

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10907
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

December 16, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PABLO CANTU HERNANDEZ, also known as Paul Hernandez, also known as Ledubijen Hernandez, also known as Viejo, also known as Mr. H.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:17-CR-42-3

Before HIGGINBOTHAM, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:*

Pablo Cantu Hernandez, federal prisoner # 56212-177, moves for leave to proceed in forma pauperis (IFP) on appeal from the district court's denial of his motions for compassionate release, a sentence reduction, and reconsideration. Because the applicable time limit for noticing an appeal in this case is not jurisdictional, we pretermit the issue of the timeliness of Cantu

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX
(A)

Hernandez's notice of appeal. *See United States v. Martinez*, 496 F.3d 387, 388-89 (5th Cir. 2007); *United States v. Lewis*, 921 F.2d 563, 564 (5th Cir. 1991).

A movant seeking IFP status must show both financial eligibility and a nonfrivolous issue for appeal. *See Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982). Even if he satisfies the financial eligibility requirement, Cantu Hernandez has not shown a nonfrivolous appellate issue. *See id.* He makes no argument concerning the denial of his motion for compassionate release. Instead, he argues only that he is entitled to a sentence reduction pursuant to the safety-valve provision of the First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221 (2018), and that, contrary to the district court's findings, this provision applies to him.

The relevant provision of the First Step Act applies "only to a conviction entered on or after the date of enactment"—December 2018. § 402(b), 132 Stat. at 5221; *see United States v. Hegwood*, 934 F.3d 414, 416 (5th Cir.), *cert. denied*, 140 S. Ct. 285 (2019). The district court entered the criminal judgment against Cantu Hernandez long before December 2018, and there was no appeal. The safety-valve provision at § 402 thus does not apply under any construction of the term "conviction entered" as used in the statute. *See* § 402(b), 132 Stat. at 5221.

Accordingly, the motion to proceed IFP is DENIED, and the appeal is DISMISSED as frivolous. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983); 5TH CIR. R. 42.2.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

UNITED STATES OF AMERICA

§

v.

§

PABLO CANTU HERNANDEZ (3)

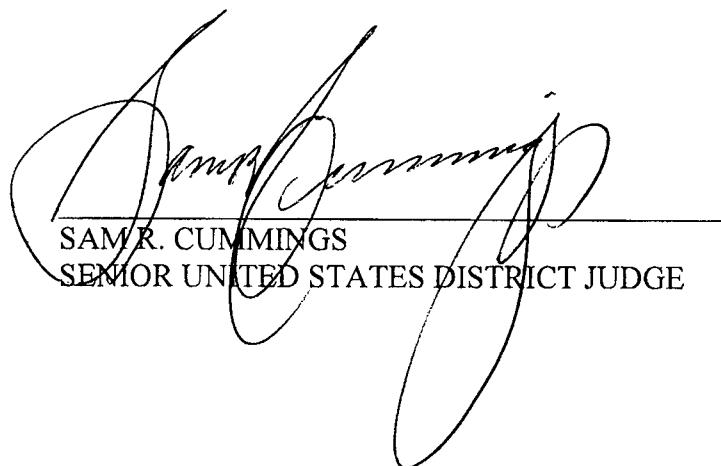
§ NO. 6:17-CR-042-03-C
§ ECF

ORDER

The Court having considered Movant's Objections to Court's Order, is of the opinion that the same should be **DENIED**.

SO ORDERED.

Dated July 17, 2019.



SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX
C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

ORDER

BEFORE THE COURT are Movant's Motion for Compassionate Release under Elderly Offender Home Detention Program [docket number 244] and Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(2), and the First Step Act of 2018 ("The Act"), S-756, P.L. 115 [docket number 246]. Having considered the foregoing, the Court is of the opinion that both of Movant's Motions should be **DENIED**.

First, in his Motion for Compassionate Release under Elderly Offender Home Detention Program, Movant appears to assert that he is entitled to compassionate release under 18 U.S.C. § 3582(c)(1)(A), as amended by § 603(b)(1) of the First Step Act. However, his discussion seems to focus on his satisfying the statutory requirements of an “eligible elderly offender” as defined in 34 U.S.C. § 60541 and amended by § 603(a) of the Act. This Court will consider Movant’s eligibility for relief under both sections.

A defendant may argue under § 603(a) that the defendant should receive home confinement by virtue of meeting the requirements of an “eligible elderly offender” as defined in

APPENDIX B

34 U.S.C. § 60541 and amended by § 603 of the Act. An eligible elderly offender is an offender in the custody of the Bureau of Prisons (BOP):

- (i) who is not less than 60 years of age;
- (ii) who is serving a term of imprisonment that is not life imprisonment based on conviction for an offense or offenses that do not include any crime of violence (as defined in section 16 of Title 18), sex offense (as defined in section 20911(5) of this title), offense described in section 2332b(g)(5)(B) of Title 18, or offense under chapter 37 of Title 18, and has served 2/3 of the term of imprisonment to which the offender was sentenced;
- (iii) who has not been convicted in the past of any Federal or State crime of violence, sex offense, or other offense described in clause (ii);
- (iv) who has not been determined by the Bureau of Prisons, on the basis of information the Bureau uses to make custody classifications, and in the sole discretion of the Bureau, to have a history of violence, or of engaging in conduct constituting a sex offense or other offense described in clause (ii);
- (v) who has not escaped, or attempted to escape, from a Bureau of Prisons institution;
- (vi) with respect to whom the Bureau of Prisons has determined that release to home detention under this section will result in a substantial net reduction of costs to the Federal Government; and
- (vii) who has been determined by the Bureau of Prisons to be at no substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention.

