

In the Supreme Court of the United States

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SAMUEL GALBRAITH,
Petitioner,

v.

DARREL VANNOY, WARDEN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

APPENDIX TO BRIEF IN OPPOSITION

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United States Court of Appeals
for the Fifth Circuit

No. 22-30159

United States Court of Appeals
Fifth Circuit

FILED

August 20, 2025

Lyle W. Cayce
Clerk

SAMUEL GALBRAITH,

Petitioner—Appellee,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary,*

Respondent—Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:19-CV-181

ON PETITION FOR REHEARING

Before STEWART, DENNIS, and SOUTHWICK, *Circuit Judges.*

LESLIE H. SOUTHWICK, *Circuit Judge:*

An earlier opinion in this appeal was issued on October 23, 2023. *See Galbraith v. Hooper*, 85 F.4th 273 (5th Cir. 2023). The opinion was later withdrawn. *Galbraith v. Hooper*, No. 22-30159, 2024 WL 1170026 (5th Cir. Mar. 19, 2024). The petition for rehearing is GRANTED.

Samuel Galbraith, a Louisiana prisoner, sued the Louisiana Board of Pardons and Parole (“Parole Board”) and sought reinstatement of his parole on the grounds that its rescission just prior to its effective date violated his

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due process rights. The district court agreed with Galbraith and ordered his release on parole within 30 days, subject to the original conditions of his parole. On appeal, the State argues that Galbraith's claim is barred by 28 U.S.C. § 2244's one-year statute of limitations and that Galbraith did not fully exhaust his state court remedies. We agree and REVERSE.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2000, Samuel K. Galbraith pled guilty to the 1988 manslaughter and attempted aggravated rape of Karen Hill. He was sentenced to 71 years of hard labor. The victim's surviving husband, James Hill, completed a "Louisiana Department of Public Safety and Corrections Victim/Witness Notification Request Form" in November 2000. The form required the Parole Board to notify the named person when a parole hearing was granted for a specified inmate. The record does not contain a similar form from any other person requesting notice of Galbraith's potential parole.

In the spring of 2016,¹ Galbraith filed an Application for Parole. His first possible parole eligibility date was April 23, 2017. The Parole Board set Galbraith's hearing for October 13, 2016, and sent notification letters on July 7, 2016, to Hill and Jessie McWilliams, Karen Hill's mother, advising them of their right to appear and present testimony at the parole hearing. McWilliams's letter was erroneously addressed to a post office box in Albany, New York, instead of to the same-numbered post office box in Albany, Illinois. On September 14, 2016, Galbraith's attorney requested a continuance of the October hearing until November 3, 2016, which was granted. The Parole Board sent notification letters with the new hearing date to Hill and McWilliams on September 28, 2016, this time to their correct

¹ Galbraith's Application for Parole is undated, but other documents in the application reflect dates of early-to-mid 2016.

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addresses. At that time, the Louisiana Administrative Code required notification to be sent to “[t]he victim, spouse, or next of kin of a deceased victim” 30 days before the parole hearing. LA. ADMIN. CODE tit. 22, pt. XI, § 510(B) (eff. Aug. 2013 to Mar. 2018).² Thus, the Parole Board was required to give notice only to Hill as the surviving husband. The Parole Board did so.

A pre-parole investigation report was prepared. The report contained statements from Hill, McWilliams, the Vernon Parish District Attorney’s Office, the Vernon Parish Sheriff’s Office, and the Vernon Parish sentencing judge. They all opposed parole. At Galbraith’s parole hearing, a three-member panel of the Parole Board heard testimony and statements from those opposed to his early release. The panel also heard from Galbraith’s family members, who supported his parole. Galbraith was represented by counsel at the hearing. The panel unanimously voted to grant parole to Galbraith with a scheduled release date of April 23, 2017, and with a list of specific conditions during his parole term. The Certificate of Parole showed that Galbraith would reside in Aransas Pass, Texas, and would be subject to the authority of a parole office in Corpus Christi, Texas.

Neither Hill nor McWilliams attended the hearing, but each provided a written statement. Both were contacted directly by someone from the Department of Corrections after the hearing and were notified of the decision.

² The statute was amended in March 2018 to require 90-days’ notice and to require notice to any person who has filed a victim notice and registration form. *See* LA. ADMIN. CODE tit. 22, pt. XI, § 510(B) (eff. Mar. 2018 to Dec. 2018). Victim notification errors were not a permissible basis, at least explicitly, for rescission of parole until the code was amended in August 2019. *Compare* LA. ADMIN. CODE tit. 22, pt. XI, § 504(K) (eff. Jan. 2015 to Aug. 2019), *with* LA. ADMIN. CODE tit. 22, pt. XI, § 504(K) (eff. Aug. 2019 to Jan. 2020).

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After parole was granted, Vernon Parish District Attorney Asa Skinner filed requests for reconsideration of the Parole Board's decision on November 15, 2016, November 30, 2016,³ and January 9, 2017. In February 2017, the Parole Board denied Skinner's request for reconsideration, explaining that "[t]he panel voted unanimously to grant parole . . . after serious and thorough consideration" and "[t]he board's policy provides for a reconsideration review only in [limited] circumstances," none of which were applicable in Galbraith's case. Skinner and McWilliams aired their displeasure to the press, leading to negative reporting regarding Galbraith's imminent parole.

In early April 2017, the Parole Board and the Department of Corrections made final preparations for Galbraith's release. On April 10, 2017, Parole Board member Mary Fuentes sent an email to Louisiana Governor John Bel Edwards's Deputy Executive Counsel. Fuentes referred to a news story about Galbraith's release that would air on April 13. Her concern was that the story could impact criminal justice legislation that was desired by the Governor. Two days later, a single Parole Board member, Sheryl Ranatza, added electronic monitoring as a condition of Galbraith's parole. On April 20, 2017, the Parole Board received notice from Texas that the new condition of parole was accepted, and Ranatza signed and issued a Certificate of Parole with a release date of April 23, 2017.

On April 21, 2017, the Special Counsel of the Louisiana Governor's Legislative Staff exchanged emails with a lobbyist from Top Drawer Strategies, LLC. Both expressed concern about the negative media reports

³ In one of the November 30 letters, Skinner attached a report by retired chief detective, Martin Hilton, who relayed his opinion that Galbraith may be responsible for two cold-case murders in Vernon Parish. Galbraith was never charged with either of these murders, and there is no evidence in the record connecting him to the two victims.

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about Galbraith's release and their potential impact on the success of the pending criminal justice reform legislation. The referenced news report included details about interviews with McWilliams, who stated her victim notification letter was sent to the wrong mailing address, and with Skinner, who claimed Galbraith was responsible for two other cold-case murders in Vernon Parish.

On April 21, the same day as the email exchange we just discussed, Galbraith's parole hearing docket record stated: "Rescind Pending Per Mary F," *i.e.*, Parole Board member Mary Fuentes. That day, one Parole Board member, Jim Wise, filled in a "Parole Board Action Sheet" that rescinded Galbraith's parole based on this reason: "Other [—] There may have been tech[n]ical irregularity to victim notice."

Galbraith was not released. In a letter dated May 1, the Parole Board officially notified him of the rescission and repeated the phrasing of the Parole Board Action Sheet:

This correspondence is to advise you that the Parole Board has voted to rescind the parole granted at your original parole hearing.

This action was taken due to the following:

We have been advised that Other.

There may have been technical irregularities notifying the victim's family.

You will be scheduled for another hearing on 08/03/2017.

There is no evidence that the Parole Board took any action to rescind parole beyond the one Parole Board member's signing the rescission form. The Parole Board later issued a press release announcing the decision to rescind. It explained that, even though McWilliams received notice of the November 2016 hearing and provided a statement for its consideration, the

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Parole Board was rescheduling the parole hearing “because of the apparent procedural error which occurred with the initial victim notification.”⁴

In May 2017, Galbraith filed an administrative grievance, which was rejected because the Parole Board’s decision was discretionary and could not be challenged. In June 2017, Galbraith’s counsel sent a letter (1) contesting the decision to rescind for failure to adhere to Parole Board policy, (2) contesting the factual basis of the alleged technicality that occurred with the victim notice, and (3) advising the Parole Board that neither of the two permissible reasons for rescission of parole applied in his case. In July 2017, Galbraith, through counsel, withdrew from parole consideration for the reasons stated in his attorney’s June letter.

On July 26, 2017, Galbraith’s attorney filed a 42 U.S.C. § 1983 complaint in the Middle District of Louisiana challenging the Parole Board’s rescission of his parole. Galbraith sought reinstatement of his parole and immediate release from prison. A year and a half later, the Parole Board filed a motion for summary judgment, arguing Galbraith’s exclusive remedy to seek release from custody was through a writ of *habeas corpus*.

Galbraith’s attorney then filed a 28 U.S.C. § 2241 application on March 27, 2019, naming the prison’s warden as the defendant. We will refer to the defendant as the State because the warden was sued in his official capacity. After concluding the two cases had common legal issues, the district court stayed and administratively closed the Section 1983 proceedings pending resolution of the Section 2241 application. In its answer to Galbraith’s Section 2241 application, the State argued Galbraith failed to

⁴ As we have already explained, the Parole Board was required to provide 30 days’ notice of the hearing, and timely notice was given for the November 2016 hearing. There is no suggestion or record that McWilliams requested notification, and she was not required to be notified under the statute in effect at the time. *See supra* n.2.

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exhaust his available state court remedies, his application was time-barred, and his claim lacked merit because the Parole Board's rescission did not infringe any constitutionally protected liberty interest.

In a March 9, 2022, Report and Recommendation, the magistrate judge determined:

- (1) Galbraith was not required to exhaust his claims because Louisiana's statutory scheme did not permit him to challenge the Parole Board's rescission under these circumstances;
- (2) It was not clear if Galbraith's Section 2241 application was subject to a limitations period;
- (3) Even if a one-year limitations period was applicable, Galbraith filed a Section 1983 complaint within that time period seeking *habeas corpus* relief;
- (4) Although Galbraith did not have a liberty interest in the granting of parole, there was a state-created liberty interest at issue here because the Parole Board regulations in effect at the time permitted rescission of a parole grant only in two circumstances, neither of which was applicable to Galbraith's situation;
- (5) Galbraith was therefore entitled to notice and a meaningful opportunity to be heard prior to rescission of his parole grant, but he received neither; and
- (6) A remand to the Parole Board to conduct a rescission hearing would be futile because neither permissible basis for rescission was applicable.

The magistrate judge recommended granting Galbraith's *habeas* application and ordering his release on parole within 30 days, subject to the original conditions of his parole as granted on November 3, 2016. The State filed objections. On March 28, 2022, the district court granted Galbraith's *habeas* application "for the reasons set forth in the Magistrate Judge's

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Report.” The State filed a timely notice of appeal. We granted an unopposed motion to stay the district court’s judgment and release order pending appeal.

The State now argues that the district court erred in holding (1) Galbraith was not required to exhaust state remedies, (2) Galbraith’s application was not time-barred, and (3) Galbraith had a protected liberty interest in his parole grant prior to release.

DISCUSSION

“In a *habeas corpus* appeal, we review the district court’s findings of fact for clear error and its conclusions of law *de novo*.” *Reeder v. Vannoy*, 978 F.3d 272, 276 (5th Cir. 2020) (quoting *Jenkins v. Hall*, 910 F.3d 828, 832 (5th Cir. 2018)).

We first review the district court’s legal conclusion about the often-difficult question of which statutory vehicle is proper for a prisoner’s claim. Different procedural hurdles apply depending on that answer. We then turn to the State’s three arguments about reversible error in the district court’s rulings.

I. Habeas corpus application or civil rights suit?

Three possible statutory bases for Galbraith’s claim have been proposed: a civil rights suit under Section 1983, a *habeas* application under Section 2241, or a *habeas* application under Section 2254.

We start with Section 1983. A helpful precedent concerned a Section 1983 suit in which two state prisoners claimed that state authorities violated the *Ex Post Facto* and Due Process Clauses of the United States Constitution. *See Wilkinson v. Dotson*, 544 U.S. 74, 76–77 (2005). The alleged violations occurred when officials applied new, harsher guidelines to determine the parole of prisoners whose crimes had been committed when less-demanding

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guidelines were used. *Id.* When considered for parole under the more stringent guidelines, the two prisoners were denied and deemed ineligible to seek parole again for five years. *Id.* The prisoners then filed a Section 1983 suit and sought immediate parole hearings under the prior guidelines. *Id.* at 77. The Court held that the constitutional claims were properly brought using Section 1983, and it rejected the argument that “the prisoners’ lawsuits, in effect, collaterally attack the *duration* of their confinement; hence, such a claim may only be brought through a *habeas corpus* action.” *Id.* at 76, 78. “A consideration of this Court’s case law makes clear that the connection between the constitutionality of the prisoners’ parole proceedings and release from confinement is too tenuous here to achieve [the state’s] legal door-closing objective.” *Id.* at 78.

Galbraith, though, is not seeking a new hearing. He insists that the parole he was actually granted was improperly rescinded and should be reinstated. He brings a direct and immediate claim about the duration of his confinement, without the contingency that existed in *Dotson* that a new hearing might not grant parole. *Habeas* is the proper procedure here.

We now examine the *habeas* application Galbraith eventually did file. Galbraith filed for *habeas* under Section 2241. He argued his claim was ripe for immediate *de novo* review by a federal court under Section 2254(b)(1)(B)(i) because there is no Louisiana state corrective process to challenge his parole rescission. The State asserted Galbraith’s claims were time-barred because the one-year statute of limitations established by Section 2244(d)(1) applied and he did not file within one year of May 1, 2017, when he received notice of his parole rescission. The district court disagreed.

Quoting *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000), the district court held that Galbraith’s challenge to the rescission of his parole was properly brought under Section 2241 (which has no statute of limitations)

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because it raised issues regarding “the manner in which a sentence [was] carried out.” The district court concluded Section 2244(d)(1)’s one-year statute of limitations did not extend to Section 2241 *habeas* applications, meaning Galbraith’s application could not conclusively be deemed untimely. The court further determined Galbraith sufficiently established his claim was not subject to Section 2254’s exhaustion requirement. *See* 28 U.S.C. § 2254(b)(1)(B)(i). According to the court, “[w]ithout a mechanism to exhaust, there can be no failure to exhaust,” allowing Galbraith’s claim to be reviewed by a federal court.

So, was Galbraith’s application properly brought under Section 2241, which contains no statute of limitations? Do Section 2254 and the applicable one-year limitations period apply and bar Galbraith’s claims? An explanation of the interaction between the two statutes will be useful.

These “two statutes do not represent an either/or dichotomy.” *Topletz v. Skinner*, 7 F.4th 284, 293 (5th Cir. 2021). Section 2241 is the general statute authorizing federal courts to grant writs of *habeas corpus* in their respective jurisdictions. 28 U.S.C. § 2241(a). This authority “applies to persons in custody regardless of whether [a] final judgment” exists. *Hartfield v. Osborne*, 808 F.3d 1066, 1071 (5th Cir. 2015) (quoting *Dickerson v. Louisiana*, 816 F.2d 220, 224 (5th Cir. 1987)); *see also* 28 U.S.C. § 2241(c). Once Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), federal courts’ authority to grant *habeas* relief became more limited. *See* Pub. L. No. 104-132, 110 Stat. 1214; *Shoop v. Twyford*, 596 U.S. 811, 818 (2022). As part of AEDPA, Congress enacted Section 2254, which governs writs to which Section 2241(c)(3) applies. *Topletz*, 7 F.4th at 293.

Importantly, Section “2254 is not an independent avenue through which petitioners may pursue *habeas* relief.” *Hartfield*, 808 F.3d at 1073.

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“Instead, all *habeas* petitions . . . are brought under [Section] 2241, and [Section] 2254 places additional limits on a federal court’s ability to grant [*habeas*] relief if the petitioner is being held in custody ‘pursuant to the judgment of a State court.’” *Topletz*, 7 F.4th at 294 (quoting 28 U.S.C. § 2254(a)). Galbraith is in custody because of a state court judgment; his *habeas* application must be viewed under both Sections 2241 and 2254.

With Galbraith’s *habeas* application being subject to both statutes, the question remains whether it is also subject to a statute of limitations. The Supreme Court explained that AEDPA “changed the standards governing our consideration of *habeas* petitions by imposing new requirements for the granting of relief to state prisoners.” *Felker v. Turpin*, 518 U.S. 651, 662 (1996). Because federal courts’ *habeas* authority is now limited by Section 2254, AEDPA’s additional “new requirements” for granting relief to state prisoners also apply to writs governed by Section 2254. *Id.* These include Section 2244’s limitations. *See* AEDPA § 101, 110 Stat. at 1217. Among those limitations is that the *habeas* application “by a person in custody pursuant to the judgment of a State court” must be filed within one year of various events; relevant here is “the date on which the factual predicate of the claim” was or could have been discovered. 28 U.S.C. § 2244(d)(1)(D).

The district court concluded that, because Galbraith challenged the Parole Board’s refusal to hold a hearing prior to the rescission of his parole grant, he is challenging “the manner in which [his] sentence is carried out or the prison authorities’ determination of its duration.” *Pack*, 218 F.3d at 451. Citing a pre-AEDPA, unpublished Fifth Circuit opinion, the district court further determined that Section 2254 did not apply to Galbraith. *See Richie v. Scott*, 70 F.3d 1269 (5th Cir. 1995) (unpublished table opinion that is precedential under 5TH CIR. R. 47.5.3). In *Richie*, we rejected the district court’s determination that the prisoner had to bring his claim under Section 2254, finding that a challenge to the revocation of parole should be brought

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under Section 2241 only. *Id.* at *1 (citing *Rome v. Kyle*, 42 F.3d 640 (5th Cir. 1994) (unpublished); *Johnson v. Scott*, 56 F.3d 1385 (5th Cir. 1995) (unpublished)). We concluded that if the party is not contesting the legality or validity of the sentence, Section 2254 is inapplicable. *Id.*

In a later decision, the court concluded that this precedent did not survive AEDPA. *Kimbrell v. Cockrell*, 311 F.3d 361, 362 (5th Cir. 2002). The court considered whether AEDPA's one-year limitation period applied to Section 2254 *habeas* applications "contesting the outcome of prison disciplinary proceedings." *Id.* We held that "when prison disciplinary proceedings result in a change in good-time earning status that extends the prisoner's release date," Section 2254 applies. *Id.* The court refused to treat prison disciplinary proceedings in such a distinct way as to give them "unusual procedural recognition" that would render Section 2244(d)(1)'s one-year limitation period inapplicable. *Id.* at 362–63. Instead, the court concluded that Section 2244(d)(1) "is . . . easily applied" to applications "attacking the prisoner's conviction" and also to those attacking "the calculation of time served." *Id.* at 363. Both applications are seeking "a shorter confinement pursuant to the original judgment," thus "any [Section] 2254 writ application by a 'person in custody pursuant to the judgment of a State court'" is limited by Section 2244(d)(1). *Id.* In other words, when a favorable outcome would affect the amount of time a state prisoner served, "Section 2244(d)(1) literally applies." *Id.*

Galbraith's claim is based on the Parole Board's allegedly improper rescission of his parole. He is requesting that it be reinstated and that he immediately be released from prison. An outcome in Galbraith's favor would affect the time he will serve; indeed, it would end his confinement almost instantly. Section 2244(d)(1) therefore applies.

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II. *Timeliness*

Because we conclude Galbraith's claim is properly viewed under both Sections 2241 and 2254 and is challenging the duration of time he will serve, we now address the State's argument that the one-year limitations period in Section 2244(d)(1) bars Galbraith's *habeas* application.

Under Section 2241(d)(1), the one-year period begins to run on one of four dates. 28 U.S.C. § 2244(d)(1)(A)–(D). The latest date that could begin this period for Galbraith's claim is “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” § 2244(d)(1)(D). The factual predicate that is alleged to support Galbraith's claims is the Parole Board's rescission of “his Certificate of Parole based upon facts the Board knew to be false and a reason not enumerated in the [Louisiana] law that allows for rescission.” We must determine on what date Galbraith could have discovered this factual premise.

Galbraith argues that he could not have discovered or verified the facts underlying his claim until after he received complete discovery in his Section 1983 action. Therefore, Section 2244(d)(1)'s one-year statute of limitations allegedly would not apply. Galbraith's parole file was confidential and unable to be released to him except through discovery. *See* La. R.S. § 15:574.12(A); LA. ADMIN. CODE tit. 22, pt. I, § 101(K)(6)(c) (2023). Once Galbraith received full disclosure of the file, he learned that the “technical irregularit[ies]” the Parole Board cited as its reason for rescinding his parole were false because the victim's family had been properly notified of his parole hearing. Discovery was complete by June 13, 2018, and Galbraith filed his *habeas* application based on these undisputed facts on March 27, 2019. Because Galbraith could not access his parole file except through discovery, he argues he could not have uncovered the Parole Board's true rationale until June 2018. He therefore exercised the required due diligence and timely filed

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his application. Further, even if the one-year limitations period applied, Galbraith filed his *habeas* application in March 2019, which was within one year of receiving his parole file.

Galbraith's claim is premised on the fact that the Parole Board could only rescind its decision to grant him parole if he "violated the terms of work release" or "engaged in misconduct prior to [his] release." LA. ADMIN. CODE tit. 22, pt. XI, § 504(K) (eff. Jan. 2015 to Aug. 2019).⁵ In its notification to Galbraith of its decision to rescind his parole, the Parole Board advised Galbraith that "[t]here may have been technical irregularities notifying the victim's family" of his original parole hearing and explained that was the reason for the rescission. The Parole Board clearly stated the grounds for its decision, which was neither of the reasons authorized by the Louisiana Administration Code. *See id.*

The May 1, 2017 letter notified Galbraith that the Parole Board had rescinded his parole and informed him of its reason for doing so. Neither of Section 504(K)'s reasons were listed in the letter, so Galbraith would have known, upon receipt of the letter, of the argument that the rescission was not statutorily authorized. The possibility that the Parole Board's actual rationale was "false" and that evidence establishing falsity was in Galbraith's

⁵ Galbraith's argument relies on a prior version of Louisiana's Administration Code that was effective until August 2019. *See* LA. ADMIN. CODE tit. 22, pt. XI, § 504(K) (eff. Jan. 2015 to Aug. 2019). The relevant section has been amended five times since Galbraith's proceedings began. *See* LA. ADMIN. CODE tit. 22, pt. XI, § 504 (historical notes). Under the prior version, the Parole Board did not have explicit statutory authority to rescind Galbraith's parole grant for errors regarding victim notification. At the time, the only permissible bases for rescission were (1) violation of the terms of work release, and (2) misconduct prior to release, and upon rescission, the parolee would promptly receive a new parole hearing. LA. ADMIN. CODE tit. 22, pt. XI § 504(K) (eff. Jan. 2015 to Aug. 2019). Victim notification errors were not a permissible basis for parole rescission until August 2019. LA. ADMIN. CODE tit. 22, pt. XI, § 504(K)(2) (eff. Aug. 2019 to Jan. 2020). We will use the law that was in effect at the time of Galbraith's filings.

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parole file is irrelevant to his claim. Galbraith “is confusing his knowledge of the factual predicate of his claim with the time permitted for gathering evidence to support that claim.” *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998). “Section 2244(d)(1)(D) does not convey a statutory right to an extended delay . . . while a *habeas* petitioner gathers every possible scrap of evidence that might . . . support his claim.” *Id.*

For Galbraith to file for *habeas* relief, all that was required under Section 2244(d)(1)(D) was that he know the factual premise of the claim. Here, that premise is the Parole Board’s rescinding Galbraith’s parole for a reason other than that he “violated the terms of work release” or “engaged in misconduct prior to [his] release.” LA. ADMIN. CODE tit. 22, pt. XI, § 504(K) (eff. Jan. 2015 to Aug. 2019). Galbraith knew that premise upon receipt of the May 1, 2017 letter; thus, Section 2244(d)(1)’s one-year limitations period began to run on that date. He therefore was required to file his *habeas* application by May 2018. Galbraith filed his application on March 27, 2019, roughly 10 months after the one-year limitations period ended. Galbraith’s *habeas* application is thus time-barred absent tolling.

Galbraith argues, and the district court determined, that even if Galbraith’s *habeas* claim was subject to a one-year limitations period, it was tolled when he filed his Section 1983 complaint on July 26, 2017, because that complaint was a *de facto habeas* application. We need not decide this issue because of our holding in the following section.

III. Exhaustion of state remedies

“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.” 28 U.S.C. § 2254(b)(1). On appeal, the State repeats the arguments it made to the district court that Galbraith could have

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raised his challenge in a state *habeas corpus* application and has thus failed to exhaust his state court remedies. It relies heavily on *Sinclair v. Stalder*, 867 So. 2d 743 (La. Ct. App. 1st Cir. 2003), and *Sneed v. Hooper*, 328 So. 3d 1164 (La. 2021). The district court rejected the argument that Galbraith could have filed a state *habeas* application, because it concluded Louisiana’s statutory scheme does not permit a challenge to the Parole Board’s rescission on *any* ground *except* for the denial of a revocation hearing. Because of the perceived lack of any available state corrective process, the district court held there was no state mechanism for Galbraith to exhaust, so his claim was reviewable in federal court under Section 2254(b)(1)(B)(i).

“Whether a federal *habeas* petitioner has exhausted state remedies is a question of law reviewed *de novo*.” *Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003). The “exhaustion requirement is not jurisdictional, but ‘reflects a policy of federal-state comity . . . designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.’” *Id.* (alteration in original) (quoting *Wilder v. Cockrell*, 274 F.3d 255, 260 (5th Cir. 2001)).

An applicant has not exhausted his available remedies “if he has the right under the law of the State to raise, by any available procedure, the question presented.” § 2254(c). The district court relied on the fact that “Louisiana’s parole statutes allow for appeal of parole board actions in only one circumstance.” *See* La. R.S. § 15:574.11. Even if that is so, exhaustion is still required if there is some other state procedure available. The pertinent language in the parole statute is this:

Parole is an administrative device for the rehabilitation of prisoners under supervised freedom from actual restraint, and the granting, conditions, or revocation of parole rest in the discretion of the committee on parole. *No prisoner or parolee shall have a right of appeal from a decision of the committee*

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regarding release or deferment of release on parole, the imposition or modification of authorized conditions of parole, the termination or restoration of parole supervision or discharge from parole before the end of the parole period, or the revocation or reconsideration of revocation of parole, *except for the denial of a revocation hearing under R.S. 15:574.9.*

La. R.S. § 15:574.11(A) (emphasis added).

Another relevant parole statute provides:

The committee may order revocation of parole upon a determination that:

- (1) The parolee has failed, without a satisfactory excuse, to comply with a condition of his parole; and
- (2) The violation of condition involves the commission of another felony, or misconduct including a substantial risk that the parolee will commit another felony, or misconduct indicating that the parolee is unwilling to comply with proper conditions of parole.

§ 15:574.9(B).

Based on this statutory language, a prisoner has no right to appeal a decision by the Parole Board unless his parole was revoked under Revised Statute 15:574.9 without a revocation hearing. *See Leach v. La. Parole Bd.*, 991 So. 2d 1120, 1124 (La. Ct. App. 1st Cir. 2008). This explains why Galbraith’s attempt at filing an administrative grievance to challenge the Parole Board’s decision was rejected. The stated reason was the Parole Board’s policy that “decisions of these boards are d[i]scretionary and may not be challenged,” which follows Louisiana’s parole statutes.

Even so, we must consider whether there was any other available state court remedy that Galbraith could have used. One possibility, seeking a writ of *habeas corpus*, generally is “not the proper procedural device for petitioners” in Louisiana seeking “post-conviction relief” because *habeas*

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“deals with *preconviction* complaints concerning custody.” *State ex rel. Bartie v. State*, 501 So. 2d 260, 263 (La. Ct. App. 1st Cir. 1986). “An application for post-conviction relief is a petition . . . seeking to have the conviction and sentence set aside.” *Id.* (emphasis removed); *see also* LA. CODE CRIM. PROC. art. 924. There are instances, however, when state *habeas* does apply in a post-conviction setting in Louisiana when the applicant is not seeking to set aside his original sentence. *See Sinclair v. Kennedy*, 701 So. 2d 457, 460 (La. Ct. App. 1st Cir. 1997). Louisiana Code of Criminal Procedure Article 362(2) governs these cases, and it states *habeas* “relief shall be granted” if “[t]he original custody was lawful, but by some act, omission, or event which has since occurred, the custody has become unlawful.” *Id.*

A Louisiana intermediate court held that a state *habeas* application “is the proper mechanism” when “an inmate . . . claims his initially lawful custody became unlawful due to the parole board’s actions in denying him release on parole.” *Sinclair v. Stalder*, 867 So. 2d at 744. That is similar to Galbraith’s claim, though in *Sinclair* the prisoner’s parole was denied while here the parole, already granted, was rescinded. That opinion is the most closely relevant authority cited to us. Although Galbraith is contesting the duration of his sentence and seeking a shorter confinement, he is neither challenging the validity of his original sentence nor seeking to have the sentence set aside. Instead, he is asserting that a lawful sentence has now become unlawful because the Parole Board had no authority to rescind his Certificate of Parole and then deny him release.

Galbraith did not pursue *habeas* relief, and the State argues he has failed to satisfy the need to exhaust state remedies before seeking relief in federal court. Galbraith argues he did not need to begin in state court because *Sinclair v. Stalder* held that even though state *habeas* is the proper procedure for a claim such as this, no relief can be granted. That court said “the fact that an action may be properly maintained as a petition for a writ of *habeas*

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corpus does not end the inquiry into whether a cause of action has been stated.” *Id.* Because the parole statute provides only two bases to contest a parole board decision, the court held, any “[p]leadings challenging actions of the parole board other than [the two statutory reasons] should be dismissed.” *Id.* The opinion also explains that the inmate failed to state a cause of action. As a result, Galbraith in essence is arguing that there were no “remedies available in the courts of the State.” § 2254 (b)(1).

At times this court, and other circuit courts, have discussed availability in terms of futility. In one decision, we held that “exhaustion is not required if it would plainly be futile.” *Morris v. Dretke*, 413 F.3d 484, 492 (5th Cir. 2005). We found futility when the state’s highest court had recently decided the same legal issue adversely to the *habeas* applicant. *Fisher v. Texas*, 169 F.3d 295, 303 (5th Cir. 1999). Such a standard mirrors the level of clarity sister circuits require. See BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 9C:53 (collecting cases).

Regardless of whether “futility” is the best terminology, Galbraith has failed to show there is no available state procedural remedy. We have already identified one distinction with *Sinclair*, namely, that the inmate there was denied parole — which the court said was entirely discretionary — while Galbraith’s parole was first granted but then rescinded before he was released. Consequently, even if *Sinclair* expresses the manner in which all Louisiana courts would resolve a similar case, we do not see that reasoning to be clearly applicable here. In addition, Galbraith’s one state intermediate court opinion does not suffice. In *Fisher*, we held there was clarity about the relevant state law because of a recent state supreme court opinion. No such clarity exists here. Importantly, we agree with the observation by another panel of this court that if the uncertainty concerns a matter of state procedure and not the merits of an applicant’s claims, even more respect is potentially

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due to the requirement to exhaust. *Berkley v. Quarterman*, 310 F. App'x 665, 671-72 (5th Cir. 2009).

Because Galbraith is “claiming he is entitled to *immediate release* under [Article] 362,” he should have raised his challenge in a state *habeas* application in the appropriate state district court. *Madison v. Ward*, 825 So. 2d 1245, 1254 (La. Ct. App. 1st Cir. 2002) (*en banc*), *superseded by statute on other grounds*, Act No. 460, 2005 La. Acts 2174. Had he sought relief using Article 362(2), state courts would have resolved the legal issues he now raises with us. Under AEDPA, Galbraith was required to give state courts a chance before applying for federal *habeas* relief. Galbraith did not exhaust his available state court remedies and therefore is not entitled to federal *habeas* relief.

The petition for rehearing is GRANTED. The judgment of the district court is REVERSED and RENDER judgment for Respondent Hooper.

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JAMES L. DENNIS, *Circuit Judge*, dissenting:

The majority says Galbraith did not exhaust his state remedies because, at least in theory, he could have filed a state *habeas* petition under Article 362(2) of the Louisiana Code of Criminal Procedure to challenge the Parole Committee’s decision to rescind his parole grant. But whether Louisiana law permits such a challenge is an unresolved and contested question. The Louisiana Supreme Court has never addressed the scope of the state district courts’ *habeas* jurisdiction in this precise context, and the state’s intermediate appellate courts have reached conflicting results. In the absence of clear controlling authority, I would not undertake an *Erie* guess to settle this open question of state law as the majority does—particularly not in a way that forecloses federal *habeas* review. Moreover, even assuming Louisiana courts might entertain such a petition under their original jurisdiction, the district court below lacked the opportunity to address whether pursuing that remedy would have been futile under the circumstances of this case in the first instance. As an appellate court, we are bound to review questions decided below, not to decide in the first instance questions that were never passed upon.

I would therefore either certify the question to the Louisiana Supreme Court, or, in the alternative, vacate the district court’s judgment and remand for consideration of the availability, adequacy, and futility of any state corrective process in the first instance. Because the majority concludes otherwise, I respectfully dissent.

* * *

The majority’s exhaustion analysis turns on the interaction of Article 362(2) of the Louisiana Code of Criminal Procedure and Section 15:574.11(A) of the Louisiana Revised Statutes. Article 362(2)—a general provision about *habeas corpus*—provides a mechanism for relief to prisoners who file a writ of

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habeas corpus in state court challenging an order of custody when the original custody was lawful, but by some act, omission, or event which has since occurred, the custody has become unlawful. Louisiana Revised Statute § 15:574.11(A)—a specific statute about the finality of parole committee decisions—provides that “[p]arole . . . rest[s] in the discretion of the committee on parole.” To that end:

No prisoner or parolee shall have a right of appeal from a decision of the committee regarding release or deferment of release on parole, the imposition or modification of authorized conditions of parole, the termination or restoration of parole supervision or discharge from parole before the end of the parole period, or the revocation or reconsideration of revocation of parole.

Id. Section 15:574.11(A) carves out one exception: a prisoner or parolee *does* have a right to appeal the parole committee’s “denial of a revocation hearing under R.S. 15:574.9.”¹ It is undisputed that this exception is inapplicable here.

An “appeal” under § 15:574.11(A) refers to the state district court’s “review of an administrative tribunal’s action” and “is considered functionally to be an exercise of its appellate review jurisdiction.” *Madison v. Ward*, 2000-2842 (La. App. 1 Cir. 7/3/02), 825 So. 2d 1245, 1250 n.7 (en banc) (citing *Loop, Inc. v. Collector of Revenue*, 523 So. 2d 201, 203 (La. 1987)), *superseded by statute on other grounds*, 2005 La. Acts, No. 460, § 1. The Louisiana Constitution confines the state district courts’ exercise of

¹ Section 15:574.9(A) entitles a parolee, upon his return to the custody of the Department of Public Safety and Corrections, to a hearing before the parole committee “to determine whether his parole should be revoked, unless said hearing is expressly waived in writing by the parolee.” Section 15:574.9(B)–(H) sets forth, *inter alia*, the hearing procedure and the standard by which the parole committee may revoke parole.

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appellate jurisdiction to that which is specifically authorized by statute. LA. CONST. ANN. art. V, § 16(B); *Loop, Inc.*, 523 So. 2d at 203. As such, “[a] litigant seeking judicial review of administrative action in a district court must establish that there is a statute which gives subject matter jurisdiction to that court.” *Loop, Inc.*, 523 So. 2d at 203. And where the governing statute prescribes a particular procedure for obtaining judicial review, that procedure must be followed; jurisdiction cannot be invoked “unless there can be found within the act a genuine legislative intent to authorize judicial review by other means.” *Id.* (citing *Corbello v. Sutton*, 446 So. 2d 301, 302 (La. 1984)). Section 15:574.11(A) expressly limits appellate jurisdiction over decisions of the parole committee to those arising from the denial of a revocation hearing under LA. R.S. § 15:574.9. This suggests that state district courts lack subject matter jurisdiction to consider any challenge to parole committee decisions other than those concerning the “denial of a revocation hearing under R.S. 15:574.9.” LA. R.S. § 15:574.11(A); *see also Madison*, 825 So. 2d at 1250 n.7.

The district court below concluded that Galbraith could not obtain redress in state court because § 15:574.11(A) “effectively deprived [Galbraith] of a procedure to challenge the actions of the Parole [Committee] in rescinding his parole.” The majority agrees that § 15:574.11(A) bars appellate review of parole committee decisions but nevertheless holds that Galbraith could have pursued his claim through a state *habeas* petition under Article 362(2). *Ante*, at 18–19. This conclusion necessarily assumes that state district courts possess original jurisdiction to hear *habeas* petitions challenging any parole committee decision. Yet, the Louisiana Supreme Court has never resolved this jurisdictional question and, contrary to the majority’s analysis, state intermediate appellate courts are divided on whether Article 362(2) provides a viable means of relief in this context.

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The majority's holding turns on one line of cases that permits state *habeas* petitions challenging parole committee decisions but dismiss those failing to allege the denial of a revocation hearing under § 15:574.9 (again, the sole exception to § 15:574.11(A)'s general prohibition) as failing to state a cause of action. *Ante*, at 16–19. For example, in *Sinclair v. Kennedy*, 96-1510 (La. App. 1st Cir. 9/19/97), 701 So. 2d 457, 461–62, the Louisiana First Circuit Court of Appeal considered a prisoner's *habeas* petition claiming he was wrongfully denied parole despite satisfying all eligibility criteria and, thus, was entitled to immediate release. Because the prisoner did not contest the validity of his underlying conviction or sentence, but instead “claim[ed] his initially lawful custody became unlawful due to the parole [committee]'s actions in denying him release on parole,” *habeas* was an available remedy. *Id.* at 462. Nevertheless, *Kennedy* ruled that the prisoner failed to state a cause of action allowing for *habeas* relief because merely qualifying for parole did not entitle him to immediate release.² *Id.*

Later, in *Sinclair v. Stalder*, 2003-1568 (La. App. 1 Cir. 10/17/03), 867 So. 2d 743, the First Circuit again considered a prisoner's *habeas* petition seeking review of the parole committee's decision denying him parole. Citing *Kennedy*, the court agreed that a *habeas* petition “is the proper mechanism for an inmate who claims his initially lawful custody became unlawful due to the parole [committee]'s actions in denying him release on parole.” *Id.* at 744. However, the court ruled that the prisoner's petition failed to state a

² *Kennedy*'s holding relied heavily on *State ex rel. Bartie v. State*, 501 So. 2d 260 (La. Ct. App. 1986), a case involving a prisoner's *habeas* claim that the Louisiana Department of Public Safety and Corrections had miscalculated his time served and that, upon proper calculation, he was entitled to immediate release. *Bartie* found that such an action should be categorized as a post-conviction *habeas corpus* action because the prisoner did not “contest the validity of his conviction or sentence[.]” *Id.* at 263. Critically, *Bartie* did not squarely address whether *habeas* relief was available when challenging a decision of the parole committee. See *Madison*, 825 So. 2d 1245, 1250 n.7.

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cause of action because the “parole statutes do not create an expectancy of release or liberty interest.” *Id.* (citing *Bosworth v. Whitley*, 627 So.2d 629, 633 (La. 1993)).³

A more recent line of cases, however, suggest the specific limitations of § 15:574.11(A) broadly prohibits state district courts from considering any challenge to a parole committee decision—via *habeas* or otherwise—unless the prisoner or parolee alleges they were denied a revocation hearing under § 15:574.9. In other words, § 15:574.11(A) is a specific statutory exception to general state *habeas* relief. Beginning with *Madison v. Ward*, 825 So. 2d at 1250 n.7, the Louisiana First Circuit Court of Appeal sitting en banc revisited its approach to reviewing parole decisions in light of a growing number of prior First Circuit rulings that had permitted post-conviction *habeas* relief in such cases. The court explained that Louisiana “jurisprudence has not satisfactorily addressed the appropriate procedure for challenges to actions of the Board of Parole.” *Id.* The threshold question *Madison* considered was *what* parole committee actions may be challenged:

We find the clear meaning of La. R.S. 15:574.11(A) is that there shall be no appeal of decisions of the [committee] unless the procedural due process protections specifically afforded by the hearing provisions of La. R.S. 15:574.9 are violated. *See Smith v. Dunn*, 263 La. 599, 268 So.2d 670, 671 (1972). Thus, for example, challenges to the [committee]’s denial of parole, revocation of parole, refusal to consider an inmate for parole, or imposition of parole conditions would not be subject to

³ *Stalder* seemed to observe the tension between § 15:574.11(A) and Article 362(2) but made no effort to resolve it. Because the petitioner sought review of a parole committee decision beyond the scope of § 15:574.9, the court found “no statutory basis for [the petitioner] to seek review” of that decision. *Id.* Despite this, the court evaluated the merits of the *habeas* petition by applying *Kennedy*’s reasoning that a *habeas* petition is permissible to challenge the parole committee’s actions in denying release on parole. *Id.*

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appeal. This statement is consistent with *Bosworth v. Whitley*, 627 So.2d 629, 633 (La. 1993), which cites United States Supreme Court decisions holding that the existence of a parole system does not by itself give rise to a constitutionally protected liberty interest and that laws or regulations providing that a parole [committee] “may” release an inmate on parole have not been found to give rise to that interest; *Bosworth* goes on to say that “the Parole [Committee] has full discretion when passing on applications for early release.” *Bosworth*, 627 So.2d at 633.

Id. It follows, *Madison* observed, that “[o]nly where it is alleged that the hearing provisions of La. R.S. 15:574.9 were violated is appeal allowed.” *Id.*

Madison then turned to the question of “*how* such appeal is to be accomplished” under § 15:574.11. *Id.* (emphasis added). For example, it reaffirmed that parole decisions are not subject to review under the Louisiana Administrative Procedure Act. *Id.* (citing *Smith v. Dunn*, 268 So. 2d 670, 671–72 (La. 1972) (“[T]he special provisions in Title 15 creating the Board of Parole and setting out its powers and duties are not complementary or supplementary to the general administrative rules of procedure.”)). The court then sharply limited the scope of all other possible procedural avenues, holding that “pleadings challenging actions of the parole [committee] other than failure to act in accordance with La. R.S. 15:574.9, *whether styled as writs of habeas corpus or captioned in some other fashion*, should be dismissed by the district court.” *Id.* (emphasis added). By contrast, only “[p]leadings alleging a denial of a revocation hearing under La. R.S. 15:574.9, however styled,” were to be “reviewed on the merits by the district court.” *Id.* In adopting this restrictive procedural rule, the *Madison* court abrogated all prior First Circuit jurisprudence “considering challenges to parole [committee] actions in a manner other than that outlined” in its opinion, noting that such decisions “are without precedential effect to the extent [they are] inconsistent with the

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procedure we adopt today.” *Id.* This broad repudiation of earlier authority reasonably extends to the portions of *Kennedy*, 701 So. 2d at 462, upon which *Stalder*, 867 So. 2d at 744, and now the majority relies upon to support the availability of state *habeas* review. In substance, *Madison*’s procedural holding did not merely define the method of review—it functionally eliminated state *habeas* petitions as a viable remedy for challenging parole committee actions outside the narrow confines of § 15:574.9.

More recent, albeit unpublished, decisions from the Louisiana First Circuit Court of Appeal reflect a consistent trend of dismissing state *habeas* petitions that challenge parole committee decisions unrelated to the denial of a revocation hearing, citing a lack of jurisdiction. In *Boston v. Jones*, 2009-1778 (La. App. 1 Cir. 6/4/10), 2010 WL 2844344, the court rejected a *habeas* petition filed by a parolee alleging procedural violations during the revocation process. The court explained that “[t]o properly assert [a] right of review of the [committee]’s decision, a parolee is required to file a petition for judicial review in a district court, alleging that his right to a revocation hearing was denied” *Id.* at *1 (citing *Leach v. La. Parole Bd.*, 2007-0848 (La. App. 1 Cir. 6/6/08), 991 So. 2d 1120). Because the parolee had instead filed a *habeas* petition claiming his confinement was unlawful, the court was “unable to consider the propriety of the [committee]’s decision or the validity of the inmate’s waiver of the final parole revocation hearing.”⁴ *Id.* Similarly, in *Gatson v. La. Dep’t of Pub. Safety & Corr.*, 2014-1127 (La. App. 1 Cir. 3/6/15), 2015 WL 997222, the court dismissed a *habeas* petition challenging the revocation of parole where the petitioner conceded that a revocation hearing

⁴ Like *Boston*, some First Circuit decisions have suggested that a petition for judicial review is the exclusive avenue to challenge parole committee decisions. *See, e.g., Moore v. La. Parole Bd.*, 2022-1278 (La. App. 1 Cir. 6/2/23), 369 So. 3d 415, 418 (citation omitted); *Williams v. La. Dep’t of Pub. Safety & Corr.*, 2023-1235 (La. App. 1 Cir. 6/27/24), 2024 WL 3198974 at *2–3.

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had been held. Because the claim did not concern the denial of a hearing, the court held it “was not properly a claim for *habeas corpus* relief under Article 362,” and affirmed the district court’s conclusion that it “lacked subject matter jurisdiction over appellant’s challenge of the Parole [Committee]’s decision to revoke his parole.” *Id.* at *2–3. These cases cast further doubt on the viability of state *habeas* petitions as an accepted means of challenging parole committee decisions under *Kennedy*, 701 So. 2d at 462 and *Stalder*, 867 So. 2d at 744.

At most, then, Louisiana intermediate appellate courts offer uncertain and inconsistent support for the majority’s conclusion that Galbraith could have pursued his challenge through a state *habeas* petition. And the Louisiana Supreme Court has not weighed in at all. True enough, Galbraith’s claim tracks the language of Article 362(2) in a general sense: he alleges his “original custody was lawful” but contends that the parole committee’s subsequent “act” of rescinding his parole rendered his continued confinement “unlawful.” LA. CODE CRIM. PRO. art. 362(2); *Kennedy*, 701 So. 2d at 462; *Stalder*, 867 So. 2d at 744. But a growing body of Louisiana caselaw casts serious doubt on whether state district courts may entertain *habeas* petitions (or any other pleadings) challenging parole committee decisions outside the narrow confines of LA. R.S. 15:574.9 under either their original or appellate jurisdiction. *See, e.g., Madison*, 825 So. 2d at 1250 n.7; *accord Leach*, 991 So. 2d at 1125; *Gatson*, 2015 WL 997222 at *2–3. To speak authoritatively on the availability of a state *habeas* remedy here would be, at best, a jurisprudential gamble. *Compare Galbraith v. Hooper*, 85 F.4th 273, 284 (5th Cir. 2023) (finding no available state *habeas* remedy because Galbraith’s claim did not fall within the jurisdictional bounds of § 15:574.11), *op. withdrawn*, No. 22-30159, 2024 WL 1170026 (5th Cir. Mar. 19, 2024), *with ante*, at 20 (holding that Galbraith could have brought his claim in a state *habeas* application).

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Even more troubling, the majority makes its *Erie* guess without the benefit of a considered judgment from the district court. The district court did not analyze whether Louisiana state district courts possess original jurisdiction to hear a *habeas* petition under Article 362 in this context. And understandably so: neither party raised it below, nor has either meaningfully briefed it on appeal. “[M]indful that we are a court of review, not of first view,” judicial humility cautions against “seek[ing] out alternative grounds” to deny relief—especially where those grounds were neither addressed by the district court nor developed by the parties. *Rutila v. Dep’t of Transp.*, 12 F.4th 509, 511 n.3 (5th Cir. 2021) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). “[R]ather than decide these heady questions ourselves without the benefit of any considered judgment below,” our well-established practice is to vacate and remand to allow the district court to consider the issue in the first instance. *See, e.g., Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 957 (5th Cir. 2024); *Arnesen v. Raimondo*, 115 F.4th 410, 414 (5th Cir. 2024); *Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017).

The majority nevertheless forges ahead with a significant departure from our prior opinion’s exhaustion analysis—despite the serious due process violation we recognized there—without the benefit of a district court ruling and relying on nothing more than an *Erie* guess. Instead of guessing, I would either certify the question to the Louisiana Supreme Court or, in the alternative, remand for our capable district court colleague to weigh in first.⁵

⁵ I do not view the majority opinion to conclude that Galbraith’s petition was untimely because it acknowledges but does not resolve the district court’s timeliness ruling. *Ante*, at 15 (“We need not decide this issue because of our holding in the following section.”). Lest there be any doubt, I would find Galbraith’s petition timely for the reasons stated by the district court.

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Because the majority provides no answer to the concerns I have raised, I respectfully dissent.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 19, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-30159 Galbraith v. Hooper
USDC No. 3:19-CV-181

The court has taken the following action in this case:

The published opinion filed on October 23, 2023, is hereby
WITHDRAWN. A new opinion will be substituted at a later date.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Whitney M. Jett, Deputy Clerk
504-310-7772

Mr. John Taylor Gray
Mr. Michael L. McConnell
Mr. Nicholas Joseph Trenticosta
Mr. Christopher Neal Walters
Mr. Grant Lloyd Willis

basis for a belief that these consistent results have been the result of Judge Ashe's actions in this case.

Finally, "the public's confidence in the judicial process" is not undermined once, after a review of the records in the consolidated cases before us on appeal, it can be seen that Judge Ashe has made the same rulings as his colleagues who have been presented with the same issues.

If Judge Ashe erred when he failed to recuse in these cases, that error was harmless. Nonetheless, as the arguments on this appeal support, potential conflicts of interest must be taken seriously by every member of the judiciary. The litigants and the public need to be confident in the impartiality of those who will decide legal disputes. This appeal is fair warning to each of us of the importance of assuring the reality and appearance of that impartiality.

AFFIRMED.



Prod. Inc., 2022 WL 2342474, at *4 (E.D. La. June 29, 2022) (Barbier, J.) ("Dr. Cook fails to identify the dose of any such chemical that would result in the adverse health effects contained in his report, and his report is therefore unreliable and inadmissible."); *Harrison v. BP Expl. & Prod. Inc.*, 2022 WL 2390733, at *6 (E.D. La. July 1, 2022) (Morgan, J.) ("Cook's expert report includes no identification of the necessary dose of exposure for any of Plaintiff's complained-of symptoms to manifest."); *Harris v. BP Expl. & Prod. Inc.*, 2022 WL 2789037, at *7 (E.D. La. July 15, 2022) (Vance, J.) ("Dr. Cook's failure to identify the level of exposure to a relevant chemical that can cause the conditions asserted in plaintiff's complaint renders his opinion unreliable, unhelpful, and incapable of establishing general causation."); *Hill v. BP Expl. & Prod. Inc.*, 2022 WL 4534747, at *6 (E.D. La. Sept. 28, 2022) (Vitter, J.) ("Dr. Cook does not even

Samuel GALBRAITH, Petitioner—
Appellee,

v.

Tim HOOPER, Warden, Louisiana
State Penitentiary, Respondent—
Appellant.

No. 22-30159

United States Court of Appeals,
Fifth Circuit.

FILED October 23, 2023

Background: State prisoner filed petition for writ of habeas corpus seeking to have his parole reinstated on ground that its rescission just prior to its effective date violated his due process rights. The United States District Court for the Middle District of Louisiana, John W. deGravelles, J., 2022 WL 907142, adopted report and recommendation of Erin Wilder-Doomes, United States Magistrate Judge, 2022 WL 943144, and granted petition, and Board appealed.

Holdings: The Court of Appeals, Southwick, Circuit Judge, held that:

specify the exact chemicals that Plaintiff was allegedly exposed to, let alone provide evidence regarding the level of exposure at which Plaintiff's symptoms might manifest."); *see also Laster v. BP Expl. & Prod. Inc.*, 2022 WL 5165019, at *1 (E.D. La. Sept. 13, 2022) (Guidry, J.) ("[F]or the previous reasons cited by this Court as well as the seven other judges of this Court, both the *Daubert* Motion and the Motion for Summary Judgment shall be granted."); *Reed v. BP Expl. & Prod. Inc.*, 2022 WL 3099925, at *3 (E.D. La. Aug. 4, 2022) (Milazzo, J.) ("[F]or the same reasons articulated by Judges Ashe, Vance, Barbier, Morgan, and Zainey, the Court grants Defendants' *Motion in Limine*."); *Barksdale v. BP Expl. & Prod. Inc.*, 2022 WL 2789022, at *3 (E.D. La. July 15, 2022) (Zainey, J.) (excluding Dr. Cook's testimony "[f]or the same reasons given by Judges Vance, Barbier, Morgan, and Ashe").

