UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-5708

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PAUL V. VILLARREAL,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
SA 92 CR 170 1

June 2, 1993

Before POLITZ, Chief Judge, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Paul V. Villarreal appeals his conviction and sentence, contending that his guilty plea was invalid. Because the district court erred by failing to impose the mandatory three-year term of supervised release, we modify the sentence to conform to the statutory prerequisites, and remand to the district court for correction of the judgment and commitment order. We affirm the conviction and sentence in all other respects.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

Villarreal pleaded guilty to Count I of a two-count indictment charging him with two instances of distributing cocaine, in violation of 21 U.S.C. § 841(a)(1) (1988). *See* TAPE No. 142, 09:40:20-09:42:36, 09:43:18-09:43:23 (Jul. 28, 1992); Record on Appeal at 13, 50-51. Pursuant to the plea agreement, the government successfully moved to dismiss Count II. *See* Tape No. 187B, 02:38:02-02:38:11 (Oct. 1, 1992); Record on Appeal at 13.

Before accepting Villarreal's plea of guilty at his rearraignment hearing, the district court explained to Villarreal that his guilty plea would subject him to a maximum of twenty years imprisonment, up to a $1 million fine, to a $50.00 special assessment, and up to a three-year term of supervised release. *See* Tape No. 142, 09:38:03-09:38:22 (Jul. 28, 1992). The district court explained the meaning of supervised release to Villarreal, and informed him that he could face additional imprisonment if his supervised release was revoked. *See id.* 09:38:25-09:38:50; Brief for Villarreal at 2.

The district court sentenced Villarreal to 168 months imprisonment, followed by five years supervised release, and ordered Villarreal to pay a special assessment of $50.00. *See* Tape No. 187B, 02:36:51-02:37:34 (Oct. 1, 1992); Record on Appeal at 8-11. Villarreal appeals.

II

A

The government concedes that the district court erred in sentencing Villarreal to five years supervised release. *See* Brief for Government at 4. Section 841(b)(1)(C) requires a minimum of three years supervised release. *See* 21 U.S.C. § 841(b)(1)(C) (1988). Because violation of § 841(b)(1)(C) is a class "C" felony, 18 U.S.C. § 3559(a)(3) (1988), the statutory maximum term of supervised release is also three years. 18 U.S.C. § 3583(b)(2) (1988). Because both the statutory maximum and statutory minimum of supervised release for a violation of § 841(a)(1) is three years, we hold that the district court erred in sentencing Villarreal to five years supervised release. *See United States v. Gracia,* 983 F.2d 625, 630 (5th Cir. 1993) (district court erred in imposing five years supervised release for violation of 21 U.S.C. § 841(b)(1)(C), a class "C" felony).

B

Villarreal contends that his guilty plea is invalid and his conviction must be reversed because the district court failed to comply with the requirements of Fed. R. Crim. P. 11(c)(1). Villarreal claims that the district court failed to explain the minimum mandatory term of supervised release and failed to inform him of the number of years of imprisonment he faced if his supervised release was revoked.

There are three core concerns under Rule 11 that the district court must address during the plea colloquy: (1) whether the

guilty plea was voluntary; (2) whether the defendant understands the nature of the charges; and (3) whether the defendant understands the consequences of the guilty plea. *United States v. Hekimain,* 975 F.2d 1098, 1100 (5th Cir. 1992). The defendant's substantive rights are affected when a district court completely fails to address one of these core concerns, and Rule 11 mandates automatic reversal. *Id.* A partial failure to address a core concern, however, does not require automatic reversal. *Id.* If a district court only partially fails to address a core concern, we may review the court's failure for harmless error if (1) the aggregate maximum period of imprisonment under the actual prison sentence and supervised release does not exceed the statutory maximum explained to the defendant, and (2) the potential restraint on the defendant's liberty is less than the statutory maximum term of imprisonment. *United States v. Bachynsky,* 934 F.2d 1349, 1360 (5th Cir.) (en banc), *cert. denied,* ___ U.S. ___, 112 S. Ct. 402, 116 L. Ed. 2d 351 (1991); *United States v. Garcia-Garcia,* 939 F.2d 230, 232 (5th Cir. 1991); *see also United States v. Bounds,* 943 F.2d 541, 545 (5th Cir. 1991) (discussing holding in *Bachynsky*). In determining whether or not there is harmless error, we will focus on "whether the defendant's `substantive' rights were affected." *Bachynsky,* 934 F.2d at 1355, 1360. In doing so, we must "examine the facts and circumstances of the instant case to see if the district court's flawed compliance with [Rule 11] may reasonably be viewed as having been a material factor affecting [the defendant's] decision to plead guilty." *Id.*

The district court informed Villarreal that his term of imprisonment would be followed by a maximum of three years supervised release. *See* Tape No. 142, 9:38:20 (Jul. 28, 1992). The district court also explained to Villarreal (1) the meaning of supervised release, (2) that his supervised release could be revoked, and (3) that he could face additional imprisonment if his supervised release was revoked.[1] *Id.* The district court failed, however, to inform Villarreal that the minimum term of supervised release was three years and that he could be imprisoned for an additional two years if supervised release was revoked, without credit for any term already served under supervised release. *See* 18 U.S.C. § 3583(e)(3) (1988) (revocation of supervised release for Class C felon results in maximum of two years imprisonment). The district court's omission in the plea colloquy was only a partial failure to address a core concern of Rule 11. *See United States v. Arlen,* 947 F.2d 139, 146 (5th Cir. 1991) (district court only partially failed to address core concern where district court advised defendant that his term of imprisonment would be followed by three years supervised release, but failed to tell him that he

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[1] The district court stated:

> There is also a term of supervised release of up to three years that would apply in your case[]. This means that you'll probably go off and do some time, and when you get out, for up to three years, you're going to have to be reporting to a probation office. And if you mess up, you don't show up when you're supposed to, you get on drugs, you get into some sort of trouble, then you could find yourself back here before me. I could take away that supervised release, and make you go back to jail and serve more time. Do you understand?

Tape No. 142, 9:38:20-9:38:50 (Jul. 28, 1992).

would face additional imprisonment if supervised release was revoked), *cert. denied,* ___ U.S. ___, 112 S. Ct. 1480, 117 L. Ed. 2d 623 (1992); *United States v. Bachynsky,* 934 F.2d at 1360 (holding that district court only partially failed to address core concern where district court totally failed to mention or explain effect of supervised release to defendant, and stating that "[s]upervised release is only one *component* of one *element* of a *core concern,* not a separate and distinct core concern in and of itself").

Villarreal's aggregate maximum period of imprisonment under his actual sentence of imprisonment and supervised released is less than the statutory maximum that he could have received, as properly explained to him by the district court during the plea colloquy. The aggregate maximum period of incarceration that Villarreal faces under his actual sentence is 16 years (14 years incarceration plus two years if his supervised release is revoked). In addition, under *Bachynsky*'s "worse case" scenario, Villarreal would (1) serve every day of his 168 month prison term, (2) have his supervised release revoked and be returned to prison on the last day of his supervised release term, and (3) serve every day of his additional two-year prison time after revocation of his supervised release. *See Bachynsky,* 934 F.2d at 1353. If so, under Villarreal's sentence as modified by this Court, the potential restraint on Villarreal's liberty would be 19 years. Because both the aggregate maximum period of incarceration under the actual sentence and the potential restraint on Villarreal's liberty is less than the

statutory maximum term explained by the district court to Villarreal,[2] we review the district court's partial failure to address one of Rule 11's core concerns for harmless error.

Although Villarreal only completed school through the eighth grade, he was 38 years old, was born and raised in the United States, and had some vocational education. Villarreal could communicate effectively, *see* Presentence Investigation Report ("PSR") at 11 (sealed); was represented by competent counsel throughout the proceedings, *see* Record on Appeal at 46; and negotiated his plea agreement, *see id.* at 13. Furthermore, the district court explained to Villarreal that he could receive a maximum of three years supervised release, and that he could face additional imprisonment if his supervised release was revoked. Villarreal failed to object to the supervised release term, either in the presentence report or after sentence was imposed. In light of all of the facts and circumstances, we conclude that Villarreal's substantive rights were not affected by the district court's error and that the district court's omission was not a material factor affecting Villarreal's decision to plead guilty. *Cf. Bachynsky,* 934 F.2d 1349 (5th Cir. 1991) (holding that district court's failure to mention or explain the effects of supervised

[2] Villarreal argues that under the worst case scenario, the potential restraint on his liberty is greater than the statutory maximum. *See Brief for Villarreal at 6.* In calculating the aggregate maximum period of incarceration that he faces, Villarreal adds in five years supervised release. *See id.* Because the five year term of supervised release exceeded the term authorized by law (three years), and we are modifying the district court's judgment as a result, Villarreal's calculation is not dispositive.

release during plea colloquy was harmless error where defendant was highly educated, represented by competent counsel, engaged in close contact with counsel, and did not object to PSR's mention of supervised release). Therefore, the district court's partial failure to address a core concern of Rule 11 was harmless error.

III

For the foregoing reasons, the sentence of the district court is **MODIFIED** to impose a three-year term of supervised release.[3] We **AFFIRM** the district court's judgment as modified, and **REMAND** to the district court for correction of the judgment and commitment order.

[3] In *Gracia,* "in the sake of judicial economy," we merely modified the district court's sentence to impose three years of supervised release instead of remanding for resentencing, because the three year term was both the statutory minimum and statutory maximum. *See id.,* 983 F.2d at 630.