(CORRECTED)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13435-E

WILLIAM WALLACE,

Petitioner-Appellant,

versus

FLORIDA COMMISSION ON OFFENDER REVIEW,

Respondent-Appellee.

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

ORDER:

William Wallace moves for a certificate of appealability in order to appeal the denial of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Elizabeth L. Branch
UNITED STATES CIRCUIT JUDGE

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Respondent-Appellee.

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

Before: NEWSOM and BRANCH, Circuit Judges.

BY THE COURT:

William Wallace has filed a motion for reconsideration of this Court's March 4, 2022, order denying his motion for a certificate of appealability from the denial of his 28 U.S.C. § 2254 petition. Upon review, Wallace's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-62010-CIV-SINGHAL/REID

WILLIAM WALLACE,

Petitioner,

v.

FLORIDA COMMISSION ON OFFENDER REVIEW,

Respondent.
_____/

ORDER AFFIRMING AND ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Petitioner William Wallace's Objections to Magistrate Judge's Report and Recommendation (DE [22]). On August 17, 2020, Magistrate Judge Reid entered a well-reasoned Report and Recommendation ("R&R") (DE [15]) concluding that Petitioner was not entitled to habeas corpus relief under 28 U.S.C. § 2254. Judge Reid concluded that the record did not show that the Parole Commission "engaged in 'arbitrary and capricious' or 'flagrant and unauthorized' action in making its parole determinations," and Petitioner failed to show that the Commission relied on false information. *Id.* at 13. "[I]n an abundance of caution," however, Judge Reid addressed each of Petitioner's six claims and found them to be without merit. *Id.* Judge Reid recommended denying the petition for habeas relief, and the R&R required any objections to be filed within 14 days of the date of service of the order. *Id.* at 21–22.

Having received no objections, the Court conducted a *de novo* review of Judge Reid's legal conclusions and affirmed and adopted the R&R on September 8, 2020.

(DE [16]). Petitioner moved for reconsideration of this Court's September 8 Order, stating that he never received a copy of the Order and therefore never filed any objections. (DE [18]). The Court partially granted Petitioner's motion, giving him until October 28, 2020, to file his objections. (DE [19]). Although the Court did not receive any objections by the deadline, the Court entered another Order (DE [20]) on April 19, 2021, giving Petitioner until May 19, 2021, to file objections.

Petitioner timely filed his objections on May 18, 2021 (DE [22]), which the Court now reviews *de novo*. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); *Saldana v. United States*, 406 F. App'x 413, 416 n.4 (11th Cir. 2010) ("A district court judge must review *de novo* the parts of the report and recommendation to which a party objects." (citations omitted)).

Petitioner raises the following objections to Judge Reid's R&R:

1. No points should have been assessed against him because he does not have a history of violent behavior, and the FBI's report states that Case No. 88-19720, on which the Commission relied, "cannot be used against the Petitioner."
2. There is no evidence that any blunt object or weapon was used during commission of the crime, and the State's discovery at trial did not mention any weapon.
3. No document from the Parole Commission was signed or stamped, so the documents are not binding on Petitioner.
4. Petitioner was not informed of the date of the parole release hearing.
5. Petitioner would have never accepted time served for the sexual battery that occurred the same time as the murder if he knew that the points would be assessed

against him in determining parole.

6. No fingerprints from Petitioner or the victim and no blood spatter were found at the crime scene, and the lab report apparently identified the substance on Petitioner's jeans as "drops of paint," not blood.
7. Petitioner's violent behavior in Case No. 88-19720 cannot be used against him because the case was dismissed. (This argument is essentially the same as ground 1.)
8. No lab report or coroner's report was provided to the jury at trial.
9. Petitioner was charged twice for the same crime in Case No. 06-1992CF02065A88810.

