

Supplemental opening brief by panel attorney Robert Wayne Gehring in
People v. Marcos Del Rosario (D043110).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,)	
)	
Plaintiff and Respondent,)	Court of Appeal
)	No. D043110
v.)	
)	San Diego County
MARCOS DEL ROSARIO,)	Superior Court
)	No. SCD174879
<u>Defendant and Appellant.</u>)	

**APPEAL FROM THE SUPERIOR COURT
OF SAN DIEGO COUNTY**

Honorable David J. Danielsen, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

ROBERT WAYNE GEHRING
Attorney at Law
State Bar No. 118989
156 Palacio Norte
Fallbrook, California 92028
(760) 728-5854

**Attorney for Appellant-
Defendant by appointment of
the Court of Appeal under the
Appellate Defenders, Inc.,
Independent-case system**

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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

INTRODUCTION

The court sentenced Mr. Marcos Del Rosario¹ to the upper term of 10 years for the firearm use enhancement based upon findings not submitted to the jury nor found beyond a reasonable doubt. This action violates the principles followed in *Blakely v. Washington, supra*. Because double jeopardy principles preclude a new trial to determine the truth of any aggravating elements, the Court of Appeal is requested to set aside six years

¹ The Information named the defendant "Mark Derek Delrosario." The notice of appeal filed by trial counsel listed the name was Mark Delrosario. I have been informed the proper name is Marcos Del Rosario, and that name is used throughout this supplemental opening brief.

of Mr. Del Rosario's sentence, reducing the term imposed for the section 12022.5 enhancement to the middle term of four years.

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I

MR. DEL ROSARIO WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND DUE PROCESS WHEN THE TRIAL COURT IMPOSED THE UPPER TERM OF 10 YEARS FOR THE FIREARM USE ENHANCEMENT UNDER SECTION 12022.5, SUBDIVISION (a), BY RELYING ON AGGRAVATING FACTORS NEVER SUBMITTED AND INSTRUCTED TO THE JURY NOR FOUND TRUE BEYOND A REASONABLE DOUBT.

A. The Relevant Facts.

The Information alleged a violation of Penal Code, section 245, subdivision (a)(2), and an allegation under section 12022.5, subdivision (a)(1), in the following terms:

"On or about May 18, 2003, MARK DEREK Del Rosario did unlawfully commit an assault upon BRANDEN ESPINOZA with a firearm, in violation of PENAL CODE SECTION 245(a)(2).

"And it is further alleged that in the commission and attempted commission of the above offense, the defendant, MARK DEREK Del Rosario, personally used a firearm, to wit: a shotgun, within the meaning of PENAL CODE SECTION 12022.5(a)(1)." (CT 2.)²

The trial court instructed the jury about what they had to find in order to convict Mr. Del Rosario of this offense³ and this enhancement.⁴

² Mr. Del Rosario was also charged with discharging a firearm in grossly negligent manner (Penal Code, sec. 246.3 - count 2), making a criminal threat (sec. 422 - count 3), and possession of firearm by felon (sec. 12021, subd. (a)(1) - count 4). (CT 2-3.) The jury found Mr. Del Rosario guilty of counts 1, 2, and 4, and not guilty of count 3, and found true the section 12022.5, subdivision (a)(1) enhancement. (7 RT 551-553; CT 59-62, 116-117.) The sentence on counts 2 and 4 were stayed per section 654 and are not pertinent to the issue raised in this supplemental opening brief.

³ "This defendant is accused in count one of having violated section 245 subdivision (a)(2) of the Penal Code, a crime.

"Every person who commits an assault upon the person of another with a firearm is guilty of the -- of a violation of section 245 subdivision (a)(2) of the Penal Code, a crime.

"A firearm includes a pistol, revolver, shotgun, rifle or any other device designed to be used as a weapon from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

"In order to prove this crime, each of the following elements must be proved:

"One, a person was assaulted;

"And two, the assault was committed with a firearm.