34 U.S.C. § 60541(g)(5)(A). However, because § 603 vests the Attorney General with discretion to determine if and when home confinement is appropriate, courts do not have the authority to grant relief under this theory. *See Burg v. Nicklin*, EP-19-CV-24-FM, 2019 WL 369153, at *2–3 (W.D. Tex. Jan. 29, 2019); *see also Zheng Yi Xiao v. La Tuna Federal Correctional Institution*, EP-19-CV-97-KC, 2019 WL 1472889, at *3 (W.D. Tex. Apr. 3, 2019) (“The Attorney General—and by delegation the BOP—has the exclusive authority and discretion to designate the place of an inmate’s confinement.”). Consequently, Movant is not entitled to relief under § 603(a) of the First Step Act.

Alternatively, under §603(b)(1) of the First Step Act, a defendant may argue that the defendant is entitled to compassionate release under 18 U.S.C. § 3582(c)(1)(A). A court may consider this claim. *See United States v. Bell*, Criminal Case No. 3:93-cr-302-M, 2019 WL 1531859, at *1 (N.D. Tex. Apr. 9, 2019); *see also United States v. Curry*, Criminal Action No. 6:06-082-DCR, 2019 WL 508067, at *1–2 (E.D. Ky. Feb. 8, 2019). To be entitled to relief, in addition to exhaustion of administrative remedies with the BOP or “the lapse of 30 days from the receipt of [a request to bring a motion on the defendant’s behalf] by the warden of the defendant’s facility, whichever is earlier,” the defendant must either present “extraordinary and compelling reasons” for such a reduction or meet all of the following requirements: (1) the defendant must be at least 70 years old; (2) the defendant must have served at least 30 years in prison, pursuant to a sentence imposed under 18 U.S.C. § 3559(c), for which the defendant is currently imprisoned; and (3) the BOP must make a determination that the defendant is not a danger to the safety of any other person or the community. 18 U.S.C. § 3582(c)(1)(A); *see also United States v. Curry*, Criminal Action No. 6:06-082-DCR, 2019 WL 508067, at *1–2 (E.D. Ky. Feb. 8, 2019).

Here, Movant states in his Motion that he was born on June 7, 1956 and was 62 years old. At the time of this Order, he is now 63. Both of these ages are under the age-70 requirement imposed by 18 U.S.C. § 3582(c)(1)(A)(ii). Additionally, Movant states that he has served 14 months in prison, which is not even close to that section’s 30-year requirement for time served. As for 18 U.S.C. § 3582(c)(1)(A)(i), Movant has put forward no “extraordinary and compelling reasons” why he should be granted relief under this section.

Second, in his Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(2), and the First Step Act of 2018 (“The Act”), S-756, P.L. 115, Movant asserts that he is eligible for application of the safety valve provision under the First Step Act, as well as consideration of the sentencing factors under 18 U.S.C. § 3553(a). Section 402 of the First Step Act amends 18 U.S.C. § 3553(f) and provides that a defendant may receive a sentence without regard to any minimum sentence if:

- (1) the defendant does not have--
 - (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
 - (B) a prior 3-point offense, as determined under the sentencing guidelines; and
 - (C) a prior 2-point violent offense, as determined under the sentencing guidelines[.]

18 U.S.C. § 3553(f); *Hernandez v. FCI La Tuna*, EP-19-CV-112-PRM, 2019 WL 1925897, at *3 (W.D. Tex. Apr. 30, 2019). Additionally, § 402(b) states that “[t]he amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.”

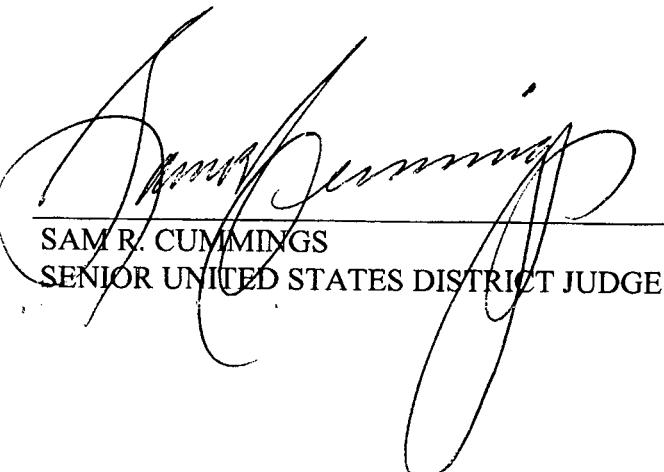
Here, Movant states that he pleaded guilty to his offense in 2017 and was sentenced on February 16, 2018. The effective date of the First Step Act is December 21, 2018—over ten months later than Movant’s sentencing date. Consequently, Movant is not entitled to relief under § 402 of the First Step Act. *See Hernandez v. FCI La Tuna*, EP-19-CV-112-PRM, 2019 WL 1925897, at *4 (W.D. Tex. Apr. 30, 2019) (“[b]ecause Petitioner’s sentence was imposed before the date of the enactment of the Act, Petitioner will never benefit from the changes to the ‘safety valve’ provision in the First Step Act.”). In light of this determination, Movant is not entitled to consideration of the sentencing factors under 18 U.S.C. § 3553(a).

For these reasons, it is **ORDERED** that Movant’s Motion for Compassionate Release under Elderly Offender Home Detention Program and Motion to Reduce Sentence Pursuant to 18

U.S.C. § 3582(c)(2), and the First Step Act of 2018 ("The Act"), S-756, P.L. 115 are hereby

DENIED.

SO ORDERED this 17th day of June, 2019.



SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE