

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-50340  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DELFINO CERVANTES-GUTIERREZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
(A-93-CR-175)

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(May 24, 1995)

Before JOHNSON, JOLLY, and DAVIS, Circuit Judges.

JOHNSON, Circuit Judge:<sup>1</sup>

Delfino Cervantes-Gutierrez ("Cervantes") appeals the district court's denial of his motion to dismiss the indictment charging him with illegal re-entry into the United States pursuant to 8 U.S.C. § 1326. Because we agree with the district court that Cervantes has not shown that his prior deportation violated his procedural due process rights, we affirm.

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<sup>1</sup>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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

## I. Facts and Procedural History

Cervantes was indicted for illegally re-entering the United States after having previously been deported. Cervantes moved to dismiss the indictment on the ground that his prior deportation was unlawful due to the deportation proceedings being fundamentally unfair and in violation of his rights under the Due Process Clause.<sup>2</sup> The district court denied the motion to dismiss, tried the case to the jury, and then entered judgment based on the jury's guilty verdict. Cervantes now appeals.

## II. Discussion

A defendant being prosecuted for illegal re-entry into the United States may collaterally attack the prior deportation order in his or her criminal proceeding for illegal re-entry. *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-39 (1987). The collateral attack must be grounded upon a due process violation which occurred in the deportation proceedings. *Id.* The alien must first show that the deportation hearing was "fundamentally unfair." *See United States v. Palacios-Martinez*, 845 F.2d 89, 91 (5th Cir.), *cert. denied*, 488 U.S. 844 (1988). Secondly, the alien must show that the deportation hearing effectively eliminated his or her

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<sup>2</sup>Specifically, Cervantes claims that his procedural due process rights have been violated because during the deportation proceedings: 1) he did not receive proper notice of either the deportation hearing or the deportation order and 2) he was deported without termination of his permanent resident status. Because Cervantes has not demonstrated that he has been prejudiced by the district court's denial of his motion to dismiss the indictment, it is not necessary for this Court to determine whether or not Cervantes' allegations do, in fact, rise to the level of due process violations.

right to challenge that hearing by means of judicial review of the deportation order. *Id.* This Court has held that in order for an alien to show fundamental unfairness, he or she must be actually prejudiced by the procedural defects in the proceeding that led to his deportation. *United States v. Encarnacion-Galvez*, 964 F.2d 402, 409 (5th Cir.), *cert. denied*, 113 S. Ct. 391 (1992). In other words, the alien must show with a reasonable likelihood that but-for the procedural defects in the prior proceeding, he or she would not have been deported. *See id.* at 409-410.

Even assuming that Cervantes were able to demonstrate that he has suffered procedural defect in the case at bar, nowhere in the record has it been suggested that he could escape deportability. As such, he has not shown that the deportation proceedings were fundamentally unfair and his collateral attack on the deportation proceedings cannot succeed.

### III. Conclusion

Because Cervantes has not alleged nor demonstrated that he would not have been deported but-for the alleged procedural defects, we affirm the district court's denial of his motion to dismiss the indictment and judgment of conviction.

AFFIRMED.