"Now in order to prove an assault, each of the following elements must be proved:

"No. 1, a person willfully committed an act which by its nature would probably and directly result in the application of physical force on another person;

"Two, the person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act, that physical force would be applied to another person;

"And three, at the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another.

"Now the word 'willfully' means that the person committing the act did so intentionally. However, an assault does not require an intent to cause injury to another person or an actual awareness of the risk that injury might occur to another person.

"And to constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted, it may be considered in connection with the other evidence in determining whether an assault was committed and, if so, the nature of the assault." (6 RT 393-394.)

⁴ "It is alleged in counts one, two and three that defendant personally used a firearm during the commission of those crimes charged.

"If you find the defendant guilty of one or more of the crimes charged in counts one, two and three, you must determine whether the defendant personally used a firearm in the commission of those felonies.

"The word 'firearm' is defined to include a pistol, revolver, shotgun, rifle, or any other device, designed to be used as a weapon from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

The jury convicted Mr. Del Rosario and returned a true finding on the enhancement, stating in its verdict and finding forms that it found Mr. Del Rosario "guilty of the crime of assault with a firearm, in violation of Penal Code Section 245(a)(2), as charged in Count One of the Information. [Par.] And we further find that in the commission of the above offense the said defendant did personally use a firearm, to wit: a shotgun, within the meaning of Penal Code Section 12022.5(a)(1)." (7 RT 552.) Other than what was stated on its verdict forms, the jury made no other factual findings regarding Mr. Del Rosario or his guilt.

In imposing the upper term for the aggravated assault, the court explained:

"The court is going to impose the upper term on the enhancement, ten years. The upper term is imposed because of certain aggravating facts which the Court is going to cite to support the decision to impose the aggravated term.

"The defendant's prior performance on parole is poor, and he has continued to reoffend. He has continued to be violated on his parole and returned on a number of occasion to the state prison.

"I think the defendant has engaged in violent conduct which indicates a serious danger to society. This particular activity was undertaken with a remarkably callous attitude, demonstrated by the trial testimony and physical and photographic evidence, remarkably callous attitudes towards the consequences of the acts.

"Specifically, I find the aggregate term because this victim was particularly vulnerable compared to other victims

"The term 'personally used as firearm', as used in this instruction, means that the defendant must have intentionally displayed as firearm in a menacing manner, intentionally fired it or intentionally struck or hit a human being with it." (6 RT 399-400.)

in a situation. The Court is aware of many circumstances where men of a certain age butt heads, much like rams in the wild, attempting to establish dominance, one over the other, but rarely do I find a situation where one side has clearly superior firepower, that is, an individual has a shotgun at close range, where the person is clearly unarmed, the person has discontinued any confrontation which was initially just verbal, and he was actually fleeing, running away from the defendant. And it is at that time that this defendant purposely pointed a shotgun in the direction of another human being and pulled the trigger, and the physical evidence supports, I think, the conclusion that this defendant had his victim in an extremely vulnerable position, and but for the interference of what turned out to be the inadvertent bullet-proof jacket from Wilson Leather & Suede, and the fact that it was birdshot, and but for the pellets struck in areas that would not result in significant bodily harm, all but for the fact of that, the intent was there, and the vulnerability was exploited. I thought it was particularly a cowardly and despicable act." (9 RT 572-574.)

As discussed more fully below, Mr. Del Rosario was deprived of his state and federal constitutional rights to a jury trial and due process because the trial court imposed the upper term of 10 years by relying on aggravating factors found true neither by a jury nor beyond a reasonable doubt. Accordingly, Mr. Del Rosario's sentence must be reversed.

B. Mr. Del Rosario Was Deprived Of His Constitutional Right To Have A Jury Determine The Truth Of Aggravating Factors Beyond A Reasonable Doubt.

1. Federal constitutional law.

The Fifth Amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property without due process of law" Similarly, the Fourteenth Amendment prohibits any state from depriving a person of liberty without "due process of law." In addition, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused

shall enjoy the right to a speedy and public trial, by an impartial jury."

Taken together, these amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510 [132 L.Ed.2d 444, 115 S.Ct. 2310]; *see also Mullaney v. Wilbur* (1975) 421 U.S. 684, 698 [44 L.Ed.2d 508, 95 S.Ct. 1881]; *In re Winship* (1970) 397 U.S. 358, 363-364 [25 L.Ed.2d 368, 90 S.Ct. 1068].) Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Fifth and Sixth Amendments require to be proven to a jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Mullaney v. Wilbur*, 421 U.S. at p. 698; *Specht v. Patterson* (1967) 386 U.S. 605, 608-611 [87 S.Ct. 1209, 18 L.Ed.2d 326].) Indeed, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, 530 U.S. at p. 490.)

In *Apprendi*, defendant pled guilty to possession of a firearm for an unlawful purpose, a "second degree" offense punishable by imprisonment for between five and ten years. However, pursuant to New Jersey's hate crime statute, the trial court at sentencing found by a preponderance of the evidence that defendant had committed the crime with a purpose to intimidate individuals because of race. Under the hate crime statute, this

finding increased defendant's sentence to imprisonment for between ten and twenty years. The United States Supreme Court held that although the New Jersey Supreme Court characterized the hate crime enhancement as a "sentencing factor," it was actually an element of the offense which should have been decided by the jury. (530 U.S. at pp. 492-493.) The increase in the prescribed statutory maximum penalty to which defendant was exposed violated his Fifth and Sixth Amendment rights because the factual determination which served to elevate his maximum statutory exposure had not been submitted to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490-492.) Indeed, the Supreme Court concluded that *all* facts (other than the fact of a prior conviction) which increase the penalty beyond the prescribed statutory maximum must be found by a jury to exist beyond a reasonable doubt:

"[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." (*Id.* at p. 490, quoting *Jones v. United States* (1999) 526 U.S. 227, 252-253 [119 S.Ct. 1215, 143 L.Ed.2d 311] [conc. opn. of Stevens, J].)

Thereafter, in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], the Supreme Court applied the holding of *Apprendi* to Arizona's death penalty law. Under Arizona law, the maximum punishment for first-degree murder was life imprisonment unless the trial court found beyond a reasonable doubt the existence of one of ten statutorily enumerated aggravating factors. The Court held that defendant's death sentence under this law violated his right to a jury determination of

guilt on every element of the crime charged. (*Id.* at p. 589.) Thus, in line with *Apprendi*, the Court found that the Sixth Amendment mandates that the existence of an aggravating factor necessary for the imposition of the death penalty must be found by a jury rather than a sentencing judge. (*Id.* at p. 609.)

Most recently, the Court decided *Blakely v. Washington, supra*. In *Blakely*, defendant pleaded guilty to kidnaping his estranged wife while using a firearm. Under Washington law, the facts defendant admitted supported a prison sentence in the "standard range" of 49 to 53 months. However, Washington law also permitted the trial court to impose a sentence above the standard range if it found the existence of an aggravating factor demonstrating "substantial and compelling reasons justifying an exceptional sentence." (124 S.Ct. at p. 2535.) Pursuant to this latter provision, the trial judge imposed an exceptional sentence of 90 months based on a finding that defendant had acted with "deliberate cruelty" in committing the kidnaping offense. (*Ibid.*)

Once again applying the holding of *Apprendi*, the Supreme Court reversed defendant's sentence. The Court first noted:

"[T]he '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 omitted.] 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 facts." (*Blakely, supra*, 124 S.Ct. at p. 2537. [Emphasis in original].)

