

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

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION</b>
	:	
v.	:	
	:	
<b>DAVID LEE SPIKES</b>	:	<b>No. 08-201-2</b>
	:	

**MEMORANDUM**

PRATTER, J.

MARCH 16, 2020

David Lee Spikes, a criminal defendant represented by counsel, filed a *pro se* motion to compel the U.S. Probation Officer to amend his presentence report under 28 U.S.C. § 1361. Mr. Spikes’ motion fails for a variety of reasons. First, the Court is not to accept a *pro se* filing submitted by a represented criminal defendant. Second, Mr. Spikes’ mandamus petition is an improper vehicle for a collateral attack on his sentence. Third, Mr. Spikes knowingly and voluntarily waived his right to present such post-conviction challenges to his sentence. Finally, his underlying objection is without merit. As further set forth in this memorandum, the Court therefore denies Mr. Spikes’ motion.

**BACKGROUND**

In December 2008, Mr. Spikes pled guilty to three counts of aiding and abetting substantive Hobbs Act robberies, in violation of 18 U.S.C. § 1951(a)(2), and to two counts of aiding and abetting the use or carrying of firearms in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). The plea agreement included a waiver of appellate and collateral relief.<sup>1</sup>

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<sup>1</sup> The plea agreement provides:

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

At Mr. Spikes' change of plea hearing, the Court reviewed the plea agreement with Mr. Spikes at great length. After reviewing the terms of the agreement on the record, the Court confirmed that Mr. Spikes read the plea agreement, reviewed the plea agreement with his attorney, understood the implications of his waiver, and knew that he was bound by his guilty plea, even if he later disagreed with or was disappointed by his sentence and/or the contents of his presentence report. Dec. 2, 2008 Hearing Tr. at 16-26, 33-34, 50-54.

The Court sentenced Mr. Spikes to a total of 204 months' imprisonment and ordered him to pay \$41,781 in restitution. Specifically, Mr. Spikes was sentenced to 84 months for aiding and abetting robbery to be followed by two successive 60-month sentences for brandishing a gun during a crime of violence. Mr. Spikes was also sentenced to a total term of supervised release of 5 years. In consideration of the Government's departure motion, Mr. Spikes was relieved of 22 years of additional, consecutive mandatory imprisonment for his § 924(c) charges.

Despite waiving his appellate and collateral rights, Mr. Spikes has repeatedly sought post-conviction relief. Mr. Spikes first moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The Court held that Mr. Spikes knowingly and voluntarily waived his appellate and collateral rights, and that his waiver was enforceable with respect to his claims of sentencing error and prosecutorial misconduct. Mem. at 12 (Doc. No. 273). The Third Circuit Court of Appeals subsequently denied Ms. Spikes' motion for a certificate of appealability.

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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. This waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.

Guilty Plea Agreement at ¶ 9.

Nearly nine months after the parties completed their briefing for Mr. Spikes' § 2255 motion, Mr. Spikes filed another brief in support of his motion. In this late filing, he argued for the first time that his four 1996 convictions were improperly used to calculate his criminal history category. Pursuant to §§ 4A1.1(a) and 4A1.2(e) of the U.S. Sentencing Guidelines, three points are added to a defendant's criminal history calculation for every prior sentence they received exceeding 1 year and 1 month. Because Mr. Spikes was sentenced to more than 13 months in custody for each of his 1996 convictions, 12 points were added to his criminal history calculation. Mr. Spikes argued that because he was imprisoned for less than a year for each offense due to his participation in New Jersey's Intensive Supervision Program, these points should not have been included in the calculation. Mem. at 5 n.6 (Doc. No. 273). Because Mr. Spikes did not raise this argument in an earlier filing and it was not a clarification of an argument Mr. Spikes previously asserted, the Court held that Mr. Spikes' claim was barred by § 2255's 1-year time limitation. *Id.*<sup>2</sup>

On September 11, 2017, Mr. Spikes filed a *pro se* document titled "Notice of Hearing Cause for Expedited Hearing / Order." (Doc. No. 333). In this filing, Mr. Spikes challenged his criminal history calculation under Federal Rule of Civil Procedure 60(b)(6), arguing that his presentence report did not include the full facts concerning his 1996 convictions. The Court denied the motion without prejudice and permitted Mr. Spikes' counsel to re-submit the motion if defense counsel, in consultation with Mr. Spikes, determined to do so. (Doc. No. 335). Defense counsel elected not to re-submit the motion.

