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United States Court of Appeals
Tenth Circuit

April 17, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRYCE FRANKLIN,

Petitioner - Appellant,

v.

ALISHA LUCERO, HECTOR BALDERAS,

Respondents - Appellees.

No. 22-2125
(D.C. No. 1:18-CV-01156-JB-JHR)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ, BALDOCK,** and **McHUGH**, Circuit Judges.

Petitioner Bryce Franklin, a New Mexico Department of Corrections ("NMDOC") prisoner proceeding pro se,[1] filed a 28 U.S.C. § 2254 petition seeking the expungement of a prison disciplinary conviction and return of good time credits revoked by NMDOC for the alleged possession of escape paraphernalia. Mr. Franklin claimed NMDOC violated his right to due process by unjustifiably not producing surveillance video footage

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Mr. Franklin is proceeding pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

Mr. Franklin requested for his disciplinary hearing. Mr. Franklin claimed that video footage of his cell from the alleged time of the search and discovery of the escape paraphernalia would prove no search ever occurred, no paraphernalia was found, and NMDOC's misconduct report was based upon a fabrication. Mr. Franklin also submitted a discovery motion requesting production of the surveillance video.

The district court, treating Mr. Franklin's action as a proceeding under 28 U.S.C § 2241, granted relief in the form of a conditional order. The court set aside Mr. Franklin's disciplinary adjudication and sanction, remanded for NMDOC to hold a new hearing within ninety days, and ordered Mr. Franklin's good time credits be restored if NMDOC failed to hold a hearing within ninety days that complied with *Wolff v. McDonnell*.[2] The court denied Mr. Franklin's discovery motion, determining that requiring NMDOC to hold a hearing compliant with *Wolff* adequately addressed Mr. Franklin's concerns about the video footage. The court denied Mr. Franklin a certificate of appealability ("COA").

Mr. Franklin petitions this court for a COA, arguing reasonable jurists could disagree as to whether the district court's decision violated his constitutional rights by (1) fashioning an inadequate remedy in the form of a conditional order, rather than unconditional restoration of his good time credits and expungement of the disciplinary charge and (2) issuing a final order while his motion for discovery of potentially

[2] 418 U.S. 539 (1974).

exculpatory video footage was pending. Concluding no reasonable jurist could debate the district court's decision on either issue, we deny Mr. Franklin's petition for a COA.

I. BACKGROUND

A. Factual History

On February 2, 2017, NMDOC charged Mr. Franklin with possession of escape paraphernalia and possession of dangerous contraband. NMDOC alleged that through a search of Mr. Franklin's cell, officers discovered multiple security sensitive documents "that an inmate [is] not authorized to possess" as they are "considered to be a threat to the security of the institution." ROA at 24. Specifically, NMDOC claimed Mr. Franklin possessed "an original copy of a transport order, a copy of his [NMDOC] Escape Flyer and a copy of a confidential memorandum that is directly related to an ongoing investigation involving staff." *Id.* According to the disciplinary report, NMDOC officers questioned Mr. Franklin about these security sensitive documents, and Mr. Franklin refused to divulge how he acquired them.

NMDOC held a disciplinary hearing on February 8, 2017. The hearing officer recommended dismissal of the possession of escape paraphernalia charge based on a procedural error, namely that the disciplinary report identified multiple witnesses but no witness statements were attached to the report. NMDOC's deputy warden overturned the hearing officer's recommendation of dismissal and "order[ed] a new hearing/another investigation based on the severity of the charges." *Id.* at 26. NMDOC prepared a new disciplinary report that included witness statements from the three officers who were

listed as witnesses in the original report, and, based on the revised report, conducted a second disciplinary hearing. At the hearing, Mr. Franklin raised several motions to dismiss the disciplinary charge. Specifically, Mr. Franklin argued the charge should be dismissed because the disciplinary report and witness statements alleged the search of Mr. Franklin's cell and recovery of the security sensitive documents took place at 1:00 p.m., but the evidence log showed the documents were recovered at 10:40 a.m., several hours prior to the alleged time of the search. Mr. Franklin contended he was not in his cell at 1:00 p.m., the officers who allegedly completed the search were not in his unit at 1:00 p.m., and accordingly, the alleged search resulting in recovery of the sensitive documents never actually occurred. Mr. Franklin also moved for dismissal based on "the lack of evidence collected after/during the time of the incident/shakedown." *Id.* at 34.

The hearing officer denied Mr. Franklin's motions for dismissal of the charge, concluding the discrepancy between the time the evidence was logged and the time the disciplinary report stated the search took place was a clerical error that NMDOC corrected in the second investigation. The hearing officer found Mr. Franklin guilty of possession of escape paraphernalia and, as punishment, deducted ninety days of Mr. Franklin's good time credits, in addition to restricting his telephone and commissary privileges for a period of ninety days. Mr. Franklin appealed the hearing officer's decision to the warden, but the warden denied his appeal. Mr. Franklin sought review of the warden's decision with the Secretary of NMDOC, who also denied his appeal.

B. Procedural History

Mr. Franklin filed a petition for a writ of habeas corpus in New Mexico State Court in the Eighth Judicial District Court, alleging due process violations with his prison disciplinary hearing. The court summarily dismissed Mr. Franklin's petition, and the Supreme Court of New Mexico denied certiorari. Mr. Franklin then filed the habeas corpus petition at issue with the United States District Court for the District of New Mexico using a form titled, in part, "Petition Under 28 U.S.C. § 2254." *Id.* at 6. Mr. Franklin claimed NMDOC violated his right to due process by refusing to produce security video footage of the time and location of the alleged search. Mr. Franklin alleged the video footage would have revealed the disciplinary report was based on a sham and that the hearing officer had no justification for not producing the evidence. In his petition, Mr. Franklin asked the court to "expunge his disciplinary conviction, declare prison officials denied [him] due process[,] and restore" his lost good time credits. *Id.* at 20.

Pursuant to 28 U.S.C. §§ 636(b)(1)(B), (b)(3), the district court referred the matter to a magistrate judge to conduct any hearings necessary, conduct legal analysis, and submit a recommendation to the district court that included analysis, findings of fact, and ultimate disposition. The magistrate judge ordered NMDOC to respond to Mr. Franklin's petition and informed both parties that the district court would be construing Mr. Franklin's petition under 28 U.S.C. § 2241 because the petition "attack[ed] 'the execution of a sentence,' including 'the deprivation of good-time credits and other prisoner disciplinary matters.'" Order to Answer at 1, *Franklin v. Lucero*, No. 1:18-cv-

01156-JB-JHR, Doc. 12 (D.N.M. July 6, 2020) (quoting *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997)).

NMDOC responded to Mr. Franklin's petition, arguing the petition should be dismissed for (1) "abuse of the writ," or (2) because "Mr. Franklin received all the process he was due in the course of the challenged disciplinary proceeding." ROA at 64, 67. After Mr. Franklin's petition had been pending for over three years, Mr. Franklin filed a motion asking the court to either set an evidentiary hearing or rule on the petition. NMDOC countered that no evidentiary hearing was necessary, and the district court could resolve Mr. Franklin's petition based on the pleadings. The magistrate judge then ordered Mr. Franklin and NMDOC to submit additional briefing addressing (1) "whether harmless error analysis applie[d] to the alleged due process violation of refusal to produce videotapes," and (2) whether NMDOC's refusal to produce the videotapes was a harmless error. *Id.* at 289. Mr. Franklin and NMDOC agreed that harmless error analysis applied to the alleged due process violation, but they disagreed about whether NMDOC's failure to produce the video tapes was a "harmless error."

Mr. Franklin submitted a motion for leave to conduct discovery, requesting the court order NMDOC to produce the security video footage of his cell from the alleged time of the search and a recording of his disciplinary hearing. NMDOC argued the court should deny Mr. Franklin's motion because (1) the video footage would not be exculpatory, (2) the district court ought not expand the record beyond the record in Mr. Franklin's state habeas proceedings; and (3) Mr. Franklin was aware from his other

habeas cases that NMDOC only stored video footage for a limited period of time and the video from 2017 was likely no longer available.

The magistrate judge submitted Amended Proposed Findings and Recommended Disposition, ("PFRD") concluding (1) "[Mr.] Franklin's right to call witnesses and present documentary evidence was infringed by the Respondents' unjustified refusal to produce and review the videotapes," *id.* at 327; (2) the violation was not harmless as the video footage may have been exculpatory; and (3) NMDOC's "abuse of the writ" argument failed when this was Mr. Franklin's first petition filed based on the alleged wrongdoing. The magistrate judge relied on the Supreme Court's analysis in *Wolff v. McDonnell*, 418 U.S. 539, 556–58 (1974), to determine NMDOC needed to allow Mr. Franklin to present documentary evidence in his favor or provide a justification for not producing the evidence. Based on these findings, the magistrate judge recommended the district court "SET ASIDE the disciplinary adjudication and sanction and REMAND the matter to the facility for a new hearing within ninety (90) days of the District Judge's Order adopting these findings." ROA at 332. The magistrate judge further recommended that "[i]f the facility fails to hold a new hearing that complies with *Wolff* . . . that the [c]ourt RESTORE [Mr.] Franklin's good time credits." *Id.* Finally, the magistrate judge recommended the district court dismiss Mr. Franklin's discovery motion as moot.

Mr. Franklin objected to the PFRD, arguing the magistrate judge erred in recommending a remand to the facility for a new hearing because (1) the magistrate judge should have first addressed Mr. Franklin's pending motion for discovery, to determine if

NMDOC still had the video footage; and (2) NMDOC had demonstrated it was not capable of holding a fair hearing. The district court overruled Mr. Franklin's objections. First, the court concluded it was speculative whether the video footage continued to exist and that the PFRD accounted for any potential issues in the hearing by providing that Mr. Franklin's good time credits would be restored if NMDOC failed to complete a fair hearing within ninety days in compliance with *Wolff*. Accordingly, if NMDOC violated *Wolff* again in a subsequent hearing, by failing to produce the videotapes or to provide a sufficient justification for not producing the videotapes, Mr. Franklin would be entitled to get his good time credits restored. Second, the district court determined Mr. Franklin had not met the high bar of showing NMDOC was incapable of conducting a fair hearing. Third, the district court determined Mr. Franklin had waived any argument that the district court should directly restore his good time credits instead of remanding to the facility by not raising this argument prior to the PFRD. The district court adopted the PFRD in full and "decline[d] to certify [its] order for appeal." *Id.* at 376. The court then issued a "[f]inal [j]udgment . . . (i) set[ting] aside the disciplinary adjudication and sanction, and (ii) remand[ing] the matter to the facility to hold a new hearing within ninety days." *Id.* at 377.

Mr. Franklin responded to the district court's order by filing an application for a COA with this court, arguing reasonable jurists could disagree as to whether the district court's order violated his constitutional rights. Based on Mr. Franklin's application for a COA, NMDOC filed a motion requesting an abeyance of the part of the district court's

order directing NMDOC to conduct a new hearing until the Tenth Circuit resolved Mr. Franklin's COA request. As of the date of our order, the district court has not ruled on NMDOC's motion. Therefore, it appears NMDOC complied with the district court's order adopting the PFRD and conducted the hearing within ninety days of that order, and Mr. Franklin has not advised us otherwise. Accordingly, we focus on only the issues presented by Mr. Franklin in support of his request for a COA: (1) whether reasonable jurists could debate that Mr. Franklin had a constitutional right to a remedy other than a remand to NMDOC for a new hearing; and (2) whether reasonable jurists could debate the district court's denial of Mr. Franklin's motion for discovery.[3]

