

PETITIONER'S APPENDIX

TABLE OF CONTENTS

Findings of Fact & Conclusions of Law by State Court	1
District Court's Memorandum Opinion & Order Dismissing Claims	6
District Court's Memorandum Opinion & Order Denying	13
Rule 59(e) Motion	
Fifth Circuit Court of Appeals Opinion Denying COA	24
Scott Palmer's Amended Response to Respondent's Answer	27
Respondent's Answer with Brief in Support	54
Scott Palmer's Motion to Amend & 2241 Petition	70
District Court's Order Denying 2241 petition	88
District Court's Order Striking Palmer's Amended	91
Response to Respondent's Answer	
Scott Palmer's Emergency Rule 59(e) Motion	93
District Court's Order to Respond to 59(e) Motion	101
Respondent's Out-Of-Time Response to 59(e) Motion	102
Scott Palmer's 59(e) Notice of Appeal	116
Scott Palmer's Motion for COA & Brief in Support	118
District Court's Order (highlighting erroneous opinion .. that state proceedings were an adjudication on the merits and failure to exhaust)	148
District Court's Order (same as above)	149
Scott Palmer's Emergency Motion for Judicial Notice	151
of Adjudicative Facts	

ENTERED

December 06, 2024

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SCOTT EDWARD PALMER, a/k/a
KENNETH EDWARD SPENCE,

Petitioner,

v.

BOBBY LUMPKIN,

Respondent.

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CIVIL ACTION NO. H-23-4293

MEMORANDUM OPINION AND ORDER

Petitioner, a state inmate proceeding *pro se*, filed a habeas petition under 28 U.S.C. § 2254 challenging the loss of good time and work credits following his parole revocation in 2021. Pending before the Court are respondent's motion to dismiss based on limitations (Docket Entry No. 10), to which petitioner filed a response in opposition (Docket Entry No. 15), and petitioner's motion to lift stay (Docket Entry No. 52).

Having considered the petition, the motion to dismiss, the response, the motion to lift stay, matters of public record, and the applicable law, the Court **GRANTS** the motion to lift stay, **LIFTS** the stay, **GRANTS** the motion to dismiss, and **DISMISSES** this case for the reasons shown below.

I. BACKGROUND AND CLAIMS

Petitioner was convicted of arson in 1993 and sentenced to a twenty-year term of incarceration; of theft in 1994 and sentenced to a forty-year term of incarceration, enhanced

by two prior felony convictions; of impersonating a public servant in 2020 and sentenced to a six-year term of incarceration; and for fraudulent use or possession of identifying information in 2020 and sentenced to a six-year term of incarceration. Petitioner brings this action in context of his 1994 Harris County theft conviction and enhanced forty-year sentence in *State v. Palmer*, Cause No. 580,171 in the 351st District Court of Harris County, Texas.

Petitioner was released to parole on December 18, 2000, and parole was subsequently revoked on August 11, 2021. He states that, on August 17, 2021, he received a prison time credit slip showing that his 1,854 days of previously accrued pre-parole good time and work credits were forfeited due to the parole revocation.

Petitioner alleges that he submitted a time credit dispute resolution (“TDR”) to prison officials on February 14, 2022, contesting the forfeiture. He states that prison officials did not respond, and that the TDR was deemed denied by operation of law in August 2022. Petitioner’s application for state habeas relief as to the loss of credits, filed with the state trial court in May 2023, was denied by the Texas Court of Criminal Appeals on August 23, 2023. *In re Scott Edward Palmer*, WR-38,165-05.¹ Petitioner filed the instant habeas petition under section 2254 no earlier than November 3, 2023.

App. 7

¹The state trial court expressly found that state law required the forfeiture of petitioner’s accrued good time credits upon revocation of parole. (Docket Entry No. 11-14, p. 134.)

Petitioner claims in the instant petition that his good time and work credits were arbitrarily and unlawfully forfeited. Specifically, he complains that the forfeiture denied him due process and equal protection under the law, and that his certificate of parole, executed in 2000, did not inform him that parole revocation would result in loss of accrued good time and work credits. Petitioner does not challenge his underlying conviction or the parole revocation. He seeks as judicial relief reinstatement of the 1,854 days of forfeited good time and work credits.

Respondent filed the pending motion to dismiss, arguing that petitioner's habeas claims are barred by limitations. In response, petitioner argued that his claims were actually brought pursuant to 28 U.S.C. § 2241, which has no governing statute of limitations, and moved for leave to amend his petition as one brought pursuant to section 2241. He did not deny that his section 2254 claims were barred by limitations. In his motion to amend, petitioner also sought to amend his claim to seek reinstatement of not 1,854 days of good time and work credits, but *17 years, 11 months, and 15 days* of accrued pre-parole good time and work credits allegedly forfeited by his parole revocation. He argued that reinstatement of the credits would entitle him to immediate mandatory supervised release.²

²The state court record shows that petitioner did not forfeit 17 years, 11 months, and 15 days of accrued pre-parole good time and work credits following his parole revocation. To the contrary, he forfeited 17 years, 11 months, and 15 days of *calendar street time* – the actual duration of his release to parole prior to its revocation. (Docket Entry No. 10-3, pp. 3–4.) Petitioner did not claim on state collateral review, and does not claim in this federal action, that his calendar street time was unlawfully forfeited by virtue of his parole revocation.

The Court denied petitioner's motion to amend, and denied his subsequent motions to expedite, for summary judgment, and for emergency release to mandatory supervision. Petitioner pursued an appeal of those interlocutory rulings, and the Court ordered the case stayed and abated pending disposition of the appeal. The United States Court of Appeals for the Fifth Circuit dismissed petitioner's appeal on October 29, 2024, for his failure to comply with certificate of appealability requirements, and denied his two applications for writs of mandamus on October 31, 2024. Petitioner's motion for reconsideration of the dismissal was denied on November 5, 2024.

II. ANALYSIS

Respondent argues that the instant federal habeas petition is barred by limitations and should be dismissed.

Petitioner's federal habeas petition is governed by the limitations provisions appearing in 28 U.S.C. § 2244(d), which provide as follows:

- (d)(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §§ 2244(d)(1)–(2). As an initial consideration, the record does not indicate that any unconstitutional “State action” prevented petitioner from filing for federal habeas relief prior to the end of the limitation period. *See* 28 U.S.C. § 2244(d)(1)(B). Nor do his claims concern a constitutional right recognized by the Supreme Court within the last year and made retroactive to cases on collateral review. *See* 28 U.S.C. § 2244(d)(1)(C). Moreover, petitioner is not challenging his state conviction. *See* 28 U.S.C. § 2244(d)(1)(A).

For parole revocation proceedings and the resultant forfeiture of time credits, the limitations period begins, at the latest, “when the petitioner is returned to custody after a parole revocation because inmates should know that their sentence is recalculated when they are returned to prison.” *Roy v. Lumpkin*, No. 2:23-CV-00054, 2024 WL 36010, at *2 (S.D. Tex. Jan. 3, 2024) (citing cases) (citations omitted); *see also Heiser v. Johnson*, 263 F.3d 162, 2001 WL 803542, at *2 (5th Cir. 2001) (“Heiser knew of the facts surrounding the revocation of his mandatory supervision and the forfeiture of his accrued good conduct

credits at least by the date his supervision was revoked on February 11, 1998. Accordingly, we conclude that under § 2244(d)(1)(D) the statute of limitations on Heiser’s claim began running on that date.”). Regardless, petitioner acknowledges in his petition that he knew as of August 17, 2021, that his pre-parole accrued good time and work credits had been forfeited upon his return to prison. Consequently, under a conservative factual application, petitioner’s one-year limitation commenced on August 17, 2021, and expired one year later, on August 17, 2022.

Petitioner states that he submitted his TDR to prison officials on February 14, 2022; at that point in time, 181 days had expired – and 184 days remained – on the one-year limitations “clock.” Because no action was taken on the TDR, it expired by law 180 days later on August 15, 2022, thereby tolling limitations for 180 days and extending petitioner’s federal deadline to February 15, 2023.

Petitioner signed his underlying application for state habeas relief on May 16, 2023, *after* expiration of the federal one-year statute of limitations, and the state habeas proceeding had no federal statutory tolling effect. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Thus, the instant federal habeas petition, filed on November 3, 2023, is untimely by nearly nine months.

Petitioner did not argue in his response to the motion to dismiss that his section 2254 petition was timely filed, nor did he allege any grounds for application of equitable tolling.

Consequently, the instant federal habeas petition is barred by the applicable one-year statute of limitations and will be dismissed with prejudice.

III. CONCLUSION

For the above reasons, petitioner's motion to lift the stay (Docket Entry No. 52) is **GRANTED** and the **STAY IS LIFTED**. Respondent's motion to dismiss (Docket Entry No. 10) is **GRANTED** and this case is **DISMISSED WITH PREJUDICE**. Any and all pending motions are **DENIED AS MOOT**. A certificate of appealability is **DENIED**.

Signed at Houston, Texas, on this the 17th day of December, 2024.

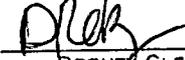


KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

App. 12

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TRUE COPY I CERTIFY AND ATTEST:
NATHAN OCHSNER, CLERK OF COURT

By 
DEPUTY CLERK

ENTERED

April 28, 2025

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SCOTT EDWARD PALMER, a/k/a
KENNETH EDWARD SPENCE,

Petitioner,

v.

ERIC GUERRERO,

Respondent.

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CIVIL ACTION NO. H-23-4293

**MEMORANDUM OPINION AND ORDER
DENYING RULE 59(e) MOTION**

Petitioner, a state inmate proceeding *pro se*, filed a habeas petition under 28 U.S.C. § 2254 seeking reinstatement of 1,854 days of good time and work credits forfeited upon revocation of his parole in 2021. The Court granted respondent’s motion to dismiss predicated on expiration of the one-year statute of limitations, and dismissed the case on December 6, 2024.

Pending before the Court is petitioner’s motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) (Docket Entry No. 64). On February 23, 2025, respondent filed a motion for leave to file an out-of-time response in opposition to the Rule 59(e) motion (Docket Entry No. 79) with a response (Docket Entry No. 80).

The Court **GRANTS** respondent’s motion for leave to file an out-of-time response, **DEEMS** the response filed of record, and **DENIES** the Rule 59(e) motion for the reasons shown below.

I. BACKGROUND AND CLAIMS

Petitioner was convicted of theft in Harris County, Texas and sentenced to an enhanced forty-year term of imprisonment on January 12, 1994. He was released to parole on December 18, 2000, which was subsequently revoked on August 11, 2021, with new felony convictions for fraud and impersonating a public servant.

Petitioner states that on August 17, 2021, following his return to prison, he received a prison time credit slip showing that his 1,854 days of previously accrued pre-parole good time and work credits were forfeited due to the parole revocation. He filed the instant lawsuit under 28 U.S.C. § 2254 on November 3, 2023, claiming the forfeiture denied him due process and equal protection. In support, he argued that his written parole contract warned him that he would forfeit all calendar street time upon revocation of parole, but did not expressly warn him that he would also forfeit all accrued pre-parole good time and work credits. He additionally cited cases where parole contracts had included warnings that accrued pre-parole good time and work credits would be forfeited if parole were revoked. Petitioner stated he was entitled to reinstatement of the 1,854 days of good time credit that were “arbitrarily” forfeited upon revocation of his parole.

On February 15, 2024, respondent filed a motion to dismiss, asserting that petitioner’s § 2254 claims accrued upon revocation of his parole and expired one year later in August 2022 under 28 U.S.C. § 2244(d)(1)(D). Respondent further argued that petitioner’s

applications for state habeas relief, signed on May 16, 2023, were filed after expiration of limitations and afforded petitioner no tolling benefit.

Petitioner filed a response to the motion to dismiss on March 8, 2024, asserting that his petition was not barred by limitations because his claims were actually claims brought under 28 U.S.C. § 2241, which has no statute of limitations. Petitioner filed with the response a motion to amend, seeking leave to recharacterize his § 2254 claims as § 2241 claims, and to expand the scope of his good time credit loss from 1,854 days to “17 years, 11 months, and 15 days.” According to petitioner, this would entitle him to immediate release to mandatory supervision. He made no argument that his § 2254 claims were timely filed.

The Court denied petitioner’s motion to amend his petition on March 28, 2024, noting that his claims were properly brought under § 2254¹ and that his purported loss of “17 years, 11 months, and 15 days” good time credit was refuted by the state court records.² The Court

¹*See, e.g., Topletz v. Skinner*, 7 F.4th 284 (5th Cir. 2021):

[O]ur case law makes clear that the two statutes do not represent an either/or dichotomy. Section 2241 empowers a federal court to grant writs of habeas corpus while § 2254 applies to a subset of those to whom § 2241(c)(3) applies, mandating the deferential AEDPA standard of review specifically when a person is in custody pursuant to the judgment of a State court. In other words, § 2254 is not an independent avenue through which petitioners may pursue habeas relief. Instead, all habeas petitions . . . are brought under § 2241, and § 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.

Id. at 293–94 (cleaned up).

²*See* n.3, *infra*.

further notes here that claims for release to mandatory supervision must be brought under § 2254, not § 2241, and that petitioner had not exhausted any claim that he was denied release to mandatory supervision. *See Malchi v. Thaler*, 211 F.3d 953, 956 (5th Cir. 2000) (recognizing that habeas claims seeking accelerated or immediate release from prison must be brought under § 2254, not § 2241).

Petitioner filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit on May 1, 2024, appealing the Court's denial of his motion to amend his petition. On May 20, 2024, the Court stayed and abated this case pending disposition of the appeal, so that petitioner could present his § 2241 argument without disruption. The only motion pending at that time was respondent's motion to dismiss the § 2254 claims as untimely, to which petitioner had not filed a merits response. No ruling as to a certificate of appealability was made, as the Court's orders were interlocutory. However, on June 14, 2024, petitioner asked the Court to grant a certificate of appealability as to the denial of his motion to amend, and the Court denied a certificate of appealability on July 24, 2024.

On July 29, 2024, during pendency of his appeal and the abatement of this case, petitioner filed an amended response to respondent's motion to dismiss, addressing for the first time the merits of respondent's February 2024 motion as to his § 2254 claims. Petitioner did not seek leave to file the amended and untimely pleading, nor did he move to lift the stay to allow the filing. The Court struck the pleading on August 7, 2024. Petitioner did not move to lift the stay until November 18, 2024, or seek leave to file the amended and untimely

pleading until December 13, 2024, nearly ten months after respondent filed the motion to dismiss.

On October 29, 2024, the Fifth Circuit Court of Appeals dismissed petitioner's appeal for his failure to comply with the court's orders. Petitioner filed an emergency motion to lift the stay in the instant case on November 18, 2024, predicated not on the dismissal of his appeal or to allow filing of an amended response to the motion to dismiss, but on his unsupported argument that he was entitled to immediate release to mandatory supervision. On December 6, 2024, the Court lifted the stay, granted respondent's motion to dismiss, and dismissed the case with prejudice as barred by limitations. The Court's rulings crossed paths with the Fifth Circuit's order of December 5, 2024, reinstating petitioner's appeal. The Fifth Circuit subsequently dismissed the appeal for lack of jurisdiction on April 9, 2025.

Petitioner states that he mailed the instant emergency Rule 59(e) motion to the Court on December 10, 2024, four days after the Court dismissed the case. However, the Court did not receive the motion until over a month later, on January 14, 2024. Because the record before the Court does not fault petitioner for the unexplained delay, the Court will assume for purposes of this order that the motion was timely filed.

II. ANALYSIS

A. Legal Standards

Federal Rule of Civil Procedure 59(e) permits this Court to alter or amend the judgment due to (1) an intervening change in controlling law, (2) availability of new evidence

not previously available, or (3) the need to correct a clear error of law or fact or prevent a manifest injustice. *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); *Schiller v. Physicians Res. Grp.*, 342 F.3d 563, 567 (5th Cir. 2003). Rule 59(e) serves the narrow post-judgment purpose of allowing a party to bring manifest errors or newly discovered evidence to the court's attention. *In re Rodriguez*, 695 F.3d 360, 371 (5th Cir. 2012). Rule 59(e) does not allow a movant "to rehash arguments which have already been raised before [the district] court," to advance "arguments that could have been offered or raised before entry of judgment," or "to argue [the] case under a new legal theory." *Naquin v. Elevating Boats, L.L.C.*, 817 F.3d 235, 240 n.4 (5th Cir. 2016).

Petitioner does not offer newly discovered evidence or argue there has been an intervening change in controlling law. He contends that the Court's failure to address the merits of three pleadings that were filed prior to, but received after, the Court's dismissal constitutes an error of law or manifest injustice. Specifically, he argues that the Court should have addressed on the merits (1) his second emergency motion for immediate release, (2) his second motion for leave to file an amended response to respondent's motion to dismiss, and (3) his proposed second amended response to respondent's motion to dismiss.

B. Second Emergency Motion for Release

Petitioner argues that the judgment should be altered so that the Court can consider the merits of his second emergency motion for immediate release to mandatory supervision. (Docket Entry No. 58.) Although the Court dismissed the second emergency motion as moot,

it also found that “petitioner fails to show he is entitled to immediate release to mandatory supervision.” (Docket Entry No. 61.) Thus, the Court has already considered and rejected the merits of petitioner’s second emergency motion for release.

The Court stands by that ruling. Petitioner’s second emergency motion for release raises the same meritless claims and arguments he raised in his first emergency motion. Petitioner again wholly fails to support, and the state court records refute, his argument that he forfeited “15 years, 5 months, and approximately 23 days” of accrued pre-parole good time credit as a result of his 2021 parole revocation.³ To the contrary, the state court records do not show that petitioner had even accrued “15 years, 5 months, and approximately 23 days” of pre-parole good time credit at the time of his parole release in 2000, much less forfeited that amount of good time credit following parole revocation.

The merits of petitioner’s motion is necessarily intertwined with the merits of his underlying habeas claims and pending appeal. Thus, the Court cannot grant petitioner’s motion in absence of a favorable determination of his underlying habeas claims. Because the

³Petitioner argued in an earlier pleading that the affidavit of Texas Department of Criminal Justice employee Charley Valdez established that he forfeited “17 years, 11 months, 15 days” of accrued pre-parole good time credit. (Docket Entry No. 18, p. 5.) Although petitioner has now changed the numbers, he presumably continues to rely on the affidavit as proof for his current argument that he forfeited “15 years, 5 months, and approximately 23 days” of accrued pre-parole good time credit. Petitioner misreads the affidavit. Mr. Valdez testified in his affidavit that, “Because the remaining portion of his sentence was greater than the amount of time from his [parole] release date to the date the [parole violation] warrant was issued, Inmate *Palmer* forfeited 17 years, 11 months, and 15 days of calendar street-time. He also forfeited all previously accrued good time.” *Id.*, Exhibit 3, p. 3 (citations omitted, emphasis added). Petitioner fails to show that he forfeited “15 years, 5 months, and approximately 23 days” of accrued pre-parole good time credit following parole revocation.

Court has dismissed petitioner's habeas claims as barred by limitations, the motion carries no merit. Moreover, petitioner's habeas petition did not seek mandatory supervised release as judicial relief, nor had he exhausted his state court remedies as to such relief.⁴

The second emergency motion for release (Docket Entry No. 58) is **DENIED**.

Petitioner fails to establish a clear error of law or fact or manifest injustice, and the Rule 59(e) motion (Docket Entry No. 64) is **DENIED** as to this issue.

C. Second Motion for Leave to File Amended Response

Petitioner next argues that the Court's failure to consider the merits of his second motion for leave to file an amended response and proposed second amended response was an error of law or manifest injustice under Rule 59(e). Petitioner contends that he should be allowed to file an amended response opposing the merits the motion to dismiss because his § 2254 petition was timely filed.

The Court again notes that petitioner argues in this lawsuit and on appeal that his habeas claims should be recognized as § 2241 claims. Indeed, the basis of his response to the motion to dismiss was that § 2241 claims are not subject to limitations. Nevertheless, petitioner now argues that his need to file an amended response *as to his § 2254 claims* became necessary on March 19, 2024, when the Fifth Circuit Court of Appeals withdrew its opinion in *Galbraith v. Hooper*, 85 F.4th 273 (5th Cir. 2023), *withdrawn*, 2024 WL 1170026

⁴For these and related reasons, the Court denied petitioner's recent post-judgment motion for a temporary or preliminary injunction granting his release to mandatory supervision. (Docket Entry No. 73.)

(Mar. 19, 2024). (Docket Entry No. 64, n.1.) In his earlier motion to amend his petition, petitioner had relied on *Galbraith* as establishing that § 2241 claims are not subject to a statute of limitations. (Docket Entry No. 15, p. 2.)

But the withdrawal of *Galbraith* does not mean that § 2241 claims are subject to a statute of limitations. The Supreme Court of the United States and the Fifth Circuit Court of Appeals have never held that § 2241 claims are subject to the one-year limitation applicable to § 2254 petitions. Moreover, petitioner filed his pending appeal *after* the Fifth Circuit withdrew *Gilbraith*, and his appellate pleadings made no mention of *Galbraith*. More importantly, *Galbraith* had no effect on the timeliness – or untimeliness – of petitioner’s § 2254 claims.

Consequently, the Court is not persuaded that the withdrawal of *Gilbraith* triggered a need for petitioner to file an untimely second amended response to the motion to dismiss. This is particularly true given that the facts and grounds underlying petitioner’s proposed second amended response were known to him at the time the motion to dismiss was filed in February 2024. In his response to the motion to dismiss petitioner filed on March 8, 2024, petitioner elected to change the nature of his lawsuit in order to circumvent limitations and in lieu of arguing that his § 2254 claims were timely filed. That *Gilbraith* was withdrawn eleven days later provided petitioner no good cause for attempting to file an amended response four months later and a second amended response over nine months after the motion to dismiss was filed. Petitioner’s second amended response was untimely, and he shows no

good cause for seeking to file the second amended response. No error of law or manifest injustice is shown.

D. Meritless § 2241 Claims

The Court dismissed petitioner's § 2254 habeas claims on December 6, 2024, as barred by AEDPA limitations. Even assuming petitioner's habeas claim for reinstatement of 1,854 days of unlawfully forfeited good time and work credits were before the Court as § 2241 habeas claims, he would merit no relief.

Petitioner argues that his 1,854 days of accrued pre-parole good time credit were arbitrarily forfeited upon his parole revocation. However, this forfeiture was required under Texas Government Code § 498.004(b). Because the credit was forfeited pursuant to state law, petitioner had fair notice that it would be forfeited if his parole were revoked. Petitioner cites no authority holding that § 498.004(b) is unenforceable, or violates federal due process or equal protection, if its provisions do not appear within the parole contract itself. Petitioner would warrant no relief under § 2241 as to the forfeiture of accrued pre-parole good time and work credits following his parole revocation.

The Court finds that petitioner's Rule 59(e) motion as to the motion for leave to file a second amended response and the proposed second amended response in opposition to the motion to dismiss raise no error of law or fact or manifest injustice.

The Rule 59(e) motion lacks merit and is **DENIED** as to this issue.⁵

⁵To the extent a dispositive ruling on the second motion for leave to file an amended response is necessary, the motion (Docket Entry No. 60) is **DENIED**.

III. CONCLUSION

For the reasons shown above, the Court **ORDERS** as follows:

1. Petitioner's second emergency motion for release (Docket Entry No. 58) is **DENIED**.
2. Petitioner's second motion for leave to file an amended response (Docket Entry No. 60) is **DENIED**.
3. Respondent's motion for leave to file an out-of-time response in opposition to the Rule 59(e) motion (Docket Entry No 79) is **GRANTED**.
4. Respondent's response in opposition to the Rule 59(e) motion (Docket Entry No. 80) is **DEEMED** filed of record.
5. Petitioner's Rule 59(e) motion (Docket Entry No. 64) is **DENIED**.
6. A certificate of appealability is **DENIED**.

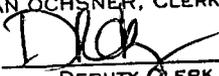
Signed at Houston, Texas, on this the 23rd day of April, 2025.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

App - 23

TRUE COPY I CERTIFY AND ATTEST:
NATHAN OCHSNER, CLERK OF COURT

BY 

DEPUTY CLERK

United States Court of Appeals
for the Fifth Circuit

No. 25-20206

United States Court of Appeals
Fifth Circuit

FILED
December 3, 2025

Lyle W. Cayce
Clerk

SCOTT EDWARD PALMER,

Petitioner—Appellant,

versus

ERIC GUERRERO, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC No. 4:23-CV-4293

ORDER:

Scott Edward Palmer, Texas prisoner # 00660844, moves for a certificate of appealability (COA) to appeal the time-bar dismissal of his 28 U.S.C. § 2254 application and the subsequent denial of his Federal Rule of Civil Procedure 59(e) motion. He also appeals the denial of his postjudgment “Amended Emergency Motion for Temporary Restraining Order and Preliminary Injunction,” which is construed as having requested Federal Rule of Civil Procedure 60(b) relief. Although he additionally purports to appeal the denial of his May 11, 2025 motion, which he captioned as an

“Emergency Rule 59(e) Motion Pursuant to Dkt. No. 83,” his notice of appeal is ineffective in this regard since the district court had not issued an order deciding that motion when Palmer filed his notice. *See* FED. R. APP. P. 4(a)(1)(A) (providing that notice of appeal must be filed after entry of order appealed from).

In his § 2254 application, Palmer challenged the forfeiture of good time and work time credits resulting from the revocation of the term of parole he was serving following his conviction for theft by check. Palmer now argues that (1) the district court erred by determining that (a) the state habeas court had denied his claims on the merits, and (b) he had not sufficiently exhausted his state remedies; (2) Texas Government Code § 508.154 and his due process rights were violated by the forfeiture of the credits at issue; (3) the district court erred by determining that his claims arose under § 2254 rather than 28 U.S.C. § 2241; and (4) the district court abused its discretion by disallowing his attempts to amend his response to the State’s answer to show, in the alternative, that his § 2254 claims were timely filed. Palmer does not address the dismissal of his equal protection claim, and he has therefore abandoned any challenge to that dismissal. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993); *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

A COA may issue only if the applicant has made “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When the district court denies relief on procedural grounds, a COA should issue if the applicant establishes that jurists of reason would find it debatable whether the application states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To obtain a COA to appeal the denial of a Rule 59(e) or 60(b) motion, a prisoner must show that jurists of reason

could conclude that the district court abused its' discretion by denying the motion. *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Palmer fails to make the necessary showings. Accordingly, his motion for a COA is DENIED. His motion for leave to file amended COA pleadings is GRANTED.

/s/James E. Graves, Jr.

JAMES E. GRAVES, JR.

United States Circuit Judge



Certified as a true copy and issued
as the mandate on Dec 24, 2025

Attest:

Jyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

ENTERED

April 01, 2024

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SCOTT EDWARD PALMER, a/k/a §
KENNETH EDWARD SPENCE, a/k/a §
KENNETH ALBRECHT, a/k/a §
EDWARD L. SPENCE, §

Petitioner, §

v. §

CIVIL ACTION NO. H-23-4293

BOBBY LUMPKIN, §

Respondent. §

ORDER

The Court **ORDERS** as follows:

1. Petitioner's *pro se* motion for leave to file an amended habeas petition (Docket Entry No. 16) is **DENIED**.

On November 3, 2023, petitioner filed a *pro se* habeas petition under 28 U.S.C. § 2254 challenging the loss of 1,854 days of good time and work credit following revocation of his parole on August 11, 2021. On February 15, 2024, respondent filed a motion to dismiss the petition as barred by the applicable one-year statute of limitations found in 28 U.S.C. § 2244(d). In response, petitioner filed his motion for leave to amend, seeking to amend his section 2254 habeas petition to a section 2241 habeas petition, and to expand his habeas claim to seek restoration of "17 years, 11 months, and 15 days" of good time and

work credit. Petitioner simultaneously filed a response opposing the motion to dismiss, arguing that claims brought under section 2241 are not subject to time limitations.

Petitioner labels his loss of “17 years, 11 months, and 15 days” as post-revocation forfeiture of pre-parole accrued good time and work time credit. However, documents submitted by petitioner show that he forfeited “17 years, 11 months, and 15 days” of *calendar street time* under Texas Government Code § 498.283(c) following revocation of his parole, and forfeited all previously accrued good time credit under Texas Government Code § 498.004(b). (Docket Entry No. 18, Exhibit 3.) The state court record filed by respondent does not reflect accrual of nearly eighteen years’ good time and work credit prior to petitioner’s release to parole in December 2000, nor does it reflect forfeiture of nearly eighteen years’ good time and work credit following his parole revocation in 2021. (Docket Entry No. 14-3, pp. 24–25.) In short, the allegations in petitioner’s proposed amended petition are refuted by the state court record. Further, the state court record does not show that petitioner exhausted through the Texas Court of Criminal Appeals his proposed claim for forfeiture of nearly eighteen years’ good time and work credit; at most, he may have exhausted his original claim for loss of 1,854 days of good time and work credit.

Moreover, petitioner may not proceed under section 2241. Petitioner is in custody of the Texas Department of Criminal Justice pursuant to four state convictions. It is well settled in this circuit that a state prisoner’s claims for restoration of sentence credit that would result “in their immediate or sooner release from prison [if valid], fall under § 2254.” *Malchi v.*

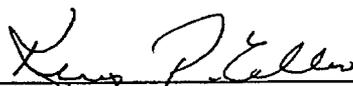
Thaler, 211 F.3d 953, 956 (5th Cir. 2000); *Kimbrell v. Cockrell*, 311 F.3d 361, 362 (5th Cir. 2002). In both his original and proposed amended petitions, petitioner claims he was wrongfully denied certain sentence credits which, if restored, would require his earlier if not immediate release to mandatory supervision. Consequently, petitioner's claims fall squarely within the ambit of *Malchi* and *Kimbrell* and must be brought under section 2254. See *Malchi*, 211 F.3d at 956; *Kimbrell*, 311 F.3d at 362.

2. Petitioner's *pro se* motion for summary judgment (Docket Entry No. 18) is **DENIED**. Petitioner does not show he is entitled to habeas relief as a matter of law.

3. Petitioner's "Emergency Motion for Immediate Release to Mandatory Supervision" (Docket Entry No. 19) is **DENIED** for lack of merit. Petitioner does not establish a right to immediate release to mandatory supervision.

4. Respondent's pending motion to dismiss (Docket Entry No. 10) is ripe for disposition. No further pleadings are to be filed pending disposition of the motion. Pleadings filed in violation of this order will be terminated on the docket without a ruling and without further notice.

Signed at Houston, Texas, on this the 28th day of March, 2024.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

App. - 90

ENTERED

August 13, 2024

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SCOTT EDWARD PALMER, a/k/a §
KENNETH EDWARD SPENCE, a/k/a §
KENNETH ALBRECHT, a/k/a §
EDWARD L. SPENCE, §

Petitioner, §

v. §

CIVIL ACTION NO. H-23-4293

BOBBY LUMPKIN, §

Respondent. §

ORDER

The motion to substitute counsel filed by respondent Bobby Lumpkin (Docket Entry No. 39) is **GRANTED**. Assistant Attorney General Jacey Winget is **WITHDRAWN** as attorney in charge for respondent and Assistant Attorney General Cara Hanna is **SUBSTITUTED** in her place and stead.

Petitioner's request for free copies of pages 24 and 25 of Docket Entry No. 14-3 is **DENIED**. The pages reflect exhibits 1 and 2 as attached to petitioner's own application for state habeas relief and are in his possession. To the extent petitioner is requesting free copies of any other documents filed in this proceeding, the docket shows that he paid the filing fee and the appellate filing fee in this case and is not proceeding *in forma pauperis*. Petitioner does not show that he lacks resources to pay for copies of documents.

Petitioner complains that he is being denied due process because he is not receiving copies of the docket in this case. The docket shows that petitioner was sent an updated copy of the docket as recently as July 29, 2024.

Petitioner's amended response to respondent's motion to dismiss (Docket Entry No. 38) is **STRICKEN FROM THE RECORD**. Petition did not request and obtain leave of court to file the amended pleading.

Petitioner is reminded that the Court stayed and abated this habeas case pending disposition of his interlocutory appeal to the United States Court of Appeals for the Fifth Circuit. No further dispositive rulings will be made in the instant case until a final ruling is issued in the appeal and the stay has been lifted in this case. Accordingly, petitioner's motion for an expedited ruling on pending dispositive motions (Docket Entry No. 37) is **DENIED**.

Signed at Houston, Texas, on this the 13th day of August, 2024.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas

ENTERED

December 27, 2024

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SCOTT EDWARD PALMER, a/k/a
KENNETH EDWARD SPENCE,

Petitioner,

v.

BOBBY LUMPKIN,

Respondent.

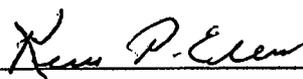
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CIVIL ACTION NO. H-23-4293

ORDER

Petitioner's duplicate motions to file an amended response to respondent's motion to dismiss (Docket Entries No. 59, 60) are **DISMISSED AS MOOT**.¹ The Court granted respondent's motion and dismissed this *pro se* state inmate habeas case on December 6, 2024. Petitioner's pending motions were received by the Court on December 13, 2024, and docketed on December 17, 2024, and December 18, 2024.

Signed at Houston, Texas, on this the 27th day of December 2024.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

¹Petitioner currently claims entitlement to over 15 years of purported accrued pre-parole good time and work credit that he argues was forfeited upon his parole revocation. *See, e.g.*, Docket Entry No. 58, pp. 1-2. Nothing in the state court record shows that petitioner had accrued over 15 years of pre-parole good time and work credit at the time of his release to parole or that he forfeited over 15 years of pre-parole good time and work credit upon revocation of his parole. Moreover, parolees do not accrue good time credit while released on parole. TEX. GOV'T CODE § 498.003(c).

ENTERED

April 02, 2025

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SCOTT EDWARD PALMER, a/k/a
KENNETH EDWARD SPENCE,

Petitioner,

v.

ERIC GUERRERO,

Respondent.

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CIVIL ACTION NO. H-23-4293

ORDER

The Court dismissed this *pro se* state inmate habeas case on December 6, 2024, as barred by limitations. On March 28, 2025, the Court docketed petitioner’s pending *pro se* “Emergency Motion for Temporary Restraining Order and Preliminary Injunction.” (Docket Entry No. 70.) He seeks as temporary or preliminary injunctive relief his immediate release to mandatory supervision based on an unsubstantiated – and twice rejected – argument that “15 years, 5 months, and approximately 23 days” of accrued pre-parole good time and work credits were unlawfully forfeited following his 2021 parole revocation.

Temporary or preliminary affirmative relief cannot be granted at this juncture, as the Court dismissed with prejudice the habeas claims underlying petitioner’s instant motion. Even so, petitioner did not seek release to mandatory supervision in his habeas petition. In his petition, petitioner sought “credit for the approximate 1,854 days of good-time and work-time credits arbitrarily taken.” (Docket Entry No. 1, p. 15.) He did not file suit for the denial

of release to mandatory supervision, nor did he claim that restoration of the 1,854 days of good time and work credits would require his immediate mandatory supervised release. Moreover, he does not allege, and public online records for the Texas Court of Criminal Appeals do not show, that he has exhausted his available state remedies as to the alleged denial of mandatory supervised release. Petitioner cannot sidestep the habeas process by moving for “temporary” or “preliminary” injunctive relief.

Petitioner satisfies none of the requirements for a temporary or preliminary injunction. *See Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009); *see also Bluefield Water Association, Inc. v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009). The motion (Docket Entry No. 70) is **DENIED**.

Signed at Houston, Texas, on this the 1st day of April, 2025.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**