IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

NO._____

EARLE DUANE WILLIAMS, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO
THE CALIFORNIA COURT OF APPEAL
Second Appellate District

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QUESTION PRESENTED FOR REVIEW

Whether California's aggravated kidnapping statute, (Cal. Penal Code, § 209, subdivision (b), penalizing kidnapping for designated crimes and requiring that "the movement of the victim [be] beyond that merely incidental to the commission of, and increase[ ] the risk of harm to the victim over and above that necessarily present in, the intended underlying offense," is void for vagueness under the rule of *Sessions v. Dimaya* (2018) 584 U.S. ____, 138 S.Ct. 1204 or does no more than apply an intelligible measure of conduct to real world facts.

PETITION FOR CERTIORARI

Petitioner, Earle Duane Williams respectfully petitions for a writ of certiorari to review the judgement of the California Court of Appeal, Second Appellate District, affirming his conviction & sentence in the Superior Court of Los Angeles County, California.

OPINIONS BELOW

The unreported opinion of the California Court of Appeal, Second Appellate District Division One, filed 12 April 2018, appears as Appendix A.

The order of the California Supreme Court dismissing the petition for review, filed 18 July 2018 appears as Appendix B.

JURISDICTIONAL STATEMENT

The judgement of the California Court of Appeal, Second Appellate District was entered on 12 April 2018. A timely petition for review was filed on 21 May 2018. The petition was denied on 18 July 2018. This Court granted an extension to file petition on 12 October 2018. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257, subd. (a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

United States Constitution, Fourteenth Amendment, Section One:

STATUTORY PROVISIONS INVOLVED

Cal. Penal Code, § 209

Cal. Penal Code, § 288

FACTUAL SYNOPSIS

The sufficient, underlying facts are that, on a sunny afternoon, Petitioner walked onto a private yard, picked up a crying 5 year old girl (Jazmyne), kissed her on the forehead, and carried her 26 feet before putting her down and exiting the premises just as the girl's mother (Caryn) emerged from the house. A verbal encounter between the mother and petitioner ensued. Petitioner was arrested shortly thereafter. A search of petitioner's RV and home failed to discover pornography or kidnapping tools. Petitioner had prior convictions for drug usage and misdemeanor sexual exposure or propositioning adult women but none involving sexual misconduct with children.

PROCEDURAL HISTORY

Petitioner was charged with aggravated kidnapping of a child under the age of 14 (Pen. Code, § 209, subd. (b)(1)), lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288, subd.(b)(1) and uttering threats (Pen. Code, § 422). (CT 204-207.)[1] By jury verdict petitioner was acquitted of lewd acts with a child but convicted on the remaining charges. (CT 102-107.) In bifurcated proceedings various prior conviction allegations were found true. (CT 199-200; RT 1807-1815.) Petitioner was sentenced to an indeterminate life term with a 14 years parole date and a consecutive 16 year determinate term. (CT 204-207; RT 1834-1835.)

On appeal, petitioner contended: (1) that there was insufficient evidence to support his conviction of aggravated child kidnapping in that (a) the jury had acquitted him of

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1 "CT" refers to the Clerk's Transcript on appeal and "RT" refers to the Reporter's Transcript on appeal

lewd acts against the child; (b) the distance the victim was moved was absolutely minimal under caselaw and (c) the mode and manner of the kidnapping did not increase the danger of the target crime (i.e. the lewd act). Appellant also contended: (2) that there was insufficient evidence of a threat in that (a) the altercation was provoked by the child's mother herself; (b) the words uttered were not, in context, facially threatening and/or (c) the victim was not in any actual or reasonable fear.[2] A petition for a writ of habeas corpus, (Case No.B280742) raising issues of ineffective assistance of counsel was filed contemporaneously with the appeal.

By decision rendered 12 April 2108, the court of appeal**,** rejected all of appellant's arguments and affirmed the judgement. Petitioner's habeas corpus petition was summarily denied. (Slip opn. 21, fn 2.) As detailed more fully in the Argument, the appellate court found sufficient evidence of aggravated kidnapping on the grounds that, as a stranger with no prior connection to the kidnapped child, appellant's lewd intent could not be doubted and because moving the victim from "deep" within the yard to the sidewalk was a qualitatively substantial distance. (Slip opn. 8, 11.)

Five days after the appellate court's decision, this Court published its decision in *Sessions v. Dimaya* (2018) 584 U.S. ____, 138 S.Ct. 1204 ("*Dimaya*").

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2 Appellant also contended that (2) insufficient evidence of a threat in that (a) the altercation was provoked by the child's mother herself; (b) the words uttered were not, in context, facially threatening and/or (c) the victim was not in any actual or reasonable fear; (3) instructional error in failing to instruct on attempted kidnapping and (4) evidentiary error in allowing defence character witnesses to be impeached with with knowledge of appellant's previous misdemeanor sexual misconduct (ruled inadmissible in the prosecution's case in chief). These claims are not asserted here.

Petitioner petitioned for rehearing on the grounds that the court of appeal opinion had overlooked material facts which would have affected the outcome; *inter alia,* that, in concluding that appellant was motivated by a "deviant interest" in children (slip opn., p. 8), the court's opinion omitted consideration of the absence of sexual priors or of the fact that no evidence of pornography, pedophilia, kidnapping or sequestration were found either in appellant's home or RV.[3]

In addition, petitioner sought leave to file supplemental briefing raising a vagueness challenge to Penal Code, section 209, subdivision (b) in light of the this Court's decision in *Dimaya* which significantly clarified and extended its decision in *Johnson v. United States*, (2015) 576 U.S. ____, 135 S.Ct. 2551 ("*Johnson*"). Petitioner argued that the qualitative assessments of "substantial distance" and "increased risk" required for a finding of aggravated kidnapping necessarily entailed consideration of an arbitrarily determined, "idealized" non-aggravated asportation and/or a "normal" commission of the target crime. In view of the fact that *Dimaya's* clarifications had not been published until *after* the appellate court's opinion, equity and fairness warranted hearing of an issue that had not previously been raised and that was, in all events, of constitutional magnitude and public interest.

On 2 May 2018, the petition for rehearing was denied; and on 18 July 2018 the

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3 Similarly, in concluding that the child's mother had been threatened and that her alleged fear was reasonable, the opinion omitted any mention or analysis of the fact that the mother had chased after petitioner barraging him with a stream of insults designed (by her own admission) to keep him at the scene, in response to which petitioner turned around and said, "Bitch you don't know what I am capable of." (RT 671-672.)

California Supreme Court denied review on these and other issues raised. This petition follows.

REASONS FOR GRANTING WRIT

"The Fifth Amendment provides that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.' The Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standard-less that it invites arbitrary enforcement. (*Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983).)

This Court has reached varying results as to whether a statute is unconstitutionally vague. It has struck statutes requiring assessments of "real value" (*Collins v. Kentucky*, 234 U.S. 634 (1914)) or charging an "unjust or unreasonable rate" *United States v. L. Cohen Grocery Co*., 255 U.S. 81, 89 (1921**).)** It has similarly voided statutes prohibiting "loitering" and "prowling by auto" (*Papachristou v. Jacksonville*, 405 U.S. 156 (1972)) or making it a crime to behave in "a manner annoying to persons passing by." (*Coates v. Cincinnati*, 402 U. S. 611 (1971).) On the other hand, this Court has upheld statues forbidding the sale of goods at "unreasonably" low prices (*United States v. National Dairy Corp.,* 372 U.S. 29, 34 (1963)), picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress" into buildings. (*Cameron v. Johnson,* 390 U.S. 611, 615-616 (1968)), or contracts "reasonably calculated" to bring about a prohibited result. (*Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86, 110 (1909).)

More recently in *Johnson v. United States, supra,* 576 U.S. ____, this Court struck a residual clause that tied judicial assessment of a crime's "potential risk" to a

judicially imagined "ordinary case" of the crime, and not to real-world facts[.]" (*Id.,* slip opn. pg. 5.) At the same time, *Johnson* approved laws that "require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion." (*Ibid*) This Court stated, "[a]s a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; (*Ibid.,* citing *Nash v. United States*, 229 U. S. 373, 377 (1913).) Subsequently, in *Sessions v. Dimaya, supra,* 584 U.S. ____, this Court exposited various clarifications of *Johnson* which are discussed in the Argument below but, at the same time, it approved *Johnson's* reserving language (*Dimaya, supra,* slip op. pg. 11.)

California Penal Code section 209, subdivision (b) punishes kidnapping for the purpose of committing designated crimes provided "the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense."

The question presented herein is whether Section 209 falls for vagueness under *Johnson* and *Dimaya* or passes muster under *Nash* and *Cameron*. More specifically, does section 209(b) apply a qualitative standard to actual conduct *or* does it entail a standard which necessitates and depends upon fact-finder ideation? Encompassed within this issue is the more fundamental question of whether the *Nash-Johnson* dichotomy is tenable or merely states a distinction without a difference. Review is warranted to clarify a question of fundamental importance as to how criminal statutes are to be framed.

I. CALIFORNIA PENAL CODE SECTION 209 SUBDIVISION (B) IS UNCONSTITUTIONALLY VAGUE UNDER *SESSIONS v. DIMAYA.*

Under California law, the asportation involved in *any* kidnapping must be quantitatively and qualitatively "substantial." (*People v. Martinez* (1999) 20 Cal.4th 225, 237.) Kidnapping for the purpose of committing designated crimes (Pen. Code, § 209, subd. (b)(1)) requires a substantial asportation which "is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (Pen. Code, § 209, subd. (b)(2).)

The issue raised herein is whether the substantial distance and qualitative aggravation elements of Penal Code 209 give objective notice of what is prohibited or instead rely on judicial (or jury) ideations as to what constitutes the prohibited behavior. Although this petition is not asking this Court to review a sufficiency of evidence claim, the marked insufficiency of the evidence to support the charge serves as a necessary background to the vagueness issue. A preliminary analysis of the evidence will demonstrate that the only "sufficiency" in this case was the ideation of the reviewing court.

A. There was Insufficient Evidence of Substantial Asportation or Aggravated Kidnapping.

The court of appeal found that there was sufficient evidence of aggravated kidnapping (§ 209) because there was no evidence "that would normalize a kiss" (slip opn. pg. 8) and because the asportation of the child was "substantial for purposes of kidnapping" (slip opn. pg. 11).

(1) No Evidence of Lewd Conduct.

In contrast to simple kidnapping (§ 207) which only requires proof of asportation, proof of aggravated kidnapping under Penal Code section 209 subdivision (b)(1) requires that the asportation of the victim be undertaken with the intent and for the purpose of committing certain listed crimes, in this case the commission of a lewd act against a child under fourteen years of age. (*People v. Thornton* (1974) 11 Cal.3d 738, 765 [jury "could not find defendant guilty of either of the two counts of kidnaping for the purpose of robbery (§ 209) unless it found a specific intent to commit robbery"]; *People v. Tribble* (1971) 4 Cal.3d 826, 833; *People v. Perkins* (2016) 5 Cal.App.5th 454, 455, 470 [same, sexual crimes].) The elements of lewd conduct are: (1) any touching, (2) of a child under 14 years, (3) if the touching is motivated by a lewd intent. (Penal Code, § 288, subd. (a); *People v. Lopez* (1998) 19 Cal.4th 282, 289; *People v. Martinez* (1999) 11 Cal.4th 434, 442-445 [and cases cited].)

In rejecting petitioner's argument that the jury's acquittal on the count of lewd conduct (Count III) was dispositive on the issue of petitioner's ulterior intent, the appellate court stated, "Williams's intent, as a violation of section 288 involves several elements, for lack of any one of which the jury would have been compelled to acquit." (Slip. opn. pg. 8.) This reasoning was not persuasive.

There was no dispute at trial that the child was under 14 years of age. Although petitioner denied kissing the child at all, on appeal it was assumed that a kiss had taken place. There being no doubt as to the child's age or the fact of a kiss, the sole remaining question concerned the existence of the requisite lewd intent, which the jury necessarily

found did not exist by virtue of its acquittal on Count III. It was not petitioner's burden to prove his conduct was normal. The jury's acquittal ought to have been dispositive on the element in question.

Of course, "[s]pecific intent may be, and usually must be, inferred from circumstantial evidence." (*People v. Cole* (1985) 165 Cal.App.3d 41, 48.) Typically, cases of lewd conduct with children have involved contemporaneous charges of possessing child pornography from which an inference of intent or purpose could be drawn.[4] However, in this case, no pornography of any kind was found at petitioner's premises and no priors involving sexual conduct with children existed or were introduced. Under California law, "[a] legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established." (*Eramdjian v. Interstate Bakery Corp.* (1957) 153 Cal.App.2d 590, 602; accord, *People v. Stein* (1979) 94 Cal.App.3d 235, 239.)

The appellate court also stressed the fact that appellant was a stranger to the child and it drew an inference of lewd purpose from that fact. However, no California case has predicated the existence of a lewd intent on the sole fact that the defendant was a stranger to the victim. (See, *People v. McCurdy* (1923) 60 Cal.App. 499, 501; *People v. Austin* (1980) 111 Cal.App.3d 110; *People v. Dontanville* (1970) 10 Cal.App.3d 783, 788, 795-797.) In fact, California caselaw has recognized that kissing "can be a perfunctory peck

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4 See e.g. *People v. Woodward* (2004) 116 Cal.App.4th 821 [§ 288, subd. (a) and § 311.11, subd. (a)]; *Robin J. v. Superior Court (Lucas J.)* (2004) 124 Cal.App.4th 414; *People v. Shields* (2011) 199 Cal.App.4th 323 [same]; *People v. Nicholls* (2008) 159 Cal.App.4th 703 [same]; *People v. Hertzig* (2007) 156 Cal.App.4th 398; *People v. Miramontes* (2010) 189 Cal.App.4th 1085; *People v. Spurlock* (2003) 114 Cal.App.4th 1122; *In re Stevens* (2004) 119 Cal.App.4th 1228.

on the cheek, so asexual that balding Communist Party apparatchiks aren't ashamed to do it on TV, or it can be so explosively erotic ….” (*In re R.C.* (2011) 196 Cal.App.4th 741, 751.) Ignoring these cases, the court of appeal concluded that “the jury could reasonably conclude from his *deviant* interest in and abduction of [the child] that he planned to involve her in a lewd act.” (Slip opn. pg. 8 [italics added].) This conclusion begged the question. It also ignored the ultimate fact that, by virtue of its acquittal, the jury had *found* that the kiss was not a deviant act. [5]

Nevertheless, assuming *arguendo* that the court of appeal's findings of law and fact were correct as to the existence of intent, there remained insufficient evidence of a substantial asportation which aggravated the intended or committed target crime.

(2) No Evidence of Dangerous Asportation.

Traditionally, simple kidnapping, under California law, required asportation for a “substantial distance” measured in feet or miles. (*People v. Caudillo* (1978) 21 Cal.3d 562, 572; *People v. Stanworth* (1974) 11 Cal.3d 588, 601 [“actual distance” must be more than “trivial.”) Petitioner's research has uncovered no case holding that simple kidnapping for a distance of 26 feet was quantitatively substantial and many cases have found greater distances to be insufficient.

In contrast, aggravated kidnapping requires proof of a *qualitatively* dangerous

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5 Subdivision (b)(1) of section 288 penalizes a lewd act accomplished by force but, in this case, the force was the kidnapping itself which was a seamless grabbing, kiss on the forehead, lifting up and carrying away. (See court of appeal slip opn. p. 3.) Since the jury's guilty verdict on kidnapping necessarily entailed a finding of force its acquittal on Count III just as necessarily entailed a negative finding on lewd intent.

asportation. The genesis of this rule is as follows. In *People v. Daniels* (1969) 71 Cal.2d 1119 ("*Daniels*"), defendants committed a robbery but were charged, under Penal Code section 209 with kidnapping for robbery on account of the fact that the victims were moved around for distances of between 15 and 30 feet. (*Id.,* at pp.1123-1125.) *Daniels* reversed, holding that section 209 excluded from its purview cases "in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself." (*Id.,* at p. 1139.) [6]

In *People v. Rayford* (1994) 9 Cal.4th ("*Rayford*"), held that "the two-part *Daniels* asportation test should apply to section 208(d) kidnapping for rape." (*Rayford*, at p. 20.)[7] *Rayford* summarized *Daniels* as holding "that the asportation required for kidnapping for robbery consist[s] of a movement of the victim that is **[a]** not *merely incidental* to the commission of the robbery, and **[b]** which substantially increases the risk of harm over and above that *necessarily present* in the crime of robbery itself. (*Id.* at p. 1139.)" (*Rayford,* at p. 9.) *Rayford* went on to explain that "whether the movement is merely

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6 In reaching its result, *Daniels* noted that "[e]xamples of abusive prosecution for kidnapping are common" and that "it is desirable to restrict the scope of kidnapping, as an alternative or cumulative treatment of behavior whose chief significance is robbery or rape" in order to stem the "serious injustice" of using a kidnapping charge "to secure a death sentence or life imprisonment for behavior that amounts in substance to robbery or rape." (*Id.,* at p. 1138.)

7 At the time, the crime of kidnapping for the purpose of rape was set forth in former section 208, subd. (d). It was subsequently merged into section 209, subdivision (b) punishing kidnapping for sex crimes and other designated offences. (*People v. Dominguez* (2006) 39 Cal.4th 1141. 1150, fn 5.)

incidental depends on the '*scope and nature*' of the movement. (*People v. Daniels*, supra, 71 Cal.2d at p. 1131, fn. 5. [italics added].) This includes the actual distance a victim is moved. ...[¶]... but it also includes an assessment of "whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that *inherent* in robbery. [Citations.] This includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes." (*Rayford, supra,* at pp. 12-13 [italics added].) On the facts before it, *Rayford* found that the victim had been moved "a 'substantial distance' and that this movement 'substantially increased' her risk of physical injury 'over and above those to which such person is normally exposed in the commission of the crime of rape.' " (*Id.*, at p. 23.)

Furthering the harmonization of kidnapping statutes, in *People v. Martinez, supra,* 20 Cal.4th 225, the California Supreme Court, applied the *qualitative* asportation standard to simple kidnapping. The court held that for both crimes "in determining whether the movement of the victim was " 'substantial in character' [citation] the jury should consider the totality of the circumstances." (*id*, at p. 237.)

> "Thus, in a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as [1] whether that movement increased the risk of harm above that which existed prior to the asportation, [2] decreased the likelihood of detection, and [3] increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*Id.,* at p. 237.)

Thus, in California, *all* variants of kidnapping currently entail a *qualitative* assessment of whether the asportation was "substantial." In cases of *simple* kidnaping the

assessment includes "whether th[e] movement increased the risk of harm above that which existed prior to the asportation" (*Martinez, supra* at p. 237)[8] whereas, in cases of kidnapping for designated crimes (§209), the assessment depends on "whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in [the target crime]" (*Rayford, supra,* at pg. 12.)

