UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL ACTION NO.
	§	4:18-CR-115
RODOLFO RUDY DELGADO	§	

ORDER

Before the Court are Defendant's Emergency Motion for Compassionate Release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) (the "Motion") (Doc. #191), Defendant's Supplement to his Motion for Compassionate Release (Doc. #192), the Government's Response (Doc. #193), Defendant's Reply (Doc. #194), Defendant's Second Supplement to his Motion for Compassionate Release (Doc. #195), the Government's Supplemental Response to Defendant's Motion for Compassionate Release (Doc. #196), and Defendant's Reply to the Government's Supplemental Response (Doc. #197).[1] Having reviewed the parties' arguments and applicable legal authority, the Court denies the Motion.

I. Background

a. Indictment, Trial, and Sentencing

On February 28, 2018, a federal grand jury returned an indictment against Defendant Rodolfo "Rudy" Delgado—former Hidalgo County District Judge who was later elected to the Thirteenth Court of Appeals—charging him with three counts of federal program bribery in violation of 18 U.S.C. § 666 and three counts of interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952. Doc. #19. Subsequently, the grand jury returned several superseding indictments. On June 19, 2018, the first superseding indictment added one count of conspiracy to commit federal program

[1] Without leave, both parties have filed pleadings exceeding the page limits and briefing schedule permitted under Judge Bennett's Court Procedures and Practices. The Court admonishes the parties to strictly follow its rules concerning motion practice. Though the Court has reviewed all pleadings listed above and their accompanying arguments, future pleadings violating the Court's Procedures and Practices will be stricken without further instruction from the Court.

bribery in violation of 18 U.S.C. § 371. Doc. #41. On July 25, 2018, the second superseding indictment added one count of obstruction of justice in violation of 18 U.S.C. § 1512. Doc. #51. And on November 15, 2018, the third superseding indictment—the final charging instrument—corrected errors in the second superseding indictment but did not add or remove charges. Doc. #68. On July 2, 2019, the criminal trial of Defendant commenced in McAllen, Texas. Through his counsel, Defendant made timely motions for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 at the close of the Government's evidence and at the close of all evidence. The Court denied both motions on the record. On July 11, 2019, a jury returned a verdict of guilty on all counts. After Defendant moved for a judgment of acquittal notwithstanding the verdict and for a new trial, the Court denied both motions on September 24, 2019.

On September 25, 2019, in McAllen, Texas, Defendant was sentenced to a term of 60 months imprisonment and, upon release, two years of supervised release. At the sentencing hearing, the Court granted Defendant's request to remain on bond and voluntarily surrender on a later date to be determined by the Bureau of Prisons ("BOP"). Subsequently, Defendant filed a Notice of Appeal on October 3, 2019, and the BOP ordered Defendant to surrender on November 19, 2019, at the Federal Medical Center facility in Fort Worth, Texas ("FMC Fort Worth"). After his motion to postpone his surrender date was denied by the Court, Defendant timely reported to FMC Fort Worth on November 19, 2019.

b. Imprisonment and Health Conditions

As of the date of this Order, Defendant has served approximately six months of his 60-month sentence (i.e., 10 percent) at FMC Forth Worth. According to his Motion and the final Presentence Investigation Report, Defendant—a 67-year-old man—is a diabetic and has been diagnosed with hyperglycemia, hypertension, and hypercholesteremia. Doc. #149 ¶ 67; Doc. #191 at 1–2.

