

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

| | | |
|--------------------------|---|-----------------|
| UNITED STATES OF AMERICA |) | |
| |) | Criminal Action |
| |) | No. 03-cr-00388 |
| |) | |
| vs. |) | |
| |) | |
| LERONE ELLIOTT, |) | |
| |) | |
| Defendant-Petitioner |) | |

O R D E R

NOW, this 12th day of July, 2010, upon consideration of the Petition for Writ of Error Coram Nobis filed by defendant-petitioner Lerone Elliott on October 31, 2007 (Document 46), together with defendant's Memorandum of Law in Support of Writ of Error Coram Nobis and in Response to Government's Motion to Dismiss, which memorandum was filed February 27, 2008 (Document 49); upon consideration of the Government's Motion to Dismiss Petition for Writ of Error Coram Nobis, which motion was filed February 15, 2008 (Document 48); and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that the Government's Motion to Dismiss Petition for Writ of Error Coram Nobis is granted.

IT IS FURTHER ORDERED that defendant's Petition for Writ of Error Coram Nobis is denied.

IT IS FURTHER ORDERED that a certificate of appealability is denied.

IT IS FURTHER ORDERED that the Clerk of Court shall continue to mark this case closed for statistical purposes.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

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LERONE ELLIOTT,)
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) Defendant-Petitioner
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* * *

APPEARANCES:

ANNE WHATLEY CHAIN, ESQUIRE
Assistant United States Attorney
On behalf of the United States of America

STEVEN A. MORLEY, ESQUIRE
On behalf of Defendant-Petitioner

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

The matter before the court is the Petition for Writ of Error Coram Nobis filed by defendant-petitioner Lerone Elliott on October 31, 2007 (Document 46). Also before the court is the

Government's Motion to Dismiss Petition of Error Coram Nobis, which motion was filed February 15, 2008 (Document 48).¹

On February 27, 2008 defendant filed his Memorandum of Law in Support of Writ of Error Coram Nobis and in Response to Government's Motion to Dismiss (Document 49). For the following reasons, I grant the government's motion to dismiss and deny defendant's petition.

PROCEDURAL HISTORY

Based upon defendant's petition; the government's motion to dismiss; the briefs of the parties; Indictment; record papers; docket entries; Guilty Plea Agreement; notes of testimony of the evidence suppression hearing, guilty plea, and sentence; the trial court Judgment in a Criminal Case dated March 18, 2004; and the Third Circuit Judgment and non-precedential Opinion dated September 22, 2005, the pertinent procedural history of this matter is as follows.

Defendant-petitioner Lerone Elliott is a native and citizen of Jamaica who alleges that he entered the United States as a lawful permanent resident on April 20, 1988 when he was ten years old.

¹ Although the title of the government's document is "Goernment's Motion to Dismiss Petition of Error Coram Nobis", it is actually both a motion to dismiss and a memorandum in support of the motion.

On September 27, 1996 defendant was found guilty of possession with intent to distribute a quantity of cocaine by the Superior Court of Hunterdon County, New Jersey. Subsequently, he was sentenced to a five-year prison term.

As a result of that conviction for a drug-related offense which also constituted an aggravated felony, the former United States Immigration and Naturalization Service ("INS") initiated removal proceedings against him at the conclusion of his prison sentence. On April 25, 2000 an immigration judge sitting at the Federal Detention Center in Oakdale, Louisiana ordered defendant removed from the United States.

Defendant was deported to Jamaica on August 30, 2000.

At that time he was informed that it was illegal to return to the United States without the express permission of the Attorney General. Nevertheless, on May 14, 2003, defendant was found in the United States, having re-entered without permission from the Attorney General of the United States or his successor, the Secretary of the Department of Homeland Security, in violation of 8 U.S.C. § 1326.

Defendant's presence came to the attention of the authorities after he was stopped by a local Pennsylvania police officer on suspicion of careless, and possibly intoxicated, driving. On

June 12, 2003, defendant was indicted in the United States District Court for the Eastern District of Pennsylvania for that illegal re-entry.

Defendant moved to suppress the identification evidence obtained by the officer at the scene, contending that the stop was racially motivated. I denied the motion, finding that the officer had conducted a lawful investigative stop pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), because he had reasonable suspicion that defendant had violated Pennsylvania statutes concerning Careless driving, 75 Pa.C.S.A. § 3714, and Driving under the influence of alcohol or other controlled substances, 75 Pa.C.S.A. § 3802. I also found that the officer was unaware of defendant's race before stopping him.

