.T. pp. 504-506, 512-514.)

In choosing to impose consecutive terms, the trial court relied upon its determination that Counts Two, Five, and Eight occurred on a "separate occasion and did not arise out of the same operative facts." (6 R.T. pp. 1232-1234.) No reason was given for the imposition of a consecutive term as to Count Ten.

As discussed below, the trial court's imposition of consecutive terms violates recent United States Supreme Court authority, and reversal for resentencing is required.

**B. Blakely v. Washington**

The United States Supreme Court recently decided *Blakely v. Washington* (June 24, 2004) 542 U.S. \_\_\_\_ [No. 02-1632, 124 S.Ct. 2531, 04 DAR 7581] (hereafter *Blakely*). In *Blakely* the defendant pleaded guilty to kidnaping his estranged wife. Defendant Blakely was subject to an absolute maximum of 10 years. However, the "standard range" for his offense was 49 to 53 months. Washington law provided that a court could impose a sentence greater than the "standard range" (but still within the 10-year maximum) only if it found "substantial and compelling reasons justifying an exceptional sentence." The statute provided a list of "aggravating factors" which could justify such a "departure" from the "standard range" and described the listed factors as "illustrative rather than exhaustive." (*Blakely, supra*, slip opn., at pp. 2-3.) 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.

The Supreme Court held that the trial court’s use of that aggravating factor violated the rule explained in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], entitling a defendant to jury determination of any fact that exposed a defendant to greater punishment than the “maximum” otherwise allowable for the underlying offense. The *Blakely* majority rejected the state’s assertion that the relevant “maximum” was the 10-year cap for the offense involved in the case. 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:

Our precedents make clear, however, 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. [Citations.] In other words, 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. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ [citation], and the judge exceeds his proper authority.

(*Blakely, supra*, slip opn. at p. 7, emphasis in original.)

Drawing together the lessons of *Apprendi*, *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] (which applied *Apprendi* to death-penalty aggravating factors), and *Blakely* itself, the majority commented:

Whether the judge’s authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*),

one of several specified facts (as in *Ring* ), or *any* aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

(*Blakely, supra*, at p. 9, emphasis in original.)

Therefore, in essence, the only factors the judge is permitted to use to increase a sentence are those presented to the jury for its consideration and decision. If the jury does not find unanimously and beyond a reasonable doubt that those factors are true, the judge may not use them to increase a sentence.

**C. Blakely’s Application to California’s Determinate Sentencing Law**

California statutes, court rules, and case law unequivocally provide that unless there is a finding of at least one aggravating circumstance, a court cannot impose the upper-term: “When a judgment of imprisonment is to be imposed, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” (Penal Code section 1170, subd. (b); see also, California Rules of Court, rule 4.420; cf., e.g., *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360.)

As with the “standard range” in *Blakely*, the mid-term 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.

The factors set forth in Penal Code section 1170 and rule 4.420 clearly violate the *Apprendi* mandate. The term of imprisonment that may be imposed based solely on the jury’s verdict is the middle term. The court may not impose the upper term unless it finds that there are additional aggravating factors, and under *Apprendi* and *Blakely*, those factors cannot

be relied upon unless the jury has found them to be true beyond a reasonable doubt. However, under rule 4.420, subdivision (d), the court is prohibited from relying on elements of the crime as factors in aggravation. Thus, the aggravating circumstances authorizing an upper term are almost necessarily facts beyond those determined by the jury's offense verdicts and enhancement findings (unless the court elects to strike an enhancement and instead use the enhancing facts to impose the upper term. (See rule 4.420, subd. (c).)

California's determinate sentencing law clearly suffers from the same fatal flaws as the Washington statute. Specifically, the *Blakely* court noted that under Washington law:

[a] judge may impose a sentence above the standard range [only] if he finds 'substantial and compelling reasons justifying an exceptional sentence.' §§ 9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. §§ 9.94A.390. Nevertheless, 'a reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.' *State v. Gore*, 143 Wash.2d 288, 315-316, 21 P.3d 262, 277 (2001). When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. §§ 9.94A.120(3).

(*Blakely* at p. 2, emphasis added.)

