No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LLOYD GEORGE KENNEY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

HEATHER E. WILLIAMS
Federal Defender
Eastern District of California
CAROLYN M. WIGGIN
Assistant Federal Defender
Counsel of Record
801 I Street, 3rd Floor
Sacramento, California 95814
e-mail address: carolyn_wiggin@fd.org
Telephone: (916) 498-5700

Attorneys for Petitioner
LLOYD GEORGE KENNEY

I. QUESTIONS PRESENTED FOR REVIEW

This case centers on whether California's simple kidnapping offense as it existed in 1974 was a "violent felony" under the "force clause" definition of "violent felony" for purposes of the Armed Career Criminal Act (ACCA). The text of the statute required the defendant act "forcibly," but the California Supreme Court held that the "forcibly" element was satisfied even if no physical force was used if the victim was a child or vulnerable adult and the defendant acted with an illegal intent. Despite this variation in the means by which "forcibly" could be proved, California courts have never treated kidnapping of a child or vulnerable adult as a separate offense from regular kidnapping. Indeed, California courts could not have done so since California allows only its legislature to establish offenses, which are then published in the California Penal Code. Nonetheless, the United States Court of Appeals for the Ninth Circuit held that California kidnapping could be divided into two separate offenses: (a) kidnapping of a child or vulnerable adult, and (b) kidnapping of a competent adult.

In addition, the Ninth Circuit held that even though the "forcibly" element of California kidnapping could be fulfilled by an implicit threat of arrest regardless of the victim's characteristics, an implicit threat of arrest fulfills the "physical force" requirement of the "violent felony" definition contained in 18 U.S.C. § 924(e)(2)(b).

The questions presented are:

1. When a state's highest court has interpreted a state criminal statute to allow for a conviction even if no physical force is used in certain circumstances, can a federal court hold that the statute is divisible despite the fact that the statute's language and it's treatment by the state's courts indicate it is indivisible?

2. Is the Ninth Circuit correct in holding that an implicit threat of arrest fulfills the "force clause" definition of "violent felony"?

TABLE OF CONTENTS

TABLE OF CONTENTS FOR APPENDIX

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

State Statutes

Other Authorities

II. Opinions Below

The November 4, 2021, order issued by the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Rehearing *En Banc* is unreported and is reproduced at Appendix A.

The citation for the August 23, 2021, unpublished Memorandum Disposition issued by the United States Court of Appeals for the Ninth Circuit affirming the district court order is *United States v. Kenney*, 2021 WL 3721805, 2021 U.S. App. LEXIS 25167 (9th Cir. Aug. 23, 2021).

The citation for the July 7, 2020, order of the United States District Court for the Eastern District of California denying Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 is *Kenney v. United States*, 2020 WL 3802812, 2020 U.S. Dist. LEXIS 119065 (E.D. Cal. July 7, 2020).

III. Basis for Jurisdiction

The Memorandum Disposition affirming the district court's order denying Mr. Kenney's Section 2255 motion was issued by the United States Court of Appeals for the Ninth Circuit on August 23, 2021. App. B at 2a-9a. The Ninth Circuit denied Mr. Kenney's Petition for Rehearing and Rehearing *En Banc* on November 4, 2021. App. A at 1a. This Court has jurisdiction to review the judgment on a writ of *certiorari* pursuant to 28 U.S.C. § 1254(1).

IV. Constitutional Provisions and Statutes Involved in the Case

1. 18 U.S.C. § 924(e)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * *

(A) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another;

* * *

2. California Penal Code Section 207 (1974)

Every person who forcibly steals; takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him 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 such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free-will and consent of such persuaded person; and every person who, being out of this state, abducts or takes by force or fraud any person contrary to the laws of the place where such act was committed, and brings, sends, or conveys such person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnaping.

V. Statement of the Case

In 2015, a jury found Mr. Kenney guilty of three counts, including one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). An advisory Presentence Investigation Report (PSR) asserted Mr. Kenney had three prior "violent felony" convictions under the ACCA, including a 1974 conviction for kidnapping under California Penal Code Section 207. Due to ACCA sentence enhancements, the PSR calculated Mr. Kenney's advisory guidelines range to be 272-319 months. Without the ACCA enhancements, the advisory range would have been 125-135 months. The district judge sentenced Mr. Kenney to 319 months, the top of the advisory range that was based on the assumption that Mr. Kenney was subject to the ACCA.