II. JURISDICTION

Following Mr. Franklin's application for a COA, we ordered both parties to submit briefing addressing whether the district court's decision was "a final and appealable order." Order at 2, *Franklin v. Lucero*, No. 22-2125 (10th Cir. Oct. 25, 2022). Having reviewed Mr. Franklin's and NMDOC's briefs on the issue, we determine that the district court's order was final and appealable, and accordingly we exercise jurisdiction over Mr. Franklin's application for a COA.

A conditional order is final and appealable, so long as "it is a final disposition of the disputed matters based on the court's understanding of the law and on its findings of

[3] If NMDOC did not conduct a hearing on remand within ninety days of the district court's order, this order does not create any law of the case precluding Mr. Franklin from obtaining relief from the district court on that ground.

fact." *Allen v. Hadden*, 738 F.2d 1102, 1106 (10th Cir. 1984). To be "final for purposes of appellate review under 28 U.S.C. § 1291," conditional orders must contain an "affirmative statement of the relief granted or to be granted." *Id.* "For example, a conditional order that directs the state to retry the defendant within sixty days or to release him is final." *Alexander v. U.S. Parole Comm'n*, 514 F.3d 1083, 1087 (10th Cir. 2008); *see also Burton v. Johnson*, 975 F.2d 690, 691, 694 (10th Cir. 1992) (concluding, in context of habeas proceeding under 28 U.S.C. § 2254, conditional order that ordered state to retry petitioner within ninety days or release him was "an appealable final judgment" and that, accordingly, state waived any challenge to remedy by not appealing until after the ninety days had passed).

Here, the district court set aside Mr. Franklin's disciplinary adjudication and sanction and "remand[ed] to the facility for a new hearing within ninety days." ROA at 376. The district court also adopted the magistrate judge's recommendation that Mr. Franklin's good time credits be restored if the facility failed to hold a new hearing that complies with *Wolff* within ninety days. Accordingly, under the district court's order, NMDOC had ninety days to hold a new hearing that complies with *Wolff*, and if NMDOC failed to hold a hearing compliant with *Wolff*, NMDOC was required to restore Franklin's good time credits. This is an "affirmative statement of the relief granted or to be granted." *Allen*, 738 F.2d at 1106. Accordingly, the district court's order is final and appealable, and we exercise jurisdiction under 28 U.S.C. § 1291.

NMDOC argues this court lacks jurisdiction over Mr. Franklin's application for a COA because the district court retains jurisdiction over NMDOC's compliance with its order. We agree with NMDOC that the district court retains jurisdiction over any challenges Mr. Franklin may bring related to NMDOC's compliance with its order. *See Jensen v. Pollard*, 924 F.3d 451, 454 (7th Cir 2019) ("When a district court issues a conditional habeas writ, it retains jurisdiction to determine compliance."); *see also Eaton v. Pacheco*, 931 F.3d 1009, 1029 (10th Cir. 2019) (noting earlier remand to district court to address issue of State's compliance with conditional writ in first instance); *Burton*, 975 F.2d at 694 (10th Cir. 1992) (determining district court had jurisdiction over execution of its conditional order). But Mr. Franklin does not allege NMDOC failed to comply with the district court's order. Rather, Mr. Franklin argues the district court erred by issuing a conditional order as opposed to an unconditional order to restore his good time credits. Accordingly, Mr. Franklin's application for a COA challenges a final and appealable decision by the district court.

III. DISCUSSION

We start by reviewing the standard for issuing a COA. Applying this standard to Mr. Franklin's claims, we determine no reasonable jurist could debate the district court's selection of remedy or denial of Mr. Franklin's discovery motion. Accordingly, we deny the COA in full.

A. *Certificate of Appealability Standard*

Because Mr. Franklin is a New Mexico prisoner and his detention arises from a conviction in New Mexico courts, Mr. Franklin must obtain a COA to appeal the denial of his § 2241 petition.[4] *See Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir. 2000); 28 U.S.C. § 2253(c)(1)(A). "To receive a COA, [Mr. Franklin] must make 'a substantial showing of the denial of a constitutional right.'" *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1050 (10th Cir. 2017) (quoting 28 U.S.C. § 2253(c)(2)). To make this substantial showing, Mr. Franklin needs to demonstrate "reasonable jurists would find the district court's assessment of [his] constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We limit out analysis at the COA stage "'to a threshold inquiry into the underlying merit of [Mr. Franklin's] claims,' and ask 'only if the [d]istrict

[4] Although Mr. Franklin initially styled his habeas corpus petition as arising under 28 U.S.C. § 2254, the district court informed both parties that Mr. Franklin's petition would be construed under 28 U.S.C. § 2241 because the petition "attack[ed] 'the execution of a sentence,' including 'the deprivation of good-time credits and other prisoner disciplinary matters.'" Order to Answer at 1, *Franklin v. Lucero*, No. 1:18-cv-01156-JB-JHR, Doc. 12 (D.N.M. July 6, 2020) (quoting *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997)). Mr. Franklin did not object to this construction of his filing, and the parties and the district court proceeded by treating Mr. Franklin's petition as arising under 28 U.S.C. § 2241. Because the district court correctly construed Mr. Franklin's petition as a § 2241 petition, and neither party has disputed this, we also treat Mr. Franklin's petition as a § 2241 petition in our analysis of his application for a COA. *See Hamm v. Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2002) (determining district court properly construed petition fashioned as § 2254 petition as a petition under § 2241 when the petitioner "was challenging the execution of his sentence rather than the validity of his conviction").

[c]ourt's decision was debatable.'" *Buck v. Davis*, 580 U.S. 100, 116 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 348 (2003)).

Mr. Franklin requests a COA based on two claims: (1) the district court should have issued an unconditional writ, rather than a conditional writ and (2) the district court erred by denying his motion for discovery.[5] On appeal, "[w]e review the district court's formulation of an appropriate habeas corpus remedy for abuse of discretion." *Fontenot v. Crow*, 4 F.4th 982, 1082 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2777 (2022). We also review the district court's denial of a motion for discovery for an abuse of discretion. *See Curtis v. Chester*, 626 F.3d 540, 549 (10th Cir. 2010). Accordingly, we will grant Mr. Franklin's COA request only if reasonable jurists could debate whether the district court's formulation of a remedy, or denial of Mr. Franklin's motion for discovery, were abuses of its discretion. *See United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015) ("[T]he COA test for appeal . . . should coincide with the standard of review the court will apply during the appeal."); *see also Fleming v. Evans*, 481 F.3d 1249, 1257 (10th Cir. 2007) (deciding to issue COA where "reasonable jurists could debate whether the [d]istrict [c]ourt abused its discretion in rejecting equitable tolling"); *Zani v. U.S.*

[5] Specifically, Mr. Franklin alleges the district court "erred by ruling on [his] petition without first ruling on his motion for production of video footage." Appellant's Br. & App. for COA at 7. But Mr. Franklin's argument rests on an inaccurate description of the district court's order. The district court did rule on Mr. Franklin's motion for discovery, denying this motion as moot. Construing Mr. Franklin's pro se pleadings liberally, *see James*, 724 F.3d at 1315, we interpret this claim as challenging the district court's denial of Mr. Franklin's discovery motion.

Marshals, 351 F. App'x 299, 301 (10th Cir. 2009) (unpublished) (when reviewing application for COA based on claim that would be reviewed for abuse of discretion, assessing whether "reasonable jurists could . . . debate that the district court did not abuse its discretion in declining to transfer the case").

