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No. 86241-9-N

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SUPREME COURT OF THE STATE OF WASHINGTON

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In the Matter of the Personal Restraint of:

BENJAMIN B. BROCKIE,

Petitioner.

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PETITIONER'S SUPPLEMENTAL BRIEF RE KOSEWICZ

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ORIGINAL

In *State v. Kosewicz*, 174 Wn.2d 683, 278 P.3d 184 (2012), two defendants argued that reversal of their first degree kidnapping convictions required reversed of felony murder and aggravating factor verdicts that were based in part on the first degree kidnappings. The court determined the defendants suffered no prejudice from the manner in which the crimes were charged and affirmed the convictions.

The *Kosewicz* court observed that first degree kidnapping was a multiple means crime that may be proved in five different alternative ways. *Id.* at 688 n.1. It further noted that the State may charge a defendant with one or all of the alternative means outlined in the statute. *Id.*; *State v. Bray*, 52 Wn. App. 30, 34, 156 P.2d 1332 (1988). But if the information charges an alternative means crime, and lists only one alternative, it is error to instruct the jury that it may consider any of the other alternative means for purposes of that charge. *Id.*

That is exactly what happened in Mr. Brockie's case. In the amended information, he was only charged with the single alternative means of committing first degree robbery that the defendant displayed what appeared to be a firearm or other deadly

weapon. Former RCW 9A.56.200(1)(b) (2000); St's Response, Ex. B. Yet, the trial court instructed the jury on the uncharged alternative means of committing first degree robbery that he was armed with a deadly weapon. Former RCW 9A.56.200(1)(a) (2000). This is reversible error and Mr. Brockie's first degree robbery convictions must be reversed. *State v. Doogan*, 82 Wn. App. 185, 917 P.2d 256 (1996).

In *Kosewicz*, a defendant, Robert Brown, was charged with (among other things) felony murder and first degree kidnapping. The felony murder charge was predicated on the felony of first degree kidnapping. The information expressly limited his first degree kidnapping charge by specifying that Brown, as an actor or accomplice, kidnapped the victim "with intent to inflict bodily harm." His felony murder charge did not include the same limitations and simply alleged Brown murdered the victim in the course of first degree kidnapping. 174 Wn.2d at 688.

In a separate trial involving the same victim, Theodore Kosewicz was charged with several crimes, including premeditated first degree murder with aggravating circumstance and first degree kidnapping. The aggravating circumstance was that the murder

was committed during the first degree kidnapping. Like Mr. Brown, the State expressly limited the first degree kidnapping charge to kidnapping “with intent to inflict bodily injury.” But the State did not include the same limitation in the charge of premeditated murder with aggravating circumstance, stating only that the murder occurred in the course of first degree kidnapping. *Id.* at 689.

In both trials, the jury instructions defined first degree kidnapping not only under the charged alternative means of “intent to inflict bodily injury,” but also the uncharged alternative means of “intent to inflict extreme mental distress.” The Court of Appeals reversed the defendants’ kidnapping convictions, but affirmed their respective felony murder and premeditated murder with aggravating circumstance convictions. *Id.* at 688-89.

Similar to the defendants’ claims in *Kosewicz*, Mr. Brockie contends that because his first degree robbery convictions must be reversed, his first degree kidnapping convictions must also be reversed as there is no valid predicate offense.

The issue is whether the insufficient notice of the uncharged alternative means of committing first degree robbery, *i.e.*, being armed with a deadly weapon, “permeated” the amended

information so as to require reversal of the first degree kidnapping convictions as well. *Id.* at 695. Since the elements of the predicate felony need not be pleaded, the information also does not need to specify the alternative means of committing a crime on which the State will ultimately rely. *Id.* at 692.

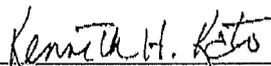
Finding the information charged Mr. Brown with all the required elements of felony murder by stating the victim's death was caused while committing or attempting to commit first degree kidnapping, the court held that the State did not enumerate a particular alternative means (as it must do on the stand-alone charge of first degree kidnapping) so all alternative means could potentially be argued by the State and thus all essential elements of the felony murder charge alone were adequately pleaded for the purpose of the constitutional notice requirements. *Id.* at 692. The court held to the same effect on Mr. Kosewicz's aggravating circumstance verdict. *Id.* at 693-94. Going further, the court determined the missing alternative means as to both defendants could be found by a fair construction of the whole charging document. *Id.* at 694-96.

But here, Mr. Brockie has indeed been prejudiced by the

way he was charged with 15 counts of first degree kidnapping because the State failed to identify any predicate offense. St's Response, Ex. B ("intent to facilitate commission of a felony"). Unlike *Kosewicz*, Mr. Brockie got no notice of the underlying offense at all, much less its elements. Unlike *Kosewicz*, this violation of his constitutional right to notice of the alleged crimes the State intends to prove cannot be cured by any construction of the amended information. Wash. Const. art. I, § 22; U.S. Const. amend. VI. Mr. Brockie's first degree kidnapping convictions must be reversed as well as the first degree robbery convictions.

DATED this 23<sup>rd</sup> day of August, 2012.

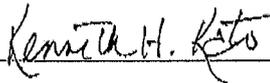
Respectfully submitted,



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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.



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

Rec. 8-23-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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

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**Sent:** Thursday, August 23, 2012 11:17 AM  
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**Cc:** Kathleen Owens  
**Subject:** PRP of Brockie, # 862419

Dear Clerk: Attached for filing is Petitioner's Supplemental Brief in PRP of Brockie, No. 862419. By agreement of counsel, I have cc'ed Mark E. Lindsey, Spokane County Prosecutor's Office, at [kowens@spokanecounty.org](mailto: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](mailto:khkato@comcast.net).