

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted July 1, 2024*

Decided July 1, 2024

BeforeDIANE S. SYKES, *Chief Judge*THOMAS L. KIRSCH II, *Circuit Judge*JOSHUA P. KOLAR, *Circuit Judge*

Nos. 23-2763 & 23-2769

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,**v.*

ROBERTO BUSTOS-JIMENEZ,

*Defendant-Appellant.*Appeals from the United States District
Court for the Southern District of
Indiana, Indianapolis Division.

Nos. 1:21CR00332-001

1:13CR00187-001

James R. Sweeney II,
*Judge.***ORDER**

Roberto Bustos-Jimenez pleaded guilty to illegally reentering the United States as a previously removed noncitizen. At the same time, he admitted to violating the terms of supervised release associated with a prior conviction. After receiving his sentences, Bustos-Jimenez filed a notice of appeal in each case, and we consolidated the appeals. His appointed counsel asserts that the appeals are frivolous and moves to withdraw. *See*

Anders v. California, 386 U.S. 738, 744 (1967). Counsel's brief explains the nature of the case and raises potential issues that we would expect appeals like this to involve. Because the analysis appears thorough, and Bustos-Jimenez has not come forth with additional issues to raise on appeal, *see* CIR. R. 51(b), we limit our review to the subjects that counsel discusses. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

In September 2021, Bustos-Jimenez was investigated by Indiana law enforcement for dealing methamphetamine, and local authorities arrested him later that month. Officers of the U.S. Immigration and Customs Enforcement Agency confirmed that Bustos-Jimenez is a Mexican citizen who had been removed from the United States four times. His most recent removal had been just three months earlier, after he completed a 96-month sentence for illegally reentering the United States in 2013. He was still on supervised release for the 2013 conviction when he was arrested in 2021.

Bustos-Jimenez was charged with illegally reentering the United States as a previously removed noncitizen. *See* 8 U.S.C. § 1326(a). His probation officer also requested that the district judge revoke Bustos-Jimenez's supervised release for the 2013 conviction for: (1) failing to report to his probation officer upon reentering the United States; (2) committing the state crimes of intimidation and various misdemeanors; (3) committing the federal crime of illegally reentering the United States; and (4) committing the Indiana state crime of attempted dealing in methamphetamine.

Bustos-Jimenez later entered into an agreement with the government to plead guilty to the new illegal reentry charge. The agreement contained a broad waiver of his right to appeal "the conviction and sentence imposed on any ground." At the combined change-of-plea and sentencing hearing, after a detailed colloquy with Bustos-Jimenez, the district judge accepted the guilty plea.

The judge next addressed the revocation allegations, which were not covered by the plea agreement. After waiving his right to a preliminary hearing, *see* FED. R. CRIM. P. 32.1(b)(1)(A), Bustos-Jimenez admitted to the conduct underlying Violations 3 and 4 (committing the federal crime of illegally reentering the United States and the Indiana state crime of attempted dealing in methamphetamine). In exchange, the government agreed to dismiss the other two charged violations. The parties agreed that the reimprisonment range under the policy statements in Chapter 7 of the Sentencing Guidelines was 24 months, the statutory maximum under 18 U.S.C. § 3583(e)(3).

After hearing both parties' arguments about the appropriate sentences for the new illegal reentry conviction and revocation of supervised release, and confirming that

he had the discretion to make the sentences consecutive to each other and to Bustos-Jimenez's state conviction, the district judge imposed sentences. The judge discussed the sentencing factors under 18 U.S.C. § 3553(a), including Bustos-Jimenez's extensive and serious criminal history; his lack of respect for the law by repeatedly reentering the country illegally; the need to deter Bustos-Jimenez when previous sentences had not; and the need to protect the public. The judge sentenced Bustos-Jimenez to a within-guidelines sentence of 110 months on the illegal reentry conviction and a 24-month term for the supervised-release violations, to be served consecutive to each other and to his state sentence. Bustos-Jimenez also received three years' supervised release on the illegal reentry conviction and the statutory maximum of one year of supervised release on the supervised-release violations, with the terms of supervision to be served concurrently.

Counsel begins by considering whether Bustos-Jimenez could challenge his illegal reentry conviction and sentence and properly concludes that he could not. Counsel does not say whether Bustos-Jimenez wishes to challenge the validity of the plea. *See United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*, 287 F.3d 667, 670–71 (7th Cir. 2002). But the oversight is harmless because the district judge substantially complied with Rule 11 of the Federal Rules of Criminal Procedure, so a challenge to the validity of Bustos-Jimenez's plea would be pointless. *See Konczak*, 683 F.3d at 349. Bustos-Jimenez did not move in the district court to withdraw his guilty plea, so plain-error review applies. *United States v. Davenport*, 719 F.3d 616, 618 (7th Cir. 2013). And there was no error here: Bustos-Jimenez stated, under oath, that he understood the nature of the charges, the potential penalties, and the effects of his plea; that he agreed with the factual basis for the charge; that he understood that he was giving up his trial and appellate rights; and that his plea was voluntary. These statements under oath are presumed true, *see United States v. Barr*, 960 F.3d 906, 917 (7th Cir. 2020), and it would be frivolous to argue that accepting the plea was plain error.

It follows, as counsel correctly explains, that it would be frivolous to raise any challenge to Bustos-Jimenez's sentence. An appeal waiver "stands or falls" with the underlying guilty plea, *United States v. Nulf*, 978 F.3d 504, 506 (7th Cir. 2020), and here the plea is not subject to a colorable challenge on appeal. Further, no exception to the enforceability of the waiver could apply: The sentence did not exceed the statutory maximum of 20 years, 8 U.S.C. § 1326(b)(2), and the judge did not rely on any constitutionally impermissible factors in determining Bustos-Jimenez's sentence.

See Nulf, 978 F.3d at 507. Bustos-Jimenez's broad appeal waiver is therefore enforceable, and it covers any challenge to his sentence.

Counsel next turns to whether Bustos-Jimenez could challenge the revocation of his supervised release, which was not covered by the plea agreement and appeal waiver, and correctly determines he could not. Though a defendant does not have an unqualified constitutional right to counsel in revocation proceedings, *Gagnon v. Scarpelli*, 411 U.S. 778, 789–90 (1973), our practice is to apply the *Anders* safeguards, *United States v. Brown*, 823 F.3d 392, 394 (7th Cir. 2016). Once again, counsel does not inform us whether Bustos-Jimenez wishes to challenge the revocation of his supervision. *See United States v. Wheeler*, 814 F.3d 856, 857 (7th Cir. 2016). But again the omission is harmless because Bustos-Jimenez admitted the conduct underlying the violations, and there is no nonfrivolous argument for allowing him to withdraw his admissions. He voluntarily made those admissions under oath, with representation by counsel, at a hearing that complied with Rule 32.1(b)(2). *See United States v. Nelson*, 931 F.3d 588, 591 (7th Cir. 2019).

Counsel next rightly concludes that a challenge to Bustos-Jimenez's revocation sentence would be frivolous, beginning with the calculation of the reimprisonment range and permissible term of supervised release. Bustos-Jimenez affirmatively agreed that the reimprisonment range under the Chapter 7 Policy Statements was 24 months, so any challenge to that calculation is waived. *See United States v. Fuentes*, 858 F.3d 1119, 1121 (7th Cir. 2017). In any event, there was no error in the calculation. Bustos-Jimenez's violation for committing the Indiana state crime of attempted dealing in methamphetamine is a Class A violation, *see* U.S.S.G. § 7B1.1(a)(1)(A)(ii), and his criminal history category was VI, *see id.* § 7B1.4 cmt. n.1, which corresponded to a reimprisonment range of 33 to 41 months, *see id.* § 7B1.4(a). But because Bustos-Jimenez was on supervised release for illegally reentering the United States, a Class C felony, his reimprisonment range was statutorily capped at 24 months. *See* 18 U.S.C. § 3583(e)(3). Further, Bustos-Jimenez's term of supervised release was properly calculated as three years minus any term of reimprisonment imposed, *see id.* § 3583(b)(2), (h), so his one-year supervised release sentence also was within the statutory maximum.

Finally, counsel considers, and correctly rejects, an argument that Bustos-Jimenez's within-guidelines revocation sentence is substantively unreasonable. We review the reasonableness of a revocation sentence under a "highly deferential" standard, overturning it only if the sentence was "plainly unreasonable." *United States v. Childs*, 39 F.4th 941, 944–45 (7th Cir. 2022). Here, the judge considered the correct

reimprisonment range under the Guidelines; the statutory maximum; and the sentencing factors under 18 U.S.C. § 3553(a), including Bustos-Jimenez's criminal history and the need to deter criminal conduct, promote respect for the law, and protect the public. And the judge properly observed that he had discretion to determine whether to make the revocation sentence consecutive to Bustos-Jimenez's other sentences, *see* U.S.S.G. § 7B1.3(f); *United States v. Njos*, 68 F.4th 1060, 1065 (7th Cir. 2023), and appropriately exercised that discretion. This was more than enough to show that the revocation sentence was not plainly unreasonable. *See Childs*, 39 F.4th at 946.

Therefore, we GRANT counsel's motion to withdraw and DISMISS the appeals.