

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EVELYN BURKE,	:	
	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	No. 04-4404
	:	
PEOPLE OF THE STATE OF NEW YORK,	:	
	:	
Respondent.	:	
	:	

MEMORANDUM

ROBERT F. KELLY, SR. J.

OCTOBER 25, 2004

Presently before this Court is Petitioner Evelyn Burke’s Petition for a Writ of Error *Coram Nobis* and Motion for Emergency Stay of Removal. This is Petitioner’s fourth Petition to appear before this Court.

Petitioner is a native and citizen of Jamaica. Petitioner entered the United States on November 18, 1968 as an F1 nonimmigrant student. Petitioner was allowed to remain in the United States for a period of up to one year due to his F1 status. Despite the expiration of his legal status, Petitioner has never left the United States, thereby overstaying his visa without authorization. In addition to his overstay, Petitioner has a lengthy criminal record including convictions for assault, criminal possession of marijuana, attempted bribery of a public servant, attempted criminal mischief, criminal possession of a controlled substance, petit larceny, possession of stolen property, rape, and sodomy.

Petitioner was in Immigration and Naturalization Service (“INS”) custody twice,

in 1975 and 1979, before being granted voluntary departure in lieu of deportation. Petitioner was to have departed the country before August 9, 1980, or be subject to an Order of Deportation. Petitioner failed so to do and, as a result, the Order of Deportation against him became final on September 9, 1980. Petitioner continued to illegally remain in the United States and was convicted of rape and sodomy charges in 1989 in the State of New York. In November 2000, Petitioner was returned to INS custody after serving his sentence for the rape and sodomy convictions. Upon being taken into INS custody, Petitioner began seeking relief from deportation.

Petitioner filed his first petition for writ of habeas corpus in this District on March 15, 2001, challenging his deportability and continued detention by the INS.¹ The case was assigned civil action number 01-1224. After review of the petition and the response thereto, this Court concluded that it was without jurisdiction to review a final order of removal issued by the INS, and that the continued detention of the Petitioner was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The Petition was accordingly dismissed by an Order from this Court dated June 27, 2001. Petitioner noticed his appeal on July 2, 2001. The United States Court of Appeals for the Third Circuit affirmed this Court's decision on March 6, 2002.

On May 19, 2002, Petitioner filed a motion with the Immigration Judge ("IJ"), requesting that his removal proceeding be reopened to allow him to file a claim for relief under the United Nations Convention Against Torture ("UNCAT"). On May 30, 2002, the IJ granted

¹ The Immigration and Naturalization Service is now part of the Department of Homeland Security. The Service was split into the Citizenship and Immigration Services Bureau and the Bureau of Immigration and Customs Enforcement.

Petitioner's motion and vacated the order granting voluntary departure with an alternative order for deportation. On July 24, 2002, Petitioner was served with a Notice to Appear, charging him with removability or deportability on the basis of his convictions for rape, petit larceny and criminal possession. On August 27, 2002, additional grounds of removability were brought including Petitioner's convictions for possession of crack cocaine and marijuana.

While the above was pending, on May 20, 2002, Petitioner filed his second petition for writ of habeas corpus with the United States District Court for the Eastern District of New York, challenging his final order of deportation on the grounds that he was eligible for relief under UNCAT, and requesting a stay of removal. The Eastern District of New York granted Petitioner a stay of removal.

On December 2, 2002, the Eastern District of New York transferred Petitioner's second petition to this Court based upon venue grounds. The court also ordered that the stay of removal remain in place until further order of the transferee court. Upon transfer to this Court, the case was assigned civil action number 03-379. Petitioner appealed the transfer decision to the United States Court of Appeals for the Second Circuit on December 16, 2002. In a letter dated February 3, 2003, Petitioner requested that this Court not take action on the second petition until his appeal to the Second Circuit was concluded. The Second Circuit dismissed Petitioner's appeal on May 16, 2003, on the grounds that it lacked jurisdiction because a district court's order to transfer a case is not an appealable final order. This Court was not informed of that decision until August 24, 2004.

On January 22, 2003, the IJ found Burke ineligible for relief from removal on the basis of his drug and rape convictions, which the IJ found to be particularly serious. The IJ also

found that Petitioner had not shown he was eligible for deferral of removal under UNCAT, and ordered Petitioner to be removed from the United States. The IJ set a parole bond of \$35,000, which was appealed by the Department of Homeland Security to the Board of Immigration Appeals (“BIA”). On May 12, 2003, the BIA vacated the bond order and ordered that Petitioner be held without bond as subject to mandatory detention under section 236(c)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c)(1).² On June 18, 2003, the BIA affirmed the IJ’s decision denying Petitioner deferral of removal under UNCAT.

Petitioner’s third petition for writ of habeas corpus was filed in this District on June 16, 2003, seeking review of Petitioner’s status as a mandatory detainee and review of the BIA’s decision to vacate his bond order. The case was assigned civil action number 03-3640. The petition was denied on July 17, 2003, and this Court’s decision was affirmed by the Third Circuit on June 25, 2004.

On September 9, 2004, this Court considered Petitioner’s second petition for writ of habeas corpus and issued an Order denying the petition. This Court’s Order of September 9, 2004, also revoked the stay of removal issued by the Eastern District of New York. Petitioner filed his notice of appeal to the Third Circuit on September 21, 2004. That appeal is still pending.

In the hope of securing another stay of removal, Petitioner filed the current

² There was an intervening change in case law regarding the constitutionality of mandatory detention under the Immigration and Nationality Act. In making a decision to set bond, the IJ relied upon Patel v. Zemski, 275 F.2d 299 (3d Cir. 2001), which held the mandatory detention requirement to be violative of due process and unconstitutional. However, Patel has been abrogated by Demore v. Kim, 538 U.S. 510 (2003), where the Court held that the practice was constitutional.

petition, his fourth, in the Middle District of Pennsylvania, seeking a writ of error *coram nobis* and emergency stay of removal. The Middle District of Pennsylvania promptly transferred the case to this Court as the proper venue for Petitioner's motion for stay of removal.

This Court lacks the authority to grant Petitioner a writ of error *coram nobis*. The writ is an extraordinary remedy, and in order to qualify for relief under *coram nobis* after a sentence has been served, the petitioner must show exceptional circumstances and continuing collateral disadvantages. Obado v. New Jersey, 328 F.3d 716, 718 (3d Cir. 2003). As it is a unique remedy disfavored in the federal courts, *coram nobis* is not available in a federal court as a means of attack on a state criminal conviction. See id. Petitioner must, therefore, seek relief in the courts of the State of New York.³ As this Court does not have the authority to grant a writ of error *coram nobis*, the case will be dismissed. Furthermore, it appearing from the record that Petitioner has not raised a non-frivolous claim for judicial review, the motion for stay of removal will be denied.

An appropriate Order follows.

³ A review of the record shows that Petitioner has, in fact, been rather busy in the courts of the State of New York. In addition to his regular appeals of his 1989 convictions for rape and sodomy, Petitioner has filed four petitions for a writ of error in the New York courts, appealing three of them all the way to the New York Court of Appeals. His most recent petition for writ of error *coram nobis* was denied by the Supreme Court of Kings County on March 26, 2004. (Pet. Ex. A & B).

