

04-5079-pr

To Be Argued By:
ALAN M. SOLOWAY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-5079-pr

SALA-THIEL THOMPSON,
Plaintiff-Appellant,

-vs-

WAYNE CHOINSKI,
FEDERAL BUREAU OF PRISONS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE FEDERAL BUREAU OF PRISONS

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TABLE OF CONTENTS

Table of Authorities.....	iv
Statement of Jurisdiction.....	viii
Statement of Issues Presented for Review.....	ix
Preliminary Statement.....	1
Statement of the Case.....	3
Statement of Facts and Proceedings Relevant to this Appeal.....	4
A. Thompson’s Conviction and Relevant Litigation History.....	4
B. The Instant Petition.....	6
C. Thompson’s Civil Rights Complaint.....	9
Summary of Argument.....	9
Argument.....	11
I. Thompson’s Challenge to His 1992 Conviction Was Properly Dismissed Because He Cannot Raise this Claim in a Petition under 28 U.S.C. § 2241 and Does Not Meet the Standards for Filing a Second or Successive Motion under 28 U.S.C. § 2255.....	11

A. Relevant Facts.....	11
B. Governing Law and Standard of Review.....	11
C. Discussion.....	13
II. Thompson’s Challenges to Conditions of His Confinement That Do Not Affect the Fact or Length of His Confinement Were Properly Dismissed.....	15
A. Relevant Facts.....	15
B. Governing Law and Standard of Review.....	15
1. The Proper Scope of a Habeas Petition.....	15
2. The Amendment of Habeas Petitions.....	17
C. Discussion.....	18
III. The Dismissal of Thompson’s Remaining Claims Should Be Vacated and the Case Remanded for Further Proceedings.....	19
A. Thompson’s remaining claims, based on allegations of ongoing injuries, were not	

rendered moot by his transfer to a new state facility.....	20
1. Relevant Facts.....	20
2. Governing Law.....	20
3. Discussion.....	21
B. Thompson’s remaining claims, challenging the length of his confinement, were properly presented in a petition under 28 U.S.C. § 2241.....	22
1. Relevant Facts.....	22
2. Governing Law.....	22
3. Discussion.....	22
C. The dismissal of Thompson’s remaining claims should be vacated and the case remanded for further proceedings.....	23
Conclusion.....	25
Addendum	

TABLE OF AUTHORITIES

CASES

PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

<i>Adams v. United States</i> , 372 F.3d 132 (2d Cir. 2004).....	11, 14
<i>Aetna Cas. & Sur. Co. v. Aniero Concrete Co., Inc.</i> , 404 F.3d 566 (2d Cir. 2005).....	17, 19
<i>Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics</i> , 403 U.S. 388 (1971).....	9
<i>Carmona v. United States Bureau of Prisons</i> , 243 F.3d 629 (2d Cir. 2001).....	13, 15, 23
<i>In re Certain Underwriters</i> , 294 F.3d 297 (2d Cir. 2002).....	13
<i>Jenkins v. Haubert</i> , 179 F.3d 19 (2d Cir. 1999).....	16
<i>Jiminian v. Nash</i> , 245 F.3d 144 (2d Cir. 2001).....	11, 12
<i>Levine v. Apker</i> , 455 F.3d 71 (2d Cir. 2006).....	23

<i>Lewis v. Continental Bank Corp.</i> , 494 U.S. 472 (1990).....	20
<i>Littlejohn v. Artuz</i> , 271 F.3d 360 (2d Cir. 2001).....	17
<i>Muhammad v. Close</i> , 540 U.S. 749 (2004).....	16, 17, 18
<i>Nelson v. Campbell</i> , 541 U.S. 637 (2004).....	15, 16
<i>Peralta v. Vasquez</i> , ___ F.3d ___, No. 04-2822-pr, 2006 WL 2948816 (2d Cir. Oct. 17, 2006). . .	15, 22
<i>Pliler v. Ford</i> , 542 U.S. 225 (2004).....	8
<i>Preiser v. Rodriguez</i> , 411 U.S. 475 (1973).....	15, 16, 17
<i>Spencer v. Kemna</i> , 523 U.S. 1 (1998).....	20
<i>Thompson v. Choinski</i> , No. 3:04CV823 (CFD), 2004 WL 1900428 (D. Conn. Aug. 16, 2004).	5
<i>Thompson v. Lanz</i> , No. 3:04CV2084 (AWT).	9, 19, 22

