No. 24-

IN THE

Supreme Court of the United States

MARLO HELMSTETTER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under 18 U.S.C. §3582(c)(1)(A), a defendant who has exhausted his administrative remedies is allowed to file his own motion to reduce his prison sentence. The statute instructs a district court that it "may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . ."

The First, Second, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits have concluded that this language means that "compassionate release" under the statute can be denied after considering only the 3553(a) factors, without determining whether there are extraordinary and compelling reasons that might warrant a reduction.

The question presented is whether this procedural approach is consistent with the plain language of the statute, and with this Court's decision in *Concepcion v. United States*, 597 U.S. 481 (2022).

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1. The caption of the case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED CASES

United States v. Gerlad Elwood, 2024 WL 454976, Criminal Action No. 92-469, U.S.D.C., E.D. of La. Judgment affirming defendant's sentence entered on February 6, 2024. Notice of appeal to the United States Court of Appeals for the Fifth Circuit filed on March 12, 2024.

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The opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of Helmstetter's motion and renewed motion for compassionate release under the First Step Act (18 U.S.C. § 3582(c)(1)(A)(i)) is not reported but is attached to this petition as Appendix 1a-3a. The opinions of the United States District Court denying Helmstetter's motions for compassionate release are not reported but are attached to this petition as Appendix 4a-51a.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over these proceedings pursuant to 18 U.S.C. § 3582(c)(1)(A). The Court of Appeals for the Fifth Circuit had jurisdiction over Helmstetter's appeal pursuant to 28 U.S.C. § 1291. On May 23, 2024, Helmstetter filed an application to extend the time to file a petition for a writ of certiorari. On May 31, 2024, Justice Alito granted the application, and extended the time in which to file this petition until July 15, 2024. This petition is therefore timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property without due process of law . . .

Title 18, United States Code, Section 3582(c)(1)(A) provides in pertinent part:

> **(c) Modification of an imposed term of imprisonment.**--The court may not modify a term of imprisonment once it has been imposed except that--
>
> **(1)** in any case--
>
> **(A)** the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
>
> **(i)** extraordinary and compelling reasons warrant such a reduction; or
>
> **(ii)** the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant

> is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission;
>
> ***

STATEMENT OF THE CASE

In August 1992, a grand jury sitting in and for the United States District Court for the Eastern District of Louisiana returned a 54-count indictment against a group of individuals known to law enforcement as the "Metz Organization." Marlo Helmstetter was alleged to be a member of the Metz Organization. The original indictment alleged, *inter alia*, a RICO violation (18 U.S.C. § 1962(c)); a criminal enterprise (21 U.S.C. § 848); a conspiracy to distribute cocaine (21 U.S.U. §846); murder in aid of racketeering activity (18 U.S.C. § 1959); aggravated assault in aid of racketeering activity (18 U.S.C. § 1959(a)(3)); and using and carrying a firearm in aid of drug trafficking (18 U.S.C. § 924(c)).

Helmstetter and others proceeded to trial on a superseding indictment. Following a three-week jury trial at which over 100 witnesses testified, all defendants were convicted of one or more counts. *See United States v. Tolliver,* 61 F.3d 1189 (5th Cir. 1995). Helmstetter was convicted of five counts: Count 1 – conspiracy to possess

cocaine with the intent to distribute it; Counts 9, 10, and 11 - murder and other violent crimes in aid of racketeering; and Count 15 – using and carrying a firearm in aid of drug trafficking activity.

On December 15, 1993, Helmstetter was sentenced to three life sentences on Counts 1, 9, and 10; 240 months on Count 11; and 60 months on Count 15, all sentences to be served concurrently, except for his sentence on Count 15, which was to run consecutivly to all other sentences. Helmstetter's convictions and sentences were affirmed on appeal. *See United States v. Tolliver, supra* (5th Cir. 1995).

In the three decades since his sentencing, Helmstetter has sought relief in the district court on multiple occasions, with mixed results. Although his conviction on Count 15 for using and carrying a firearm in aid of drug trafficking (18 U.S.C. § 924(c)) was set aside in 1997 – and he has served the entirety of his 20-year sentence on Count 11 - the life sentences on counts 1, 9 and 11 remain.

In August 2020, Helmstetter filed a *pro se* motion for compassionate release under the First Step Act (18 U.S.C. § 3582(c)(1)(A)(i)). Helmstetter supplemented the motion twice and filed a motion for reconsideration following the district court's first denial of the motion. The motion for reconsideration was also denied. Appendix 4a – 12a.

Helmstetter's motions and supplements cited numerous reasons for his release, including three that have been recognized either by the courts or by the policy statements of the Sentencing Commission[2] as "extraordinary and compelling": (1) his age at the time of

2. The policy statements are found at U.S.S.G. § 1B1.13.

the offense;[3] (2) his unusually long sentence coupled with changes in the law;[4] and (3) his efforts at rehabilitation.[5]

Notwithstanding the existence of these reasons, the district court, consistent with the law of the Fifth Circuit, declined to consider them. In its order denying Helmstetter's motion for reconsideration of the earlier denial of Helmstetter's motion for compassionate release, the court wrote:

> The Court . . . concluded that it need not determine if Helmstetter had demonstrated the existence of extraordinary and compelling circumstances warranting a sentence reduction because such a reduction was not appropriate in light of the § 3553 factors.
>
> Nothing in Helmstetter's motion for reconsideration warrants a different conclusion. (Appendix 11a – 12a (footnote omitted)).

Helmstetter appealed the district court's decision to the Fifth Circuit. That Court also denied Helmstetter relief:

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3. When the drug conspiracy described in Count 1 began, Marlo Helmstetter was 14 years old. Helmstetter was only 18 when the offenses in counts 9 and 10 were committed (in the same incident). At the time the federal indictment was returned, he was being held in a juvenile detention facility, but was transferred to federal custody to be prosecuted as an adult.

4. Helmstetter was sentenced in 1993, when the sentencing guidelines were considered mandatory.

5. As indicated in his *pro se* pleadings, Helmstetter had earned over 50 certificates for the various prison programs he had completed.

> In light of the district court's reliance on the § 3553(a) factors as the basis for denying relief, it was not required to determine whether Helmstetter had cited extraordinary and compelling reasons for compassionate release. *See Ward v. United States*, 11 F.4th 354, 360-62 (5th Cir. 2021). (Appendix 3a).

This is an erroneous view of the law, one that has been taken by most of the circuits. The nature of the error is explained in the Argument and Reasons for Granting the Petition.

ARGUMENT AND REASONS FOR GRANTING THE PETITION

1. The Circuit Courts of Appeals have decided an important question of federal law that has not been, but should be, settled by this Court.

When it passed the "First Step Act" (FSA) in 2018 (Pub. L. No. 115-391, 132 Stat. 5194 (2018)), Congress was keenly aware of the need for reform of the Federal Sentencing Guidelines – and the need to make the possibility of relief from harsh sentences more widely available.[6] This awareness was the motive behand the provision found in 18 U.S.C. §3582(c)(1)(A), which for the first time gave a defendant the right to file a motion

6. As of the end of fiscal year 2023, 29,946 inmates had been released as a result of all the provisions of the First Step Act. First Step Act Annual Report, April 2023, United States Department of Justice, Office of the Attorney General.

to modify his sentence after exhausting administrative remedies.[7]

Congress not only intended to increase the use of compassionate release, Section 3582(c)(1)(A) was meant to "assure the availability of **specific review** and reduction of a term of imprisonment 'for extraordinary and compelling reasons' and to respond to changes in the guidelines."[8]

The availability of that specific review was guaranteed by the language of the statute itself: "[a] court . . . upon motion of the defendant . . . may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction[.]" (emphasis added).

The most logical reading of this section of the statute is that it imposes two obligations upon a district court: first, the court must consider the 3553(a) factors; and second, the court must thereafter determine whether extraordinary and compelling reasons warrant a reduction. That is the only interpretation that gives

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7. Congress had found that leaving compassionate release in the hands of the Federal Bureau of Prisons was not working, since only 6% of all requests were presented to a court by the Bureau. In fiscal year 2018, before the passage of the FSA, only 24 motions for compassionate release were granted by the courts. In fiscal year 2023, 3,140 motions were filed, mostly by defendants, and 432 (13.8%) were granted. U.S. Sentencing Commission Compassionate Release Data Report, Fiscal Year 2023, p.7 (March, 2024).

8. S. Rep. No. 98-225, at 121 (emphasis added).

"effect to the intent of Congress,"[9] because it is the only reading that requires a district court to consider any extraordinary and compelling reasons advanced by a defendant.

Obviously, a district court is never required to grant a reduction – it is simply required to consider the "extraordinary and compelling reasons" advanced by a defendant in favor of one. And even if the reasons are extraordinary and compelling, a district court can reject them, based on the 3553(a) factors, or because the reduction sought is not consistent with applicable policy statements issued by the Sentencing Commission.

Any reading of the statute that permits a district court to choose not to consider any extraordinary and compelling reasons for a reduction that have been advanced by a defendant subverts the core purpose of this section of the FSA: to provide defendants with a vehicle for advancing their own extraordinary and compelling reasons for a compassionate release. Yet that contrary reading is precisely the one every circuit court has given § 3582(c)(1)(A) – as elucidated by the Second Circuit in *United States v. Keitt*[10]:

> Finally, it is true that in deciding Keitt's motion for compassionate release, the court did not determine whether his proffered circumstances rose to the level of extraordinary

9. *Fischer v. United States*, 603 U.S.___, 2024 WL 3208034, No. 23-5572, at 10 (June 28, 2024)(Jackson, J. concurring), quoting *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542 (1940).

10. *United States v. Keitt*, 21 F.4th 67, 73 (2d Cir. 2021).

> and compelling reasons. Instead, it denied relief solely in light of the § 3553(a) factors. That was not an error. As we explained above, a court may reduce a sentence under § 3582(c)(1)(A) only if three conditions are in place: administrative exhaustion (absent waiver or forfeiture by the government); satisfaction of the § 3553(a) factors; and extraordinary and compelling reasons. It follows that if a district court determines that one of those conditions is lacking, it need not address the remaining ones. *See [United States v.] Jones*, 17 F.4th at 374 ("[E]xtraordinary and compelling reasons are necessary—but not sufficient—for a defendant to obtain relief under § 3582(c)(1)(A)."). We therefore hold that when a district court denies a defendant's motion under § 3582(c)(1)(A) in sole reliance on the applicable § 3553(a) sentencing factors, it need not determine whether the defendant has shown extraordinary and compelling reasons that might (in other circumstances) justify a sentence reduction. (footnote omitted).

In a footnote to the above paragraph, the Second Circuit noted that it joined its "sister Circuits" in holding "that a district court may rely solely on the § 3553(a) factors when denying a defendants motion for compassionate release," citing decisions from the First,[11]

11. *United States v. Saccoccia*, 10 F.4th 1 (1st Cir. 2021).

Sixth,[12] Ninth,[13] Tenth,[14] and Eleventh[15] Circuits. To this list can now be added the Fifth Circuit. Tellingly, not one of these circuit courts looked to the structure of the statute, or to its legislative history.

Common sense compels the conclusion that when the purpose of a statute is to permit a defendant to present to a court his extraordinary and compelling reasons for a reduction in his sentence, the court should consider those reasons. But even if common sense does not, the caselaw of this Court does.

2. The Circuit Courts of Appeal have decided an important federal question in a way that conflicts with the decisions of this Court.

One need look no further than the recent decision of this Court in *Concepcion v. United States*, 587 U.S. 481, 500-501 (2022), to see the conflict between what the circuit courts now permit under § 3582(c)(1)(A), and what this Court otherwise requires. As the Court wrote in *Concepcion*: "[i]t follows, under this Court's sentencing jurisprudence, that when deciding a First Step Act motion, district courts bear the standard obligation to explain their decisions and demonstrate that they considered the parties' arguments."

The *Concepcion* Court went on to explain: "[t]he First Step Act does not require a district court to be persuaded

12. *United States v. Elias*, 984 F.3d 516 (6th Cir. 2021).

13. *United States v. Keller*, 2 F.4th 1278 (9th Cir. 2021).

14. *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021).

15. *United States v. Tinker*, 14 F.4th 1234 (11th Cir. 2021).

by the nonfrivolous arguments raised by the parties before it, but it does require the court to consider them."[16]

If a district court can deny a motion pursuant to § 3582(c)(1)(A) by looking only to the 3553(a) factors, then it is not actually "considering" the question of whether there are extraordinary and compelling factors justifying a reduction. It is not even reaching the question – it is simply re-visiting the 3553(a) factors. And if the court is the one that imposed the original sentence, the court is highly unlikely to conclude it made a mistake when it first considered those factors.

In sum, the only way to give full meaning to the language of the statute, and the intent of Congress when it passed the First Step Act, is to treat the first two conditions imposed by § 3582(c)(1)(A) as requirements: a court must first look to the 3553(a) factors, and then to any reasons advanced by a defendant to determine if they are in fact extraordinary and compelling, and then rule on the motion. Anything less defeats the principal purpose of the FSA.

16. *Concepcion v. United States*, 587 U.S. 481, 502 (2022).

CONCLUSION

Wherefore, Movant Marlo Helmstetter respectfully moves this Honorable Court for the entry of an order granting his petition for a writ of certiorari, vacating the opinion of the United States Court of Appeals for the Fifth Circuit, and remanding the matter to the district court in light of *Concepcion v. United States.*

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MARCH 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-30384
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARLO HELMSTETTER,

Defendant-Appellant.

Filed March 15, 2024

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:92-CR-469-7

Before ELROD, OLDHAM, and WILSON, Circuit Judges.

OPINION

PER CURIAM:*

Marlo Helmstetter, federal prisoner # 23245-034, appeals the denial of his motion for compassionate release,

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

filed pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), and the denial of his motion for reconsideration. Helmstetter, who was sentenced to life imprisonment for conspiring to possess cocaine with intent to distribute and two counts of committing murder in aid of racketeering activity and to 240 months for aggravated assault in aid of racketeering activity, asserts that the district court failed to afford adequate consideration and weight to his arguments that his post-sentencing rehabilitation, the length of time he has already served, and his youth at the time of the offenses of conviction warranted § 3582(c)(1)(A) relief. We review each denial for abuse of discretion. *See United States v. Chambliss*, 948 F.3d 691, 693 (5th Cir. 2020); *Kapordelis v. Myers*, 16 F.4th 1195, 1202 (5th Cir. 2021).

The district court considered Helmstetter's arguments relating to his rehabilitation and his youth at the time that he committed his criminal offenses; nevertheless, the court determined that Helmstetter's sentences as imposed were appropriate to protect the public from his future crimes, reflect the seriousness of his offenses, promote respect for the law, and deter future similar conduct. *See* 18 U.S.C. § 3553(a)(1), (a)(2)(A)-(C). In other words, the district court's "written order adequately reflects that it gave due consideration to [Helmstetter's] arguments in favor of a reduction of his sentence" under the § 3553(a) factors. *United States v. Batiste*, 980 F.3d 466, 478-79 (5th Cir. 2020). Helmstetter's extensive disagreement with the district court's weighing of the § 3553(a) factors does not establish that the court abused its discretion. *See Chambliss*, 948 F.3d at 694; *Kapordelis*, 16 F.4th at 1202. In light of the district court's reliance on the

§ 3553(a) factors as the basis for denying relief, it was not required to determine whether Helmstetter had cited extraordinary and compelling reasons for compassionate release. *See Ward v. United States*, 11 F.4th 354, 360-62 (5th Cir. 2021).

AFFIRMED.

APPENDIX B — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, FILED MAY 30, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

v.

MARLO HELMSTETTER

CRIMINAL ACTION NO. 92-469
SECTION I

May 30, 2023

ORDER & REASONS

Before the Court is Marlo Helmstetter's ("Helmstetter") motion[1] to reconsider the Court's order[2] denying Helmstetter's "renewed" motion for compassionate release. The United States of America ("United States") opposes[3] the motion. For the reasons discussed below, the Court denies Helmstetter's motion.

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1. R. Doc. Nos. 1328 (motion for reconsideration) and 1331 (reply memorandum in support of motion for reconsideration).

2. R. Doc. No. 1327.

3. R. Doc. No. 1330.

Appendix B

I. BACKGROUND

In 1993, Helmstetter was convicted of five felony counts: conspiracy to possess cocaine with the intent to distribute (Count 1), murder in aid of racketeering activity (Counts 9 and 10), aggravated assault in aid of racketeering activity (Count 11), and using and carrying a firearm in aid of drug trafficking activity (Count 15).[4] The Court sentenced Helmstetter to three life sentences each for Counts 1, 9, and 10; 240 months' imprisonment for Count 11; and 60 months' imprisonment for Count 15.[5] All sentences were to be served consecutively.[6] The Fifth Circuit affirmed on all counts, *United States v. Tolliver*, 61 F.3d 1189 (5th Cir. 1995), but this Court later vacated his conviction and sentence as to Count 15.[7]

On August 14, 2020, Helmstetter filed a motion for compassionate release, citing his health ailments in light of the COVID-19 pandemic as grounds for relief.[8] Helmstetter also highlighted the length of his incarceration, his youth at the time of his offense and conviction, his efforts at rehabilitation while in prison, and his support network at

4. R. Doc. No. 1185, at 1.

5. *Id.*

6. *Id.*

7. R. Doc. No. 805, at 8-9 (setting aside Helmstetter's conviction as to Count 15 as "the court's instruction to the jury on the firearms count was erroneous" and therefore "there [was] no certainty that the conviction was for carrying instead of using.").

8. R. Doc. No. 1246.

home as reasons the Court should consider compassionate release.[9] This Court denied his motion after determining that "Helmstetter's risk of serious illness is too speculative to be compelling."[10] This Court also found that "[n]either Helmstetter's age (49) nor his family circumstances qualify as extraordinary or compelling under the [U.S. Sentencing Guidelines] policy statement."[11] Finally, the Court held that even if Helmstetter had presented an extraordinary and compelling circumstance, the factors set forth in 18 U.S.C. § 3553(a) would nonetheless preclude his release.[12]

On December 12, 2022, Helmstetter filed a "renewed" motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).[13] In his renewed motion, Helmstetter requested that the Court reconsider his previous motion in light of the Supreme Court's recent decision in *Concepcion v. United States,*[14] which held that the First Step Act "allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence." 142 S. Ct. 2389, 2404 (2022). The

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9. *Id.*

10. R. Doc. No. 1255, at 12.

11. *Id.* at 9.

12. *Id.* at 14.

13. R. Doc. Nos. 1304 ("renewed" motion for compassionate release), 1306 (supplemental memorandum), 1308 (supplemental memorandum), and 1309 (supplemental memorandum).

14. R. Doc. No. 1304, at 1.

Supreme Court further held in *Concepcion* that a federal judge, when determining and imposing a sentence, "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Id.* at 2399 (quoting *United States v. Tucker*, 404 U.S. 443, 446, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972)). Helmstetter cited *United States v. Booker*, 543 U.S. 220 (2005), and *Alleyne v. United States*, 570 U.S. 99 (2013), as intervening changes in law that justified a reduction in his sentence.

In his first supplement memorandum to his renewed motion, Helmstetter further contended that changes in the application of the Guidelines have resulted in a "gross disparity" between his sentence and those of similarly situated defendants.[15] Accordingly, Helmstetter asked this Court to consider the inequity brought about by these changes to the law "in conjunction with the 'other contentions,' documents, and evidence that was submitted in his previous compassionate release motion."[16]

The Court denied Helmstetter's renewed motion.[17] In its order and reasons denying Helmstetter's motion, the Court first noted that, "[a]s this Court and others have held, *Concepcion* is not relevant to the threshold requirements parties seeking compassionate release must first satisfy: a finding by the Court that the

15. R. Doc. No. 1306, at 1.

16. R. Doc. No. 1304, at 3.

17. R. Doc. No. 1327.

§ 3553 factors do not warrant the defendant's continued incarceration and the existence of 'extraordinary and compelling' circumstances which justify compassionate release."[18] The Court then determined that Helmstetter had not demonstrated his medical conditions constituted "extraordinary and compelling" circumstances.[19] Finally, though the Court noted that it "may consider the defendant's youth at the time of his offense and conviction when determining whether extraordinary and compelling circumstances exist[,]" the Court concluded that it need not reach the question of whether extraordinary and compelling circumstances existed as Helmstetter could not show that a reduction in sentence was warranted in light of the 18 U.S.C. § 3553 factors.[20] Accordingly, the Court denied Helmstetter's renewed motion.

II. LAW & ANALYSIS

In Helmstetter's motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e)[21] currently before the Court, Helmstetter asserts that reconsideration is

18. *Id.* at 7.

19. *Id.* at 8-9.

20. The Court noted that it "is 'bound only by § 3582(c)(1)(A)(i) and, as always, the sentencing factors in § 3553(a).'" *Id.* at 13 (quoting *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021)).

21. Helmstetter's motion seeks reconsideration pursuant to Rule 59(e)(3). However, as there is no subsection (3) to Rule 59(e), the Court interprets his motion as seeking relief pursuant to Rule 59(e).

necessary to "correct an error of law or prevent a manifest injustice[.]"[22] Reconsideration is necessary, Helmstetter argues, because the Court erred in failing to take Helmstetter's age at the time of offense, conviction, and sentencing into consideration when applying the § 3553 sentencing factors.[23]

"Although the Fifth Circuit has noted that the Federal Rules 'do not recognize a "motion for reconsideration" in *haec verba*,' it has consistently recognized that such a motion may challenge a judgment or order under Federal Rules of Civil Procedure 54(b), 59(e), or 60(b)." *United States v. Martin*, No. 17-179, 2022 WL 2986579, at *2 (E.D. La. July 28, 2022) (Brown, C.J.) (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990)). The Supreme Court has "concluded that motions to reconsider in criminal prosecutions are proper and will be treated just like motions in civil suits." *United States v. Rollins*, 607 F.3d 500, 502 (7th Cir. 2010) (citing *United States v. Healey*, 376 U.S. 75, 84 (1964)).

Pursuant to Federal Rule of Civil Procedure 59(e), a party may file a motion to alter or amend a judgment no later than 28 days after the entry of the judgment. Rule 59(e) motions "serve the narrow purpose of allowing a party to correct manifest errors of law or fact or to present

22. R. Doc. No. 1328, at 1.

23. *Id.* at 3 ("Because the government failed to consider the youth age, which [sic] this Court has adopted their position, in regards to the § 3553 factors, this renders an injustice that must be considered or reconsidered under the 'youth age' juvenile fact[.]").

newly discovered evidence." *Waltman v. Int'l Paper Co.* 875 F.2d 468, 473 (5th Cir. 1989). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.* 367 F.3d 473, 479 (5th Cir. 2004). "[S]uch a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Id.* (citing *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)).

"'A moving party must satisfy at least one of the following four criteria to prevail on a Rule 59(e) motion: (1) the movant demonstrates the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) the movant presents new evidence; (3) the motion is necessary in order to prevent manifest injustice; [or], (4) the motion is justified by an intervening change in the controlling law.'" *Upper Room Bible Church, Inc. v. Sedgwick Delegated Auth.*, No. 22-3490, 2023 WL 2018001, at *2 (E.D. La. Feb. 15, 2023) (Africk, J.) (quoting *Jupiter v. BellSouth Telecomms., Inc.*, No. 99-0628, 1999 WL 796218, at *1 (E.D. La. Oct. 5, 1999) (Vance, J.) (internal quotation marks omitted)). "A manifest error is one that is plain and indisputable, and that amounts to a complete disregard of the controlling law." *Puga v. RCX Sols., Inc.*, 922 F.3d 285, 293 (5th Cir. 2019) (quotation and citations omitted).

As noted, Helmstetter alleges that the Court erred when applying the § 3553 factors by failing to consider his age at the time of his offense, conviction, and sentencing. Helmstetter also asserts that "the Court agreed that

Helmstetter has met the threshold of § 3582(c)(1)(A)(i) 'extraordinary and compelling reasons' . . . . [h]owever, the Court took the contrary [position] that Helmstetter has not met the threshold of § 3553(a)(1), (a)(2)(A)-(C). . . ."[24] Yet the Court did not so find. The Court instead stated that "it *may* consider the defendant's youth at the time of his offense and conviction when determining whether extraordinary and compelling circumstances exist[,]"[25] but concluded that it need not determine if Helmstetter had demonstrated the existence of extraordinary and compelling circumstances warranting a sentence reduction because such a reduction was not appropriate in light of the § 3553 factors.[26]

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24. R. Doc. No. 1328, at 2.

25. R. Doc. No. 1327, at 11 (emphasis added).

26. *Id.* at 13. The Court notes that the United States, in its opposition to Helmstetter's motion for reconsideration, also misinterprets the Court's ruling on whether age may be considered an extraordinary and compelling circumstance. The United States asserts that the Court "concluded that 'neither [Helmstetter's medical conditions or 'other reasons'] are sufficient to constitute extraordinary and compelling circumstances warranting compassionate release.'" R. Doc. No. 1330, at 3 (quoting R. Doc. No. 1327, at 8). The unmodified quoted language states that "[n] either Helmstetter's age (51) nor his family circumstances qualify as extraordinary or compelling under the policy statement." This language therefore refers to whether Helmstetter sufficiently alleged his *current* age (51) as an extraordinary and compelling circumstance as contemplated by U.S. Sentencing Guidelines Manual § 1B1.13, Policy Statement, cmt. n.1(B) – not whether his age at the time of offense is such a circumstance.

Nothing in Helmstetter's motion for reconsideration warrants a different conclusion. The cases Helmstetter cites certainly support the proposition that a Court may consider a defendant's youth at the time of sentencing as extraordinary and compelling circumstances sufficient to warrant a reduction in sentence. However, they do not alter the fact that the Court is "bound only by § 3582(c)(1)(A)(i) and, as always, the sentencing factors in § 3553(a)." *Shkambi*, 993 F.3d at 393.

"Age and lack of guidance as a youth are factors that may be considered under § 3553(a)." *United States v. Acosta*, 584 F. App'x 276, 277 (5th Cir. 2014) (citing *United States v. Mondragon-Santiago*, 564 F.3d 357, 363 & n. 4 (5th Cir. 2009)). Indeed, the sentencing court "must also consider the policy statements of the Sentencing Commission, [18 U.S.C.] § 3553(a)(5), which expressly allow for consideration of the defendant's age, 'including youth[.]'" *United States v. Sparks*, 941 F.3d 748, 755 (5th Cir. 2019) (citing U.S.S.G. § 5H1.1, p.s.).

However, no one § 3553 factor is dispositive. *See United States v. Dunn*, 728 F.3d 1151, 1159 (9th Cir. 2013) ("No one [§ 3553] factor should be given more or less weight than any other."); *United States v. Choi*, 272 F. App'x 133, 134 (2d Cir. 2008) ("[T]he requirement that a sentencing judge consider an 18 U.S.C. § 3553(a) factor is not synonymous with a requirement that the factor be given determinative or dispositive weight in the particular case." (internal citation omitted)); *United States v. Ferguson*, 156 F. App'x 175, 176 (11th Cir. 2005) (noting that courts are required

to apply the § 3553 factors "with no one factor bearing more weight then another.").

Section 3582(c)(1)(A) directs the Court to consider the sentencing factors, to the extent they are applicable, before exercising its discretion and granting compassionate release. *See*, *e.g.*, *United States v. Chambliss*, 948 F.3d 691, 694 (5th Cir. 2020) (noting discretionary nature of compassionate release). The Court did so. The Court considered Helmstetter's age at the time he committed the offenses for which he was convicted when the Court considered his history and his personal characteristics. 18 U.S.C. § 3553(a)(1). Helmstetter's sentence is appropriate in light of not only his relative youth at the time of offense, but also the need for his sentence to reflect the seriousness of his offenses, promote respect for the law, provide just punishment for his offenses, adequately deter criminal conduct, and to protect the public from further crimes.[27] *See United States v. Clark*, No. 94-1, 2023 WL 2815152, at *3, 8 (E.D. Tex. Apr. 6, 2023) (denying motion for compassionate release as "the sentencing court carefully considered [the defendant's] youth" and his sentence of 50 years was appropriate in light of the severity of the offense).

Helmstetter has failed to demonstrate that reconsideration is necessary to correct manifest errors of law or fact, to present new evidence, to show that reconsideration is necessary to prevent manifest injustice,

27. *See* R. Doc. No. 1327, at 13-14.

or to remedy an intervening change in the controlling law. *Upper Room Bible Church, Inc.*, 2023 WL 2018001, at *2.

III. CONCLUSION

Accordingly,

IT IS ORDERED that Helmstetter's motion for reconsideration is **DENIED**.

New Orleans, Louisiana, May 30, 2023.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED APRIL 6, 2023

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CRIMINAL ACTION

No. 92-469 SECTION I

UNITED STATES OF AMERICA,

v.

MARLO HELMSTETTER.

April 5, 2023, Decided
April 6, 2023, Filed

ORDER & REASONS

Before the Court is *pro se* defendant Marlo Helmstetter's ("Helmstetter") "renewed" motion[1] for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).[2] Helmstetter asks the Court to reconsider its ruling on his previous motion for compassionate release in light of the Supreme Court's decision in *Concepcion v. United States*, 142 S. Ct. 2389, 213 L. Ed. 2d 731 (2022).

1. R. Doc. No. 1304.

2. This Court previously denied a motion for compassionate release filed on August 14, 2020. R. Doc. No. 1255.

The government opposes[3] the motion. For the following reasons, the Court will deny Helmstetter's motion.

I. BACKGROUND

Helmstetter was convicted of five felony counts in 1993: conspiracy to possess cocaine with the intent to distribute (Count 1), murder in aid of racketeering activity (Counts 9 and 10), aggravated assault in aid of racketeering activity (Count 11), and using and carrying a firearm in aid of drug trafficking activity (Count 15).[4] The Court sentenced Helmstetter to three life sentences each for Counts 1, 9, and 10; 240 months' imprisonment for Count 11; and 60 months for Count 15.[5] All sentences were to be served consecutively.[6] The Fifth Circuit affirmed on all counts, *United States v. Tolliver*, 61 F.3d 1189 (5th Cir. 1995), but this Court later vacated his conviction and sentence as to Count 15.[7] Helmstetter is currently incarcerated at United States Penitentiary Lee in Virginia.[8]

In August 2020, Helmstetter filed a motion for compassionate release, citing his health ailments

3. R. Doc. No. 1307.

4. R. Doc. No. 1185, at 1.

5. *Id.*

6. *Id.*

7. *Id.* at 1-2 (citing R. Doc. No. 1178, at 2).

8. *Inmate Locator*, Bureau of Prisons, https://www.bop.gov/inmateloc/ (last visited April 5, 2023).

in light of the COVID-19 pandemic as grounds for relief.[9] Helmstetter also highlighted the length of his incarceration, his youth at the time of his arrest and conviction, his efforts at rehabilitation while in prison, and his support network at home as reasons the Court should consider compassionate release.[10] This Court denied his motion after determining that "Helmstetter's risk of serious illness is too speculative to be compelling."[11] This Court also found that "[n]either Helmstetter's age (49) nor his family circumstances qualify as extraordinary or compelling under the policy statement."[12] Finally, the Court held that even if Helmstetter had presented an extraordinary and compelling circumstance, the factors set forth in 18 U.S.C. § 3553(a) would nonetheless preclude his release.[13]

II. STANDARD OF LAW

The Court "may" grant defendant's motion for compassionate release pursuant to the First Step Act if, "after considering the factors set forth in [18 U.S.C. § 3553(a)] to the extent they are applicable," it finds that "extraordinary and compelling reasons warrant such a

9. R. Doc. No. 1246.

10. *Id.*

11. R. Doc. No. 1255, at 12.

12. *Id.* at 9.

13. *Id.* at 14.

reduction." 18 U.S.C. § 3582(c)(1)(A)(i).[14] According to the statute, the Court must also conclude that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* (ii). However, the Fifth Circuit—along with the Second, Fourth, Sixth, Seventh, and Tenth Circuits[15]—has held that "neither the [Sentencing Commission's] policy statement nor the commentary to it binds a district court addressing a prisoner's own motion under § 3582." *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021). Accordingly, the Court is "bound only by § 3582(c)(1)(A)(i) and, as always, the sentencing factors in § 3553(a)." *Id.* Nonetheless, the Fifth Circuit has also recognized that the policy statement may still "inform[ ] [its] analysis." *United States v. Thompson*, 984 F.3d 431, 433 (5th Cir. 2021).

The most relevant policy statement is found in § 1B1.13 of the U.S. Sentencing Guidelines Manual ("U.S.S.G."). The Application Notes to that policy statement, in turn, provide four categories of extraordinary and compelling reasons: "(1) medical conditions, (2) age, (3) family circumstances, and (4) 'other reasons.'" *Thompson*, 984

14. "[T]he district court may deny [the defendant's] motion without reaching the Section 3553(a) factors if it determines that he has not identified 'extraordinary and compelling reasons' justifying his release." *United States v. Jackson*, 27 F.4th 1088, 1093 n.8 (5th Cir. 2022) (quoting 18 U.S.C. § 3582(c)(1)(A)(i) and *United States v. Thompson*, 984 F.3d 431, 433-35 (5th Cir. 2021)).

15. *See United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020); *McCoy*, 981 F.3d 271; *United States v. Jones*, 980 F.3d 1098 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020); *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021).

F.3d at 433 (quoting U.S.S.G. § 1B1.13, Policy Statement, cmt. n.1(A)-(D)) (alterations omitted). Before passage of the First Step Act, only the Director of the Bureau of Prisons ("BOP")—not defendants themselves—could move for compassionate release. The First Step Act changed that, but the Sentencing Commission's policy statements have lagged behind. Because these policy statements have not been amended since the enactment of the First Step Act, portions of the statements now contradict 18 U.S.C. § 3582(c)(1)(A).[16]

III. ANALYSIS

a. *Concepcion v. United States*

Helmstetter again seeks compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).[17] Helmstetter

16. For example, the policy statement referenced above begins with "[u]pon a motion by the Director of the Bureau of Prisons"—which implies that the entire statement applies only to motions made by the Director of the BOP (and not those filed by defendants). U.S.S.G. § 1B1.13, Policy Statement; *see also id.* cmt. n.4 ("A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons[.]"); *see also United States v. Perdigao*, No. 07-103, 2020 U.S. Dist. LEXIS 57971, 2020 WL 1672322, at *2 (E.D. La. Apr. 2, 2020) (Fallon, J.) (noting the discrepancy).

17. R. Doc. No. 1304. It is not clear to the Court that Helmstetter exhausted his administrative remedies before filing his renewed motion. However, the government has not invoked failure to exhaust. *See United States v. Franco*, 973 F.3d 465, 468 (5th Cir. 2020), *cert. denied*, 208 L. Ed. 2d 466, 141 S. Ct. 920 (2020)

filed the instant motion on December 12, 2022, and filed supplemental memoranda on December 29, 2022, January 20, 2023, and January 30, 2023.[18] Helmstetter's renewed motion requests the Court reconsider his previous motion in light of the Supreme Court's recent decision in *Concepcion v. United States*.[19] In *Concepcion*, the Supreme Court held that the First Step Act "allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence." *Id.* at 2404. A federal judge, in determining and imposing a sentence, "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Id.* at 2399 (quoting *United States v. Tucker*, 404 U.S. 443, 446, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972)). Helmstetter asserts that *Concepcion* allows this Court to consider "intervening changes of law or fact in exercising [its] discretion to reduce a sentence."[20]

(holding that failure to exhaust is not jurisdictional, but is rather a mandatory claim-processing rule that must be enforced if invoked by the government). And, pursuant to Fifth Circuit precedent, it is an abuse of discretion for the Court to raise the issue *sua sponte*. *See United States v. McLean*, No. 21-40015, 2022 U.S. App. LEXIS 234, 2022 WL 44618, at *1 (5th Cir. Jan. 5, 2022) ("Because the Government did not raise exhaustion, the district court abused its discretion in denying McLean's request for compassionate release based on his purported failure to comply with § 3582(c)(1)(A)'s exhaustion requirement.).

18. R. Doc. Nos. 1306, 1308, 1309.

19. R. Doc. No. 1304, at 1.

20. *Id.*

Helmstetter specifically cites *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), as intervening changes in law that justify a reduction in his sentence. In *Booker*, the Supreme Court held that the Sentencing Reform Act of 1984, as amended, "makes the Guidelines effectively advisory." 543 U.S. at 245. In *Alleyne*, the Supreme Court held that an aggravating factor used to increase a statutory maximum sentence must be submitted to the jury and proved beyond a reasonable doubt. 570 U.S. at 103. In his first supplement memorandum, Helmstetter further contends that changes in the application of the Guidelines have resulted in a "gross disparity" between his sentence and those of similarly situated defendants.[21] Accordingly, Helmstetter asks this Court to consider the inequity brought about by these changes to the law "in conjunction with the 'other contentions,' documents, and evidence that was submitted in his previous compassionate release motion."[22]

In response, the government asserts that Helmstetter "does not identify or allege any new or changed facts in pursuit of his early release from prison."[23] Specifically, the government argues that his claims are doomed by

21. R. Doc. No. 1306, at 1. Helmstetter cites *United States v. Rollins*, 540 F. Supp. 3d 804, 812-13 (N.D. Ill. 2021), wherein the court noted that the average federal sentence for murder in fiscal year 2002 was 232.7 months, roughly 19 years.

22. R. Doc. No. 1304, at 3.

23. R. Doc. No. 1307, at 5.

his failure to explain which changes to the Guidelines would have reduced his Guideline range.[24] Instead, the government argues, he "only represents generally that the guidelines have changed; he does not identify which offense level applications or criminal history calculations would result in what amounts to a three-offense level reduction."[25] Finally, the government asserts that Helmstetter mischaracterizes and misapplies *Concepcion*.[26]

As the government argues, *Concepcion* does not aid Helmstetter. The Supreme Court held in *Concepcion* that the only limitations on the "longstanding tradition" of discretion afforded to sentencing courts "to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution." 142 S. Ct. at 2396, 2400. The procedural requirements of 28 U.S.C. § 2255 and 18 U.S.C. § 3582(c)(1)(A) are such congressional constraints.

As this Court and others have held, *Concepcion* is not relevant to the threshold requirements parties seeking compassionate release must first satisfy: a finding by the Court that the § 3553 factors do not warrant the defendant's continued incarceration and the existence of "extraordinary and compelling" circumstances which justify compassionate release. *See United States v.*

24. *Id.* at 6.

25. *Id.*

26. *Id.*

Elwood, No. 92-469, 2022 U.S. Dist. LEXIS 194676, 2022 WL 14810101 (E.D. La. Oct. 26, 2022) (Africk, J.). Without *Concepcion*, Helmstetter's renewed motion largely recycles his first one. Nonetheless, the Court will consider Helmstetter's renewed and new arguments to determine (1) if extraordinary and compelling circumstances justifying his release or a reduction in sentences exist, and (2) whether compassionate release is warranted after application of the 18 U.S.C. § 3553(a) factors.

b. Extraordinary and Compelling Circumstances

A defendant must present extraordinary and compelling reasons justifying his compassionate release. 18 U.S.C. § 3582(c)(1)(A)(i). As stated, the Sentencing Commission's policy statement "informs" the Court's analysis of whether Helmstetter has presented such reasons. *Thompson*, 984 F.3d at 433 (citing U.S.S.G. § 1B1.13, Policy Statement, cmt. n.1); *Perdigao*, 2020 U.S. Dist. LEXIS 57971, 2020 WL 1672322, at *2. Neither Helmstetter's age (51)[27] nor his family circumstances[28]

27. R. Doc. No. 1304, at 4. The Commission's policy statement requires a minimum age of 65 years, in addition to other criteria, for age to constitute an extraordinary and compelling reason. *See* U.S.S.G. § 1B1.13 cmt. 1(B).

28. As to family circumstances, the policy statement requires either (1) the "death or incapacitation of the caregiver of the defendant's minor child or minor children" or (2) the "incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner." U.S.S.G. § 1B1.13 cmt. 1(C). Helmstetter has shown neither of these circumstances.

qualify as extraordinary or compelling under the policy statement. Therefore, the Court reviews Helmstetter's medical conditions and "other reasons." *See* U.S.S.G. § 1B1.13 cmt. n.1(A)-(D). The Court concludes that neither are sufficient to constitute extraordinary and compelling circumstances warranting compassionate release

i. Medical Conditions

The Sentencing Commission's relevant policy statement specifies that, to be sufficiently serious as to warrant release, a medical condition must be a "terminal illness," or a condition that "substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." U.S.S.G. § 1B1.13 cmt. n.1(A). Helmstetter states in his motion that he suffers from high blood pressure and hypertension.[29] Helmstetter offers no evidence that these conditions substantially diminish his ability to provide self-care in the facility where he is incarcerated, or that his conditions are ones from which he is not expected to recover. U.S.S.G. § 1B1.13 cmt. n.1(A).

Courts in the Fifth Circuit have held that the medical conditions Helmstetter alleges do not qualify as "extraordinary and compelling." *See, e.g.*, *United States v. Murray*, No. 19-041, 2020 U.S. Dist. LEXIS 124716, 2020 WL 4000858, at *5 (E.D. La. July 15, 2020) (Fallon, J.) (holding that conditions such as high blood

29. R. Doc. No. 1308, at 2.

pressure and arthritis do not constitute "extraordinary and compelling" reasons justifying release as the "conditions are not life-threatening, nor do they appear to substantially diminish [defendant's] ability to provide self-care while incarcerated"); *Thompson*, 984 F.3d at 434 (affirming denial of compassionate release for inmate with hypertension and high cholesterol, noting that "both [conditions] are commonplace" and not "extraordinary"). There is also no reason to conclude that the BOP cannot address Helmstetter's medical needs.

ii. "Other" Reasons

Helmstetter first asserts that his age at the time of conviction (18) constitutes "extraordinary and compelling" circumstances warranting a sentence reduction. Although the Sentencing Commission's policy statement contemplates old age—rather than youth—as a factor with respect to a sentence reduction, Helmstetter argues that "it would be unfair to argue Helmstetter is a 'danger to the community' 'today,' [sic] for the actions of a juvenile with an undeveloped[d] brain to function to make reasonable decisions 30 years ago, to say he's the same 'today.'"[30]

Helmstetter's memoranda reference a series of United States Supreme Court cases[31] that have issued following Helmstetter's sentencing hearing and support

30. R. Doc. No. 1304, at 4.

31. *See, e.g., Miller v. Alabama*, 567 U.S. 460, 466, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

the notion that a defendant's youth or immaturity at the time of his offense is a relevant factor at sentencing. *See, e.g., Miller*, 567 U.S. at 477 ("To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."). Helmstetter also references multiple United States Court of Appeals and United States District Court cases that granted compassionate release based in part on the defendant's youth at the time of his offense.[32]

Recent decisions from this circuit and from others support Helmstetter's argument that his youth at the time of his offense and conviction constitute extraordinary and compelling circumstances. In *United States v. Lee*, No. 04-11, 2021 U.S. Dist. LEXIS 137470, 2021 WL 3129243, at *4 (E.D. La. July 23, 2021) (Fallon, J.), another section of this Court granted a reduction in sentence to a defendant who participated in a series of carjackings when he was 23 years old. The Court did so partially on the basis of the defendant's youth at the time of the offenses, stating that "[a]ge at the time of conviction is 'a factor that many courts have found relevant under § 3582(c)(1)(A)(i).'" *Id.* (quoting *McCoy*, 981 F.3d at 286, and collecting cases). The Court ultimately found that "the incredible length of [the defendant's] stacked mandatory sentences under § 924(c), *his young age at the time of the offenses of conviction*, and

32. *See, e.g., United States v. Kerby*, No. 02-336, 2022 U.S. Dist. LEXIS 204371, 2022 WL 16837039 (D. Neb. Nov. 9, 2022); *United States v. Cruz*, No. 94-112, 2021 U.S. Dist. LEXIS 68857, 2021 WL 1326851 (D. Conn. Apr. 9, 2021); *United States v. McCoy*, 981 F.3d 271, 276 (4th Cir. 2020).

the fact that he would likely not receive the same sentence if the crime occurred today constitutes extraordinary and compelling grounds to reduce his sentence as to . . . his three § 924(c) convictions." 2021 U.S. Dist. LEXIS 137470, [WL] at *5 (emphasis added). *See also United States v. Sterling*, No. 05-20061, 2021 U.S. Dist. LEXIS 10910, 2021 WL 197008, at *6 (W.D. La. Jan. 19, 2021) ("[T]he undersigned finds [the defendant's] youth at the time of the offenses is a factor to be considered in determining whether [he] has shown 'extraordinary and compelling' reasons justifying a sentence reduction pursuant to § 3582(c)(1)(A)." (citing *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993); *Roper v. Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

In *United States v. Ramsay*, 538 F. Supp. 3d 407 (S.D.N.Y. 2021), Judge Jed Rakoff of the United States District Court for the Southern District of New York granted a former gang member, who was convicted of murder in aid of racketeering, a reduction in sentence from life to 360 months on the basis of his youth (18) at the time of the offense, his troubled upbringing, and his rehabilitation. Judge Rakoff's opinion discusses at length the reasons, scientific and moral, why youthful offenders should receive less severe punishments than adult offenders. The Court concludes that it may consider the defendant's youth at the time of his offense and conviction when determining whether extraordinary and compelling circumstances exist.

Helmstetter next asserts that his rehabilitation while incarcerated has prepared him for life outside of prison. Helmstetter acknowledges that "his conduct of conviction was an [sic] indeed violent, harsh, and unwarranted, and he makes no excuse . . . ."[33] Helmstetter states that he has support from his family that will "assure the needs [sic] to keep him from criminal activity" and will provide him a job upon release.[34] He further asserts that the "50 plus programs" he has completed since being incarcerated "assure that he will not be a threat to society or his community" because of the skills he has acquired.[35] Helmstetter also indicates that he has enrolled in the Challenge Program, in which he "mentor[s] the youth that was once like him to change for the better."[36] In short, Helmstetter's arguments center on his claim that he is a changed man and he believes he deserves the opportunity to prove it.

Helmstetter's criminal record pre-incarceration includes two juvenile adjudications for possession of marijuana and one for possession of heroin.[37] Helmstetter's documented disciplinary infractions while incarcerated

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33. R. Doc. No. 1304, at 3.

34. *Id.* at 5-6.

35. *Id.* at 4 (these programs include computer programming, commercial driving, resume and job application skills, checking and savings. Helmstetter also states that he is certified in "victim impact awareness" and "all STOP The Violence programs[.]")

36. *Id.* at 4-5.

37. R. Doc. No. 672, at 16.

include two instances of "fighting," six instances of assault (five without serious injury; one with serious injury), and three instances of possessing a dangerous weapon—including (in one instance) a nine-inch "metal rod [with a] lanyard hidden in a locker."[38] However, the Court notes that the most recent of these infractions occurred more than nine years ago and his current inmate risk level is "low."[39]

The Court commends Helmstetter's personal growth and acknowledgement of past mistakes. Helmstetter notes, and the Court agrees, that rehabilitation alone does not constitute an extraordinary and compelling reason for compassionate release under the First Step Act. *Shkambi*, 993 F.3d at 391 (quoting 28 U.S.C. § 994(t)); *see also United States v. Hudson*, No. 10-329, 2021 U.S. Dist. LEXIS 128962, 2021 WL 2912012, at *4 (E.D. La. July 12, 2021) (Africk, J.) ("Hudson's rehabilitation, though certainly commendable, is not extraordinary or compelling."). Notwithstanding, the Court in this case need not weigh all of the multiple factors which support and fail to support Helmstetter's position as Helmstetter's arguments regarding the § 3553 analysis fails.

c. Section 3553(a) Factors

As noted, the Court is "bound only by § 3582(c)(1)(A)(i) and, as always, the sentencing factors in § 3553(a)." *Shkambi*, 993 F.3d at 393. Thus, pursuant to § 3582, the

38. R. Doc. No. 1248-2, at 1-6.

39. R. Doc. No. 1304-1, at 1.

Court may grant a reduction in sentence based on the existence of extraordinary and compelling circumstances only "after considering the factors set forth in section 3553(a) to the extent that they are applicable[.]" 18 U.S.C. § 3582(c)(1)(A). After considering the applicable § 3553 sentencing factors, the Court finds that a reduction in sentence is not warranted.

The most applicable § 3553 factors are (1) "the nature and circumstances of the offense and the history and characteristics of the defendant," (2) the need for the sentence imposed "to reflect the seriousness of the offense, [or] to promote respect for the law," (3) the need "to afford adequate deterrence to criminal conduct," and (4) the need to "protect the public from further crimes of the defendant." 18 U.S.C. §§ 3553(a)(1), (a)(2)(A)-(C). As the Court has previously noted,[40] Helmstetter is currently serving three life sentences, to be followed by an additional 240 months, for "committing murder and other violent crimes in aid of racketeering activity." *Tolliver*, 61 F.3d at 1196. The underlying drug conspiracy distributed "approximately 1000 kilograms of cocaine" (or nearly two-and-a-quarter tons) in and around New Orleans. *Id.* His sentence therefore serves the purpose of protecting the public from future crimes—including violent crimes—that he may commit if released. 18 U.S.C. § 3553(a)(1), (2)(C). Defendant's sentence also reflects the seriousness of the offenses—involvement in several murders and an extensive drug conspiracy. *See* 18 U.S.C. § 3553(a)(2)(A). Helmstetter's sentence may also be justified as a means of

40. R. Doc. No. 1255, at 15-16 (citing R. Doc. No. 1185, at 1).

promoting respect for the law and to deter future similar conduct. *See* 18 U.S.C. § 3553(a)(2)(B)-(C). In summary, the § 3553(a) factors weigh against granting Helmstetter's motion for compassionate release.

III. CONCLUSION

For the foregoing reasons,

IT IS ORDERED that Helmstetter's renewed motion for compassionate release is **DENIED**.

New Orleans, Louisiana, April 5, 2023.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

APPENDIX D — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, FILED JANUARY 29, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

v.

MARLO HELMSTETTER.

CRIMINAL ACTION NO. 92-469
SECTION I

January 29, 2021

ORDER & REASONS

Before the Court is *pro se* defendant Marlo Helmstetter's ("Helmstetter") motion[1] for compassionate release under 18 U.S.C. § 3582(c)(1)(A). In his motion, Helmstetter also asks the Court to "consider my *Montgomery* juvenile claim while it's deciding my review for COVID-19."[2] The government opposes the motion for compassionate release and states, with respect to the

1. R. Doc. No. 1246; *see also* R. Doc. No. 1254 (supplemental "motion" by Helmstetter in support of his first motion for compassionate release). That second motion reasserts the same arguments made in the first motion, so the Court considers both as one.

2. R. Doc. No. 1246, at 4.

Montgomery claim, that "this is an improper procedural vehicle to introduce such an argument."[3] For the following reasons, the motion for compassionate release is denied; the *Montgomery* claim is dismissed without prejudice.

I.

Helmstetter was convicted of five felony counts in 1993: conspiracy to possess cocaine with the intent to distribute (Count 1), murder in aid of racketeering activity (Counts 9 and 10), aggravated assault in aid of racketeering activity (Count 11), and using and carrying a firearm in aid of drug trafficking activity (Count 15).[4] The Court sentenced Helmstetter to three life sentences each for Counts 1, 9, and 10; 240 months' imprisonment for Count 11; and 60 months for Count 15.[5] All sentences were to be served consecutively.[6] The Fifth Circuit affirmed on all counts, *United States v. Tolliver*, 61 F.3d 1189 (5th Cir. 1995), but this Court later vacated his conviction and sentence on Count 15.[7] Helmstetter is currently incarcerated at FCI Yazoo City Medium ("Yazoo City").[8]

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3. R. Doc. No. 1248, at 3 n.3.

4. R. Doc. No. 1185, at 1. Helmstetter's roles in the conspiracy included "firearms procurer and storer" and "gunman and enforcer." *Tolliver*, 61 F.3d at 1196.

5. R. Doc. No. 1185, at 1.

6. *Id.*

7. *Id.* at 1-2 (citing R. Doc. No. 1178, at 2).

8. *Inmate Locator*, BOP, https://www.bop.gov/inmateloc/ (last

Appendix D

II.

Helmstetter requests compassionate release under 18 U.S.C. § 3582(c)(1)(A).[9] He provides copies of two requests for compassionate release, both addressed to his warden: (1) a copy of a typed message sent on July 4, 2020,[10] and (2) a copy of a handwritten note on a Bureau of Prisons ("BOP") form dated July 8, 2020.[11] Helmstetter also provides a copy of a message he sent, dated July 4, 2020, to the prison's Health Services, "requesting a copy of my Medical Records."[12]

Helmstetter, who is 49 years old[13] and has "been incarcerated since [he] was a juvenile,"[14] argues that his

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visited January 28, 2021).

9. R. Doc. No. 1246.

10. R. Doc. No. 1246-3, at 2 ("I'm requesting to be reviewed for compassionate release under Covid-19 motion. I have been in prison 30 years. I'm 48 years old and I am on Chroine Care [sic] for High Blood Pressure[.] Would you please consider this letter.").

11. *Id.* at 1 (stating "I haven't had a write up in over 6 years, I've completed many programs. I'm 48 years old and I am on Chronic Care for, High Blood Pressure. Would you please consider this Request. PS I sent a cop-out to you via email requesting Covid-19 Compassionate Release on July 4, 2020.").

12. *Id.* at 3.

13. *See* R. Doc. No. 1246, at 4 (stating "I will be 49 years old in October").

14. *Id.* at 1.

age and hypertension expose him to a risk of "serious illness."[15] Helmstetter argues that "despite management with medications and other therapeutic intervention,"[16] if he were to contract COVID-19, his chronic condition "will still progress and may result in serious complications."[17]

Helmstetter also argues that he is at greater risk of COVID-19 because of the conditions at Yazoo City.[18] Helmstetter states that "inmates are not being tested" and that members of the prison staff "fill in for each other throughout the complex, going from one prison to the other not knowing what inmates or staff members may be asymptomatic."[19] He argues that the "prison environment can facilitate [COVID-19's] spread" and explains that "[e]ven if inmates are housed in individual cells, we typically share the same ventilation system."[20] "The unprecedented an[d] extraordinarily dangerous nature of the COVID-19 pandemic,"[21] Helmstetter concludes, constitutes extraordinary and compelling reasons warranting relief.

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15. *Id.* at 2. *See* R. Doc. No. 1248-4 (Helmstetter's BOP medical records, confirming that he suffers from hypertension).

16. *See* R. Doc. No. 1246, at 3 (listing Helmstetter's medications).

17. *Id.*

18. *Id.* at 2-4.

19. *Id.* at 2.

20. *Id.* at 3.

21. *Id.*

Helmstetter also claims that if he were granted compassionate release, he "would not be a burden on the state" because "a good family & friend support system" and "meaningful job" await him.[22] He appends copies of numerous certificates he has been awarded for completing various programs in prison.[23] He also attaches five letters from friends,[24] family, and acquaintances attesting generally to his "growth spiritually and emotionally" through the years and the community he has outside prison.[25] His nearly 20-year-old "treatment plan," also attached, lists his "treatment activity" as "weekly anger management classes"[26]—though it is unclear whether he is still participating in this treatment plan.

The government opposes Helmstetter's motion on the merits,[27] arguing that it should be denied because he has failed to establish that he suffers from a medical condition that presents an "extraordinary and compelling" reason

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22. R. Doc. No. 1248, at 4.

23. R. Doc. No. 1246-2, at 1-11, 13-30.

24. R. Doc. No. 1246-1, at 6 (stating "I've known Marlo Helmstetter since he was 15 years old since 1985. . . . He is a very nice, kind young man who just got caught up with the wrong crowd at a very young tender age of 15.").

25. R. Doc. No. 1246-1, at 1.

26. R. Doc. No. 1246-2, at 12.

27. The government concedes the facts necessary to find that Helmstetter has exhausted his administrative remedies. *See* R. Doc. No. 1248, at 2.

warranting his release.[28] Citing the Centers for Disease Control and Prevention ("CDC"), the government explains that hypertension "might" increase Helmstetter's risk of severe illness but is not "a condition that definitely subjects him to a greater risk of severe illness, should he contract COVID-19."[29] Even if it did, the government concludes compassionate release is still improper because Helmstetter's "prior conduct—both before and during his current period of incarceration—establishes he would be a danger to the safety of the community if the Court were to grant his release."[30]

III.

At the outset, the Court must clarify what it is and is not addressing here. Helmstetter asks the Court to "consider my *Montgomery* juvenile claim while it's deciding my review for COVID-19."[31] He continues, "in

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28. *Id.* at 3, 11 (arguing that "Helmstetter fails to satisfy his burden to establish 'extraordinary and compelling reasons' to warrant a reduction, to prove that he suffers from one or more medical condition(s) which constitute a CDC risk factor or presents a likelihood of a severe outcome from COVID-19").

29. *Id.* at 14-15.

30. *Id.* at 1.

31. R. Doc. No. 1246, at 4 (emphasis in original). *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), held that *Miller v. Alabama*, 567 U.S. 460, 470 (2012)—which prohibited sentences of mandatory life without parole for juvenile offenders—was a substantive rule of constitutional law that applied retroactively. *Montgomery*, 136 S. Ct. at 736 (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989)).

my last appeal with a private attorney, counsel asked the Court to review my sentence under *Montgomery v. Louisiana* because the charges I was convicted of happened when I was still a juvenile (14 years old)."[32] The government responds in a footnote, arguing in full:

> Helmstetter references other, immaterial grounds in the instant motion, specifically a request to review and/or vacate a portion of his sentence in accordance with *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), as revised (Jan. 27, 2016). *See* Doc. No. 1236 at 4, 5. The docket of this matter reflects that Helmstetter has made no such claim. Moreover, this is an improper procedural vehicle to introduce such an argument.[33]

Since neither Helmstetter nor the government briefed the *Montgomery* issue in detail, the Court is not equipped to address this argument as part of the instant motion.

Accordingly, the Supreme Court instructed that such "prisoners . . . must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736-37 (adding that "[t]he opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change").

32. *Id.* at 5; *see also* R. Doc. No. 1253, at 7-9 (explaining that his *Montgomery* argument is a factor the Court should consider when determining whether compassionate release is appropriate).

33. R. Doc. No. 1248, at 3 n.3.

To the extent Helmstetter seeks relief under § 2255 and *Montgomery*, he should file the appropriate motion. As ordered below, any claim that Helmstetter asserts under *Montgomery* here is dismissed without prejudice to his right to re-urge it through the appropriate means.

IV.

As for compassionate release: the general rule is that "[t]he court may not modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c). That general rule has some exceptions, which, under the First Step Act, may now be presented to the court upon a defendant's motion.[34] For such a motion to be properly before the court, the defendant must either exhaust all administrative remedies, or thirty days must elapse "from the receipt of [a compassionate release request] by the warden of the defendant's facility, whichever is earlier." *Id.* § 3582(c)(1)(A).

The court "may" grant such a motion if, "after considering the factors set forth in [18 U.S.C. § 3553(a)] to the extent they are applicable," it finds that "extraordinary and compelling reasons warrant such a reduction." *Id.* The court must also conclude, however, that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.*

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34. The First Step Act provided defendants a mechanism to unilaterally move for a sentence reduction; previously, the "Director of the Bureau of Prisons" needed to file the motion. *See* First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5193, 5239.

Appendix D

The most relevant policy statement is found in § 1B1.13 of the U.S. Sentencing Guidelines Manual. The Application Notes to that policy statement, in turn, provide four categories of extraordinary and compelling reasons: "(1) medical conditions, (2) age, (3) family circumstances, and (4) 'other reasons.'" *United States v. Thompson*, 984 F.3d 431, 433 (5th Cir. 2021) (quoting U.S.S.G. § 1B1.13, Policy Statement, cmt. n.1(A)-(D)) (alterations omitted).

As noted above, the First Step Act provided a new avenue to request compassionate release. Previously, only the Director of the BOP—not defendants on their own—could move for compassionate release. The First Step Act changed that. However, the Sentencing Commission's policy statements have lagged behind. Because these policy statements have not been amended since the enactment of the First Step Act, portions of them now appear to squarely contradict 18 U.S.C. § 3582(c)(1)(A). For example, the policy statement referenced above begins with, "[u]pon a motion by the Director of the Bureau of Prisons"—which implies that the entire statement applies only to such motions (and not those filed by defendants). U.S.S.G. § 1B1.13, Policy Statement; *see also id.* cmt. n.4 ("A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons. . . . "); *see also United States v. Perdigao*, No. 07-103, 2020 WL 1672322, at *2 (E.D. La. Apr. 2, 2020) (Fallon, J.) (noting the discrepancy). This raises a significant question: whether courts, instead of the BOP exclusively, have discretion to determine which reasons are sufficiently extraordinary and compelling to fall under

the policy statement's catch-all, 'other reasons' category. *See United States v. Ruffin*, 978 F.3d 1000, 1006-08 (6th Cir. 2020) (collecting cases and describing the debate). Courts are split on the matter. *See id.*

For its part, the Fifth Circuit has recognized that the policy statement, notwithstanding this discrepancy, should still at least "inform[ ] [its] analysis." *Thompson*, 984 F.3d at 433. And as to whether courts (rather than exclusively the BOP) have discretion to find 'other reasons' that are extraordinary and compelling—even if those reasons are not expressly addressed by the policy statement's guidance on (1) medical conditions, (2) age, and (3) family circumstances—the Fifth Circuit has "opt[ed] not to weigh in." *Id.* at 433 n.4.

This Court need not weigh in either. That is because it finds, as discussed below, that (1) Helmstetter's medical condition does not qualify under the policy statement as extraordinary and compelling, (2) there are no 'other reasons' that could be extraordinary and compelling, and (3) even if there were extraordinary and compelling reasons, Helmstetter has not carried his burden to show that the applicable § 3553(a) factors justify his release.

A. Exhaustion of Administrative Remedies

Section 3582, as mentioned above, allows a court to consider a defendant's compassionate-release motion only after the defendant exhausts administrative remedies, or 30 days elapse after the defendant submits a compassionate-release request to the warden. 18 U.S.C. § 3582(c)(1)(A); *see United States v. Franco*, 973 F.3d 465,

467 (5th Cir. 2020) (holding that the statutory requirement is "*not* jurisdictional but . . . *is* mandatory") (emphasis in original). As stated previously, the government concedes that Helmstetter satisfied this requirement.[35] Accordingly, the Court may consider Helmstetter's motion. *See* 18 U.S.C. § 3582(c)(1)(A).

B. Extraordinary and Compelling Reasons

The Sentencing Commission's policy statement "informs" this Court's analysis of whether Helmstetter has presented extraordinary and compelling reasons that justify his release. *Thompson*, 984 F.3d at 433 (citing U.S.S.G. § 1B1.13, Policy Statement, cmt. n.1); *Perdigao*, 2020 WL 1672322 at *2. Again, the policy statement provides four categories of extraordinary and compelling reasons: "(1) medical conditions, (2) age, (3) family circumstances, and (4) 'other reasons.'" *Thompson*, 984 F.3d at 433 (quoting U.S.S.G. § 1B1.13, Policy Statement, cmt. n.1(A)-(D)) (alterations omitted).

Neither Helmstetter's age (49)[36] nor his family circumstances[37] qualify as extraordinary or compelling

35. R. Doc. No. 1248, at 2 (stating that "[o]n about July 8, 2020, Helmstetter filed an administrative request with FCI Yazoo City Medium personnel (which appears to have been forwarded to the facility's warden)").

36. R. Doc. No. 1246, at 2. The Commission's policy statement requires a minimum age of 65 years, in addition to other criteria, for age to constitute an extraordinary and compelling reason. *See* U.S.S.G. § 1B1.13 cmt. 1(B).

37. As to family circumstances, the policy statement requires either (1) death or incapacitation of the caregiver of the defendant's

under the policy statement. Therefore, the only remaining possible grounds are his medical conditions or "other reasons" that the Court may find extraordinary and compelling. *See id.* The Court concludes that neither are sufficient.

1. Medical Conditions

A medical condition qualifies as extraordinary and compelling under the Commission's policy statement if it is either a (1) "terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory)," or (2) "serious physical or medical condition" that "substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." *Id.* (quoting U.S.S.G. § 1B1.13, Policy Statement, cmt. n.1(A)(i)-(ii)).

Helmstetter has hypertension that, by all accounts, is being effectively managed by the treatment he receives from the BOP.[38] That shows that Helmstetter is able to "provide self-care" for his hypertension from within prison—all that is required by the policy statement. U.S.S.G. § 1B1.13, Policy Statement, cmt. n.1(A)(ii); *see also Thompson*, 984 F.3d at 433 (finding sufficient that

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minor child(ren), or (2) the "incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner." U.S.S.G. § 1B1.13 cmt. 1(C). Helmstetter has shown neither.

38. R. Doc. No. 1246, at 2-3 (stating that "I am a Chronic Care inmate on high blood pressure medication" and listing medications); *see* R. Doc. No. 1248-4, at 12 (BOP medical records listing Helmstetter's active prescriptions).

the hypertension was being "managed effectively by medication"); *United States v. Mazur*, No. 18-68, 2020 WL 2113613, at *3 (E.D. La. May 4, 2020) (Africk, J.) ("Courts have also taken into account the quality of healthcare provided to the defendant while incarcerated[.]"). Nor does Helmstetter argue that his hypertension is terminal. Therefore, viewing that condition in isolation, it is neither extraordinary nor compelling.

Nor would Helmstetter's hypertension, even if considered alongside his age (49)[39] and risk of contracting COVID-19, be extraordinary or compelling.[40] The Fifth Circuit recently affirmed the denial of compassionate release for a 43-year-old inmate with hypertension, high cholesterol, and who had suffered a stroke ten years prior. *Thompson*, 984 F.3d at 432-33. The court noted that "nearly half " of American adults have hypertension, rendering the inmate's condition far from "extraordinary." *Id.* at 434. Helmstetter, though six years older than that inmate, neither suffers from high cholesterol, nor has he had a stroke.

The Court therefore cannot conclude that Helmstetter's situation is compelling—it is at least less compelling than

39. R. Doc. No. 1246, at 4 ("I will be 49 years old in October[.]").

40. *See COVID-19: Older Adults*, Centers for Disease Control and Prevention (updated Dec. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html ("[P]eople in their 50s are at higher risk for severe illness than people in their 40s. Similarly, people in their 60s or 70s are, in general, at higher risk for severe illness than people in their 50s. The greatest risk for severe illness from COVID-19 is among those aged 85 or older.").

Thompson's, which was still insufficient. For example, the CDC has recently advised that those with hypertension "*might* be at an increased risk for severe illness" from COVID-19.[41] That is to be distinguished from a separate category of comorbidities (*e.g.*, cancer, COPD, sickle cell disease), the sufferers of which the CDC definitively states "*are* at increased risk of severe illness" from COVID-19.[42] All told, Helmstetter's risk of serious illness is too speculative to be compelling. *See Thompson*, 984 F.3d at 434-35. Other courts have concluded the same based on analogous facts.[43]

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41. *COVID-19: People with Certain Medical Conditions*, Centers for Disease Control and Prevention (updated Dec. 29, 2020), https://www.cdc.gov/coronavirus/2019ncov/need-extra-precautions/people-with-medical-conditions.html (emphasis added).

42. *Id.* (emphasis added). The Court obviously declines to opine, however, whether such conditions, viewed in combination with the risk of COVID-19 complications, would categorically be either extraordinary or compelling. It notices this distinction only to observe that Helmstetter's condition is not compelling.

43. *United States v. Adams*, No. 16-86, 2020 WL 3026458, at *1 (D. Conn. June 4, 2020) (denying compassionate release for a 59-year-old with hypertension); *United States v. Takewell*, No. 14-36, 2020 WL 4043060, at *5 (W.D. La. July 17, 2020) (denying compassionate release for a defendant suffering from hypertension and obesity); *United States v. Alexander*, No. 14-126, 2020 WL 2468773, at *5 (M.D. La. May 13, 2020) (denying compassionate release because, among other reasons, hypertension was not by itself sufficiently extraordinary); *United States v. Roberts*, No. 15-135, 2020 WL 2130999, at *3 (W.D. La. May 5, 2020) (stating that the defendant's "proffered reason of hypertension fails to meet the standard for compassionate release").

2. Other Possible Reasons

Nor do Helmstetter's concerns regarding COVID-19 warrant compassionate release. The BOP is undertaking measures to curb the spread of COVID-19 and to limit inmates' risk of contracting it.[44] Helmstetter has alleged only a general concern that being incarcerated increases his risk of COVID-19 infection and that this "may result in serious complications" because of his hypertension and age.[45] Numerous courts—including the Fifth Circuit—have concluded that such broad allegations do not warrant a sentence reduction under § 3582. *See*, *e.g.*, *Thompson*, 984 F.3d at 435 ("Fear of COVID doesn't automatically entitle a prisoner to release.").[46] Moreover, the existence

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44. *See* R. Doc. No. 1248, at 3-8 (describing the safety measures and precautions taken by the BOP to address the risks of COVID-19).

45. *See* R. Doc. No. 1246, at 2-3.

46. *See also United States v. Clark*, No. 17-85, 2020 WL 1557397, at *4 (M.D. La. Apr. 1, 2020) ("Defendant cites no authority for the proposition that the *fear* of contracting a communicable disease warrants a sentence modification.") (emphasis in original); *United States v. Zywotko*, No. 19-113, 2020 WL 1492900, at *2 (M.D. Fla. Mar. 27, 2020) ("General concerns about possible exposure to COVID-19 do not meet the criteria for extraordinary and compelling reasons for a reduction in sentence set forth in the Sentencing Commission's policy statement on compassionate release, U.S.S.G. § 1B1.13.") (quoting *United States v. Eberhart*, No. 13-00313, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020)); *United States v. Gileno*, No. 19-161, 2020 WL 1307108, at *4 (D. Conn. Mar. 19, 2020) ("With regard to the COVID-19 pandemic, Mr. Gileno has also not shown that the plan proposed by the Bureau of Prisons is inadequate to manage the pandemic within

of COVID-19 at Yazoo City alone[47] cannot independently justify compassionate release. *See United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020).

C. Years in Prison

Helmstetter also contends that he should be considered for release because, according to him, he has served 30 years in prison, and "the law surrounding compassionate release allows an inmate to request compassionate release after an inmate has served over 30 years, even without medical conditions."[48] Helmstetter is mistaken.

The relevant statutory provision provides that a court may grant a sentence reduction—irrespective of whether extraordinary and compelling reasons exist—where:

> the defendant *is at least 70 years of age*, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, *and* a determination

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Mr. Gileno's correctional facility, or that the facility is specifically unable to adequately treat Mr. Gileno.").

47. As of January 28, 2021, five inmates and six staff members are currently testing positive for COVID-19 at Yazoo City. 145 inmates, and ten staff members, have recovered from prior infections. No inmates or staff there have died from COVID-19. *See COVID-19 Cases*, BOP, https://www.bop.gov/coronavirus/ (last visited Jan. 28, 2021).

48. R. Doc. No. 1246, at 5.

> has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g).

18 U.S.C. § 3582(c)(1)(A)(ii) (emphasis added). Even if Helmstetter has served 30 years in prison (and the government contests that assertion),[49] he is not "at least 70 years of age," as required by the statute. *Id.* Since Helmstetter is 49,[50] he does not qualify for release under 18 U.S.C. § 3582(c)(1)(A)(ii).

D. Section 3553(a) Factors

Even if the Court were to find that Helmstetter's circumstances presented extraordinary and compelling reasons to grant compassionate release, "after considering the factors set forth in [18 U.S.C. § 3553(a)] to the extent they are applicable," it could not conclude that compassionate release is warranted. *See* 18 U.S.C. § 3582(c)(1)(A). The most applicable factors are: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant," and (2) the "need for the sentence imposed- (A) to reflect the seriousness of the offense, [or] to promote respect for the law . . . to afford adequate deterrence to criminal conduct; [and] (C) to protect the public from further crimes of the defendant."

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49. R. Doc. No. 1248, at 2 (stating on August 31, 2020 that "Helmstetter has spent approximately 27 years, 11 months in prison"); R. Doc. No. 1248-1, at 3 (stating on August 28, 2020 that Helmstetter had served 27 years, 10 months, and 27 days).

50. R. Doc. No. 1246, at 4 ("I will be 49 years old in October[.]").

18 U.S.C. §§ 3553(a)(1), (a)(2)(A)-(C). Considering these factors, a sentence reduction is inappropriate.

Helmstetter is currently serving three life sentences, to be followed by an additional 240 months,[51] for "committing murder and other violent crimes in aid of racketeering activity." *Tolliver*, 61 F.3d at 1196. The underlying drug conspiracy distributed "approximately 1000 kilograms of cocaine" (or nearly two-and-a-quarter tons) in and around New Orleans, and Helmstetter was a "gunman and enforcer" and "firearms procurer and storer" for the conspiracy. *Id.* The government is correct to describe Helmstetter as "the antithesis of a non-violent inmate."[52] While incarcerated, Helmstetter's documented disciplinary infractions include two instances of "fighting," six instances of assault (five without serious injury; one with serious injury), and three instances of possessing a dangerous weapon—including (in one instance) a nine-inch "metal rod [with a] lanyard hidden in a locker."[53] Though the Court notes that the most recent of these documented infractions occurred more than seven years ago,[54] Helmstetter's history demonstrates that he would be a danger to the community if released.

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51. R. Doc. No. 1185, at 1 (stating that "all sentences [are] to be served consecutively").

52. R. Doc. No. 1248, at 19; *see also id.* at 18-19 (quoting *Tolliver*, 61 F.3d at 1214, 1218) ("While in jail . . . Helmstetter discussed his desire to reassociate with the gang to take care of their 'business,' to get back in the 'game, and' to 'have his gun ready for him when he was released.'" (alterations omitted)).

53. R. Doc. No. 1248-2, at 1-6.

54. *Id.* at 1.

Helmstetter's sentence is therefore justified chiefly as a means of protecting the public from future crimes—violent crimes—that he may commit if released. 18 U.S.C. § 3553(a)(1), (2)(C). His serious sentence also reflects the seriousness of the offense—a massive and violent drug conspiracy that blighted New Orleans. *See* 18 U.S.C. § 3553(a)(2)(A). Although perhaps less compelling, his sentence may also be justified as a means of promoting respect for the law and to deter future similar conduct. *See* 18 U.S.C. § 3553(a)(2)(B)-(C).

Further, to the extent the Court is bound by 18 U.S.C. § 3582(c)(1)(A) to consider—because it may be "applicable"—the now-stale policy statement described in detail above,[55] that only reinforces its conclusion. That policy statement *requires* the Court to find that Helmstetter "is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)" before granting compassionate release. U.S.S.G. § 1B1.13(2), Policy Statement. The Court has already found the opposite; therefore, to grant compassionate release would not be "consistent with" that policy statement, assuming it is applicable. 18 U.S.C. § 3582(c)(1)(A).

Accordingly, regardless of whether the Court uses as its yardstick the § 3553(a) factors or the policy statement

55. *See supra* the introduction to part IV. Again, the Court is hesitant to conclude that the policy statement is "applicable"—as its text clearly implies it is applicable only to motions filed by the BOP. *Id.* That said, the Fifth Circuit has used it to at least "inform[ ]" its analysis, *Thompson*, 984 F.3d at 433, and this Court follows that approach.

alone, both require denial of Helmstetter's motion—irrespective of whether extraordinary and compelling reasons exist.

V.

Having found that there are no extraordinary or compelling reasons justifying a sentence reduction, and after reviewing the § 3553(a) factors and considering the Sentencing Commission's (potentially) applicable policy statement, the Court must conclude that compassionate release is not warranted.

Accordingly,

IT IS ORDERED that Helmstetter's motions[56] for compassionate release under 18 U.S.C. § 3582(c)(1)(A) are **DENIED**.

IT IS FURTHER ORDERED that to the extent Helmstetter's *Montgomery* argument is construed as a separate claim, it is **DISMISSED WITHOUT PREJUDICE** to his right to re-urge it in the appropriate motion.

New Orleans, Louisiana, January 29, 2021.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

56. R. Doc. Nos. 1246, 1254.