

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 00-40154
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS ANGEL HERNANDEZ-FAUSTO,

Defendant-

Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-99-CR-412-1

October 19, 2000

Before EMILIO M. GARZA, STEWART, and PARKER Circuit Judges:

PER CURIAM:*

Luis Angel Hernandez-Fausto appeals following his guilty-plea conviction and sentencing for his offense of illegal reentry into the country. See 8 U.S.C. § 1326. He contends that his criminal history category over-represented the seriousness of his criminal history, that the district court would have departed downwardly had the court not mistakenly believed that it lacked authority to do so,

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

and that the indictment was insufficient because it failed to allege his prior felony conviction, which was used to enhance his sentence.

Given Hernandez-Fausto's three prior felonies and the pattern of those offenses, he was not entitled to a downward departure. See U.S.S.G. §§ 2K1.2, comment. (n.5) and 4A1.3. Furthermore, Hernandez-Fausto's case is governed by Almendarez-Torres v. United States, 523 U.S. 224, 234-35 (1998), which was not overruled by Apprendi v. New Jersey, 120 S. Ct. 2348, 2362-63 (2000). The indictment in his case was sufficient.

AFFIRMED.