<i>Thompson v. Martin</i> , No. 3:05CV926 (PCD) (D. Conn.).....	5
<i>Thompson v. Martin</i> , No. 06-1181 (2d Cir.).....	5
<i>Thompson v. United States</i> , 252 F.3d 438 (11th Cir. 2001) (Table).....	5, 14
<i>Thompson v. United States of America</i> , No. 04-22275-CIV-Jordan (S. D. Fl. Oct. 15, 2004).....	5-6
<i>Thompson v. United States of America</i> , No. 04-15861-A (11th Cir. Jan. 26, 2005).....	6
<i>United States v. Blackman</i> , 66 F.3d 1572 (11th Cir. 1995).	4
<i>Wang v. Ashcroft</i> , 320 F.3d 130 (2d Cir. 2003).....	13

STATUTES

28 U.S.C. § 1291.	viii
28 U.S.C. § 2241.	<i>passim</i>
28 U.S.C. § 2254.	13, 17

28 U.S.C. § 2255. *passim*
42 U.S.C. § 1983. 9

RULES

Fed. R. App. P. 4. viii
Fed. R. Civ. P. 15. 17

STATEMENT OF JURISDICTION

The district court had jurisdiction over this petition under 28 U.S.C. § 2241 pursuant to 28 U.S.C. § 2241(a). The district court dismissed all claims in the petition and entered final judgment on August 25, 2004. Joint Appendix (“JA”) 2. Petitioner-Appellant filed a timely notice of appeal on August 30, 2004. JA 86. *See* Fed. R. App. P. 4(a). This Court has jurisdiction over this appeal dismissing the petition under 28 U.S.C. § 1291.

**STATEMENT OF ISSUES
PRESENTED FOR REVIEW**

1. Whether Petitioner’s claim challenging the jurisdiction of the court that convicted him was properly dismissed when Petitioner had not obtained this Court’s permission to file a second or successive motion under 28 U.S.C. § 2255, and where he did not qualify for relief under the “savings clause” of that Section.
2. Whether Petitioner’s claims challenging conditions of his confinement that do not affect the fact or length of his confinement were properly dismissed because they were not properly raised in a petition under 28 U.S.C. § 2241.
3. Whether the dismissal of Petitioner’s remaining claims should be vacated and the case remanded where those claims are not moot and where they are properly presented in a petition under 28 U.S.C. § 2241.

United States Court of Appeals

FOR THE SECOND CIRCUIT

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Plaintiff-Appellant,

-vs-

WAYNE CHOINSKI,
FEDERAL BUREAU OF PRISONS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE FEDERAL BUREAU OF PRISONS

Preliminary Statement

In 1992, Petitioner-Appellant Sala-Thiel Thompson was convicted of armed bank robbery in the United States District Court for the Southern District of Florida and sentenced to 371 months of imprisonment. Pursuant to this sentence, Thompson was incarcerated in various federal facilities until 2004, when he was transferred to a Connecticut state prison pursuant to an agreement between

Connecticut and the federal Bureau of Prisons. Later that same year, Thompson filed the instant petition under 28 U.S.C. § 2241 complaining primarily about the continuing consequences of an allegedly improper prison disciplinary proceeding, but also challenging the conditions of his confinement in the Connecticut state prison and the jurisdiction of the court that convicted him of bank robbery in 1992. The district court dismissed his petition because Thompson had failed to exhaust his claims regarding the conditions in the Connecticut state prisons by presenting them to the Connecticut state courts before filing his habeas petition.

This Court should affirm in part and vacate and remand in part. This Court should affirm the dismissal of Thompson's challenge to his 1992 conviction. This claim is properly brought only as a motion under 28 U.S.C. § 2255, but Thompson did not (and could not) obtain this Court's approval to file a second or successive § 2255 motion or demonstrate that he should be allowed to file this claim in a § 2241 petition. Similarly, this Court should affirm the dismissal of Thompson's claims that do not affect the fact or length of his confinement because these claims are not properly raised in a habeas petition. With respect to Thompson's remaining claims, however, this Court should vacate and remand to the district court for further proceedings. Further proceedings in the district court would allow clarification of the claims in Thompson's petition and the development of a record to support the ultimate dismissal of his petition.

