FILED
United States Court of Appeals
Tenth Circuit

October 26, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSEPH A. HARRIS,

Petitioner - Appellant,

v.

MICHAEL PACHECO, Warden, Wyoming State Penitentiary,

Respondent - Appellee.

No. 20-8011
(D.C. No. 2:19-CV-00193-NDF)
(D. Wyo.)

ORDER

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

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix A

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(D.C. No. 2:19-CV-00193-NDF)
(D. Wyo.)

ORDER AND JUDGMENT*

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

Joseph A. Harris, a Wyoming state prisoner representing himself, seeks to appeal the district court's dismissal of his application for relief under 28 U.S.C. § 2241. We deny his request for a certificate of appealability (COA) and dismiss that aspect of the matter. Aside from seeking a COA, Mr. Harris appeals the district court's order denying his motion to appoint counsel, and we affirm that order.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appendix B

I. Background

In 1999 a Wyoming state court sentenced Mr. Harris to serve between 22 and 40 years in prison. He eventually was placed in a community-corrections facility. In 2015, however, he left the facility and did not return; after surrendering in North Carolina, he was extradited back to Wyoming. On April 30, 2015, he was found guilty of escape under the prison disciplinary code. He pursued an administrative appeal but the conviction was upheld on July 21, 2015. On March 21, 2017, the Wyoming parole board ordered that based on his escape he is ineligible for parole on the sentence he was serving when he escaped.

On February 26, 2018, Mr. Harris petitioned for a writ of habeas corpus in a Wyoming state court. The court dismissed the petition on April 4, 2019.

In September 2019, Mr. Harris filed his § 2241 application. He asserted that his 2015 disciplinary proceeding violated his due-process rights because (1) no one told him that an escape conviction would render him ineligible for parole, (2) no one brought him before a court without unnecessary delay, (3) the disciplinary sergeant was not neutral, and (4) he lost good time that the sentencing judge had granted.[1] Mr. Harris also alleged that the Wyoming parole board had granted parole to at least

[1] Mr. Harris's good-time claim is unclear. His application says that the Wyoming Attorney General has not "contented [sic] anything about the [Wyoming State Penitentiary] adding time to Mr. Harris' incarceration by removing Good time granted by the judge during his sentencing which the disciplinary involved has done." R. at 13. The district court reasonably construed this to allege "the disciplinary proceeding added time to his incarceration by the removal of good time credit." R. at 123.

six other prisoners who were statutorily ineligible, an allegation that the district court construed as an equal-protection claim. After denying Mr. Harris's motion to appoint counsel, the district court dismissed the due-process claims with prejudice, concluding that they are barred by the statute of limitations. And it dismissed the equal-protection claim without prejudice after allowing Mr. Harris to amend his application to provide additional essential information.

II. Discussion

A. COA

A state prisoner seeking to appeal a district court's denial of a § 2241 application must obtain a COA before we may consider the merits of the appeal. *See Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000). We may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires a petitioner to "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (brackets and internal quotation marks omitted). When a district court denies a habeas petition on procedural grounds, however, the petitioner must show that reasonable jurists could debate not only whether the petition states a valid constitutional claim but also whether the district court's procedural ruling is correct. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists could not debate the propriety of the district court's procedural ruling on Mr. Harris's due-process claims. His § 2241 claims are subject to a one-year statute of limitations. *See Burger v. Scott*, 317 F.3d 1133, 1138 (10th Cir. 2003). This one-year period begins to run, as relevant here, on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Although Mr. Harris's due-process claims arise from his 2015 disciplinary hearing, the district court determined that one of the claims—the one alleging that no one told him an escape conviction would make him ineligible for parole—could have accrued as late as March 21, 2017, when he learned he is ineligible for parole. The district court correctly concluded that a pending state habeas proceeding tolled the statute of limitations from February 26, 2018, through April 4, 2019. *See* 28 U.S.C. § 2244(d)(2). And it further correctly concluded that after the state-court proceeding ended on April 4, 2019, Mr. Harris had 24 days remaining to file his application. Mr. Harris did not file his § 2241 application, however, until September 2019.

