

**December 6, 2006**

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 06-40739  
Conference Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NICASIO HERNANDEZ-MONTANO,

Defendant-Appellant.

-----  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 1:05-CR-1033-ALL  
-----

Before REAVLEY, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:\*

Appealing the Judgment in a Criminal Case, Nicasio Hernandez-Montano 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. The Government's motion for summary affirmance is GRANTED, and the judgment of the district court is AFFIRMED.

---

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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