

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCT 17 2024

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUNIOR STANDLY MARTINEZ-
MARTINEZ,

Defendant - Appellant.

No. 23-2654

D.C. No.
2:22-cr-00574-JJT-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
John Joseph Tuchi, District Judge, Presiding

Argued and Submitted September 12, 2024
Phoenix, Arizona

Before: RAWLINSON and COLLINS, Circuit Judges, and FITZWATER, District
Judge.**

Junior Standly Martinez-Martinez (Martinez-Martinez), a citizen of
Honduras, appeals from the district court's denial of his motion to dismiss the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

APPENDIX A

indictment charging him with illegal reentry in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

“We review *de novo* a motion to dismiss an indictment under 8 U.S.C. § 1326 on the basis of a claimed due process defect in the predicate deportation proceeding.” *United States v. De La Mora-Cobian*, 18 F.4th 1141, 1145 (9th Cir. 2021) (citation omitted). “Mixed questions of law and fact . . . are also reviewed *de novo*, while the underlying facts are reviewed for clear error.” *Id.* (citations omitted).

1. Martinez-Martinez contends that the district court erroneously denied the motion to dismiss the indictment because “he [demonstrated] a due process right to collaterally attack the 1998 Removal Order.” “To prevail in a collateral attack on the underlying removal order in a motion to dismiss, [Martinez-Martinez] must, as a threshold matter, show that he exhausted his administrative remedies.” *United States v. Villavicencio-Burriel*, 608 F.3d 556, 559 (9th Cir. 2010) (citations omitted); *see also* 8 U.S.C. § 1326(d).¹

¹ “In a criminal proceeding under this section, [a non-citizen] may not challenge the validity of the deportation order . . . unless the [non-citizen] demonstrates that -- (1) the [non-citizen] exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the [non-citizen] of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.” 8 U.S.C. § 1326(d). The district court held that Martinez-Martinez did not satisfy the first two requirements, and it therefore did not address the third.

Martinez-Martinez has not met the first threshold requirement. Martinez-Martinez maintains that administrative remedies were unavailable to him because the withdrawal of his “appeal [was] the functional equivalent” of an invalid waiver. However, in *Villavicencio-Burruel*, we held that, by “declin[ing] to exercise [the] right” to appeal, Villavicencio failed to “comply with § 1326(d)(1)’s exhaustion requirement.” 608 F.3d at 560. We concluded that failure to file an appeal was not “tantamount to [him] waiving his appeal rights . . . and does not excuse the nonexhaustion.” *Id.*

Federal regulations in effect when Martinez-Martinez filed his withdrawal treated the withdrawal of an appeal the same as failure to file an appeal. *See* 8 C.F.R. § 3.4 (1999). Therefore, the reasoning of *Villavicencio-Burruel* forecloses Martinez-Martinez’s argument that the withdrawal of his appeal was the equivalent of an invalid waiver.

2. Contrary to Martinez-Martinez’s argument, he also failed to establish that he was deprived of an opportunity for judicial review. “Because he could have sought judicial review had he taken such an appeal, [Martinez-Martinez] was not deprived of the opportunity for judicial review and therefore did not satisfy § 1326(d)(2).” *United States v. Portillo-Gonzalez*, 80 F.4th 910, 920 (9th Cir. 2023) (alteration and internal quotation marks omitted). Thus, the district court did not err by denying the motion to dismiss the indictment because Martinez-Martinez

could not collaterally challenge the validity of the 1998 Removal Order. *See Villavicencio-Burruel*, 608 F.3d at 560; *see also United States v. Castellanos-Avalos*, 22 F.4th 1142, 1146 (9th Cir. 2022) (citation and quotation marks omitted) (“[A] failure to satisfy *any* of the three prongs [of § 1326(d)] dooms a collateral attack on a removal order.”) (emphasis in the original).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America

v.

Junior Standly Martinez-Martinez

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

No. CR-22-00574-001-PHX-JJT

Juan L. Rocha (CJA)
Attorney for Defendant

USM#: 94413-079

ICE# A043563484

THE DEFENDANT ENTERED A PLEA OF guilty on 7/17/2023 to Count 1 of the Information.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 8, U.S.C. §1326(a), Reentry of Removed Alien, with sentencing enhancement pursuant to Title 8, U.S.C. §1326(b)(1), a Class C Felony offense, as charged in Count 1 of the Information.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is committed to the custody of the Bureau of Prisons for a term of TWENTY-FOUR (24) MONTHS, with credit for time served. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of THREE (3) YEARS.

IT IS ORDERED dismissing the Indictment on motion of the United States.

IT IS FURTHER ORDERED terminating supervised release as unsuccessful in CR-22-50136-PHX-JJT.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: REMITTED FINE: WAIVED RESTITUTION: N/A

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

On motion of the Government, the special assessment is REMITTED.

SUPERVISED RELEASE

It is ordered that while on supervised release, the defendant must comply with the mandatory and standard conditions of supervision as adopted by this court, in General Order 17-18, which incorporates the requirements of USSG §§ 5B1.3 and 5D1.2. Of particular importance, the defendant must not commit

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another federal, state, or local crime during the term of supervision. Within 72 hours of sentencing or release from the custody of the Bureau of Prisons the defendant must report in person to the Probation Office in the district to which the defendant is released. The defendant must comply with the following conditions:

MANDATORY CONDITIONS

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted.
- 3) You must refrain from any unlawful use of a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted. Unless suspended by the Court, 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.

STANDARD CONDITIONS

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of sentencing or your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- 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

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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.

SPECIAL CONDITIONS

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

- 1) If deported, you must not re-enter the United States without legal authorization.

THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter, with limited exceptions as stated in the plea agreement. The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons.

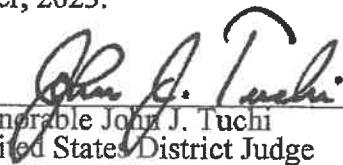
The defendant is remanded to the custody of the United States Marshal.

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Date of Imposition of Sentence: **Monday, September 25, 2023**

Dated this 25th day of September, 2023.


Honorable John J. Tuchi
United States District Judge

RETURN

I have executed this Judgment as follows:

defendant delivered on _____ to _____ at _____, the institution
designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

United States Marshal

By: _____ Deputy Marshal

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JUNIOR STANDLY MARTINEZ-
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Defendant - Appellant.

No. 23-2654

D.C. No.
2:22-cr-00574-JJT-1
District of Arizona,
Phoenix

ORDER

Before: RAWLINSON and COLLINS, Circuit Judges, and FITZWATER, District Judge.*

The panel voted to deny the Petition for Panel Rehearing.

Judges Rawlinson and Collins voted to deny, and Judge Fitzwater recommended denying, the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Defendant-Appellant's Petition for Panel Rehearing and Suggestion for Rehearing En Banc, filed October 23, 2024, is DENIED.

* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

APPENDIX C