Nos. 20-3186 & 20-3206

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TIMOTHY SUMPTER,
Petitioner-Appellee/Cross-Appellant,

v.

STATE OF KANSAS,
Respondent-Appellant/Cross-Appellee.

On Appeal and Cross-Appeal from the United States District Court
for the District of Kansas, (No. 5:19-CV-03267-JWL)
Honorable John W. Lungstrum, United States District Judge

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER-APPELLEE/CROSS-APPELLANT AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae National Association of Criminal Defense Lawyers submits the following corporate disclosure statement, as required by Fed. R. App. P. 26.1 and 29(c): NACDL is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Respectfully submitted,

DATED: April 16, 2021

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association working on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, the NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

All parties have consented to the filing of this brief.

[1] Counsel for amicus state that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

A jury convicted Appellee-Defendant ("Defendant") under the 1969 Kansas aggravated kidnapping statute, Kan. Stat. Ann. § 21-3421. Section 21-3421 defines "kidnapping" for aggravated kidnapping purposes using the same definition set forth in Section 21-3420. Thus, the heart of any Section 21-3421 prosecution lies in the interpretation, construction, and application of Section 21-3420.

The issues raised are (i) whether the Kansas Supreme Court's decision in *State v. Buggs* is unambiguous and notorious in Section 21-3421 and Section 21-3420 prosecutions in which the alleged *actus* of "taking or confining" may be found incidental to non-kidnapping crimes, (ii) whether constitutional due process requires a *Buggs* defense be raised in so-called "multiplicative prosecutions" under Section 21-3421 and Section 21-3420, and (iii) whether Section 21-3420 violates due process because it was unconstitutionally applied.

Since 1976, *Buggs* is the leading case articulating the State's burden in multiplicative prosecution cases under the Kansas kidnapping statutes (Sections 21-3420 and 21-3421). It is clear and notorious. Because *Buggs* has been the leading case for over 40 years, due process requires defense counsel to raise a *Buggs* defense. Counsel must raise a *Buggs* defense when the "taking or confining" acts may be construed as merely incidental to any non-kidnapping offense. And

ultimately, Section 21-3420 is facially vague, which has also led to its unconstitutional application in violation of due process.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE KANSAS KIDNAPPING STATUTES AND *STATE v. BUGGS* IS CLEAR, NOTORIOUS AND UNEQUIVOCAL.

The Kansas kidnapping laws have always provided that confinement may support a conviction under the Kansas kidnapping statutes. *State v. Brown*, 312 P.2d 832, 841 (Kan. 1957)("The gist of the offense under the old law was the unlawful seizure, taking, detention, concealment or carrying away of the kidnaped [*sic*] person"); Kan. Stat. Ann. § 21-449 (repealed 1969)("without lawful authority, seize, confine")(herein, the "1935 Statute").

In 1969, Kansas repealed its 1935 Statute, drawing on the Model Penal Code (MPC) as inspiration for new kidnapping statutes. But the Kansas statute departed from the MPC in two respects. First, the MPC treated kidnapping as a single offense of varying degrees. Model Penal Code § 212.1 (1962). Kansas created kidnapping and aggravated kidnapping as separate offenses. Kan. Stat. Ann. §§ 21-3420, 3421 (1969)(repealed 2010)(herein, the "1969 Statutes"). Second, the MPC required confinement be "for a substantial period in a place of isolation." Kansas did not. The 1969 Statutes merely required a more general "confining." *State v. Buggs*, 547 P.2d 720, 730 (Kan. 1976); 1969 Statutes at § 21-3420. In 2010, new

legislation combined kidnapping and aggravated kidnapping into two sub-sections of the same statute but retained black letter of the 1969 Statutes. Kan. Stat. Ann. § 21-5408 (2010)(herein, the "2010 Statute"). Kansas courts continue to apply pre-2010 precedent to post-2010 offenses. *Cf. State v. Harris*, 453 P.3d 1172, 1177-1178 (Kan. 2019)(applying pre-2010 authorities to prosecutions charged under Kan. Stat. App. § 21-5408).

Defendant was charged and convicted under Section 21-3421 of the 1969 Statutes which adopts the definition of kidnapping set forth in Section 21-3420. Therefore, the test for whether an aggravated kidnapping occurred under Section 21-3421 is whether a kidnapping occurred under Section 21-3420.

However, Section 21-3420 of the 1969 Statutes and its progenitor, Section 21-499 of the 1935 Statute, created a problem termed "multiplicative prosecution." Section 21-3420 of the 1969 Statute defined "kidnapping" under sub-sections (b) and (c) as "the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . (b) [t]o facilitate flight or the commission of any crime; or (c) [t]o inflict bodily injury or to terrorize the victim or another." Kan. Stat. Ann. § 21-3420. This naturally leads to problems in prosecution because many *non*-kidnapping offenses necessarily and expectedly involve some form of taking or confining of others. Without construction or

interpretation, this language necessarily elevated *every* such non-kidnapping offense into the independent crime of kidnapping.

Kansas courts dealt with this problem as it arose in connection with Section 21-499 of the 1935 Statute. Kansas courts rejected arguments to limit construction and application of Section 21-499 only to those cases in which "pure" kidnapping was at issue. *State v. Curreri*, 213 P.3d 1084, 1087 (Kan. App. 2009). However, by the 1970s, two things had happened to cause the Kansas Supreme Court to reconsider application of the statute. First, the legislature repealed and replaced Section 21-499 with Section 21-3420 in 1969, *supra*. Second, a national trend was growing in which many states were reconsidering their application of kidnapping statutes in multiplicative prosecution cases, *infra*.

In light of those developments, the Kansas Supreme Court took up on review the multiplicative prosecution issue under the Kansas kidnapping statutes. And in 1976, the Kansas Supreme Court published its watershed decision in *State v. Buggs* on prosecutions for kidnapping and aggravated kidnapping brought under Section 21-3420(b) and (c). 547 P.2d 720 (Kan. 1976).

The *Buggs* Court noted a national trend "limit[ing] the scope of the kidnapping statute, with its very substantially more severe penal consequences, to true situations and not to apply it to crimes which are essentially robbery, rape or assault and in which some confinement or asportation occurs as a subsidiary

incident." *Id*. at 727-728. Citing developments from California, Michigan, and New York state courts, the *Buggs* Court stated:

> [a] standstill robbery on the street is not a kidnapping; the forced removal of the victim to a dark alley for robbery is. The removal of a rape victim from room to room within a dwelling solely for the convenience and comfort of the rapist is not a kidnapping; the removal from a public place to a place of seclusion is. The forced direction of a store clerk to cross the store to open a cash register is not a kidnapping; locking him in a cooler to facilitate escape is.

Id. at 731.

In response, the *Buggs* Court created a three-prong test to determine when a confinement or taking implicit in the commission of a non-kidnapping offense crosses the line and supports the independent offense of kidnapping. The *Buggs* test is clear and unambiguous. When the State charges kidnapping, and the accused defends on grounds the "taking or confining" element is not satisfied because the *actus* alleged was merely incidental to a non-kidnapping offense (*e.g.* robbery, sexual assault), the State meets its burden of proving the "taking or confining" element beyond a reasonable doubt *only* if the State proves:

> (1) the taking or confinement is not "slight, inconsequential and merely incidental" to the non-kidnapping offense,
>
> (2) the taking or confinement is not "of the kind inherent in the nature of" the non-kidnapping offense, and
>
> (3) the taking or confinement has "some significance independent of" the non-kidnapping offense that makes the non-kidnapping offense "substantially easier of commission or substantially lessens the risk of detection."

Id. at 731. These are intensive fact inquiries. But they are obvious in any case in which the conduct alleged to constitute the *actus* of "taking or confining" may reasonably be found incidental to a non-kidnapping offense. If the record fails to reflect evidence supporting all three *Buggs* prongs, such an evidentiary failure is fatal to the kidnapping prosecution.

This has been the unambiguous and unequivocal law on Section 21-3420 and Section 21-3421 offenses since 1976. And the Kansas Supreme Court has explicitly, consistently and regularly for over 40 years reaffirmed *Buggs* as the leading case in multiplicative prosecution situations. *State v. Cabral*, 619 P.2d 1163, 1166 (Kan. 1980)("*Buggs* is the leading Kansas case"); *State v. Fisher*, 891 P.2d 1065, 1071 (Kan. 1995)("*Buggs* is the leading Kansas case"); *State v. Burden*, 69 P.3d 1120, 1123 (Kan. 2003)("*Buggs* is the leading Kansas case").

