



licensed firearms dealer. Ms. Rome, however, was unable to purchase the guns that day because her name had been put on hold by the Insta-check system. On May 5, 2004, the firearms dealer called Ms. Rome and informed her that she had been approved for the gun purchases. That same day, Ms. Rome returned to the store with Defendant, purchased the two handguns, and handed them to Defendant. The firearms were recovered by the Firearms Trafficking Task Force from a vehicle in which Defendant was riding later that day.

Defendant's Guilty Plea Agreement includes the following summary of the maximum sentence Defendant faced:

The defendant understands, agrees and has had explained to him by counsel that the Court may impose the following statutory maximum sentence: Count 1 - conspiracy to make false statements to a firearms dealer: 5 years imprisonment, 3 years supervised release, a \$250,000 fine, and a \$100 special assessment; Count 3 - possession of a firearm by a convicted felon: ten years imprisonment, a \$250,000 fine, and a \$100 special assessment.

The total possible maximum sentence is: 15 years imprisonment, 3 years supervised release, a \$500,000 fine, and a \$200 special assessment.

(Guilty Plea Agreement at 2.) The Guilty Plea Agreement also provides that "[t]he defendant explicitly consents to be sentenced pursuant to the applicable Sentencing Guidelines . . . . The defendant explicitly acknowledges that his plea to the charged offenses authorizes the court to impose any sentence, up to and including the statutory maximum sentence, that is authorized by the

Sentencing Guidelines." (Id. at 4.) The Guilty Plea Agreement further provides that Williams is eligible for a 2 level downward adjustment of the base offense level for acceptance of responsibility pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 3E1.1(a), and to a 1 level downward adjustment for assisting authorities in the investigation or prosecution of his own misconduct pursuant to U.S.S.G. § 3E1.1(b). (Id. at 3-4.) The Guilty Plea Agreement also states that:

In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal to collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a 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.

(Id. at 4-5.) Finally, the Guilty Plea Agreement provides that "[t]he defendant is satisfied with the legal representation provided by the defendant's lawyer; the defendant and this lawyer have fully discussed this plea agreement; and the defendant is agreeing to plead guilty because the defendant admits that he is guilty." (Id. at 5.)

On September 1, 2004, the Court held a change of plea hearing. During the hearing, the Government summarized the charges against Defendant, the evidence upon which those charges were based, the maximum and minimum sentences he faced, and the terms of his plea agreement with the Government. (9/1/2004 N.T. at 7-19.)

Defendant, having first been sworn and under oath, agreed that the Government had accurately summarized the terms of his plea agreement, affirmed that he had discussed the plea agreement with his counsel prior to signing it, and stated that he had signed the plea agreement. (Id. at 3, 5-8.) Defendant also agreed, under oath, that he had to his satisfaction discussed with his attorney the charges made against him, his right to contest those charges, and the maximum and mandatory minimum penalties that he faced. (Id. at 18, 20.) The Court accepted Defendant's plea of guilty. (Id. at 22.)

On December 9, 2004, Defendant was sentenced to 40 months imprisonment and three years of supervised release on each of Counts I and II, to run concurrently, a fine of \$4,000, and a special assessment of \$200. Defendant was represented by Scott Di Claudio, Esq., at both his change of plea hearing and at sentencing. Presently before the Court is Defendant's Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255, and Motion to Supplement the Motion to Vacate pursuant to Federal Rule of Civil Procedure 15.

## II. LEGAL STANDARD

28 U.S.C. § 2255 provides, in relevant part, as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to

impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

"Section 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors." United States v. Rishell, Crim. No. 97-294-1, Civ. A. No. 01-486, 2002 WL 4638, at \*1 (E.D. Pa. Dec. 21, 2001) (citation omitted). In order to prevail on a Section 2255 motion, the movant's claimed errors of law must be constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962).

### III. DISCUSSION

Defendant has raised the following four grounds for relief pursuant to 28 U.S.C. § 2255: (i) the Government lacked jurisdiction to prosecute Defendant because he was not arrested on federal property; (ii) Defendant's imprisonment is unconstitutional because he is not imprisoned pursuant to an act of Congress; (iii) the Sentencing Guidelines pursuant to which Defendant was sentenced are unconstitutional and subjected Defendant to double jeopardy; and (iv) Defendant's counsel was ineffective for failing to address these issues at the time of Defendant's sentencing and to file a notice of appeal. Defendant has also filed a Motion to Supplement

his Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. The Government does not oppose Defendant's Motion to Supplement. Accordingly, Defendant's Motion to Supplement is granted.

