

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 29 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CENOBIO HUMBERTO HERRERA, Sr.,
AKA Bert Herrera, AKA Cenobio Herrera
Lanz, AKA Cenobio Humberto Lanz,

Defendant-Appellant.

No. 20-50213

D.C. No. 2:02-cr-00531-RSWL-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Submitted June 21, 2021**

Before: SILVERMAN, WATFORD, and BENNETT, Circuit Judges.

Cenobio Humberto Herrera, Sr., appeals from the district court's order denying his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). We have jurisdiction under 28 U.S.C. § 1291. We review for abuse of discretion,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

see United States v. Aruda, 993 F.3d 797, 799 (9th Cir. 2021), and we affirm.

Contrary to Herrera’s arguments, the district court did not rely on any clearly erroneous material facts. Although the district court repeated a calculation error from the presentence report regarding the amount of drugs involved in Herrera’s offense, the mistake was of no consequence because even the correct amount would have triggered the maximum offense level in the Guidelines, which was the concern of the court. The district court also accurately stated that Herrera’s sister received a similar sentence, even if the Bureau of Prisons (“BOP”) had subsequently transferred her to home confinement. *See United States v. Earl*, 729 F.3d 1064, 1066 (9th Cir. 2013) (observing that a defendant “remains in BOP’s legal custody” while on home confinement).

The district court considered Herrera’s age and medical conditions and did not abuse its discretion in concluding that the 18 U.S.C. § 3553(a) sentencing factors weighed against release. *See* 18 U.S.C. § 3582(c)(1)(A) (district court must consider the applicable § 3553(a) sentencing factors on a motion for compassionate release); *United States v. Robertson*, 895 F.3d 1206, 1213 (9th Cir. 2018) (a district court abuses its discretion only if its decision is illogical, implausible, or without support in the record).

AFFIRMED.

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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12 UNITED STATES OF AMERICA,) CR 02-531-RSWL-1
13)
14 Plaintiff,) **ORDER RE: DEFENDANT'S**
15 v.) **RENEWED MOTION TO REDUCE**
16) **SENTENCE PURSUANT TO 18**
17) **U.S.C. § 3582(c)(1)**
18) **[546]**
19)
20 CENOBIO H. HERRERA, SR., et)
al.,)
Defendants.)
_____)

21 Currently before the Court is Defendant Cenobio H.
22 Herrera Sr.'s ("Defendant") Renewed Motion to Reduce
23 Sentence Pursuant to 18 U.S.C. § 3582(c)(1) ("Motion")
24 [546], filed on May 18, 2020. Having reviewed all
25 papers submitted pertaining to this Motion, the Court
26 **NOW FINDS AND RULES AS FOLLOWS:** the Court **DENIES**
27 Defendant's Motion.

28 ///

I. BACKGROUND

In May 2002, Defendant was indicted for: conspiracy to aid and abet the manufacture of more than 500 grams of a mixture or substance containing a detectable amount of methamphetamine and to possess pseudoephedrine knowing or having reasonable cause to believe that it would be used to manufacture a controlled substance, in violation of 21 U.S.C. § 846, 841(a)(1), 841(c)(2), and 18 U.S.C. § 2; illegal possession of pseudoephedrine in violation of 21 U.S.C. § 841(c)(2); and conspiracy to commit money laundering and substantive money laundering in violation of 18 U.S.C. §§ 1956(h), 1956(a)(1), and 1957 [1]. On March 19, 2003, a jury convicted Defendant on all counts of the indictment [130, 133]. This Court entered judgment against Defendant on December 22, 2003 [183], and sentenced him to 360 months' imprisonment [182]. Upon release from imprisonment, Defendant shall be placed on supervised release for a term of five years [182].

II. DISCUSSION

A. Legal Standard

The First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, was enacted in 2018 and permits a defendant to directly petition the district court for a sentence reduction under the compassionate release statute. See 18 U.S.C. § 3582(c)(1)(A). 18 U.S.C. § 3582(c)(1)(A) incorporated the following procedures with respect to requests for compassionate release:

1 The court may not modify a term of imprisonment
2 once it has been imposed except that the court,
3 upon motion of the Director of the Bureau of
4 Prisons, or upon motion of the defendant after
5 the defendant has fully exhausted all
6 administrative rights to appeal a failure of
7 the Bureau of Prisons to bring a motion on the
8 defendant's behalf or the lapse of 30 days from
9 the receipt of such a request by the warden of
10 the defendant's facility, whichever is earlier,
11 may reduce the term of imprisonment (and may
12 impose a term of probation or supervised
13 release with or without conditions that does
14 not exceed the unserved portion of the original
15 term of imprisonment), after considering the
16 factors set forth in section 3553(a) to the
17 extent that they are applicable, if it finds
18 that . . . extraordinary and compelling reasons
19 warrant such a reduction . . . and that such a
20 reduction is consistent with applicable policy
21 statements issued by the Sentencing
22 Commission

