APPENDIX A

DECISION OF THE 11th CIRCUIT COURT OF APPEALS

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-12226

Non-Argument Calendar

BARRY SLAKMAN,

Plaintiff-Appellant,

versus

STATE BOARD OF PARDONS AND PAROLES,
TERRY E. BARNARD,
Chairman of State Board Pardons & Paroles,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-04822-SCJ

Before WILSON, ROSENBAUM, and NEWSOM, Circuit Judges.

PER CURIAM:

Barry Slakman, a Georgia inmate serving a life sentence, was denied parole in 2020. He sued, claiming that the denial violated his constitutional rights. The district court adopted the magistrate judge's Report and Recommendation and dismissed Slakman's complaint. Slakman appeals; we affirm.

I

In 1993, Barry Slakman beat and strangled his wife to death while she was in the shower because she indicated that she wanted a divorce. *Slakman v. State*, 280 Ga. 837, 837 (2006). Slakman was convicted in 2001 and sentenced to life in prison, with the opportunity to seek parole. *Id.* at 837 n.1.

According to Slakman's complaint, he has been "periodically" denied parole during his time in prison. His most recent denial occurred in 2020, in which the Parole Board cited an "insufficient amount of time served to date given the nature and circumstances" of his crimes as its "main reason" for issuing the denial. It also noted that Slakman's "parole eligibility status remains intact,"

and affirmed that his "case will be reconsidered by the Board during August 2023."

Slakman filed suit against the Board and its chairman under 42 U.S.C. § 1983, alleging that the denial of parole violated his constitutional rights. Specifically, Slakman asserted (1) that the denial "retroactively increased" his sentence in violation of the Ex Post Facto Clause, and (2) that he "has been denied equal protection."

Defendants moved to dismiss Slakman's complaint for failure to state a claim. The district court referred the motion to a magistrate judge, who issued a Report and Recommendation concluding that the motion should be granted and Slakman's complaint dismissed.

The district court adopted the magistrate judge's recommendation, reasoning that Slakman failed to state a claim against the Board because, as a state agency, the Board was immune from § 1983 liability. It also held that Slakman's claim against the chairman was barred by the statute of limitations. And, on the merits, the court went on to observe (1) that Slakman failed to show an Ex Post Facto violation because he hadn't alleged a change in his parole eligibility, and (2) that he failed to state a claim for an equal protection violation because he had not alleged "that he received different treatment based on any constitutionally protected interest." Slakman appeals.

II

On appeal, Slakman maintains that his parole denial violated the Ex Post Facto Clause and his equal protection rights.[1] We consider those in turn.[2]

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[1] Slakman also raises a due process violation. But because that issue was not properly brought before the district court and is raised for the first time on appeal, we will not consider it. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). Similarly, Slakman addresses the Board's sovereign immunity for the first time in his reply brief and, consequently, has waived that issue. *See In re Egidi*, 571 F.3d 1156, 1163 (11th Cir. 2009) ("Arguments not properly presented in a party's initial brief or raised for the first time in the reply brief are deemed waived."). Accordingly, Slakman's claims against the Board are dismissed on immunity grounds. Ordinarily, that would be the end of our inquiry. *See McClendon v. Ga. Dep't of Comty. Health*, 261 F.3d 1252, 1256 (11th Cir. 2001) ("[F]ederal courts lack jurisdiction to entertain claims that are barred by the Eleventh Amendment."). But because Slakman also sues Chairman Barnard—who is not entitled to Eleventh Amendment immunity—we address the merits of Slakman's claims as they apply to Barnard. *See Hafer v. Melo*, 502 U.S. 21, 30–31 (1991) ("[T]he Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983.").

[2] We review a district court's dismissal for failure to state a claim de novo. *Next Century Commc'ns Corp. v. Ellis*, 318 F.3d 1023, 1025 (11th Cir. 2003) (per curiam). Because Slakman has failed to state a claim on the merits, we opt not to address whether his claims are also time-barred. *Cf. United States v. Najjar*, 283 F.3d 1306, 1309 (11th Cir. 2002) (per curiam) (stating that "the expiration of the statute of limitations does not divest a district court of subject matter jurisdiction," but instead is a waivable "affirmative defense"); *see also Waddell v. Dep't of Corr.*, 680 F.3d 384, 394 (4th Cir. 2012) ("[I]nasmuch as the statute of limitations question is arguably more difficult than the merits

A

Slakman contends that a 2006 amendment to the Georgia Code retroactively altered his eligibility for parole. As amended, the law provides that "for a first conviction of a serious violent felony in which the accused has been sentenced to life imprisonment, that person shall not be eligible for any form of parole . . . until that person has served a minimum of 30 years in prison." O.C.G.A. § 17-10-6.1(c)(1). According to Slakman, that's a serious departure from previous practice, under which he asserts he would "have been paroled after serving 7-9 years in prison."

It's true that a change in parole policy can implicate the Ex Post Facto Clause. *See Brown v. Ga. Bd. of Pardons & Paroles*, 335 F.3d 1259, 1260 (11th Cir. 2003) (per curiam). Thus, if applied retroactively to Slakman, it's conceivable that § 17-10-6.1(c) might raise Ex Post Facto concerns.