Mr. Harris's tolling arguments cannot save his due-process claims from the statute of limitations. He argues that the district court did not receive motions in which he described circumstances that entitle him to equitable tolling from February 2, 2016, until July 14, 2016. In addition, he says, he pursued administrative remedies for his escape conviction, a pursuit that further tolled the limitations period. He concludes, then, that his claims did not accrue until March 21, 2017. But as we

explained, even if his due-process claims did not accrue until March 21, 2017, they are still barred by the statute of limitations.[2]

Nor could reasonable jurists debate whether the district court correctly dismissed Mr. Harris's equal-protection claim. To prevail on his class-of-one equal-protection claim, Mr. Harris must show that others "similarly situated in every material respect were treated differently." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1216 (10th Cir. 2011) (internal quotation marks omitted). A Wyoming prisoner is ineligible for "parole on a sentence if, while serving that sentence," the prisoner has assaulted with a deadly weapon any officer, employee, or inmate of an institution; or escaped, attempted to escape, or assisted others to escape. Wyo. Stat. Ann. § 7-13-402(b). The parole board determines whether an inmate has committed a disqualifying act. Wyo. Bd. of Parole Policy and Procedure Manual, 36, § II.C.1 (2018). The district court gave Mr. Harris an opportunity to amend his application to satisfy the similarly-situated requirement by providing for the allegedly paroled prisoners "at least each person's criminal history; disciplinary history, length of time served before parole, mental health needs or risks, educational

[2] The district court did not specifically decide when Mr. Harris's good-time claim accrued. To the extent he asserts that his loss of good time violated his due-process rights, he appears to argue that this violation occurred during the 2015 disciplinary proceeding. R. at 13 (asserting that "the disciplinary [proceeding] involved" the removal of good time that a judge had granted). And Mr. Harris did not allege in his application, or in his submissions to us, that this claim accrued later than July 21, 2015, when his disciplinary conviction was upheld, let alone later than March 21, 2017, when the parole board ordered that he is ineligible for parole. Reasonable jurists could not debate whether the court correctly dismissed that claim as untimely.

or programming achievements, and date of parole." R. at 178 (internal quotation marks omitted). Yet Mr. Harris's amended application does not allege such facts or any facts showing that any of the six inmates with whom he compares himself was determined by the parole board to have committed a disqualifying act and was nevertheless granted parole on the sentence he was serving when he committed the act. Because Mr. Harris's amended application does not allege facts showing he is similarly situated to any of the six inmates, he has not made a substantial showing of an equal-protection violation. *See Kansas Penn Gaming*, 656 F.3d at 1216.

Mr. Harris complains that the information required by the district court was not available to him. But it would have been improper for the court to speculate about those matters. And the court's dismissal was without prejudice.

B. Motion for Counsel

Mr. Harris does not need a COA to appeal the district court's order denying his motion for counsel. *See Harbison v. Bell*, 556 U.S. 180, 183 (2009). The district court denied his motion after considering the facts that Mr. Harris alleged, the legal arguments, and the stage of the case. "The decision to appoint counsel is left to the sound discretion of the district court." *Engberg v. Wyoming*, 265 F.3d 1109, 1122 (10th Cir. 2001). We see no reason to disturb the district court's decision, especially given our assessment of the merits of Mr. Harris's claims.

III. Conclusion

We deny Mr. Harris's request for a COA, affirm the district court's order declining to appoint counsel, and dismiss the balance of this matter.

Entered for the Court

Harris L Hartz
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

JOSEPH A. HARRIS,

Petitioner,

vs.

MICHAEL PACHECO, Warden,
Wyoming State Penitentiary,

Respondent.

Case No. 19-CV-00193-F

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS AMENDED PETITION

In its December 11, 2019 order, the Court dismissed the due process claim of Petitioner Joseph A. Harris as time-barred and permitted him to amend as to his equal protection claim. Doc. 16. Mr. Harris timely filed a motion to amend, which the Court granted. Because Petitioner did not attach a separate Amended Petition, the Court construes the motion as the Amended Petition. Doc. 21.[1] The Respondent, Warden of the Wyoming State Penitentiary in Rawlins, Wyoming ("WSP"), Michael Pacheco, moves to dismiss the Amended Petition for failure to state a claim. Doc. 23. Petitioner opposes the motion. Doc. 25. The deadline for a reply has passed, and the motion is therefore ripe. For the following reasons, the Court grants the motion and dismisses this case.

[1] The Amended Petition adds allegations without restating the original. Because Petitioner is *pro se,* the Court considers the allegations in both the original (doc. 1) and Amended Petition.

Appx C

Petitioner alleges he has served the minimum years of his 22–40 year sentence. He claims he was found ineligible for and denied parole in a March 21, 2017 hearing[2] in violation of his equal protection rights. Petitioner claims he was similarly-situated to six other prisoners (Roger Black, Robert Spence, Thomas Rivera, Jonathan Roderick, Keith Allen Rhodes, and Douglas A. Short) who were granted parole.

I. Legal Standards for Equal Protection Claims

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "In order to assert a viable equal protection claim, plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them." *Requena v. Roberts,* 893 F.3d 1195, 1210 (10th Cir. 2018) (internal quotation marks omitted), *cert. denied,* 139 S. Ct. 800 (2019). "Individuals are 'similarly situated' only if they are alike 'in all relevant respects.'" *Id.* (internal quotation marks omitted). *See also Heath v. Norwood,* 772 F. App'x 706, 709 (10th Cir. 2019) (for a "class of one" equal protection claim, the plaintiff must show the "others were similarly situated in *every* material respect," internal quotation marks omitted).

A "class of one" claim is "where the plaintiff alleges that []he has been intentionally treated differently from others similarly situated and that there is no rational basis for the

[2] As in the December 11 order, the Court does not reach the statute of limitation issue as to Petitioner's equal protection claim.

difference in treatment." *Kansas Penn Gaming LLC v. Collins,* 656 F.3d 1210, 1216 (10th Cir. 2011) (quoting *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000)). "The paradigmatic 'class of one' case, sensibly conceived, is one in which a public official, with no conceivable basis for his action other than spite or some other improper motive (improper because unrelated to his public duties), comes down hard on a hapless private citizen." *Id.*

> To prevail on this theory, a plaintiff must first establish that others, similarly situated in every material respect were treated differently. A plaintiff must then show this difference in treatment was without rational basis, that is, the government action was irrational and abusive, and wholly unrelated to any legitimate state activity. This standard is objective—if there is a reasonable justification for the challenged action, we do not inquire into the government actor's actual motivations.

Kansas Penn, 656 F.3d at 1216 (quotation marks and citations omitted).

The Tenth Circuit has "approached class-of-one claims with caution, wary of turning even quotidian exercises of government discretion into constitutional causes," because "[t]he concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors ... a role that is both ill-suited to the federal courts and offensive to state ... autonomy in our federal system." *Id.* (quotation marks omitted). "Relying in part on these concerns, we have recognized a 'substantial burden' that plaintiffs demonstrate others 'similarly situated in all material respects' were treated differently and that there is no objectively reasonable basis for the defendant's action." *Id.* at 1217.

Thus Petitioner must allege enough facts about himself and each inmate who was allegedly given more favorable treatment to make plausible that they were similarly-

– like his disciplinary conviction for escape[3] – are supposed to cause inmates to be ineligible for parole under the Wyoming Parole Board's rules. Petitioner quotes the Wyoming Board of Parole Policy and Procedure Manual at length, which the Court excerpts here in relevant part:

> II. CRITERIA
>
> A. An inmate must have served his/her minimum term, less any good time and special good time earned.
>
> * * *
>
> C. An inmate is disqualified from parole eligibility *on a sentence* if the Board determines that, *while serving that sentence*, he/she has made an assault with a deadly weapon upon an officer, employee or inmate of any institution, or has *escaped, attempted to escape or assisted others to escape* from any institution. (W.S. § 7-13-402). The following provisions shall apply in the application of this statutory bar by the Board:
>
> 1. It is the Board's responsibility to determine whether an inmate has committed a disqualifying act.
>
> 2. The following definitions shall be applied in making that determination:
>
> * * *
>
> d. *"Escape"* is defined as escape by an inmate from official detention in any institution or, in the case of inmates, probationers and parolees committed to Adult Community Corrections Facilities (ACCs), failure to remain within the extended limits of confinement or to return to the ACC within the time prescribed or ordered to do so or leaving the place of employment. (W.S. §§ 6-5-206 and 7-18-112).
>
> * * *
>
> 3. In the case of a conviction in a court of law of the commission of a crime which contains all of the factual elements of a disqualifying act, such

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[3] Petitioner appears to argue his disciplinary conviction is barred by res judicata because the criminal charge was dismissed with prejudice. The Court already held Petitioner's claim regarding the disciplinary conviction is time-barred. The Court has reviewed Petitioner's motion to reconsider, and the two response briefs Petitioner submitted with it. Docs. 18-20. Petitioner does not show error in the Court's determination that the due process claim is barred as untimely.

Petitioner also does not cite any support that the DOC's disciplinary process is subject to res judicata. Petitioner cites *Barrows v. Hogan*, 379 F. Supp. 314, 315 (M.D. Pa. 1974), but in that case, the prisoner "was acquitted by a jury after considering all the evidence in the case; no mere technical rule imposed by the governing law caused the Court to dismiss the indictment." Here, Petitioner's criminal escape charge was dismissed without trial. Respondent asserts it was dismissed because of a speedy trial act violation. Doc. 7. Petitioner does not appear to dispute this.

conviction shall be conclusive in the Board's determination that the inmate is ineligible for parole. Convictions for crimes which, in the Board's determination, are not based on facts containing all of the elements of a disqualifying act as set forth and defined herein shall not bar an inmate from parole eligibility.

4. In the case of a WDOC or ACC disciplinary conviction based on commission of an act or acts which include all of the factual elements of a disqualifying act, there shall be *a rebuttable presumption* that the inmate is ineligible for parole.

a. Inmates who are deemed by the Board to be ineligible for parole based on a disciplinary conviction may petition the Board to reconsider its decision, utilizing the Petition for Review form appended to this policy.

b. *Upon petition of an inmate under this policy, the Board shall afford the inmate an evidentiary hearing* meeting the same procedural protections as those contained in the Board's final revocation hearing procedure. Notice of such hearings will be provided to WDOC, which may provide any evidence to substantiate the disciplinary conviction, with WDOC having the burden of proof.

c. Upon the conclusion of the presentation of evidence, *a three member panel of the Board shall make its determination by a majority vote as to eligibility or non-eligibility based on the preponderance of the evidence regarding the question of whether or not a disqualifying act was voluntarily committed.*

d. A finding of eligibility does not … in any way obligate the Board to grant a parole.

Doc. 21, pp. 3-4 (emphasis added).[4]

Mr. Harris also adds the following facts regarding the six other inmates:

Inmate	Amended Petition
Roger Black	Petitioner alleges Black "has repeatedly been paroled and/or released by the Parole Board after being convicted of murdering another inmate and escaping from the Wyoming State Penitentiary, meeting 2 of the non-parolable [sic] criteria and being paroled." The Amended Petition does not allege whether the convictions were disciplinary, judicial, or both.
Robert Spence	Petitioner alleges Spence "murdered another inmate, violating the law and being convicted in the Courts for such and having

[4] Respondent attaches a copy of the same rule to his motion to dismiss. Doc. 24-1.

	a disciplinary for the offense, yet he too was paroled from the number [sic] that he committed the offense."
Thomas Rivera	Petitioner alleges "attempted escape, and he too was released by the Board," despite having a disciplinary conviction for same. In his response, Petitioner alleges Mr. Rivera also received a court conviction for same.
Jonathan Roderick	Petitioner alleges Roderick "was convicted of *Conspiracy* to Escape by the courts and received a 4 to 6 year prison sentence, which is supposed to be an un-parolable offense, but he was still paroled."
Keith Allen Rhodes	Petitioner alleges Rhodes "assaulted a prison guard in 2017, and [was] found guilty of such by the Court and convicted of an internal disciplinary for the offense, and he too was paroled." The original Petition alleges Mr. Rhodes was paroled to his criminal assault no. CR-2017-004.
Douglas A. Short	Petitioner alleges escape, but does not allege whether Mr. Short was criminally convicted or received a disciplinary conviction, if either. Also alleges "paroled to his detainer for the escape, ... violating the requirements of the Parole Boards Manual." The original Petition further alleges Mr. Short was serving a 12-22 year sentence and was paroled to his escape detainer" "after the WBP contended at a March 21, 2019 Parole hearing that Mr. Short had escaped."
Unknown Name	Petitioner alleges "multitudes of others" including "one inmate more closely related to me," but WSP refuses to give his name to Petitioner.

Petitioner asserts he has now alleged all relevant facts regarding the other inmates because, as clarified in his Amended Petition, his claim does not regard the Board's *denial* of his parole request, but only the finding that he is *ineligible* for parole.

B. Jurisdictional Issue on the Amended Claim

In the original Petition, it was less than clear whether Petitioner's equal protection claim sought only a reversal of his parole ineligibility or instead sought immediate parole. *See* Doc. 1 ¶ 2 (alleging other inmates have been granted parole, and constitutional

violations "which delay Mr. Harris' release"); Doc. 1, p. 12 (order of the Second Judicial District denying Petitioner's request for review of the Board's *denial* of Petitioner's parole), Doc. 1, p. 19 (order of the Eighth Judicial District dismissing Petitioner's request to review Board's determination that he is *ineligible* for parole). Petitioner now alleges

> The parole board has the authority to parole anyone that it chooses, as there is not a constitutional right to be paroled, but under no authority ... does it have the right to say that I'm ineligible for parole and then parole the multitude of persons that it has that committed the same or similar non-paroleable offense. * * * *[T]he Parole board should then be forced to make me parole eligible* as they have allowed other[s] to be paroled that were in my same or similar situation. *The parole board would then not have to grant me parole based upon any disciplinary infractions, but the relevance is that I would be eligible for parole or at least be considered for this release.*

Doc. 21, ¶¶ 18, 20 (emphasis added).

Petitioner's clarification of his claim raises a jurisdictional issue. He asks for a ruling that he is eligible for parole and recognizes this does not necessarily mean he will be granted parole. The claim therefore does not seek speedier release and does not fall within the Court's habeas jurisdiction. *See, e.g., Barela v. Wyoming Dept. of Corrections Warden,* 19-cv-11-NDF, 2020 WL 500170 (D. Wyo. Jan. 31, 2020) (citing *Palma-Salazar v. Davis,* 677 F.3d 1031, 1035 (10th Cir. 2012); *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005)). Such a claim would have to be brought under 42 U.S.C. § 1983.

C. Construing the Amended Claim as Brought Under § 1983 Would Be Futile

Because Petitioner is *pro se,* the Court has considered whether it should liberally construe the Amended Petition as though he had filed it as a civil action under § 1983. See *Barela*, 2020 WL 500170. Petitioner has qualified to proceed in forma pauperis on his habeas petition, but for "a civil action," such as a § 1983 complaint, that only means he

would not have to prepay the entire $400 filing fee. Petitioner would have to pay the full filing fee over time. 28 U.S.C. § 1915(b)(1), (2). This could impose a significant burden on Petitioner.