23 The statute establishes a three-step process for
24 Courts to evaluate a defendant's request for
25 compassionate release. First, a defendant must exhaust
26 his or her administrative remedies by either
27 "exhaust[ing] all administrative rights to appeal a
28 failure of the Bureau of Prisons to bring a motion on
the defendant's behalf" or waiting until thirty days
have lapsed "from the receipt of such request by the
warden of the defendant's facility" to reduce the term
of imprisonment. Id. Second, the district court
evaluates whether "extraordinary and compelling reasons
warrant such a reduction" and that such a reduction "is
consistent with applicable policy statements issued by
the Sentencing Commission." Id. Third, the district
court considers the sentencing factors outlined in
"section 3553(a) to the extent that they are

1 applicable." Id.

2 The defendant "bears the initial burden to put
3 forward evidence that establishes an entitlement to a
4 sentence reduction." U.S. v. Greenhut, No. 2:18-CR-
5 00048-CAS-1, 2020 WL 509385, at *1 (C.D. Cal. Jan. 31,
6 2020) (citing U.S. v. Sprague, 135 F.3d 1301, 1306-07
7 (9th Cir. 1998)).

8 **B. Discussion**

9 1. Exhaustion of Administrative Remedies

10 The parties do not dispute that Defendant has
11 exhausted his administrative obligations as it relates
12 to his COVID-19 concerns. Warden B. von Blanckensee
13 denied Defendant's release request on April 8, 2020 and
14 this Motion was filed on May 18, 2020. See Ex. A in
15 Supp. of Mot. ("Request Denial"), ECF No. 546-1; Mot.,
16 ECF No. 546. As such, the Court turns to address the
17 Motion on its merits.

18 2. Extraordinary and Compelling Reasons

19 The Court previously found in its Order re
20 Defendant's Motion to Reduce Sentence ("First Release
21 Order") [536] that extraordinary and compelling reasons
22 exist favoring compassionate release under U.S.S.G.
23 1B1.13 Application Note 1(B). See generally First
24 Release Order 7:27-8:1; 8:21-23, ECF No. 536
25 ("Defendant is currently seventy-five years old,
26 suffers from a number of severe medical conditions, and
27 has served well over ten years of his sentence
28 As such, the Court finds extraordinary and compelling

1 reasons exists favoring compassionate release under
 2 U.S.S.G. 1B1.13 Application Note 1(B)."). The fact
 3 that Defendant has unfortunately tested positive for
 4 COVID-19 does not alter the Court's prior determination
 5 that extraordinary and compelling reasons exist given
 6 Defendant's age and serious health conditions related
 7 to the aging process.

8 3. The Section 3553 Factors

9 The Court's First Release Order denied Defendant's
 10 motion based on the section 3553(a) factors.
 11 Therefore, the parties here have dedicated the majority
 12 of their arguments to discussion of these factors. As
 13 previously outlined in the First Release Order, simply
 14 finding that "extraordinary and compelling" reasons
 15 exist does not automatically entitle a defendant to
 16 compassionate release. 18 U.S.C. section 3553(a)
 17 provides the Court with a set of factors to be
 18 considered during the original sentencing and which
 19 need be reconsidered when evaluating compassionate
 20 release. The statute provides:

21 (a) Factors To Be Considered in Imposing a
 22 Sentence. – The court shall impose a sentence
 23 sufficient, but not greater than necessary, to
 24 comply with the purposes set forth in paragraph
 (2) of this subsection. The court, in
 determining the particular sentence to be
 imposed, shall consider–

25 (1) the nature and circumstances of the
 26 offense and the history and
 characteristics of the defendant;

27 (2) the need for the sentence imposed–

28 (A) to reflect the seriousness of the

1 offense, to promote respect for the
2 law, and to provide just punishment
for the offense;

3 (B) to afford adequate deterrence to
4 criminal conduct;

5 (C) to protect the public from further
6 crimes of the defendant; and

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

10 (3) the kinds of sentences available;

11 (4) the kinds of sentence and the sentencing
range established for—

12 (A) the applicable category of offense
13 committed by the applicable category
of defendant as set forth in the
14 guidelines [issued by the Sentencing
Commission];

15 (5) any pertinent policy statement;

16 (6) the need to avoid unwarranted sentence
17 disparities among defendants with similar
18 records who have been found guilty of
similar conduct; and

19 (7) the need to provide restitution to any
victims of the offense.

20 18 U.S.C. § 3553(a).

21 Here, Defendant relies almost exclusively upon two
22 new arguments. First, Defendant highlights that he
23 recently missed two scheduled renal care visits and
24 labs that were supposed to be run by April 1, 2020, do
25 not appear to have been conducted. Mem. of P. & A. in
26 Supp. of Mot. ("Mem.") 6:16-19, ECF No. 546. Defendant
27 argues that the medical resources in FCI Lompoc are
28

1 being allocated towards COVID-19 and away from other
2 medical services. Id. As a result, Defendant states
3 that release is warranted because he will be able to
4 most effectively receive medical care outside of his
5 facility. Id. at 7:3-11. Second, Defendant repeatedly
6 references his updated release plan, which he claims
7 supports that he poses no risk to the public if
8 released. Id. at 8:14-28. In response, the Government
9 fails entirely to address Defendant's argument
10 regarding the inadequacy of care available at FCI
11 Lompoc and states that "Defendant's release plan, while
12 more thought-out, does not change [that] . . . the
13 [s]ection 3553 factors do not support release." Mem.
14 P. & A. in Supp. of Opp'n ("Opp'n") 4:25-27, ECF No.
15 551.

16 For the reasons discussed below, the Court finds
17 that Defendant has failed to carry his burden to put
18 forth evidence to show that he is entitled to a
19 sentence reduction in light of the section 3553(a)
20 factors.

21 a. *Nature and Circumstances of Offense,*
22 *History and Characteristics of Defendant,*
23 *and Types of Sentences Available*

24 As the Court previously discussed in its First
25 Release Order, Defendant has a criminal record dating
26 back to the early 1980s and previously participated in
27 a multi-million dollar investment fraud in 1994 prior
28 to the conduct that gave rise to the instant Action.

1 See Pre-Sentence Report ("PSR") ¶ 27. At the time of
2 his arrest for the instant offenses, Defendant was
3 already in custody serving a sentence for revocation of
4 supervised release and had another federal matter
5 pending. Id. ¶ 75. Given his prior offenses,
6 Defendant was classified as a criminal history category
7 4. Id. at 1, Guidelines Summary.

8 Over the lifetime of Defendant's scheme, "the
9 weight of the pseudoephedrine possessed by [Defendant]
10 for resale was 1,202 kilograms." Id. ¶ 87. Applying
11 the pseudoephedrine to methamphetamine conversion
12 formula outlined in Defendant's PSR, this amount of
13 pseudoephedrine would yield approximately 1,762.9
14 kilograms of methamphetamine. Id. ¶ 88.

15 Defendant's PSR relied on the Guidelines Manual
16 that was in effect on November 1, 1997, in which an
17 offense level of 38 was applied to offenses involving
18 in excess of 15 kilograms of methamphetamine. USSG §
19 2D1.1 (Nov. 1997). The current guidelines apply a
20 level 38 base offense to offenses involving 45 or more
21 kilograms of methamphetamine. Therefore, even applying
22 the present guidelines, the amount of methamphetamine
23 involved in Defendant's offenses far exceeds that
24 required for a level 38 offense. See U.S.S.G. §
25 2D1.1(c)(1). Further, Defendant was determined to be
26 the organizer or leader of the scheme, which resulted
27 in an additional 4-level enhancement. See PSR ¶ 91.

28 Additionally, in regard to the money laundering

1 counts, Defendant's PSR notes that the base level
2 offense was 23. Id. ¶ 91. This was enhanced because
3 Defendant knew or believed that the funds were the
4 proceeds of activity involving the manufacture of
5 methamphetamine, the amount well exceeded \$1,000,000,
6 and Defendant again was deemed the organizer/leader of
7 the activity. Id. ¶¶ 97-99. Ultimately, the total
8 offense level for the grouped offenses was 42. Id. ¶¶
9 103-06.

10 While Defendant urges the Court to "put more weight
11 in the object facts than any expression of remorse,"
12 the objective fact is that Defendant continues to
13 question the legitimacy of his conviction and has
14 failed to provide the Court with any evidence that he
15 has made any efforts to rehabilitate himself during his
16 incarceration. Contra U.S. v. Smith, 04-CR-2002-CJW-
17 MAR, 2020 WL 3913482, at *7 (N.D. Iowa July 10, 2020)
18 ("Although defendant has a flawed past, he has taken
19 significant steps over the last 16 years to
20 rehabilitate himself despite staring down a life
21 sentence and despite having multiple chronic medical
22 conditions."). Instead, Defendant acknowledges the
23 "extraordinary amount of pseudoephedrine" associated
24 with his offenses, see Mem. 7:21-23, but now attempts
25 to justify his prior acts by stating that "one can see
26 why [being found guilty of trafficking in
27 methamphetamine when no methamphetamine was ever found]
28 might be a tough pill to swallow," id. at 7:12-26.

1 Given the severity of his offenses, the sentencing
2 options ranged from 360 months to life imprisonment.
3 PSR ¶ 36. Defendant's expected release date is
4 approximately eight years away. See BOP Inmate
5 Locator, <https://www.bop.gov/inmateloc/> (last accessed
6 August 10, 2020) ("Release Date: 08/06/2028").
7 Considering the circumstances of the offense,
8 Defendant's characteristics, and the types of sentences
9 available, the Court finds that these factors disfavor
10 compassionate release.

11 b. *Need for the Sentence Imposed: Punishment,*
12 *Deterrence, Medical Services, Educational*
13 *or Vocation Training*

14 As mentioned above, Defendant does not deny the
15 severity of his offenses. Instead, in regard to these
16 factors, Defendant exclusively argues that because of
17 the COVID-19 lockdown in FCI Lompoc the "quality of
18 chronic care for the other conditions is likely to be
19 undermined." Mot. 6:15-16. But the need to provide
20 medical care in the most effective way is only one
21 consideration, among many, evaluated when determining
22 whether compassionate release is appropriate. Absent
23 more, Defendant is unable to carry his burden to
24 justify compassionate release at this time.

25 While the Court acknowledges the hardships faced in
26 the federal prison system during the current pandemic,
27 and the Court does not mean to minimize the magnitude
28 of the ongoing tragedy of the pandemic, Defendant's

1 bare allegations that he has been unable to access
2 certain healthcare as a result of the pandemic alone is
3 insufficient to substantiate his request for
4 compassionate release. Defendant appears to have
5 contracted, and fully recovered from, COVID-19 while
6 incarcerated. Further, as of the date of this Order,
7 there are currently one inmate and one staff member
8 with confirmed cases of COVID-19 in Defendant's
9 facility. See COVID-19 Cases,
10 <https://www.bop.gov/coronavirus/> (last accessed August
11 10, 2020).

12 Despite, as Defendant points out, that there is
13 still much unknown about the disease, the Court finds
14 that given the severity of the offenses a reduction to
15 time served, with nearly eight years remaining until
16 Defendant's projected release, would not properly
17 reflect the seriousness of the offenses, promote
18 respect for the law, or afford adequate deterrence to
19 criminal conduct. See U.S. v. Willis, 382 F. Supp. 3d
20 1185, 1189 (D.N.M. 2019) (finding seriousness of
21 defendant's offenses and his limited period of
22 incarceration precluded compassionate release
23 irrespective of defendant's health conditions). As
24 such, the Court finds that the totality of these
25 factors also lean against compassionate release.

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27 ///

c. *Protection of the Public*¹

Defendant is currently seventy-five years old and has a variety of serious health issues, which this Court has already extensively discussed. See First Release Order 8:5-8 (acknowledging that Defendant suffers from hypertension, heart failure, aortic valve disorders with valve replacement, hyperlipidemia, and gout). Defendant claims that while he may have "perceived that he was serving an unjust sentence, he appears to have conformed his behavior to the expectations of the facilities, earning all good time credit that is available to him." Mem. 8:7-9. Additionally, Defendant claims that "with a failing heart, a failing kidney, and partial blindness, he hardly seems the picture of a threat to the community." Id. at 8:11-13. Finally, Defendant repeatedly relies on his updated release plan, which states that he will be living with his wife and son, and will receive financial and medical benefits through the VA. See Ex. H in Supp. of Mot. ("Release Plan"), ECF No. 546-8.

¹ U.S.S.G. § 1B1.13 also requires the Court consider whether the defendant would be "a danger to the safety of any other person or to the community as provided in 18 U.S.C. § 3142(g)." The factors to be considered are: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and character of the person; and (4) the nature and seriousness of the dangers to any person or the community that would be posed by the person's release. 18 U.S.C. § 3142(g). For similar reasons discussed within this Order, the Court is unable to conclude that Defendant would not pose a danger if released.

1 Balancing Defendant's apparent lack of remorse and
2 prior criminal history against his age, serious health
3 conditions, and more developed release plan, is a close
4 call. Ultimately, the Court is unable to conclude that
5 Defendant would not pose a risk should he be released.
6 Simply providing a more developed release plan is
7 insufficient to overcome the fact that the totality of
8 the section 3553(a) factors disfavor compassionate
9 release at this time.

10 d. *Comparative Sentence Analysis*

11 Defendant fails entirely to address this section
12 3553(a) factor. In addressing this factor, the Court
13 must consider the "the need to avoid unwarranted
14 sentence disparities among defendants with similar
15 records who have been guilty of similar
16 conduct" 18 U.S.C. § 3553(a)(6). Of note
17 here, Defendant's sister, Nelly Herrera, was also
18 sentenced to 360 months' imprisonment for her
19 involvement in the same scheme. See United States v.
20 Nelly Herrera, 2:02-cr-0531-RSWL-2, (C.D. Cal. Dec. 18,
21 2003) J. and Commitment Order, ECF No. 181. Given the
22 importance of avoiding unwarranted sentence disparities
23 between parties like Defendant and his sister who were
24 both sentenced to 360 months' imprisonment for their
25 involvement and offenses in the same scheme, this
26 factor disfavors compassionate release.

27 The Court fully understands the gravity of the
28 COVID-19 pandemic, especially as it impacts the federal

1 prisons. But having considered the totality of the
2 section 3553(a) factors, the Court concludes that
3 Defendant has failed to present sufficient evidence to
4 carry his initial burden justifying release. As such,
5 the Court **DENIES** Defendant's Motion.

6 **III. CONCLUSION**

7 Based on the foregoing, the Court **DENIES**
8 Defendant's Motion for Compassionate Release under 18
9 U.S.C. § 3582(c)(1).

10
11 **IT IS SO ORDERED.**

12
13 DATED: August 10, 2020

_____/s/ Ronald S.W. Lew

14 **HONORABLE RONALD S.W. LEW**
15 Senior U.S. District Judge
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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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12 UNITED STATES OF AMERICA,) CR 02-531-RSWL-1
13)
14 Plaintiff,) ORDER RE: DEFENDANT'S
15 v.) MOTION TO REDUCE
16) SENTENCE PURSUANT TO 18
17) U.S.C.
18) § 3582(c)(1)(A)(i) [511]
19)
20 CENOBIO H. HERRERA, SR., et)
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Defendants.)
_____)
21)

22 Currently before the Court is Defendant Cenobio H.
23 Herrera Sr.'s ("Defendant") Motion to Reduce Sentence
24 Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) ("Motion")
25 [511], filed on January 23, 2020. Having reviewed all
26 papers submitted pertaining to this Motion, the Court
27 **NOW FINDS AND RULES AS FOLLOWS:** the Court **DENIES**
28 Defendant's Motion.

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I. BACKGROUND

In May 2002, Defendant was indicted for: conspiracy to aid and abet the manufacture of more than 500 grams of a mixture or substance containing a detectable amount of methamphetamine and to possess pseudoephedrine knowing or having reasonable cause to believe that it would be used to manufacture a controlled substance, in violation of 21 U.S.C. § 846, 841(a)(1), 841(c)(2), and 18 U.S.C. §2; illegal possession of pseudoephedrine in violation of 21 U.S.C. § 841(c)(2); and conspiracy to commit money laundering and substantive money laundering in violation of 18 U.S.C. §§ 1956(h), 1956(a)(1), and 1957 [1]. On March 19, 2003, a jury convicted Defendant on all counts of the indictment [130, 133]. This Court entered judgment against Defendant on December 22, 2003 [183], and sentenced him to 360 months' imprisonment [182]. Upon release from imprisonment, Defendant shall be placed on supervised release for a term of five years [182].

II. DISCUSSION

A. Legal Standard

The First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, was enacted in 2018 and permits a defendant to directly petition the district court for a sentence reduction under the compassionate release statute. See 18 U.S.C. § 3582(c)(1)(A). 18 U.S.C. § 3582(c)(1)(A) incorporated the following procedures with respect to requests for compassionate release:

1 The court may not modify a term of imprisonment
2 once it has been imposed except that the court,
3 upon motion of the Director of the Bureau of
4 Prisons, or upon motion of the defendant after
5 the defendant has fully exhausted all
6 administrative rights to appeal a failure of
7 the Bureau of Prisons to bring a motion on the
8 defendant's behalf or the lapse of 30 days from
9 the receipt of such a request by the warden of
10 the defendant's facility, whichever is earlier,
11 may reduce the term of imprisonment (and may
12 impose a term of probation or supervised
13 release with or without conditions that does
14 not exceed the unserved portion of the original
15 term of imprisonment), after considering the
16 factors set forth in section 3553(a) to the
17 extent that they are applicable, if it finds
18 that . . . extraordinary and compelling reasons
19 warrant such a reduction . . . and that such a
20 reduction is consistent with applicable policy
21 statements issued by the Sentencing
22 Commission

23 The statute establishes a three-step process for
24 Courts to evaluate a defendant's request for
25 compassionate release. First, a defendant must exhaust
26 his or her administrative remedies by either
27 "exhaust[ing] all administrative rights to appeal a
28 failure of the Bureau of Prisons to bring a motion on
the defendant's behalf" or waiting until thirty days
have lapsed "from the receipt of such request by the
warden of the defendant's facility" to reduce the term
of imprisonment. Id. Second, the district court
evaluates whether "extraordinary and compelling reasons
warrant such a reduction" and that such a reduction "is
consistent with applicable policy statements issued by
the Sentencing Commission." Id. Third, the district
court considers the sentencing factors outlined in
"section 3553(a) to the extent that they are

1 applicable." Id.

