

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted October 16, 2023*

Decided October 18, 2023

BeforeFRANK H. EASTERBROOK, *Circuit Judge*AMY J. ST. EVE, *Circuit Judge*THOMAS L. KIRSCH II, *Circuit Judge*

No. 23-1042

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,**v.*TIMOTHY FREDRICKSON,
*Defendant-Appellant.*Appeal from the United States District
Court for the Central District of Illinois.

No. 17-cr-40032

Michael M. Mihm,
*Judge.***ORDER**

Timothy Fredrickson, a federal prisoner, filed multiple motions for compassionate release under 18 U.S.C. § 3852(c)(1). The district court denied Fredrickson's second motion and then denied his motion to reconsider. We have jurisdiction to review only the denial of the latter motion, and we affirm.

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Fredrickson first moved for compassionate release several months after we affirmed his conviction and sentence for sexual exploitation of a minor under 18 U.S.C. § 2251(a), (e). *See United States v. Fredrickson*, 996 F.3d 821 (7th Cir. 2021). His primary argument for a reduced sentence was that the prison term was extraordinarily lengthy. He also contended that the reduction of prison programs occasioned by the COVID-19 pandemic eliminated the rehabilitative purpose for which he was in prison and kept him in what amounted to solitary confinement. In papers attached to the motion, he stated that he was particularly vulnerable to COVID-19 and that prison conditions, such as limited access to hand sanitizer and clean showers, the connected ventilation between cells, and the use of communal toilets, spurred the virus's spread.

The district court denied the motion. It determined that the reductions in prison services to mitigate the spread of COVID-19 were not extraordinary and compelling reasons for release. It then considered the papers pertaining to Fredrickson's health and concluded that he did not show a high risk of complications from a COVID-19 infection and that, because of the availability of vaccines—which Fredrickson had refused—the threat of the virus alone was not extraordinary and compelling.

Fredrickson appealed. While that appeal was pending, he filed a second motion for compassionate release. He emphasized that his first request was primarily based on the COVID-related reduction in programming, but he also challenged the court's reliance on the prison's vaccination and infection rates and asserted that he could not benefit from the vaccine because it was ineffective against new variants, and his religion forbade vaccinations by injection. He also raised a new reason for early release: Because the Bureau of Prisons placed him in the highest security classification and classified his offense as a "crime of violence," he could not be placed in a federal camp, benefit from many other prison programs, or use the inmate email system. These restrictions, he argued, resulted in a harsher sentence than the sentencing judge intended.

After briefing, the district court denied Fredrickson's second motion, primarily because he failed to show that he had exhausted his administrative remedies. The court further observed that "at least some" of his arguments—such as his defense of being unvaccinated—were responses to the denial of his first motion, which Fredrickson had appealed. The court then concluded that the Bureau of Prisons' classification of Fredrickson's offense, and the restrictions such as limited access to email, were not extraordinary and compelling reasons for early release. Fredrickson did not appeal, and a short time after that ruling, we affirmed the denial of his first motion. *See United States v. Fredrickson*, No. 22-1542, 2022 WL 16960322 (7th Cir. Nov. 16, 2022).

But in the meantime, Fredrickson had filed documents related to his efforts to exhaust remedies before filing his second motion. And about a month after losing the second motion, Fredrickson asked in a “Motion to Reconsider or Renew” for the court to consider those documents as proof that he had fulfilled the exhaustion requirement with respect to the second motion for compassionate release. He alternatively asked the court to treat his request as a “renewed” motion for compassionate release.

The district court denied this motion, explaining first that Fredrickson should have produced his evidence of exhaustion sooner and that it was not conclusive, in any event. Further, the second compassionate-release motion that Fredrickson was asking the court to reconsider had repeated arguments that this court had since rejected in affirming the denial of his first motion. The court declined to address them again.

Fredrickson then filed a notice of appeal, which was timely only with respect to the denial of the motion for reconsideration because he filed it more than 14 days after the court denied his second motion for compassionate release. FED. R. APP. P. 4(b)(1)(A); *see United States v. Rollins*, 607 F.3d 500, 501 (7th Cir. 2010). We therefore address only the denial of the motion for reconsideration, a decision that we review for an abuse of discretion. *United States v. Sarno*, 37 F.4th 1249, 1253 (7th Cir. 2022).

Fredrickson contends that the district court should have addressed his motion on the merits instead of denying it for the same reasons as the underlying motion—primarily a failure to exhaust. He maintains that he did not have the opportunity to demonstrate exhaustion with respect to his second motion. He asserts that he never received the government’s full response brief, which raised exhaustion. The docket shows that he asked the district court to send him the full response—but the court issued its decision the day before it received this request. Although the court directed the government to send Fredrickson the full brief, it did not reopen its ruling or allow a reply to the exhaustion defense. Fredrickson now contends that, because he had no chance to demonstrate exhaustion of his second motion but provided his evidence to the court later, the district court should have treated his “motion for reconsideration” as an independent, third request for compassionate release and ruled on the merits.

We acknowledge that mail delivery problems and the timing of the court’s ruling could have meant that Fredrickson lacked a meaningful chance to reply to the government’s exhaustion defense. As a result, we steer clear of exhaustion as a reason to

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affirm the denial of his second motion, and by extension the denial of the motion for reconsideration. But we still see no abuse of discretion requiring remand.

It would not have helped Fredrickson for the district court to treat his last motion as an independent compassionate-release motion that satisfied the exhaustion requirement. Whether the filing was a request for reconsideration or a third motion for compassionate release, the district court's description was apt: Apart from disputing whether he had exhausted his remedies, Fredrickson "rehashed similar arguments this Court and now the Seventh Circuit, rejected." Indeed, Fredrickson's arguments that he could not benefit from the vaccine, that his prison's reported vaccination and infection rates were inaccurate or immaterial, and that his prison displayed unique incompetence in handling outbreaks all respond to the ruling on his first compassionate-release motion, which we affirmed on appeal. Fredrickson did not press these arguments in that appeal, but he could have. His forfeiture does not mean that the district court abused its discretion by declining to address issues Fredrickson had put before the court previously, when circumstances had not changed. *See generally United States v. Robinson*, 29 F.4th 370, 374 (7th Cir. 2022) (discussing law-of-the-case doctrine).

Nor was it an abuse of discretion for the district court to reject Fredrickson's challenges to the Bureau of Prisons' policies that classified him as violent and assigned him a high security level, resulting in limited access to email and other restrictions. This argument does not belong in a motion for compassionate release. Only the Bureau makes security-level classifications, so the district court has no role. 18 U.S.C. §§ 3586, 3621; 28 C.F.R. § 524.11.

Finally, the district court did not abuse its discretion in declining to appoint counsel to supplement the points in Fredrickson's second motion for compassionate release, though he had appointed counsel to assist with his first motion. The COVID-related General Order he points to as support for this duty was rescinded in 2022, before he filed his second motion. Third Amended Administrative Order, No. 20-mc-4011 (C.D. Ill. Mar. 9, 2022). Further, there is no statutory or constitutional right to counsel with respect to § 3852 motions, and so the district court lacked authority to "appoint" a lawyer. *United States v. Blake*, 986 F.3d 756, 758 (7th Cir. 2021). The district court has discretion to recruit a pro bono attorney, *see id.*, but Fredrickson presents no individualized reasons why it should have done so here.

AFFIRMED