

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

March 5, 2008

\_\_\_\_\_  
No. 07-51203  
Conference Calendar  
\_\_\_\_\_

Charles R. Fulbruge III  
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ANTONIO BANE GAS-HERNANDEZ, also known as Juan Tinoco Garcia

Defendant-Appellant

\_\_\_\_\_  
Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 2:07-CR-329-ALL  
\_\_\_\_\_

Before KING, STEWART, and PRADO, Circuit Judges.

PER CURIAM:\*

Appealing the Judgment in a Criminal Case, Antonio Banegas-Hernandez raises arguments that are foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998), which held that 8 U.S.C. § 1326(b)(2) is a penalty provision and not a separate criminal offense. *United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007), cert. denied, 128 S. Ct. 872 (2008).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

The Government's motion for summary affirmance is GRANTED, and the judgment of the district court is AFFIRMED.