FILED: September 26, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6076
(5:21-cv-00170-JPB-JPM)

KAMIL HAKEEM JOHNSON

Petitioner - Appellant

v.

R. M. WOLFE, Warden

Respondent - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Motz, Judge Harris, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6076

KAMIL HAKEEM JOHNSON,

Petitioner - Appellant,

v.

R. M. WOLFE, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. John Preston Bailey, District Judge. (5:21-cv-00170-JPB-JPM)

Submitted: May 19, 2022 Decided: May 24, 2022

Before MOTZ and HARRIS, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Kamil Johnson, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kamil Hakeem Johnson, a federal prisoner, appeals the district court's orders dismissing his 28 U.S.C. § 2241 petition and denying reconsideration. We review the district court's ruling on Johnson's petition de novo, *see Farkas v. Butner*, 972 F.3d 548, 553 (4th Cir. 2020); *Lennear v. Wilson*, 937 F.3d 257, 267 (4th Cir. 2019), and its denial of reconsideration for abuse of discretion, *see Wicomico Nursing Home v. Padilla*, 910 F.3d 739, 750 (4th Cir. 2018). Finding no reversible error, we affirm.

In his petition, Johnson first sought to challenge disciplinary convictions that resulted in the loss of earned good time credits, arguing that the evidence presented during the disciplinary hearing was insufficient to support the findings of the discipline hearing officer (DHO). To comport with "the minimum requirements of procedural due process," a prison disciplinary decision leading to the loss of good time credits must be "supported by some evidence in the record." *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985) (internal quotation marks omitted). This "exceedingly lenient standard . . . does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the DHO." *Tyler v. Hooks*, 945 F.3d 159, 170 (4th Cir. 2019) (cleaned up). As the district court correctly determined, Johnson's challenged disciplinary convictions satisfy this standard.

Johnson's petition also sought to challenge his sentence* by way of the savings clause in 28 U.S.C. § 2255. Pursuant to § 2255(e), a prisoner may challenge his sentence in a traditional writ of habeas corpus pursuant to § 2241 if a § 2255 motion would be inadequate or ineffective to test the legality of his detention.

> [Section] 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.

United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018). "In evaluating substantive claims under the savings clause, however, we look to the substantive law of the circuit where a defendant was convicted." *Hahn v. Moseley*, 931 F.3d 295, 301 (4th Cir. 2019). Because Johnson was convicted in the District of Minnesota, we assess the "settled law" of the Eighth Circuit and the Supreme Court. *See Marlowe v. Warden, FCI Hazelton*, 6 F.4th 562, 572 (4th Cir. 2021). We have reviewed the record and find no error in the

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* Johnson has forfeited appellate review of the district court's ruling on his separate claim seeking to challenge his conviction by way of the savings clause. *See* 4th Cir. R. 34(b); *Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). Insofar as Johnson attempts to raise new challenges to his sentence in his informal brief, those claims are not properly before us. *See In re Under Seal*, 749 F.3d 276, 285 (4th Cir. 2014) ("Our settled rule is simple: absent exceptional circumstances, we do not consider issues raised for the first time on appeal." (cleaned up)).

district court's conclusion that it lacked jurisdiction over Johnson's sentencing challenge, as he fails to satisfy the *Wheeler* test.

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

KAMIL HAKEEM JOHNSON,

Petitioner,

v.

CIVIL ACTION NO. 5:21-CV-170
Judge Bailey

R.M. WOLFE, Warden,

Respondent.

ORDER DENYING MOTION TO RECONSIDER

The above-styled matter came before this Court for consideration of petitioner's Motion to Reconsider [Doc. 9], filed December 6, 2021. Therein, petitioner moves this Court to reconsider its November 9, 2021 Order [Doc. 6] for three reasons. First, petitioner argues his sentence is not authorized by Congress. *See* [Doc. 6 at 1–5]. Second, petitioner asserts that depriving him of "good time" credits infringes on his liberty interest that is protected by the due process clause. *See* [Id. at 6–9]. Third, petitioner argues ***Miller v. Alabama***, 567 U.S. 460 (2012) constitutes a substantive decision. *See* [Id. at 9].

