

FILED

JUN 16 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SH

DIVISION III

In re Personal Restraint	)	
Petition of:	)	No. 29756-0-III
	)	
BENJAMIN B. BROCKIE,	)	
	)	
Petitioner.	)	RESPONSE TO PERSONAL RESTRAINT PETITION
_____	)	

86241-9

This court has sent a letter to the Spokane County Prosecuting Attorney's Office requesting the State's response to two issues:

(1) Timeliness of defendant's motion to vacate judgment and sentence and (2) merits of the issues in the motion to vacate judgment and sentence. Attach. A.

1. TIMELINESS OF DEFENDANT'S MOTION TO VACATE JUDGMENT AND SENTENCE.

Based on the records available to the State, the defendant's motion was timely filed under both CrR 7.8 and RCW 10.73.090. CrR 7.8(b)(5) sets a general time limit of one year for CrR 7.8 motions. CrR 7.8(b)(5).

The defendant's time limits have been extended by defendant's repetitive use of the justice system. His last "starting event" for the running of the one year limit would have been on March 25, 2008. One year from that date would have been March, 2009. The motion to vacate

filed in Spokane County Superior Court was filed prior to the one year date. Attach. B.

RCW 10.73.090 likewise sets a one year expiration date for collateral attacks on existing judgment and sentences. The one year time limitation had not expired at the time this motion was originally filed.

The defendant's second trial (first trial hung jury) began in November of 2003.

The defendant filed an appeal which was mandated (affirmed in part and reversed in part) March 25, 2008. Attach. C.

The defendant filed a second appeal which was mandated July 22, 2010. Attach. D.

A CrR 7.8 motion to vacate was received by the Spokane County Superior Court and sent to this court as a PRP on September 8, 2010. Attach. B.

This court rejected the PRP transfer and returned the motion to Superior Court on October 7, 2010. Attach. E.

On February 28, 2011, the Honorable Judge Plese sent a letter to the defendant explaining that the court had determined that the defendant's motion was not time barred. The Superior Court also stated that it had reviewed the defendant's motion and determined that (without a hearing) the defendant had not established adequate grounds for relief. The court

noted it was again sending defendant's motion to the Court of Appeals for processing as a PRP. Attach. F.

The defendant filed another appeal of this decision on March 11, 2011. Attach. G.

2. THE DEFENDANT'S PRP LACKS MERIT.

It is well settled that the information must state all essential elements of the crime. *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). It is also well settled that a charging document will be liberally construed in favor of validity if challenged for the first time on appeal. *Id.* at 105.

"[A]n information need not state the statutory elements of an offense in the precise language of the statute, but may instead use words conveying the same meaning and import as the statutory language." *State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989) citing *State v. Nieblas-Duarte*, 55 Wn. App. 376, 380, 777 P.2d 583 (1989).

The Washington State Supreme Court has recognized the tactic of "sandbagging." *State v. Kjorsvik, supra; State v. Goodman*, 150 Wn.2d 774, 83 P.3d 410 (2004). "Sandbagging" is the practice of delaying any complaints regarding defects in the charging document until it is too late to correct the defects. The Court adopted particular rules in order to discourage the practice. The defendant remained silent until the State

could no longer amend the information and then filed his motion to arrest judgment. Attach. B (pg 9).

The *Kjorsvik* Court adopted a two-prong test for claims of charging document defects when challenging for the first time on appeal. “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” *Kjorsvik, supra* at 105-06.

The defendant has failed to mention how he was prejudiced by any alleged defect. It is difficult to see how the defendant could have been prejudiced by his claimed defect when the defense was: complete denial.

The defendant is doing what several court’s opinions have been concerned about: he waited silently until it is too late to correct the problem and now claims defects. If he had an *actual* problem with the charging language, he would have pointed it out long before trial so that he could prepare a defense. The defense was simplicity itself: deny everything.

Where, as here, the charging language is challenged for the first time on appeal, this court should liberally construe the language on appeal. *City of Auburn v. Brooke*, 119 Wn.2d 623, 636, 836 P.2d 212 (1992) (citing *State v. Kjorsvik, supra* at 106). In such a case, a two-step test is

applied to determine if error occurred. First, the charging document is examined to determine if the necessary facts appear in any form or if they can be found by a fair construction of the charging language. *Brooke*, 119 Wn.2d at 636, 836 P.2d 212. If so, the defendant has the burden of showing that he was actually prejudiced as a result of the inartful language. *Brooke*, 119 Wn.2d at 636.

In this case, the charging language places the defendant on notice that he is charged under alternatives (a) and (b) of RCW 9A.56.200(1). The defendant was charged with the alternative that he “displayed what appeared to be a firearm or other deadly weapon.” Attach. H. Using the “liberally construed” language mentioned above, the “display” alternative tells the defendant that the State will attempt to prove that he “displayed a firearm or other deadly weapon.” It is logical that before someone can display a firearm, they must possess said firearm or other deadly weapon. If the defendant possessed a firearm, the jury could find that he was armed with that firearm.

Logic, combined with a liberal reading of the information supplies the necessary facts. The next issue requires the defendant to show that he was actually prejudiced as a result of the inartful language. In this case, that showing of actual prejudice is impossible. The defense in this case was complete denial of all aspects. By choosing a denial defense, the

defendant removed the possibility of a showing of prejudice from the inartfully crafted information. *See State v. Allen*, 116 Wn. App. 454, 460, 66 P.3d 653 (2003).

In the alternative, while it is correct that the information in charging two counts of first degree robbery did not include the alternative of “armed with a deadly weapon,” the State submits that this oversight was harmless error. The jury instructions for the charge of first degree robbery state, “...armed with a deadly weapon or what appears to be a firearm or other deadly weapon.” Attach. I. Yet the jury instructions did not define the phrase “armed with a deadly weapon.” The jury would have to have returned a verdict for an undefined alternative in order to find the defendant guilty of First Degree Robbery by way of being “armed with a deadly weapon.” The element charged in the information i.e. “...displayed what appeared to be a firearm or other deadly weapon” matches the facts as presented by the State. The jury would need no additional instructions defining a “deadly weapon” as the instruction requires only the display of what *appeared* to be a firearm or other deadly weapon. Thus, the jury could properly find that what *appeared* to be a pistol was displayed. On the other hand, in order to find the defendant *actually* armed with a deadly weapon, the jury would need to know that the pistol was, in fact, a firearm and what being “armed” actually meant.

Since there were no instructions defining a firearm or being “armed,” the jury could not have returned a guilty verdict on any other basis except the charged alternative of “displayed.”

In this case, the issue of “harmless error” is of a constitutional nature. Therefore, it must be shown that the error is harmless beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). An error is harmless if the court is convinced beyond a reasonable doubt that the jury would have reached the same verdict absent the error. *Id.* In this case, the jury could not properly return a verdict of guilty on the uncharged alternative of “armed with a deadly weapon.”

As for the remedy, the Court in *State v. Vangerpen*, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995) stated: “We have repeatedly and recently held that the remedy for an insufficient charging document is reversal and dismissal of charges without prejudice to the State’s ability to re-file charges.”

Dated this 16<sup>th</sup> day of June, 2011.

STEVEN J. TUCKER  
Prosecuting Attorney

  
Andrew J. Metts #19578  
Deputy Prosecuting Attorney  
Attorney for Respondent

# ATTACHMENT A

ATTEST

JUN 10 2011

THOMAS R. FALLQUIST, COUNTY CLERK  
COUNTY OF SPOKANE, STATE OF WASHINGTON

COURT COSTS 1101  
 VICTIM ASSESS 500  
 RESTITUTION 63,195 *Mary Cab* DEPUTY  
 FINE \_\_\_\_\_  
 ATTY FEES \_\_\_\_\_  
 SHERIFF COSTS \_\_\_\_\_  
 METH \_\_\_\_\_  
 DNA FEE \_\_\_\_\_  
 CRIME LAB \_\_\_\_\_  
 OTHER COSTS \_\_\_\_\_

**FILED**  
 JUN 02 2008  
 THOMAS R. FALLQUIST  
 SPOKANE COUNTY CLERK

**SUPERIOR COURT OF WASHINGTON  
COUNTY OF SPOKANE  
STATE OF WASHINGTON**

	)	
	)	No. 02-1-00790-3
Plaintiff,	)	
	)	PA# 02-9-08851-0
v.	)	RPT# CT IV - IX: 002-02-0053897
	)	CT X - XXII: 002-02-0065220
BENJAMIN B. BROCKIE	)	RCW CT IV, X: 9A.56.200(1)(B)-F (#68305)
WM 10/31/81	)	CT V - VIII, XI - XXI: 9A.40.020(1)(B)-F
	)	(#46503)
Defendant.	)	CT IX, XXII: 9.61.160-F (#12011)
	)	<b>AMENDED</b>
SID: 020492056	)	FELONY JUDGMENT AND SENTENCE (FJS)
	)	[ X ] Prison [ ] RCW 9.94A.712 Prison Confinement
	)	[ ] Jail One Year or Less [ ] RCW 9.94A.712
	)	Prison Confinement
	)	[ ] First Time Offender
	)	[ ] Special Sexual Offender Sentencing Alternative
	)	[ ] Special Drug Offender Sentencing Alternative
	)	[ X ] Clerk's Action Required, para 4.5 (SDOSA),
	)	4.7 and 4.8 (SSOSA) 4.1, 5.2, 5.3, 5.6 and 5.8

**I. HEARING**

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

**II. FINDINGS**

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 11-20-03

by [ ] plea [X] jury verdict [ ] bench trial of:

Count No.: IV **FIRST DEGREE ROBBERY**  
 RCW 9A.56.200(1)(B)-F (#68305)  
 Date of Crime February 22, 2002  
 Incident No. 002-02-0053897

AMENDED FELONY JUDGMENT AND SENTENCE (JS)  
(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2007))

*Handwritten:*  
 039093408  
 11/10/07 7-1-08 DOC

- Count No.: V      **KIDNAPPING IN THE FIRST DEGREE**  
RCW **9A.40.020(1)(B)-F (#46503)**  
Date of Crime **February 22, 2002**  
Incident No. **002-02-0053897**
- Count No.: VI      **KIDNAPPING IN THE FIRST DEGREE**  
RCW **9A.40.020(1)(B)-F (#46503)**  
Date of Crime **February 22, 2002**  
Incident No. **002-02-0053897**
- Count No.: VII      **KIDNAPPING IN THE FIRST DEGREE**  
RCW **9A.40.020(1)(B)-F (#46503)**  
Date of Crime **February 22, 2002**  
Incident No. **002-02-0053897**
- Count No.: VIII      **KIDNAPPING IN THE FIRST DEGREE**  
RCW **9A.40.020(1)(B)-F (#46503)**  
Date of Crime **February 22, 2002**  
Incident No. **002-02-0053897**
- Count No.: IX      **THREATS TO BOMB OR INJURE PROPERTY**  
RCW **9.61.160-F (#12011)**  
Date of Crime **February 22, 2002**  
Incident No. **002-02-0053897**
- Count No.: X      **FIRST DEGREE ROBBERY**  
RCW **9A.56.200(1)(B)-F (#68305)**  
Date of Crime **March 05, 2002**  
Incident No. **002-02-0065220**
- Count No.: XI      **KIDNAPPING IN THE FIRST DEGREE**  
RCW **9A.40.020(1)(B)-F (#46503)**  
Date of Crime **March 05, 2002**  
Incident No. **002-02-0065220**
- Count No.: XII      **KIDNAPPING IN THE FIRST DEGREE**  
RCW **9A.40.020(1)(B)-F (#46503)**  
Date of Crime **March 05, 2002**  
Incident No. **002-02-0065220**
- Count No.: XIII      **KIDNAPPING IN THE FIRST DEGREE**  
RCW **9A.40.020(1)(B)-F (#46503)**  
Date of Crime **March 05, 2002**  
Incident No. **002-02-0065220**
- Count No.: XIV      **KIDNAPPING IN THE FIRST DEGREE**  
RCW **9A.40.020(1)(B)-F (#46503)**

Date of Crime March 05, 2002  
Incident No. 002-02-0065220

Count No.: XV KIDNAPPING IN THE FIRST DEGREE  
RCW 9A.40.020(1)(B)-F (#46503)  
Date of Crime March 05, 2002  
Incident No. 002-02-0065220

Count No.: XVI KIDNAPPING IN THE FIRST DEGREE  
RCW 9A.40.020(1)(B)-F (#46503)  
Date of Crime March 05, 2002  
Incident No. 002-02-0065220

Count No.: XVII KIDNAPPING IN THE FIRST DEGREE  
RCW 9A.40.020(1)(B)-F (#46503)  
Date of Crime March 05, 2002  
Incident No. 002-02-0065220

Count No.: XVIII KIDNAPPING IN THE FIRST DEGREE  
RCW 9A.40.020(1)(B)-F (#46503)  
Date of Crime March 05, 2002  
Incident No. 002-02-0065220

Count No.: XIX KIDNAPPING IN THE FIRST DEGREE  
RCW 9A.40.020(1)(B)-F (#46503)  
Date of Crime March 05, 2002  
Incident No. 002-02-0065220

Count No.: XX KIDNAPPING IN THE FIRST DEGREE  
RCW 9A.40.020(1)(B)-F (#46503)  
Date of Crime March 05, 2002  
Incident No. 002-02-0065220

Count No.: XXI KIDNAPPING IN THE FIRST DEGREE  
RCW 9A.40.020(1)(B)-F (#46503)  
Date of Crime March 05, 2002  
Incident No. 002-02-0065220

Count No.: XXII THREATS TO BOMB OR INJURE PROPERTY  
RCW 9.61.160-F (#12011)  
Date of Crime March 05, 2002  
Incident No. 002-02-0065220

(If the crime is a drug offense, include the type of drug.)  
as charged in the Amended Information.

[ ] Additional current offenses are attached in Appendix 2.1.

The jury returned a special verdict or the court made a special finding with regard to the following:

- [ ] The defendant is a sex offender subject to indeterminate sentencing under **RCW 9.94A.712.**
- [ ] The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count \_\_\_\_\_. RCW 9.94A.\_\_\_\_\_
- [ ] The offense was predatory as to Count(s) \_\_\_\_\_. RCW 9.94A.836.
- [ ] The victim was under 15 years of age at the time of the offense in Count(s) \_\_\_\_\_ RCW 9.94A.837.
- [ ] The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count(s) \_\_\_\_\_ RCW 9.94A.838, 9A.44.010.
- [ ] The defendant acted with **sexual motivation** in committing the offense in Count(s) \_\_\_\_\_. RCW 9.94A.835
- [ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- [ ] The defendant used **a firearm** in the commission of the offense in Count(s) \_\_\_\_\_. RCW 9.94A.602, 9.94A.533.
- [ ] The defendant used **a deadly weapon other than a firearm** in committing the offense in Count(s) \_\_\_\_\_. RCW 9.94A.602, 9.94A.533.
- [ ] Count \_\_\_\_\_, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435 took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, in a public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- [ ] The defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count(s) \_\_\_\_\_. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- [ ] The defendant committed [ ] **vehicular homicide** [ ] **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by the operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030
- [ ] The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- [ ] The crime charged in Count(s) \_\_\_\_\_ involve(s) **domestic violence. RCW 10.99.020.**
- [ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- [ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 **CRIMINAL HISTORY: (RCW 9.94A.525):**

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
NO PREVIOUS FELONIES					

- Additional criminal history is attached in Appendix 2.2
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The following prior offenses require that the defendant be sentenced as a **Persistent Offender** (RCW 9.94A.570):
  
- The following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):
  
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 **SENTENCING DATA:**

CT NO	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus enhancements*	Total Standard Range (including enhancements)	Maximum Term
4	32		129-171	-	129-171	LIFE
5	6		98-130	-	98-130	LIFE
6	0		51-68	-	51-68	LIFE
7	0		51-68	-	51-68	LIFE
8	0		51-68	-	51-68	LIFE
9	17		68-84	-	68-84	10yrs
10	32		129-171	-	129-171	LIFE

11	0		51-68	/	51-68	LIFE
12	0		51-68	/	51-68	LIFE
13	0		51-68	/	51-68	LIFE
14	0		51-68	/	51-68	LIFE
15	0		51-68	/	51-68	LIFE
16	0		51-68	/	51-68	LIFE
17	0		51-68	/	51-68	LIFE
18	0		51-68	/	51-68	LIFE
19	0		51-68	/	51-68	LIFE
20	0		51-68	/	51-68	LIFE
21	0		51-68	/	51-68	LIFE
22	17		68-84	/	68-84	10yrs

\*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9).

[ ] Additional current offense sentencing data in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are [ ] attached  as follows:

NO AGREEMENTS

2.4 [ ] **EXCEPTIONAL SENTENCE:** The Court finds substantial and compelling reasons that justify an exceptional sentence:  
 [ ] within [ ] below the standard range for Count(s)\_\_\_\_\_  
 [ ] above the standard range for Count(s) \_\_\_\_\_  
 [ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.  
 [ ] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [ ] found by jury by special interrogatory.  
 Findings of fact and conclusions of law are attached in Appendix 2.4. [ ] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or

likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753): \_\_\_\_\_

III. JUDGMENT

3.1 The defendant is **GUILTY** of the Counts and Charges listed in paragraph 2.1 and Appendix 2.1

3.2 [ ] The defendant is found **NOT GUILTY** of Counts \_\_\_\_\_

[ ] The Court **DISMISSES** Counts \_\_\_\_\_

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court *per schedule entered December 19, 2003*

JASS.CODE RTN/RJN \$ 63175<sup>00</sup> Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_  
(Name and Address-address may be withheld and provided confidentially to Clerk's Office)

PCV \$500.00 Victim Assessment RCW 7.68.035

\$ \_\_\_\_\_ Domestic Violence Assessment RCW 10.99.080

CRC \$110.00 Court costs, including: RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal Filing fee \$ \_\_\_\_\_ FRC

Witness costs \$ \_\_\_\_\_ WFR

Sheriff service fees \$ \_\_\_\_\_ SFR/SFS/SFW/SRF

Jury demand fee \$ \_\_\_\_\_ JFR

Extradition costs \$ \_\_\_\_\_ EXT

Other \_\_\_\_\_ \$ \_\_\_\_\_

PUB \$ \_\_\_\_\_ Fees for court appointed attorney RCW 9.94A.760

WRF \$ \_\_\_\_\_ Court appointed defense expert and other defense costs RCW 9.94A.760

FCM/MTH \$ \_\_\_\_\_ Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] VUCSA additional fine deferred due to indigency RCW 69.50.430

MTH \$ \_\_\_\_\_ Meth/Amphetamine Cleanup Fine, \$3000. RCW 69.50.440, 69.50.401(a)(1)(ii)

CDF/LDI \$ \_\_\_\_\_ Drug enforcement fund of \_\_\_\_\_ RCW 9.94A.760

FCD/NTP/SAD/SDI

CLF \$ \_\_\_\_\_ Crime lab fee [ ] suspended due to indigency RCW 43.43.690

\$ \_\_\_\_\_ Felony DNA collection fee of \$100  not imposed due to hardship RCW 43.43.7541

\$ \_\_\_\_\_ Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1,000 maximum) RCW 38.52.430

\$ \_\_\_\_\_ Other costs for: \_\_\_\_\_

\$ \_\_\_\_\_ **TOTAL** RCW 9.94A.760

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[ ] shall be set by the prosecutor

[ ] is scheduled for \_\_\_\_\_

[ ] **RESTITUTION.** Schedule attached.