Statement of the Case

On May 21, 2004, Thompson filed, *pro se*, a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, along with a motion for injunctive relief, and a motion for discovery and an evidentiary hearing. JA 3-73. Most of the claims in Thompson's petition related to his confinement in various federal facilities. Three claims, however, challenged the conditions of his confinement in the Connecticut state prison and a prison disciplinary proceeding there.¹ The final claim in the petition alleged that the conditions of his confinement were unconstitutional because the court that convicted him lacked jurisdiction over his case.

On August 11, 2004, the district court (Peter C. Dorsey, J.) issued an opinion, *sua sponte*, dismissing the petition without prejudice for failure to exhaust state court remedies on the claims challenging the conditions in Connecticut prisons. JA 77-84. The district court entered final judgment on August 25, 2004. JA 2. Still

¹ One of Petitioner's claims, claim 9, relates to a prison disciplinary proceeding, but it is unclear whether it relates to a disciplinary proceeding in federal prison or in state prison. The district court described it as an incident arising from his incarceration in a Connecticut prison, and although Petitioner's brief does not directly dispute this characterization, it suggests that this claim arises from his federal incarceration. *See* Petitioner's Br. at 4. In the absence of any reason to question the district court's characterization of this claim, however, for purposes of this appeal, the government has accepted the district court's interpretation.

proceeding *pro se*, Thompson appealed, and the parties briefed the appeal. On October 31, 2005, this Court directed that counsel be appointed for Thompson (with his consent), and invited the parties to file new briefs in the case. In addition, the Court invited the parties to specifically address the following issues: (1) whether Thompson's claims were mooted by his transfer to a new state facility, (2) whether § 2241 was the proper vehicle for challenging actions which did not affect the length or fact of his confinement, and (3) if the answer to the first two questions was no, whether the district court erred in not affording Thompson the opportunity to amend his petition.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Thompson's Conviction and Relevant Litigation History

In 1992, Thompson was convicted by a jury in the Southern District of Florida of two counts of armed bank robbery and two counts of using a firearm in the commission of a felony. His convictions and sentence were upheld on appeal by the United States Court of Appeals for the Eleventh Circuit. *United States v. Blackman*, 66 F.3d 1572 (11th Cir. 1995).

In 1997, he filed a motion to vacate his conviction under 28 U.S.C. § 2255. That motion was denied and the denial was upheld on appeal by the Eleventh Circuit.

Thompson v. United States, 252 F.3d 438 (11th Cir. 2001) (Table).

In 2004, Thompson filed two petitions captioned as petitions under 28 U.S.C. § 2241 in the United States District Court for the District of Connecticut.² The first petition, filed May 17, 2004 and assigned to Judge Christopher F. Droney, challenged his 1992 conviction, alleging that the court that convicted him lacked jurisdiction and that it was the improper venue in any event. On August 16, 2004, Judge Droney issued an opinion holding that Thompson's challenges to the jurisdiction and venue of the court that convicted him were properly the subject of a motion under 28 U.S.C. § 2255. *Thompson v. Choinski*, No. 3:04CV823 (CFD), 2004 WL 1900428 (D. Conn. Aug. 16, 2004). Judge Droney further held that so construed, he lacked jurisdiction to consider Thompson's petition and transferred it to the United States District Court for the Southern District of Florida. That court ultimately dismissed Thompson's petition for failure to obtain permission to file a second or successive petition. *See Thompson v. United States of America*, Order of Dismissal for Failure to File Authorization Required by 28

² Thompson filed a third petition under 28 U.S.C. § 2241 in the District of Connecticut on June 7, 2005. *See Thompson v. Martin*, No. 3:05CV926 (PCD). The district court dismissed this petition on February 22, 2006, finding that it lacked jurisdiction to consider claims regarding the validity of Thompson's conviction and sentence under § 2241. Thompson appealed, and this Court dismissed the appeal as meritless on October 30, 2006. *See Thompson v. Martin*, No. 06-1181.

U.S.C. § 2244(b)(3), No. 04-22275-CIV-Jordan (S. D. Fl. Oct. 15, 2004). The Eleventh Circuit dismissed Thompson's appeal from this decision on January 26, 2005. *Thompson v. United States of America*, No. 04-15861-A (11th Cir. Jan. 26, 2005).

B. The Instant Petition

The instant petition is Thompson's second petition under § 2241 filed in the District of Connecticut. In this petition, filed May 21, 2004 and assigned to Judge Peter C. Dorsey, Thompson raised various challenges to the execution of his sentence and the conditions of his confinement. As related by Thompson's counsel, most of his claims ultimately arise from a July 1991 prison incident report, and the subsequent prison disciplinary proceeding, relating to a hostage-taking incident in the federal facility where Thompson was incarcerated at the time. Petitioner's Br. at 3-4.

