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Court of Appeal No. 35450-4-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NESTOR V. GONZALEZ

Appellant.

APPEAL FROM THE KITTITAS COUNTY SUPERIOR COURT

Cause No. 10-1-00276-6

The Honorable Scott R. Sparks

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The statute for Kidnapping in the first degree, RCW 9A.40.020 is unconstitutionally vague because lacks ascertainable standards and fails to protect against arbitrary enforcement.

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Whether the court should review this issue on direct appeal because it is not governed by the law of the case doctrine, it raises different issues than Mr. Gonzalez's earlier PRP, and substantial justice would be served by a full review of the issue.
2. Whether the Kidnapping in the first degree statute is unconstitutionally vague on its face due to the Supreme Court's decision in *State v. Berg*, 181 Wn.2d 857, 337 P.3d 310 (2014), holding that when kidnapping and robbery are charged separately, it is immaterial to a sufficiency of the evidence challenge that the kidnapping activity was only incidental to the other crime.
 - a. Whether the Kidnapping statute is so broadly defined that it lacks ascertainable standards.
 - b. Whether the Kidnapping statute allows pyramiding of charges, which is against the intent of the legislature.

3. Whether the Kidnapping statute is unconstitutionally vague as applied to Mr. Gonzalez because it allowed the State to charge him with kidnapping even though the kidnapping activity was incidental to the robbery and the sweeping nature of the crime meant that no evidence of intent was needed.

B. STATEMENT OF THE CASE

Nestor Gonzalez pleaded guilty to robbery in the first degree, theft of a firearm, and two counts of kidnapping in the first degree. (CP 24-32) The facts from the police incident report showed that Mr. Gonzalez pointed a pistol at the gun store owner and forced him and a customer to move to the back isle of the store. (See *In the Matter of the Personal Restraint of Nestor Gonzalez*, 32644-6-III, Slip op. December 14, 2015) Mr. Gonzalez ordered the men to lie face down on the floor and he tied their hands behind their backs. *Id.* He was sentenced to 137 months of imprisonment and 54 months of community custody. (CP 41)

In 2015, more than a year after his judgment and sentence, Mr. Gonzalez submitted a personal restraint petition (PRP) contending that he was denied due process because the Kidnapping statute, RCW 9A.40.020, was unconstitutionally vague. (*In re Gonzalez*, 32644-6-III) This court dismissed the petition as untimely. *Id.* at 3. In reviewing it as an applied

challenge, this court determined that Mr. Gonzalez failed to show a due process violation and failed to qualify for an exception to the one-year time bar. (*Id.* at 3) Mr. Gonzalez petitioned for discretionary review with the Washington Supreme Court and was denied Mr. Gonzalez. (*In the Matter of the Personal Restraint of Nestor Gonzalez*, 92676-0, Slip op. July 21, 2016)

Then, in June 2017, Mr. Gonzalez filed a motion to extend time to file his notice of appeal on the grounds that he was not advised of his right to appeal the circumstances of his guilty plea. (Appellant Motion to Extend Time, filed pro se on June 22, 2017 and with counsel on September 13, 2017) Commissioner Monica Wasson agreed and granted the motion to extend the time to file to prevent a gross miscarriage of justice. (*State v. Gonzalez*, 35450-4-III, Commissioner's ruling, November 09, 2017)

Mr. Gonzalez timely appeals, requesting that the court give full review to his contention that the Kidnapping statute is unconstitutionally vague. He contends that the court's broad interpretation of the Kidnapping statute leads to unclear standards and arbitrary enforcement.

C. ARGUMENT

1. Review of the issue on direct appeal is warranted

As stated, Mr. Gonzalez previously submitted a PRP with this court where he challenged the Kidnapping statute under the void-for-vagueness issue. He contends that the ends of justice would be served by reviewing the issue on direct appeal.

