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STATE OF WASHINGTON
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No. 86241-9-11

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SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

BENJAMIN B. BROCKIE,

Petitioner.

PETITIONER'S REPLY TO STATE'S RESPONSE

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ORIGINAL

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I. ARGUMENT

A. Benjamin B. Brockie's personal restraint petition (PRP) has merit.

Contrary to the State's assertion in its response, Mr. Brockie's PRP certainly does have merit. As stated by the Court of Appeals in its Order Transferring Personal Restraint Petition to Supreme Court, "Mr. Brockie's petition may have merit." (Order, p. 4; *In re Pers. Restraint of Perkins*, 143 Wn.2d 261, 263-67, 19 P.3d 1027 (2001).

B. Undisputed facts

The amended information charged Mr. Brockie under only one alternative means of committing first degree robbery, that is, "in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon." Former RCW 9A.56.200(1)(b) (2000). But the jury was also instructed on the uncharged alternative means of committing first degree robbery that in the commission of a robbery or of immediate flight therefrom, he was armed with a deadly weapon. Former RCW 9A.56.200(1)(a) (2000). These instructions are 8, 9, and 30.

The verdict forms do not reflect under which of these

alternative means the jury convicted Mr. Brockie of the two first degree robbery counts. Moreover, the jury was further instructed on each of the first degree kidnapping counts that an essential element of the crime was the defendant “abducted that person with intent to facilitate the commission of first or second degree robbery.” (Instructions 20, 22, 24, 26, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53).

C. The court erred by instructing the jury on an uncharged alternative means of committing first degree robbery.

The trial court’s error in instructing the jury on an uncharged alternative means of committing first degree robbery prejudiced Mr. Brockie’s right to a fair trial because the jury may have convicted him under the uncharged alternative. *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). The error is of constitutional magnitude. *State v. Jain*, 151 Wn. App. 117, 121, 210 P.3d 1061 (2009), *review denied*, 167 Wn.2d 1017 (2010).

First degree robbery is an alternative means crime. *State v. Nicholas*, 55 Wn. App. 261, 272, 776 P.2d 1385, *review denied*, 113 Wn.2d 1030 (1989). In the context of a first degree robbery, “armed” and “displayed” do not have the same meaning or actions.

State v. Hauck, 33 Wn. App. 75, 77, 651 P.2d 1092 (1982), *review denied*, 99 Wn.2d 1001 (1983). Instructing the jury on an uncharged alternative means violates the defendant's right to be informed of the nature of the charges against him. *State v. Laramie*, 141 Wn. App. 332, 343, 169 P.3d 859 (2007). The manner of committing a crime is an essential element and the defendant must be informed of this element in the charging document so he may prepare a proper defense. *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1949).

Contrary to the State's characterization, Mr. Brockie does not challenge the sufficiency of the charging document as to the first degree robbery counts. Rather, he claims error based on the court's instructing the jury on an uncharged alternative. *See Laramie*, 141 Wn. App. at 337, 341. The State's reliance on *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991), is misplaced. Moreover, the State proposed the erroneous instruction and relied on the uncharged alternative in closing argument. (RP 801, 802, 805-08). Other instructions did not define the crime in a manner leaving only the charged alternative before the jury. *Chino*, 117 Wn. App. at 540. In these circumstances, there can be no

confidence in the jury's verdict.

Allowing the jury to consider uncharged alternative means of committing a crime violates the defendant's right to notice and is reversible error. *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996); *Jain*, 151 Wn. App. at 124. Just as in *Jain*, the jury here could have returned a guilty verdict by finding he committed acts not charged in the amended information, *i.e.*, he was armed with a deadly weapon in the commission of a robbery or of immediate flight therefrom, and this is not harmless error beyond a reasonable doubt. 151 Wn. App. at 124; *see also Givens v. Housewright*, 786 F.2d 1378, 1379 (9th Cir. 1989), *Gault v. Lewis*, 489 F.3d 993 (9th Cir. 2007), *cert. denied*, 552 U.S. 1245 (2008). Mr. Brockie's first degree robbery convictions must therefore be reversed.

D. By not responding to Mr. Brockie's contention that his kidnapping convictions must also be reversed upon reversal of his robbery convictions, the State has conceded he is correct.

The State cannot now take a contrary position as it failed to respond to his argument even though the Court of Appeals called for an answer to the issue in a May 17, 2011 letter. The kidnapping

convictions should also be reversed for the reasons stated in Mr. Brockie's PRP.

Furthermore, in charging the 15 counts of first degree kidnapping, the State failed to identify the predicate felony for the offense. RCW 9A.40.020(1)(b). This failure alone requires reversal of the kidnapping convictions as it is a violation of due process. If a charging document on its face, as here, does not state an offense, the document is unconstitutional and must be dismissed without prejudice to the State's right to recharge. *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995).

In urging reversal of both the first degree robbery and first degree kidnapping convictions, Mr. Brockie incorporates by reference the argument in his supplemental brief regarding the application of *State v. Kosewicz*, 174 Wn.2d 683, 278 P.3d 184 (2012) to his case.

E. Other issues

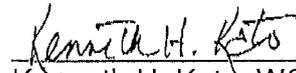
As for any other issues, Mr. Brockie rests on the briefing in his motion to vacate/PRP.

II. CONCLUSION

Based on the foregoing facts and authorities, Mr. Brockie respectfully urges this Court to grant his PRP and dismiss the charges or remand for further proceedings.

DATED this 23rd day of August, 2012.

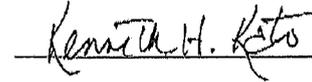
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on August 23, 2012, I caused a true and correct copy of the Petitioner's Reply to be served by first class mail, postage prepaid, on Benjamin B. Brockie # 866117, Airway Heights C.C., PO Box 2049, Airway Heights, WA 99001.



OFFICE RECEPTIONIST, CLERK

To: Ken Kato
Cc: Kathleen Owens
Subject: RE: PRP of Brockie, # 862419

Rec. 8-23-12

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-----Original Message-----

From: Ken Kato [<mailto:khkato@comcast.net>]
Sent: Thursday, August 23, 2012 10:08 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Kathleen Owens
Subject: PRP of Brockie, # 862419

Dear Clerk: Attached for filing is the Petitioner's Reply to State's Response in PRP of Brockie, No. 862419. As agreed by counsel, I have cc'ed Mark E. Lindsey, Spokane County Prosecutor's Office, at kowens@spokanecounty.org. Thank you. Kenneth H. Kato, WSBA # 6400, 1020 N. Washington St., Spokane, WA 99201; Tel: (509) 220-2237; e-mail: khkato@comcast.net.