[ ] Restitution ordered above shall be paid jointly and severally with:  
NAME of other defendant CAUSE NUMBER (Victim Name) (Amount\$)

RJN

[ ] The Department of Corrections or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8)

[X] All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by the DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 10 per month commencing 7.1.08 RCW 9.94A.760.

The defendant SHALL report to the Spokane County Superior Court Clerk's Office immediately after sentencing if out of custody or within 48 hours after release from confinement if in custody. The defendant is required to keep an accurate address on file with the Clerk's Office and to provide financial information when requested by the Clerk's Office. The defendant is also required to make payments on the legal-financial obligations set by the court. **Failure to do any of the above will result in a warrant for your arrest.** RCW 9.94A.760(7)(b).

[ ] The Court finds that the defendant has the means to pay, in addition to the other costs imposed herein, for the cost of incarceration and the defendant is ordered to pay such costs at the rate of \$50 per day, unless another rate is specified here: \_\_\_\_\_. (JLR) RCW 9.94A.760

The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160

4.1b [ ] Electronic Monitoring Reimbursement. The defendant is ordered to reimburse \_\_\_\_\_ (name of electronic monitoring agency) at \_\_\_\_\_, for the cost of pretrial electronic monitoring in the amount of \$ \_\_\_\_\_.

4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754 **FAILURE TO REPORT FOR TESTING MAY BE CONSIDERED CONTEMPT OF COURT.**

HIV TESTING. The defendant shall submit to HIV testing. RCW 70.24.340 **FAILURE TO REPORT FOR TESTING MAY BE CONSIDERED CONTEMPT OF COURT.**

The victim, based upon their request, shall be notified of the results of the HIV test whether negative or positive. (Applies only to victims of sexual offenses under RCW 9A.44.) RCW 70.24.105(7)

4.3 No Contact: The Defendant shall not have contact with Any victim or business named in the information (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence.)

Domestic Violence No-Contact Order or Anti-Harassment No-Contact Order or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 **OTHER** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

- 129 (months) on Count No. 4 ;
- 98 (months) on Count No. 5 ;
- 51 (months) on Count No. 6 ;
- 51 (months) on Count No. 7 ;
- 51 (months) on Count No. 8 ;
- 68 (months) on Count No. 9 ;
- 129 (months) on Count No. 10 ;
- 51 (months) on Count No. 11 ;
- 51 (months) on Count No. 12 ;
- 51 (months) on Count No. 13 ;
- 51 (months) on Count No. 14 ;
- 51 (months) on Count No. 15 ;
- 51 (months) on Count No. 16 ;
- 51 (months) on Count No. 17 ;
- 51 (months) on Count No. 18 ;
- 51 (months) on Count No. 19 ;
- 51 (months) on Count No. 20 ;
- 51 (months) on Count No. 21 ;
- 68 (months) on Count No. 22 .

The confinement time on Count(s) \_\_\_\_\_ contain(s) a mandatory minimum term of \_\_\_\_\_.

The confinement time on Count \_\_\_\_\_ includes \_\_\_\_\_ months as enhancement for { } firearm  deadly weapon  sexual motivation  VUCSA in a protected zone  manufacture of methamphetamine with juvenile present  sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: 812 months

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth in Section 2.3, and except for the following counts which shall be served consecutively: 5, 6, 7, 8,

11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

The sentence herein shall run consecutively with the sentence in cause number(s) \_\_\_\_\_ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

(b) CONFINEMENT. RCW 9.94A.712 (Sex Offenses only): The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count \_\_\_\_\_ minimum term \_\_\_\_\_ maximum term \_\_\_\_\_

Count \_\_\_\_\_ minimum term \_\_\_\_\_ maximum term \_\_\_\_\_

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: \_\_\_\_\_

4.6 [ ] **COMMUNITY PLACEMENT** is ordered as follows: Count \_\_\_\_\_ for \_\_\_\_\_ months; Count \_\_\_\_\_ for \_\_\_\_\_ months; Count \_\_\_\_\_ for \_\_\_\_\_ months.

[ ] **COMMUNITY CUSTODY** for count(s) \_\_\_\_\_, sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

[X] **COMMUNITY CUSTODY** is ordered as follows:

- Count 4 for a range from 18 to 36 months;
- Count 5 for a range from 24 to 48 months;
- Count 6 for a range from 24 to 48 months;
- Count 7 for a range from 24 to 48 months;
- Count 8 for a range from 24 to 48 months;
- Count 9 for a range from 9 to 18 months;
- Count 10 for a range from 18 to 36 months;
- Count 11 for a range from 24 to 48 months;
- Count 12 for a range from 24 to 48 months;
- Count 13 for a range from 24 to 48 months;
- Count 14 for a range from 24 to 48 months;
- Count 15 for a range from 24 to 48 months;
- Count 16 for a range from 24 to 48 months;
- Count 17 for a range from 24 to 48 months;
- Count 18 for a range from 24 to 48 months;
- Count 19 for a range from 24 to 48 months;
- Count 20 for a range from 24 to 48 months;
- Count 21 for a range from 24 to 48 months;

Count 22 for a range from 9 to 18 months; or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offense, second degree assault, any crime against a person with a deadly weapon finding and Chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver Methamphetamine including its salts, isomers, and salts of isomers		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; and (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC; (8) for sex offenses, submit to electric monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

- The defendant shall not consume any alcohol.
- Defendant shall have no contact with: \_\_\_\_\_

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: \_\_\_\_\_

[ ] Defendant shall not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030(8).

[ ] The defendant shall participate in the following crime-related treatment or counseling services: \_\_\_\_\_

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: \_\_\_\_\_

[ ] Other conditions: \_\_\_\_\_

[ ] For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than 7 working days.

4.7 [ ] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (Known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: \_\_\_\_\_

## V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for the purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606
- 5.4 **RESTITUTION HEARING.**  
 Defendant waives any right to be present at any restitution hearing (sign initials):  
 \_\_\_\_\_
- 5.5 **COMMUNITY CUSTODY VIOLATION.** (a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.  
 (b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).
- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

**Cross off if not applicable:****5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200.**

- 1. General Applicability and Requirements:** Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington, but you are a student in Washington, or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.
- 2. Offenders Who Leave the State and Return:** If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.
- 3. Change of Residence Within State and Leaving the State:** If you change your residence within a county, you must send signed written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.
- 4. Additional Requirements Upon Moving to Another State:** If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph within the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.
- 5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (k-12):** If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under

Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school

**6. Registration by a Person Who Does Not Have a Fixed Residence.** Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours, excluding weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

**7. Reporting Requirements for Persons Who Are Risk Level II or III:** If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least 5 years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

**8. Application for a name change:** If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

5.8 [ ] The court finds that Count \_\_\_\_\_ is a felony in the commission of which a motor vehicle was used. The court clerk is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If you are or become subject to court-ordered mental health or chemical dependency treatment, you must notify DOC and you must release your treatment information to DOC for the duration of your incarceration and supervision. RCW 9.94A.562.

5.10 **OTHER:** \_\_\_\_\_  
\_\_\_\_\_

DONE in Open Court in the presence of the defendant this 30 day of MAY, 2008.

*Robert D. Austin*  
\_\_\_\_\_  
JUDGE Print name: ROBERT D. AUSTIN

*Larry D. Steinmetz*  
\_\_\_\_\_  
LARRY D. STEINMETZ  
Deputy Prosecuting Attorney  
WSBA# 20635

*Mark V. Hannibal*  
\_\_\_\_\_  
MARK V. HANNIBAL  
Attorney for Defendant  
WSBA# *6027*

*Benjamin B. Brockie*  
\_\_\_\_\_  
BENJAMIN B. BROCKIE  
Defendant

**VOTING RIGHTS STATEMENT:** I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.  
Defendant's signature: *[Signature]*

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the \_\_\_\_\_ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: \_\_\_\_\_

I, \_\_\_\_\_, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

**WITNESS** my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_

Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

**IDENTIFICATION OF DEFENDANT**

SID No. 020492056

Date of Birth 10/31/1981

(If no SID take fingerprint card for State Patrol)

FBI No. 481238VB6

Local ID No. 0288161

**AMENDED JUDGMENT AND SENTENCE (Felony) (JS)**  
(RCW 9.94A.110,.120)(WPF CR 84.0400 (7/2007))

PCN No.

Other

DOB 10/31/1981

Alias name

**Race:**

**Ethnicity:**

**Sex:**

Asian/Pacific Islander

Black/African-American

Caucasian

Hispanic

Male

Native American

Other: \_\_\_\_\_

Non-hispanic

Female

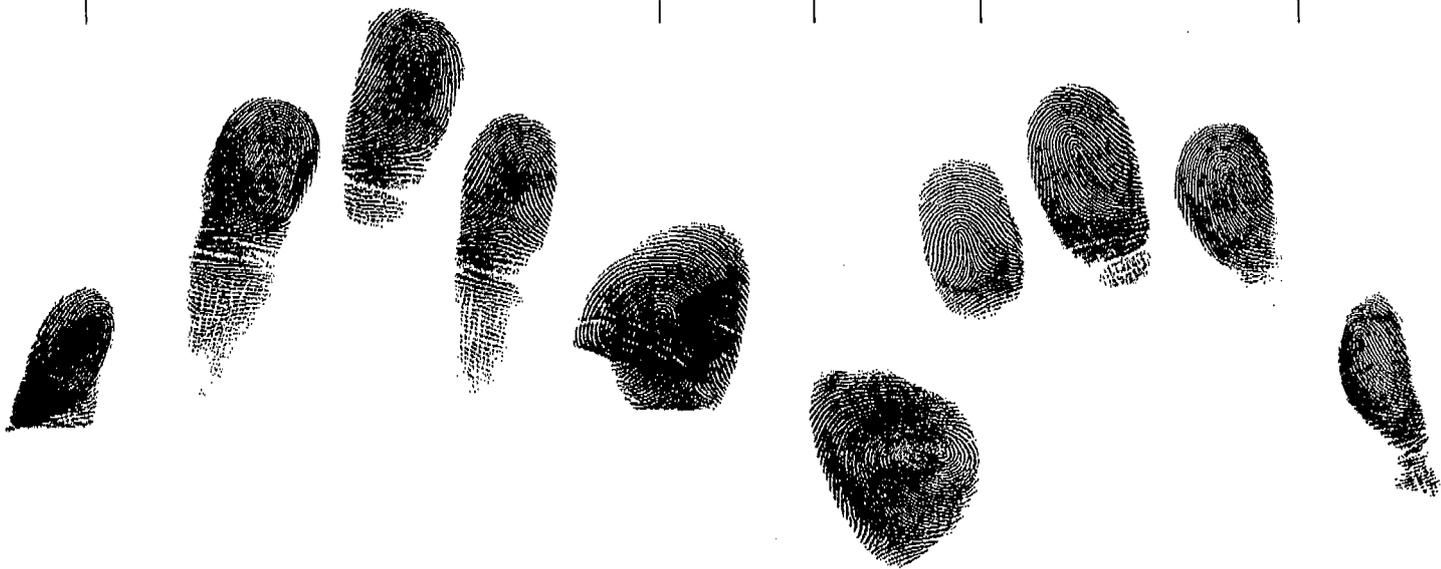
**FINGERPRINTS** I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto.

**THOMAS R. FALLQUIST, County Clerk**

Clerk of the Court: Mary King, Deputy Clerk, Dated: May 30, 2008

DEFENDANT'S SIGNATURE: \_\_\_\_\_

Left 4 fingers taken simultaneously	Left Thumb	Right Thumb	Right 4 fingers taken simultaneously
-------------------------------------	------------	-------------	--------------------------------------



# ATTACHMENT B

I certify that this document is a true and correct copy of the original on file and of record in my office

ATTEST

JUN 10 2011

FILED

THOMAS R. FALLQUIST, COUNTY CLERK  
COUNTY OF SPOKANE, STATE OF WASHINGTON

SEP 08 2010

BY Mary Cato DEPUTY

THOMAS H. FALLQUIST  
SPOKANE COUNTY CLERK

**SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE**

State of Washington  
Plaintiff(s)

)  
) CASE NO. 2002-01-00790-3  
)

vs.

) ORDER TRANSFERRING CASE TO  
) COURT OF APPEALS  
)

Benjamin B. Brockie  
Defendant(s)

THIS MATTER having come before the Court on the motion of Defendant, the Court having reviewed the pleadings and records filed herein, and otherwise being fully informed, NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

Defendant's motion is transferred to the Court of Appeals pursuant to CrR 7.8(c)(2) as a personal restraint petition. This transfer will serve the ends of justice.

DATED: September 8, 2010



Michael P. Price  
Superior Court Judge



BENJAMIN B. BROCKIE  
STAFFORD CREEK CORRECTION CENTER  
191 CONSTANTINE WAY  
ABERDEEN WA, 98520

Thomas Fallquist, Clerk  
Spokane County Superior Court  
1116 W. Broadway  
Spokane WA. 99260-0090

August 10, 2010

RE: State of Washington vs. Benjamin Brockie  
Superior Court No. 02-1-00790-3

Dear Mr. Fallquist:

Please find enclosed an amended Motion to Vacate Judgment and Sentence, pursuant to CrR 7.4; CrR 7.5; CrR 7.8, an Objection to Transfer to the Court of Appeals, and other documents.

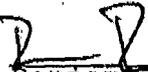
I filed an earlier motion with this court on March 18, 2010, but because I still had an appeal pending no action could be taken until the appeal has been resolved. The Court of Appeals issued its mandate on July 22, 2010. This issue is now ripe for review.

I would please request that the motion filed on March 18, 2010 be stricken and respectfully request that you file this new amended motion with the court and respectfully request from you to present them to Judge Robert Austin for his review and consideration.

Please find enclosed a copy of said documents, which I respectfully request to stamp them with the date files and return them to me for my records.

Thank you for your time and consideration in this matter.

Sincerely,

  
Benjamin Brockie  
Pro se, #866117

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	)	No. 02-1-00790-3
Plaintiff,	)	
	)	
vs.	)	NOTICE OF MOTION
	)	(Clerk's Action Required)
	)	
BENJAMIN B. BROCKIE,	)	
Defendant.	)	

TO: Clerk of the Court  
AND TO: Prosecuting Attorney

PLEASE TAKE NOTICE that on this 12 th day of August, 2010, 9:00 a.m., or soon thereafter as the court schedule allows, the defendant will bring forth his Motion to Transfer and his Motion to Vacate Judgment and Sentence, with oral argument.

DATED THIS \_\_\_ th day of August, 2010.

  
Benjamin Brockie

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	)	No. 02-1-00790-3
Plaintiff,	)	
	)	
	)	MOTION AND ORDER
vs.	)	TO TRANSPORT
	)	
	)	
BENJAMIN B. BROCKIE,	)	
Defendant.	)	

I. IDENTITY

I, Benjamin Brockie, Defendant, in the above-entitled Motion state the following:

1. I am the defendant herein, and in the attached order for transportation.

2. My current mailing address is:

Benjamin Brockie, #866117  
Stafford Creek Correction Center  
191 Constantine Way  
Aberdeen WA, 98520.

Motion to Transport/Order.



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	)	No. 02-1-00790-3
Plaintiff,	)	
	)	
	)	ORDER TO TRANSPORT
vs.	)	
	)	
	)	
BENJAMIN B. BROCKIE,	)	
Defendant.	)	

Benjamin Brockie, Defendant in the above-entitled matter, and herby formally moved this Court for an Order to Transport.

The defendant is presently incarcerated at Stafford Creek Correction Center, in Aberdeen Washington. The defendant has the right to appear before this Court in the above-entitled matter on the 27th day of August , 2010, at 9:00 a.m. or as soon as the Court schedule allows and the Court being duly advised, now, herein.

Motion to Transport/Order

It is ordered that the sheriff of Spokane County shall transport the defendant, Benjamin Brockie, from Stafford Creek Correction Center, in Aberdeen Washington and to be held by him pending proceedings in the above-entitled matter.

It is further ordered that immediately following the proceedings in Spokane County, the said authorities of Spokane County shall forthwith return said defendant to the custody of the Washington Department of Corrections, unless the Court orders other actions in this matter.

DONE IN OPEN COURT this \_\_\_ day of \_\_\_\_\_, 2010.

Judge/Commissioner

Motion to Transport/Order

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	)	No. 02-1-00790-3
PLANTIFF,	)	
VS.	)	DEFENDANT'S OBJECTION
BENJAMIN B. BROCKIE,	)	TO TRANSFER MOTION TO
DEFENDANT.	)	COURT OF APPEALS
	)	
	)	

COMES NOW, Benjamin Brockie, the defendant, pro se, and hereby OBJECTS to the transfer of defendant's motion to Vacate the Judgement and Sentence to the Appellate Court for consideration as a Personal Restraint Petition, based on the fact the motion is timely made and that the defendant has made substantial showing that he is entitled to relief and the resolution of this motion requires a factual hearing, (See defendants brief).

Under CrR 7.8(b), "[T]he court may relieve a party from a final judgement, order, or proceeding for the following reasons: ...

- (4) The judgement is void; or
- (5) Any other reasons justifying relief from the operation of the judgement."

---

Objection to Transfer

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	)	No. 02-1-00790-3
Plaintiff,	)	
	)	
vs.	)	MOTION TO VACATE
	)	JUDGMENT AND SENTENCE
	)	(CrR 7.4; 7.5; 7.8)
	)	
BENJAMIN B. BROCKIE,	)	
Defendant,	)	

I. RELIEF REQUESTED

COMES NOW, Benjamin Brockie, defendant pro se, asks this court to grant his Motion to Vacate his convictions for counts 4-22, and order a new trial, in which the jury will be instructed only on the charges that are alleged in the Information.

II. STATEMENT OF FACTS

On March 18, 2002, the Spokane County Prosecutor charged Benjamin Brockie with 3 counts of first degree robbery, 6 counts of first degree kidnapping (based on the commission of the robberies), 2 counts of threats to bomb, and 1 count of attempted first degree robbery. (See

accompanying Brockie Affidavit, Ex A (Dkt. 1) -  
Information.)

