

the mandatory minimum of life, prior to entry of the guilty plea.¹ However, when Pierce entered his guilty plea, the Court advised him that his mandatory minimum term, absent departure, was life imprisonment.

Prior to sentencing, the Government filed a motion for a downward departure on Pierce's behalf under 18 U.S.C. § 3553(e) and U.S.S.G § 5K1.1. At the July 23, 2010, sentencing hearing, this Court granted the Government's motion and departed downward from both the statutory mandatory minimum of life imprisonment and the final Guidelines range of 262 to 327 months of incarceration, imposing a below-Guidelines sentence of 180 months of incarceration followed by 10 years of supervised release. At his sentencing hearing, Pierce did not contest the findings in the PSR relating to his prior convictions, his career offender status, or the Guidelines calculation. Pierce objected only to the application of the statutory mandatory minimum sentence of life imprisonment because of the Government's failure to file a § 851 information, which the Court declined to address as a result of the Government's departure motion. Pierce filed a timely notice of appeal, and on April 23, 2012, the Third Circuit Court of Appeals affirmed his conviction and sentence in all respects.

On July 12, 2012, Pierce filed the instant § 2255 motion, raising the following claims: (1) the Government breached the terms of his plea agreement by seeking unauthorized statutory enhancements to his sentence; (2) his sentence exceeded the statutory maximum; (3) the Court violated the separation of powers doctrine; (4) the Court expanded his appellate waiver exceptions; (5) his counsel was ineffective for allowing the unauthorized statutory enhancements; and (6) the

¹ Application of the statutory mandatory sentence of life imprisonment rested on Pierce's previous convictions and required the Government to file a § 851 notice. § 851 states, "[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless . . . before entry of a plea of guilty, the United States Attorney files an information with the court . . . stating in writing the previous convictions to be relied upon."

plea agreement was unknowing and involuntary. The Government filed a motion to dismiss, arguing Pierce's § 2255 motion is precluded by the appellate waiver.

DISCUSSION

When the Government invokes an appellate waiver to bar a defendant's appeal, a court must consider three factors: (1) whether the waiver was knowing and voluntary, (2) whether there is an exception to the waiver which prevents its enforcement, and (3) whether enforcement of the waiver would cause a miscarriage of justice. *United States v. Goodson*, 544 F.3d 529, 536 (3d Cir. 2008) (quoting *United States v. Jackson*, 523 F.3d 234, 243-44 (3d Cir. 2008)). If valid, a waiver of appeal should be strictly construed. *United States v. Khattak*, 273 F.3d 557, 558 (3d Cir. 2001). To evaluate the waiver's validity, the court reviews the language of the plea agreement and the colloquy between the sentencing judge and the defendant. *United States v. Gwinnett*, 483 F.3d 200, 204 (3d Cir. 2007).

Pierce's plea agreement includes the following appellate waiver provision:

(9) In exchange for the undertakings made by the government in entering this plea, 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 a right to appeal or collaterally attack arises under 18 U.S.C. § 3724, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law. This waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.

- a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.
- 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 defendant's sentence on any count of conviction exceeds the statutory maximum for that count as set forth in paragraph six above;
 - (2) the sentencing judge erroneously departed upward pursuant to the Sentencing Guidelines; and/or
 - (3) the sentencing judge, exercising the Court's discretion pursuant to *United States v. Booker*, 543 U.S. 220 (2005), imposed an

unreasonable sentence above the final Sentencing Guideline range determined by the Court.

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.

At the change of plea hearing, this Court carefully reviewed the appellate waiver provision with Pierce, satisfying itself that the guilty plea and the appellate waiver were knowingly and voluntarily entered. *See United States v. Mabry*, 536 F.3d 231, 237-38 (3d Cir. 2008) (“[A] court has an affirmative duty . . . to examine the knowing and voluntary nature of the waiver . . .”). At the hearing, Pierce stated his lawyer had read the plea agreement to him but he had not had the chance to read it himself, so the Court recessed to allow Pierce to read the agreement. Guilty Plea Tr. 16. The Court then explained the appellate waiver provision to him, reading portions of the waiver aloud to ensure Pierce’s comprehension. *Id.* at 20-24. The Court also advised Pierce the mandatory minimum term of incarceration was life imprisonment, and Pierce indicated he understood. *Id.* at 12. Finally, when asked about his legal rights and if he understood that he did not have to plead guilty, Pierce responded, “yes.” *Id.* at 18. The Third Circuit Court of Appeals found the plea agreement’s appellate waiver was knowing and voluntary, and barred Pierce’s direct appeal. *United States v. Pierce*, 476 F. App’x 984 (3d Cir. 2012). Consequently, Pierce’s claim that he did not knowingly and voluntarily waive his appellate rights is without merit.

There is also no exception to the waiver which allows Pierce to prevent its enforcement. The only claim Pierce makes that could fall within one of the stated exceptions is his claim that his sentence breached the statutory maximum; however, this claim is without merit as Pierce’s sentence did not exceed the statutory maximum. Both the Court and the guilty plea agreement advised Pierce the statutory mandatory minimum term was life imprisonment, and he was sentenced to 180 months incarceration. Accordingly, none of Pierce’s claims can be classified as exceptions to the waiver and

prevent its enforcement.

Because the waiver was knowing and voluntary and Pierce's claims are within the scope of the waiver, absent a miscarriage of justice, the waiver is enforceable to foreclose review of the merits of Pierce's claims in his petition for collateral relief. The Third Circuit Court of Appeals has adopted a "common sense approach in determining whether a miscarriage of justice would occur if the waiver were enforced." *Mabry*, 536 F.3d at 242. Factors to consider in determining whether to set aside a waiver include "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." *Khattak*, 272 F.3d at 563. There are no circumstances in this case suggesting a miscarriage of justice.

Pierce had notice he was facing a life sentence both from the plea agreement itself and from this Court's statements during the guilty plea colloquy. As noted by the Third Circuit, the failure to give notice under § 851 was a mere oversight that ultimately had no impact on Pierce's sentence. *Pierce*, 476 F. App'x at 988. The Third Circuit also noted that even absent the § 851 notice, Pierce faced a Sentencing Guidelines range of 262 to 327 months, and it is from this range that the Court departed when ultimately sentencing Pierce to 180 months. Accordingly, Pierce's claim presents no illegal sentence or miscarriage of justice and he cannot avail himself of the limited circumstances specified in his plea agreement for an appeal or collateral attack of his sentence.

Pierce's only claim that even arguably raises the possibility of a miscarriage of justice is his allegation of ineffective assistance of counsel based on his counsel's failure to scrutinize the PSR and to object to the use of a statutory enhancement to increase his mandatory minimum sentence. *See United States v. Shedrick*, 493 F.3d 292, 298-99 (3d Cir. 2007) (considering the merits of an

ineffective assistance of counsel claim where enforcement of a collateral-attack waiver would result in a miscarriage of justice). Pierce alleges his counsel's actions seriously prejudiced him by increasing his mandatory minimum sentence to life imprisonment; however, even where a petitioner claims ineffectiveness tainted a plea agreement, a waiver does not become unenforceable unless the record demonstrates the claim that the waiver was the result of ineffective assistance of counsel is meritorious. *United States v. Akbar*, 181 F. App'x 283, 286 (3d Cir. 2006). Pierce attempts to repackage his argument made on direct appeal regarding the Government's failure to file a § 851 notice in terms of an ineffective assistance of counsel claim. Reframing this claim does not render it meritorious because, as the Third Circuit concluded, the Government's failure to file a § 851 notice had no impact on Pierce's sentence. Thus, Pierce cannot show his claim of ineffective assistance of counsel is meritorious and/or results in a miscarriage of justice.

Regarding Pierce's motion to amend his initial § 2255 motion, a court may deny such leave based on "undue delay, bad faith, dilatory motive, prejudice, and futility." *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997)). Futility means that, even if the pleading were amended, it would fail to state a claim upon which relief could be granted. *Id.* Ultimately, "if a claim is based on facts that provide no basis for the granting of relief by the court, the claim must be dismissed." *Id.* at 117. Pierce raises no new arguments in his motion to amend but rather reframes the same arguments from his initial § 2255 motion as ineffective assistance of counsel claims. As reasoned above, reframing these arguments do not make them meritorious. Because these claims are precluded by the appellate waiver, the motion will be denied as futile.

The Court took many steps to ensure Pierce understood the terms of the plea agreement and entered into it willingly. Pierce knowingly and voluntarily waived his right to collaterally attack his

sentence via a § 2255 motion and has set forth no facts from which this Court could conclude that enforcing the waiver would work a miscarriage of justice; as the Government's failure to file the § 851 notice had no impact on Pierce's sentence and Pierce was on notice that he faced a minimum mandatory sentence of life imprisonment. Because Pierce's claims in both his initial § 2255 and his motion to amend are foreclosed by his guilty plea agreement, the Government's motion to dismiss is granted.

An appropriate order follows.

BY THE COURT:

/s/ Juan R. Sánchez

Juan R. Sánchez

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

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|--------------------------|---|---------------------------|
| UNITED STATES OF AMERICA | : | CIVIL ACTION No. 12-3923 |
| | : | |
| v. | : | CRIMINAL ACTION No.08-245 |
| | : | |
| RICHARD PIERCE | : | |

ORDER

AND NOW, this 22nd day of August, 2013, it is ORDERED the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 (Document 37) is GRANTED. Petitioner Richard Pierce's pro se Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Document 35) is DISMISSED.

It is further ORDERED Pierce's Motion for Leave to Amend His § 2255 Petition Under Federal Rule of Civil Procedure 15(a) (Document 45) is DENIED as futile.

The Court declines to issue a certificate of appealability. The Clerk of Court shall mark both of the above-captioned cases CLOSED.

BY THE COURT:

/s/ Juan R. Sánchez
Juan R. Sánchez