Thereafter, on August 20, 2003, defendant pled guilty before me to a single count of illegal reentry after removal, in violation of 8 U.S.C. § 1326. Defendant's Guilty Plea Agreement included a waiver of his appellate rights.

On December 22, 2003 while defendant was awaiting sentencing on his illegal re-entry charge, his New Jersey conviction for

possession with intent to deliver was vacated and the state-court indictment dismissed.

On March 12, 2004, at defendant's sentence hearing, he argued that he was entitled to a downward departure under United States Sentencing Guidelines section 5K2.0 based on his cultural assimilation. The government argued that his cultural assimilation was not so exceptional as to warrant a departure. Defendant also argued that he was entitled to a downward departure because his New Jersey drug conviction was vacated on racial profiling grounds after his illegal re-entry. The government responded that no departure was warranted on that ground because there was no individualized determination by the New Jersey courts that defendant had been subjected to racial profiling.

Because defendant's underlying conviction had been vacated, I granted defendant's motion for downward departure from the sentence guideline range. The applicable guideline range was 37 to 46 months. I sentenced defendant to 17 months incarceration, a substantial downward departure from his guideline range; a three-year term of supervised release; and a \$100 special assessment.

On March 18, 2004, I entered formal Judgment in a

Criminal Case, filed March 19, 2004, and entered on the docket on March 22, 2004. On March 18, 2004 defendant filed a Notice of Appeal from his conviction and sentence.

On July 30, 2004, defendant filed a motion to reopen the removal proceedings, alleging that the vacation of the underlying criminal conviction upon which removal was predicated warranted vacating the removal order. The motion was denied on September 23, 2004 by Immigration Judge John A. Duck. Judge Duck found the motion jurisdictionally barred because the removal Order had already been executed.

Defendant completed his federal sentence and, at its conclusion, was taken into the custody of the Department of Homeland Security - Immigration and Customs Enforcement ("ICE") for purposes of removal. Subsequently, defendant was removed from the United States by ICE through the prior removal Order which had been issued previously by the immigration court in Oakdale, Louisiana on April 25, 2000. He currently resides in Jamaica. On September 22, 2005 the United States Court of Appeals for the Third Circuit entered its Judgment and Opinion affirming my Judgment entered March 22, 2004.

The Third Circuit concluded that the evidence demonstrates that the Pennsylvania police officer had a reasonable basis for

stopping defendant's car in light of the officer's testimony that the driver of the automobile had violated Pennsylvania's careless driving statute. The Third Circuit also agreed with my conclusion that there is no evidence to support the suggestion that the stop was racially motivated.

Defendant's appellate counsel, Robert Epstein, Esquire, filed a brief with the Third Circuit pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In his Anders brief, defense counsel states that there are no non-frivolous issues to be raised on appeal and that there is no basis to challenge the appeal waiver. The Third Circuit Court of Appeals agreed. Under the circumstances, it gave effect to defendant's waiver of his appellate rights and granted former defense counsel's motion to withdraw because he fulfilled his obligations under Anders.

On October 31, 2007 defendant filed his within Petition for Writ of Error Coram Nobis pursuant to the All Writs Act, 28 U.S.C. § 1651(a) by and through new counsel, Steven A. Morley, Esquire. On February 15, 2008 the government filed its within motion to dismiss defendant's petition. On February 27, 2008 defendant filed his Memorandum of Law in Support of Writ of Error Coram Nobis and in Response to Government's Motion to Dismiss.

CONTENTIONS OF THE PARTIES

Defendant's Contentions

Defendant's main contention in support of his request to vacate his conviction is that he is suffering a miscarriage of justice as a result of his federal conviction and deportation Order. He contends that his removal Order was based on a constitutionally defective conviction (his underlying New Jersey conviction), and is therefore invalid. He avers that an invalid removal cannot support a conviction for illegal re-entry after removal.

In the alternative, defendant argues that his trial counsel, Assistant Federal Defender Benjamin B. Cooper, was ineffective for failing to seek dismissal of the federal Indictment after the 1997 New Jersey conviction was vacated. More specifically, defendant contends that a writ of error coram nobis is the proper relief under the All Writs Act, 28 U.S.C. § 1651(a).

He avers that his federal conviction should be vacated because he has no other remedy because the immigration laws

preclude him from challenging his executed removal Order, and he can no longer file a habeas corpus motion under 28 U.S.C. § 2255, nor can he file an appeal to the Third Circuit.

He contends that his conviction has adverse consequences, specifically removal, which permanently separate him from his family, friends, and life in the United States.

Defendant further contends that his deportation is the result of a fundamental error, arguing that the sole basis for the removal Order was his New Jersey conviction which has since been vacated because of constitutional error, therefore rendering his removal invalid. He argues that enforcing an invalid removal is a fundamental deprivation of substantive liberty because he should have never been removed in the first place.

He also contends that any waiver in his plea agreement of his right to bring a collateral attack should not be enforced because the consequences of the waiver are so grave. Specifically, he avers that enforcement of the waiver has resulted in his being wrongfully stripped of his right to live in the United States.

In the alternative, he argues that as a result of the ineffective assistance of trial counsel, he did not enter such a waiver knowingly because he did not fully understand

the term "collateral" appeal. He further asserts that he did not understand that a waiver of all collateral attacks would bar him

from bringing any "form of litigation that might correct a fundamental error."

Therefore, defendant argues that vacating his federal guilty plea and conviction is necessary to prevent a miscarriage of justice.

Government's Contentions

The government contends that defendant's Petition should be dismissed because in his plea agreement, defendant waived his right to appeal and collaterally attack his conviction and sentence. The government argues that because it did not appeal my sentence, defendant's plea agreement limits defendant's appeals to (1) denial of his suppression motion; (2) a sentence exceeding the statutory maximum; and (3) an erroneous upward departure from the applicable sentencing guideline range. The government contends that because none of those factors are present, no miscarriage of justice has occurred and no relief should be granted.

Specifically, the government contends that because

defendant knowingly and voluntarily waived his appeal rights, he cannot appeal even meritorious claims. Moreover, the government argues that defendant's "fundamental error" argument is frivolous because defendant's conviction for illegal re-entry was not based on his New Jersey drug conviction, as defendant contends.

Rather, the government contends that the New Jersey conviction was presented only as sentencing evidence. It is not an element of the offense of "illegal re-entry after removal".² Furthermore, the government avers that defendant's deportation from his family and friends is not a collateral consequence of his federal conviction. Instead, it is a consequence of his underlying April 25, 2000 removal Order, which defendant admits was properly executed, and therefore he is still subject to it.

The government argues that the defense does not present an allegation of an absence of jurisdiction, an illegal sentence, or any other miscarriage of justice. Rather, it is a routine claim for collateral relief that is foreclosed by the plea agreement.

Finally, the government contends that defendant's claim

² The government also argues that the New Jersey conviction was not vacated because of constitutional violations, as defendant claims, but was dismissed by the prosecution before any judicial opinion was issued.

of ineffective assistance of counsel is not a proper basis to invalidate the appellate waiver because defendant is not alleging that his trial counsel was ineffective in negotiating the plea agreement.

Because I agree with the government that defendant waived his rights to all collateral appeals, including this Petition for Writ of Error Coram Nobis, I dismiss the petition without addressing the merits of defendant's claims.

DISCUSSION

The Writ of Error Coram Nobis is an extraordinary remedy which is used when a conviction has resulted in a complete miscarriage of justice. United States v. Stoneman, 870 F.2d 102, 105-06 (3d Cir. 1989)(citing United States v. Cariola, 323 F.2d 180, 184 (3d Cir. 1963); Davis v. United States, 417 U.S. 333, 346-47, 94 S.Ct. 2298, 2305 41 L.Ed.2d 109, 119 (1974)). The writ is only available after a defendant's sentence is served if he is suffering from continuing consequences because of an "invalid conviction." United States v. Morgan, 346 U.S. 502, 512-13, 74 S.Ct. 247, 253, 98 L.Ed. 248, 257 (1954).

The writ is appropriate to correct errors where no other remedy was available at the time of trial and defendant has "sound reasons" for not seeking earlier relief. Id. at 512,

74 S.Ct. at 253, 98 L.Ed. at 257. The writ is also an appropriate form of redress when the error is of a fundamental character. Cariola, 323 F.2d at 184.

A Petition for Writ of Error Coram Nobis is a collateral appeal of a conviction. See United States v. Gross, 614 F.2d 365, 368 (3d Cir. 1980). A plea agreement which waives the right to all collateral appeals is enforceable so long as it was entered into knowingly and voluntarily. United States v. Khattak, 273 F.3d 557, 562 (3d Cir. 2001).