The first degree robbery counts were charged pursuant  
to the statute applicable to Brockie, former RCW  
9A.56.200(1)(b):

"COUNT [ ]: FIRST DEGREE ROBBERY, committed  
as follows: That the defendant, Benjamin B.  
Brockie, in the State of Washington, on or  
about [ ], with intent to commit theft...  
and in the commission of and immediate  
flight therefrom, the defendant displayed  
what appeared to be a firearm or other  
deadly weapon."

Counts 1, 4, 9 (Emphasis added).

On November 22, 2002 the State amended the  
information to include 11 additional counts of first  
degree kidnapping: one count for every person present  
during each charged robbery. Brockie Affidavit, Ex B  
(Dkt. 33) Amended Information.

The first degree robbery charge under count 1 and  
its corresponding kidnapping charges, counts 2 and 3, were  
severed (and eventually dismissed). Dkt. 41 and 132. Trial  
for the remaining charges, counts 4 through 23, began in  
December, 2002. The jury was unable to reach a verdict, so  
the trial court declared a mistrial. Dkt. 48.

After the mistrial, Brockie's attorney resigned. In  
January, 2003, new counsel was appointed to represent  
Brockie. Dkt. 55, 56.

In November, 2003, a new trial began. Id. at ¶5, Dkt. 76. Although the information was amended twice, both informations charged Brockie with first degree robbery based only on the allegation, that in the commission of the robbery, "he displayed what appeared to be a firearm or other deadly weapon"; former RCW 9A.56.200(1)(b), Dkts. 1 and 33.

Nevertheless, after both sides had rested, the jury was instructed by the trial court that either two means of first degree robbery could sustain a conviction for the robbery counts. Id. ¶5, Dkt. 81. The court instructed the jury on an uncharged means of committing first degree robbery as follows:

Instruction No. 8:

A person commits the crime of robbery in the first degree when in the commission of a robbery he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon.

Brockie Declaration, ¶5, Ex C, RP 778 (Emphasis added).

<sup>1</sup> Under this RCW it states;

(1) A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he/she:

... (b) Displays what appears to be a firearm or other deadly weapon[.]

Former RCW 9A.56.200, Laws of 1975, 1st Ex. Sess., Ch.260.

Instructions 9 and 30:

To convict the defendant of the crime of robbery in the first degree in count [], each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about the [] day of [], 2002, the defendant unlawfully took personal property from the person or in the presence of [];
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or property of another;
- (4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5) That in the commission of these acts the defendant was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon.
- (6) That these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Brockie Aff., ¶5, Ex C, RP 778-779, 786-788, (Emphasis

added).

The court also instructed the jury that to convict Mr. Brockie of first degree kidnapping, they had to find that he intentionally abducted each victim in the commission of these first degree robberies. See RCW 9A.40.020(b), jury instructions 20, 22, 24, 26, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51. RP 781-796.

The defense did not purpose these instructions, in fact, they were purposed by the State. Ex C, RP 770: 16-20.

The jury returned its verdict and found Brockie guilty of 2 counts of first degree robbery (based on the instructions given), 15 counts of first degree kidnapping (based on the robberies), and 2 threats to bomb. The jury's verdict did not specify under which alternative means the jury relied on to convict Brockie of the first degree robberies. Brockie Aff., ¶5, Dkts. 81-101.

### III. ISSUES PRESENTED

Was the jury incorrectly instructed on an alternative means of committing first degree robbery that was not alleged in the Information? Did these uncharged uncharged convictions (the robberies) form the predicate offense in which all other convictions rest on?

#### IV. EVIDENCE RELIED UPON

Mr. Brockie refers to his accompanying Affidavit of Benjamin Brockie in Support; Dkt. 1 Information; Dkt. 33 Amended Information; Dkt. 81- Jury Instructions; and Report of the Proceedings (RP), 801, 802, 805-808, and the court file in this case.

#### V. LEGAL ARGUMENT

Instructional errors are errors of constitutional magnitude and may be challenged for the first time on review. RAP 2.5(a); CrR 7.4; CrR 7.5; CrR 7.8; State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000).

Under the U.S. Constitution, 6th Amend. and the Wash. Const, art. 1, §22, a criminal defendant must be informed of all charges he must face at trial and cannot be tried for a crime that has not been charged. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1122 (1995).

When a statute provides that a crime may be committed in alternative ways or by alternative means, the information may charge one or all of the alternatives, provided the alternatives are not repugnant to one another. State v. Bray, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988). When the information charges only one of the alternatives, however, it is error to instruct the jury that they may consider other ways or means by which the crime could have

been committed, regardless of the range of evidence admitted at trial. Id. The manner of committing an offense is an element, and the defendant must be informed of this element in the information in order to prepare a proper defense. Id.

The defendant has a right to notice of all the crimes charged. Allowing the jury to consider uncharged alternative means violates the defendant's right to notice and is reversible error. State v. Doogan, 82 Wn.App. 185, 188, 917 P.2d (1996).

A. Brockie was Convicted in Counts 4 and 9 in Violation of his State and Federal Constitutional Right to Notice of the Charges Against him.

First degree robbery is an alternative means crime. State v. Nicholas, 55 Wn.App. 261, 272, 776 P.2d 1385 (1989). The first degree robbery statute provides the State with three alternatives:

(1) A person is guilty of robbery in the first degree if, in the commission of a robbery or of immediate flight therefrom, he:

- (a) Is armed with a deadly weapon; or
- (b) Displays what appears to be a firearm or other deadly weapon; or
- (c) Inflicts bodily injury.<sup>2</sup>

former RCW 9A.56.200(1)(a)-(c), (1975).

<sup>2</sup> "These alternative elements are separate means of committing the offense, but only those alternative(s) pled in the information... should be presented to the jury." Washington Pattern Jury Instructions, WPIC 37.02, pgs. 668, 669. (3rd Ed, 2008).

In the context of a first degree robbery, "armed..." and "displayed..." do not encompass the same meaning or actions. State v. Hauck, 33 Wn.App. 75, 77, 651 P.2d 1092 (1982).

Brockie was charged with first degree robbery pursuant to RCW 9A.56.200(1)(b); that he "displayed what appeared to be a firearm or other deadly weapon." The information only alleged one alternative means of committing first degree robbery. Therefore Brockie was only on notice that he was being charged with robbery pursuant to RCW 9A.56.200(1)(b).

The primary issue on review involves instruction 8, the "Definition Instruction," and 9 and 30, the "To Convict Instructions." These instructions set forth two statutory means of committing first degree robbery defined in RCW 9A.56.200(1). Because Brockie was charged only pursuant to the second alternative, however, RCW 9A.56.200(1)(b), instructions 8, 9 and 30 failed to give him notice and erroneously permitted the jury to convict Brockie of a crime that was not charged, specifically, RCW 9A.56.200(1)(a). This is reversible error.

No other instructions were given that defined the charged crime or precluded the jury from considering the uncharged means. The jury was never instructed on the

difference between "armed" and "displayed." The jury was never instructed on which element they were required to agree upon in finding Brockie guilty of first degree robbery. In fact, the error was only compounded by the prosecutor's repeated references to the uncharged means in his closing argument:

"Judge Austin has read you the court's instructions..."

...

"A person commits the crime of first degree robbery when in the commission of a robbery he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon."

...

"A gunman enters the Safeway Federal Credit Union armed..."

...

"The defendant armed himself again."

Brockie Aff., ¶5, Ex D, State's closing argument, RP 801, 802, 806.

To instruct the jury that the conviction could rest on the uncharged element was highly prejudicial and requires reversal.

**B. The Error Cannot be Harmless.**

An erroneous instruction given on behalf of the party in whose favor the verdict is returned is presumed prejudicial unless it affirmatively appears the error was harmless. State v. Laramie, 141 Wn.App. 332, 342-43, 169

P.3d 859 (2007)(citing Bray, at 34-35).

Error may be harmless if other subsequent instructions "clearly and specifically defined the charged crime." State v. Chino, 117 Wn.App. 531, 540, 73 P.3d 256 (2003). In addition, courts have also found harmless error where there was no possibility that the defendant was impermissibly convicted on an uncharged alternative means. See Nicholas, 55 Wn.App. at 273 (finding harmless error where the jury returned a special verdict finding that the defendant was "armed with a deadly weapon" at the time of the commission of the crime, the charged means of committing the crime). However, an error which possibly influenced the jury adversely is not harmless. Chapman v. California, 386 U.S. 18, 24 (1967).

In Severns, supra, the Washington Supreme Court held it was error to permit the jury to consider two statutory means of committing rape when only one alternative was charged in the information. The Court found that the error was exacerbated by the prosecutor's reference to the uncharged means during his closing arguments. The Court also found that the defendant was prejudiced by the absence of any subsequent instructions that expressly precluded the jury from considering the uncharged means of committing rape. Id. at 549. The Supreme Court concluded

that the error was prejudicial and reversed the conviction, because the jury might have convicted the defendant under either alternative. Id. at 552.

Division Three's opinion in Laramie, 141 Wn.App. followed the same rationale used in Severns. Laramie was charged with second degree assault based solely on the alternative means of using a deadly weapon. The court's instructions, however, incorporated the alternative means of "recklessly inflicting substantial bodily harm." Laramie, at 341. Despite the State's harmless error argument, the appellate court held that the error was not harmless and that reversal was required:

The State argues Mr. Laramie suffered no prejudice because he knew prior to trial that evidence supported the alternative means, despite Mr. Laramie's constitutional right to be informed of the nature of the charges against him. U.S. Const. Amend. VI; WASH. CONST., art I, §22; see State v. Pelkey, 109 Wn.2d 484, 490-491, 754 P.2d 854 (1987). The error was necessarily prejudicial because, under the instructions given, the jury could have convicted Mr. Laramie of second degree assault based on either the charged or the uncharged alternative means. State v. Severns, 13 Wn.2d 542, 548-49, 552, 125 P.2d 659 (1942).

Laramie, 141 Wn.App. at 343.

The same result is required here. The reversible error in Brockie's case is of the same nature and prejudice as that in Severns and Laramie.

The jury was instructed that it could convict Brockie of counts 4 and 9 under either of the two alternative means: Being armed with a deadly weapon, or displaying what appears to be a firearm or other deadly weapon. RCW 9A.56.200(1)(a) and (b). This error denied Brockie his 6th Amend. right to fair notice of the charges he was facing because it was not so charged under the statute cited. The failure to charge RCW 9A.56.200(1)(a) precluded defense counsel from preparing or presenting any defense to the uncharged alternative means.

The prosecutor referred several times to the uncharged means in his closing argument and constantly referred to Brockie as the "gunman," RP 806, 807, etc., and described the alleged weapon as a "black semi-auto gun," RP 805, 808, etc., Ex D. These statements were highly inflammatory and prejudicial and made the error particularly egregious. Severns, at 151.

The standard for whether the error is harmless is that the court must be able to conclude that there is NO POSSIBILITY a defendant was convicted on an uncharged alternative. The possibility of conviction for an uncharged alternative is impermissible. Nicholas, 55 Wn.App. at 273.

In Brockie's case the record does not affirmatively establish whether the jury based its verdict on one means or the other, or a combination of both. Therefore the record does not establish that the error was harmless, and Brockie's convictions must be reversed.

C. Brockie's Remaining Convictions  
Must be Reversed, as Well.

Brockie's 15 counts of first degree kidnapping and 2 threats to bomb were the product of the first degree robberies; if the first degree robbery convictions are reversed, the remaining charges must also be reversed. These convictions are only possible because of the robberies..

Kidnapping in the first degree is defined as:

(1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:

- (a) To hold him for ransom, or as a shield or hostage; or
- (b) To facilitate the commission of any felony or flight thereafter; or
- (c) To inflict bodily injury on him; or
- (d) To inflict extreme mental distress on him or a third person; or
- (e) To interfere with the performance of any governmental function.

RCW 9A.40.020(1)(a)-(e), (1975).

Brockie was charged with first degree kidnapping pursuant to RCW 9A.40.020(1)(b). See Brockie Aff., ¶3; Dkts. 1 and 33, Information(s); See also Dkt. 81, Jury.

Instructions.

The jury was only instructed under element (b), that Brockie committed kidnapping only by the facilitation of the two robberies, Dkt. 81. That was the only element the State charged Brockie with.

Where, as here, the commission of a specific underlying crime (the robberies) is necessary to sustain a conviction for a more serious offense (the kidnappings), jury unanimity as to the underlying crime is imperative. See State v. Whitney, 108 Wn.2d 596, 508, 739 P.2d 1150 (1987) (citing State v. Green, 94 Wn.2d 216, 233, 616 P.2d 628 (1980)).

Because we do not know what alternative means the jury relied on in convicting Brockie of first degree robbery, we do not know if there was jury unanimity as to the underlying crime as needed by Green.

First degree robbery is a separate and distinct offense, not an alternative means of committing first degree kidnapping. If the robberies are reversed, then the convicting element for each of the first degree kidnappings is removed, and consequently those convictions should also be reversed. Kidnapping is complete when all its essential elements are completed. State v. Dove, 52 Wn.App. 81, 757 P.2d 990 (1988).

Futher, the jury could have rested on the uncharged means of first degree robbery, that Brockie was armed with a deadly weapon. If this was the case, then the jury could have relied on that to prove a deadly threat, as the prosecutor erroneously argued to the jury in his closing argument concerning the robberies:

"Would you expect the tellers testimony to be exactly the same when they're being threatened with deadly force."

Ex D, RP 841, State's closing argument.

If the jury was only instructed on the charged means of committing first degree robbery, that Brockie only displayed what appeared to be a firearm or other deadly weapon, then the jury might not have found that there was a deadly threat; once someone is armed with a deadly weapon, the victim will always perceive any type of threat as a deadly threat.

Simply put, if the robberies are reversed, then there can be no 15 first degree kidnappings because there is no robbery element to rest on. One required, instructed element has not been proved.

As to the threats to bomb, the State has already conceded the argument in its brief regarding the search warrant, filed on November 19, 2002:

"During the commission of the robber[ies] [Brockie] informed the tellers that there was a bomb outside, and he would detonate the bomb if the tellers called the police."

Ex E, State's brief re: Search Warrant, pg. 4.

The alleged bomb threats were only made in the commission of the robberies. If the robberies are reversed, then the bomb threats need to be reversed.

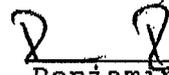
The robberies are the thread that holds the tapestry of all the convictions together. Without the thread of robbery, there is no tapestry. Because the robbery convictions form the predicat "To Convict" element for the kidnappings and are essential to the bomb threat charges; without the improperly instructed robbery convictions, the remaining convictions must also be reversed.

#### VI. CONCLUSION

For these reasons and the record, Brockie respectfully asks this court to reverse his convictions, 4-22, and remand for a new trial, one in which the jury will only be instructed on the charges alleged in the information.

Dated this 12th day of August, 2010.

Respectfully Submitted:

  
Benjamin Brockie  
Pro, se  
#866117

Stafford Creek Corr. Center  
191 Constantine way  
Aberdeen WA, 98520

AFFIDAVIT OF BENJAMIN BROCKIE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	)	No. 02-1-00790-3
Plaintiff,	)	
	)	
	)	AFFIDAVIT IN SUPPORT
vs.	)	OF MOTION TO VACATE
	)	JUDGMENT AND SENTENCE
	)	
BENJAMIN B. BROCKIE,	)	
Defendant.	)	

I. AFFIDAVIT OF BENJAMIN BROCKIE

I, Benjamin Brockie, state under oath, penalty of perjury and the laws of the State of Washington, that the following is true and correct to the best of my knowledge:

1. I am making this Affidavit in support of my Motion to Vacate my judgment and sentence and to show the court I just recently discovered this information through due diligence and acted to the best of my knowledge. I did inform the court of the error in a previous motion, dated March 18, 2010, but the court responded that since I had an appeal pending, no futher action would be taken until that

\_\_\_\_\_   
Affidavit in Support

issue has been resolved. Dkt. 176.

2. The Court of Appeals issued its mandate on July 22, 2010. Dkt. 177. I am now resubmitting my Motion to Vacate my Judgment and Sentence.

3. On March 8, 2002, I was arrested on probable cause for a Pizza Hut robbery. On March 18, 2002, I was charged with three counts of first degree robbery, six counts of first degree kidnapping, two threats to bomb and an attempted robbery in the first degree. Dkt. 1. On November 22, 2002, the Information was amended to include eleven additional counts of first degree kidnapping, one count for every person present in the robberies. Dkt. 33. The only reason the State amended the information was because I would not take the plea agreement they offered.

4. During this time I never received a copy of my "Charging Information."

5. I eventually went to trial (in which the jury was instructed on an uncharged means of first degree robbery and the prosecutor was able to refer to the offending instruction in his closing argument). The jury convicted me of all charges, except the attempted first degree robbery. The jury verdict did not disclose on which means they relied upon in convicting. Dkt. 81-101.

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Affidavit in Support

6. I timely filed an appeal, Dkt. 110, and eventually lost in November, 2009. I filed a Petition for Review to the Washington Supreme Court.

7. It was while researching for my petition for review in January, 2010, that I discovered that I was charged with first degree robbery on counts 4 and 9 under former RCW 9A.56.200(1)(b), but the jury was instructed that they could convict me of an uncharged means of first degree robbery for which I was not charged, specifically, RCW 9A.56.200(1)(a).

8. As soon as I found this out I wrote my trial attorney, Mark Hannibal. Unfortunately, I never heard back from him. I was eventually able to contact my old appellate attorney, Lana Glenn, and informed her of what happened. She told me that I should inform the court of what happened because she no longer represented me.

9. I then tried to file a CrR 7.8 motion with the trial court, but the court responded that they could do nothing until the appeal had been resolved. Dkt. 176.

10. I never received a copy of my "Charging Information" until late January, 2009. The only reason I even received a copy was because I wrote the county clerk and requested and paid for a copy of my Indictment

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Affidavit in Support

and Information.

11. This error has never been raised before in any proceedings and was never even discovered by any counsel.

12. DOC only allows inmates a limited amount of time and access to the law library and legal materials. Per DOC policy I must maintain a consistent work or educational program. Any legal or personal matters are secondary according to the DOC policy and procedures currently in place.

13. During this time I was working five days a week, seven hours a day, and partaking in several educational programs. Adding to this were cutbacks that DOC recently enforced that significantly hampered any access to the law library and makes it almost impossible to do any type of legal work on a consistent basis. I was also moved to four different prisons in the last five years.

