

8 Fed.Appx. 857, 2001 WL 209211 (C.A.10 (Kan.)), 2001 DJCAR 1230
(Not Selected for publication in the Federal Reporter)
(Cite as: 8 Fed.Appx. 857, 2001 WL 209211 (C.A.10 (Kan.)))

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
 Tenth Circuit.
 Mikel TRUMBLY, Petitioner-Appellant,
 v.
 KANSAS PAROLE BOARD; Attorney General of
 Kansas, Respondents-Appellees.
 No. 00-3083.
 March 2, 2001.

State inmate petitioned for writ of habeas corpus after he was denied parole. The United States District Court for the District of Kansas denied petition, and inmate sought certificate of appealability (COA). The Court of Appeals, Stephen H. Anderson, Circuit Judge, held that: (1) inmate did not have protected liberty interest in his parole; (2) application of amended Kansas parole statute that was not in effect at time inmate was convicted was not an ex post facto violation; and (3) reasons given by Kansas Parole Board for denying inmate parole were sufficiently specific to comply with the requirements of Kansas statute requiring the Board to state in writing the reasons for not granting parole.

Certificate denied and appeal dismissed.

West Headnotes

[1] Habeas Corpus 197 ↪818

197 Habeas Corpus
 197III Jurisdiction, Proceedings, and Relief
 197III(D) Review
 197III(D)1 In General

197k817 Requisites and Proceedings
 for Transfer of Cause

197k818 k. Certificate of Probable Cause. Most Cited Cases
 Substantial showing that habeas petitioner has been denied a constitutional right, as required for certificate of appealability, can be made if petitioner demonstrates that the issues are debatable among jurists, that a court could resolve the issues differently, or that the questions presented deserve further proceedings. 28 U.S.C.A. § 2253(c)(2).

[2] Constitutional Law 92 ↪4838

92 Constitutional Law
 92XXVII Due Process
 92XXVII(H) Criminal Law
 92XXVII(H)12 Other Particular Issues
 and Applications
 92k4838 k. Parole. Most Cited Cases
 (Formerly 92k272.5)

Pardon and Parole 284 ↪46

284 Pardon and Parole
 284II Parole
 284k45 Authority or Duty to Grant Parole or Parole Consideration
 284k46 k. Parole as Right or Privilege.
 Most Cited Cases
 There is no constitutional right to conditional release prior to the expiration of a valid sentence; nonetheless, a state may create a liberty interest by using mandatory language in a statute which restricts the parole authority's discretion or creates a presumption of release. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 ↪4838

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(Formerly 92k272.5)

Pardon and Parole 284 ↪46

284 Pardon and Parole

284II Parole

284k45 Authority or Duty to Grant Parole or Parole Consideration

284k46 k. Parole as Right or Privilege.

Most Cited Cases

Inmate agreement stating that parole release was "in part, contingent upon satisfactory completion" of certain programs did not create a protected liberty interest in parole; agreement merely extended possibility of parole, rather than mandating inmate's release upon the successful completion of the programs. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ↪4838

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)12 Other Particular Issues and Applications

92k4838 k. Parole. Most Cited Cases

(Formerly 92k272.5)

Kansas statute establishing inmate program agreement program does not confer a liberty interest in parole. U.S.C.A. Const.Amend. 14; K.S.A. 75-5210a.

[5] Constitutional Law 92 ↪4838

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)12 Other Particular Issues and Applications

92k4838 k. Parole. Most Cited Cases

(Formerly 92k272.5)

Pardon and Parole 284 ↪46

284 Pardon and Parole

284II Parole

284k45 Authority or Duty to Grant Parole or

Parole Consideration

284k46 k. Parole as Right or Privilege.

Most Cited Cases

Statute giving Kansas Adult Authority the power to release inmates who were eligible for parole when there was a reasonable probability that such inmates would not be a detriment to the community did not create liberty interest in parole. U.S.C.A. Const.Amend. 14; K.S.A. 22-3717 (1978).

[6] Federal Courts 170B ↪386

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(B) Decisions of State Courts as Authority

170Bk386 k. State Constitutions and Statutes, Validity and Construction. Most Cited Cases
 Kansas Supreme Court's interpretation of its own statutes is binding on Court of Appeals absent some conflict with federal law or overriding federal interest.

[7] Constitutional Law 92 ↪2823

92 Constitutional Law

92XXIII Ex Post Facto Prohibitions

92XXIII(B) Particular Issues and Applications

92k2823 k. Parole. Most Cited Cases

(Formerly 92k203)

Pardon and Parole 284 ↪42.1

284 Pardon and Parole

284II Parole

284k42 Constitutional and Statutory Provisions

284k42.1 k. In General. Most Cited Cases

Application of amended Kansas parole statute that was not in effect at time inmate was convicted was not an ex post facto violation, where neither amended nor original statute created a liberty interest in parole. U.S.C.A. Const. Art. 1, § 9, cl. 3, § 10, cl. 1; K.S.A. 22-3717(4) (1978).

[8] Pardon and Parole 284 ↪46

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284 Pardon and Parole
 284II Parole
 284k45 Authority or Duty to Grant Parole or Parole Consideration
 284k46 k. Parole as Right or Privilege.
 Most Cited Cases

Pardon and Parole 284 ↪ 47

284 Pardon and Parole
 284II Parole
 284k45 Authority or Duty to Grant Parole or Parole Consideration
 284k47 k. Discretionary Nature. Most Cited Cases
 Parole is a matter of grace under Kansas law, and parole decisions lie within the discretion of the paroling authority.

[9] Pardon and Parole 284 ↪ 61

284 Pardon and Parole
 284II Parole
 284k57 Proceedings
 284k61 k. Reasons for Decision. Most Cited Cases
 Reasons given by Kansas Parole Board for denying inmate parole, including the serious nature and circumstances of his crime and the violent nature of his crime, were sufficiently specific to comply with the requirements of Kansas statute requiring the Board to state in writing the reasons for not granting parole. K.S.A. 22-3717(k).

*858 Before BRISCOE, ANDERSON, and MURPHY, Circuit Judges.

ORDER AND JUDGMENT^{FN*}

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nev-

ertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

STEPHEN H. ANDERSON, Circuit Judge.

**1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist 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.

[1] Petitioner seeks a certificate of appealability (COA) in order to appeal the denial of his habeas corpus action brought pursuant to 28 U.S.C. § 2254. We note at the outset that because this action did not challenge the validity of his conviction or sentence, but rather its execution (specifically the allegedly unconstitutional denial of parole), the matter should have been characterized as one brought pursuant to 28 U.S.C. § 2241. See *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir.2000). Petitioner needs a COA in either case. See *id.* at 869. Only if he has made the substantial showing that he has been denied a constitutional right is he entitled to a COA. See 28 U.S.C. § 2253(c)(2). This showing can be made if petitioner demonstrates that the issues are debatable among jurists, that a court could resolve the issues differently, or that the questions presented deserve further proceedings. See *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000). We have jurisdiction under 28 U.S.C. § 1291, and we review the district court's legal conclusions de novo. See *Patterson v. Knowles*, 162 F.3d 574, 575 (10th Cir.1998).

Petitioner is serving two sentences of life imprisonment for first degree murder, for which he has been incarcerated since 1979. He was first considered for parole in 1994, at which point he was passed to 1997. He appealed that decision to the Kansas Parole Board, after which he pursued habeas corpus relief in the state courts before commencing this action.

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The issues he raises on appeal are the same as those presented to the district court. He claims that based on the Kansas statutes in effect at the time of his incarceration, he has a protected liberty interest in parole based on his completion of the Inmate Program Agreement; that *859 he also has a protected liberty interest in parole because the Kansas statutes in effect at the time of the offense contained mandatory language and limited the discretion of the parole board; the failure of the parole board to consider him for parole under the provisions in effect at the time of his offense violated ex post facto principles; and the parole board failed to provide both sufficient reasons for denying him parole and an impartial forum.

[2] There is no constitutional right to conditional release prior to the expiration of a valid sentence. See *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). Nonetheless, a state may create a liberty interest by using mandatory language in a statute which restricts the parole authority's discretion or creates a presumption of release. See *id.* at 11-12.

[3][4] The inmate agreement petitioner signed states that the inmate understands that his parole release is “in part, contingent upon [his] satisfactory completion of [certain] programs.” R. doc. 2, ex. A. (Emphasis added.) Nothing in the agreement mandates an inmate's release upon the successful completion of programs. Rather, the agreement merely extends the possibility of parole. See *Greenholtz*, 442 U.S. at 11. Moreover, the clear language of the agreement does not constitute a promise of parole upon completion of the program agreement. *Payne v. Kan. Parole Bd.*, 20 Kan.App.2d 301, 887 P.2d 147, 151 (1994). Likewise, the statute establishing the program agreement program, Kan.Stat. Ann. § 75-5210a, does not confer a liberty interest in parole.