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<sup>2</sup> In June 2016, defense counsel filed a successive § 2255 motion, arguing that Mr. Spikes' convictions were invalid following the decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Defense counsel concurrently filed a motion in the Third Circuit Court of Appeals for permission to file the successive § 2255 motion. On August 27, 2019, the Third Circuit Court of Appeals granted Mr. Spikes' motion for leave. Mr. Gordon refiled his memorandum of law in support of the successive § 2255 motion that same day. This motion is still pending and is not at issue in this memorandum.

On February 25, 2019, Mr. Spikes filed the *pro se* motion at issue. He now challenges his criminal history calculation by seeking mandamus under 28 U.S.C. § 1361. He requests the Court to direct his assigned U.S. Probation Officer to correct his presentence report. Mr. Spikes reiterates his concerns that his criminal history calculation improperly considered his four 1996 convictions.

#### DISCUSSION

The Court denies Mr. Spikes' motion for a litany of reasons.

As a preliminary matter, Mr. Spikes filed this *pro se* motion while represented by counsel. Because there is no right to "hybrid representation," Mr. Spikes may not submit *pro se* motions while an attorney represents him. *United States v. Turner*, 677 F.3d 570, 578 (3d Cir. 2012) (barring the submission of *pro se* briefs in a case in which the appellant was represented by counsel).

Second, "[a] motion to vacate sentence pursuant to 28 U.S.C. § 2255 is the means to collaterally challenge a federal conviction or sentence." *Massey v. United States*, 581 F.3d 172, 174 (3d Cir. 2009) (per curiam).<sup>3</sup> Accordingly, the type of error raised by Mr. Spikes may be presented, if at all, in a motion brought under 28 U.S.C. § 2255 to modify his sentence. Of course, such a motion would be subject to the applicable procedural rules, including the 1-year time limitation and the restriction on successive petitions. *Id.* at § 2255(f), (h).

Instead of moving to modify his sentence under § 2255, Mr. Spikes instead seeks to challenge his sentence through a petition for mandamus under 28 U.S.C. § 1361. Pursuant to 28 U.S.C. § 1361, "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform

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<sup>3</sup> A court's judgment can also be subject to a motion for correction of the judgment under Federal Rule of Criminal Procedure 35 or a motion to modify the sentence under the specific circumstances set forth in 18 U.S.C. § 3582(c). See *United States v. Washington*, 549 F.3d 905, 914 (3d Cir. 2008). Neither motion is at issue here.

a duty owed to the plaintiff.” Mandamus is a “drastic” remedy “to be invoked only in extraordinary situations.” *Kerr v. U.S. Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 402 (1976) (collecting cases); see *In re Chambers Dev. Co., Inc.*, 148 F.3d 214, 223 (3d Cir. 1998) (“The writ is a drastic remedy that ‘is seldom issued and its use is discouraged.’”) (citing *Lusardi v. Lechner*, 855 F.2d 1062, 1069 (3d Cir. 1988)). Mandamus is only appropriate where: “(1) the petitioner has ‘no other adequate means to attain the relief’ sought; (2) the ‘right to the issuance of the writ is clear and indisputable;’ and (3) ‘the issuing court ... [is] satisfied’ in the exercise of its discretion that mandamus ‘is appropriate under the circumstances.’” *Gillette v. Prosper*, 858 F.3d 833, 841 (3d Cir. 2017). Accordingly, “a mandamus petition may not be used in lieu of satisfying the standard for pursuing a claim in a successive § 2255 motion.” *In re Reynolds*, 767 F. App’x 363, 364 (3d Cir. 2019) (citing *Massey*, 581 F.3d at 174).

