

AUG 24 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>JORGE ANTONIO AGUILA,</p> <p style="text-align: center;">Defendant - Appellant.</p>
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No. 10-50209

D.C. No. 3:05-cr-01919-DMS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Dana M. Sabraw, District Judge, Presiding

Submitted August 23, 2010**

Before: LEAVY, HAWKINS, and THOMAS, Circuit Judges.

Jorge Antonio Aguila appeals from the sentence imposed following revocation of supervised release. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand.

Aguila contends the district court abused its discretion by sentencing him

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

based on an offense of unlawful sexual intercourse with a minor that never occurred. We vacate and remand for resentencing because it is not clear from the record whether the district court considered the non-existent offense in imposing its sentence at the revocation hearing. *See, e.g., United States v. Rodriguez-Martinez*, 25 F.3d 797, 800 n.3 (9th Cir. 1994) (remanding on another ground, but stating that “the record is unclear as to whether the sentencing court considered a 1974 narcotics conviction to be evidence of Rodriguez’s recidivist nature”).

We do not reach Aguila’s remaining contention.

SENTENCE VACATED AND REMANDED.