

April 24, 2003

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 02-40876  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GABRIEL MANZO-LOPEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. B-02-CR-21-1  
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Before DAVIS, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:\*

Gabriel Manzo-Lopez appeals his conviction of illegal reentry following deportation. He argues that his previous deportation proceeding was fundamentally unfair due to the retroactive application of statutory changes to the immigration laws barring him from seeking a waiver of deportation. He acknowledges that his argument is foreclosed by circuit precedent but he wishes to preserve the issue for further review.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Manzo-Lopez's deportation proceeding was not rendered fundamentally unfair because he was not able to argue for a waiver of deportation. See United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 123 S. Ct. 922 (2003).

Manzo-Lopez argues for the first time on appeal that 8 U.S.C. § 1326(b)(1) and (2) is unconstitutional because a prior felony conviction is an element of the offense of illegal re-entry, and not merely a sentence enhancement, and should have been charged in the indictment and proven beyond a reasonable doubt. He acknowledges that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but seeks to preserve the issue for further review.

Apprendi v. New Jersey, 530 U.S. 466 (2000) did not overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). This court must follow Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." Dabeit, 231 F.3d at 984 (internal quotation marks and citation omitted). Accordingly, the judgment of the district court is AFFIRMED.