

OCT 05 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SERAFIN HERNANDEZ-GARCIA,

Defendant - Appellant.

No. 09-50549

D.C. No. 3:09-cr-01802-GT

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, District Judge, Presiding

Submitted September 13, 2010**

Before: SILVERMAN, CALLAHAN, and N.R. SMITH, Circuit Judges.

Serafin Hernandez-Garcia appeals from the 33-month sentence imposed following his guilty-plea conviction for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand.

* 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).

Hernandez-Garcia contends the district court did not comply with Federal Rule of Criminal Procedure 32(h)'s requirement that it provide notice of its intent to depart upward from the applicable Sentencing Guidelines range. We agree.

Neither the presentence report nor the Government's pretrial submission identified the district court's grounds for departure, and the district court itself did not provide notice by the outset of the sentencing hearing of the factual and legal basis supporting its intent to depart. *See* Fed. R. Crim. P. 32(h) (notice must specify the ground on which the departure is based); *United States v. Evans-Martinez*, 530 F.3d 1164, 1168 (9th Cir. 2008) (explaining that parties must receive notice of the basis of the departure so the issues are "fully aired"); *United States v. Hernandez*, 251 F.3d 1247, 1251 n.4 (9th Cir.) ("district courts must in any case provide notice of a potential departure not later than the outset of the sentencing hearing"), *amended by* 280 F.3d 1216 (9th Cir. 2001). We vacate and remand for resentencing because we "cannot be confident that the issues which impacted sentencing were thoroughly tested as intended under Rule 32(h)." *See Evans-Martinez*, 530 F.3d at 1168.

In light of our disposition of the Rule 32 issue, we do not address Hernandez-Garcia's remaining contentions.

VACATED and REMANDED.