After an unsuccessful appeal, Mr. Kenney moved for relief under 28 U.S.C. § 2255, claiming both that his sentence was unlawful because his 1974 kidnapping conviction was not a "violent felony" under the ACCA, and that his attorney committed ineffective assistance of counsel by failing to make that argument to the

district court. Mr. Kenney pointed to two lines of California cases to argue that kidnapping did not categorically require ACCA-level force. The first line of cases showed that if the victim is a child or incompetent adult, a defendant need not use or threaten to use physical force as long as s/he acts with an illegal purpose. The second line of cases showed that regardless of the victim's characteristics, if the defendant induced a victim to move merely by pretending to be a law enforcement officer giving an order to move, the defendant was guilty of kidnapping.

The district court denied the § 2255 motion and the United States Court of Appeals for the Ninth Circuit affirmed the denial. The Ninth Circuit concluded that kidnapping under the 1974 California Penal Code § 207 is divisible into two offenses: (1) kidnapping a competent adult, and (2) kidnapping a child or incompetent adult for an illegal purpose. App. B, pp. 5a-6a. Having decided the statute was divisible, the Ninth Circuit employed the modified categorical approach to examine the information to which Mr. Kenney pled guilty. App. B, p. 6a. It reasoned that because the information did not include an allegation that Mr. Kenney acted for an illegal purpose, Mr. Kenney must have entered a guilty plea to what it called "competent adult kidnapping." App. B, pp. 6a-7a.

The Ninth Circuit also held that although the "forcibly" element of California kidnapping could be satisfied when a defendant impersonates a police

officer and therefore implies that s/he has the power to arrest, this implicit threat of arrest constitutes an ACCA-level threat of force. App. B, pp. 7a-8a.

VI. Reasons for Granting the Petition for a Writ of *Certiorari*

A. Introduction

This case centers on whether Mr. Kenney's 1974 California kidnapping conviction is a "violent felony" under the Armed Control Criminal Act's (ACCA) "force clause," that is whether it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). In 1974, California Penal Code § 207 required a defendant to act "forcibly."[1] In 1961, the California Supreme Court, interpreting California Penal Code § 207, held that if the victim was a child or incompetent adult, the "force" required was minimal, covering a situation where a child willingly followed an adult defendant, as long as the defendant acted with an illegal intent. *People v. Oliver*, 361 P.2d 593, 596 (Cal. 1961). The *Oliver* Court did not indicate that it was defining a new criminal offense that was separate from simple kidnapping

[1] At issue in this case is simple kidnapping as codified in the 1974 California Penal Code § 207, which Mr. Kenney contends is a single, indivisible offense. He acknowledges that California Penal Code § 207, as it existed in 1974, defined two other special kidnapping offenses that are likely divisible from simple kidnapping: transportation across state lines for sale into slavery and unlawful transportation into the state for any purpose. Only simple kidnapping, the offense at issue in this case, required that the defendant act "forcibly." Throughout this brief, "kidnapping" refers to California's simple kidnapping offense.

under California Penal Code § 207. Nonetheless, despite California's continuous treatment of kidnapping as a single offense, the Ninth Circuit invented the supposedly distinct California offenses of (1) kidnapping competent adult, and (2) kidnapping a child or incompetent adult for an illegal purpose. App. B, pp. 5a-6a. It then relied on its own invention to reach the faulty conclusion that it could glean from the information charging Mr. Kenney with kidnapping that he pled guilty to kidnaping a competent adult.

The Ninth Circuit made a second error as well. It recognized that California courts have held that if a defendant in a kidnapping case has impersonated a law enforcement officer, and thus implicitly indicated s/he has the power to arrest a person who does not obey commands, the defendant has satisfied the "forcibly" element of California kidnapping. It held that this implicit threat arrest of fulfills the physical force requirement 18 U.S.C. § 924(e)(2)(B)(i). This holding is at odds with this Court's precedent regarding the "physical force" required for an offense to be a "violent felony." Further, it creates a split between the Ninth Circuit and sister circuits. Finally, it opens the door to numerous state and federal offenses that involve detaining a victim to become "violent felonies" or "crimes of violence."

B. This Court should clarify that when a state's highest court interprets a state criminal statute to allow proof of a state offense through alternative means, the statute is indivisible for purposes of the categorical analysis.

This Court should grant Mr. Kenney's petition because the Ninth Circuit failed to follow this Court's holdings regarding the divisibility component of the categorical analysis. In doing this, it also failed to give deference to California's statutory and case law providing that simple kidnapping could be proved by alternative means, but that it was a single offense. The Ninth Circuit's holding is not only highly prejudicial to Mr. Kenney, but also throws into question federal cases recognizing that a statute can be indivisible despite the fact that its elements can be proven by more than one means.

1. Kidnapping under California Penal Code Section 207 is indivisible, containing one set of elements that can be established by more than one means.

The Ninth Circuit's conclusion that kidnapping as set forth in the 1974 California Penal Code § 207 is divisible into two separate crimes—(1) competent-adult-kidnapping and (2) child-or-incompetent-adult kidnapping—is wrong and rests on a flawed analysis. As recently as 2019, the California Supreme Court recognized that under *People v. Oliver*, 361 P.2d 593 (Cal. 1961), kidnapping under Section 207 has a reduced "standard of force as we apply it to children." *People v. Westerfield*, 433 P.3d 914, 974 (Cal. 2019). That does *not* make it a

separate, divisible offense from standard kidnapping. As stated by the California Supreme Court:

> *Oliver* and *Michele D.* and the other related cases described above, *did not create a new or different crime of kidnapping* that needed to be expressly pleaded against the defendant. Instead, these cases simply applied an alternative standard in kidnapping cases involving children.

Westerfield, 433 P.3d at 975 (emphasis added). Despite the California Supreme Court's treatment of kidnapping as a unitary offense that covers both the kidnapping of a competent adult and the kidnapping of a child/incompetent adult, the Ninth Circuit erroneously deemed the offense divisible.

2. As a Matter of California law, simple kidnapping under the 1974 version of California Penal Code Section 207 defined a single offense.

"In California all crimes are statutory and there are no common law crimes. Only the Legislature and not the courts may make conduct criminal." *In re Brown*, 9 Cal. 3d 612, 624, 510 P.2d 1017 (Cal. 1973). Under the 1974 California Penal Code § 207, kidnapping was defined as follows:

> Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county. . . is guilty of kidnaping.

California Penal Code § 207 (1974). The text of the statute provides that one element of kidnapping was that a defendant act "forcibly." Under California law, the California courts could not eliminate the "forcibly" requirement; they could

only interpret it. As the *Brown* Court held, "[d]eletion by the courts of one of the statutory requirements of a crime would make conduct criminal which the Legislature has not seen fit to make criminal and would violate the fundamental principle that there are no common law crimes in this state." *Brown*, 9 Cal. 3d at 624. Thus when the California Supreme Court explained in *Oliver**Error! Bookmark not defined.*** that under Section 207, the force requirement was relaxed when the victim was a child or incompetent adult, it was interpreting a single offense set forth in the California Penal Code, not creating a separate kidnapping offense.

3. The Ninth Circuit's divisibility analysis is at direct odds with the analytic framework created by this Court in *Descamps* and *Mathis*.

As set forth below, point by point the Ninth Circuit's determination that simple kidnapping under the 1974 California Penal Code is divisible is directly at odds with the analytic framework this Court established in *Descamps* and *Mathis*.

a. As to Force, Kidnapping under the 1974 California Penal Code Section 207 Does Not Use Disjunctive Language.

A statute is divisible only when it "lists multiple, alternative elements, and so effectively creates several different crimes." *Descamps v. United States*, 570 U.S. 254, 264 (2013) (internal quotations and citations omitted). Kidnapping under the 1974 California Penal Code § 207 did not list multiple, alternative levels

of force a defendant could use to commit the offense; it universally required the defendant act "forcibly." The text of the statute makes the offense indivisible.

b. Kidnapping under the 1974 California Penal Code § 207 Does Not Contain Alternate Elements that Must Be Charged and Proven to the Jury.

Elements, this Court has made clear, are those things a prosecutor must allege in the charging document and that a jury must unanimously find true beyond a reasonable doubt. *Descamps*, 570 U.S. at 263–64; *Mathis v. United States*, 579 U.S. 500 (2016). In deciding whether a particular fact in an offense is an element or merely a means (one of multiple factual ways an element can be proven), a federal court can look to whether a state's supreme court has decided that the factual finding is simply an "alternative method" that the jury need not unanimously agree upon (in which case it is a means), whether different punishments are tied to the proof of different facts (in which case those facts are elements), and whether the statute itself identifies "which things must be charged (and so are elements) and which need not be (and so are means)." *Mathis*, 136 S. Ct. at 2256.

By any of these criteria, kidnapping under the 1974 California Penal Code § 207 contains only one set of elements.

a. In California, Prosecutors Do Not Charge a Distinct "Child/ Incompetent Adult" Kidnapping Crime.

As the California Supreme Court held, "*Oliver* and *Michele D.*, . . . did not create a new or different crime of kidnapping that needed to be expressly pleaded against the defendant." *Westerfield*, 433 P.3d at 975. In *Westerfield*, the kidnapping victim was seven years old. The San Diego County District Attorney filed an information charging the defendant with kidnapping under California Penal Code Section 207.[2] The information did not allege the defendant used a lesser quantum of force or acted for an unlawful purpose in committing the kidnapping.[3] The California Supreme Court held that evidence was sufficient to support the kidnapping conviction because

> [the victim'] status as a young child is significant because we have long recognized an alternative standard for such victims for purposes of kidnapping under section 207. We have held that the kidnapping of a minor can be accomplished without the same kind of force or fear applicable to adult victims provided that it was done for an improper purpose, because a minor is "too young to give his [or her] legal consent to being taken." (*People v. Oliver* (1961) 55 Cal.2d 761, 764, 12 Cal.Rptr. 865, 361 P.2d 593 (*Oliver*)).

Westerfield, 433 P.3d at 973-74. The California Supreme Court rejected Mr. Westerfield's objection that those allegations were not made in the charging

---

[2] Respondent's Brief, *People v. Westerfield*, No. S112691, 2012 WL 5392372 at * 1 (filed in the California Supreme Court on October 9, 2012).

[3] *Id*. at 975.

document, holding "*Oliver****Error! Bookmark not defined.*** and *Michele D.*. . . . did not create a new or different crime of kidnapping that needed to be expressly pleaded against the defendant." *Id*. at 975.

The *Westerfield* Court did note that the information alleged that the victim was under 14,[4] but it did not hold that the prosecutor had to plead that the victim was a child/incompetent adult and the defendant acted for an illegal or improper purpose in order to rely on this theory to obtain a kidnapping conviction. *Id*. at 975. Instead, the *Westerfield****Error! Bookmark not defined.*** Court held that the prosecution need not specify in the charging document which "theory" of liability it intends to pursue in a kidnapping case. *Id*. It cited *People v. Abel*, 271 P.3d 1040 (Cal. 2012), which held that when a California prosecutor charges a single statutory offense such as murder, the "accusatory pleading . . . need not specify the theory of murder upon which the prosecution intends to rely." *Abel*, 271 P.3d at 1077. Because the *Oliver* allegations and theory of liability need not be made in the charging document in a kidnapping prosecution, under *Descamps* and *Mathis*, they are not "elements."

---

[4] In 1990, California Senate Bill No. 2079 revised California Penal Code § 208 by adding a new enhanced punishment for kidnapping when the victim is under the age of 14. Stats. 1990, c. 1560 (S.B. 2079), § 1. In *Westerfield*, a case charged in 2002, the information included this fact because it was relevant to punishment. In Mr. Kenney's case, charged well before 1990, there was no reason for the prosecutor to allege the age of the victim because there was no enhanced punishment if a younger victim was involved. Cal. Penal Code § 208 (1974).

b. In California Kidnapping Cases, Jurors Do Not Have to Unanimously Agree that either (a) Elevated Force Was Used, or (b) a Child or Incompetent Adult Was Seized for an Illegal Purpose.

When a California kidnapping case goes to trial, jurors are not instructed that they must unanimously agree that the kidnaping was done either (a) to a competent adult, or (b) to a child or mentally incompetent adult for an illegal purpose. Under the so-called "*Sullivan* rule," which California follows, "where a statute prescribes disparate alternative means by which a single offense may be committed, no unanimity is required as to which of the means the defendant employed so long as all the members of the jury are agreed that the defendant has committed the offense as it is defined by the statute." *People v. Sutherland*, 17 Cal.App.4th 602, 612-13 (1993); *see also People v. Davis*, 8 Cal.App.4th 28, 34-45 (1992) (discussing *Sullivan* rule). Under *Mathis*, when jurors need not unanimously agree on the method a defendant used in committing a statutory offense, the statutory offense is indivisible.

c. Kidnapping under the 1974 California Penal Code § 207 Did Not Tie Different Punishment to Proof of Different Facts.

Under the 1974 California Penal Code § 207, different punishments were not tied to proof of different facts. Instead, the California Penal Code simply provided: "Kidnapping is punishable by imprisonment in the state prison not less than one

nor more than twenty-five years." Cal. Pen. Code § 208 (1974). This is further evidence that kidnapping a child or incompetent adult for an illegal purpose was not a separate offense divisible from regular kidnapping. *Mathis*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then under *Apprendi* they must be elements.").

c. The fact that one means of committing a crime requires proof of a unique fact does not mean the crime is divisible into separate offenses.

The Ninth Circuit's division of kidnapping into "competent-adult-kidnapping" and "child-or-incompetent-adult-kidnapping" rested on its observation that the latter requires proof that a defendant acted with an illegal purpose or intent, whereas the former does not. App. B, p. 6a. The Ninth Circuit's reasoning is contrary to its own precedent and that of other federal appellate courts. Federal courts regularly recognize that where a statute defines an offense that can be proven in multiple, alternative ways, it is indivisible. It does not matter that each of those ways requires proof of unique facts. For example:

- *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir. 2014): where sexual abuse under Oregon Revised Statutes Section 163.425 required proof of non-consent by the victim, and non-consent could be proven by ***either*** by an actual lack of consent ***or*** by proof that the victim was legally incapable of giving consent due to their youth,

mental incapacity, or physical incapacity (*id*. at 1135), the Ninth Circuit held "the fact that § 163.425 'covers' multiple means of commission . . . does not render § 163.425 divisible." *Id*. at 1136. The Ninth Circuit noted that a holding that the offense was divisible "would render every criminal statute divisible" in which an offense could be proved by "one or more means of commission." *Id*. at 1137. *Descamps* "squarely foreclose[s]" this approach. *Id*.

- *United States v. Al-Muwwakkil*, 983 F.3d 748 (4th Cir. 2020): where attempted rape under Virginia Code Annotated Section 18.1-44 could consist of having sexual intercourse with an adult woman "against her will, by force," ***or***, alternatively, having sexual intercourse against a "female child" or a disabled or institutionalized adult woman, the Fourth Circuit held the statute was indivisible and "prohibits the single offense of rape, which can be committed by several means satisfying the elements of the crime." *Id*. at 757. Because the prosecution could prove the offense ***either*** "through proof that the defendant used actual force" ***or*** "through proof that the victim was deemed legally incapable of consenting," the offense was indivisible and did not require the element of physical force necessary to satisfy the ACCA's force clause. *Id*. at 760. The fact that different

means required proof of different facts did not make the rape offense divisible.

- *United States v. Coleman*, 918 F.3d 592 (8th Cir. 2019): where kidnapping under Arkansas Code § 5-11-102 could be proved through various means, some that required force and some that did not, the Eighth Circuit rejected the government's argument that the statute was divisible, holding that "[t]he text of § 5-11-102 names only one offense—kidnapping—and defines that offense as 'a class Y felony' regardless of which nefarious purpose is used. The statutory text suggests, therefore, that subsections (a)(1) through (a)(7) list means, not elements." *Coleman*, 918 F.3d at 594. Further, the Eighth Circuit recognized that the Arkansas Supreme Court itself ruled that when an information charging kidnapping by one means is later amended to allege other means, the amendment does not change the kidnapping charge but only "amend[s] the manner in which the alleged kidnapping took place." *Id*. (quoting *Hill v. State*, 370 Ark. 102, 107 (2007)). This is comparable to the California Supreme Court's recognition in *Westerfield* that even though the charging document did not include allegations supporting an *Oliver****Error! Bookmark not defined.*** theory of kidnapping, the prosecution could rely on that

theory to prove guilt because kidnapping is a single offense and its elements can be proven by different means.

Kidnapping under California Penal Code § 207 is much like the offenses considered in the cases above. It can be proven by a means that requires force ***or*** by a means that relaxes the force requirement but adds a requirement that the victim is a child or incompetent adult and the defendant acted for an illegal or improper purpose. Those alternate means require proof of different facts, but under *Descamps* and *Mathis*, that does not transform them into elements that define separate, divisible offenses.

4. Because California charging documents in kidnapping cases need not allege that the defendant took a child or incompetent adult for an illegal purpose in order for the prosecutor to rely on that theory of guilt, the charging document here reveals nothing about whether Mr. Kenney pled guilty to kidnapping requiring actual physical force.

The problems with the Ninth Circuit's divisibility analysis in this case created a flawed application of the modified categorical analysis. As the California Supreme Court held in *Westerfield*, although kidnapping liability could be based on proof of taking a child or incompetent adult for an illegal purpose without the use of force, this "did not create a new or different crime of kidnapping that needed to be expressly pleaded against the defendant." *Westerfield*, 433 P.3d at 975. Thus, contrary to the Ninth Circuit's conclusion in this case, Mr. Kenney's 1974

entry of a guilty plea to an information that simply alleged a standard violation of California Penal Code § 207 reveals nothing about whether the prosecutor's theory of liability in the case was that Mr. Kenney kidnapped a competent adult using conventional force or kidnapped a child or incompetent adult using relaxed force.

C. This Court should avoid a radical expansion of the types of crimes that satisfy the "force clause," and resolve the circuit split this decision creates, by clarifying that an implicit threat of arrest does not satisfy the "force clause. "

This Court has held that "physical force" necessary to satisfy the ACCA's force clause must be force exerted through concrete bodies, as opposed to emotional or intellectual force, and the force must be sufficient to overcome a victim's will, "necessarily involv[ing] a physical confrontation and struggle" *Stokeling v. United States*, __ U.S. __; 139 S. Ct. 544, 552, 553 (2019). In this case, the Ninth Circuit held that this *Stokeling* definition of "physical force" is satisfied when a defendant impersonates a law enforcement officer and gives an order to a civilian. It reasoned that an implicit threat to arrest a disobedient civilian—which California courts hold satisfies the "forcibly" element of California kidnapping—is a threat to use "physical force" under the ACCA. This holding expands the reach of the "physical force" clause considerably and creates a significant circuit split.

California cases pre-dating Mr. Kenney's 1974 conviction held that inducing a person to move by either abusing one's authority as a law enforcement officer or impersonating a law enforcement officer, thus implicitly threatening to arrest the person for failing to comply with an order, satisfied the "forcibly" element of California Penal Code § 207. *People v. Fick*, 89 Cal. 144, 152-53 (1891); *People v. Broyles*, 151 Cal. App. 2d 428, 431 (1957).[5] Mr. Kenney argued this "implicit threat of arrest" force was not ACCA-level physical force, but the Ninth Circuit rejected his argument. The Ninth Circuit inaccurately stated that the California Supreme Court itself held that "the threat of arrest implicitly carries with it the threatened use of violent force." App. B, p. 7a. While the California Supreme Court has held that the threat of arrest satisfies the "forcibly" element of California kidnapping, it has never offered an opinion on whether it entails "the threatened use of violent force" or "violence" at all.[6]

More importantly, as the Ninth Circuit should have recognized, whether any predicate offense includes an element requiring "physical force" for the purposes

---

[5] *See also People v. Majors*, 92 P.3d 360, 367 (Cal. 2004).

[6] The panel stated, "the California Supreme Court has held that the threat of arrest implicitly carries with it the threatened use of violent force. *See People v. Stephenson*, 517 P.2d 820, 825 (Cal. 1974); *People v. Majors*, 92 P.3d 360, 366-67 (Cal. 2004)." App. B, p. 7a. In fact, the *Stephenson* opinion never once uses the term "violent" or "violence." Instead, it held deceit and fraud alone do not satisfy the "forcibly" element of kidnapping. *Id*. at 825. The *Majors* opinion likewise did not hold the defendant must implicitly threaten a violent arrest to be guilty of kidnapping, only implicitly threaten an arrest.

of the ACCA's force clause, 18 U.S.C. § 924(e)(2)(B)(i), is a question of federal law, not state law. *Johnson v. United States*, 559 U.S. 133, 138 (2010) ("[t]he meaning of 'physical force' in § 924 (e)(2)(B)(i) is a question of federal law, not state law."). The implicit threat of arrest simply does not fit the definition of "physical force" this Court has described in *Johnson* and *Stokeling*. At its most basic, an arrest is a detention of the arrestee. In some cases it can be initiated by strong physical force necessary to overcome the arrestee's resistance, but in many cases it can just be an order that is obeyed due to the arrestee's recognition of a police officer's legal authority.[7] In *Stokeling* this Court clarified that "physical force" for purposes of the ACCA must be "force exerted by and through concrete bodies," not "intellectual or emotional force." *Stokeling*, 139 S. Ct. at 552. Obedience in response to a law enforcement officer's order out of respect for the officer's legal authority would seem to be the type of "intellectual or emotional force" that is not "physical force" under the force clause definition of "violent felony."

The Ninth Circuit's decision is not only contrary to *Stokeling*, but it puts the Ninth Circuit at odds with other circuits that have held that offenses involving

[7] . In California "[a]n arrest is made by an actual restraint of the person, or by submission to the custody of an officer." Cal. Penal Code § 835. Thus when an individual voluntarily submits to the custody of an officer, they are under arrest. For example, if a person agrees to go to a police station, empty their pockets, and undergo interrogation, that person is under arrest. *People v. Hatcher*, 2 Cal. App. 3d 71, 75 (Ct. App. 1969).

detaining or arresting another person do not inherently require actual or threatened ACCA-level physical force. For example, the Fifth Circuit has ruled that simply "threatening to continue to detain an individual does not necessarily involve the threat of physical force." *United States v. Picazo-Lucas*, 821 F. App'x 335, 340 (5th Cir. 2020) (unpublished) (hostage taking pursuant to 18 U.S.C. § 1203(a) not a "crime of violence" because threatening to continue to detain someone is not a threat to use physical force). Similarly, in *United States v. Swanson*, 55 F. App'x 761, 762 (7th Cir. 2003) (unpublished), the Seventh Circuit ruled the crime of "unlawful restraint" does not satisfy the force clause definition of "crime of violence" because it can be accomplished "as long as an individual's freedom of locomotion is impaired." (quoting *People v. Bowen*, 241 Ill.App.3d 608, 182 Ill. Dec. 43, 609 N.E.2d 346, 361 (Ill.App.Ct.1993)).

In addition, the Ninth Circuit's holding substantially enlarges the type of offenses that would fall within the "force clause" definition of "violent felony" or "crime of violence." Federal and state criminal codes contain numerous criminal offenses prohibiting individuals from pretending to be government and/or law enforcement officers. *See*, *e.g.*, 18 U.S.C. § 912 (prohibiting pretending to be an officer or employee of the United States); Fla. Stat. Ann. § 843.08 (prohibiting false impersonation of law enforcement and other officers); Colo. Rev. Stat. Ann. § 18-8-112 (prohibiting falsely pretending to be a peace officer and performing an

act in that pretended capacity). Federal courts have never held that these offenses satisfy a "force clause" definition of "violent felony," that is require the use or threatened use of physical force, because pretending to be a law enforcement officer implies one has the authority to arrest others. However, under the Ninth Circuit's reasoning, because a defendant who pretends to be a police officer is implies s/he has the power to arrest, such offenses involve the threatened use of ACCA-level "physical force" and thus satisfy the force clause. It is doubtful Congress ever meant for the term "violent felony" to apply to these offenses, but under the Ninth Circuit's rationale in this case, such offenses will fall within the fold of "violent felonies." This Court should close the door to such an expansion the definition of "violent felony" before other circuits follow the Ninth Circuit's lead.

VII. Conclusion

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*.

Dated: January 25, 2022

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

s/ Carolyn M. Wiggin
CAROLYN M. WIGGIN
Assistant Federal Defender

Attorney Petitioner
LLOYD GEORGE KENNEY