

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

MAR 25 2008

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GERARDO WENCES-ALCAIDE, aka  
Gerardo Wences-Alcalde,

Defendant - Appellant.

No. 07-10222

D.C. No. CR-06-00250-DCB

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
David C. Bury, District Judge, Presiding

Submitted March 12, 2008\*\*  
Phoenix, Arizona

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

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

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

Gerardo Wences-Alcaide appeals the district court's imposition of a sixteen-level sentencing enhancement based on its determination that his prior felony conviction constituted a "crime of violence." We affirm.

Wences-Alcaide's prior conviction was for Criminal Sexual Conduct in the Second Degree, in violation of section 609.343(1)(a) and (2) of the Minnesota Statutes. The relevant statutory provision criminalizes "sexual contact" with a person "under 13 years of age" where "the actor is more than 36 months older than the complainant." Minn. Stat. § 609.343(1)(a). It provides that "consent to the act by the complainant" is not a defense, and that "the state is not required to prove that the sexual contact was coerced." *Id.*

Wences-Alcaide contends that the statute reaches conduct that does not qualify as "sexual abuse of a minor," a "crime of violence" under the United States Sentencing Guidelines, because it does not require any proof that the "sexual contact" was harmful or injurious. *See* U.S.S.G. § 2L1.2(b)(1)(A)(ii). He argues that the statute encompasses even consensual relations, which he maintains do not constitute maltreatment under our decision in *United States v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006).

In *Baza-Martinez*, we considered a statute that North Carolina courts had interpreted to punish "mere words." *Id.* at 1016. We held that a conviction for

violating the statute was not categorically “abuse of a minor” because the courts had applied it to convict individuals for conduct, such as covertly filming a minor undressing, that the victim was not aware of and that therefore did not necessarily involve the infliction of either physical or psychological harm. *Id.* at 1017.

In contrast, the Minnesota statute punishes only “sexual *contact*” with a child under the age of 13 if the perpetrator is at least 3 years older than the victim. Minn. Stat. § 609.343(1)(a) (emphasis added). In *United States v. Sinerius*, 504 F.3d 737, 741 (9th Cir. 2007), we held that even “consensual sexual contact by a 16-year-old on a 13-year-old victim[] categorically qualifies as ‘sexual abuse.’” *See also United States v. Baron-Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999) (minor’s consent to sexual contact irrelevant because Congress did not intend the law “to excuse an individual who preys upon a child too young to understand the nature of his advances”). Accordingly, a conviction for violating section 609.343(1)(a) of the Minnesota Statutes categorically qualifies as “sexual abuse of a minor.” Wences-Alcaide’s conviction therefore constituted a “crime of violence,” justifying the imposition of a sixteen-level sentencing enhancement under the United States Sentencing Guidelines. *See* U.S.S.G. § 2L1.2(b)(1)(A)(ii).

**AFFIRMED.**