II. DUE PROCESS REQUIRES A *BUGGS* DEFENSE TO BE RAISED IN MULTIPLICATIVE PROSECUTION SITUATIONS.

The Fifth Amendment and Fourteenth Amendment mandate that no state may deprive a person "of life, liberty, or property, without due process of law." U.S. Const., amts. v, xiv. It has long been understood that constitutional due process requires the State to prove *each* element of a crime beyond a reasonable doubt in order to convict. *In re Winship*, 397 U.S. 358, 364 (1970); *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993); *United States v. Gaudin*, 515 U.S. 506,

510 (1995); *Taylor v. United States*, 136 S. Ct. 2074, 2080 (2016)("There is no question that the Government in a Hobbs Act prosecution must prove beyond a reasonable doubt that the defendant engaged in conduct that satisfies the Act's commerce element").

In any multiplicative prosecution under Section 21-3420 or 3421, the *Buggs* test is *necessarily* implicated. Just as lack of entrapment is an implied element of every criminal prosecution, *United States v. Duran*, 133 F.3d 1324, 1331 (10th Cir. 1998), the *Buggs* prongs are material to the factual issue of a "taking or confining." While not statutory, they are no less implied as an element of the Kansas kidnapping offenses than is entrapment. Due process permits a conviction to stand *only* when the State proves *every* element of a crime beyond a reasonable doubt. And *Buggs* requires the State to prove each prong of the *Buggs* test to take a "taking or confining" out of a non-kidnapping offense and turn it into an independent crime. Therefore, due process requires the State to prove satisfaction of the *Buggs* test beyond a reasonable doubt. Furthermore, failure to do so necessarily puts the criminally accused at risk of greater loss of liberty.

The reason the *Buggs* Court reviewed what had been well-established Kansas law by 1976 was because under the 1969 Statutes, kidnapping and aggravated kidnapping carried "very substantially more severe penal consequences" than the underlying offenses alleged for purposes of establishing a

Section 20-3420(b) or (c) offense, *supra*. *Buggs*, 547 P.2d at 727-728. Thus, due process demands defense counsel raise a *Buggs* defense in multiplicative prosecution situations under the Kansas kidnapping statutes.

III. KAN. STAT. ANN. § 21-3420 IS RIFE WITH DUE PROCESS PROBLEMS DUE TO UNCONSTITUTIONALLY VAGUE LANGUAGE.

A. Constitutional Due Process.

The Fifth Amendment mandates that "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const., amt. v. The Fourteenth Amendment mandates that no State may "deprive any person of life, liberty, or property, without due process of law." U.S. Cons., amt. xiv. The Supreme Court has long held that criminal statutes lacking sufficient definiteness or specificity "may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *Musser v. Utah*, 333 U.S. 95, 97 (1948). Such vagueness may be from uncertainty in regard to persons brought within the scope of a criminal statute "or in regard to the applicable tests to ascertain guilt." *Id*. at 97.

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented,

> laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attended dangers of arbitrary and discriminatory applications."

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). Laws defining criminal offenses must do so with "sufficient definiteness that ordinary people can understand what conduct is prohibited," so as to be able to navigate with certainty, no matter how close, between the rock and the shore of unlawful conduct, "and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Under Section 21-3420, kidnapping may be achieved only when the alleged "taking or confining" is achieved "by force, threat or deception." 1969 Statutes, Kan. Stat. Ann. § 21-3420. However, the Kansas legislature failed to statutorily define any of these phrases. Specifically in regard to "confining," it has been demonstrated to have no reliable definition. *Cf. State v. Spain*, No. 77,108, 1998 Kan. App. Unpub. LEXIS 737 at *5 (Kan. App. 1998)(unpublished)(jury requested and never received clarification on definition of "confining," as used in Section 20-3420). This leaves the statute open to an extraordinarily broad range of interpretations, constructions and applications, so much so that no person could reasonably be said to have notice of what conduct they may be charged with. The legislature's failure raises significant due process concern with regard to the application of Section 21-3420 in multiplicative prosecution cases like this.

B. Section 21-3420 was unconstitutionally applied because the victim was never factually confined.

At first glance, the phrase "confining" seems straightforward. However, its common meaning is simply "to keep within limits." *The American Heritage Dictionary* 308 (Margery S. Berube, dir. ed. ops., 2nd College ed., Houghton Mifflin Co. 1982). But what about cases in which a victim knows of a means of egress from the geographic space in which she is kept? In this case, J.B. *knew* of a factual means of egress from the interior of her vehicle. The undisputed facts demonstrate that *after* she locked herself inside, she subsequently *opened the door* to her vehicle. Common sense suggests that by opening her own car door (i) there was a means of egress from the interior, and (ii) she was aware of such means of egress. She was *not* factually confined. Thus, the question arises whether she was *legally* confined.

In connection to kidnapping offenses, Kansas law simply does not answer this question. Nor do most states. However, Kansas provides a potential means of resolving this matter. In 2014, the Kansas Supreme Court held that "criminal restraint and kidnapping involved 'substantially the same over conduct – restraint of the victim's movement or confinement.'" *State v. Ramirez*, 328 P.3d 1075, 1078 (Kan. 2014). This suggests that simply as a means of ascertaining a statutory definition of "confining," it would be reasonable to look at the meaning of "confinement" as used in Kansas' criminal restraint statute. Unfortunately, Kansas

state courts have yet to review the definition of "confinement" as used in its criminal restraint statute. Other states have. On one hand, Kansas could adopt the majority rule that a victim's knowledge of a reasonable means of egress defeats any finding of confinement. *Alam v. State*, 776 P.2d 345, 350 (Alaska Ct. App. 1989); *State v. C.V.C.*, 450 N.W.2d 463, 466-467 (Wis. 1989); *State v. Tatreau*, 126 N.W.2d 157, 161 (Neb. 1964); *State v. Dillon*, 456 P.3d 1199, 1205 (Wash. App. 2020). On the other hand, Kansas could adopt the minority rule that such knowledge on the part of the victim is *not* a defense to a confinement element. *See Potts v. State*, 955 So. 2d 913, 919 (Miss. Ct. App. 2007).

If J.B. was physically able to leave, then she was – by definition – *not* confined. However, she was found "confined" simply because the Defendant was present outside of the car. Simply put, the statute is so vague that it permitted arbitrary enforcement in this case, especially in light of the victim's undisputed means of physically leaving the geographic area to which she allegedly was confined. And in light of *Buggs*, which was intended to limit application of kidnapping statutes to situations in which traditional notions of kidnapping were intended to be the limits of the offense, one clear theme emerges: Section 20-3420 was arbitrarily applied to obtain a conviction in this case because the victim was not factually confined.

C. Section 21-3420 was unconstitutionally applied because the Defendant did not factually confine the victim.

Confinement is "the *act* of imprisoning or restraining." *Black's Law Dictionary* 340 (Bryan A. Garner ed., 9th ed., West 2009)(emphasis added). But an act by *who*? Notions of kidnapping traditionally require the *criminally accused* to do the imprisoning or restraining. *See Tatreau*, 126 N.W.2d at 161 ("means to confine another person against his will within boundaries *fixed by the actor*"). In other words, the State must prove a causal nexus between the *criminally accused's* conduct and the restriction on physical liberty of the victim. In this case, however, the facts merely demonstrate a causal nexus between the *victim's* conduct and her restriction on physical liberty. In this case, the Defendant did not confine J.B. to the vehicle interior. She confined herself.

The undisputed facts of this case: the confines at issue were the interior of J.B.'s vehicle. Not the parking space her car was in. Not the parking lot her car was in. Not Old Town, the heavily-trafficked nightlife section of Wichita her car was in. The act of "confining" at issue was the Defendant's physical display to her of her car keys from his position outside the vehicle. *Sumpter v. State*, 433 P.3d 201, 2019 Kan. App. Unpub. LEXIS 26 at *12-13 (Kan. App. 2019)(herein, *Sumpter II*). However, the question under Kansas law remains: who did the *factual* confining?

The undisputed facts remain that *prior* to his display of the keys, *she* "force[d] him out [of the vehicle] and lock[ed] the car." *State v. Sumpter,* 2013 Kan. App. Unpub. LEXIS 1062 at *4 (Kan. App. 2013)(herein *Sumpter I*). In other words, *she* expelled him from the vehicle. *She* closed the door. *She* locked the doors. *She* remained in the vehicle despite a factual means of egress, *i.e.* opening the door, *supra*. In other words, any acts of actual confinement were not perpetrated by the Defendant. They were caused by J.B. In other words, the Defendant did not *confine* J.B. so much as J.B. *barricaded* herself within the confines of her vehicle. Any actual confinement of J.B. into that physical space was self-imposed.