Mr. Gonzalez's direct appeal and the issue he raises is not governed by the law of the case doctrine set forth in RAP 12.2 because no mandate was issued pursuant to the PRP. Under RAP 12.2, once a mandate has been issued in accordance with RAP 12.5, the action taken by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings, except as provided under RAP 12.9 and RAP 2.5(c)(2). A mandate is the written notification by the clerk of court to the trial court and the parties of an appellate court decision terminating review. RAP 12.5(a). No mandate is issued after a court action on a PRP because it is an interlocutory decision. *In re Pers. Restraint Petition of Lord*, 123 Wn. 2d 737, 739, 870 P.2d 964 (1994). Thus, because there was no prior appeal and only a PRP that was dismissed as untimely, no mandate has been issued in this case and the law of the case doctrine under RAP 12.2 does not apply.

Also, the issue raised in this direct appeal differs from of the challenge Mr. Gonzalez raised in his PRP. As such, the issue has not been fully determined. For an issue to have been previously heard and

determined, it must be shown that: “(1) [T]he same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.” *In re Haverty*, 101 Wn.2d 498, 503, 681 P.2d 835 (1984) (quoting *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963)).

Mr. Gonzalez’s argument on appeal differs from his PRP because he requests that the court review the constitutionality of the statute on its face, and not just applied. A facial challenge is appropriate when there is a concern that a criminal statute results in arbitrary enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed. 903 (1983); *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). Additionally, this appeal addresses the court’s decision in *Berg* and how it affects the current interpretation of the Kidnapping statute.

Also, Mr. Gonzalez should be allowed a full determination on the merits. Mr. Gonzalez’s PRP is not a substitute for a direct appeal on the issue. The three-page PRP decision was concise and did not undertake a full analysis of Mr. Gonzalez’s arguments. Furthermore, his personal restraint petition (PRP) was a civil action, and is not considered direct review of conviction. *In re Lord*, 123 Wn.2d 737, 739, n. 2, 870 P.2d 964

(1994). He requests that this court fully review the issue on direct appeal. Mr. Gonzalez would benefit from a better analysis of the issues he presented.

Finally, Mr. Gonzalez's PRP argument was written without the assistance of counsel. See *In re Aldoph*, 170 Wn.2d 556, 243 P.3d 540 (2010) (a defendant's failure to raise an issue in a prior personal restraint petition when the defendant was not represented by counsel but acted pro se was excused). Mr. Gonzalez failed to analyze the effect of *Berg* in his PRP. Substantial justice favors allowing Mr. Gonzalez to present these issues on direct appeal with the help of counsel.

2. Unconstitutionally Vague

The Kidnapping statute is unconstitutionally vague both facially and as applied to Mr. Gonzalez. Under the Fourteenth Amendment, a statute is void for vagueness if its terms are "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Worrell*, 111 Wn.2d 537, 540, 761 P.2d 56, 58 (1988), quoting *Myrick v. Board of Pierce Cy. Comm'rs*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984) (amended by *Myrick v. Board of Pierce Cy. Comm'rs*, 102 Wn.2d 698, 687 P.2d 1152). The test for vagueness rests on two considerations: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. *State v. Worrell*, 111 Wn.2d 537, 540. In a

constitutional challenge a statute is presumed constitutional unless its unconstitutionality appears beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 306–07, 745 P.2d 479 (1987).

The more important aspect of vagueness doctrine “is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.” *Kolender*, 461 U.S. at 358, quoting *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). “Where the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’” *Kolender*, 461 U.S. at 385, quoting *Smith*, 415 U.S. at 575. “The law demands that a crime be described in specific, not vague, language, so that a citizen as well as law enforcement may comprehend the variety of human conduct that the legislature intends to prescribe and punish.” *State v. Harrington*, 181 Wn. App. 805, 822, 333 P.3d 410 (2014). “Under the due process clause, the enactment is unconstitutional only if it invites an inordinate amount of police discretion.” *In re Detention of Danforth*, 173 Wn.2d 59, 74, 264 P.3d 783 (2011).

To determine if a statute is unconstitutionally vague, a court may read into the statute, court decisions that define the statute’s terms.” *State*

v. Harrington, 181 Wn. App. 805, 826, 333 P.3d 410 (2014). “An ordinance is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.” *Burien Bark Supply v. King Cy.*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986).

