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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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MOLLY C. DWYER, CLERK
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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LLOYD GEORGE KENNEY, Defendant-Appellant.	No. 20-16332 D.C. Nos. 1:19-cv-00647-AWI 1:12-cr-00266-AWI-BAM-1 Eastern District of California, Fresno ORDER

Before: McKEOWN and NGUYEN, Circuit Judges, and LAMBERTH,* District Judge.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable Royce C. Lamberth, United States District Judge for the District of Columbia, sitting by designation.

Appendix B

NOT FOR PUBLICATION

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AUG 23 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LLOYD GEORGE KENNEY, Defendant-Appellant.	No. 20-16332 D.C. Nos. 1:12-cr-266-AWI 1:19-cv-647-AWI MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted July 27, 2021
San Francisco, California

Before: McKEOWN and NGUYEN, Circuit Judges, and LAMBERTH,** District Judge.

In 2015, a jury found defendant-appellant Lloyd George Kenney guilty of possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g). Ordinarily, the maximum sentence for a § 922(g) offense is ten years' imprisonment. 18 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Royce C. Lamberth, United States District Judge for the District of Columbia, sitting by designation.

§ 924(a)(2). But 18 U.S.C. § 924(e)(1), a portion of the Armed Career Criminal Act ("ACCA"), provides that "a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony . . . shall be fined under this title and imprisoned not less than fifteen years." The probation officer who prepared Kenney's presentence investigation report ("PSR") reasoned that Kenney was subject to this fifteen-year minimum given three of his prior convictions: his 1984 and 1985 federal convictions for bank robbery, in violation of 18 U.S.C. § 2113(a) & (d), and his 1974 state conviction for kidnapping, in violation of California Penal Code ("CPC") § 207. Kenney's lawyer did not challenge the PSR at sentencing. And the district court adopted it, finding that Kenney was subject to the fifteen-year minimum for his three prior violent felonies. Based on that finding and other aggravating factors under the Sentencing Guidelines, the district court imposed a 235-month sentence for Kenney's § 922(g) offense.

On direct appeal, Kenney argued that he does not have three prior violent felonies since, in his view, § 207 does not require the use of violent force as an element of the offense. *United States v. Kenney*, 724 F. App'x 551, 555 (9th Cir. 2018). (He does not contend that his federal bank robbery convictions were not violent felonies. *See United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018) (holding that violation of 18 U.S.C. § 2113(a) & (d) is categorically a violent felony).) Thus, he said, his sentence was invalid because it lacked a third ACCA

predicate. *Kenney*, 724 F. App'x at 555; *see also Johnson v. United States*, 576 U.S. 591 (2015). But because Kenney had not preserved that objection below, we reviewed only for plain error. *Kenney*, 724 F. App'x at 555. Because § 207's text explicitly requires that the defendant commit the asportation "forcibly," we held that even if the district court had committed error at sentencing, such error was not "plain." *Id.* So we affirmed. *Id.* at 556.

Kenney then moved to vacate his sentence under 28 U.S.C. § 2255, arguing that his sentencing lawyer was constitutionally ineffective for having failed to argue that § 207 kidnapping does not require violent force as an element of the offense. The district court held that § 207 kidnapping in fact does require violent force, so it denied his § 2255 motion. Kenney appealed. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review a district court's determination that a prior conviction qualifies as a "violent felony" under the ACCA de novo. *United States v. Walker*, 953 F.3d 577, 578 n.1 (9th Cir. 2020). We also review claims of ineffective assistance of counsel de novo. *United States v. Manzo*, 675 F.3d 1204, 1209 (9th Cir. 2012).

To succeed on an ineffective-assistance claim, Kenney must show both that his sentencing lawyer's performance was deficient and that Kenney was thereby prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Kenney has failed to make either showing. His information reveals that he pleaded guilty to

competent-adult kidnapping under § 207. And competent-adult kidnapping in 1974 required violent force as an element of the offense, making it a valid ACCA predicate. *Cf. Stokeling v. United States*, 139 S. Ct. 544, 550 (2019) (requiring that violent force simply be force sufficient to overcome the victim's resistance, however slight that resistance). We explain these points below.

Tracking the language of § 207, Kenney's information charged Kenney with "the crime of KIDNAPING, in violation of Section 207, Penal Code, a felony, committed as follows: That the said LLOYD GEORGE KENNEY on or about the 26th day of February, 1974 . . . did willfully, unlawfully and feloniously and forcibly steal, take and arrest . . . William J. Bessant, and carry said William J. Bessant into another County of the State of California, to wit, the County of Ventura." Kenney pleaded guilty to this charge in September 1974.

Kenney now says that his resultant conviction did not require violent force for two reasons. First, he says, California courts accept less-than-violent force under § 207 when the victim is a child or an adult legally incompetent to consent. Second, he says, even when the victim is a competent adult, California courts have upheld § 207 convictions for false arrest when the defendant captures the victim with mere suasion or a mere show of authority and without the use of violent force.

Neither argument is persuasive. Section 207 is divisible, and child-or-incompetent-adult kidnapping under § 207 is not the offense to which Kenney

pleaded guilty. The California Supreme Court's *Oliver* decision in 1961 held that when the kidnapping victim is a child or an incompetent adult, the prosecution must prove an additional element—that the defendant had an "illegal purpose" or an "illegal intent" when performing the caption and asportation. *People v. Oliver*, 361 P.2d 593, 596 (Cal. 1961); *see also In re Michele D.*, 59 P.3d 164, 172 (Cal. 2002) (noting that *Oliver* made "having an illegal purpose or intent . . . an element of the offense"). By contrast, competent-adult kidnapping under § 207 does not require proof of this element. *See People v. Rhoden*, 492 P.2d 1143, 1147–48 (Cal. 1972). Thus, child-or-incompetent-adult kidnapping is a distinct offense, since it necessarily requires proof of an additional and different fact than does competent-adult kidnapping. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). So the level of force that California courts require for the caption and asportation of a child or an incompetent adult is not relevant to Kenney's § 207 conviction.

Indeed, the *Shepard* documents reveal that Kenney pleaded guilty to competent-adult kidnapping. *See Shepard v. United States*, 544 U.S. 13, 16 (2005). His charging document tracks exactly the elements that the California Supreme Court had explained were required to convict a defendant of "general" competent-adult kidnapping. *See Rhoden*, 492 P.2d at 1147–48. By contrast, it mentions nothing about an "illegal purpose" or an "illegal intent." So the relevant *Shepard* document gives us no reason to believe that Kenney was charged with kidnapping

a child or an incompetent adult. *See People v. Randazzo*, 310 P.2d 413, 417 (Cal. 1957) (explaining that a charging document must contain the "essential elements of the offense").

Having established that Kenney was convicted of competent-adult kidnapping, the only remaining question is whether that version of the offense categorically requires the use of force sufficient to overcome the victim's resistance.[1] It does, and Kenney's counterarguments are unavailing. *People v. Fick*, 26 P. 759 (Cal. 1891), is not persuasive, since it never details the level of force the defendant used. Thus, it does not define the "outer contours" of a § 207 offense. *Cf. United States v. Walton*, 881 F.3d 768, 771–72 (9th Cir. 2018). Moreover, 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). Kenney's false-

[1] We held in *Delgado-Hernandez v. Holder* that California's present-day version of § 207 is not categorically a crime of violence under the elements clause of 18 U.S.C. § 16(a). 697 F.3d 1125, 1127 (9th Cir. 2012). Section 207 currently provides that "[e]very 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." CPC § 207(a) (emphasis added). Because the statute thus includes kidnapping by "any means of instilling fear," we held that § 207 does not categorically require as an element the use of force. *Delgado-Hernandez*, 697 F.3d at 1127. But since the 1974 version of the statute to which Kenney pleaded guilty did not contain that italicized language, *Delgado-Hernandez* does not control here.

authority-arrest argument thus fails on its own terms. *People v. Broyles* is likewise unpersuasive, since the defendants in that case hit a woman whom they would soon rape as they transported her in the back of their car—a clear use of violent force. 311 P.2d 88, 89 (Cal. Dist. Ct. App. 1957).

California Supreme Court cases decided shortly before Kenney's § 207 conviction further dispel his claim that § 207 competent-adult kidnapping did not require violent force. *Rhoden*, decided two years before Kenney's plea, held that a defendant could violate § 207 only with "the use or threat of force." 492 P.2d at 1148. Thus, mere fraud was held to be insufficient. *Id.* Likewise, *Stephenson*, decided just months before Kenney's plea, reversed two § 207 competent-adult kidnapping convictions when the State had proven fraud alone. 517 P.2d at 825. By contrast, it upheld another conviction in the same case when the State had proven that the defendant physically forced a resisting woman back into his vehicle. *Id.* at 823, 825. These cases decisively refute Kenney's claim that § 207 competent-adult kidnapping did not categorically require the use of violent force in 1974.

Because Kenney's offense thus categorically required violent force, any *Johnson* challenge would have been meritless. Kenney's counsel had no duty to make a meritless objection, and Kenney suffered no prejudice when counsel failed to do so. *See Baumann v. United States*, 692 F.2d 565, 572 (9th Cir. 1982).

Because Kenney's § 207 conviction is a valid ACCA predicate, we do not reach whether CPC §§ 211 and 12022.5, when combined, create a categorically violent felony. Kenney's other arguments are without merit.

We therefore **AFFIRM** the district court's denial of Kenney's § 2255 motion.

Appendix C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LLOYD GEORGE KENNEY, **Petitioner** **v.** **UNITED STATES OF AMERICA,** **Respondent**	**CASE NO. 1:12-CR-0266 AWI** **ORDER PETITIONER'S 28 U.S.C. § 2255 PETITION AND ORDER GRANTING A CERTIFICATE OF APPEALABILITY** (Doc. No. 169)

On December 3, 2015, a jury returned a unanimous verdict against Petitioner Lloyd Kenney, finding him guilty of violations of 18 U.S.C. §§ 922(g) (felon in possession of a firearm), 924(c) (carrying and brandishing a firearm during and in relation to a crime of violence), and 2113(a) and (d) (armed bank robbery). See Doc. No. 105. On March 14, 2016, this Court sentenced Kenney to a total term of imprisonment of 319 months (235 months on the § 2113 and § 922(g) counts, and 84 months to run consecutively on the § 924(c) count). The sentence included a mandatory minimum 15 year sentence pursuant to 18 U.S.C. § 924(e)(1) because it was determined that Kenney had three or more convictions for "violent felonies." On February 9, 2018, the Ninth Circuit affirmed Kenney's conviction and sentence. On May 14, 2019, Kenney through counsel filed this petition for relief under 28 U.S.C. § 2255 (hereinafter "§ 2255"). After receiving a court-ordered sur-reply from the United States and a reply to that sur-reply from Kenney, all briefing has now been received. For the reasons that follow, Kenney's petition will be denied.

§ 2255 FRAMEWORK

28 U.S.C. § 2255 provides, in pertinent part: "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... may move the court which imposed the sentence to vacate, set aside or correct the sentence." Under § 2255, a district court must grant a prompt hearing to a petitioner in order to determine the validity of the petition and make findings of fact and conclusions of law, "[u]nless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief . . . ." 28 U.S.C. § 2255(b). The court may deny a hearing if the movant's allegations, viewed against the record, fail to state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal. United States v. Withers, 638 F.3d 1055, 1062-63 (9th Cir. 2011); Baumann v. United States, 692 F.2d 565, 571 (9th Cir. 1983). A petitioner is not required to allege facts in detail, but he "must make factual allegations" and cannot rest on conclusory statements. Baumann, 692 F.2d at 571; United States v. Hearst, 638 F.2d 1190, 1194 (9th Cir.1980). Accordingly, an evidentiary hearing is required if: (1) a petitioner alleges specific facts, which, if true would entitle him to relief; and (2) the petition, files, and record of the case cannot conclusively show that the petitioner is entitled to no relief. United States v. Howard, 381 F.3d 873, 877 (9th Cir. 2004). Additionally, "[w]hen a defendant has raised a claim and has been given a full and fair opportunity to litigate it on direct appeal, that claim may not be used as basis for a subsequent § 2255 petition." United States v. Hayes, 231 F.3d 1132, 1139 (9th Cir. 2000); see United States v. Redd, 759 F.2d 699, 701 (9th Cir. 1985); Battaglia, 428 F.2d at 960; see also United States v. Jingles, 702 F.3d 494, 498-500 (9th Cir. 2012).

§ 2255 PETITION

Petitioner's Argument

Kenney argues that he is entitled to relief because he does not have three prior convictions for crimes of violence under § 924(e). One of the felonies that was relied upon by the pre-sentence report was a 1974 conviction for kidnapping, in violation of Cal. Pen. Code § 207

(hereinafter "§ 207"). The Ninth Circuit has previously held that § 207 is a "violent felony" under § 924(e)(2)(B)(3), known as the "residual clause." However, the residual clause has been held to be unconstitutionally vague by the Supreme Court. Thus, § 207 must fit within the "force/elements" clause of § 924(e)(2)(B)(1) to constitute a crime of violence. Courts use the categorical approach to determine whether an offense always has as an element the use, attempted use, or threatened use of physical force against a person and thus, fall under the force clause. California courts have held that § 207 can be violated without the use of sufficient physical force and thus, it is not categorically a crime of violence.. For example, a California court has upheld a conviction under § 207 when a defendant pretended to be a police officer, ordered the victim to get into the car and then drove "some distance" away. See People v. Broyles, 151 Cal.App.2d 428 (1957); see also People v. Majors, 33 Cal.4th 321, 330 (2004) (finding that an implicit threat of arrest satisfies the force requirement). Another court has held that a parent getting into a car and then remaining in the car as it drove and made stops was a kidnapping where the defendant had taken custody of the parent's child. See People v. Felix, 92 Cal.App.4th 905 (2001). Another court has held that holding a person around his or her shoulders and having them walk at a faster than normal pace is sufficient force. See People v. Dejourney, 192 Cal.App.4th 1091, 1115 (2011). Finally, the California Supreme Court has held that when a victim is a child or an incapacitated adult, the "force" necessary for a violation of § 207 is only what is necessary to move the victim, so long as the defendant acted with an illegal purpose or intent. See In re Michel D., 29 Cal.4th 600 (2002). Because these cases show that the "force" required to commit kidnapping under § 207 is not severe enough to make it a "violent felony" under the § 924(e)(2) force clause, Kenney argues that his § 207 conviction can no longer be used for the § 924(e)(1) enhancement and resentencing is necessary.

Kenney also argues that his attorney was constitutionally ineffective for failing to object to the presentencing report, failing to file a sentencing memorandum, and failing to present an argument at the sentencing hearing. Kenney argues that this was deficient because he did not have three prior conviction for "serious drug offenses" or "violent felonies" for purposes of § 924(e)(1), as discussed above.

Respondent's Opposition

In part, the United States argues that Kenney's first ground for relief should be denied because the propriety of using the § 207 conviction was raised on direct appeal and rejected by the Ninth Circuit. All of the arguments made by Kenney in this Court were made by Kenney at the Ninth Circuit. The rejection of the claim on direct appeal precludes Kenney from now raising it as part of a § 2255 petition.

The United States also argues that, per *Stokeling v. United States*, 139 S.Ct. 544 (2019), the § 924(e)(2) "force/elements clause" only requires the amount of force necessary to overcome a victim's resistance. The force required to kidnap an individual in violation of § 207 is something more than the quantum of physical force necessary to affect the movement of the victim from one location to another, it is force enough to overcome the victim's free will. This understanding of § 207 is consistent with *Stokeling*. Therefore, because § 207 requires an amount of force that is sufficient to overcome a victim's resistance, it meets the § 924(e)(2) force clause, and defense counsel was not ineffective for failing to argue to the contrary.

In sur-reply, the United States argues that, per *People v. Majors*, kidnapping under § 207 is consistent with *Stokeling*, and many cases cited by Kenney are addressed in *Majors*. The United States also argues that, through rulings by the California Supreme Court, § 207 is divisible and subject to the modified categorical approach for determining a crime of violence. California Supreme Court rulings show that kidnapping an individual who is incapable of giving consent is a separate crime under § 207. Because documents indicate that Kenney kidnapped an individual who was capable of giving consent, he necessarily used an amount of force consistent with *Stokeling* and thus, committed a crime of violence.

Discussion

1. Application of the Law of the Case Doctrine

As the United States has correctly pointed out, if Kenney raised the issue of whether § 207 qualifies as a crime of violence on direct appeal, and the Ninth Circuit decided the issue, then the Ninth Circuit's "decision is the law of the case." Jingles, 702 F.3d at 498. The law of the case doctrine applies in § 2255 proceedings and ordinarily precludes a court from reexamining an issue

previously decided by the same court, or a higher court, in the same case. Id. at 499. For the law of the case doctrine to apply, "the issue in question must have been decided explicitly or by necessary implication in the previous disposition." Id.

The Ninth Circuit resolved Kenney's challenge to using his § 207 conviction as a crime of violence through application of the "plain error" standard. See Kenney, 724 F. App'x at 555. "Plain error" review has four components: (1) an error was committed, (2) the error was plain or obvious, (3) the error affected substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Hoard v. Hartman, 904 F.3d 780, 787 (9th Cir. 2018); United States v. Gnirke, 775 F.3d 1155, 1164 (9th Cir. 2015). For purposes of the second prong, "mere error" is not enough, rather the error must be sufficiently clear at the time of trial that error is obviously being committed. Hoard, 904 F.3d at 790. If there is no controlling authority on an issue, and the most closely analogous precedent leads to conflicting results, then an error regarding that issue cannot be plain or obvious. Gnirke, 775 F.3d at 1164; see also United States v. Carthorne, 878 F.3d 458, 464 (4th Cir. 2017) ("An error can be 'plain' only on the basis of settled law.").

The Ninth Circuit found no "plain error" because there was a failure of the second component. See Kenney, 724 F. App'x at 555. Specifically, the Ninth Circuit found that there was no controlling authority that had construed § 207 and § 924(e). Id. Without "settled law" or "controlling authority," an error cannot be plain or obvious. See Carthorne, 878 F.3d at 464; Gnirke, 775 F.3d at 1164. The Ninth Circuit did not hold that no error was committed, nor can the Ninth Circuit's opinion be read as holding by necessary implication that no error occurred. An error that is not obvious is still an error, and it is only plain or obvious errors that warrant reversal under the "plain error" standard. Hoard, 904 F.3d at 790. Simply put, the finding of "no plain error" because there is an absence of controlling authority does not mean, either expressly or by necessary implication, that Kenney's counsel did not commit any prejudicial error. See id. Because the Ninth Circuit's opinion does not address, either expressly or through necessary implication, the issue of whether § 207 is a crime of violence for purposes of § 924(e), the law of the case doctrine does not bar Kenney's § 2255 challenge.

2. Crime of Violence Under § 924(e)

a. Legal Standard

Under 18 U.S.C. § 924(e), a person who is convicted of *inter alia* being a felon in possession of a firearm (in violation of 18 U.S.C. § 922(g)(1)) and who has three previous convictions for "violent felonies," shall be imprisoned for not less than fifteen years. See 18 U.S.C. § 924(e)(1); United States v. Strickland, 860 F.3d 1224, 1226 (9th Cir. 2017). A "violent felony" is defined under the "force clause" of § 924(e)(2) as a crime punishable by imprisonment for a term exceeding one year and "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); Strickland, 860 F.3d at 1226. "Physical force" means "force capable of causing physical pain or injury," and includes "the amount of force necessary to overcome a victim's resistance." Stokeling v. United States, 139 S. Ct. 544, 553-55 (2019); United States v. Dominguez, 954 F.3d 1251, 1258-59 (9th Cir. 2020). A "threatened use of force" requires "at least an implicit threat to use the type of violent physical force necessary to meet the [*Stokeling*] standard." Dominguez, 954 F.3d at 1260 (citation omitted).

To determine whether a predicate offense has "as an element the use, attempted use, or threated use of physical force against the person of another," courts employ the categorical approach. Dominguez, 954 F.3d at 1259; Strickland, 860 F.3d at 1226. Under this approach, the sole focus is on the elements of the relevant statutory offense, not on the facts underlying the convictions. Dominguez, 954 F.3d at 1259; United States v. Watson, 881 F.3d 782, 784 (9th Cir. 2018). An offense is categorically a crime of violence only if the least violent form of the offense qualifies as a crime of violence. Dominguez, 954 F.3d at 1259; Watson, 881 F.3d at 784. Courts examine the text of the statute and the state courts' interpretation of the statute's terms. Strickland, 860 F.3d at 1226. To identify the elements of a state crime, courts employ that state's rules of statutory construction. Almanza-Arenas v. Lynch, 815 F.3d 469, 475-76 (9th Cir. 2016) (en banc). "State cases that examine the outer contours of the conduct criminalized by the state statute are particularly important because [courts] must presume that the conviction rested upon nothing more than the least of the acts criminalized by that statute." United States v. Walton, 881

F.3d 768, 771-72 (9th Cir. 2018); Strickland, 860 F.3d at 1226-27. In the absence of a ruling by a state's highest court, federal courts are bound by reasoned intermediate state court rulings. Walton, 881 F.3d at 772.

If the terms of the state statute or the cases construing the state statute demonstrate that the use or threatened use of physical force is not required to obtain a conviction, then the offense will not fit within the force clause of § 924(e)(2). See Strickland, 860 F.3d at 1227. If a statute is "divisible," meaning that the statute contains multiple alternative sets of elements that define multiple distinct crimes, then courts may consult a limited class of extra-statutory documents to determine which statutory elements formed the basis of the defendant's prior conviction. See Descamps v. United States, 570 U.S. 254, 260-62 (2013); Altayar v. Barr, 947 F.3d 544, 549 (9th Cir. 2020). If a conviction to a divisible crime is based on a guilty plea, courts may examine the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding made by the trial judge to which the defendant assented." Altayar, 947 F.3d at 549. Once it is determined which part of a divisible statute formed the basis of the prior offense, the federal court will determine whether those elements meet the requirements of the "force clause." United States v. Werle, 877 F.3d 879, 881 (9th Cir. 2017).

b. Kenney's Criminal History

Prior to his 2016 conviction in this Court, the pre-sentence report noted that Kenney had five prior convictions. In December 1974, Kenney was sentenced in San Mateo County to five years to life for "armed robbery." No Penal Code citation is identified. In October 1974, Kenney was sentenced in Los Angeles County to five years to life in prison for two convictions, one for robbery and one for kidnapping for robbery. However, documents submitted by the parties show that Kenney was not convicted of kidnapping for robbery, rather he was only convicted of general kidnapping in violation of § 207. In October 1984, Kenney was sentenced to 25 years in prison by the federal court for the District of Oregon for armed bank robbery. Finally, in October 1985, Kenney was sentenced to 25 years in prison by the federal court for the Eastern District of California for armed bank robbery. On direct appeal from the conviction in this court, the Ninth Circuit held that Kenney's two prior federal armed bank robbery convictions were crimes of

violence for purposes of § 924(e). See Kenney, 724 F. App'x at 555-56. Thus, in order for the § 924(e) enhancement to apply, one of the three 1974 state convictions must fit within the § 924(e)(2) force clause.

(1) 1974 San Mateo Conviction

The Ninth Circuit has held that robbery in violation of California Penal Code § 211 is not a crime of violence under the force clause because robbery can be committed through unintentional conduct. See United States v. Dixon, 805 F.3d 1193, 1197 (9th Cir. 2015). There is no information or documents before the Court that show precisely what Kenney was charged with and convicted of with respect to the 1974 San Mateo conviction. Without the charging documents or plea documents, the Court will assume that Kenney was convicted simply of violating § 211. With this assumption, *Dixon* prevents the San Mateo conviction from being classified as a crime of violence under the force clause.[1] See id.

(2) § 207 Kidnapping Conviction[2]

(A) Categorical Approach

In 1974, California Penal Code § 207 read in relevant part: "Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or

[1] The United States also argues that Kenney's 1974 Los Angeles County robbery conviction is distinguishable from *Dixon* and is a "crime of violence." The charging documents, amended judgment, and plea colloquy relating to that conviction indicate that an enhancement under Penal Code § 12022.5, which enhanced a sentence for the use of a firearm, was charged, admitted, and found to be true. Under *People v. Chambers*, 7 Cal. 3d 666, 672 (1972), a level of force or threat of force consistent with *Stokeling* was required under Penal Code § 12022.5 in 1974 Although most district courts find that § 12022.5 is an enhancement only and not an element of a crime, e.g. United States v. Heflin, 195 F.Supp.3d 1134 (E.D. Cal. 2016), the United States argues that pursuant to *Alleyne v. United States*, 570 U.S. 99, 107-08 (2013), an enhancement like § 12022.5 is actually an element of the offense. While cases like *Heflin* do not discuss *Alleyene*, *Ramirez v. Lynch*, 810 F.3d 1127, 1135 n.2 (9th Cir. 2016) appears to foreclose the United States' arguments because it refused to consider the effects of an enhancement when it found the underlying penal code conviction (Penal Code § 273a(a)) was indivisible. However, *Ramirez* is arguably dicta on that point because the relevant analysis is one sentence long, the opinion also contained an alternative holding that the enhancement involved (Cal. Penal Code § 12022.7) does not meet the definition of a "crime of violence," and the opinion does not discuss *Alleyene* or the possible implication from *Alleyene* that an enhancement like § 12022.5 adds a new element and thus, creates a new offense that is not simply a violation of an otherwise non-divisible statute. See Ramirez, 810 F.3d at 1135 n.2. Nevertheless, because the Court finds that Kenney's § 207 conviction is a crime of violence, the Court need not rule whether the Los Angeles conviction under Penal Code § 211 is a crime of violence. It is enough to note that reasoned arguments have been made that attempt to distinguish *Dixon* from the Los Angeles County robbery conviction.

[2] In 1990, § 207 was amended to read, "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 . . . ." People v. Majors, 33 Cal.4th 321, 326 (2004). The Court's reference to § 207 or "kidnapping" or "general kidnapping" unless otherwise noted is a reference to the 1974 version, i.e. the pre-1990 version, of § 207, which served as the basis of Kenney's conviction.

county, or into another part of the same county . . . is guilty of kidnapping." Cal. Pen. Code § 207 (1974 ed.)[3]; People v. Stanworth, 11 Cal.3d 588, 599 n.12 (1974).

In 1972, it was established that general kidnapping under § 207 could "only be accomplished by the use or threat of force." People v. Rhoden, 6 Cal.3d 519, 527 (1972).

In 1974, the California Supreme Court affirmed one count of § 207 as it related to one victim (Mrs. Anderson), but reversed two other counts of § 207 kidnapping as they related to two other victims (Mr. Anderson and Mr. del Bucchia). See People v. Stephenson, 10 Cal.3d 652, 659-60 (1974). The *Stephenson* court explained that the "distinction is that Mrs. Anderson *was forcibly* required by defendant to get into his car against her will and that he transported her several blocks . . . . The two men, and originally Mrs. Anderson, were enticed to get voluntarily into defendant's car by deceit or fraud." Id. at 659 (emphasis in original). *Stephenson* reiterated *Rhoden*'s holding that "a general act of kidnapping . . . can only be accomplished by use of threat or force." Id. at 660. As to the victim Mrs. Anderson, her reentry into the automobile was "against her will and was accomplished by means of threats and fear. While the statute requires force as an operative act, the force need not be physical. The movement is forcible where it is accomplished through the giving of orders which the victim feels compelled to obey because he or she fears harm or injury from the accused and such apprehension is not unreasonable under the circumstances." Id. at 660.

In 1976, the California Supreme Court addressed kidnapping in the context of a voluntary entry into an automobile. The California Supreme Court noted that § 207 "encompasses any movement of a victim which is substantial in character and accomplished by means of force or threat of force." People v. Camden, 16 Cal.3d 808, 814 (1976) (internal citations omitted). The *Camden* court found that it would be an unreasonable interpretation of § 207 to exclude "those asportation which although voluntarily initiated are continued by means of threat or force." Id. Thus, convictions under § 207 will stand if, "although the initial entry was voluntary, the victim was subsequently restrained therein by means of threat or force while asportation continued." Id.

[3] The parties acknowledge that the 1974 version of § 207 included additional separate offenses that are not at issue. See Doc. No. 183 at 7:28-8:16; Doc. No. 184 at 6:15-18.

In 2000, the California Supreme Court held that § 207(a) "generally requires that the defendant use force or fear." People v. Hill, 23 Cal.4t h 853, 856 (2000). Importantly, *Hill* also approved and quoted *People v. Moya*, 4 Cal.App.4th 912, 916 (1992) as follows: "If a person's free will was not overborne by the use of force or the threat of force, there was no kidnapping." Hill, 23 Cal.4th at 856. *Moya* cited *Stephenson* for this proposition. See Hill, 23 Cal.4th at 856 (noting that *Moya* cited *Stephenson*); Moya, 4 Cal.App.4th at 916 (citing Stephenson, 10 Cal.3d at 959). Therefore, *Hill* accepted a characterization of general kidnapping that was based on *Stephenson* and the 1974 version of § 207.

These cases recognize that § 207 requires physical force or the implicit threat of harm from physical force to accomplish movement. That is, *Rhoden*, *Stephenson*, *Camden*, and *Hill* indicate that either physical force or the implicit threat of physical force is necessary to overcome a person's will and thus, accomplish movement. This is consistent with § 924(e)(2), *Stokeling*, and *Dominguez*.

Kenney cites a number of cases that he contends demonstrates that something less than the force described in *Stokeling* is sufficient for kidnapping under § 207. After review, the Court does not find these cases persuasive.

Kenney cites *People v. Fick*, 89 Cal. 144, 147 (1891) as an example of a case in which no "physical force" was used by the defendant, yet a § 207 general kidnapping conviction was upheld. In *Fick*, a constable executed an arrest warrant on the victim, but instead of taking the victim to the jail, Fick took the victim to a "house of ill repute" and left her there. See Fick, 89 Cal. at 147. In *People v. Majors*, the California Supreme Court held that force was not an issue in *Fick*, so there was no discussion of force within that opinion. See People v. Majors, 33 Cal.4th 321, 328-29 (2004). Prior to *Majors*, *Fick* had never (and still has never) been cited by the California Supreme Court with respect to kidnapping. *Majors*'s observation of *Fick*, that it did not actually address the force issue, is both correct and controlling. *Fick* does not aide Kenney.

Kenney cites *People v. Broyles*, 151 Cal.App.2d 428 (1951) as another example of a case in which no "physical force" was used by the defendant, yet a § 207 conviction was upheld. In *Broyles*, a victim entered a car at the orders of a defendant who falsely identified himself as a

deputy sheriff. See Broyles, 151 Cal.App.2d at 429. *Majors* also addressed *Broyles* and found that *Broyles* is ambiguous regarding what conduct was found sufficient to support a kidnapping conviction. See id. at 330. "In *Broyles*, it is unclear whether the Court of Appeal concluded the totality of the evidence was sufficient to demonstrate kidnapping, or whether it had alternative bases for its hold, i.e. that the evidence demonstrated kidnapping both when the victim entered the car because of orders form apparent police officers she felt compelled to obey, and when force was later applied during the asportation." Id. Prior to *Majors*, the California Supreme Court cited to *Broyles* in *Stephenson* to support the proposition that movement "is forcible where it is accomplished through the giving of orders which the victim feels compelled to obey because he or she fears harm or injury from the accused and such apprehension is not unreasonable under the circumstances." Stephenson, 10 Cal.3d at 660. Pursuant to *Majors*, *Broyles* is an ambiguous case with respect to a force analysis, which means that it is not binding precedent for purposes of the categorial approach. See Walton, 881 F.3d at 772. In 1974, however, *Broyles* was considered to be supportive of the theory that the giving of orders was sufficiently forceful to support a kidnapping conviction where the victim feels compelled to obey out of a reasonable fear of harm or injury. See Stephenson, 10 Cal.3d at 660. That particular type of fear is tantamount to a threat to cause injury through a use of force and is consistent with § 924(e)(2), *Stokeling*, and *Dominguez*. *Broyles* does not aide Kenney.

Kenney also cites *People v. Dejourney*, 192 Cal.App.4th 1091, 1115 (2011) for the proposition that holding a person around his or her shoulders and having them walk at a faster pace than they otherwise would is sufficient force under § 207. Kenney's characterization is based on the following passage:

> From the evidence that [Dejourney] continued to hold [the victim] around her shoulders during the bus trip, pulling her closer to him when she tried to look around as if he were controlling her movements, *and the fear she exhibited* in [the restaurant] when asking the cashier to call 911 and her quietness when Dejourney entered the restaurant and left with her, with his arm again around her should and moving her at a pace faster than she could walk, the jury could have reasonably inferred that Dejourney forcefully pushed [the victim] beyond her capabilities to move her to the dumpster area without her consent while continuing to instill fear in her after leaving [the restaurant].

Id. at 1115.

The Court cannot find that *Dejourney* supports Kenney. First, the quoted analysis focused largely on the victim's fear. See id.; see also id. at 1114. The version of § 207(a) applicable in *Dejourney* applied to "[e]very person who forcibly, *or by any other means of instilling fear . . . .*" Id. at 1114 (emphasis added). That is not the version of § 207 that applies in this case.[4] Second, the quoted passage indicates that the victim was led at a pace that was quicker than she could manage and had been traumatized to a point "beyond her capabilities," i.e. beyond a point that she could resist. See id. The next sentence after the quoted language was: "The jury also could have concluded that [the victim's] statements to the 911 operator and the police detective made closer to the time of her ordeal that Dejourney had dragged her into the dumpster area were more accurate than her trial testimony, which she explained was a struggle 'to fetch [her] memory.'" Id. at 1115-16. The prosecution's theory apparently was that Dejourney "put his arm around [the victim's] shoulder and walked at a *fast pace that she could not control, essentially dragging her* to a fenced dumpster area behind the business." Id. at 1098. These passages do not support the characterization that the victim was simply led at a pace that was faster than she would otherwise walk. These passages show that the victim was physically dragged at a pace that she could not meet and that she did not have the capability to resist the physical force being applied to her. In other words, Dejourney applied an amount of force that was sufficient to overcome the victim's will and resistance. Cf. Stokeling, 139 S. Ct. at 555. Therefore, *Dejourney* either relied heavily on a portion of § 207 that was not in existence in 1974 or involved conduct that appears to meet *Stokeling*'s standard. Either way, *Dejourney* does not sufficiently lessen or undermine the analysis of force in *Rhoden*, *Stephenson*, *Camden*, or *Hill*.

Kenney cites *People v. Felix*, 92 Cal.App.4th 905, 910 (2001), for the proposition that a defendant is guilty of kidnapping a parent when he takes custody of the parent's child and the parent accompanies the defendant out of concern for the child's safety, even where no physical force is threatened or employed on either the parent or the child. In *Felix*, despite a restraining order, Felix grabbed a car seat that had the victim's three-year old daughter and put the car seat in

[4] The Court notes that *Dejourney* post-dates Kenney's conviction by 37 years. How accurately *Dejourney* reflected the state of the law in 1974 is debatable.

his car. See Felix, 92 Cal.App.4th at 908. Felix told the victim to get in the car and that this was the only way he had of talking to the victim. See id. The victim complied because she was afraid for her daughter's safety and believed that Felix would not give her daughter back. See id. Felix drove the victim and the daughter around for 45 minutes, stopped the car three times, and refused 12 requests to take the victim and her daughter home before finally relenting. See id. at 909.

The Court cannot find that *Felix* supports Kenney. First, the issue that was appealed by Felix was whether the victim had voluntarily consented to accompany him. See id. at 910. Felix did not challenge the sufficiency of the evidence with respect to force. Thus, this is a situation that is similar to *Fick* in that the force issue was not necessary to resolve on appeal and was not clearly and expressly addressed. Second, the *Felix* court noted that § 207(a) applied to "[e]very person who forcibly, or by any other means of instilling fear . . . ." Id. at 910. The court then noted, as part of its discussion regarding consent, that the victim was afraid for her daughter's safety. See id. Thus, the conviction could arguably be supported on the basis of language that was not part of the 1974 version of § 207.[5] Third, the evidence showed that Felix drove the car for about 45 minutes, although he did make three stops. It is well known that major bodily injuries can result from trying to exit a moving vehicle. Keeping a car moving so as to prevent a person from exiting (because they would suffer physical injury in that process) would seem to be a use of force or threat of force under *Rhoden*, *Stephenson*, *Camden*, *Stokeling*, and § 924(e)(2). Cf. Camden, 16 Cal.3d at 814-15 (noting the various ways that a victim was forcibly restrained in an automobile, including the use of high speeds and centrifugal force). For at least these three reasons, the Court cannot find that *Felix* lessens or undermines the discussion of force in *Rhoden*, *Stephenson*, *Camden*, or *Hill*.

Kenney also relies on *Majors* for the proposition that the California Supreme Court has recognized that merely making a threat of arrest is sufficient force for kidnapping, irrespective of whether physical force is actually threatened. In *Majors*, the California Supreme Court reviewed a kidnapping conviction in which the defendant falsely represented that he was a mall security

[5] The Court notes that *Felix* post-dates Kenney's 1974 conviction by 27 years. How accurately *Felix* reflected the state of the law in 1974 is debatable.

officer investigating a shoplifting charge and ordered the victim to accompany him but did not expressly threaten the use of force. Majors, 33 Cal.4th at 324. The issue was whether "movement accomplished by the implicit threat of arrest satisfies the elements of force or fear in § 207(a), or whether such movement is simply asportation by fraud." Id. at 328.[6] The *Majors* court found no prior cases were on point. See id. at 330. Nevertheless, *Majors* eventually concluded that "an implicit threat of arrest satisfies the force or fear element of § 207(a) kidnapping if the defendant's conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to so, and the victim's belief is objectively reasonable." Id. at 331. *Majors* reached this conclusion after observing that "the threat of arrest carries with it the threat that one's compliance, if not otherwise forthcoming, *will be physically forced*. Thus, the use of force is implicit when an arrest is threatened. Contrary to defendant's assertion, 'being arrested' is not an 'esoteric' fear that stretches the meaning of the statute. . . . The compulsion, which is the gravamen of the crime of kidnapping, remains present." Id. (emphasis added).

The Court does not find that *Majors* supports Kenney. First, the basis for *Majors*'s holding was that a threat of arrest carries with it the further implicit threat that physical force to gain compliance will be used if compliance is not forthcoming. See id. This view of an arrest carries with it a description of force or threat of force that would seem to be consistent with *Stokeling* and § 924(e)(2). Kenney argues that the United States cites no cases that have held that a mere threat of arrest can be considered forcible under *Stokeling*. However, Kenney cites no cases that have rejected the reasoning of *Majors* or held that no implicit threat of force can be reasonably found through the threat of arrest. As noted above, the Ninth Circuit has recognized that threats of force can be implicit. See Dominguez, 954 F.3d at 1260. The Court cannot hold that it is unreasonable to view a threat of arrest as implicitly carrying with it a threat to use physical force to gain compliance. Second, *Majors* surveyed exiting California law and held that there were no cases that were sufficiently on point or controlling with respect to the issue presented. Majors, 33 Cal.4th at 330. That means that prior to 2004, there were no California cases that clearly held that

[6] The Court notes that *Majors* post-dates Kenney's conviction by 30 years. How accurately *Majors* reflects the state of the law in 1974 with respect threats of arrest is debatable.

a threat of arrest could support the force element of § 207 kidnapping. Not until 2004 was the issue squarely addressed and decided through a reasoned and binding opinion. Therefore, in 1974, § 207's force requirement was not met by the mere threat of arrest. Cf. Walton, 881 F.3d at 772 (holding that federal courts are bound by the reasoned intermediate state court rulings in the absence of a ruling from the state's highest court). *Majors*'s holding does not undermine the force analysis of *Rhoden*, *Stephenson*, *Camden*, and *Hill* with respect to Kenney's § 207 conviction.

Finally, Kenney relies on *In re Michele D.*, 29 Cal.4th 600 (2002) and *People v. Oliver*, 55 Cal.2d 761 (1961), cases in which the kidnapping victim was a minor/infant and thus, incapable of giving consent to be moved. *Oliver* addressed a child victim who was incapable of giving consent and *Michele D.* addressed what force was necessary to effectuate the kidnapping of an unresisting infant. See In re Michelle D., 29 Cal.4th at 603; Oliver, 55 Cal.2d at 764-65. *Michele D.* described *Oliver* as holding that § 207, "as applied to a person forcibly taking and carrying away another, who by reason of immaturity or mental condition is unable to give his legal content thereto, . . . [constitutes] kidnapping only if the taking and carrying away is done for an illegal purpose or with an illegal intent." Id. at 607 (quoting Oliver, 55 Cal.2d at 768). *Michele D.* recognized that two courts of appeal in dicta had read *Oliver* as implying or indicating that the force requirement can be eliminated or relaxed if the victim is too young to give consent and the kidnapping was done for an illegal purpose or motive. Id. at 608-09 (discussing People v. Rios, 177 Cal.App.3d 445, 451 (1986) and People v. Parnell, 119 Cal.App.3d 392, 402-03 n.3 (1981)). *Michelle D.* could not identify where in *Oliver* it was suggested that the force requirement could be eliminated or relaxed where the victim was an infant or young child, particularly when *Oliver* used the term "forcible" to describe the taking and carrying away of the child victim. See id. at 609. Nevertheless, *Michele D.* found that the lower courts' observations regarding *Oliver* had some merit because consent and force are intertwined. See id. *Michele D.* concluded that the "holding in *Oliver* -- that, where the victim by reason of youth or mental incapacity can neither give consent nor withhold consent, kidnapping is established by proof that the victim was taken for an improper purpose or improper intent – was *reasonably extended* by *Parnell* and *Rios* to encompass situations in which, because of the victim's youth, there is no evidence the victim's

will was overcome by force." Id. (emphasis added). *Michele D.* also noted that *Hill* had signaled at least a tacit agreement with *Rios* and *Parnell*. See id. at 609-10. *Michele D.* explained that *Hill* expressly noted that *Hill* "need not and [did] not decide whether, or to what extent, the *Oliver* decision eliminated the need to show as to a child force or fear in addition to an illegal purpose." Id. (quoting Hill, 23 Cal.4th at 857). *Michele D.* then noted that *Hill* quoted *Rios* for the proposition that "*Oliver* indicated that in kidnapping cases the requirement of force may be relaxed where the victim is a minor who is 'too young to give his legal consent to be taken' and the kidnapping was done for an improper purpose." Id. at 610 (quoting Hill, 23 Cal.4th at 858 (quoting Rios, 177 Cal.App.3d at 451)). *Michele D.* agreed with *Hill*, *Rios*, and *Parnell* that "infants and young children are in a different position vis-à-vis the force requirement for kidnapping than those who can apprehend the force being used against them and resist it." Id. *Michele D.* then set a new standard: "the amount of force required to kidnap an unresisting infant or small child is simply 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." Id. This description of "force" is inconsistent with *Stokeling*. Cf. id. with Stokeling, 139 S.Ct. at 553-55

Although *Michele D.* clearly describes a quantum of force that is insufficient under *Stokeling* to meet the criteria of a "crime of violence," the Court cannot find that *Michele D.* is dispositive of a categorical analysis of § 207. As discussed above, *Michele D.* noted that the holding of *Oliver* dealt with consent, the holding did not expressly address force. See In re Michele D., 29 Cal.4th at 607. Consistent with the issue that was actually decided in *Oliver*, *Michele D.* expressed skepticism about *Rios* and *Parnell*'s interpretation of *Oliver* because the holding of *Oliver* used the term "forcible taking." While *Michele D.* ultimately agreed that the force requirement could be relaxed for infants or young children, of critical importance, it also described *Rios* and *Parnell* as "extending *Oliver*" to find sufficient force for kidnapping in the case of an unresisting infant. See id. at 609. If *Oliver* was "extended," that means that *Oliver* did not actually hold that the force requirement in cases involving an infant/young child victim can be relaxed. It was not until 1981 in *Parnell* that there was arguably a reasoned California case that relaxed the force requirement for infant kidnapping victims. Cf. Walton, 881 F.3d at 772 (holding

that federal courts are bound by the reasoned intermediate state court rulings in the absence of a ruling from the state's highest court). *Parnell* was decided seven years after Kenney was convicted. In 1974, only *Oliver* had been decided. In the absence of any case "extending" *Oliver* prior to *Parnell*, the Court must conclude that kidnapping under the 1974 version of § 207 did not provide for the relaxation of the force requirement for an infant victim. Cf. id.

In sum, the Court concludes that the minimum amount of force that was necessary to commit general kidnapping under the 1974 version of § 207 is the force described in *Rhoden*, *Stephenson*, *Camden*, and *Hill*, and that amount of force meets the requirements for a crime of violence under § 924(e)(2) and *Stokeling*.