Construing the Amended Petition as a § 1983 action would also be futile in this case. The applicable Wyoming statute provides "A prisoner is not eligible for parole on a sentence if, *while serving that sentence*, he has:(i) Made an assault with a deadly weapon upon any officer, employee or inmate of any institution; or (ii) Escaped, attempted to escape or assisted others to escape from any institution." Wyo. Stat. Ann. § 7–13–402(b). The Board's rule regarding parole disqualification quoted in the Amended Petition (and above) mirrors the statute. Although Petitioner argues he has now pled all facts necessary to state a plausible equal protection claim regarding his ineligibility for parole, the Amended Petition still fails to state a plausible claim, for several reasons.

First, parole ineligibility under this rule regards only the sentence(s) being served at the time of a disqualifying act. An inmate cannot be paroled from the sentence he is serving at the time the disqualifying offense occurred, but *the disqualifying act does not make him ineligible for parole on sentences he was not yet serving at the time.* The Amended Petition does not allege what sentence(s) each of the six inmates were serving at the time they committed their disqualifying offense(s), and whether those were the same sentences from which they were paroled. Many DOC inmates are serving multiple sentences and while some are served concurrently, many are served consecutively. Therefore, the sentence(s) the inmate was serving at the time of the disqualifying act versus consecutive sentence(s) they were not yet serving is a critical fact Petitioner must allege as to each inmate. The

Amended Petition does not allege this information as to any of the six inmates. It therefore fails to plausibly allege Petitioner was similarly situated as to any of the other inmates.

Indeed, because Petitioner alleges Short and Rhodes were paroled to their detainers on the convictions received for the disqualifying acts – which by definition they could not have been serving already when they committed those acts – his allegations affirmatively show these inmates were *not* paroled on sentences they were serving at the time of their disqualifying acts. Petitioner was not similarly situated with respect to Short or Rhodes.

Second, under the Board's rule a judicial conviction for a disqualifying offense is conclusive, whereas a disciplinary conviction for such an offense is rebuttable. In the latter, the inmate has the opportunity to petition the Board for an evidentiary hearing. See the Board rule at § II.C.4. The Board then votes "as to eligibility or non-eligibility based on the preponderance of the evidence regarding the question of whether or not a disqualifying act was voluntarily committed." The Amended Complaint alleges four of the inmates received judicial convictions for disqualifying acts, but is silent on this issue regarding Mr. Black and Mr. Short. Petitioner's response just asserts "they all received a disciplinary for their actions, but some unlike me, also received an extra charge." Assuming Black and Short did not have judicial convictions for their disqualifying acts, if they requested an evidentiary hearing and the evidence supported it, the Board could have found they did not voluntarily commit a disqualifying act. The Amended Petition does not allege any facts regarding these questions as to Black or Short. This is an additional reason Petitioner does not allege he was similarly situated to Black or Short.

Third, as to Mr. Roderick, while escape, attempted escape, and assistance of others' escape are disqualifying offenses, *conspiracy* to escape is not. Wyo. Stat. Ann. § 7–13–402. Petitioner argues Roderick received a judicial conviction for that conduct, and that any judicial conviction causes the inmate to be ineligible for parole under the Board's rule. This is inaccurate. Only judicial convictions for "the commission of a crime which contains all of the factual elements of a disqualifying act" during a particular sentence make the inmate ineligible for parole on that sentence. See the Board's rule at § II.C.3. This is an additional reason Petitioner does not allege he was similarly-situated to Mr. Roderick.

In short, even if Petitioner's equal protection claim is timely, it fails to state a claim. As such, liberally construing the Amended Petition as though it were a § 1983 civil action would be futile.

III. Conclusion

For each of the reasons stated above, the Court GRANTS Respondent's motion to dismiss (Doc. 23). This proceeding is DISMISSED WITH PREJUDICE as to Petitioner's due process claim. It is DISMISSED WITHOUT PREJUDICE as to Petitioner's equal protection claim. Judgment shall enter accordingly, and the Clerk shall close this case.

IT IS SO ORDERED this 7th day of February, 2020.

Nancy D Freudenthal

NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE