UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DARRYL MCFADDEN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondant.

OPINION AND ORDER

15 Civ. 4465 (ER)

Ramos, D.J.:

Darryl McFadden, proceeding *pro se*, petitions the Court under 28 U.S.C. § 2255 to adjust the sentence this Court imposed in March 2014. He claims that a mutual mistake of McFadden's counsel, the United States, and the Court led to him being sentenced to a term of imprisonment almost four months longer than proper. Because it finds that the Court had no power to sentence McFadden to a term of imprisonment any shorter than it did in March 2014, the Court DENIES McFadden's petition.

I. BACKGROUND

Darryl McFadden was arrested and eventually convicted by the state of New York for Criminal Possession of a Weapon in the Second Degree and Attempted Assault in the First Degree in late 2009. Letter from AUSA Andrew Bauer ("Bauer Letter") at 2 (Aug. 11, 2015), Doc 6. For those crimes, a Westchester County state court sentenced him in June 2010 to a term of 42-months' imprisonment. *Id.*

Two years later, in June 2012, McFadden was indicted by a grand jury in the Southern District of New York for conspiring to distribute narcotics and for the possession and discharge of firearms in the furtherance of that conspiracy. *Id.* Although he was still serving his state sentence at the time, he was brought into federal custody immediately after his indictment via a

writ of habeas corpus. *Id.* In December 2013, he pled guilty to a violation of 18 U.S.C. § 924(c), the possession of a firearm in furtherance of a narcotics conspiracy. *Id.* This Court sentenced McFadden to 60 months' imprisonment and 3 years' supervised release, the mandatory minimum for the offense. *Id.*; *see also* J. in a Criminal Case, *United States v. McFadden*, No. 12 Crim. 214-14 (ER) at 2, 3 (Mar. 7, 2014), Doc. 259.

During sentencing, McFadden asked the Court to account for his time spent in federal custody following his indictment. Tr. of Proceedings, *United States v. McFadden*, No. 12 Crim. 214-14, 6:1–9 (Mar. 7, 2014), Doc. 263. In particular, he asked that the Court "expressly provide that Mr. McFadden get credit on the federal sentence from the day he was writted [that is, brought into federal custody from state custody] on this case," June 26, 2012. *Id.* The Court then asked, "Isn't that the effect of writting him? Hasn't he gotten credit for every day that he's been in federal custody?" *Id.* 6:12–14. The assistant U.S. Attorney indicated that he had spoken with the general counsel of the Bureau of Prisons about a similar case and responded, "One would think so, . . . intuitively, that that would be the effect of writting him over. However, it is not always the case. BOP makes its own calculation." *Id.* 6:15–19. The Court then, without objection from the United States, made "a specific recommendation that Mr. McFadden receive credit for time served since June 26 at the time that he was writted over from state custody." *Id.* 6:20–21, 8:8–20; *see also* J. in a Criminal Case at 2.

When the Bureau of Prisons made its calculations, however, it only credited McFadden for the time spent in federal custody after the earliest day he would have been released from state custody: October 12, 2012 — nearly four months less than McFadden had requested. Bauer Letter at 1. This was because, under 18 U.S.C. § 3585(b), only time served "that has not been credited against another sentence" may be credited against his federal term of imprisonment. *See*

also Lopez v. Terrell, 654 F.3d 176, 178 (2d Cir. 2011) ("If a defendant's presentence custody has been credited to another sentence, no § 3585(b) credit is available . . . ."). Even though McFadden was in federal custody during the pendency of his federal case, "the state retain[ed] primary jurisdiction over [McFadden]" and he was considered to be serving a state sentence. *Rosario v. United States*, No. 02 Civ. 3360 (HB), 2004 WL 439386, at *5 (S.D.N.Y. Mar. 9, 2004) (citing *United States v. Fermin*, 252 F.3d 102, 108 n.10 (2d Cir. 2001)).

McFadden timely filed a petition for a writ of habeas corpus from this Court in December 2014 under 18 U.S.C. § 2255. Doc. 1. The Court first recharacterized his motion as one under 28 U.S.C. § 2241, challenging the execution of his sentence, rather than the imposition of the sentence. *See McFadden v. United States*, No. 14 Civ. 9860 (ER) (Dec. 29, 2014), Doc. 3. It transferred the petition to the Middle District of Pennsylvania, where McFadden was then incarcerated, as a result. *See Rumsfield v. Padilla*, 542 U.S. 426, 442 (2004) (holding that jurisdiction for a challenge to a prisoner's confinement lies in the district of his confinement). Six months later, McFadden moved the court to reconsider its motion, stating that he was challenging the imposition of his sentence, not its execution.[1] *McFadden v. United States*, No. 14 Civ. 9860 (ER) (June 9, 2015), Doc. 6. The Court granted that motion, reversing its prior order and directing the U.S. Attorney's Office for the Southern District of New York to answer the petition. Doc. 2. The Office answered and McFadden replied in 2015. *See* Bauer Letter; Doc. 7. McFadden was released from federal custody in March 2017 and is currently serving his period of supervised release.

[1] Indeed, McFadden has expressly admitted that the Bureau of Prisons correctly calculated his credit for time served. *See* Doc. 1 at 17–18.

II. APPLICABLE LAW

Under 28 U.S.C. § 2255, a prisoner who was sentenced by a federal court can petition the sentencing court to be released if (1) the sentence was imposed in violation of the Constitution or the laws of the United States; (2) the court did not have jurisdiction to impose the sentence; (3) the sentence exceeded the maximum sentence authorized by law; or (4) the sentence is subject to collateral attack. 28 U.S.C. § 2255(a). Challenges on a Section 2255 motion "conflict with 'society's strong interest in the finality of criminal convictions,' so defendants are subject to a higher bar 'to upset a conviction on a collateral, as opposed to direct, attack.'" *Sidney Bright v. United States*, 2018 WL 5847103, at *2 (S.D.N.Y. 2018) (quoting *Yick Man Mui v. United States*, 614 F.3d 50, 53 (2d Cir. 2010)) *appeal filed* (2d Cir. Dec. 4, 2018). Therefore, in cases not involving a constitutional violation or a lack of jurisdiction, "the Supreme Court has long held that . . . relief [through a collateral attack] is available only when the claimed error constitutes a 'fundamental defect which inherently results in a *complete* miscarriage of justice' and presents '*exceptional circumstances* when the need for the remedy afforded by the writ of habeas corpus is apparent.'" *Nnebe v. United States*, 534 F.3d 87, 90 (2d Cir. 2008) (emphasis added) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

For *pro se* petitions, the submissions are "held to 'less stringent standards than formal pleadings drafted by lawyers.'" *Ferran v. Town of Nassau*, 11 F.3d 21, 22 (2d Cir. 1993) (quoting *Hughes v. Rowe*, 449 U.S. 5, 9 (1980)); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Courts construe the petitioner's submissions "liberally and interpret them 'to raise the strongest arguments that they suggest.'" *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)); *see also Green v. U.S.*¸ 260 F.3d 78, 83 (2d Cir. 2001).

III. DISCUSSION

McFadden asks the Court to vacate his prior sentence and impose a new sentence that would "approximate the sentence that would have been imposed had the state and federal sentence been imposed at the same time." Doc. 1 at 24. He argues that the Court's initial sentence — which provided that the federal sentence was to run consecutively with the state sentence — was premised on the incorrect assumption that the Bureau of Prisons would credit him for time served between his June 2012 entry into federal custody and the October 2012 date on which he would have been released from state custody.

In support of his ability to use § 2255 to obtain relief, McFadden cites to *United States v. Werber*, where the Second Circuit identified § 2255 petitions as the proper vehicle for seeking relief from a sentence based on an incorrect assumption by the sentencing judge. 51 F.3d 342, 349 n.17 (2d Cir. 1995). There, like here, the district judge recommended a specific time-served credit to the Bureau of Prisons that the Bureau did not implement. *Id.* The Second Circuit saw the case again three years later after the defendant filed a § 2255 petition to make that challenge. *United States v. Werber ("Werber II")*, 149 F.3d 172 (2d Cir. 1998).

As did the court in *Werber II*, this Court notes that there is a preliminary issue regarding whether a mistaken assumption in exercising the Court's discretionary power rises to the level of a "a fundamental defect which inherently results in complete miscarriage of justice." *Id.* at 177 n.4.[2] But because the Court finds that it clearly would not have had authority to impose a concurrent sentence that achieved McFadden's desired results—and because the parties did not

[2] The United States assumes, *arguendo*, that McFadden's petition is not barred by waiver in his plea agreement or the failure to raise this argument in his appeal. Bauer Letter at 4. The Court does the same.

address this issue in their briefing—it declines to address them at this time.[3] *See id.* at 177.

This case centers on the powers and discretion granted to district courts by 18 U.S.C. § 3584 and its interpretation in U.S. Sentencing Guidelines § 5G1.3(b). Section 3584 concerns the situation where a federal court sentences a defendant at a time when the defendant is already serving another sentence. If the defendant is "already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively." 18 U.S.C. § 3584(b). A court may run a mandatory minimum sentence consecutively with an undischarged sentence and still observe the mandate set by the mandatory minimum in the statute. *United States v. Rivers*, 329 F.3d 119, 122 (2d Cir. 2003).

Section 5G1.3(b) provides guidance for a sentencing court's discretion in this situation when the two sentences arise from related conduct. The provision recommends that a court adjust the instant sentence to account for the already served portion of the undischarged sentence and to set the instant sentence to run concurrently with the remainder of the undischarged sentence. U.S.S.G. § 5G1.3(b).

But the powers granted by § 3584 and guided by § 5G1.3 must otherwise be consistent with the law that sets the sentence for the underlying offense. Here, 18 U.S.C. § 924(c) provides that "the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment." The reference to "any other term of imprisonment" includes state sentences. *United States v. Gonzales*, 520 U.S. 1, 5 (1997). As the Second Circuit held shortly after *Gonzales*, "the plain language of the statute deprive[s]" district courts of the power

[3] Additionally, the Court has assured itself that it retains jurisdiction despite the time that has passed since McFadden filed his initial petition. He is still serving his period of supervised release and relief in this case could allow him to complete that period early. Therefore, there is still a live case or controversy for this Court to adjudicate. *See United States v. Wiltshire*, 772 F.3d 976, 979 (2d Cir. 2014).

to make sentences under § 924(c) "run concurrently with [defendants'] state law sentences." *Hooper v. United States*, 112 F.3d 83, 87–88 (2d Cir. 1997).

By asking the Court to resentence him and use § 3584 to make his sentence retroactively run concurrently with his state sentence, McFadden is asking the Court to do precisely what § 924(c) forbids. And, because § 924(c) commands that those convicted under it serve at least 60 months in prison, the Court would be further unable to reduce his sentence by the analogous amount of time.

IV. CONCLUSION

"Because a mandatory sentencing requirement set by statute trumps any conflicting Sentencing Guidelines," *United States v. Hodges*, 75 F. App'x 57, 58 (2d Cir. 2003) (summary order) (citing *United States v. Kirvan*, 86 F.3d 309, 311 (2d Cir. 1996)), the Court finds that it could not have ordered that McFadden's sentence run concurrently with his state sentence. Therefore, it could not have granted him relief even if it had realized that the Bureau of Prisons would not fully implement the Court's recommendation in 2014, nor can it grant that relief today. The Court DENIES McFadden's petition. It respectfully directs the Clerk of Court to terminate McFadden's motion to expedite, Doc. 8, as moot, terminate the case, and mail this opinion and order to McFadden.

It is SO ORDERED.

Dated: October 2, 2019
New York, New York

Edgardo Ramos, U.S.D.J.