

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8197
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO FRANCO-HERNANDEZ,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-92-CR-355
- - - - -
(January 6, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Francisco Franco-Hernandez (Franco) asserts that his enhanced sentence under 8 U.S.C. § 1326(b) violated his due process rights because the Government failed to allege in the indictment his prior aggravated felony conviction as an element of the offense.

An indictment for a federal crime is defective if it does not contain the elements of the offense. United States v. Chaney, 964 F.2d 437, 446 (5th Cir. 1992). Franco relies on

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

caselaw from the Ninth Circuit stating that § 1326 enumerates three separate offenses and that a prior felony is an element of the offense in § 1326(b)(1). Rejecting that caselaw, United States v. Vasquez-Olvera, 999 F.2d 943, 945-47 (5th Cir. 1993), holds that § 1326(b) is a sentence enhancement provision and not a separate element that must be alleged in an indictment.

AFFIRMED.