

Supplemental briefing by panel attorney Mark Alan Hart in *People v. Kelly Brooks* (E033507)

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

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

KELLY HASSAN BROOKS,

Defendant and Appellant.

E033507

(Sup. Ct. No.  
FSB-032199)

On Appeal from the Superior Court of San Bernardino County  
The Honorable Bob N. Krug, Judge

**APPELLANT'S SUPPLEMENTAL OPENING BRIEF**

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KELLY HASSAN BROOKS,

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(Sup. Ct. No.  
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**INTRODUCTION**

Appellant Kelly Hassan Brooks submits this Appellant's Supplemental Opening Brief to raise two issues relating to appellant's sentence. Two very recent decisions invalidate portions of appellant's sentence. Both were decided after Appellant's Opening Brief was filed. The United States Supreme Court's decision on June 24, 2004, in *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_ [2004 DJDAR 7581] should be applied to overturn the part of the judgment making counts one and three consecutive because the trial court's order that the terms run

consecutively was based on findings made by the court that are not reflected in the jury's verdict. (Argument I, *infra*.) The decision filed by Division Seven of the Second Appellate District on June 28, 2004 in *People v. Woods* (2004) \_\_ Cal.App.4th \_\_ [2004 DJDAR 7724] requires that the separate enhancements imposed and stayed pursuant to Penal Code section 12022.5, subdivision (a), and Penal Code section 12022.53, subdivisions (b) and (c), must be stricken because the sentence was enhanced pursuant to Penal Code section 12022.53, subdivision (d). (Argument II, *infra*.)

## ARGUMENT

### I.

#### THE PART OF THE JUDGMENT ORDERING THAT COUNTS ONE AND THREE BE SERVED CONSECUTIVELY VIOLATES APPELLANT'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL BECAUSE THE FINDINGS SUPPORTING CONSECUTIVE SENTENCING WERE MADE BY THE JUDGE BASED ON FACTS NOT REFLECTED IN THE JURY'S VERDICT

Appellant contends that the part of the judgment ordering that his sentence on counts one and three be served consecutively violates his Sixth Amendment right to a jury trial (as made applicable to the states by the Fourteenth Amendment due process clause). The findings the trial court made as support for consecutive sentences are based on facts not reflected in the jury's verdict.

On June 25, 2004, the United States Supreme Court decided *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_ [2004 DJDAR 7581], which dealt with the constitutionality of a Washington state felony sentencing scheme in which judges, not juries, make discretionary sentencing decisions based on various factors attending the commission of the particular crime. Blakely pleaded guilty to

kidnapping his estranged wife. The facts admitted in his plea supported a maximum sentence of 53 months. However, the Washington scheme lists several aggravating factors that justify a departure from the statutory maximum. After a separate sentencing hearing on the aggravating factors, the trial judge sitting without a jury found that the defendant acted with “deliberate cruelty.” Based on that aggravating factor, the judge imposed a total sentence of 90-months. (*Id.*, at pp. 7581-7582.)

The United States Supreme Court invalidated the Washington sentencing procedure. The High Court relied on its prior decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435], which held:

“Other 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 v. New Jersey, supra*, as quoted in *Blakely v.*

*Washington, supra*, 2004 DJDAR at p.  
7582.)

In *Blakely*, the High Court held that the judge could not increase a sentence based on his finding of “deliberate cruelty,” even though the sentence imposed did not exceed the statutory maximum for that type of offense. The Sixth Amendment requires that any sentence enhancement to be proved beyond a reasonable doubt and found to be true by a unanimous jury. The finding of deliberate cruelty was not based solely on facts admitted in Blakely’s guilty plea. (*Id.*, at pp. 7582-7583.)

The High Court defined the “statutory maximum” as “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.*, at p. 7582, italics in original, citing *Ring v. Arizona* (2002) 536 U.S. 584, 602 [122 S.Ct. 2428, 153 L.Ed.2d 556].)

“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 omitted], and the judge exceeds his proper authority." (*Blakely v. Washington, supra*, 2004 DJDAR at p. 7582, italics in original.)

The *Blakely* majority based its opinion squarely on the Sixth Amendment right to jury trial and noted that the Framers put a guarantee to a jury trial in the Constitution because "they were unwilling to trust the government to mark out the role of the jury." (*Id.*, at p. 7583.)

