NO. 19-7560

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 2019

MICHAEL SWAIN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

CORRECTED
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To bring this case before the Supreme Court for a decision on the merits, the following federal question is presented for review:

> DID THE JUDGES OF THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEAL ERR WHEN THEY AFFIRMED THE DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF TO PETITIONER WITHOUT REVISITING JONAS V. WAINWRIGHT, 779 F.2D 1576 (11TH CIR. 1986) FOR THE PURPOSE OF RESOLVING A CIRCUIT COURT CONFLICT BETWEEN JONAS AND THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS' DECISION IN JOOST V. U.S. PAROLE COMMISSION, 698 F.2D 418 (10TH CIR. 1983) ON AN IMPORTANT MATTER OF FEDERAL LAW THAT A VIOLATION OF PAROLE BOARD'S OWN REGULATIONS, BARRING CONSIDERATION AND RELIANCE ON CRIMINAL OFFENSES FOR WHICH PROSPECTIVE PAROLEE HAD BEEN ACQUITTED, VIOLATES PETITIONER'S CONSTITUTIONAL DUE PROCESS PROTECTIONS AGAINST ARBITRARY ACTION BY GOVERNMENT AGENCY?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner, **MICHAEL SWAIN**, respectfully petitions the Supreme Court for a Writ of Certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit which conflict with a decision of the United States Court of Appeals for the Tenth Circuit on the same important question of federal constitutional law.

PARTIES

Michael Swain was the Appellant in the United States Court of Appeal for the Eleventh Circuit. The Florida Commission on Offender Review (formerly named the Florida Parole Commission) was the Appellee in the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's request for rehearing is unreported and appears in the Appendices as Appendix A. The opinion of the Eleventh Circuit Court of Appeals affirming the final judgment of the United States District Court, Southern District of Florida, denying the Section 2241 Application for Writ of Habeas Corpus on June 19, 2019 is reported at 2019 U.S. App. Lexis 18175 and appears in the Appendices as Appendix B.

The opinion of the United States District Court, Southern District of Florida denying Section 2241 Application for Writ of Habeas Corpus and granting a limited Certificate of Appealability on April 18, 2018 is reported at 2018 U.S. Dist. LEXIS 66089 and appears in the Appendices as Appendix D. The opinion of the United States Magistrate Judge recommending that the Section 2241 application be denied is reported at 2018 U.S. Dist. Lexis 27733 and appears in the Appendices as Appendix E.

JURISDICTION OF COURT

The final judgment of the United States Court of Appeals for the Eleventh Circuit denying the Petition for Rehearing was entered on August 15, 2019. (App. A). The Supreme Court, pursuant to Title 28 U.S.C. § 1254(1), has jurisdiction to grant petitions for writs of certiorari to review decisions entered by a United States Court of Appeals.

CONSTITUTION, STATUTE, AND ADMINISTRATIVE RULES INVOLVED

The federal question presented for review involves the due process of law guarantee of the Fourteenth Amendment to the United States Constitution which appears in the Appendices in full text. (App. J.). The question presented for review also involves Section 947.165(1) of the Florida Statutes which is set out in full text and appears in the Appendices as Appendix K.

The important question of federal law that has divided the United States Circuit Courts of Appeals in this case also involves standard federal and state parole guideline rules prohibiting consideration or use of conduct for which the parole - eligible inmate was acquitted. These regulations appears in the Appendices as Appendix L and Appendix M, respectfully.

STATEMENT OF THE CASE

On January 13, 1976, during a jury trial conducted in reference to Criminal Case Number F75-9247 in the Circuit Court of the Eleventh Judicial Circuit, Dade County, State of Florida, a jury acquitted 19 years-old Petitioner of the offenses of aggravated assault and involuntary sexual battery. (App. I, pg. 3a).

Thereafter, the State of Florida came against Petitioner in a separate criminal prosecution when it filed an Information on February 2, 1976 in the same Circuit Court charging Petitioner under Case Number F76-976 with the felony offenses of

breaking and entering a dwelling, sexual battery, and robbery. The State alleged that these crimes were committed during a single criminal episode against two tenants on October 23, 1974.

At a subsequent jury trial conducted a month after charges were filed, the Petitioner was convicted by a jury as charged. This resulted in Petitioner's first felony convictions. On April 14, 1976, the trial court sentenced Petitioner to imprisonment for life with eligibility for parole.

On December 13, 1979, the Respondent set Petitioner's presumptive parole release date (PPRD) for June 12, 2001. By September 1997, Petitioner's PPRD came to rest with Respondent at March 6, 1999. (App. I, pg. 3a).

Pursuant to Florida's parole laws and objective parole guidelines rules, Respondent's investigator (formerly named parole examiner) interviewed Petitioner on December 17, 1998 to determine whether to convert the PPRD into an effective parole release date. After a panel of two (2) commissioners met on February 3, 1999 and voted to refer Petitioner's case to a full commission panel (three commissioners) for extraordinary review, the Commissioners received for their consideration a no-release letter from the Dade County State Attorney Office (DCSAO). The no-release letter, with police reports attached thereto, elaborated on the circumstances of criminal offenses in unrelated cases for which Petitioner

were acquitted by a jury following a trial and which were nolle prossed by the DCSAO. (App. I, pg. 3b).

After considering the no-release letter and other information inside Petitioner's inmate file as required by parole guidelines rules, Respondent adopted mental health impressions from mental health officials employed with the Florida Department of Corrections and concluded on March 3, 1999 that Petitioner has a "continuing persistent pattern of criminal conduct," "has a propensity for criminal conduct representative of a repeat offender," his parole risk was "extremely poor," and is in need for mental disordered treatment. The Respondent voted to deny parole, suspended the PPRD indefinitely, and set a subsequent extraordinary review for 2003. (App. I, pg. 3c).

During each of the subsequent extraordinary review proceedings conducted in 2003, 2008, and 2013, the Petitioner presented a release plan. Investigators for Respondent recommended that the Commission lift the PPRD-suspension and placed Petitioner on parole based on his exemplary program achievements, satisfactory institutional conduct record, and because he posed little, if not any risk to others. At Petitioner's most recent extraordinary review hearing conducted by Respondent on September 25, 2013, a victim's advocate placed in evidence for consideration a letter from a victim in Case Number F76-976. The victim's submission informed Respondent that she was told by law

enforcement officers of Petitioner's alleged involvement to unrelated crimes for which he was acquitted and which the DCSAO nolle prossed. (App. I, pg. 3c).

The Respondent subsequently issued a written report of its action. The Respondent continued to be unable to make a finding that there is reasonable probability that Petitioner would live and conduct himself as a respectable and law-abiding citizen and that his release would not be compatible with his own welfare and the welfare of society as required by statute. Respondent noted that a review of the entire Department of Corrections records revealed insufficient completion of programming to assist with successful re-entry since the last review. Respondent also incorporated the prior negative findings arrived at in 1999, noting that the serious nature of the offense was still of concerns to Commissioners. Respondent established Petitioner's next interview date in seven years, noting that it was not reasonable to expect that Petitioner would be granted parole within the following years.

After the 2013 parole review process concluded, Petitioner unsuccessfully challenged Respondent's administrative action in the State of Florida's judiciary via Petition for Writ of Mandamus which was denied on the merits. Following exhaustion of his state court remedies, Petitioner filed a Section 2241 Application for Writ of Habeas Corpus with the United States District Court, Southern District of Florida on August 4, 2016. (App. I).

Among the constitutional grounds raised in the habeas corpus petition, the Petitioner challenged his continued detention in the custody of the State of Florida on the basis that Respondent violated his rights to due process guaranteed him under the Fifth and Fourteenth Amendments by engaging in abitrary actions when Respondent failed to comply with its own regulation (Rule 23-21.010(2)(d)) barring consideration and reliance on criminal charges of which Petitioner, had been acquitted and to continually use such constitutionally impermissible factors to deny Petitioner parole repeatedly. (App. I, pg. 3-3D)

On October 26, 2016, pursuant to a show cause order, the Respondent filed a response contending that it had not deprived Petitioner of a federally protected right because there is nothing improper and arbitrary in accepting written submissions from either the victim or the DCSAO describing a history of crimes allegedly committed by Petitioner which he was either acquitted or were dismissed against him.

Petitioner filed a reply citing to the Tenth Circuit Court of Appeals' decision in Joost v. United States Parole Commission, 698 F.2d 418 (10th Cir. 1983) and insisted to the District Court that criminal charges for which a prospective parolee has been acquitted may not be considered by Respondent to arbitrarily deny him parole without violating due process. In his report to the District Judge

recommending that the habeas corpus application be denied, the Magistrate Judge made the following findings:

> "[T]he petitioner's reliance upon Joost v. U.S. Parole Commission, 698 F.2d 418 (10th Cir. 1983), is misplaced. The petitioner relies on Joost for the proposition that, with regard to federal parole decisions, criminal charges of which a prospective parolee has been acquitted may not be considered to deny parole. However, review of that decision shows that the holding is based on a violation of the Parole Commission's own regulations and not a constitutional violation. Joost at 419. . ." (App. F).

Petitioner filed objections to the Magistrate Judge's factual findings and attempt to distinguish the Joost case from his case. Upon finding that discovery matters raised by Petitioner needed to be addressed and ruled upon, the District Judge rejected the Magistrate Judge's report and recommendation and remanded the cause to the Magistrate Judge for judicial action on the discovery matters and for a supplemental report thereafter.

In a Supplemental Report entered on February 20, 2018, the Magistrate Judge found that Respondent's 1999 negative decision denying parole and suspending Petitioner's release date were supported by substantial evidence other than the letters from the State Attorney and victim, and that the continued decision to deny Petitioner parole was not arbitrary and capricious. The Magistrate Judge also

readopted his reasoning as why the Joost decision is being misplaced by Petitioner which is that the holding in Joost "is based on a violation of the Parole Commission's own regulations." (App. E, pg. 13). The Magistrate Judge added that "[e]ven if the [Respondent] did rely to some extent on the acquitted conduct, there was no constitutional violation as such reliance is not prohibited." (App. E, pg. 14).

Petitioner filed written objections to the Supplemental Report of the Magistrate Judge. Noting that Respondent is required by Florida law to follow Florida Administrative Codes. By final order entered on April 18, 2018, the District Judge made the following findings and legal conclusions as to Petitioner's habeas corpus claim that Respondent violated his Fourteenth due-process protection against arbitrary governmental action when, contrary to its own administrative regulation, the Respondent considered and relied upon criminal charges for which Petitioner was acquitted to repeatedly deny Petitioner parole:

> "[I]nstead, as Petitioner correctly notes the Commission is required to follow the Florida Administrative Code. (See Obj's. 16). In determining aggravating parole factors, Florida's regulations require the Commission not consider "[c]harges for which a person was acquitted after trial." Fla. Admin. Code 23-21.010(2)(d)(alteration added). Thus, if the Commission relied on the charges for which Petitioner was acquitted - - charges described in both the 1999 protest letter and the 2013 victim's

> letter - - then the Commission violated its own regulations.
>
> Under Joost, a violation of the regulations regulating Commission is a violation of due process. See Joost, 698 F.2d at 419 ("Such reliance violates the Commission's own regulations. . . Unless the Commission can rebut the allegation that it relied upon the acquitted charges, petitioner is entitled to relief." (alteration added)). The Eleventh Circuit has stated in dicta, however, "[t]he claim that the Commission did not abide by its own rules and regulations does not allege a constitutional violation. "Jonas v. Wainwright, 779 F.2d 1576 (11th Cir. 1986) (alteration added). In this Circuit, only by showing the Commission knowingly relied on false information can Petitioner raise a due process claim. See Monroe, 932 F.2d at 1442; see also Jones, 279 F.3d at 946. Petitioner's objection to the Report's denial of his due process claim thus fails, . ." (App. D, pg. 9).

After denying all of the habeas corpus claims on their merit, the District Judge sua sponte granted a certificate of appealability reasoning that Petitioner identified a conflict between the Joost holding and the Eleventh Circuit's dicta in the Joans decision:

> "By citing Joost's holding regarding the consideration of acquitted charges in violation of a parole commission's regulations, Petitioner has identified a conflict with Eleventh Circuit dicta in Jonas. Thus, reasonable jurists can disagree regarding whether reliance on charges for

> which Petitioner was acquitted - - in violation of
> regulations governing the Commission - - constitutes a violation of Petitioner's due process rights because the Eleventh Circuit has not directly addressed this issue, a certificate of appealability is warranted. (App. pg. 12).

On August 14, 2018, the Petitioner filed with the District Court a Renewed Application for Certificate of Appealability seeking an expansion of the appealability grant. Respondent answered asking the District Court to reconsider its grant of a certificate of appealability raising untimely issues regarding the applicability of administrative rule 23-21.010(2)(d). On August 16, 2018, the District Judge denied Petitioner's renewed request for expansion of the certificate of appealability regarding whether Responder violated Florida laws by considering criminal charges for which Petitioner was acquitted and, if so, whether that violation infringed Petitioner's due process rights. (App/ C, pg. 7).

Petitioner took an appeal from the District Court's final orders to the United States Eleventh Circuit Court of Appeals. On December 21, 2018, Petitioner filed his principal brief on appeal arguing that he is entitled to a reversal because the District Court erroneously relied on the Eleventh Circuit Court of Appeal's dictum in Jonas which, conflicts with the Tenth Circuit Court of Appeals decision in Joost holding that a violation of the Parole Board's regulations, prohibiting consideration

of charges for which a person was acquitted, is a violation of due process. (App. H, pgs. 19-27).

Respondent filed a brief on appeal arguing that it had complied with applicable regulations when denying Petitioner parole and that his argument concerning violation of administrative rules was foreclosed by the Jonas decision.

On June 17, 2009, a panel for the Eleventh Circuit Court of Appeal affirmed the District Court's denial of Petitioner's application for a writ of habeas corpus and answered the certificate of appealability issue as follows:

> "Swain concedes that his argument that the Commission violated its regulation in denying him parole is foreclosed by binding precedent. In Jonas, we held that the failure of the Commission to "abide by its own rules and regulations [did] not allege a constitutional violation." 779 F.2d at 1578. We are bound to follow Jonas "unless and until [it is] overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting en banc." Hylor v. United States, 896 F.3d 1219, 1224 (11th Cir. 2018)(quoting United States v. Deshazior, 882 F.3d 1352, 1355 (11th Cir 2018), cert. denied, 139 S.Ct. 1375 (2019).
>
> Even if we were not bound by Jonas, we would still affirm the denial of Swan's petition because the Commission did not violate its regulation. The record establishes that the Commission denied Swain parole based on the "particularly heinous and cruel" nature of the crimes for which he had been convicted, his use of a knife during

> those crimes, the trauma inflicted on his victims, the "unreasonable risk" he posed to others, and his lack of participation in programs prerequisite to his release. Swain submitted no evidence that the Commission denied him parole based on criminal charges of which he had been acquitted.
>
> We **AFFIRD** the denial of Swain's petition or a writ of habeas corpus. (App. B, pg. 6).

Petitioner sought rehearing and rehearing en banc of the Eleventh Circuit's decision in this case. (App. G). On August 15, 2019, rehearing and rehearing en banc was denied by the Court of Appeals. (App. A).

Petitioner remains in the custody of the State of Florida Department of Corrections in violation of due process of law.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question of whether Petitioner's Fourteenth Amendment due process right against arbitrary action by State government agency was violated and whether conflicting decisions exist between federal courts of appeals were properly presented to the Eleventh Circuit Court of Appeals. The Eleventh Circuit, however, erroneously rejected Petitioner's constitutional violation argument on the merits and concluded that that court was bound by it's own precedent that failure of a Parole Board to abide by it own rules and regulations does not allege a constitutional violation, but never determined the decisional conflict issue existing

between it and the Tenth Circuit Court of Appeals. Thus, the claims were presented and reviewed below, and are appropriate for this Court's consideration.

REASONS FOR GRANTING THE WRIT

DID THE JUDGES OF THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEALS ERR WHEN THEY AFFIRMED THE DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF TO PETITIONER WITHOUT REVISITING JONAS V. WAINWRIGHT, 779 F.2D 1576 (11TH CIR. 1986) FOR THE PURPOSE OF RESOLVING A CIRCUIT CONFLICT BETWEEN JONAS AND THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS' DECISION IN JOOST V. U.S. PAROLE COMMISSION, 698 F.2D 418 (10TH CIR. 1983) ON AN IMPORTANT QUESTION OF FEDERAL LAW THAT A VIOLATION OF PAROLE BOARD'S OWN REGULATIONS, BARRING CONSIDERATION AND RELIANCE ON CRIMINAL OFFENSE FOR WHICH PROSPECTIVE PAROLEE HAD BEEN ACQUITTED, VIOLATES PETITIONER'S CONSTITUTIONAL DUE PROCESS PROTECTION AGAINST ARBITRARY ACTION BY GOVERNMENT AGENCY?

The Supreme Court should exercise its powers and issue a writ of certiorari in this case because the existence of conflicting decisions have divided federal courts of Appeals on an important question of due process of law in administrative parole proceedings which the Eleventh Circuit Court of Appeals never addressed during the appeal taken below, leaving unanswered the underlying question of whether Petitioner's due process right against arbitrary governmental action was violated by the Florida Parole Commission's consideration of a constitutionally impermissible reason to repeatedly deny parole.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

Long ago, the Court determined that the fundamental core of due process under the Fourteenth Amendment is protection against arbitrary action. Hurtoda v. California, 110 U.S. 516, 527 (1884) (this principle stretches back to words taken from the Magna Charta which was intended to secure individuals from the arbitrary exercise of powers of government). Throughout this Court's due process jurisprudence since the Hurtoda decision, the Court has repeatedly upheld this principle and has over emphasized that the due process clause protects individuals against arbitrary governmental action. Wolff .v McDonnell, 418 U.S. 539, 558 (1974) (the touchstone of due process is protection against arbitrary action of government).

Justice White, writing the opinion for the Court in Wolff, concluded that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." Id. 418 U.S. at 555-5565. After the Wolff decision, this Court held that being incarcerated does not divest prisoners of all constitutional protections. Shaw v. Murphy, 532 U.S. 223, 228-29 (2001).

This Court's decision in Greenholtz and precedents of the United States Eleventh Circuit Court of Appeals appear on their face to be a legal barrier to

Petitioner's habeas corpus claim for relief that his due process right to protection from the arbitrary denial of a discretionary benefit was violated. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1970); Damaino v. Florida Parole and Probation Commission, 785 F.2d 929, 931-932 (11th Cir. 1986); See also Meola v. Department of Corrections, 732 So.2d 1029, 1034 (Fla. 1998). (Florida Supreme Court determined that "[i]n Florida, parole – eligible inmates do not have a legitimate expectation of liberty or right to expect release on a certain date even after they have been given a specific Presumptive Parole Releasee Date.").

Petitioner is submitting to this Court, however, that its Greenholtz decision and precedents of the Eleventh Circuit does not obliterate a Florida prisoner's Fourteenth Amendment due process right to protection against arbitrary action of the parole commission's decision to deny discretionary release.

In Greenholtz, the Court held that there is no liberty interest in parole release, derived either from the Constitution or from the mere existence of a discretionary parole system, to which procedural due process protections attach. The Court also made it clear in Greenholtz that once a State enacts a statute which gives a parole commission discretionary powers to grant parole upon a prisoner meeting applicable standard and criteria, a prisoner justifiably expect that parole will be granted fairly and according to law whenever those standards are met. Id. 442 U.S. at 19. As Justice Powell stated for the Court in Greenholtz which, unlike

the present case, involved state parole statutes creating a liberty interest in parole release:

"We can accept respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectable entitlement must be decided on a case-by--case basis. Id. 442 U.S. at 12.

In the State of Florida, parole release is a discretionary grace of the State and a determination by the commission to grant parole release rest on a prisoner meeting several statutory conditions and criteria set forth in Section 947.18, Florida Statute which provides in pertinent part:

"No person shall be placed on parole merely as a reward for good conduct or efficient performance of duties assigned in prison. No person shall be place on parole until and unless the commission finds that there is reasonable probability that, if the person is place on parole, he or she will live and conduct himself or herself as a respectable and law-abiding person and that the persons release will be compatible with his or her own welfare and the welfare of society. No person shall be placed on parole unless and until the commission is satisfied that he or she will be suitable employed in self-sustaining employment or that he or she will not become a public charge..."

Petitioner submits to the Court that the presence of a wide measure of discretion for parole release under Florida's parole system does not escape the century-old due process guarantee of protection against arbitrary government action in release determinations. Kent v. United States, 383 U.S. 541, 553 (1966) (a legislative grant of discretion to government agency does not amount to a license for arbitrary decisions). Under Greenholtz, a State statute may not sanction

totally arbitrary parole-release decisions founded in part or in whole on impermissible reasons or trump over Constitutional Rights. See Williams v. Florida Parole Commission, 625 So.2d 926, 932 (Fla. 1st DCA 1993) (determined that "[t]he Commission's exercise of this delegated discretion cannot be arbitrary or capricious, for it must conform to the requirements of applicable...rules setting objective guidelines.").

The Supremacy Clause of the United States Constitution provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme law of the land; and the Judges in every state shall be bound thereby, and thing in the Constitution or Laws of any State to the contrary notwithstanding," Article VI, Clause 2, U.S. Const.

Under the Supremacy Clause, a state statute may not vitiate the due process right, guarantee under the Fourteenth amendments to be free from arbitrary governmental action. See Meachum v. Fano, 427 U.S. 215, 230 (1976). Furthermore, the Court emphasized in Perry v. Sindermann that even though a person has no "right to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. "Id. 408 U.S. 593, 597 (1972).

The question framed for review by this Court in the instant case arose out of an important federal law question wrongly decided by the United States Eleventh

Circuit Court of Appeals' reliance on its decision in Jonas v. Wainwright, 779 F. 2d 1576 (11th Cir. 1986) which Petitioner contends squarely conflicts with the decision of the United States Tenth Circuit Court of Appeals in Joost v. U.S. Parole Commission , 698 F. 2d 418 (10th Cir. 1983). In Jonas, the Eleventh circuit held that a "[c]laim that the Commission did not abide by its own rules and regulations does not allege a constitutional violation." Id. 779 F. 2d at 1578. By finding in Jonas that a constitutional violation does not occur when the commission fails to abide by its own rules and regulations, the Eleventh Circuit decided an important federal question in a way that conflicted with the Tenth Circuit decision in Joost. In Joost, the prisoner claimed that the United States Parole Commission considered murder charges for which the prisoner was acquitted to extend his incarceration period beyond the standard guidelines in violation of the commission's own regulation. See 28 C.F.R. §2.19(c). Under the Joost case, a violation of regulation 2.19(c) was a violation of due process. Id. 698 F. 2d at 419.

In the State of Florida, the Parole Commission is not at liberty to ignore, capriciously or arbitrarily, the commission's own rules. McKahn v. Florida Parole and Probation Commission, 399 So.2d 476, 478 (Fla. 1sst DCA 1981); Hardy v. Greadington, 405 So.2d 768 (Fla. 5th DCA 1981) ("[t]the Parole commission is required, as any other body, to comply with constitutional requirements; it cannot deny parole upon illegal grounds or upon improper considerations,"); Williams,

625 So.2d at 937 (parole release discretion cannot be exercised arbitrarily or capriciously).

Florida Administrative code 23-21.010(2) (d) specifically prohibits the Parole Commission from taken into consideration criminal charges for which a prisoner was acquitted after trial when making decisions. (App. L). This regulation makes criminal charges for which a parole-eligible prisoner was acquitted an impermissible consideration. In other terms, Rule 23-21.01(2)(d) places substantive limitations on the Parole Commission's powers to deny discretionary parole for reasons not within the scope of its authority.

One of this Court's primary functions is to resolve an "important matter" on which courts of appeals are "in conflict." Thompson v. Keohane, 516 U.S. 99, 106 (1995). Under Supreme Court Rule 10 (a), entitled "Considerations Governing Review on Certiorari," the court has power to consider granting certiorari review if a court of appeals "has entered a decision in conflict with another United States Court of Appeals on the same important matter." Brown v. United States, 139 S. Ct. 14 (2018).

In the instant case, the Petitioner has never claimed a due process right to parole release in his federal habeas corpus application filed in the District Court or in the state courts. (App. I).

Rather, the Petitioner claimed below that the Florida Parole Commission's continued detention of him in the custody of the Florida Department of Corrections violates his Fourteenth Amendment due process right to protection from arbitrary denial of parole release beginning in 1999 after initially considering and relying upon information contained in protestation letters from the prosecuting attorney office that he had engaged in escalating an continuing persistent pattern of criminal conduct consisting of, among others, separate sexual assault charges unrelated to his conviction and which he was tried and acquitted following a jury trial.