Applying this reasoning, the Court found that the statutory maximum sentence based solely on the facts defendant admitted in his guilty plea was

the standard range of 49 to 53 months; the trial judge was prohibited from imposing the exceptional 90-month sentence on those facts alone. (*Id.* at pp. 2537-2538.) Consequently, the judge's imposition of an additional three years beyond the statutory maximum was based on a factual finding to which defendant never confessed and which no jury had ever found true beyond a reasonable doubt. (*Id.* at p. 2538.) The imposition of the 90-month exceptional sentence therefore violated defendant's Sixth Amendment right to trial by jury. (*Ibid.*)

2. California's Determinate Sentencing Law.

California's Determinate Sentencing Law employs a system of sentencing choices much like Washington's sentencing scheme at issue in *Blakely*. Under Penal Code section 1170, subdivision (b), "[w]hen 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." (Emphasis supplied.)⁵ Thus, under the Determinate Sentencing Law, the middle term is the presumptive sentence (*see, e.g., People v. Arauz* (1992) 5 Cal.App.4th 663, 674 [conc. & dis. opn. of Yegan, J.]), or as in *Blakely*, the "statutory maximum" allowable for the particular offense. In fact, a trial court need not even state reasons for imposing the middle term. (*People v. Arceo* (1979) 95 Cal.App.3d 117, 121.)

⁵ *See also* Cal. Rules of Court, rule 4.420(a) ["The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation."].)

As in *Blakely*, the upper or "exceptional" term may only be imposed where aggravating factors exist justifying a departure from the middle term. (Cal. Rules of Court, rule 4.428(b) ["When the defendant is subject to an enhancement that was charged and found true for which three possible terms are specified by statute, the middle term shall be imposed unless there are circumstances in aggravation or mitigation.... [Par.] The upper term may be imposed for an enhancement based on any of the circumstances in aggravation enumerated in these rules or, under rule 4.408, any other reasonable circumstances in aggravation that are present.."] The rules of court, provide for the trial court to find those circumstances in aggravation by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b); see also *People v. Levitt* (1984) 156 Cal.App.3d 500, 515.)

California Rules of Court, rule 4.421 sets forth a non-exhaustive list of circumstances which may constitute aggravating factors. In addition, rule 4.408(a) provides that for purposes of making discretionary sentencing decisions, the sentencing court may consider "additional criteria reasonably related to the decision being made." (*Cf. Blakely, supra*, 124 S.Ct. at p. 2535 [Washington statute provides "illustrative" list of aggravating factors which justify imposition of exceptional sentence].)

The rules of court make equally clear in spelling out what facts a court may **not** rely upon in finding the existence of an aggravating factor.⁶

The court may *not* rely on a factor which is an element of the crime.

⁶ As with finding the upper term for an offense, when finding the upper term for an enhancement, the court must give its reasons. (*People v. Tran* (1996) 47 Cal.App.4th 759, 774; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 869.)

(Cal. Rules of Court, rule 4.420(d) ["A fact that is an element of the crime shall not be used to impose the upper term."].⁷ Similarly, even where an aggravating factor technically is not an element of the underlying crime, the court may not rely on it where the factor is inherent in the crime. (*People v. Young* (1983) 146 Cal.App.3d 729, 734 [trial court improperly relied on "extreme serious nature of the offense" to aggravate defendant's sentence for assault with a deadly weapon since assault with a deadly weapon is "obvious[ly]" an extremely serious offense].) **Nor may the court "impose an upper term by using the fact of any enhancement upon which sentence is imposed...."** (Sec. 1170, subd. (b).)⁸ Consequently, under California's Determinate Sentencing Law, when a sentencing court finds the existence of factors in aggravation, it necessarily finds the existence of facts *beyond* which the jury found to exist in arriving at its verdict.

3. Application to Penal Code, section 12022.5, and Mr. Del Rosario's case.

Penal Code section 12022.5, subdivision (a) provides that "any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by imprisonment in the state prison for 3, 4, or 10 years...." As *Apprendi* and *Blakely* make clear, the middle term

⁷ See also *People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [youth of victim made her vulnerable, but error to treat as aggravating factor in sentencing resident child molester because age range was specified in underlying offense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159-1160 [Same].)

