Appendix A

NOT FOR PUBLICATION

FILED

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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. JOSE GOMEZ-AGUILAR, AKA Jose Orlando Gomez-Aguilar, Defendant-Appellant.	No. 18-10010 D.C. No. 2:17-cr-00874-DJH-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Diane J. Humetewa, District Judge, Presiding

Submitted April 16, 2019**
San Francisco, California

Before: D.W. NELSON, FERNANDEZ, and BEA, Circuit Judges.

Jose Gomez-Aguilar is a native and citizen of El Salvador. He entered the United States without inspection in 1998. In 2001, Gomez was convicted of robbery in violation of D.C. Code § 22-2801 (formerly § 22-2901.59). Gomez was

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

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

deported after immigration officers determined that his robbery conviction was an aggravated felony under 8 U.S.C. § 1101(a)(43), thus rendering him removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). He reentered the country twice and was charged with illegal reentry in violation of 8 U.S.C. § 1326. Gomez filed a motion to dismiss pursuant to 8 U.S.C. § 1326(d), claiming that his removal order was invalid because D.C. Code § 22-2801 was not an aggravated felony. The district court denied his motion to dismiss and sentenced Gomez to 30 months' imprisonment and three years of supervised release.

We have jurisdiction under 28 U.S.C. § 1291, and we review de novo the denial of a motion to dismiss under 8 U.S.C. § 1326(d). *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 755 (9th Cir. 2015).

The government argues only that D.C. Code § 22-2801 is an aggravated felony theft offense under 8 U.S.C. § 1101(a)(43)(G). To determine whether D.C. Code § 22-2801 qualifies as a theft offense, we apply the "categorical approach," wherein we "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the generic crime." *United States v. Martinez-Hernandez*, 912 F.3d 1207, 1213 (9th Cir. 2019) (citation omitted). The government also concedes that the D.C. Code § 22-2801 is indivisible. As such, we need not conduct a modified categorical analysis. *See United States v. Walton*, 881 F.3d 768, 774–75 (9th Cir. 2018).

The elements of a generic theft offense are "(1) the taking of (2) property (3) without consent (4) with the intent to deprive the owner of rights and benefits of ownership." *Martinez-Hernandez*, 912 F.3d at 1213 (citation omitted). In comparison, the elements of D.C. Code § 22-2801 are "(1) a felonious taking, (2) accompanied by an asportation [or carrying away], of (3) personal property of value, (4) from the person of another or in his presence, (5) against his will, (6) by violence or by putting him in fear, (7) *animo furandi* [the intention to steal]." *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996) (citation omitted); *Criminal Jury Instructions for the District of Columbia*, § 4.300.

Gomez alleges that § 22-2801 is overbroad in four respects, arguing that D.C. robbery: 1) does not require that the item taken be "property"; 2) does not require that the item be taken with the intent to deprive the owner of rights and benefits of ownership; 3) does not require that the item be taken without consent; and 4) extends to accessories after the fact. We reject each of his arguments in turn.

First, § 22-2801 requires that the item taken be property. *Lattimore*, 684 A.2d at 359; *Criminal Jury Instructions for the District of Columbia*, § 4.300. D.C. robbery does not include theft of services or means of transportation, both of which are covered under a different chapter of the Code. *See* D.C. Code § 22, Chapter 32. D.C. robbery, like generic theft, does not require proof of ownership. *Compare Criminal Jury Instructions for the District of Columbia*, § 4.300, *with Martinez-*

Hernandez, 912 F.3d at 1213. Rather, "[w]hat is critical in the generic definition [of a theft offense] is the criminal intent to deprive the owner." *Nevarez-Martinez v. I.N.S.*, 326 F.3d 1053, 1055 (9th Cir. 2003); *see also United States v. Flores*, 901 F.3d 1150, 1161 (9th Cir. 2018) (holding that receipt of stolen property, which does not require proof of ownership, is a generic theft offense).