(B) Modified Categorical Approach

Alternatively, the Court will assume that *Oliver* in 1961 lowered the amount of force necessary for the kidnapping of an unresisting infant or small child to a point that falls outside of *Stokeling*'s description of "force." Under this assumption, the Court then shifts to the modified categorical approach.

Again, in 1974, § 207 read in relevant part: "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 kidnapping." Cal. Pen. Code § 207 (1974 ed.). At first blush, the relevant portion of § 207 does not seem to be divisible as it does not appear to contain multiple alternative sets of elements that define multiple distinct crimes. Cf. id. with Altayar, 947 F.3d at 549. However, the California Supreme Court in *Oliver* examined § 207 to determine what crimes may be contained therein.

As indicated above, the issue in *Oliver* was how to evaluate kidnapping when the victim was too young or incapacitated to validly give consent. See Oliver, 55 Cal.2d at 764-65. *Oliver* recognized that, because an infant was incapable of giving consent, and because the forcible moving without consent of someone capable of giving consent is kidnapping irrespective of motive, there was a real danger that a person who merely escorts an infant from point A to point B without any improper motive could be convicted under § 207. Id. *Oliver* concluded that the "rule governing the forcible carrying of conscious persons capable of giving consent, which makes a

person who forcibly carries such a person and transports him against his will guilty of kidnapping, however good or innocent his motive or intent may otherwise be, can only lead to an obvious injustice and a perversion of the legislative purpose if blindly and literally applied where the person who is forcibly transported, because of infancy or mental condition, is incapable of giving his consent." Id. at 766. To confront this injustice, *Oliver* reasoned:

> The courts are not powerless to read exceptions into the law when confronted by a criminal statute which literally interpreted would lead to the conviction of crime in cases to which it is obvious that the Legislature cannot have intended the statute to apply.
>
> The governing rule of construction in cases of this character was stated by this court in *Ex parte Lorenzen*, 128 Cal. 431, at pages 438-440: "[It] is to be remembered that the letter of a penal statute is not of controlling force, and that the courts, in construing such statutes, from very ancient times have sought for the essence and spirit of the law and decided in accordance with them, even against express language; and in so doing they have not found it necessary to overthrow the law, but have made it applicable to the class of persons or the kind of acts clearly contemplated within its scope. The rule was thus early expressed in Bacon's Abridgment: "A statute ought sometimes to have such an equitable construction as is contrary to the letter." . . . In *Holmes v. Paris*, 75 Me. 559, it is said: "It has been repeatedly asserted in both ancient and modern cases that judges may in some cases decide upon a statute even in direct contravention of its terms. In all of these cases the apparent defect of the statute is cured by making it apply according to its spirit to the act in its nature illegal or fraudulent."[citations omitted].
>
> Penal Code, section 207, as applied to a person forcibly taking and carrying away another, who by reason of immaturity or mental condition is unable to give his legal consent thereto, should, following the rule of *Lorenzen* hereinabove quoted, be construed as making the one so acting guilty of kidnaping *only if* the taking and carrying away is done for an illegal purpose or with an illegal intent. [emphasis added] So construed the legislative purpose will be preserved and furthered, and innocent persons who cannot have been within the legislative intention in adopting section 207 will be excluded from the operation of the law. It results that the instruction above quoted upon the intent necessary to constitute the crime of kidnaping under the facts of this case was erroneous. It also appears under the facts of this case to have been prejudicial. The defendant was more or less intoxicated. He was with the child from 4 p. m. to 5 p. m., when the lady first saw them together behind the fence. At that time both appeared to her to be fully clothed. Fifteen minutes later the police found them in the compromising position which they described. It seems highly improbable, if the defendant had the violation of section 288 in mind while he was leading the child, that he would have waited an hour to accomplish that purpose. Given an instruction that the defendant's purpose or intent must have been an illegal one in taking the child to the point where they were later discovered in order to render him guilty of kidnaping, it seems reasonably probable that the jury would have found that defendant had no such illegal purpose or intent in leading the child, and only formed the intent to violate section 288 at some time between 5 p. m. when they were observed fully clothed and 5:15 p. m. when the officers observed them partially undressed.

Id. at 766-68. Because of the instructional error, Oliver's § 207 conviction was reversed. See id.

In *Michele D.*, in addition to the issue regarding force that was discussed above, the Supreme Court also discussed Penal Code § 207(e)(1) and intent with respect to kidnapping cases involving infants or young children. See In re Michele D., 29 Cal.3d at 610-12. The Attorney General argued that a prosecutor did not need to prove in its case-in-chief that a defendant harbored an illegal purpose or intent when moving an unresisting infant/child, rather the absence of an illegal purpose or intent should be an affirmative defense pursuant to Cal. Penal § 207(e)(1). See id. at 610-11. At the time, § 207(e)(1) stated that kidnapping under § 207 did not apply 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." Cal. Pen. Code § 207(e)(1) (2002 ed.); In re Michele D., 29 Cal.4th at 611 n.4. *Michele D.* rejected the Attorney General's argument. *Michele D.* explained that *Oliver* held that, "in the case of the kidnapping of an unresisting infant, it was necessary to prove that the defendant harbored an illegal purpose or intent so that individuals with lawful intentions could not be convicted of kidnapping." Michele D., 29 Cal.4th at 611. *Michele D.* also noted that *Oliver*'s "illegal purpose or intent" requirement was "reaffirmed" in *Hill*. See id. However, *Hill* did not need to decide "whether having an illegal purpose or intent *remained an element* of the offense because, in that case, we found that there was ample evidence of force or fear, which is the traditional requirement for a charge of kidnapping." Id. (emphasis added). *Michele D.* found that § 207(e)(1) "did not abrogate the 'illegal purpose or intent' requirement we set forth in *Oliver* because it is not inconsistent with this requirement." Id. at 612. Importantly, *Michele D.* also found that § 207(e)(1) did not overrule *Oliver* because the subsection was "too underinclusive." Id. "Were we to overrule *Oliver* and conclude that § 207 contains no 'illegal purpose or intent' requirement, [§ 207(e)(1)] would be the only recourse for a defendant who moved a child for a lawful purpose." Id. In order to protect individuals who move an infant or young child for an innocuous purpose, "it is essential to *affirm* our decision in *Oliver* that the 'illegal purpose or intent' requirement *constitutes an element of the offense when the victim is an unresisting infant or child.*" Id. (emphasis added). *Michele D.* concluded by noting that its decision "affects only a narrow class of cases in which an unresisting infant or small child is taken away without any force or fear. In the

typical kidnapping case, the prosecutor must prove that there was force, or fear, and does not need to show an illegal purpose or intent." Id. at 612 n.5.

Oliver and *Michele D.* reflect that the California Supreme Court examined the crimes within Penal Code § 207 twice in a forty year span (1961 to 2002). *Oliver* necessarily concluded that there are two separate "general kidnapping" offenses encompassed within the language of § 207. Under one offense, the forcible movement of an un-consenting person who is capable of giving consent must be proven and the defendant's intent or purpose does not matter. See Cal. Pen. Code § 207 (1961 ed.); Oliver, 55 Cal.2d at 765; see also In re Michele D., 29 Cal.4th at 612 n.5. Under the second offense, the movement of an unresisting infant/young child must be proven, along with an illegal intent or purpose. See Oliver, 55 Cal.2d at 768;[7] see also In re Michele D., 29 Cal.4th at 610-12 & n.5. In other words, when a particular type of victim is involved, consent is irrelevant and an otherwise inapplicable *mens rea* must be proven.[8] *Michele D.* confirms this. See In re Michele D., 29 Cal.4th at 610-12 & n.5. As quoted above, *Michele D.* recognized that *Oliver* established a particular *mens rea* element depending upon who the victim was. See In re Michele D., 29 Cal.4th at 610-12 & n.5. *Michele D.* expressly described *Oliver* as creating required "elements" when the victim was an infant/young child and refused to overrule those elements. See id. *Michele D.* also explained that its own holding was narrow and would not affect the typical kidnapping case in which there is no need to establish an improper purpose or intent. See id. at 612 n.5. Section 207's language did not change between *Oliver* in 1961 and Kenney's conviction in 1974.

It is true that there are not lists of elements in the 1961/1974 version of § 207 or any language that specifically addresses infant victims. The Court is unaware of, and the parties have not cited to, any case that has found a statute to be divisible when the text of the statute itself not contain some form of list or subsections. Nevertheless, elements are determined according to

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[7] The Court again notes that although *Oliver* recognized that the "forcible" moving of a child was prohibited, for purposes of this portion of the order, the Court is assuming that *Oliver* clearly relaxed the force requirement for an infant/young child.

[8] It is again worth noting that *Oliver* reversed a § 207 conviction because the jury was not given an instruction that required the prosecution to prove that the defendant moved the infant/young child with an illegal intent or purpose. Oliver, 55 Cal.2d at 768.

principles of state law statutory interpretation. See Almanza-Arenas, 815 F.3d at 475-76. The California Supreme Court applied those principles to the 1961 version of § 207 and found that, despite the express language, § 207 contains two distinct crimes with distinct elements. Were the Court to hold that the absence of express divisions, lists, or subparts in the relevant portion of § 207 was dispostive, the Court would be ignoring the reality of how California actually interpreted and construed kidnapping under § 207 after *Oliver* – as containing two crimes with distinct elements. The California Supreme Court has twice affirmed its conclusion that the "illegal intent or purpose" *mens rea* is a required element when a particular victim is allegedly kidnapped. That was the law as it existed in 1974. Therefore, pursuant to *Oliver* and *Michele D.*, the Court holds that the 1974 version of § 207 contains distinct crimes with distinct elements and is a divisible statute.

Because § 207 is divisible and Kenney pled guilty to that offense, the Court may examine "the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding made by the trial judge to which the defendant assented."[9] Altayar, 947 F.3d at 549. Here, there is no written plea agreement, the transcript of the plea and sentencing colloquy's do not contain any facts relating to the commission of the § 207 offense, and the trial court made no relevant factual findings that Kenney assented to. However, the information to which Kenney pled in relevant part reads as follows:

> [Kenney] is accused by the [L.A. County District Attorney] by this information, of the crime of kidnapping in violation of Section 207, Penal Code, a felony committed as follows: That the said [Kenney] on or about [February 26, 1974] at and in [Los Angeles County] did willfully, unlawfully and feloniously and forcibly steal, take and arrest of Los Angeles, State of California, William J. Bessant, and carry said William J. Bessant into another county of the State of California, to wit, the County of Ventura.

Doc. No. 183-1 at ECF p.48.

As can be seen, the information tracks the express language of § 207. The information does not allege either that William J. Bessant was an infant or incapable of giving consent, nor does it allege that Kenney moved William J. Bessant with an illegal intent or purpose. Cf. id. with

[9] The United States urges the Court to examine the transcript of a preliminary hearing and a probation report. However, there is no indication that Kenney ever accepted any factual bases or assertions within either the probation report or the preliminary hearing. Thus, the Court declines to examine these documents. See Altayar, 947 F.3d at 549.

Oliver, 55 Cal.2d at 768 and Michele D., 29 Cal.4th at 610-12. Criminal charging instruments, such as an information, must include the essential elements of the offense being charged. See People v. Randazzo, 48 Cal.2d 484, 489 (1957); People v. Britton, 6 Cal.2d 1, 5 (1936); People v. Soto, 74 Cal.App.3d 267, 273 (1977); People v. Atwood, 223 Cal.App.3d 316, 323 (1963); People v. Burch, 196 Cal.App.2d 754, 764 (1961). There is no indication in the exhibits provided to the Court that any objections to the information or corrections to the information were ever made. Therefore, because the information to which Kenney pled did not allege either that the victim was an infant or otherwise incapable of giving consent or that Kenney moved the victim with an illegal intent or purpose, both of which are essential elements for a "relaxed force" § 207 kidnapping offense, see Michele D., 29 Cal.4th at 610-12; Oliver, 55 Cal.2d at 798, the Court concludes that Kenney was charged with and pled guilty to general kidnapping under § 207 in which the victim was not an infant, young child, or incapacitated person.

In cases where the victim is not an infant, young child, or incapacitated, but is able to give consent, there is no *mens rea* element and the force requirement is not relaxed. See Michele D., 29 Cal.4t h at 610-12; Oliver, 55 Cal.2d at 765, 768. Kenney pled guilty to a § 207 kidnapping in which the force requirement was not relaxed. Therefore, the force described in *Rhoden*, *Stephenson*, *Camden*, and *Hill* is the force that was required for Kenney's § 207 conviction. The level of force described in *Rhoden*, *Stephenson*, *Camden*, and *Hill* is consist with *Stokeling*, *Dominguez*, and § 924(e)(2).

(C) Conclusion

Under the categorical approach, through the holdings of *Rhoden*, *Stephenson*, *Camden*, and *Hill*, Kenney's 1974 kidnapping conviction under § 207 is a crime of violence under § 924(e)(2). Alternatively, under the modified categorical approach, though the analyses and holdings of *Oliver* and *Michele D.*, Kenney's 1974 kidnapping conviction under § 207 is a crime of violence under § 924(e)(2) because Kenney was not charged with kidnapping an infant/person incapable of giving consent nor was it alleged that Kenney moved the victim with an illegal intent or purpose. Therefore, the 1974 kidnapping conviction serves as Kenney's third prior conviction for a crime of violence under § 924(e). Any failure on the part of Kenney's attorney to make a *Johnson*

objection was not unreasonable, did not prejudice Kenney, and did not amount to a violation of the Sixth Amendment right to effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 692 (1984) (holding that a claim of ineffective assistance of counsel requires a petitioner/defendant to show that his counsel's performance fell below an objective standard of reasonableness and that the deficiency was prejudicial); United States v. Kwan, 407 F.3d 1005, 1014 (9th Cir. 2005) (same). In the absence of a violation of the Sixth Amendment, no relief under § 2255 is available.

3. Certificate of Appealability

28 U.S.C. § 2253 provides in pertinent part:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

A court should issue a certificate of appealability when the petitioner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

In the present case, the Court finds that reasonable jurists may find it debatable that Kenney has three prior convictions for "crimes of violence" for purposes of § 924(e). If Kenney did not have three prior convictions for "crimes of violence," then it is likely that he received ineffective assistance of counsel in violation of the Sixth Amendment when his defense counsel failed to raise the issue at sentencing. Under these circumstances, the Court will grant Kenney a

certificate of appealability with respect to the following to issues: (1) whether Petitioner has three prior "crimes of violence" for purposes of § 924(e); and (2) whether Petitioner received ineffective assistance of counsel when counsel failed to object that Petitioner did not have three prior convictions for "crimes of violence" for purposes of § 924(e). See 28 U.S.C. § 2253(c); Slack, 529 U.S. at 483-84.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner's 28 U.S.C. § 2255 petition (Doc. No. 169) is DENIED;
2. The Court grants petitioner a certificate of appealability on the following issues:
   a. Whether Petitioner has three prior "crimes of violence" for purposes of § 924(e)? and
   b. Whether Petitioner received ineffective assistance of counsel when counsel failed to object that Petitioner did not have three prior convictions for "crimes of violence" for purposes of § 924(e)?

IT IS SO ORDERED.

Dated: July 6, 2020

SENIOR DISTRICT JUDGE