IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-50980

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN MENDOZA-GARCIA, also known as
Ramiro Gallegos, also known as
Juan Florez,

Defendant-Appellant,

Appeal from the United States District Court
for the Western District of Texas, El Paso
(EP-01-CR-834-ALL-DB)

August 12, 2002

Before WIENER, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Juan Mendoza-Garcia ("Mendoza") pleaded guilty to illegally re-entering the United States in violation of 8 U.S.C. § 1326(a) as charged in a one-count indictment. A notice of penalty enhancement was attached to the indictment, indicating that the government planned to prove that Mendoza had been convicted on February 26, 2001, in the district court of Denver County, Colorado, of a state felony offense of possession of a

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

controlled substance sufficient to constitute an aggregated felony for federal sentencing purposes. Before the magistrate judge, Mendoza argued that the Colorado conviction was a misdemeanor rather than a felony. The magistrate judge acknowledged the dispute and indicated it would be resolved by the district court. The probation officer who prepared the Presentence Investigation Report (PSR) relied on the Colorado conviction to increase Mendoza's offense level by 16 levels pursuant to U.S.S.G. § 2L1.2(b)(1)(A).

Mendoza objected to the application of that provision to enhance his sentence, relying on a computer printout ("TECS") produced by the government during discovery, as well as other evidence. The probation officer stated that the Colorado court documents indicated that Mendoza was convicted of a felony and that conversations with state court personnel had confirmed that the conviction was an aggregated felony.

At sentencing, counsel for Mendoza re-urged his objection to the characterization of the Colorado conviction as an aggregated felony. Counsel argued that Mendoza had pled guilty only to the second count of a two-count indictment, and that the second count was a misdemeanor for which he received a sentence of 90 days jail.

The district court overruled Mendoza's objection and added the 16 levels for the Colorado controlled substance conviction as a felony. After granting Mendoza's request for an unrelated

reduction, the court sentenced him to a prison term of 18 months. Mendoza timely filed a notice of appeal.

In dealing with Mendoza's objection regarding the Colorado conviction, the court made no discrete factual findings; only the conclusion that the crime of conviction was a felony. Mendoza argues that the government failed to carry its burden of establishing that the Colorado conviction qualifies as an aggregated felony conviction for purposes of § 2L1.2. The government depends entirely on the PSR and the PSR addendum as sufficiently reliable evidence to support the district court's adoption of the recommendation in the PSR and application of the 16-level aggregated felony enhancement.

On July 26, 2002, the government filed an opposed motion to supplement the record on appeal with a copy of a one-page instrument purporting to be the Colorado judgment of conviction. In its motion, the government acknowledges that the addendum to the PSR "indicated that the Colorado judgment was available for review by counsel," that it "was not formally offered as evidence at the sentencing hearing" but was nevertheless "available for review by the parties and the district court." That is insufficient: In so many words, the government concedes, albeit less than forthrightly, that the document in question was never before the district court and thus never viewed by it. It thus could not have been relied on by the court at sentencing. The court was therefore left to rely on the probation officer's representations which were less than

dispositive regarding documentary support for the felony characterization of the Colorado conviction. The government's motion implicitly acknowledges that, under the situation presented here, with timely objections advanced by Mendoza accompanied by non-conclusional specific allegations and supporting affidavits, the PSR and its addendum do not provide sufficient indicia of reliability, absent documentation to confirm, one way or the other, whether the Colorado conviction was for a felony or a misdemeanor. The probation officer's remark about the Colorado instrument's being available for review by counsel leaves us uncertain as to whether documents from that court were actually reviewed. The probation officer's recounting of a discussion with court personnel in Colorado falls well short of supplying the reliability required in light of Mendoza's specific, supported objection. See United States v. Patterson, 962 F.2d 409 (5th Cir. 1992); United States v. Calverley, 11 F.3d 505, 515 (5th Cir. 1993), aff'd en banc, 37 F.3d 160 (5th Cir. 1994).

As the document from the Colorado court with which the government seeks to supplement the record was never a part of the PSR or its addendum and was never otherwise presented to the district court, the government's motion to supplement the record must be, and hereby is, denied. Given Mendoza's rebuttal evidence and the absence of corroboration of the pertinent statements in the PSR, the sentencing record fails to reflect "an acceptable evidentiary basis for the court's fact-findings at the sentencing

hearing." United States v. Lage, 183 F.3d 374, 383 (5th Cir. 1999). We are left with no choice, therefore, but to vacate Mendoza's sentence and remand for resentencing, at which a factual determination can be made, either supporting or rejecting the sentence enhancement requested by the government under § 2L1.2(b)(1)(A), by considering, inter alia, the best evidence of the nature of the Colorado conviction.

MOTION TO SUPPLEMENT THE RECORD DENIED; SENTENCE VACATED; REMANDED FOR RESENTENCING.