Additionally, Defendant underwent a liver transplant in 2010 and is prescribed Sirolimus, an immunosuppressant. Doc. #191 at 1–2.

c. COVID-19 and FMC Fort Worth

Currently, the world is suffering from the spread of a novel coronavirus that causes COVID-19, an extremely dangerous and potentially fatal illness. *Coronavirus (COVID-19)*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/index.html (last visited May 16, 2020). On its website, the Centers for Disease Control and Prevention ("CDC") cautions that "older adults and people of any age who have serious underlying medical conditions might be at higher risk for severe illness from COVID-19." *Coronavirus (COVID-19): People Who Are at Higher Risk for Severe Illness*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last updated May 14, 2020). Older adults include "[p]eople 65 years and older." *Id.* Individuals with serious underlying medical conditions include those with chronic lung disease, moderate to severe asthma, serious heart conditions, severe obesity, diabetes, chronic kidney disease, and liver disease, as well as those who are immunocompromised. *Id.*

Defendant represents that, as of May 12, 2020, 635 inmates have tested positive for COVID-19 at FMC Forth Worth. Doc. #195 at 1.

d. Requests for Release due to COVID-19

On April 1, 2020, Defendant made a verbal request to his case manager for a release to home confinement. Doc. #191 at 11. Two days later, on April 3, Defendant hand-delivered a completed form titled "Request for Administrative Remedy – Attempt at Informal Resolution." Doc. #194, Ex. B. Specifically, on that form, Defendant states that he "want[s] the BOP to use its statutory authority to grant [him] home confinement in response to the virus [that causes COVID-19] consistent with

Attorney General Barr's directive of 3-26-20 and the CARES Act signed into law on March 27, 2020." *Id.* On April 11 and 13, Defendant received responses informing him that his request for home confinement is under review. Doc. #194 at 10. According to Defendant, he was informed on May 5 that his request had been denied and that he "could appeal the decision but would need to fill out a different form." *Id.* at 13–14.[2] The Government notes that the "BOP's records do not show that the defendant has initiated any appeal of BOP's decision." Doc. #193 at 7–8.

Filed on April 27, 2020, and now before the Court, is Defendant's Emergency Motion for Compassionate Release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), which requests the Court to "reform [Defendant's] judgment to a time-served sentence or home detention for a specified time period." Doc. #191 at 1 and 21. The Government opposes the Motion, arguing that Defendant has failed to fully exhaust his administrative rights and a sentence reduction is unwarranted on the merits. Doc. #193 at 1.

II. Legal Standards

a. Notice of Appeal's Effect on District Court's Jurisdiction

"If an appeal is taken from a judgment which determines the entire action, the district court loses power to take any further action in the proceeding upon the filing of a timely and effective notice of appeal, except in aid of the appeal or to correct clerical errors under Rule 60(a)." *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir. 1984); *see also United States v. Pena*, 713 Fed. Appx. 271, 272–73 (5th Cir. 2017) ("An appeal divests the district court of its jurisdiction over those aspects of the case involved in the appeal. Further, an appeal of a judgment determining the entire

[2] The Government represents that Defendant's request for home confinement was denied on April 20. Doc. #193 at 7.

action divests the district court of jurisdiction, while that appeal is pending, over any further matters for that action, except in aid of the appeal or to correct clerical errors." (internal citations omitted)).

Yet, pursuant to Federal Rule of Criminal Procedure 37, "[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Crim. P. 37(a); *see also* Fed. R. Crim. P. 37 advisory committee's note to 2012 adoption (when Rule 37 is triggered, the Court "can entertain [a § 3582(c)] motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue").

b. Compassionate Release, 18 U.S.C. § 3582(c)(1)(A)

After a defendant has been sentenced to a term of imprisonment, a court "may reduce the term" if, after considering the factors set forth in section 18 U.S.C. § 3553(a), the court finds that "extraordinary and compelling reasons warrant such a reduction" and "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A); *see e.g.*, *United States v. Chambliss*, 948 F.3d 691, 692 (5th Cir. 2020) (finding no abuse of discretion when district court denied compassionate release, although an extraordinary and compelling reason for sentence reduction existed, because § 3553(a) factors weighed against release).

The factors listed under 18 U.S.C. § 3553(a) include the following:

1) the nature and circumstances of the offense and the history and characteristics of the defendant;
2) the need for the sentence imposed to
    (A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    (B) afford adequate deterrence to criminal conduct;
    (C) protect the public from further crimes of the defendant; and

(D) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

3) the kinds of sentences available;
4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines;
5) any pertinent policy statement issued by the Sentencing Commission;
6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (summarized).

In addition to considering the § 3553(a) factors, the court must also determine whether there exist extraordinary and compelling reasons that warrant a sentence reduction and whether such a reduction is consistent with applicable policy statements issued by the Sentencing Commission. Specifically, § 1B1.13 of the Federal Sentencing Guidelines (titled "Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)") and its attendant Application Notes are instructive.[3] Under the section, "extraordinary and compelling reasons" exist under the following circumstances:

(A) Medical Condition of the Defendant –
  (i) The defendant is suffering from a terminal illness. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia; or
  (ii) The defendant is suffering from a serious physical or medical condition; suffering from a serious functional or cognitive impairment; or experiencing deteriorating physical or mental health because of the aging process; and

  the illness, condition, or impairment substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) Age of the Defendant – The defendant is at least 65 years old; is experiencing a serious deterioration in physical or mental health because of the aging process;

[3] The § 1B1.13 provisions concerning individuals who are at least 70 years old are inapplicable to Defendant.

and has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family Circumstances –

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children; or

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) Other Reasons – As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

U.S.S.G. 1B1.13 (summarized).

Importantly, when seeking compassionate release, a defendant may not move the court for a sentence reduction under § 3582(c)(1)(A) until "the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf ***or*** the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier . . . ." 18 U.S.C. § 3582(c)(1)(A) (emphasis added); *see, e.g.*, *United States v. Orellana*, Criminal Action No. 4:17-CR-0220, 2020 WL 1853797, at *1 (S.D. Tex. Apr. 10, 2020) (denying defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) after finding that defendant failed to file a request); *United States v. Clay*, Criminal No. 2:18-1282-10, 2020 WL 2296737, at *3 (S.D. Tex. May 4, 2020) (holding that defendant's motion for compassionate release was not ripe because defendant had failed to comply with exhaustion requirements under § 3582).

c. Home Confinement under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136

By federal statute, only the BOP has authority over the placement of a prisoner during the prisoner's term of imprisonment. 18 U.S.C. § 3621(b). This includes placement on home confinement. 18 U.S.C. § 3624(c)(2) ("The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months. The Bureau of Prisons shall, to the extent practicable, place prisoners with

lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.").

Though the CARES Act lengthens the period a prisoner may be placed on home confinement, nothing in the Act disturbs the BOP's sole authority over the placement of a prisoner during the prisoner's term of imprisonment. CARES Act § 12003(b)(2) ("During the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director determines appropriate."); *see also Clay*, 2020 WL 2296737, at *3 ("While the CARES Act allows the BOP Director to lengthen the amount of time a prisoner may be placed in home confinement, nothing in the Act grants individual prisoners the right to serve the remainder of their sentence in home confinement. The BOP still has exclusive authority to determine where a prisoner is housed.").

III. Analysis

The Court must address two threshold issues. The first concerns jurisdictional issues arising from Defendant's appeal. Defendant filed his Notice of Appeal of the final judgment on October 3, 2019. Therefore, because Defendant's April 27, 2020 Motion seeks to reform the judgment, the Court is without jurisdiction to grant the requested relief. *See Nicol*, 743 F.2d at 299; *Pena*, 713 Fed. Appx. at 272–73. However, the inquiry does not end there. The Court must determine whether Defendant's Motion constitutes a "timely motion" under Federal Rule of Criminal Procedure 37 (i.e., whether Defendant has exhausted administrative remedies under 18 U.S.C. § 3582(c)(1)(A)). If so, then the Court has jurisdiction to either entertain the Motion and deny it *or* entertain the Motion and state that

the Motion would be granted on remand. Fed. R. Crim. P. 37(a). Though the Court has the option to defer considering the Motion, the urgent nature of the Motion forecloses that route. *Id.*

The second threshold issue concerns the Court's authority to grant Defendant's requested relief. Due to COVID-19 and the circumstances at FMC Fort Forth, Defendant moves the Court to reform his judgment to either a time-served sentence or home confinement. Doc. #191 at 1 and 21. However, as outlined above, the Court has no authority—and Defendant cites no binding authority enabling the Court—to place Defendant on home confinement for the duration of his term of imprisonment.

Therefore, the Court must first determine whether Defendant filed a "timely motion" pursuant to Federal Rule of Criminal Procedure 37 by exhausting administrative remedies under § 3582(c)(1)(A). If Defendant has met his burden, the Court must then consider the merits of the Motion to determine whether a sentence reduction to a time-served sentence is appropriate.

a. Defendant has exhausted administrative remedies under 18 U.S.C. § 3582(c)(1)(A).

Pursuant to § 3582, before moving this Court for a sentence reduction, Defendant must "fully exhaust[] all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf ***or*** [await] the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility . . . ." 18 U.S.C. § 3582(c)(1)(A) (emphasis added).

Here, Defendant concedes that his first verbal request on April 1 and second written request on April 3 to his case manager were for home confinement due to COVID-19. Doc. #191 at 11–12. The Government argues that such a request for home confinement does not qualify as the type of request contemplated by § 3582(c)(1)(A) for exhaustion purposes because a request for home confinement invokes the BOP's general authority, whereas a request for a sentence reduction or compassionate release invokes the Court's specific authority conferred by § 3582(c)(1)(A). Doc.

#193 at 9–12. Though the Court recognizes the technical legal distinction between the two types of requests, from a practical standpoint, Defendant has requested his release from FMC Forth Worth in writing through proper channels due to the spread of COVID-19—whether that release occurs through home confinement or a time-served sentence seems to be of little concern to Defendant. Furthermore, if Defendant were required to refile his request with the BOP pursuant to the Government's instructions, it seems unlikely that the BOP would recommend a sentence reduction to a time-served sentence after already refusing to place Defendant on home confinement. Accordingly, because (1) the Court considers Defendant's written April 3 request as a proper request under § 3582(c)(1)(A) and (2) both parties do not dispute that 30 days have passed since Defendant lodged that request, the Court finds that Defendant has exhausted administrative remedies under § 3582(c)(1)(A).

Therefore, Defendant's Motion constitutes a timely motion under Federal Rule of Criminal Procedure 37, and the Court retains jurisdiction to consider the merits of the Motion and determine whether Defendant's Motion for a sentence reduction to a time-served sentence should be denied *or* would be granted on remand.

b. Defendant is not entitled to a sentence reduction to a time-served sentence pursuant to § 3582(c)(1)(A).

Though the Court appreciates that Defendant's age and some of his health conditions are recognized by the CDC as factors that might place him at higher risk for severe illness if COVID-19 is contracted, the Court finds that the COVID-19-related reasons offered by Defendant do not constitute "extraordinary and compelling" reasons that warrant a sentence reduction to a time-served sentence under § 1B1.13 of the Federal Sentencing Guidelines. Further, permitting Defendant to serve approximately six months of his 60-month sentence after a jury of his peers returned guilty verdicts—on one count of conspiracy to commit federal program bribery, three counts of federal program bribery, three counts of interstate travel in aid of racketeering, and one count of obstruction

of justice—would be nothing short of a travesty of justice. At the September 25, 2019 sentencing hearing, the Court took considerable effort and time outlining on the record how the Court weighed several § 3553(a) factors in support of a 60-month sentence, including the nature of the offenses, the history and characteristics of Defendant, and the need for the sentence to reflect the seriousness of the offenses. Despite the COVID-19 pandemic and the recent rise in the number of infections at FMC Fort Worth, the Court's reasoning delivered on September 25, 2019, concerning Defendant and his conduct still holds true today.

IV. Conclusion

For the foregoing reasons, Defendant's Emergency Motion for Compassionate Release is hereby DENIED.

It is so ORDERED.

May 19, 2020
Date

The Honorable Alfred H. Bennett
United States District Judge