

April 21, 2004

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 03-20804  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARCO ANTONIO RIOS-ELIAS,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. H-02-CR-675-1  
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Before JOLLY, JONES, and SMITH, Circuit Judges.

PER CURIAM:\*

Marco Antonio Rios-Elias (Rios) pleaded guilty to an indictment charging that he was found in the United States after having been deported and convicted of an aggravated felony. For the first time on appeal, he argues that 8 U.S.C. § 1326(b)(1) and (b)(2) are unconstitutional in light of the Supreme Court's ruling in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Rios recognizes that relief is presently foreclosed

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

in this court, but raises the issue to preserve it for further review.

Apprendi did not overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998). See Apprendi, 530 U.S. at 489-90; see also United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). This court must therefore follow the precedent set in Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." Dabeit, 231 F.3d at 984 (internal quotation and citation omitted). The judgment of the district court is AFFIRMED.