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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8  
9 United States of America,

No. CR-11-00150-001-TUC-DCB (BGM)

10 Plaintiff,

**ORDER**

11 v.

12 Manuel Osorio-Arellanes,

13 Defendant.  
14

15 On January 11, 2021, the Defendant filed a pro se motion for a sentence reduction  
16 under 18 U.S.C. § 3582(c)(1)(A). (Doc. 900.) Pursuant to General Order 20-28, the Federal  
17 Public Defender reviewed the motion and the Defendant’s Bureau of Prisons (BOP)  
18 medical records. The Federal Public Defender does not recommend appointment of counsel  
19 because the motion lacks merit. The Court has considered the Government’s Response,  
20 and there has been no Reply. The Court denies the motion.

21 On February 10, 2014, the Court accepted a stipulated-sentence, pursuant to a plea  
22 agreement for first-degree murder. The Court imposed a 30-year prison sentence followed  
23 by five years of supervised release. (Doc. #233.)

24 This Court may modify the term of imprisonment under 18 U.S.C. §  
25 3582(c)(1)(A)(i), if “extraordinary and compelling reasons warrant such a reduction.” The  
26 sentence reduction must be “consistent with applicable policy statements issued by the  
27 Sentencing Commission,” *id.*, as found at U.S.S.G. § 1B1.13, and are binding on this Court.  
28 *Dillon v. United States*, 560 U.S. 817, 825–27 (2010).

1           The Sentencing Commission’s policy statement describes six extraordinary and  
2 compelling reasons: 1) defendant has a terminal illness, defined as a “serious and advanced  
3 illness with an end of life trajectory”; 2) defendant has some other physical or medical  
4 condition, physical or cognitive impairment, or a deteriorating physical or mental condition  
5 because of the aging process that “substantially diminishes the ability of the defendant to  
6 provide self-care within the environment of a correctional facility and from which he or  
7 she is not expected to recover”; 3) defendant is at least 65 years old, experiencing a serious  
8 deterioration in physical or mental health because of the aging process, and has served at  
9 least 10 years or 75 percent of his or her term of imprisonment, whichever is less; 4) the  
10 caregiver for defendant’s children has died or been incapacitated; 5) the defendant’s spouse  
11 is incapacitated, leaving the defendant as the only available caregiver for his spouse; 6) any  
12 other extraordinary and compelling reason that, as determined by the Director of the BOP,  
13 warrants a sentence reduction. U.S.S.G. § 1B1.13 application note 1 (citing 18 U.S.C. §  
14 3582(c)(1)(A)(i)).

15           Equally important, the Court may reduce a sentence for one of these extraordinary  
16 and compelling reasons, only if it determines that “the defendant is not a danger to the  
17 safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g).”  
18 U.S.S.G. § 1B1.13(2) & application note 1.

19           The Court does not construe the “extraordinary and compelling reasons” under 18  
20 U.S.C. § 3582(c)(1)(A) and U.S.S.G. § 1B1.13, strictly, to require either a “terminal  
21 illness” or “a serious medical condition that substantially diminishes the ability of the  
22 defendant to provide self-care within the environment of a correctional facility and from  
23 which he or she is not expected to recover.” Such a limited view of compassionate release  
24 would make it unavailable for COVID-19, even for high-risk inmates until they contracted  
25 the virus and death appeared imminent. Instead, the Court applies the Sentencing  
26 Guidelines’ catch-all provision, which allows the Court to find an “extraordinary and  
27 compelling reason other than, or in combination with, the reasons described in subdivisions  
28 (A) through (C).” U.S.S.G. § 1B1.13 Application note 1(D).

1 The Defendant's assertion for compassionate release is essentially that his  
2 incarceration increases the risk that he will contract COVID-19. Even generously defining  
3 "extraordinary and compelling reasons," the Defendant's reasons miss the mark. The Court  
4 agrees with the Federal Public Defender's review of Mr. Osorio's pro se filing and his  
5 prison medical records, that they fail to disclose a prima facie claim to a sentence reduction  
6 for "extraordinary and compelling" reasons under the two prong rubric. First, he has no  
7 medical condition that is considered to create a high risk of death should he contract  
8 COVID-19.

9 Second, the Defendant is danger to the community. He admitted to participating in  
10 the attempted robbery of drug traffickers in December 2010, where he and his co-  
11 conspirators armed themselves with assault rifles and searched for drug traffickers to rob.  
12 When they encountered Border Patrol BORTAC agents, they engaged in a firefight that  
13 resulted in Agent Terry's murder. Defendant's willingness to engage in this inherently  
14 dangerous criminal enterprise, involving large quantities of drugs, that resulted in the tragic  
15 death of a Boarder Patrol agent supports the Court's conclusion that the defendant poses a  
16 danger to the community to which he will return. These types of large-scale criminal  
17 enterprises, involving large amounts of dangerous drugs, are the type that pose  
18 considerable danger to the community. *United States v. Stone*, 608 F.3d 939, 947 (6th Cir.  
19 2010), *United States v. Hare*, 873 F.2d 796, 798 (5th Cir.1989) (stating that "[t]he risk of  
20 continued narcotics trafficking on bail constitutes a risk to the community"), *United States*  
21 *v. Leon*, 766 F.2d 77, 81 (2d Cir.1985) ("[I]t is clear that the harm to society caused by  
22 narcotics trafficking is encompassed within Congress' definition of 'danger'"). Danger to  
23 a community is not limited to a geographic location in the United States where the offense  
24 of conviction has effects abroad. *United States v. Hir*, 517 F.3d 1081, 1088-89 (9th Cir.  
25 2008). If released, the Defendant would be deported and pose a risk to communities in  
26 Mexico, which are already burdened with rampant drug trafficking and violent crime. He  
27 poses a risk to communities in the United States because his offense conduct evinces a  
28 willingness to cross illegally into the United States to commit serious offenses

1           The Court need not, however, even make these meritorious determinations because  
2 his motion fails procedurally. He did not administratively exhaust a request for  
3 compassionate release to the Director of the BOP.

