

**FILED**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JUN 29 2021  
MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CENOPIO 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-RS WL-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,

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\* 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.**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) CR 02-531-RSWL-1  
)  
)  
Plaintiff, ) ORDER RE: DEFENDANT'S  
) RENEWED MOTION TO REDUCE  
) SENTENCE PURSUANT TO 18  
) U.S.C. § 3582(c)(1)  
) [546]  
)  
v. )  
)  
CENOBIO H. HERRERA, SR., et )  
al., )  
)  
Defendants. )  
)  
)  
\_\_\_\_\_  
)

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

///

## I. BACKGROUND

2        In May 2002, Defendant was indicted for: conspiracy  
3 to aid and abet the manufacture of more than 500 grams  
4 of a mixture or substance containing a detectable  
5 amount of methamphetamine and to possess  
6 pseudoephedrine knowing or having reasonable cause to  
7 believe that it would be used to manufacture a  
8 controlled substance, in violation of 21 U.S.C. § 846,  
9 841(a)(1), 841(c)(2), and 18 U.S.C. § 2; illegal  
10 possession of pseudoephedrine in violation of 21 U.S.C.  
11 § 841(c)(2); and conspiracy to commit money laundering  
12 and substantive money laundering in violation of 18  
13 U.S.C. §§ 1956(h), 1956(a)(1), and 1957 [1]. On March  
14 19, 2003, a jury convicted Defendant on all counts of  
15 the indictment [130, 133]. This Court entered judgment  
16 against Defendant on December 22, 2003 [183], and  
17 sentenced him to 360 months' imprisonment [182]. Upon  
18 release from imprisonment, Defendant shall be placed on  
19 supervised release for a term of five years [182].

## II. DISCUSSION

#### A. Legal Standard

22 The First Step Act, Pub. L. No. 115-391, 132 Stat.  
23 5194, was enacted in 2018 and permits a defendant to  
24 directly petition the district court for a sentence  
25 reduction under the compassionate release statute. See  
26 18 U.S.C. § 3582(c)(1)(A). 18 U.S.C. § 3582(c)(1)(A)  
27 incorporated the following procedures with respect to  
28 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  
25 (2) of this subsection. The court, in  
26 determining the particular sentence to be  
27 imposed, shall consider—

28           (1) the nature and circumstances of the  
29 offense and the history and  
30 characteristics of the defendant;

31           (2) the need for the sentence imposed—

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

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.

26 ///

27 ///

1                   c. *Protection of the Public*<sup>1</sup>

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

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22                   <sup>1</sup> U.S.S.G. § 1B1.13 also requires the Court consider whether  
 23 the defendant would be "a danger to the safety of any other  
 24 person or to the community as provided in 18 U.S.C. § 3142(g)." The factors to be considered are: (1) the nature and  
 25 circumstances of the offense charged; (2) the weight of the  
 26 evidence against the person; (3) the history and character of the  
 27 person; and (4) the nature and seriousness of the dangers to any  
 28 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

14 /s/ Ronald S.W. Lew

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HONORABLE RONALD S.W. LEW  
Senior U.S. District Judge

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) CR 02-531-RSWL-1  
)  
)  
Plaintiff, ) ORDER RE: DEFENDANT'S  
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) SENTENCE PURSUANT TO 18  
) U.S.C.  
) § 3582(c)(1)(A)(i) [511]  
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Currently before the Court is Defendant Cenobio H. Herrera Sr.'s ("Defendant") Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) ("Motion") [511], filed on January 23, 2020. Having reviewed all papers submitted pertaining to this Motion, the Court  
**NOW FINDS AND RULES AS FOLLOWS:** the Court **DENIES** Defendant's Motion.

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## I. BACKGROUND

2        In May 2002, Defendant was indicted for: conspiracy  
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10 possession of pseudoephedrine in violation of 21 U.S.C.  
11 § 841(c)(2); and conspiracy to commit money laundering  
12 and substantive money laundering in violation of 18  
13 U.S.C. §§ 1956(h), 1956(a)(1), and 1957 [1]. On March  
14 19, 2003, a jury convicted Defendant on all counts of  
15 the indictment [130, 133]. This Court entered judgment  
16 against Defendant on December 22, 2003 [183], and  
17 sentenced him to 360 months' imprisonment [182]. Upon  
18 release from imprisonment, Defendant shall be placed on  
19 supervised release for a term of five years [182].

## II. DISCUSSION

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23 5194, was enacted in 2018 and permits a defendant to  
24 directly petition the district court for a sentence  
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5       the defendant has fully exhausted all  
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8       defendant's behalf or the lapse of 30 days from  
9       the receipt of such a request by the warden of  
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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  
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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 . . . .")<sup>1</sup>

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21       <sup>1</sup> 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 unprecedeted 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

1       2. Extraordinary and Compelling Reasons

2       Section 3582(c)(1)(A) permits a sentence reduction  
 3 only upon a showing of "extraordinary and compelling  
 4 reasons" and only if "such reduction is consistent with  
 5 applicable policy statements issued by the Sentencing  
 6 Commission." Congress never explicitly defined  
 7 "extraordinary and compelling reasons," except to state  
 8 that "[r]ehabilitation . . . alone" is insufficient.  
 9 18 U.S.C. § 994(t). Instead, Congress directed the  
 10 Sentencing Commission to define the term.

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

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

22       

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 23 extent that Defendant's request is predicated upon relief in  
 24 response to the COVID-19 crisis, the Motion is **DENIED** for failure  
 25 to exhaust administrative remedies. See U.S. v. Allen, 1:19-cr-  
 26 98-10, 2020 WL 1878774, at \*1 (N.D. Ohio April 15, 2020) (finding  
 27 court lacked the authority to review the defendant's motion for  
 28 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).

- (2) The defendant is not a danger to the safety of any other persons or to the community, as provided in 18 U.S.C § 3142(g); and
- (3) The reduction is consistent with this policy statement.”

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

22       Here, Defendant argues that he is entitled to  
23 sentence reduction under section 3582(c)(1)(A) for  
24 three reasons: (1) he received an unusually long and  
25 unjustified sentence; (2) he was sentenced to an  
26 unreasonably long term because he "exercised his  
27 constitutional right to a jury"; and (3) his  
28 "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.<sup>2</sup>  
 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.<sup>3</sup> See U.S. v. Willis, 382 F. Supp. 3d 1185,  
 10 1189 (D.N.M. 2019) (finding seriousness of defendant's

11  
 12 <sup>2</sup> 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 <sup>3</sup> 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).  
See U.S.S.G. § 1B1.13(2). Defendant states that he is "a  
 21 statically good candidate for release"; however, this ignores  
 22 that in 2013 the BOP Unit Team believed that if released,  
 23 Defendant would rapidly resume participating in new criminal  
 24 activity. See Comp. Release Request 9. Defendant argues that  
 25 the BOP Unit Team's finding was based entirely on likely Grade C  
 26 violations of supervision that occurred more than twenty years in  
 27 the past and claims that these incidents are "hardly indicative  
 28 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  
19 **HONORABLE RONALD S.W. LEW**  
Senior U.S. District Judge

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