Here, the Court has reviewed objections 1–5 and 7 and finds them to be without merit. Petitioner simply regurgitates his original arguments made in his Petition (DE [1]) without pointing to specific reasons for disagreeing with Judge Reid. *Cf. McCullars v. Comm'r, Soc. Sec. Admin.*, 825 F. App'x 685, 694 (11th Cir. 2020) ("Frivolous, conclusive, or general objections need not be considered by the district court. An objection must specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection." (internal quotation marks and citations omitted)). Nevertheless, the Court has reviewed *de novo* the facts and the law on each of these objections and overrules them; Petitioner is not entitled to habeas relief on these points.

Regarding objections 6, 8, and 9, they appear to be new arguments raised for the first time before this Court. The Court declines to address these arguments that were not presented to Judge Reid. *See Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009)

("The district court retained the final adjudicative authority and properly exercised its discretion in deciding whether to consider any new arguments raised by [the habeas petitioner] in his objections to the magistrate judge's report and recommendation. . . . [A] district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge."). Accordingly, it is hereby

ORDERED AND ADJUDGED that Judge Reid's Report and Recommendation (DE [15]) is **AFFIRMED** and **ADOPTED**. This case shall remain **CLOSED**.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 9th day of September 2021.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished to counsel via CM/ECF

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 19-62010-CV-SINGHAL
MAGISTRATE JUDGE REID

WILLIAM WALLACE,

Petitioner,

v.

FLORIDA COMMISSION ON
OFFENDER REVIEW,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

Petitioner, **William Wallace**, has filed this amended *pro se* petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his Presumptive Parole Release Date ("PPRD") established by the Florida Commission on Offender Review ("the Commission") related to his conviction for first-degree murder in Broward County Circuit Court. For the reasons detailed below, the Petitioner is not entitled to habeas corpus relief.

This cause has been referred to the undersigned for consideration and report, pursuant to 28 U.S.C. § 636(b)(1)(B), (C); S.D. Fla. Local Rule 1(f) governing

Magistrate Judges; S.D. Fla. Admin. Order 2019-02; and the Rules Governing Habeas Corpus Petitions in the United States District Courts.

For its consideration of the petition [ECF No. 1], the court has the Respondent's response to this court's order to show cause [ECF No. 11], along with its supporting appendix [ECF No. 11-1], containing copies of relevant state court pleadings, and the Petitioner's reply [ECF No. 13].

II. Claims

Construing the arguments liberally as afforded *pro se* litigants, pursuant to *Haines v. Kerner*, 404 U.S. 519, 520 (1972), Petitioner raises the following grounds[1] for relief:

1. The points assessed to Plaintiff do not apply to him. [ECF No. 1 at 4].

2. There was never any evidence of a blunt object or weapon used in the crime. [ECF No. 1 at 5].

3. Plaintiff's notice of commission review was not signed or stamped. [ECF No. 1 at 6].

4. His PPRD hearing was untimely and Petitioner was not given notice of the time and place of the hearing. [ECF No. 1 at 8].

5. The points assessed to Petitioner for sexual battery should not have been applied. [ECF No. 1 at 11].

[1] Petitioner's grounds in his Petition appear to be mislabeled. For example, he has two "ground fours," and grounds 5 and 4 appear to be identical. [ECF No. 1 at 8-9]. As such, for purposes of this Report, the Court has independently numbered the grounds as listed in this Report.

6. The Commission improperly determined that Petitioner is an unreasonable risk to others. [ECF No. 1 at 13].

III. Factual Background and Procedural History

In 1991, Petitioner was sentenced to three years in the Florida Department of Corrections ("FDOC") as a probation violator for possession of cocaine. [ECF Nos. 11-2, 11-3]. On February 14, 1995, he was sentenced to life imprisonment with a 25-year minimum mandatory sentence for first degree murder in Broward County Circuit Court Case No. 92-23065. [ECF Nos. 11-2, 11-5].

On September 21, 1995, Petitioner pled guilty to sexual battery/slight force in Broward County Circuit Court Case No. 92-24198. [ECF No. 11-4]. He was sentenced to credit for time served. [*Id.* at 2]. This offense occurred on July 4, 1992. [*Id.* at 4].

Since his 1992 FDOC commitment, Petitioner has incurred multiple disciplinary infractions. [ECF No. 11-2 at 5].

On August 15, 2017, the Commission established Petitioner's PPRD as December 7, 2048. [ECF No. 11-7]. Relevant to this petition, the Commission assessed three aggravating factors including: (1) the scored offense involved the use of a blunt object; (2) Petitioner committed the separate offense of sexual battery on a victim 12 years or older; and (3) unsatisfactory institutional conduct as evidenced by Petitioner's processed disciplinary record. [*Id.*]. Petitioner's subsequent interview

was set to occur seven years in the future, rather than the default two years, pursuant to Fla. Stat. § 947.174, based on the Commission's finding that it was not reasonable to expect that Petitioner would be granted parole during the following years because of the aggravating factors discussed above and the fact that Petitioner was an unreasonable risk to others. [*Id.*].

Pursuant to Fla. Stat. § 947.173, Petitioner requested administrative review of his PPRD establishment. [ECF No. 11-8 at 3]. The Commission granted administrative review of Petitioner's appeal and found no reason to modify his assigned PPRD. [*Id.* at 2].

After the Commission rejected Petitioner's appeal, he filed a petition for writ of habeas corpus in Martin County Circuit Court. [ECF No. 11-9]. In that petition, Petitioner argued that (1) he should not have been assessed additional points because no blunt object was used in the offense and there were no multiple, separate offenses; (2) his review was not completed within the required time; (3) there was no signature on the Commission's response to his administrative review request; (4) he was denied the right to have anyone be at his parole hearing because it was not done at the proper time and on the proper date [*Id.* at 4]; and, (5) he should not have received points for unsatisfactory institutional conduct. [*Id.*]. The case was then transferred to the Second Judicial Circuit Court in Leon County, Florida, after the Martin County Circuit Court determined the petition for writ of habeas corpus was actually

an action sounding in mandamus. [ECF No. 11-10]. On November 8, 2019, the Leon County Circuit Court denied Petitioner's claims on the merits. [ECF No. 11-13]. The First District Court of Appeal *per curiam* dismissed the appeal [ECF No. 11-24 at 2] and the mandate issued on June 13, 2019. [*Id.* at 4]. Petitioner's motion for rehearing was denied on July 15, 2019. [ECF No. 11-26 at 2].

Petitioner then came to this Court[2] filing the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the lawfulness of the determination of his PPRD by the Commission, on **July 29, 2019**, after signing the petition and handing it to prison authorities for mailing, in accordance with the mailbox rule. [ECF No. 1 at 1]. Petitioner essentially claims that the Commission is violating his constitutional rights and he seeks an Order from this Court directing the Commission to recalculate his PPRD. *See generally* [ECF No. 1].

IV. Threshold Issues

A. Timeliness

The Respondent concedes [ECF No. 11 at 9] the petition is timely filed under 28 U.S.C. § 2244(d).

B. Exhaustion

[2] Petitioner initially filed the Petition in the Northern District of Florida, and the action was subsequently transferred to this Court. [ECF No. 4].

Next, the Respondent asserts that Petitioner's claims are barred from federal habeas review because they were not properly raised and exhausted in state court. [ECF No. 11 at 9-13].

Pursuant to 28 U.S.C. §§ 2254(b)-(c), petitioners must exhaust their claims before presenting them in a federal habeas petition. When petitioners do not properly present their claims to a state court by exhausting those claims and complying with the applicable state procedure, § 2254 may bar federal review of those claims in federal court. *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010) (relying upon 28 U.S.C. § 2254(b)-(c)). When it is unclear or less efficient to resolve whether the additional restriction in § 2254(d) applies, federal courts may also deny writs of habeas corpus under § 2254 by engaging in *de novo* review, a more favorable standard, as a habeas petitioner would surely not be entitled to a writ under § 2254(d) if the claim would fail under *de novo* review. *See, e.g., Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010); *Hittson v. GDCP Warden*, 759 F.3d 1210, 1248 (11th Cir. 2014); *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1109-10 (11th Cir. 2012).

Pursuant to 28 U.S.C. § 2254(b)(2), the Court has authority to address unexhausted claims when a denial is appropriate on the merits. *See also Berguis v. Thompkins*, 560 U.S. 370, 390 (2010). To promote judicial efficiency, the merits of the allegedly unexhausted claims have been addressed within this Report.

V. Standard of Review

AEDPA ensures that federal habeas corpus relief works to "guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *See Greene v. Fisher,* 565 U.S. 34, 38 (2011). This standard is both mandatory and difficult to meet. *White v. Woodall,* 572 U.S. 415, 420 (2014).

Deferential review under 28 U.S.C. § 2254(d) is generally limited to the record that was before the state court that adjudicated the claim on the merits. *See Cullen v. Pinholster,* 563 U.S. 170, 182 (2011); *Gill v. Mecusker*, 633 F.3d 1272, 1288 (11th Cir. 2011). To review a federal habeas corpus claim, the district court must first identify the last state court decision, if any, that adjudicated the merits of the claim. *See Marshall v. Sec'y, Fla. Dep't of Corr.,* 828 F.3d 1277, 1285 (11th Cir. 2016).

Where the claim was "adjudicated on the merits," in the state forum, § 2254(d) prohibits re-litigation of the claim unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States": or, (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Harrington v. Richter,* 562 U.S. 86, 97-98 (2011).

A state court decision is "contrary to" established Supreme Court precedent

when it (1) applies a rule that contradicts the governing law set forth by the Supreme Court; or (2) confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" of clearly established federal law is different from an incorrect application of federal law. *Williams v. Taylor*, 529 U.S. at 410. Consequently, "[a] state court's determination that a claim lacks merit precludes federal habeas corpus relief so long as fair-minded jurists could disagree on the correctness of the state court's decision." *Mitchell v. Esparza,* 540 U.S. 12, 16 (2003); *Tharpe v. Warden,* 834 F.3d 1323, 1337 (11th Cir. 2016), *cert. den'd,* 137 S. Ct. 2298 (2017) (accord).

However, regardless of whether AEDPA deference applies, the Court is authorized to deny a claim for federal habeas relief when the claim is subject to rejection under *de novo* review. *See Conner v. GDCP Warden*, 784 F.3d 752, 757 n. 16 (11th Cir. 2015); *Reese v. Sec'y, Dep't of Corr.*, 675 F.3d 1277, 1291 (11th Cir. 2012). Accordingly, because the Court addresses the merits of Petitioner's claims without reaching the issue of exhaustion, his claims are evaluated under *de novo* review standard.

VI. Discussion

As an initial matter, Respondent asserts that Petitioner's claims are not cognizable upon federal habeas review because they solely involve issues of state law. [ECF No. 11 at 15]. 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); *Barclay v. Florida*, 463 U.S. 939, 957-958 (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).

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, 1560 (11th Cir. 1991) (quoting *Carrizales v. Wainwright*, 699 F.2d 1053, 1053-54 (11th Cir. 1983)). 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 (11th 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). Due process interests in the prison setting will, therefore, generally be limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. *Id.* at 486. Notwithstanding this long-standing principle, courts have held that state-created procedures can give rise to a protected liberty interest for purposes of procedural due process when those procedures place substantive limitations upon official discretion. *Cook v. Wiley*, 208 F.3d 1314, 1322 (11th Cir. 2000); *see also Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (stating that if the relevant statute "place[s] no substantive limitations on official discretion" in granting an early release from a valid sentence, no constitutionally protected liberty interest is implicated).

In the context of parole, the Supreme Court of the United States has held that a convicted prisoner has no constitutional right to be released before the expiration of a valid sentence. *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979). Accordingly, an administrative decision on whether

to grant an inmate release on parole, however serious the impact to the particular inmate, does not automatically invoke due process protection. *Id.*

Important here, the Eleventh Circuit has held that Florida's parole statutes 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. 1986); *Hunter v. Florida Parole & Probation Commission*, 674 F.2d 847, 848 (11th Cir. 1982). Thus, while much of Florida's statutory scheme involving parole is written in mandatory terms, the setting of the PPRD 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).[3]

[3] The Eleventh Circuit adopted as binding precedent all former Fifth Circuit decisions issued prior to October 1, 1981, and all former Fifth Circuit Unit B decisions issued after October 1, 1981. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc); *Stein v. Reynolds Sec., Inc.,* 667 F.2d 33, 34 (11th Cir.1982).

Thus, there is no liberty interest in the calculation of a presumptive parole release date. *See Walker v. Florida Parole Comm'n*, 299 F. App'x 900, 902 (11th Cir. 2008); *Damiano v. Florida Parole and Probation Comm'n*, 785 F.2d 929, 932 (11th Cir. 1986); *Hunter, supra. See also Meola v. Dep't of Corr.*, 732 So.2d 1029, 1034 (Fla. 1998) ("In 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).").

Since there is no inherent constitutional right to parole in Florida, no deprivation of a federally protected right can occur in the absence of such a state-created liberty interest. *Jonas, supra.* Based on the foregoing, it is apparent that decisions regarding the establishment of a PPRD, the granting of an effective parole release date and the suspension of that release date are decisions within the discretion of the Commission.

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) (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); *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."); *Slocum v. Ga. State Bd. of Pardons and Paroles*, 678 F.2d 940, 941 (11th Cir. 1982) (holding that prisoner did not state due process claim by simply asserting the parole board considered erroneous information or inaccurate reports during parole consideration).

In the instant case, there is no evidence whatever that the Commission engaged in "arbitrary and capricious" or "flagrant and unauthorized" action in making its parole determinations. Petitioner here fails to demonstrate that the Commission erred in its determination of the PPRD, because the information used to determine the PPRD was false or otherwise fabricated. Rather, Petitioner merely disagrees with the Commission's interpretation of the Florida Administrative Code, and the conclusions the Commission drew from information contained in Petitioner's file, information which petitioner does not prove to be false. Accordingly, he is not entitled to habeas relief in this case. Nevertheless, in an abundance of caution, the Court examines each of Petitioner's claims below individually.

First, in **claim 1**, Petitioner asserts that "points" should not have been assessed. [ECF No. 1 at 4]. Under the Florida Administrative Code, points are assessed by evaluating "salient factors." which are "indices of the offender's present and prior criminal behavior and related factors found by experience to be predictive in regard to parole outcome." *See* Fla. Admin. Code R. 23-21.002(43). In Petitioner's case, he received a total of five salient factor points: one (1) point for his prior convictions; one (1) point for prior incarcerations; two (2) points because the total time imposed was two or more years; and one (1) point for a supervision revocation. [ECF No. 11-8 at 2-3]. Petitioner fails to provide any facts to suggest that any of these determinations were incorrect or relied on patently false information. Accordingly, he has failed to demonstrate any due process violation. Claim 1 should be denied.

In **claim 2**, Petitioner's asserts that he should not have been assessed an "aggravating factor" for use of a blunt object because there was no evidence of a blunt object or weapon being used during the course of the crime presented at trial. [ECF No. 1 at 5]. Under the Florida Administrative Code, the Commission may render a decision outside the matrix range based on "competent and persuasive evidence relevant to aggravating or mitigating circumstances." Fla. Admin. Code. R. 23-21.010(1). Under Fla. Admin. Code. R. 23-21.010(2), certain information "may be relied upon as aggravating or mitigating circumstances" unless that

aggravated factor relates to an element of the crime, was used in calculation of the salient factor score, was used in calculating the severity of the offense behavior, or relates to charges for which a person was acquitted at trial. *See* Fla. Admin. Code. R. 23-21.010(2)(a)-(d). Further the aggravation must be supported by competent and persuasive evidence, defined as, "(a) That the information is specific as to the behavior alleged to have taken place; and, (b) The source of the allegation appears to be reliable." *See* Fla. Admin. Code R. 23-21.010(1).

Here, the sworn Pompano Beach probable cause affidavit provided by the Respondent in its appendix indicates that the medical examiner concluded that the victim denied as a result of blunt force trauma to the head. [ECF No. 11-5 at 12]. According to a witness who saw the victim and Petitioner arguing, he observed Petitioner, with blood on his hands, frantically search for and pick up a large corner stone in the shape of a pyramid and return to where the victim was located. [*Id.* at 13-14]. Blood spatter was found on the wall and it appeared that the victim had suffered a severe injury, possibly from her head contacting cement. [*Id.* at 12]. Because the probable cause affidavit supported the use of a blunt force object as an aggravating factor in determining Petitioner's PPRD, it was not error for the Commission to consider it, nor was the Commission required to rely on evidence solely presented to the jury. Accordingly, Petitioner's claim on this issue is without merit. Even if Petitioner could somehow show that the Probable Cause Affidavit did

not satisfy the requirements of Fla. Admin. Code R. 23-21.010(2), such a claim does not rise to the level of a federal constitutional issue cognizable upon habeas review. It is purely a matter of state law. Claim 2 should be denied.[4]

In **claim 3**, Petitioner asserts that there was no signature on his commission response to his administrative review request nor was it stamped. [ECF No. 1 at 6]. Petitioner is correct that there was no signature or stamp on the response to his administrative review request. [ECF No. 11-8 at 2]. However, he fails to cite to any provision of Florida law or regulation that requires that a signature be present on a commission response or that it be stamped. As noted by the Respondent, neither is required under Fla. Admin. Code. R. 23-21.012 or Fla. Stat. § 947.173(2), which only requires that the inmate be notified of the Commission's decision relevant to the administrative request for review of the PPRD. Claim 3 should be summarily denied.

In **claim 4**, Petitioner asserts that he was not given notice of the time and place for the hearing. [ECF No. 1 at 8]. Because of this, Petitioner claims that there was no way for his family to be present at the hearing. [*Id.* at 10]. Fla. Stat. § 947.16(5) requires that only that the Commission establish the PPRD within 90 days after the

[4] To the extent that Petitioner provides first-time factual support for this claim, or others, in his traverse [ECF No. 13], he cannot do so. A traverse is not the proper vehicle to raise for the first-time facts to support a ground for relief. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir.1994)

initial interview. *See* Fla. Stat. § 947.16(5). In Petitioner's case, the initial interview was held by the Commission on June 29, 2017. [ECF No. 11-6 at 3], and his PPRD was established less than 90 days later on August 9, 2017. [ECF No. 11-7 at 2].

Here, Petitioner does not assert that he was unable to participate in the PPRD hearing despite allegedly not being informed of its time and place. He claims that he was deprived of the opportunity to have family members present at the hearing, but fails to allege any facts to indicate who those family members are or what they would have testified to at the hearing. Petitioner does not even allege that he requested a postponement of the hearing in order to present any witnesses. Lastly, he fails to cite to any part of the Florida Administrative Code that supports his claim. Such conclusory allegations are insufficient to establish a due process violation. *See e.g. Gaines v. Jones*, 20165 WL 9131998, *12 (N.D. Fla. Dec. 6, 2016) (stating that in the context of a parole review, a "due process claim is not presented by a conclusory allegation") (citing *Slocum*, 678 F.2d at 942). Claim 4 should be denied.

In **claim 5**, Petitioner asserts that he should not have been given an aggravating factor for sexual battery because he was told, when he entered his guilty plea to the battery charge, that the conviction would be removed from his record by the judge. [ECF No. 1 at 11]. Review of the records provided by the Respondent reveals that Petitioner pled guilty to sexual battery/slight force in September 1995 for a crime that occurred in July 1992, months before the murder for which he

received the life sentence. [ECF No. 11-4 at 2-3, 13-14]. The signed guilty plea waiver indicates that Petitioner understood he was giving up his right to a trial as a result of his guilty plea. [*Id.* at 13-14]. In a letter from the prosecutors regarding the plea agreement, the prosecutors acknowledged that the agreement was for Petitioner to plead guilty to the sexual battery and receive credit for time served. [*Id.* at 15]. At the time of the agreement, Petitioner had already been sentenced for the first-degree murder, the conviction regarding his present incarceration. [*Id.*]. His case, however, remained on appeal. [*Id.*]. Accordingly, the prosecutors explained that if Petitioner's first-degree murder conviction was somehow reversed, he would be able to withdraw his guilty plea in the sexual battery case. [*Id.*]. Petitioner fails to provide any evidence to suggest that his first-degree murder conviction was vacated or otherwise overturned on appeal, and the sexual battery conviction remains on his record. Accordingly, his conviction for sexual battery was properly used as an aggravating factor in determination of his PPRD. Claim 5 should be denied.

In **claim 6**, Petitioner alleges that the Commission erroneously determined that he is an unreasonable risk to others. [ECF No. 1 at 13]. He claims that he has completed multiple courses during his incarceration, has had overall satisfactory work ratings from the security staff, and does not have any detainers for escape or attempted escape. [*Id.*]. Fla. Stat. § 947.174(1)(b) provides that if a parole eligible inmate is convicted of murder, the Commission may schedule his next interview for

within seven years, if it finds that parole release is not reasonable to expect in the following years. *See* Fla. Stat. § 947.174(1)(b). Petitioner has a serious and violent criminal history, including convictions for first degree murder and sexual battery. [ECF No. 11-6]. Petitioner's institutional disciplinary history also shows nine disciplinary infractions, including violations for possession of weapons, fighting, and disorderly conduct. [ECF No. 11-2 at 5]. Thus, the determination that Petitioner was an unreasonable risk to others was well within the Commission's discretion. *See Damiano*, 785 F.2d at 932.

Moreover, review of Petitioner's PPRD document shows that the Commission set his next interview date to be held within 7 years, not only because he was an unreasonable risk of others, but also because he used a deadly weapon during the course of the murder, committed multiple separate offenses, and had unsatisfactory institutional conduct. [ECF No. 11-7 at 2]. Accordingly, even if the Court erroneously determined that he was an unreasonable risk to others, three other factors still weighed in favor of delaying Petitioner's next interview for 7 years. This claim does not constitute a due process violation. Claim 6 should be denied.

In sum, because the denial of earlier release on parole does not in any way lengthen Petitioner's sentence or impose upon him a significant hardship in relation to the ordinary incidents of prison life and because the Commission in no way treated Petitioner arbitrarily and capriciously by relying upon false information to deny

parole, Petitioner suffered no due process violation. *Sandin v. Conner*, 515 U.S. at 483; *Greenholtz, supra. See also Nyberg v. Crawford*, 290 F. App'x 209, 210 (11th Cir. 2008) (Nyberg's right to due process was not violated as he failed to show the Commission knowingly relied upon false information to set his PPRD). Since the Commission's determination of Petitioner's PPRD did not violate Petitioner's due process rights, he is not entitled to federal habeas relief.

VII. Evidentiary Hearing

In a habeas corpus proceeding, the burden is on the Petitioner to establish the need for a federal evidentiary hearing. *See Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011). To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, are not refuted by the record and may entitle a petitioner to relief. *Schriro v. Landrigan,* 550 U.S. 465, 474 (2007); *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1318-19 (11th Cir. 2016), *cert. den'd*, 137 S. Ct. 2245 (2017). The pertinent facts of this case are fully developed in the record before the Court. Because this Court can "adequately assess [petitioner's] claim[s] without further factual development," *Turner v. Crosby*, 339 F.3d 1247, 1275 (11th Cir. 2003), an evidentiary hearing is not warranted here.

VIII. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his

petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1); *Harbison v. Bell,* 556 U.S. 180, 183 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the Petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, the Petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Upon consideration of the record, this court should deny a certificate of appealability. Notwithstanding, if Petitioner does not agree, he may bring this argument to the attention of the District Judge in objections.

IX. Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be denied, that no Certificate of Appealability issue and the case be closed.

Any party who objects to this recommendation or anything in it must, within

fourteen (14) days of the date of service of this document, file specific written objections with the court. Failure to do so will bar a *de novo* determination by the District Judge of anything in the recommendation and will bar an attack, on a appeal, of the factual findings of the Magistrate Judge. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn,* 474 U.S. 140, 149 (1985).

SIGNED this 17th day of August, 2020.

UNITED STATES MAGISTRATE JUDGE

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