It is the role of the sentencing judge to make certain that defendant fully understands the rights he is giving up in his plea agreement. Id. at 563. Federal Rule of Criminal Procedure 11(b)(1)(N) provides:

Before accepting a plea of guilty...the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands the following: the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

Before invalidating a waiver, the court will consider the following factors:

[T]he clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue,

a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.

Khattak, 273 F.3d at 563 (citing United States v. Teeter, 273 F.3d 14, 25-26 (1st Cir. 2001)).

Where a defendant has waived all of his rights to a collateral appeal in a written guilty plea agreement, he must prove one of four scenarios for his waiver to be invalid: (1) his sentence exceeded the statutory maximum; (2) the sentencing judge erroneously departed upwards from the sentence guidelines; (3) suppression issues were decided erroneously; or (4) some other extraordinary injustice has occurred. United States v. Lockett, 406 F.3d 207, 210 (3d Cir. 2005).

In this case, defendant signed a written Guilty Plea Agreement on August 20, 2003. I accepted defendant's guilty plea and approved the Guilty Plea Agreement at a change of plea hearing that same date.

In his written Guilty Plea Agreement, defendant waives all of his rights to file a collateral appeal. Specifically, paragraph 9 of the agreement states that

the defendant voluntarily and expressly waives all

rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law. The parties agree that in entering this agreement, the defendant reserves the right to appeal the Court's ruling on the defendant's pre-trial motion to suppress.³

In addition, in the written Guilty Plea Agreement, defendant gives up some, but not all, of his rights to file a direct appeal. If the government appeals from the sentence, then the defendant may file a full direct appeal from his sentence.⁴ However, if the government does not appeal, defendant's right to file a direct appeal is partially limited by the terms of his plea agreement.⁵

Specifically, paragraph 9b. of the Guilty Plea Agreement provides:

b. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:

1. the district court erred in denying

³ Paragraph 9b. of the Guilty Plea Agreement clarifies that the right which defendant reserved was the right to file a direct appeal from my ruling denying the defendant's suppression motion, not a collateral appeal.

⁴ Guilty Plea Agreement, paragraph 9a.

⁵ Guilty Plea Agreement, paragraph 9b.

the defendant's pretrial motion to suppress;

2. the defendant's sentence exceeds the statutory maximum; or
3. the sentencing judge erroneously departed upward from the otherwise applicable sentencing guideline range.

If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

The plea agreement further indicates that defendant is satisfied with the legal representation provided by his lawyer; that he and his lawyer have fully discussed the plea agreement; and that defendant is agreeing to plead guilty because he admits that he is guilty.⁶

Moreover, at the August 20, 2003 change of plea hearing, defendant testified that Attorney Cooper had explained the charges, his trial rights, and the rights he was giving up by pleading guilty.⁷ Defendant further testified that he had read the Guilty Plea Agreement, understood its contents, and signed it

⁶ Guilty Plea Agreement, paragraph 10.

⁷ Notes of Testimony of the sentence hearing conducted on August 20, 2003 before me in Allentown, Pennsylvania, styled "Hearing before the Honorable James Knoll Gardner[,] United States District Judge" ("N.T. 8/20/03"), at pages 7-8.

voluntarily.⁸

Defendant also testified that he was satisfied with his attorney's assistance:

THE COURT: Did your lawyer answer all of your questions to your satisfaction?

THE DEFENDANT: Yes.

THE COURT: Did you have enough time with Attorney Cooper to discuss your case and your plea agreement?

THE DEFENDANT: Plenty of time.

THE COURT: Are you satisfied with the services of Mr. Cooper as your attorney?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied that Mr. Cooper has given you effective assistance as your lawyer in this case?

THE DEFENDANT: Yes.

THE COURT: So far, has your lawyer done everything for you that you had wanted him to do?

THE DEFENDANT: Yes.⁹

⁸

N.T. 8/20/03 at page 8.

⁹

N.T. 8/20/03 at pages 7-9.

Assistant United States Attorney Anne Whatley Chain thoroughly summarized all the terms of defendant's written Guilty Plea Agreement.¹⁰ Following this summary, defendant testified that Attorney Chain correctly and completely summarized the terms of the plea agreement, and that he heard, understood, and agreed with all of the terms of the agreement.¹¹

Moreover, during the change of plea hearing, I explained to defendant the consequences of his plea agreement. This explanation included the possibility of deportation as a result of his plea,¹² his relinquishment of the right to file a collateral appeal, and his partial relinquishment of the right to file a direct appeal.¹³ Defendant testified that he understood all of these consequences.¹⁴

Thus, it is clear from the record, as defendant averred under oath, that he understood and agreed to all of the provisions of his Guilty Plea Agreement, including his

¹⁰ N.T. 8/20/03 at pages 9-12.