A. Waiver of Right to File a Section 2255 Motion

The Government argues that Defendant's Section 2255 Motion should be denied because Defendant waived his right to seek collateral relief in his Guilty Plea Agreement. In this judicial circuit, waivers of appeals and the right to pursue collateral attacks of sentences are enforced if they do not work a miscarriage of justice and were entered into knowingly and voluntarily. United States v. Khattak, 273 F.3d 557, 558 (3d Cir. 2001); United States v. Roach, Crim. No. 02-405-04, 2005 WL 1514191, at \*2 (E.D. Pa. June 24, 2005). Such waivers should be strictly construed, and the sentencing judge's role in conducting a plea colloquy under Federal Rule of Criminal Procedure 11 is critical to a determination of whether a defendant's waiver of appellate rights was knowing and voluntary. Khattak, 273 F.3d at 562-63; United States v. Buchanan, Crim. No. 03-198; Civ. A. No. 04-4578, 2005 WL 408043, at \*2 (E.D. Pa. Feb. 18, 2005). Under Rule 11, "before accepting a plea of guilty, the court must address the defendant personally and determine that the defendant understands the terms of any plea agreement provision waiving the right to . . . collaterally attack the sentence." Buchanan, 2005 WL 408043, at \*2.

Here, Defendant does not argue that the waiver of his right to file a Section 2255 Motion was not knowing and voluntary. Indeed, the Court colloquied Defendant on this issue, and Defendant clearly stated that he understood the limitations placed on his right to collaterally attack his sentence by the Guilty Plea Agreement. (09/01/2004 N.T. at 11, 20.) Accordingly, the Court concludes that Defendant's waiver of his right to collaterally attack his sentence was knowing and voluntary. See Buchanan, 2005 WL 408043, at \*2.

Nonetheless, there are certain situation in which an "error amounting to miscarriage of justice" may invalidate a knowing and voluntary waiver. Khattak, 273 F.3d at 562. The United States Court of Appeals for the Third Circuit has "declined to identify specific situations in which enforcement of a waiver provision would work a miscarriage of justice, and has instead endorsed the case-by-case approach established in United States v. Teeter, 257 F.3d 14 (1st Cir. 2001)." Buchanan, 2005 WL 408043, at \*3 (citing Khattak, 273 F.3d at 563.) Under Teeter, courts weigh various factors in deciding whether to enforce an otherwise valid waiver, including:

the 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.

Teeter, 257 F.3d at 26.

Although Defendant does not explicitly argue that enforcement of his waiver would result in a miscarriage of justice, Defendant does claim that the sentence imposed by the Court was unlawful. Accordingly, the Court will analyze each argument raised by Defendant to determine whether any errors were committed and, if so, whether the failure to correct such errors would amount to a miscarriage of justice.

1. Jurisdiction to prosecute

First, Defendant argues that his sentence is unlawful because he was not arrested on federal property and the Government, therefore, lacked jurisdiction to prosecute him. "The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme." Tennessee v. Davis, 100 U.S. 257, 163 (1879). Here, Defendant was arrested within the territory of the United States for a violation of a federal law. Defendant's arrest, therefore, was proper, and the Government had valid jurisdiction of over Defendant at all times.<sup>1</sup> Accordingly,

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<sup>1</sup> Defendant seems to argue that the Government did not have the authority to arrest him because it did not comply with the requirements listed in 18 U.S.C. § 7. 18 U.S.C. § 7 governs the "special maritime and territorial jurisdiction of the United States" over locations that are outside of the geographical borders of the 50 states. 18 U.S.C. § 7. Here, Defendant was arrested, and the offense conduct took place, within the Commonwealth of Pennsylvania. 18 U.S.C. § 7, therefore, does not apply in this case.

no error was made in exercising jurisdiction over Defendant, and Defendant's Motion to Vacate is denied in this respect.

2. Imprisonment pursuant to an act of Congress

Second, Defendant argues that his sentence is unlawful because no act of Congress authorizes his imprisonment. Defendant pled guilty to Count I of the Indictment, charging him with conspiracy to knowingly make false statements to a federally licensed firearms dealer, in violation of 18 U.S.C. § 371. Pursuant to 18 U.S.C. § 371, this offense is punishable by a period of imprisonment of up to 60 months. Defendant also pled guilty to Count III of the Indictment, charging him with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Pursuant to 18 U.S.C. § 924(a)(2), this offense conduct is punishable by a period of imprisonment of up to 120 months. The sentence imposed on Defendant was a term of imprisonment of 40 months on each of Counts I and III, to run concurrently. As this is well within the period of imprisonment authorized by 18 U.S.C. § 371 for Count I and 18 U.S.C. § 924(a)(2) for Count III, Defendant was sentenced in accordance with the relevant federal statutes. Accordingly, the Court did not err in imposing the period of imprisonment to which it sentenced Defendant, and Defendant's Motion to Vacate is in this respect.

3. Sentencing Guidelines

Third, Defendant argues that his sentence is unlawful because

the Court's calculation of his Guideline sentencing range was improper and subjected him to double jeopardy. Defendant raises three arguments in this respect. First, Defendant contends that the Sentencing Guidelines should not have been applied because they were considered unconstitutional at the time of his sentencing. Second, Defendant argues that the Court incorrectly calculated his criminal history points, and that the calculation of the criminal history score subjected him to double jeopardy. Third, Defendant argues that the Court improperly took into account two prior convictions when calculating his criminal history score.

Defendant relies on United States v. Booker, --- U.S. ----, 125 S. Ct. 738 (2005) to establish that the Sentencing Guidelines were unconstitutional at the time of his sentencing. In Booker, the Supreme Court held that because the Sentencing Guidelines allowed judges to find facts that lead to a greater sentence than that authorized by the facts established by a plea of guilty or a jury verdict, the Guidelines were unconstitutional. Booker, 125 S. Ct. at 746 (Stevens, J.). To remedy this situation, the Supreme Court excised the statutory provision that made the Guidelines mandatory, and thereby rendered the Guidelines "effectively advisory." 125 S. Ct. at 757 (Breyer, J.). However, the rule announced in Booker is a procedural rule which does not apply retroactively to cases on collateral review in which a defendant's judgment had become final prior to the Booker decision. Lloyd v.

United States, 407 F.3d 608, 614 (3d Cir. 2005).

Where no direct appeal is filed, a defendant's judgment of conviction becomes final for the purposes of the retroactivity analysis on the date on which the time for filing such appeal has expired. Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999). A defendant has ten days from the entry of judgment in which to file a timely notice of appeal. Fed. R. App. P. 4(b)(1)(A)(i). Here, Defendant was sentenced on December 9, 2004. Consequently, Defendant's judgment of conviction became final on December 19, 2004. As Defendant's conviction was final prior to the Supreme Court's decision in Booker, this decision does not apply to him and the Court's application of the Sentencing Guidelines to determine Defendant's sentence was mandatory.

Defendant next argues that the Court subjected him to double jeopardy by incorrectly calculating his criminal history points. Specifically, Defendant contends that it was improper to add three criminal history points on grounds that he committed the charged offenses while he was on parole and less than two years following his release from custody for a prior offense. Defendant notes that the prior offense had already been taken into account when the Court added three criminal history points for it under a separate heading, and that the additional three points added for that offense thereafter are repetitive and violate the double jeopardy clause of the Constitution. However, it is well-established that

such sentence enhancements address "the penalty for the current offenses, not for those crimes for which [the defendant] has already served a sentence of imprisonment." Roach, 2005 WL 1514191, at \*3. Accordingly, these enhancements are "'not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,'" but rather as "'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" Witte v. United States, 515 U.S. 389, 400 (1995) (quoting Gryger v. Burke, 334 U.S. 728, 732 (1948)). The Court, therefore, did not subject Defendant to double jeopardy by its computation of Defendant's criminal history points.<sup>2</sup>

Defendant further argues that the Court erred in calculating his criminal history score because the Court improperly took into account two of his prior convictions. Defendant contends that the Court should not have added a criminal history point for one of his prior adult criminal convictions for possession of a controlled substance, because Defendant was not convicted of that offense.<sup>3</sup>

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<sup>2</sup> Defendant also seems to argue that no criminal history point should have added on grounds that the instant offenses were committed while Defendant was on parole, because Defendant was sentenced after his period of parole had expired. However, under the Sentencing Guidelines, what is relevant is not that a defendant is on parole at the time of sentencing, but rather that "the defendant *committed* the instant offense while [on] . . . parole." U.S.S.G. § 4A1.1(d). Here, it is undisputed that Defendant's parole had not yet expired at the time he committed the instant offense.

<sup>3</sup> Defendant has two prior adult criminal convictions for possession of a controlled substance and has not identified the

However, the record establishes that Defendant pled guilty to his 1995 conviction for possession with intent to deliver a controlled substance, and was adjudged guilty of his 1997 offense of possession of a controlled substance. (Pretrial Investigation Report ¶¶ 33-34.) Defendant has offered no proof that would refute the existence of these convictions. The Court, therefore, properly added one criminal history point for each of Defendant's prior convictions for possession of a controlled substance.

Defendant also contends that the Court improperly added one criminal history point for a 2001 conviction for false reports to law enforcement, because that offense conduct was only punishable with six months imprisonment. However, pursuant to the Sentencing Guidelines, one criminal history point is to be added "for each prior sentence not counted in (a) [imprisonment of more than one year] or (b) [imprisonment of 60 days or more], up to a total of 4 points for this item." U.S.S.G. § 4A1.1(c). Defendant's 2001 conviction was not previously counted in the calculation of his criminal history score. The Court, therefore, properly added one criminal history point for Defendant's 2001 conviction for false reports to law enforcement even though that offense was not punishable by one year or more of imprisonment. Accordingly, the Court did not err in its application of the Sentencing Guidelines, and Defendant's Motion to Vacate is denied in this respect.

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specific offense to which this objection pertains.

B. Ineffective Assistance of Counsel

Defendant has also raised an ineffective assistance of counsel claim. Defendant argues that his privately retained counsel was ineffective because he failed to bring the issues raised in Defendant's Motion to Vacate to the Court's attention prior to or during the sentencing hearing, and because he failed to file a notice of appeal on Defendant's behalf.<sup>4</sup> In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance. Id. at 687. In order to prevail on an ineffective assistance of counsel claim, a defendant must show (1) that his counsel's performance was deficient, and (2) that such performance prejudiced Defendant's defense. Id. To establish that his counsel's performance was deficient, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. "In evaluating counsel's performance, [the Court is] 'highly deferential' and 'indulge[s] a strong presumption' that, under the circumstances,

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<sup>4</sup> Defendant also argues that the Court improperly failed to advise him of his right to an appeal at the sentencing hearing. The record, however, establishes that the Court advised Defendant that he had "the right to appeal, including the right to appeal the sentenced . . . just imposed." (12/09/04 N.T. at 30.) The Court further informed Defendant that if he could not afford the costs of taking such an appeal, he could apply for leave to appeal *in forma pauperis*. Id. The Court cautioned, however, that Defendant might have further compromised and limited his right to appeal by his Guilty Plea Agreement, and noted that Defendant could rely on the advice of his counsel in this regard. Id.

counsel's challenged actions 'might be considered sound . . . strategy.'" Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999) (quoting Strickland, 466 U.S. at 689). Accordingly, "it is 'only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.'" Id. (quoting United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

If a defendant shows that his counsel's performance was deficient, he then must show that the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

It is well-established that "[t]here can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument." United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999). Because the Court has already concluded that the claims which Defendant contends counsel should have raised on his behalf during or prior to sentencing are meritless, Defendant has failed to establish that his counsel was ineffective

for failing to raise these issues prior to or during sentencing.

Moreover, it is well-established that where a defendant has knowingly and voluntarily waived his right to appeal, his counsel's failure to file an appeal is reasonable under prevailing professional norms and cannot provide the basis for an ineffective assistance of counsel claim. Buchanan, 2005 WL 408043, at \*4. Here, Defendant knowingly and voluntarily waived his right to appeal in his Guilty Plea Agreement. (09/01/2004 N.T. at 4, 7.) Defendant's counsel, therefore, was not ineffective for failing to file a notice of appeal, and Defendant's Motion to Vacate is denied in this respect.

#### IV. CONCLUSION

For the foregoing reasons, the Court finds that enforcement of Defendant's waiver of his right to seek collateral relief does not work a miscarriage of justice. Accordingly, Defendant's Motion to Supplement is granted and Defendant's Motion to Vacate is denied.

An appropriate Order follows.