14. Because access to the law library was limited and the fact that I have no experience; I acted to the best of my knowledge and applied the best resources available to me in finding this new piece of information. This error even eluded my attorneys.

15. This error of constitutional magnitude, denied

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Affidavit in Support

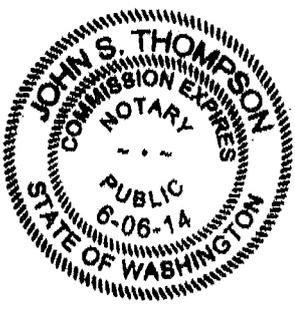
me my right to proper notification of the charges I was facing and the opportunity to prepare a proper defense. It allowed the jury to convict me of an uncharged means of first degree robbery.

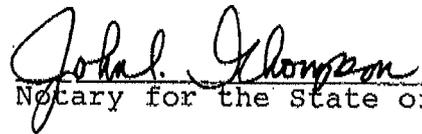
Signed at Aberdeen WA, on this 12th day of August, 2010.

  
Benjamin Brockie  
#866117

Stafford Creek Corr. Center  
191 Constantine Way  
Aberdeen WA, 98520

Subscribed and sworn to me on this 12th day of August, 2010.



  
Notary for the State of Washington  
Commission expires: 6/6/14

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Affidavit in Support

EXHIBIT A  
( 1st CHARGING INFORMATION.)

FILED

MAR 18 2002

THOMAS R. FALLOQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BENJAMIN B. BROCKIE )  
 WM 10/31/81 )  
 )  
 Defendant(s). )

INFORMATION  
 (INFO)  
 No. **02100790-3**  
 LARRY D. STEINMETZ  
 Deputy Prosecuting Attorney  
 PA# 02-9-08851-0  
 RPT# CT I - III: 02-01-0311016  
 CT IV - VIII: 01-02-0053897  
 CT IX - XI: 02-02-0065220  
 CT XII: 02-02-0068115  
 RCW CT I, IV, IX: 9A.56.200(1)(B)-F (#68305)  
 CT II - III, V - VII, X: 9A.40.020(1)(B)-F  
 (#46503)  
 CT VIII, XI: 9.61.160-F (#12011)  
 CT XII: 9A.56.200(1)(B)AT-F  
 (9A.28.020(1)) (#68306)

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

COUNT I: FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about October 13, 2001, with the intent to commit theft, did unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of MATTHEW M. MCCALL (PIZZA HUT), against such person's will, by use or threatened use of immediate force, violence and fear of injury to MATTHEW M. MCCALL (PIZZA HUT), and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,

COUNT II: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about October 13, 2001, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct MATTHEW M. MCCALL,

COUNT III: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about October 13, 2001, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct LEAH N. SCARCELLO,

COUNT IV: FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about February 22, 2002, with the intent to commit theft, did unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of ANGELA THURMAN (INLAND NORTHWEST BANK), against such person's will, by use or threatened use of immediate force, violence and fear of injury to ANGELA THURMAN (INLAND NORTHWEST BANK), and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,

COUNT V: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about February 22, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct SHARLENE WIDMERE,

COUNT VI: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about February 22, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct DIANE ALFANO,

COUNT VII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about February 22, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct TRACY GAYLORD,

COUNT VIII: THREATS TO BOMB OR INJURE PROPERTY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about February 22, 2002, did threaten to bomb or otherwise injure a building, common carrier, or structure, located at 1021 East Hawthorne Road,

COUNT IX: FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about March 05, 2002, with the intent to commit theft, did unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of STEVE OLSON (SAFE FEDERAL CREDIT UNION), against such person's will, by use or threatened use of immediate force, violence and fear of injury to STEVE OLSON (SAFE FEDERAL CREDIT UNION), and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,

COUNT X: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct STEVE OLSON,

COUNT XI: THREATS TO BOMB OR INJURE PROPERTY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about March 05, 2002, did

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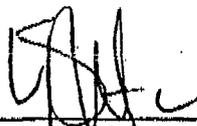
INFORMATION

Page 2

SPOKANE COUNTY PROSECUTING ATTORNEY  
COUNTY CITY PUBLIC SAFETY BUILDING  
SPOKANE, WA 99260 (509) 477-3662

threaten to bomb or otherwise injure a building, common carrier, or structure, located at 504 East North Foothills Drive,

COUNT XII: ATTEMPTED FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about March 08, 2002, with intent to commit the crime of FIRST DEGREE ROBBERY as set out in RCW 9A.56.200, committed an act which was a substantial step toward that crime, by attempting, with the intent to commit theft, to unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of A BANK EMPLOYEE (STERLING SAVINGS BANK), against such person's will, by use or threatened use of immediate force, violence and fear of injury to A BANK EMPLOYEE (STERLING SAVINGS BANK), and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,



Deputy Prosecuting Attorney  
WSBA# 20635

**DEFENDANT INFORMATION:**

BENJAMIN B. BROCKIE  
Address: 4001 N. LINCOLN ST., SPOKANE, WA 99205-1223

Height: 6'02"

Weight: 280

Hair: Blk

Eyes: Bro

DOL #:

State:

SID #: 020492056

DOC #:

FBI NO. 481238VB6

EXHIBIT B  
( AMENDED CHARGING INFORMATION. )

FILED  
NOV 22 2002  
THOMAS R. FALLOQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON	)	AMENDED
	)	INFORMATION
Plaintiff,	)	
	)	No. 02-1-00790-3
v.	)	LARRY D. STEINMETZ
	)	Deputy Prosecuting Attorney
BENJAMIN B. BROCKIE	)	
WM 10/31/81	)	PA# 02-9-08851-0
	)	RPT# CT I - III: 002-01-0311016
	)	CT IV - IX: 002-02-0053897
Defendant(s).	)	CT X - XXII: 002-02-0065220
	)	CT XXIII: 002-02-0068115
	)	RCW CT I, IV, X: 9A.56.200(1)(B)-F (#68305)
	)	CT II - III, V - VIII, XI - XXI:
	)	9A.40.020(1)(B)-F (#46503)
	)	CT IX, XXII: 9.61.160-F (#12011)
	)	CT XXIII: 9A.56.200(1)(B)AT-F
	)	(9A.28.020(1)) (#68306)
	)	(AMINF)

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COUNT I: FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about October 13, 2001, with the intent to commit theft, did unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of MATTHEW M. MCCALL, against such person's will, by use or threatened use of immediate force, violence and fear of injury to MATTHEW M. MCCALL, and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,

2 COUNT II: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about October 13, 2001, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct MATTHEW M. MCCALL,

3 COUNT III: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about October 13, 2001, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct LEAH N. SCARCELLO,

4 COUNT IV: FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about February 22, 2002, with the intent to commit theft, did unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of ANGELA THURMAN (INLAND NORTHWEST BANK), against such person's will, by use or threatened use of immediate force, violence and fear of injury to ANGELA THURMAN (INLAND NORTHWEST BANK), and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,

5 COUNT V: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about February 22, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct SHARLENE W. WIDMERE, ✓

6 COUNT VI: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about February 22, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct DIANE L. ALFANO, ✓

7 COUNT VII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about February 22, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct TRACY KAY GAYLORD, ✓

8 <sup>new</sup> COUNT VIII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about February 22, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct KIMBERLY JOLENE BOVA,

9 COUNT IX: THREATS TO BOMB OR INJURE PROPERTY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about February 22, 2002, did threaten to bomb or otherwise injure a building, common carrier, or structure, located at 1021 East Hawthorne Road,

10 COUNT X: FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about March 05, 2002, with the intent to commit theft, did unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of STEVE OLSON (SAFEWAY FEDERAL CREDIT UNION), against such person's will, by use or threatened use of immediate force, violence and fear of injury to STEVE OLSON (SAFEWAY FEDERAL CREDIT UNION), and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,

11  
COUNT XI: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct STEVE OLSON, ✓

12  
COUNT XII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct NORMA KERR,

13  
COUNT XIII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct SHARON STROBRIDGE,

14  
COUNT XIV: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct ANNA C. SCHULTZ,

15  
COUNT XV: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct JEANETTE LANGTON,

16  
COUNT XVI: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct KRISTIN M. BACON,

17  
COUNT XVII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct DARCIE G. WOLVERTON,

18  
COUNT XVIII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct YVONNE PROCTOR,

19  
COUNT XIX: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct WENDY K. SPOERL,

20  
COUNT XX: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct CARON C. LENNON,

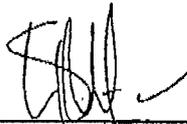
21  
COUNT XXI: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct PAMELA A. LEFFLER,

22  
COUNT XXII: THREATS TO BOMB OR INJURE PROPERTY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about March 05, 2002, did

Spokane County Prosecuting Attorney  
County-City Public Safety Building  
Spokane, WA 99260

threaten to bomb or otherwise injure a building, common carrier, or structure, located at 504 East North Foothills Drive,

23  
COUNT XXIII: ATTEMPTED FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about March 08, 2002, with intent to commit the crime of FIRST DEGREE ROBBERY as set out in RCW 9A.56.200, committed an act which was a substantial step toward that crime, by attempting, with the intent to commit theft, to unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of A BANK EMPLOYEE (STERLING SAVINGS BANK), against such person's will, by use or threatened use of immediate force, violence and fear of injury to A BANK EMPLOYEE (STERLING SAVINGS BANK), and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,

  
Deputy Prosecuting Attorney  
WSBA # 20635

**DEFENDANT INFORMATION:**

BENJAMIN B. BROCKIE  
Address: 4001 N. LINCOLN ST., SPOKANE, WA 99205-1223  
Height: 6'02"  
Eyes: Bro  
SID #: 020492056

Weight: 280  
DOL #:  
DOC #:

Hair: Blk  
State:  
FBI NO. 481238VB6

AMENDED INFORMATION - 4

Spokane County Prosecuting Attorney  
County-City Public Safety Building  
Spokane, WA 99260

EXHIBIT C  
( JURY INSTRUCTIONS. )

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(Jury out.)

THE COURT: Please be seated.

Mr. Hannibal, do you have any more witnesses?

MR. HANNIBAL: No, Your Honor.

THE COURT: Will you have any rebuttal?

MR. STEINMETZ: No, Your Honor.

THE COURT: All right. Okay.

On the instructions, do you want to meet at about 1:30, we will go through that. I think it's fairly cut and dried. You proposed lessers on the kidnapping. And I believe those were given last time, as well, were they not?

MR. HANNIBAL: Yes.

THE COURT: So I will blend the two, see what we come up with.

MR. HANNIBAL: Judge --

THE COURT: Any problems with the verdict forms?

MR. STEINMETZ: I have not looked at Mr. Hannibal's verdict forms.

MR. HANNIBAL: I don't think there's any problems with them. He proposed them.

Judge, I did object, or would put no objection on Mr. Steinmetz' package. He does include the Castle instruction in there. I don't believe -- we would request it not be given because I think the language is different than the other instruction.

1 of injury to that person or to the person or property of  
2 anyone. The force or fear must be used to obtain or retain  
3 possession of the property or to prevent or overcome  
4 resistance to the taking, in either of which cases the  
5 degree of force is immaterial.

6 Instruction No. 8: A person commits the crime of  
7 robbery in the first degree when in the commission of a  
8 robbery he or she is armed with a deadly weapon or displays  
9 what appears to be a firearm or other deadly weapon.

10 Instruction No. 9: To convict the defendant of the  
11 crime of robbery in the first degree in Count 4, each of the  
12 following elements of the crime must be proved beyond a  
13 reasonable doubt:

14 (1) That on or about the 22nd day of February, 2002,  
15 the defendant unlawfully took personal property from the  
16 person or in the presence of Angela Thurman (Inland  
17 Northwest Bank);

18 (2) That the defendant intended to commit theft of  
19 the property;

20 (3) That the taking was against the person's will by  
21 the defendant's use or threatened use of immediate force,  
22 violence or fear of injury to that person or to the person  
23 or property of another;

24 (4) That the force or fear was used by the defendant  
25 to obtain or retain possession of the property or to prevent

1 or overcome resistance to the taking;

2 (5) That in the commission of these acts the  
3 defendant was armed with a deadly weapon or displayed what  
4 appeared to be a firearm or other deadly weapon; and

5 (6) That the acts occurred in the State of  
6 Washington.

7 If you find from the evidence that each of these  
8 elements has been proved beyond a reasonable doubt, then it  
9 will be your duty to return a verdict of guilty.

10 On the other hand, if, after weighing all of the  
11 evidence, you have a reasonable doubt as to any one of these  
12 elements, then it will be your duty to return a verdict of  
13 not guilty.

14 Instruction No. 10: A person commits the crime of  
15 attempted first degree robbery when, with intent to commit  
16 that crime, he or she does any act which is a substantial  
17 step toward the commission of that crime.

18 Instruction No. 11: Theft means to wrongfully obtain  
19 or exert unauthorized control over the property or services  
20 of another, or the value thereof, with intent to deprive  
21 that person of such property or services.

22 Instruction No. 12: Wrongfully obtains means to take  
23 wrongfully the property or services of another.

24 Instruction No. 13: The term "deadly weapon" includes  
25 any firearm, whether loaded or not.

1 reasonable doubt:

2 (1) That on or about the 22nd day of February, 2002,  
3 the defendant threatened to bomb or otherwise injure a  
4 building or structure;

5 (2) That the acts occurred in the State of  
6 Washington.

7 If you find from the evidence that elements 1 and 2  
8 have been proved beyond a reasonable doubt, then it will be  
9 your duty to return a verdict of guilty.

10 On the other hand, if, after weighing all the  
11 evidence, you have a reasonable doubt as to any one of these  
12 elements, then it will be your duty to return a verdict of  
13 not guilty.

14 Instruction No. 29: Threat means to communicate,  
15 directly or indirectly, the intent to cause bodily injury in  
16 the future to the person threatened or to any other person  
17 or to cause physical damage to the property of a person  
18 other than the actor.

19 Instruction No. 30: To convict the defendant of the  
20 crime of robbery in the first degree in Count 10, each of  
21 the following elements of the crime must be proved beyond a  
22 reasonable doubt.

23 (1) That on or about the 5th day of March, 2002, the  
24 defendant unlawfully took personal property from the person  
25 or in the presence of Steve Olson (Safeway Federal Credit

1 Union). The rest of this instruction is the same as found  
2 in Count 6.

3 Instruction No. 31: To convict the defendant of the  
4 crime of kidnapping in the first degree in Count 11, each of  
5 the following elements of the crime must be proved beyond a  
6 -- excuse me, that is not correct.

7 Going back to that.

8 Count 10, and I'm going to read the full instruction.  
9 That on or about the 5th day of March, 2002, the defendant  
10 unlawfully took personal property from the person or in the  
11 presence of Steve Olson (Safeway Federal Credit Union);

12 (2) That the defendant intended to commit theft of  
13 the property;

14 (3) That the taking was against the person's will by  
15 the defendant's use or threatened use of immediate force,  
16 violence, or fear of injury to that person or to that  
17 person's property of another;

18 (4) That force or fear was used by the defendant to  
19 obtain or retain possession of the property or to prevent or  
20 overcome resistance to the taking;

21 (5) That in the commission of these acts the  
22 defendant was armed with a deadly weapon or displayed what  
23 appeared to be a firearm or other deadly weapon; and

24 (6) That the acts occurred in the State of  
25 Washington.

1           If you find from the evidence that each of these  
2 elements has been proved beyond a reasonable doubt, then it  
3 will be your duty to return a verdict of guilty.

4           On the other hand, if, after weighing all of the  
5 evidence you have a reasonable doubt as to any one of these  
6 elements, then it will be your duty to return a verdict of  
7 not guilty.

8           Instruction No. 31: To convict the defendant of the  
9 crime of kidnapping in the first degree in Count 11, each of  
10 the following elements of the crime must be proved beyond a  
11 reasonable doubt:

12           (1) That on or about the 5th day of March, 2002, the  
13 defendant intentionally abducted Steve Olson (Safeway  
14 Federal Credit Union);

15           (2) That the defendant abducted the person with  
16 intent to facilitate the commission of a crime of first or  
17 second degree robbery; and

18           (3) That the acts occurred in the State of  
19 Washington.

20           If you find from the evidence that each of these  
21 elements has been proved beyond a reasonable doubt, then it  
22 will be your duty to return a verdict of guilty.

23           On the other hand, if, after weighing all of the  
24 evidence, you have a reasonable doubt as to any one of these  
25 elements, then it will be your duty to return a verdict of

EXHIBIT D  
( PROSECUTOR'S REMARKS IN CLOSING ARGUMENT. )

1 women and one man on February 22nd, and on March 5th of  
2 2002.

3 You heard descriptors of being frightened. Hopeless.  
4 Not knowing whether or not you are going to be killed.  
5 Seems like an eternity. Did not know whether or not I would  
6 see my grandchildren, or children, again. This is the  
7 emotional impact of 15 men -- excuse me, 15 women and one  
8 man on those dates.

9 And what caused this emotional impact?

10 Then and now?

11 It was the actions, the sophistication, the planning,  
12 the decision making, the power, the control, and most  
13 importantly, the greed. The greed of one person, the greed  
14 of Mr. Brockie.

15 It was greed in its purest and simplest form. Most  
16 people work and save, work and save, work and save, to buy a  
17 home. To buy a car. To buy a stereo. Not the defendant.

18 He wanted it now. For whatever reason. He wanted it  
19 in February and March of 2002.

20 Judge Austin has read you the court's instructions.  
21 And they may seem daunting. And I will grant you there are  
22 a number of charges against the defendant. However, I would  
23 submit that it was the defendant who chose the charges. And  
24 it was the defendant who dictated the number of people that  
25 he affected. And those people affected should be granted

1 equal protection of the laws. No one should be -- no one  
2 should be denied, because of the numbers of alleged victims  
3 in this case.

4 In this case, Judge Austin's advised you the defendant  
5 has been charged primarily with three principal crimes.  
6 With robbery. With kidnapping. And with threat to bomb.

7 A person commits the crime of robbery when he, or she,  
8 unlawfully and with intent to commit theft, takes personal  
9 property from the presence -- from the person or in the  
10 presence of another, against that person's will by the use  
11 or threatened use of immediate force, violence, or fear of  
12 injury to that person or to the property of anyone. The  
13 force or fear must be used to obtain or retain possession of  
14 the property or to prevent or overcome resistance to the  
15 taking, in either of which cases the degree of force is  
16 immaterial.

17 A person commits the crime of robbery in the first  
18 degree when in the commission of a robbery he or she is  
19 armed with a deadly weapon or displays what appears to be a  
20 deadly weapon.

21 A person commits the crime of first degree attempted  
22 robbery when, with intent to commit that crime, he or she  
23 does any act which is a substantial step toward the  
24 commission of that crime.