¹¹ N.T. 8/20/03 at page 13.

¹² N.T. 8/20/03 at page 15.

¹³ N.T. 8/20/03 at pages 23-24.

¹⁴ N.T. 8/20/03 at pages 15, 23-25.

satisfaction with his counsel's representation.

Regarding defendant's contention that he did not fully understand the consequences of his guilty plea, the record reflects that I explained, and he understood, all of the applicable statutory maximum punishments.¹⁵ The record also reflects, as noted above, that I advised defendant, and he understood, that he could be deported as the result of his guilty plea in this case,¹⁶ and that he could lose valuable civil rights as the result of his guilty plea to a felony offense.¹⁷

The record of the guilty plea hearing also reflects that I explained to the defendant, and he understood, all of the constitutional and appeal rights that he would give up by pleading guilty.¹⁸

In addition, at the change of plea hearing, government counsel summarized the facts which the government

¹⁵ N.T. 8/20/03 at pages 18-23. I advised defendant that his maximum possible sentence would be 20 years imprisonment, four years of supervised release, a \$250,000.00 fine, and a \$100.00 special assessment.

¹⁶ N.T. 8/20/03 at page 15.

¹⁷ N.T. 8/20/03 at pages 14-15. I specifically advised defendant that if he were adjudged guilty of a felony, he could lose his right to vote, hold public office, serve on a jury, possess a firearm, or hold a professional license.

¹⁸ N.T. 8/20/03 at pages 23-34.

could prove if the case were to go to trial.¹⁹ Defendant testified that he heard and understood the facts as Attorney

Chain summarized them, and he admitted that those facts were correct.²⁰

Based upon the representations made by defendant during the guilty plea colloquy, I found that he was fully alert, competent and capable of entering an informed plea. Moreover, I found that his plea was a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense to which defendant pled guilty, that is, one count of illegal re-entry.²¹ I incorporate those findings here.

Because defendant admitted all of the facts proffered by the government, and because I found that defendant's guilty plea was knowing, voluntary and supported by a factual basis, defendant's appellate waiver is enforceable. Khattak, 273 F.3d at 562. Moreover, defendant agreed at the guilty plea hearing that he

¹⁹ N.T. 8/20/03 at pages 35-39.

²⁰ N.T. 8/20/03 at page 41.

²¹ N.T. 8/20/03 at page 46.

understood and knew deportation was a possible result of his guilty plea to his federal conviction.²² Accordingly, defendant cannot bring a collateral appeal unless he can establish an "extraordinary circumstance" under Lockett. 406 F.3d at 210.²³

Defendant contends that his deportation amounts to an extraordinary injustice because his trial counsel was ineffective for failing to seek dismissal of the federal charge once he knew that defendant's 1997 New Jersey drug conviction was vacated. I disagree.

Although the United States Court of Appeals for the Third Circuit has recognized that ineffective assistance of counsel may support a claim of extraordinary injustice, this claim is very limited and will succeed only where the attorney's performance was deficient and defendant has been prejudiced by the deficient legal service. United States v. Shedrick, 493 F.3d 292,

²² N.T. 8/20/03 at page 15. See also Notes of Testimony of the sentence hearing conducted on March 12, 2004 before me in Allentown, Pennsylvania, styled "Hearing before the Honorable James Knoll Gardner[,] United States District Judge" ("N.T. 3/12/04"), at pages 31-35.

²³ Defendant does not argue that any of the first three Lockett scenarios apply here. That is, he does not contend that his sentence exceeded the statutory maximum, that I erroneously departed upward from the sentence guidelines, or that suppression issues were decided erroneously. Rather, he relies on the fourth factor which permits invalidation of an appeal waiver where an extraordinary injustice has occurred. Lockett, 406 F.3d at 210.

299 (3d Cir. 2007).

The Third Circuit has ruled, however, that when an adequate plea hearing is conducted and the proper plea colloquy was given, as it was here, then the waiver will be enforceable despite a claim of ineffective assistance of counsel. Id.; see also United States v. Jones, 336 F.3d 245 (3d Cir. 2003); United States v. Mustafa, 238 F.3d 485 (3d Cir. 2001).

To date the Third Circuit has identified only limited circumstances as presenting a miscarriage of justice permitting a collateral challenge to proceed despite an appellate waiver. The Court held that it will consider a claim that the defendant did not understand the plea agreement itself because of ineffective assistance of counsel. Shedrick, 493 F.3d at 298.

Here defendant contends that his counsel was ineffective for failing to seek dismissal of his federal charge of illegal re-entry once he knew that defendant's 1997 New Jersey drug conviction was vacated. He did not claim that his counsel failed to adequately explain the appellate waiver provision of his Guilty Plea Agreement, or that defendant did not understand the waiver provision.

Other circuits have addressed this issue in the context of other collateral appeals. The Seventh Circuit has held that "waivers

are enforceable as a general rule; the right to mount a collateral attack pursuant to § 2255 survives only with respect to those discrete claims which relate directly to the negotiation of the waiver." Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1998). Accord United States v. White, 307 F.3d 336, 343-344 (5th Cir. 2002); Davila v. United States, 258 F.3d 448, 451 (6th Cir. 2001); United States v. Cockerham, 237 F.3d 1179, 1182 (10th Cir. 2001); DeRoo v. United States, 223 F.3d 919, 924 (8th Cir. 2000); United States v. Djelevic, 161 F.3d 104, 107 (2d Cir. 1998).

Thus, a petitioner may raise a claim that his attorney was ineffective in negotiating the plea agreement. But all other claims of ineffectiveness, such as those presented by the defendant in this case, may not be presented. For instance in Mason v. United States, 211 F.3d 1065 (7th Cir. 2000), the Court held that a defendant's ineffective assistance claim merely challenging his attorney's performance at sentencing was subject to the waiver. As the Fifth Circuit explained elsewhere,

the opposite result would render waivers of appeal meaningless. If all ineffective assistance of counsel claims were immune from waiver, any complaint about the process could be brought in a collateral attack by merely challenging the attorney's failure to achieve the desired result. A knowing and intelligent waiver should not be so easily evaded.

White, 307 F.3d at 344.

As discussed above, I found defendant's plea agreement to be knowing and voluntary after an extensive plea colloquy. The Third Circuit, in denying defendant's direct appeal in this matter, also concluded that defendant's appeal waiver was enforceable. United States v. Elliott, 150 Fed.Appx. 143 (3d Cir. 2005).

Moreover, I note that at sentencing, defendant sought a downward departure from the Sentencing Guidelines based on the fact that his underlying conviction had been vacated. I granted that motion, sentencing him to 17 months rather than a sentence in the guideline range of 37 to 46 months.²⁴ Therefore, to the extent defendant is arguing his deportation is an extraordinary injustice, the court has already considered that issue at sentencing.

Based on defendant's admission of the facts, his decision to enter a guilty plea and his testimony that he agreed to and understood all the consequences of his plea, I conclude that defendant entered his plea agreement knowingly and

²⁴ N.T. 3/12/04 at page 29.

voluntarily after an extensive plea colloquy. Therefore, I conclude no miscarriage of justice or extraordinary injustice has occurred.

Accordingly, because I conclude, based on a review of the record of this case, that none of the grounds set forth in defendant's petition justify any relief under the writ, I deny the petition without an evidentiary hearing. See United States v. Williams, 615 F.2d 585, 591-92 (3d Cir. 1980).

Certificate of Appealability

The Third Circuit has determined that, "[n]either the statute making the writ of error coram nobis available in federal courts in criminal matters, see 28 U.S.C. § 1651(a), nor any Federal Rule of Appellate Procedure requires a certificate of appealability before an appeal may be taken, nor does such a requirement appear in the case law." United States v. Baptiste, 223 F.3d 188, 189 n. 1 (3d Cir. 2000). Therefore, it appears unnecessary to determine whether a certificate of appealability should issue.

I note, however, that reasonable jurists would not debate the conclusion that defendant's Petition for Writ of Error Coram Nobis fails to state a valid claim of the denial of a

constitutional right or this Court's procedural rulings with respect to petitioner's claims. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542, 555 (2000). Accordingly, to the extent such a determination is necessary, a certificate of appealability is denied.

CONCLUSION

For all the foregoing reasons, I deny the defendant's Petition for Writ of Error Coram Nobis. Moreover, a certificate of appealability is denied.