In Support of these claims, Petitioner contended in the lower federal courts that, by incorporating the bases for its 1999 order denying parole release into its 2015 order and being required by its own rules during every subsequent extraordinary review to consider all information in his entire inmate file pursuant to Rule 23-21.016 (1), FAC, the Commission has continued to improperly rely upon dismissed or acquitted criminal charges as reasons for evaluating any risk he may pose to the public if released and has arbitrarily exercised its delegated discretion under §947.18, Fla. Stat., to deny him parole release and reaffirm for two decades its suspension of the March 6, 1999 presumptive parole release date established by the commission using objective parole guidelines.

Although the United States Magistrate Judge's Supplemental Report distinguished the Joost case, stating that its holding was "based on a violation of

the Parole Commission's own regulations," (App. E), the District Judge found in her denial of the application for a writ of habeas corpus that, if the Florida Parole Commission relied on criminal charges for which Petitioner was acquitted—charges described in both the states attorney office's 1999 no-release letters and the victim's 2013 letter, then the Commission violated its own regulations pursuant to Rule 23-21.010(2)(d) and, under the Joost case, would constitute a violation of due process. (App. D, pg. 9).

In Joost, the Tenth Circuit Court of Appeals held that the Parole Commission could not extend a prisoner's incarceration beyond the standard parole guidelines on the basis of murder charges which Joost had been acquitted without violating its own regulation and due process. Id. 698 F.2d at 419.

In the present case, the District Judge refused, however, to grant Petitioner's habeas corpus relief because Petitioner, in the opinion of the judge, had failed to present authority stating that reliance on acquitted criminal charges 'is against the regulations governing the Commission or violates a constitutional right [.]" (App. D, pgs, 9-10). The District Judge further found that, by citing to the Joost decision, the Petitioner had identified a circuit court conflict with the Eleventh Circuit Court conflict with the Eleventh Circuit Court of Appeal's decision in Jonas v. Wainwright and granted a certificate of Appealability on the issue of "whether reliance on charges for which Petitioner was acquitted – in violation of regulations

governing the Commission – constitutes a violation of Petitioner's due process rights." (App. D, pg. 12).

On appeal taken by Petitioner, the Eleventh Circuit evaded and never addressed the circuit conflict which seemingly exist between its Jonas decision and the Tenth Circuit's Joost decision. (App. B). Rather, the Eleventh Circuit determined in the present case that it was bound to follow its own precedents "[u]nless, and until [they are] overruled or undermined to the point of abrogation by the Supreme Court []" and that the failure of the Parole Commission to "abide by its own rules and regulations does not allege a constitutional [due process of law] violation," (App. B, pg.2).

The circuit conflict issue in the present case, however, is extremely important and its manifest importance is demonstrated by the fact that consideration by the Commission of criminal charges for which a person was acquitted following a jury trial is fundamentally at odds with firmly – established judicial maxims and concerns of constitutional proportions such as a person is innocent until proven guilty beyond a reasonable doubt and vitiates a jury's role in a trial resulting in a verdict of not guilty. This is because punishment has long been reserved for those persons convicted of criminal charges tested in an adjudicative judicial proceeding where due process is fully applicable. In Wixom

v. United State, the United States Eighth Circuit Court of Appeals, stated in dictum:

> "[i]t would be inappropriate for the Parole commission to consider any of the objected to information (relating to unadjudicated conduct) in determining the length of time that the defendant will be required to serve under the guidelines established by the United States Parole Commission." Id. 585 F. 2d 920, 921 (8th Cir. 1978).

Petitioner submits that the decisional conflict existing between the Tenth and Eleventh Circuits presented by this case is one that is not likely to go away without guidance from this court and could reappear in future cases involving constitutional deficiencies in Florida's existing parole release process.

For the foregoing reasons, the Court should review the decision of the United States Eleventh Circuit Court of Appeals in this case which is in conflict with Joost and the uniform course of decision previously made on the same important federal law question. See Goldlawr v. Heiman, 369 U.S. 463, 465 (1962).

CONCLUSION

Based on the foregoing, Petitioner is requesting any four justices of the court to grant this Petition for Writ of Certiorari.

Dated: 1/17/2020

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