25 I would submit, members of the jury, that substantial

1 (End of bench conference.)

2 MR. STEINMETZ: In this case, you heard testimony that  
3 on February 22nd of 2002, the defendant entered into the INB  
4 bank, at approximately 1:31 p.m. There is some discrepancy  
5 as to the time. You heard testimony that he appeared to be  
6 surveilling the bank. In fact, he was so suspicious that  
7 the person, man working the bank's security, took down his  
8 license plate.

9 He was in the bank for approximately 30 to 45 minutes  
10 and left.

11 At approximately two hours later, a gunman enters the  
12 bank. At approximately -- police were called at 3:23.

13 What suspect information did witnesses provide? The  
14 defendant had a black hooded sweatshirt. A black mask.  
15 Dark nylon pants. Black leather gloves. A blue duffel bag.  
16 Or gym bag. And that the person who robbed the bank was  
17 between six foot, and six-foot-two, and large. Matching the  
18 defendant's physical description at the time.

19 The voice used at that time, you heard testimony that  
20 the defendant attempted to disguise his voice. With slang.  
21 The distinct use of profanity. And slang. You heard  
22 testimony that the gunman, during that robbery, became  
23 angrier, and more upset at the employees. And that the  
24 weapon used was a black semi-auto pistol. The defendant  
25 entered the bank, waving the pistol at the employees. He

1 herded them into the vault, like cattle. He made them  
2 crawl. The suspect knew the layout of the bank. He forced  
3 them to their hands and knees. These tellers feared they  
4 would be killed by the defendant -- by the gunman's actions  
5 and statements. And the suspect used specific demeaning  
6 language towards the tellers in the vault.

7 The tellers indicated that this seemed like an  
8 eternity, and one can only imagine. They did not feel free  
9 to leave the vault.

10 They were forced at gunpoint to remove the currency.  
11 And they were threatened that they would be killed if they  
12 called the police. Threatened they would be killed,  
13 initially. The gunman told them they would be killed within  
14 ten minutes and then changed it to 20 minutes.

15 On March 5th, defendant enters the Safeway Credit  
16 Union at approximately 1:30 in the afternoon. Again, two  
17 hours later, a gunman enters the Safeway Credit Union,  
18 armed, waving a pistol at the employees. Again, ordering  
19 them into the vault. The -- gunman was described as having  
20 a dark hooded sweatshirt. One witness described the  
21 sweatshirt as being teal, similar to the chair.

22 We had information that the defendant had purchased a  
23 black pair of nylons at 2:14 on that day. Or someone placed  
24 the receipt into the Nissan at 2:14 that day. The gunman  
25 was described as wearing a black mask, mesh. Again the

1 gunman was wearing dark nylon pants. The gunman was  
2 described as having black, or leather gloves. A blue  
3 duffel, or gym bag. And again, described as being six to  
4 six-foot-two. Large. Again, matching the physical  
5 description of the defendant at the time of the robbery.

6 Again, the gunman attempted to disguise a voice by  
7 using slang. There was a distinct use of profanity. And  
8 slang language.

9 Again, the gunman became angrier and more upset.

10 Again the gunman was described as using a semi-auto  
11 pistol. The defendant entered the bank. And then, as in  
12 the INB bank, yelling and waving the handgun, yelling for  
13 tellers to get into the vault. Tellers were again herded  
14 like cattle into the manager's office. And vault area.  
15 Again, the defendant knew the layout of the bank. Tellers  
16 again, as in the INB bank, were forced to the ground.  
17 Tellers feared that they would be killed. Suspect again  
18 used specific demeaning language toward the tellers in the  
19 vault. Again, the tellers indicated that it seemed like an  
20 eternity during the takeover. They were forced at gunpoint,  
21 as in the INB robbery, to remove the money. The tellers  
22 were threatened that they would be killed if police were  
23 called. And again, the defendant slash gunman, threatened  
24 that they would be killed if they called the police within  
25 ten minutes, and added this time that there was a sniper

1 the existence of the sun. Or of the moon. Or of the wind.  
2 Those are truths that no one disputes. And in this case,  
3 you have evidence that shows that the defendant committed  
4 the robberies. On February 22nd. On March 5th. And March  
5 8th, where he attempted a robbery.

6 Mr. Hannibal certainly can point out discrepancies in  
7 the teller testimony. I would submit that if you have a gun  
8 pointed in your face for a period of time, that you are not  
9 going to memorize each and every detail of the gunman. Are  
10 you going to be staring at the gun, or are you going to be  
11 staring at the face? If every witness came in here and  
12 testified the same, Mr. Hannibal would claim that they got  
13 together, and prevaricated their testimony.

14 If witnesses don't testify the same, Mr. Hannibal can  
15 come in and say they don't know what they're talking about,  
16 because their testimony is different from each other.

17 Would you expect the tellers' testimony to be exactly  
18 the same when they're being threatened with deadly force?  
19 No. You wouldn't.

20 You can't even get people to testify to the same thing  
21 on an accident in a street. Does it mean that the robberies  
22 did not occur? No.

23 Mr. Hannibal focuses on the identity of the defendant.  
24 But there are other pieces of evidence in this case which  
25 are identity, as well. The mask. The surveillance at the

EXHIBIT E  
( STATE'S BRIEF, 11/19/2002. )

FILED  
NOV 19 2002  
THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	)	NO. 02100790-3
PLAINTIFF,	)	STATE'S BRIEF
vs.	)	RE: SEARCH WARRANT/ CrR 4.4 SEVERANCE OF
BENJAMIN B. BROCKIE,	)	COUNTS
DEFENDANT.	)	

The Plaintiff, State of Washington, represented by Steven Tucker, Spokane County Prosecuting Attorney, by his deputy, Larry Steinmetz, presents the following brief in opposition to defendant's motion to sever counts 1-23 as contained within the amended information.

I.

FACTS

The State incorporates the probable cause affidavits filed in the above referenced-cause in support of the court denying defendant's motion for severance of the offenses as contained within the information.

II

STATE'S BRIEF  
RE: CrR 4.4  
Page 1 of 8

STEVEN TUCKER  
PROSECUTING ATTORNEY  
WEST 1100 MALLON  
SPOKANE, WA 99260

Under Counts 4 through 10 (February 22, 2002/Inland Northwest Bank), the suspect entered the bank and forced the tellers onto the floor at gunpoint. He made them crawl to the vault. Inside the vault, he required them to remain in a kneeling position facing the floor and to not look at him. Thereafter, the suspect had a blue duffel bag and forced two tellers to fill it with money. The money was labeled with INB bank wrappers demarcated in \$1000 increments. The total amount taken was \$35,000. An additional \$3170 was taken from the teller stations. During commission of the robbery, the suspect informed the tellers that there was a bomb outside, and he would detonate the bomb if the tellers called the police. Also, the suspect used the same obscurities as noted above, he faked a black accent and he used "black street slang." The suspect's clothing was described as a hooded sweatshirt, black mask, black gloves, blue or black nylon athletic pants, and white tennis shoes. He also used a dark semi-automatic handgun during the robbery. The defendant repeatedly threatened to kill the tellers when they were in and outside of the vault.

Witnesses will further testify that earlier in the day on February 22, 2002, a young dark skinned male entered the bank and he requested investment information. The male provided a birth date of October 13, 1981, the same birth date as the defendant. The suspect and the male who earlier entered the bank were also the same physical build. In addition, witnesses at the bank identified the person requesting investment information as the defendant through the use of a photomontage.

During a subsequent search of the both the defendant's residence executed on March 8, 2002, detectives found thirty five (35) \$1000 empty money wrappers from Inland Northwest Bank, several of which were dated the day of the robbery with INB teller initials. In addition, on March 8, 2002, officers found a dark colored sweatshirt, blue duffel bag, a black handgun, and a black mask during a search of defendant's vehicle

STATE'S BRIEF  
RE: CrR 4.4  
Page 4 of 8

STEVEN TUCKER  
PROSECUTING ATTORNEY  
WEST 1100 MALLON  
SPOKANE, WA 99260

DECLARATION OF SERVICE BY MAIL  
GR 3.1

I, Benjamin Brockie, declare and say:

That on the 12 day of August, 2010, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 02-1-00790-3:

COVER LETTER; NOTICE OF MOTION(s); MOTION TO VACATE JUDGMENT;  
AND SENTENCE; OBJECTION TO TRANSFER OF MOTION; AFFIDAVIT OF;  
BENJAMIN BROCKIE; MOTION AND ORDER TO TRANSPORT; AND;  
DECLARATION OF MAILING.

addressed to the following:

THOMAS FALLQUIST

LARRY STEINMETZ

SPOKANE COUNTY CLERK

Deputy Prosecuting Attorney

1116 W. Broadway

1100 W. Mallon

Spokane WA, 99260

Spokane WA, 99260

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 12 day of August, 2010, in the City of Aberdeen, County of Grays Harbor, State of Washington.



Benjamin Brockie

DOC 866117 . Unit GB

Stafford Creek Corrections Center

191 Constantine Way

Aberdeen. WA 98520-9504

Ben Brockie, # 866117  
GB-5  
Stafford Creek Correction Center  
191 Constantine Way  
Aberdeen WA 98520

Thomas Fallquist, Clerk  
Spokane County Superior Court  
1116 W Broadway  
Spokane WA, 99260-0090



UNITED STATES  
02 1R  
000655  
MAILED

RECEIVED  
AUG 16 2010  
COUNTY CLERK

LEGAL MAIL

# ATTACHMENT C

I certify that this document is a true and correct copy of the original on file and of record in my office

ATTEST

JUN 10 2011

FILED

THOMAS R. FALLQUIST, COUNTY CLERK  
COUNTY OF SPOKANE, STATE OF WASHINGTON

FILED

MAR 25 2008

MAR 31 2008

BY Mary Cate DEPUTY

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

### COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent and  
Cross-Appellant,

v.

BENJAMIN B. BROCKIE,

Appellant.

MANDATE

No. 22655-7-III

Spokane County No. 02-1-00790-3

The State of Washington to: The Superior Court of the State of Washington,  
in and for Spokane County

*Affirmed In Part  
Remanded In Part*

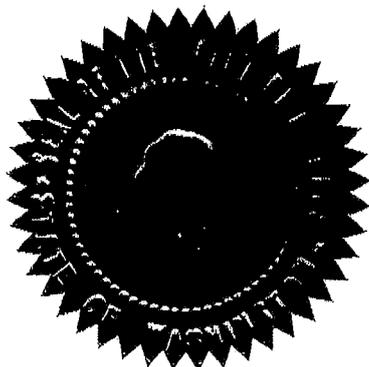
This is to certify that the Opinion of the Court of Appeals of the State of Washington, Division III, filed on March 27, 2007 became the decision terminating review of this court in the above-entitled case on March 21, 2008. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.

**There being no objection, costs in the amount of \$217.06 are awarded to the Spokane County Prosecuting Attorney office and \$5,820.58 awarded to the Office of Public Defense to be paid by Benjamin B. Brockie.**

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 25th day of March, 2008.

Genevieve Jounksley  
Clerk of the Court of Appeals, State of Washington  
Division III

cc: Benjamin B. Brockie  
Mark E. Lindsey  
Hon. Robert D. Austin  
Indeterminate Sentence Review Board  
Department of Corrections



*MB*  
039093408  
*TD*

*PK*

*Hon. Austin*

**FILED**

**MAR 31 2008**

THOMAS R. FALLOQUIST  
SPOKANE COUNTY CLERK

**FILED**

**MAR 27 2007**

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 22655-7-III</b>
	)	
<b>Respondent and</b>	)	
<b>Cross-Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>Division Three</b>
	)	
<b>BENJAMIN B. BROCKIE,</b>	)	
	)	
<b>Appellant.</b>	)	<b>UNPUBLISHED OPINION</b>

KATO, J.\*—Benjamin Brockie appeals his convictions of two counts of first degree robbery, fifteen counts of first degree kidnapping, and two counts of threats to bomb or injure property. He contends the court erred by denying his motion to suppress and the evidence was insufficient to support the kidnapping convictions. Contending the court improperly sentenced Mr. Brockie below the standard range, the State cross-appeals. Mr. Brockie also claims error in his statement of additional grounds for review. We affirm the convictions, but remand for resentencing.

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\* Judge Kenneth H. Kato is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

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On October 13, 2001, Matthew McCall, a Pizza Hut employee, was taking out the trash when a man confronted him. The man held a large handgun. He pulled a black nylon mask over his face and forced Mr. McCall to the cash register. He then ordered Leah Scarcello, another employee, to remove money from the register and place it in a bag. The man told Mr. McCall and Ms. Scarcello to get on the floor, crawl to the mop room, and count to 100. He then told them he would shoot them if they called the police.

Mr. McCall and Ms. Scarcello described the man to police as being either Black or Hispanic, 6'2" in height, between 230-250 pounds, and approximately 20-25 years old. Ms. Scarcello also said the man used derogatory words such as "fuck, nigger and bitch" in reference to them. Clerks Papers (CP) at 31, 66.

On February 22, 2002, a man entered an Inland Northwest Bank branch with a black semiautomatic handgun. The man was wearing a dark-blue hooded sweatshirt, white tennis shoes, black gloves, black or blue athletic pants, and a black nylon mask. The man pointed the gun at the tellers and spoke to them in "black street gang slang." CP at 34. He ordered the tellers to put \$100 and \$50 bills into a nylon duffle bag. The man also told them to crawl to the vault area of the bank. The tellers placed approximately \$38,000 in the bag. The man then said there was a bomb outside the bank. He threatened to detonate the bomb if

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the police were called. The man was described as being 6' to 6'2" in height and approximately 200-225 pounds.

On March 5, 2002, a man wearing a dark blue, hooded sweatshirt and a nylon-style mask entered a Safeway Federal Credit Union with a handgun. He ordered everyone in the credit union to go into an office and then told the credit union manager to go into the vault. The manager placed \$25,000 in \$100, \$50, \$20, \$10 and \$5 bills into a blue canvas gym bag. The man told everyone in the credit union not to call the police for 10 minutes. He said there were two bombs outside and a sniper watching the credit union. The man then left and ran into heavy traffic. Witnesses told the police that the man used a lot of obscenities, spoke in a manner similar to "black street gang slang," and repeatedly called them "niggers." CP at 35.

On March 7, 2002, Detective George Benevidez contacted Mr. McCall to show him a photomontage. The detective told him he was not obligated to choose a person from the montage and the suspect may not even be in the lineup. Mr. McCall looked at the photos for 30 seconds. He then said the photo of Mr. Brockie "kind of looked like him" because the eyes and goatee were similar. CP at 67. Mr. McCall asked when the photo was taken. The detective said it "could have been taken at any time before or after the robbery." *Id.* Mr.

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McCall looked at the montage again and pointed to Mr. Brockie's photo. He then said "[t]hat's the guy. . . . I remember his eyes." *Id.*

On March 8, 2002, Mr. Brockie was put under surveillance. He was arrested after police watched him drive past a Sterling Savings bank branch three times. In Mr. Brockie's car, police saw in plain view a blue nylon style duffle bag, a semiautomatic gun, a dark-blue sweatshirt, and black heavy nylon pantyhose on the front passenger seat.

Mr. Brockie was charged by amended information with 3 counts of first degree robbery, 17 counts of first degree kidnapping of the victims of each robbery, 2 counts of threats to bomb or injure property, and 1 count of attempted first degree robbery. One count of first degree robbery and two counts of first degree kidnapping involving the Pizza Hut robbery were later severed.

Prior to trial, Mr. Brockie filed a motion to suppress evidence. He argued Mr. McCall's identification of him through the photomontage should be suppressed because the photo identification procedure used was impermissibly suggestive. The court denied the motion. The case proceeded to jury trial.

Mr. Brockie denied involvement in the crimes. He testified he received \$5,153 on his income tax return and \$1,000 from an insurance company for

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damage to his car. On February 24 and 25, 2002, he used this money to gamble at a casino and won over \$20,000.

The jury found Mr. Brockie guilty of 2 counts of first degree robbery, 15 counts of first degree kidnapping, and 2 counts of threats to bomb or injure property, but not guilty on the attempted first degree robbery charge.

On the basis of the multiple offense policy, the court sentenced Mr. Brockie to an exceptional sentence below the standard range. The court sentenced Mr. Brockie to concurrent sentences of 129 months each for the two first degree robbery convictions, 68 months each for the two threats to bomb or injure property convictions, 100 months for the kidnapping convictions pertaining to the Safeway Federal Credit Union robbery and 100 months for the kidnapping convictions pertaining to the Inland Northwest Bank robbery for a total of 397 months. The court's written findings of fact stated:

The Court found that an exceptional sentence was warranted in this case as the low end of the standard range, which was 812 months, was not something that the facts of the crime merited and further that such a sentence was not appropriate under the multiple offense policy of the Sentencing Reform Act. Specifically, the standard range sentence was clearly excessive under the multiple offense policy of the Sentencing Reform Act.

The Court further finds that first degree robbery is a most serious offense as is first degree kidnapping. As such, the standard range sentence as envisioned by the Sentencing Reform Act, calls for consecutive sentences under such circumstances. Specifically, the low end of the standard range, which is 812 months, exceeds

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sentences imposed for persons convicted of other most serious offenses, including but not limited to murder.

The Court further finds that in each situation, there was no physical injury to any of the victims. However, there was significant mental trauma and horror to each of the victims, which was amply displayed during their testimony at trial.

CP at 454-55. This appeal follows.

Mr. Brockie contends the court erred by denying his motion to suppress. He argues the court should have suppressed the photomontage identification because it was impermissibly suggestive.

"On appeal of a superior court's suppression order, we review only those factual findings to which the appellant has assigned error." *State v. O'Day*, 91 Wn. App. 244, 247, 955 P.2d 860 (1998). Because Mr. Brockie has not assigned error to any findings, we accept as verities the court's determination as to the "factual events and happenings," but independently examine the legal issues raised by those findings. *Id.* We, however, give great significance to the trial court's conclusions. *State v. Ozuna*, 80 Wn. App. 684, 691, 911 P.2d 395, review denied, 129 Wn.2d 1030 (1996).

A photographic identification procedure violates due process if, under the totality of the circumstances, the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977) (quoting *Simmons v. United*

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*States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)). Even a suggestive photo lineup is admissible, however, unless its corrupting effect outweighs other factors probative of the reliability of the witness's identification. *State v. Burrell*, 28 Wn. App. 606, 610, 625 P.2d 726 (1981). To make this determination, "the appellate court must balance the reliability of the witness against the harm of the suggestiveness, considering the totality of the circumstances." *State v. Cook*, 31 Wn. App. 165, 172, 639 P.2d 863, *review denied*, 97 Wn.2d 1018 (1982). The court should consider "(1) the opportunity of the victim to observe the subject at the time of the crime, (2) the witness'[s] degree of attention, (3) the accuracy of the witness'[s] prior description, (4) the level of certainty at the confrontation, and (5) the length of time between the crime and confrontation." *Id.*

Mr. Brockie argues that Mr. McCall described the suspect as being either African-American or Hispanic, but the photo lineup only contained pictures of men of "possible Hispanic descent." He also argues that Mr. McCall only had a limited opportunity to view the suspect's face and had never provided police with a description of the suspect's facial features or facial hair.

But here, Mr. McCall had the opportunity to view the suspect before he even put on his mask and thus had a significant opportunity to view the person

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he believed had committed the crime. Although he identified Mr. Brockie after some five months, this passage of time alone is not so lengthy as to compromise Mr. McCall's reliability. Even if the lineup's containing men of potential Hispanic descent made it suggestive, there was no substantial likelihood of irreparable misidentification under the circumstances. Nothing in the record shows that the photographic identification procedure was unreasonably suggestive or otherwise tainted. The court did not err by denying the motion to suppress.

Mr. Brockie next contends the evidence was insufficient to support the kidnapping convictions. Specifically, he argues that under *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), *aff'd in part, rev'd in part on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006), his kidnapping convictions should have merged with his robbery convictions because there was no evidence any restraint to the victims caused a separate and distinct injury from the restraint inherent in the armed robberies.

In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and

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interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime may be established by either direct or circumstantial evidence; one type is no more valuable than the other. *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977). "Credibility determinations are within the sole province of the jury and are not subject to review." *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and weighing the evidence are also within the sole province of the fact finder. *State v. Longuskie*, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990).

In *Korum*, 120 Wn. App. at 707, Division Two of this Court determined that convictions for first degree kidnapping incidental to a first degree robbery merged with the robbery conviction. But in *State v. Louis*, 155 Wn.2d 563, 571, 120 P.3d 936 (2005), our Supreme Court held that first degree kidnapping, even when incidental to first degree robbery, did not merge with a robbery degree.

In *Louis*, the defendant robbed a jewelry store and bound the hands and feet of the two owners, covered their eyes and mouths with duct tape, and coerced them into a bathroom. *Id.* at 566-67. He was convicted of one count of first degree kidnapping and one count of first degree robbery for each victim. *Id.* at 567.

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On appeal, the defendant argued that his convictions for kidnapping and robbery merged because the kidnappings were simultaneous and incidental to the robbery. *Id.* at 570. The Supreme Court, however, determined the crimes did not merge because proof of one was not necessary to prove the other. *Id.* at 570-71. Specifically, it held that proof of kidnapping is not necessary to prove first degree robbery and proof of first degree kidnapping requires only the intent to commit robbery, not the completion of robbery. *Id.* at 571. *Louis* controls. Mr. Brockie's kidnapping convictions for first degree kidnapping and first degree robbery do not merge.

To convict Mr. Brockie of first degree kidnapping, the State had to prove beyond a reasonable doubt that he intentionally abducted the victims with intent to facilitate commission of any felony or flight thereafter. RCW 9A.40.020(1)(b). "Abduct" is defined as restraining "a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2). "Restrain" means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty." RCW 9A.40.010(1).

The evidence established that during the Inland Northwest Bank robbery, Mr. Brockie pointed a gun at the tellers and ordered them into the vault area.

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After the tellers placed the money in his bag, he told them that there was a bomb outside the bank and he would detonate the bomb if they called the police.

Likewise, during the Safeway Federal Credit Union robbery, Mr. Brockie ordered everyone in the credit union to go into an office. He then told them not to call the police for 10 minutes. He said there were two bombs outside the credit union and a sniper watching from a neighboring house. Based on this evidence, the jury could reasonably find that Mr. Brockie intentionally abducted the victims with the intent to facilitate the commission of first degree robbery. The evidence was sufficient to support the first degree kidnapping convictions.

In its cross appeal, the State contends the court's findings do not support an exceptional sentence below the standard range. A court may impose a mitigated exceptional sentence if it finds there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. "A court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). One mitigating factor used to impose an exceptional sentence is the multiple offense policy. *Id.* Under RCW 9.94A.535(1)(g), a trial court can impose an exceptional sentence downward when "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that

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is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.”

To reverse an exceptional sentence, we must find that

(a) [e]ither the reasons supplied by the sentencing judge are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4). A trial court may depart from the standard range sentence when there are multiple offenses if the effects of the first criminal act and the cumulative effects of subsequent criminal acts are nonexistent, trivial, or trifling. *State v. Hortman*, 76 Wn. App. 454, 461, 886 P.2d 234 (1994), *review denied*, 126 Wn.2d 1025 (1995). The State argues the court failed to find the effects of the criminal acts on the kidnapping victims were trivial or nonexistent.

Here, nothing in the record shows that the effects of the first degree robbery counts and the cumulative effects of the subsequent first degree kidnapping counts were “nonexistent, trivial or trifling.” Indeed, the court recognized in its written findings of fact to support the exceptional sentence downward that there was “significant mental trauma and horror to each of the victims.” CP at 455. That there was “no physical injury” as indicated by the court, does not lessen the seriousness of the offenses. *Id.* The court’s findings

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do not justify a mitigated exceptional sentence on the basis of the multiple offense policy. Remand for resentencing within the standard range is required.

In his additional grounds for review, Mr. Brockie first contends the prosecutor committed misconduct by charging him with 15 counts of first degree kidnapping. Mr. Brockie was charged with 17 counts of first degree kidnapping to correspond with the victims of the Pizza Hut and bank robberies. Two of these counts were later severed. The prosecutor was entitled to seek these charges against Mr. Brockie. *Louis*, 155 Wn.2d at 571. There was no misconduct.

Mr. Brockie further contends the prosecutor committed misconduct during trial. To obtain reversal of a conviction on the basis of such prosecutorial misconduct, a defendant must show the prosecutor's conduct was improper and the conduct had a prejudicial effect, which means there must be a substantial likelihood the conduct affected the verdict. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). Absent an objection, a defendant cannot claim prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that a curative instruction could not have neutralized any prejudice. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and

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the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Mr. Brockie claims the prosecutor committed misconduct by expressing an opinion as to his guilt. During the cross examination of Mr. Brockie, the prosecutor asked "[h]ow is it that a person who makes minimum wage with a little in their bank account, can acquire and gamble such large amounts? If you know Mr. Brockie?" Report of Proceedings (RP) at 659. This question was not an improper opinion on guilt. The question was simply in reference to Mr. Brockie's previous testimony that he had won substantial amounts of money by gambling at a casino. The prosecutor did not commit misconduct.

Mr. Brockie next contends the prosecutor committed misconduct in two instances during closing arguments. A prosecutor has wide latitude in arguing facts in evidence and drawing reasonable inferences from them during closing arguments. See *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). Otherwise improper remarks are not grounds for reversal when they are invited, provoked, or occasioned by defense counsel, and when the comments are in reply to or retaliation for his acts and statements, unless they go beyond the scope of an appropriate response. *State v. Davenport*, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984).

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He argues the prosecutor committed misconduct by misstating the law during closing argument that when Mr. Brockie committed the bank robberies, he committed the separate crime of kidnapping against each of the victims in both incidents. But under *Louis*, the crimes of robbery and kidnapping do not merge and are not incidental to each other. The prosecutor did not misstate the law.

Mr. Brockie also argues the prosecutor committed misconduct when he expressed his personal opinion. During closing arguments, the prosecutor stated:

Now, the defendant claims he started out with \$6,000. Well, how do we jump to \$10,000? And by my calculation, the defendant is on a losing streak and not a winning streak at the casino.

And you can either believe that he is the luckiest man alive, or that he committed the robberies, and that is where he got the large amount of money to go gamble with.

RP at 843. The prosecutor's statements were a characterization of the evidence presented at trial. These statements did not contain a clear and unmistakable expression of the prosecutor's personal opinion. There was no misconduct.

Mr. Brockie next contends the court erred by admitting evidence of the nylons because the evidence was not properly authenticated. He argues that a detective put his hand inside the nylons for the jury in his first trial, which resulted in a hung jury. The evidence was then subsequently sent to two other forensic

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scientists and thus subject to contamination when transferred from agency to agency.

But the record is silent as to what occurred during Mr. Brockie's first trial. Because this issue refers to matters outside the record, it cannot be considered on appeal. It can, however, be raised in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

We affirm the convictions, but remand for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

*Kato JPT*

Kato, J. Pro Tem.

WE CONCUR:

*Sweeney, C.J.*  
Sweeney, C.J.

*Brown, J.*  
Brown, J.

I certify that the foregoing document is a full, true and correct copy of the original, as the same appears of record and on file in my office.

Dated: MARCH 25 2008  
RENEE S. TOWNSLEY

Clerk of the Court of Appeals, Division III, State of Washington

By *Barbara Spence*  
CASE MANAGER

# ATTACHMENT D

I certify that this document is a true and correct copy of the original on file and of record in my office

FILED

ATTEST

JUN 10 2011

THOMAS R. FALLQUIST, COUNTY CLERK  
COUNTY OF SPOKANE, STATE OF WASHINGTON

BY Mary Cals DEPUTY

FILED

JUL 22 2010

JUL 26 2010

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

### COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 Respondent, )  
 v. )  
 BENJAMIN B. BROCKIE, )  
 Appellant. )  
 In re the Personal Restraint of: )  
 BENJAMIN B. BROCKIE, )  
 Petitioner. )

MANDATE

No. 27203-6-III consolidated  
 with No. 27879-4-III  
 Spokane County No. 02-1-00790-3

The State of Washington to: The Superior Court of the State of Washington,  
 in and for Spokane County

*Affirmed*

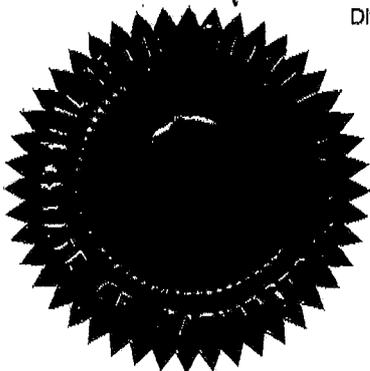
This is to certify that the Opinion of the Court of Appeals of the State of Washington, Division III, filed on November 19, 2009 became the decision terminating review of this court in the above-entitled case on July 21, 2010. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.

**There being no objection, costs in the amount of \$104.78 are awarded to the Spokane County Prosecuting Attorney office and \$2,779.47 awarded to the Office of Public Defense to be paid by Benjamin B. Brockie. RAP 14.3**

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 22nd day of July, 2010.

Renee S. Townsley  
 Clerk of the Court of Appeals, State of Washington  
 Division III

cc: Benjamin B. Brockie  
 CeCe L. Glenn  
 Mark E. Lindsey  
 Andrew J. Metts  
 Hon. Annette S. Plese  
 (Hon. Robert D. Austin's case)  
 Department of Corrections



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*UK*  
*WA*  
*JPC*

Hon. Austin

**FILED**

**FILED**

**JUL 26 2010**

**NOV 19 2009**

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 27203-6-III</b>
	)	<b>( consolidated with</b>
<b>Respondent,</b>	)	<b>No. 27879-4-III)</b>
	)	
<b>v.</b>	)	
	)	
<b>BENJAMIN B. BROCKIE,</b>	)	
	)	<b>Division Three</b>
<b>Appellant.</b>	)	
-----	)	
<b>In re the Personal Restraint of:</b>	)	
	)	
<b>BENJAMIN B. BROCKIE,</b>	)	
	)	<b>UNPUBLISHED OPINION</b>
<b>Petitioner.</b>	)	

SWEENEY, J. — This is the second appeal from a sentence for multiple counts of kidnapping. We have already concluded that the sentencing court erred when it departed downward from the presumptive range sentence. *State v. Brockie*, noted at 137 Wn. App. 1052, 2007 WL 914292. On remand, the court invited Benjamin Brockie to suggest other reasons that might justify a downward departure from the presumptive standard range for the sentence. Other than citing to the general purposes of Washington’s Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, he could not do so. So the judge

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sentenced him within the standard range. We conclude that this was not an abuse of discretion and we affirm the sentence. We also deny Mr. Brockie's personal restraint petition.

#### FACTS

The trial court found Mr. Brockie guilty of 2 counts of first degree robbery, 15 counts of first degree kidnapping, and 2 counts of threats to bomb or injure property. The judge concluded that his sentence for all of these convictions resulted in a presumptive standard range sentence that was clearly excessive. And so the judge sentenced Mr. Brockie to an exceptional sentence below the standard range.

Mr. Brockie's first trial on these charges ended in a hung jury. The State elected to again put Mr. Brockie on trial. Before the second trial, the State recovered six hairs from a pair of nylons found in Mr. Brockie's truck. The resulting DNA<sup>1</sup> tests linked Mr. Brockie or his maternal relatives to the nylons.

Mr. Brockie appealed the convictions. He contended that the trial court should have suppressed some of the evidence against him and that the evidence was not sufficient to support the elements of kidnapping. *Brockie*, 2007 WL 914292, at \*3-\*4. The State cross-appealed the sentence. It contended that the so-called multiple offense policy of the SRA did not support a downward departure from a sentence within the

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<sup>1</sup> Deoxyribonucleic acid.

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presumptive range. We disagreed with Mr. Brockie but agreed with the State and remanded for resentencing. *Brockie*, 2007 WL 914292, at \*7.

On remand, the State again requested a sentence within the standard range. Mr. Brockie again requested a downward departure from the presumptive range. Specifically, he asked that the court run his sentences for the multiple kidnapping convictions concurrently. Kidnapping is a violent crime and so the court would be required to impose consecutive sentences, absent some reason to depart from the presumptive sentencing range. RCW 9.94A.589(1)(b); RCW 9.94A.535. Our opinion in his first appeal notwithstanding, Mr. Brockie has again urged the court to depart from the presumptive range because the standard range for his convictions was too high because of the multiple offense policy. The court referred to our opinion, in the first appeal, and invited Mr. Brockie to come up with some other reason to depart from the presumptive range. He could not do so, other than to cite to the general purposes of the SRA. And the court sentenced him to a standard range sentence.

#### DISCUSSION

Mr. Brockie characterizes the judge's refusal to depart from the presumptive standard range as an abuse of discretion for a couple of reasons. First, he says that the sentencing court erroneously concluded that it had no discretion to depart from the standard range sentence based on the court's reading of our opinion in his first appeal. And he notes the refusal to exercise discretionary authority is an abuse of discretion.

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*State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Next, he contends that the presumptive range required by these multiple crimes justifies a downward departure.

We review the court's decision under the so-called abuse of discretion standard of review. *State v. Tili*, 148 Wn.2d 350, 374, 60 P.3d 1192 (2003).

First, the court certainly had authority to depart from a presumptive standard range sentence by imposing concurrent sentences for violent crimes, despite a legislative mandate for consecutive sentences for these crimes. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 331, 166 P.3d 677 (2007). But the court's reasons for a downward departure must be substantial and compelling. RCW 9.94A.535; *Mulholland*, 161 Wn.2d at 329-30. Here, we have already concluded in Mr. Brockie's first appeal that the reasons were neither substantial nor compelling because Mr. Brockie did not show and the sentencing judge, accordingly, could not find that the "cumulative effects of subsequent criminal acts are nonexistent, trivial, or trifling." *Brockie*, 2007 WL 914292, at \*5.

Mr. Brockie makes two essential arguments. First, he argues that the sentencing court erred by reading our opinion in his first appeal as eliminating any exercise of discretion. We read the judge's comments differently. We did conclude that the multiple offense policy was not supported by the record and therefore was not grounds for an exceptional downward sentence. But, on remand, the sentencing court invited Mr.

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Brockie to suggest other grounds that might support an exceptional sentence. Mr. Brockie offered none.

Next, Mr. Brockie argues that the court erred when it failed to recognize that it had discretion under RCW 9.94A.535 to order that he serve his kidnapping sentences concurrently. A sentencing court may order that multiple serious violent offenses run concurrently as an exceptional sentence only if it finds that mitigating factors justify a concurrent sentence. RCW 9.94A.535; *Mulholland*, 161 Wn.2d at 329-30. The sentencing court said:

I asked [defense counsel] for some alternative theory. And he didn't give me one. He said there are many, but I didn't hear one other than the multiple offense policy.

I feel that I have no discretion [under the statute] and that I must impose the range suggested by [the deputy prosecutor] which is 812 months. If I had discretion, I would certainly exercise it. Not one of those purposes of the SRA, in my opinion, [is] satisfie[d] [by] that sentence.

Report of Proceedings (RP) at 45.

Yes, the judge made the statement that he had no discretion under the SRA but in the same breath he solicited mitigating factors for a downward departure. And Mr. Brockie offered none other than the multiple offense policy we had already rejected. The judge did not then fail to exercise his discretion here. Mr. Brockie failed to offer compelling reasons for a downward departure from the standard range.

Mr. Brockie also argued that the standard range sentence did not further the SRA's goals. However, "the purposes of the [SRA] enumerated in RCW 9.94A.010 are not in

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State v. Brockie; In re Pers. Restraint of Brockie

and of themselves mitigating circumstances. Rather, they may provide support for the imposition of an exceptional sentence once a mitigating circumstance has been identified by the trial court.” *State v. Alexander*, 125 Wn.2d 717, 730 n.22, 888 P.2d 1169 (1995). Simply citing to the purposes of the SRA is not enough. Mr. Brockie must show specific mitigating circumstances that justify a downward departure. And this he failed to do.

We therefore affirm the sentence.

#### STATEMENT OF ADDITIONAL GROUNDS

Mr. Brockie raises several additional grounds for reversal.

#### DOUBLE JEOPARDY/MERGER

He contends that his kidnapping convictions merge into his robbery convictions. We rejected this claim in Mr. Brockie’s first appeal. *Brockie*, 2007 WL 914292, at \*4; *see also State v. Louis*, 155 Wn.2d 563, 120 P.3d 936 (2005) (rejecting argument that kidnapping merges as “incidental” to robbery). And we will not revisit the issue here. *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996).

#### JURY INSTRUCTIONS

Mr. Brockie next argues that the jury instruction defining “threat” misstated the law and effectively reduced the State’s burden of proof. Specifically, he contends that a threat to bomb a building requires a showing greater than merely a threat to cause bodily injury.

Instruction 30 defined “threat” as follows:

No. 27203-6-III, 27879-4-III  
State v. Brockie; In re Pers. Restraint of Brockie

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person or to cause physical damage to the property of a person other than the actor.

Clerk's Papers (CP) at 204.

Jury instruction 30 defined "threat" according to the applicable statute. Former RCW 9A.04.110(25)(a) (1988)<sup>2</sup> defines "threat" as "to communicate, directly or indirectly the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person."

Mr. Brockie cites no authority nor does he argue that the trial court's definition of "threat" misstated the law. The instruction properly states the law set out in former RCW 9A.04.110(25)(a).

#### INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Brockie appears to claim that defense counsel was ineffective for failing to object to the "threat" jury instruction. To show ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness, and that he was prejudiced by those failures. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *State v. Wilson*, 117 Wn. App. 1, 15-16, 75 P.3d 573 (2003). But often legitimate trial strategy or tactics justify counsel's conduct. *Aho*, 137 Wn.2d at 745-46. And competence is strongly presumed. *Wilson*, 117 Wn. App. at 16.

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<sup>2</sup> Now RCW 9A.04.110(27)(a).

No. 27203-6-III, 27879-4-III  
State v. Brockie; In re Pers. Restraint of Brockie

Defense counsel's failure to object to an erroneous jury instruction may show ineffective assistance of counsel if the jury instruction prejudiced the defendant. *Id.* at 17. Again, the trial court properly defined "threat." So defense counsel's failure to object to the instruction could not amount to ineffective assistance of counsel.

Mr. Brockie also argues that his attorney was ineffective because he failed to offer alternative mitigating factors for an exceptional downward sentence. But he does not tell us what those grounds might be. Mr. Brockie merely speculates that alternatives were available. That is not helpful and certainly does not support his claim of ineffective assistance.

#### PERSONAL RESTRAINT PETITION

Mr. Brockie also filed a personal restraint petition (PRP). We consolidated it with his second appeal. To obtain relief through this procedure, he must show actual and substantial prejudice resulting from alleged constitutional errors, or for alleged nonconstitutional errors, a fundamental defect that inherently results in a miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). To avoid dismissal, the petition must be supported by facts, not merely conclusory allegations. *Id.* at 813-14.

#### ADMISSION OF PHYSICAL EVIDENCE

Mr. Brockie argues that the trial court at his second trial erred by admitting DNA test results from hairs found on nylons recovered from his truck. He contends the nylons

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State v. Brockie; In re Pers. Restraint of Brockie

were contaminated by one of the detectives during the first trial when he put his bare hand inside the nylons to show them to the jury. He further contends the nylons could have been contaminated when they were supplied to the jury during the first trial. PRP Ex. F, RP at 2-4.

To be admissible, physical evidence of a crime must be sufficiently identified and demonstrated to be in the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). The trial court has wide discretion in ruling on the admissibility of evidence. *Id.* "Factors to be considered 'include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" *Id.* (quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960)). But the proponent need not eliminate every possibility of alteration of the evidence. *Id.*

During Mr. Brockie's second trial a detective removed the same nylons from a package and testified that the nylons were in substantially the same condition as when he seized them. The hairs recovered from the nylons were identified as head hair. Mr. Brockie makes no showing that the DNA was the detective's rather than his. And he only suggests the possibility that the nylons came into contact with the other clothing items given to the jury during deliberation. A mere possibility of contamination goes to the weight, not the admissibility, of the evidence. *State v. McGinley*, 18 Wn. App. 862, 867, 573 P.2d 30 (1977).

No. 27203-6-III, 27879-4-III  
State v. Brockie; In re Pers. Restraint of Brockie

Mr. Brockie, thus, fails to show a miscarriage of justice with his argument that the State could not show the hairs were on the nylons prior to the first trial.

#### FAILURE TO RULE

Mr. Brockie next argues that the trial court abused its discretion by failing to rule on the DNA evidence before admitting it. PRP at 5. The State counters that there was no need for a ruling because there was no objection. Resp. to PRP at 9. The trial court has considerable discretion to admit evidence and did not abuse its discretion here. *See State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603 (1985).

When a trial court reserves ruling on an issue, the moving party must “again raise the issue at an appropriate time to insure that a record of the ruling is made for appellate purposes.” *State v. Noltie*, 116 Wn.2d 831, 844, 809 P.2d 190 (1991).

Here, the trial court reserved ruling on Mr. Brockie’s motion to exclude the DNA evidence found on the nylons. Mr. Brockie argued that the nylons were mishandled by the jury during the first trial and thus contaminated. The trial court reserved ruling on the motion. So Mr. Brockie had to object to the admission of the evidence during trial. *See id.* Mr. Brockie did not do so; the trial court did not abuse its discretion by not ruling on the motion. And the evidence appears to be easily admissible anyway.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

*Failure To Renew.* Mr. Brockie argues that the failure of his counsel to renew his objection to the admission of the hair evidence found on the nylons presented at trial

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State v. Brockie; In re Pers. Restraint of Brockie

constituted ineffective assistance of counsel denying him a fair trial. The State originally offered the nylons to illustrate that Mr. Brockie did, in fact, wear the nylon mask over his head during the robberies, as witnesses reported. The nylons were later tested and DNA evidence was offered by the State. Mr. Brockie's counsel objected to its admission, but did not renew his objection after the court reserved its ruling on the issue.

Mr. Brockie bears the burden of showing ineffective assistance of counsel. An ineffective assistance of counsel claim requires a showing of deficient performance with resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We start with the presumption that counsel's performance was reasonable or effective. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

Here, defense counsel did not pursue the objection and allowed the DNA evidence to come in. Mr. Brockie does not explain, nor can we see, how this amounts to deficient performance. There may be a number of reasons why an attorney would choose not to renew an objection. Mr. Brockie only shows that there was a possibility that the nylons were contaminated. His attorney, then, was not required to object to the DNA evidence where a possibility of contamination would go only to the weight of the evidence.

As for the second prong of an ineffective assistance analysis, Mr. Brockie has failed to show that the error resulted in a reasonable probability that the outcome of the trial would have been different had the hair evidence not been admitted. *Bowerman*, 115

No. 27203-6-III, 27879-4-III  
State v. Brockie; In re Pers. Restraint of Brockie

Wn.2d at 808. Mr. Brockie's assertion that the admission of the nylons and the resulting DNA testing was the *only* evidence against him in the second trial is wrong. A reasonable fact finder could have reached the same conclusions, absent the general DNA evidence, that Mr. Brockie was guilty of robbery and kidnapping.

*Failure To Investigate.* Mr. Brockie also contends his counsel's failure to investigate whether the nylons were contaminated amounted to ineffective assistance of counsel. An attorney's conduct cannot provide the basis for a claim of ineffective assistance unless "there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993) (emphasis omitted) (citing *Strickland*, 466 U.S. at 687-88).

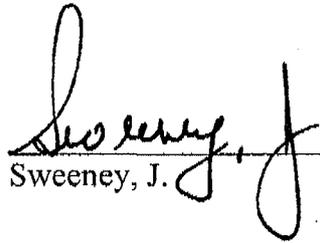
Here, Mr. Brockie fails to show that he was prejudiced by his attorney's purported investigatory failures. In fact, Mr. Brockie fails to provide any basis in the record or otherwise upon which to conclude his attorney's conduct was even deficient. Because Mr. Brockie fails to explain what exactly his counsel needed to investigate, he has failed to prove ineffective assistance of counsel.

We affirm the sentence and deny the PRP.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to

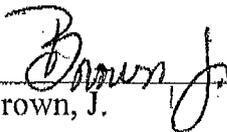
No. 27203-6-III, 27879-4-III  
State v. Brockie; In re Pers. Restraint of Brockie

RCW 2.06.040.

  
Sweeney, J.

WE CONCUR:

  
Kulik, A.C.J.

  
Brown, J.

I certify that the foregoing document  
is a full, true and correct copy of the  
original, as the same appears of record  
and on file in my office.

Dated: JULY 22, 2010  
**RENEE S. TOWNSLEY**  
*Clerk of the Court of Appeals, Division III, State of Washington*

By:   
**CASE MANAGER**

# ATTACHMENT E

I certify that this document is a true and correct copy of the original on file and of record in my office

ATTEST

JUN 10 2011

THOMAS R. FALLQUIST, COUNTY CLERK  
COUNTY OF SPOKANE, STATE OF WASHINGTON

BY Mary Cato DEPUTY

FILED

OCT 08 2010

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

FILED

OCT -7 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

### COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Application  
for Relief From Personal Restraint  
of:

BENJAMIN B. BROCKIE,

Petitioner.

#### CERTIFICATE OF FINALITY

No. 29342-4-III

Spokane County No. 02-1-00790-3

#### COURT ACTION REQUIRED

*Rejected*

The State of Washington to: The Superior Court of the State of Washington,  
in and for Spokane County

This is to certify that the Court of Appeals of the State of Washington, Division III, considered and granted an Order Rejecting CrR 7.8 Transfer, Returning Petition to Superior Court, and Closing Personal Restraint Petition motion to dismiss the Personal Restraint Petition in the above-entitled case on October 7, 2010.

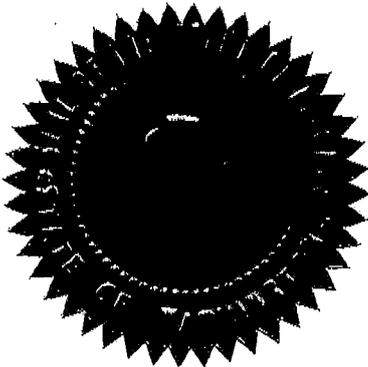
**Court Action Required:** The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the Ruling.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 7th day of October, 2010.

*Gene S. Jounelle*  
Clerk of the Court of Appeals, State of Washington  
Division III

cc: Benjamin B. Brockie  
Hon. Michael P. Price

*JPC*



FILED

OCT -7 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

**In the Matter of the Personal Restraint of:** )

**29342-4-III**

**BENJAMIN B. BROCKIE,** )  
 )  
**Petitioner.** )

**ORDER REJECTING CrR 7.8  
TRANSFER, RETURNING  
PETITION TO SUPERIOR COURT,  
AND CLOSING PERSONAL  
RESTRAINT PETITION**

Benjamin B. Brockie seeks relief from personal restraint imposed in his June 2008 Spokane County amended judgment and sentence on a conviction of two counts of first degree robbery, fifteen counts of first degree kidnapping, and two counts of threats to bomb or injure property. Mr. Brockie's convictions were affirmed in his first appeal, but this court remanded for resentencing. *See State v. Brockie*, unpub. op'n no. 22655-7-III (Wa. Ct. App. 2007). This court then affirmed his amended judgment and sentence and a consolidated personal restraint petition in *State v. Brockie*, unpub. op'n nos. 27203-6-III, 27879-4-III (Wa. Ct. App. 2010). The mandate was issued on August 24, 2010.

Mr. Brockie initially filed this petition in the superior court as a CrR 7.8 motion to vacate the judgment and sentence. He contends he was denied his Sixth Amendment right to notice of the charges against him because although he was charged with only one

No. 29342-4-III  
*PRP of Brockie*

of the alternative means of committing first degree robbery, the jury was instructed on both alternative means of committing first degree robbery. The superior court transferred the matter to this court for consideration as a personal restraint petition under CrR 7.8(c)(2), stating that “[t]his transfer will serve the ends of justice.”

Mr. Brockie is resisting the transfer of his motion to this court. As he points out, CrR 7.8(c)(2) was amended in 2007 and no longer authorizes a superior court to transfer a motion to the court of appeals for consideration as a personal restraint petition “if such transfer would serve the ends of justice.” Former CrR 7.8(c)(2) (2003). Current CrR 7.8(c)(2) states that the court must transfer a motion to the court of appeals “unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.”

The motion filed by Mr. Brockie is not barred by RCW 10.73.090 because it is timely. But the superior court in its order does not indicate whether transfer of Mr. Brockie’s motion is based on CrR 7.8(c)(2)(i) or CrR 7.8(c)(2)(ii). Accordingly, this court rejects the CrR 7.8(c)(2) transfer, returns the matter to the superior court, and closes the personal restraint petition file in this court.

DATED: October 7, 2010



**TERESA C. KULIK**  
**CHIEF JUDGE**

# ATTACHMENT F

STATE OF WASHINGTON  
SPOKANE COUNTY SUPERIOR COURT



SPOKANE COUNTY COURT HOUSE

This document is a true and correct copy  
of the original and of record in my office

JUN 10 2011

Annette S. Plese  
Superior Court Judge

Spokane County Courthouse  
1116 West Broadway Avenue  
Spokane, Washington 99260-0350  
(509) 477-4709  
dept1@spokanecounty.org

THOMAS R. FALLQUIST, COUNTY CLERK  
COUNTY OF SPOKANE, STATE OF WASHINGTON

BY Mary Cato DEPUTY

February 25, 2011

Benjamin B. Brockie  
#866117 GD-6  
Stafford Creek Correction Center  
191 Constantine Way  
Aberdeen, WA 98520

FILED

FEB 28 2011

THOMAS R FALLQUIST  
SPOKANE COUNTY CLERK

RE: State of Washington v. Benjamin B. Brockie Cause No. 02-1-00790-3

Dear Mr. Brockie,

On February 11, 2011, the above motion was transferred to my court by order of the Presiding Criminal Judge.

I have reviewed the entire court file in this matter, several letters to the Superior Court, and your motion to vacate the judgment and sentence which included several letters attached and dated in December 2010 and January 2011.

The Court then reviewed your brief entitled, "Motion to vacate judgment and sentence under CrR 7.8" and all your corresponding attachments. CrR 7.8(c)(2) states that the court must transfer a motion to the court of appeals "unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing".

After review, the Court has determined that your motion is **not** barred by RCW 10.73.090 and is timely. Therefore this Court will review your motion pursuant to the court rule.

When the Court reviews a motion that collaterally attacks a judgment and sentence, the petitioner bears the burden of demonstrating an entitlement to relief. *In re Quinn*, 154 Wn.App. 816 (Div. I, 2010). To obtain an entitlement to relief, the petitioner must show

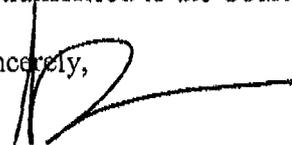
**actual and substantial** prejudice resulting from the alleged constitutional errors, for alleged non-constitutional errors there must be a fundamental defect that inherently results in a miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810-814, 792 O.2d 506 (1990). If the petitioner fails to meet this burden, the Court may deny the petitioners motion without a factual hearing, so long as the facts alleged in the affidavits do not establish grounds for relief. *Toliver v. Olsen*, 109 Wn.2d 607, 612, 746 P.2d 809(1987).

After much review of the entire court file, the Court regrets to inform you that your motion to vacate judgment and sentence is denied without a hearing, due to your failure to establish adequate grounds for relief.

The Court finds that you have *not* made a substantial showing that you are entitled to relief pursuant to CrR 7.8 and your motion is not a factual question, so no hearing was held.

Since the Court has denied your motion to vacate the judgment and sentence, after a determination that you have not made a substantial showing of entitlement your case can be transferred to the Court of Appeals.

Sincerely,

  
Judge Annette S. Plese

Cc: Court file  
DPA's office  
Court of Appeals

# ATTACHMENT G

I certify that this document is a true and correct copy of the original on file and of record in my office.

ATTEST

JUN 10 2011

THOMAS R. FALLQUIST, COUNTY CLERK  
COUNTY OF SPOKANE, STATE OF WASHINGTON

BY Mary Cate DEPUTY

FILED

MAR 11 2011

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

<u>State of Washington</u> ,	)	No. <u>02-1-00790-3</u>
	)	
Plaintiff,	)	
v.	)	NOTICE OF APPEAL
<u>Benjamin Brockie</u> ,	)	(RAP 5.3) AND RAP 2.1(a)(1), 2.2(a)(10)
	)	
Defendant.	)	
	)	

I, Benjamin Brockie, appearing pro se, seek review by the designated appellate court of the: Superior Court's denial of Defendant's Motion to Vacate Judgment and Sentence

entered on the 25 day of February, 2011.

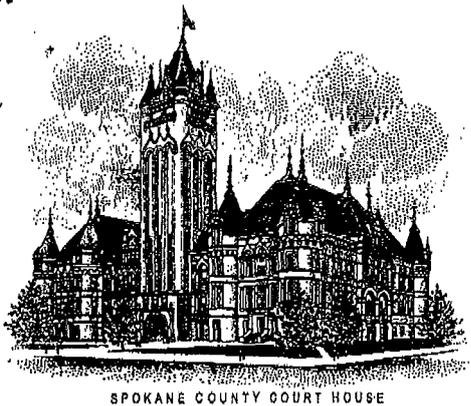
A copy of the decision is attached to this notice.

DATED THIS 3 day of March, 2011, in the City of Aberdeen, Grays Harbor County, State of Washington.

[Signature]  
Benjamin Brockie

DOC# 866117, Unit GD-06  
191 Constantine Way  
Aberdeen, WA 98520-9504

*[Handwritten initials]*



STATE OF WASHINGTON  
SPOKANE COUNTY SUPERIOR COURT

Annette S. Plese  
Superior Court Judge

Spokane County Courthouse  
1116 West Broadway Avenue  
Spokane, Washington 99260-0350  
(509) 477-4709  
dept1@spokanecounty.org

February 25, 2011

Benjamin B. Brockie  
#866117 GD-6  
Stafford Creek Correction Center  
191 Constantine Way  
Aberdeen, WA 98520

RE: State of Washington v. Benjamin B. Brockie Cause No. 02-1-00790-3

Dear Mr. Brockie,

On February 11, 2011, the above motion was transferred to my court by order of the Presiding Criminal Judge.

I have reviewed the entire court file in this matter, several letters to the Superior Court, and your motion to vacate the judgment and sentence which included several letters attached and dated in December 2010 and January 2011.

The Court then reviewed your brief entitled, "Motion to vacate judgment and sentence under CrR 7.8" and all your corresponding attachments. CrR 7.8(c)(2) states that the court must transfer a motion to the court of appeals "*unless* the court determines that the motion is not barred by RCW 10.73.090 and *either* (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing".

After review, the Court has determined that your motion is **not** barred by RCW 10.73.090 and is timely. Therefore this Court will review your motion pursuant to the court rule.

When the Court reviews a motion that collaterally attacks a judgment and sentence, the petitioner bears the burden of demonstrating an entitlement to relief. *In re Quinn*, 154 Wn.App. 816 (Div. I, 2010). To obtain an entitlement to relief, the petitioner must show

**actual and substantial** prejudice resulting from the alleged constitutional errors, for alleged non-constitutional errors there must be a fundamental defect that inherently results in a miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810-814, 792 O.2d 506 (1990). If the petitioner fails to meet this burden, the Court may deny the petitioners motion without a factual hearing, so long as the facts alleged in the affidavits do not establish grounds for relief. *Toliver v. Olsen*, 109 Wn.2d 607, 612, 746 P.2d 809(1987).