Section 21-3420 is so vague that it invited arbitrary application in this case. And Kansas law supports this finding of vagary. For instance, in *State v. Snyder*, the Kansas Court of Appeals reversed a kidnapping conviction in a rape/kidnap case in which the victim barricaded herself inside a bathroom to escape her attacker, who remained outside some three feet away. The *Snyder* Court found that no *Buggs* confinement occurred until *after* the victim left the bathroom and the defendant forcibly pulled her *back* into the bathroom for purposes of raping her. 457 P.3d 212, 2020 Kan. App. Unpub. LEXIS 80 at *26-32 (Kan. App. 2020)(unpublished).

And in *State v. Olsman*, the Kansas Court of Appeals overturned a kidnapping conviction in another rape/kidnap case in which the victim barricaded herself inside her mobile home. 473 P.3d 937, 948 (Kan. App. 2020). Noting *Snyder*, the *Olsman* Court stated that "[r]ape through force necessarily and inherently requires confinement of the victim to a particular place where the rape occurs. After all, if the victim were allowed to leave, there would be no rape." *Id*. at 946-947.

Due process requires a would-be criminal to conform *his own* conduct to the law. It is the height of due process that no person is required to prognosticate what every victim *might* do in any set of circumstances. Any contrary holding imposes a duty on every individual to use a crystal ball on an *ad hoc* basis to determine what conduct does or does not conform to the law. By definition, that is not fair notice. And by definition, it invites arbitrary enforcement. This is exactly the type of disparate application of the law that due process prohibits. The statute permits conviction to rest only on the criminally accused's actions preventing *egress from* a confined geographic space. It does not permit conviction to rest on a victim's actions preventing *ingress into* a confined geographic space.

In this case, the statute was unconstitutionally applied because there is no causal nexus between the Defendant's conduct holding up a set of keys, without making any overt statement as to the meaning of such demonstrative

communication, and J.B. remaining in the car. She was able to open her car door. She could have opened a *different* car door and escaped through the opposite side. There is no evidence her escape from an alternate exit would have been in vain, especially in light of the fact she was in a parking lot in a well-trafficked area of town. *Sumpter II*, 2019 Kan. App. Unpub. LEXIS at *9 ("Another car fortuitously pulled up"). While J.B. may have been *motivated* to remain in the car based on the Defendant's prior effort *to attack* her, there is no indication that she was reasonably *required* to remain in the vehicle because the Defendant showed her the car keys. All findings to the contrary, thus, constitute an unconstitutional application of the statute since the alleged acts of confinement were factually caused by the victim. They were not caused by the Defendant. It was an arbitrary application.

D. Section 21-3420 was unconstitutionally applied because the Defendant's mere taunting was not "confining by force."

Under Section 21-3420, confining must be achieved either "by force, threat or deception" to sustain a conviction. 1969 Statutes, Kan. Stat. Ann. § 21-3420. In this case, the only conduct alleged to fulfill the *actus* of the crime was the Defendant standing outside of the vehicle holding J.B.'s keys where she could see them. While such so-called "taunting" *might arguably* amount to a threat, in no way may it be reasonably construed as confining by force. Any application of the

statute to these facts constitutes a stretch of credulity, and therefore an arbitrary application of the statute in violation of due process.

The only force applied in J.B.'s confinement was by her own hand, *supra*. *She* got into her own vehicle. *She* expelled him from the vehicle. *She* closed the doors. *She* locked the doors. The State certainly had fair opportunity to obtain instructions in the alternative that the jury could convict if it found confinement by force, *or* by threat, *or* by deception. But the State did not. Instead, the jury simply received an instruction that in order to convict, it had to find that the Defendant holding the keys where the victim could see them constituted "confining by force."