B. *Analysis*

1. Adequacy of Remedy

Mr. Franklin argues reasonable jurists could debate whether the district court abused its discretion by issuing a conditional writ allowing ninety days for NMDOC to hold a new hearing that complied with *Wolff*, rather than an unconditional writ restoring Mr. Franklin's good time credits and expunging the disciplinary conviction from his record. Specifically, Mr. Franklin argues the district court abused its discretion because a fair hearing is not possible as NMDOC no longer has the potentially exculpatory video footage. Mr. Franklin also argues the district court abused its discretion because an unconditional writ was the only appropriate remedy based on NMDOC's pattern of failing to provide video evidence to inmates.

Under 28 U.S.C. § 2243, courts "entertaining an application for a writ of habeas corpus" are required to "dispose of the matter as law and justice require." The Supreme Court has interpreted § 2243 as giving district courts "broad discretion in conditioning a judgment granting habeas relief." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). "[A] federal court possesses power to grant *any form of relief necessary* to satisfy the requirement of justice." *Burton*, 975 F.2d at 693 (internal quotation marks omitted).

Issuing conditional writs, under which the State has an opportunity to conduct a new trial, is within this broad discretion.[6] *See Herrera v. Collins*, 506 U.S. 390, 403 (1993) ("The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner."); *Eaton*, 931 F.3d at 1028 (determining "district court didn't err—let alone abuse its discretion—in rejecting" petitioner's "request for an unconditional writ" raised through rule 59 motion); *Douglas v. Workman*, 560 F.3d 1156, 1176 (10th Cir. 2009) (holding district court did not abuse its discretion by granting a conditional writ allowing for retrial). District courts granting writs of habeas corpus may only bar retrials when "'special circumstances' . . . exist." *Capps v. Sullivan*, 13 F.3d 350, 352 (10th Cir. 1993) (quoting *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 489 (1973)). For example, district courts may bar a retrial when "the constitutional violation [is] such that it cannot be remedied by another trial, or other exceptional circumstances exist such that the holding of a new trial would be unjust." *Id.* at 352–53. "But where nothing in the record suggests that the constitutional violation on which habeas corpus relief is predicated could not be redressed by holding a

[6] Mr. Franklin has not argued that a different standard applies to reviewing remedies fashioned for habeas petitions brought under 28 U.S.C. § 2241, as opposed to 28 U.S.C. § 2254. *See* Appellant's Br. & App. for COA at 4. Accordingly, we assume without deciding that the default remedy for a constitutional violation in a prison disciplinary hearing, like the default remedy for a constitutional violation in a trial, is a conditional order allowing for a rehearing. *See id.* ("It is an exceptional circumstance that should be reserved for when [t]he error forming the basis for the relief cannot be corrected in further proceedings." (quotation marks omitted)).

retrial, granting an unconditional writ constitutes an abuse of discretion." *Douglas*, 560 F.3d at 1176.

Recognizing these precedents, Mr. Franklin argues his petition presents an exceptional circumstance where the constitutional violation could not be remedied through a new hearing because (1) NMDOC no longer has the potentially exculpatory video footage and (2) NMDOC has engaged in a pattern of not producing video evidence. Addressing Mr. Franklin's first argument, there are two significant shortcomings. First, as the district court noted, "it is speculative whether the videotapes exist now." ROA at 371. In response to Mr. Franklin's discovery motion requesting production of the video footage, NMDOC stated that based on Mr. Franklin's experience in separate habeas proceedings, "Mr. Franklin [wa]s fully aware that any surveillance video footage of an incident occurring on January 31, 2017, would no longer exist by April 2022." *Id.* at 316. Although NMDOC implied it could no longer access the video footage, this statement stopped short of definitively stating the videos no longer exist. Indeed, Mr. Franklin argued in reply that the video footage may still be available through the Geo Group, the private company that was operating the detention center at the time the incident occurred. Accordingly, it is speculative whether NMDOC will be able to produce the video footage for a new hearing.

Second, even if NMDOC is unable to produce the video footage at a new hearing, this does not necessarily mean any future hearing will be constitutionally infirm. The district court determined Mr. Franklin did not receive due process at the original hearing

because (1) NMDOC failed to produce the potentially exculpatory video footage; and (2) NMDOC did not provide a proper justification for not producing the video evidence. Although an inmate should typically be able to "present documentary evidence in his defense," a detention facility may limit the production of evidence in disciplinary proceedings when the production of said evidence would be "unduly hazardous to institutional safety or correctional goals." *Wolff*, 418 U.S. at 566. Here, NMDOC failed in the initial hearing to justify nonproduction of the videos because it identified no hazards to institutional safety or correctional goals stemming from production of the video footage. For any future hearing to comply with *Wolff*, as the district court mandated, NMDOC must either produce the video footage or provide an adequate justification for failing to produce it. Accordingly, NMDOC may hold a fair hearing that complies with *Wolff* even without producing the video footage.

Mr. Franklin's argument that NMDOC has demonstrated it is incapable of holding a fair hearing through a pattern of behavior also falls flat. Mr. Franklin points to his several habeas corpus petitions relating to disciplinary proceedings as demonstrating NMDOC has engaged in a pattern of failing to produce video evidence. Assuming we consider Mr. Franklin's other habeas petitions adequate to demonstrate a pattern by NMDOC, Mr. Franklin has identified no caselaw from any court stating a district court abuses its discretion by allowing for a rehearing when a detention facility has a pattern of not producing video evidence. As discussed above, the district court specifically ordered NMDOC to hold a new hearing that complied with *Wolff*, directly addressing the video

production issue. *See Wolff*, 418 U.S. at 566 (holding that "the inmate facing disciplinary proceedings should be allowed to . . . present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals"); *see also Howard v. U.S. Bureau of Prisons*, 487 F.3d 808, 813–14 (10th Cir. 2007) (applying *Wolff* standard to prisoner's request for production of video evidence). Outside of NMDOC's history of failing to produce video footage, Mr. Franklin has identified no other reason NMDOC is incapable of holding a fair hearing. As the district court noted in its order, in Mr. Franklin's original disciplinary hearing, NMDOC "reviewed physical evidence, allowed various motions, and listened to three prison officials' testimony." ROA at 372.

The two cases Mr. Franklin points to as demonstrating reasonable jurists may debate the adequacy of the district court's remedy do not advance his position. Rather, the cases demonstrate only that district courts have broad discretion to fashion remedies for habeas corpus petitions. First, Mr. Franklin relies on *Lopez v. LeMaster*, 61 P.3d 185, 194 (N.M. 2003), a case where the Supreme Court of New Mexico affirmed the district court's decision to bar a rehearing based on a pattern of misconduct. But in *Lopez*, the court did not determine barring a rehearing was the only adequate remedy. Rather, applying a deferential abuse-of-discretion standard of review, the court concluded "the [district] court acted within its discretion to fashion an appropriate remedy." *Id.* at 195. Next, Mr. Franklin cites an unpublished decision from the United States District Court for the District of Colorado, where the court granted a § 2241 petition based on non-

production of video footage and ordered expungement of the petitioner's disciplinary records and the restoration of good time credits. *Deberry v. Berkebile*, No. 13-CV-01926-RBJ, 2014 WL 1100184, at *3 (D. Colo. Mar. 17, 2014). Like *Lopez*, this case shows that a conditional writ is not the only possible remedy, not that a district court abuses its broad discretion in fashioning remedies for habeas violations by issuing a conditional order.

Here, rather than barring a rehearing, the district court addressed NMDOC's pattern of failing to produce video evidence by requiring NMDOC to either hold a hearing that complied with *Wolff* or to restore Mr. Franklin's good time credits. No reasonable jurist could debate that this remedy was within the district court's "broad discretion" to fashion habeas relief. *Braunskill*, 481 U.S. at 775. Because NMDOC has never stated whether it could produce the video footage for a future hearing, and it is not clear what justifications it could provide at a future hearing if it fails to produce the footage, it is premature to say NMDOC could not hold a new hearing that complied with *Wolff*. Even assuming Mr. Franklin is correct, and NMDOC will fail to produce the video footage or to adequately justify nonproduction, this would mean that NMDOC failed to comply with the district court's order and Mr. Franklin would be entitled to the restoration of his good time credits. Concluding no reasonable jurist could debate

whether the district court abused its discretion in fashioning a remedy for Mr. Franklin's due process violation, we deny a COA on this claim.[7]

2. Pending Discovery Motion

Mr. Franklin also argues reasonable jurists could debate whether the district court abused its discretion by denying Mr. Franklin's discovery motion.[8] Prior to the magistrate judge issuing the PFRD, Mr. Franklin filed a motion "requesting [the] court to order respondents to produce the relevant exculpatory video footage" pursuant to 28 U.S.C. § 2254(f). ROA at 312. In the PFRD, the magistrate judge recommended the district court deny Mr. Franklin's discovery motion as moot, so long as the district court adopted the PFRD, including its recommendation that NMDOC set aside Mr. Franklin's disciplinary adjudication and hold a new hearing that complied with *Wolff* within ninety days. In its order adopting the PFRD, the district court overruled Mr. Franklin's objection to the PFRD's denial of his discovery motion, noting the court was "hesitant to order production here because: (i) [Mr.] Franklin may not be entitled to review personally the

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[7] The district court also concluded Mr. Franklin waived any challenge to the remedy by raising the issue for the first time in his objections to the PFRD. In Mr. Franklin's petition, he requested expungement of his disciplinary conviction, a declaration that prison officials denied him due process, and the restoration of his good time credits. Because we determine no reasonable jurist could debate the district court's choice of remedy, we need not address whether the language in Mr. Franklin's petition was sufficient to preserve his remedy argument.

[8] As noted above, we construe Mr. Franklin's argument that the district court erred in issuing its judgment on his habeas petition while his discovery motion was pending as challenging the district court's denial of his motion for discovery.

videotapes; and (ii) [Mr.] Franklin cites no authority that requires production when the Court already granted relief in the movant's favor." ROA at 372 (footnotes omitted).

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). "Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts permits discovery in the discretion of the trial judge upon a showing of 'good cause.'" *Wallace v. Ward*, 191 F.3d 1235, 1245 (10th Cir. 1999) (internal quotation marks omitted). "Good cause is shown if the petitioner makes a specific allegation that shows reason to believe the petitioner may be able to demonstrate he is entitled to relief." *LaFevers v. Gibson*, 182 F.3d 705, 723 (10th Cir. 1999).

Reasonable jurists could not debate that the district court did not abuse its discretion in denying Mr. Franklin's discovery motion because the district court chose instead to a fashion a remedy through which Mr. Franklin was entitled to relief through a new hearing. Mr. Franklin has identified no authority requiring a district court to permit discovery pursuant to a habeas petition when relief is being granted. And, as discussed above, the district court has broad discretion in fashioning relief for habeas petitions. *See Braunskill*, 481 U.S. at 775. By denying Mr. Franklin's discovery motion, but ordering NMDOC to comply with *Wolff* in a future hearing, the district court put NMDOC on notice that it would have to either produce the video footage or provide an adequate justification for failing to produce it at any future hearing. If NMDOC fails to comply with the conditional order, Mr. Franklin may seek relief from the district court. *See*

Jensen, 924 F.3d at 454 ("When a district court issues a conditional habeas writ, it retains jurisdiction to determine compliance.").

IV. CONCLUSION

We **DENY** Mr. Franklin's petition for a COA and **DISMISS** this matter in full.

Entered for the Court

Carolyn B. McHugh
Circuit Judge