2 The defendant "bears the initial burden to put
3 forward evidence that establishes an entitlement to a
4 sentence reduction." U.S. v. Greenhut, No. 2:18-CR-
5 00048-CAS-1, 2020 WL 509385, at *1 (C.D. Cal. Jan. 31,
6 2020) (citing U.S. v. Sprague, 135 F.3d 1301, 1306-07
7 (9th Cir. 1998)).

8 **B. Discussion**

9 1. Exhaustion of Administrative Remedies

10 The parties do not dispute that Defendant exhausted
11 his administrative obligations. Defendant made an
12 administrative request for a sentence reduction under
13 18 U.S.C. § 3582(c)(1)(A) in April 2017, which was
14 denied on September 21, 2017. See Opp'n 5:18-6:10, ECF
15 No. 516 ("[T]he government believes that it is
16 appropriate to proceed to the merits of defendant's
17 motion. . . there is no reason to believe that
18 additional development of the administrative record
19 will be of assistance").¹

21 ¹ Defense Counsel's supplemental brief argues that Defendant
22 is entitled to relief in part because his age and medical
23 conditions make him particularly susceptible to COVID-19. See
24 Supp. Brief 1:2-9, ECF No. 529. While the Court acknowledges the
25 unprecedented circumstances presented by the pandemic currently
26 sweeping the nation and the concerns of the prison population,
27 Defendant's 2017 administrative request with the BOP did not, and
28 could not have, specify the COVID-19 concerns presented in the
Supplemental Briefing. As such, the BOP has not yet been given
the opportunity to review those concerns as Defendant never
sought compassionate relief on this basis. Defendant's April
2017 request cannot be used to satisfy the administrative
exhaustion requirement for any request for compassionate relief,
which he later seeks to file with this Court. Therefore, to the

2. Extraordinary and Compelling Reasons

Section 3582(c)(1)(A) permits a sentence reduction only upon a showing of "extraordinary and compelling reasons" and only if "such reduction is consistent with applicable policy statements issued by the Sentencing Commission." Congress never explicitly defined "extraordinary and compelling reasons," except to state that "[r]ehabilitation . . . alone" is insufficient. 18 U.S.C. § 994(t). Instead, Congress directed the Sentencing Commission to define the term.

Section 1B1.13 of the United States Sentencing Guidelines ("U.S.S.G.") contains policy statements issued by the Sentencing Commission that relate to compassionate release. Those policy statements, which have not been amended since the First Step Act, state that "the court may reduce a term of imprisonment . . . if, after considering the factors set for in 18 U.S.C. § 3553(a), to the extent they are applicable, the court determines that-

- (1) (A) Extraordinary and compelling reasons warrant the reduction . . .

extent that Defendant's request is predicated upon relief in response to the COVID-19 crisis, the Motion is **DENIED** for failure to exhaust administrative remedies. See U.S. v. Allen, 1:19-cr-98-10, 2020 WL 1878774, at *1 (N.D. Ohio April 15, 2020) (finding court lacked the authority to review the defendant's motion for compassionate release related to COVID-19 because the defendant had failed to comply with the exhaustion and 30-day statutory requirements); U.S. v. Schultz, 17-cr-193S, 2020 WL 1872352, (W.D.N.Y April 15, 2020) (denying the defendant's compassionate release motion without prejudice because the defendant failed to satisfy the mandatory exhaustion provisions of the statute).

1 (2) The defendant is not a danger to the
2 safety of any other persons or to the
3 community, as provided in 18 U.S.C §
4 3142(g); and

5 (3) The reduction is consistent with this
6 policy statement."

7 Subsections (A) to (C) of the Application Notes to
8 section 1B1.13 outline three specific circumstances of
9 "extraordinary and compelling reasons": (A) the
10 defendant is suffering from a terminal or serious
11 illness, which substantially diminishes the defendant's
12 ability to provide self-care within the correctional
13 facility and from which the defendant is not expected
14 to recover; (B) the defendant is at least 65 years old
15 with serious deterioration in physical or mental health
16 because of the aging process, and has served at least
17 ten years or 75 percent of his or her term of
18 imprisonment, whichever is less; or (C) two family
19 related circumstances. See id. app. n1 (A)-(C). The
20 policy statement also includes a catch all provision
21 for "extraordinary and compelling reason[s] other than,
22 or in combination with, the reasons described in
23 subdividisons (A) through (C)." Id. app. n1 (D).

24 Here, Defendant argues that he is entitled to
25 sentence reduction under section 3582(c)(1)(A) for
26 three reasons: (1) he received an unusually long and
27 unjustified sentence; (2) he was sentenced to an
28 unreasonably long term because he "exercised his
 constitutional right to a jury"; and (3) his
 "remarkable record of rehabilitation." See Mot. 2-3,

1 16. None of these arguments provide a basis for
2 compassionate relief. Additionally, Defendant also
3 briefly mentions that he suffers from a variety of
4 medical conditions including congestive heart failure.
5 Id. at 17.

6 In response, the Government argues that no
7 "extraordinary and compelling" medical condition exists
8 justifying compassionate release. While it is true
9 that Defendant does not currently have a medical
10 condition which substantially impacts his ability to
11 self-care in his facility, the Government's argument
12 ignores that Defendant meets the criteria outlined in
13 Application Note 1(B). See U.S.S.G. 1B1.13, app.
14 n.1(B) ("the defendant is (i) at least 65 years old;
15 (ii) is experiencing a serious deterioration in
16 physical or mental health because of the aging
17 process; and (iii) has served at least 10 years or 75
18 percent of his or her term of imprisonment, whichever
19 is less). Unlike Application Note 1(A), which the
20 Government exclusively relies, Application Note 1(B)
21 does not require Defendant's health condition be
22 extreme or terminal. Application Note 1(B) simply
23 requires that "the age-related deterioration to be
24 'serious.'" U.S. v. Hansen, 07-CR-0520(KAM), 2020 WL
25 1703672, at *7 (E.D.N.Y. April 8, 2020) (citation
26 omitted).

27 Defendant is currently seventy-five years old,
28 suffers from a number of severe medical conditions, and

1 has served well over ten years of his sentence. In
2 2017, Dr. Kenneth Russell evaluated Defendant and noted
3 Defendant's extensive past medical and surgical
4 history. See Dr. Russell Memo., Ex. B in Supp. of
5 Opp'n ("Medical Eval.") 1, ECF No. 516-2. Among other
6 conditions, Defendant suffers from hypertension, heart
7 failure, aortic valve disorders with valve replacement,
8 hyperlipidemia, and gout. Id. In 2012, Defendant had
9 a 3V CABG and subsequently in 2017 underwent an aortic
10 valve replacement. Id. Additionally, in the
11 memorandum denying Defendant's request for
12 compassionate release, Warden Steve Langford
13 acknowledged that Defendant is being treated for
14 "serious medical conditions." See Mem. Denying Def.'s
15 BOP Request for Compassionate Release, Ex. C in Supp.
16 of Opp'n ("BOP Review Mem."), ECF No. 516-3. Further,
17 the BOP found that Defendant suffers from chronic or
18 serious medical conditions related to the aging
19 process. See Def.'s Compassionate Relief Request, Ex.
20 A in Supp. of Opp'n ("Comp. Release Request") 7, ECF
21 No. 516-1. As such, the Court finds extraordinary and
22 compelling reasons exist favoring compassionate release
23 under U.S.S.G. 1B1.13 Application Note 1(B). See
24 Hansen, 2020 WL 1703672, at *7 (E.D.N.Y. April 8, 2020)
25 (finding extraordinary and compelling reasons because
26 the defendant was 72-years-old, had served more than
27 ten years of his mandatory twenty year sentence and
28 suffered from serious, age-related deterioration

1 including hyperlipidemia, tuberculosis, glaucoma, high
2 blood pressure, type II diabetes, and memory loss).

3 3. The Section 3553 Factors

4 Simply finding that "extraordinary and compelling"
5 reasons exist does not automatically entitle a
6 defendant to compassionate release. Despite finding
7 that extraordinary and compelling reasons exist, here
8 the Court finds that the section 3553(a) factors
9 disfavor compassionate release. 18 U.S.C. § 3553(a)
10 provides the Court with a set of factors to be
11 considered during the original sentencing and which
12 need be reconsidered when evaluating compassionate
13 release. The statute provides:

14 (a) Factors To Be Considered in Imposing a
15 Sentence. – The court shall impose a sentence
16 sufficient, but not greater than necessary, to
17 comply with the purposes set forth in paragraph
18 (2) of this subsection. The court, in
19 determining the particular sentence to be
20 imposed, shall consider–

21 (1) the nature and circumstances of the
22 offense and the history and
23 characteristics of the defendant;

24 (2) the need for the sentence imposed–

25 (A) to reflect the seriousness of the
26 offense, to promote respect for the
27 law, and to provide just punishment
28 for the offense;

 (B) to afford adequate deterrence to
 criminal conduct;

 (C) to protect the public from further
 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;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines [issued by the Sentencing Commission];

(5) any pertinent policy statement;

(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)).

Here, Defendant fails to carry his burden to justify why compassionate release is warranted in light of these factors. Given the severity of Defendant's crime and the circumstances surrounding the offenses, the Court finds that the section 3553(a) factors favor denying Defendant's Motion.

Defendant has a criminal record dating back to the early 1980s and previously participated in a multi-million dollar investment fraud in 1994 prior to the conduct giving rise to the instant Action. See Pre-Sentence Report ("PSR") ¶ 27. Additionally, the PSR requested a 4-level enhancement because Defendant was found to be the organizer or leader of the criminal offense. Id. ¶ 91. While the Court is aware that the

1 parties are familiar with the facts of this Action, it
2 is critical to emphasize the sheer amount of
3 pseudoephedrine associated with the offenses.
4 According to the calculations outlined by the National
5 Drug Intelligence Center, the amount of pseudoephedrine
6 involved would yield approximately 1,762.9 kilograms of
7 methamphetamine, well above the "15 kilograms or more"
8 specified in the highest guidelines at the time of
9 sentencing. Id. ¶ 88.

10 Additionally, Defendant's sentence was previously
11 affirmed by the Ninth Circuit. See Ninth Cir. Mem.,
12 ECF No. 400. All the while, Defendant has filed over
13 25 motions and petitions with the Court alleging
14 various defects with his conviction and sentence. See,
15 e.g., ECF Nos. 184, 301, 336, 414, 416, 486. Even in
16 the instant Motion, Defendant chooses to attack his
17 sentence stating that he was "sentenced to prison for
18 three decades . . . [because] . . . he exercised his
19 constitutional right to a jury trial." Mot. 2.
20 Defendant does not appear to appreciate the severity of
21 his offenses and still has over one third of his
22 sentence remaining. The requested relief undermines
23 the need to "promote respect for the law," "afford
24 adequate deterrence to criminal conduct," and "avoid
25 unwarranted sentence disparities." 18 U.S.C. §
26 3553(a).

27 Ultimately, Defendant bears the initial burden to
28 put forth evidence that establishes an entitlement to

1 sentence reduction and he has failed to do so.²
 2 Defendant makes vague generalizations about why he is
 3 deserving of compassionate release without seeming to
 4 understand the circumstances and severity of his
 5 actions. Having considered the Section 3553(a)
 6 factors, the Court finds that while Defendant qualifies
 7 under U.S.S.G. 1B1.13 Application Note 1(B), given the
 8 severity of his offenses, compassionate release is
 9 improper.³ See U.S. v. Willis, 382 F. Supp. 3d 1185,
 10 1189 (D.N.M. 2019) (finding seriousness of defendant's
 11

12 ² Defense Counsel makes general claims regarding Defendant's
 13 release plan. See Supp. Brief 9:2-11. But this plan fails to
 14 provide the Court with adequate information and runs in direct
 15 conflict with Defendant's own statement that "that [his] family
 16 has already abandoned [him]" Reply 4, ECF No. 518.
 Defendant's lack of a clear release plan is further evidence that
 Defendant has failed to meet his burden to justify sentence
 reduction.

17 ³ The Sentencing Commission's pre-First Step Act policy
 18 statement provides that compassionate release is appropriate
 19 where "the defendant is not a danger to the safety or any other
 20 person or to the community" as provided in 18 U.S.C. § 3142(g).
 21 See U.S.S.G. § 1B1.13(2). Defendant states that he is "a
 22 statically good candidate for release"; however, this ignores
 23 that in 2013 the BOP Unit Team believed that if released,
 24 Defendant would rapidly resume participating in new criminal
 25 activity. See Comp. Release Request 9. Defendant argues that
 26 the BOP Unit Team's finding was based entirely on likely Grade C
 27 violations of supervision that occurred more than twenty years in
 28 the past and claims that these incidents are "hardly indicative
 of [Defendant's] likelihood of success on supervision at the age
 of 75." Supp. Brief 7:3-12. But the Court is unable to conclude
 given the severity of Defendant's offense and his apparent lack
 of remorse, which is highlighted by Defendant's comment that he
 "was given horrendously long term of imprisonment that has not
 taught [him] anything new or better to improve [his] life. . . ,"
 Reply 4, that Defendant is not a danger to the community should
 he be released.

1 offenses and his limited period of incarceration
2 precluded compassionate release irrespective of
3 defendant's health conditions); U.S. v. Esparaza, 1:07-
4 cr-0294-BLW, 2020 WL 1696084, at *3-4 (D. Idaho April
5 7, 2020) (finding compassionate release not appropriate
6 despite defendant's health problems because court could
7 not conclude that defendant is not a danger to the
8 safety of the community given the seriousness of his
9 drug trafficking conviction).

10 **III. CONCLUSION**

11 Based on the foregoing, the Court **DENIES**
12 Defendant's Motion for Compassionate Release under 18
13 U.S.C. § 3582(c)(1)(A).
14

15 **IT IS SO ORDERED.**

16
17 DATED: April 24, 2020

_____/s/ Ronald S.W. Lew

18 **HONORABLE RONALD S.W. LEW**
19 Senior U.S. District Judge
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