

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3432

SERDAR TATAR,

Appellant,

v.

UNITED STATES OF AMERICA

(District Court No.: 1-07-cr-00459-005)

PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, McKEE, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, Circuit Judges and RENDELL* AND FUENTES*, Senior Circuit Judge

The petition for rehearing filed by **appellant** in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court en banc, are denied.

*Honorable Marjorie O. Rendell and Honorable Julio M. Fuentes' votes are limited to panel rehearing only.

BY THE COURT,

s/Thomas L. Ambro
Circuit Judge

Dated: August 30, 2022
Sb/cc: All Counsel of Record
Serdar Tatar

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3432

UNITED STATES OF AMERICA

v.

SERDAR TATAR,
Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 1-07-cr-00459-005)
District Judge: Honorable Robert Kugler

Submitted Under Third Circuit L.A.R. 34.1(a)
June 6, 2022

Before: AMBRO, RENDELL, and FUENTES, Circuit Judges

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on June 6, 2022.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgments of the District Court dated November 4, 2020, and July 8, 2021, are hereby AFFIRMED.

All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: July 15, 2022



Certified true copy and issued in lieu
of a formal mandate on September 7, 2022

Teste: *Patricia S. Dodszuweit*
Clerk, U.S. Court of Appeals for the Third Circuit

TRULINCS 61287066 - TATAR, SERDAR - Unit: MEM-D-A

FROM: Research Grp, Federal
TO: 61287066
SUBJECT: 20-3432, USA v. Serdar Tatar
DATE: 09/09/2022 06:58:18 AM

20-3432, USA v. Serdar Tatar
US Circuit Court of Appeals - 03rd Circuit

Online 09/07/2022 MANDATE ISSUED. (SB)

TRULINCS 61287066 - TATAR, SERDAR - Unit: MEM-D-A

FROM: Research Grp, Federal
TO: 61287066
SUBJECT: 20-3432, USA v. Serdar Tatar
DATE: 09/01/2022 06:27:11 AM

20-3432, USA v. Serdar Tatar
US Circuit Court of Appeals - 03rd Circuit

Online 08/30/2022
ORDER (CHAGARES, Chief Judge, MCKEE, AMBRO, JORDAN, HARDIMAN, GREENAWAY JR., RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, RENDELL* and FUENTES*, Circuit Judges) denying Petition for en banc rehearing and for panel rehearing filed by Appellant Serdar Tatar. Ambro, Authoring Judge. [*Honorable Marjorie O. Rendell and Honorable Julio M. Fuentes' votes are limited to panel rehearing only.] (SB)

UNITED STATES OF AMERICA v. SERDAR TATAR, Appellant
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
2022 U.S. App. LEXIS 19568
No. 20-3432
June 6, 2022, Submitted Under Third Circuit L.A.R. 31.4(a)
July 15, 2022, Opinion Filed

Notice:

NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT. PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1}Appeal from the United States District Court for the District of New Jersey. (D.C. Criminal Action No. 1-07-cr-00459-005). District Judge: Honorable Robert B. Kugler. United States v. Tatar, 2020 U.S. Dist. LEXIS 205659, 2020 WL 6482706 (D.N.J., Nov. 2, 2020)

Judges: Before: AMBRO, RENDELL, and FUENTES, Circuit Judges.

CASE SUMMARYRegarding its denial of his motion for compassionate release, the district court did not abuse its discretion in holding that 18 U.S.C.S. § 3553(a) sentencing factors weighed against release where defendant played a crucial role in the conspiracy, had served less than half of his thirty-year sentence, and had committed an extremely serious crime.

OVERVIEW: HOLDINGS: [1]-Regarding its denial of his motion for compassionate release, the district court did not abuse its discretion in holding that 18 U.S.C.S. § 3553(a) sentencing factors weighed against release where defendant played a crucial role in the conspiracy for which he was convicted, had served less than half of his thirty-year sentence, and had committed an extremely serious crime; [2]-For similar reasons, the district court did not abuse its discretion by rejecting defendant's motion for reconsideration; [3]-The district court lacked jurisdiction to consider defendant's Fed. R. Civ. P. 60(b) motion because the motion was an unauthorized second or successive 28 U.S.C.S. § 2255 motion where the arguments raised therein-a constitutional challenge to his conviction-went straight to the merits of his conviction.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Sentencing > Imposition > Factors

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions

Federal law allows for compassionate release when a prisoner shows that both extraordinary and compelling reasons and the 18 U.S.C.S. § 3553(a) sentencing factors support an early release. 18 U.S.C.S. § 3582(c)(1). A district court's decision to grant compassionate release is purely discretionary,

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so the appellate court reviews its order for abuse of discretion. Under this standard, the appellate court will not disturb the district court's determination unless it is left with a definite and firm conviction that there was a clear error of judgment in the conclusion it reached.