The remarkable feature of California law, in this regard, is that Section 209 does not require the actual commission of the intended target crime; it punishes asportation with a specific intent. Despite that legal fact, the *Daniel/Rayford* rule is based on the assumed commission of a further and additional crime. Whatever may have been the facts of other cases, petitioner herein argued that since the jury found that the target crime had not been committed, his 26 foot asportation could not be deemed *incidental* to something which did not exist.

Petitioner further argued that, assuming *arguendo* the actual commission of the target crime, petitioner's asportation involved none of the so-called contextual factors which had been held to increase the risk of harm inherent in a normal asportation, such as movement to a secluded or confined area (*People v. Shadden* (2001) 93 Cal.App.4th 164,

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8 The first factor is baffling to say the least. Presumably, "prior to the asportation" no risk of harm existed at all, other than the normal everyday risk that a piano might fall from the window of a building. Viewed in this time-frame, *any* asportation increases the risk of harm given that no risk existed before. But this is just a convoluted way of stating the obvious: kidnapping itself represents a harm to the victim. Read literally this factor turns any kidnapping *ipso facto* into aggravated kidnapping. Supposedly, *Martinez* sought to allow consideration of *qualitative* factors in addition to the purely *quantitative* factor of distance. But without a baseline as to what constitutes a "normal" non-aggravated kidnapping, the question remains, "increase over what?"

167 [dragging from publicly viewable place "to a small back room"]; *In re Crumpton,* (1973) 9 Cal.3d 463, 466 [20 to 30 feet behind a truck]; *People v. Jones* (1999) 75 Cal.App.4th 616, 629 [from parking lot into a car]; or movement designed to avoid detection or enhances the attacker's opportunity to commit additional crimes; *People v. Vines* (2011) 51 Cal.4th 830, 870; *People v. Rayford, supra,* 9 Cal.4th, at p. 13) or movement which poses a substantial increase in the risk of psychological trauma. (*People v. Nguyen* (2000) 22 Cal.4th 872, 885-886.)

In rejecting petitioner's claim that the child's asportation was quantitatively and qualitatively insignificant, the court of appeal concluded that the 26 feet Jazmyne was carried was "substantial for purposes of kidnapping" because "[a]bsent Caryn's intervention those feet meant the difference between freedom and severe peril" (court of appeal, slip opn. pg. 11) and because given a 26 foot head start on Caryn "Williams would likely have been driving away with Jazmyne in seconds, placing her beyond reasonable hope of quick rescue" (*ibid*. pp. 11-12). [9]

This analysis apparently side-stepped the caveat in *Martinez, supra,* that "contextual factors, whether singly or in combination, will not suffice to establish asportation if the movement is only a very short distance." (*Id.,* 20 Cal.4th, at p. 237.) Assuming *arguendo* that 26 feet is not "a very short distance," the ultimate ground of the appellate court's affirmance is left at its finding that the asportation qualitatively increased the risk

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9 For purposes of this petition, it is assumed that petitioner put the child *as a result* of Caryn's "intervention." However, at trial, Caryn's could not remember if petitioner was holding the girl or had put her down. (RT 670.)

inherent in the target crime. (Slip opn. pg. 9, citing *People v. Robertson* (2012) 208 Cal.App.4th 965, 978 [asportation "was more than incidental and increased the risk of harm above that inherent in the enumerated sexual offense itself."].) One is left to suppose that what the court of appeal meant was that petitioner might have kissed the child without moving (i.e. kidnapping) her at all. Since the movement increased the risk of a crime which the jury found had not been committed, the asportation was qualitatively aggravated.

However, in at least two other cases, appellate courts have found no aggravated asportation on more egregious facts. In *People v. Williams* (2017) 7 Cal.App.5th 644, the very same division as heard the present case, the court held that the movement of victims during multiple robberies some 20 to 60 feet into back room vaults or storage areas was insufficient under *Daniels* to create an increased risk of harm to the victims. (*Williams*, at pp. 668-669.) In that case, the court rejected the Attorney General's argument that the back rooms of the stores were "shielded from view," and thus the movements from "a relatively safe public sales area" put the victims at an increased risk of harm. (*Id.*, at p. 669.) Similarly, in *People v. Perkins, supra,* 5 Cal.App.5th 454, the the Third Appellate District reversed a conviction of kidnapping to commit rape (Pen. Code, § 209, subd. (b)(1)), where the evidence had shown that, after sodomizing the victim, defendant ordered her to move from the apartment's only bathroom to the apartment's only bedroom, a distance of 10 and 30 feet. (*Id.*, at p. 470.) The court ruled that "substantial evidence [did] not establish that the movement was not merely incidental to the underlying crime or that it increased the risk of harm" or that "it increased the

danger in the victim's foreseeable attempts to escape" given that "it was unlikely the victim could have escaped" in any case. (*Ibid.*)

If such inconsistently disparate results obtain on appeal it is mentally taxing to see how the statute itself gives consistent notice of what is prohibited.

B. California's Definition of Aggravated Asportation is Unconstitutionally Vague

The point of the foregoing analysis is not whether the court of appeal reached an erroneous outcome-determinative decision but, rather, that section 209 and the *Daniels/Rayford* standard allow courts or juries to substitute free roaming, creative ideation for objective notice as to what conduct is prohibited. As noted, "the terms of a penal statute [...] must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." (*Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926).) This the statute does not do. As shall be explained, under *Johnson/Dimaya,* the qualifiers, "*substantial,"* "*incidental*," "*inherent*" and "*scope and nature*" render Section 209, subdivision (b) unconstitutionally vague. [10]

In *Johnson v. United States, supra,* 576 U.S. ____, this Court held that the residual clause of the Career Criminal Act (ACCA), 18 U.S.C. § 924(e) was unconstitutionally vague in that, without further definition, it sought to punish conduct under the vague standard that it might present a risk of physical injury to another. The statue increased punishment for unlawful possession of a firearm if the offender had suffered previous a

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10 Since section 209, subd. (b) means what *People v. Daniels* and *People v. Rayford* said it means the statutory provision and the term "*Daniels/Rayford* rule" are used inter-changeably.

previous conviction for a specified violent felony " 'or *otherwise* involves conduct that presents a serious potential risk of physical injury to another.' § 924(e)(2)(B)." (*Johnson, supra,* slip opn., p. 2 [italics added].) This "element" required the trier of fact to speculate as to some idealized criminal conduct "and to judge whether that abstraction presents a serious potential risk of physical injury." (*Id.,* at slip pg. 4.) This Court explained that "the residual clause "leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? (*Id.,* slip pg. 5.) This Court held that "the indeterminacy of the wide- ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." (*Id.,*at slip pg. 5.) That was clear enough; however, in reaching this conclusion, *Johnson* pointed out that it was not calling into question the applicability of qualitative risk assessment to *proved* conduct facts of the underlying the charge viz.: "As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree,' *Nash v. United States*, 229 U. S. 373, 377 (1913).]." (*Id.,* at slip pg. 12; see *People v. Morgan* (2007) 42 Cal.4th 593, 606 [following same rule].) Under the rule of *Nash*, it ought to be a simple matter to determine whether any given asportation was substantial *in fact*. (*Johnson,* slip pg. 12.)

This caveat of *Johnson's* leaves in doubt whether the *Daniels/Rayford* standard was

truly unconstitutionally vague since, ostensibly, that standard simply assessed the *substantiality* of actual conduct that had taken place. However, in *Sessions v. Dimaya*, this Court added further explanations which indicate that the *Daniels/Rayford* standard was not one based on actual conduct *sufficiency* but rather abstract judicial *ideation.*

Sessions involved a challenge to The Immigration and Nationality Act (INA), 8 U.S.C. § 1227(a)(2)(A)(iii), which mandated deportation of any alien convicted of an "aggravated felony." (Slip opn. pg. 1.) An "aggravated felony" included any "crime of violence" which, in turn, was defined by 18 U. S. C. §16 [hereinafter § 16], as

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." (Slip opn. p. 2 [italics added].)

Dimaya held that the residual clause of Section 16, subdivision (b) suffered from the same defect as the ACCA clause which it had struck in *Johnson*; namely it called upon the court to "identify a crime's 'ordinary case' in order to measure the crime's risk." (*Dimaya,* at slip opn. pg. 9.) The infirmity of §16's residual clause arose from applying a standard that involved "a judge-imagined abstraction" -- *i.e., '*an idealized ordinary case of the crime.' *Id.,* at ___, ___." (*Dimaya,* slip opn., at p. 11, quoting *Johnson*). It is then that the standard ceases to work in a way consistent with due process. (*Dimaya,* slip. pg. 11.) *In addition*, section 16(b) possessed a second fatal feature of ACCA's residual clause; namely, "uncertainty about the level of risk that makes a crime 'violent.' " (*Dimaya,* at slip opn. pg. 10 [italics added].) Although the statutes in *Johnson* and

Dimaya shared the same defects, the infirmity of Section 16(b) was *more* pronounced,

> "[T]he words 'by its nature' in § 16(b) *make that meaning all the clearer.* The statute, recall, directs courts to consider whether an offense, *by its nature*, poses the requisite risk of force. An offense's "nature" means its "normal and characteristic quality." Webster's Third New International Dictionary 1507 (2002). So § 16(b) tells courts to figure out what an offense normally -- or, as we have repeatedly said, "ordinarily" -- entails, not what happened to occur on one occasion. And the same conclusion follows if we pay attention to language that is *missing* from § 16(b). As we have observed in the ACCA context, the absence of terms alluding to a crime's circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit. [Citation] If Congress had wanted judges to look into a felon's actual conduct, "it presumably would have said so; other statutes, in other contexts, speak in just that way." *Id.,* at 267-268. fn. 5. The upshot of all this textual evidence is that § 16's residual clause -- like ACCA's, except still more plainly -- has no "plausible" fact-based reading. *Johnson,* 576 U. S., at ___." (*Dimaya,* slip opn., at pp. 14-15 [italics added]).

Dimaya's "by its nature" entails far more speculation than *Johnson's* "otherwise." "Otherwise" implies "otherwise *in fact*" -- an inquiry coming within *Johnson's* saving language. In contrast, "by nature" involves *"*a judge-imagined abstraction" as to what a baseline, "normal" underlying crime "inherently" involves. Under *Dimaya,* the various formulations of California's qualitative asportation standard all fall into this prohibited idealization, *viz.*:

> • "whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that *inherent* in robbery.[11] (*Rayford, supra,* at p. 12);
>
> • "risk of harm to the victim over and above that *necessarily* present in the commission or attempted commission of these crimes." (*Rayford, supra*, at p. 22)
>
> • the movement 'substantially increased' her risk of physical injury 'over and above those to which such person is *normally* exposed in the commission of the crime of

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11 Not "*this*" or "*the"* robbery by *a* robbery or robbery in general.

rape.' " (*Rayford*, *supra,* at p. 23.)

• "was more than incidental and increased the risk of harm above that *inherent* in the enumerated sexual offense itself." (*People v. Robertson, supra,* 208 Cal.App.4th, at p. 978.)

The word "inherent" means: "Existing in something as a permanent, essential, or characteristic attribute"[12] or "existing as a natural and permanent quality of something or someone"[13] or "involved in the constitution or essential character of something; belonging by nature or habit." [14]

The clear import of the cited language is that it signifies some "idealized ordinary case" of the target crime; e.g. a "typical" robbery or rape without increased risk. Likewise, as regards the classic substantial asportation element, the standard invites the trier of fact or reviewing court to imagine some "normal" asportation that does not involve any increase in risk.

The inherent vagueness of the section 209(b) standard is what led the court of appeal in this case to predicate substantial asportation on judicially hypothesized harm of what appellant "would likely have" done had his alleged kidnapping not been thwarted; that is, on a contrary to fact hypothesis.

In the same vein, the vague *Daniels/Rayford* standard requires the fact finder or a reviewing court to imagine some ideal form of lewd conduct involving a typical, inherent

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12 https://en.oxforddictionaries.com/definition/ inherent

13 https://dictionary.cambridge.org/us/dictionary/english/inherent

14 https://www.merriam-webster.com/dictionary/inherent

or necessary risk, *in se*. But since a lewd act is committed by *any* touching (with the requisite intent), *any* movement, howsoever slight would add to the supposedly "inherent" risk and, under the law cited by this court, any increase in risk equates with a a substantial asportation.

The fact that the *Perkins* and *Williams* cases cited above reached an opposite result on similar or even more egregious facts than those herein does not mean that the appellate court, in this case, committed legal error. The Court of Appeal did not misapprise California law; it explicitly relied on the *Daniels/Rayford/Martinez* standard.[15] (Slip opn. pp. 9-11.) The disparity of results indicates that the statute is defectively vague and that its meaning is supplied, *post hoc*, by jury or judicial ideation or speculation. The factual peculiarity of this case -- that fact that the jury found that no target crime had taken place -- highlights the constitutional deficiency of the statute; *viz.* it allows a finding of aggravated asportation to be based on the fact-finder's own view of what a normal or decent or reasonable criminal asportation ought to be. Words signifying specific conduct are, in this statute, replaced with words that are semantic vessels for variable content. As a result, *Jackson's* sufficiency test is rendered toothless.

For the foregoing reasons, appellant submits that, the law under which appellant has been convicted and pursuant to which his conviction has been affirmed is unconstitutionally vague "because it 'ties the judicial assessment of risk' to a speculative hypothesis about the crime's 'ordinary case,' but provided no guidance on how to figure

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15 It did not cite *Daniels* or *Rayford* by name but through the intervening precedent of *People v. Robertson, supra*, 208 Cal.App.4th 965 which did. (*Id.,* at p. 978.)

out what that ordinary case was." (*Dimaya, supra,* at slip p. 2.)

II. NECESSITY FOR GRANTING CERTIORARI

Nevertheless, while California's qualitative asportation standard is arguably unconstitutionally vague, the legal fact remains that both *Dimaya* and *Johnson* affirmed and left untouched the "imprecise" serious potential risk standard (*Dimaya,* at slip pg. 8; citing *Johnson,* at slip. pg. 12.) The line (if any) between impermissible ideation and qualitative assessment of real world conduct (*Nash* and *Cameron*) remains unclear.

As caselaw demonstrates, clarity is not obtainable from parsing imprecise phrases or adjectives, such as "substantial" or "unreasonable." The word *substantial* means: of considerable importance, size, or worth; important in material or social terms; concerning the essentials of something; real and tangible rather than imaginary;[16] large in size, value, or importance; relating to the main or most important things being considered.[17] "Substantial in ... *degree*" (*Johnson, supra,* at slip pg. 12) suggests but does not restrict the analysis to quantitative measures. Even when the word "substantial" is, at least ostensibly, restricted to signifying a bigger-than-not quantity, the restriction inevitably fails, as illustrated in *People v. Morgan, supra,* 42 Cal.4th 593. In that case, the court analyzed the sufficiency of the evidence under the superseded substantial *distance* rule of *Caudillo* (which applied at the time of trial). The court found substantial distance because, given that the defendant was "large and muscular," was seen to be holding both

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16 https://en.oxforddictionaries.com/definition/substantial

17 https://dictionary.cambridge.org/us/dictionary/english/substantial

of the victim's arms and appeared to be pulling her, "a reasonable jury could find that defendant *forcibly* moved Wong at least 245 feet." (*Id* at pp. 614-615 [italics added].) Imperceptibly an unmistakable *quala* snuck into the *quanta* of the matter. The *Martinez* rule, applying the same qualitatively substantial asportation standard to both simple and aggravated kidnapping, is not illogical. Six feet with a knife pressed against a jugular vein has a far greater potential for harm than arm twisting a victim for 200 feet. As noted in *Daniels*, *supra,* "[i]n basic concept the crime of kidnapping envisages the asportation of a person under restraint and compulsion." (*Id*., at p. 1136, 1139.) But once that fact is given recognition, the substantiality question necessarily becomes qualitative and this, in turn, inevitably brings into play the trier of fact's concept of what a "normal" or "basic" asportation ought to be. The word "substantial" not only invites but requires judges and juries to decide what is essential to something, what is more than necessarily essential to something, what is the nature of something and/or its relation to other things

The same dead-end is reached hobby-horsing the word "reasonable." For example, in *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, the California supreme court upheld a statute prohibiting the placement of a newsracks in a location that "unreasonably interferes with or impedes the flow of pedestrian or vehicular traffic.) (*Id*., at pp. 303, 313.) In doing so, the court relied on *Cameron v. Johnson* (1968) 390 U.S. 611, in which this Court held that the term "unreasonably interfere and obstruct" clearly and precisely delineated the reach of the challenged statute in words of "common understanding." (*Id.,* at pp. 615-616; see also *United States v. National Dairy Corp.,* 372 U.S. 29 (1963), [statute forbidding sales of goods at "unreasonably" low

prices not vague].) At the same time, relying on *Coates v. Cincinnati*, *supra,* 402 U.S. at p. 616 in which this Court struck a statute forbidding assembly in an "annoying" manner, *Kash* ruled that the ordinance's further requirement that newsracks be kept in an "attractive" condition was impermissibly vague in that it relied on a "totally aesthetic subjective judgement." (*Id*., 305.) How a requirement that newsracks be kept in a "reasonable" condition would be any more specific was not explained. The word "reasonable" means "being in accordance with reason," "not extreme or excessive," and "moderate or fair." [18] "based on good judgement and therefore fair and practical," "not expensive," "satsifactory and not bad." [19] As is well-recognized, the exercise of discretion entails judgements over which reasonable persons may differ. Statutes falling back on this adjective simply substitute trier of fact discretion for clear and precise notice.

Similarly, in *People v. Flores* (2014) 227 Cal.App.4th 1070, the appellate court upheld Proposition 36 (Pen. Code, § 1170.126) against a vagueness challenge to the standard used to disqualify Three Strike inmates from resentencing. Under the Proposition, inmates committed on the basis of a non-violent third strike would not be entitled to resentencing "if it would pose an unreasonable risk of danger to public safety." (*Id.,* at 1074.) On appeal from a denial of resentencing, defendant contended that "that the use of the word 'unreasonable' in the phrase, 'pose an unreasonable risk of danger to

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18 https://www.merriam-webster.com/dictionary/reasonable

19 https://dictionary.cambridge.org/us/dictionary/english/reasonable

public safety' rendered it vague and indefinite."[20] (*Flores,* at p. 1074.) Citing *Cameron, Go--Bart Importing Co. v. United States,* 282 U.S. 344 (1931) and *Morgan, Flores* held that "unreasonable" was not impermissibly vague, provided its meaning could be objectively ascertained by reference to "common experience." (*Ibid.*) Apparently referencing this "common experience," *Flores* held that,

> "Surely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would pose an unreasonable risk of harm to the public safety." (*Id.* at p. 1075.)

This, the court explained, was "one of those instances where the law is supposed to have what is referred to by Chief Justice Rehnquist as 'play in the joints.' (*Locke v. Davey* (2004) 540 U.S. 712, 718 [158 L.Ed.2d 1]), which was "a descriptive way of saying that the law is flexible enough for the . . . trial court to achieve a just result depending upon the facts, law, and equities of the situation." (*Flores,* at p. 1075.)

Assuming "play in the joints" is appropriate at sentencing after conviction, the vagueness doctrine is designed to avoid play in the joints prior to prosecution. It is no answer to a vagueness challenge to say that surely a judge can achieve a "just" result as God gives *him* the light to see the right.

Go-Bart, it might be noted, did not involve a vagueness issue but was a case arising under the Fourth Amendment. The dicta cribbed was the statement "'There is no formula for the determination of reasonableness." (*id* at 357.) Evidently it was *Daniels*

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20 What appellant *ought* to have argued was that the phrase "risk of danger" was a meaningless pleonasm given that both *risk* and *danger* involve probabilities. The appellate court's opinion silently corrected the statute by referencing a risk of *harm*.

that added the proviso that "standards of this kind are not impermissibly vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind." (*Id.,* at pp 1128-1129; see *Morgan, supra,* at p. 606.) But the dicta protests too much. If, as certainly appears to be the case, there is no "formula" for reasonableness, a statute formulating a prohibition in reliance on that word cannot possibly provide specific notice. If it could, the entire corpus of the penal code could be replaced with the simple injunction: *Behave reasonably; but if you are going to behave unreasonably at least do so in a reasonable manner*. While such an injunction is certain comprehensible in the abstract -- we *do* understand the idea of what is meant -- it provides no specific notice of anything. The addendum by *Daniels* tacking on the "common experience of mankind" provides no more specificity. The common experience of mankind simply incorporates by reference Gibbon's definition of history as "the register of the crimes, follies, and misfortunes of mankind." (*Decline and Fall of the Roman Empire,* Ch. III.)

In noting that, when construing a statute, "a man's fate depends on his estimating rightly . . . some matter of degree," (*Johnson, supra,* at slip p. 12), this Court implicitly accepted that the adjectives and stock phrases discussed do not provide specific notice. As noted in *Morgan, supra,* "The law is replete with instances in which a person must at his peril govern his conduct by such nonmathematical standards as 'reasonable,' 'prudent,' 'necessary and proper,' 'substantial' and the like." (*Id.,* 42 Cal.4th , at p. 606.) But the purpose of the vagueness doctrine is to protect individuals from having to act "at their peril." It was popular disgust at having to do so that required the Senate to first post the Twelve Tables in the Forum.

In *Johnson*, this Court sought a demarcation that was not dependent on parsing adjectives but which looked to whether the statutory terms applied to real world facts; viz.: "It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." (*Johnson, supra,* at slip p. 6; see also p. 12 ["abstract inquiry offers significantly less predictability than one '[t]hat deals with the actual, not with an imaginary condition other than the facts.' "].) It is submitted, however, that "real-world conduct" and "fact-finder ideation" is a distinction without a difference. All prosecutions involve "real world conduct." The question is not whether the conduct is real or imagined but whether evaluation of that conduct is clear *beforehand* or only becomes clear after the fact through the fact-finder's evaluation of the conduct. As stated by Justice Brewer, sitting in circuit, "the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty." (*Tozer v. United States* (1892) 52 F. 917, 919.) Yet it was precisely *this* dictum that *Nash* discarded and it is significant to note the *full* statement; *viz*. "the law is full of instances where a man's fate depends on his estimating rightly -- *that is, as the jury subsequently estimates it* -- some matter of degree. (*Nash,* at p. 377 [italics added].) By omitting the italicized portion, *Johnson* permitted itself a false dichotomy between things that happen in the real world as opposed to ideas, notions, speculations, likes and dislikes that revolve in the minds of so-called fact-"finders." What really takes place, in a vaguely formulated statute, is that the jury become fact-projectors reading their prejudices and ideations into circumstances at hand. It was precisely to avoid the peril of being found guilty of something *subsequently*

estimated by the jury (or a judge) that the vagueness doctrine exists. In other words, this issue is not one between "the real world" and "ideation" but rather whether the terms of the statute are open-ended enough to invite a judge or jury to project *their* sense of what is acceptable or not acceptable into the case.

As drafted in 1872, kidnapping (§ 207) was simple enough and merely restated the common law, which required that the victim be moved across county or state lines." (*People v. Nguyen, supra,* 22 Cal.4th, at p. 882.) Once that quantitative specificity was abandoned, *what* was prohibited became an open-ended question giving rise to " 'grave uncertainty about how to estimate the risk posed by a crime' and 'tie[s] the judicial assessment of risk" to a speculative hypothesis about the crime's 'ordinary case,' " (*Dimaya,* at slip p. 2.) It is submitted that by leaving undoubted those "laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct" (*Dimaya,* at slip p.8; *Johnson,* at slip p. 12) this court promulgated a distinction that is at least unclear if not untenable.

Certiorari is warranted to resolve theses inconsistencies and to vindicate in an unequivocal and practical manner the individual's right to know, without the hazards of speculation, precisely what, in which circumstances, he is forbidden to do.

CONCLUSION

For the foregoing reasons, petitioner therefore respectfully requests that his petition for certiorari be granted.

Word Count Certification

I certify that the word count of this petition, exclusive of tables and appendices, is 8101 words as estimated by computer word count.

Dated: 12 December 2018

Respectfully submitted

/s/ kcmanjarrez

Kieran D. C. Manjarrez
Attorney for Petitioner

APPENDIX A

Filed 4/12/18 P. v. Williams CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EARL D. WILLIAMS, Defendant and Appellant.	B269049 (Los Angeles County Super. Ct. No. MA064979)
In re EARL D. WILLIAMS, on Habeas Corpus.	B280742 (Los Angeles County Super. Ct. No. MA064979)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Affirmed.

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Lisa M. Chung, Judge. Petition denied.

Kieran D. C. Manjarrez, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Earl D. Williams challenges by appeal and petition for writ of habeas corpus a judgment of conviction entered after a jury found him guilty of aggravated kidnapping and of making criminal threats. Williams contends insufficient evidence supports the aggravated kidnapping conviction because no evidence suggested either that he moved the victim a substantial distance or intended that the kidnapping facilitate another, separate crime. He further contends the trial court made several evidentiary and instructional errors. We affirm the conviction and deny the petition.

BACKGROUND

A. Abduction

In the late morning on December 20, 2014, Jazmyne G., age four, was playing outside her home in Lancaster, at the top of a 55-foot long driveway going from her garage to the street. Her brother, Anthony G., age 13, was in the front yard scraping a furrow in the dirt with a shovel. With him were three younger children and Caryn G., his and Jazmyne's mother.

Williams drove in his RV to a vacant lot approximately 100 feet away from the house, exited the vehicle, and walked to the property directly across the street from Jazmyne's house, where he paced back and forth on the sidewalk for about 15 to 20 minutes, watching the children.

When Caryn went inside the house to use the restroom, Williams crossed the street, paced for a moment on the sidewalk

in front of the house, then walked up the driveway toward Jazmyne. Anthony asked what he was doing but Williams ignored him and walked the length of the driveway to Jazmyne, to whom he said, "Come here, little girl." When Jazmyne moved toward Anthony, Williams grabbed her, gave her a "side hug," kissed her on the top of the head, picked her up, and began walking with her toward the street. While Jazmyne squirmed and screamed, Anthony grabbed her hand and Williams's clothing, but he jerked away and said, "Get the fuck off me." Williams carried Jazmyne down the driveway while Anthony ran in the house to get Caryn.

Just before Williams reached the street, Caryn ran out of the house, chased him down, and shouted at him to let Jazmyne go. Williams put the girl down and began walking toward his RV. Caryn confronted him in the middle of the street, and he said, "Bitch, you don't know who I am. You don't know what I am capable of." He threw a beer can at her, then went to his vehicle.

Anthony testified Williams had taken Jazmyne approximately 26 feet down the driveway, from his front door (which Caryn had entered) to within approximately 10 feet of the road.

The family alerted Los Angeles County Sheriff's Deputy Amber Leist, who happened to be passing in her patrol car, and she detained Williams and placed him in the back seat of her patrol car. Williams told her, "What the fuck am I being arrested for? I thought I knew her. I just asked her name." He stated he had heard talking in the yard and thought he recognized voices. He walked toward Jazmyne, picked her up, kissed her on the head, and took her toward the street because he was worried for her safety. He said, "I was trying to keep her safe because they

are digging holes and shit in the yard to bury kids." Williams then became aggressive and irate, and yelled at the family from the back of the patrol car, "I will fucking come back and fuck you all up," and, "I'm coming back. I'm coming back for you."

Williams was later interviewed by Los Angeles County Deputy Sheriff Detective Claudia Rissling. He denied kissing the top of Jazmyne's head but admitted he had picked her up. According to him, Jazmyne "was glad" he picked her up, and "felt happy."

