

NONPRECEDENTIAL DISPOSITION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 September 18, 2023*
Decided October 3, 2023

Before

DIANE P. WOOD, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-1506

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KELLY HARPER,
Defendant-Appellant.

Appeal from the United States District
Court for the Western District of
Wisconsin.

No. 21-cr-18-wmc-1

William M. Conley,
Judge.

ORDER

Kelly Harper appeals the denial of her motions for compassionate release and sentence reduction under 18 U.S.C. § 3582(c)(1)(A). She is currently serving a 72-month sentence after pleading guilty to a murder-for-hire scheme in 2021. See 18 U.S.C.

* 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).

§ 1958(a). The district court properly ruled that some of her proffered grounds for release (untreated cancer and in-prison abuse) were unsubstantiated and the others (alleged trial errors and rehabilitation) did not warrant release. Therefore, we affirm.

Harper moved for compassionate release in 2023. As relevant to this appeal, she first asserted that she faced an increased risk of serious illness from COVID-19 because of her skin cancer diagnosis. A dermatologist from the Mayo Clinic (whom the Bureau of Prisons had enabled her to see) verified her condition, but she worries that the Bureau is ignoring the condition. Second, she asserted without elaboration that the Bureau has allowed her to be physically, emotionally, and sexually abused. Third, she contended that she has been rehabilitated through her completion of vocational programs and her service as a tutor for other prisoners. Finally, she argued that during her criminal case the prosecutor violated her due process rights, and the judge gave her a disparate sentence.

The district court denied Harper's motion. It first determined that Harper had not shown that her skin cancer put her at a higher risk of negative health outcomes if she contracted COVID-19, nor had she shown that the Bureau was ignoring her cancer, given that Harper's dermatology consultation at the Mayo Clinic showed that the Bureau was addressing it. Next, the court ruled that Harper's allegations of abuse lacked any substantiating details that might establish grounds for release. Then the court observed that post-sentencing rehabilitation was not alone a basis for a sentence reduction under 18 U.S.C. § 3742(a). Finally, regarding her criminal trial, the court explained that she had to raise on a direct appeal or collateral attack any arguments about prosecutorial problems or sentence length.

On appeal, Harper resubmits her motion and contends that she has presented, collectively, the "extraordinary and compelling reasons" required under the compassionate-release statute for early release. 18 U.S.C. § 3582(c)(1)(A). We review for abuse of discretion the district court's findings that Harper did not meet this standard. *United States v. Barbee*, 25 F.4th 531, 532 (7th Cir. 2022).

First, apparently replying to the court's rejection of rehabilitation and sentence length as justifying a sentence reduction, she argues that the United States Sentencing Commission's Amendment 814, altering U.S.S.G. § 1B1.13, would support her release. But the Commission's amendments will not become effective until November 2023 (and may not become effective even then if Congress intervenes). Because the amendments are not now effective, we may not give an advisory opinion on their hypothetical application to Harper's motion. See *Hall v. Beals*, 396 U.S. 45, 48 (1969).

Second, Harper contends that her cancer diagnosis and claims of abuse support her case of extraordinary and compelling reasons for release, but she has not offered a reason to disturb the district court's contrary finding. She has the burden of proving the severity of her cancer and any increased risk to her health from COVID-19, see *Barbee*, 25 F.4th at 533, as well as her claims of abuse. But she did not provide evidence about the risks from her cancer or detail any assertions of abuse. Nor did she show that the Bureau was refusing to address her cancer or respond to concerns of mistreatment. (As the district court rightly observed, Harper's medical records show that the Bureau is monitoring her condition with an outside dermatology consultation.) In any case, if Harper believes that the Bureau is ignoring her, she must show that available civil remedies are useless and that the prison is needlessly putting her "at greater risk of a dire outcome inside prison than [she] would be outside." *United States v. Vaughn*, 62 F.4th 1071, 1071–72 (7th Cir. 2023). She has not done so.

Next, Harper reiterates that problems with her criminal trial and sentence entitle her to release. She begins by insisting that she received a disparate sentence. But she agreed to her 72-month sentence in her plea agreement, and so she has waived the argument. Regardless, this contention would fail because sentencing challenges are not grounds for compassionate release and, instead, should be raised on direct appeal or a collateral challenge. See *United States v. Martin*, 21 F.4th 944, 946 (7th Cir. 2021). Relatedly, Harper argues that the district judge and prosecutor abused their powers during her case. Harper did not raise an argument about judicial misconduct in her motion for compassionate release; thus it is waived. *Id.* at 945. In any case, the adverse rulings that Harper identifies are not evidence of judicial bias. *United States v. Barr*, 960 F.3d 906, 920 (7th Cir. 2020). And again, Harper must bring a direct or collateral challenge, rather than in a motion for compassionate release, for any claims that the prosecutor or judge denied Harper her rights during her criminal case. See *United States v. Brock*, 39 F.4th 462, 465 (7th Cir. 2022).

Finally, we address Harper's contention about her post-sentencing rehabilitation. Rehabilitation is not a stand-alone ground for relief. *United States v. Peoples*, 41 F.4th 837, 842 (7th Cir. 2022). While we must consider rehabilitation among the factors discussed above, see *Vaughn*, 62 F.4th at 1072–73, doing so does not change the outcome because the other factors fail.

AFFIRMED