The case invalidates the consecutive sentence in two respects: the factual findings supporting the sentencing decision were made by a judge and those findings were not found using a beyond a reasonable doubt standard. The *Blakely* holding logically prohibits a court from ordering terms to be served consecutively unless the facts supporting consecutive sentences are presented to the jury and found unanimously and beyond a reasonable doubt, or admitted by the defendant. (*Id.*, at pp. 7582-7584.)

Penal Code section 669 provides that when a defendant is convicted of two or more offenses, the judgment shall direct whether the terms of imprisonment shall run concurrently or consecutively. Rule 4.425, California Rules of Court, implements Penal Code section 669 by setting forth criteria affecting the decision to impose consecutive rather than concurrent sentences. In other words, concurrent sentencing is the presumptive norm unless the sentencing court finds the existence of facts under the criteria listed in Rule 4.425. These facts are not related to the jury's finding of the elements of the crime beyond a reasonable doubt. Indeed, the rule specifically provides that "a fact that is an element of the crime shall not be used to impose consecutive sentences." (Rule 4.425(b)(iii), Cal. Rules of Court.)

One criterion included in the rule is: "The crimes and their objectives were predominately independent of each other." (Rule 4.425(a)(1), Cal. Rules of Court.) It is that factor that the trial court relied on to order count one (murder) and count three (residential robbery) to run consecutively. When rejecting appellant's trial

counsel's request that count three be stayed pursuant to Penal Code section 654, the court stated:

“In my opinion however, because of this incident where the killing was in fact separate and apart from the robbery, although they were certainly committed during the same course of conduct, I don't think there is that that is the kind of connection which would require a stay under 654. And the court is not going to do that.”

(RT 1140.)

The court then imposed a four-year term for count three consecutive to count one but ordered the enhancements attached to count three to run concurrently because the enhancements were identical to those attached to count one. (RT 1142.)

The factual findings made by the trial court to justify the decision to sentence consecutively were never presented to the jury and are not part of the jury's verdict. Therefore, consecutive sentencing in

this case violates appellant's Sixth Amendment right to a jury trial as interpreted in *Apprendi v. New Jersey, supra*, and *Blakely v. Washington, supra*. This Court should order the sentences to be served concurrently.

## II.

THIS COURT SHOULD MODIFY THE JUDGMENT TO  
STRIKE THE STAYED ENHANCEMENTS IMPOSED  
PURSUANT TO PENAL CODE SECTION 12022.5,  
SUBDIVISION (A), AND PENAL CODE SECTION  
12022.53, SUBDIVISIONS (B) AND (C)

This Court should modify the judgment to strike the enhancements imposed pursuant to Penal Code section 12022.5, subdivision (a), and Penal Code section 12022.53, subdivisions (b) and (c). The trial court imposed and then stayed these enhancements as part of the sentence on both counts one and three. However the court separately enhanced count one by imposing a term of 25 years to life pursuant to Penal Code section 12022.53, subdivision (d), and the court enhanced count three by imposing a concurrent term pursuant to that same subdivision. (CT 453-454, 459.)<sup>1</sup> As argued herein, the

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<sup>1</sup> The trial court's minutes list the Penal Code section 12022.53, subdivision (b), enhancement imposed on count one as stricken. (CT 454.) However, when the court orally pronounced judgment, it stayed that enhancement (RT 1138), and the Abstract of Judgment lists it as stayed (CT 459). When orally pronouncing judgment, the court said it was striking allegations as to count seven as those enhancements are the same as count three. (RT 1142.) Since there was no count seven, it is not clear to what the court was referring.

subdivision (d) enhancements are the only firearm enhancements that may be included in the judgment.

Appellant was convicted of first degree murder with special circumstances as charged in count one and residential robbery as charged in count three. The verdicts on both counts included firearm findings pursuant to Penal Code section 12022.5, subdivision (a), and Penal Code section 12022.53, subdivisions (b), (c) and (d). (CT 410-427, 430, 448.) Appellant's sentence on count one was enhanced by 25 years to life based on the finding that appellant personally and intentionally discharged a firearm proximately causing death pursuant to Penal Code section 12022.53, subdivision (d). Appellant's sentence on count three was enhanced by a concurrent term of 25 years to life pursuant to the same subdivision. In addition, the trial court imposed and stayed determinate terms on each count for firearm findings pursuant to Penal Code section 12022.5, subdivision (a), and Penal Code section 12022.53, subdivisions (b) and (c). (CT 453-454, 459; RT 1138-1141.) The court said it was staying these additional enhancements pursuant to Penal Code section 12022.53,

subdivision (f). (RT 1138-1141; see also Pen. Code § 1170.1, subd. (f).)

