XI. INDEX TO APPENDICES

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3239

UNITED STATES OF AMERICA

v.

DANIEL GEORGE BROWN,
a/k/a Choley McKenzie
a/k/a Choley Brown
a/k/a Daniel Brown

Daniel George Brown,
Appellant

On Appeal from United States District Court
for the Eastern District of Pennsylvania
(E.D. PA No. 2-16-cr-00234-001)
District Judge: Honorable Gerald A. McHugh

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
October 2, 2018

Before: SHWARTZ, ROTH and FISHER, *Circuit Judges*

(Filed: December 3, 2018)

OPINION*

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* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

APP. A

FISHER, *Circuit Judge*.

Daniel George Brown appeals the District Court's order denying his motion to dismiss his indictment under 8 U.S.C. § 1326(d) and claims that the District Court violated certain of his rights during its proceedings. We will affirm the District Court.

I.

Brown, a native of Jamaica, entered the United States in 1992 as a non-immigrant visitor with permission to stay for six months; however, Brown unlawfully remained in the United States for years. Between 1992 and 2016, Brown was convicted of numerous crimes and removed from the United States on two separate occasions. As detailed below, Brown illegally re-entered the United States shortly after each removal.

In 1995, Brown was convicted in Pennsylvania state court for possession of a controlled substance with intent to deliver 62.5 grams of marijuana and sentenced to one year probation. Over the next couple of years, Brown was arrested and convicted multiple times for drug-related offenses and fraudulent schemes.

Following these convictions, INS commenced a removal proceeding, during which Brown proceeded *pro se* and confirmed that he understood the risk of removal and his right to be represented by counsel. After finding him removable, the Immigration Judge ("IJ") entered an order of removal (the "1997 Order") and advised Brown of his right to appeal. Brown had the choice to either reserve his right to file an appeal or to accept the

judge's opinion as a final order; Brown "accept[ed] the decision"[1] and was removed to Jamaica.

Brown unlawfully re-entered the United States and was arrested for bank fraud and illegal re-entry. He pled guilty to both crimes and received a fifty-one-month sentence, after which his removal order was administratively reinstated and he was again removed. Brown re-entered the United States and, in 2016, was again charged with illegal re-entry after removal.

Brown received a public defender, but chose to file a *pro se* motion to dismiss the indictment,[2] which the District Court denied. He then accepted a conditional plea and waived his appellate rights, with limited exceptions. One such exception permitted Brown to appeal the District Court's order denying his motion to dismiss the indictment, as he does here.

II.

We have jurisdiction over this matter under 28 U.S.C. § 1291 and jurisdiction under 18 U.S.C. § 3742 to review the sentence imposed on Brown. The District Court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

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[1] Suppl. App. at 108.

[2] Brown made five claims: (i) the IJ did not advise him of his right to counsel; (ii) notice of the hearing did not include its time or location; (iii) the IJ did not permit Brown to present favorable testimony; (iv) INS failed to prove the grounds for removal; and (v) the IJ erroneously found that Brown had prior convictions for aggravated felonies.

We review the District Court's decisions of law de novo, but review its determinations of fact for clear error.[3] Further, we exercise plenary review in determining the enforceability of an appellate waiver.[4]

III.

A.

The District Court did not err in confirming the validity of the 1997 Order. A defendant charged with illegal re-entry may collaterally challenge the underlying proceeding and order effectuating his removal if he "demonstrates that (1) [he] exhausted all available administrative remedies; (2) the deportation proceedings . . . deprived [him] of the opportunity for judicial review; and (3) the entry of the deportation order was fundamentally unfair."[5] To mount a successful collateral attack, the defendant must satisfy all three prongs.[6] Here, however, Brown did not satisfy any of them.

1.

By choosing to not appeal the 1997 Order to the Board of Immigration Appeals, Brown failed to exhaust his administrative remedies and forfeited his opportunity to challenge the validity of the removal order.[7] Though Brown was deported before the opportunity to appeal expired, this did not prevent him from exhausting his

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[3] *United States v. Charleswell,* 456 F.3d 347, 351 (3d Cir. 2006).
[4] *United States v. Jackson,* 523 F.3d 234, 237 (3d Cir. 2008).
[5] 8 U.S.C. § 1326(d).
[6] *Charleswell,* 456 F.3d at 351.
[7] *United States v. Dixon,* 327 F.3d 257, 260 (3d Cir. 2003).

administrative remedies; rather, his waiver, provided after the IJ repeatedly informed Brown of his appellate rights, caused this failure and nullifies his argument.

Because Brown failed to satisfy even the first prong of § 1326(d), we do not need to consider whether Brown was denied judicial review or whether the removal proceeding was fundamentally unfair;[8] but, even absent that fact, he did not support these latter prongs in their own right.

2.

Brown cannot show that he was denied judicial review as required by § 1326(d)(2) because he knowingly waived his right to appeal.[9] He further forwent judicial review of the 1997 Order when he pled guilty to illegal re-entry in 2000, thereby conceding that he was validly removed in 1997. Five years after the order's issuance, Brown did file a habeas petition; however, the court considered and reasonably denied his claim. Accordingly, the record demonstrates that Brown either declined to exercise his rights or received the review he sought at each step.