But the shift in policy of which Slakman complains was not applied to him—although he has not yet served the 30-year minimum required by § 17-10-6.1(c), he has remained eligible for parole. Slakman freely admits that, throughout his incarceration, his parole applications have been "periodically" considered and denied. And the Board, absent unique circumstances not present here, only considers inmates that are eligible for parole. *See* O.C.G.A. §§ 42-9-45(a), 42-9-46; *see also Charron v. St. Bd. of*

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issues, we are content to assume without deciding that [the plaintiff's] claims are not time-barred and proceed with our analysis of their merits.").

Pardons & Paroles, 253 Ga. 274, 276 (1984) (holding that the Board "can consider" an inmate who is ineligible for parole only if the notice requirements of O.C.G.A. § 42-9-46—which require notifying the sentencing judge, the district attorney, and any victim—are satisfied).

So, the fact that Slakman's applications have been "periodically" considered and denied—well within § 17-10-6.1(c)(1)'s 30-year minimum—compels the conclusion that the 30-year minimum has not been applied to him.[3] Slakman simply confuses being *eligible* for parole with being *granted* parole.[4]

Slakman cannot demonstrate that § 17-10-6.1(c)(1) was applied to him at all, much less in a way that violated the Ex Post Facto Clause of the U.S. Constitution. His Ex Post Facto claim is meritless.

B

Slakman's opening brief contends (without citing to any legal support for his argument) that he "has been denied equal protection when compared with other similarly situated inmates

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[3] This is underscored by the Board's 2020 denial, which reaffirmed that Slakman's "parole eligibility status *remains intact*." Pl's Am. Compl. Ex. C (emphasis added). His eligibility can't have *remained* intact if it wasn't intact prior to the 2020 parole denial.

[4] Slakman's real gripe must be that he wasn't *granted* parole, not that he wasn't *eligible* for it. But "the ultimate grant or denial of parole to a prisoner who is eligible . . . remains a discretionary matter for the Board." *Ray v. Carthen*, 275 Ga. 459, 460 (2002) (quotation marks omitted).

serving life sentences for murder." To the extent that argument is preserved,[5] it is unpersuasive.

As a "class of one," Slakman must allege that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)).[6] "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) (quotation marks and emphasis omitted).

In his complaint, Slakman conclusorily asserted that "[o]ther similarly situated inmates with life sentences for murder, who were not as advantageously positioned as [he], have been paroled with substantially shorter incarcerations." To establish that those inmates were "similarly situated," Slakman provided only: (1) the crime for which they were convicted, and (2) the length of their sentence served before being granted parole.

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[5] *See* Fed. R. App. P. 28(a)(8)(A) (stating that the appellant's brief must provide "citations to the authorities" supporting his or her arguments); *see also N.L.R.B. v. McClain of Ga., Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998) ("Issues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived.").

[6] Slakman does not contend that the alleged "discriminatory treatment was based on some constitutionally protected interest such as race." *Jones v. Ray*, 279 F.3d 944, 947 (11th Cir. 2001) (per curiam).

"The decision to grant or deny parole is based on many factors such as criminal history, nature of the offense, disciplinary record, employment and educational history, etc." *Fuller v. Ga. St. Bd. of Pardons & Paroles*, 851 F.2d 1307, 1310 (11th Cir. 1988) (per curiam); *see also* O.C.G.A. § 42-9-42(c). Slakman failed to provide the district court with any information regarding these "many factors." Thus, the court had no way to determine whether the comparators were "*identical in all relevant respects*." *Grider*, 618 F.3d at 1264 (quotation marks omitted; emphasis in original).

Because Slakman did not (and does not on appeal) engage with the "many factors" that could have distinguished his purported comparators, he has failed to state a claim for an equal protection violation.[7]

AFFIRMED.

[7] In his reply brief, Slakman discusses at least a few of the ways in which he was "advantageously positioned" for parole. But even if we took those claims—which were not brought forth in this litigation until he filed his reply brief—at face value, he fails to articulate how those factors compare to his purported comparators.

APPENDIX B-

DECISION OF U.S. DISTRICT COURT,
NORTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BARRY SLAKMAN, Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	1:20-CV-4822-SCJ
	:	
STATE BOARD OF PARDONS AND PAROLES, et al., Defendants.	:	

ORDER

Presently before the Court is the Magistrate Judge's Report and Recommendation (R&R) recommending that the instant action be dismissed. [Doc. 23]. Plaintiff has filed his objections in response to the R&R. [Doc. 25].

A district judge has broad discretion to accept, reject, or modify a magistrate judge's proposed findings and recommendations. United States v. Raddatz, 447 U.S. 667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the Report and Recommendation that is the subject of a proper objection on a *de novo* basis and any non-objected portion under a "clearly erroneous" standard. "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988).

23.

In 2001, Plaintiff, an inmate at Dodge State Prison in Chester, Georgia, was convicted of murdering his wife and sentenced to life in prison.[1] Plaintiff, who periodically has been denied parole, was recently considered for parole in March 2020. [Doc. 22 at 3, 17-20]. On August 4, 2020, the Georgia State Board of Pardons and Paroles Board (the Board) informed Plaintiff that it had denied parole. "The main reason cited by the Board, after a review of the totality of your case, is insufficient amount of time served to date given the nature and circumstances of your offenses(s)." [Id. at 22]. Plaintiff initiated this 42 U.S.C. § 1983 civil rights action against the Board and the chairman thereof, claiming that, by retroactively adopting a policy requiring convicted murderers serving life sentences to serve at least thirty years, the Board has violated Plaintiff's ex post facto rights. When Plaintiff committed his crimes, the requirement was that murderers with life sentences would serve at least seven to nine years, and Plaintiff declined an offer that he serve five years and proceeded to trial in reliance on the policy that he would serve approximately seven years if convicted. He further contends that his equal protection rights have been violated because other, similarly-situated convicted murderers have been release after serving less time than he now has.

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[1] Plaintiff committed his crimes in 1993. His 1994 jury trial conviction was reversed by the Georgia Supreme Court in 2000. Slakman v. State, 533 S.E.2d 383 (Ga. 2000). He was retried and convicted in 2001.

Defendants filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for Plaintiff's failure to state a claim for relief. The Magistrate Judge concluded that Defendants' motion should be granted. The Magistrate Judge agreed with Defendants that the Board is immune from suit and further concluded that Plaintiff's claims are barred by the two-year statute of limitations applicable to § 1983 actions brought in Georgia.

With respect to Plaintiff's specific claims for relief, the Magistrate Judge concluded that Plaintiff's ex post facto claim failed because it is clear that the Board has not retroactively applied O.C.G.A. § 17-10-6.1—enacted in 2006 and requiring that all prisoners sentenced to life for violent felonies serve at least thirty years—because, as Plaintiff acknowledges in his complaint, the Board has periodically *considered* Plaintiff for parole over the years in compliance with the law that was in effect at the time that he murdered his wife. See also Sultenfuss v. Snow, 35 F.3d 1494, 1501-1502 (11th Cir. 1994) (en banc) (noting that Georgia's parole system confers wide discretion on the Board to consider whether inmates should be granted parole).

The Magistrate Judge further concluded that Plaintiff's equal protection claim failed. Plaintiff is not a member of a protected class, he has not alleged he was denied parole based on a suspect classification, and his attempt to state a claim as a "class of

one" fails because he has not shown comparators who were identical to him in all relevant respects. See Fuller v. Georgia State Bd. of Pardons and Paroles, 851 F.2d 1307, 1309 (11th Cir. 1988) ("The decision to grant or deny parole is based on many factors such as criminal history, nature of the offense, disciplinary record, employment and educational history, etc.").[2]

In his objections, Plaintiff mostly restates the arguments that he made before the Magistrate Judge. This Court concludes that the Magistrate Judge's conclusions in response to those arguments were proper, and in any event "general objections to a magistrate judge's report and recommendation, reiterating arguments already presented, lack the specificity required by Rule 72 and have the same effect as a failure to object." Chester v. Bank of Am., N.A., 1:11-CV-1562-MHS, 2012 WL 13009233, at *1 (N.D. Ga. Mar. 29, 2012)). With respect to those rare instances where Plaintiff contends that the Magistrate Judge erred, this Court responds as follows.

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[2] In his response to Defendants' motion to dismiss, [Doc. 15], and in his objections, Plaintiff repeatedly indicates that his due process rights were violated by the Board's decisions to deny him parole. As pointed out by the Magistrate Judge, [Doc. 23 at 7 n.4], Plaintiff, who is proceeding with counsel, did not raise a due process claim in his complaint, he has not sought to amend his complaint, and thus no due process claim is properly before the Court. In any event, it is well established that Georgia prisoners have no liberty interest in being released on parole. Sultenfuss, 35 F.3d at 1502.

Plaintiff's arguments regarding the immunity of the individual members of the Board entirely miss the mark because the Magistrate Judge determined only that the Board as an agency of the State enjoys immunity from § 1983 liability. Plaintiff's further contention that he is entitled to due process protections in the Board's decision making based on the Supreme Court's opinion in Morrissey v. Brewer, 408 U.S. 471 (1972), is unavailing as the holding Morrissey related only to the question of whether parole may be revoked without due process. Similarly, other cases relied upon by Plaintiff for the proposition that the Board has violated his due process and ex post facto rights, e.g., Garner v. Jones, 529 U.S. 244 (2000); California Dept. of Corrections v. Morales, 514 U.S. 499 (1995); Jackson v. State Bd. of Pardons & Paroles, Case No. 2:01-CV-068-WCO, 2002 WL 1609804, at *1 (N.D. Ga. May 30, 2002), are inapplicable because they all concern the frequency with which inmates are considered for parole or when they initially become eligible for parole, and as discussed both in the R&R and above, it is clear that Plaintiff has been considered for parole in compliance with the standards in effect when he committed his crimes. Given the fact that the Board retains "virtually unfettered discretion" in determining a prisoner's eligibility for release on parole, Jones v. Georgia State Bd. of Pardons and Paroles, 59 F.3d 1145, 1150 (11th Cir. 1995), a change in how Board members choose to exercise that discretion "creates only the most speculative and attenuated possibility

of producing the prohibited effect of increasing the measure of punishment for covered crimes." Morales, 514 U.S. at 500. This Court thus agrees with the Magistrate Judge that Plaintiff has failed to state a valid claim that his ex post facto rights have been violated.

Finally, this Court responds to Plaintiff's contention, with respect to his equal protection claim, that he

> does not fail to show that his case was prima facie identical to comparators, as he had a more favorable record in all relevant respects. Similarly situated inmates include those with life sentences for murder who were sentenced before January 1, 1995. Plaintiff has no other criminal history that is not linked to this case, he has a clean disciplinary record for over15 [sic] years, and he has impressive employment and education experience and history.

[Doc. 25 at 16].

This Court points out that Plaintiff has entirely failed to mention the nature of his crime, see Fuller, 851 F.2d at 1309, which was the very basis that the Board cited in its most recent decision denying parole. Plaintiff beat and strangled his wife to death while she was taking a shower after she indicated that she wanted a divorce. Slakman v. State, 533 S.E.2d 383, 385 (Ga. 2000) ("An autopsy revealed that Shana died between the hours of 6:00 a.m. and 8:00 a.m. from severe head trauma complicated by manual strangulation."). Plaintiff has not alleged that the comparators

that he cites committed crimes that were as truly horrific as his. As such, he has not alleged a viable equal protection claim.

Having reviewed the R&R in light of Plaintiff's objections, this Court concludes that the Magistrate Judge is correct. Accordingly, the R&R, [Doc. 23], is hereby **ADOPTED** as the order of this Court, Defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for a failure to state a claim is **GRANTED**, and the complaint is **DISMISSED**.

The Clerk is **DIRECTED** to close this action and enter judgment in favor of Defendants.

IT IS SO ORDERED, this 22nd day of June, 2021.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

29.

APPENDIX C

MAGISTRATE JUDGE'S FINAL REPORT
AND RECOMMENDATIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BARRY SLAKMAN, Plaintiff,	:	PRISONER CIVIL RIGHTS 42 U.S.C. § 1983
v.	:	
STATE BOARD OF PARDONS & PAROLES, TERRY E. BARNARD, Chairman of State Board Pardons & Paroles, Defendant.	:	CIVIL ACTION NO. 1:20-CV-4822-SCJ-CMS

UNITED STATES MAGISTRATE JUDGE'S
FINAL REPORT AND RECOMMENDATION

The matter is before the Court on Plaintiff's amended complaint [Docs. 14-1, 22]; Defendants' pre-answer motion to dismiss, applied to amended complaint [Doc. 11; see Doc. 19 at 2]; Plaintiff's response in opposition [Doc. 15]; and Defendants' reply [Doc. 17]. For the reasons state below, it is recommended that the motion to dismiss be granted.

I. Discussion

A. Background

On May 4, 1994, Petitioner was convicted for murder, felony murder, and aggravated assault based on the July 6, 1993, death of Shana Glass Slakman, his wife,

and assault on an officer. Slakman v. State, 272 Ga. 662, 662 and n.1, 533 S.E.2d 383, 385 n.1 (2000). On July 13, 2000, the Georgia Supreme Court reversed in part and remanded for a new trial. Id., 272 Ga. at 671, 533 S.E.2d at 391; see also Slakman v. State, 280 Ga. 837, 837 n.1, 632 S.E.2d 378, 381 n.1 (2006). On November 15, 2001, a jury again found Petitioner guilty of assaulting and murdering Ms. Slakman. Slakman, 280 Ga. at 837 n.1, 632 S.E.2d at 380 n.1. The court sentenced Petitioner to a life term of imprisonment for malice murder – the felony murder conviction was vacated, and the aggravated assault conviction merged with the malice murder conviction. Id. On June 26, 2006, the Georgia Supreme Court affirmed. Id., 280 Ga. at 837, 632 S.E.2d at 380. The United States Supreme Court denied *certiorari* on February 20, 2007. Slakman v. Georgia, 549 U.S. 1218 (2007).

Plaintiff, who periodically has been denied parole, was recently considered for parole on or around March 2020. [Doc. 22 at 3, 17-20]. On August 4, 2020, Plaintiff was informed (1) that the Georgia State Board of Pardons and Paroles Board (Board) had considered his case and had denied parole – "[t]he main reason cited by the Board, after a review of the totality of your case, is insufficient amount of time served to date given the nature and circumstances of your offenses(s)" and (2) that Plaintiff's statutory parole eligibility status remained intact. [Id. at 22].

