NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 2019, TERM

MICHAEL SWAIN,
PETITIONER,

V.

FLORIDA COMMISSION ON OFFENDER REVIEW
RESPONDENT.

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

APPENDIX TO PETITION

MICHAEL SWAIN
PETITIONER, *PRO SE*

MICHAEL SWAIN
DC #052803
DADE CORR. INST.
19000 S.W. 377 ST.
FLORIDA CITY, FL 33034

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Section 2241 Application for Writ of Habeas Corpus with Exhibits dated August 1, 2016, and filed with United States District Court, Southern District of Florida.

APPENDIX J

Amendment XIV, United States Constitution.

APPENDIX K

Section 947.165 (1), Florida Statutes (2018).

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APPENDIX M

28 Code of Federal Regulation 2.19(c).

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Order of The United States Court of Appeals for the Eleventh Circuit entered August 15, 2019, denying the Petition for Rehearing and Petition for Rehearing En Banc.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12156-HH

MICHAEL SWAIN,

Petitioner - Appellant,

versus

FLORIDA COMMISSION ON OFFENDER REVIEW,

Respondent - Appellee,

TENA M. PATE,
Chairperson,

Respondent.

Appeal from the United States District Court
for the Southern District of Florida

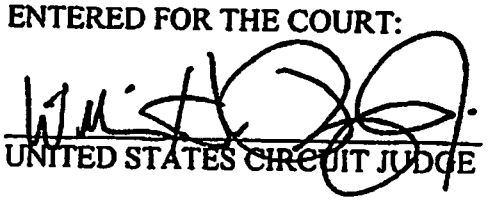
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-46

APPENDIX B

Opinion of the United States Court of Appeals for the Eleventh Circuit affirming District Court's denial of Petition for Writ of Habeas Corpus entered June 17, 2019.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12156
Non-Argument Calendar

D.C. Docket No. 1:16-cv-23395-CMA

MICHAEL SWAIN,

Petitioner-Appellant,

versus

FLORIDA COMMISSION ON OFFENDER REVIEW,

Respondent-Appellee,

TENA M. PATE,
Chairperson,

Respondent.

Appeal from the United States District Court
for the Southern District of Florida

(June 17, 2019)

Before WILLIAM PRYOR, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

Michael Swain, a Florida prisoner, appeals *pro se* the denial of his petition for a writ of habeas corpus. 28 U.S.C. § 2254. Swain argues that the Florida Commission on Offender Review violated his right to due process under the Fifth and Fourteenth Amendments by breaching a regulation that barred it from denying parole based on criminal charges of which he had been acquitted. Because our precedent establishes that the failure of the Commission to "abide by its own rules and regulations does not allege a constitutional violation," *Jonas v. Wainwright*, 779 F.2d 1576, 1578 (11th Cir. 1986), and, in any event, the record controverts Swain's contention that the Commission violated its regulation, we affirm.

Swain challenged the denial of parole arising from his convictions in 1976 in a Florida court for one count of breaking and entering a dwelling with assault, two counts of armed sexual battery, and two counts of robbery and his sentence of three terms of life imprisonment and two terms of 99 years of imprisonment. After a state appellate court summarily affirmed Swain's convictions and sentence, *Swain v. State*, 341 So. 2d 305 (Fla. Dist. Ct. App. 1976), the Commission set Swain's presumptive parole date as June 12, 2001. Later, the Commission adjusted the presumptive parole date to March 6, 1999.

Swain attached to his federal petition a copy of a letter that the State Attorney's Office submitted to the Commission protesting Swain's release in 1999. In the letter, the state prosecutor described the facts underlying Swain's sexual battery convictions and the facts of three other cases in which Swain was implicated based on his fingerprints and a statement to the police. In the three cases, Swain allegedly broke into homes armed with a knife and sexually assaulted its female occupants. The prosecutor stated that Swain had been acquitted in one of the three cases and that the state had nol prossed the other two cases because "the State and the victims were satisfied the community would be protected in light of [Swain's] sentence" in 1976.

Swain also attached to his petition the decision of the Commission in 1999 to suspend Swain's presumptive date for parole. The Commission found that Swain's "offense involved the use of a firearm or dangerous weapon," his "offense of Sexual Battery and Robbery, . . . [was] particularly heinous and cruel," and his victims had suffered severe trauma. The Commission also found that Swain's release posed an "unreasonable risk to others"; his mental health treatment evidenced that he was "in need of continued observation and treatment in a structured environment"; his "parole risk [was] extremely poor" on account of his disciplinary reports for fighting and for attempting to incite a mutinous act; and "a significant risk existed . . . of [Swain engaging in] future criminal behavior that

[might] involve crimes of sexually deviant behavior . . . hazardous to others." Based on those findings, the Commission "conclude[d] that [Swain's] conviction . . ., his aggressive and assaultive behavior which [was] reflected in his sexually deviant-type convictions and disciplinary reports . . ., [and] his lack of adequate treatment . . . [for] behavior that resulted in his commitments . . . demonstrated his unsuitability for community based supervision and [were] not conducive indicators for successful parole."

In response to Swain's federal petition, the Commission argued that Swain had no right to release on parole before the expiration of his sentence; that his argument about the violation of a regulation was foreclosed by *Jonas*, 779 F.2d at 1578; and that it had, in any event, complied with applicable regulations when denying him parole. The Commission submitted copies of its decisions in 2013 and in 2015 that left "intact the suspension of [Swain's] assigned Presumptive Parole Release Date of 3/6/1999." In its 2013 decision, the Commission stated that it was denying Swain parole based on his "lack of program participation since [his] last review" and "[t]he serious nature of the offense," including his "[u]se of a knife," the "[p]hysical and psychological trauma to [his] victim," his "[m]ultiple separate offenses," and the "[u]nreasonable risk" he posed to society. In 2015, the Commission denied Swain parole based on the reasons identified in its 2013

decision and "[t]he insufficient programming [he had] completed to assist with successful re-entry into society since the last review."

The district court denied Swain's petition. The district court ruled that, given "[t]here is no constitutional right to parole in Florida" and the decision to grant parole rests in the "discretion of the Commission," *Jonas*, 779 F.2d at 1577, Swain had to prove the Commission knowingly relied on false information, *Monroe v. Thigpen*, 932 F.2d 1437, 1442 (11th Cir. 1991), but had failed to do so. The district court also ruled that Swain's argument about the Commission allegedly violating its regulation was foreclosed by *Jonas, id.*, and it rejected his argument for relief based on *Joost v. United States Parole Commission*, 698 F.2d 418 (10th Cir. 1983), in which the court concluded that the denial of parole based on murder charges for which the petitioner had been acquitted would "violate[] the Commission's own regulations unless [it possessed] 'reliable information' of guilt not introduced at trial . . . ." *Id.* at 419. The district court concluded that *Joost* "conflict[ed] with . . . *Jonas*" and issued a certificate of appealability to address "whether [the] reliance on charges for which [Swain] was acquitted—in violation of regulations governing the Commission—constitutes a violation of [his] due process rights."

We review *de novo* the denial of a petition for a writ of habeas corpus. *Wilson v. Warden, Ga. Diagnostic Prison*, 898 F.3d 1314, 1320 (11th Cir. 2018).

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 Swain'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 **AFFIRM** the denial of Swain's petition for a writ of habeas corpus.

APPENDIX C

Order of the United States District Court, Southern District of Florida denying Respondent's Request to Reconsider Certificate of Appealability on October 16, 2018.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-23395-CIV-ALTONAGA/White

MICHAEL SWAIN,

Petitioner,

v.

FLORIDA COMMISSION ON OFFENDER REVIEW and TENA M. PATE,

Respondents.

ORDER

THIS CAUSE came before the Court on Petitioner, Michael Swain's Renewed Application for Certificate of Appealability [ECF No. 50], filed August 14, 2018. Petitioner requests the Court broaden the scope of the certificate it granted in the Order [ECF No. 39] denying his Petition. On August 30, 2018, Respondents, the Florida Commission on Offender Review (the "Commission") and Tena M. Pate, filed a Response [ECF No. 53]. The Court has carefully considered the parties' submissions, the record, and applicable law.

I. BACKGROUND

In the Order denying Petitioner's Petition for Writ of Habeas Corpus [ECF No. 1], the Court granted Petitioner a certificate of appealability 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." (Order 12). Petitioner seeks a certificate of appealability regarding five "additional issues." (Mot. 3). Respondents oppose this request and additionally ask the Court to "re-consider the initial Certificate of Appealability issued in this case." (Resp. 14). The Court addresses each request in turn.

II. LEGAL STANDARD

Under 28 U.S.C. section 2253, a petitioner is not permitted to take an appeal from the

final order in a habeas corpus proceeding "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c) (alteration added). A certificate of appealability "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) (alteration added). The Supreme Court has described the limited circumstances when a certificate of appealability should properly issue after the district court denies a habeas petition: "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy [section] 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (alteration added).

III. ANALYSIS

A. Reliance on Unsubstantiated Allegations

Petitioner's first request is for a certificate of appealability on the issue of "[w]hether [the] Parole Commission's reliance upon unsubstantiated accusations implicating Petitioner in other crimes, which was dismissed or *nolle prossed* by State Attorney, constitutes impermissibl[e] considerations for denying discretionary parole and violates the Fourteenth Amendment's due process guarantees against arbitrary action." (Mot. 3 (alterations added)).

The issue Petitioner raises here is subsumed into the certificate of appealability the Court has already issued. If Petitioner wishes to make arguments regarding Respondents' reliance on "unsubstantiated accusations" (Mot. 3), he can do so in the context of his arguments about "consideration of acquitted charges in violation of [the] parole commission's regulations." (Order 12 (alteration added)). Petitioner's arguments here do not raise a distinct legal issue about which "reasonable jurists" could disagree; thus, no separate certificate of appealability is warranted. *See Slack*, 529 U.S. at 484.

B. Reliance on Written Submissions from State Attorney

Petitioner's second request is for a certificate of appealability on the issue of "[w]hether written submissions solicited from prosecuting attorney's office and victim, referencing dismissed or *nolle prossed* collateral-crime accusations implicating Petitioner, disqualifies as unauthorized action in violation of due process protections when considered and relied upon by Commission to deny Petitioner discretionary parole." (Mot. 3 (alteration added)).

This issue is also concerned with whether the Commission relied on improper considerations when suspending Petitioner's parole release date. The original certificate of appealability already permits Petitioner to make arguments related to the Commission's reliance on improper information; however, the Court reminds Petitioner it already held the written submissions upon which the Commission relied were *not* improper, and reasonable jurists would not disagree on this point. (*See* Order 10–11). Arguments regarding the written submissions from the State Attorney's Office are thus improper for Petitioner's appeal.

C. Bias in Parole Commissioners

Petitioner next seeks a certificate of appealability on the issue of whether "[i]n light of the Eleventh Circuit's decision in *Bowers v. U.S. Parole Comm'n Warden*, 760 F.3d 1177 (11th Cir. 2014), on which Petitioner relied the District Court erred in relying upon orbiter dictum to find that Petitioner's biased Commissioner claim did not violate his due process rights." (Mot. 3 (alteration added).

As in his second request (*see supra*, section III(B)), Petitioner seeks to make arguments regarding the propriety of the Commission's reliance on written statements from the State Attorney's Office, as well as the propriety of one Commissioner's decision to solicit those written statements. (*See* Mot. 9). The Court has already determined the Commissioner's actions did not violate Petitioner's due process rights, nor did the Commission act improperly

when it considered the written submissions. (*See* Order 10–11). The Court already considered and rejected Petitioner's citation to *Bowers*, which did not hold that parole commissioners are not permitted to solicit opinions from a state attorney's office. (*See id.* 10). The Court does not find reasonable jurists would disagree regarding this conclusion, and a certificate of appealability is not warranted.

D. Equal Protection Claim

Petitioner's fourth request is for a certificate of appealability regarding his equal protection claim, which the Court denied. (*See* Mot. 3; Order 11). Petitioner insists the "differences between African-American Petitioner and Caucasian comparator are not significant." (Mot. 3).

Petitioner misunderstands the basis for the Court's holding he failed to state a "class of one" equal protection claim. (Order 11). Petitioner's claim did not fail just because of differences between him and the comparator, but because Petitioner did not show "the Commission had no rational basis for its decision" to suspend his release date. (Order 11). Petitioner was required to demonstrate he was "intentionally treated differently from others similarly situated and that there is *no rational basis for the difference in treatment.*" *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1202 (11th Cir. 2007) (emphasis added; internal quotation marks and citation omitted).

Even if the differences between Petitioner and the comparator are, as he states, "not significant" (Mot. 10–11), Petitioner has not shown reasonable jurists would disagree with the Court's conclusion a rational basis existed for the Commission's decision to suspend his early release date. No certificate of appealability is warranted on this issue.

E. Denial of Discovery

Finally, Petitioner seeks a certificate of appealability regarding whether the Court

F. Respondents' Request for Reconsideration

In their Response, Respondents asks the Court to reconsider its granting of a certificate of appealability regarding the Commission's failure to follow the Florida Administrative Code when suspending Petitioner's release date. (*See* Resp. 12–14). The Response raises for the first time an argument that the administrative rule Petitioner relied on to contest the suspension of his release date — Rule 23-21.010(2)(d), Florida Administrative Code — "is only concerned with the establishment of the [presumptive parole release date]," not with the Commission's later suspension of that date. (*Id.* 12 (alteration added)). According to Respondents, suspension of the release date is governed not by Rule 23-21.010(2)(d), but by Rules 23-21.015, 23-21.0155, and 23-21.0161. (*See id* 14).

Petitioner raised his argument regarding Rule 23-21.010(2)(d) in his original Objections [ECF No. 24] to the first Report, which Petitioner filed on November 21, 2017. Respondents have not contested the applicability of this rule until moving for reconsideration now, nearly a year after Petitioner alerted Respondents to the argument. Respondents chose not to file a response to Petitioner's Objections [ECF No. 38], on which the Court relied in its Order. Respondents "cannot use a motion for reconsideration to raise 'new arguments that were previously available, but not pressed.'" *United States v. Akel*, 610 F. App'x 875, 877 (11th Cir. 2015) (quoting *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009)).

Moreover, even if suspension of Petitioner's presumptive release date is governed by Rule 23-21.015 as Respondents suggest, that rule requires the Commission to identify "whether new information has been gathered which requires modification of the presumptive parole release date." Fla. Admin. Code § 23-21.015(9). Respondents do not point to evidence in the record showing the decision to suspend Petitioner's presumptive parole release date was based on new information gathered after the date was set in 1979. (*See* Resp. 12–14).

"abused its discretion in denying Petitioner's request to conduct discovery to fully develop facts relevant to the impact which prosecuting attorney's parole protest letter, placing blanket ban against Commission's decisions relating to Petitioner, probably had on Commission's decision-making after 1989." (Mot. 3).

The Court held the discovery Petitioner requested was "unlikely to provide evidence of the motivations of individual Commissioners, and Petitioner has not explained how discovery could prove his allegations regarding the Commissioners' state of mind." (Order 7–8). Petitioner cites *Bowers*, 745 F.3d at 1132, and *Arthur v. Allen*, 459 F.3d 1310, 1311 (11th Cir. 2006), to argue the Court "abused its discretion in denying the prisoner's request for discovery." (Mot. 11–12).

In *Bowers*, the Eleventh Circuit reversed the denial of a habeas petitioner's request for discovery because "the district court did not consider whether [petitioner] had demonstrated good cause." *Bowers*, 745 F.3d at 1183 (alteration added). By contrast, in denying Petitioner's request for discovery, the Court specifically found good cause did not exist because the discovery sought would not lead to evidence likely to prove Petitioner's allegations regarding the Commissioners' state of mind. (*See* Order 7–8). *Bowers* does not foreclose the Court's determination Petitioner failed to meet the good cause standard. Petitioner's citation to *Arthur v. Allen* also unavailing. There, the Eleventh Circuit affirmed the district court's denial of discovery because the petitioner's affidavits did not meet the good cause standard. *See Arthur*, 459 F.3d at 1311. Here, the Court has similarly found Petitioner did not meet the good cause standard. (*See* Order 7–8).

Because Petitioner has not shown reasonable jurists would disagree regarding the Court's conclusion he did not meet the good cause standard for seeking discovery, no certificate of appealability is warranted.

Because Respondents' argument in their request for reconsideration was not previously raised, and because the Court lacks the benefit of full briefing on the proper application of relevant Florida administrative code rules governing the parole release date process, the Court declines to reconsider its grant of a certificate of appealability regarding whether the Commission violated Florida law by considering charges for which Petitioner was acquitted when deciding to suspend his presumptive parole release date; and, if so, whether that violation of Florida law infringed Petitioner's due process rights. (*See* Order 12).

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion **[ECF No. 50]** is **DENIED**. The Motion for Reconsideration, contained within Respondents' Response **[ECF No. 53]**, is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 15th day of October, 2018.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record; Petitioner, *pro se*

APPENDIX D

Order of the United States District Court, Southern District of Florida denying Petition for Writ of Habeas Corpus and granting a limited Certificate of Appealability entered on April 18, 2018.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-23395-CIV-ALTONAGA/White

MICHAEL SWAIN,

Petitioner,

v.

FLORIDA COMMISSION ON OFFENDER REVIEW,

Respondent.
_____/

ORDER

On August 4, 2016, Petitioner, Michael Swain, filed a *pro se* Petition for Writ of Habeas Corpus [ECF No. 1], alleging violations of his constitutional rights by Defendant, Florida Commission on Offender Review. (*See generally* Pet.). Petitioner seeks (1) an evidentiary hearing; (2) the appointment of counsel during the evidentiary process; (3) vacation of the Commission's decision to deny him parole; and (4) an order of the Court requiring the Commission not to consider improper information in making its decision regarding Petitioner's parole release date. (*See id.* 19[1]).

On September 1, 2016, Magistrate Judge Patrick A. White filed an Order to Show Cause [ECF No. 8] requiring Defendant to file a response to the Petition. (*See* Order to Show Cause 1). The Commission filed its Response [ECF No. 14] on October 26, 2016, and Petitioner filed his Reply [ECF No. 18] on January 4, 2017. On October 18, 2017, Judge White filed a Report of Magistrate Judge [ECF No. 21] recommending the Petition be denied on the merits. On November 22, 2017, the Court entered an Order [ECF No. 31] rejecting the Report to allow

[1] All citations to page numbers are to the page numbers generated by the CM/ECF filing system and appended to each document filed with the Court.

Judge White to consider pending motions filed by Petitioner. (*See* Order 1).

After disposing of the pending motions, Judge White has now filed a Supplemental Report of Magistrate Judge [ECF No. 35], again recommending the Court deny the Petition on its merits. (*See generally* Suppl. Report). The Court assumes the reader's familiarity with the 19-page Supplemental Report. Petitioner timely filed Objections [ECF No. 38] to the Supplemental Report on March 28, 2018. When a magistrate judge's "disposition" has properly been objected to, as is the case here, district courts must review the disposition *de novo*. Fed. R. Civ. P. 72(b)(3). The Court has carefully reviewed the parties' written submissions, record, and applicable law.

I. BACKGROUND

On August 23, 1975, Petitioner was arrested in Miami-Dade County, Florida in connection with an assault and sexual battery. (*See* Pet. 4). He was charged in Case Number F75-9247, resulting in an acquittal by the jury. (*See id.*; *see also* Protest Letter [ECF No. 1] 21–23). By this time, Petitioner was also implicated in several other sexual battery cases. (*See generally* Protest Letter). Following his acquittal in the first case, Petitioner was prosecuted in Case Number F76-976. (*See* Pet. 4).

Petitioner was convicted in Case Number F76-976 of breaking and entering a dwelling with assault, two counts of armed sexual battery, and two counts of robbery. (*See* Suppl. Report 2). He was sentenced to three terms of life imprisonment and two 99 year terms. (*See id.*). His conviction and sentence were affirmed on November 16, 1976. *See Swain v. State*, 341 So. 2d 305 (Fla. 3d DCA 1976). Following this conviction, the State Attorney's Office announced a *nolle prosequi* in two other sexual battery cases in which Petitioner had been implicated. (*See* Pet. 4; *see also* Protest Letter 22). The State Attorney's Office declined to prosecute the

remaining two cases because "the State and the victims were satisfied the community would be protected in light of the sentence handed down in case number 76-976." (Protest Letter 22).

On December 13, 1979, the Commission established a presumptive parole release date for Petitioner of June 12, 2001. (*See* Supplemental Report 2). That date was later modified to March 6, 1999. (*See* Pet. 4). On December 17, 1998, a parole examiner conducted Petitioner's final parole interview to determine whether to authorize his release on March 6, 1999. (*See id.*). The examiner recommended an effective parole release date of March 6, 1999. (*See id.* 5). When the Commission met for Petitioner's final hearing, however, a panel of two commissioners was unable to unanimously make a finding Petitioner should be released, so Petitioner's case was referred to the entire Commission for extraordinary review. (*See id.*).

Before the extraordinary review could take place, the State Attorney's Office wrote a Protest Letter objecting to Petitioner's potential release. (*See id.*). The Protest Letter outlined Petitioner's criminal history, including the crime for which he was convicted as well as the two crimes for which the State declined to prosecute him. (*See* Protest Letter 21–22). The Protest Letter also contained a discussion of the sexual battery for which Petitioner was prosecuted and then acquitted by a jury. (*See id.* 22). In closing, the Protest Letter stated these facts demonstrated Petitioner had "forfeit[ed] his right to live outside the prison setting." (*Id.* 22 (alteration added)).

The Commission conducted the extraordinary review on March 3, 1999. (*See* Extraordinary Review Report [ECF No. 1] 25–29). The Commission heard presentations from the State Attorney and members of Petitioner's family. (*See* Supplemental Report 3). It then issued an Extraordinary Review Report, explaining its findings regarding Petitioner. (*See generally* Extraordinary Review Report). The Extraordinary Review Report recounted the facts

of the underlying conviction and referred to the State Attorney's Office's objections to Petitioner's release. (*See id.* 26–27). The Commission also noted Petitioner had a record of unsatisfactory institutional conduct, listing a number of disciplinary reports for fighting and attempting to incite a mutinous act. (*See id.* 26). The Report discussed Petitioner's participation in self-betterment and education programs, but found he was "still very much in need of long term Mentally Disordered Sex Offender therapy in a structured environment." (*Id.* 27).

The Extraordinary Review Report suspended Petitioner's release date and concluded "it is not reasonable to expect that [Petitioner] will be granted parole during the following years." (*Id.* 25 (alteration added)). The Commission's bases for this finding were:

> (1) The offense involved the use of a firearm or dangerous weapon.
> (2) Extent of psychological or physical trauma to victim(s) due to the criminal offense.
> (3) Escalating or continuing persistent pattern of criminal conduct.
> (4) Inmate evaluated to be in need of mental health treatment as a sex offender.
> (5) Any release may cause unreasonable risk to others.

(*Id.*). The Commission set Petitioner's next extraordinary interview date for the month of October 2003. (*Id.*). Petitioner alleges the Protest Letter was considered in each subsequent extraordinary review the Commission has conducted regarding his parole. (*See* Pet. 6).

Petitioner's most recent extraordinary interview occurred on June 26, 2013, when a parole examiner recommended the suspension of Petitioner's release date be lifted and he be released on parole on September 26, 2013. (*See id.*). On September 25, 2013, Petitioner appeared before the Commission again for a final extraordinary review. (*See* 2013 Transcript of Extraordinary Review [ECF No. 18] 33–52). After hearing from Petitioner's lawyer and family, the Commission considered a letter from the victim in Petitioner's 1976 sexual battery case. (*See generally id.*). The victim's letter also described the charges for which Petitioner was acquitted by a jury, stating:

> Another point that should be mentioned is something that we were told by the

> Detectives assigned to this case. After the assault the police did their routine interviews and fingerprinting, nothing developed for a year. Then we were finally notified they had someone in custody and it was because they had matched his prints to another rape scene in our neighborhood. This woman we were told was over 80 years old. What type of sexual deviant rapes an 80-year-old woman? I am very sorry for this heinous violation against our neighbor, but I am grateful that at least some good came out of it after our trial . . . we were further told due to the verdict of this rapist case against us leading to his extensive jail sentences that the elderly woman's case never went to court.

(Extraordinary Review Tr. 47–48 (alteration added)). In fact, the sexual battery case concerning the 80-year-old woman was prosecuted by the State and resulted in Petitioner's acquittal by a jury. (*See* Protest Letter 22).

After considering the victim's letter, the Commission voted not to lift the suspension of Petitioner's release date and set his next extraordinary interview for the month of April 2020. (*See* Extraordinary Review Tr. 50). In a written report following the hearing, the Commission incorporated the prior extraordinary review findings and stated Petitioner had completed insufficient programming to assist with successful reentry. (*See* Suppl. Report 6–7). Petitioner alleges the Commission's decision was based on both the victim's letter and the 1999 Protest Letter. (*See* Pet. 6–7).

In objecting to the Supplemental Report, Petitioner makes five arguments: (1) the Magistrate Judge abused his discretion in denying Petitioner discovery and the appointment of counsel; (2) the Magistrate Judge misconstrued Petitioner's due process claim; (3) the Magistrate Judge erred by failing to address Petitioner's argument regarding the Commission's reliance on dismissed charges and charges for which Petitioner was acquitted; (4) the Magistrate Judge erred in his analysis of Petitioner's due process claim regarding biased commissioners; and (5) the Magistrate Judge incorrectly rejected Petitioner's class-of-one claim for violation of equal protection. (*See generally* Objs.). In this *de novo* review of the Supplemental Report, the Court addresses each argument.

II. LEGAL STANDARD

Federal habeas relief is available to correct only constitutional injury. *See* 28 U.S.C. §§ 2241(c)(3), 2254(a); *see also Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (holding errors not infringing upon a defendant's constitutional rights provide no basis for federal habeas corpus relief); *Barclay v. Florida*, 463 U.S. 939, 957–58 (1983) ("[M]ere errors of state law are not the concern of this court, unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." (alteration added; internal citation omitted)). "There is no constitutional right to parole in Florida. . . . The decision if and when to parole an inmate is left to the discretion of the Commission guided by its own administrative rules." *Jonas v. Wainwright*, 779 F.2d 1576, 1577 (11th Cir. 1986) (alteration added; internal citations omitted).

Furthermore, "[t]here is no liberty interest in the calculation of Florida's 'presumptive parole release date' even though it is binding on the Commission, because the ultimate parole decision is a matter of Commission discretion." *Walker v. Fla. Parole Comm'n*, 299 F. App'x 900, 902 (11th Cir. 2008) (alteration added; citations omitted). Where there is no liberty interest, "the procedures followed in making the parole determination are not required to comport with standards of fundamental fairness." *Slocum v. Ga. State Bd. of Pardons & Paroles*, 678 F.2d 940, 942 (11th Cir. 1982) (citations omitted).

Nevertheless, even where there is no liberty interest in parole, "[a] parole board may not engage in 'flagrant or unauthorized action.'" *Monroe v. Thigpen*, 932 F.2d 1437, 1442 (11th Cir. 1991) (alteration added; citation omitted). *Monroe* held a parole board's reliance on information it knew was false to deny parole constituted "flagrant or unauthorized action," and consequently the parole board "treated [petitioner] arbitrarily and capriciously in violation of due process."

Monroe, 932 F.2d at 1442 (alteration added). Since *Monroe*, the Eleventh Circuit has clarified this standard, holding "prisoners cannot make a conclusory allegation regarding the use of such information as the basis of a due process claim. Without evidence of the Board's reliance on false information, a prisoner cannot succeed." *Jones v. Ray*, 279 F.3d 944, 946 (11th Cir. 2001).

"To plead an equal protection claim, a plaintiff must allege that 'through state action, similarly situated persons have been treated disparately.'" *Thorne v. Chairperson Fla. Parole Comm'n*, 427 F. App'x 765, 771 (11th Cir. 2011) (citation omitted). Yet, the Supreme Court has recognized "class of one" equal protection claims where a plaintiff asserts that she was irrationally discriminated against on an individual basis, rather than as a member of a particular group. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). A plaintiff can establish a "class of one" claim by showing that he was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* "To be 'similarly situated,' the comparators must be prima facie identical in all relevant respects." *Grider v. City of Auburn*, 618 F.3d 1240, 1264 (11th Cir. 2010) (internal quotation marks and emphasis omitted).

III. ANALYSIS

Petitioner's objection to Judge White's order denying discovery (*see* Objs. 4–9) is easily addressed. Under Rule 6(a) of the Rules Governing § 2254 Cases,[2] "[a] party shall be entitled to invoke processes of discovery available under Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." *Id.* (alteration added). Discovery of documents is unlikely to provide evidence of the motivations of individual Commissioners, and Petitioner has not explained how

[2] The Rules Governing Section 2254 cases also may be applied to habeas-corpus actions filed under section 2241. *See* Rule 1(b), Rules Governing Section 2254 Cases.

discovery could prove his allegations regarding the Commissioners' state of mind. Furthermore, Judge White did not abuse his discretion by denying discovery where he was "provided with sufficient evidence through the filings of the parties" to adjudicate the Petition. (Paperless Order [ECF No. 33]).

Petitioner's second objection is to the Supplemental Report's characterization of his arguments under the due process clause. (*See* Objs. 12–14). The Supplemental Report states Petitioner alleges the Commission erred in its determination of his presumptive parole release date and improperly considered letters a single Commissioner improperly solicited from the State Attorney. (*See* Suppl. Report 12).

Petitioner argues these characterizations of his arguments are wrong — in fact, the Petition is concerned not with the Commission's determination of his presumptive parole release date, but with its suspension of that date. (*See* Objs. 14). In addition, Petitioner objects to the Commission's alleged reliance on information in the February 1999 Protest Letter, not the 1991 letter solicited by a single Commissioner. (*See id.*). Nevertheless, because the Court reviews the Report and Petition *de novo*, these errors, if any, do not affect its analysis of Petitioner's claims.

Petitioner next objects to the Supplemental Report's finding "even if the Commission did rely to some extent on the acquitted conduct, there was no constitutional violation as such reliance is not prohibited." (Suppl. Report 14; *see also* Objs. 14–18). The Supplemental Report rejected Petitioner's assertion "criminal charges of which a prospective parolee has been acquitted may not be considered to deny him parole." (Reply 10 (citing *Joost v. U.S. Parole Comm'n*, 698 F.2d 418, 419 (10th Cir. 1983))). The Supplemental Report distinguished *Joost*, stating its holding "is based on a violation of the Parole Commission's own regulations." (Suppl. Report 14).

The Supplemental Report cites the federal parole regulations, which allow for the consideration of conduct for which a prospective parolee was acquitted, as evidence the Commission did not breach its own regulations with respect to Petitioner. (*See id.*). But the federal parole regulations are inapplicable to Petitioner, who was convicted in Florida state court.

Instead, as Petitioner correctly notes, the Commission is required to follow the Florida Administrative Code. (*See* Objs. 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 r. 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 the 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." (alterations 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, 1578 (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.

In addition to objecting to the Commission's alleged reliance on charges for which he was acquitted, Petitioner argues the Commission improperly relied on charges that were dismissed because the State declined to prosecute. (*See* Objs. 18–20). Because Petitioner offers

no authority stating such reliance is against the regulations governing the Commission or violates a constitutional right, this claim must be denied. Similarly, Petitioner's argument the Protest Letter's placement in his file precipitated an "escalating and continuing persistent pattern of criminal conduct" (Objs. 19–23) fails because any reliance on the information in the letter does not rise to the level of a constitutional violation. *Jonas*, 779 F.2d at 1578.

Petitioner next objects to the Report's denial of his claim of bias on the part of individual commissioners. (*See* Objs. 23–26). The Supplemental Report denied this due process claim because Petitioner's allegations "are conclusory and he cannot establish that the commissioner acted in violation of his due process rights or was otherwise [not] impartial." (Suppl. Report 15 (alteration added)). Petitioner argues his Petition alleges specific conduct by Commissioner Judith A. Wolson, who spoke to the State Attorney's Office in 1991 and was given a list of inmates the office believed should never be released on parole. (*See* Pet., Ex. C, Parole Objection Letter [ECF No. 1] 31–33; Reply 16–18; Objections 23–26).

Petitioner cites *Bowers v. U.S. Parole Commission, Warden*, 760 F.3d 1177, 1180 (11th Cir. 2014), to argue Wolson's solicitation of a list of inmates not to release on parole violated his due process rights. *Bowers* addressed the "unprecedented" actions of a Georgia parole commissioner who sent a 14-page memorandum to the Attorney General, requesting the Parole Commission review its decision to grant an individual inmate parole. *Id.* at 1179–80. After the commissioner's letter, the Parole Commission denied the inmate's parole. *Id.* By advocating against a specific inmate, the commissioner exhibited bias and "impermissibly tainted" the Parole Commission's decision. *Id.* at 1181.

Unlike the commissioner in *Bowers*, Commissioner Wolson did not set out to sabotage the Commission's consideration of Petitioner's parole release date. Rather, Commissioner

Wolson sought the input of the State Attorney's Office in a generalized way. The State Attorney's Office responded with a general list of approximately 50 inmates for whom it would object to release on parole. (*See* Parole Objection Letter). The Commission is permitted to consider objections filed by the State Attorney's Office when determining a parole release date. *See Broom v. Fla. Parole Comm'n*, No. 2:03-CV-435-FTM-29DNF, 2008 WL 186533, at *5 (M.D. Fla. Jan. 18, 2008) ("The Court also finds that there was no impropriety on the part of the Commission in taking notice of letters that were submitted by the Office of the State Attorney."). Soliciting a list of these objections in advance was not improper.

Petitioner's final objection is to the Supplemental Report's denial of his "class of one" equal protection claim. The Supplemental Report recommends denial of this claim because Petitioner's convictions are not similar to those of his comparator and because "the findings of the Commission . . . reflect a rational basis for denying [Petitioner's] parole." (Suppl. Report 16–17 (alterations added)). Petitioner argues he "was not required to demonstrate an exact correlation between himself and former inmate Dirk M. Porten." (Objs. 26).

A "class of one" equal protection claim does not allege discrimination against a protected class, but rather alleges the plaintiff "'has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Griffin Indus. v. Irvin*, 496 F.3d 1189, 1202 (11th Cir. 2007) (quoting *Olech*, 528 U.S. at 564). The written reports issued by the Commission after each extraordinary review give ample rational bases for the Commission's denial of parole to Petitioner. (*See generally* Extraordinary Review Report). Petitioner's disagreement with the Commission's bases for suspending his release date is not evidence the Commission had no rational basis for its decision.

Furthermore, the "the 'similarly situated' requirement must be rigorously applied in the

context of 'class of one' claims." *Holley v. Bossert*, No. 3:15-CV-389-LAC-EMT, 2016 WL 674772, at *3 (N.D. Fla. Jan. 19, 2016) (citation omitted). As the Supplemental Report notes, there are significant differences between Petitioner and his alleged comparator. (*See* Suppl. Report 16). For this reason, and because the Commission articulated a rational basis for suspending Petitioner's parole release date, Petitioner's Equal Protection claim must be denied.

A certificate of appealability "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) (alteration added). The Supreme Court has described the limited circumstances when a certificate of appealability should properly issue after the district court denies a habeas petition:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The [Movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000) (alteration added).

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.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Supplemental Report [ECF No. **35**] is **ACCEPTED AND ADOPTED** as follows:

1. Petitioner, Michael Swain's Petition for Writ of Habeas Corpus **[ECF No. 1]** is **DENIED**.
2. A Certificate of Appealability **SHALL ISSUE**.
3. The Clerk of the Court is directed to **CLOSE** this case, and all pending motions are **DENIED** AS MOOT.

DONE AND ORDERED in Miami, Florida, this 18th day of April, 2018.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Petitioner, Michael Swain, *pro se*

APPENDIX E

Supplemental Report of Magistrate Judge for the United States District Court, Southern District of Florida entered on February 20, 2018.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-23395-Civ-ALTONAGA
MAGISTRATE JUDGE P.A. WHITE

MICHAEL SWAIN,

Petitioner,

v.

FLORIDA COMMISSION ON OFFENDER REVIEW, ET AL.,

Respondent.

SUPPLEMENTAL REPORT OF MAGISTRATE JUDGE

I. Introduction

Michael Swain, who is presently confined at Dade Correctional Institution in Florida City, Florida, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, attacking Florida Commission on Offender Review's denial of parole.

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

The Court has before it the petition for writ of habeas corpus with a memorandum and exhibits, the Respondent's response to an order to show cause with an appendix of exhibits and the petitioner's reply. An initial report was not adopted so that the undersigned could address motions filed by the petitioner subsequent to the issuance of that report. Those motions have now been disposed of.

II. Procedural History

date was modified to March 6, 1999. On December 17, 1998, the petitioner was afforded a final interview to determine whether to authorize his release. The petitioner submitted a parole release plan. After the meeting, the examiner entered a recommendation that the effective release date be set on March 6, 1999.

On February 3, 1999, the commission conducted an Effective Parole Release Date hearing. The two commissioners were unable to agree to make a finding for release. The case was re-docketed for extraordinary review by all commissioners.

Prior to the extraordinary review hearing the commission received a parole-release protest letter from the State Attorney's Office. (DE# 1, p. 21-23). This letter provided a brief summation of the petitioner's sexual battery cases. The letter described the circumstances for the case in which the petitioner was convicted. It also described three other cases and noted that the petitioner was implicated in those cases through fingerprints and a statement to the police. In all the cases the petitioner was alleged to have broken into homes armed with a knife and sexually assaulted the female residents. The letter noted that one of the cases was tried and resulted in an acquittal. The other two cases were dismissed by the state after it was satisfied that the conviction in the one case resulted in a life sentence. The State Attorney expressed the opinion that there was no reason to believe that the petitioner would remain at liberty without violating the law. According to the petitioner, this letter was placed in his parole file.

The commission conducted the extraordinary review on March 3, 1999. The commission heard presentations from the State Attorney and members of the petitioner's family. The petitioner has provided a copy of the extraordinary review action. (DE# 1, p. 25-29). The

> finds the inmate is in need of continued observation and treatment in a structured environment.
>
> The Commission concludes that it cannot lose sight of the seriousness of the offenses of conviction and finds the inmate's potential is great regarding his propensity for sexual violence. The Commission concludes that the inmate's participation in the offenses of conviction leads the Commission to believe that his parole risk is extremely poor and a significant risk existed with regard to the possibility of future criminal behavior that may involve crimes of sexually deviant behavior with a strong likelihood this behavior may demonstrate to be hazardous to others.
>
> The Commission concludes that although his coping skills may be somewhat adequate for a structured setting, such as provided by a correctional institution, we find lack of adequate treatment exists and that he has a propensity for criminal conduct, representative of a repeat offender. Thus, we forecast a negative prognosis for acceptable re-socialization.
>
> The Commission finds, in total, that the circumstances of his case represent to the Commission that there still exists doubt as to whether this inmate would be able to perform well under the conditions of parole supervision. The Commission is drawn to the conclusion that the available record does not support a positive finding that inmate Swains's release on parole would be compatible with his welfare and the welfare of society.
>
> Based on the foregoing, the Commission is drawn to the conclusion that a reasonable doubt exists with regard to whether inmate Swain would remain free of any criminal conduct should parole be granted in his case. The Commission, therefore, by this action, suspends inmate Swain's presumptive release date of March 6, 1999, pursuant to Section 947.18, Florida Statutes.

As a result of the Commission's findings, the petitioner's presumptive release date was suspended.

The petitioner apparently received additional extraordinary interviews over the years. He provides detail only for what he

incorporated the prior negative findings, noting that the serious nature of the offense was still of concern to the Commission. The Commission established a next interview date in seven years, noting that it was not reasonable to expect that the petitioner would be granted parole within the following years.

III. Discussion

It is well settled that federal habeas relief is available to correct only constitutional injury. 28 U.S.C. §2241(c)(3); 28 U.S.C. §2254(a). See also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)(holding that errors that do not infringe upon a defendant's constitutional rights provide no basis for federal habeas corpus relief); Wainwright v. Goode, 464 U.S. 78 (1983); Barclay v. Florida, 463 U.S. 939, 958-659 (1983)(stating that "[m]ere errors of state law are not the concern of this court . . . unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution.")(citations omitted); Carrizales v. Wainwright, 699 F.2d 1053 (11th Cir. 1983).

Questions of state law and procedure "rarely raise issues of federal constitutional significance. [A] state's interpretation of its own laws provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." Tejada v. Dugger, 941 F.2d 1551 (11th Cir. 1991), cert. denied, 502 U.S. 1105 (1992)(quoting Carrizales, supra). Federal habeas corpus review of a state law claim is, therefore, precluded if no due process violations or facts indicating such violations are alleged. This limitation on federal habeas review is of equal force when a petition, which actually involves state law issues, is couched in terms of equal protection and due process. Branan v. Booth, 861 F.2d 1507, 1508 (11 Cir. 1988).

that it depends wholly on the unfettered exercise of discretion by a board or other authority. Greenholtz, supra.

Florida's parole statutes have been found to be the latter and the courts have held that they do not create a legitimate expectation of parole, leaving due process inapplicable to the procedure for granting parole. Jonas v. Wainwright, 779 F.2d 1576, 1577 (11th Cir.), cert. denied, 479 U.S. 830 (1986); Hunter, supra. 674 F.2d 847 (11th Cir. 1982). The Eleventh Circuit has clearly held that while much of Florida's statutory scheme involving parole is written in mandatory terms, that language is qualified by the exercise of the Commission's discretion.

Thus, the setting of the presumptive parole release date and the decision whether that date is to become the effective parole release date are matters committed ultimately to the discretion of the Commission. Even if the inmate's conduct has been satisfactory, Florida law specifically grants the Commission the power to authorize the effective parole release date or to deny or delay release. Since the decision whether to release an inmate on parole is a matter committed to the discretion of the Commission without the mandate of statute, no entitlement to or liberty interest in parole is created by the Florida statutes. Staton v. Wainwright, 665 F.2d 686, 688 (5th Cir. 1982), cert. denied, 456 U.S. 909 (1982). See also Meola v. Dep't of Corrections, 732 So.2d 1029, 1034 (Fla. 1998)(stating 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 Release Date (PPRD)."). [1] As the

[1]Of course, once an inmate has actually been granted parole, then the inmate clearly has a legitimate liberty interest which may not be taken without affording him certain minimum due process protections during parole revocation proceedings. Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973);

improperly calculated prisoner's PPRD); see also, e.g., Walker v. Fla. Parole Comm'n, 299 Fed.Appx. 900 (11th Cir. 2008) ("There is no liberty interest in the calculation of Florida's "presumptive parole release date,' . . . because the ultimate parole decision is a matter of Commission discretion."). "Unless there is a liberty interest in parole, the procedures followed in making the parole determination are not required to comport with standards of fundamental fairness." Slocum v. Ga. State Bd. of Pardons and Paroles, 678 F.2d 940 (11th Cir. 1982); O'Kelley v. Snow, 53 F.3d 319, 321 (11th Cir. 1995) (same).

Further, although the Eleventh Circuit once found that a state parole board's admitted use of false information was arbitrary and capricious and, thus, violated the Due Process Clause, Monroe v. Thigpen, 932 F.2d 1437, 1442 (11th Cir. 1991), the Eleventh Circuit has since clarified that "prisoners cannot make a conclusory allegation regarding the use of such information as the basis of a due process claim. Without evidence of the Board's reliance on false information, a prisoner cannot succeed." Jones v. Ray, 279 F.3d 944, 946 (11th Cir. 2001). Compare Jones v. Ray, 279 F.3d at 946 (holding that district court properly dismissed prisoner's due process claim asserted in civil rights complaint, because prisoner did not come forward with any false information relied on by the Board), with Thomas v. Sellers, 691 F.2d 487 (11th Cir. 1982) ("**[A]bsent flagrant or unauthorized action by a parole board the discretionary power vested in a parole board will not be interfered with by the Federal courts.**"(emphasis added); and, Slocum v. Ga. State Bd. of Pardons and Paroles, 678 F.2d at 941 (holding that prisoner did not state due process claim by simply asserting the parole board considered erroneous information or inaccurate reports during parole consideration); with Monroe, supra, and Damiano, 785 F.2d at 932 (finding that inmate "raised a colorable due process

commission outlined the reasons for denying parole. While the Commission referenced the "escalating and continuing persistent pattern of criminal conduct," it also provided additional reasons for denying parole. The Commission considered the nature of the offense, the trauma inflicted on the victims, the need for additional mental health treatment and the unreasonable risk to others should the petitioner be released. The Commission also referred to the petitioner's "unsatisfactory institutional conduct" as well as providing a detailed review of the Department of Corrections records containing derogatory mental health impressions. In short the Commission's 1999 decision was supported by substantial evidence other than the letters from the State Attorney and victim. **The decision to deny the petitioner parole was not arbitrary and capricious and therefore the petitioner cannot prevail on this claim.**

It is further noted that the information contained in both the letter from the State Attorney and the victim's letter is not false. Both letters point out that the petitioner's fingerprints were found at the site of three other similar crimes and that the petitioner was acquitted of one of those crimes. The letters also point out that the other charges of sexual battery and burglary were dismissed after the petitioner was convicted in the instant case. Since the information contained in the letters was not false the petitioner cannot establish that the Commission relied on false information in reaching its decision to deny him parole.

The petitioner's reliance upon Joost v. United States, 698 F2d 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

States parole commissioner acted on her own and sent a 14 page memorandum to the United States Attorney General's Office advising the office of arguments that could be used to challenge Bowers parole. Bowers at 1289. The memorandum had been sent without the knowledge of other commissioners. Id. It was described as a "a polemic against the decision to parole." Id. at 1294. The court found that the actions of the commissioner demonstrated that "she was not acting as an independent and neutral decision-maker. Id. at 1293 (11th Cir. 2011).[3]

In the instant case the petitioner has only alleged that a commissioner contacted the State Attorney's Office nearly eight years before the first denial of parole. In response the commissioner received a letter and a list of fifty-four individuals for whom the office would object to their release on parole. The list was split between those, like the petitioner, whom the office felt should never be released, and those whom the office would enter a strong objection. There was nothing further expressed in the letter. This correspondence is a far cry from the 14 page memorandum described in Bowers. The letter and list was merely an expression of the State Attorney's position on the parole of the 54 listed individuals, it contained no argument or factual allegations. Thus the placement of the letter in his parole file does not establish bias on the part of the commissioner.

In short the petitioner's allegations are conclusory and he cannot establish that the commissioner acted in violation of his due process rights or was otherwise impartial. As was noted in Bowers, the federal parole regulations provide for input from the

[3]It should be noted that the court did not find that the participation of the attorney general in the parole process to be a violation of due process.

sexual battery (no weapon), one count of aggravated assault and one count of burglary with assault. He was sentenced to two life terms and a term of 15 years. Thus, the petitioner's initial assumption of being similarly situated is incorrect. Furthermore, the findings of the Commission, as outlined above, reflect a rational basis for denying the petitioner's parole. There is no indication that they acted with an improper purpose violative of equal protection. Since the petitioner cannot establish that he is similarly situated or that the Commission engaged in invidious discrimination his claim should be denied.

IV. Certificate of Appealability

As amended effective December 1, 2009, §2254 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rules Governing §2254 Proceedings, Rule 11(b), 28 U.S.C. foll. §2254.

After review of the record, Petitioner is not entitled to a certificate of appealability. "A certificate of appealability 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). To merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised are clearly without merit,

Fort Lauderdale, FL 33301
West Palm Beach, FL 33401-2299

APPENDIX F

Report of Magistrate Judge for the United States District Court Southern District of Florida entered on October 18, 2017.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-23395-Civ-ALTONAGA
MAGISTRATE JUDGE P.A. WHITE

MICHAEL SWAIN,

Petitioner,

v.

FLORIDA COMMISSION ON OFFENDER REVIEW, ET AL.,

Respondent.

REPORT OF MAGISTRATE JUDGE

I. Introduction

Michael Swain, who is presently confined at Dade Correctional Institution in Florida City, Florida, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, attacking Florida Commission on Offender Review's denial of parole.

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

The Court has before it the petition for writ of habeas corpus with a memorandum and exhibits, the Respondent's response to an order to show cause with appendix of exhibits and the petitioner's reply.

II. Procedural History

The petitioner was convicted of breaking and entering a dwelling with assault, two counts of armed sexual battery and two counts of robbery in Miami-Dade County case number F76-976. He was

plan. After the meeting, the examiner entered a recommendation for that the effective release date be set on March 6, 1999.

On February 3, 1999 the commission conducted an Effective Parole Release Date hearing. The two commissioners were unable to agree to make a finding for release. The case was redocketed for extraordinary review by all commissioners.

Prior to the extraordinary review hearing the commission received a parole-release protest letter from the State Attorney's Office. (DE# 1, p. 21-23). This letter provide a brief summation of the petitioner's sexual battery cases. The letter described the circumstances for the case in which the petitioner was convicted. It also described three other cases and noted that the petitioner was implicated in those cases through fingerprints and a statement to the police. In all the cases the petitioner was alleged to have broken into homes armed with a knife an sexually assaulted the female residents. The letter noted that one of the cases was tried and resulted in an acquittal. The other two cases were dismissed by the state after it was satisfied that the conviction in the one case resulted in a life sentence. The State Attorney expressed the opinion that there was no reason to believe that the petitioner would remain at liberty without violating the law. According to the petitioner, this letter was placed in his parole file.

The commission conducted the extraordinary review on March 3, 1999. The commission heard presentations from the State Attorney and members of the petitioner's family. The petitioner has provided a copy of the extraordinary review action. (DE# 1, p. 25-29). The Commission explained the basis of its findings as follows:

1. The offense involved the use of a firearm or dangerous weapon

> inmate's potential is great regarding his propensity for sexual violence. The Commission concludes that the inmate's participation in the offenses of conviction leads the Commission to believe that his parole risk is extremely poor and a significant risk existed with regard to the possibility of future criminal behavior that may involve crimes of sexually deviant behavior with a strong likelihood this behavior may demonstrate to be hazardous to others.
>
> The Commission concludes that although his coping skills may be somewhat adequate for a structured setting, such as provided by a correctional institution, we find lack of adequate treatment exists and that he has a propensity for criminal conduct, representative of a repeat offender. Thus, we forecast a negative prognosis for acceptable re-socialization.
>
> The Commission finds, in total, that the circumstances of his case represent to the Commission that there still exists doubt as to whether this inmate would be able to perform well under the conditions of parole supervision. The Commission is drawn to the conclusion that the available record does not support a positive finding that inmate Swains's release on parole would be compatible with his welfare and the welfare of society.
>
> Based on the foregoing, the Commission is drawn to the conclusion that a reasonable doubt exists with regard to whether inmate Swain would remain free of any criminal conduct should parole be granted in his case. The Commission, therefore, by this action, suspends inmate Swain's presumptive release date of March 6, 1999, pursuant to Section 947.18, Florida Statutes.

As a result of the Commission's findings, the petitioner's presumptive release date was suspended.

The petitioner apparently received additional extraordinary interviews over the years. He provides detail only for what he describes as the fourth such interview which occurred on June 26, 2013. After this interview the examiner recommended that a parole release date be set for September 26, 2013. After this recommendation was made an extraordinary review hearing was

granted parole within the following years.

III. Discussion

It is well settled that federal habeas relief is available to correct only constitutional injury. 28 U.S.C. §2241(c)(3); 28 U.S.C. §2254(a). See also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)(holding that errors that do not infringe upon a defendant's constitutional rights provide no basis for federal habeas corpus relief); Wainwright v. Goode, 464 U.S. 78 (1983); Barclay v. Florida, 463 U.S. 939, 958-659 (1983)(stating that "[m]ere errors of state law are not the concern of this court ... unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution.")(citations omitted); Carrizales v. Wainwright, 699 F.2d 1053 (11 Cir. 1983).

Questions of state law and procedure "rarely raise issues of federal constitutional significance. [A] state's interpretation of its own laws provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." Tejada v. Dugger, 941 F.2d 1551 (11 Cir. 1991), cert. denied, 502 U.S. 1105 (1992)(quoting Carrizales, supra). Federal habeas corpus review of a state law claim is, therefore, precluded if no due process violations or facts indicating such violations are alleged. This limitation on federal habeas review is of equal force when a petition, which actually involves state law issues, is couched in terms of equal protection and due process. Branan v. Booth, 861 F.2d 1507, 1508 (11 Cir. 1988).

An inmate can only claim a due process violation if the liberty interest he has lost is one of real substance. Sandin v. Conner, 515 U.S. 472, 478 (1995). Accordingly, due process interests in the prison setting will generally be limited to

the courts have held that they do not create a legitimate expectation of parole, leaving due process inapplicable to the procedure for granting parole. Jonas v. Wainwright, 779 F.2d 1576, 1577 (11 Cir.), cert. denied, 479 U.S. 830 (1986); Hunter, supra. 674 F.2d 847 (11 Cir. 1982). The Eleventh Circuit has clearly held that while much of Florida's statutory scheme involving parole is written in mandatory terms, that language is qualified by the exercise of the Commission's discretion.

Thus, the setting of the presumptive parole release date and the decision whether that date is to become the effective parole release date are matters committed ultimately to the discretion of the Commission. Even if the inmate's conduct has been satisfactory, Florida law specifically grants the Commission the power to authorize the effective parole release date or to deny or delay release. Since the decision whether to release an inmate on parole is a matter committed to the discretion of the Commission without the mandate of statute, no entitlement to or liberty interest in parole is created by the Florida statutes. Staton v. Wainwright, 665 F.2d 686, 688 (5 Cir. 1982), cert. denied, 456 U.S. 909 (1982). See also Meola v. Dep't of Corrections, 732 So.2d 1029, 1034 (Fla. 1998)(stating 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 Release Date (PPRD)."). [1] As the Eleventh circuit explained in Staton:

> Much of the Florida statutory scheme [concerning parole] is written in mandatory

[1] Of course, once an inmate has actually been granted parole, then the inmate clearly has a legitimate liberty interest which may not be taken without affording him certain minimum due process protections during parole revocation proceedings. Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973); Morrissey v. Brewer, 408 U.S. 471, 482, 489 (1972).

interest in parole, the procedures followed in making the parole determination are not required to comport with standards of fundamental fairness." Slocum v. Ga. State Bd. of Pardons and Paroles, 678 F.2d 940 (11th Cir. 1982); O'Kelley v. Snow, 53 F.3d 319, 321 (11th Cir. 1995) (same).

Further, although the Eleventh Circuit once found that a state parole board's admitted use of false information was arbitrary and capricious and, thus, violated the Due Process Clause, Monroe v. Thigpen, 932 F.2d 1437, 1442 (11th Cir. 1991), the Eleventh Circuit has since clarified that "prisoners cannot make a conclusory allegation regarding the use of such information as the basis of a due process claim. Without evidence of the Board's reliance on false information, a prisoner cannot succeed." Jones v. Ray, 279 F.3d 944, 946 (11th Cir. 2001). Compare Jones v. Ray, 279 F.3d at 946 (holding that district court properly dismissed prisoner's due process claim asserted in civil rights complaint, because prisoner did not come forward with any false information relied on by the Board), with Thomas v. Sellers, 691 F.2d 487 (11th Cir. 1982) ("[A]bsent flagrant or unauthorized action by a parole board the discretionary power vested in a parole board will not be interfered with by the Federal courts."); and, Slocum v. Ga. State Bd. of Pardons and Paroles, 678 F.2d at 941 (holding that prisoner did not state due process claim by simply asserting the parole board considered erroneous information or inaccurate reports during parole consideration); with Monroe, supra, and Damiano, 785 F.2d at 932 (finding that inmate "raised a colorable due process claim with respect to the use of procedurally flawed disciplinary reports in modifying a PPRD").

Petitioner alleges that the Commission erred in its determination of the PPRD, because the information used to

acquitted may be considered under certain circumstances.[2] See 28 C.F.R. § 2.19. Hence, even if the Commission did rely to some extent on the acquitted conduct, there was no constitutional violation as such reliance is not prohibited.

Alleged Bias of Commissioners

In his next claim the petitioner contends that the denial of his parole is unconstitutional because the it is the result of biased and partial-minded commissioners who have been subjected to external political pressure. He bases this argument on his allegation that a single commissioner engaged in ex parte communications with the State Attorney's Office which he claims were illegal. He contends that the no-parole letter was "secretly" placed in his file.

The petitioner seems to rely upon Bowers v. Keller, 651 F.3d 1277 (11th Cir. 2011) in support of his argument that the actions of the commissioner and the State Attorney were improper. Bowers is easily distinguishable from the instant case. In Bowers a United States parole commissioner acted on her own and sent a 14 page memorandum to the United States Attorney General's Office advising the office of arguments that could be used to challenge Bowers parole. Bowers at 1289. The memorandum had been sent without the

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[2]If the Commission is given evidence of criminal behavior that has been the subject of an acquittal in a federal, state, or local court, the Commission may consider that evidence if:
(1) The Commission finds that it cannot adequately determine the prisoner's suitability for release on parole, or to remain on parole, unless the evidence is taken into account;
(2) The Commission is satisfied that the record before it is adequate notwithstanding the acquittal;
(3) The prisoner has been given the opportunity to respond to the evidence before the Commission; and
(4) The evidence before the Commission meets the preponderance standard.
In any other case, the Commission shall defer to the trial jury. Offense behavior in Category 5 or above shall presumptively support a finding under paragraph (c)(1) of this section.

knowledge of other commissioners. Id. It was described as a "a polemic against the decision to parole." Id. at 1294. The court found that the actions of the commissioner demonstrated that "she was not acting as an independent and neutral decision-maker. Id. at 1293 (11th Cir. 2011).[3]

In the instant case the petitioner has only alleged that a commissioner contacted the State Attorney's Office nearly eight years before the first denial of parole. In response the commissioner received a letter and attached list of fifty-four individuals for whom the office would object to their release on parole. The list was split between those, like the petitioner, whom the office felt should never be released, and those whom the office would enter a strong objection. There was nothing further expressed in the letter. This
correspondence is a far cry from the 14 page memorandum described in Bowers. The letter and list was merely an expression of the State Attorney's position on the parole of the 54 listed individuals, it contained no argument or factual allegations. Although, the petitioner has alleged that the letter was "secretly" placed in his file, he had provided no proof that such actions occurred or that there was any nefarious purpose.

In short the petitioner's allegations are conclusory and he has failed to establish that the commissioner acted in violation of his due process rights or was otherwise impartial. As was noted in Bowers, the federal parole regulations provide for input from the Attorney General. Since the court recognizes such input is proper, the inclusion of information from the State Attorney in this case

[3]It should be noted that the court did not find that the participation of the attorney general in the parole process to be a violation of due process.

and a term of 15 years. Thus, the petitioner's initial assumption of being similarly situated is incorrect. Furthermore, the findings of the Commission, as outlined above, reflect a rational basis for denying the petitioner's parole. There is no indication that they acted with an improper purpose violative of equal protection. Since the petitioner cannot establish that he is similarly situated or that the Commission engaged in invidious discrimination his claim should be denied.

IV. Certificate of Appealability

As amended effective December 1, 2009, §2254 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rules Governing §2254 Proceedings, Rule 11(b), 28 U.S.C. foll. §2254.

After review of the record, Petitioner is not entitled to a certificate of appealability. "A certificate of appealability 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). To merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised are clearly without merit, Petitioner cannot satisfy the *Slack* test. Slack, 529 U.S. at 484.