Thompson alleges that the 1991 incident report -- which he believes to be false -- has been the underlying factor motivating multiple decisions and actions by federal prison officials over the years, including security classification decisions, transfer decisions, and decisions in subsequent prison disciplinary proceedings. Thus, Thompson complains about the disciplinary proceedings (claim 1), the misclassification of his security status because of the proceedings (claim 2), the retaliation and the denial of transfers based on the incident report (claim 3), the false disciplinary findings (claim 5), and the retaliatory transfer to a state prison (claim 6). Further,

according to Thompson, the consequences from the 1991 incident report continued after his 2004 transfer to the Connecticut state prison system. According to Thompson, because he was transferred to Connecticut with an improperly elevated security status (as a result of the 1991 incident report), he was denied access to a law library or legal assistance (claim 7), denied access to a kosher diet (claim 8), and subjected to false disciplinary findings (claim 9). *See* Petitioner's Br. at 3-4. In sum, according to Thompson, because of the allegedly false 1991 prison incident report, he was subjected to a continuous and continuing stream of unconstitutional prison conditions.

Finally, Thompson complains about the Bureau's denial of his request for a final decision on a detainer and the resulting increase in security classification (claim 4). Although it is not entirely clear from Thompson's petition, it appears that this claim is unrelated to the 1991 incident report.

On August 11, 2004, the district court *sua sponte* issued an order dismissing Thompson's petition without prejudice and denying Thompson's motions for mandatory and prohibitory injunctive relief and discovery and evidentiary hearings as moot. The court noted that certain of Thompson's claims were more appropriately raised in a civil rights action rather than in a habeas petition and suggested that he file separate civil rights and habeas actions to properly raise his claims. JA 78-80. In the event that the claims were all properly cognizable under § 2241, however, the court held that his petition must be dismissed for failure to exhaust state court remedies with

respect to some of the claims. JA 81-83. Specifically, according to the district court, because part of Thompson's petition (claims 7-9) challenged conditions of confinement in a Connecticut state prison, Thompson had to present those claims to Connecticut state courts in the first instance. And because Thompson's petition contained both exhausted and unexhausted claims, the district court dismissed the petition without prejudice to refiling after he exhausts his state court remedies. JA 83 (citing *Pliler v. Ford*, 542 U.S. 225 (2004)).

Thompson, appearing *pro se*, appealed the dismissal of his petition. After receiving briefing, this Court ordered that counsel be appointed to represent Thompson (with his consent), and invited the parties to file new briefs in this case. The Court specifically invited the parties to address the following issues:

(1) Whether Thompson's action against the BOP is rendered moot by his transfer to a different state correctional facility, where (he has alleged) he has and will continue to suffer adverse consequences from the BOP's issuance of a false disciplinary report, from the BOP's classification errors, and from the BOP's transfer of him into a state correctional system.

(2) If the action against BOP is not moot, whether § 2241 is a proper vehicle for challenging actions that do not affect the fact or length of Thompson's confinement.

(3) If the action against BOP is not moot, and if § 2241 is not a proper vehicle for the challenges to the BOP's

conduct that does not affect the fact or length of Thompson's confinement, whether the district court erred in not affording Thompson the opportunity to amend his petition.

C. Thompson's Civil Rights Complaint

On December 9, 2004, Thompson filed a civil rights complaint against various state and federal officials under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), raising claims substantially similar to those raised in the instant petition. *See Thompson v. Lanz*, No. 3:04CV2084 (AWT). This case is still pending.

SUMMARY OF ARGUMENT

I. Thompson's tenth claim was properly dismissed because it was an improper collateral attack on his 1992 conviction. Because Thompson's claim attacks the jurisdiction of the court that convicted him, that claim is not properly the subject of a § 2241 petition, but rather must be raised in a motion under 28 U.S.C. § 2255. Although § 2255 contains a "savings clause" that allows certain claims that should be brought in a § 2255 motion to be raised in a § 2241 petition, Thompson makes no argument here that his claim falls within that savings clause. Furthermore, there is no basis for allowing him to proceed with his tenth claim as a motion under § 2255. He has never obtained this Court's permission to file a second or successive § 2255 motion, and even in this Court does not argue that he would meet the standard for doing so.

II. The district court properly dismissed three of Thompson's claims (claims 4, 7, and 8) that were not properly presented in a habeas petition. These claims do not call into question either the fact of his conviction or the length of his sentence, and as such, they do not sound in habeas. Because he cannot pursue these claims in a petition under 28 U.S.C. § 2241, and because he has already included these claims in a pending civil rights complaint, there is no need to remand these claims to allow Thompson to amend his petition.

III. This Court should vacate the dismissal of the remaining claims and remand for further proceedings. Thompson's remaining claims are properly presented in a petition under 28 U.S.C. § 2241, and to the extent they allege continuing consequences from the Bureau's decisions, they were not rendered moot by Thompson's transfer to a new state facility. Although the government believes that Thompson's claims ultimately warrant dismissal, a remand is warranted to allow the development of a record to support that contention.

ARGUMENT

I. THOMPSON’S CHALLENGE TO HIS 1992 CONVICTION WAS PROPERLY DISMISSED BECAUSE HE CANNOT RAISE THIS CLAIM IN A PETITION UNDER 28 U.S.C. § 2241 AND DOES NOT MEET THE STANDARDS FOR FILING A SECOND OR SUCCESSIVE MOTION UNDER 28 U.S.C. § 2255

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts and Proceedings above.

B. Governing Law and Standard of Review

As a general rule, when a federal prisoner files a collateral attack on his conviction or sentence, he must file that attack as a motion under 28 U.S.C. § 2255. *Jiminian v. Nash*, 245 F.3d 144, 147 (2d Cir. 2001) (“[A]s a general rule, federal prisoners must use § 2255 instead of § 2241(c)(3) to challenge a sentence as violating the Constitution or laws of the United States.”). *See also Adams v. United States*, 372 F.3d 132, 134 (2d Cir. 2004) (holding that a challenge to the jurisdiction of the convicting court is appropriately brought under § 2255).

Although § 2255 provides a mechanism for collateral attacks on federal convictions and sentences, it places “gatekeeping” limits on a federal prisoner’s ability to file multiple § 2255 motions. Specifically, a prisoner may

only maintain a second or successive motion for relief under § 2255 if this Court certifies the motion to contain

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) 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.

Section 2255 also contains a “savings clause” that permits a prisoner to seek habeas corpus relief under 28 U.S.C. § 2241 if the remedy available under § 2255 is “inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255. The remedy under § 2255 is not “inadequate or ineffective, such that a federal prisoner may file a § 2241(c)(3) petition, simply because a prisoner cannot meet the . . . gatekeeping requirements, provided that the claim the prisoner seeks to raise was previously available on direct appeal or in a prior § 2255 motion.” *Jiminian*, 245 F.3d at 147-48.

“In reviewing a district court’s denial of a habeas petition brought pursuant to 28 U.S.C. § 2241, [this Court] examine[s] both the merits of the petition and questions pertaining to subject matter jurisdiction *de novo*.” *Wang*

v. Ashcroft, 320 F.3d 130, 139-40 (2d Cir. 2003). This Court may affirm the judgment below on any grounds supported by the record.³ *In re Certain Underwriters*, 294 F.3d 297, 302 (2d Cir. 2002).

C. Discussion

The tenth claim in Thompson’s petition, raising a collateral attack on his 1992 conviction for armed bank

³ The district court dismissed the petition because Thompson had failed to exhaust state court remedies with respect to those claims challenging the conditions of his confinement in state facilities. The government, however, is unaware of any authority that would require exhaustion of state court remedies in these circumstances. A federal prisoner who files a § 2241 petition to challenge prison conditions must exhaust administrative remedies, *Carmona v. United States Bureau of Prisons*, 243 F.3d 629, 634 (2d Cir. 2001), and Thompson alleges here that he has exhausted the relevant state prison system administrative remedies. Although a state prisoner challenging his conviction or sentence under 28 U.S.C. § 2254 must exhaust *state court* remedies, *see* 28 U.S.C. § 2254(b)(1)(A), Thompson is not subject to this requirement because he is not a “person in custody pursuant to the judgment of a State court.” He is a person in custody pursuant to the judgment of a *federal* court. Therefore, if a federal court were to grant relief in this case, it would not upset any state court judgment. On these facts, the exhaustion requirement, designed as a matter of comity, has no role. The government sees no reason to require Thompson, a federal prisoner, who has done (or at least alleged that he has done) what would ordinarily be required of him, to go to the state courts merely because the Bureau has elected to house him in a state prison.

robbery, *see* Petitioner's Br. at 14, was properly dismissed. This claim is not the proper subject of § 2241 petition, but rather must be raised through a motion under § 2255. *Adams*, 372 F.3d at 134 (holding that a challenge to the jurisdiction of the convicting court is appropriately brought under § 2255). And although § 2255 contains a savings clause that allows federal prisoners to bring claims in a § 2241 petition when the remedy under § 2255 is "inadequate or ineffective," Thompson made no effort in the district court -- and makes no effort here -- to demonstrate that he falls within this savings clause.

Finally, there is no basis for holding that the district court should have allowed Thompson to pursue this claim under § 2255. Because he has already had a § 2255 motion decided on the merits, *see Thompson v. United States*, 252 F.3d 438 (11th Cir. 2001) (Table), he cannot pursue another motion under that Section without this Court's permission. He did not seek that permission before he filed the instant petition, and makes no effort now to demonstrate that he would meet the standard to obtain that permission. In the absence of any showing that he meets the legal standard for filing a second or successive petition, Thompson's tenth claim must be dismissed.

II. THOMPSON'S CHALLENGES TO CONDITIONS OF HIS CONFINEMENT THAT DO NOT AFFECT THE FACT OR LENGTH OF HIS CONFINEMENT WERE PROPERLY DISMISSED

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law

1. The Proper Scope of a Habeas Petition

When a prisoner challenges the fact of his conviction or the duration of his sentence, the writ of habeas corpus is his “sole federal remedy.” *Peralta v. Vasquez*, ___ F.3d ___, No. 04-2822-pr, 2006 WL 2948816 *3 (2d Cir. Oct. 17, 2006) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). *See also Nelson v. Campbell*, 541 U.S. 637, 643 (2004) (claims challenging fact of conviction or duration of sentence fall within “core” of habeas corpus and are not cognizable as civil rights action). Thus, for example, challenges to prison disciplinary proceedings that resulted in the loss of good-time credits necessarily affect the length of confinement and are properly raised in a habeas petition. *Carmona v. United States*, 243 F.3d 629, 632 (2d Cir. 2001). Conversely, a civil rights action is proper when a prisoner challenges the conditions of his confinement that do not affect the fact or length of his

custody. *Peralta*, 2006 WL 2948816 at *3 (quoting *Preiser*, 411 U.S. at 499); *Nelson*, 541 U.S. at 643 (“By contrast, constitutional claims that merely challenge the conditions of a prisoner’s confinement, whether the inmate seeks monetary or injunctive relief, fall outside of [the] core [of habeas corpus] and may be brought pursuant to a [civil rights action] in the first instance.”).

As this Court noted in *Jenkins v. Haubert*, 179 F.3d 19, 23 (2d Cir. 1999), dicta in the Supreme Court’s *Preiser* decision suggested that federal habeas corpus might be available to prisoners who challenged decisions imposing conditions of confinement that had no impact on the fact or length of a prisoner’s confinement. *See Preiser*, 411 U.S. at 499 (“When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal.”). And as the *Jenkins* Court noted, this dicta generated considerable confusion. 179 F.3d at 23.

In *Muhammad v. Close*, 540 U.S. 749 (2004), the Supreme Court clarified the proper scope of the writ of habeas corpus. In that case, a state prisoner filed a civil rights claim seeking damages for time he spent in prehearing detention for a prison disciplinary proceeding. Because he did not seek expungement of the disciplinary proceeding or any other relief that “could be construed as seeking a judgment at odds with his conviction or with the State’s calculation of time to be served in accordance with the underlying sentence,” the Supreme Court found that he had “raised no claim on which habeas relief could have

been granted on any recognized theory.”⁴ 540 U.S. at 754-55. In other words, unless a claim necessarily requires a judgment inconsistent with the prisoner’s underlying conviction or with the calculation of the length of the sentence, the claim does not lie in habeas.

2. The Amendment of Habeas Petitions

Amendments to habeas petitions are governed by Federal Rule of Civil Procedure 15(a). *See Littlejohn v. Artuz*, 271 F.3d 360, 363 (2d Cir. 2001) (amendment to a motion under § 2254 to be governed by Rule 15). Under that Rule, a party may amend his pleading “once as a matter of course at any time before a responsive pleading is served,” or “by leave of court or by written consent of the adverse party.” Fed. R. Civ. P. 15(a).

Although Rule 15 directs that “leave [to amend] shall be freely given when justice so requires,” Fed. R. Civ. P. 15(a), this Court has made clear that a court may deny leave to amend when the amendment would be futile. *Aetna Cas. & Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566, 603-604 (2d Cir. 2005).

⁴ In the course of this holding, the Court acknowledged its language in *Preiser*, but expressly stated that it “ha[d] never followed the speculation in [*Preiser*]” that habeas might be available for challenges to prison conditions that had no impact on the fact or length of confinement. 540 U.S. at 751 n.1.

C. Discussion

At least three of Thompson's claims do not sound within the core of habeas and are more properly pursued as civil rights claims. Specifically, in claims 7 and 8, Thompson complains about his lack of access to a law library and his lack of access to kosher food. Even if, as suggested by Thompson's lawyer, these allegedly unconstitutional conditions of confinement are a direct result of the 1992 prison disciplinary proceeding, these conditions do not affect the fact or length of Thompson's confinement. As such, they are not properly raised in a habeas petition. Similarly, in claim 4, Thompson alleges that the Bureau failed to issue a final decision on his detainer and thus improperly raised his security classification. This claim, too, does not affect the fact or length of his confinement and is therefore not properly raised in a § 2241 petition. *Muhammad*, 540 U.S. at 754-55 (because his suit "could not . . . be construed as seeking a judgment at odds with his conviction or with the State's calculation of time to be served in accordance with the underlying sentence" petitioner had not raised a claim that sounded in habeas).

In sum, Thompson's claims 4, 7, and 8 do not call into question his underlying conviction or the calculation of the length of his sentence. In other words, a judgment in his favor on these claims would not change the fact or length of his confinement. Thus, these claims were properly dismissed from Thompson's habeas petition.

In addition, there is no need to remand these claims to allow Thompson the opportunity to amend his petition. Because these claims cannot be raised in a petition under § 2241 at all, any amendment of these claims would be futile. *Aetna Cas. & Sur. Co.*, 404 F.3d at 603-604 (district court may deny leave to amend when amendment would be futile). In any event, Thompson will not be denied the opportunity to pursue these claims because he has already included them in a pending civil rights complaint. *Thompson v. Lanz*, No. 3:04CV2084 (AWT).

**III. THE DISMISSAL OF THOMPSON'S
REMAINING CLAIMS SHOULD BE
VACATED AND THE CASE REMANDED
FOR FURTHER PROCEEDINGS**

The dismissal of Thompson's remaining claims -- claims 1, 2, 3, 5, 6, and 9 -- should be vacated and the case remanded for further proceedings. These claims were not mooted by Thompson's transfer to a new state facility, and they are properly presented in a petition under 28 U.S.C. § 2241. Although the government believes that these claims ultimately warrant dismissal, at this time, the case should be remanded for further development of the record.

A. Thompson’s remaining claims, based on allegations of ongoing injuries, were not rendered moot by his transfer to a new state facility

1. Relevant Facts

In May 2004, when Thompson filed his petition, he was incarcerated in the Northern Correctional Institution, a Connecticut state facility in Somers, Connecticut. On September 10, 2004, Thompson was transferred from Northern, a level 5 maximum security facility, to Cheshire Correctional Institution, a level 4 facility in the State of Connecticut. Thompson was subsequently transferred to different facilities within the state, but since April 2005, he has been incarcerated in Cheshire.

2. Governing Law

Article III of the Constitution limits the jurisdiction of the federal courts to “cases” or “controversies.” U.S. Const., Art. III, § 2. As the Supreme Court has repeatedly explained, “[t]his case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate The parties must continue to have a personal stake in the outcome of the lawsuit.” *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990)). In other words, the plaintiff “must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.” *Id.* (quoting *Lewis*, 494 U.S. at 477).

3. Discussion

Thompson's transfer to a new state facility does not moot his action against the Bureau to the extent he alleges continuing consequences arising from the Bureau's actions. As characterized by Thompson's brief, he has suffered, and continues to suffer, adverse consequences -- in the form of, *inter alia*, false disciplinary findings, improper security classifications, and retaliatory prison transfers -- from the Bureau's actions. Petitioner's Br. at 10-11. Because he alleges that he continues to suffer actual injuries from the Bureau's decisions, his transfer within the Connecticut state prison has no impact on most of his claims.

Two of Thompson's claims, however, were potentially rendered moot by his transfer from Northern to Cheshire. In claim 7, Thompson complains about the denial of his access to a law library at Northern and in claim 8, he complains about the denial of his access to kosher food at Northern. Even if Thompson was denied access to a law library and kosher food at Northern because of the 1991 incident report, there is no indication in Thompson's brief that these conditions continue today in Cheshire. Thus, while there might be continuing consequences for Thompson in the state prison system (primarily in the form of his security classification, *see* Petitioner's Br. at 10), Thompson has made no showing that the precise consequences he complains about in claims 7 and 8 continue to aggrieve him in Cheshire. In other words, if Thompson's transfer from Northern to Cheshire provided

him access to a law library and to kosher food, then claims 7 and 8 are now moot.

Although it is conceivable that Thompson could amend these claims to add facts demonstrating ongoing injury on these claims, there is no need to allow amendment here. As described above, these claims do not sound in habeas, and thus any amendment of these claims in this habeas petition would be futile. Furthermore, Thompson is already pursuing these claims in his pending civil rights complaint. *Thompson v. Lanz*, No. 3:04CV2084 (AWT).

B. Thompson's remaining claims, challenging the length of his confinement, were properly presented in a petition under 28 U.S.C. § 2241

1. Relevant Facts

The relevant facts are set forth above.

2. Governing Law

As described more completely above, *see supra* at Part II.B.1., a prisoner's claim that calls into question the fact or length of his confinement is properly presented in a habeas petition. *Peralta*, 2006 WL 2948816 at * 3.

3. Discussion

As clarified by Thompson's counsel, Thompson's central complaint relates to the imposition of sanctions and

the continuing consequences from an allegedly improper prison disciplinary proceeding. Petitioner's Br. at 13. The allegedly false incident report and the resulting disciplinary proceeding ultimately led to Thompson's loss of good time credits, and thus a judgment in his favor on his claims that would require overturning the results of the disciplinary proceeding would necessarily affect the fact or length of his confinement.⁵ See Petition, JA 63 (seeking expungement of incident report). These claims fall within the core of habeas corpus, *Carmona*, 243 F.3d at 632, and were properly raised in a petition under 28 U.S.C. § 2241.

In addition, this Court has upheld the use of habeas corpus to raise claims challenging the location of confinement, see *Levine v. Apker*, 455 F.3d 71, 78 (2d Cir. 2006), and thus Thompson's claims challenging the location of his confinement are properly raised in a § 2241 petition.

C. The dismissal of Thompson's remaining claims should be vacated and the case remanded for further proceedings

On the current record, the dismissal of Thompson's remaining claims (claims 1, 2, 3, 5, 6, and 9) should be

⁵ Although Thompson's brief does not break down his claims, it appears from the petition that claims 1, 2, 3, 5, 6, and 9 all ultimately rest on validity of the 1991-92 prison disciplinary proceeding. In other words, for Thompson to succeed on those claims, he would need to overturn the results of that proceeding.

vacated and the case remanded for further proceedings. Although the government believes that it will ultimately be able to present arguments to support the dismissal or denial of all of Thompson's claims, a remand for further proceedings would allow clarification of those claims and the development of a proper record for dismissal.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing claims 4, 7, 8, and 10 should be affirmed. The dismissal of the remaining claims should be vacated and the case remanded for further proceedings.

Dated: November 3, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read 'Alan M. Soloway', with a long horizontal stroke extending to the right.

ALAN M. SOLOWAY
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

ADDENDUM

28 U.S.C. § 2241. Power to grant writ.

- (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

- (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

- (c) The writ of habeas corpus shall not extend to a prisoner unless --
 - (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

 - (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

 - (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

 - (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done

or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

- (5) It is necessary to bring him into court to testify or for trial.

.....

28 U.S.C. § 2254. State custody; remedies in Federal Courts

- (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
- (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that --
 - (A) the applicant has exhausted the remedies available in the courts of the State; or
 - (B)(i) there is an absence of available State corrective process; or

- (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
- (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
- (3) A state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

.....

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the filed and records of the case conclusively show that the prisoner is entitled to no relief,

the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, 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, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

...

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain --

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Federal Rule of Civil Procedure 15(a)

a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended

pleading, whichever period may be the longer, unless the court otherwise orders.