B. Plaintiff's Amended Complaint

Plaintiff brings this counseled 42 U.S.C. § 1983 action, filed on November 30, 2020 [Doc. 1] and subsequently amended [Doc. 22], against the Board and Terry E. Barnard, Board Chairman. Plaintiff complains that his parole periodically has been denied, most recently on August 4, 2020. [Id. at 3]. Plaintiff contends that the Ex Post Facto Clause has been violated by the Board's retroactively extending the time of Plaintiff's parole to thirty years, when the Board's policy and practice at the time of Plaintiff's 1993 crimes and 1994 trial was to parole defendants – with life sentences for murder and an excellent profile – after seven to nine years.[1] [Id. at 3-

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[1] Plaintiff states (1) that, under O.C.G.A. § 42-9-45 at the time he committed his crimes, he was required to serve a minimum sentence of seven to nine years before release on parole and (2) that the time frame subsequently was changed, per O.C.G.A. § 17-10-6[.1(c)(1)], requiring service of a minimum of fourteen years, then a minimum of twenty-five years, and now a minimum of thirty years before release on parole. [Doc. 22 at 4].

The portion of § 42-9-45 to which Plaintiff refers addresses when a defendant becomes eligible for consideration for parole. O.C.G.A. 42-9-45(b)(2) ("Except as otherwise provided in[, *inter alia*, § 17-10-6.1], inmates serving sentences aggregating 21 years or more shall become eligible for consideration for parole upon completion of the service of seven years."); see also Corey v. Georgia Bd. of Pardons & Paroles, CIV.A. 107CV1241-RLV, 2007 WL 2080310, at *2 (N.D. Ga. July 16, 2007) ("Before 1994, Georgia law provided, 'Inmates serving sentences aggregating 21 years or more shall become eligible for consideration for parole upon completion

7]. Plaintiff also contends that his right to equal protection has been violated because he has been required to serve many more years of his life sentence that other, similarly situated inmates. [Id. at 8]. Plaintiff provides a list of eight inmates, convicted of murder, murder/burglary, murder/gun, and murder/aggravated assault who have been released after serving from sixteen to twenty-one years. [Id. at 6]. Plaintiff also contends that the Board's deference to the victim's family in denying him release on parole has increased his sentence in violation of equal protection. [Id. at 8]. Plaintiff seeks declaratory and injunctive relief. [Id. at 10].

C. Defendants' Motion to Dismiss, Plaintiff's Response, and Defendants' Reply

Defendants move to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. [Doc. 11 at 1]. Defendants state that all claims against the

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of the service of seven years.' O.C.G.A. § 42-9-45(b) (1993)" (emphasis omitted)).

To show the Board's policy and practice at the time he committed his crimes, Plaintiff has attached a copy of a November 29, 1984 letter to the Board which proposes "Procedures for Initial Consideration of Life Sentence Inmates[.]" [Doc. 22 at 13-14]. The proposal provides that Board staff will review life cases, classify them as Class I or II, and provide the Board with a parole recommendation, on which the Board will vote. Plaintiff also has attached a copy of the December 4, 1984 Board Minutes, which deal with the tentative adoption of "Board Classification of Life Cases Program[.]" [Id. at 12]. The relevance of the minutes is not clear.

Board must be dismissed for lack of jurisdiction because the Board is protected by Eleventh Amendment immunity, no matter the relief sought, and because the Board is not a person under § 1983. [Doc. 11-1 at 2-3]. Defendants further argue that Plaintiff fails to state either an ex post facto claim or an equal protection claim. [Id. at 4-9]. Defendants assert (1) that Plaintiff does not show that the increased times for *parole consideration* have been applied to him; (2) that Plaintiff shows only that, under 1993 policy, he was parole eligible after serving seven years and that, to date, the Board has exercised its discretion to deny parole; and (3) that Plaintiff fails to show that his parole eligibility, or right to be considered, has changed. [Id. at 5-6]. Defendants also point out that, assuming the November 1984 proposal was adopted and was in effect in 1993, it does not establish release dates and leaves the parole decision within the Board's discretion. [Id. at 7-8]. Defendants contend that Plaintiff's equal protection claim – which simply lists various inmates serving life sentences for murder who have been paroled – fails as conclusory. [Id. at 9]. Defendants further assert that Plaintiff's claims are barred by the applicable two-year limitations period (1) because Plaintiff alleges that he has been incarcerated more than twenty years beyond what should have been his parole date and knew, or should have known, of the alleged violation over twenty years ago and (2) because

successive denials of parole do not provide for a renewed statute-of-limitations calculation. [Id. at 10-12].

Plaintiff responds that the Board is not protected by Eleventh Amendment immunity because § 1983 overrides the Eleventh Amendment. [Doc. 15 at 5 (citing Rozar v. Mullis, 85 F.3d 556 (11th Cir. 1996), and Meeker v. Addison, 586 F. Supp. 216 (S.D. Fla. 1983))]. Plaintiff further argues that the Board is not protected by the Eleventh Amendment because the Georgia Constitution, "Section 1 Paragraph V.(b)(1)[,]" explicitly waives sovereign immunity for actions in the superior court seeking declaratory relief from acts of a state agency.[2] [Id. at 5-6]. Plaintiff further argues that Defendants' life sentence policy retroactively increases his punishment. [Id. at 9-13].[3] Plaintiff also contends that a violation of equal protection is shown by his allegations that "individuals with a similar life sentence for single murders and excellent records have been released with lesser time than the plaintiff[.]" [Id. at

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[2] Plaintiff does not state to which Article of the Georgia Constitution he refers but appears to refer to Article 1 and appears to refer to § 2, ¶ V(b)(1) and not § 1, ¶ V(b)(1).

[3] Plaintiff also discusses qualified immunity. [Doc. 15 at 6, 8-9]. However, as pointed out by Defendants, Plaintiff does not seek damages, and his discussion of qualified immunity has no basis. [Doc. 17 at 2]. This matter is not further addressed.

14].[4] As to Defendants' statute-of-limitations defense, Plaintiff contends that the August 2020 denial of parole, which causes Plaintiff to remain incarcerated, is a continuing violation and that his action is timely filed. [Id. at 16-17].

Defendants reply that the Supreme Court repeatedly has held that § 1983 does not override a State's Eleventh Amendment immunity and that Meeker does not change the matter. [Doc. 17 at 1-2]. Defendants further state –

> Plaintiff confuses *eligibility* for parole, i.e., parole consideration, with a decision by the parole board to *grant* parole. As the Eleventh Circuit recognized in Sultenfuss v. Snow, 35 F.3d 1494, 1501-1502 (11th Cir. 1994) (en banc) the Board has broad discretion to grant or deny parole. Plaintiff has not identified any policy or practice in existence at the time he murdered his wife that would guarantee him a grant of parole within seven (7) years. . . . Again, here, there has been no statute, policy or practice applied retroactively. Plaintiff *has* been considered for parole. That the Board has exercised its discretion to deny parole does not violate the Ex Post Facto Clause.

[Doc. 17 at 4-5]. Defendants repeat that Plaintiff's conclusory equal protection claim fails. [Id. at 6-7]. Defendants also assert that Plaintiff's argument on a continuing

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[4] Plaintiff also refers to due process. [Doc. 15 at 14]. Plaintiff, who is counseled, did not raise a due process claim in his amended complaint and has not moved to amend. This matter is not further addressed. Additionally, Plaintiff disagrees with Defendants' alleged defense based on Plaintiff's lack of standing. [Id. at 15]. Defendants have not argued that Plaintiff lacks standing, and this matter is not addressed.

violation fails as it is contrary to binding precedent. [Id. at 7 (citing Brown v. Georgia Bd. of Pardons and Paroles, 335 F.3d 1259, 1261 (11th Cir. 2003))].

D. Law and Recommendation

A defendant may move to dismiss a complaint for, among other things, lack of subject-matter jurisdiction and/or failure to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(1), (6). To state a claim, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). "A plaintiff . . . must plead facts sufficient to show that [his] claim has substantive plausibility" and inform the defendant of "the factual basis" for the complaint. Johnson v. City of Shelby, 574 U.S. 10, 12 (2014). When a litigant raises a defense of Eleventh Amendment immunity – a facial attack on subject matter jurisdiction, the court takes the plaintiff's allegations as true and determines whether the plaintiff has sufficiently alleged a basis for subject matter jurisdiction. Madison v. Dep't of Juvenile Justice, 118CV00484TWTJFK, 2018 WL 4214421, at *1 (N.D. Ga. Aug. 13, 2018), report and recommendation adopted, 2018 WL 4078436 (N.D. Ga. Aug. 27, 2018). As discussed in more detail below, Defendants' motion to dismiss is due to be granted on multiple grounds, both as to the Board based on

Eleventh Amendment immunity and exclusion from § 1983 liability and as to Barnard based on the statute of limitations and failure to state a claim.

1. Immunity and § 1983 Liability

"[T]he Eleventh Amendment represents a constitutional limitation on the federal judicial power[, and] . . . federal courts lack jurisdiction to entertain claims that are barred by the Eleventh Amendment." McClendon v. Georgia Dep't of Cmty. Health, 261 F.3d 1252, 1256 (11th Cir. 2001). The Eleventh Amendment bars any action, whether for damages or equitable relief, against state entities such as the Board. See Fuller v. Georgia State Bd. of Pardons and Paroles, 851 F.2d 1307, 1309 (11th Cir. 1988) (affirming district court ruling that the Board was entitled to sovereign immunity under the Eleventh Amendment); see also Cory v. White, 457 U.S. 85, 90-91 (1982) ("[T]he Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity."); Stevens v. Gay, 864 F.2d 113, 115 (11th Cir. 1989) (holding that Eleventh Amendment bars § 1983 action against the Georgia Department of Corrections, a state agency – "this Eleventh Amendment bar applies regardless of whether the plaintiff seeks money damages or prospective injunctive relief"). Further, the state or a state entity is not a person subject to liability under § 1983. Howlett ex rel. Howlett v. Rose, 496 U.S. 356, 365

(1990) ("As we held last Term in Will v. Michigan Dept. of State Police, 491 U.S. 58 . . . (1989), an entity with Eleventh Amendment immunity is not a "person" within the meaning of § 1983."); GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1254 (11th Cir. 2012) ("The State of Georgia . . . is not a 'person' subject to suit under § 1983.").

Plaintiff fails to state a claim against the Board. The Board is protected by Eleventh Amendment immunity and is not subject to a § 1983 complaint. See Fuller, 851 F.2d at 1309; GeorgiaCarry.Org, Inc., 687 F.3d at 1254. Plaintiff's contention that § 1983 overrides Eleventh Amendment immunity is contrary to the law, if not frivolous. See Nichols v. Alabama State Bar, 815 F.3d 726, 731 (11th Cir. 2016) ("Congress has not abrogated Eleventh Amendment immunity in § 1983 cases."). Further, Plaintiff is not helped by Rozar or Meeker. Rozar does not discuss the Eleventh Amendment, much less state that it has been overridden by § 1983. See Rozar, 85 F.3d at 558-65. Meeker, which found that the State of Florida had waived Eleventh Amendment immunity for § 1983 actions, is non-binding precedent by a district court in Florida, does not state that § 1983 has overridden Eleventh Amendment immunity, involves a waiver under *Florida* law (not Georgia law), and, further, has been rejected by the Eleventh Circuit Court of Appeals. See Meeker, 586

F. Supp. at 222; see also Gamble v. Florida Dep't of Health & Rehab. Servs., 779 F.2d 1509, 1515 n.7 (11th Cir. 1986) ("A contrary result – holding that the statutory enactments considered in this opinion had waived Florida's immunity to damage suits under § 1983 in federal court – was reached in Meeker . . . . We reject the reasoning of the Meeker opinion for the reasons set out in this opinion."). Plaintiff's reliance on the Georgia Constitution also is without merit. The section of the Georgia Constitution on which Plaintiff appears to rely, see supra n. 2, dictates that "Sovereign immunity is hereby waived for actions *in the superior court* seeking declaratory relief from acts of the state or any agency . . . of this state . . . outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States." Ga. Const. art. I, § 2, ¶ V(b)(1) (emphasis added). The waiver, by its terms, pertains to actions in Georgia superior courts, not federal courts. Further, ¶ V concludes with the following statement – "This Paragraph shall not constitute a waiver of any immunity provided to this state or any agency . . . by the Constitution of the United States." Ga. Const. art. I, § 2, ¶ V(b)(5).

2. Statute of Limitations

Even if a plaintiff otherwise states a claim, his claim fails if it is barred by the applicable statute of limitations, which, for a § 1983 claim arising out of events

occurring in Georgia, is two years. See Crowe v. Donald, 528 F.3d 1290, 1292 (11th Cir. 2008). The statute of limitations begins to run when "the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Lovett v. Ray, 327 F.3d 1181, 1182 (11th Cir. 2003) (quoting Rozar, 85 F.3d at 561-62); see also McGroarty v. Swearingen, 977 F.3d 1302, 1309 (11th Cir. 2020) (same). The initial parole decision or application of a challenged policy, not subsequent and repeated applications of the initial decision, triggers the limitations period. Lovett, 327 F.3d at 1182-83 (distinguishing between consequences of a prior violation and an ongoing violation and stating that ongoing consequences do not extend the limitations period); Brown, 335 F.3d at 1261 (holding the policy change on the timing of parole reconsideration hearings was the limitations triggering event and that subsequent applications of the changed policy did not extend the limitations period); see also McGroarty, 977 F.3d at 1309 (stating that allegations of a continuing harm do not show a continuing violation).

Here, even if Plaintiff could state an ex post facto claim (which he does not, as discussed below), his ex post facto claim is barred by the applicable statute of limitations. It is apparent based on Plaintiff's allegations that he believed that he

should have been released on parole approximately twenty years ago, after he had served seven to nine years in confinement, and that he is challenging an alleged policy that he believes prevented that release, most recently in August 2020. The relevant fact that Plaintiff was not granted parole (as he alleges he should have been under the 1994 policy) was known to Plaintiff by at least the end of August of 2002.[5] Plaintiff's ex post facto claim was available years ago, and it is barred by the applicable statute of limitations.

3. Ex Post Facto Clause

"The Ex Post Facto Clause prohibits States from enacting laws that, by their retroactive application, increase the punishment for a crime after it has been committed." Metheny v. Hammonds, 216 F.3d 1307, 1310 (11th Cir. 2000). To establish an ex post facto violation, a plaintiff must show a punitive law or measure, applied retrospectively, that works to his disadvantage by increasing the punishment

[5] Although Plaintiff challenges a policy that does not exist, it is apparent that, if it did exist, Plaintiff would have been aware of it by the end of August 2002. The Court bases its calculation on Plaintiff's statement that he had served twenty-seven years as of August 4, 2020. [Doc. 22 at 3].

for past conduct. See Dufresne v. Baer, 744 F.2d 1543, 1546 (11th Cir. 1984); Paschal v. Wainwright, 738 F.2d 1173, 1175-76 (11th Cir. 1984).

The relevant Georgia law on parole is as follows. "Except as otherwise provided in Code Sections 17-10-6.1 . . . , inmates serving sentences aggregating 21 years or more shall become eligible for consideration for parole upon completion of the service of seven years." O.C.G.A. § 42-9-45(b)(2); see also Corey, 2007 WL 2080310, at *2 ("Before 1994, Georgia law provided, 'Inmates serving sentences aggregating 21 years or more shall become eligible for consideration for parole upon completion of the service of seven years.' O.C.G.A. § 42-9-45(b) (1993)[.]" (emphasis omitted)). As amended in 2006, § 17-10-6.1(c)(1) provides, "for a first conviction of a serious violent felony in which the defendant has been sentenced to life imprisonment, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles until that person has served a minimum of 30 years in prison." O.C.G.A. § 17-10-6.1(c)(1) (see historical and statutory notes).[6]

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[6] The Board states on its official web site that, because of statutory changes, it considers life sentenced inmates for parole when they become eligible, according to

It is apparent that, notwithstanding § 17-10-6.1 and the extended time frames for parole eligibility, that the Board periodically *has considered* Plaintiff for parole – as stated by Plaintiff, "his release on parole has been periodically denied[.]" [Doc. 22 at 5]. It is apparent that the Board's August 2020 consideration and denial of parole was based on the Board's first finding that Plaintiff was eligible to be considered for parole, before it exercised its discretion to deny parole. Plaintiff does not show that the Board applied O.C.G.A. § 17-10-6.1 (as amended) to find that Plaintiff was ineligible for parole consideration. Plaintiff does not show that his parole eligibility after serving seven years of his sentence has been canceled or changed. Absent any change in his parole eligibility, Plaintiff fails to show an ex post facto violation.

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the crime commit date. See www.pap.georgia.gov/parole-consideration (follow "The Parole Process in Georgia" hyperlink) (last visited May 11, 2021). "If a crime considered to be a "seven deadly sin" was committed prior to 1995, the offender is eligible after seven years. In 1995, offenders committing these crimes became eligible after serving fourteen years. If the crime is committed on/after July 1, 2006, the offender is eligible for parole after serving thirty years." Id.

4. Equal Protection

To state a claim under the Equal Protection Clause, a plaintiff generally must allege "that (1) he is similarly situated with other prisoners who received more favorable treatment; and (2) his discriminatory treatment was based on some constitutionally protected interest such as race." Jones v. Ray, 279 F.3d 944, 946-47 (11th Cir. 2001); Thomas v. Georgia State Bd. of Pardons and Paroles, 881 F.2d 1032, 1034 n.3 (11th Cir. 1989) (stating that Plaintiff must show that parole decision was "made on the basis of race, poverty, or some other constitutionally invalid reason . . . and that similarly situated inmates who were not members of the protected class received parole"). To state a claim of equal protection as a "class of one," a plaintiff must allege that (1) he is similarly situated to (2) "comparators [who are] prima facie identical in all relevant respects," and that (3) defendants have intentionally treated him differently, (4) without any rational basis. See Campbell v. Rainbow City, Ala., 434 F.3d 1306, 1314 (11th Cir. 2006); see also Fuller, 851 F.2d at 1310 ("The decision to grant or deny parole is based on many factors such as criminal history, nature of the offense, disciplinary record, employment and educational history, etc. Fuller does not show himself to be similarly situated, considering such factors, with any inmates who were granted parole.").

Plaintiff's equal protection claim is conclusory and does not show that he received different treatment based on any constitutionally protected interest. See Jones, 279 F.3d at 946-47. To the extent that Plaintiff attempts to state a claim as a class of one, his allegation that he and various paroled prisoners are similarly situated because they all received a life sentence for murder fails to show comparators who were identical to him in all relevant respects. See Campbell, 434 F.3d at 1314 (stating, in regard to a class-of-one equal protection claim, that for a situation to be deemed similar "it must be prima facie identical in all relevant respects"). Accordingly, Plaintiff's equal protection claim fails.

II. Conclusion

For the reasons stated above,

IT IS RECOMMENDED that Defendants' motion to dismiss [Doc. 11] be **GRANTED** and that the complaint, as amended [Docs. 14-1, 22], and this action be **DISMISSED** for failure to state a claim and for lack of jurisdiction.

The Clerk of Court is **DIRECTED** to withdraw the referral to the undersigned Magistrate Judge.

IT IS SO RECOMMENDED and DIRECTED, this 14th day of May, 2021.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

ELEVENTH CIRCUIT DENIAL FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-12226-JJ

BARRY SLAKMAN,

Plaintiff - Appellant,

versus

STATE BOARD OF PARDONS AND PAROLES,
TERRY E. BARNARD,
Chairman of State Board Pardons & Paroles,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

BEFORE: WILSON, ROSENBAUM, and NEWSOM, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing construed from Motion for Reconsideration filed by Barry Slakman is DENIED.

ORD-41

5p.

APPENDIX E

APPROVAL OF TIME EXTENSION TO FILE PETITION FOR CERTIORARI

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