

December 12, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 05-21089  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FELIX FLORES-MORALES, also known as Felix Morales,  
also known as Alfonso Castro,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:05-CR-278-ALL  
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Before KING, WIENER, and OWEN, Circuit Judges.

PER CURIAM:\*

Felix Flores-Morales appeals his guilty plea conviction and sentence for illegal reentry into the United States after deportation following an aggravated felony in violation of 8 U.S.C. § 1326(a) & (b)(2). He argues that the district court erred in enhancing his sentence by 16 levels under U.S.S.G. § 2L1.2(b)(1)(A)(ii) based on his 1995 Texas conviction for sexual assault of a child under TEX. PENAL CODE § 22.011(c)(1); he argues that the offense was not sexual abuse of a minor because

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\* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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 term "child" in the TEX. PENAL CODE § 22.011(a)(2)(A) & (c)(1) includes a person younger than 17. As Flores-Morales concedes, review is limited to plain error. See United States v. Vega, 332 F.3d 849, 852 n.3 (5th Cir. 2003). In view of this court's decision in United States v. Zavala-Sustaita, 214 F.3d 601, 604-08 (5th Cir. 2000), Flores-Morales cannot establish that the district court's application of the § 2L1.2 enhancement was clear or obvious error. See Vega, 332 F.3d at 852 n.3.

Flores-Morales challenges § 1326(b)'s treatment of prior felony and aggravated felony convictions as sentencing factors rather than elements of the offense in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). Flores-Morales's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Flores-Morales contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi, we have repeatedly rejected such arguments on the basis that Almendarez-Torres remains binding. See United States v. Garza-Lopez, 410 F.3d 268, 276 (5th Cir.), cert. denied, 126 S. Ct. 298 (2005). Flores-Morales acknowledges the Supreme Court's decision in Almendarez-Torres, but raises the issue to preserve it for further review.

AFFIRMED.