Ordinarily, vagueness challenges to statutes that do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. *Worrell*, 111 Wn.2d at 541. However, when a statute imposes criminal penalties, the standard of certainty is higher. See *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 92 L.Ed. 840 (1979). In *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed. 903 (1983), the United States Supreme Court recognized that the concern over criminal penalties has occasionally prompted the Court to invalidate a criminal statute on its face even when it could conceivably have some valid application, especially in the arbitrary enforcement context. *Id.* at 358 n. 8; see also *Colautti v. Franklin*, 439 U.S. 379, 394-401, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979). This facial challenge to an arbitrary criminal statute was applied most recently in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

Here, the court should conduct both a facial review of the Kidnapping statute and as applied review. As stated in *Worrell*,

The court should ... examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should examine the complainant's conduct before analyzing other hypothetical applications of the law.

Worrell, 111 Wn.2d at 541, quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 445 U.S. 489, 494-95, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982).

As a preliminary note, Mr. Gonzalez asserts that the issue he raises is not a merger issue. It is well established by the courts that once the evidence is proven to be sufficient to establish both the crimes of kidnapping and robbery, the crimes do not merge. *State v. Louis*, 155 Wn.2d 563, 568-69, 120 P.3d 936 (2005), *State v. Berg*, 181 Wn.2d at 872. Instead, Mr. Gonzalez contends the imprecise standards that fail to guide law enforcement and courts determining if evidence is sufficient to charge and convict a person of kidnapping. The merger doctrine does not address whether the evidence is sufficient to support a conviction. *State v. Grant*, 172 Wn. App. 496, 506, 301 P.3d 459 (2012). “Whether the jury

had sufficient evidence to convict is a distinct question from whether the two convictions should merge. Sufficiency of the evidence considers whether there was enough evidence proffered from which a jury could find beyond a reasonable doubt the elements of the crime had been proven. Merger accepts that there was sufficient evidence of the crime but considers further whether the legislature nevertheless intended for one of the offenses to be extinguished because of its redundant consideration within the primary offense.” *Berg*, 181 Wn.2d at 872.

Ascertainable standards of guilt: The Kidnapping statute lacks ascertainable standards and fails to protect against arbitrary enforcement. This is not because the Kidnapping statute lacks statutory definitions. Both abduct and restrain have statutory definitions, which have been reviewed by the courts. The Kidnapping statute is vague because the definitions of abduct and restrain have broadened the statute past its intended purpose. With the court’s most recent interpretation in *State v. Berg*, 181 Wn.2d 857, 337 P.3d 310 (2014), now all crimes that involve force or threat of force are also kidnapping, no matter how incidental. This leads to no discernable standards of what constitutes the intentional crime of kidnapping and arbitrary charges and convictions. Kidnapping has reverted back to a charge that simply pyramids on top of an underlying

charge, which is something the legislature sought to stop when revising the penal code in 1975.

Kidnapping is an intentional crime. *State v. Harris*, 36 Wn. App. 746, 753-54, 677 P.2d 202 (1984). A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent: ... (b) To facilitate commission of any felony or flight thereafter.... Former RCW 9A.40.020(1)(b)(1975).

“Abduct” means to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force. Former RCW 9A.40.010(2)(1975). The critical element of abduction can take three forms, all of which necessarily involve restraint: (1) restraint by secreting the victim in a place where he or she is not likely to be found, (2) restraint by threats of deadly force, or (3) restraint by the use of deadly force. *State v. Green*, 94 Wn.2d 216, 225, 616 P.2d 628 (1980); see RCW 9A.40.010(1) . Abduction does not require movement or asportation of the victim. *State v. Vladovic*, 99 Wn.2d 413, 418 n. 1, 622 P.2d 853 (1983).

“Restrain” is statutorily defined as “to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is “without consent” if it is accomplished by (a) physical force, intimidation, or deception, or (b)

any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.” Former RCW 9A.40.010(1)(1975).¹

Before *Berg*, there was disagreement in the divisions of the Appellate Courts as to whether the evidence in a case could be sufficient to support a kidnapping conviction where the restraint employed in committing the offense was merely incidental to a separately charged offense. *See State v. Phuong*, 174 Wn. App. 494, 537, 299 P.3d 37 (2013), This conflict stirred from the interpretation of *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In *Green*, the defendant was charged with aggravated first-degree murder, which required proof of the elements of kidnapping. *Id.* at. 224-25. The Supreme Court found that the evidence was not sufficient to support the elements of kidnapping, and therefore

¹ Admittedly, the court in *State v. Worrell* determined that “restrain” was not unconstitutionally vague. *Worrell*, 111 Wn.2d at 543-44. However, the decision is distinguishable because it addressed the definition only in relation to the clause “without legal authority.” Here, Mr. Gonzalez challenges the constitutionality of the statute as a whole, not the interpretation of one or two particular phrases in the restrain definition. While a sufficiently specific prior judicial construction of a statute can save it from unconstitutional vagueness, *Kolender*, 103 S.Ct. at 1857 n. 4, Mr. Gonzalez contends that the court’s current construction is what makes the statute vague and arbitrarily applied.

reversed the conviction for first degree murder. *Id.* at 226-228. The Court also addressed Michigan and New York’s assessment of its kidnapping statutes in regard to merger of kidnapping and other crimes and stated incidental restraint and movement alone may not be indicia to true kidnapping. *Id.* at 226-27.

Division II interpreted the holding in *Green* to mean that restraint incidental to the underlying crime is insufficient to support a conviction for kidnapping. See *State v. Elmore*, 154 Wn. App. 885, 228 P.3d 760 (2010); *State v. Bybee*, 142 Wn. App. 260, 175 P.3d 589 (2007); *State v. Saunders*, 120 Wn. App. 800, 86 P.3d 232 (2004); *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004); *State v. Harris*, 36 Wn. App. 746, 677 P.2d 202 (1984). In *Bybee*, Division II stated, “Although *Green* borrowed the ‘incidental restraint’ concept from an earlier merger case, it incorporated this concept into a new standard for determining sufficiency of evidence on appeal. Thus, as we applied *Green* in *Korum*, when the only evidence presented to the jury demonstrates that the restraint is merely incidental to completing another crime, the jury has not received sufficient evidence to convict the defendant of a separately charged kidnapping.” *Bybee*, 142 Wn.App. at 266–67, 175 P.3d 589 (footnotes omitted).

Division I and III disagreed and declined to recognize the incidental restraint concern as implicating the Fourteenth Amendment due process guarantee of proof beyond a reasonable doubt. *See Phuong*, 174 Wn. App. at 541; *See State v. Butler*, 165 Wn. App. 820, 828–29, 269 P.3d 315 (2012). In *Phuong*, Division I analyzed the issue determined that *Green* was a merger case- it addressed a crime within a crime and whether kidnapping would merge with first degree murder if proved. *Phuong*, 174 Wn. App. at 520-21. *Phuong* held that *Green* did not create a due process right that convictions for restraint-based offenses should be vacated where the appellate court determines that the restraint employed was incidental to the separately charged offense. *Id.* at 521.

Still, *Phuong* recognized the problems with defining kidnapping too broadly. “The incidental restraint concern derives from the potential for prosecutorial abuse where the offense of kidnapping is broadly defined, thus encompassing other criminal offenses. The concern recognizes that such broad definitions ‘could literally overrun several other crimes, notably robbery and rape, and in some circumstances assault, since detention and sometimes confinement, against the will of the victim, frequently accompany these crimes.’” *Phuong*, 174 Wn. App. at 504, quoting *People v. Levy*, 15 N.Y.2d 159, 164, 256 N.Y.S.2d 793, 204 N.E.2d 842 (1965).

Recently, in *State v. Berg*, 181 Wn.2d 857, 337 P.3d 310 (2014), the court clarified that in sufficiency of the evidence challenges, when kidnapping and robbery are charged separately, whether the kidnapping is incidental to the robbery is immaterial. *Id* at 861. It rejected Division II's approach. Now, any evidence of restraint by secreting or by force, no matter if it is incidental to the commission of the crime the defendant intended to commit, is sufficient to support a conviction for kidnapping.