After much review of the entire court file, the Court regrets to inform you that your motion to vacate judgment and sentence is denied without a hearing, due to your failure to establish adequate grounds for relief.

The Court finds that you have *not* made a substantial showing that you are entitled to relief pursuant to CrR 7.8 and your motion is not a factual question, so no hearing was held.

Since the Court has denied your motion to vacate the judgment and sentence, after a determination that you have not made a substantial showing of entitlement your case can be transferred to the Court of Appeals.

Sincerely,



Judge Annette S. Plese

Cc: Court file  
DPA's office  
Court of Appeals

# ATTACHMENT H

I certify that this document is a true and correct copy of the original on file and of record in my office

FILED

NOV 22 2002

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

ATTEST

JUN 10 2011

THOMAS R. FALLQUIST, COUNTY CLERK  
COUNTY OF SPOKANE, STATE OF WASHINGTON

BY Mary Cals DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON

Plaintiff,

v.

BENJAMIN B. BROCKIE  
WM 10/31/81

Defendant(s).

) AMENDED  
) INFORMATION

) No. 02-1-00790-3  
) LARRY D. STEINMETZ  
) Deputy Prosecuting Attorney

) PA# 02-9-08851-0  
) RPT# CT I - III: 002-01-0311016  
) CT IV - IX: 002-02-0053897  
) CT X - XXII: 002-02-0065220  
) CT XXIII: 002-02-0068115  
) RCW CT I, IV, X: 9A.56.200(1)(B)-F (#68305)  
) CT II - III, V - VIII, XI - XXI:  
) 9A.40.020(1)(B)-F (#46503)  
) CT IX, XXII: 9.61.160-F (#12011)  
) CT XXIII: 9A.56.200(1)(B)AT-F  
) (9A.28.020(1)) (#68306)  
) (AMINF)

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

COUNT I: FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about October 13, 2001, with the intent to commit theft, did unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of MATTHEW M. MCCALL, against such person's will, by use or threatened use of immediate force, violence and fear of injury to MATTHEW M. MCCALL, and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,

AMENDED INFORMATION  
AMINF

Page 1

2 COUNT II: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about October 13, 2001, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct MATTHEW M. MCCALL,

3 COUNT III: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about October 13, 2001, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct LEAH N. SCARCELLO,

4 COUNT IV: FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about February 22, 2002, with the intent to commit theft, did unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of ANGELA THURMAN (INLAND NORTHWEST BANK), against such person's will, by use or threatened use of immediate force, violence and fear of injury to ANGELA THURMAN (INLAND NORTHWEST BANK), and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,

5 COUNT V: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about February 22, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct SHARLENE W. WIDMERE,

6 COUNT VI: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about February 22, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct DIANE L. ALFANO,

7 COUNT VII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about February 22, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct TRACY KAY GAYLORD,

8 COUNT VIII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about February 22, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct KIMBERLY JOLENE BOVA,

9 COUNT IX: THREATS TO BOMB OR INJURE PROPERTY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about February 22, 2002, did threaten to bomb or otherwise injure a building, common carrier, or structure, located at 1021 East Hawthorne Road,

10 COUNT X: FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about March 05, 2002, with the intent to commit theft, did unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of STEVE OLSON (SAFEWAY FEDERAL CREDIT UNION), against such person's will, by use or threatened use of immediate force, violence and fear of injury to STEVE OLSON (SAFEWAY FEDERAL CREDIT UNION), and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,

*new 11* COUNT XI: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct STEVE OLSON,

*new 12* COUNT XII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct NORMA KERR,

*new 13* COUNT XIII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct SHARON STROBRIDGE,

*new 14* COUNT XIV: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct ANNA C. SCHULTZ,

*new 15* COUNT XV: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct JEANETTE LANGTON,

*new 16* COUNT XVI: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct KRISTIN M. BACON,

*new 17* COUNT XVII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct DARCIE G. WOLVERTON,

*new 18* COUNT XVIII: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct YVONNE PROCTOR,

*new 19* COUNT XIX: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct WENDY K. SPOERL,

*new 20* COUNT XX: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct CARON C. LENNON,

*new 21* COUNT XXI: KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant, BENJAMIN B. BROCKIE, on or about March 05, 2002, did, with intent to facilitate commission of a felony or flight thereafter, intentionally abduct PAMELA A. LEFFLER,

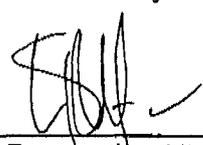
*new 22* COUNT XXII: THREATS TO BOMB OR INJURE PROPERTY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about March 05, 2002, did

Spokane County Prosecuting Attorney  
County-City Public Safety Building  
Spokane, WA 99260

threaten to bomb or otherwise injure a building, common carrier, or structure, located at 504 East North Foothills Drive,

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COUNT XXIII: ATTEMPTED FIRST DEGREE ROBBERY, committed as follows: That the defendant, BENJAMIN B. BROCKIE, in the State of Washington, on or about March 08, 2002, with intent to commit the crime of FIRST DEGREE ROBBERY as set out in RCW 9A.56.200, committed an act which was a substantial step toward that crime, by attempting, with the intent to commit theft, to unlawfully take and retain personal property, lawful U.S. currency, from the person and in the presence of A BANK EMPLOYEE (STERLING SAVINGS BANK), against such person's will, by use or threatened use of immediate force, violence and fear of injury to A BANK EMPLOYEE (STERLING SAVINGS BANK), and in the commission of and immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon,



Deputy Prosecuting Attorney  
WSBA # 20635

<b>DEFENDANT INFORMATION:</b>	BENJAMIN B. BROCKIE	
Address:	4001 N. LINCOLN ST., SPOKANE, WA 99205-1223	
Height:	6'02"	Weight: 280
Eyes:	Bro	DOL #:
SID #:	020492056	DOC #:
		Hair: Blk
		State:
		FBI NO. 481238VB6

# ATTACHMENT I

I certify that this document is true and correct copy  
of the original on file and of record in my office

ATTEST

JUN 10 2011

THOMAS R. FALLQUIST, COUNTY CLERK  
COUNTY OF SPOKANE, STATE OF WASHINGTON

BY: Mary Cab DEPUTY

FILED

NOV 20 2003

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR SPOKANE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

BENJAMIN B. BROCKIE,

Defendant,

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)

NO. 2002-1-00790-3

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COURTS INSTRUCTIONS TO THE JURY

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November 19, 2003



Judge Robert D. Austin

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner

while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2.

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 3.

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 4

The defendant is charged by Information with the crimes of first degree robbery under Counts 4, and 10, attempted first degree robbery under Count 23, first degree kidnapping under Counts 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 and threats to bomb or injure property under Counts 9 and 22 .

INSTRUCTION NO. 5

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 6.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

INSTRUCTION NO. 7.

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

INSTRUCTION NO. 8.

A person commits the crime of robbery in the first degree when in the commission of a robbery he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon.

INSTRUCTION NO. 9.

To convict the defendant of the crime of robbery in the first degree in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 22nd day of February, 2002, the defendant unlawfully took personal property from the person or in the presence of Angela Thurman (Inland Northwest Bank);

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to the person or property of another;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts the defendant was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

A person commits the crime of attempted first degree robbery when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 11.

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

INSTRUCTION NO. 12.

Wrongfully obtains means to take wrongfully the property or services of another.

INSTRUCTION 13.

The term "deadly weapon" includes any firearm, whether loaded or not.

INSTRUCTION NO. 14.

A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to facilitate the commission of a first or second degree robbery.

INSTRUCTION NO. 15

Abduct means to restrain a person by using or threatening to use deadly force.

INSTRUCTION NO. 16.

Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty. Restraint is without consent if it is accomplished by physical force, intimidation or deception.

INSTRUCTION NO. 17.

The crime of first degree kidnapping does not require movement of the alleged victim of the crime.

INSTRUCTION NO. 18.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of first degree kidnapping necessarily includes the lesser crime of unlawful imprisonment.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

INSTRUCTION NO. 19.

A person commits the crime of unlawful imprisonment when he or she knowingly restrains another person by restricting that person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty. The restraint is without consent if it is accomplished by physical force, intimidation or deception.

INSTRUCTION NO. 20.

To convict the defendant of the crime of kidnapping in the first degree in Count 5, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 22nd day of February, 2002, the defendant intentionally abducted Sharlene Widmere (Inland Northwest Bank);
- (2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

To convict the defendant of the crime of unlawful imprisonment in Count 5, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 22<sup>nd</sup> day of February, 2002, the defendant knowingly restrained Sharlene Widmere (Inland Northwest Bank) by restricting that person's movements in a manner which interfered substantially with that person's liberty;

(2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception.

(3) That such restraint was without legal authority; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 22.

To convict the defendant of the crime of kidnapping in the first degree in County 6, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 22<sup>nd</sup> day of February, 2002, the defendant intentionally abducted Diane Alfano (Inland Northwest Bank);

(2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 23

To convict the defendant of the crime of unlawful imprisonment in Count 6, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 22<sup>nd</sup> day of February, 2002, the defendant knowingly restrained Diane Alfano (Inland Northwest Bank) by restricting that person's movements in a manner which interfered substantially with that person's liberty;
- (2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception.
- (3) That such restraint was without legal authority; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 24.

To convict the defendant of the crime of kidnapping in the first degree in Count 7, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 22<sup>nd</sup> day of February, 2002, the defendant intentionally abducted Tracy Gaylord (Inland Northwest Bank);
- (2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25.

To convict the defendant of the crime of unlawful imprisonment in Count 7, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 22<sup>nd</sup> day of February, 2002, the defendant knowingly restrained Tracy Gaylord (Inland Northwest Bank) by restricting that person's movements in a manner which interfered substantially with that person's liberty;

(2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception.

(3) That such restraint was without legal authority; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 26

To convict the defendant of the crime of kidnapping in the first degree in Count 8, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 22<sup>nd</sup> day of February, 2002, the defendant intentionally abducted Kimberly Bova (Inland Northwest Bank);
- (2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 27.

To convict the defendant of the crime of unlawful imprisonment in Count 8, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 22<sup>nd</sup> day of February, 2002, the defendant knowingly restrained Kimberly Bova (Inland Northwest Bank) by restricting that person's movements in a manner which interfered substantially with that person's liberty;

(2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception.

(3) That such restraint was without legal authority; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 28.

To convict the defendant of threatening to bomb or injure property in Count 9, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 22<sup>nd</sup> day of February, 2002, the defendant threatened to bomb or otherwise injure a building or structure;
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that elements 1 and 2 have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 29.

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person or to cause physical damage to the property of a person other than the actor.

INSTRUCTION NO. 30.

To convict the defendant of the crime of robbery in the first degree in Count 10, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant unlawfully took personal property from the person or in the presence of Steve Olson (Safeway Federal Credit Union);
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property of another;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5) That in the commission of these acts the defendant was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon; and
- (6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 31.

To convict the defendant of the crime of kidnapping in the first degree in Count 11, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 5<sup>th</sup> day of March, 2002, the defendant intentionally abducted Steve Olson (Safeway Federal Credit Union);
- (2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 32

To convict the defendant of the crime of unlawful imprisonment in Count 11, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant knowingly restrained Steve Olson (Safeway Federal Credit Union) by restricting that person's movements in a manner which interfered substantially with that person's liberty;
- (2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception;
- (3) That such restraint was without legal authority; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 33.

To convict the defendant of the crime of kidnapping in the first degree in Count 12, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 5<sup>th</sup> day of March, 2002, the defendant intentionally abducted Norma Kerr (Safeway Federal Credit Union);

(2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 34.

To convict the defendant of the crime of unlawful imprisonment in Count 12, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant knowingly restrained Norma Kerr (Safeway Federal Credit Union) by restricting that person's movements in a manner which interfered substantially with that person's liberty;

(2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception

(3) That such restraint was without legal authority; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 35

To convict the defendant of the crime of kidnapping in the first degree in Count 13, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 5<sup>th</sup> day of March, 2002, the defendant intentionally abducted Sharon Strobridge (Safeway Federal Credit Union);
- (2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 36

To convict the defendant of the crime of unlawful imprisonment in Count 13, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant knowingly restrained Sharon Stobridge (Safeway Federal Credit Union) by restricting that person's movements in a manner which interfered substantially with that person's liberty;

(2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception.

(3) That such restraint was without legal authority; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 37.

To convict the defendant of the crime of kidnapping in the first degree in Count 14, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 5<sup>th</sup> day of March, 2002, the defendant intentionally abducted Anna Schultz (Safeway Federal Credit Union);

(2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 38

To convict the defendant of the crime of unlawful imprisonment in Count 14, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant knowingly restrained Anna Schultz (Safeway Federal Credit Union) by restricting that person's movements in a manner which interfered substantially with that person's liberty;
- (2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception;
- (3) That such restraint was without legal authority; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 39.

To convict the defendant of the crime of kidnapping in the first degree in Count 15, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 5<sup>th</sup> day of March, 2002, the defendant intentionally abducted Jeanette Langton (Safeway Federal Credit Union);
- (2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 40

To convict the defendant of the crime of unlawful imprisonment in Count 15, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant knowingly restrained Jeanette Langton (Safeway Federal Credit Union) by restraining that person's movements in a manner which interfered substantially with that person's liberty;
- (2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception;
- (3) That such restraint was without legal authority; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 41

To convict the defendant of the crime of kidnapping in the first degree in Count 16, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 5<sup>th</sup> day of March, 2002, the defendant intentionally abducted Kristin Bacon (Safeway Federal Credit Union);

(2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 42.

To convict the defendant of the crime of unlawful imprisonment in Count 16, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant knowingly restrained Kristin Bacon (Safeway Federal Credit Union) by restricting that person's movements in a manner which interfered substantially with that person's liberty;

(2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception.

(3) That such restraint was without legal authority; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 43

To convict the defendant of the crime of kidnapping in the first degree in Count 17, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 5<sup>th</sup> day of March, 2002, the defendant intentionally abducted Darcie Wolverton (Safeway Federal Credit Union);

(2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 44

To convict the defendant of the crime of unlawful imprisonment in Count 17, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant knowingly restrained Darcie Wolverton (Safeway Federal Credit Union) by restricting that person's movements in a manner which interfered substantially with that person's liberty;
- (2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception;
- (3) That such restraint was without legal authority; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 45

To convict the defendant of the crime of kidnapping in the first degree in Count 18, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 5<sup>th</sup> day of March, 2002, the defendant intentionally abducted Yvonne Proctor (Safeway Federal Credit Union);
- (2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 46

To convict the defendant of the crime of unlawful imprisonment in Count 18, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant knowingly restrained Yvonne Proctor (Safeway Federal Credit Union) by restricting that person's movements in a manner which interfered substantially with that person's liberty;

(2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception;

(3) That such restraint was without legal authority; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 47

To convict the defendant of the crime of kidnapping in the first degree in Count 19, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 5<sup>th</sup> day of March, 2002, the defendant intentionally abducted Wendy Spoerl (Safeway Federal Credit Union);

(2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and]

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 48

To convict the defendant of the crime of unlawful imprisonment in Count 19, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant knowingly restrained Wendy Spoerl (Safeway Federal Credit Union) by restricting that person's movements in a manner which interfered substantially with that person's liberty;

(2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception;

(3) That such restraint was without legal authority; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 49.

To convict the defendant of the crime of kidnapping in the first degree in Count 20, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 5<sup>th</sup> day of March, 2002, the defendant intentionally abducted Caron Lennon (Safeway Federal Credit Union);

(2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 50.

To convict the defendant of the crime of unlawful imprisonment in Count 20, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant knowingly restrained Caron Lennon (Safeway Federal Credit Union) by restricting that person's movements in a manner which interfered substantially with that person's liberty;

(2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception;

(3) That such restraint was without legal authority; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 51

To convict the defendant of the crime of kidnapping in the first degree in Count 21, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 5<sup>th</sup> day of March, 2002, the defendant intentionally abducted Pamela Leffler (Safeway Federal Credit Union);

(2) That the defendant abducted that person with intent to facilitate the commission of a first or second degree robbery; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 52

To convict the defendant of the crime of unlawful imprisonment in Count 21, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant knowingly restrained Pamela Leffler (Safeway Federal Credit Union) by restricting that person's movements in a manner which interfered substantially with that person's liberty;

(2) That such restraint was without that person's consent or was accomplished by physical force, intimidation or deception;

(3) That such restraint was without legal authority; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 53

A person commits the crime of threatening to bomb or injure property when he or she threatens to bomb or otherwise injure any building or structure.

INSTRUCTION NO. 54

To convict the defendant of threatening to bomb or injure property in Count 22, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 5<sup>th</sup> day of March, 2002, the defendant threatened to bomb or otherwise injure a building or structure; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that elements 1 and 2 have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 56.

A person commits the crime of attempted first degree robbery when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 56

To convict the defendant of the crime of attempted first degree robbery in Count 23, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 8<sup>th</sup> day of March, 2002, the defendant did an act which was a substantial step toward the commission of first degree robbery;
- (2) That the act was done with the intent to commit first degree robbery; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 57

A substantial step is conduct which strongly indicated a criminal purpose and which is more than mere preparation.

INSTRUCTION NO. 58

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 59

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict forms for Counts 4, 9, 10, 22, and 23, and two verdict forms A and B, for Counts 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21.

For Counts 4, 9, 10, 22, and 23, you must fill in the blank provided in the verdict form with the words "not guilty" or the word "guilty"; according to the decision you reach.

When completing the verdict forms for Counts 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 you will first consider the crime of 1<sup>st</sup> degree kidnapping as charged. If you unanimously agree on a verdict, you must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in verdict form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of 1<sup>st</sup> degree kidnapping, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of unlawful imprisonment. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty" according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in verdict form B.

Since this is a criminal case, all twelve of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your

decision. The foreman will sign it and notify the bailiff who will conduct you into court to declare your verdict.

FILED

JUN 16 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

In re Personal Restraint	)	
Petition of:	)	
	)	NO. 29756-0-III
BENJAMIN B. BROCKIE,	)	
	)	CERTIFICATE OF MAILING
Petitioner.	)	
	)	

86241-9

I certify under penalty of perjury under the laws of the State of Washington that on June 16, 2011, I mailed a true and correct copy of the Response to Personal Restraint Petition, addressed to:

Benjamin B. Brockie  
DOC #866117  
191 Constantine Way  
Aberdeen, WA 98520

6/16/2011  
(Date)

Spokane, WA  
(Place)

*Kathleen R. Owens*  
(Signature)