4           Under 18 U.S.C. § 3582(c), the Director of the BOP may make a motion for the  
5 compassionate release of a prisoner. Following the implementation of the First Step Act in  
6 2019, an inmate may also file a motion, subject to the exhaustion requirement described  
7 below. Compassionate release is both a drastic and permanent remedy, subject to several  
8 strict statutory conditions, including administrative exhaustion. Defendant bears the burden  
9 of proving he meets all elements of eligibility for a sentence reduction. 18 U.S.C. §  
10 3582(c)(1)(A); *United States v. Hamilton*, 715 F.3d 328, 337 (11th Cir. 2013) (“defendant,  
11 as the § 3582(c)(2) movant, bears the burden of establishing” eligibility for sentencing  
12 reduction); *United States v. Butler*, 970 F.2d 1017, 1026 (2d Cir. 1992) (“A party with an  
13 affirmative goal and presumptive access to proof on a given issue normally has the burden  
14 of proof as to that issue.”).

15           The statute expressly provides a defendant can file a motion only “after the  
16 defendant has fully exhausted all administrative rights to appeal a failure of the BOP to  
17 bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a  
18 request by the warden of the defendant’s facility, whichever is earlier ....” 18 U.S.C. §  
19 3582(c)(1)(A). Administrative exhaustion is a congressionally mandated claims-  
20 processing rule that must be applied when invoked by the government. *United States v.*  
21 *Alam*, 960 F.3d 831, 833 (6th Cir. 2020). “Where Congress specifically mandates it,  
22 exhaustion is not merely appropriate but ‘required.’” *Barron v. Ashcroft*, 358 F.3d 674, 677  
23 (9th Cir. 2004) (citing *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)). Even considering  
24 the COVID-19 pandemic, the Court “does not have the authority to excuse an inmate’s  
25 failure to comply with the exhaustion provision of the FSA.” *United States v. Holden*, 2020  
26 WL 1673440, at \*10 (D. Or. Apr. 6, 2020).

27           This Court finds that if Congress had wanted to suspend the exhaustion requirement  
28 because of COVID-19, it could have done so when it passed the CARES Act in late March

1 of 2019. It did not, and this Court will not waive it. *See United States v. Epstein*, 2020 WL  
2 1808616, at \*5 (D.N.J. Apr. 9, 2020) (declining to waive administrative exhaustion  
3 requirement: “[I]t is ultimately Congress that must act to provide some relief from the  
4 statute’s strict proscription, and to address the emergent need of inmates during this  
5 pandemic. See, e.g., the [CARES Act].”)

6 The Defendant asserts he sought compassionate release from FCI Petersburg: “I  
7 have requested a compassionate release from the Warden (Andrews) in F.B.O.P. –  
8 Petersburg. It’s been past thirty days and I haven’t heard from the Warden.” (Doc. 900, p.  
9 5.) The Government, however, has investigated this assertion and found no documentation  
10 reflecting this request, and FCI Petersburg has no record of defendant requesting  
11 compassionate release. (Response (Doc. 902) at 6.)<sup>1</sup> Before the Court can consider his  
12 motion, defendant must file a request with the warden. 18 U.S.C. § 3582(c)(1)(A); *United*  
13 *States v. Weidenhamer* (Weidenhamer II), 2020 WL 1929200 at \*2-3 (Ariz. April 21, 2020)  
14 (denying COVID-related motion for compassionate release because defendant failed to  
15 exhaust administrative remedies); *United States v. Tomlinson*, 2020 WL 1935522 at \*1-2  
16 (Ariz. April 22, 2020) (same).

17 The Court finds that the BOP’s administrative review process plays a crucial role  
18 and should not be usurped. The Attorney General has directed BOP to prioritize  
19 transferring vulnerable inmates, especially those at institutions with COVID-19 outbreaks,  
20 to home confinement in appropriate circumstances. For each compassionate release  
21 request, BOP carefully considers the inmate’s medical condition and his plan for release,  
22 among other things. See BOP Program Statement 5050.50 (January 17, 2019),  
23 Compassionate Release/Reduction in Sentence: Procedures for Implementation [],  
24 available at [https://www.bop.gov/policy/progstat/5050\\_050\\_EN.pdf](https://www.bop.gov/policy/progstat/5050_050_EN.pdf). The Court finds that  
25 the BOP is in the best position to assess the merits of the Defendant’s request for  
26 compassionate release in the first instance.

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<sup>1</sup> There has been no Reply.

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**Accordingly,**

**IT IS ORDERED** that the Motion for Compassionate Release (Doc. 900) is DENIED.

Dated this 22nd day of February, 2021.



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David C. Bury  
United States District Judge