

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

November 8, 2007

No. 07-50390
Conference Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

GABRIEL GAITAN-TOVALLES, also known as Gabriel Gaitan

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:06-CR-515-1

Before KING, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:*

Appealing the Judgment in a Criminal Case, Gabriel Gaitan-Tovalles 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), petition for cert. filed (Aug. 28, 2007) (No. 07-6202). The

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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