- (1) prisoner's challenge to revocation of his parole was properly brought as § 2241 habeas petition;
- (2) prisoner was not required to exhaust his state remedies before seeking federal habeas relief; and
- (3) parole board violated prisoner's procedural due process rights when it rescinded his parole because of alleged problem with notice to victim.

Affirmed.

1. Habeas Corpus ⇌842, 846

In habeas corpus appeal, Court of Appeals reviews district court's findings of fact for clear error and its conclusions of law de novo.

2. Habeas Corpus ⇌206.1, 208

When state prisoners contest their custody and seek to obtain release, appropriate procedure is to file § 2254 habeas application, but if prisoner instead is contesting execution of his sentence, § 2241 is relevant statute. 28 U.S.C.A. §§ 2241, 2254.

3. Habeas Corpus ⇌517

State prisoner's challenge to revocation of his parole was properly brought as habeas petition under § 2241, rather than as § 1983 action or § 2254 habeas petition. 28 U.S.C.A. §§ 2241, 2254; 42 U.S.C.A. § 1983.

4. Habeas Corpus ⇌842

Whether federal habeas petitioner has exhausted state remedies is question of law reviewed de novo. 28 U.S.C.A. § 2241.

5. Habeas Corpus ⇌320

Requirement that federal habeas petitioner exhaust state remedies is not jurisdictional, but reflects policy of federal-state comity designed to give state initial opportunity to pass upon and correct al-

leged violations of its prisoners' federal rights. 28 U.S.C.A. § 2241.

6. Habeas Corpus ⇌374.1

For purposes of federal habeas statute's exhaustion requirement, prisoner's state remedy must be adequate and available. 28 U.S.C.A. § 2254(b).

7. Habeas Corpus ⇌374.1

Louisiana prisoner did not have adequate and available state remedy or corrective process that would have allowed him to assert in state court claim that state parole board's rescission of his parole two days before his release date violated due process, and thus prisoner was not required to exhaust his state remedies before seeking federal habeas relief; Louisiana's parole statutes did not allow for appeal of parole board actions except for denial of revocation hearing, prisoner's administrative grievance was rejected on ground that Board's decisions "are d[i]scretionary and may not be challenged," and passage of release date was necessary event for invoking state court jurisdiction. U.S. Const. Amend. 14; 28 U.S.C.A. §§ 2241, 2254(b); La. Rev. Stat. Ann. § 15:574.11(A).

8. Constitutional Law ⇌3869

Those seeking to invoke Fourteenth Amendment's procedural protection must establish that life, liberty, or property is at stake. U.S. Const. Amend. 14.

9. Constitutional Law ⇌3873

Liberty interest protected by Due Process Clause may arise from Constitution itself, by reason of guarantees implicit in word "liberty," or it may arise from expectation or interest created by state laws or policies. U.S. Const. Amend. 14.

10. Constitutional Law ⇌3876

Purpose of due process protection is to shield person against arbitrary action of government. U.S. Const. Amend. 14.

11. Constitutional Law ⇌4838

Pardon and Parole ⇌46

There is no constitutional or inherent right to parole, but once state grants prisoner conditional liberty properly dependent on observance of special parole restrictions, due process protections attach to decision to revoke parole. U.S. Const. Amend. 14.

12. Constitutional Law ⇌4838

Pardon and Parole ⇌70.1, 77.1

Louisiana law created liberty interest protecting prisoner from rescission of his parole once granted for any reason other than for violation of terms of work release or for misconduct, even though Louisiana's parole statutes did not create liberty interest in granting of parole, and thus Louisiana parole board violated prisoner's procedural due process rights when it rescinded his parole because of alleged problem with notice to victim. U.S. Const. Amend. 14; La. Rev. Stat. Ann. § 15:574.11(A); La. Admin. Code tit. 22, pt. XI, § 504(K).

Appeal from the United States District Court for the Middle District of Louisiana, USDC No. 3:19-CV-181, John W. deGravelles, U.S. District Judge

Nicholas Joseph Trenticosta, Esq., Attorney (argued), Herrero & Trenticosta, New Orleans, LA, for Petitioner-Appellee.

Christopher Neal Walters, Assistant Attorney General, Louisiana Department of Justice, Baton Rouge, LA, Grant Lloyd Willis, Assistant Attorney General (argued), Louisiana Department of Justice, Litigation Division, Baton Rouge, LA, for Respondent-Appellant.

1. Galbraith's Application for Parole is undated; however, other documents in the applica-

Before Stewart, Dennis, and Southwick, Circuit Judges.

Leslie H. Southwick, Circuit Judge:

Samuel Galbraith, a Louisiana prisoner, sued the Louisiana Board of Pardons and Parole ("Parole Board"), seeking to have his parole reinstated on the grounds that its rescission just prior to its effective date violated his due process rights. The district court agreed with Galbraith and ordered his release on parole within 30 days, subject to the original conditions of his parole. On appeal, the Parole Board's arguments include that there is no constitutionally protected liberty interest in parole. Based on Louisiana's parole statutes, we hold that, on the facts of this case, a liberty interest did arise. We AFFIRM.

**FACTUAL AND PROCEDURAL
BACKGROUND**

In February 2000, Samuel K. Galbraith pled guilty to the manslaughter and attempted aggravated rape of Karen Hill in November 1988. He was sentenced to 71 years at hard labor. In November 2000, James Hill, who is the victim's surviving husband, completed a "Louisiana Department of Public Safety and Corrections Victim/Witness Notification Request Form." The form required the Parole Board to notify the named person when a parole hearing was granted for a specified inmate. The record does not contain a similar form from anyone else that requested notice regarding Galbraith's potential parole.

In the spring of 2016,¹ Galbraith filed an Application for Parole. His first possible parole eligibility date was April 23, 2017. The Parole Board set Galbraith's hearing for October 13, 2016, and sent notification

tion reflect dates of early-to-mid 2016.

letters on July 7, 2016, to Hill and Jessie McWilliams, Karen Hill's mother, advising them of their right to appear and present testimony at the parole hearing. McWilliams's letter was erroneously addressed to a post office box in Albany, New York, instead of to the same-numbered post office box in Albany, Illinois. On September 14, 2016, Galbraith's attorney requested a continuance of the October hearing until November 3, 2016, which was granted. The Parole Board sent notification letters to Hill and McWilliams on September 28, 2016, this time to their correct addresses, reflecting the new November hearing date. At this time, the Louisiana Administrative Code required notification 30 days prior to the parole hearing to be sent to "[t]he victim, spouse, or next of kin of a deceased victim." LA. ADMIN. CODE, tit. 22, Pt XI, § 510(B) (eff. Aug. 2013 to Mar. 2018).² Thus, the Parole Board was required to give notice only to Hill as the surviving husband. The Parole Board did so.

A pre-parole investigation report was prepared. The report contained statements from Hill, McWilliams, the Vernon Parish District Attorney's Office, the Vernon Parish Sheriff's Office, and the Vernon Parish sentencing judge. They all opposed parole. At Galbraith's parole hearing, a three-member panel of the Parole Board heard testimony or statements from those opposed to his early release. That Board also heard from Galbraith's family members, who supported his parole. Galbraith was represented by counsel at the hearing. The

Parole Board panel unanimously voted to grant parole to Galbraith with a scheduled release date of April 23, 2017, and with a list of specific conditions during his parole term. The Certificate of Parole showed that Galbraith would reside in Aransas Pass, Texas, and would be subject to the authority of a parole office in Corpus Christi, Texas.

Neither Hill nor McWilliams attended the hearing, but each provided a written statement or testimony. Both were contacted directly by someone from the Department of Corrections after the hearing and were notified of the decision.

After parole was granted, Vernon Parish District Attorney Asa Skinner filed a request for reconsideration of the parole board's decision. He sent request letters on November 15, 2016, November 30, 2016,³ and January 9, 2017. In February 2017, the Parole Board denied Skinner's request for reconsideration, explaining that "[t]he panel voted unanimously to grant parole . . . after serious and thorough consideration" and "[t]he board's policy provides for a reconsideration review only in [limited] circumstances," none of which were applicable in Galbraith's case. Skinner and McWilliams aired their displeasure to the press, leading to negative reports that appeared in the news regarding Galbraith's imminent parole.

In early April 2017, the Parole Board and the Department of Corrections made final preparations for Galbraith's release.

2. The statute was amended in March 2018 to require 90-days' notice and to require notice to any person who has filed a victim notice and registration form. See LA. ADMIN. CODE, tit. 22, pt. XI, § 510(B) (eff. Mar. 2018 to Dec. 2018). Victim notification errors were not a permissible basis, at least explicitly, for rescission of parole until the statute was amended in August 2019. Compare LA. ADMIN. CODE, tit. 22, pt. XI, § 504(K) (eff. Jan. 2015 to Aug.

2019), with LA. ADMIN. CODE, tit. 22, pt. XI, § 504(K) (eff. Aug. 2019 to Jan. 2020).

3. In one of the November 30 letters, Skinner attached a report by retired chief detective, Martin Hilton, who relayed his opinion that Galbraith may be responsible for two cold-case murders in Vernon Parish. Galbraith, however, was never charged with either of these murders, and there is no evidence in the record connecting him to those two victims.

On April 10, 2017, Parole Board member Mary Fuentes sent an email to the Deputy Executive Counsel to Louisiana Governor John Bel Edwards. She referred to a news story regarding Galbraith’s release that would air on April 13. Her concern was that the story could impact criminal justice legislation that was desired by the governor. Two days later, a single Parole Board member, Sheryl Ranatza, added electronic monitoring as a condition of Galbraith’s parole. On April 20, 2017, the Parole Board received notice from Texas that the new condition of parole was accepted, and Ranatza signed and issued a Certificate of Parole with a release date of April 23, 2017.

On April 21, 2017, an email exchange occurred between Special Counsel of the Louisiana Governor’s Legislative Staff and a lobbyist with Top Drawer Strategies, LLC. Both expressed concern about the negative media reports regarding Galbraith’s release and potential impact on the success of the pending criminal justice reform legislation. The news report referenced in that email exchange included details about interviews with McWilliams, who stated her victim notification letter was sent to the wrong mailing address, and with Skinner, who claimed Galbraith was responsible for two other cold-case murders in Vernon Parish.

On April 21, the same day as this email exchange, Galbraith’s parole hearing docket record stated: “Rescind Pending Per Mary F,” *i.e.*, board member Mary Fuentes. That day, a single Parole Board member, Jim Wise, filled in a “Parole Board Action Sheet” that rescinded Galbraith’s parole based on this reason: “Oth-

er [-] There may have been tech[n]ical irregularity to victim notice.”

Galbraith was not released. In a letter dated May 1, the Parole Board officially notified him of the rescission, awkwardly repeating the phrasing of the Parole Board Action Sheet:

This correspondence is to advise you that the Parole Board has voted to rescind the parole granted at your original parole hearing.

This action was taken due to the following:

We have been advised that Other.

There may have been technical irregularities notifying the victim’s family.

You will be scheduled for another hearing on 08/03/2017.

There is no evidence that the Parole Board took any action to rescind parole beyond the single board member’s signature on the rescission form. The Parole Board later issued a press release announcing the decision to rescind. It explained that, even though McWilliams received notice of the November hearing and provided a statement for its consideration, the Board was rescheduling the parole hearing “because of the apparent procedural error which occurred with the initial victim notification.”⁴

In May 2017, Galbraith filed an administrative grievance, which was rejected on the ground that the Parole Board’s decision was discretionary and could not be challenged. In June 2017, Galbraith’s counsel sent a letter (1) contesting the decision to rescind for failure to adhere to Parole Board policy, (2) contesting the factual basis of the alleged technicality that occurred with the victim notice, and (3) advising the

4. As we have already explained, the Parole Board was required to provide 30 days’ notice of the hearing, and timely notice was given for the November hearing. There is no sugges-

tion or record that McWilliams requested notification, and she was not required to be notified under the statute in effect at the time. *See supra* n.2.

Parole Board that neither of the two permissible reasons for rescission of parole applied in his case. In July 2017, Galbraith, through counsel, withdrew from parole consideration for the reasons stated in his attorney's June letter.

On July 26, 2017, counsel for Galbraith filed a 42 U.S.C. § 1983 complaint in the Middle District of Louisiana challenging the Parole Board's rescission of his parole. He sought reinstatement of his parole and immediate release from prison. A year and a half later, the Parole Board filed a motion for summary judgment in which it argued Galbraith's exclusive remedy to seek release from custody was through a writ of *habeas corpus*.

On March 27, 2019, counsel for Galbraith filed a 28 U.S.C. § 2241 application, naming the warden of the prison as the defendant. We will refer to the defendant as the State since the warden was sued in his official capacity. Stating that it was due to the common legal issues, the district court stayed and administratively closed the Section 1983 proceedings pending resolution of the Section 2241 application. In its answer to Galbraith's Section 2241 application, the State argued Galbraith failed to exhaust his available state court remedies, his application was time-barred, and his claim lacked merit because the Parole Board's rescission did not infringe any constitutionally protected liberty interest.

In a March 9, 2022, Report and Recommendation, the magistrate judge determined:

- (1) Galbraith was not required to exhaust his claims because Louisiana's statutory scheme did not permit him to challenge the Parole Board's rescission under these circumstances;
- (2) It was not clear if Galbraith's Section 2241 petition was subject to a limitations period;
- (3) Even if a one-year limitations period was applicable, Galbraith filed a Section 1983 complaint within that time period seeking *habeas corpus* relief;
- (4) Although Galbraith did not have a liberty interest in the granting of parole, there was a state-created liberty interest at issue here because the Parole Board regulations in effect at the time permitted rescission of a parole grant only in two circumstances, neither of which was applicable to Galbraith's situation;
- (5) Galbraith was therefore entitled to notice and a meaningful opportunity to be heard prior to rescission of his parole grant, but he received neither; and
- (6) A remand to the Parole Board to conduct a rescission hearing would be futile because neither permissible basis for rescission was applicable.

The magistrate judge recommended granting Galbraith's *habeas* application and ordering his release on parole within 30 days, subject to the original conditions of his parole as granted on November 3, 2016. The State filed objections. On March 28, 2022, the district court granted Galbraith's *habeas corpus* application "for the reasons set forth in the Magistrate Judge's Report." The State filed a timely notice of appeal. We granted an unopposed motion to stay the district court's judgment and release order, pending appeal.

On appeal, the State argues the district court erred in its holding that (1) Galbraith was not required to exhaust state remedies, (2) Galbraith's application was not time-barred, and (3) Galbraith had a protected liberty interest in his parole grant prior to release.

DISCUSSION

[1] “In a *habeas corpus* appeal, we review the district court’s findings of fact for clear error and its conclusions of law *de novo*.” *Reeder v. Vannoy*, 978 F.3d 272, 276 (5th Cir. 2020) (citation omitted).

We first review the district court’s legal conclusion about the often-difficult issue of the proper statutory vehicle for a prisoner’s claim. Different procedural hurdles apply depending on that decision. We then turn to the State’s three arguments about reversible error in the district court’s rulings.

I. Habeas corpus application or Civil Rights suit?

[2] Section 2241 is a general statute permitting district courts to grant writs of *habeas corpus* to individuals who are in custody under the authority of either federal law or a state court judgment, while Section 2254 limits district courts’ authority when considering *habeas* relief for state prisoners. See *Hartfield v. Osborne*, 808 F.3d 1066, 1071–73 (5th Cir. 2015). When state prisoners contest their custody and seek to obtain release, the appropriate procedure is to file a Section 2254 application. *Id.* Significant limitations apply to the right to relief under that section. See 28 U.S.C. § 2254(a)–(i). If the prisoner instead is contesting the “execution” of his sentence, Section 2241 is the relevant statute. See *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000). Another expression of Section 2241’s applicability is that it is for challenges to “the manner in which a sentence is carried out or the prison authorities’ determination of its duration.” *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000).

“[Section] 2254 is not an independent avenue through which petitioners may pursue *habeas* relief.” *Hartfield*, 808 F.3d at 1073. “Instead, all *habeas* petitions . . . are brought under [Section] 2241, and [Sec-

tion] 2254 places additional limits on a federal court’s ability to grant relief if the petitioner is being held in custody ‘pursuant to the judgment of a State court.’” *Topletz v. Skinner*, 7 F.4th 284, 294 (5th Cir. 2021) (quoting § 2254(a)). Among those limitations is that the application “by a person in custody pursuant to the judgment of a State court” must be filed within one year of different events; relevant here is “the date on which the factual predicate of the claim” was or could have been discovered. 28 U.S.C. § 2244(d)(1)(D).

Galbraith is in custody due to a state court judgment and seeks his release by requesting the court to reinstate his parole grant. He argues the one-year limitation period is inapplicable. That is because his rights allegedly were violated when the Parole Board did not hold a hearing prior to the rescission of his parole grant, and that means he is challenging “the manner in which [his] sentence is carried out or the prison authorities’ determination of its duration.” *Pack*, 218 F.3d at 451.

Three possible vehicles for Galbraith’s claim have been proposed: a civil rights suit under Section 1983, or a *habeas* application under either Section 2241 or Section 2254.

We start with Section 1983. A helpful precedent concerned a Section 1983 suit in which two state prisoners claimed that state authorities had violated the *Ex Post Facto* and Due Process Clauses of the Constitution. See *Wilkinson v. Dotson*, 544 U.S. 74, 76–77, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005). The violation allegedly arose when officials applied new, harsher guidelines for determining parole to prisoners whose crimes had been committed when less-demanding guidelines were used. *Id.* The plaintiff prisoners had been considered for parole under the harsher guidelines, were denied parole, and then deemed

ineligible to seek parole again for five years. *Id.* The plaintiffs wanted immediate parole hearings under the prior guidelines. *Id.* at 77, 125 S.Ct. 1242. The Court held that the constitutional claims were properly brought using Section 1983. *Id.* at 76, 125 S.Ct. 1242. The Court rejected the argument that “the prisoners’ lawsuits, in effect, collaterally attack the *duration* of their confinement; hence, such a claim may only be brought through a *habeas corpus* action.” *Id.* at 78, 125 S.Ct. 1242 (emphasis in original). “A consideration of this Court’s case law makes clear that the connection between the constitutionality of the prisoners’ parole proceedings and release from confinement is too tenuous here to achieve Ohio’s legal door-closing objective.” *Id.*

Galbraith, though, is not seeking a new hearing. He insists the parole he earlier received was improperly rescinded and should again be reinstated. He brings a direct and immediate claim about the duration of his confinement, without the contingency that existed in *Dotson* that a new hearing might not grant parole. *Habeas* is the proper procedure here.

We now examine the *habeas* application Galbraith eventually did file under Section 2241. The State argues that the one-year statute of limitations that is set out in 28 U.S.C. § 2244(d) applies. The district court disagreed, holding that Galbraith’s challenge to the rescission of his parole was properly brought under Section 2241 (which has no statute of limitations) because it raised issues of “the manner in which a sentence [was] carried out,” quoting *Pack*, 218 F.3d 448. Parole was not involved in *Pack*, though, so it does not directly answer whether parole fits within the category of “carrying out” a sentence.

So, how do we categorize this claim? Does Section 2254 apply to a challenge to the validity or length of the original sen-

tence but not to disputes about whether the sentence has ended or been shortened by subsequent events? In other words, is Section 2254 inapplicable to challenges like Galbraith’s to the execution of a sentence? A treatise on federal *habeas* procedures supports our characterization of Galbraith’s claim as one that is about the “execution” of his sentence. *See Tolliver*, 211 F.3d at 877. The treatise concluded that challenges to the denial of federal parole are properly brought under Section 2241. BRIAN R. MEANS, FED. HABEAS MANUAL § 1:29, at 47 (2023) (quoting *Coady v. Vaughn*, 251 F.3d 480, 485 (3d Cir. 2001)). That treatise accepts that denial of parole is an act relating to the execution of the sentence.

The treatise continues:

All courts agree that [Section] 2241 is an appropriate vehicle to challenge government action that inevitably affects the duration of the petitioner’s custody, such as challenges to administrative orders revoking good-time credits, computation of a prisoner’s sentence by prison officials, a right to release on parole, or other equivalent sentence-shortening devices.

Id. at 48.

While Galbraith is a state prisoner and the above treatise concerns federal prisoners, our circuit has extended the same reasoning that challenges to parole revocations sound under Section 2241 to state prisoners. Generally unpublished opinions offer no precedential weight, but, in this circuit, unpublished opinions issued prior to January 1, 1996, are precedential. 5th Cir. R. 47.5.3. The district court cited one such opinion. *See Richie v. Scott*, 70 F.3d 1269 (5th Cir. 1995) (unpublished but precedential under Fifth Cir. Local R. 47.5.3). In *Richie*, we rejected the district court’s determination that the prisoner had to bring his claim under Section 2254, finding

that a challenge to the revocation of parole should be brought under Section 2241. *Id.* at *1 (citing *Rome v. Kyle*, 42 F.3d 640 (5th Cir. 1994) (unpublished); *Johnson v. Scott*, 56 F.3d 1385 (5th Cir. 1995) (unpublished)). If the party is not contesting the legality or validity of the sentence, Section 2254 is inapplicable. *Id.*

In another case, the *Johnson* panel rejected the state’s invitation to allow parole revocation challenges under either Section 2241 or 2254. *Johnson*, 56 F.3d at *1. Rather, it acknowledged that “[o]n numerous occasion . . . this court has construed a habeas petition challenging the revocation of parole as one arising exclusively under” Section 2241, and it ruled accordingly. *Id.* (citations omitted). Another panel found that the district court “improperly characterized [the defendant’s] petition as arising under Section 2254” when it was not contesting the legality or validity of the sentence. *Rome*, 42 F.3d at *2. It concluded that a petition must be construed under Section 2241 when it “is contesting the manner in which [the] sentence is being executed.” *Id.*

[3] Based on this precedent, we conclude that such a claim as Galbraith’s should indeed be defined as a dispute about how a “sentence is carried out.” *See Pack*, 218 F.3d at 451. Galbraith’s challenge to the revocation of his parole was properly brought under Section 2241. *Richie*, 70 F.3d at *1.

A prisoner must exhaust state remedies prior to seeking relief under Section 2241. *Id.* Thus, we begin with the exhaustion requirement, discuss timeliness briefly, then conclude with examining the merits of the claim.

II. Exhaustion of state remedies

[4, 5] “Whether a federal *habeas* petitioner has exhausted state remedies is a question of law reviewed *de novo*.”

Anderson v. Johnson, 338 F.3d 382, 386 (5th Cir. 2003). The “exhaustion requirement is not jurisdictional, but reflects a policy of federal-state comity . . . designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” *Id.* (alteration in original) (quotation marks and citations omitted).

On appeal, the State repeats its arguments that it made to the district court that Galbraith could have raised his challenge in a state *habeas corpus* application and has failed to exhaust his state court remedies. It relies heavily on *Sinclair v. Stalder*, 867 So. 2d 743 (La. Ct. App. 2003) and *Sneed v. Hooper*, 328 So. 3d 1164 (La. 2021). The district court rejected the argument that Galbraith could have filed a state *habeas* application. That is because Louisiana’s statutory scheme does not permit a challenge to the Parole Board’s rescission on *any* ground, *except* for the denial of a revocation hearing. Due to the perceived lack of any available state corrective process, the district court held that Galbraith was not required to exhaust his *habeas* application and met the exception in Section 2254(b)(1)(B)(i). First, we examine those conclusions.

Federal *habeas* relief for state prisoners is limited to those applicants who have “exhausted the remedies available in the courts of the State,” unless “there is an absence of available State corrective process” or “circumstances exist that render such process ineffective to protect the rights of the applicant.” § 2254(b)(1). An applicant has not exhausted his available remedies “if he has the right under the law of the State to raise, by any available procedure, the question presented.” § 2254(c).

The district court relied on the fact that “Louisiana’s parole statutes allow for ap-

peal of parole board actions in only one circumstance.” The pertinent language in the statute is this:

Parole is an administrative device for the rehabilitation of prisoners under supervised freedom from actual restraint, and the granting, conditions, or revocation of parole rest in the discretion of the committee on parole. *No prisoner or parolee shall have a right of appeal from a decision of the committee regarding release or deferment of release on parole, the imposition or modification of authorized conditions of parole, the termination or restoration of parole supervision or discharge from parole before the end of the parole period, or the revocation or reconsideration of revocation of parole, except for the denial of a revocation hearing under R.S. 15:574.9.*

La. R.S. § 15:574.11(A) (emphases added).

Another relevant statute provides that

The committee may order revocation of parole upon a determination that:

- (1) The parolee has failed, without a satisfactory excuse, to comply with a condition of his parole; and
- (2) The violation of condition involves the commission of another felony, or misconduct including a substantial risk that the parolee will commit another felony, or misconduct indicating that the parolee is unwilling to comply with proper conditions of parole.

La. R.S. § 15:574.9(B).

Based on the Louisiana statutory language, a prisoner cannot contest a decision by the Parole Board unless he has not been afforded a revocation hearing and his parole revocation meets the requirements set forth in Section 15:574.9. Otherwise, as the district court held, there is no statutory recourse to challenge a decision by the Parole Board. Making this clear, when Galbraith attempted to file an administra-

tive grievance to challenge the Parole Board’s decision, his grievance was rejected. The stated reason was the Parole Board’s policy that “decisions of these boards are d[i]scretionary and may not be challenged.”

[6, 7] For purposes of Section 2254(b)’s exhaustion requirement, “a prisoner’s state remedy must be adequate and available.” *Preiser v. Rodriguez*, 411 U.S. 475, 493, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). Based on the statutory scheme alone, Galbraith did not have an adequate and available state remedy or corrective process that would have allowed him to bring this claim in state court.

Next, we look at the Louisiana caselaw cited by the parties and the district court. The district court discussed *Sinclair v. Stalder* and determined that “[h]ad [Galbraith] attempted to challenge rescission of his parole through the state court system, his pleadings would have been dismissed as directed in *Sinclair* because he was not denied a parole revocation hearing, which is the only permissible basis to obtain review of a Parole Board decision.” The State insists the district court “conflated its own perceived likelihood of success on the merits of Galbraith’s challenge with whether state review procedures were ‘available’ for Galbraith to pursue.” We examine *Sinclair*.

In that case, a Louisiana prisoner sought review of the Parole Board’s decision to deny him early release on parole. *Sinclair*, 867 So. 2d at 743–44. The court held that a state *habeas corpus* application was “the proper mechanism for an inmate who claims his initially lawful custody became unlawful due to the parole board’s actions in *denying* him release on parole.” *Id.* at 744 (emphasis added). The court explained that Section 15:574.11(A) has been interpreted to mean “there is no appeal of decisions of the board unless the

procedural due process protections specifically afforded by the hearing provisions of 15:574.9 are violated.” *Id.*; see also *Bosworth v. Whitley*, 627 So. 2d 629, 631 (La. 1993) (outlining Louisiana’s system of parole and discussing that the Parole Board’s decisions “generally cannot be appealed” as per Section 15:574.11). Accordingly, any challenge to actions of the Parole Board not “in accordance with 15:574.9 should be dismissed by the district court.” *Sinclair*, 867 So. 2d at 744. Because Louisiana’s parole statutes did not “create an expectancy of release or liberty interest,” the court held *Sinclair*’s application failed to state a cause of action. *Id.* In that case, *Sinclair* challenged the parole board’s decision to deny his initial application for parole, but the “parole board has full discretion when passing on applications for early release.” *Id.*

Galbraith’s case significantly differs from *Sinclair*’s — most clearly in the fact that his petition for parole was granted, not denied. Galbraith had a parole hearing and was granted a Certificate of Parole. The Parole Board set his release date and arranged with the State of Texas to have Galbraith serve his parole there. Galbraith’s parole grant was rescinded two days prior to his release for a reason that appears unauthorized by statute at the time.⁵

Thus, under *Sinclair*, if Galbraith would have filed a state *habeas corpus* application challenging the Parole Board’s rescission, his application would have been dismissed because the claim was not based on

the Parole Board’s failure to provide a parole *revocation* hearing. See *id.* This supports the district court’s conclusion that Galbraith was not required to meet the exhaustion requirement because there were no available state procedures to exhaust.

The State also discusses a recent Louisiana Supreme Court opinion in which the court analyzed a *habeas corpus* application that involved a prisoner’s challenge to the rescission of his parole. *Sneed*, 328 So. 3d 1164. There, a prisoner was granted parole; four days prior to his scheduled release, he collapsed and was hospitalized. *Id.* at 1164. Upon his release from the hospital, and after his parole release date had passed, he returned to prison and was issued a disciplinary report for possessing contraband that was related to his collapse. *Id.* Although he was later found “not guilty” of possessing the contraband, a single Parole Board member rescinded his parole grant a few days after that finding. *Id.*

When presented with *Sneed*’s state *habeas corpus* application, the Louisiana Supreme Court held: (1) *Sneed*’s limited liberty interest attached once his release date passed; (2) rescission of his parole was not available for that reason; (3) *Sneed* “was entitled to a revocation hearing rather than a rescission of parole”; and (4) the denial of a revocation hearing was appealable under Section 15:574.11. *Id.* at 1165. In an opinion issued a few days later, the Louisiana Supreme Court further held the district court erred by ordering *Sneed* to

5. This argument tends toward the merits review, but importantly, the Parole Board did not have the statutory authority to rescind Galbraith’s parole grant for errors regarding victim notification. The relevant statute was not amended until August of 2019, at which time victim notification error was added as a permissible basis for parole rescission. LA. ADMIN. CODE, tit. 22, pt. XI, § 504(K) (eff. Aug.

2019 to Jan. 2020). At the time of Galbraith’s rescission, the only permissible bases for rescission were (1) violation of the terms of work release, and (2) misconduct prior to release, and upon rescission, the parolee would promptly receive a new parole hearing. LA. ADMIN. CODE, tit. 22, pt. XI § 504(K) (eff. Jan. 2015 to Aug. 2019).

be released on parole because that was “not an available remedy” under Section 15:574.11(C) for his due process violation. *Sneed v. Hooper*, 328 So. 3d 1165, 1166 (La. 2021). The Louisiana Supreme Court remanded the case to the district court with instructions to remand the matter to the Parole Board to conduct a parole revocation hearing pursuant to Louisiana law. *Id.*

The district court distinguished *Sneed* on the ground that *Sneed*’s parole was rescinded *after* his release date passed; thus, he came within the statutory exception to appeal the denial of what should have been a revocation hearing. The district court was correct that *Sneed*’s emphasis on the timing of the Parole Board’s rescission means it does not apply here. *Sneed*, 328 So. 3d at 1166.; *see also Sneed*, 328 So. 3d at 1164–65. The Louisiana Supreme Court construed *Sneed*’s challenge as a revocation, rather than a rescission, because he was kept in prison beyond his release date that was scheduled before the purported rescission decision. *Sneed*, 328 So. 3d at 1164–65.

Because Galbraith’s rescission occurred two days *prior* to his release date, his challenge could not be construed as a revocation of his parole as in *Sneed*; passage of the release date is a necessary event for invoking jurisdiction under Section 15:574.11. *See* § 15:574.11(A), (C). The Parole Board, here, acted beyond the scope of its own policies when it rescinded his parole. *See supra* nn.2, 5. Further, Galbraith did not receive formal, personal notice of the rescission until May 1, 2017.

We find there is an absence of available State corrective process and exhaustion of

state remedies is therefore inapplicable and excused.

III. Timeliness

The State also argues that Galbraith’s *habeas corpus* application needed to be brought under Section 2254, with its one-year limitations period. We already concluded that the claim here is properly brought under Section 2241 as one that challenges the execution of a sentence. There is no statute of limitations on that claim, so it cannot be dismissed as untimely.

We now examine the merits of Galbraith’s *habeas* petition.

IV. Valid, protected liberty interest

Having determined that Galbraith’s *habeas* application arises under Section 2241 and is not untimely, we conduct a *de novo* review of his application. *See Martinez v. Caldwell*, 644 F.3d 238, 242 (5th Cir. 2011).

Galbraith posits that the State violated his substantive and procedural due process rights by rescinding his parole grant without providing notice of the reason for rescission and an opportunity to be heard. He argues “the State created a right to parole that was granted” and, thus, that right could not be taken away without due process of law. The magistrate judge determined Galbraith’s procedural due process rights had been violated,⁶ and the district court agreed.

The State contends Galbraith is not entitled to relief because “Louisiana law does not afford or entitle Galbraith a right to parole or release onto parole until” he is released from incarceration under “a validly executed Certificate of Parole.” The

6. The magistrate judge did not reach the question of whether there was a substantive due process violation. Because we agree with the magistrate judge that Galbraith’s proce-

dural due process rights were violated, we too do not reach the substantive due process question.

State bases its argument on the premise that the Parole Board has unfettered discretion in *all* aspects of parole and release decisions. In support of its position, the State relies on an unpublished opinion from the Louisiana First Circuit that states:

The parole statutes do not create an expectancy of release or liberty interest. *Sinclair*, [] 867 So.2d at 744. The parole board has full discretion when passing on applications for early release. *Id.* Even if an inmate is fully rehabilitated, the Louisiana parole scheme does not require that he be paroled. *Id.* The procedures used by the Parole Board in deciding whether an inmate should be released early are beyond the scope of this court’s review. *Id.*

Burton v. Bd. of Parole, 2009 CA 1246, 2010 WL 503019, *1 (La. App. 1 Cir. Feb. 12, 2010). That opinion relies on *Sinclair* for its analysis, which we have already rejected as inapplicable in this case. We conclude the same now with regard to *Burton* because, there, the Louisiana First Circuit was considering an appeal from a prisoner’s *denial* of parole. *Id.* The opinion discusses “expectancy of release,” while the question here is whether there are limits on the Parole Board to rescind parole *after* its formal grant but *before* the effective date of release.

The State also relies on a Louisiana Supreme Court decision that addressed parole eligibility for inmates sentenced to life and the commutation of those sentences. *See Bosworth*, 627 So. 2d at 630. In *Bosworth*, the state court held that state prisoners who were statutorily ineligible for parole had no protected liberty interest in parole eligibility because the Louisiana legislature set those parameters. *See id.* at 633–34. Because the analysis was limited to non-grantees, it is not instructive of

whether a parole grantee — such as Galbraith — has a protected liberty interest.

Finally, the State argues a United States Supreme Court decision is dispositive. *See Jago v. Van Curen*, 454 U.S. 14, 102 S.Ct. 31, 70 L.Ed.2d 13 (1981). As the State puts it, that case “explicitly held that a prisoner has no protected liberty interest in parole until the prisoner is actually released on parole, even where an initial decision to grant parole is made and later rescinded.” The State’s summary of the Supreme Court’s holding is overly broad, and the Court’s analysis and holding is distinguishable from this case.

Jago is factually similar to this case, but there are notable differences that impacted that outcome. The *Jago* Court reversed the Sixth Circuit’s decision that the Ohio Parole Board violated the prisoner’s procedural due process rights when it rescinded his parole grant prior to its effective date without a hearing, a rescission based on the discovery that Jago had falsified information in his parole interview. *Id.* at 15–17, 102 S.Ct. 31. The Court held that the Sixth Circuit “erred in finding a constitutionally protected liberty interest by rel[ying] upon the ‘mutually explicit understandings’ language of *Perry v. Sindermann*,” 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). *Id.* at 17, 102 S.Ct. 31. That was because the Court’s “decision in *Sindermann* was concerned only with the Fourteenth Amendment’s protection of ‘property’ interests, and its language, relied upon by the Court of Appeals, was expressly so limited.” *Id.*

The Court reiterated that “[t]he ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency.” *Id.* at 20, 102 S.Ct. 31 (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981)). In

Ohio, parole for prisoners lay entirely within the discretion of the Ohio Adult Parole Authority. *Id.* at 16, 102 S.Ct. 31. The Court did not discuss any statutory limits on withdrawing a grant. Instead, the argument as to why process was due was based on quasi-contract. *Id.* at 17–18, 102 S.Ct. 31. The Court rejected the Sixth Circuit’s approach that relied on both the general law of contracts and common law to give rise to a protected liberty interest in that particular parole context. *Id.* at 18–20, 102 S.Ct. 31.

Thus, the Ohio statutes providing for parole did not create a protected liberty interest. Jago was therefore not entitled to a hearing prior to the rescission of his parole. *Id.* at 21–22, 102 S.Ct. 31. We need to examine the Louisiana statutory framework, but we first give background on liberty interests.

[8–10] Those seeking to invoke the Fourteenth Amendment’s procedural protection must establish that life, liberty, or property is at stake. *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005). “A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty,’ or it may arise from an expectation or interest created by state laws or policies.” *Id.* (citations omitted). The Supreme Court has recognized a liberty interest subject to due process protection even when that interest was not created by the Constitution. *See Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The *Wolff* case dealt with the Nebraska statutory right to good-time credit, which — according to the statute’s limiting language — could only be lost due to serious misconduct:

But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska

may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing in every conceivable case of government impairment of private interest. But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner’s interest has real substance and is sufficiently embraced within Fourteenth Amendment ‘liberty’ to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Id. (quotation marks and citation omitted). Thus, “a person’s liberty is equally protected, even when the liberty itself is a statutory creation of the State.” *Id.* at 558, 94 S.Ct. 2963. The purpose of due process protection is to shield a person “against arbitrary action of government.” *Id.* *Wolff* is directly applicable in that it states that a liberty interest arose because of the specific, exclusive reasons a state statute gave for losing good-time credits.

[11] Similarly, the Supreme Court has stated that “[t]here is no constitutional or inherent right to parole, but once a State grants a prisoner the conditional liberty properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revoke parole.” *Vitek v. Jones*, 445 U.S. 480, 488, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (quotation marks and citation omitted). Though *Vitek* discussed parole revocation, implying that the parole had commenced, we find it instructive for our purposes. Once a “State grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occur-

rence of specified behavior, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.” *Id.* at 490–91, 100 S.Ct. 1254 (quotation marks and citation omitted).

We have applied these principles from *Wolff* and *Vitek* to reverse a grant of summary judgment that dismissed a prisoner’s claim that his good-time credits were revoked without due process. *See Jackson v. Cain*, 864 F.2d 1235, 1250–51 (5th Cir. 1989).

We must look at Louisiana law to determine whether a liberty interest has been created so as to invoke due process protection.

Louisiana’s parole system is codified in Louisiana Revised Statutes § 15:574.2, *et seq.* “[T]he granting, conditions, or revocation of parole rest in the discretion of the committee on parole.” La. R.S. § 15:574.11(A). At the time of Galbraith’s parole rescission in April 2017, the Louisiana Administrative Code provided grounds for rescinding parole once it had been granted:

Upon notification by the secretary of the Department of Public Safety and Corrections that an offender has violated the terms of work release granted under § 311 or has engaged in misconduct prior to the inmate’s release, the committee may rescind its decision to grant parole. In such cases, the inmate shall promptly receive another parole hearing.

LA. ADMIN. CODE, tit. 22, Pt XI, § 504(K) (eff. Jan. 2015 to Aug. 2019).

Thus, unlike *Jago*, the Louisiana parole authorities did not have unlimited discretion. Certainly, a liberty interest was subject to rescission in *only* two circumstances: (1) if the parolee violated terms of

work release, or (2) if the prospective parolee engaged in misconduct prior to his release. The first possibility — violating terms of work-release — certainly seems relevant only after parole has been granted, but regardless, that and misconduct before parole begins were the only statutory reasons for rescinding parole prior to an inmate’s release.

[12] We agree with the magistrate judge’s conclusion that these statutory provisions created a liberty interest protecting Galbraith from rescission:

While it is true that Louisiana’s parole statutes do not create a liberty interest in the granting of parole, once parole has been granted, the Parole Board’s discretion to rescind that parole was statutorily limited to an objective, fact-based finding that Petitioner had either: (1) violated the terms of his work release, or (2) engaged in misconduct. Neither statutory basis was even argued, much less established in April 2017. Under the Fourteenth Amendment, Petitioner was entitled to notice and a meaningful opportunity to be heard before rescinding his parole, which did not occur.

Galbraith’s parole was ostensibly rescinded because of an alleged problem with notice to a victim. He was notified of this reason on May 1, 2017, 10 days after his parole was rescinded. At the time, that was not a permissible reason to rescind his grant of parole.

Therefore, Galbraith’s parole was improperly rescinded.

We AFFIRM and REMAND for the district court to release Galbraith, subject to the parole conditions set forth by the Parole Board in its original decision on November 3, 2016.



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

SAMUEL GALBRAITH

CIVIL ACTION NO.

VERSUS

19-181-JWD-EWD

TIMOTHY HOOPER, ET AL.

OPINION

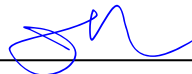
After independently reviewing the entire record in this case and for the reasons set forth in the Magistrate Judge's Report dated March 9, 2022, (Doc. 16), to which an objection, (Doc. 17) was filed and considered;

IT IS ORDERED that Petitioner's application for writ of habeas corpus, (Doc. 1) is **GRANTED**.

IT IS FURTHER ORDERED that Petitioner is released on parole within thirty (30) days, subject to the original conditions of his parole granted on November 3, 2016 found in R. Doc. 15-2, p. 177, including: "approval of residence," "low static 99 score," "approval of out of state plan," "no contact with victims or family," "no travel to Louisiana without approval of the parole office," and "perform community service speaking to at risk youth twice per year."

Judgment shall be entered accordingly.

Signed in Baton Rouge, Louisiana, on March 28, 2022.



JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

SAMUEL GALBRAITH

CIVIL ACTION NO.

VERSUS

19-181-JWD-EWD

TIMOTHY HOOPER, ET AL.

NOTICE

Please take notice that the attached Magistrate Judge's Report and Recommendation has been filed with the Clerk of the U. S. District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have 14 days after being served with the attached report to file written objections to the proposed findings of fact, conclusions of law, and recommendations set forth therein. Failure to file written objections to the proposed findings, conclusions and recommendations within 14 days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Signed in Baton Rouge, Louisiana, on March 9, 2022.



**ERIN WILDER-DOOMES
UNITED STATES MAGISTRATE JUDGE**

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

SAMUEL GALBRAITH

CIVIL ACTION NO.

VERSUS

19-181-JWD-EWD

TIMOTHY HOOPER, ET AL.

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

Before this Court is the application of Petitioner Samuel Galbraith (“Petitioner”) for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. There is no need for oral argument or for an evidentiary hearing. As the Louisiana Board of Pardons and Parole violated Petitioner’s due process rights when it arbitrarily and without notice rescinded his parole in violation of Louisiana’s statutory and administrative rules, it is recommended that Petitioner’s habeas application be granted. Additionally, because the facts are clear that the Parole Board did not rescind Petitioner’s parole for a reason permitted under the applicable statutes, it is recommended that Petitioner be released within thirty (30) days, subject to the parole conditions set forth by Parole Board in its original decision on November 3, 2016.

I. PROCEDURAL HISTORY

On February 1, 2000, Petitioner was charged in the Thirtieth Judicial District Court for the Parish of Vernon with first degree murder and attempted aggravated rape of Karen Hill, perpetrated on November 21, 1988.¹ On February 3, 2000, Petitioner pled guilty to manslaughter and attempted aggravated rape, receiving a total sentence of seventy-one (71) years.² The sentences were to run consecutively and were subject to diminution for good behavior. On November 16,

¹ R. Doc. 15-1, pp. 104-05.

² R. Doc. 15-1, p. 106. Specifically, Petitioner received a sentence of twenty-one (21) years for manslaughter and fifty (50) years for attempted aggravated rape.

2000, James Hill (“Hill”), the surviving spouse of the victim, completed a *Louisiana Department of Public Safety and Corrections Victim/Witness Notification Request Form*, asking for notification by the Louisiana Board of Pardons and Parole (“Parole Board”) when a hearing is granted.³ The record does not contain a similar form from any other individuals.

Sometime in the spring of 2016 Petitioner filed an Application for Parole.⁴ On July 7, 2016, the Parole Board sent two notification letters regarding Petitioner’s upcoming October 13, 2016 parole hearing. The first letter went to Hill at the Texas address provided on his Notification Request Form.⁵ The second letter went to Jessie McWilliams (“McWilliams”), the victim’s mother, at an incorrect address in Albany, New York.⁶ The October 13, 2016 parole hearing never occurred because Petitioner’s attorney requested a continuance, which was granted.⁷ The hearing was reset to November 3, 2016.⁸

New notification letters were sent to Hill and McWilliams advising of the hearing on November 3, 2016.⁹ This time, the letter to McWilliams went to her correct address in Albany, Illinois.¹⁰ Hill and McWilliams were also asked to provide a statement for the pre-parole investigation report.¹¹ The pre-parole investigation report, dated October 17, 2016, contains statements from Hill and McWilliams opposing parole.¹² The pre-parole investigation report also contains statements from the Vernon Parish District Attorney’s Office, the Vernon Parish Sheriff’s

³ R. Doc. 15-2, p. 213.

⁴ R. Doc. 15-1, pp. 226-296. Petitioner’s parole application is undated.

⁵ R. Doc. 15-1, p. 222.

⁶ R. Doc. 15-1, p. 219.

⁷ R. Doc. 15-2, p. 198. The request to continue the October 13, 2016 hearing was due to Petitioner’s attorney’s scheduling issues, not any issue related to notification.

⁸ *Id.*

⁹ R. Doc. 15-1, pp. 213-18.

¹⁰ R. Doc. 15-1, pp. 213-15. The letter to Hill went to the Texas address provided on his Notification Request Form.

¹¹ R. Doc. 15-1, pp. 217, 214.

¹² R. Doc. 15-1, pp. 34-49.

Office, and the Vernon Parish sentencing judge opposing parole.¹³ The Parole Board also received a letter from the Vernon Parish District Attorney's Office advising that it "strongly object[ed]" to parole,¹⁴ and a detailed letter from Hill about the impact of his wife's murder and his objection to parole.¹⁵

At the November 3, 2016 parole hearing, Chairperson Cheryl Renatza ("Renatza"), Jim Wise, and Pearl Wise unanimously voted to grant Petitioner parole. Among the reasons noted were, "good support," "good plan," "good conduct," "good programs," "has emp[loyment] plan," "taken all programs," and "will be a tax-payer and not a tax burden."¹⁶ According to the Pardon Board Decision Form, dated November 3, 2016, Petitioner's release was conditioned upon approval of residence, a low Static99 Score, and approval of out-of-state plan.¹⁷ Neither Hill nor McWilliams attended the November 3, 2016 hearing, but each was contacted by someone from the Department of Corrections and notified of the decision.¹⁸

Shortly after parole was granted, the District Attorney of Vernon Parish, Asa Skinner ("Skinner"), began contacting the Parole Board to express his outrage at the decision to grant parole. Skinner sent a letter on November 15, 2016,¹⁹ two letters on November 30, 2016,²⁰ and a letter on January 9, 2017.²¹ Skinner requested the Parole Board reconsider its decision. On February 2, 2017, Renatza responded to Skinner's correspondence and advised that the Parole

¹³ R. Doc. 15-1, p. 36.

¹⁴ R. Doc. 15-1, p. 49.

¹⁵ R. Doc. 15-1, p. 39.

¹⁶ R. Doc. 15-2, p. 178.

¹⁷ R. Doc. 15-2, p. 177.

¹⁸ R. Doc. 15-1, p. 225.

¹⁹ R. Doc. 15-2, p. 190.

²⁰ R. Doc. 15-1, pp. 28-29; R. Doc. 15-2, pp. 186-189. One of Skinner's November 30, 2016 letters contains an "investigative summary" from retired chief detective, Marvin Hilton, who provides his opinion that Galbraith was responsible for two unsolved murders in Vernon Parish. Galbraith was never charged with either of these murders. R. Doc. 15-2, pp. 186-189.

²¹ R. Doc. 15-2, p. 191.

Board unanimously voted to grant parole based on suitability for release and could not reconsider its decision to grant parole because the information Skinner provided did not meet the criteria for rehearing based on Parole Board policy.²²

McWilliams wrote to Skinner on November 18, 2016. In that letter McWilliams states that she was contacted by phone to provide a statement in anticipation of the parole hearing because her “paperwork had been sent to New York so there would not be enough time for me to be at the hearing....”.²³ McWilliams also contacted the Parole Board requesting they reconsider their decision.²⁴ Skinner and McWilliams also gave interviews to the press expressing disagreement with the Parole Board’s decision to grant Petitioner’s parole.²⁵

In early April 2017, Parole Board and Department of Corrections personnel made the final preparations for Petitioner’s release.²⁶ On April 10, 2017, Mary Fuentes of the Parole Board sent an email to Deputy Executive Counsel to Louisiana Governor John Bel Edwards expressing her concern regarding a news story that was set to air on April 13, 2017 regarding Galbraith’s parole.²⁷ On April 11, 2017, Renatza executed a “Single Member Action Sheet,” unilaterally adding electronic monitoring as a condition of Petitioner’s parole.²⁸

On April 20, 2017, three days before Petitioner’s scheduled release date, the Parole Board received notice that Texas accepted the electronic monitoring conditions and issued a certificate of parole signed by Renatza with a release date of April 23, 2017.²⁹ On April 21, 2017, two days

²² R. Doc. 15-1, pp. 32-33.

²³ R. Doc. 15-1, pp. 185-186.

²⁴ R. Doc. 15-1, p. 184.

²⁵ R. Doc. 15-2, pp. 125-126.

²⁶ *See, e.g.*, R. Doc. 15-2, pp. 130, 163-72, 253-54. Petitioner’s release date was calculated as April 11, 2017 at one point. *See*, R. Doc. 15-2, pp. 168; 261.

²⁷ R. Doc. 7, p. 57.

²⁸ R. Doc. 15-2, p. 170. Petitioner’s final release date was calculated as April 23, 2017. R. Doc. 15-2, pp. 192-93.

²⁹ R. Doc. 15-2, pp. 166-167.

before Petitioner was set to be released, Mary-Patricia Wray, a lobbyist with Top Drawer Strategies, sent an email at 7:59 a.m. to Governor Edwards' Special Counsel, Erin Monroe Wesley:

...I will have several background interviews on the crim justice reform bills today and so I will have a unique opportunity to (on background) deal with the story about Samuel Galbraith

<http://www.wbrz.com/news/investigative-unit-suspected-serial-killer-rapist-to-be-released-from-prison-sunday>

It looks like the Gov is not responding- is there a way to frame this story up that is helpful? Is there info reporters are missing? In my ignorance I truly do not know if there is a way to prevent re scheduled release on Sunday? I believe this is about to become a very problematic narrative, especially in the bulls [sic] dealing with parole eligibility- even though this is for a violent offense. Obviously I can separate it from the details of the bills but thought you might have some input on how to prevent the story from impacting the success of the legislation...³⁰

The news story referred to in Wray's email aired on April 20, 2017 and included an interview with Skinner, who stated that Petitioner was responsible for the murders of two additional women in Vernon Parish, though Petitioner was never charged with either murder.³¹ The news story showed the pictures of the three parole board members who voted to grant Galbraith parole and included interviews with Hill and with McWilliams, who stated her victim notification went to Albany, New York instead of Albany, Illinois.³²

Following the airing of the news story on April 20, 2021, Petitioner's records show a notation on the "Hearing Docket Record" at 11:30 a.m. on April 21, 2017, "Rescind pending per Mary F[uentes]."³³ A "Parole Board Action Sheet," signed only by Board member, Jim Wise, on April 21, 2017, states "there may have been a techical [sic] irregularity to victim notice."³⁴

³⁰ R. Doc. 1-12, p. 2.

³¹ <https://www.wbrz.com/news/investigative-unit-suspected-serial-killer-rapist-to-be-released-from-prison-sunday> (last checked 3/6/2022).

³² *Id.*

³³ R. Doc. 15-2, p. 155.

³⁴ R. Doc. 15-2, p. 158.

Petitioner was not released from prison on his scheduled release date of April 23, 2017. He was provided with a letter from the Parole Board dated May 1, 2017, which stated:

This correspondence is to advise you that the Parole Board has voted³⁵ to rescind the parole granted at your original parole hearing. This action was taken due to the following:
We have been advised that Other.
There may have been technical irregularities notifying the victim's family.
You will be scheduled for another hearing on 08/03/2017.³⁶

The Parole Board also issued the following press release:

FOR IMMEDIATE RELEASE

The Parole Board announced its decision this afternoon to rescind the parole of Samuel Galbraith, previously granted in November. In spite of numerous inconsistencies reported by Channel 2, the victim's mother did state during the interview that her parole hearing notification letter was mailed to an address in Albany, New York rather than Albany, Illinois

Although Mrs. McWilliams did receive the required notice for the November parole hearing, because of the apparent procedural error which occurred with the initial victim notification, the Board will reschedule a subsequent parole hearing for Samuel so that Mrs. McWilliams and the District Attorney has the opportunity to fully participate in the process.³⁷

After Galbraith's parole was rescinded, the news story was re-aired on April 21, 2017.³⁸ The reporter credited Governor Edwards with the decision and stated that the reason for the rescission was because McWilliams' notification was sent to Albany, New York.³⁹

On June 16, 2017 Petitioner's counsel sent a letter to counsel for the Parole Board contesting the rescission as contrary to Parole Board policy and contesting the factual basis of the alleged technical irregularity; namely that McWilliams had, in fact, received notification of the

³⁵ There is no record of a "vote" to rescind Petitioner's parole. The only evidence in the record indicates that the rescission was done through the signature of Jim Wise only. R. Doc. 15-2, p. 158.

³⁶ R. Doc. 15-1, p. 65.

³⁷ R. Doc. 15-2, p. 124.

³⁸ <https://www.wbrz.com/news/investigative-unit-suspected-serial-killer-rapist-to-be-released-from-prison-sunday> (last checked 3/6/2022).

³⁹ *Id.*

hearing.⁴⁰ The letter also advised the Parole Board that neither of the two permissible reasons for rescission of parole were applicable: the offender had not violated the terms of his work release nor engaged in misconduct prior to release. The letter requested a discussion about these issues.⁴¹ On July 7, 2017, Petitioner's counsel wrote a letter to Renatza advising that Petitioner was withdrawing from the upcoming August 3, 2017 hearing due to reasons stated in his June correspondence regarding the Parole Board's improper rescission and the failure of counsel for the Parole Board to respond to his correspondence or his phone calls.⁴² As a result of the representations of Petitioner's counsel, the August 3, 2017 hearing was canceled.⁴³

Petitioner filed a civil suit on July 26, 2017 in this Court, *Galbraith v. LeBlanc, et al.*, No. 17-cv-486, against James LeBlanc, Secretary of the Department of Public Safety and Corrections, and Sheryl Renatza, Chairperson of the Board of Pardons, in which he alleged violations of his Fourteenth Amendment rights to substantive and procedural due process.⁴⁴ Petitioner's civil suit alleges a cause of action under 42 U.S.C. § 1983 but challenges the legality of his confinement and seeks relief in the form reinstatement of the grant of parole and immediate release from prison.⁴⁵ The claims against LeBlanc were dismissed in the civil suit,⁴⁶ and Renatza filed a motion for summary judgment, in part alleging that this Court lacked jurisdiction to grant restoration of parole and release from custody because such relief is only properly sought in a writ of habeas corpus.⁴⁷ Shortly thereafter, on March 27, 2019, Petitioner filed the instant petition for habeas

⁴⁰ R. Doc. 15-1, pp. 25-26.

⁴¹ *Id.*

⁴² R. Doc. 15-1, p. 22.

⁴³ R. Doc. 15-1, p. 24.

⁴⁴ *Galbraith v. LeBlanc, et al.*, Civil Action No. 17-486 (M.D. La.), R. Doc. 1.

⁴⁵ *Id.* at p. 10.

⁴⁶ *Galbraith*, 17-486, R. Doc. 27.

⁴⁷ *Galbraith*, 17-486, R. Doc. 42-1, pp. 5-6. Renatza's Motion for Summary Judgment was denied without prejudice. R. Doc. 53. Renatza's reurged Motion for Summary Judgment also raises the argument that "plaintiff's exclusive remedy to seek release from custody is through a writ of *habeas corpus*, which he has now filed and which petition is

corpus relief, alleging substantially the same facts as those alleged in the civil suit, and seeking release based on violations of his due process rights.⁴⁸ On September 30, 2020, this Court stayed Galbraith’s civil suit, finding that the habeas petition involved the same legal issues.⁴⁹

II. ARGUMENTS OF THE PARTIES

Petitioner contends that his claim is ripe for *de novo* review by this Court because the State of Louisiana lacks a procedural mechanism to challenge his parole rescission. Particularly, the only parole board action that is appealable under Louisiana’s statutory scheme is the denial of a *revocation* hearing under La. R. S. 15:574.9. Because Louisiana lacks any form of a corrective process for parole rescission, Petitioner argues that this Court may review his claim immediately under 28 U.S.C. § 2254(b)(1)(B)(i). Respondent, on the other hand, contends Petitioner’s claim is unexhausted because he should have filed a petition for habeas corpus relief at the state level pursuant to La. C.Cr.P. Art. 351, citing *Sinclair v. Stalder*.⁵⁰ Respondent also asserts that Petitioner’s claim is untimely because it was not filed within one year of the May 1, 2017 letter advising Petitioner that his parole had been rescinded.

On the merits, Petitioner argues that his Fourteenth Amendment due process rights have been violated because the Parole Board rescinded his parole based on an admittedly false reason—lack of proper notification of the hearing to the victim’s family. Additionally, Petitioner contends that he had a liberty interest in parole based on Louisiana’s statutory scheme because there are only two circumstances under which a parole grantee may have his parole properly rescinded: (1) violation of the terms of work release, or (2) misconduct prior to release. Because neither of these

pending before the Court in *Galbraith v. Hooper, et al.*, No. 19-181-JWD-EWD.” *Galbraith*, 17-486, R. Doc. 63, p. 1.

⁴⁸ R. Doc. 1.

⁴⁹ *Galbraith*, 17-486, R. Doc. 65.

⁵⁰ 2003-1568 (La. App. 1 Cir. 10/17/03), 867 So.2d 743.

circumstances applied to him, Petitioner claims a legitimate expectation of release, but the Parole Board never gave him notice or an opportunity to be heard before it rescinded his parole. Respondent contends that state and federal law establish that Petitioner had no protected liberty interest in the expectation of release on parole and the Parole Board had the authority to rescind Petitioner's parole without any due process at any time for any reason prior to his release.

Turning first to the procedural arguments, whether appropriately brought under § 2241 or under § 2254,⁵¹ because there is no available state corrective process to challenge rescission of parole, exhaustion is not applicable to Petitioner's claims. Additionally, because Petitioner timely filed a § 1983 suit asserting the same facts and requesting the same relief requested here, the application is timely.

III. EXHAUSTION

Although Title 28 U.S.C. § 2241 contains no statutory exhaustion requirement,⁵² courts have imposed an exhaustion requirement if the claims asserted in a petition may be resolved on the merits in the state courts or by some other state procedure available to the petitioner.⁵³ “The exhaustion doctrine is applied to Section 2241(c) as a matter of comity and is based on federalism grounds to protect the state courts’ important independent jurisdictional opportunity to address and initially resolve any constitutional issues arising within their jurisdiction and to limit federal interference in the state adjudicatory process.”⁵⁴ Exhaustion under § 2241 or § 2254 requires that a petitioner “fairly present all of [her] claims” through the proper channels before pursuing federal

⁵¹ Petitioner asserts that his habeas application is brought under 28 U.S.C. § 2241 (R. Doc. 1, pp. 1 & 2), however, Petitioner also argues that exhaustion of his claims cannot occur because of the absence of a state corrective process under 28 U.S.C. § 2254(b)(1)(B)(i). R.Doc. 1, p. 2.

⁵² See 28 U.S.C. § 2241(c)(3). For cases under § 2254, an applicant must exhaust remedies available in the courts of the State, unless “there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B).

⁵³ *Marshall v. Dep’t of Corr.*, No. 18-6577, 2018 WL 6072246, at *7 (E.D. La. Oct. 26, 2018) (citations omitted).

⁵⁴ *Marshall*, 2018 WL 6072246, at *7, citing *Johnson v. Cain*, No. 15-310, 2015 WL 10438640, at *5 (E.D. La. June 4, 2015) (citing *Dickerson v. Louisiana*, 816 F.2d 220, 225 (5th Cir. 1987)).

habeas relief.⁵⁵ Exceptions to the exhaustion requirement apply only in “extraordinary circumstances” when remedies “are unavailable or wholly inappropriate to the relief sought, or where the attempt to exhaust such remedies would itself be a patently futile course of action,” and “[the petitioner] bears the burden of demonstrating the futility of administrative review.”⁵⁶

To meet his burden, Petitioner argues that there is an absence of state corrective process because “Louisiana law prohibits challenges to decisions of the Parole Board, except in cases of a parole revocation,” citing La. R.S. 15:574.11 and *Sinclair v. Stalder*.⁵⁷ Petitioner also states that he attempted to exhaust his remedies by filing a grievance under the prison administrative remedy procedure, but his grievance was rejected.⁵⁸ Respondent argues that *Sinclair* does not preclude a petitioner from challenging a Parole Board recission via a state habeas application under La. Code of Criminal Procedure art. 351, notwithstanding that the cases, including *Sinclair*, would find such a challenge fails to state a cause of action.⁵⁹

Louisiana’s parole statutes allow for appeal of parole board actions in only one circumstance. La. Stat. Ann. § 15:574.11 provides (in pertinent part):

- A. Parole is an administrative device for the rehabilitation of prisoners under supervised freedom from actual restraint, and the granting, conditions, or revocation of parole rest in the discretion of the committee on parole. **No prisoner or parolee shall have a right of appeal from a decision of the committee** regarding release or deferment of release on parole, the imposition or modification of authorized conditions of parole, the termination or restoration of parole supervision or discharge from parole before the end of the parole period, or the revocation or reconsideration of revocation of parole, **except for the denial of a revocation hearing under R.S. 15:574.9.**⁶⁰

⁵⁵ *Dickerson*, 816 F.2d at 228 (§ 2241); *Rose v. Lundy*, 455 U.S. 509, 519-20 (1982) (§ 2254).

⁵⁶ *Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994) (*per curiam*).

⁵⁷ 2003-1568 (La.App. 1 Cir. 10/17/03), 867 So.2d 743, 744, writ denied, 2003-3177 (La. 1/14/05), 889 So.2d 253. R. Doc. 1, p. 2.

⁵⁸ R. Doc. 1, p. 2.

⁵⁹ R. Doc. 6, pp. 3-4.

⁶⁰ (emphasis added).

The Louisiana First Circuit Court of Appeal in *Sinclair v. Stalder*,⁶¹ relied on by both parties, explains that § 15:574.11(A) has been interpreted to mean that “there is no appeal of decisions of the [parole] board unless the procedural due process protections specifically afforded by the hearing provisions of 15:574.9 are violated. Pleadings challenging actions of the parole board other than failure to act in accordance with 15:574.9 should be dismissed by the district court. Louisiana Revised Statutes 15:574.9 deals with parole revocations, not with denials of release on parole. Therefore, there is no statutory basis for Sinclair to seek review of the parole board’s decision denying him early release on parole.”⁶² In *Sinclair*, the petitioner’s state habeas petition was dismissed for failure to state a cause of action.

Had Petitioner attempted to challenge rescission of his parole through the state court system, his pleadings would have been dismissed as directed in *Sinclair* because he was not denied a parole revocation hearing, which is the only permissible basis to obtain review of a Parole Board decision under La. R.S. § 15:574.11. Louisiana’s statutory scheme effectively deprived Petitioner of a procedure to challenge the actions of the Parole Board in rescinding his parole.⁶³ Without a mechanism to exhaust, there can be no failure to exhaust. Accordingly, Petitioner’s claims are ripe for *de novo* review with this Court.⁶⁴

IV. TIMELINESS

Petitioner has asserted his habeas claim under 28 U.S.C. § 2241. A petition for writ of habeas corpus that “attacks the manner in which a sentence is carried out or the prison authorities’

⁶¹ 2003-1568 (La. App. 1 Cir. 10/17/03), 867 So.2d 743.

⁶² *Id.* at 744.

⁶³ Although Respondent takes a different position now, the response to Petitioner’s administrative grievance also seems to acknowledge the futility of Petitioner pursuing his claim in state court: “REJECTED: Your request has been rejected for the following reason(s): PARDON AND PAROLE BOARD DECISIONS UNDER LOUISIANA LAW, DECISIONS OF THESE BOARD ARE DESCRESIONARY [sic] AND MAY NOT BE CHALLENGED.” R. Doc. 1-1, p. 2.

⁶⁴ See *Panetti v. Davis*, 863 F.3d 366, 374–75 (5th Cir. 2017) (“...where, as here, the state courts have not reached the merits of a petitioner’s claims, federal courts will review *de novo*.”).

determination of its duration,” including parole issues, is properly considered under the general habeas authority of § 2241.⁶⁵ The one-year statute of limitations period has not been extended to Section 2241 petitions,⁶⁶ so it is not clear that Petitioner’s application is untimely in the first instance.

Additionally, district courts may construe a Section 1983 complaint as a *de facto* habeas petition.⁶⁷ Petitioner filed his civil suit on July 26, 2017 against James LeBlanc, the Secretary of the Department of Public Safety and Corrections, and Sheryl Renatza, the Chairperson of the Louisiana Parole Board. The suit attacks the constitutional validity of the Parole Board’s decision to rescind Petitioner’s parole, seeks reinstatement of Petitioner’s original parole decision, and requests Petitioner’s immediate release from confinement.

Federal Rules of Civil Procedure, Rule 8(e) requires the Court to construe pleadings “so as to do justice.” Here, the Parole Board has been on notice of the factual allegations, substance, and relief sought by Petitioner since suit was filed on July 26, 2017 and served on the Parole Board’s Executive Director on August 1, 2017.⁶⁸ The Parole Board Chairperson entered an Answer and Affirmative defenses in that suit on October 17, 2017,⁶⁹ and filed a Motion for Summary Judgment on February 18, 2019 arguing that the Petitioner’s claims sound in habeas corpus.⁷⁰ It is apparent

⁶⁵ *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000); *Richie v. Scott*, 70 F.3d 1269 (5th Cir. 1995) (“Habeas petitions challenging the revocation of the petitioner’s parole sound under § 2241.”).

⁶⁶ *United States v. Pipkins*, No. 07-163, 2012 WL 1019118, at * 1 (E.D. La. Mar. 26, 2012). (“However, unlike § 2554 habeas petitions, which are governed by the [AEDPA], § 2241 petitions have no statute of limitations.”); *Hartfield v. Quarterman*, 603 F.Supp.2d 943, 948 (S.D. Tex. 2009); *Williams v. Louisiana’s A.G.’s Office*, No. 07-603, 2007 WL 2915078, at *3 (E.D. La. Oct. 4, 2007). Section 2241 has not been amended to include a limitations period for filing a petition under that section. *Homayun v. Cravener*, 39 F.Supp.2d 837 (S.D. Tex. 1999), citing *Sandoval v. Reno*, 166 F.3d 225, 234 (3rd Cir. 1999) and *Goncalves v. Reno*, 144 F.3d 110, 120 (1st Cir. 1998). See also, *Rogers v. Robinson*, No. 14-1527, 2015 WL 4168696, at *4 (E.D. La. July 2, 2015); *Marshall*, 2018 WL 6072246, at *6; *Rodriguez v. Dir., Texas Dep’t of Crim. Just., Corr. Institutions Div.*, No. 17-236, 2020 WL 8340059, at *3 (N.D. Tex. Dec. 21, 2020).

⁶⁷ *Thompson v. Montgomery*, No. 15-1092, 2015 WL 6454563, at *3 (E.D. La. Oct. 26, 2015), citing *Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417, 420 (5th Cir. 2002) (abrogated on other grounds).

⁶⁸ R. Doc. 4 (17-cv-486).

⁶⁹ R. Doc. 14 (17-cv-486).

⁷⁰ R. Doc. 42-1, p. 5 (17-cv-486).

from the record that the Louisiana Department of Corrections⁷¹ was fully aware that Petitioner was seeking habeas corpus relief since July 26, 2017. Even assuming a one-year statute of limitation applies to Petitioner's claims, Petitioner's civil suit should be construed as a timely filed application for habeas corpus relief because it was filed less than three months after Petitioner was notified of the parole rescission on May 1, 2017.⁷²

V. MERITS REVIEW

Here, Petitioner was granted parole by the Parole Board but not yet physically released from prison (parole grantee). Petitioner contends that the Parole Board violated his substantive⁷³ and procedural Fourteenth Amendment due process rights when it arbitrarily and without notice rescinded his parole in violation of Louisiana's statutory and administrative rules. Respondent contends the Louisiana Supreme Court opinion in *Bosworth v. Whitley*⁷⁴ and the United States Supreme Court opinion in *Jago v. Van Curen*,⁷⁵ should guide our analysis in concluding Petitioner did not have a protectible liberty interest. The *Bosworth* opinion found that Louisiana state prisoners who were statutorily ineligible for parole had no protectible liberty interest in parole eligibility. Limited in its analysis to non-grantees, *Bosworth* is not instructive of whether Petitioner, as a parole grantee, had a protectible liberty interest.⁷⁶

⁷¹ The Parole Board is an arm of the Louisiana Department of Corrections. La. R.S. § 15:574.2.

⁷² There is authority for the proposition that a § 1983 suit may be used to bring a due process claim challenging parole procedures. See *Wilkinson v. Dotson*, 544 U.S. 74 (2005) (concluding that state prisoners may bring actions challenging state parole procedures under § 1983, rather than exclusively under federal habeas corpus statutes).

⁷³ Because this report concludes that Petitioner's procedural due process rights were violated, whether there was a substantive violation is not reached. To find a substantive due process violation would require a finding of egregious behavior. See *Jordan v. Fisher*, 823 F.3d 805 (5th Cir. 2016) (substantive due process protection "comes into play when 'the behavior of the governmental officer is so egregious, so outrageous, that is may fairly be said to shock the contemporary conscience'...") (citation omitted).

⁷⁴ 627 So.2d 629 (La. 1993).

⁷⁵ 454 U.S. 14 (1981).

⁷⁶ *Id.* at 633 (internal citations omitted).

In *Jago*,⁷⁷ the United States Supreme Court reversed a decision from the Sixth Circuit Court of Appeals, which determined that the Ohio parole board improperly rescinded Jago's grant of "shock parole" without a hearing after discovering that he had falsified information in his parole interview.⁷⁸ In reversing the Sixth Circuit, the Supreme Court found that Ohio law unambiguously left any early release "wholly within the discretion of the" Ohio parole authorities and allowed that decision to be exercised at any time until release."⁷⁹ Because *Jago* does not deal with statutory limitations on the discretion of the parole board, it is likewise not instructive.

In *Wolff v. McDonnell*,⁸⁰ which was decided before *Jago*, the Supreme Court recognized that a liberty interest is protected even when that liberty interest is not created by the Constitution. Because Nebraska law provided that prisoners could only lose good time credits if they were guilty of serious misconduct, the Supreme Court found that a liberty interest attached so as to give rise to Due Process protections:

It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing 'in every conceivable case of government impairment of private interest.' *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that

⁷⁷ 454 U.S. 14 (1981).

⁷⁸ *Van Curen v. Jago*, 641 F.2d 411, 415 (6th Cir. 1981).

⁷⁹ *Jago*, 454 U.S. at 20-21.

⁸⁰ 418 U.S. 539 (1974).

the state-created right is not arbitrarily abrogated. This is the thrust of recent cases in the prison disciplinary context.⁸¹

The Fifth Circuit has applied *Wolff* to find a state-created liberty interest, for example, in the revocation of good-time credit.⁸² In *Jackson v. Cain*,⁸³ the Fifth Circuit reversed a grant of summary judgment dismissing a prisoner's claim that he was deprived of good-time credits without due process. The court in *Jackson* recognized that the Supreme Court has determined that "a state can create a protected liberty interest by establishing sufficiently mandatory discretion-limiting standards or criteria to guide state decision makers"⁸⁴ and went on to quote *Vitek v. Jones*, *supra*:

If the state grants a prisoner a right or expectation that adverse action will not be taken against him except on the occurrence of specific behavior, "the determination of whether such behavior has occurred becomes critical, and the minimal requirements of procedural due process appropriate for the circumstances must be observed."⁸⁵

Finally, the court found "this Court has held that a prisoner challenging his change in classification and transfer to administrative segregation stated a due process claim if he could show that Texas Department of Corrections regulations 'authorized his transfer to administrative segregation only for specified reasons' and the reason he was transferred was not one so specified."⁸⁶

⁸¹ *Wolff*, 418 U.S. at 557.

⁸² *Keenan v. Bennett*, 613 F.2d 127, 129-30 (5th Cir. 1980), citing *Wolff*, 418 U.S. at 557 ("Revocation by state prison authorities of good-time credit must be measured against the requirements of the Fourteenth Amendment's Due Process Clause.")

⁸³ 864 F.2d 1235 (5th Cir. 1989)

⁸⁴ *Jackson*, 864 F.2d at 1250, citing *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983); *Hewitt v. Helms*, 459 U.S. 460, 470-71 (1983); *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980); *Green v. McKaskle*, 788 F.2d 1116, 1125 (5th Cir. 1986); *Lewis v. Thigpen*, 767 F.2d 252, 261-62 (5th Cir. 1985); *Parker v. Cook*, 642 F.2d 865, 867, 876 (5th Cir. Unit B, April 1981).

⁸⁵ *Id.*, quoting *Vitek v. Jones*, 445 U.S. at 490-91. See *Hewitt v. Helms*, 459 U.S. at 470-71; *Dzana v. Foti*, 829 F.2d 558, 560. (5th Cir. 1987).

⁸⁶ *Id.*, citing *Green*, 788 F.2d at 1125.

Madison v. Parker,⁸⁷ related to Texas statutes authorizing good-time credit, is also instructive. In *Madison*, after noting that the Constitution does not guarantee good time credit, but that some states choose to create such a right, the Fifth Circuit stated:

When a state creates a right to good time credit and recognizes that its revocation is an authorized sanction for misconduct, a prisoner's interest therein is embraced within the Fourteenth Amendment "liberty" concerns so as to entitle him to those minimum procedures appropriate under the circumstances and required by the due process clause to insure that this state-created right is not arbitrarily abrogated. *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974). In Texas, a prisoner may be awarded good conduct time based on his or her specific behavior in various vocations. Tex.Gov.Code Ann. § 498.003(a) (Vernon 1996). If an inmate commits an offense or violates an institutional rule during the course of his confinement, the Director of the Texas Department of Criminal Justice—Institutional Division ("TDCJ-ID") is empowered to forfeit all or any part of the inmate's accrued good time. Tex.Gov.Code Ann. § 498.004(a) (Vernon 1996). **Once an inmate acquires good time, the only way it can be revoked is if he or she commits an offense or violates an institutional rule.**⁸⁸

While it is true that Louisiana has the discretion (as do all states) whether to authorize a parole system,⁸⁹ this case does not turn on that question. Instead, this case turns on the narrower question of whether, once a parole decision has been made, the Parole Board can change that decision without affording the parole grantee Due Process protections. Neither Petitioner nor Respondents have cited any case, state or federal, addressing whether *Louisiana's* parole statutes confer a parole grantee a protectible liberty interest under the circumstances. The issue appears to be one of first impression. Accordingly, we must examine Louisiana's parole statutes and

⁸⁷ 104 F.3d 765 (5th Cir. 1997).

⁸⁸ *Madison*, 104 F.3d at 768 (emphasis added).

⁸⁹ *Trujillo v. United States*, 377 F.2d 266, 269 (5th Cir. 1967) (parole is ... a matter of legislative grace), citing *Smith v. United States*, 324 F.2d 436, 441(D.C. Cir. 1963); see also, *Stevenson v. Louisiana Bd. of Parole*, 265 F.3d 1060 (5th Cir. 2001) (the Louisiana statutes do not give rise to a constitutionally protected liberty interest in parole release) (citation omitted).

administrative rules to determine whether they create a liberty interest for a parole grantee that gives rise to due process protections in the context of rescission.

Louisiana’s system of parole is set out in La. R.S. 15:574.2, *et seq.* Parole is an administrative device for the rehabilitation of prisoners under supervised freedom from actual restraint.⁹⁰ A Board of Parole is established within the Department of Public Safety and Corrections (DPSC) and is vested with the authority to determine “the time and conditions of release on parole” for offenders sentenced to imprisonment and confinement in any correctional or penal institution in this state.⁹¹ The granting, conditions, or revocation of parole rests in the discretion of the Parole Board.⁹²

The version of La. Admin Code, tit. 22, Pt XI, § 504 (“General Procedures”) in effect on April 21, 2017, read as follows (in pertinent part):

K. Upon notification by the secretary of the Department of Public Safety and Corrections that an offender has violated the terms of work release granted under § 311 or has engaged in misconduct prior to the inmate’s release, the committee may rescind its decision to grant parole. In such cases, the inmate shall promptly receive another parole hearing.

Petitioner’s parole was rescinded through “Single Member Action,” which is authorized by La. Admin. Code Pt XI, §513. The version of this statute in effect on April 21, 2017, read as follows (in pertinent part):

3. The duty officer may rescind parole as provided in § 505.L, pending another parole hearing.⁹³

⁹⁰ La. R.S. 15:574.11(A).

⁹¹ La. R.S. 15:574.2(A) and (D)(1).

⁹² La. R.S. 15:574.11(A).

⁹³ The Board retains authority to add or remove parole conditions under § 513.

Due to an apparent statutory drafting error, § 505.L did not exist on April 21, 2017.⁹⁴ It was repealed in 2015. The repealed version was identical to §504.K, above:

L. Upon notification by the secretary of the Department of Public Safety and Corrections that an offender has violated the terms of work release granted under § 311 or has engaged in misconduct prior to the inmate's release, the committee may rescind its decision to grant parole. In such cases, the inmate shall promptly receive another parole hearing.⁹⁵

Louisiana's parole board regulations in effect on April 21, 2017, permitted the Parole Board to rescind parole only in the following two circumstances: (1) violation of the terms of work release, and (2) misconduct prior to release. When a Parole Board member unilaterally authorized the rescission of Petitioner's parole on April 21, 2017, the stated reason was "Other" and "There may have been technical [sic] irregularity to victim notice."⁹⁶ This was also the reason provided to Petitioner in the May 1, 2017 correspondence advising him of the rescission.⁹⁷ It is undisputed that neither of the two statutory reasons for rescission applied to Petitioner. Additionally, while the record is clear that McWilliams and Hill received timely notice of the November 3, 2016 parole hearing,⁹⁸ lack of victim notification was also not a permissible reason to rescind Petitioner's parole under the statutory scheme in effect on April 21, 2017. In August of 2019, the statute was amended to include victim notification errors as a permissible reason for rescission.⁹⁹ This subsequent change in the law is an additional indication that the Parole Board did not have the authority on April 21, 2017, to rescind Petitioner's parole for a victim notification error, even if it had occurred.

⁹⁴ The absence of §505.L on April 21, 2017 may have resulted in lack of authority to unilaterally rescind Petitioner's parole by "Single Member Action." This question need not be resolved as, even assuming the authority existed, the expressly permitted statutory reasons for rescission were inapplicable to Petitioner.

⁹⁵ 2013 LA REG TEXT 307903 (NS).

⁹⁶ R. Doc. 15-2, p. 158.

⁹⁷ 15-1, p. 65.

⁹⁸ The version of La. Admin Code, tit. 22, Pt XI, § 510 in effect on November 3, 2016 only required the notification be sent to Hill, and only thirty days prior to the parole hearing.

⁹⁹ La. Admin Code, tit. 22, Pt XI, § 504 (eff. August 19, 2019 to January 20, 2020).

Like the conclusion of the Fifth Circuit in *Jackson v. Cain*,¹⁰⁰ and *Madison v. Parker*,¹⁰¹ because the State of Louisiana created a parole system and limited the right to rescind parole to only two circumstances, a parole grantee, such a Petitioner, had a constitutional expectation that he would be released unless he committed one of the two violations for which his parole could be rescinded.¹⁰² The cases located through independent research in which the district courts, or the Fifth Circuit, have found that there was no due process protection where the process of parole had not reached release, are distinguishable. In *Sexton v. Wise*,¹⁰³ the Fifth Circuit reversed the district court decision granting a writ of habeas corpus, unless a hearing with sufficient due process was held on the rescission of Sexton's parole. While the *Sexton* opinion specifically states that, "Until a parole is finalized, no constitutional protections associated with a parole revocation embrace the intended parolee,"¹⁰⁴ the decision was based on the fact that, unlike the Louisiana statutes at issue in this case, the applicable regulations afforded the parole board discretionary power to rescind future parole.¹⁰⁵

In *Reneau v. Dretke*,¹⁰⁶ the Southern District of Texas dismissed the petitioner's § 2254 habeas application as frivolous and for failure to state a claim upon which relief could be granted. There, the petitioner challenged the decision of the Texas Board of Pardons and Paroles to rescind his previously granted parole release without proper notice and a hearing. The court relied on

¹⁰⁰ 864 F.2d 1235 (5th Cir. 1989)

¹⁰¹ 104 F.3d 765 (5th Cir. 1997).

¹⁰² See also, *Green v. McCall*, 822 F.2d 284 (2nd Cir. 1987) (holding that parole grantees had protectible liberty interest entitling them to due process where the parole commission had limited authority to rescind parole).

¹⁰³ 494 F.2d 1176 (5th Cir. 1974)

¹⁰⁴ *Sexton*, 494 F.2d at 1178.

¹⁰⁵ The applicable provision stated:

§ 2.20 Release; discretionary power of Board.

When an effective date has been set by the board, release on that date shall be conditioned upon continued good conduct by the prisoner and the completion of a satisfactory plan for his supervision. The Board may, on its own motion, reconsider any case prior to release and may reopen and advance, postpone, or deny a parole which has been granted. The Board may add to or modify the conditions of parole at any time.

¹⁰⁶ No. 05-3413, 2005 WL 2488421 (S.D. Tex. Oct. 6, 2005).

controlling precedent that established that Texas statutes do not create a liberty interest in parole release.¹⁰⁷ However, Tex. Gov't Code § 508.145, the statute at issue, did not contain the same limitations on parole rescission as those at issue in this case. To the contrary, the statute in *Reneau* is silent as to the bases for rescission. The *Reneau* court also relied on the language in *Sexton* that there are no constitutional protections for a parole grantee until release,¹⁰⁸ which is distinguishable, as explained above.

The court's decision in *Davis v. Johnson*¹⁰⁹ is likewise distinguishable. In that case, after noting the continuum of increasing liberty interests from one who only has a desire for parole (no liberty interest), to one who has actually been set free on parole (liberty interest), the Northern District of Mississippi noted that a parole grantee who has not been released falls in between these on the continuum.¹¹⁰ Relying on the Supreme Court's decision in *Jago*, the court found that "parolees who have not yet been released do not have the right to a hearing on the rescission of parole." As discussed above, the Supreme Court's decision in *Jago* was based on the unfettered discretion given to the Ohio parole board under Ohio statutory regime. The *Davis* court did not analyze applicable Mississippi law to determine whether those statutes afford similar discretion; however, like Texas, the Mississippi parole statute does not include any specific limitations on rescission.¹¹¹

While it is true that Louisiana's parole statutes do not create a liberty interest in the granting of parole, once parole has been granted, the Parole Board's discretion to rescind that parole was statutorily limited to an objective, fact-based finding that Petitioner had either: (1) violated the

¹⁰⁷ *Reneau*, 2005 WL 2488421, at * 1, citing *Johnson v. Rodriguez*, 110 F.3d 299, 305 (5th Cir. 1997).

¹⁰⁸ *Reneau*, 2005 WL 2488421, at * 1.

¹⁰⁹ 205 F.Supp.2d 616 (N.D. Miss. June 20, 2002).

¹¹⁰ *Davis*, 205 F.Supp.2d at 619.

¹¹¹ Miss. Code Ann. § 47-7-17.

terms of his work release, or (2) engaged in misconduct. Neither statutory basis was even argued, much less established in April 2017. Under the Fourteenth Amendment, Petitioner was entitled to notice and a meaningful opportunity to be heard before rescinding his parole,¹¹² which did not occur.¹¹³

Petitioner asks the Court to remedy the constitutional violation through reinstatement of his original parole and release from confinement. In federal habeas cases, district courts have “broad discretion in conditioning a judgment granting habeas relief.”¹¹⁴ “Federal courts are authorized, under 28 U.S.C. § 2243, to dispose of habeas corpus matters as law and justice require.”¹¹⁵ “[H]abeas corpus is, at its core, an equitable remedy.”¹¹⁶ “[R]emedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.”¹¹⁷

The competing interest at stake in this matter would be the Parole Board’s right to conduct a recission hearing. However, the only statutory bases for recission at the relevant time were that the parolee violated the terms of his work release or engaged in misconduct. The facts are undisputed, and the record is clear--Petitioner’s parole was not rescinded for either of these reasons. Because remand to the Parole Board for a decision on an undisputed fact would be an unwarranted exercise in futility, the appropriate remedy under the unique circumstances of this

¹¹² Because it is not necessary to the resolution of this matter, this Report does not seek to define the contours of the process that would have been due at a pre-deprivation recission hearing. At a minimum, due process would require notice and a meaningful opportunity to be heard.

¹¹³ It appears from the record that another parole hearing was conducted on May 27, 2020. R. Doc. 15-1, pp. 2-7. This is not sufficient to correct the procedural Due Process violation. See *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972) (“If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.”). Additionally, a new parole hearing was not the appropriate remedy where, as here, none of the statutory bases for parole recission, as of April 21, 2017, existed.

¹¹⁴ *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987).

¹¹⁵ *Id.* (quotation omitted).

¹¹⁶ *Schlup v. Delo*, 513 U.S. 298, 319 (1995).

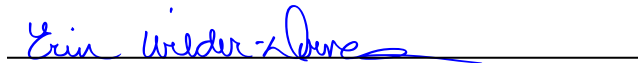
¹¹⁷ *United States v. Morrison*, 449 U.S. 361, 364 (1981).

case is release, subject to the parole conditions set forth by Parole Board in its original decision on November 3, 2016. Accordingly,

IT IS RECOMMENDED that Petitioner’s application for writ of habeas corpus¹¹⁸ be **GRANTED**.

IT IS FURTHER RECOMMENDED that Petitioner be released on parole within thirty (30) days, subject to the original conditions of his parole granted on November 3, 2016 found in R. Doc. 15-2, p. 177, including: “approval of residence,” “low static 99 score,” “approval of out of state plan,” “no contact with victims or family,” “no travel to Louisiana without approval of the parole office,” and “perform community service speaking to at risk youth twice per year.”

Signed in Baton Rouge, Louisiana, on March 9, 2022.



ERIN WILDER-DOOMES
UNITED STATES MAGISTRATE JUDGE

¹¹⁸ R. Doc. 1.