

April 24, 2003

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 02-40868  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE ANTONIO GABARETE-GUARDADO,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. L-02-CR-42-1  
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Before DAVIS, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:\*

Jose Antonio Gabarete-Guardado appeals his guilty-plea conviction for illegal reentry after deportation. He argues for the first time on appeal that 8 U.S.C. § 1326(b)(2) is unconstitutional because it does not require the prior aggravated felony conviction to be proved as an element of the offense. Gabarete concedes that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998). He nevertheless

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

seeks to preserve this issue for Supreme Court review in light of the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; see also United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000), cert. denied, 531 U.S. 1202 (2001). Gabarete's argument is foreclosed.

Gabarete also contends for the first time on appeal that the magistrate judge lacked jurisdiction to conduct his guilty plea hearing because there was no order of referral from the district court. By failing to object in the district court to the magistrate judge's exercise of authority, Gabarete waived his right to challenge this procedural defect in his plea proceeding. United States v. Bolivar-Munoz, 313 F.3d 253, 257 (5th Cir. 2002), cert. denied, \_\_\_ S. Ct. \_\_\_, 2003 WL 729161 (U.S. Mar. 31, 2003). The judgment of the district court is AFFIRMED.

AFFIRMED.