Second, D.C. robbery falls within the definition of generic theft because it requires intent to steal. *Criminal Jury Instructions for the District of Columbia*, § 4.300; *see United States v. Alvarado-Pineda*, 774 F.3d 1198, 1202–03 (9th Cir. 2014) (stating that, because specific intent to steal is an element of the Washington robbery statute, it falls within the definition of generic theft). The jury instructions also specify that, as with generic theft, "[i]t is necessary that [the defendant] intended to deprive [the victim] of his/her property and to take it for his/her own use." *Criminal Jury Instructions for the District of Columbia*, § 4.300.

In D.C., it is possible to rob a dead person, as Gomez asserts—but only if the requisite intent was formed prior to the victim's death. If the defendant formed the intent to rob prior to the victim's death, a jury could find that the defendant had the requisite intent to "deprive the owner of the rights and benefits of ownership." *See Ulmer v. United States*, 649 A.2d 295, 299 (D.C. 1994) ("appellant intended to steal *before* he killed the victim and therefore clearly [the jury] would have found appellant guilty of intending also to rob the victim *before* his death"); *Smothers v.*

United States, 403 A.2d 306, 313 n.6 (D.C. 1979) ("a dead person can be a robbery victim, at least where the taking and the death occur in close proximity").

Third, D.C. robbery also requires that the property be taken "against the will" of the victim, thus evincing lack of consent. "The taking must be against the will of the complainant, because no robbery occurs if the complainant knows about and consents to the taking . . . ." *Criminal Jury Instructions for the District of Columbia*, § 4.300; *Lattimore*, 684 A.2d at 359. Even if the robbery victim is aware of the robbery, knowledge does not equate to consent. *See id.* (citing *Noaks v. United States*, 486 A.2d 1177 (D.C. 1985) for the proposition that a "robbery victim need not be ignorant of robbery by stealth").

Finally, D.C. robbery does not extend to accessories after the fact either in language or in practice. Accessories after the fact are charged under a different section of the D.C. Code—§ 22-1806 (formerly § 22-106). *See, e.g.*, *Little v. United States*, 709 A.2d 708, 709 (D.C. 1998). D.C. robbery is therefore also not overbroad in this respect. *See Martinez-Hernandez*, 912 F.3d at 1214 (finding that California Penal Code § 211 does not extend to accessories after the fact based on the language of the statute and because accessories after the fact are charged under a different section of the Code).

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

_____

United States of America,	)	
	)	
Plaintiff,	)	CR-17-0874-PHX-DJH
	)	
vs.	)	Phoenix, Arizona
	)	September 18, 2017
Jose Gomez-Aguilar,	)	2:35 p.m.
	)	
Defendant.	)	
	)	
_____	)	

BEFORE: THE HONORABLE DIANE J. HUMETEWA, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

STATUS CONFERENCE/MOTION HEARING

APPEARANCES:
For the Government:
U.S. Attorney's Office
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

(Proceedings conducted through Renata Yawn, interpreter.)

THE CLERK: This is case number CR 17-874, United States of America versus Jose Gomez-Aguilar, on for status conference.

MS. SCHESNOL: Good afternoon, Your Honor. Jacqueline Schesnol for the United States. With me at counsel table is Brett Day.

THE COURT: Good afternoon.

MS. CASTILLO: Good afternoon, Your Honor. Ana Castillo on behalf of Mr. Gomez-Aguilar, who is present in custody being assisted by the court interpreter in Spanish.

THE COURT: Good afternoon, counsel, and good afternoon, Mr. Gomez-Aguilar.

THE DEFENDANT: Good afternoon.

THE COURT: Now, counsel, I understand that this is on the Court's calendar as noted as a status conference on the motion to dismiss and the trial date. And so it dawns on me that perhaps neither counsel is prepared to make any oral argument on the motion. However, certainly if you are prepared to do so, I believe the Court has sufficient information before it to render a decision.

But I certainly didn't want to catch counsel off guard, given that this was the status conference in which we were to set a firm trial date, depending on the Court's order of course.

I -- Well, in any event, Ms. Schesnol.

MS. SCHESNOL: Your Honor, I can advise you that your court clerk was kind enough to notify both counsel that we might be making brief comments to the Court. And I don't want to speak for opposing counsel. I'm certainly prepared to make a very, very short sort of summary statement to the Court. But if opposing counsel isn't prepared to do so, you know, I think we should be equitably situated.

THE COURT: Ms. Castillo.

MS. CASTILLO: Your Honor, I'm ready to proceed to oral argument today should this Court need.

THE COURT: All right. So we will proceed in that fashion. And certainly I will give counsel leeway, given the fact that, again, you've had -- Well, you've had some time to prepare, I should say. It's well briefed.

I have reviewed both Ms. Castillo's motion to dismiss, the attached documents thereto, the government's response, as well as defendant's reply.

And, Ms. Castillo, there's no real need to reiterate what's in your motion, but certainly if there are specific points that you wish to make or reiterate, you are free to do so. And would you please come to the podium.

MS. CASTILLO: Thank you, Your Honor. And I will make it brief because I think it's been covered sufficiently. This entire case rests upon the second element, whether the

deportation order is valid.

And there is, as there has been since Taylor, the categorical analysis that must be performed, and there are three parts to that analysis. But there are subparts to the second.

And I think the government's reliance on Sheffield, as I indicated, the very court that issued Sheffield indicated that it was unsure about whether Sheffield would still be good law or the case it cites after Mathis.

And essentially what Mathis, which is a 2016 decision, called the courts to do was in situations where it wasn't clear, if you have a statute that may have different elements or facts or alternative means, as the court put it, to determine, there is a test. So it's kind of like a test within the test at step two. And that test has this Court look at the state case law. And I'll refer to DC as the state for the purposes of the analysis.

And here in defendant's original motion, 23, to dismiss, I pointed to Leak. And Leak is a decision from the DC Court of Appeals that would suggest that it is not an element distinct that the jury must find beyond a reasonable doubt but instead that the DC robbery statute that is at issue in this case could be committed one of three ways, meaning there are alternative means, and these are not facts that the jury has to find beyond a reasonable doubt.

In DC, robbery could be committed, whether against resistance, by sudden or stealthy seizure or snatching, or by putting in fear. And Leak says that a jury could find that someone that was put in -- I'm sorry -- without there being any fear or resistance.

So this is your situation where a pickpocketer walks by and takes something. There is no element of force. And Leak says that it is not then a crime of violence to do so. So that is the first step.

And Mathis does say that these are consecutive steps that must be followed. So first this Court is to look at the case law. And only if the case law is not clear does the Court then look at the second step, which is the text of the statute.

And I did provide examples of why the text of the statute also points to an indivisible set or an indivisible element, that these are not three separate ways to commit the offense, but it is just one, and that a jury could pick from any one of those three.

And, again, the text of the statute points that this is an indivisible set. And by reference I included the carjacking statute, which follows immediately in the DC code. And there you have subsections because there are different ways of committing carjacking. And there are different punishments for those, which is what the Court of Appeals said was one way to look at: Are there different punishments? Then you're

probably looking at different elements.

But if it's the same set of elements or the same set of facts that the jury would find, then you'd just have one element.

And, finally, if the Court is still not unsure after looking at the state case law or the text of the statute then finally can you look at the conviction documents that the government has provided.

And with these, some of the appellate court judges have appointed out, you know, when you look at robbery, it's clear, like, when wouldn't it be a crime of violence or when wouldn't it be in this case a theft offense for immigration purposes in finding that it's an aggravated felony?

But our case law calls that we meet these very specific requirements. And when you look at what a DC court could find a person guilty of doing -- And I believe in my original petition there is a case of a police officer feigning to be asleep with his wallet out, and that man was convicted. And there you don't have the element of force. And there's different case law also going to whether -- what constitutes anything of value versus property.

So for all those reasons I do ask this Court to take a very close look. And I think once this Court applies Mathis, which is what the government failed to do, it is the categorical approach that applies, not the modified

categorical. And as such, when determining whether something is an aggravated felony, this Court cannot look at the conviction documents to see what he actually pled guilty to but instead must just look at the overall statute.