STANDARDS OF REVIEW

In considering the instant motion, this Court has considered the recognized grounds upon which to grant relief pursuant to Rule 59(e). The Fourth Circuit has recognized that "there are three grounds for amending an earlier judgment:"

> (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *See* [***EEOC v.***] ***Lockheed Martin Corp.***, 116

F.3d at 112; ***Hutchinson v. Staton,*** 994 F.2d 1076, 1081 (4th Cir. 1993). Thus, the rule permits a district court to correct its own errors, "sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." ***Russell v. Delco Remy Div. of Gen. Motors Corp.,*** 51 F.3d 746, 749 (7th Cir. 1995). Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance. *See* ***Russell,*** 51 F.3d at 749; ***Concordia College Corp. v. W.R. Grace & Co.,*** 999 F.2d 326, 330 (8th Cir. 1993); ***FDIC v. World Univ., Inc.,*** 978 F.2d 10, 16 (1st Cir. 1992); ***Simon v. United States,*** 891 F.2d 1154, 1159 (5th Cir. 1990); *see also* ***In re: Reese,*** 91 F.3d 37, 39 (7th Cir. 1996) ("A motion under Rule 59(e) is not authorized 'to enable a party to complete presenting h[er] case after the court has ruled against h[er].'") (quoting ***Frietsch v. Refco, Inc.,*** 56 F.3d 825, 828 (7th Cir. 1995)); 11 Wright *et al.*, ***Federal Practice and Procedure*** § 2810.1, at 127-28 (2d ed. 1995) ("The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."). Similarly, if a party relies on newly discovered evidence in its Rule 59(e) motion, the party "must produce a 'legitimate justification for not presenting' the evidence during the earlier proceeding." ***Small v. Hunt,*** 98 F.3d 789, 798 (4th Cir. 1996) (quoting ***RGI, Inc. v. Unified Indus., Inc.,*** 963 F.2d 658, 662 (4th Cir.

1992)). In general, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." Wright *et al.*, *supra,* § 2810.1, at 124.

Pac. Ins. Co. v. American Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998).

DISCUSSION

Here, petitioner appears to assert that his due process and Eighth Amendment right to be free of cruel and unusual punishment are being violated because he was sentenced to 42 years in prison. Petitioner requests this Court to vacate its November 9, 2021 Order, set this matter for an evidentiary hearing, and appoint counsel.

However, petitioner points to no legally binding decision in either the United States Circuit Court of Appeals for the Fourth Circuit or the Supreme Court of the United States which would change this Court's November 9, 2021 Order. Petitioner relies on much of the same arguments and law he relied on in his petition. Thus, this Court will not reconsider its November 9, 2021 Order.

CONCLUSION

For the reasons contained herein, petitioner's Motion to Reconsider **[Doc. 9]** is **DENIED.**

It is so **ORDERED**.

The Clerk is directed to mail a copy of this Order to *pro se* petitioner at his last known address as reflected on this Court's docket.

DATED: December 13, 2021.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

for the

Northern District of West Virginia

KAMIL HAKEEM JOHNSON,

Plaintiff(s)

v.

Civil Action No. 5:21-cv-170

RM. WOLFE, Warden,

Defendant(s)

JUDGMENT IN A CIVIL ACTION

The court has ordered that:

☐ Judgment award ☐ Judgment costs ☒ Other

other: The Petition is hereby DENIED and hereby DISMISSED WITH PREJUDICE as to Ground One and DISMISSED WITHOUT PREJUDICE as to Grounds Two and Three. Judgment is entered in favor of the respondent.

This action was:

☐ tried by jury ☐ tried by judge ☒ decided by judge

decided by Judge John Preston Bailey

Date: November 9. 2021

CLERK OF COURT

Cheryl Dean Riley

/s/ A. Greenidge

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

KAMIL HAKEEM JOHNSON,

Petitioner,

v.

CIVIL ACTION NO. 5:21-CV-170
Judge Bailey

R.M. WOLFE, Warden,

Respondent.

ORDER DISMISSING CASE

This case is before this Court for an initial review. On October 4, 2021, the petitioner filed a Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2241 [Doc. 1]. For the reasons that follow, the Court will dismiss the petition.

Petitioner raises three grounds in his petition. First, petitioner challenges a Disciplinary Hearing Officer ("DHO") hearing in which he was found to have possessed drugs and was sanctioned with the loss of Good Conduct Time. Petitioner contends that because his cell mate took responsibility for the contraband, there was not evidence to support the DHO's decision; petitioner asks this Court to restore his Good Conduct Time and expunge the report. Second, petitioner contends that his 42-year sentence is not authorized by 18 U.S.C. § 1959, which authorizes only death or life imprisionment for the charge of murder in aid of recketeering activity. Petitioner was originally sentenced to life in prison but was resentenced following the Supreme Court's decision in ***Miller v. Alabama***, 567 U.S. 460 (2012). Third, petitioner challenges his conviction, alleging that

on the day of trial, his counsel received evidence that contradicted the testimony of witness Greg Hynes.

First, as petitioner is challenging the sufficiency of the evidence at his DHO hearing, the Court notes that

> [t]he role of the district court is not to afford a de novo review of the DHO's factual findings. The district court should simply determine whether the decision was supported by some facts.

Melendez v. Masselieno, No. CIV.A. ELH-13-1864, 2014 WL 460848, at *7 (D. Md. Feb. 4, 2014). "[W]here good time credits constitute a protected liberty interest, a decision to revoke such credits must be supported by some evidence." ***Superintendent, Massachusetts Corr. Inst., Walpole v. Hill***, 472 U.S. 445, 447 (1985). That standard is clearly met here. As stated in the DHO report, attached to the Complaint [Doc. 1-1], the finding of guilt was supported by, among other evidence, the officer's report, photographs, and petitioner's refusal of a pat search. Accordingly, the Court finds that the DHO's findings are supported by some facts.

Next, the Court turns to petitioner's challenges to the legality of his conviction or sentence. Generally, 28 U.S.C. § 2255 provides the exclusive means for a prisoner in federal custody to test the legality of his detention. However, § 2255(e) contains a savings clause, which allows a district court to consider a habeas petition brought by a federal prisoner under § 2241 where § 2255 is "inadequate or ineffective to test the legality" of the detention. 28 U.S.C. § 2255; *see also* ***United States v. Poole***, 531 F.3d 263, 270 (4th Cir. 2008). The fact that relief under § 2255 is procedurally barred does not render the remedy

inadequate or ineffective to test the legality of a prisoner's detention. ***In re Jones***, 226 F.3d 328, 332 (4th Cir. 2000). In the Fourth Circuit, a § 2255 petition is only inadequate or ineffective to test the legality of detention when:

> (1) [A]t the time of conviction, settled law in this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provision of § 2255 because the new rule is not one of constitutional law.

Poole, 531 F.3d at 269 (quoting ***In re Jones***, 226 F.3d at 333–34). The Fourth Circuit recently found that the savings clause may apply to certain sentencing challenges. It explained:

> [W]e conclude that § 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.

United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018). Because the requirements of the savings clause are jurisdictional, a § 2241 petitioner relying on the § 2255(e) savings clause must meet either the ***Jones*** test (if challenging the legality of his conviction) or the ***Wheeler*** test (if challenging the legality of his sentence) for the court to have subject-matter jurisdiction to evaluate the merits of the petitioner's claims. *See* ***Wheeler***, 886 F.3d at 423–26.

Petitioner's second ground, challenging the legality of his sentence, argues that his resentencing to a term of forty-two (42) years is not authorized by the statute. This argument has already been raised and rejected by several other courts. As summarized by the District Court of South Carolina,

> Petitioner cannot satisfy element two under the ***Wheeler*** standard because he does not rely on a substantive change in the law. Instead, petitioner argues that because the murder in aid of racketeering statute only sets forth two punishments, death or life imprisonment, his 2015 sentence is void because it is not a punishment established by Congress. This claim was previously rejected by the Minnesota district court that imposed his sentence. *See* 28 U.S.C. 2255 (e) (noting that a § 2241 petitioner shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief.) A failure to meet the requirements of the savings clause is a jurisdictional defect that cannot be waived. *See* ***Wheeler***, 886 F.3d at 426. Because Petitioner does not meet the ***Wheeler*** § 2255 savings clause

factors, his § 2241 petition must be dismissed for lack of jurisdiction. ***Rice v. Rivera***, 617 F.3d 802, 807 (4th Cir. 2010).

Johnson v. Mackelburg, No. CV 0:20-00176-RMG, 2020 WL 1316530, at *2 (D.S.C. Mar. 20, 2020) (Gergel, J.), *aff'd*, 818 F. App'x 293 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2538 (2021). Here, petitioner cannot point to any substantive change in the law and this Court finds that the above analysis applies to his case; petitioner does not meet the second prong of ***Wheeler*** and thus this claim must be dismissed for lack of jurisdiction.

Finally, as to petitioner's third ground, challenging the legality of his conviction based on alleged evidence contradicting the testimony of Greg Hynes, the Court finds that petitioner again has failed to meet the requirements of the savings clause. Specifically, the second prong of ***Jones*** requires "(2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal." Because the petitioner cannot meet the requirements of either ***Jones*** or ***Wheeler***, this Court is without jurisdiction as to his challenges to his conviction or sentence and must dismiss this case.

For the reasons stated above, the Petition **[Doc. 1]** is hereby **DENIED** and hereby **DISMISSED WITH PREJUDICE** as to Ground One and **DISMISSED WITHOUT PREJUDICE** as to Grounds Two and Three. The Court hereby **DIRECTS** the Clerk to **STRIKE** this matter from the active docket of this Court and to enter judgment in favor of the respondent.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein and mail a copy to the *pro se* petitioner.

DATED: November 9, 2021.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE