

APR 16 2009

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDUARDO FERNANDEZ-SERRANO,
a/k/a David Ruiz-Serrano,

Defendant - Appellant.

No. 08-50208

D.C. No. 3:07-cr-02364-LAB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Submitted April 14, 2009**
Pasadena, California

Before: FERNANDEZ, SILVERMAN and CALLAHAN, Circuit Judges.

Eduardo Fernandez-Serrano appeals his sentence after his conviction for being a deported alien found in the United States in violation of 8 U.S.C. § 1326.

We review de novo his contention that the district court erred in holding his

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

conviction for kidnapping under California Penal Code § 207 to categorically be a crime of violence for purposes of a 16-level guidelines enhancement under U.S.S.G. § 2L1.2. We agree, and accordingly vacate his sentence and remand for resentencing. We reject Fernandez-Serrano's other arguments.

Fernandez-Serrano's § 207 conviction is not categorically a crime of violence because the conviction lacked the "nefarious purpose" element of the generic crime of kidnapping. *See United States v. Gonzalez-Perez*, 472 F.3d 1158, 1161 (9th Cir. 2007). The conviction also does not have as an element the use, attempted use, or threatened use of *physical* force against the person of another. *See United States v. Lopez-Montanez*, 421 F.3d 926, 931 (9th Cir. 2005). We decline to apply the modified categorical approach to Fernandez-Serrano's § 207 conviction, but remand to the district court on an open record to determine whether to apply the modified categorical approach in the first instance. *See United States v. Grisel*, 488 F.3d 844, 852 (9th Cir. 2007) (en banc).

We reject Fernandez-Serrano's contention that he deserves an adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1(a). Fernandez-Serrano actively argued at trial that he was not guilty and that the government could not meet its burden of proof. He called into question the reliability of government witnesses and declined to speak to the probation officer. Given these actions, the

district court did not clearly err in denying the acceptance of responsibility adjustment. *See United States v. Weiland*, 420 F.3d 1062, 1080 (9th Cir. 2005).

The district court also did not err when it increased Fernandez-Serrano's statutory maximum sentence even though the indictment failed to allege a specific date of deportation. The indictment permitted the jury to find Fernandez-Serrano guilty only if he was removed *after* the date of his aggravated felony conviction, which *was* alleged. More is not required. *See United States v. Martinez-Rodriguez*, 472 F.3d 1087, 1093-94 (9th Cir. 2007); *see also United States v. Salazar-Lopez*, 506 F.3d 748, 752 (9th Cir. 2007).

Fernandez-Serrano correctly recognizes that his arguments that the prior conviction exception of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should be limited to its facts, that *Almendarez-Torres* has been implicitly overruled, and that § 1326 is unconstitutional, are foreclosed by circuit precedent. *See Salazar-Lopez*, 506 F.3d at 751 n.3.

VACATED and REMANDED.