

APPENDIX A

NONPRECEDENTIAL DISPOSITION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 June 23, 2023*

Decided June 28, 2023

Before

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 22-3018

BRENT DOUGLAS COLE,
Petitioner-Appellant,

v.

R.D. KEYES,
Respondent-Appellee.

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

No. 20-cv-453-wmc

James D. Peterson,
Chief Judge.

ORDER

Brent Cole is serving 355 months' imprisonment for shooting and injuring a federal Bureau of Land Management ranger and an assisting state officer. The sentence was imposed in the Eastern District of California, *United States v. Cole*, 722 F. App'x 749 (9th Cir. 2018) (affirming), where Cole's 2019 request to vacate the judgment under

* Appellee R.D. Keyes was not served with process and is not participating in this appeal. We have agreed to decide the case without oral argument because the brief 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).

28 U.S.C. § 2255 remains pending after extensive motions practice, *United States v. Cole*, 2:14-cr-00269-WBS-DB-1 (E.D. Cal., § 2255 motion filed on criminal docket Nov. 8, 2019). While Cole was serving this sentence at the Federal Correctional Institute in Oxford, Wisconsin, he lost 27 days' good-time credit as discipline for fighting. See 28 C.F.R. § 541.3, Table 1, Offense 201. Cole then petitioned the district court in the Western District of Wisconsin for a writ of habeas corpus under 28 U.S.C. § 2241. That court denied the petition, rejecting Cole's three disparate theories: that he should not be disciplined for fighting because he meant only to defend others and restore peace; that he needs better medical care and access to the courts; and that perceived delays in his § 2255 action in California entitle him to review in Wisconsin of his conviction and sentence. We affirm.

We note initially that although Cole was transferred to FCI Sandstone in Minnesota (in the Eighth Circuit) after he filed his petition but before it was denied, this transfer does not affect the district court's jurisdiction or ours. See *In re Hall*, 988 F.3d 376, 378 (7th Cir. 2021) (district court); *Gamboa v. Daniels*, 26 F.4th 410, 414 (7th Cir. 2022) (circuit court). We turn, then, to Cole's arguments.

In his appellate brief, Cole does not contest the discipline for fighting. But he does in his separate jurisdictional memorandum, insisting that officers should have heeded his defense that he was a "Good Samaritan" who used force only to protect one prisoner from another. The disciplinary hearing officer considered but dismissed this theory because Cole was not authorized to restrain another prisoner and, in any event, Cole did not stop when staff told him to. Even if Cole's jurisdictional memorandum preserves this argument for appeal, the district court was right to deny it. Cole has not identified any rule authorizing federal prisoners to use physical force in defense of others, our own research has unearthed none, and we have repeatedly held that due process does not require prisons to allow such a defense in disciplinary proceedings. See *Jones v. Cross*, 637 F.3d 841, 847 (7th Cir. 2011); *Scruggs v. Jordan*, 485 F.3d 934, 939 (7th Cir. 2007); *Rowe v. DeBruyn*, 17 F.3d 1047, 1052–53 (7th Cir. 1994).

Next, Cole asserts in the same jurisdictional memorandum that, contrary to the district court's ruling, his various complaints about prison medical care and access to courts (the details of which we omit here) belong in this habeas corpus action, rather than in a civil rights action under, for instance, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). See *Carlson v. Green*, 446 U.S. 14, 20 (1980) (federal prisoners can sometimes challenge healthcare decisions under *Bivens*). But his argument is foreclosed by *Glaus v. Anderson*, 408 F.3d 382, 387–88 (7th Cir. 2005). As the district court

observed, its denial of this action will not bar any valid challenge to conditions of confinement in a proper civil rights action, but habeas corpus is not the correct vehicle for Cole to pursue such relief.