I will address some of the other points. Ochoa, which is a Ninth Circuit decision that recently came out, makes it clear that if Mr. Gomez-Aguilar was not in fact convicted of an aggravated felony, then it does not need to prove prejudice because it is a due process violation that cannot be cured.

And in this case he was told he was an aggravated felon, which is not in fact true, and thus he was not able to see an immigration court judge. And there are three different types of relief that he would have been eligible for. I believe this Court has sufficient briefing on that.

What this all really will come down to is whether that element, whether it's divisible or indivisible. And it is defendant's position that it is an indivisible set. Thus, we do not have a categorical match, and it is not an aggravated felony.

THE COURT: Thank you. Ms. Schesnol.

MS. SCHESNOL: Would you like me to come to the podium or stay here?

THE COURT: Why don't you stand at the table.

MS. SCHESNOL: Thank you, Your Honor.

In the present situation, we're not talking about a

pickpocket. We are talking about a crime in which force was used.

The government did not use the categorical approach that Mathis sets out because the government essentially concedes that this was not a categorical match, that we had to go to the next level of analysis and look at -- and look at the underlying documents and the underlying facts of the case which have been set out, and I will not reiterate them.

What I will do is say that even if the Court finds that the defendant should have been brought before an immigration judge, that he wasn't -- that he wasn't an aggravated felon, he should have been brought before an immigration judge, that only removal is retroactive, not relief.

And so if he had been brought before an immigration judge, he wouldn't have been eligible for relief, and we'd be in the exact same posture that we are -- that he'd be in the same posture that he ended up in anyway.

He can't now show that he suffered any prejudice. It's the government's position that the defendant would have been removed, regardless, because he wasn't -- he had no right to be in this country. He had entered without inspection. And so he would have been removed anyway even if he had been brought before an immigration judge.

And for those reasons, the government argues that the

indictment should not be dismissed. Thank you.

THE COURT: Well, I guess, Ms. Schesnol, I do want to ask you a question, because I too noted, as Ms. Castillo did, that you did not address the argument that the defendant was denied due process because the notice of intent failed to indicate the subsection of -- under Title 8 United States Code Section 1101(a)(43) and that that in and of itself should be a due process violation because he had insufficient notice.

What do you say to that argument?

MS. SCHESNOL: May I have a moment, Your Honor?

THE COURT: You may.

MS. SCHESNOL: Your Honor, it's the government's position that that failure to notice the defendant with that level of specificity doesn't rise to the level of a due process violation because the defendant was in fact advised that he was convicted of an aggravated felony even if it didn't notify him of the subsection under that statute.

THE COURT: And then, Ms. Castillo, I would ask you a similar question. Why isn't it sufficient on the documents that you provided that show not only was he removed on the basis of an aggravated felony, but it is also clearly written here robbery?

MS. CASTILLO: Well, Your Honor, as we've had to brief -- and by we, I mean the attorneys -- there's a whole range of subsections. And I had to go through the entire 43,

you know, without going through whether it was theft or not.

And I would submit to this Court that as someone who is indigent and who at this point is unrepresented by counsel, because this is an ICE or Customs Border Protection agent meeting with him in a prison facility handing him this piece of paper saying you're convicted of an aggravated felony.

I propose to this Court that my client didn't have any resources to go look at the statute and then have the legal expertise to be, like, which one of these might fit? We did that for this Court's analysis. The government doesn't specify.

But it could be either a theft offense -- and that has its own requirements, which we briefed to the Court -- and it also has the crime of violence analysis, which Mathis changed, Amaya changed.

So I think that notice is incredibly important, and I don't mean to bypass it, because the rest of the case law argues. I think that is enough for this Court to dismiss the indictment because he was not provided with the adequate notice to know which of these many -- And I believe there are over a dozen crimes that could be considered an aggravated felony.

And I think I'm, you know, being generous by saying it doesn't. I think the number is actually higher than that. So I think there is a due process violation.

The bulk of the motion addresses the other ones, but I

think that is enough and that it is a strong one to begin, because he didn't have the benefit. How could he defend or even go the next step, if he disagreed with that analysis, was to go to a Court of Appeals. So I think there is enough just on the notice violation.

THE COURT: And, Ms. Castillo, you mentioned before you ended your oral presentation that you had additional information or you wanted to make additional statements?

MS. CASTILLO: Your Honor, I don't know if this Court needs me to. I believe that this is well briefed for the Court to make a ruling, so I don't know that I have any additional information for this Court.

THE COURT: Well, it is well briefed. I read Mathis and found that to be of interest. But in reviewing and rereviewing your briefing as well as Mathis, the Sheffield decision, and the other decisions mentioned in Mathis, I do believe that the robbery conviction is an appropriate predicate crime, and it is a crime of violence.

And my ruling is based on the following:

Ms. Castillo does point out that footnote one of the Sheffield decision basically recognized that Mathis -- and I think they use the language -- may cast additional light on their analysis, finding that the District of Columbia's robbery statute was divisible.

But they certainly did not hint at whether or not that

would change the decision on divisibility in Sheffield. And because Sheffield relied predominantly on the case In Re Sealed Case at 548 F.3d 1085, which is a 2008 District of Columbia decision, I reviewed that case as well. And I find that In Re Sealed Case based its finding of divisibility on the DC robbery statute according to the Supreme Court's jurisprudence in this area.

Now, that court applied -- And I should say the In Re Sealed Case court applied James versus United States. It applied Taylor versus United States and Shepard versus United States.

And when I reread the Mathis decision, as counsel may also recall, Mathis reiterated its finding in those decisions. They are still good law. What the Mathis court essentially said is, in big bold letters, it is elements that matter, not facts.

And so there is nothing, at least in my review of In Re Sealed Case and Sheffield, that at least in my view would change under the Mathis decision. Mathis reiterated those prior holdings.

And so, as counsel points out, this Court should defer to the District of Columbia's own analysis of its own statute because it comports with Mathis, that is, finding the robbery statute divisible.

And so applying the modified categorical approach and

in view of the fact that the defendant resolved his robbery case in the District of Columbia by way of plea agreement, I looked to the documents produced by the government or I should say I peeked at those documents. And, to be sure, the government didn't provide a number of documents that, well, now under Mathis I would be able to peek closer at. There is no transcript of the plea colloquy. There is essentially no factual basis. But in view of Mathis, I think that's okay, because I wouldn't necessarily be guided by those facts.

But what I do have before me that I think is sufficient is that there is this pre-indictment plea offer. The defendant will plead guilty to one count of robbery by force and violence. And that I find to be the operative terminology, given what Sheffield stated and my recognition of Sheffield's statement that a person can be convicted of committing either the violent version of robbery or the non-violent version, the stealthy version, as they state or as Ms. Castillo mentioned, the sort of pickpocket while the individual is sleeping scenario.

And because he committed a crime that has an element, the use of physical force, and the statement of force and violence in the operative documents that the government has produced, I find that to be sufficient.

And so having so found, it is the defendant's burden to show that he exhausted his administrative remedies. And on

this record, well, I find that -- And he also must show that there was some -- that the deportation proceeding where the order was issued, that proceeding improperly provided -- deprived him, I should say, of the opportunity for judicial review. But having found that he was convicted of a crime of violence, it is sufficient, in my view, to find that he does not make his burden here.

That said, I was somewhat troubled by -- when I looked at the documents that Ms. Castillo provided in the removal proceeding. And I was somewhat troubled by the fact that there was this missing section in the final removal order.

This is obviously a form document, and it states in the middle of the order that he is ineligible for any relief pursuant to Title 8 United States Code Section 1101(a)(43). And then there's obviously an open parentheses where a removal officer is supposed to notate whatever the specific category is. That was somewhat troubling. But I do find that the notice was sufficient, and here's why:

I do believe the notation of robbery and the notation that he was sentenced to five years in prison followed by supervised release is sufficient to put him on notice that this is a crime of violence and an aggravated felony. And so I also find no due process violation here.

Now, having so found then, I will deny the motion to dismiss the indictment in this proceeding.

Ms. Castillo, is there any further record that you wish to make?

MS. CASTILLO: Not at this time, Your Honor.

THE COURT: Thank you. Ms. Schesnol?

MS. SCHESNOL: No, nothing from the government, Your Honor.

THE COURT: Now, having denied the motion to dismiss, then, the next obvious question is when do the parties anticipate being ready for trial?

MS. CASTILLO: May I have one moment to confer with my client, Your Honor?

THE COURT: You may.

Do you need more than five minutes Ms. Castillo?

MS. CASTILLO: No, Your Honor.

(The defendant and his counsel confer off the record.)

MS. CASTILLO: Your Honor, I had met with my client earlier today and discussed the possibility that this Court would rule against that. I've also spoken to Ms. Schesnol about the same thing.

There are four elements to reentry, the first being that he's not a U.S. citizen; the second that there's a valid deportation order; the third that he was found in the country; and the fourth that he didn't ask for permission.

Mr. Gomez-Aguilar is ready to stipulate that the government could prove at trial beyond a reasonable doubt the

other three elements, with the exception of the second that there's a valid deportation order.

So I've proposed to Ms. Schesnol -- she has informed me that she would need to get approval from her superiors -- but to go ahead and waive a jury trial as this is a legal issue which this Court has already decided, so to have a bench trial. And we can put together whatever stipulated facts we need. So I don't anticipate that this really would take longer than half an hour.

THE COURT: Ms. Schesnol.

MS. SCHESNOL: And, Your Honor, as Ms. Castillo pointed out, I would need to get permission from supervisors to agree to that. We talked in the courtroom today and no earlier, so I apologize I haven't had the opportunity to ensure that. So obviously if we were going to go forward on a stipulated facts type of trial, we wouldn't need much preparation time, nor would we need much of the Court's time.

Additionally, though, based on the Court's ruling, the government will certainly consider extending another plea agreement under these facts as well. So perhaps we would not even need a trial if we could come to some sort of mutual resolution.

So perhaps if I could get back to the Court with regard to, number one, could we work this out with a plea agreement, and, if not, do I have the permission to go forward

on a stipulated facts trial.

THE COURT: When is our trial date?

MS. CASTILLO: October 17th, Your Honor.

THE COURT: October 17th is the current trial date.

MS. SCHESNOL: That's fine, Your Honor.

THE COURT: Well, why don't we leave that on the calendar. And in advance of that, of course if Mr. Gomez-Aguilar either declines the -- whatever the plea offer is that the government intends to extend at least a week in advance of that trial date, please let me know.

If there are stipulations that are going to be entered into, I certainly would like them at least no later than three full days before that particular trial.

Having said that, I realize that's probably on a Saturday, so let's make it the Friday before that any stipulations as to foundation or any evidentiary stipulations be provided in advance of that time. Is there anything further from --

MS. SCHESNOL: No, Your Honor.

THE COURT: -- the government?

Ms. Castillo?

MS. CASTILLO: No, Your Honor. Thank you.

THE COURT: All right. Thank you, counsel. This matter's adjourned.

(Proceedings recessed at 3:03 p.m.)

C E R T I F I C A T E

I, LINDA SCHROEDER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 9th day of February, 2018.

s/Linda Schroeder
Linda Schroeder, RDR, CRR

Appendix C

FILED

JUL 25 2019

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. JOSE GOMEZ-AGUILAR, AKA Jose Orlando Gomez-Aguilar, Defendant-Appellant.	No. 18-10010 D.C. No. 2:17-cr-00874-DJH-1 District of Arizona, Phoenix ORDER

Before: D.W. NELSON, FERNANDEZ, and BEA, Circuit Judges.

Appellant's petition for panel rehearing filed on May 3, 2019, is **DENIED**.