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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WAYNE C. EVANS,

Petitioner - Appellant,

v.

UNITED STATES OF AMERICA,

Respondent - Appellee.

No. 06-15791

D.C. Nos. CV-04-00610-FRZ
CR-99-01267-FRZ

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, US District Judge, Presiding

Argued and Submitted March 7, 2008
Phoenix, Arizona

Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

Wayne C. Evans appeals the district court's denial of his petition for a writ of error coram nobis. We affirm.

Evans argues that the district court wrongfully ordered him to pay restitution to the Tohono O'odham Indian Nation as part of his guilty plea to misappropriation

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

of funds from an Indian tribal organization. Evans claims that his trial counsel violated his Sixth Amendment right to effective assistance by not demanding a hearing on restitution and by failing to adequately challenge the Pre-Sentence Report's calculation of restitution.

However, in his plea agreement, Evans waived "any right to raise or collaterally attack any matter pertaining to this prosecution and sentence if the sentence imposed is consistent with the terms of this agreement." A writ of error coram nobis constitutes a collateral attack on a criminal conviction. Telink, Inc. v. United States, 24 F.3d 42, 45 (9th Cir. 1994). The plea agreement explicitly provided that the district court would decide the amount of restitution to be paid by Evans. Accordingly, because the restitution order was not illegal or unconstitutional, Evans is barred by his plea waiver from contesting the sentence through a writ of error coram nobis. See United States v. Phillips, 174 F.3d 1074, 1076 (9th Cir. 1999).

Assuming arguendo that a claim of ineffective assistance of counsel survives a waiver of collateral challenge contained in a plea agreement, we observe that Evans has failed to demonstrate that his counsel's performance fell below the standards required by Strickland v. Washington, 466 U.S. 668 (1984). See Hill v. Lockhart, 474 U.S. 52, 59 (1985). Evans' counsel clearly contested the amount of

restitution at the sentencing hearing, and the disagreements as to the strategy employed do not rise to the level of a constitutional violation. See Strickland, 466 U.S. at 689.

AFFIRMED.