In his appellate brief, Cole also contends that delay in the Eastern District of California renders his § 2255 proceedings “inadequate or ineffective” to test the legality of his convictions and sentence, 28 U.S.C. § 2255(e), thus opening habeas corpus courts in this circuit to a wide variety of his challenges. *Cf. Jones v. Hendrix*, 599 U.S. ___, (June 22, 2023) (slip op.) (eliminating § 2255(e) review for federal prisoners seeking to enforce new interpretation of criminal statute). We disagree. Even if we assumed that unfairly delayed § 2255 proceedings in one district court could lead to habeas corpus review in another—an unlikely assumption after *Jones*—Cole himself is responsible for much of the asserted delay here. After filing his collateral attack in late 2019, he followed up with a stream of supplemental filings requiring action from the court or government, most recently in December 2022. No authority suggests to us that this timeline entitles Cole to pursue collateral review here instead of completing his pending action in the sentencing court. *Cf. Evans v. Wills*, 66 F.4th 681, 685–86 (7th Cir. 2023) (excusing exhaustion of state remedies for Illinois prisoner after two-decade delay); *Stirone v. Markley*, 345 F.2d 473, 475 (7th Cir. 1965) (declining to foreclose theoretical possibility that “refusal to entertain a section 2255 motion or an inordinate delay in its disposition” in another circuit would open the door to habeas corpus review in this circuit).

Finally, Cole suggests that the Northwest Ordinance, an eighteenth-century statute on land ownership, statehood, and slavery, has some bearing on his access to habeas corpus here. But no connection between that law and this case is apparent.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



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FINAL JUDGMENT

June 28, 2023

Before

DIANE P. WOOD, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*

No. 22-3018	BRENT D. COLE, Petitioner - Appellant
	v.
	R. D. KEYES, Respondent - Appellee
Originating Case Information:	
District Court No: 3:20-cv-00453-wmc Western District of Wisconsin District Judge James D. Peterson	

The judgment of the District Court is **AFFIRMED** in accordance with the decision of this court entered on this date.

A handwritten signature in cursive script, reading "Christopher Conway".

Clerk of Court

APPENDIX C

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BRENT DOUGLAS COLE,

Plaintiff,

v.

OPINION and ORDER

R.D. KEYES,¹

20-cv-453-wmc²

Defendant.

Brent Douglas Cole is a federal prisoner currently incarcerated at the Federal Correctional Institution in Sandstone, Minnesota. When he was incarcerated at FCI-Oxford, he filed this petition under 28 U.S.C. § 2241. Cole challenges: (1) disciplinary proceedings that arose from a charge that he was fighting; (2) conditions of confinement, including his ability to access the courts and the denial of medical and dental care; and (3) the validity of his federal conviction. Although venue in this court is improper because Cole is no longer incarcerated at FCI-Oxford, I will take up this petition on its merits because venue is not jurisdictional. *See Moore v. Olson*, 368 F.3d 757, 760 (7th Cir. 2004).

This petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases, which can be applied to petitions brought under § 2241. *See* Rule 1(b), Rules Governing Section 2254 Cases. Cole's allegations about the disciplinary proceedings do not state a constitutional claim, so I am dismissing that claim with prejudice. Cole's access to the courts and medical and dental care claims are not available in a petition

¹ Under Federal Rule of Civil Procedure 25(d), I have substituted the current warden of FCI-Oxford as the respondent.

² I am exercising jurisdiction over this case for purposes of this screening order only.

under § 2241, so I am dismissing those claims without prejudice. And Cole's challenge to the validity of his conviction is not cognizable in this action, so I am dismissing that claim with prejudice.

BACKGROUND

In August of 2019, Cole was in the law library at FCI-Oxford. He alleges that two inmates were assaulting a third inmate. Cole says that he intervened to protect that third inmate, restraining one of the attackers. Cole denies harming the inmate that he restrained. After the incident, Cole was charged with fighting, based on a staff member's allegations that Cole was wrestling and in a face-to-face physical confrontation with another inmate. Cole says that the officials handling his charges refused to consider his defense. Attachments to Cole's petition show that Cole received notice of the charge, and he appeared with the assistance of a staff representative before a Disciplinary Hearing Officer (DHO) for a hearing on September 5, 2019. Dkt. 1-2, at 5-8. Cole's defense was that he participated in the fight to prevent more serious injury to the inmate being attacked. A witness testified on Cole's behalf, stating that that he did not see Cole well during the fight, but that it appeared Cole was trying to stop another inmate from striking the inmate being attacked. The DHO also received video footage, which did not show every part of the fight.

