

September 27, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-40827
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALEXANDER MORALES-GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-03-CR-66-1

Before JONES, BARKSDALE and PRADO, Circuit Judges.

PER CURIAM:*

Alexander Morales-Garcia appeals his sentence for illegal reentry following deportation after having been convicted of an aggravated felony. He argues that the district court erred in holding that his Nebraska misdemeanor conviction for third degree sexual assault was an "aggravated felony," thereby enhancing his base offense level by eight levels pursuant to U.S.S.G.

§ 2L1.2(b)(1)(C) (2002).

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The Government concedes that the eight-level enhancement was erroneous; the elements of the offense of Morales's misdemeanor state conviction do not describe the sexual abuse of a minor, and the district court was precluded from looking to Morales's underlying conduct to make such a determination. See United States v. Zavala-Sustaita, 214 F.3d 601, 603 (5th Cir. 2000). We therefore VACATE Morales's sentence and REMAND for resentencing. In light of the foregoing, the issue whether the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1)&(2) are unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), is moot.

SENTENCE VACATED; REMANDED FOR RESENTENCING.