

Decision Below

789 Fed.Appx. 215 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Homar Perez CHAVEZ, Defendant-Appellant.

No. 19-10994

|

Non-Argument Calendar

|

(January 6, 2020)

Attorneys and Law Firms

Sara C. Sweeney, U.S. Attorney's Office, Orlando, FL, Michelle Thresher Taylor, U.S. Attorney Service - Middle District of Florida, U.S. Attorney's Office, Tampa, FL, for Plaintiff-Appellee




Rosemary Cakmis, Donna Lee Elm, Federal Public Defender's Office, Orlando, FL, Mara Allison Guagliardo, Federal Public Defender's Office, Tampa, FL, Russell K. Rosenthal, Federal Public Defender's Office, Fort Myers, FL, for Defendant-Appellant

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 2:18-cr-00040-JES-UAM-1

Before WILLIAM PRYOR, MARTIN and ROSENBAUM, Circuit Judges.


Opinion



PER CURIAM:



Homar Chavez appeals his sentence of 57 months of imprisonment for reentering the United States illegally.  8 U.S.C. § 1326(a),  (b)(1). Chavez argues that the district court failed to elicit objections after imposing his sentence as required by  *United States v. Jones*, 899 F.2d 1097 (11th Cir. 1990). Chavez also argues that his sentence is procedurally

and substantively unreasonable and that his sentence *216 is unconstitutional because his maximum statutory sentence was increased based on the fact of a prior conviction that was not proved to a jury beyond a reasonable doubt. We affirm.


The district court erred by failing to elicit objections from Chavez after imposing his sentence, but its statements create a record sufficient to avoid the need to vacate and remand the judgment. The district court neglected “to elicit fully articulated objections, following imposition of sentence, to [its] ultimate findings of fact and conclusions of law.”


 *Id.* at 1102. Instead, the district court asked whether the parties had “anything further to come to [its] attention,”


which is inadequate under  *Jones*. See  *United States v. Campbell*, 473 F.3d 1345, 1348 (11th Cir. 2007). Such a limited inquiry ordinarily would require us to “vacate the sentence and remand ... to give the parties an opportunity


to raise and explain their objections.”  *Jones*, 899 F.2d at 1103. But because the record reflects that the district court considered the Sentencing Guidelines and the statutory sentencing factors, we can review Chavez’s challenges to his sentence. See  *Campbell*, 473 F.3d at 1348.

Chavez’s sentence is procedurally reasonable. The explanation provided by district court, “though brief, was legally sufficient” to establish that it “considered the parties’ arguments and [had] a reasoned basis” for its chosen sentence.








See  *Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). The district court stated that “a sentence within [Chavez’s] established guideline range” was necessary to punish his crime and address “the matters

that are appropriate” for sentencing. See  18 U.S.C. § 3553. And the district court explained that it was “deny[ing] [Chavez’s] request for a variance” and rejecting the request of the government to incarcerate Chavez for 60 months because “a sentence at the low[] end of the guideline range” compensated for his “confusion with respect to [points added to his] criminal history score” for multiple distinct offenses of robbery and provided “adequate punishment and

adequate deterrence.” See  *id.* The district court also made evident that it did not presume that the guidelines range was reasonable when it denied Chavez’s request for a downward departure yet continued to “take [his] variance request under advisement.”

Chavez's sentence is also substantively reasonable. Chavez left the United States voluntarily in 1995 and was deported in 2013 after serving lengthy sentences for several armed robberies and burglaries. Undeterred, Chavez reentered the United States illegally and was arrested for aggravated assault with a deadly weapon, carrying a concealed firearm, exhibiting a dangerous weapon, and resisting an officer without violence. Based on that record, the district court reasonably determined that a sentence at the low end of Chavez's recommended guideline range of 57 to 71 months of imprisonment was required to satisfy the statutory purposes of sentencing. See  *id.* And Chavez's sentence is well below his maximum statutory sentence of 10 years, which suggests that it is reasonable. See *United States v. Carpenter*, 803 F.3d 1224, 1234 (11th Cir. 2015). The district court also considered Chavez's argument for a downward variance based on his obligations to family members living in the United States and in Mexico and acted reasonably in determining that mitigating factor was outweighed by the nature and circumstances of Chavez's crime, his recidivism, and the need to deter him from committing similar future crimes. See *United States v. Rosales-Bruno*, 789 F.3d 1249, 1254 (11th Cir. 2015) ("The decision about how much weight to assign a particular sentencing factor is 'committed to the sound discretion of

the district court.' "). The district court did not abuse its discretion *217 when it sentenced Chavez to 57 months of imprisonment.

Chavez concedes that his challenge to the constitutionality of his sentence is foreclosed by precedent. In   *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the Supreme Court held that a prior conviction "relevant only to the sentencing of an offender found guilty of the charged crime" does not have to be charged in an indictment or proven beyond a reasonable doubt to a jury, even if it increases the defendant's maximum statutory sentence.   *Id.* at 228–47.   *Almendarez-Torres* remains the law until overruled by the Supreme Court, and it expressly refused to do so in  *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). *Id.* at 1260 n.1.

We **AFFIRM** Chavez's sentence.

All Citations

789 Fed.Appx. 215 (Mem)

District Court Judgment

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v.

HOMAR PEREZ CHAVEZ

Case Number: 2:18-cr-40-FtM-29UAM

USM Number: 71261-018

Russell K. Rosenthal, AFPD
Kress Building, Suite 301
1514 Broadway
Ft. Myers, FL 33901

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Count One of the Indictment. The defendant is adjudicated guilty of this offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
8 U.S.C. § 1326(a), 8 U.S.C. § 1326(b)(1)	Illegal Reentry After Deportation and Felony Conviction	December 30, 2017	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as modified by United States v. Booker, 543 US 220 (2005).

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Judgment:

March 4, 2019



PAUL A. MAGNUSON
SENIOR UNITED STATES DISTRICT JUDGE

March 6, 2019

Homar Perez Chavez
2:18-cr-40-FtM-29UAM

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **57 Months**.

The Court makes the following recommendations as to incarceration:

The Court recommends to the Bureau of Prisons that the defendant participate in the Institution Hearing Program of the Federal Bureau of Prisons to determine his removal status while incarcerated.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

Homar Perez Chavez
2:18-cr-40-FtM-29UAM

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **3 Years**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
4. You must cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

Homar Perez Chavez
2:18-cr-40-FtM-29UAM

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature: _____

Date: _____

Homar Perez Chavez
2:18-cr-40-FtM-29UAM

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. If the defendant's removal status is not resolved while hi is incarcerated, then pursuant to 18 U.S.C. § 3583(d), the defendant is to be delivered, upon release from imprisonment, to a duly authorized immigration official to determine if deportation is appropriate. Should deportation be ordered, the defendant is to remain outside the United States, unless authorized by the Secretary for the Department of Homeland Security or the appropriate immigration authority.
2. The defendant shall cooperate in the collection of DNA, as directed by the Probation Officer.
3. You must refrain from any unlawful use of controlled substance. You must submit to one drug test within 15 days of placement on supervision and at least two periodic drug tests thereafter as directed by the probation officer.

Homar Perez Chavez
2:18-cr-40-FtM-29UAM

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

	<u>Assessment</u>	<u>JVTA Assessment</u> ¹	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0	waived	N/A

SCHEDULE OF PAYMENTS

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

¹ Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Transcript of Guilty Plea Hearing
(Excerpts)

* * * *

12

1 THE DEFENDANT: Yes.

2 THE COURT: And has your attorney explained the
3 charge to you?

4 THE DEFENDANT: Yes, he did.

5 THE COURT: And did you discuss the charge and the
6 case in general with your attorney?

7 THE DEFENDANT: Yes.

8 THE COURT: Did your attorney answer all of your
9 questions?

10 THE DEFENDANT: Yes.

11 THE COURT: Did you explain everything you know about
12 the case to him?

13 THE DEFENDANT: Yes, I did.

14 THE COURT: Count 1 of the indictment charges that on
15 or about December 30th, 2017, in the Middle District of
16 Florida, the Defendant, Homar Perez Chavez, also known as Leo
17 Perez, also known as Leo Omar Perez-Chavez, also known as Homar
18 Perez -- Homer Perez Chavez, being an alien of the United
19 States who previously had been convicted of a felony offense
20 and thereafter was deported, excluded and removed from the
21 United States on or about March 13th, 2013, and who had not
22 received the consent of the Attorney General or the Secretary
23 of Homeland Security to reapply for admission to the United
24 States, was found to be voluntarily in the United States in
25 violation of Title 8, United States Code, Sections 1326(a) and

1 (b)(1).

2 Sir, do you understand the charge against you in the
3 indictment?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you have any questions about the
6 charge?

7 THE DEFENDANT: No.

8 THE COURT: Now, the necessary elements the
9 Government must prove beyond a reasonable doubt for you to be
10 convicted are as follows:

11 First, that you were an alien at the time stated in
12 the indictment; second, you had been deported or removed from
13 the United States; third, afterwards you knowingly re-entered
14 or were found to be voluntarily back in the United States; and,
15 fourth, you did not have the consent of the Attorney General of
16 the United States or the Secretary of Homeland Security for the
17 United States to reapply for admission or readmission to the
18 United States.

19 Sir, do you understand the elements of the charge the
20 United States would have to prove beyond a reasonable doubt for
21 you to be convicted?

22 THE DEFENDANT: Yes.

23 THE COURT: Do you have any questions about them?

24 THE DEFENDANT: No.

25 THE COURT: Now, the penalties for the offense

1 charged in Count 1 of the indictment are a maximum sentence of
2 ten years of imprisonment, a fine of up to \$250,000, a term of
3 supervised release of not more than three years and a special
4 assessment of \$100.

5 Sir, do you understand the maximum penalties as to
6 Count 1?

7 THE DEFENDANT: Yes, I do.

8 THE COURT: And do you understand the potential for
9 these penalties are logical consequences of your guilty plea?

10 THE DEFENDANT: Yes.

11 THE COURT: Do you have any questions about what I
12 have explained so far?

13 THE DEFENDANT: No.

14 THE COURT: All right. Next, I want to speak with
15 you about the United States Sentencing Guidelines because they
16 apply in your case. Did you discuss the guidelines with your
17 attorney and how they might apply?

18 THE DEFENDANT: Yes.

19 THE COURT: Let me ask you that again.

20 So the sentencing guidelines is something that the
21 Court will use to help determine your sentence at your
22 sentencing hearing, and so my question was did you talk about
23 the sentencing guidelines with your lawyer and how they might
24 apply in your case? Did you have a discussion about them?

25 THE DEFENDANT: Yes.

1 THE COURT: All right. Very good. Then I won't go
2 into a lot more detail, but there are a few things I do want to
3 go over with you.

4 First, the district judge will not be able to
5 determine your guideline sentence until after the United States
6 Probation Office prepares a Pre-Sentence Investigation Report.
7 Now, after the district judge reviews the report, he will
8 determine what guidelines apply to your case. He then has the
9 authority to impose a sentence that is more severe or less
10 severe than the sentence the guidelines recommend. In fact, he
11 has the authority to impose any sentence up to the maximum
12 allowed by law. In other words, the district judge is not
13 bound by the sentencing guidelines. They are only advisory.

14 Do you understand that?

15 THE DEFENDANT: Yes.

16 THE COURT: Now, the United States may appeal a
17 sentence the district judge imposes. That means the United
18 States may ask the Court of Appeals to reverse the sentence as
19 too low or based on a guidelines miscalculation.

20 Parole has been abolished; and if the district judge
21 sentences you to prison, you will not be released on parole.
22 Also, the sentence the district judge imposes may be different
23 than any estimated sentence that your attorney or anyone else
24 has given you. In fact, it might be higher than you expect.
25 If that happens, you still would be bound by your guilty plea

1 and would not have a right to withdraw it.

2 Sir, do you understand all of these things I've just
3 explained about sentencing?

4 THE DEFENDANT: Yes.

5 THE COURT: All right. Do you understand everything
6 we have discussed up to this point, your rights, the rights you
7 give up by pleading guilty, the charge against you, the
8 potential penalties, the potential consequences and the
9 sentencing guidelines?

10 THE DEFENDANT: Yes.

11 THE COURT: All right. Please stand with your
12 lawyer.

13 And let me ask you directly, Mr. Homar Perez Chavez,
14 how do you plead, guilty or not guilty, to Count 1 of the
15 indictment?

16 THE DEFENDANT: Guilty.

17 THE COURT: All right. You may be seated.

18 I will now hear from the prosecutor a proffer of
19 facts the United States must prove beyond a reasonable doubt
20 for you to be convicted.

21 Ms. Viacava?

22 MS. VIACAVA: May I approach the podium, Your Honor?

23 THE COURT: You may.

24 MS. VIACAVA: The Government would be relying upon
25 the factual basis as provided in Document Number 19, the notice

1 of maximum penalties, elements of offense and personalization
2 of elements and factual basis.

3 On December 30th, 2017, a designated immigration
4 officer located the Defendant, Homar Perez Chavez, in Collier
5 County, Florida. After the designated immigration officer read
6 Homar Perez Chavez his Miranda warnings, the Defendant agreed
7 to provide a sworn statement. He said that his true and
8 correct name is Leo Omar Perez-Chavez, and the Defendant
9 admitted that he was born in Guatemala. He said that he last
10 entered the United States in 2013, and the Defendant admitted
11 that he had been deported previously from the United States in
12 2013.

13 The Defendant admitted that he had not obtained the
14 permission of the Secretary of Department of Homeland Security
15 or the United States Attorney General to re-enter the United
16 States. The Defendant's alien file contains an executed
17 warrant of removal or deportation dated March 13th, 2013, which
18 contained a photograph and fingerprint of the person deported
19 from the United States.

20 Furthermore, the Defendant's alien file contained a
21 copy of a Judgment & Commitment for a felony, to wit,
22 first-degree burglary and robbery with a dangerous weapon
23 issued in the general court of justice in the superior court
24 division in the state of North Carolina in Sampson County on
25 February 25th, 2008. Further, the Defendant's alien file

1 contained a copy of an emergency travel document issued by the
2 Consulate General of Guatemala on March 5th of 2013.
3 Subsequent to his deportation, Homar Perez Chavez entered the
4 United States on an unknown date at an unknown location without
5 being admitted or paroled after inspection by an immigration
6 officer at a designated port of entry and without permission by
7 the Department of Homeland Security.

8 A fingerprint specialist with U.S. Immigration and
9 Customs Enforcement Homeland Security Investigations examined
10 the fingerprint contained on the warrant of removal or
11 deportation executed on March 13th, 2013, and compared the
12 fingerprints to that of the individual located in Collier
13 County, Florida, on December 30th, 2017. The fingerprint
14 specialist determined that the fingerprints were made by the
15 same individual, Homar Perez Chavez. A search of the United
16 States Immigration and Customs Enforcement databases has
17 revealed that the Defendant had never received permission to
18 re-enter the United States from the United States Attorney
19 General or the Secretary for Homeland Security subsequent to
20 his deportation on March 13th of 2013.

21 THE COURT: Thank you, Ms. Viacava.

22 Mr. Rosenthal, any objection to that factual basis?

23 MR. ROSENTHAL: Your Honor, Mr. Perez Chavez is in
24 agreement with the factual basis only to the extent that it
25 states the essential elements of the offense.

1 THE COURT: I'm sorry. I didn't hear the last part.
2 You probably need to speak into the microphone a little bit.

3 MR. ROSENTHAL: I'm sorry.

4 Only to the extent that it states the essential
5 elements of the offense.

6 THE COURT: Oh, the elements.

7 All right. Mr. Chavez, let me ask you a few
8 questions then. If you could please answer them, and you can
9 explain anything else you want to explain.

10 At the time alleged in the indictment which was
11 December 30th, 2017, were you, in fact, an alien of the United
12 States or, that is, a citizen of Guatemala?

13 THE DEFENDANT: Yes.

14 THE COURT: And had you previously been deported or
15 removed from the United States on or about March 13th, 2013?

16 THE DEFENDANT: Yes.

17 THE COURT: And after that time that you were
18 deported, did you knowingly then re-enter or were found to be
19 voluntarily back in the United States?

20 THE DEFENDANT: Yes.

21 THE COURT: And did you do so without permission or
22 consent of the Attorney General of the United States or
23 Secretary of Homeland Security to apply for readmission to the
24 United States?

25 THE DEFENDANT: No.

1 THE COURT: Okay. Did you have consent to return to
2 the United States?

3 THE DEFENDANT: No.

4 THE COURT: All right. Then I do find a factual
5 basis for your plea.

6 Sir, are you pleading guilty freely and voluntarily?

7 THE DEFENDANT: Yes.

8 THE COURT: Are you pleading guilty because you are
9 guilty?

10 THE DEFENDANT: Yes.

11 THE COURT: Has anyone threatened you, forced you,
12 coerced you or intimidated you in any way about your decision
13 to plead guilty?

14 THE DEFENDANT: No.

15 THE COURT: Has anyone made any promises or
16 assurances to you of any kind to induce you to plead guilty?

17 THE DEFENDANT: No.

18 THE COURT: Are you relying on any agreement,
19 discussion, promise or understanding with anyone concerning
20 what sentence will be imposed if you plead guilty?

21 THE DEFENDANT: No.

22 THE COURT: Has anyone promised that you will receive
23 a light sentence or otherwise be rewarded for pleading guilty?

24 THE DEFENDANT: No.

25 THE COURT: Counsel, do you each assure the Court as

* * * *