Third, as the Court has already made clear, Mr. Spikes’ knowing and voluntary waiver forecloses his collateral attack of his conviction. To set aside an otherwise valid waiver, courts should consider whether enforcing the waiver “would result in a miscarriage of justice.” *United States v. Castro*, 704 F.3d 125, 137 (3d Cir. 2013). In doing so, courts consider factors such as “the clarity of the error, 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.” *United States v. Banks*, 743 F.3d 56, 59 (3d Cir. 2014) (quoting *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001)).

Mr. Spikes’ contention that his criminal history was incorrectly calculated is precisely the type of claim anticipated by such a waiver. See, e.g., *Castro*, 704 F.3d at 141-42 (“It appears instead that a district court’s arguably erroneous calculation of a guidelines range is precisely the

kind of garden variety claim of error contemplated by [an] appellate waiver.”) (internal quotation marks and citation omitted) (alteration in original); *United States v. Corso*, 549 F.3d 921, 931-32 (3d Cir. 2008) (“[A]llow[ing] alleged errors in computing a defendant’s sentence to render a waiver unlawful would nullify the waiver based on the very sort of claim it was intended to waive.”) (internal quotation marks omitted) (alteration in original). This is especially true considering the Court’s determination to relieve Mr. Spikes of 22 years of additional, consecutive mandatory imprisonment on his § 924(c) charges. *See Banks*, 743 F.3d at 59 (holding that where defendants’ prison terms fell within the ranges specified in the plea agreement and the entire sentence fell well below the statutory maximum, “[t]here is no foundation to conclude that the District Court’s sentence constituted a miscarriage of justice”). Thus, enforcing Mr. Spikes’ waiver does not result in a miscarriage of justice, and the Court again enforces the waiver here.

Finally, Mr. Spikes’ motion fails on the merits. Mr. Spikes raises issue with the information used to calculate his criminal history points and seeks an amendment of his presentence report. According to Mr. Spikes, he should not have received points for his 1996 convictions because his participation in New Jersey’s Intensive Supervision Program resulted in him being confined in prison for less than 13 months per sentence. New Jersey’s program “allows an offender to serve the remainder of his sentence in the community rather than in prison, (‘a prison without walls’), but if he offends, he returns to confinement (‘prison with walls’).” *United States v. Fisher*, No. 12-777, 2014 WL 200644, at \*2 (D.N.J. 2014), *aff’d*, 597 F. App’x 685 (3d Cir. 2015). Although the defendant is permitted to serve the balance of this sentence in the community, participation in the program does not alter the original sentence. *Id.*

Pursuant to the Sentencing Guidelines, the criminal history calculation rests on the maximum sentence imposed for the offense. *See* U.S.S.G. § 4A1.2(b)(1) (“The term ‘sentence of

imprisonment' means a sentence of incarceration and refers to the maximum sentence imposed."); *id.* at application note 2 ("To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence . . . . For the purposes of applying § 4A1.1(a), (b), or (c), the length of a sentence of imprisonment is the stated maximum . . . . That is, criminal history points are based on the sentence pronounced, not the length of time actually served."). Accordingly, the criminal history calculation in the presentence report was based on the maximum terms of imprisonment imposed for Mr. Spikes' previous convictions. The fact that Mr. Spikes was placed on intensive supervision in the community for the remainder of his previous convictions is of no moment.

#### CONCLUSION

For the foregoing reasons, the Court denies Mr. Spikes' Motion to Compel an Officer of the United States to Perform Duty Under Pursuant to 28 U.S.C. § 1361. An appropriate order follows.

**BY THE COURT:**

  

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**GENE E.K. PRATTER**  
**UNITED STATES DISTRICT JUDGE**

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

UNITED STATES OF AMERICA

v.

DAVID LEE SPIKES

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CRIMINAL ACTION

No. 08-201-2

**ORDER**

AND NOW, this 16th day of March, 2020, upon consideration of Defendant's *Pro Se* Motion to Compel an Officer of the United States to Perform Duty Pursuant to 28 U.S.C. § 1361 (Doc. No. 346) and the Response in Opposition (Doc. No. 348), it is **ORDERED** that the Motion (Doc. No. 346) is **DENIED** for the reasons set forth in the accompanying memorandum.

BY THE COURT:

  
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GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE