

DEC 12 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARIO PEREZ-CHAVEZ,

Defendant - Appellant.

No. 08-30011

D.C. No. CR-07-00052-DWM

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, Chief District Judge, Presiding

Argued and Submitted November 18, 2008
Seattle, Washington

Before: KOZINSKI, Chief Judge, B. FLETCHER and RAWLINSON, Circuit
Judges.

Mario Perez-Chavez appeals his sentence. We find that the district court did not err by categorically refusing to consider whether to disagree with the policy underlying the United States Sentencing Guidelines' sentence enhancement for aliens with felony convictions.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

First, the district court *did* consider the policy behind the sentencing enhancement, and found that it was justified.

More importantly, *Kimbrough v. United States*, 128 S. Ct. 558 (2007), does not impose an affirmative duty to consider whether to disagree with the Guidelines in every sentencing decision. Rather, it gives a district judge discretion to do so.

AFFIRMED.