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > Excusable Neglect

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > Mistake
Civil Procedure > Judgments > Relief From Judgment > Fraud

Fed. R. Civ. P. 60(b) allows relief from a final judgment in civil cases for reasons such as mistake, excusable neglect, or fraud. Fed. R. Civ. P. 60(b)(1), (3).

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability

Criminal Law & Procedure > Habeas Corpus > Successive Petitions > Prerequisites > Authorization

Criminal Law & Procedure > Habeas Corpus > Successive Petitions > Prerequisites > Prima Facie Showing

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof

A collateral attack on a federal conviction and judgment normally must be filed as a motion under 28 U.S.C.S. § 2255. And once that motion is denied, a prisoner may only file a second or successive motion if the appropriate court of appeals certifies that the new motion contains: (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the U.S. Supreme Court, that was previously unavailable. 28 U.S.C.S. § 2255(h). If a prisoner does not receive a certificate of appealability from the court of appeals, a district court lacks jurisdiction to consider the second or successive motion. Litigants may not circumvent these requirements by disguising a second or successive motion as something else, like a motion under Fed. R. Civ. P. 60(b).

Criminal Law & Procedure > Habeas Corpus > Successive Petitions

Civil Procedure > Judgments > Relief From Judgment

A Fed. R. Civ. P. 60(b) motion should be treated as a second or successive 28 U.S.C.S. § 2255 motion if it challenges the defendant's conviction or sentence rather than a procedural error in the prior § 2255 proceeding. A Rule 60(b) motion cannot be used to circumvent 28 U.S.C.S. § 2244's second or successive requirements if the motion attacks the federal court's previous resolution of a claim on the merits rather than alleging some defect in the integrity of the prior federal habeas proceedings.

Opinion

Opinion by: AMBRO

Opinion

OPINION*

AMBRO, Circuit Judge

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Appellant Serdar Tatar appeals the denial of three post-conviction motions: one motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), another for reconsideration of the denial of that motion, and the third for relief from judgment under Federal Rule of Civil Procedure 60. The District Court did not err in rejecting all three motions. Thus we affirm.

I. Background

Fourteen years ago, Serdar Tatar was convicted of conspiring to murder members of the U.S. military. The plot began when Tatar and four co-conspirators-his high school friends-became interested in jihad. The friend group often shared videos with one another of jihadist rhetoric and acts of violence. Tatar had applied to be a police officer and hoped to join the U.S. military so he could "kill [American soldiers] from [the] inside." *United States v. Duka*, 671 F.3d 329, 347 (3d Cir. 2011).

In 2006, the group took a trip to a firing range in the Pocono Mountains. There they recorded a video where they shouted, among other things, "jihad in the States." *Id.* at 333-34. When one member went{2022 U.S. App. LEXIS 2} to make a copy of the video, a concerned Circuit City employee turned it over to the local police, who sent it to the FBI. The FBI, in turn, sent two informants to infiltrate the group. Shortly thereafter, the group told one of the informants of a plan to attack Fort Dix, a U.S. Army post in New Jersey. Tatar, a former pizza delivery driver, was familiar with the post because of his many deliveries there, so one informant asked him to get a map for the group. Tatar agreed.

Just a few days later though, Tatar reported the informant to a Philadelphia police officer. While he told the officer about the request for the map, he conveniently omitted all other relevant information about the plot and his own involvement in it. At the same time, Tatar moved forward with the plan and handed over the map to the informant. He also reassured the informant he was all-in, saying "[i]t doesn't matter to me, whether I get locked up Whether I die, don't matter, I'm doing it in the name of Allah." SA 122.

A few weeks later, on December 7, 2006, the FBI interviewed Tatar about the report he made to the Philadelphia police. During this interview, Tatar told the FBI agents he did not give the map{2022 U.S. App. LEXIS 3} to the informant and knew no one else involved in the plot.

The FBI arrested Tatar and other members of the conspiracy after two of them purchased weapons from one of the informants. A jury later convicted Tatar of conspiracy to murder members of the U.S. military. His advisory Guidelines' sentence was life imprisonment. But at sentencing, the District Court varied Tatar's sentence downward to 396 months based on his potential for rehabilitation. We affirmed his conviction and sentence.

Tatar has spent the last decade seeking release. He first moved to vacate his conviction under 28 U.S.C. § 2255, which was denied. He then moved for compassionate release under 18 U.S.C. § 3582(c)(1), which was again denied. He promptly sought reconsideration of that denial. This, too, was denied. Lastly, Tatar filed a Rule 60 motion for relief from judgment, which was dismissed. Tatar now appeals the denial of the latter three motions.

II. Analysis

1. Motion for Compassionate Release1

Federal law allows for compassionate release when a prisoner shows that both "extraordinary and compelling reasons" and the 18 U.S.C. § 3553(a) sentencing factors support an early release. 18 U.S.C. § 3582(c)(1). A district court's decision to grant compassionate release is "purely discretionary," so we review{2022 U.S. App. LEXIS 4} its order for abuse of discretion. *United States*

v. Andrews, 12 F.4th 255, 259 (3d Cir. 2021). Under this standard, we will not disturb the Court's determination unless we are left with "a definite and firm conviction" that there was "a clear error of judgment in the conclusion it reached." *Id.* (quoting *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3d Cir. 2000)).

A natural starting place, then, is the District Court's decision. In moving for compassionate release, Tatar insisted his medical conditions (such as his latent tuberculosis, sleep apnea, "chest pains, kidney problems, [and] circulation problems," SA 209-10) made him particularly vulnerable to contracting and suffering serious complications from COVID-19. These medical conditions, he said, were extraordinary and compelling reasons for his early release. Tatar also contended that the § 3553(a) factors supported early release, as he was not a threat to the public and would permanently return to his home country of Turkey.

The District Court disagreed. The Court found Tatar's health conditions did "not place him at a significantly greater risk of complications for COVID-19," so he did "not meet the required 'extraordinary and compelling' standard for reduction of his sentence." SA 12. That was likely correct. But we need not definitively decide this{2022 U.S. App. LEXIS 5} issue because the Court did not abuse its discretion in its alternative holding—that the § 3553(a) factors weighed against release. As the Court observed, Tatar "played a crucial role" in the conspiracy for which he was convicted, had "served less than half of his thirty-year sentence," and had "committed an extremely serious crime." SA 12-13. Despite Tatar's protest, these factual findings are not clearly erroneous based on the record. The Court also properly determined that the need for "adequate deterrence and punishment," the "seriousness of Tatar's conduct," and "the need to protect the public" were all factors that "weigh firmly against compassionate release." *Id.* We cannot say the Court abused its discretion in reaching this conclusion.

For similar reasons, the Court did not abuse its discretion by rejecting Tatar's motion for reconsideration. In his renewed motion, Tatar alleged he had contracted COVID-19. This infection, he claimed, when coupled with his other medical issues, placed him at a heightened risk of severe illness from COVID-19. Again, even assuming he met the threshold requirements for seeking reconsideration, nothing in this new motion undermined the Court's reasoning that{2022 U.S. App. LEXIS 6} the § 3553(a) factors weighed against early release. We thus affirm the Court's denial of relief.

2. Rule 60 Motion

Separate from his motion for compassionate release, Tatar sought relief under Federal Rule of Civil Procedure 60(b).² In this motion, he asked the Court to "set aside the judgment entered . . . on April 29, 2009," (that is, his criminal judgment) based on allegations the Government committed a *Brady* violation by withholding exonerating evidence. SA 264, 278. The Government, he said, violated his constitutional rights by omitting or destroying "material evidence" from his December 7, 2006 interview with the FBI. SA 265-66. Had the evidence been properly turned over, he insists the "outcome of [his] trial would have been different." SA 268.

A collateral attack on a federal conviction and judgment normally must be filed as a motion under 28 U.S.C. § 2255. And once that motion is denied, a prisoner may only file a "second or successive motion" if the "appropriate court of appeals" certifies that the new motion contains: (1) "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of{2022 U.S. App. LEXIS 7} the offense"; or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h). If a prisoner does not receive a certificate of appealability from

the court of appeals, a district court lacks jurisdiction to consider the second or successive motion. See, e.g., *Pridgen v. Shannon*, 380 F.3d 721, 725 (3d Cir. 2004) (citing 28 U.S.C. § 2244(b)).

Litigants may not circumvent these requirements by disguising a second or successive motion as something else, like a motion under Rule 60(b). Indeed, a "Rule 60(b) motion should be treated as a second or successive § 2255 motion if it challenges the defendant's conviction or sentence rather than a procedural error in the prior § 2255 proceeding." *United States v. McKye*, 947 F.3d 1293, 1295 (10th Cir. 2020); see also *Gonzalez v. Crosby*, 545 U.S. 524, 532, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005) (determining a Rule 60(b) motion cannot be used to circumvent § 2244's second or successive requirements if the motion "attacks the federal court's previous resolution of a claim *on the merits*" rather than alleging "some defect in the integrity of the [prior] federal habeas proceedings" (emphasis in original)).

Tatar's Rule 60(b) motion is a clear attempt to relitigate his conviction, not a procedural challenge to his previous § 2255 proceeding. Indeed, the very first page of his motion states he is seeking reconsideration of the District Court's {2022 U.S. App. LEXIS 8} April 29, 2009, judgment—the judgment of conviction and sentence—not the Court's February 11, 2016, denial of his motion to vacate under § 2255.³ Further, the argument raised in the motion—a constitutional challenge to his conviction—goes straight to the merits of his conviction. In this context, the motion simply cannot be construed as raising a procedural mistake in the prior § 2255 case. Tatar's motion thus was an unauthorized second or successive § 2255 motion, and the Court lacked jurisdiction to consider it.⁴

For the reasons above, we affirm the District Court's denial of Tatar's motion for compassionate release and his motion to reconsider that order. Because the Court lacked jurisdiction to consider Tatar's Rule 60(b) motion (which was in fact an unauthorized successive § 2255 motion), we also affirm dismissal of that motion.

Footnotes

*

This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

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The District Court had jurisdiction under 18 U.S.C. § 3582(c)(1)(A) to consider Tatar's motion for compassionate release and his motion for reconsideration. We have jurisdiction to review the denial of these motions under 28 U.S.C. § 1291.

2

Rule 60(b) allows relief from a final judgment in civil cases for reasons such as "mistake," "excusable neglect," or "fraud." Fed. R. Civ. P. 60(b)(1), (3).

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This is all the more obvious from the fact that Tatar filed his Rule 60(b) motion on the docket of his criminal case, *United States v. Tatar*, No. 1:07-cr-00459 (D.N.J. filed June 5, 2007), *not* on the docket of his civil § 2255 case, *Tatar v. United States*, No. 1:13-cv-03317 (D.N.J. filed May 28, 2013).

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In his motion, Tatar also invoked Rule 59(a)(1) which allows the Court to "grant a new trial on all or some of the issues" if the motion for a new trial is "filed no later than 28 days after the entry of judgment." Fed. R. Civ. P. 59(a)(1), (b). Tatar cites no authority extending Rule 59(a)(1) to the criminal context. And his time to file such a motion ran out long ago; judgment was entered against him more than a decade ago. He also cited Rule 60(d)(3), but that only states that Rule 60 "does not limit a court's power to . . . set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3). As the Government observes, this rule "does not create any affirmative mechanism for relief." Gov't Br. at 24.