The result of this clarification in *Berg* is that kidnapping is no longer an intentional crime, separate from other crimes. The restraint does not need to be for kidnapping purposes. As long as the defendant's actions in committing another crime meet the broad language of the Kidnapping statute, the crime of kidnapping can be stacked on top of the other crimes. The concern stated in *Phuong* has manifested itself in the *Berg* ruling. The standard to use here is vague and leads to arbitrary enforcement.

Since *Berg*, the intent element of the Kidnapping statute no longer clearly defined. The objective intent to abduct is irrelevant. As stated, Kidnapping is an intentional crime. *State v. Harris*, 36 Wn. App. 746, 753-54, 677 P.2d 202 (1984). Both kidnapping in the second degree and kidnapping in the first degree require intentionally abducting another person, although kidnapping in the first degree requires an additional

specific intent to increase the severity of the crime. *State v. Garcia*, 179 Wn.2d 828, 838, 318 P.3d 266 (2014). A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010(1)(a). Intentionally abduct meant to do so on purpose, or that an abduction must be the ultimate contemplated or intended objective. See *State v. Stubsjoen*, 48 Wn. App. 139, 150, 738 P.2d 306 (1987) (discussing a jury instruction for abduction). Criminal intent may be inferred from circumstantial evidence, *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983), or from conduct, where the intent is plainly indicated as a matter of logical probability. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Since *Berg*, any restraint by use of secreting or force, even if incidental is sufficient to establish abduction. This constitutes most crimes. It no longer matters for a kidnapping conviction if the defendant's actions were committed with the objective or purpose of robbery. Kidnapping is established as long as there is restraint. Intent or purpose to abduct is not required, only the incidental actions of restraint committed for the purpose of another crime.

This broad interpretation was not intended by the Legislature. The Legislature had a different intent when they crafted the Kidnapping statute. The legislature intended a much narrower application of the

Kidnapping statute. The drafters of the Kidnapping statute intended for abduction to only include serious, intentional abduction and restraint. See *State v. Green*, 91 Wn. 2d 431, 449-50, 588 P.2d 1370, 1386 (1979) (*Green I*) (Utter, J. dissenting) reversed on reconsideration, 94 Wn. 2d 216, 616 P.2d 628 (1980). Justice Utter explained in his dissent in *Green I* when applying the facts of *Green I* to the intent of the Kidnapping statute:

This evidence of intent strongly suggests the inapplicability of the kidnapping statute in the absence of a “genuine” kidnapping. Except for the fatal stabbing itself, a matter to be taken up later, there was no substantial removal, isolation, and/or violence of a kind indicating a genuine kidnapping. Further, it can confidently be stated that the drafters did not intend that the kidnapping statute be applicable to all robberies and assaults because it is doubtful that they would intentionally render their work on those crimes superfluous. If kidnapping, punishable in all instances as severely as the underlying crime, can always be applied whenever any other crime occurs, the drafters wasted considerable time preparing statutes on these other offenses in the new criminal code.

Id.

Thus, “The term ‘abduct’ is defined in such fashion as to make abduction a Very serious form of restraint, savoring strongly of the Substantial removal, isolation and/or violence usually associated with Genuine kidnapping.” *Id.* (Utter, J. dissenting), quoting the Washington State Criminal Justice Training Commission, Revised Criminal Code

Training and Seminar Manual at 9A.40.010 (1976). Justice Utter also recognized that Washington patterned its Kidnapping statute or had similar statutes as New YorkK statute required acts showing intentional abduction in addition to the underlying crime. See *Id.* 454-62. This purpose evidences a Legislative intent not to have a broad, sweeping interpretation of the Kidnapping statute.

Additionally, when drafting the current Kidnapping statute and the criminal code, the legislature's purpose was to avoid the arbitrary stacking of additional crimes when conduct is not inherent to an offense. Title 9A was designed to make statutes more precise and to prevent pyramiding of charges. *State v. Vladovic*, 99 Wn.2d at 429-30 (Utter, J. concurring in part/dissenting in part). "Historically, such 'pyramiding' of a kidnapping charge upon that for the underlying offense was a common abuse and has been roundly condemned by the commentators" *Id.*, citing Model Penal Code § 212.1, comment 2, at 220-22 (1980); Note, A Rationale of the Law of Kidnapping, 53 Colum.L.Rev. 540, 556-58 (1953). Again, Justice Utter recognized the comment from a Michigan court that any Kidnapping statute broad enough to allow this practice would be unconstitutionally vague because of the broad discretion given to judges and juries. *Id.* This broad discretion is the conduct here that makes the Kidnapping statute vague.

Case law since *Berg* show the sweeping effect of the statute. The majority if not all kidnapping convictions have been affirmed since *Berg*. For instance, in *State v. Wright*, (2017 WL 2653036 (Division II 2017) (unpublished)² the defendant's kidnapping conviction was upheld when he attempted to assault a mental health therapist while in jail. *Id.* at 1. The defendant became angry after talking to the therapist for 10-15 minutes, pushed the door closed and moved a desk in front of it, hit the therapist, and briefly but forcefully grabbed her neck. *Id.* The door locked automatically, but the prison guards were across the hall and had a key to the door. *Id.* A prison guard unlocked the door, pushed it open, and detained the defendant without resistance. *Id.* at 1-2. In total, it took the guard less than 15 seconds to respond. *Id.* at 2. The court rejected the defendant's claim that this did not constitute abduction, finding the evidence sufficient. *Id.*

In *State v. Stomps*, 2016 WL 3965175, (Division II 2016) (unpublished)³ a bail bondsman's convictions for first degree robbery, three counts of second degree assault, and three counts of second degree kidnapping was upheld. *Id.* at 1. The bondsman kicked in the door of a

² Citation permitted under GR 14.1 as opinion filed on or after March 1, 2013 and is a non-binding authority.

³ Citation permitted under GR 14.1 as opinion filed on or after March 1, 2013 and is a non-binding authority.

home where he was looking for a fugitive, pointed his gun at the three persons inside the home, handcuffed them and refused a request to remove them, and ordered them to lay on the floor. *Id* at 1. The victims were ordered to stay in the same room and felt like they were not free to leave. *Id* at 1. These were the same facts used to support the robbery and assault convictions. *Id.* at 1-4.

In both of these cases, the conduct of the defendants were only incidental to their intent of committing assault or robbery. There was no movement of the victims, no extended time, and no purposeful abduction.

In sum, since *Berg*, the First Degree Kidnapping statute is vague on its face. Kidnapping becomes a comprehensive crime applicable to nearly all crimes against the person, overlapping and rendering superfluous all statutes on robbery, rape and assault. *Green I*, 91 Wn.2d at 450, (Utter, J. dissenting). The intent element is irrelevant. Thus, law enforcement and courts have the power to arbitrarily stack kidnapping onto a violent crime.

As applied challenge: As applied to Mr. Gonzalez, law enforcement used the kidnapping charge as a pyramid crime. Like recent case law, the restraint and force used was incidental to commission of his robbery. There was no asportation of the victims. The robbery was committed in a public place, he moved the victims a matter of feet within

the open public, and he restrained the victims in order to take items and flee the scene. His intent to commit the crime was irrelevant under the statute. This is exactly the scenario where the defendant's actions serve no other purpose than commission of another crime, and gets caught in the vague, sweeping Kidnapping statute.

Mr. Gonzalez's conviction for kidnapping in the First Degree should be stricken because it is unconstitutionally vague both facially and as applied. The vagueness led to arbitrary enforcement because there is no longer ascertainable standards since *Berg*.

D. CONCLUSION

The statute for Kidnapping in the first degree, RCW 9A.40.020 is unconstitutionally vague because lacks ascertainable standards and fails to protect against arbitrary enforcement. This court should strike Mr. Gonzalez's kidnapping conviction.

Respectfully submitted this 9th day of February, 2018.

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CERTIFICATE OF SERVICE

The undersigned states the following under penalty of perjury under the laws of the State of Washington. On the date below, I personally e-filed and emailed and/or placed in the United States Mail the foregoing Appellant's Opening Brief with postage paid to the indicated parties:

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