The DHO found Cole guilty of the charge, noting all the evidence and finding that the staff member's observation about Cole's wrestling with an inmate to be persuasive evidence of fighting. *Id.* at 3. The DHO revoked 27 days of good-time credit and restricted his telephone and commissary access for 60 days. Cole also was also placed in the Special Housing Unit (SHU).

Cole contends that when he was in the SHU, FCI-Oxford officials deprived him of meaningful access to the courts by withholding his legal materials. Cole says that he could not access legal materials while the statute of limitations for him to file a motion to vacate under 28 U.S.C. § 2255 was running. Cole also says that he did not have access to a copy machine for five weeks and could not store his legal materials. Although Cole raised his concerns with BOP officials, he still lacks adequate access to his legal materials.

Next Cole contends that he has been denied necessary medical and dental care since his incarceration by the BOP began. Although Cole received treatment for gunshot wounds while in state custody, the BOP did not obtain his medical records when Cole was taken into federal custody in 2015. So, Cole has not received any follow-up treatment for his injuries and pre-existing conditions. As a result, Cole has limited mobility in his left arm, permanent damage to his jawbone, and an abnormal bone growth that he does not describe.

Finally, Cole challenges the validity of his federal conviction. Cole's exact challenge to the proceedings is disjointed, but he appears to take issue with (1) the federal government charging him while he was being held in California state custody and facing state charges, (2) the admission of certain evidence during his criminal trial, and (3) the withholding of exculpatory evidence.

ANALYSIS

Cole asks that the court (1) reverse his fighting conviction, (2) enjoin prison officials from taking legal materials and require prison officials to provide him medical and dental care, and (3) order his release from prison.

I. Fighting conviction

Cole contends that prison officials violated his constitutional rights by failing to consider his defense to the fighting charge. Disciplinary hearings that deprive an inmate like Cole of good-time credit—and as a result, increase the inmate’s period of incarceration—*may* serve as a basis for habeas relief. *See Walker v. O’Brien*, 216 F.3d 626, 629 (7th Cir. 2000); *Waletzki v. Keohane*, 13 F.3d 1079, 1080 (7th Cir. 1994). But § 2241 states that the “writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States.” In other words, Cole must show that his loss of good time was in violation of the Constitution or other federal law.

A disciplinary decision that results in the loss of good-time credits must provide the inmate with the following procedural safeguards to adhere to the constitutional requirement of due process: (1) advance written notice of the charges; (2) an opportunity, taking into account the institution’s safety concerns, to call witnesses and present evidence in his or her defense; (3) a written statement from the factfinder identifying the evidence on which they relied and the reason(s) for the decision; and (4) findings supported by “some evidence” in the record. *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985).

Cole’s submissions show that he received all four constitutional safeguards. I understand Cole to claim that this guilty finding was not support by “some evidence” as required by due process because he submitted evidence to the DHO that he was not fighting. But the Court of Appeals for the Seventh Circuit has described the “some evidence” requirement as a “meager threshold.” *Scruggs v. Jordan*, 485 F.3d 934, 941 (7th Cir. 2007). In *Scruggs*, the court acknowledged that even though the evidence must bear “some indicia of reliability,” once that showing has been made, courts do not reverse results of the disciplinary

official. *Id.* In other words, this standard “require[s] only that the decision not be arbitrary or without support in the record.” *McPherson v. McBride*, 188 F.3d 784, 786 (7th Cir. 1999).

The DHO acknowledged Cole’s position, but the officer did not credit Cole’s defense over the staff member who alleged that Cole was in a face-to-face confrontation with, and wrestling with, another prisoner. The DHO also noted that Cole’s witness was not actually present throughout the entire confrontation. Based on the record before the DHO, and their entitlement to make credibility determinations, Cole has not made a plausible showing that the DHO’s determination lacked an evidentiary basis. Therefore, I am dismissing this ground for relief with prejudice for failure to state a constitutional claim.

2. Access to legal materials and medical and dental care

Cole contends that BOP officials consistently deprive him of meaningful access to the courts. He also contends that his physical and dental health needs have been left untreated since his incarceration by the BOP. I’ll treat these two claims together because they present the same fundamental problem.

These are not the types of claims that can be raised in a habeas petition, which is limited to challenges to the validity or duration of a prisoner’s confinement. *Pischke v. Litscher*, 178 F.3d 497, 499-500 (7th Cir. 1999) (habeas is the proper vehicle for presenting a claim “only if the prisoner is seeking to ‘get out’ of custody in some meaningful sense”). Challenges to a prisoner’s conditions of confinement must be brought in a civil action. *Glaus v. Anderson*, 408 F.3d 382, 387-88 (7th Cir. 2005). And I cannot convert these claims to a civil action: Cole must decide for himself whether he wishes to pursue these claims in a separate civil action. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (dismissing action brought under 42 U.S.C. § 1983 that should have been brought as petitions for a writ of habeas corpus); *Bunn v. Conley*, 309 F.3d

1002, 1006-07 (7th Cir. 2002) (district court should not have converted a declaratory judgment action to a petition for a writ of habeas corpus). Therefore, I will dismiss these claims without prejudice; Cole may bring them in a civil proceeding.

3. Validity of Cole's federal conviction

Cole may not challenge the validity of his federal conviction in this action. The general rule for federal prisoners is that a collateral attack on a conviction must be brought under § 2255. *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013). A second or successive collateral attack under § 2255 is allowed only if the court of appeals certifies that it rests on newly discovered evidence or “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h)(2).

There's an exception to the general rule. Under Seventh Circuit law, to succeed on a petition brought under § 2241, Cole must meet the requirement of the so-called “savings clause” of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2255(e). *See In re Davenport*, 147 F.3d 605, 608–12 (7th Cir. 1998) (discussing the savings clause's purpose and development of case law). For the savings clause to apply, Cole must demonstrate that “his section 2255 remedy is ‘inadequate or ineffective to test the legality of his detention.’” *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012) (quoting 28 U.S.C. § 2255(e)). To show that his § 2255 remedy is “inadequate or ineffective,” a federal prisoner must satisfy three conditions: (1) his petition is based on a rule of statutory law; (2) he is relying on a retroactive decision that he could not have invoked in his first § 2255 motion; and (3) the sentence enhancement must have been grave enough to be deemed a miscarriage of justice. *Light v. Caraway*, 761 F.3d 809, 812–13 (7th Cir. 2014); *In re Davenport*, 147 F.3d at 611–12.

Cole's challenge does not fit the general rule or the exception. His challenge to his criminal conviction does not arise from a new rule of statutory law, and he has not shown that his jurisdictional and evidence-based challenges to his conviction were unavailable when he was charged in federal court or when he could have filed a § 2255 motion. Therefore, I need not address whether he can show actual innocence. I will dismiss this ground for relief with prejudice.

ORDER

IT IS ORDERED that:

1. Brent Cole's petition under 28 U.S.C. § 2241 is DENIED.
2. Cole's claims challenging his disciplinary proceedings and conviction are DISMISSED with prejudice.
3. Cole's claims challenging his access to the courts and medical and dental care are DISMISSED without prejudice.
4. The clerk of court is directed to close this case.

Entered October 11, 2022.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

APPENDIX H

ORDER, August 18, 2023, PETITION
FOR REHEARING DENIED, Suggestion
FOR REHEARING EN BANC: DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 18, 2023

Before

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 22-3018

BRENT DOUGLAS COLE,
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R.D. KEYES,
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Appeal from the United States District
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Wisconsin.

No. 20-cv-453-wmc

James D. Peterson,
Chief Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc filed by Petitioner-Appellant on August 3, 2023, no judge in active service has requested a vote on the petition for rehearing en banc, and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing and rehearing en banc is DENIED.