UNITED STATES OF AMERICA, Plaintiff, v. SERDAR TATAR, Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2020 U.S. Dist. LEXIS 205659

Crim. No. 07-459 (RBK)

November 2, 2020, Decided

November 2, 2020, Filed

Notice:

NOT FOR PUBLICATION

Editorial Information: Prior History

Tatar v. Levi, 2010 U.S. Dist. LEXIS 98857 (D.N.J., Sept. 20, 2010)

Counsel

{2020 U.S. Dist. LEXIS 1}For USA, Plaintiff: MICHAEL A. HAMMER, LEAD ATTORNEY, OFFICE OF U.S. ATTORNEY, NEWARK, NJ; NORMAN JOEL GROSS, WILLIAM E. FITZPATRICK, LEAD ATTORNEYS, OFFICE OF THE US ATTORNEY, CAMDEN, NJ; JOHN WILLIAMS VAN LONKHUYZEN, U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION - NYFO, NEW YORK, NY.

Judges: ROBERT B. KUGLER, United States District Judge.

Opinion

Opinion by: ROBERT B. KUGLER

Opinion

KUGLER, United States District Judge:

This matter comes before the Court upon the following Motions: (1) Defendant's Sealed Motion for Reduction of Sentence Under First Step Act (Doc. 489); (2) Defendant's Motion for Reduction of Sentence Under First Step Act (Doc. 490); and (3) Christopher O'Malley's Motion to Withdraw as Attorney (Doc. 494).

I. BACKGROUND

Defendant is Serdar Tatar. Beginning around 2006, Tatar, along with a group of several other men, conspired and developed a plan to commit an attack on the United States Army Base at Fort Dix. *United States v. Duka*, 671 F.3d 329, 332-35 (3d Cir. 2011). The evidence presented at trial indicated that Tatar and the co-defendants developed an interest in violent jihad, particularly attacks against the United States military. *Id.* Over the course of sixteen months, Tatar and the other men sought to acquire numerous weapons, engaged in shooting practice, {2020 U.S. Dist. LEXIS 2} and discussed plans to attack Fort Dix. *Id.* In discussing these plans, the defendants conducted research and Tatar personally procured a map of the army base to use in planning and coordinating such an attack. *Id.* Regarding the overall plan to attack Fort Dix, Tatar told an FBI informant in a recorded conversation, "I'm in, honestly, I'm in." *Id.* In 2008, a jury convicted Tatar of conspiracy to murder members of the United States military, in violation of 18 U.S.C. §§ 1114 and 1117. (Doc. 371.) The Court accordingly sentenced Tatar to 396 months in prison. (Doc. 427.) On appeal, the Third Circuit

affirmed Tatar's conviction. 671 F.3d at 356.

Tatar is now thirty-seven years old and is serving his sentence at Memphis FCI. Tatar has 179 months left to serve on his 396-month custodial sentence. Despite this remaining sentence, Defendant seeks compassionate release due to the ongoing COVID-19 pandemic. (See Docs. 489 ("Mot."), 490, and 493 ("Supp. Brief.")) Tatar applied to the Bureau of Prisons for compassionate release, but the request was denied. (Opp. at 4.)

The Federal Public Defender's Office reviewed Tatar's filing, but determined that the "office [would] not be entering an appearance in this case because [Tatar] does not appear{2020 U.S. Dist. LEXIS 3} to fall within the class of people that the Centers for Disease Control considers the most vulnerable to COVID-19[.]" (Doc. 494.) Accordingly, Assistant Federal Public Defender Christopher O'Malley, Tatar's trial counsel, filed a Motion to withdraw as counsel. (*Id.*)

II. LEGAL STANDARD

A. Motion for Reduction of Sentence Under First Step Act

Under the recently enacted First Step Act, a court may afford a defendant "compassionate release for 'extraordinary and compelling reasons.'" *United States v. Sellers*, Crim. No. 10-434, 2020 U.S. Dist. LEXIS 72991, 2020 WL 1972862, at *1 (D.N.J. Apr. 24, 2020) (quoting 18 U.S.C. § 3582(c)(1)(A)(i)). Before bringing a motion for reduced sentence on their own behalf, defendants first "must ask the Bureau of Prisons ("BOP") to do so on their behalf, give BOP thirty days to respond, and exhaust any available administrative appeals." *United States v. Raia*, 954 F.3d 594, 2020 WL 1647922, at *1 (3d Cir. 2020) (citing § 3582(c)(1)(A)). "Thus, under the First Step Act, a defendant seeking a reduction in his term of imprisonment bears the burden of satisfying both that he has (1) exhausted remedies before seeking judicial review, and (2) that compelling and extraordinary reasons exist to justify compassionate release." *Sellers*, 2020 U.S. Dist. LEXIS 72991, 2020 WL 1972862 at *1 (citing 18 U.S.C. § 3582(c)(1)(A)).

