

CLERK OF COURT
SUPERIOR COURT
FILED

2016 JUL -1 PM 2: 22

BY  CLERK OF COURT

1 **FOR PUBLICATION**

2
3
4 **IN THE SUPERIOR COURT**
5 **FOR THE**
6 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

7 **COMMONWEALTH OF THE**
8 **NORTHERN MARIANA ISLANDS,**

9 Plaintiff,

10 vs.

11 **ROSE DLG MONDALA,**

12 Defendant.

) **CRIMINAL CASE NO. 15-0174**

) **ORDER DENYING DEFENDANT'S**
) **MOTION TO CORRECT RESTITUTION**

) **ORDER GRANTING DEFENDANT'S**
) **MOTION TO REDUCE SENTENCE**

13
14 **I. INTRODUCTION**

15 **THIS MATTER** is before the Court on Defendant Rose DLG Mondala's
16 ("Defendant") motion to correct the restitution portion of then Associate Judge David A.
17 Wiseman's ("Judge Wiseman") sentencing order. Defendant simultaneously filed a motion for
18 reduction of Defendant's sentence of one-year imprisonment to home confinement. Assistant
19 Attorney General Matthew C. Baisley represents the Commonwealth. Defendant is represented
20 by Court appointed counsel, Attorney Loren A. Suttan.

21 Based on a review of the parties' filings, oral arguments, and applicable law, the Court
22 hereby **DENIES** Defendant's motion to correct its restitution order; and **GRANTS**
23 Defendant's motion to reduce her prison sentence to house arrest.

24 //

25 //

26 //

27 //

28 //

ENTERED

II. BACKGROUND

On February 26, 2016, Defendant pled guilty to the offenses of (1) Forgery, in violation of 6 CMC § 1701(b); and (2) Use of Public Supplies, Time, and Personnel for Campaign Activities, in violation of 1 CMC § 8534(b). As a result of Defendant's guilty plea to these two counts, Judge Wiseman dismissed all the remaining counts in the Information and rejected the recommended sentence in the plea agreement.

On May 19, 2016, the Court sentenced Defendant to one year of imprisonment for the offense of Forgery and a five hundred (\$500.00) dollar fine for the offense of Use of Public Supplies, Time, and Personnel for Campaign Activities. The sentencing order also directed the Office of Adult Probation to determine the amount of restitution that Defendant shall pay for all of the dismissed counts. Defendant was ordered to begin serving her jail term on June 1, 2016.

On May 26, 2016, Defendant filed a Motion to Stay Execution of Jail Sentence Pending Appeal, requesting that she be confined to her home pending the outcome of her appeal. This matter was then assigned to the undersigned judge. The undersigned judge presided over the hearing on Defendant's motion on May 31, 2016. The Court heard arguments from both the Defendant and the Commonwealth regarding Defendant's age and related health issues. The Court, concerned with Defendant's declining health, continued this matter to June 7, 2016 and instructed the Commonwealth to seek assurances from the Department of Corrections ("DOC") that its facility is equipped to handle Defendant's demanding health needs.

On June 7, 2016, the Court heard testimony from DOC Commissioner Georgia M. Cabrera. Ms. Cabrera testified that DOC has proper protocol in place to ensure that Defendant receives proper care and oversight for the range and severity of her health issues. There are two DOC officers assigned to monitor the twelve female inmates who are incarcerated at DOC. Defendant, age 71, will be the oldest female inmate ever to be incarcerated at DOC. In addition, Ms. Cabrera testified that DOC has a full-time nurse on duty from Monday through Friday, and a doctor from the Commonwealth Healthcare Corporation ("CHCC") who performs routine check-ups on the inmates. Aside from DOC's medical staff, DOC receives

1 assistance from the Fire Department in the event no medical staff are present at DOC. Ms.
2 Cabrera further testified that DOC's full-time nurse prepares a weekly medical chart for DOC
3 staff informing them of when an inmate should receive medication. Ms. Cabrera also informed
4 the Court that in the event an inmate would benefit from having medication in his or her cell,
5 the medical unit could recommend that the inmate keep those medications on his or her
6 persons.

7 The parties agreed for Defendant to amend her underlying motion for a motion for a
8 reduction of sentence. Having received the requested motion from Defendant and a subsequent
9 opposition by the Commonwealth, the Court makes the following order.

10 III. DISCUSSION

11 A. *The Court Finds that the Order to Pay Restitution for Dismissed Counts is Proper.*

12 Defendant argues that Judge Wiseman's sentencing order requiring her to pay
13 restitution for the dismissed counts was improper because the Plea Agreement did not contain
14 a "Harvey Waiver" when Judge Wiseman rejected the recommended sentence in the Plea
15 Agreement. As such, Defendant argues, the Court is prevented from imposing restitution for
16 any of the dismissed counts without her consent. Accordingly, Defendant essentially argues
17 that she is entitled to a correction of the restitution portion of the sentencing order under
18 Commonwealth Rules of Criminal Procedure 35(a).

19 Rule 35(a) provides that "[t]he court may correct an illegal sentence at any time and
20 may correct a sentence imposed in an illegal manner within the time provided herein for the
21 reduction of sentence." NMI R. Crim. P. 35(a). The Court agrees with the Commonwealth that
22 Defendant has not challenged the illegality of the restitution order, nor has she sufficiently
23 articulated a basis for her Rule 35(a) motion. On this basis alone, the Court is inclined to deny
24 Defendant's motion for a corrected sentence under Rule 35(a), but nevertheless will address
25 Defendant's contention that failure to secure a "Harvey Waiver" precludes the Court from
26 awarding restitution based on factual allegations contained in dismissed counts.

27 Defendant relies principally on *People v. Harvey*, 602 P.2d 396, 398 (Cal. 1979) in
28 support of its position that the sentencing court may not consider any facts underlying

1 dismissed counts absent any contrary agreement. In *Harvey*, the California Supreme Court
2 cautioned against adverse sentencing consequences that a defendant might suffer if a
3 sentencing court takes into consideration facts underlying the dismissed counts. While the
4 California Supreme Court fashioned this general safeguard to protect defendants from unduly
5 harsh sentences, Defendant in this case failed to acknowledge a narrow exception recognized
6 in *Harvey*. That is, the sentencing court may “take into account certain facts underlying
7 charges dismissed pursuant to a plea bargain” when those facts are transactionally related to
8 and a part of the offenses he or she was convicted of. *Id.* at 398-99 (citing *People v. Guevara*,
9 88 Cal. App. 3d 86, 92-94 (Cal. App. 4th Dist. 1979). In *Guevara*, the California Court of
10 Appeal held that “transactionally related” facts are “attendant facts,” which include
11 “practically everything which has a legitimate bearing on the matter in issue.” *Guevarra*, 88
12 Cal. App. 3d at 93; *see also State v. Melton*, 298 S.E.2d 673, (N.C. 1983) (“[A]ll
13 circumstances which are transactionally related to the admitted offense and which are
14 reasonably related to the purposes of sentencing must be considered during sentencing.”).
15 Thus, under *Guevarra*, the Court may look to acts committed or omitted in the commission of
16 the offenses Defendant was convicted of. *Id.*

17 Here, Judge Wiseman properly considered the facts underlying the dismissed charges
18 because, as noted in the sentencing order, these facts were transactionally related to offenses
19 Defendant was convicted of – (1) Forgery, and (2) Use of Public Supplies, Time, and
20 Personnel for Campaign Activities. In instructing the Office of Adult Probation to calculate the
21 amount of restitution owed for the dismissed charges, the sentencing court specifically
22 recognized:

23 Although the crimes for which the Defendant is convicted of
24 involved Defendant as the Executive Director of the Aging Office,
25 who owed a fiduciary duty to the Commonwealth government and
26 its people, stole \$68.00 of government money, the original charges
27 of criminal conduct filed on Defendant showed an alleged pattern
28 of stealing and using money and resources, respectively, over a
period of more than 1 year for a sum totaling \$42,000.00. Defendant allegedly used the government funds of which she was entrusted with . . . [I]ike her own private piggy bank taking out

1 money and using the government's resources whenever she felt
2 like it.

3 Sentence and Commitment Order at 2. Based on the foregoing, the Court finds that Judge
4 Wiseman's order for restitution based on the dismissed charges is proper.

5 While the Court finds that a "Harvey Waiver" is not necessary when the sentencing
6 court takes into consideration transactionally related facts of underlying dismissed counts, the
7 Court does not necessarily adopt this rule. The Court is aware that a majority of jurisdictions
8 have declined to follow *Harvey* and have even outright rejected it. *See, e.g., People v. Glass*,
9 494 N.E.2d 886, 889 (Nev. 1986) ("Moreover, in those jurisdictions which have directly
10 considered [*Harvey*], the vast majority have concluded that it is not improper to consider the
11 circumstance underlying dismissed charges in sentencing a defendant after a plea."). For
12 example, in *Ferris v. State*, 677 P.2d 1066 (Nev. 1984), the Nevada Supreme Court rejected the
13 *Harvey* decision because "it would ignore the practicality of a [] judge's involvement in the
14 entry of the guilty plea." *Ferris* recognized that it is common for a sentencing judge to be the
15 same judge who accepts the guilty plea, and therefore, understands and is made aware of the
16 charges that have been dismissed in exchange for the plea. *Id. Glass* and *Ferris*, therefore,
17 stand for the majority position that the sentencing judge has a broad and relatively unbounded
18 discretion to consider evidence of other crimes which have not resulted in conviction. *See also*
19 *United States v. Majors*, 490 F.2d 1321, 1324 (10th Cir. 1974) ("The plea bargain and the
20 indictment dismissal resulting from it did not and, indeed, could not, deprive the judge of the
21 right and probably the duty of giving consideration to it."); and *People v. Lowery*, 642 P.2d
22 515, 518 (Colo. 1982) ("[I]t is proper for the judge to consider aggravating or mitigating
23 information, including other charges dismissed at the time of the plea, in order to best balance
24
25
26
27
28

1 the competing sentencing goals of punishment, deterrence, rehabilitation, and protection of
2 society.”).

3 Based on foregoing and the Court’s consideration of the majority approach, the Court
4 also finds that Judge Wiseman’s restitution order was proper. While the Commonwealth asks
5 the Court to adopt the majority approach and reject *Harvey*, this Court is not ready to accept a
6 hard and fast rule for sentencing. Instead, the Court recognizes that in both circumstances—
7 *Harvey* and the majority rule reached by *Glass* and *Ferris*—Judge Wiseman properly
8 considered the facts related to the dismissed charges in ordering restitution.
9

10
11 *B. Defendant’s Jail Term of One Year Imprisonment Shall Be Converted to House Arrest.*

12 Defendant argues that her declining health and old age warrants reconsideration by this
13 Court under Rule 35(b). Specifically, Defendant contends that her deteriorating medical
14 conditions cast insurmountable doubt as to whether DOC can properly attend to and deal with
15 her demanding medical needs. As such, Defendant requests that her sentence of one year of
16 imprisonment be converted to house arrest. The Commonwealth does not oppose this Court’s
17 consideration of Defendant’s health in weighing in on an alternative sentence.
18

19 Rule 35(b) provides, in part, that “[a] motion to reduce a sentence may be made, or the
20 court may reduce a sentence without motion, within 120 days after the sentence is imposed or
21 probation is revoked... Changing a sentence from a sentence of incarceration to a grant of
22 probation shall constitute a permissible reduction of sentence under this subdivision.” NMI R.
23 Crim. P. 35(b). “A motion for a reduction of sentence pursuant to Rule 35(b) . . . is essentially
24 a ‘plea for leniency’ which offers the sentencing court an opportunity to temper its original
25 sentence when presented with considerations appealing to its compassion.” *United States v.*
26
27
28

1 *Distasio*, 820 F.2d 20 (1st Cir. 1987) (interpreting Rule 35(b) of the Federal Rules of Criminal
2 Procedure).¹ A Rule 35(b) motion is left to the informed discretion of the sentencing court. *Id.*

3
4 The Court has always been under the impression that what Defendant wanted was a
5 change to her sentence. The Court is unsure whether filing an appeal and a corresponding
6 motion for a stay was the proper way of doing it. The Court believes that a Rule 35(b) motion
7 is the appropriate mechanism for a change of sentence, and finds that Defendant's Rule 35(b)
8 motion is properly before this Court.

9
10 As an initial matter, the undersigned judge expresses his profound respect for Judge
11 Wiseman's sentencing order. The undersigned judge unequivocally agrees with Judge
12 Wiseman that although a sentencing court may consider a defendant's medical condition to
13 mitigate his or her sentence, it does not necessarily cancel it out. There is no doubt that Judge
14 Wiseman took immense caution in preparing an appropriate sentence when considering the
15 Defendant's old age and health related issues.

16
17 The Court has meticulously scrutinized Defendant's request for a motion to reduce her
18 sentence. The Court finds that Defendant suffers from a range of serious life threatening
19 medical illnesses stemming from her diabetes, hypoglycemia, heart condition, and old age. The
20 Court received a letter from Defendant's doctor, Dr. Vicente S. Aldan, detailing an enormous
21 list of medical maladies that Defendant suffers from, including but not limited to: osteoarthritis
22 of her bilateral knee, chronic bilateral knee pain, chronic left hip pain, left lower extremity
23 weakness, persistent dizziness, anxiety disorder, essential hypertension (high blood pressure),
24 hyperlipidemia (abnormally high concentration of fats in the blood), paroxysmal atrial
25 fibrillation (persistent and irregular heart palpitations), and Type II diabetes. According to Dr.
26
27

28 ¹ Since Rule 35(b) is identical to its federal counterpart, federal jurisprudence guides the Court. *Commonwealth v. Laniyo*, 2012 MP 1 ¶ 6.

1 Aldan’s letter, Defendant is insulin dependent requiring diligent outpatient monitoring and diet
2 modification to prevent low blood sugar. Dr. Aldan’s letter further emphasized that Defendant
3 needs constant medical care as her hypoglycemia (low blood sugar) continues to worsen. Dr.
4 Aldan stresses that Defendant’s failing health due to her diabetes and old age makes her a
5 model candidate for stroke, heart attack, and even death. Defendant has testified that she
6 monitors her sugar level four to five times each day and takes insulin twice a day—once in the
7 morning and once in the evening. Defendant has testified that she has suffered from inadvertent
8 hypoglycemic episodes several times in the past, causing her to become immobile and mute,
9 which makes it impossible for her to seek assistance. Defendant currently takes nine different
10 medications for her medical issues. Based on this Court’s thorough review of Defendant’s
11 medical records and Dr. Aldan’s report,² the Court finds that Defendant suffers from an
12 extraordinary physical impairment that warrants a downward departure from Judge Wiseman’s
13 original sentence. *See, e.g. United States v. Martin*, 363 F.3d 25, 56-57 (1st Cir. 2004) (“[A]n
14 extraordinary physical impairment may be a reason to impose a sentence below the applicable
15 guideline range.... A court may find such an extraordinary impairment when imprisonment
16 would threaten or shorten a defendant’s life or when the [prison facility] would be unable to
17 adequately meet the defendant’s needs.”) (quotation omitted) (citation omitted).

18
19
20
21
22 Defendant’s age and serious medical conditions make her exceptionally fragile and the
23 high probability of her life being shortened by virtue of incarceration makes Defendant’s case
24 more complicated than most. The Court is convinced that Defendant’s medical conditions are
25 serious enough that the Court has great concerns that DOC will be unable to take care of a 71-
26 year old diabetic who suffers from low blood sugar attacks and has a heart condition. While the
27

28 ² The undersigned judge notified the parties that he had spoken to Dr. Aldan *ex parte* regarding his letter to the Court. The parties expressed no concerns.

1 Court is slightly content with DOC's assurances that it is equipped to handle Defendant's
2 medical needs, the Court is uncertain whether Defendant would be able to receive around the
3 clock medical assistance, especially on weekends—the time when Defendant becomes most
4 vulnerable because there is no medical staff on duty.
5

6 Based on the foregoing, the Court grants Defendant's motion for a reduction of
7 sentence. Defendant's one year of imprisonment shall be converted to house arrest.

8 Again, this Court stresses its high admiration for Judge Wiseman's sentencing order
9 and understands the goals intended by his sentencing decision. However, this Court must
10 weigh the risks of Defendant's fragility and the possible adverse effect a prolonged
11 imprisonment would have on her health. The ends of justice will not be had if the punishment
12 causes Defendant her life. Today's Order is a rare and difficult one for this Court to make and
13 is not intended to apply broadly to all inmates who suffer from various illnesses and of old age.
14 Rather, this Order stresses a case-by-case review.
15
16


17 IV. CONCLUSION

18 Based on the foregoing reasons, the Court:

- 19 (1) **DENIES** Defendant's motion to correct the restitution portion of Judge Wiseman's
20 sentencing order; and
- 21 (2) **GRANTS** Defendant's motion to reduce her sentence. Defendant's sentence of one
22 year imprisonment shall be converted to house arrest. Defendant may only leave
23 her house for medical and hospital care. Additionally, Defendant may leave her
24 house to meet with her attorney, attend church, and Court proceedings. The
25 Department of Public Safety is ordered to perform routine random checks to ensure
26 that Defendant is complying with this Order. In the event that Defendant does not
27 comply, after a hearing, the Court may impose jail time.
- 28 (3) All other sentencing conditions imposed in Judge Wiseman's Order shall remain in
effect.

1 (4) A **Restitution Hearing** is set for **October 11, 2016** at **1:30 p.m.** in **Courtroom**
2 **205A**. All parties are ordered to appear.

3
4
5 **IT IS SO ORDERED** this 30th day of June 2015.

6
7
8 
9 KENNETH L. GOVENDO
Associate Judge