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APR 15 2009

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. CRISPIN JIMENEZ-ALVARADO, Defendant - Appellant.	No. 07-50514 D.C. No. CR-07-00007-BEN Southern District of California, San Diego ORDER

Before: RYMER and M. SMITH, Circuit Judges, and KORMAN,[*] District Judge.

The Memorandum Disposition previously filed on December 15, 2008, and appearing in 303 Fed. Appx. 478, is withdrawn, and the Memorandum disposition filed with this Order is filed in its stead. The following amendment was made:

1. Following the paragraph ending on Page 6, line 1, insert the following additional paragraph:

> Jimenez-Alvarado, however, argues that a 16-level enhancement is not supported under the modified categorical approach because his charging documents included rape committed by means of "fear of immediate and unlawful bodily injury," which does not meet this circuit's definition of a "forcible sex offense." However, the Information to which Jimenez-Alvarado pled guilty charged "sexual intercourse . . .

[*] The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, sitting by designation.

> by means of force, violence *and* fear of immediate and unlawful bodily injury." We read "and" to mean what it says – that is, that Jimenez-Alvarado pled guilty to rape by means of force and violence and fear. See Snellenberger, 548 F.3d at 701 ("Because the three noun phrases are connected by 'and' rather than 'or,' the charging document and minute order, if consulted, establish that Snellenberger committed burglary of a dwelling."); United States v. Williams, 47 F.3d 993, 995 (9th Cir. 1995) ("When a defendant pleads guilty (or as here, pleads nolo contendere) to facts stated in the conjunctive, each factual allegation is taken as true.").[1] Jimenez-Alvarado has made no argument – and we cannot imagine a successful one – that sexual intercourse by means of force and violence is not a "forcible sex offense."
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> [1] Malta-Espinoza v. Gonzales, 478 F.3d 1080, 1083 n.3 (9th Cir. 2007), a two-to-one holding upon which Jimenez-Alvarado relies, is inconsistent with United States v. Williams, which preceded it and our en banc opinion in Snellenberger, which post-dated it. We choose to follow Snellenberger and Williams.

With the above amendment, the pending petition for rehearing is DISMISSED as moot. The parties may file new petitions as to the amended memorandum disposition for rehearing and rehearing en banc in accordance with the Federal Rules of Appellate Procedure.