⁸ See e.g., *People v. Fain* (1983) 34 Cal.3d 350, 357 [Error to consider prior conviction for escape both as an enhancement and as reason for upper term of four years]; *People v. Smith* (1980) 101 Cal.App.3d 964, 967 [Error to use firearm use both to impose upper term and for section 12022.5 enhancement].

of four years is the "statutory maximum" sentence that a judge may impose for an enhancement under section 12022.5, subdivision (a) "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely, supra*, 124 S.Ct. at p. 2537.) Without the existence of additional aggravating factors, a departure from the middle term sentence of four years to the upper term of 10 years is unauthorized. (Pen. Code § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).)

As *Apprendi* and *Blakely* also make clear, however, before any such aggravating factors can be used to impose the upper term, a jury must find them to exist beyond a reasonable doubt.⁹ Here, the trial court usurped the jury's fact finding function when it found the existence of aggravating factors to impose the upper term of 10 years. Moreover, by operation of rule 4.420(b), the court based its findings on a preponderance of the evidence standard. Consequently, the trial court's imposition of the upper term based on the aggravating factors it found to exist violated Mr. Del Rosario's Sixth Amendment right to a jury trial on the truth of those aggravating factors and his Fifth and Fourteenth Amendment rights to due process requiring that they be found true beyond a reasonable doubt.¹⁰

⁹ In order to effectuate Mr. Del Rosario's constitutional right to have a jury determine the existence of aggravating factors beyond a reasonable doubt, Mr. Del Rosario had a corollary federal due process right to have the jury properly instructed on this question. (*See, e.g., People v. Flood* (1998) 18 Cal.4th 470, 491-492.)

¹⁰ Mr. Del Rosario's upper term sentence also violated his constitutional rights in that the aggravating factors were not pled in the Information. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Jones v. United States, supra*, 526 U.S. at p. 243, fn. 6, quoted in *Apprendi v. New Jersey, supra*, 530 U.S. at p. 476.) This federal constitutional

C. The Constitutional Violations Require Correction Of Mr. Del Rosario's Sentence.¹¹

Generally, the violation of a criminal defendant's constitutional rights warrants reversal unless the error is deemed harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 1283, 17 L.Ed.2d 705].) However, certain violations represent "structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards," and therefore require correction per se. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629 [123 L.Ed.2d 353, 113 S.Ct. 1710], quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 113 L.2d.2d 302].)

The denial of a jury trial is just such a structural defect. (*See, e.g., Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *Rose v. Clark* (1986) 478 U.S. 570, 578 [92 L.Ed.2d 460, 106 S.Ct. 3101]; *People v. Ernst* (1994) 8 Cal.4th 441, 449.) As the United States Supreme Court stated in *Rose*, because of the Sixth Amendment's clear command to afford jury trials in serious criminal cases, where that right is altogether denied, the error cannot be deemed harmless. (*Rose v. Clark, supra*, 478 U.S. at p. 578 ["the error in such a case is that the wrong entity judged the defendant guilty."].)

violation is not now raised as a separate claim of error because it is subsumed within the denial of the jury trial right.

¹¹ This argument calls for correction rather than reversal because the following section explains a new trial to determine any aggravating factors is barred by double jeopardy.

Significantly, the United States Supreme Court has also found an error to be structural, and therefore subject to automatic reversal, where the trial court permitted the jury to convict the defendant based on a standard less than proof beyond a reasonable doubt. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 281-282.)¹² By finding the existence of aggravating factors based on a preponderance of the evidence, and not beyond a reasonable doubt, the trial court here subjected Mr. Del Rosario to increased punishment on an unconstitutionally low standard of proof, requiring correction per se.

Given the nature of these constitutional violations, one cannot assess with any precision the harm caused by denial of a jury trial on the aggravating factors or the failure to require that those factors be found true beyond a reasonable doubt. The constitutional violations in this case must therefore be deemed "structural defects" under the *Brecht* taxonomy. No appellate court can or should speculate as to how the resolution of Mr. Del Rosario's sentencing would have differed had a jury been required to find the existence of aggravating factors beyond a reasonable doubt.¹³ Indeed, it

¹² The Court in *Sullivan* noted the close interplay between the Fifth and Sixth Amendment rights at issue in this case:

"It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 278.)