The phrase "force" means "to *compel* by *physical* means or legal *requirement*." *Black's Law Dictionary* at 718 (emphasis added). Obviously, the Defendant could not legally require J.B. to remain in the vehicle. Therefore, the question is whether his conduct amounted to compelling her by physical means. First, the undisputed facts demonstrate that he was not compelling her *to remain in the vehicle*; it was to compel her to *permit him entry*. (Thus, applying *Buggs*, it would only be that his conduct is subsumed into any attempt to commit sexual assault and does not stand as a separate kidnapping offense anyway). And second, the undisputed facts demonstrate that his actions constituted no *physical* means of compelling her to stay within the vehicle. Psychological means? Maybe, but arguably. But certainly not physical means. To permit any finding to suggest that

holding up keys constituted "force" would be a clear and terrifying application of the statute, and thus it does not survive due process concerns.

But even assuming, *arguendo*, that the entirety of the statute was in play vis-à-vis proper jury instructions, it remains unconstitutional as applied. In addition to force, Section 21-3420 defines kidnapping as confining "by . . . threat or deception." 1969 Statutes, Kan. State. Ann. § 21-3420. The phrase "deception" necessarily implies some form of fraud or dishonesty. *See Black's Law Dictionary* at 465 (defining "deceit" as "giving a false impression" and citing to "fraudulent misrepresentation"). It is a far cry to suggest any declarative conduct on the part of the Defendant constituted dishonesty. To say "I have your keys," or "you do not have your keys" would be true statements in this case.

And the phrase "threat" is defined as "[a] communicated intent to inflict harm or loss on another or on another's property." *Black's Law Dictionary* at 1618; *see also State v. Woolverton*, 159 P.3d 985, 993 (Kan. 2007)(a threat is a communication between the criminally accused and the victim). Certainly, the Defendant's conduct could be described as communicative conduct, but what was the meaning Defendant was "readily and clearly" trying to express? *See Woolverton*, 159 P.3d at 993. Nothing suggests it was a statement of intent to inflict harm or damage on J.B. While his *general* intent for the evening was to sexually assault J.B., there is no evidence that the specific demonstrative statement

of holding up the keys was particularly intended to communicate his specific intent to cause harm or loss to anybody. Instead, it was mere taunting: "I have your keys. You can't drive your car." To hold otherwise would invite arbitrary application of the law by allowing the general tenor of a particular set of circumstances to be substituted in as the specific intent behind any particular statement alleged to satisfy as a threat the "by force, threat or deception" element of the offense. And there is no savings or residual clause. Simply, it would invite arbitrary and disparate application from case to case. Thus, even under this hypothetical in which the jury was actually given an instruction beyond force, the finding would remain an unconstitutional application of Section 21-3420, in violation of constitutional due process.

CONCLUSION

Since 1976, *State v. Buggs* has outlined the State's evidentiary and factual burden necessary to convict when confining conduct of an alleged kidnapping is allegedly incidental to a non-kidnapping offense. *Buggs* is the notorious *starting* point for all offenses charged under Kan. Stat. Ann. § 21-3421 prior to 2011. Failure to bring a *Buggs* defense violates due process. And in this case, Section 21-3420 was unconstitutionally applied against the Defendant. For these reasons, this Court should affirm the District Court's decision overturning Sumpter's kidnapping conviction in accordance with 28 U.S.C. § 2254.

DATED: April 16, 2021

Respectfully submitted,

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/s/ Kari S. Schmidt
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NATIONAL ASSOCIATION OF
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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. P. 32(a)(7)(C)

Nos. 20-3186 & 20-3206

I certify that pursuant to Fed. R. App. P. 29(a)(5) and 32(a), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 4,622 words.

/s/ Tyler J. Emerson
Tyler J. Emerson

/s/ Kari S. Schmidt
Kari S. Schmidt

ECF CERTIFICATE

U.S. Court of Appeals Docket Numbers: 20-3186 & 20-3206

I hereby certify (1) that all privacy redactions have been made in the foregoing; (2) that the hard copy or copies of the foregoing that will be submitted to the Court is/are identical to the electronically filed version; and (3) that the foregoing has been scanned using the latest version of Webroot SecureAnywhere Endpoint Protection v.9.0.21.18, which is updated continuously, and according to the program is free of viruses and other threats.

/s/ Tyler J. Emerson
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/s/ Kari S. Schmidt
Kari S. Schmidt

CERTIFICATE OF SERVICE
When All Case Participants Are Registered For
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U.S. Court of Appeals Docket Numbers: 20-3186 & 20-3206

I hereby certify that on the 16th day of April 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tyler J. Emerson
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