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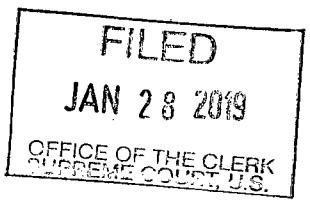

IN THE

SUPREME COURT OF THE UNITED STATES

RHEUBEN JOHNSON — PETITIONER

VS.

STATE OF KANSAS — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS OF KANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1. To determine "same offense" in a single-statute case, regarding multiplicity that affects double jeopardy, does the directive set forth by the United States Supreme Court still require courts to examine the unit-of-prosecution? If so, is Kansas improperly analyzing single-statute cases, such as Johnson's, by utilizing an inappropriate test?

Question 2. By using the suffix "–ion" and "–ing", do statutes prohibit ongoing activity as opposed to finite acts? If so, does *K.S.A. 21-5303* prohibit ongoing-type conduct?

Question 3. What is the unit-of-prosecution for *K.S.A. 21-5303 Solicitation*? If such is ambiguous, does the rule of lenity apply? If it is "per ongoing objective," as Johnson manifests, does *the Fifth* Amendment, multiplicity, or K.S.A. prevent a conviction and an acquittal on identical offenses, as in Johnson's case? —or is correction otherwise required?

Question 4. Is *K.S.A. 21-5303* unconstitutionally overbroad and vague — particularly due to its prohibition of "encouraging"—both facially and as applied to Johnson's case? Is "encouraging" always ambiguous and overbroad, or only in the 10th Circuit and Kansas District court? Did the court charge and convict Johnson of an unconstitutional statute?

Question 5. Does the *First Amendment* protect discussion of a crime? Can those words constitute specific advocating when a listener merely has a different impression or a vague opinion of such? Are Johnson's words protected regardless of how they were subjectively interpreted, and after renunciation?

Question 6. What are the exceptions to the invited error rule? Is an alternative means error an exception? Are state-created PIK instructions or legally infirm instructions an exception? If so, must Kansas courts, or this Court, consider Johnson's instruction and alternative means issues or provide retrial?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] From state court:

The opinion of the highest state court to review the merits appears at Appendix A. to the petition and is
[x] unpublished.

JURISDICTION

[x] From state court:

The date on which the highest state court (Kan.App.) decided my case was October 13, 2017.
A copy of that decision appears at Appendix A.
[x] A timely petition for review was thereafter denied (by Kan.Sup.) on the following date: August 31, 2018, and a copy of the order denying rehearing appears at Appendix C.

[x] An extension of time to file the petition for a writ of certiorari was granted to and including January 28, 2019 on November 28, 2018 in Application No. 18 A 557 and appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

K.S.A. 21-5303 Solicitation.	Appendix E.
K.S.A. 21-5302 Conspiracy.	Apx F.
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Other misc statutes are noted within Petition.	

STATEMENT OF THE CASE

In 2013, a Johnson County, Kansas jury convicted Mr Johnson of 2 counts of solicitation of murder and acquitted him of a 3rd—all having the same alleged victim who was never hurt or aware of such. The court imposed consecutive sentences totaling 132 months in prision. Subsequently the Court of Appeals of Kansas affirmed; then the Supreme Court of Kansas denied his Petition for Review.

Johnson preserved issues in the appellate courts, summarized as: **(a)** *K.S.A. 21-5303* is overbroad and

vague. Kan.App.brief p.8-19. **(b)** Multiplicity. p.20-32. **(c)** Insufficient evidence. p.32-37. **(d)** Instruction error re renunciation. p.38-40. **(e)** Insufficient evidence to disprove renunciation. p.41-42. **(f)** Instruction error re venue / jurisdiction. p.43-46. **(g)** Failure to give alternative means instruction; lack of evidence. p.49.

Johnson still asserts that the Appellate Court's "facts" were slanted to support the Opinion, formed unsupported conclusions, and omitted much of what benefited Johnson. Johnson now states only what he feels will benefit this Court in addressing his Questions. In his petition to the Kansas Supreme Ct, he wrote:

> ▪ Matters re Johnson's ex were improving; child visitation was being increased. R.9,160. ("going pretty good") R.15,20, 21, 32, 106.
>
> ▪ Johnson met RN [Nodwell] who owned Nodwell Construction [that was] able to clean up "a big pile of junk" like the hazzard Kathy (Johnson's gf [girlfriend]) disliked on the farm property. R.9,91; R.2,22; R.15.101-6. Talk shifted to the ex and how it would be nice if she'd disappear or overdose: RN felt this meant "/Johnson personally/ wanted to kill her"; he never said he wanted RN to do such; RN felt all was a joke. R.9,110-5, 94. After the drive, at the end, Johnson only wanted "following her to track (her)." R.9,110. RN did not believe [that] Johnson wanted him to "kill his wife"; nor did RN report to OPD [Olathe Police Department] that Johnson requested such, suggested a means or money, or spoke in code. R.9,118,112-4; R.15, 84-6. In fact, RN still wanted to work for Johnson: RN called back "to ask about employment." [2-3 times per day for a month]. R.9,100.
>
> ▪ RN testified [that] Johnson suggested 3 ways his ex could be harmed, was worth $20,000. R.9,9-11. But when OPD asked, RN reported none of the above. R.2,29-37. ...
>
> ▪ [Detective] Stites (LS) was to "fullfill the solicitation." R.9,122. RN arranged the meet[ing]. R.2,102-3. There, RN told Johnson [that] he [had] told "Lonnie" the details. R.21,2. [RN] left. Johnson told LS [that] he asked for an estimate. R.1,45; R.21,2. LS replied: RN told him "everything that needed to be done as far as the project": a "project where he wants some junk hauled off." R.15,135; R.9,150. Johnson made similar statements (e.g., raccoons inside, broken glass all over. R.1,46; R.21,2) and separately mentioned his ex and custody. R.9,152. LS felt all was code, only [because] of [Johnson's] initial [statement that] custody and life were going good so it was "time to get these other project**s** done" which might be referred to as getting "vans hauled off . . ." R.9,150-2. Johnson never asked for or said he intended to have his ex killed. In fact, when LS asked if he wanted the problem terminated, he replied, "That's not why we are chatting today, I just want you to get the vans hauled off." R.9,149-54. No date was set to re-meet. R.9,124.
>
> ▪ LS called, the next day, for a second meet. R.15,73. Johnson [said]: "I'd like to track and see where my wife is." R.1.150; R.21,3. (Kathy was aware he planned to hire another investigator. R.15,108-11.) When Johnson said "hiring you to do detective work . . . Undercover work," LS **cut him off**. Johnson added: "Project is detective work . . . figure out where she goes . . . part of detective work is to make sure nobody . . . gets hurt." Again, LS **cut him off**. R.1,50-1; R.21,3. LS requested to meet [again]. R.15,125.
>
> ▪ Johnson, in MO [Missouri], cancelled the meet[ing]. R.9,125,156. . . . unless (into rush hr) LS would meet in MO. R.15,75. LS [replied that such was] impossible [which] ended all. R.9,156.
>
> ▪ LS called again, after 30 minutes. [He] asked [Johnson] if [he] "still wanted" any work done. Reluctant ["hedging"], Johnson repeated he needed to think more; [but] LS urged, firm re ***no*** [Missouri !]; so Johnson insisted on MO. R.9,156-7; R.15,75. When pressed, Johnson replied he "/has/ to go back to thinking about this whole thing," which caused LS to confirm all was over, ***forever***, [stating]: "I'm leaving town," "won't be around"; [and] LS hung up. R.9,157; R.2,77; R.1.52.

- But LS called again [30 min later and] offered to meet in MO. R.15,75; R.9,159-60. Johnson ([who] doesn't like conflict, gets taken advantage of, bullied R.15,98) said he's looking for investigative work and doesn't want his actions "misconstrued" (R.21,3), and agreed to meet in MO.
- In MO, Johnson repeatedly referenced "investigator work" and gave what LS requested: photo, money, map. R.9,144-6; R.21,5,6. LS asked if the photo was the vehicle he wanted to "disappear"; Johnson said "yeah" (he doesn't pay attention, listen, or hear well: per Kathy. R.15,98) but immediately clarified: "You mean to do the investigative work?" R.9,160-1. After all, he ***never*** indicated he wanted her [the ex] (or anyone in photo) to "disappear," nor did he ever indicate or refer to wanting LS to overdose her, burn her house, or shoot her (per LS). R.9,151,154.
- LS had a "personal opinion" re[garding] Johnson's intent because "Nodwell said this /info/" (and [info] "came through . . . other detectives." R.9,149); yet at the very end, LS was "still trying to determine" [Johnson's] intent. R.9,163.

[Ital.bold had emphasis in original. Reg.bold added. Minor alterations. Other facts stated within Petition.]

The State presented transcripts (improperly sent into deliberations) depicting bits of secrecy and fear of recordings. But Johnson and his ex-wife were in the middle of a protracted divorce. Who wouldn't want utmost secrecy? With the State's motion of limine, the court prevented Johnson from evidencing why he had sought investigation —because those reasons would make the ex 'look bad'. R.18,5. E.g.: being "a bad parent... dangerous activities" (R.18,3-7); child molesting (R.2,29); "weird things," "goth, vampires, addicted to pain pills" (R.9,93; R.15,108-11). Also, the court **altered** (edited) the conversation between Johnson and Stites, as prosecution found lines about the ex's behavior "particularly troubling." R.18,7-8.

This Court need not consider solicitous events, if any, in Missouri because Missouri does not yet prohibit solicitation. See e.g., State v. Sexton, 232 Kan. 539, 542-44 (1983) (not a crime yet in KS, in 1983).

REASONS FOR GRANTING THE PETITION

Specific reasons are presented separately at the start of each following question:

Question 1. To determine "same offense" in a single-statute case, regarding multiplicity that affects double jeopardy, does the directive set forth by the United States Supreme Court still require courts to examine the unit-of-prosecution? If so, is Kansas improperly analyzing single-statute cases, such as Johnson's, by utilizing an inappropriate test?

This Court should address this question because it affects the constitutional analysis of *Double Jeopardy* issues, raising important constitutional questions of national importance. The Kansas "same offense" test conflicts with the United States Supreme Court and other state courts. This Court has never addressed this issue. Long ago, the United States Supreme Court set forth a directive on how to determine

if conduct is the "same offense" —the factor that determines multiplicity and double jeopardy. Because Kansas violates this directive, this Court must now intervene and clarify. Kansas will likely never openly concede that its own test is flawed. Such test is not always wrong —but it is not always right.

In 2006, the Kansas Supreme Court considered "same offense" and set forth a 2-component 4-factor multiplicity test to determine "same conduct" to resolve every multiplicity issue. State v. Schoonover, 281 Kan. 453, 496-97 (2006). However, *Schoonover* created this "test" for the plethora of cases with violations of ***multiple statutes*** —not for the few isolated cases with violations of a ***single statute***.[1] Ironically, *Schoonover* professes the directive of the United States Supreme Court that contradicts the "*Schoonover* test" when applied to single-statute cases. As Kansas courts misuse and abuse this 'resolves-all-multiplicity' test, defendants with violations of a single statute often face excessive charges and the resulting sufferings.[2] Thus, this question affects an entire class of cases: those in every state with violations of only a single statute.

Ironically, when a defendant will benefit from this 'resolves-all-multiplicity' *Schoonover* test, courts have forbidden it. E.g., in State v. Calderon-Aparicio the court revealed and ordered: "*Schoonover* dealt with whether charges in a complaint ***under different statutes*** are multiplicitous"; "the language in *Schoonover* is not applicable to the present case" —a case with violations of a single statute."[3] 44 Kan. App. 2d 830, 848 ¶3 (2010) (***court's*** *emphasis*). Yet courts continue using this test for single statute cases.[4]

"[N]o double-jeopardy test will cover the entire spectrum of possible situations." State v. Miles, 229 N.J. 83, 98 (Sup.2017). "[S]ome rules apply to all categories of fact patterns while others apply to only specific categories." Schoonover, 281 Kan. at 463 ¶2.[5] Chief Justice Rehnquist described *Double Jeopardy* as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Id. ¶1.[6]

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[1] Per Lexis, 29 KS cases stated "multiplicity" in 2007. Only 3 were single-statute cases; 23 were multiple-statute cases.

[2] See e.g., United States v. Phillips, 962 F. Supp. 200, 202 ¶2 (DC.Dist.1997) ("letting multiplicitous counts go to the jury" increases "possibility of prejudice against the defendant").

[3] Calderon-Aparicio argued that his 2 counts of *K.S.A. 65-4163(a)* were different crimes (not multiplicitous).

[4] Post- and pre-*Aparicio* single-statute cases that relied upon *Schoonover's* language: ***(3mo later)*** State v. Gadbury, 2011 Kan. App. Unpub. Lexis 19 (Jan.7) (245 P.3d 12)*26 ¶3; ***(a yr later)*** State v. Haymond, 2011 Kan. App. Unpub. Lexis 946 (Nov.10) (263 P.3d 222) (by *Aparicio's* justices, Greene, and Green); ***(2 mo prior)*** State v. King, 2010 Kan. App. Unpub. Lexis 604 (Aug.27) (237 P.3d 668)*22-26(quoting *Thompson* that quoted *Schoonover*).

[5] Cited Thomas, *A Unified Theory of Multiple Punishment*, 47 U. Pitt. L. Rev. 1 (1985).

[6] Quoted Albernaz v. United States, 450 U.S. 333, 343 (1981).

A. United States Supreme Court precedent clearly directs courts to find and examine the unit-of-prosecution before determining "same offense" for single-statute cases.

> The first step in navigating the sea of [double jeopardy] case law is to determine which map or chart guides the analysis. ...[O]ne must recognize which line of cases applies. 281 Kan. at 463 ¶2.

Thus, the United States Supreme Court directs to categorize cases: Category 2 analyzes "what constitutes 'same offense'" for "multiple violations of the same statute."[7] Id. 464 ¶2 (e.g., Johnson's case). Here:

> The ***sole issue*** in these cases is identification of the "allowable unit of prosecution." Id, quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952) (bold added).[8]
>
> The proper inquiry...is what "unit of prosecution" has the Legislature intended as the punishable act. State v. Adel, 136 Wn.2d 629, 634 (Sup.1998), citing Bell v. United States, 349 U.S. 81, 83 (1955).

B. Kansas unfairly found that Johnson's single-statute charges and convictions were separate units of the offense —without first, or ever, determining the unit-of-prosecution.

The court charged Johnson with 3 units (counts) of the same offense. A single-statute. The jury convicted him of 2 counts.[9] Subsequently, the Court of Appeals used the *Schoonover* test to determine that Johnson's conduct was not the same —different facts, "separate evidence." But the court never looked to see how the legislature defined the conduct (e.g.: if ongoing) and never determined the "unit of prosecution." State v. Johnson, 2017 Kan. App. Unpub. Lexis 872 (Oct.13) (404 P.3d 362) No.110,837 *21-22. Apx A.

> [T]he same evidence test will ***never*** be satisfied. Two convictions...will always be the same in law, but they will never be the same in fact. ... [T]he prosecutor will always attempt to distinguish the two charges by dividing the evidence supporting each charge into distinct segments. Adel, supra, 136 Wn.2d at 633-34 (re single statute cases) (***court's*** *emphasis*).[10] Apx I.

(Note: even under the *Schoonover* test, Johnson's charges are the same. E.g., Nodwell and Stites overlapped at the meeting. I.e., there was not a new "impulse" but rather a transfer of the initial impulse —to do whatever.)

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[7] Category 1 analyzes cases with violations of multiple statutes, also refered to as "multiple-description cases."

[8] Similar at, e.g., United States v. Rentz, 777 F.3d 1105, 1119 ¶6 (10thCir.2015) (concur).

[9] For count 3 the prosecutor purchased perjury: paid Porterfield, a jail-snitch, an "out" of a 10-year prison sentence to testify. R.1,100; R.15,50-54. Johnson at *11. The jury did not believe his testimony —thus perjury— and acquitted Johnson of count 3. Id. *12. See Blakely v. Quinn, 2008 U.S. Dist. Lexis 117152 (E.D.Wash.Sep.11,2008) No. CV-07-316-RHW at *35 ("a conviction using knowingly perjured testimony violates due process").

[10] Citing: Leslie...*Clouding the Already Murky Waters of Unit of Prosecution Analysis...* 1993 Wis. L. Rev. 811, 824.

C. The *Schoonover* test conflicts with the directive of the United States Supreme Court by allowing a court to end its multiplicity / double jeopardy analysis before looking to see how the legislature defined the offense within the statute —before finding the "unit of prosecution."

1. The *Schoonover* test deprives most single-statute cases of a fair analysis.

Conflict arises because *Schoonover* created a new 2-component "test" to determine "same offense." Here:

▶ 1st component ("prong") considers 4 factors (if same time, location, relationship, and impulse) to determine "same conduct" (i.e. "unitary"). If not the same, then the entire multiplicity analysis ends — the court never has to look at the statute. The end ! State v. Coleman, 47 Kan. App. 2d 658, 670 ¶1 (2012).

▶ 2nd component —if reached— looks at the "statutory definition" to see how the legislature defined the offense (e.g., multiple or ongoing acts) and even provides a "unit-of-prosecution test." Id. 669 ¶4; 671 ¶1.

The problem arises when a court determines at the 1st component that conduct is 'not-the-same' in a single-statute case (i.e., in a "unit-of-prosecution case"[11]). Then the case never reaches this 2nd component's "unit-of-prosecution test." See e.g.: State v. Sellers, 292 Kan. 346, 360 ¶1 (2011) (Single-statute conduct was not unitary, thus the multiplicity analysis ends).[12]

Failure to analyze the statute does not necessarily result in a wrong conclusion; rather, a court does not ensure a legally correct conclusion. The result is often unfitting, incongruous, and disconcerting.

Failure to analyze the statute results in courts making up laws. E.g., Adel questioned "How far apart do drugs have to be kept to constitute 'separate' stashes?" and noted absurd results when the defendant or prosecutor manipulate the statute. 136 Wn.2d at 636. The answer depends upon what the statute authorizes. Id. In Sellers the court [made up the law] how leaving the room for 30 seconds, then returning, constituted a new offense of "to touch." 292 Kan. at 360 ¶1. If the statute says such, then so be it. But the court never reached that step: analysis ended. Id. Instead, *Sellers* listed other courts' made-up "law"; e.g., in *Dorsey*, acts over "45 minutes resulted in only one count of rape." Sellers, at 359. (Actually: a "lapse of a few minutes between each alleged offense" was one count. State v. Dorsey, 224 Kan. 152, 156 ¶1 (1978)). Yet

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[11] Courts often refer to single-statue / same-statute cases as "unit-of-prosecution cases."

[12] E.g.: State v. Walker, 283 Kan. 587, 611 ¶1 (2007) (If discrete conduct, "double jeopardy analysis ends"); State v. Betts, 2009 Kan. App. Unpub.Lexis 6 (May1)No. 99,742,*5¶1;*7¶1 (not "same conduct" as drugs in bedroom; test ends).

Seller's 30 seconds results in a new offense.[13] Ironically, *Sellers* initially quoted *Harris*:

> "The court will not speculate as to legislative intent or read such a statute to add something not readily found in it." Sellers, 292 Kan. at 357, quoting State v. Harris, 284 Kan. 560, 572 (2007).

The results allowed from the *Schoonover* test, in all single-statute cases, blatently contradict its own words. Following 3 paragraphs of United States Supreme Court precedent, *Schoonover* states:

> In essence, if multiple convictions arise from violations of a single statute, the definition of the crime ***must*** be examined to determine the unit of conduct defined by the legislature. There can be only one conviction for that unit of conduct. 281 Kan. at 472 ¶4 (bold added).

Repeatedly, courts pluck and abuse quotes from *Schoonover*. See e.g., State v. Sprung, 294 Kan. 300 (2012). The *Sprung* court, at the **2nd** component's analysis, refered to the common *Schoonover–at–472* phrase as: "[T]he key is the scope of the course of conduct proscribed by the statute." Id. 308 ¶4. But this semi-quote came from the topic *Unit-Of-Prosecution Cases*. The unchopped quote reveals:

> The unit of prosecution was determined by the scope of the course of conduct ***defined*** by the statute ***rather than the discrete physical acts***. 281 Kan. at 472 ¶2 (re *Univ. C.J.T.*) (bold added).

Thus, discrete (not-the-same) conduct is NOT dispositive —which contradicts the test's **1st** component.

This misuse of the *Schoonover* test leads to bizarre Opinions. See e.g., State v. Haymond, 2011 Kan. App. Unpub. Lexis 946 (Nov 10, 2011) (263 P.3d 222) (single-statute multiplicity). Initially the court stated that the conduct must have occured at the same time (Id. *7 ¶4); yet, in the **2nd** component the court states:

> In a unit of prosecution case, the key is not how many acts occurred or how many victims were injured, but rather "the nature of the conduct proscribed." Id. *9 ¶3, quoting 281 Kan. at 472.

It's hard to fathom how an individual can do multiple single-statute acts at the exact same time !

2. Courts prohibit the use of a *Blockburger*–type test, e.g., *Schoonover's*, for a single-statute analysis.

"Simply put, utilizing *Blockburger* to discern congressional intent... puts the cart before the horse."[a] "There are two rules governing multiplicity."[b] "*Blockburger* is for when charges involve 'two distinct statutory provisions'"[c] "and is therefore inapplicable where a single statutory provision was violated."[d] [a]United States v. Rigas, 605 F.3d 194, 205 ¶4 (3rdCir.2010); [b]United States v. Turner, 2007 U.S. Dist. Lexis 21385 (W.D.Wash.2007) No.CR05-355C, *7; [c]281 Kan. at 466 ¶3, quoting Blockburger v. United States, 284

[13] Sellers violated *21-3504* ("touching") —not "to touch" (a finite act). Id. 350 ¶3. And in Potts,"a few minutes went by" between acts "at nearly the same time," yet "same conduct," "same continuous transaction." 281 Kan. at 872 ¶5.

U.S. 299, 304 (1932); [d]Rigas, supra, 204-05, citing Sanabria v. United States, 437 U.S. 54, 70 n.24 (1978).

3. The *Schoonover* test is essentially a reworded *Blockburger* test. Compare:

- ***Blockburger* test:** If the first step fails, "courts need not proceed to the second step." State v. Watkins, 362 S.W.3d 530, 545 ¶3. (Tenn.Sup.2012).

  1st: "The first portion of the [*Blockburger*] test... indicates the conduct must be unitary. Thus, a 'same conduct' inquiry still applies" to see "if there *could* be a violation." Schoonover, 281 Kan. at 466-67.

  2nd: The *Blockburger* test examines "whether each provision requires proof of a fact that the other does not," i.e., the statutory definition. Id.

- ***Schoonover* test:** If the first component fails, the analysis ends. Sellers, supra, 292 Kan. at 360 ¶1.

  1st: "Do the convictions arise from the same conduct?" Schoonover, 281 Kan. at 496 ¶2.

  2nd: "By statutory definition are there two offenses or only one?" Id.

4. How the "same offense" testing method became so discombobulated in Kansas:

(a) The *Schoonover* test was designed for multiple-statute cases! I.e.: "[T]o analyze **Schoonover's** arguments" —multiple-statute multiplicity— the court creates the two component test. 281 Kan. at 496 ¶2.

(b) The *Schoonover* test simply replaced a prior multiple-statute test, per State v. Potts, 281 Kan. 863 (2006). The *Potts* court explained how recently *Schoonover*, a 2006 multiple-statute case, stated:

> "[T]he single act of violence/merger analysis should no longer be applied...where a defendant has been convicted of violations of multiple statutes arising from the same course of conduct." Potts, at 871 ¶4.

and to REPLACE the above, the Kansas Supreme Court, in *Potts*, continued:

> **Rather,** we set forth the following analysis to be utilized in analyzing multiplicity / double jeopardy cases: ... [the new *Schoonover* test]. Id (bold added).[14]

This resulting 2-component 4-factor *Schoonover* "analysis" attempts to be a grand test to resolve every possible multiplicty issue, but it simply replaced the multiple-statute, single act of violence/merger analysis.

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[14] Similarly, see: State v. Medlock, 2009 Kan. App. Unpub. Lexis 933 (Nov 13 2009) (218 P.3d 1197) at *8 (*Schoonover* "rejected the merger concept," created an elements test); State v. Hawkins, 40 Kan. App. 2d 10, 17 ¶2 (2008) (per *Schoonover*, the "'violence/merger analysis should no longer be applied....' Thus... [the new test]").

(c) How case types differ was lost because, likely, *Schoonover's* extensive historical, multiple-statute-case analysis (43 pgs!) only briefly addressed single-statute cases (1 para. at 464; 4 at 471-72; 1 at 495). Ironically, these 6 paragraphs clearly state that the only "test" is to determine legislative intent within the statute. **(d)** Further confusing "same-offense / conduct," too many things are called "unit-of-prosecution."[15]

D. The *Schoonover* test conflicts with *K.S.A 21-5111(c)* where "conduct" can be a series of acts.

The *Schoonover* test demands "same conduct" —same time, location, relationship, impulse. Coleman, supra. But K.S.A. 21-5111(c) defines "conduct" as an "act or a series of acts."Apx G. Thus, the *Schoonover* test renders *21-5111(c)* meaningless. Acts in a series will **never** happen at the same time, seldom at the same place. Finding separate "conduct" because acts were 30 seconds apart is absurd, even if asserting that each was a new impulse. Eg, Sellers, supra. Every act, to some degree, would be a new impulse. But 30 seconds, 30 days —it does not matter, as long as all leads towards one objective. And, a "single impulse" is "singleness of thought, **purpose** or action." Universal C.I.T., supra, 344 U.S. at 224 (bold added). Apx J.

E. Using the *Schoonover* test for a single-statute case can lead to absurd results. Infrequently, Kansas seems to recognize that its test is flawed.

Absurd results can occur when determining "same conduct" in a single-statute case while ignoring how the legislature defined such conduct. Not all crimes are one-act offenses. E.g., stalking, which requires 2+ acts, would fail a "same conduct" test (e.g., not same time), thus requiring a court to vacate. See also:

- In State v Pham, 281 Kan. 1227, 1254-62 (2006) the court recognized how multiple charges of *Conspiracy* (single statute) "does not easily lend itself to this particular [*Schoonover*] analysis... especially using 'arising from the same conduct' as the threshold question." Id. 1254 ¶4. In contrast, *Pham* also considered multiple-statute multiplicity where the *Schoonover* test was appropriate. Id. 1262-63.

- In State v. Harris, 284 Kan. 560, 570-78 (2007) the court decided if 3 counts of capital murder, each punishable by death, were the same. But what ***if*** Harris had convinced the court to use the mandatory *Schoonover* test to determine if the murders within each count were separate acts, thus separate crimes. Then the fact that each murder happened at a different time and location would have resulted in a slew of

[15] "Unit-of-prosecution" describes a type of case, method to test, name of the test within a test; and in State v. Hirsh the court refered to the entire 2-component 4-factor test as a "unit of prosecution test". 54 Kan. App. 2d 705, 718 ¶4 (2017).

first-degree murders. Capital murder vacated. No death sentence. Arbitrarily, the court did not mention its extraordinary *Schoonover* test. The test is flawed, vomiting out bizarre results for single-statute cases.

However, the *Harris* court got it right (*for what it's worth*). Correctly —from the very beginning, to reach the unit of prosecution question— the court stated:

> There are two types of potential multiplicity issues: "multiple description" and "unit of prosecution." This is not a multiple description case like [*Schoonover*] requiring comparison of the elements in the legislature's definitions of two crimes. Here... alleged violations of the same statute... presents a classic unit of prosecution question. ... In a unit of prosecution case, the court asks how the legislature has defined the scope of conduct composing one violation of a statute. The statutory definition controls... only one conviction for each unit of prosecution. ... The court will not speculate as to legislative intent or read such a statute to add something not readily found in it. Id. 571-72, quoting 281 Kan. at 496-98, 472,[16] Bell v. United States, 349 U.S. 81 (1955), and others.

The result: Now Harris only faced one, rather than two death sentences. Somehow, that must be a good thing.

► In State v. Robinson, 303 Kan. 11 (2015)[17] Robinson argued how the murders occurred prior to the enactment of the capital murder statute; thus, those convictions must be vacated. Id. 206 ¶3. The court noted the *Schoonover* test in the next topic (Id. 210 ¶5), but did not mention or use it here. ***If*** used, the **1st** component would have found discrete acts —prior to the enactment date. Test ends! No **2nd** component. No review of the statute. Charges vacated. I.e., the court evaded this test when it would benefit the defendent.

Next, to resolve Robinson's separate multiplicity issue, the court again did not use the mandatory **1st** component analysis.[18] Instead —done correctly— the court looked only the definition of the crime, then determined the unit of prosecution. Id. 211-12. This benefited Robinson (*conceivably*), as the court found that 2 counts of capital murder were multiplicitous. Id. 213 ¶2. Lucky Robinson now only had one death sentence.

► In State v. Mundy, ***she*** caught a lucky break when the court recognized how its test was flawed. 2012 Kan. App. Unpub. Lexis 460 (Jun.1,2012) (277 P.3d 447) *18-25 Apx K. (single-statute multiplicity,[19] with "-ing" language[20]). The court noted the **1st** component of the *Schoonover* test but never used it because:

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[16] Note: 281 Kan. at 472 is *Schoonover's* topic titled *Unit Of Prosecution Cases* (that cites, e.g.,*Universal C.I.T).*

[17] Overruled by State v. Cheever, 306 Kan. 760 (2016), but re "guilt-phase cumulative error" and other.

[18] The court was quick to quote *Arnett* (Sup.Kan) "...intent of the legislature governs"; and noted *Olsson* (Sup.N.M.) "relevant inquiry... is whether legislature intended punishment for the entire course of conduct or for each discrete act" and *Schoonover* "...key is the nature of the conduct...rather than discrete physical acts." Robinson, 206 ¶4; 212 ¶2.

[19] Before Justices Greene and Standridge, from *Aparicio*, supra, and conflicting post and pre decisions.

[20] Relevent to Johnson's "-ing" participle/gerund issue, in *Mundy*: "[T]he statute defined Making a false Medicaid claim as 'knowingly... engaging in a pattern of making, presenting, submitting, offering or causing to be made....'" Id.*7¶1.

> Our case differs from all of the published appellate cases on multiplicity in that the crime alleged, and the crime defined by statute, required that Mundy have engaged ***in a pattern*** of fraudulent conduct. Thus, even though she may have engaged in conduct at different times and in different locations, that doesn't necessarily make it different conduct for multiplicity purposes. Id. *21 ¶2.

But no! —*Mundy* does not "differs from all...cases." Many crimes require / include ongoing activity. A statute should not have to be a blatently obvious exception to the test in order to receive the correct, fair analysis. Plus, for its correct conclusion, the *Mundy* court had to first see and recognize the unit of prosecution.

Conclusion.

The underlying problem is that courts usually fail to FIRST determine the unit of prosecution in single-statute cases where THEN they can reasonably determine if one's conduct fits into a single unit. If conduct exceeds one unit —as the legislature defined, rather than per a court's transmogrification— then so be it. A court cannot possibly determine what constitutes a single unit of "same conduct" if the court does not know how the legislature defined that unit. It is difficult to conceive how analyzing the evidence in a single-statute case aids a court in ascertaining legislative intent. As such, this Court should order that the *Schoonover* test cannot be used for single-statute cases and vacate Johnson's convictions.

Question 2. By using the suffix "–ion" and "–ing", do statutes prohibit ongoing activity as opposed to finite acts? If so, does *K.S.A. 21-5303* prohibit ongoing-type conduct?

Before determining the unit of prosecution for *K.S.A 21-5303*, this Court should address this unique grammar question that significantly impacts a statute's meaning and intent. Doing so will set a precedent for how courts interpret many statutes in all states. Addressing this question will help prevent multiplicity and *Double Jeopardy* violations, thus raising important constitutional questions of national importance. When a court ignores the grammer utilized by the law writers, that court's actions and findings conflict with the United States precedent that stated:

> [The United States] Supreme Court does not consider grammar a mere technicality [and] has stated that "Congress' use of a verb tense is significant in construing statutes." United States v. Ketchum, 201 F.3d 928, 933 (7thCir.2000), quoting U.S. v. Wilson, 503 U.S. 329, 333 (1992). Apx L.

K.S.A. 21-5303(a) states: "Criminal solicitat***ion*** is command***ing***, encourag***ing*** or request***ing***...." (bold added). Apx E. This statute uses gerunds that are also present participles. Both mean ongoing action.

Many statutes in Kansas and elsewhere use "-ing" gerunds as opposed to verbs that prohibit finite acts, e.g.,: "request"; "requested." Thus, this question affects criminal and civil matters in all states (and in education facilities). Yet courts have seldom noticed or addressed this issue. Kansas simply avoided the problem.

A. A gerund is an "–ing" present participle: both mean uncompleted, present, ongoing action.

> Merriam-Webster Online Dictionary defines "gerund" as a "verbal noun in Latin that expresses generalized or uncompleted action." Godley v. Open Grounds Farm, Inc., 505 B.R. 192, 196 ¶4 (Bankr. E.D. N.C. 2014), quoting http://www.merriam-webster.com/dictionary/gerund (4 Feb. 2014).

See e.g., Midland Ins. Co. v. Home Indem. Co., 619 S.W.2d 387, 389 ¶1 (Tenn.App.1981) ("the gerund or verbal noun form is used to denote a present or ongoing activity such as 'selling', 'repairing', etc").

> The gerund is a present participle that functions as a noun and therefore names an action or state of being. ... Because they [verbals] have lost their subjects and their tense, verbals never function as do finite verbs. Essentials Of English, 4ed.1990, pg 30.

The *Ketchum* court analyzed "is . . . obtaining or providing" [sic] (201 F.3d at 933 ¶2 (7thCir). Apx L.), which appears to be a gerund phrase after a linking verb (like in *K.S.A. 21-5303*). The court found that by using present progressive tense ("–ing") Congress meant to prohibit "[acts] provided on a recurring or continuing basis" (Id. ¶2); "continuing —i.e. present and future— activities" (935 ¶1); "ongoing" (933 ¶3).

The use of a present participle is "indicating a different intent" —a "continuing process or activity, not one that has a finite beginning and end." Detention of J.R., 912 P.2d 1062, 1067 (Wash.App.1996). See e.g.: Sprung, supra, 294 Kan at 309 (2012) ([gerunds] "fondling or touching" is "suggesting that any number of" act is one). The use of "–ing" **requires** ongoing activity. See e.g., Verizon... v. Hopewell..., 26 N.J. Tax 400, 417 (2012) (participle "providing" means "must be... currently providing"). *Verizon* noted: *Exxon* (refused to apply present tense "discharging" to past conduct); *Pohl* (participle "falling" means "a state of action in progress"); etc. See also, Bosserman v. Hayes, 89 Va. Cir. 84, 87 (2014) ([apparently in a gerund phrase] the "progressive verb tense" in "providing" implies ongoing, not subsided).[21] See contra, McClanahan v. State, 324 S.W.3d 692, 694 (Ark.App.2009) (statute's "finite acts," e.g., dissects, are not continuing).

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[21] Also: U.S. v. Hull, 456 F.3d 133, 145 (dissent) (3rdCir.2006) (present participle "connotes present, continuing action [per] Am. Gas... v. SEC, ...134 F.2d 633, 648 (D.C.Cir.1943)" ("conveys the idea of process or continuence"); J.R., supra, 912 P.2d at 1067 ("examining" must be "continually and constantly"); San Diego Baykeeper v. U.S. DOD, 2010 U.S. Dist. Lexis 44499 (S.D.Cal. May6) (72 ERC(BNA)1193) *4 ("isolated or sporadic" is not ongoing).

B. The suffix "–ion" also means ongoing activity; e.g., solicitat(ion).

"–ion" means "action or process... state or condition." ("Process" means "series of actions, changes, or functions bringing about a result.") ("State" means "a condition of being.") ("Condition" means "mode" — which means "a method of doing"). American Heritage Dictionary 4ed, p450, 670, 805, 185, 545.

Conclusion.

The suffix "–ing," used as a gerund or as a participle, and "–ion" both mean ongoing uncompleted activity. "Solicitation" means ongoing activity; thus, what solicitation "is" must consist of ongoing activity.

Question 3. What is the unit-of-prosecution for *K.S.A. 21-5303 Solicitation*? If such is ambiguous, does the rule of lenity apply? If it is "per ongoing objective," as Johnson manifests, does the *Fifth Amendment*, multiplicity, or K.S.A. prevent a conviction and an acquittal on identical offenses, as in Johnson's case? —or is correction otherwise required?

This Court should address this question and determine the unit of prosecution for *K.S.A. 21-5203* because **(1)** The crime of *Solicitation* is relatively new (Kansas created in 1983) and rarely discussed, resulting in a small amount of caselaw for courts to reference. **(2)** This matter affects the constitutional analysis of *Double Jeopardy* issues, raising important constitutional questions of national importance. **(3)** This question appears to be a matter of first impression for this Court, and also for the Kansas Supreme Court that avoided the matter. **(4)** Leaving this question unresolved allows state and federal courts to turn a single conspiracy into a plethora of solicitations, making a mockery of the course-of-conduct principle. **(5)** Currently, in Kansas and in other states, prosecutors manipulate statutes' unit-of-prosecution to suit their needs; e.g., by extracting various facts to create atrocious outcomes to coerce defendants into plea deals[22] or by multiplying charges to infect a jury's opinion.[23] Addressing this matter will remind that

> The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges. Brown v. Ohio, 432 U.S. 161...(1977) ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."); Snow, 120 U.S. at 282 (if prosecutors were allowed arbitrarily to divide up ongoing criminal conduct into separate time periods to support separate charges, such division could be done ad infinitum, resulting in hundreds of charges). Adel, supra, 136 Wn.2d at 635. Apx I.

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[22] In Johnson County, KS there is a well-known strategy called "adding kickers": multiplying charges to "kick" them off in a plea deal —to essentially force a plea deal: A win for the DA. A win for paid def. attorney. Overcrowded prisons!!!

[23] See e.g., United States v. Phillips, 962 F. Supp. 200, 202 ¶2 (DC.Dist,1997) ("letting multiplicitous counts go to the jury" increases "possibility of prejudice against the defendant").

> "It is Congress, and not the prosecution, which establishes and defines offenses. ... Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice." State v. Gomez, 36 Kan. App. 2d 664, 671 (2006), quoting Sanabria v. United States, 437 U.S. 54, 69-70 (1978). Apx M.

(6) Johnson's case involves solicitation of murder, but the statute's unit of prosecution applies to solicitation of any felony. Apparently no court has specifically determined the unit-of-prosecution for *K.S.A. 21-5303*. This Court's analysis will resolve the problem in Kansas, creating uniformity for other states' similar statutes. **(7)** The court wrongfully prosecuted and convicted Johnson of multiple identical units (counts) of a same statute without ever determining what one unit —the unit-of-prosecution— consists of.[24] The jury acquitted him of one, leaving the 2 convictions as duplicates of the acquittal. This Court now has a unique opportunity to example its recent statement that the "*Double Jeopardy Clause*... protects... against 'charg[ing] the same offense in more than one count' of a single indictment." U.S. v. Cooper, 886 F.3d 146, 153¶2 (DC.Cir.2018).

A. *K.S.A. 21-5203's* unit of prosecution is per objective. Thus, Johnson's 3 charges are identical.

At first glance, one could easily justify turning each solicited individual or each time span into the unit of prosecution. Johnson's court split his single crime based upon, primarily, specific individuals. But such is not stated or allowed within *K.S.A. 21-5203*. Nor is such reasonable. The statute prohibits ongoing solicitation directed towards "another person," which can include many individuals —like in *Conspiracy*.

> In charging two violations of the same statute, the prosecutor will ***always*** attempt to distinguish the two charges by dividing the evidence supporting each charge into distinct segments. Adel, supra, 136 Wn.2d at 633-34 (Sup.1998) (bold added). Apx I.

1. Kansas caselaw indicates that "per victim" is the unit of prosecution.

Only one case has indicated the unit-of-prosecution for *K.S.A. 21-5203*: State v. Sommerfeld found that "[e]ach solicitation count required proof that a different victim was being targeted for murder" 1999 Kan. App. Unpub. Lexis 1059 (Nov.24,1999) No. 80,404 at *8. Apx N. Similarly see: Martin v. Kaiser, 907 F.2d 931, 936 (10thCir,1990) Apx O. ("To convict on each count [of solicitation] required proof that a different individual was being targeted for murder on each count"); Melina v. People, 161 P.3d 635, 649-

[24] Ironically, Johnson's court noted different times and individuals, then stated that each charge is "a separate and distinct unit of prosecution," but never stated what the unit of prosecution was or how such was determined. *21-22.

41 (Colo.Sup.2007) (solicits to multiple individuals over a year were one transaction to kill one victim: specific individuals "serve as corroborating evidence of his intent, not evidence of multiple acts"); State v. Mead, 27 P.3d 1115, 1130 n10 (Utah.Sup.2001) (solicits over years are separate showings of a single intent).

2. Legislative history indicates that the unit of prosecution is, at most, per felony solicited.

Legislative history indicates that the specific offense of *Solicitation* was designed to reach those who are inducing crimes but escape criminal liability because contact was with undercover officers who had no intention of committing the offense and cannot form the basis for a conspiracy. Sexton, supra, 232 Kan. 539, 542-44. Because the purpose is to extend liablilty to those who would otherwise go unpunished, then logically they should be punished for each offense they were commanding. Thus, the permissible unit of prosecution is, at most, per each felony solicited.

3. *K.S.A. 21-5303's* language manifests that the unit of prosecution is per plot or underlying crime.

a. The critical modifier creates a "circumstances-of-conduct" and "plot-centric" unit of prosecution.

The language within *K.S.A. 21-5303* identifies a specific singular object —"a felony"— which may not have "commanding...", then references "the felony" as opposed to "felonies." This specific reference to a singular felony indicates legislative intent to prevent the completion of a single felony by prohibiting solicitous conduct, regardless of how many times such is repeated. See e.g., United States v. Olsowy, 836 F.2d 439, 442-43 (9th.Cir.1988) (one conviction for identical false statements, made 5 months apart).

"**Plot-centric.**" The United States v. Gordon court looked for the unit of prosecution in *18 U.S.C. 1958(a)* ("murder-for-hire").[25] 875 F.3d 26 (1stCir.2017). The court considered options, noted how a court should choose "a textually plausible" choice "that would produce a more sensible result," and concluded "that the correct unit of prosecution is plot-centric"[26] —"a single plot to murder a single individual, not the number of [phone calls made.]" Id. 35-36; 28 ¶2. The other option (per call) leads to absurd results, as each call could constitute a separate crime —worse than if he made one call to murder 10 individuals. Id. 35 ¶2.

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[25] Note: to begin its single-statute case analysis, Gordon manifested how "Congress's intent is paramount." Id.32-33.

[26] Similarly, see United States v. Wynn, 987 F.2d 354, 359 (6thCir.1993) ("[S]eparate phone calls which relate to one plan to murder one individual constitute only one violation."). Gordon at 35 ¶3.

K.S.A. 21-5303 differs from *18 U.S.C. 1958(a)*,[27] and the court multiplied Johnson's charges per alleged-hire, not per call. However, the reasoning in *Gordon* and the potential absurdness are the same. Thus, "plot-centric" is reasonable and is consistent with the slightly greater crime of *Conspiracy* (See sec.#6, p.22.)

Circumstances. "To determine the units of prosecution, [courts] first look to the gravemen of the offense," which can be the result of "the circumstances surrounding the conduct." Stevenson v. State, 499 S.W. 3d 842, 850 (Tex.Crim.App.2016). See: Nijhawan v. Holder, 557 U.S. 29, 36-38 (2009) (recognizing how a statute's language can call for a "'circumstance-specific'... interpretation") and Dunham v. State, 554 S.W.3d 222, 233 ¶2 (Tex.App.Houston 14thDist.2018) (the crime was a "circumstances-of-conduct offense": one crime). When the actions within a statute are criminal only under certain circumstances, it is a "circumstances-surrounding-the-conduct offense." Riggs v. State, 482 S.W.3d 270, 275 (Tex.App.Waco 2015).

> [E.g.] Unlawful discharge... [I]t is the circumstances —the where, when, and how— under which a gun is fired that determines whether an offense was committed. A marksman is blameless if he fires his rifle at a target down a firing range, but if he turns around and shoots into the crowded parking lot, he has committed an offense. Young v. State, 341 S.W.3d 417, 423 (Tex.Crim.App.2011).

K.S.A. 21-5303's "commanding... another" is only illegal when done under the circumstances of "to commit a felony." Commanding another, by itself, is not illegal. See e.g., State v. Thompson, 287 Kan. 238, 248 (2008) ("possession" is only illegal when there is intent to manufacture meth: quantity of charges is based on the illegal intent). Also, the renunciation defense involves "under circumstances." 21-5303(c). Apx E.

"**Result-of-conduct.**" *K.S.A. 21-5303* requires an end direct object ("to commit a felony") for the verb (or gerund) to become criminal. See Dunham, supra, ("result-of-conduct" offense when verb requires a direct object). Thus, each offense of *K.S.A. 21-5303* punishes the cumulative result of soliciting each felony.[28]

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[27] 18 U.S.C. § 1958(a) was designed to be "similar to existing state murder crimes (e.g., solicitation of murder)" (Id. 34) but includes hire via the "use of interstate commerce facilities." §1958.

[28] See also, People v. Salvato, 234 Cal. App. 3d 872, 882 (1991) (court's emphasis)("spousal abuse [is] a continuous conduct crime because the gravamen of the offense lay in the ***cumulative result*** of the acts").

Modifier. The United States v. Lindsay court based the unit of prosecution on the critical modifier, refered to as the "underlying crime," found within a long phrase describing ***which*** person. 985 F.2d 666, 673-75 (2ndCir.1993). It is not "any person" nor any person who "uses...a firearm." Id. Rather, the statute applies to: any person who uses a firearm "during...a drug-trafficking crime" shall be sentenced. Id. I.e., the use of firearm is illegal ONLY in this certain singular "a" circumstance. Likewise, "commanding," e.g., in *K.S.A. 21-5303* is illegal only with the critical modifier "to commit a felony." Apx E.

b. *K.S.A. 21-5303's* "special sentencing rules" in section *(d)(1)* indicate the unit of prosecution.

> [S]pecial sentencing rules apply to convictions for conspiracy and criminal solicitation [—"identical language"—], depending on the underlying crime the defendant was conspiring or soliciting someone to commit State v. Housworth, 2017 Kan. App. Unpub. Lexis 528 (June 30, 2017) (399 P.3d 285) at*17-19 (re *(d)(1)* rules). Apx P.

These rules include that "***the*** underlying or completed crime" determines the severity ranking. K.S.A. 21-5302(d)(1) and 21-5303(d)(1) (bold added). Apx F. &E. This specific reference to a singular "underlying crime" indicates that such is the unit-of-prosecution. This is reasonable. E.g., if 'each individual solicited' was the unit-of-prosecution, the court could not determine an offense's ranking if the defendant solicited one individual to commit multiple crimes —e.g., theft and arson— with different severity levels.

The Bollig court stated, refering to section *(d)(1)* in *K.S.A. 21-5302 Conspiracy* :

> [K.S.A.] punishes a conspiracy conviction by keying the sentence [the punishment] to "the underlying or completed crime."... [Thus, w]hen a conspiracy entails an agreement involving multiple crimes, the Kansas Supreme Court appears to look at the principal purpose or object of the agreement as fixing the appropriate severity level and, hence, the presumptive guidelines punishment. Bollig v State, 2018 Kan. App. Unpub. Lexis 312 (Apr.27, 2018) (416 P.3d 179) *15. Apx Q.

Since *K.S.A. 21-5303 Solicitation* uses identical language, then logically the Kansas Supreme Court focuses on *(d)(1)* to determine *Solicitation's* punishment. *Bollig* also found that a court can punish only the most serious underlying crime. Id. *17 ¶1. Lessers are dismissed. Id. *17 ¶2. All is one crime. This parallels how *18 USCS 3D1.2* orders the grouping of charges that involve one objective for a single punishment.[29] Apx Z.

Gordon noted that the unit of prosecution should be "consistent with the... sentencing scheme formulated by Congress." Supra, 875 F.3d at 33 ¶4. Similarly, *K.S.A. 21-5303* has a sentencing scheme: section *(d)(1)*.

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[29] See e.g. U.S. v. Wilson, 920 F.2d 1290, 1293-4 (6thCir.1990) (grouping 6 same-objective solicitations of murder).

4. *K.S.A. 21-5303's* unit of prosecution includes continuing conduct.

Justice Luckert explained how "[s]ome crimes, by their nature, do not happen instantaneously" and are therefore continuing in nature. State v. Daws, 303 Kan. 785, 799 ¶3; (794-802 dissent) (2016). E.g.:

> The United States Supreme Court explained the concept in the context of conspiracy, which, by its nature, is a continuing crime so long as the conspirators engage in overt acts towards its commission because "each day's acts bring a renewed threat of the substantive evil Congress sought to prevent." Daws at 799 ¶4, quoting Toussie v. United States, 397 U.S. 112, 122 (1970).

a. *K.S.A. 21-5303's* use of "-ing" / "-ion" makes the unit of prosecution contain ongoing activity.

See Question #2: The use of present participles or gerunds ("-ing") and "-ion" describes ongoing, incomplete action that is not discrete and numerate sufficient to be counted and broken into units of prosecution. In contrast, *Criminal Threat* utilizes past tense verbs to create countable units of prosecution. K.S.A. 21-5415; State v. King, 297 Kan. 955 (2013). Therefore, in *K.S.A. 21-5303,* the "commanding, requesting or encouraging" provision cannot form the basis for determiniation of the unit of prosecution.

b. Any finite act is not the unit of prosecution, and the court cannot add to the statute.

K.S.A. 21-5303 does not prohibit finite acts. The legislature could have used finite verbs and past participles if it meant to prohibit finite acts; e.g., "it shall be unlawful to command." See e.g., Sanabria v. U.S., 437 U.S. 54, 70 ¶2 (1978) ("...nor did [Congress] define discrete acts of gambling as independent federal offenses"); U.S. v. Reed, 647 F.2d 678, 684; n2 (6thCir.1981) Apx T. (Congress could have forbid each act).

> [A]ll crimes are established by legislative act. ...and there can be no conviction except for such crimes as are defined by statute. ... [A] criminal statute will not be "extended by courts to embrace acts or conduct not clearly included within its prohibitions." Our criminal statutes are to be construed strictly against the State. Sexton, supra, 232 Kan. at 542-43 (1983) (citations omitted).
>
> The court will not speculate as to legislative intent or read such a statute to add something not readily found in it. Harris, supra, 284 Kan. at 572 (2007).

In Johnson's case, if "per time" or "per each finite verb" was the unit of prosecution, the court could have charged him with, e.g, each phone call: 2-3 times per day for a month. "[S]uch division could be done ad infinitium." Adel, supra, 138 Wn.2d at 635. E.g., in United States v. Jones, if weapon possession could be broken into time segments, he could have been charged with 110 days —a life sentence. 533 F.2d 1387, 1391 (6thCir.1976). Proof of only three days but not for the others should not result in three punishments. Id.

> A course of conduct involves a number of acts. To hold that proof of a different act under a separate count establishes a separate offense would destroy the principle that a course of conduct is punishable as only one offense. Id. 1392.

c. *K.S.A. 21-5111 Definitions (c)* defines *21-5303's* "conduct" to include "a series of acts."

K.S.A. 21-5303 appears to involve "conduct." Sec.*(b)*. Apx E. K.S.A. 21-5111 Definitions (c) defines "conduct" as "act or a series of acts." Apx G. Thus, a single unit of *Solicitation* can contain several acts.

d. Due to a single objective, *K.S.A. 21-5303's* unit of prosecution is a "course of conduct."

> If the scope of the minimum unit of conduct is unclear in the statute, a presumption arises that the proper unit is the course of conduct defined by the statute, rather than the discrete physical acts making up that course of conduct or the number of victims injured by the conduct. Thomas, *A Unified Theory Of Multiple Punishment,* 47 U. Pitt. L. Rev. 1, 55 Rule 1 (1985). (Cited at 281 Kan. at 463).
>
> [A] series of acts constituting a course of conduct are not punishable separately if the legislature intended to punish the course of conduct alone." Reed, supra, 647 F.2d at 684 (extensive unit of prosecution analysis). Apx T.
>
> Like the conspiracy statute, the solicitation statute punishes a course of conduct, not a single act. See Braverman, 317 U.S. at 53-54 (characterizing conspiracy as a course of conduct crime). The prohibited course of conduct is attempting to engage another person to participate in a specific crime. This is an "inherently continuous offense." See In re Snow, 120 U.S. 274 (1887). The crime continues so long as the offer remains open, exposing another person to the corrupting influence of the enticement. State v. Jensen, 164 Wn.2d 943, 956-57 (Sup.Wash.2008).
>
> [T]he unit of prosecution for solicitation centers on the enticement to commit the unlawful act...[N]o matter how many times such a request is repeated, only one charge of solicitation is permitted. State v. Mockovak, 2013 Wash. App. Lexis 1211 (May 20) unpub. No. 66924-9-I, at *33, citing Jensen.
>
> [W]hen individual acts are part of an overall "design or objective" they represent a continuing course of conduct. State v. Ultreras, 296 Kan. 828, 856 ¶2 (2013).
>
> When a criminal statute punishes a course of conduct, the prosecution may not divide that course up into multiple counts of the offense; the entire continuous course constitutes only a single violation of the statute. People v. Avina, 14 Cal. App. 4th 1303, 1311 (1993).

"[Where a single impulse repeats a given act, the offense is continuous." State v. McAninch, 172 Iowa 96, 117 (1915). "[S]ingleness of thought, purpose or action" is a "single 'impulse.'" Universal, supra, 344 U.S. at 224 Apx J. (unless the statute specifically prohibits individual acts. Blockburger, supra, 284 U.S. at 302.)

e. Because renunciation is an option in *K.S.A. 21-5303(c)*, the statute is a continuing crime.

> It is obvious that the authors of the Crimes Code considered criminal solicitation to be a continuing crime because *902(b) 3* provides a method of renunciation of the solicitation and permits a defendant who has solicited another person to commit a crime, to do various things, which in essence, amount to a renunciation. Such being the case, it is obvious that, like the crime of conspiracy, the crime of solicitation once it is consummated and becomes a conspiracy continues until the solicitation is either terminated by a renunciation or by other means, or the act itself is committed. Commonwealth v. Carey, 293 Pa. Super. 359,366 (Penn.Sup.1979).

5. "Per individual" is not the unit of prosecution —based on 7 substantial reasons.

K.S.A. 21-5303 prohibits "commanding... another person." The State chopped Johnson's crime into 3 counts based upon, primarily, per individual solicited. This resulted in 2 convictions. However, neither "person" nor "another" nor "another person" mean one individual, but rather can include an entire group of human beings. Thus, the term "another person" fails to specify a clear unit of prosecution as a matter of law.

(a) The conspiracy statute 100% proves legislative intent. Next to *Solicitation*, the *Conspiracy* statute requires that "another person" can include many individuals. K.S.A. 21-5302 states: "Conspiracy is an agreement with another person," then refers to such as "any other person" and "one or more of the accused co-conspirators." Apx F. (Each was solicited to agree.) Courts prohibit dividing the co-conspirators —the "another person"— to create multiple charges. (See sec.#6, p.22.) To maintain consistency, "another person" must keep the same meaning within contiguous statutes, even if the phrase has different meaning elsewhere.

(b) *State v Jensen.* Washington's *RCW 9A.28.030(1)* prohibits solicitation to "another" and refers to "another" as "such other person." Jensen, supra, 164 Wn.2d at 949 (Sup.2008). Thus, *RCW 9A.28.030(1)* applies to "another person." See e.g.: 951 ¶1; 953 ¶1; 956-57 ("The prohibited course of conduct is attempting to engage another person to participate in a specific crime"). The State suggested a separate unit of prosecution for each conversation because of "different time and place, and involving a different person." Id. 956 ¶2. The State noted how *Graham's* "endangering 'another person' is 'victim-specific,'" constituting separate unit of prosecutions." Id. 957-58. But the *Jensen* court realized the different context and concluded:

> In the context of the solicitation statute, it is more sensible to interpret "another" as "every and all." A paradigmatic case of solicitation occurs when a person on a platform incites a crowd to engage in criminal conduct. See, e.g., State v. Schleifer, 99 Conn. 432, 434 (1923) (union leader urged striking railway workers to "[t]ake [scabs] in a dark alley and hit them with a lead pipe"). The essence of the crime is the attempt to persuade someone other than oneself to act as one's agent in committing a specific crime. The crime is the same when the enticement is made simultaneously to many people. See 2 Wayne R. Lafave, Substantive Criminal Law § 11.1(c), at 198 (2d ed. 2003). Just as the unit of prosecution for conspiracy does not multiply with the addition of coconspirators, the unit of prosecution for solicitation does not multiply when the offeree brings in his or her crime partners. Jensen, supra, 164 Wn.2d at 958 (court's brackets).[30]

[30] When Jensen offered more money to additionally have his son killed, it was that new and completely different offer that "constitutes a fresh enticement that supports a second conviction." Id. 958.

(c) Throughout K.S.A., "individual" and "person" are used together within a statute. Deliberate word choices. Different intents. See e.g.: K.S.A. 21-5928 ("referring an individual to a person").[31] Apx DD.

(d) *K.S.A. 77-201 Rules...Construction(3).* Apx DD. Singular may be plural. E.g.: Erhart v. Kaw, 91 Kan. 914, 917 (1914) (singular may be several); Fidelity v. Morris, 130 Kan. 290, 297 (1930) (attorney can be three).[32]

(e) Definitions. In *Webster's Third New International Dictionary* 1686 (1971), "person" includes "a body of persons." Texas v. United States, 300 F. Supp. 3d 810, 834-35 (N.D.Tex.2018). In Anderson's Law Dictionary "person" includes "(3) an individual... (4) individuals..." [plural]; and "individual" is repeatedly used to indicate one —not "person" (Same usage in Balentine's Law Dictionary). In K.S.A. 21-5111: (b) "another" is a person or persons; (t)"person" is "individual... corporation... partnership, or unincorporated association"; (cc)"solicitation" is "to command... or advise another to...." Apx G. Similarly, 1 USCS § 1 states: "person" includes "corporations... as well as individuals." CTS Corp. v. Waldburger, 134 S.Ct. 2175, 2187 (US.2014). Both "another" and "person" fail to exclusively designate a definition of a single human being. See contra, K.S.A. 21-5402 (Murder is the killing of a "human being").

(f) Caselaw. See: Town of Mesilla v. ...Las Cruces, 898 P.2d 121, 123 (NM.App.1995), quoting Gonzales v. ...Int'l Union, 77 N.M. 61, 68 (Sup.1966) ("'person'...[is] 'inclusive, rather than exclusive... includes bodies of persons as well as individuals' ...a generic term"); Lower v. Bd. of Dirs., 274 Kan. 735, 745 (2002) (cemetary board is "a person)"; People v. Gotay, 39 D.P.R. 754 (Sup.1929) re State v. Brady, 44 Kan 435 (1890) ("person" includes an entire class of persons; the number of individuals do not "add to the enormity of the act").[33]

(g) Absurd results. "Person" must include many individuals to avoid "absurd results. (See sec.#8, p.23.) Ney v. Blaney explained how if "person" meant only one individual then the act is not illegal when two individuals are involved. 2011 U.S. Dist. Lexis 110858 (E.D.Cal.Sep.27,2011) No. 2:08-193-GW.

> "Construing the word 'person' as including the singular only, the intention of the [L]egislature would be defeated and an absurd result reached." Ney, *16, quoting In re Mathews 191 Cal. 35, p43 (1923).

See also State v. Wille, 2007 WI App 27 at P13 (2007) (interpreting "'any person' in the singular" is absurd).

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[31] Also: K.S.A. 58-4723 ("employing a controlling person or any individual"). Apx DD.

[32] Similarly: State v. Smouse, 49 Iowa 634, 636 (1878) (person can be persons).

[33] Also: Extendicare, Inc. v. ...Health Planning, 216 Kan. 527, 529 (1975) (Dr Bletz and Phys. Ass. are "a person").

If person had to be one individual, the following examples would be legal: What if an actor made a solicitation on Craigslist? —towards no named individual? —received by others, day after day? What if an actor solicited an A-Team-like, vigilante-like corporation (conceived to protect the soliciting clients) that in no way resembles a specific individual? What if the actor made a "platform solicitation" —directed to thousands of unknown individuals to harm a class of people, e.g., LGBT? And if such was illegal, these scenarios could result in thousands of charges —just as absurd as Johnson's 3 charges.

6. When considering the *Conspiracy* statute, *Solicitation's* unit of prosecution must be per objective to keep it a less-severe crime.

a. Solicitation is an attempted conspiracy; thus, it must be charged less than a conspiracy.

> [E]very solicitation is an ***attempted*** conspiracy, [fn25] and, under the general grading of punishments, would be expected to carry a lesser maximum penalty than a "completed" conspiracy. People v. Rehkopf, 422 Mich. 198, 213 (Sup.1985) (***court's*** *emphasis*), noting at fn25: Williams, n 10 supra, § 212, p669; LaFave & Scott, § 58, p417.
>
> Solicitation is properly analyzed as an "attempt to conspire. ... Viewed as attempted conspiracy, it would be anomalous to punish solicitation more severely than conspiracy. Imposing ***greater*** punishment based on the fortuity of the solicitant's response would "shock the common sense of justice" no less than imposing none. Jensen, supra, 164 Wn.2d at 951 ¶2 (¶18) (Sup.Wash.2008) (***court's*** *emphasis*, quotes omited) Apx R.

Solicitation is an "attempted conspiracy." Sexton, supra, 232 Kan. at 540 ¶1; United States v. Anzalone, 43 MJ 322, 336: no20 (C.A.A.F.1995)(concur) per J.Dresler, *Understanding Criminal Law*. "Solicitation applies to a narrow area of conduct very close to the beginning of a criminal enterprise and may be thought of as an 'attempted' conspiracy" Schwenk v. State, 733 S.W.2d 142, 148 (Tex.Crim.App.1987).

b. A comparison of the statute-imposed punishments shows that courts must treat *Solicitation* as a less-severe crime:

> Criminal solicitation to commit **an** off-grid felony shall be ranked at nondrug severity **level 3**. Criminal solicitation to commit any other nondrug felony shall be ranked on the nondrug scale at **three severity levels below** the appropriate level for **the** underlying or completed crime. K.S.A. § 21-5303 (d)(1). Apx E. (bold added).
>
> v.
>
> Conspiracy to commit **an** off-grid felony shall be ranked at nondrug severity **level 2**. Conspiracy to commit any other nondrug felony shall be ranked on the nondrug scale at **two severity levels below** the appropriate level for **the** underlying or completed crime. K.S.A. § 21-5302 (d)(1). Apx F. (bold added).

c. The unit-of-prosecution for a conspiracy is, undoubtedly, per objective.

A conspiracy with a single-objective agreement will ***always*** result in only one charge. Quantity of charges is not based on changes in time, location, members, or knowledge of such[a]; but rather is charged per the "common objective test"[b]; per objective[c]; that can have multiple acts over years[d]. [a]U.S. v. Roberts, 14 F.3d 502, 511 (10thCir.1993); [b]U.S. v. Petersen, 611 F.2d 1313, 1326-27 (10thCir.1979); [c]U.S. v. Fishman, 645 F.3d 1175, 1190 (10thCir.2011); [d]Pham v. State, 281 Kan 1227, 1254-58 (2006). See e.g., State v. Gawith, 1990 Kan. App. Lexis 119 (Feb.23,1990) (787 P.2d 742) Unpub. *15-18 Apx S. (3 dates, 6 co-conspirators, and multiple acts is one conspiracy: one agreement to distribute). *Gawith* cited: U.S. v. Winship, 724 F.2d 1116, 1122 (5thCir.1984) ("crucial factor... common plan or scheme") and U.S. v. Sinito, 723 F.2d 1250, 1256 (6thCir.1983) ("An overzealous prosecutor" could split facts, "carving up one conspiracy into two or even more artificial offenses."). Gawith, at *13-14.

7. Conspiracy's multiplicity test, based on "same objective," is appropriate for *Solicitation*.

In People v. Morocco, 191 Cal.App.3d 1449 (1987) (solicitation of murder) the court noted *Cook* (conceptual relationship between solicitation and conspiracy) and *Miley* (six counts of soliciting murders were "one package") then stated solicitation multiplicity is determined by the conspiracy test: one charge if "all were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end result." Id. 1453, quoting Blumenthal v. United States, 332 US 539, 558 (1947).

8. Allowing *Solicitation* to mutate into a crime worse than *Conspiracy* creates disproportionate and absurd results —violating the *Eighth Amendment* and the Kansas Supreme Court Rules.

Cruel and unusual punishment. A court must interpret *K.S.A. 21-5303 Solicitation* in a manner where multiple convictions will receive a lesser punishment than a conspiracy. Any other interpretation is absurdly disproportionate, i.e., cruel and unusual punishment. E.g., two charges of soliciting one felony to two individuals might (wrongly, like in Johnson's case) result in a sentence of 5 years each: totaling 10. Whereas a more serious charge of conspiracy to commit the same felony —involving the same two individuals as co-conspirators who had to have been solicited to agree— might result in 6 years: totaling 6. More absurd is permitting a ten-conspirator conspiracy to explode into ten charges of solicitation, resulting

in a sentence totaling 50 years, more than had he committed murder. (Yet 6 years as a conspiracy.) Such a punishment for *Solicitation*, when analyzed under the three-part *Freeman* test to determine whether a sentence is cruel and unusual —viz: "(2) the comparison of the punishment at issue with other punishments in Kansas for more serious crimes"— would prove to be a violation of the *Eighth Amendment to the United States Constitution* and to *9 of the Kansas Constitution Bill of Rights*. See State v. Freeman, 223 Kan. 362, 367 (1978).

Absurd result. A statutory interpretation permitting more charges under *K.S.A. 21-5303 Solicitation* than for the same conduct under *21-5302 Conspiracy* is an absurd result that "would 'shock the common sense of justice.'" Jensen, supra, 164 Wn.2d at 951 (¶18). Apx R. *Conspiracy* is a more serious crime: the group now agrees to and plans to commit the crime, and they did an overt act. Thus, to avoid a violation of the Kansas Supreme Court "absurd result" rule, the charges for *Solicitation* must be less than for *Conspiracy*.

"[I]nterpretation of a statute must be reasonable and sensible,"[a] avoiding "uncertainty or... an absurd result"[b] ("unreasonable or absurd results"[c]). No rule requires "acceptance of an interpretation resulting in patently absurd consequences."[d] [a]State v. Bannon, 55 Kan. App. 2d 259, 265 (2018); [b]State v. Finley, 18 Kan. App. 2d 419, 422 (1993); [c]Northern Natural Gas Co. v. ONEOK..., 296 Kan. 906, 918 (2013); [d]United States v. Brown, 333 U.S. 18, 27 (1948).

B. At the least, *K.S.A. 21-5303's* unit of prosecution is ambiguous; thus, the rule of lenity applies.

Options exist for *K.S.A. 21-5303's* unit of prosecution, but they all center around "per ongoing objective." If this Court disagrees, it must at least acknowledge that *21-5303* fails to clearly define the unit of prosecution, presents ambiguity, or allows multiple interpretations. "[A]mbiguity regarding the unit of prosecution is construed in favor of the defendant." Sprung, supra, 294 Kan at 311; State v. Coman, 294 Kan. 84, Syl. ¶5 (2012). Thus, this Court must apply the rule of lenity and interpret ambiguity in the favor of Johnson.

> When Congress fails to establish the unit of prosecution "clearly and without ambiguity," we resolve doubt as to congressional intent in favor of lenity for the defendant. United States v. Chipps, 410 F.3d 438, 448 ¶2 (8thCir.2005), quoting Bell v. United States, 349 U.S. 81, 83-84 (1955).
>
> Interpretation of the statute as prohibiting a course of conduct is further strengthened by the fact that this is a criminal statute. Congress could easily have specified that each act would be a separate violation. They did not choose to do so. Criminal statutes must be strictly interpreted. Where two alternatives are available the Court may not choose the harsher reading without clear and definite language in the statute. United States v. Woody Fashions, Inc., 190 F. Supp. 709, 713 (S.D. NY.1961), citing United States v. Resnick, 299 U.S. 207 (1936); United States v. Alpers, 338 U.S. 680, 681 (1950); Bell, supra, 349 U.S. at 83; Universal C.I.T. Credit Corp. supra, 344 U.S. at 222.

The abiguity in "another person" also requires lenity. See e.g., United States v. Jackson, 736 F.3d 953, 956 (10thCir.2013) ("any person" could be interpreted either in the singular or plural, making it sufficiently ambiguous as to require lenity"). As described earlier, "another person" fails to specify a number of human beings, especially when "person" is repeatedly described as, and found to be, groups of individuals.

C. Johnson's 3 charges were multiplicitous, depriving him of a fair trial, then violating the *Double Jeopardy Clause*. Thus, this Court must reverse Johnson's 2 convictions.

(1) The *Double Jeopardy Clause* (Apx AA.) protects Johnson from multiple charges of the same offense within one trial. The United States v. Cooper court stated:

> Multiplicity violates the *Fifth Amendment's Double Jeopardy Clause*, which "protects not only against a second prosecution for the same offense after acquittal or conviction" but also against "charg[ing] the same offense in more than one count" of a single indictment. Cooper, 886 F.3d 146, 153¶2 (DC.Cir.2018) (quote and cites omitted)(court's brackets).
>
> [M]ultiplicity... [also] creates the *potential* for multiple punishments for a single offense in violation of the *Double Jeopardy Clause of the Fifth Amendment of the United States Constitution* and *section 10 of the Kansas Constitution Bill of Rights.* [Apx AA.]. Schoonover, supra, 281 Kan. at 475.

Likewise, *K.S.A. 21-5109* prohibits charges and sentences based upon identical offenses, stating:

> A defendant may not be convicted of identical offenses based upon the same conduct. The prosecution may choose which such offense to charge and, upon conviction, the defendant shall be sentenced according to the terms of ***that*** [single] offense. K.S.A. 21-5109(e). Apx H. (bold added).

(2) Because of an unclear and undetermined unit-of-prosecution, Johnson unfairly had to defend against 3 charges. This spread his resources thin and provided a stronger impression of guit to the jury.

> The law protects an individual against multiplicitous indictments to avoid multiple sentences for a single offense ***and to eliminate the prejudice which such indictments may generate in the eyes of a jury.*** For when an indictment charges numerous offenses arising from the same conduct it "may falsely suggest to a jury that a defendant has committed not one but several crimes." . . . Compromise verdicts or assumptions that, with so many charges pending the defendant must be guilty on at least some of them, pose significant threats to the proper functioning of the jury system. U.S. v. Phillips, 962 F. Supp. 200, 202 ¶2 (D.C.Dist.1997) (court's emphasis).

(3) In Johnson's case, the court charged him 3 times for an identical offense. Then —after a jury acquitted him of one identical offense and the intent element— the court sentenced him twice for the identical offense. Thus, Johnson's 2 convictions are legally impossible. The court violated Johnson's right to be free of double jeopardy and multiplicty. The court violated *K.S.A. 21-5109* when it failed to select one identical offense and then imposed 2 sentences.

Conclusion

The unit of prosecution for *K.S.A. 21-5303* is per each objective solicited, regardless of how many others received such solicitation or how many times such occured. This is mandatory in order to keep *Solicitation* in line with *Conspriracy*, the slightly-worse crime. All conduct which leads towards this single objective is contained within one unit of prohibited conduct. Therefore, because the entirety of Johnson's conduct, as described within his 3 charges, was one unit; and because the jury acquitted him of this unit of crime; and because *K.S.A. 21-5109* authorizes only one such charge; and because Johnson's 3 charges were impermissibly multiplicitious; then the court permitted 2 illegal and impossible convictions that require reversal. This Court must resolve any doubt in Johnson's favor, per the rule of lenity.

Question 4. Is *K.S.A. 21-5303* unconstitutionally overbroad and vague — particularly due to its prohibition of "encouraging"—both facially and as applied to Johnson's case? Is "encouraging" always ambiguous and overbroad, or only in the 10th Circuit and Kansas District court? Did the court charge and convict Johnson of an unconstitutional statute?

This Court should address this question because it raises important *First Amendment* questions of national importance. The 10th Circuit Court addressed "encourage" only once before and determined such word is overbroad. The Kansas Court of Appeals ignored that decison and instead considered how "encouraging" a bird to fight did not violate constitutional rights. Many courts manifest that "encourage" is vague; some say it's not. This disagreement alone creates enough ambiguity to conclude that a common person cannot comprehend "encourage" with legal certainty. Allowing the criminalizing of "encouraging a felony" could result in a myriad of unintended guilty targets; e.g., arguably: CNN (copy-cat crimes); this Court (Lexis publications); literature, incl children's books (Sleeping Beauty: e.g.,battery[34]); and housewives who verbally wish their husband's golf clubs would "disappear" (felony theft). "Encouraging" is based upon another's subjective opinion. Thus, this matter should be clarified by the higher courts.

The district court charged Johnson with *K.S.A. 21-5303* "encouraging or requesting another person to commit a felony." Johnson certainly did not make any request, thus "encouraging" appears to be a determinative factor. As such, *K.S.A. 21-5303* violates Johnson's *First Amendment* rights. Apx AA.

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[34] E.g.: Weaver v. Clark, 2011 U.S. Dist. Lexis 151106, (S.D.Cal.May12) No. 10-cv-655 LAB (POR), *5. (defendant's sex with child started with a kissing game called "Sleeping Beauty"); Sandstrom v. City of McHenry, 2012 U.S. Dist. Lexis 143253, (N.D.Ill,Oct.3)No. 10 C 07932,*5 ("Prince Charming may have committed a battery on Sleeping Beauty").

A. A prohibition of "encouraging" is overbroad, per the 10th Circuit Court (U.S.Sup. affirmed).

The 10th Circuit Court found that a prohibition of "encouraging" is overbroad, stating:

> "Encouraging" and "promoting" ... do not necessarily imply incitement to imminent action. Thus ... encouraging, or promoting homosexual activity is unconstitutionally overbroad. National Gay Task Force v. Board of Education, 729 F.2d 1270, 1274 (10thCir,1984), Apx U., Affirmed: Bd of Education v. National Gay... 1985 U.S. Lexis 1524 (Mar.26,1985) No. 83-2030.

One cannot be punished for "encouraging" what might happen "at some indefinite time." 729 F.2d at 1274: citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); quoting Hess v. Indiana, 414 U.S 105, 109 (1973).

> "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. *** *First Amendment* freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought. ... The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" In re Marriage of Weddigen, 2015 IL App (4th) 150044, at P49 (concur), quoting Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002).

The NOW v. Operation Rescue court also found "encouraging" overbroad. 37 F.3d 646, 657 (D.C.Cir.1994):

> Reviewing the injunction under the demanding standard set out in *Madsen*, whether the challenged provisions 'burden no more speech than necessary to achieve a significant government interest,' Madsen, 114 S. Ct. at 2525, we conclude that the language of the injunction ["the terms 'inducing' and 'encouraging'"] was vague enough to create an impermissible potential for overinclusiveness.

Johnson's case case lacks *Brandenburg* incitement and imminence. (See Question #5, p.33, free speech). E.g., Johnson's discussion with Nodwell transfered to Stites, so Nodwell was 100% out (renounced). Johnson passively renounced all with Stites by avoiding the Kansas meeting, so all was "over" per Stite's testimony. At the Missouri finale that Stites solicited, he was not certain what Johnson wanted. But most determinative, "encourage" does not imply incitement to imminence, thus always overbroad per *Natl. Gay* and *NOW*.

B. By criminalizing "encouraging," *K.S.A. 21-5303* is overly-broad and needlessly restrictive.

"Encourage" is omitted (unnecessary) in K.S.A. 21-5111(cc) where "'solicitation' means to command, authorize, urge, incite, or advise...." Apx G. Thus, *K.S.A. 21-5303* is not the "least restrictive means among available, effective alternatives," as required by Ashcroft v ACLU, 542 U.S. 656, 666 (2004). Apparently no state has prosecuted a felony solicit based on an encouraging, further indicating how such term is unnecessary.

C. The United States District Court of Kansas stated "'encourages'... is ambiguous."

The Court of Appeals stated that a "common person can understand" the term "encourage,"[a] which is "clear and unambiguous."[b] [a]Johnson, *16 ¶4); [b]*16 ¶1. ***~False~*** In fact, the year ***after*** Johnson's charges, the United States District Court (surely of 'common intelligence') stated:

> Congress has not yet defined "encourages"... ***its meaning is ambiguous***. United States v. Delgado-Ovalle, 2013 U.S. Dist. Lexis 181000 (D.Kan.Dec.30) No.13-20033-07-KHV, *13. Apx V.

Published or not, judges cannot determine exactly what **constitutes** "encourage" —without substantial research. See also: State v. Geist, 1997 Kan. App. Unpub. Lexis 744 (Dec.24,1997) No.74,916 at *9 Apx W. ("There appear to be no Kansas cases expressly defining 'encouragement.'"); State v. McCune, 189 Neb. 165, 172 (dissent) (1972) ("'Encouraging' or 'contributing' in Nebraska are just as vague and subjective as 'annoying' in Ohio."); Amalgamated Transit Union Int'l v. Donovan, 767 F.2d 939, 946 (D.C.Cir.1985) ("The Senate dropped the 'encouragement' language... 'encouragement' was too vague a standard").[35]

The definitive question is not if courts' analyses can agree upon what "encouraging" consists of —clearly there is substantial uncertainty— but if an ordinary person like Johnson can figure it out.

> [I]f a federal criminal statute is so enigmatic that the government has experienced such difficulty settling on its meaning maybe that goes some way toward showing that ordinary citizens lack reasonable notice about its meaning and the time has come to let lenity in. United States v. Rentz, 777 F.3d 1105, 1114 ¶2 (10thCir.2015).

D. "Encourage" has varying definitions that include other vague and overbroad words.

The Court of Appeals stated that "encourage" is not "confusing or susceptible to ambiguous or differing meanings";[a] rather, "we have a clear, easily understood, and universally accepted definition of the verb 'encourage.'"[b] [a]Johnson, *16 ¶4; [b]¶1. ***~False~*** E.g., the court provided a definition from the 2014 *Black's Law Dictionary* (Id.*14) that omitted prior subjective phrases, e.g. "raise confidence." See *Black's* 6th ed (at Geist, supra, *9 Apx W.). Varying definitions create vagueness. State v. Lackey, 232 Kan. 478, 480-81 (1993).[36]

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[35] Other examples: BB&T Ins. Servs. v. Thomas Rutherfoord, Inc., 80 Va. Cir. 174, 179 (2010) ("encourage" and other terms "are not defined and are ambiguous."); Yarborough v. Warren, 383 F. Supp. 676, 687 (E.D.Mich.1974) ("...when dealing, as we are, with vague terms such as 'encouragement,' 'motivation,' and 'psychological impact....'" And, "...the case at bar which relies on the unformable "encouragement").

[36] Contrary to the Opinion (Johnson *14), Jonathan Swift **would** fear the **prior** *Black's* and everchanging, ambiguous definition of "encourage." Moreso, like the witchcraft trials of the 1700's, Swift and others should fear modern-day entrappers and head-hunters accusing "he encouraged me!" over what they "felt" words or actions "really" meant.

Words that define "encourage" —viz: help, advise, courage, confidence— are also vague. The *Delgado* court reviewed *Lopez* (whose dissent stated: "The most general and least meaningful possible interpretation [of encouraging is] 'to help'" which "is vague." [Apx X.]). Delgado, supra, (D.Kan) No. 13-20033-07-KHV, *18-20. Apx V. To avoid overinclusiveness, *Delgado* rejected "equating of 'encourage' with 'help.'" Id.*22¶1.[37] See also: Cramp v. Board of Public Inst., 368 U.S. 278, 286 (1961) ("general words [incl advice] are vague"); United States v. Andrews, 790 F.2d 803, 812 (10thCir.1986) ("subjective lack of confidence")[38].

Requiring a word's absence from a dictionary before the word is ruled as vague, is a sensless notion:

> Many words are defined in a standard dictionary which are not "commonly understood." The question is whether a person of ordinary intelligence understands what conduct is prohibited by the use of these terms. State v. Adams, 254 Kan. 436, 445 (1994) (re "misconduct").

See e.g., People v. McCaughan, 49 Cal. 2d 409, 416; 415 (Sup.1957) ("harsh" and "unkind" are vague, even though in the Penal Code since 1872 and in *Webster's*). A word is a "general term" when the "statute does not specifically enumerate the types of [conduct] prohibited." Adams, at 441. Like "encouraging," such

> terms are not adjectives which modify, limit, or qualify the act or conduct prohibited. Instead, each of these terms constitutes conduct which is prohibited. Nor are they terms which have been considered and defined by numerous appellate court decisions. We find such unlimiting terms necessarily require persons of ordinary intelligence to guess.... Id. 445.

E. "Encourage" depends upon the mental impression of the listener.

The Court of Appeals stated: "the definition of 'encourage' does not include any element related to any mental state of the person solicited. ...is not dependent to the subjective feelings of the victims." Johnson, 15¶2. ***~False,*** for 2 reasons:

(1) "Encourage" comes from "en-" plus the noun "courage,"[39] which most always defines "encourage." "Courage" is a mental state, derived from: "OFr [old French]. *Courage, corage*, mind, heart, spirit, from L. [Latin] *cor*, heart." Webster's New Twentieth Century Dictionary 2nd ed 1973, p419. "Courage" means:

> mental or moral strength enabling one to venture, persevere, and withstand danger, fear, or difficulty firmly and resolutely < ...a perfect sensibility of the measure of danger and a mental willingness to endure it—W.T.Sherman>. Webster's Third International Dictionary (1981), p522.

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[37] See also PerfectVision Mfg. v. PPC..., 2014 U.S. Dist. Lexis 121057 (E.D.Ark.2014) No. 4:12CV00623 JLH, *65 ("'to help'... so subjective so that a person of ordinary skill in the art cannot discern with reasonable certainty.").

[38] Another example: United States v. Breque, 964 F.2d 381, 389 (5thCir.1986) ("subjective confidence").

[39] "en-" is "used to form verbs from nouns...meaning (a) to put into or on" Webster's...Twentieth, supra, p596.

"Embolden" also describes "encourage," per *Black's*. Johnson,*14 ¶3. "Embolden includes: "to impart... courage." Webster's Third, supra, p739. "Courage" is a subjective mental impression. See e.g., State, Dep't... v. State Troopers..., 179 N.J. Super. 80, 90 (1981) ("subjective factors —e.g. ...courage").

(2) The Court of Appeals stated that "[Johnson's] conduct —rather than the subjective [mental] understanding of the person solicited— is the standard for determining" guilt. Johnson, *15 ¶2. As support, the court noted that *K.S.A. 21-5303(b)* includes " if the person's conduct was... a communication." Id. Problem is: "the person's conduct" refers to the someone other than the actor. The actor's conduct is irrelevent. (See sec.I, p.32.) *K.S.A 21-5303* prohibits speech and says nothing about the actor's (defendant's) conduct.

This Court might still ask: did Johnson do inciting or instigating? Both define "encourage" and generally mean to spur on, urge, or goad. Johnson did not. See Question #5 (B), p.35 (re urge and incite).

F. *K.S.A. 21-5303* is vague due to no clear line to separate the illegal.

K.S.A. 21-5303 does not provide a clear line between what is illegal and what's not. Eg., when does Johnson's protected discussion become an encouragement or request when one was not specifically made? (See Question #5, p.33, re free speech). Lack of a clear line results in vagueness and guessing, per: Wood v. Utah Farm..., 2001 UT App 35, at P1 (2001) ("vague encouragement" and "hyperbolic optimism" re "Get your problem taken care of"); Ruff v. City of Leavenworth, 858 F. Supp. 1546, 1558-59 (D.Kan.1994) (re "political activity"); State v. Meinert, 225 Kan. 816, 819-20 (1979) (corporal punishment v. illegal abuse is based on personal beliefs); Altamont v. Finkle, 224 Kan. 221, 224 (1978) (re exhibition of acceleration).

G. *K.S.A. 21-5303* is vague due to its lack of objective standards.

K.S.A. 21-5303 lacks objective standards, thus vague. Objective standards must exist when a law depends upon another's perception, per: Howard v. State, 272 GA 242, 247-48 (2000) (Solicitation statute is vague; fn24 citing, incl. Grayned, 408 U.S. at 108-109); Planned Parenthood v. Phil Kline, 287 Kan. 372, 428 (2008).("no objective test"). In City of Lincoln v. Farmway the court reviewed *Luna* ("annoying" is entirely subjective) and *Wichita* (has "reasonable sensibilities standard") and found Lincoln's statute lacked objective standards, thus vague. 298 Kan. 540, 547-49 (2013). In State v. Bryan, *K.S.A 21-5427 Stalking* was vague: no objective standards, subjecting the defendant to "the particular sensibilities of the individual victim." 259 Kan 143,151-55 (1996). Later, *K.S.A. 21-5427* added a "reasonable person" standard.

"Encouraging" is a mental effect that requires an objective standard, e.g., how much, how long. See Independence v. Richards, 666 S.W.2d 1, 9 (MO.App.1983) (effect must be defined). In Johnson's case, e.g., was Stites's mere opinion enough to constitute an encourage or request? —such opinion that he was only "fairly certain of" while trying to determine what Johnson wanted. If so, *K.S.A. 21-5303* must state that it allows another's unclear perception to constitute the crime.

K.S.A. 21-5303 also lacks "reasonable person" guidance. In Johnson's case, neither Stites (LS), Nodwell (RN), nor the prosecutor constitute a "reasonable person." The prosecutor is obviously in a biased position —and he's the only one that said it all meant murder (other than Porterfield: acquittal). RN and LS both testified that Johnson never asked them to kill his ex-wife, but instead discussed investigative and construction work. R.9,110-4,151,154-55,160-61. RN is a lifelong criminal[a] who initialy thought all was a joke,[b] makes stuff up on people in court,[c] and forgets a lot[d]. [a]R.2,20-21; [b]R.9,94; [c]R.2,36, [d]23,32; R.9,113. RN's belief that Johnson meant something different [undisclosed] was not an "assumption or logical inference" and went unexplained. R.9,116. After the meeting, RN called Johnson "back to ask about employment" (R.9,100): 3-4 calls per day for a month (R.9,115-8; R.2.16,41). Yet Johnson had not hired him for a regular job. With this state of mind, RN made his police report. The preliminary judge stated that RN "was singularly unimpresive as the State's witness." R.2,85. LS's goal was to make Johnson admit the crime. R.9,122. LS had received input from others as to what all discussion would mean. R.9,149,163. In fact, LS agreed that Johnson's case is "entire[ly]... innuendo or interpretation" [a] and "assumptions and inferences" where the innocent explanation "was one way to look at it." [b] [a]R.2.82, [b]R.9,151-52. Thus, neither RN nor LS could make a "reasonable person" determination. Yet, *K.S.A. 21-5303* leaves such up to the listener's subjective impressions with zero guidance.[40]

[40] Other states solved this problem. See e.g., Colo. Rev. Stat. 18-2-301(1) (requires proof of acts committed "under circumstances strongly corroborative of that intent [to solicit]."

"Encourging" is as vague as "endangering" was in *Kirby* —for the same reasons: (1) Not defined by statute; (2) Not defined in criminal code; (3) No accepted defnition; (4) No clear line; (5) No standards; (6) Requires speculation; (7) the prior, yet word is in *Webster's*. State v. Kirby, 222 Kan 1, 9-10 (1977).

H. A prohibition on "encouraging birds" does not compare to encouraging a person.

The Court of Appeals stated that *Edmondson* rejected a similar constitutional argument. Johnson, *12, citing Edmondson v. Pearce, 2004 OK 23 (Sup.). Apx Y. But there is a huge difference between "encouraging ***birds***"[41](Id. 57) in an adjective phrase —that merely describes "training flight," which is only an objective modifier example of the prohibited conduct: "a fight between birds" (Id. 50) ~vs~ a United States Supreme Court-affirmed ruling about ***encouraging a person*** where such is the specific prohibited conduct that infringes upon *First Amendment* Rights (*Nat'l Gay*). *Edmondson's* citations, e.g., *Todd*, are also regarding birds. True, getting birds to fight is unlawful. Thus, encouraging birds to fight is not protected speech. However, comparing adjective bird-stuff to encouraging a person is a silly conjecture.

I. *K.S.A. 21-5303* is overbroad and vague, as it permits guilt based solely upon another's conduct.

Throughout K.S.A., "actor" is the defendant; "person" is the receiver(s). E.g., *21-5221*. Apx BB. Likewise, K.S.A. 21-5303(c) states: "It is an affirmative defense that the ***actor***, after soliciting another ***person*** to commit a felony, persuaded that ***person*** not to do so." (bold added.) Based on such, 21-5303(b) is clear that another's conduct —not the defendant's— can make the defendant guilty of *Solicitation*, stating (Apx E.):

> It is immaterial under subsection *(a)* that the actor fails to communicate with the ***person*** solicited to commit a felony if ***the person's conduct*** was designed to effect a communication. (bold added).

Thus, if the receiver (the person) did conduct that meant something, the defendant's non-communication is irrelevant. Confusing. How could one know if the receiver did conduct that meant something? Such might incorrectly lead others to conclude that the actor's conduct was relevant. Ambiguous and vague. *K.S.A 21-5303* is thus also overbroad because the statute prohibits everything that the defendant is not even aware of.

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[41] "provisions clearly prohibit **individuals** from encouraging **birds** to attack or fight. ... [B]irds can in fact be encouraged to attack one another, which is the conduct this part of the Act is designed to prohibit." 2004 OK, at 57.

In Johnson's case, Nodwell's and Stites' conduct included phone calls to Johnson (solicits) and urging.

Conclusion

Many courts have found that "encourage" and its defining words are unconstitutionally overbroad or vague. Some courts have found otherwise, but usually only after an indepth analysis. This uncertainty confirms that one cannot easily determine what specific speech / conduct constitutes "encouraging." Similarly, a listener may subjectively percieve "requesting" with no reasonable-person guidelines for the actor, listener, or jury. Criminalization of "encourage" infringes upon free speech. Such term is unnecessary for *K.S.A.21-5303* to achieve its goal. Thus, the entire *K.S.A.21-5303* is vague and overbroad, facially and as applied.

K.S.A.21-5303 is further overbroad and vague by allowing guilt based solely upon another's conduct. Although this may be an error by the legislature, the statute says what it says and must be read as such.

This Court may find that Johnson's conduct and speech was questionable (keep in mind that any P.I work for a divorce would be top-secretive), esp based upon the Court of Appeals' slanted "facts." But regardless, Johnson did not do any inciting or urging. In fact, undercover Stites did the actual and substantial soliciting. Johnson became the solicitee. Turn the tables: consider if Johnson had made all the calls and set up the meetings while Stites was hedging—a switched scenario. Who is the real solicitor here? Imminence was non-existent. All the above, even moreso, when excluding what took place in Missouri where solicitation speech and conduct is not yet illegal.

Question 5. Does the *First Amendment* protect discussion of a crime? Can those words constitute specific advocating when a listener merely has a different impression or a vague opinion of such? Are Johnson's words protected regardless of how they were subjectively interpreted, and after renunciation?

This Court should address this question because it affects everyone's freedom of speech, raising important constitutional questions of national importance. Such has become a topic in national news, e.g., questioning President Trump's words. This Court should clarify how the *Brandenburg* analysis in Pres. Trump's case applies equally to citizens. Johnson's alleged type of speech —discussing criminal activity— is seldom addressed, perhaps never by this court. Such talk may seem uncommon, but likely everyone has

said something innocent that could be perceived as a criminal or different-meaning thought. A devious listener can twist another's words. Johnson's case started when he mentioned that his life would be easier if his ex-wife was gone. Is this and what followed —and what others might similarly wish aloud and discuss— protected speech? Where is the line? Clarity is needed on specific speech topics and scenarios.

A. Pres. Trump's case manifests how unprotected speech must *clearly* incite imminent violence.

The court in Nwanguma v. Trump considered if Trump's words —"Get 'em out of here"— constituted "inciting to riot." 903 F.3d 604 (6thCir.2018). The court noted *Brandenburg's* factors unprotect speech if

> "(1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech." Id. 609, quoting Bible Believers v. Wayne Cty., Mich., 805 F.3d 228, 246 (6thCir.2015), citing Brandenburg v. Ohio, 395 U.S. 444 (1969).

The district court had stated "'it is plausible'" that Trump advocated force (1st factor). Id. 610-11. But the *Trump* court emphasized how unprotected words must "***specifically***" advocate violence, stating:

> "[T]he mere tendency of speech to encourage unlawful acts . . .[is not] sufficient reason for banning it." What is ***required***, to forfeit constitutional protection, is incitement speech that "***specifically*** advocate[s]" for listeners to take unlawful action. Trump's words may arguably have had a tendency to encourage unlawful use of force, but they did not specifically advocate for listeners to take unlawful action and are therefore protected. Id. 610 ¶3 (bold added), quoting Bible Believers, supra, at 245 that quoted Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).
>
> Hess [v. Indiana, 414 U.S. 105 (1973)] teaches that the speaker's intent to encourage violence (second factor) and the tendency of his statement to result in violence (third factor) are not enough to forfeit *First Amendment* protection unless the words used specifically advocated the use of violence, whether explicitly or implicitly (first factor). Here, too, the district court. ... placed too much weight on the second and third *Brandenburg* factors while slighting the key role of the first. ... must meet all three factors to avoid *First Amendment* free speech protection. Trump, at 611 ¶3.

In Trump's speech, "not a single word encouraged violence or lawlessness, explicitly or implicitly." Id. 610 ¶2.

> [T]he subjective reaction of any particular listener cannot dictate whether the speaker's words enjoy constitutional protection. It is the words used by the speaker that must be at the focus of the incitement inquiry, not how they may be heard. Trump, at 613 ¶3.

The *Trump* court also considered the context of words: Trump's "admonition, 'don't hurt 'em' ...undercuts the alleged violence-inciting sense of [his] words." Id. 612 ¶1. "[T]he plausibility of such a finding [of incitement] is directly negated by" such admonition. Id. 608 ¶3. I.e. "'stops short of the line between

possibility and plausibility.'" Id. 609 ¶2, quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

B. In Johnson's case, all *Brandenburg* factors and more must be met before speech is unprotected.

*See Johnson's Statement Of The Case (above, pg 1) that pins facts to the Record for appeal.)

(1) Did Johnson's words specifically urge violence? I.e., clearly understood? —by Nodwell (RN) and Stites (LS), not by the jury or prosecutor (stacked inferences). *No.*

E.g.: RN testified that Johnson wanted (not requested) only "following her."* RN then called back about work 3-4 times per day (30 days).* LS initiated every contact,* (except Johnson's cancellation call*) with the intent to "fullfill the solicitation."* Johnson was reluctant ("hedging").* He passively ditched LS (for 1 hour/2 calls) by limiting LS's proposed meeting to an impossible Missouri location.* Had LS not called back, all would have remained ended. But LS urged on (solicited): asked if Johnson "still wanted" work done.* A call later, Johnson merely agreed to meet and pay.* Even if something somehow meant something else, Johnson never requested or urged anything. Johnson was the solicitee, at most.

Similarly, in People v. Salazar the informant "did the inciting, inducing... defendant was only responding to solicitations." 140 Mich.App. 137, 147-8 (1985). E.g. (like LS's words), the informant asked, "did he still want me to take care of that for him, and [Salazar] said, yes." Id. See: State v. Anderson, 618 NW 2d 369, 373-4 (Iowa.Sup.2000) ("one may not be solicited into soliciting. He is either the solicitor or solicitee"); State v. Swann, 142 Ohio. App. 3d 88, 90 (2001) (Solicitation "does not prohibit acceptance." "Swann was the solicitee." "[D]istinction makes sense [as] law should be slow to punish converstation").

(2) Did Johnson intend violence? *No.*

E,g.: RN did not believe Johnson wanted him to kill the ex-wife* and never told the police otherwise.* LS was unsure what Johnson wanted, even at the very end.* His opinion that words meant different —speculation is required here— came from others.*

(3) Was imminent violence likely? *No.*

E.g.: The most RN might ever do was "look into it" (following her).* The other alleged forgotten-then-remembered acts merely "could" be done.* All ended with RN when LS arrived. Then LS apparently

never had any idea what Johnson wanted.*

(4) Did Johnson make an admonition or renunciation that negated possible violence? *Yes.*

E.g., Johnson told LS: "...part of detective work is to make sure ***nobody***, no bystanders ***or anybody else gets hurt***." Vol.1,50-51; Vol.21. (bold added). Note: LS cut off Johnson, twice*, connivingly preventing further admonition, artfully fabricating his recording. Renunciation is another form of admonition, negating solicitation. K.S.A. 21-5303(c). Apx E. The actor must persuade the other to not commit the felony ***or*** otherwise prevent the felony. The State must disprove (K.S.A. 21-5108(c). Apx BB.), but failed. Johnson prevented RN from doing anything. In KS, Johnson never even agreed to re-meet LS*, effectively preventing "the" felony. Then, passively, Johnson ditched LS for over an hour, stating he needed to "go back to thinking about this whole thing" (R.9,157) that caused an ending (R.2,77; R.1,52) until, in Missouri, Johnson succumbed to LS's advances. See Nichols v. ...Oxford, 182 Conn. App. 674, 681-2 (2018) (renunciation may be through passive conduct or inferred from circumstances). At trial, the prosecutor told the jury that the "withdrawl defense requires... persuade" (R.15,89) (sim.at R.15,147-8), which was "a misstatement of controlling law." State v. Gunby, 282 Kan. 39, 63-4 (2006) (must review misstatement on appeal). "Prevent" is an alternate means. Johnson prevented all with RN and did another finite act of prevent with LS by persuading him to go away.

(5) Did Johnson's words in Kansas amount to legal discussion? *Yes.*

See Enoch v. State, 95 So. 3d 344, 362 (Fla.1st DCA 2012) ("serious discussions... was not solicitation... thinking about an illegal act is not, by itself, a crime." Citing *Gains*). And Johnson wanted to "go ***back*** to ***thinking*** about" whatever it was. R.9,157.

Conclusion

Like in *Trump*, this Court must focus on Johnson's words, not on how others reacted or "heard" such words. And not on speculation as to what the others "heard." Nothing Johnson said or did "specifically" —clearly— advocated violence. There was no immince. And, if there was, Johnson negated all with his

clear admonition and passive renunciation, to whatever and everything he was sucked into or he discussed.

Question 6. What are the exceptions to the invited error rule? Is an alternative means error an exception? Are state-created PIK instructions or legally infirm instructions an exception? If so, must Kansas courts, or this Court, consider Johnson's instruction and alternative means issues or provide retrial?

This Court should address this question because caselaw on invited error is conflicting and incomplete. "There is no bright-line rule for [the invited error's] application." State v. Sasser, 305 Kan. 1231, 1236 (2017).

> There are cases supportive of about any outcome. Some opinions offer little more than rote. Others rest on more developed discussions, though occasionally neglecting to account for the purpose behind the invited error rule. State v. Hargrove, 48 Kan. App. 2d 522, 547 (2013).

Caselaw supports that invited error does not apply if the instruction, e.g., involved alternative means, created manifest injustice, was legally infirm, was not the defendant's sole doing. Or, if the error "seriously jeopardized the rights of the appellant." U.S. v. Lemaire, 712 F.2d 944, 949 (5thCir.1983). Also, the invited error doctrine does not "dispositively oust this Court's traditional rule that we may address a question properly presented in a petition for certiorari." U.S. v. Wells, 519 U.S. 482, 488 (1997). Thus, this Court should address this conflicting issue that affects trials in every state and defendant's rights.

A. Johnson's alternative means instruction error is an exception to the invited error rule.

The *Sasser* court recognized distinctions of cases (listed) that declined to apply the invited error rule. 305 Kan. at 1236. E.g., an alternative means issue reaches far beyond an instruction analysis:

> An alternative means error is not just about sufficiency of the evidence. It is a jury unanimity error injected into a trial through the confluence of the instructions given to the jury and the lack of evidence to support one or more means of committing the crime as set out in the instructions. Id. 1236. Apx CC.
>
> The overarching question presented involves the sufficiency of the evidence...which does not require [the court] to engage in a preservation inquiry. State v. Castleberry, 301 Kan. 170,188 (2014).[42]

Like *Sasser's* listed cases, Johnson did not request an instruction for a non-existent means (in *Schreiner* "the instruction expanded the scope" of offense, created alternative means. He "got what he asked for."[43]); Johnson **did** claim non-sufficient evidence to prove both means (as in *Creason*). Also, Johnson could not foresee the State's failure to prove both means, reasonably concluding that no instruction was needed. E.g.:

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[42] See also State v. LeGrand, 2013 Kan. App. Unpub. Lexis 1095 (November 27, 2013) No. 108,389 at *37-38 (error, as in *Hargrove,* does not apply because "he challenges the sufficiency of the evidence to support the elements").

[43] Quote by State v. Filbert, 2018 Kan. App. Unpub. Lexis 402 (May 25, 2018) (419 P.3d 104) No 117,326 at *10.

> [A]t the time Sasser requested the challenged instruction in advance of trial, he could not have known that the instruction would be erroneous at the close of evidence, especially because the instruction matched the State's allegations. Sasser's failure to object to the jury instructions finalized at the instructions conference more closely resembles acquiescence than invitation. We will not apply the invited error doctrine under these circumstances. Sasser, at 1238. Apx CC.

Johnson's case is also like State v. Dern where the court stated: "[T]here is a critical distinction between [Dern's] case and *Schreiner*." Dern did not submit an alternative means instruction. 303 Kan. 384, 397 (2015). Likewise, Johnson's court failed to instruct on **alternative means**. When in an elements instruction (as at R.15,146), each alt. means "demand[s] super-sufficiency of the evidence." State v. Brown, 295 Kan. 181, 199-200 (2012). "Should evidence be lacking on one of the means, however, then the guilty verdict fails." State v. Schreiner, 46 Kan. App. 2d 778, 782 (2011). *K.S.A. 21-5303* includes "encouraging or requesting." Apx E. These 2 means are not part of a "definitional provision," not "elaborat[ing] on elements," not "secondary matters." Castleberry, supra, 301 Kan. at 189. The State failed to present evidence to support either means, at least not for both, certainly not "super-sufficient."

B. Johnson's instruction errors re renunciation and jurisdiction are also invited error exceptions.

The U.S. v. Jereb court quoted how in *Harris*, the invited error applied to a "defendant who proffers his or her own instruction [and] persuades the court to adopt it." 882 F.3d 1325, 1341 (10thCir.2018). But "proffers his... ***own*** instruction" is substantially different than merely suggesting a state-created PIK. Also, Harris took steps to ***persuade*** the court to use his instruction. The invited-error doctrine applies to a party "who ***induces*** an erroneous ruling." Jereb, at 1338 (bold added). U.S. v. Cornelius also had urging: "later he ***implored*** the trial judge to instruct jurors to return to this now-challenged instruction"; "the 'proposition that [he] had ***urged*** the district court to adopt.'" 696 F.3d 1307, 1320 (10thCir.2012) (bold added). See e.g.: State v. Verser, 299 Kan. 776, 784-85 (2014) (errors were discussed, Verser continued, part of strategy).[44]

> [W]hen a defendant actively pursues what is later argued to be an error, then the doctrine most certainly applies. See [*Angelo*] (applying doctrine when defendant affirmatively requested no lesser included offense instructions because defense strategy was "all-or-nothing"). Sasser, at 1236. Apx CC.

[44] Applies when problems forseen. State v Alvarez, 2014 Kan. App. Unpub. Lexis 882 (Oct.24) (336 P.3d 922) *20-24.

Johnson's court based invited error on *Verser, supra* and *Hargrove, supra*. Id. *27. But Hargrove also found that the defendant did not fashion the jury instruction, thus ***blameless*** (48 Kan. App. 2d 522, at 536) because: **(a)** jury instructions are a "collaborative" process to ***suggest*** instructions to the judge; **(b)** the judge controls the decision and has a duty to fashion correctly (Id. 535); **(c)** when the State created instructions, they share the blame (Id.); and **(d)** the court has final authority (Id.).

> The use of PIK instructions is not mandatory but is strongly recommended. The pattern instructions have been developed by a knowledgeable committee to bring accuracy, clarity, and uniformity to jury instructions. They should be the starting point in the preparation of any set of jury instructions. If the particular facts in a given case require modification of the applicable pattern instruction, or the addition of some instruction not included in PIK, ***the trial court*** should not hesitate to make such modification or addition. However, absent such need, PIK instructions and recommendations should be followed. State v. Moncla, 262 Kan. 58, Syl. P5 (1997) (bold added).

Jury Instruction #16 &17 swapped out *K.S.A. 21-5303(c)'s* "renunciation," manifesting," and "purposes" for "abandonment," demonstrating," and "plans." R.15,143-4. "Renounce" is to give up on *v.* "abandon" is physical leaving. "Manifest" is to make clear *v.* "demonstrate" is doing acts to explain. "Purpose" is a mental goal *v.* "plan" is a detailed step-by-step method. The instructions broadened the scope of the felony by narrowing this defense. The instructions incorrectly stated the law and thus are an exception to the invited error rule: "[A]n instruction must always fairly and accurately state the applicable law, and an instruction that does not do so would be legally infirm." State v. Plummer, 295 Kan. 156, 161 (2012). This swap prejudiced Johnson's trial strategy by directing the jury to look for specific acts rather than consider how Johnson gave up on a purpose and passively renounced all. This error affected Johnson's critical decision to hold his *Fifth Amendment* right to not testify: e.g., with the error, he would have to explain his specific acts of demostrate. All crimes are defined by legislature, incl defense elements; the court shall not add. Sexton, supra, 232 Kan. at 544. See word swap error at State v. Irons, 250 Kan. 302, 307-8 (1992); State v. Hundley, 236 Kan. 461, 464 (1985); State v. Waters, 189 SW 624 (App.MO, 1916).

Johnson also argued that JI #18 improperly directed the jury to make a *K.S.A. 21-5106* jurisdiction determination (of law) that is a court's duty (thus, no PIK), and improperly instructed re *K.S.A. 22-2603* venue where 2+ acts are required. I.e., legally infirm. E.g., solicitation (wrongly-charged finite acts) is "complete when every element occurs." K.S.A. 21-5107(f). The court stated Johnson's changed his issue (Johnson at *29-31), but he only elaborated on a complicated matter.

Conclusion

In considering its objective and caselaw, invited error applies only when the error occurred due to the party's strategy or urging. Alternative means instruction issues are seldom invited error. Legally infirm instructions are never invited error. These clear errors substantially affected the fairness of Johnson's trial.

CONCLUSION

The unit of prosecution for *K.S.A 21-5303* is and must be per objective. If ambiguous, the rule of lenity surely applies here. Johnson's case involved a single objective and intent that the jury acquitted him of. *K.S.A 21-5303* is overbroad and vague, just as numerous courts have stated. At the least, the fact that courts disagree on what "encouraging" consists of means that Johnson could not reasonably determine such. The term is not even needed to achieve the statute's objective. Nothing Johnson said or did was considered as a solicitation of murder by the involved state witnesses. And even if it was, Johnson renounced and negated everything by mutually ending all with Nodwell, telling Stites he needed to go back to thinking about it all, and passively ditching Stites. And all along, Stites was the solicitor, urging all, making all the calls, keeping his overreaching rolling. The fact that Stites cut off Johnson's speaking two times as he attempted to elaborate more on no one getting hurt and investigative work, is atrocious. At most, all was discussion, which is never illegal. And what occurred in Missouri was not criminal there even if Johnson did solicit there, like *Sexton*, KS in 1983. Thus, this Court must reverse Johnson's convictions due to the above and the lack of super-sufficient evidence on both means and lack of evidence in general. At the least, this Court should order a new trial based upon instruction errors. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Notary

1/28/19
Date