In *People v. Woods* (2004) \_\_ Cal.App.4th \_\_ [2004 DJDAR 7724], Division Seven of the Second Appellate District held separate terms imposed under Penal Code section 12022.53, subdivisions (b) and (c), must be stricken rather than stayed when the trial court imposes a term under subdivision (d). (*Id.*, at pp. 7724, 7727-7729; disagreeing with Second Appellate District Division Four's opinion in *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 713, rehng. den. 4-1-03, rev. den. 5-14-03.) Penal Code section 12022.53, subdivision (f), requires that if more than one enhancement is found true under section 12022.53, the court must impose only the enhancement providing for the longest term of imprisonment. However, subdivision (h) prohibits a court from striking an allegation or finding made pursuant to section 12022.53. The *Woods* Court harmonizes the two subdivisions and the legislative intent by holding that subdivision (f) mandates that trial court impose the enhancement providing for the longest term of imprisonment and subdivision (h)

prohibits the trial court from striking that enhancement. (*People v. Woods, supra*, 2004 DJDAR at pp. 7728-7729.) “None of the other enhancements may be imposed at all; nor may the other listed enhancements under separate statutory provisions.” (*Id.*, at p. 7729.) The *Woods* Court noted that the Supreme Court in *People v. Oates* (2004) 32 Cal.4th 1048, held that a section 12022.53 enhancement may be imposed for each separate offense for which the enhancement was found true, but did not discuss and left undisturbed the Court of Appeal’s interpretation in that case that duplicative section 12022.53 enhancements on the same count should be stricken. (*People v. Woods, supra*, 2004 DJDAR at p. 7728, citing *People v. Oates, supra*, at pp. 1055, 1058-1059, 1069.) Therefore, the statute is not satisfied if the other enhancements are merely stayed pursuant to Penal Code section 654. They must be stricken from the judgment. (*People v. Woods, supra*, 2004 DJDAR at p. 7729.)

The same analysis applies to the firearm enhancements imposed and stayed pursuant to Penal Code section 12022.5, subdivision (a). Section 12022.5 is listed in section 12022.53,

subdivision (f), as an enhancement that “shall not be imposed on a person in addition to an enhancement imposed pursuant to this section.” (Pen. Code § 12022.53, subd. (f).) On that issue, both the *Woods* Court and *Bracamonte* Court agree. Section 12022.5 must be construed in conjunction with section 12022.53 where both enhancements are alleged. The directive that the section 12022.5 enhancement shall not be imposed is mandatory. (*People v. Woods, supra*, 2004 DJDAR at p. 7728; *People v. Bracamonte, supra*, at p. 712, fn. 5.) Therefore, only the enhancement pursuant to Penal Code section 12022.53, subdivision (a), may be imposed as to each count in appellant’s judgment. All of the remaining firearm enhancements must be stricken.

**CONCLUSION**

For the foregoing reasons, and for the reasons discussed in the other briefs on file, appellant respectfully requests that the judgment be reversed and/or modified.

Respectfully submitted,

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Appointment

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## **WORD COUNT CERTIFICATION**

I, Mark Alan Hart, am counsel for appellant. In compliance with Rule 33(b)(1), California Rules of Court, effective January 1, 2004, I hereby certify that, in reliance on the word count of the computer program used to prepare this document, the word count of the body of this document, excluding tables, indices and this Certification, is 2,066 words. The applicable word-count limit prescribed by Rule 33(b)(1) is 25,500 words.

Dated: July 7, 2004

Signed by:

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RE: PEOPLE V. BROOKS  
CASE NO. E033507

**DECLARATION OF SERVICE BY MAIL**

I, undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of Los Angeles, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is PMB 520, 9420 Reseda Boulevard, Northridge, California 91324. I served the Appellant's Supplemental Opening Brief, of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States Mail by me at Northridge, California, on July 7, 2004. I declare under penalty of perjury that the foregoing is true and correct. Executed on July 7, 2004, at Northridge, California.

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