3.

[8] *Charleswell,* 456 F.3d at 351; *United States v. Torres*, 383 F.3d 92, 99 (3d Cir. 2004).
[9] *Id.* at 352-53.

Brown offered three arguments[10] to prove that his removal proceeding was "fundamentally unfair,"[11] each of which fails.

First, the IJ did not fail to inform Brown of his right to counsel, but repeatedly explained this right to him and discussed the availability of pro bono legal assistance. Second, the judge relied only on permissible *Shepard* documents to find that Brown had committed aggravated felonies.[12] Third, INS counsel did not attempt to mislead the IJ or excerpt misleading statements from the hearing's audio recording; to the contrary, the IJ and INS counsel reviewed the immigration statute in search of "any possible way for [Brown] to remain in the United States legally."[13] Hence, the District Court did not err in determining the fundamental fairness of the proceeding.

Brown failed to demonstrate that he exhausted all administrative remedies, was denied judicial review, and received a fundamentally unfair proceeding; therefore, he is not entitled to relief under 8 U.S.C. § 1326(d).

B.

[10] Brown attacked the fairness of the removal hearing on three fronts: (i) failure to advise him of his right to legal counsel; (ii) reliance upon police reports; and (iii) and misleading statements made by INS counsel.

[11] *Charleswell,* 456 F.3d at 358, 362 (proving "fundamental unfairness" requires showing that a fundamental error occurred and there is "a reasonable likelihood that the result would have been different" absent the error).

[12] *Shepard v. United States*, 544 U.S. 13, 16, 26 (2005).

[13] Suppl. App. 106-07.

In addition to his claim for relief under 8 U.S.C. § 1326(d), Brown claimed that the District Court denied him his right of self-representation, the venue was improper, and the sentence he received violated the Ex Post Facto Clause. Brown waived his right to present these issues on appeal.[14]

Though this Court has discretion to override an appellate waiver in some instances, we will not do so where the waiver was made knowingly and voluntarily, the issue presented falls within the scope of the waiver, and enforcing the waiver will not result in a miscarriage of justice.[15] Brown's claims do not justify such an exception.[16]

IV.

The District Court did not err in denying Brown's motion to dismiss the indictment, and Brown waived his right to appeal on the additional grounds he presented, which were themselves meritless. We will therefore affirm.

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[14] Additionally, these arguments are without merit. First, Brown represented himself *pro se* on several motions, and the court gave each filing full consideration. Second, venue was properly exercised in the Eastern District of Pennsylvania where the charges originated. Third, Brown's sentence was calculated using the guidelines he requested at sentencing—the 2016 guidelines—which resulted in an offense level four points lower than the 2015 guidelines he now claims control.

[15] *United States v. Grimes*, 739 F.3d 125, 128-29 (3d Cir. 2014); *United States v. Goodson*, 544 F.3d 529, 536 (3d Cir. 2008).

[16] Brown knowingly waived his right to appeal on these issues and no miscarriage of justice will occur by enforcing the waiver. *See infra* note 14; *see also United States v. Khattak*, 273 F.3d 557, 562-63 (3d Cir. 2001) (providing factors to consider in determining whether a miscarriage of justice would occur).

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	No. 16-234
DANIEL GEORGE BROWN	:	FILED FEB 16 2017

MCHUGH, J. February 16, 2017

MEMORANDUM

On June 8, 2016, Daniel George Brown was indicted for unauthorized reentry to the United States after deportation. Mr. Brown, a citizen of Jamaica, admits that he was deported in 1997 and again in 2005, and that he has since returned to the country without permission. He has nonetheless filed a Motion to Dismiss the Indictment on the ground that his initial deportation order was improper. Because Mr. Brown cannot meet the rigorous standards imposed on petitioners who collaterally challenge an underlying deportation order, his motion will be denied.

I. Background

Daniel Brown entered the United States on a six-month nonimmigrant visa in 1992. He overstayed that visa and made his home in Philadelphia, Pennsylvania. In 1995, Brown was twice tried and convicted in the Philadelphia Court of Common Pleas for possession with intent to deliver marijuana. In 1997, based on his two drug convictions, INS commenced deportation proceedings. An immigration judge held a hearing, and then entered a deportation order against him. Mr. Brown did not appeal the order and was deported to Jamaica.