**D. *Blakely's Application To The Imposition Of Consecutive Terms***

Although the *Blakely* court did not address the imposition of consecutive terms, as occurred in this case, it is clear that similar to the Sixth Amendment flaws in the rules governing imposition of the upper

term, the rules governing imposition of consecutive terms also violate the *Apprendi* mandate. Both concurrent sentencing and consecutive sentencing are recognized as punishments. (*People v. Lawrence* (2000) 24 Cal. 4th 219, 226.) Consecutive sentencing is recognized as a sentence enhancement and a sentencing choice. (*People v. Ginese* (1981) 121 Cal. App. 3d 468, 479; 3 Witkin, Cal. Crim. Law (3d ed. 2000) Punishment, § 284, p. 375 .)

Penal Code section 669 provides that in the absence of special findings by the trial judge, sentences for two or more felonies shall run concurrently.<sup>1</sup> The rule implementing that statute is California Rules of Court, rule 4.425.<sup>2</sup>

A statement of reasons is required whenever consecutive sentencing involves a determinate sentence, including when a court orders that a

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<sup>1</sup> Penal Code section 669 provides in pertinent part:

“(a)When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively.....Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently.  
.”

<sup>2</sup> California Rules of Court, rule 4.425. states:

"Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

"(a) [Criteria relating to crimes] Facts relating to the crimes, including whether or not:

“(1) The crimes and their objectives were predominantly independent of each other. "(2) The crimes involved separate acts of violence or threats of violence. "(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.”

determinate term and indeterminate term run consecutive to each other. (*People v. Dixon* (1993) 20 Cal. App. 4th 1029, 1036-1037; California Rules of Court, rule 4.406.(b)(5).) Thus, unless special findings are made, the normative sentence on a second felony conviction — that is, the “statutory maximum” or the sentence to which a defendant is “entitled” — is a concurrent sentence in which the defendant serves no additional time over the time imposed as punishment on the first felony conviction.

Thus, the California statutory scheme makes a concurrent sentence the normative sentence, that is, the sentence to which the defendant is absolutely entitled, absent the additional findings. California statutory law does not require that the findings for the imposition of a consecutive sentence be made by a jury or be found to be true beyond a reasonable doubt. Moreover, the reasons for consecutive sentencing, by definition, cannot be based in the jury’s verdict finding the elements of the crime, and must be based on other facts. In the absence of a finding necessary to impose a consecutive sentence on a second offense, the second, lesser offense is concurrent to the first offense so that the defendant does not have to spend one additional day in custody.

In the presence of a finding for consecutive sentencing, however, a defendant convicted of both a crime subject to a indeterminate term and a crime subject to a determinate term, will serve a consecutive full term on the crime subject to a determinate term and that term will be served in addition to the indeterminate term. (*People v. Day* (1981) 117 Cal. App. 3d 932, 937.)

Division Five of this Court has held that a decision to impose consecutive sentencing is exempt from *Apprendi* and *Blakely*. (*People v. Sykes* (July, 28, 2004, B168042) \_\_ Cal.App.\_\_ [2004 Cal. App. LEXIS 1233, \* 28-29].) *Sykes* is mistaken for the reasons set forth above and as shown further below.

*Sykes* states that since in a consecutive sentencing situation the defendant has been convicted by the jury as to multiple crimes beyond a reasonable doubt, “this fully complies with the Sixth Amendment jury trial and Fourteenth Amendment due process clause rights.” (*People v. Sykes, supra*, 2004 Cal. App. LEXIS 1233, \* 16) because the “facts which affect the appropriate sentence . . . for each offense” have been found in accordance with *Blakely* and *Apprendi*. (*Ibid*, italics in original.) Of course, as set forth above, even if the jury returns two convictions, consecutive sentencing for the second offense is not the standard sentence; concurrent sentencing is the standard sentence and the imposition of consecutive sentencing depends upon a finding of an additional factor which may include non-recidivist, aggravating factors.

Thus, in order to find that *Blakely* and *Apprendi* did not apply to consecutive sentencing, *Sykes* could not rely simply on the fact there were two convictions. *Sykes* further asserts that the “historical and jurisprudential basis for the *Blakely* and *Apprendi* holdings did not involve consecutive sentencing.” (*Id.* at \* 15.) It quotes language in *Apprendi* where Associate Justice John Paul Stevens explained that trial practice “‘must at least adhere to the basic principles undergirding *the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt.*’” (*Apprendi v. New Jersey, supra*, 530 U.S. at pp. 483-484.)” (*People v. Sykes, supra*, 2004 Cal. App. LEXIS 1233, \* 16, (emphasis added in *Sykes*)). *Sykes* then reasons that “consecutive sentencing . . . does not involve the facts . . . ‘necessary to constitute a statutory offense.’” (*Ibid.*)

*Sykes*’s error is to bestow upon the phrase “statutory maximum” a narrow application or definition not warranted under the United States Supreme Court cases. According to *Sykes*, the “statutory maximum” is the maximum which may be served on each single offense, assuming a

defendant is convicted of only that offense, and no other offenses, without taking into account the limitation in the concurrent sentence statutory provisions. In other words, *Sykes* ignores the statutory limitation requiring that a second conviction be served concurrently with the first conviction — or that this concurrent sentence is required unless certain criteria are found to be true warranting a consecutive sentence. *Sykes* appears to conclude that the “statutory maximum” for a second conviction is really the full term, which would be imposed if that conviction were the only conviction.

*Sykes*’s conception of “statutory maximum” is not only dependent on the foregoing fiction (that a second, concurrent conviction has some independent, additional term from the first conviction). Also, its reasoning that construes *Apprendi* and *Blakely* as limited to the “facts necessary to constitute a statutory offense” runs afoul of the United States Supreme Court’s rejection of the question of whether a fact is “elemental” or a mere “sentencing factor” as an irrelevant question in resolving a defendant’s constitutional rights. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 494 and fn. 19.) Rather, *Apprendi* emphasized that the question of whether a defendant is entitled to due process and jury trial protection is whether a factual finding exposes the defendant to a punishment greater than the one authorized by the verdict. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 484, 494 and fn. 19.)

Moreover, in its reversal of the judgment, *Apprendi* relied on the social stigma associated with the finding as well as the finding’s effect on the defendant’s liberty as warranting constitutional protection:

The differential in sentence between what *Apprendi* would have received without the finding of biased purpose and what he could receive with it is not, it is true, as extreme as the difference between a small fine and mandatory life imprisonment. *Mullaney*, 421 U.S. at 700. But it can hardly be said that the potential doubling of one’s sentence – from 10 years to 20 – has no more than a nominal effect. Both in terms

of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance. When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as "a tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88.

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 495.)

*Sykes* also cited numerous federal district and circuit court cases and out-of-state cases for its conclusion that *Apprendi* does not apply to the decision to impose consecutive sentences. (*People v. Sykes*, *supra*, 2004 Cal. App. LEXIS 1233, \* 16.) These cases were all decided prior to the United States Supreme Court decision in *Blakely v. Washington*, *supra*, which expanded *Apprendi* to apply to any aggravating fact used to increase a sentence.

The question of the Three Strikes Law's effect on consecutive sentencing is also plainly raised by *Blakely* because there is a question as to its effect on a standard sentence. A reading of the plain language of that law demonstrates the trial court still has discretion to impose concurrent terms absent the existence of certain factual findings:

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

.....

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall

impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(Pen. Code § 667, subd. (c)(6)&(7); accord Pen.Code § 1170.12, subd. (a)(6)&(7) [identical provisions].)

Therefore, the default on the Three Strikes Law is not simply a question of whether there have been “strikes” but rather includes an assumption of normal sentencing discretion absent the conditions quoted above. The trial judge in this case was knowledgeable enough to recognize there were further findings which had to be made before he employed the mandate of those sections.

Application of *Blakeley* and *Apprendi* to this case is evident. *Blakely* specifically rejected any interpretation that *Apprendi*'s holding was limited to the “problem” of statutes that aggravate offenses. (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537, fn. 5.) *Blakely* noted that *Apprendi* relied on Bishop's treatise, *Criminal Procedure*, and that the “treatise is devoted to the point that ‘every fact which is legally essential to the punishment’ must be charged in the indictment and proved to a jury” and that “nowhere is there the slightest indication that [Bishop's] general principle was limited to” statutes aggravating offenses. (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537, fn. 5, citing 1 J. Bishop, *Criminal Procedure*, ch. 6, pp. 50-56 (2d ed. 1872).) Clearly, the statutory maximum is increased when a consecutive term is imposed, and terms of *Blakeley* apply in this case.

Therefore, under California statutory law, consecutive sentencing on a determinate term violates *Apprendi* and *Blakely*. California law provides that the penalty for a crime is increased from the “statutory maximum” of a concurrent term whenever there is a finding of fact — even though the

finding is not made by the jury and even though the finding does not have to be found true beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490; *Blakely v. Washington*, *supra*, 124 S.Ct. 2531; U.S. Const., 5th, 6th & 14th Amends.)

**E. Appellant Was Deprived of His Sixth Amendments Rights**

Sentencing decisions typically involve two different kinds of determinations: findings of fact and the exercise of discretion or judgment as to the most appropriate sentence; often based on the findings of fact. *Apprendi* and *Blakely* appear to focus strictly on the right to jury determination of facts that expose a defendant to the possibility of a sentence greater than the maximum allowed by the jury's findings. The *Apprendi/Blakely* majority has no quarrel with judicial sentencing discretion, provided that jurors have made all the purely factual findings necessary to authorize a maximum sentence.

In appellant's case, the trial court relied upon its own findings that each offense was "committed on a separate occasion and did not arise out of the same operative facts" to impose consecutive terms. Those findings of fact were not considered by the jury or found to be true beyond a reasonable doubt. Given that the offenses did occur during a continuing period of time, and all stemmed from the same "operative fact" of appellant's attempt to avoid arrest, it is very probable a jury would disagree with the trial court's assumption.

It is not sufficient that the jury convicted of the offense, it must also find the aggravating facts to be true. As the *Blakely* opinion noted, "Whether the judicially determined facts require a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2538, fn. 8 (emphasis in original).)

Retroactivity is not an issue in this case: “When a decision of this Court results in a ‘new rule,’ the rule applies to all criminal cases still pending on direct review.” (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [107 S.Ct. 708, 93 L.Ed.2d 649]; in accord, *Schiro v. Summerlin* (June 24, 2004) 542 U.S. \_\_\_[124 S.Ct. 2519, 04 DAR 7569].)

The issue is furthermore preserved pursuant to *People v. Scott* (1994) 9 Cal.4th 331, 356, as trial counsel argued that concurrent sentencing was allowed and appropriate, and the trial court interrupted to state that it disagreed with counsel’s analysis. (6 R.T. pp. 1207-1208.) Moreover, no objection was required to preserve the issue for appeal. 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 before the adjudication of charged prior convictions. That omission forfeited the right to contest the premature discharge as a violation of the state statutory provisions requiring the same jury to determine both the currently charged crime and any alleged priors (Penal Code sections 1025, 1164) (see *id.* at pp. 589-592) but not the right to raise the more 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 to a jury trial. [Citations.]” (*Id.* at p. 589 fn. 5; see also p. 592 [same holding re: double jeopardy claim]; accord *People v. Valladoli* (1996) 13 Cal.4th 590, 606 [also refusing to find waiver of double jeopardy claim re: post-verdict amendment of an information to add prior convictions].) 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, supra*, 5 Cal.4th at p. 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, emphasis added.)

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

Additionally, no objection was required because it would have been futile under the law in effect at the time of sentencing. (See, e.g., *O'Connor v. Ohio* (1966) 385 U.S. 92, 93 [87 S.Ct. 252, 17 L.Ed.2d 189] [“failure to object in the state courts . . . to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court”]; *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5 [citing other cases in which no objection was required due to futility]; *People v. DeSantiago* (1969) 71 Cal.2d 18, 22-23; *People v. Birks* (1998) 19 Cal.4th 108, 116, fn.6 [no waiver where lower court was bound by higher court on issue].

#### **F. The Judgment Must Be Reversed**

Deprivation of the right to a jury trial is structural error requiring reversal without regard to prejudice. The wrong entity, the judge rather than the jury, has adjudicated the aggravating factor and has applied the

wrong standard of proof. (*Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182].)

Appellant recognizes that the California Supreme Court has interpreted *Apprendi* error under the standard in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (See, *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) Even if the error is analogized to the failure to submit an element to the jury for decision (that is, the failure to instruct on an element) rather than structural error, the error here still requires reversal.

In context of instructional error affecting the elements of offenses and enhancements, the United States Supreme Court's cases actually demand a rigorous form of *Chapman* analysis, focusing on what facts the jurors necessarily found in rendering their verdict. In particular, *Neder v. United States* (1999) 527 U.S. 1 [119 S.Ct. 1827, 144 L.Ed.2d 35] which applied harmless error review of omission of an element, made clear that the error cannot be found 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.

(*Id.* at p. 19.)

Here the factors relied upon by the trial court are susceptible to dispute, and there is therefore a reasonable doubt that the error was harmless. Appellant's judgment should be reversed and remanded for a new sentencing hearing in which the court is limited to matters actually found to be true by the jury.



**CONCLUSION**

For the foregoing reasons, Mr. Darling respectfully requests that his judgment be reversed and remanded for resentencing.

Dated: August 11, 2004

Respectfully submitted,

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