At this second step, a court may reduce an inmate's sentence pursuant to 18 U.S.C. § 3852(c)(1)(A) "if the court finds that (1) extraordinary and compelling reasons warrant a reduction,{2020 U.S. Dist. LEXIS 4} (2) the reduction would be consistent with applicable policy statements issued by the Sentencing Commission, and (3) the applicable sentencing factors under § 3553(a) warrant a reduction." *United States v. Pabon*, Crim. No. 17-165-1, 458 F. Supp. 3d 296, 2020 U.S. Dist. LEXIS 78245, 2020 WL 2112265, at *2 (E.D. Pa. May 4, 2020).

III. DISCUSSION

A. Motion for Reduction of Sentence Under First Step Act

The parties agree that Tatar has satisfied the exhaustion requirement and is thus permitted to bring a motion for reduced sentence in this Court. Thus, the Court focuses on the second step of the analysis: (1) whether Tatar has demonstrated that extraordinary and compelling reasons exist for his release and (2) whether the Section 3553(a) factors weigh in Tatar's favor.

1. Whether Extraordinary and Compelling Reasons Exist

Tatar asserts that the COVID-19 pandemic and the presence of the virus at Memphis FCI constitutes extraordinary and compelling circumstances warranting a reduction in his sentence. (Supp. Br. at 6.) Tatar states that he "is in fear for his health and life because of the high likelihood of catching the virus if and when COVID-19 starts to spread in this institution." (Mot. at 8.) While the Court does not seek to undermine the seriousness of this pandemic, the Court finds these general argument unconvincing. The Third Circuit recently{2020 U.S. Dist. LEXIS 5} addressed the issue of COVID-19

as it pertains to prison populations, stating that the "mere existence of COVID-19 in society and the possibility that it may spread" in a particular prison "alone cannot independently justify compassionate release." *Raia*, 954 F.3d 594, 2020 WL 1647922, at *2. The Court also considers the data collected regarding COVID-19 at Memphis FCI. The prison holds a total of 1,070 inmates.¹ However, there are currently only three active inmate cases at the facility.² Standing alone, the relatively low existence of COVID-19 at Memphis FCI is insufficient to show "extraordinary and compelling reasons" for release. See *United States v. Stevens*, 454 F. Supp. 3d 472, 2020 WL 1888968, at *4 (E.D. Pa. 2020) ("Although the Court is aware of the dangers posed by COVID-19 and is sympathetic to [Defendant's] concern about COVID-19 given his diabetes, speculation about possible future conditions at the FDC does not constitute an exceptional reason for release.") (collecting cases); *United States v. Haney*, Crim. No. 19-541, 454 F. Supp. 3d 316, 2020 WL 1821988 at *5 (S.D.N.Y. Apr. 13, 2020) (denying a 61-year-old defendant's request for early release, stating that although the prison has several confirmed cases of COVID-19, "there is no meaningful counter-evidence suggesting that the COVID-19 virus is rapidly spreading in the [prison]"); *United States v. Sellers*, Crim. No. 10-434, 2020 U.S. Dist. LEXIS 72991, 2020 WL 1972862 at *2 (D.N.J. Apr. 24, 2020) (finding "the measures instituted by the BOP to be reasonable to address³ the virus outbreak" at a federal prison in New York even though several inmates had tested positive).

Moreover, the mere presence of COVID-19 at a prison, does not entitle every offender with a medical condition to compassionate release. See, e.g., *United States v. Roeder*, 807 Fed. App'x 157, 161 n.16 (3d Cir. 2020). Rather, Tatar must establish that the risks to him, in light of his individual medical conditions and circumstances, are so extraordinary and compelling that the Court should release him with nearly fifteen years left on his sentence.

Tatar does go a step beyond arguing risks of COVID-19 generally by arguing that he is particularly vulnerable to the virus due to his specific health conditions. Tatar contends that he suffers from tuberculosis, which puts him at a higher risk of contracting COVID-19.⁴ (Mot. at 5.) In response, the Government argues that Tatar presents no conditions that would put him in the CDC's "high-risk category" (Opp. at 17). With regard to Tatar's tuberculosis claims, the Government asserts that Tatar's medical records in fact establish that he "is not experiencing active tuberculosis symptoms" and instead Tatar may in fact have latent tuberculosis. (*Id.* at 17-20.) If the latter is true, Tatar may actually be⁵ at a reduced risk of contracting COVID-19. (*Id.* at 20.)

The Court looks to guidance from the CDC to determine whether Tatar's individual medical conditions and circumstances are extraordinary and compelling. According to this guidance, certain categories of individuals face a higher risk from COVID-19.⁴ These include "older adults"-defined as "65 years and older"-and "people of any age who have serious underlying medical conditions." *Id.* The serious medical conditions referenced include cancer, chronic kidney disease, heart conditions, weakened immune system from solid organ transplant, obesity, smoking, and type 2 diabetes mellitus.⁵

At 37 years old, Tatar is not categorized as an "older adult." Additionally, Tatar does not provide evidence to establish that he has any of the enumerated conditions that would place him at high risk of contracting COVID-19. Tatar states that he "was diagnosed with 'tuber[culosis]' by a skin test⁶ soon after he arrived [in] the United States." (Supp. Br. at 5.) However, Tatar arrived in the United States in 1998 and has since "received treatment in order to prevent the illness from spreading to his lungs[.]" (*Id.*) Tatar's medical records do not show he is currently suffering from active tuberculosis or that his condition is uncontrolled. Rather, Tatar concedes that "his condition has thus far been manageable in prison[.]" (*Id.* at 12.)

Moreover, tuberculosis is not among the conditions that the CDC has identified as creating a significant risk of contracting a severe case of COVID-19. Indeed, other courts in this Circuit have denied similar motions where the defendant suffered from tuberculosis, but the "condition [was] controlled and . . . [the defendant] successfully completed his treatment protocol." See, e.g., *United States v. Rodriguez*, No. 17-618, 468 F. Supp. 3d 681, 2020 U.S. Dist. LEXIS 110543, 2020 WL 3447777 (E.D. Pa. June 24, 2020); *United States v. Mark Viboll*, No. 10-742, 2020 U.S. Dist. LEXIS 178542, 2020 WL 5801495, at *2 (E.D. Pa. Sept. 29, 2020) ("Despite his diagnosis of latent TB infection about eight years ago, nothing in the record suggests that [defendant] was treated for this condition prior to August 4, 2020, nor that the prison cannot manage his mild reported symptoms"); *United States v. Brown*, No. 12-00224, 2020 U.S. Dist. LEXIS 134713, 2020 WL 4345077, at *3 (W.D. Pa. July 29, 2020) (denying compassionate release motion and finding "latent TB, by itself does not rise to an extraordinary and compelling reason for release[.]").{2020 U.S. Dist. LEXIS 9} Accordingly, because Tatar is only 37 years old and has submitted no evidence that is suffering from an enumerated condition, he does not qualify under this published guidance as being at greater risk of contracting a severe case of COVID-19.

Because Defendant's health conditions do not place him at a significantly greater risk of complications from COVID-19, he does not meet the required "extraordinary and compelling" standard for reduction of his sentence. See *United States v. Epstein*, Crim. No. 14-287-1, 2020 U.S. Dist. LEXIS 87653, 2020 WL 2537648 (D.N.J. May 19, 2020) (denying an inmate's motion for sentence reduction after finding that his health conditions were under control while in prison).

2. Section 3553(a) Factors

Moreover, an analysis of the Section 3553(a) factors further supports the denial of Tatar's request for sentence reduction. In considering whether to reduce a defendant's sentence, a court must look to the factors contained in 18 U.S.C. § 3553(a). These factors include:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed-
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further{2020 U.S. Dist. LEXIS 10} crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner{18 U.S.C. § 3553}.

Tatar argues that he has been sufficiently rehabilitated in prison. He asserts that "in pursuit of his rehabilitation," he has "devoted himself to education" and "successfully received an extensive achievement[.]" (Supp. Br. at 11.) He states that he presents a "low-risk of recidivism" as a first offender with no prior arrests. (*Id.* at 20.) Tatar further contends that release is warranted because he has been a "model prison inmate" and has befriended military veterans that he is incarcerated with. (*Id.* at 12, 21-22.)

While the Court commends Tatar for his actions while in prison, the Court finds that the Section 3553(a) factors weigh firmly against compassionate release. Tatar undoubtedly committed an extremely serious crime for which adequate deterrence and punishment is required. At this time, Tatar has served less than half of his thirty-year sentence. Moreover, despite Tatar's contentions to

the contrary (*id.* at 18-20), Tatar was not a minor and reluctant member of the underlying conspiracy. Rather, Tatar played a crucial role when he provided the co-defendants{2020 U.S. Dist. LEXIS 11} with a map of the Fort Dix army base and further affirmed his participation in the conspiracy when Tatar told the other defendants that he "was in." On these facts and the totality of Defendant's actions, this Court finds that Section 3553(a) factors weigh against granting Defendant's motion for a reduced sentence. In finding so, the Court is cognizant of the need to protect the public and the seriousness of Tatar's conduct. See *United States v. Butler*, Crim. No. 19-834-10, 2020 U.S. Dist. LEXIS 61021, 2020 WL 1689778, at *3 (S.D.N.Y. Apr. 7, 2020) (denying a motion for early release of a MDC inmate with asthma and a serious heart condition, after finding that, "[w]hile the prospect of contracting COVID-19 undeniably presents a serious risk to [the defendant's] health, his [early] release . . . at least equally exposes the community to a serious risk that he would resume violence."). Accordingly, the Motion for Compassionate Release is **denied**.

IV. CONCLUSION

For the reasons contained herein, (1) Defendant's Sealed Motion for Reduction of Sentence Under First Step Act (Doc. 489) is **DENIED**; (2) Defendant's Motion for Reduction of Sentence Under First Step Act (Doc. 490) is **DENIED**; and (3) Christopher O'Malley's Motion to Withdraw as Attorney (Doc. 494) is **GRANTED**. An accompanying Order shall issue.

Dated: 11/2/2020

/s/ Robert{2020 U.S. Dist. LEXIS 12} B. Kugler

ROBERT B. KUGLER

United States District Judge

ORDER

KUGLER, United States District Judge:

THIS MATTER comes before the Court upon the following Motions: (1) Defendant's Sealed Motion for Reduction of Sentence Under First Step Act (Doc. 489); (2) Defendant's Motion for Reduction of Sentence Under First Step Act (Doc. 490); and (3) Christopher O'Malley's Motion to Withdraw as Attorney (Doc. 494); for the reasons expressed in the corresponding opinion,

IT IS HEREBY ORDERED that (1) Defendant's Sealed Motion for Reduction of Sentence Under First Step Act (Doc. 489) is **DENIED**; (2) Defendant's Motion for Reduction of Sentence Under First Step Act (Doc. 490) is **DENIED**; and (3) Christopher O'Malley's Motion to Withdraw as Attorney (Doc. 494) is **GRANTED**.

Dated: 11/2/2020

/s/ Robert B. Kugler

ROBERT B. KUGLER

United States District Judge

Footnotes

1

FCI Memphis, Federal Bureau of Prisons, <https://www.bop.gov/locations/institutions/mem/> (last

visited Oct. 26, 2020).

2

COVID-19 Coronavirus, Federal Bureau of Prisons, <https://www.bop.gov/coronavirus/> (last visited Oct. 26, 2020).

3

Tatar briefly mentions that he suffers "respi[ratory] problems that [are] the leading cause of heart disease, compromised immune system, [and] kidney problems." (Doc. 490 at 7.) Tatar does not elaborate or explain what these alleged kidney issues are, nor does he assert that he has sought medical care or received a medical diagnosis related to his kidneys. Tatar contends that he "inherited" sleep apnea "from his paternal genes," which he contends is "the leading cause[] of heart disease." (Supp. Brief at 1.) However, Tatar does not assert that he is currently suffering from heart disease. The crux of Tatar's Motion relies on the latent tuberculosis diagnosis. Accordingly, the Court's analysis focuses primarily on this issue.

4

People at Increased Risk for Severe Illness, Center for Disease Control, (Sept. 11, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

5

People with Certain Medical Conditions, Center for Disease Control, (Oct. 16, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>