B. Trial

Williams was charged with simple and aggravated kidnapping, committing a lewd act involving a child, and making criminal threats (Pen. Code, §§ 207, subd. (a), 208, subd. (b), 209, subd. (b)(1), 288, subd. (a), 422, subd. (a)),[1] and it was alleged he had a prior "strike" conviction and a serious felony conviction and had served six prior prison terms (§§ 667, subds. (a)(1) & (b)-(j), 1170.12, subd. (b), 667.5, subd. (b)).

At trial, Caryn G. testified she did not know when Williams was detained whether police would arrest or release him, and she was concerned he would return even if he was arrested. She testified, "because I am a single mother and I was the sole provider for both households at the time, I was very scared." She said, "I didn't know what was going to happen with him, if they were going to release him or take him. But it is always scary when something happens to your child. You completely black out and just go with what you know. And when you are hearing [his threats], you don't know who—who his family members are, who

[1] All further statutory references are to the Penal Code unless otherwise indicated.

he is really. And if he can come back if he gets out of custody; so yes, I was in fear."

Williams testified that on the day in question he heard a child crying loudly for 15 to 20 minutes. He walked toward the sound to see if there was something wrong. When he saw Anthony digging, he said to him, "Come on. Let's go back and find whatever the child was hollering." Anthony agreed, and they went to the back of the driveway, where Jazmyne was underneath an SUV with another child. Jazmyne came out, and Williams knelt down and leaned over and asked how she was doing. He picked Jazmyne up and placed her next to Anthony, who ran inside the house. When Caryn approached him in the street and accused him of trying to take the child, Williams said only, "You know what, lady. Go on. I am going to walk back down . . . the street." He then walked away, having no intent to kidnap Jazmyne or threaten anyone.

The jury found Williams guilty of kidnapping with intent to commit a lewd act involving a child and making criminal threats, but acquitted him of committing a lewd act. In bifurcated proceedings the court found true that he had a prior strike conviction and had served six prior prison terms. He was sentenced to an aggregate term of 26 years to life.

Williams timely appealed.

DISCUSSION

I. Sufficiency of the Evidence

A. Kidnapping

Williams contends insufficient evidence supported his conviction for aggravated kidnapping because no evidence suggested either that he intended to involve Jazmyne in a lewd act or that he moved her a substantial distance.

1. Lewd Intent

The crime of simple kidnapping is defined in section 207, subdivision (a) of which provides in pertinent part: "Every person who forcibly, or by any other means of instilling fear, steals or takes . . . any person . . . and carries the person [to another place] is guilty of kidnapping."

The crime of aggravated kidnapping for the purpose of enumerated sexual offenses is set forth in section 209, subdivisions (b) and (d). Subdivision (b)(1) of section 209 provides in pertinent part: "Any person who kidnaps or carries away any individual to commit . . . [a lewd or lascivious act involving a child] . . . shall be punished by imprisonment in the state prison for life with the possibility of parole." Subdivision (b)(2) of that section provides: "This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense."

A section 209 kidnapping requires that the perpetrator have the specific intent when the kidnapping begins to commit the underlying offense. (*People v. Davis* (2005) 36 Cal.4th 510, 565-566.) The underlying offense in this case is commission of a lewd or lascivious act involving a child, a violation of section 288.

Section 288, subdivision (a), provides in relevant part that "[A]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." "[S]ection 288 is violated by 'any touching' of an

underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 452.) The basic purpose of section 288 is "to provide children with 'special protection' from sexual exploitation. [Citation.] . . . [Citation.] The statute also assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire. [Citation.] . . . [¶] For this reason, the courts have long indicated that section 288 prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. [Citation.] '[T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done. . . .' " (*Id*. at pp. 443-444.) "The trier of fact must find a union of act and sexual intent [citation], and such intent must be inferred from all the circumstances beyond a reasonable doubt." (*Id*. at p. 452.)

Circumstances relevant to determining whether a defendant acted with lewd intent include the nature of the charged act, "the relationship of the parties [citation], and any coercion . . . used to obtain the victim's cooperation or to avoid detection [citation]." (*People v. Martinez*, *supra*, 11 Cal.4th at p. 445.)

We review the record in the light most favorable to the judgment below. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) " 'The test is whether substantial evidence supports the [verdict], not whether the evidence proves guilt beyond a reasonable doubt.' " (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) That circumstances can be reconciled with a contrary

finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

Here, Williams spied on Jazmyne G., a four-year-old girl to whom he was a stranger, from across the street for several minutes. He waited until her mother went into the house, then entered the property, kissed and hugged Jazmyne, picked her up, and carried her struggling and screaming toward his nearby RV. Williams had no legitimate reason to approach the child, no history with her that would normalize a kiss or hug, and no innocuous reason to carry her away against her wishes. The jury could reasonably conclude from his deviant interest in and abduction of Jazmyne that he planned to involve her in a lewd act when he had her farther away from her home.

Williams argues the evidence was insufficient because he had evinced no morbid or excessive interest in Jazmyne in the past, and no evidence suggested he frequented places where children were present or had ever stalked anyone. He argues his kissing Jazmyne was itself not overtly sexual in nature, because "It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and groomed as part of a normal and healthy upbringing" (*People v. Martinez*, *supra*, 11 Cal.4th at p. 450), and "[k]issing is a kind of touch that has as much range as a big-city orchestra. It can be a perfunctory peck on the cheek, so asexual that balding Communist Party apparatchiks aren't ashamed to do it on TV" (*In re R.C.* (2011) 196 Cal.App.4th 741, 751). He argues that "[i]n the present case, [his] alleged forehead kiss was an empty variable. Where the act itself is sexually neutral, "the only way to determine whether [the] particular touching is permitted or prohibited is by reference to the actor's intent as inferred from all the circumstances." (*Martinez*, at p.

450.) Williams argues the evidence allowed no inference of such an intent, and his acquittal of a charge of lewd conduct involving a minor necessarily means the jury found he harbored no lewd intent.

We flatly reject the arguments. That a kiss between relatives or apparatchiks may be innocuous is irrelevant here, as Williams was neither. And the jury's not-guilty verdict for lewd conduct says in the first instance nothing specifically about Williams's intent, as a violation of section 288 involves several elements, for lack of any one of which the jury would have been compelled to acquit. In any event, it would be irrelevant even if Williams had no lewd intent when he kissed Jazmyne, a four-year-old with whom he had no prior relationship. The question is what he planned to do with her once he had her farther away from her home. On this issue Williams offers no innocent explanation, and we can conceive of none. A stranger does not approach a very young girl and kiss her, pick her up, and carry her struggling and screaming away for innocuous reasons.

2. Asportation

To establish a kidnapping the prosecution must prove " '(1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance.' [Citation.]" (*People v. Bell* (2009) 179 Cal.App.4th 428, 435.) To establish a section 209 kidnapping, the prosecution must prove that the movement of the victim "was more than incidental and increased the risk of harm above that inherent in the enumerated sexual offense itself." (*People v. Robertson* (2012) 208 Cal.App.4th 965, 978.)

Any kidnapping requires that the perpetrator move the victim a substantial rather than slight or trivial distance. (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1434-1435.) But nothing in the asportation element of kidnapping "limits the asportation element solely to actual distance." (*People v. Martinez* (1999) 20 Cal.4th 225, 236.) The focus is on the quality of the movement, not its quantity, i.e., whether the movement is "substantial in character," not substantial in terms of distance. (*Id.* at p. 237; *People v. Caudillo* (1978) 21 Cal.3d 562, 573.) "[W]here movement changes the victim's environment, it does not have to be great in distance to be substantial." (*People v. Robertson*, *supra*, 208 Cal.App.4th at p. 986.)

Thus in determining whether a victim was moved a substantial distance, the focus is not on a "specified number of feet or yards," but on "such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*People v. Martinez*, *supra*, 20 Cal.4th at p. 237.) The jury must also consider whether the movement was merely incidental to an associated crime committed by the defendant. (*Ibid.*)

In *People v. Jones* (1999) 75 Cal.App.4th 616, the Court of Appeal affirmed a conviction of kidnapping for robbery where the defendant moved the victim 40 feet across a parking lot to her car. (*Id.* at pp. 629-630.) In *People v. Shadden* (2001) 93 Cal.App.4th 164, the defendant dragged the victim nine feet from an open area to a closed room. The court held that the distance was substantial because it changed the victim's environment.

(*Id*. at p. 169.) In *People v. Arias*, *supra*, 193 Cal.App.4th 1428, the appellate court held that movement of a kidnapping victim 15 feet from outside to inside his apartment "increased his risk of harm in that he was moved from a public area to the seclusion of his apartment," and made it "less likely defendant would have been detected if he had committed an additional crime. These factors support the asportation requirement for kidnapping." (*Id*. at p. 1435; see *People v. Shadden*, *supra*, 93 Cal.App.4th at pp. 168-169 [movement of nine feet to the back of a store meets the asportation requirement of kidnapping]; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594 [movement of the victim from a driveway "open to street view" to an RV increased the risk of harm to the victim].)

Here, the record amply supports the jury's kidnapping verdict. Williams picked up Jazmyne near her front door, after her mother had gone inside, and carried her 26 feet, to within approximately 100 feet of his RV, with as yet no one to stop him. The child was thus moved (struggling and screaming) from a relatively private and protected position deep in her yard to beyond where she could easily dart into the house should she break free. Although Williams carried Jazmyne only 26 feet, never quite reaching the end of her driveway, he had essentially escaped with the child because even if her mother had come out immediately and given chase, he had a 26-foot head start and conceivably could have reached his RV with the girl. Williams was in control at that point, free to assault Jazmyne again on the sidewalk or to run with her to his RV, with no one to stop him but several small children already in his wake. Had Caryn been impeded by circumstances in the house (she had gone in to use the restroom after all), or had she or Anthony been slower

runners, Williams would likely have been driving away with Jazmyne in seconds, placing her beyond reasonable hope of quick rescue. His movement of the child from deep in her front yard almost to the street, and nearer to his RV, thus increased the likelihood that his assault would be uninterrupted and further assaults undetected.

Thus, the 26 feet Williams carried Jazmyne G. from her front door to the street—before Caryn G. came out and intervened—were substantial for purposes of kidnapping. Absent Caryn's intervention those feet meant the difference between freedom and severe peril.

B. Threats

Williams contends insufficient evidence supported his conviction for making threats. We disagree.

To establish the crime of making threats, the prosecution "must prove '(1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat . . . was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.' " (*In re George T.* (2004) 33 Cal.4th 620, 626.)

1. Post-Detention Statements

Here, Williams shouted to Caryn G. and her family from within a police car, "I will fucking come back and fuck you all up," and "I'm coming back. I'm coming back for you." He made the statements shortly after entering Caryn's property and carrying away one of her children. Caryn was in no position to know whether police would arrest or release Williams, and she was afraid that even if he was arrested he would return later. The jury could reasonably conclude from this evidence that Williams made these statements willfully, intending them to be taken seriously; that they carried a gravity of purpose and an immediate prospect of execution; and that Caryn G. actually sustained a reasonable fear for her or her children's safety.

Williams argues Caryn's fear could have been neither reasonable nor sustained, as he was shortly thereafter arrested and taken to jail, and did not return. The argument is without merit. Williams's statements and their context suggested he was not averse to bold action and would not scruple to attack a woman or her young children, and it was not then apparent that he would not shortly be free to attack the family. Caryn's fear that Williams would return was eminently reasonable, as she had just come within seconds of losing a child on his first visit, and would have if not for a timely warning from Anthony G. If Williams was willing to attack the family with no provocation, Caryn could reasonably fear he would do so now that her actions had caused him to be taken into custody.

2. Pre-Detention Statement

At trial, the prosecution's theory was that Williams's first statement to Caryn G. also constituted a criminal threat. Before police arrived, Williams told Caryn, "Bitch, you don't know who I

am. You don't know what I am capable of." Williams argues this statement was so ambiguous as to convey no threat, and in any event did not cause Caryn to fear him, as after it was made she continued to berate him for having taken Jazmyne. We disagree.

Williams had just taken Caryn's daughter, then menaced Caryn, then continued to menace her from the police car. The statement before he was detained cannot be parsed from the activity surrounding it and held to be innocuous in isolation. Williams's conduct, including both statements, created an atmosphere steeped in danger to Caryn and her family. To parse one statement from the next and call it innocuous would be to ignore its context and the gestalt of the situation.

Williams argues his threats were protected by the First Amendment. He is incorrect. (*People v. Toledo* (2001) 26 Cal.4th 221, 233 [threats made in violation of section 422 are not protected speech].)

We conclude substantial evidence supported the convictions for both section 209 kidnapping and making threats.

II. Jury Instructions

A. Attempted Kidnapping

Williams contends the trial court erred by failing to instruct on attempted kidnapping because there was evidence that any kidnapping was thwarted before he could move Jazmyne G. a substantial distance.

" 'Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154, fn. 5.)

A trial court errs if it fails to instruct "on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*Id*. at p. 162.) The "existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude" ' that the lesser offense, but not the greater, was committed." (*Ibid*.)

A trial court has no duty to instruct the jury on a lesser included offense if the evidence is such that the defendant, "if guilty at all, was guilty of the greater offense." (*People v. Kelly* (1990) 51 Cal.3d 931, 959.)

Attempted kidnapping is a lesser included offense of kidnapping. (*People v. Mullins* (1992) 6 Cal.App.4th 1216, 1221.) A conviction for kidnapping requires proof the movement of the victim "is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in," the underlying crime. (§ 209, subd. (b)(2).) A conviction for attempted kidnapping requires proof "the defendant had the specific intent required for kidnapping . . . and that the movement, if completed as the defendant intended, would have been more than merely incidental to the underlying crime . . . and would have substantially increased the risk of harm over and above that necessarily present in the" underlying crime. (*People v. Mullins*, *supra*, 6 Cal.App.4th at p. 1221.) A conviction for attempted kidnapping is proper, for example,

where the defendant's "intent was to move [the victim] much farther and that he was prevented from doing so only by her successful escape." (*Id*. at pp. 1220-1221.)

Here, the trial court instructed the jury on section 209 kidnapping and also the lesser included offense of simple (section 207) kidnapping. Williams did not request instructions on attempted kidnapping, and the court did not instruct the jury on this crime.

There is no substantial evidence in the record that Williams moved Jazmyne only an insubstantial distance. It was undisputed that at the time of the kidnapping, Caryn G. was in the house, and 12-year-old Anthony, after Williams shrugged him off, had run in to get her. Thus with no one around except for three small children, Williams moved Jazmyne 26 feet beyond her front door, from the safety of her yard almost to the street—and 26 feet nearer to his nearby RV. His vacuous explanation that he did so to protect her merited no consideration by the jury, as it could not reasonably have led them to conclude Jazmyne faced no more danger of sexual abuse near the street than she had at her front door. Even if it is conceivable the jury could have credited Williams's explanation in theory, there is no reasonable probability it would have done so. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [conviction may be reversed for error only where it is reasonably probable the defendant would have achieved a better outcome].)

B. Attempted Threats

An attempted criminal threat is a lesser included offense to making a criminal threat. (See *People v. Toledo*, *supra*, 26 Cal.4th at pp. 227-230.) Williams argues the trial court erred in failing to instruct on the lesser included offense of attempting to

make criminal threats because there was evidence that when Caryn G. confronted him she was not actually frightened by his first statement: "Bitch, you don't know who I am. You don't know what I am capable of." This is so, he argues, because she appeared calm on her 911 call, and dared to brace him in the street even after the statement.

We reject the argument out of hand. First, that a mother fights for her children is not substantial evidence that she is unafraid. Under the circumstances here, the jury could not reasonably conclude Caryn had no fear of Williams. Second, as discussed above, Williams's first statement cannot be separated from his second. The totality of his actions created and fed upon a situation ripe with fear. No element of his conduct was discrete, and the jury could not reasonably parse one statement from the next and conclude this one was fearful but that one was not. Even if it could, no purpose would be served because Williams faced only one count of making criminal threats, and no evidence indicated his statement made from the police car left Caryn unmoved. That statement alone supported his conviction. Third, even if the jury could parse Williams's two statements into threatening and nonthreatening categories, there is no probability it would have done so. His first statement was designed to create distance between him and Caryn. It had the desired effect, as she then permitted him to leave and return to his RV. There is no reasonable probability the jury would conclude the statement did not induce fear, much less that it could be taken out of context and declared nonthreatening.

III. Character Impeachment Evidence

During bifurcated proceedings on allegations that Williams had suffered a prior conviction and served prior prison terms, the

prosecution sought permission to admit during the trial in chief evidence that in 2001 Williams exposed his penis to two women and threatened one of them, and suffered misdemeanor convictions for disorderly conduct, loitering for prostitution, and uttering offensive words in public. (§§ 415, subd. (3), 647f, 653.22, subd. (b).) The prosecution requested leave to use this evidence if Williams testified himself or called character witnesses.

Williams objected to admission of the evidence for any purpose, and the trial court provisionally excluded the evidence.

After the prosecution rested, Williams asked for clarification as to what impeachment evidence would be admissible in response to his upcoming character witnesses' testimony. The trial court stated that if the witnesses limited their testimony only to Williams's veracity, then they could be impeached using only his prior felony convictions. But if the witnesses testified Williams was "a good guy" or "not sexually deviant," the court indicated it would have to reassess what evidence would be admissible in rebuttal.

Williams's counsel called as character witnesses only Williams's sister and his former employer, Fahad Atshanm. Atshanm, when asked, "was there any time in which you asked [Williams] to do personal errands involving your family?" replied, "Yes. Such as dropping off stuff at my house, picking up my family. Because I had my family visiting . . . in the summer of 2014, so I had him picking up furniture, dropping off furniture, picking up my little brothers." Williams's counsel then asked, "And based on the time that you knew him, do you have an opinion whether [Williams] is honest in regard to veracity and

honesty?" Atshanm replied, "He is, absolutely. He is a very honest man."

In light of this testimony, the trial court permitted the prosecution to ask Atshanm during cross-examination if he knew that Williams had previously exposed his penis to two "females" and had suffered felony convictions for assault with a deadly weapon and resisting arrest. Atshanm testified that he was unaware of these facts, but they did not change his opinion of Williams.

Williams argues the trial court erred in permitting the prosecution to ask Atshanm a question about his indecent exposure to two females on a prior occasion because the question went beyond the scope of Atshanm's testimony and, in the context of his testimony about his "little" brothers, suggested incorrectly to the jury that Williams's prior misconduct reflected pedophilic tendencies.

We need not determine whether the court erred because any error was harmless. "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439, referring to *People v. Watson*, *supra*, 46 Cal.2d 818.) Here, by the time Atshanm testified, the jury already knew on overwhelming and mostly undisputed evidence that in 2014 Williams went into four-year-old Jazmyne G.'s yard, kissed her, picked her up, and carried her away. This conduct itself ineluctably established his deviant propensity, as there can simply be no cogent, innocuous explanation for it. Williams neither offered one below nor suggests one here. There is no

reasonable probability that some added modicum of deviance established by one nonspecific question about indecent exposure to two females at some time in the past tipped the scales against Williams in the jury's mind.

IV. Sixth Amendment Right to Present a Defense

Williams contends the trial court's admission of impeachment evidence chilled his opportunity to present good character evidence as guaranteed under the Fourteenth Amendment. (*Webb v. Texas* (1972) 409 U.S. 95, 98.) We disagree.

The Sixth and Fourteenth Amendments guarantee state criminal defendants " 'a meaningful opportunity to present a complete defense.' " (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) A violation of confrontations rights may be shown when foreclosed testimony would have produced a significantly different impression with respect to the defendant's conduct or mental state. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) For example, in *Webb v. Texas*, *supra*, 409 U.S. 95, the Supreme Court held that the trial court committed reversible error when it dissuaded the sole defense witness from testifying by warning him that anything he said could be used against him, and by stating that if the witness lied under oath, the court would personally see that the grand jury would indict him for perjury. (*Id*. at p. 98.) The Court explained that the trial court's unnecessarily intimidating warning effectively "drove that witness off the stand" and thus deprived the defendant of due process of law. (*Ibid*.)

Here, Williams fails to explain what witnesses he would have called but for the trial court's ruling, or what they could have said. Therefore, nothing in the record suggests the trial

court's allowing witnesses to be questioned about Williams's prior indecent exposures dissuaded anyone from testifying about any matter.[2]

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.*

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[2] In the related petition for a writ of habeas corpus Williams repeats arguments he makes on appeal, makes further arguments regarding other matters, including sentencing, and contends he received ineffective assistance of counsel. We have considered the arguments.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

Court of Appeal, Second Appellate District, Division One - No. B269049

S248885

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

EARL D. WILLIAMS, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX C

28 U.S.C. § 1257, sub. (a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Penal Code §207:

(a) Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

(b) Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping.

(c) Every person who forcibly, or by any other means of instilling fear, takes or holds, detains, or arrests any person, with a design to take the person out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell that person into slavery or involuntary servitude, or otherwise to employ that person for his or her own use, or to the use of another, without the free will and consent of that persuaded person, is guilty of kidnapping.

(d) Every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where that act is committed, and brings, sends, or conveys that person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnapping.

(e) For purposes of those types of kidnapping requiring force, the amount of force required to kidnap an unresisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent.

(f) Subdivisions (a) to (d), inclusive, do not apply to any of the following:

(1) To any person who steals, takes, entices away, detains, conceals, or harbors any child under the age of 14 years, if that act is taken to protect the child from danger of imminent harm.

(2) To any person acting under Section 834 or 837. [Amended by Stats. 2003, Ch. 23, Sec. 1. Effective January 1, 2004]

Penal Code, §208:

(a) Kidnapping is punishable by imprisonment in the state prison for three, five, or eight years.

(b) If the person kidnapped is under 14 years of age at the time of the commission of the crime, the kidnapping is punishable by imprisonment in the state prison for 5, 8, or 11 years. This subdivision is not applicable to the taking, detaining, or concealing, of a minor child by a biological parent, a natural father, as specified in Section 7611 of the Family Code, an adoptive parent, or a person who has been granted access to the minor child by a court order.

(c) In all cases in which probation is granted, the court shall, except in unusual cases where the interests of justice would best be served by a lesser penalty, require as a condition of the probation that

the person be confined in the county jail for 12 months. If the court grants probation without requiring the defendant to be confined in the county jail for 12 months, it shall specify its reason or reasons for imposing a lesser penalty. [Amended by Stats. 1997, Ch. 817, Sec. 1. Effective January 1, 1998]

Cal. Penal Code, § 209:

(a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that person for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) (1) Any person who kidnaps or carries away any individual to commit robbery, rape, spousal rape, oral copulation, sodomy, or any violation of Section 264.1, 288, or 289, shall be punished by imprisonment in the state prison for life with the possibility of parole.

(2) This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.

(c) In all cases in which probation is granted, the court shall, except in unusual cases where the interests of justice would best be served by a lesser penalty, require as a condition of the probation that the person be confined in the county jail for 12 months. If the court grants probation without requiring the defendant to be confined in the county jail for 12 months, it shall specify its reason or reasons for imposing a lesser penalty.

(d) Subdivision (b) shall not be construed to supersede or affect Section 667.61. A person may be charged with a violation of subdivision (b) and Section 667.61. However, a person may not be punished under subdivision (b) and Section 667.61 for the same act that constitutes a violation of both subdivision (b) and Section 667.61. [Amended November 7, 2006, by initiative Proposition 83, Sec. 3]

Cal. Penal Code, § 288:

(a) Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

(b) (1) Any person who commits an act described in subdivision (a) by use of

force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years.

(2) Any person who is a caretaker and commits an act described in subdivision (a) upon a dependent person by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, with the intent described in subdivision (a), is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years.

(c) (1) Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child.

(2) Any person who is a caretaker and commits an act described in subdivision (a) upon a dependent person, with the intent described in subdivision (a), is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year.

(d) In any arrest or prosecution under this section or Section 288.5, the peace officer, district attorney, and the court shall consider the needs of the child victim or dependent person and shall do whatever is necessary, within existing budgetary resources, and constitutionally permissible to prevent psychological harm to the child victim or to prevent psychological harm to the dependent person victim resulting from participation in the court process.

(e) Upon the conviction of any person for a violation of subdivision (a) or (b), the court may, in addition to any other penalty or fine imposed, order the defendant to pay an additional fine not to exceed ten thousand dollars ($10,000). In setting the amount of the fine, the court shall consider any relevant factors, including, but not limited to, the seriousness and gravity of the offense, the circumstances of its commission, whether the defendant derived any economic gain as a result of the crime, and the extent to which the victim suffered economic losses as a result of the crime. Every fine imposed and collected under this section shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs pursuant to Section 13837.

If the court orders a fine imposed pursuant to this subdivision, the actual administrative cost of collecting that fine, not to exceed 2 percent of the total amount paid, may be paid into the general fund of the county treasury for the use and benefit of the county.

(f) For purposes of paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c), the following definitions apply:

(1) “Caretaker” means an owner, operator, administrator, employee, independent contractor, agent, or volunteer of any of the following public or private facilities when the

facilities provide care for elder or dependent persons:

(A) Twenty-four hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(B) Clinics.

(C) Home health agencies.

(D) Adult day health care centers.

(E) Secondary schools that serve dependent persons and postsecondary educational institutions that serve dependent persons or elders.

(F) Sheltered workshops.

(G) Camps.

(H) Community care facilities, as defined by Section 1402 of the Health and Safety Code, and residential care facilities for the elderly, as defined in Section 1569.2 of the Health and Safety Code.

(I) Respite care facilities.

(J) Foster homes.

(K) Regional centers for persons with developmental disabilities.

(L) A home health agency licensed in accordance with Chapter 8 (commencing with Section 1725) of Division 2 of the Health and Safety Code.

(M) An agency that supplies in-home supportive services.

(N) Board and care facilities.

(O) Any other protective or public assistance agency that provides health services or social services to elder or dependent persons, including, but not limited to, in-home supportive services, as defined in Section 14005.14 of the Welfare and Institutions Code.

(P) Private residences.

(2) "Board and care facilities" means licensed or unlicensed facilities that provide assistance with one or more of the following activities:

(A) Bathing.

(B) Dressing.

(C) Grooming.

(D) Medication storage.

(E) Medical dispensation.

(F) Money management.

(3) "Dependent person" means any person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. "Dependent person" includes any person who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(g) Paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c) apply to the owners, operators, administrators, employees, independent contractors, agents, or volunteers working at these public or private facilities and only to the extent that the individuals personally commit, conspire, aid, abet, or facilitate any act prohibited by

paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c).

(h) Paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c) do not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent person under care.

(i) (1) Any person convicted of a violation of subdivision (a) shall be imprisoned in the state prison for life with the possibility of parole if the defendant personally inflicted bodily harm upon the victim.

(2) The penalty provided in this subdivision shall only apply if the fact that the defendant personally inflicted bodily harm upon the victim is pled and proved.

(3) As used in this subdivision, "bodily harm" means any substantial physical injury resulting from the use of force that is more than the force necessary to commit the offense. [Amended by Stats. 2010, Ch. 219, Sec. 7. (AB 1844) Effective September 9, 2010]

Penal Code § 422:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

For the purposes of this section, "immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

"Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

PROOF OF SERVICE BY MAIL

Title: EARLE DUANE WILLIAMS v. CALIFORNIA **Court of Appeal Case No.:** B269049

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The undersigned declares:

I am a citizen of the United States of America, over the age of eighteen years and counsel for appellant herein. My business address is 1535 Farmers Lane 133, Santa Rosa, CA 95405.

On 14 December 2018 served the attached, **PETITION FOR CERTIORARI & MOTION TO PROCEED IN FORMA PAUPERIS** on the parties in this action by placing a true copy thereof, in a sealed envelope with first class postage fully prepaid, in the United States Mail, addressed as follows:

Attorney General of California 1
300 South Spring Street, 5th Fl .
Los Angeles, CA 90012

COURTESY COPY (via e/filing) to:
Court of Appeal Dist 2 / Div 1
[300 South Spring St., N.Tower, L.A., CA 90013

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

Sworn this 14 December 2018, at Santa Rosa, California

/s/kcmanjarrez
Kieran D. C. Manjarrez