¹³ "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be

is undoubtedly for these precise reasons that the Court in *Blakely* and *Apprendi* reversed the defendants' sentences without requiring a showing of prejudice. (*Blakely, supra*, 124 S.Ct. at pp. 2538-2539; *Apprendi, supra*, 530 U.S. at p. 497.) Consequently, correction of Mr. Del Rosario's sentence is required.

D. Mr. Del Rosario Is Not Precluded From Contesting On Appeal The Constitutional Violations Relating To His Sentencing.

Defense counsel did not specifically allege a constitutional violation of Mr. Del Rosario's right to a jury trial or to due process. In light of this fact, respondent may attempt to avoid the merits of the issue Mr. Del Rosario has raised by claiming that any constitutional violation was waived due to defense counsel's failure to object to the aggravating factors on the grounds raised herein. However, any such claim of waiver would lack merit.

First, the California Supreme Court has repeatedly held that "[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain, fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.) Those fundamental constitutional rights include the right to trial by jury. (*See, e.g., People v. Saunders* (1993) 5 Cal.4th 580, 589, n.5; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) Since Mr. Del Rosario is claiming on appeal that he was denied his fundamental constitutional right to a jury trial and due

sustainable on appeal." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 280.)

process right to proof beyond a reasonable doubt, this issue is not waived.

Second, it is well-established that where an objection would have been futile, an attorney is not required to make it. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, n.5; *accord* Cal. Civ. Code § 3532 ["The law neither does nor requires idle acts."].) Because sentencing in this case occurred prior to the United States Supreme Court's decision in *Blakely*, it would have been futile for defense counsel to have demanded a jury trial or application of the proof beyond a reasonable standard on the existence of aggravating factors; as explained above, California's statutory and case law explicitly prescribed judicial factfinding on aggravating factors under a preponderance of the evidence standard. (*See, e.g., People v. Jackson* (1987) 196 Cal.App.3d 380, 390-391 & fn. 8; *People v. Levitt, supra*, 156 Cal.App.3d at p. 515; Pen. Code § 1170, subd. (b); Cal. Rules of Court, rules 4.420 (a) and (b).) Similarly, the California Supreme Court has permitted the review of claims not raised during trial where there have been significant supervening changes in the law. (*See, e.g., People v. Turner* (1990) 50 Cal.3d 668, 703 [allowing claims for first time on appeal where "pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change."].) Thus, given the significant change *Blakely* has made in the law, Mr. Del Rosario's claim is reviewable on appeal.

Finally, as noted above, in order to effectuate Mr. Del Rosario's constitutional right to have a jury determine the existence of aggravating factors beyond a reasonable doubt, Mr. Del Rosario had a corollary federal

due process right to have the jury properly instructed on the existence of such factors. (*See, e.g., People v. Flood, supra*, 18 Cal.4th at p. 491-492.) To the extent the trial court violated Mr. Del Rosario's constitutional right to due process because it failed to instruct the jury on aggravating factors, appellate review of the error is appropriate because the error affected Mr. Del Rosario's "substantial rights." (Pen. Code § 1259 ["The appellate court may . . . review any instruction . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].) Thus, Mr. Del Rosario is not precluded from raising this issue on appeal.¹⁴

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¹⁴ Of course, as the California Supreme Court observed in *People v. Williams* (1998) 17 Cal.4th 148, appellate courts retain discretion to reach issues that have not been preserved for review by a party. (*Id.* at p. 161, fn.6.)

II

REMAND FOR DETERMINATION OF AGGRAVATING FACTORS WOULD VIOLATE DOUBLE JEOPARDY

A. Introduction and Summary of Argument.

In the preceding section we saw that the court imposed an upper term by finding, without a jury, aggravating factors by a preponderance of the evidence. Such a finding that permits punishment to be imposed can only be made by the jury unless Mr. Del Rosario waives that right, which he has not. (*Apprendi, supra*, 530 U.S. at p. 490; *Blakely, supra*, 124 S.Ct. 2531.)¹⁵

Remand for such a jury hearing now, however, would be a second trial for an offense of which Mr. Del Rosario was already convicted. That trial would violate the double jeopardy clauses of the United States Constitution, the California Constitution, and Penal Code section 1023. Consequently, the Court of Appeal is requested to set aside six years of the upper term imposed for the section 12022.5 enhancement, reducing it to the middle term of four years.

B. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution Bars a New Hearing to

¹⁵ “[T]he 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*.... 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.” (*Blakely*, 124 S.Ct. at p. 2537). The finding required by *Apprendi* and *Blakely* before an upper term may be imposed was never made in Mr. Del Rosario's case.

Determine the Missing Element.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects against three threats: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717 [89 S.Ct. 2072, 2076; 23 L.Ed.2d 656], overruled in nonpertinent part, *Alabama v. Smith* (1989) 490 U.S. 794, 803 [109 S.Ct. 2201, 104 L.Ed.2d 865].)¹⁶ The protection against a second prosecution after a conviction concerns us here.

In *Brown v. Ohio* (1977) 432 U.S. 161 [97 S.Ct. 2221, 53 L.Ed.2d 187], the defendant was convicted of joyriding a car, and later convicted of stealing the same car in which he had been caught joyriding. In Ohio, the misdemeanor of joyriding was an included offense of the felony of auto theft. (*Brown*, 432 U.S. at pp. 163-164.) The Supreme Court held that the Fifth Amendment precluded successive prosecutions for a greater and lesser offenses, no matter the order in which the prosecutions occurred. (*Brown*, 432 U.S. at p. 169.) “Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings.” (*Brown*, 432 U.S. at p. 166.)

Because of *Apprendi* and *Blakely*, Mr. Del Rosario's case also involves an additional element if the upper term is to be imposed: finding

¹⁶ The Double Jeopardy Clause of the Fifth Amendment is made applicable to the states through the Fourteenth Amendment. (*Benton v. Maryland* (1969) 395 U.S. 784 [23 L.Ed.2d 707, 89 S.Ct. 2056].)

an aggravating factor. Under *Brown v. Ohio*, the Fifth Amendment's Double Jeopardy Clause protects against a second prosecution to find an additional element.

That protection also precludes remand to a sentencing jury. In *Bullington v. Missouri* (1981) 451 U.S. 430 [68 L.Ed.2d 270, 101 S.Ct. 1852], the Supreme Court held that at a new trial the prosecutor could not seek the death penalty after the jury at the first trial had rejected the prosecution death plea and returned a life sentence. The Supreme Court recognized that double jeopardy normally does not apply to sentencing proceedings, but held that the sentencing proceeding in a death penalty case had the indicia of a trial on guilt or innocence. Consequently, the Double Jeopardy Clause protected the defendant at a new trial. (*Bullington*, 451 U.S. at pp. 438, 446.)

In 1998 the Supreme Court held that the Double Jeopardy Clause did not apply to sentencing except in death penalty proceedings. (*Monge v. California* (1998) 524 U.S. 721, 734 [118 S.Ct. 2246, 2253; 141 L.Ed.2d 615].) The majority opinion, however, was based on the implicit assumption that a noncapital sentencing proceeding does not involve finding elements.¹⁷ (*Monge*, 425 U.S. at p. 728 [“Historically, we have found double jeopardy protections inapplicable to sentence proceedings ... because the determinations at issue do not place a defendant in jeopardy for an ‘offense.’”].)

¹⁷ Justice Scalia's dissent, joined by Justices Souter and Ginsberg, rejected this distinction between “elements” and “sentencing factors.” (524 U.S. at pp. 737-738.)

Since *Monge*, the Supreme Court has published the decisions in *Apprendi* and *Blakely*, in which factors which must be found for making specified punishments possible are either elements or are treated as elements. They must be found by the jury beyond a reasonable doubt. For all practical purposes, sentence-determining factors are elements or their equivalent.¹⁸

The decisions in *Apprendi* and *Blakely* bring those sentence-determining factors within the concept of “element.”¹⁹ Double jeopardy applies to finding elements. Consequently, Mr. Del Rosario’s present conviction precludes a new jury trial to determine whether aggravating factors were present in the commission of that offense. To permit such a sentencing jury would violate Mr. Del Rosario's protection against double jeopardy.

C. California Constitutional and Statutory Law Precludes a Hearing to Determine Aggravating Factors.

There remains in place a true finding by the jury. The California Constitution includes protection against double jeopardy.²⁰ This

¹⁸ Between *Apprendi* and *Blakely* came *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101 [123 S.Ct. 732, 154 L.Ed.2d 588], in which Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that after *Apprendi*, double jeopardy applies to any sentencing proceedings which determine facts that increase punishment beyond that authorized by jury verdict. (537 U.S. at p. 111.)

¹⁹ “[I]f the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt.” (*Sattazahn*, 537 U.S. at p. 111 [Scalia, J., joined both Rehnquist, Chief Justice, and Thomas, J.]

²⁰ “Persons may not twice be put in jeopardy for the same offense....” (Cal. Cons., art. I, sec. 15.)

constitutional provision is implemented and extended by section 1023 of the Penal Code, which provides: “When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading.” This bar to another prosecution applies whether the greater or lesser offense is tried first. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 607.) The constitutional and statutory provisions are to prevent repeated harassment of a defendant upon a charge of the same offense. (*People v. Tideman* (1962) 57 Cal.2d 574, 585.)²¹

In Mr. Del Rosario's case, any new hearing would involve the same offense of which he was convicted but with the addition of one element: an aggravating factor. The first finding for the enhancement, all the elements of which would be included within a new trial, is obviously within the scope of section 1023. So long as the current guilty verdict stands, a new prosecution upon that same charge would violate both the California Constitution and section 1023.

²¹ The justification for these provisions is not limited to protection of the defendant against harassment, however, but must also share in the value of the wider prohibition against multiple prosecutions found in section 654 to avoid waste of public funds in multiple prosecutions. (*Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827.)

CONCLUSION

For the reasons stated above, the Court is requested to set aside six years of Mr. Del Rosario's sentence, reducing the upper term of 10 years to the midterm of four years.

Respectfully submitted,

Robert Wayne Gehring
Counsel for Defendant-Appellant
Marcos Del Rosario

WORD COUNT CERTIFICATE

In accordance with California Rules of Court, Rule 14(c), using the word count program contained in WordPerfect 11, and excluding the tables, any attachments under Rule 14(d), and this certificate, the count for words in this Supplemental Brief is 6613.

Robert Wayne Gehring

**ATTORNEY'S CERTIFICATE OF
SERVICE BY MAIL
{CCP § 1013a, subd. (2)}**

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is 156 Palacio Norte, Fallbrook, California 92028-2456.

I served Appellant's Supplemental Opening Brief in the case of People v. Marcos Del Rosario, Court of Appeal No. D043110; Superior Court No. SCD 174879; by placing a true copy of the document in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Heather F. Wells
Deputy Attorney General
P. O. Box 85266
San Diego, CA 92186-5266

Appellate Defenders, Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101-2939

Marcos Del Rosario
#V09130
480 Alta Road
San Diego, California 92179

Dwayne K. Moring
Deputy Alternate Public Defender
110 West C Street, Suite 1100
San Diego, California 92101

Clerk of the Superior Court
County Courthouse
P. O. Box 120128
San Diego, CA 92112-0128

Paul Kalivas
Deputy District Attorney
330 W. Broadway, Suite 1100
San Diego, California 92101

Each envelope was then sealed and with postage thereon fully prepaid deposited in the United States mail by me at Fallbrook, San Diego County, California on 20 August 2004.

Dated: 20 August 2004

Robert Wayne Gehring