In 1998, Mr. Brown was found again living in Philadelphia, and in 1999, he was charged with illegal reentry and conspiracy to commit bank fraud. In 2000, he pled guilty to these

 APP. B

IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
	:	
v.	:	**No. 16-234**
	:	
DANIEL GEORGE BROWN	:	

MCHUGH, J. **APRIL 24, 2017**

MEMORANDUM

This is an unlawful reentry case in which I previously denied Defendant's Motion to Dismiss the Indictment. Counsel have advised that Mr. Brown seeks to enter a plea of guilty while preserving his right of appeal. *United States v. Zudick*, 523 F.2d 848 (3d Cir. 1975). Counsel have further advised that the Government is unwilling to enter into plea negotiations under *Zudick,* because as the case currently stands, it would be limited in the arguments it could raise on appeal. The Government's concern has its roots in the fact that in denying Mr. Brown's motion, I felt it necessary to reach only one of the three grounds it advanced in opposition. To respond to the Government's concern, and to provide both prosecution and defense with an unfettered opportunity to discuss the possibility of a non-trial disposition, this memorandum addresses the remaining arguments of the Government. Specifically, under 8 U.S.C. § 1326(d), I will address: (1) whether Mr. Brown exhausted administrative remedies against his 1997 deportation order, and (2) whether he was denied the opportunity for judicial review of the proceedings in which the order was entered. The answer to both these questions is "no."

APP. C

Exhaustion

In order to collaterally attack a deportation order under 8 U.S.C. § 1326(d), a non-citizen must have "exhausted any administrative remedies that may have been available to seek relief against that order." Mr. Brown did not exhaust administrative remedies against the order he now seeks to contest, because he did not appeal that order to the Board of Immigration Appeals.

When Mr. Brown was deported in 1997, the Immigration Judge advised him twice about his right to appeal. She specifically asked him, after entering the order, "do you wish to reserve your right to file an appeal, or do you wish to accept my decision as a final order?" He replied, "I accept the decision."

According to Mr. Brown's Motion to Dismiss the Indictment, he would have appealed his 1997 order, but he was deported prematurely, which prevented him from filing an appeal. This contradicts the audio recording of the 1997 deportation hearing, previously reviewed by the Court, at which Brown explicitly waived appeal. He does not allege that his statement at the hearing was coerced, unknowing, or otherwise ineffective. Because of this, I find that Brown chose not to exhaust his administrative remedies. He is thus barred from collaterally attacking his deportation under 8 U.S.C. § 1326(d)(1).

Denial of Judicial Review

Mr. Brown also claims (as he must, under §1326(d)) that his 1997 deportation proceeding "effectively eliminate[d]" his right "to obtain judicial review." To succeed on this claim, he must prove that he was denied the right "to have the disposition in a deportation hearing reviewed in a judicial forum." *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). This he manifestly cannot do.

App. 51

As set forth in my February 16, 2017 memorandum, Mr. Brown filed a habeas corpus petition in 2002 under 28 U.S.C. §2241. This petition alleged that his 1997 deportation order was improper for various procedural reasons, including some of the reasons raised in his Motion to Dismiss this indictment. My colleague Judge Dalzell considered his arguments but found them unpersuasive, and denied the petition in December 2002.

In addition to this **actual** judicial review, Mr. Brown also had two other opportunities to seek judicial review of his 1997 deportation proceeding. As described above, he had the right to appeal the judge's ruling to the Board of Immigration Appeals, but he did not do so. Moreover, he could have attempted a collateral attack on the ruling in 2000, when he was charged with illegal reentry and criminal conspiracy. He instead chose to plead guilty to these charges – and not to contest the deportation order underlying the reentry prosecution.

Mr. Brown cannot credibly suggest that he was prevented from having his deportation reviewed by the federal courts, given both the process he received in his habeas case, and the process he forewent in both his initial deportation and his 2000 plea agreement. There are instances where unrepresented citizens default their right to judicial review of immigration court decisions because they have been insufficiently informed of their appellate rights. *See United States v. Charleswell*, 456 F.3d 347, 354-55 (3d Cir. 2006). Those instances deny noncitizens the right to judicial review and call for potential relief upon collateral attack. *Id.* But this case is different. Mr. Brown was clearly informed of his right to challenge the ruling in his 1997 deportation. He then told the immigration judge that he was choosing not to pursue that right. Years later, through his habeas petition, he collaterally attacked it nonetheless. Mr. Brown both waived and later received judicial consideration of the alleged defects in his deportation order. He was not denied judicial review.

Conclusion

Mr. Brown's failures to exhaust administrative remedies and to demonstrate that he was denied judicial review provide two additional, independently sufficient bases upon which his § 1326(d) challenge to the 1997 order is properly denied.

This Memorandum supplements my February 16, 2017 Memorandum denying Mr. Brown's Motion to Dismiss the Indictment.

/s/ Gerald Austin McHugh
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3239

UNITED STATES OF AMERICA

v.

DANIEL GEORGE BROWN,
a/k/a Choley McKenzie
a/k/a Choley Brown
a/k/a Daniel Brown

Daniel George Brown,
Appellant

(D.C. No. 2-16-cr-00234-001)

Present: SMITH, Chief Judge, ,McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, ROTH* and FISHER*, Circuit Judges

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SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant, Daniel George Brown in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

* Votes of Judges Roth & Fisher are Limited to Panel Rehearing Only.

APP. D

BY THE COURT:

s/ D. Michael Fisher
Circuit Judge

Dated: March 1, 2019

kr/cc: Daniel George Brown
Frank A. Labor, III, Esq.