**2 [5][6] Petitioner also claims that he has a liberty interest in parole based on Kan. Stat. Ann. § 22-3717 (1978), which directed the Kansas Adult

Authority (predecessor of the present Kansas Parole Board) to consider all pertinent information regarding the inmate and his offense and provided that the authority had the power to release inmates who were eligible when there was a reasonable probability that such inmates would not be a detriment to the community, but with the caveat that parole shall only be ordered in the best interest of the inmate. Contrary to petitioner's arguments, this language is in no way similar to the Montana statute determined to have created a liberty interest which provided that subject to certain restrictions, the parole board shall release or parole confined persons when there is a reasonable probability the prisoner can be released without detriment to the prisoner or the community. See *Bd. of Pardons v. Allen*, 482 U.S. 369, 376, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987) (quotations omitted). The requirement that the paroling authority shall consider all pertinent information does not equate to the “shall release ... when” requirement of *Allen* or the “shall order ... release unless” language of *Greenholtz*. See *Greenholtz*, 442 U.S. at 11. Rather, “the Kansas statute merely empowers the Board to place one on parole when the Board, in the exercise of its discretion, believes that the interests of the prisoner and the community will be served by such action.” *Gilmore v. Kan. Parole Bd.*, 243 Kan. 173, 756 P.2d 410, 414 (1988). And, petitioner's arguments notwithstanding, the Kansas Supreme Court's interpretation of its own statutes is binding on this court “absent some conflict with federal law or overriding federal interest.” *Sac & Fox Nation v. Pierce*, 213 F.3d 566, 577 (10th Cir.2000).

[7] Petitioner next claims that the Kansas Parole Board violated the constitutional prohibition against ex post facto laws by failing to consider his parole application under the laws in effect at the time of his offense and prior to the 1988 amendment*860 to Kan. Stat. Ann. § 22-3717(4) (1978), which in pertinent part read:

[a] parole shall be ordered only for the best interest of the inmate and not as an award of clemency.

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Parole shall not be considered a reduction of sentence or a pardon. An inmate shall be placed on parole only when the authority believes that the inmate is able and willing to fulfill the obligations of a law-abiding citizen....

R. doc 2, ex. C.

In petitioner's case, the Kansas Court of Appeals held that because he was not eligible for parole until 1994, his initial parole hearing was governed by the 1988 amendment, which allowed release on parole of those eligible when the board believes the inmate is able and willing to fulfill the obligations of a law abiding citizen. *See* R. doc 6, attach. B(2) (Kansas Court of Appeals Memorandum Opinion of Sept. 1, 1995) at 3. The state court of appeals determined that petitioner was in no way disadvantaged by the application of the 1988 version of the statute. *See id.* at 3-4. Moreover, even assuming the applicability of the 1978 version of the statute, there was no liberty interest in parole created under that version either. *Bookless v. McKune*, 22 Kan.App.2d 829, 926 P.2d 661, 663-64 (1996).

****3** [8] Parole is a matter of grace under Kansas law, and parole decisions lie within the discretion of the paroling authority. *See Lamb v. Kan. Parole Bd.*, 15 Kan.App.2d 606, 812 P.2d 761, 763 (1991). Because petitioner cannot demonstrate how he was disadvantaged by the application of the 1988 amendment, his ex post facto argument must fail. As the Kansas Court of Appeals noted, “[t]here being no liberty interest in parole, it cannot be argued that the denial of parole, whenever it is done or under whatever statute involved, disadvantages a prisoner.” R. doc. 6, attach. B(2) (Kansas Court of Appeals Memorandum Opinion) at 4.

[9] Finally, petitioner claims that the reasons given for denying his parole application are constitutionally inadequate and that he was denied an impartial hearing because the Board failed to grant his parole. The reasons given for the parole denial were “Pass reasons: serious nature and circumstances of crime; violent nature of crime; objections regarding

parole.” R. Doc. 6, attach. C. The reasons given were sufficiently specific to comply with the requirements of Kan. Stat. Ann. § 22-3717(k) (requiring that “if the board determines that other pertinent information regarding the inmate warrants the inmate's not being released on parole, the board shall state in writing the reasons for not granting the parole”). *See also Payne*, 887 P.2d at 152. Petitioner's argument that he was denied a fair and impartial hearing is without legal merit; he does not allege any improper procedure used by the board, nor does he claim any arbitrary or capricious action directed specifically at him.

Petitioner has failed to make the required showing of the denial of a constitutional right. Accordingly, the certificate of appealability is DENIED, and the appeal is DISMISSED.

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END OF DOCUMENT

Westlaw

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(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.
Steven A. GILKEY, Appellant,
v.
KANSAS PAROLE BOARD, Appellee.
No. 96,624.

Dec. 22, 2006.
Review Denied March 28, 2007.

Appeal from Reno District Court; Timothy J. Chambers, judge. Opinion filed December 22, 2006. Affirmed.

Steven A. Gilkey, appellant pro se.

Robert G. Allison-Gallimore, assistant attorney general, and Phill Kline, attorney general, for appellee.

Before MALONE, P.J., GREEN and BUSER, JJ.

MEMORANDUM OPINION
PER CURIAM.

****1** Steven Gilkey appeals from the trial court's dismissal of his K.S.A. 60-1501 petition for failure to state a claim upon which relief can be granted. Gilkey argues that the trial court erred in dismissing his petition without hearing the merits of the case. Finding no reversible error, we affirm.

Gilkey's parole was revoked following a revocation hearing in April 2004 for four violations of the terms of his parole. Gilkey was provided with a final action notice that notified him of the decision to revoke his parole and set forth the four violations supporting the revocation. At a hearing in March 2005, the Kansas Parole Board (KPB) continued the consideration of Gilkey's parole for measurement of

Gilkey's risk to reoffend and for an assessment for substance abuse and mental health treatment. Another hearing was conducted in May 2005, and the KPB continued the consideration of Gilkey's parole for "LSI-R and screening for Therapeutic Community and/or CDRP."

After a hearing in June 2005, the KPB passed Gilkey for parole until April 2006. The following reasons were given: history of criminal activities; 10 incarcerations in prison; failure on parole; and objections to parole. The KPB recommended that Gilkey enter and successfully complete "therapeutic community." Gilkey's next hearing occurred in March 2006. The KPB passed Gilkey for parole until April 2009, finding that it was not reasonable to expect that parole would be granted at a hearing held before that date. The KPB listed the following pass reasons: serious nature and circumstances of crimes; history of criminal activities; 10 times in prison; failure on parole; and disciplinary reports. In addition, the KPB listed the following extended pass reasons: Gilkey had not cooperated on a long term plan to resolve his physical needs and to resolve his substance abuse.

In April 2006, Gilkey petitioned for relief under K.S.A. 60-1501. Gilkey contended that the KPB had denied his right to equal protection, his right to due process, and his rights under the Americans with Disabilities Act (ADA). In a written order, the trial court dismissed Gilkey's petition for failure to state a claim upon which relief can be granted. Moreover, the trial court determined that the KPB complied with the applicable statutes and the KPB's actions were not arbitrary or capricious.

On appeal, Gilkey contends that the trial court erred in dismissing his K.S.A. 60-1501 petition without hearing the merits of his case. Proceedings on a K.S.A. 60-1501 petition are not subject to the ordinary rules of civil procedure. To avoid summary dismissal, a K.S.A. 60-1501 petition must allege shocking and intolerable conduct or continuing

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mistreatment of a constitutional stature. *Bankes v. Simmons*, 265 Kan. 341, 349, 963 P.2d 412, *cert. denied* 525 U.S. 1060 (1998).

When reviewing a district court's order dismissing a K.S.A. 60-1501 petition for failure to state a claim upon which relief can be granted, an appellate court must accept the facts alleged by the plaintiff as true. The court must determine whether the alleged facts and all the inferences arising therefrom state a claim, not only on the theories set forth by the plaintiff, but on any possible theory. *Hill v. Simmons*, 33 Kan.App.2d 318, 320, 101 P.3d 1286 (2004).

Untimely Allegations

****2** As the KPB points out, the trial court interpreted Gilkey's K.S.A. 60-1501 petition as "objecting to the petitioner's denial of parole and deferral of parole consideration to April 2009." These decisions by the KPB were contained in an action notice dated March 27, 2006. Nevertheless, it appears that in his K.S.A. 60-1501 petition and also in his appellate brief, some of Gilkey's arguments relate to the KPB's decision to revoke his parole and to the KPB's other actions occurring before March 2006. The State correctly points out that such challenges are untimely under K.S.A. 60-1501(b). K.S.A. 60-1501(b) requires that a petition must be filed within 30 days from the date of the final action, unless the inmate is attempting to exhaust administrative remedies. The final action notice in which the KPB revoked Gilkey's parole was issued in May 2004. Other decisions by the KPB were contained in action notices from March 2005, May 2005, and June 2005. In March 2006, the KPB issued its decision to pass Gilkey for parole until April 2009. Gilkey filed his K.S.A. 60-1501 petition in April 2006. Gilkey's K.S.A. 60-1501 petition was timely only as to the KPB's March 2006 decision.

March 2006 Decision to Deny Parole

Gilkey challenges the KPB's March 2006 decision

to deny him parole. Gilkey's arguments center on Americans with Disabilities Act (ADA) grounds, equal protection grounds, and due process grounds. Each of these grounds will be discussed separately.

Americans with Disabilities Act Grounds

Gilkey contends that he, as a disabled individual, was discriminated against in violation of the ADA when the KPB failed to grant him parole. Title II of the ADA, which prohibits public entities from discriminating against a "qualified individual with a disability" on account of such disability, applies to inmates in state prisons. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 208, 141 L.Ed.2d 215, 118 S.Ct. 1952 (1998); see also *Armstrong v. Wilson*, 124 F.3d 1019, 1025 (9th Cir.1997) (holding that ADA applies to inmates and parolees in state correctional system). Although it is unclear from Gilkey's K.S.A. 60-1501 petition and appellate brief the extent of his disability, the record indicates that Gilkey suffers from degenerative disc disease; arthritic changes and spurring of the back; pain; and a history of treatment for substance abuse.

In arguing that the ADA was violated in this case, Gilkey cites *Thompson v. Davis*, 295 F.3d 890, 898 (9th Cir.2002), *cert. denied* 538 U.S. 921 (2003), where the Ninth Circuit Court of Appeals held that under the ADA, a "parole board may not categorically exclude a class of disabled people from consideration for parole because of their disabilities." Thus, in order to come within the rule in *Thompson*, Gilkey needed to show that the KPB categorically excluded a class of disabled people from consideration for parole because of their disabilities. Nevertheless, in arguing that the ADA was violated in this case, Gilkey states that the KPB, while denying him parole, granted parole to other prisoners with disabilities. Gilkey's argument runs counter to the rule in *Thompson*.

****3** In his brief, Gilkey focuses on the fact that he completed some of the KPB's recommendations, such as the mental health testing and the "LSI-R"

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test, but was still denied parole. Nevertheless, Gilkey was never told in the action notices that he would be granted parole if he completed the KPB's recommendations. The action notices clearly stated: "IF YOU ARE PASSED TO A LATER DATE: The PAROLE BOARD will consider your case further during the month designated. A good institutional record and a sound parole plan are essential requirements for release on parole." A "Program Classification Review" document in the record shows that Gilkey was aware of and struggling with the fact that he was not guaranteed parole upon satisfactory completion of the KPB's recommendations. Moreover, this document indicates that Gilkey had not been completely cooperative, as he told the person doing the review that he might refuse to comply with the KPB's recommendations and just serve his sentence to 2013.

The pass reasons provided by the KPB in the March 2006 action notice are consistent with the factors under K.S.A.2005 Supp. 22-3717. K.S.A.2005 Supp. 22-3717(h)(2) requires the KPB to consider all pertinent information regarding the inmate, including but not limited to the factors specifically listed under that provision. The circumstances of the offense; the presentence report; the prior social history and criminal record of the inmate; and the conduct and attitude of the inmate in prison are all listed as factors under K.S.A.2005 Supp. 22-3717(h)(2). The documents submitted by Gilkey to support his K.S.A. 60-1501 petition indicate that the KPB's findings were based on an individualized assessment of Gilkey that is required under K.S.A.2005 Supp. 22- 3717(h)(2).

Equal Protection Grounds

Next, Gilkey argues that his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution have been violated because the KPB denied him parole but did not deny parole to other indistinguishable and similarly situated individuals. "The concept of equal protection of the law is one which 'emphasizes disparity in treatment by a State between classes of individu-

als whose situations are arguably indistinguishable.' [Citation omitted.]" *State v. Mueller*, 271 Kan. 897, 903, 27 P.3d 884 (2001), *cert. denied* 535 U.S. 1001 (2002). Gilkey seems to contend that all individuals convicted of crimes are indistinguishable for equal protection purposes because they become "slaves" to the government.

In responding to Gilkey's equal protection argument, the KPB cites *Templeman v. Gunter*, 16 F.3d 367, 371 (10th Cir.1994), where the Tenth Circuit Court of Appeals, in addressing the argument that an inmate was not treated the same as similarly situated individuals when he was moved to administrative segregation, stated that "it is 'clearly baseless' to claim that there are other inmates who are similar in every relevant respect. [Citation omitted .]" The court recognized that inmates might be classified differently due to slight differences in their histories and also because some present a higher risk of future misconduct than others. The court concluded that the plaintiff's claim that there were no relevant differences between him and other inmates that might account for their disparate treatment was not plausible or arguable. 16 F.3d at 371.

**4 The KPB also cites *Houtz v. Deland*, 718 F.Supp. 1497, 1501-02 (D.Utah 1989), where the court stated as follows:

"Each inmate brings a different set of circumstances, including his history, his crimes, and his rehabilitative progress while in prison, to the parole hearing. Parole decisions, by their very nature, require the Board of Pardons to look at the individual circumstances of the prisoner and his crimes. Only in this way can the Board decide if the prisoner before it is ready to reenter society."

As the KPB asserts, because Gilkey was not situated similarly as other inmates nor was he arguably indistinguishable from other inmates for purposes of parole, he has failed to present a situation in which the Equal Protection Clause would be implicated.

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Due Process Grounds

Finally, Gilkey contends that he was denied his due process rights. "In order to establish a cognizable claim for a due process violation, the petitioner must establish a valid liberty or property interest in his or her incarceration status which has been infringed by the State without due process of law." *Laubach v. Roberts*, 32 Kan.App.2d 863, Syl. ¶ 8, 90 P.3d 961 (2004). Holding that a previous version of K.S.A.2005 Supp. 22-3717 did not create a liberty interest in parole, our Supreme Court in *Gilmore v. Kansas Parole Board*, 243 Kan. 173, 180, 756 P.2d 410, cert. denied 488 U.S. 930 (1988), stated as follows:

"Upon consideration of the entire statutory scheme in Kansas, we conclude that the various factors which the Board is directed to consider are procedural guidelines and not a limitation upon the Board's discretion. The Board is empowered to grant parole, but only in the exercise of its discretion, after considering the facts of the offense and the background, record, history, and situation of each prisoner. While the Board's action in revoking parole involves a liberty interest, *Johnson v. Stucker*, 203 Kan. 253, 259, 453 P. 2d 35, cert. denied 396 U.S. 904 (1969), and *Morrissey v. Brewer*, 408 U.S. 471, 481, 482, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972), the Kansas parole statute does not give rise to a liberty interest when the matter before the Board is the *granting* or *denial* of parole to one in custody. Parole, like probation, is a matter of grace in this state. It is granted as a privilege and not as a matter of fundamental right. *State v. DeCourcy*, 224 Kan. 278, Syl. ¶ 3, 580 P.2d 86 (1978). We hold that K.S.A.1987 Supp. 22-3717 does not create a liberty interest in parole."

Although some of the provisions under K.S.A.2005 Supp. 22-3717 have changed from those under K.S.A.1987 Supp. 22-3717, K.S.A.2005 Supp. 22-3717(g) and (h) still gives the KPB discretion to grant or deny parole. K.S.A.2005 Supp. 22-3717 sets certain timelines when an inmate is *eligible* for parole. Nevertheless, K.S.A.2005 Supp. 22-3717

does not establish an inmate's right to the grant of parole.

Although inmates do not have a liberty interest in parole, the decision of the KPB can be reviewed in a K.S.A. 60-1501 petition as to whether the KPB complied with the applicable statutes and whether the decision was arbitrary and capricious. A habeas corpus action is the appropriate procedure to review a decision by the KPB. Nevertheless, parole is a privilege and a matter of grace, and the trial court's review of the KPB's denial of parole is limited to whether it complied with applicable statutes and whether its action was arbitrary and capricious. *Torrence v. Kansas Parole Board*, 21 Kan.App.2d 457, 458, 904 P.2d 581 (1995).

****5** In his brief, Gilkey does not allege that the KPB failed to comply with any of the statutory provisions concerning the grant or denial of parole. Instead, Gilkey cites to three administrative regulations, K.A.R. 45-500- 2(g), K.A.R. 44-15-101, and K.A.R. 44-16-104. It is unclear why Gilkey cites to these regulations. K.A.R. 45-500-2(g) requires that when an offender's release is revoked, the KPB must give the offender "a written statement as to the evidence relied upon and reasons for revoking the release." As discussed above, the KPB's decision revoking Gilkey's parole is not at issue here. Moreover, even if it were at issue, the record establishes that the KPB did comply with K.A.R. 45-500-2(g). K.A.R. 44-15-101 relates to the grievance procedure for inmates or parolees. K.A.R. 44-16-104 was revoked in 2002. None of these regulations apply to the KPB's March 2006 decision.

Here, the trial court found that the KPB complied with the applicable statutes and that the actions of the KPB were not arbitrary or capricious. An appellate court reviews a trial court's decision on a K.S.A. 60-1501 petition to determine whether the trial court's factual findings are supported by substantial competent evidence and whether those findings are sufficient to support the court's conclusions of law. *Rice v. State*, 278 Kan. 309, 320, 95 P.3d 994 (2004). In its March 2006 action notice, the

147 P.3d 1096 (Table)

147 P.3d 1096 (Table), 2006 WL 3775292 (Kan.App.)

Unpublished Disposition

(Cite as: 147 P.3d 1096, 2006 WL 3775292 (Kan.App.))

KPB specifically listed the factors on which it was relying to not grant Gilkey parole at that time. These factors were consistent with the information to be considered under K.S.A.2005 Supp. 22-3717(h)(2). There is no indication that the trial court's decision was arbitrary or capricious.

Affirmed.

147 P.3d 1096 (Table), 2006 WL 3775292

(Kan.App.), Unpublished Disposition

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Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA 10 Rule 32.1)

United States Court of Appeals,
 Tenth Circuit.
 Alvin PARKER, Petitioner-Appellant,
 v.
 Walter DINWIDDIE, Warden, Respondent-Appellee.
 No. 08-6124.
 Jan. 27, 2009.

Alvin Parker, Hominy, OK, pro se.

William R. Holmes, Attorney General for the State of Oklahoma, Oklahoma City, OK, for Respondent-Appellee.

Before O'BRIEN, McKAY, and GORSUCH, Circuit Judges.

ORDER DENYING CERTIFICATE OF APPEALABILITY AND DISMISSING APPEAL

TERRENCE L. O'BRIEN, Circuit Judge.

*1 Alvin Parker, a state prisoner proceeding pro se,^{FN1} seeks a Certificate of Appealability (COA) to appeal from the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.^{FN2} We deny a COA.

FN1. Pro se pleadings are liberally construed. *Ledbetter v. City of Topeka, Kan.*,

318 F.3d 1183, 1187 (10th Cir.2003)

FN2. Parker originally filed his petition using a § 2254 form but the district court treated his petition as a § 2241 petition in accordance with *Hamm v. Saffle*, 300 F.3d 1213, 1216 (10th Cir.2002).

I. Background

Parker filed a habeas corpus petition claiming the Oklahoma Pardon and Parole Board denied him due process when the Board considered false information in refusing to recommend him for specialized parole. *See* Okla. Stat. tit. 57, § 365 (specialized parole). The State responded to Parker's petition with a motion to dismiss for failure to state a claim upon which relief could be granted. The magistrate judge issued a report and recommendation recommending the state's motion be granted because Parker did not have a liberty interest under the Oklahoma parole statute. Parker objected arguing he had a constitutionally protected liberty interest under § 365, the specialized parole statute. He claimed the more specific statute affords rights different from those in the general parole statute, Okla. Stat. tit. 57, § 332. He further argued, even absent a liberty interest, he had a due process right not to be denied parole based on false information. The district court rejected his arguments.

Parker filed a motion to alter or amend the judgment followed by a motion to amend his petition to add another claim. The district court denied these motions and denied Parker's request for a COA.^{FN3} Parker renews his request for a COA with this Court.

FN3. The district court granted Parker's motion to proceed in forma pauperis on appeal.

II. DISCUSSION

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A COA is a jurisdictional pre-requisite to our review. *Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir.2000). We will issue a COA only if Parker makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make this showing, he must establish that “reasonable jurists could debate whether ... the petition should have been resolved [by the district court] in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

The district court denied Parker's petition because the Board's statutory discretion precluded the creation of a liberty interest in parole. Further, Parker failed to allege the state officials relied on admittedly false information in the decision to deny parole.

The resolution of Parker's claims is not subject to debate.

A. Liberty Interest

A state's parole statute can create a liberty interest in the expectancy of parole only when the statute's language and structure sufficiently limits the discretion of a parole board. See *Bd. of Pardons v. Allen*, 482 U.S. 369, 381 (1987) (determining a Montana parole statute created a liberty interest in the expectancy of parole by its use of mandatory language); *Greenholtz v. Inmates of the Neb. Penal & Corr'al. Complex*, 442 U.S. 1, 12 (1979) (determining a Nebraska parole statute's mandatory language created a liberty interest); *but see Jago v. Van Curen*, 454 U.S. 14, 20-21 (1981) (Ohio statute did not create a liberty interest in the expectancy of parole because parole decision is discretionary).

*2 The relevant Oklahoma parole statute provides:

A. Persons in the custody of the Department of Corrections sentenced for crimes committed prior to July 1, 1998, who meet the following guidelines may be considered by the Pardon and

Parole Board for a specialized parole:

[list of guidelines] ^{FN4}

FN4. The guidelines include the prisoner's relevant projected release date, the prisoner's completion of an available educational or rehabilitation program and a requirement the prisoner is not incarcerated for an offense for which parole is prohibited pursuant to law.

B. Upon an inmate becoming eligible for specialized parole it shall be the duty of the Pardon and Parole Board, with or without application being made, to cause an examination to be made of the criminal record of the inmate and to make inquiry into the conduct and the record of the inmate during confinement in the custody of the Department of Corrections.

C. Upon a favorable finding by the Pardon and Parole Board, the Board shall recommend to the Governor that the inmate be placed on specialized parole. If approved by the Governor, notification shall be made to the Department of Corrections that said inmate has been placed on specialized parole.

Okla. Stat. tit., 57 § 365. Citing no authority, Parker argues the words “favorable finding” in subsection C means a determination that the prisoner met the listed eligibility requirements. Coupled with the “shall recommend” language of subsection C, he argues the Board must recommend specialized parole for every eligible prisoner. He is wrong.

While the Board is required to make inquiry into the record of every eligible prisoner, it is not limited to the listed eligibility requirements in reaching a “favorable finding.” Parker's argument ignores the statutory requirement for the Board to “cause an examination to be made of the criminal record of the inmate and to make inquiry into the conduct and

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the record of the inmate during confinement.” Okla. Stat. tit., 57 § 365(B). Requiring consideration of criminal records as well as institutional conduct would be a hollow exercise absent considerable Board discretion in correlating those factors into an ultimate recommendation. See *Boutwell v. Keating*, 399 F.3d 1203, 1214 (10th Cir.2005) (“[W]hile the statute places restraints on eligibility for [Pre-Parole Conditional Supervision] placement, it in no way limits the Parole Board’s discretion as to which of the eligible inmates should be recommended.”).

Even more important is the permissive language of Okla. Stat. tit., 57 § 365(A): “Persons ... who meet the ... guidelines *may be considered* by the Pardon and Parole Board for a specialized parole.” (emphasis added). Meeting the eligibility requirements is a necessary but not always sufficient reason for the Board to recommend specialized parole. Since the Board has discretion, Parker has no liberty interest in receiving specialized parole.

B. Reliance on False Information

Parker failed to sufficiently support his due process claim regarding the board’s reliance on allegedly false information. In *Monroe v. Thigpen*, the Eleventh Circuit held although the Alabama parole statute did not confer a liberty interest in parole, the parole board violated a prisoner’s right to due process when it relied upon admittedly false information in determining whether to grant parole. 932 F.2d 1437, 1442 (11th Cir.1991). We have not adopted (and do not now adopt) the Eleventh Circuit’s due process construction but, even if we were to do so, Parker has not alleged the necessary facts to support his claim.

*3 The false information alleged by Parker is the testimony of the State’s expert, who has since been discredited. At Parker’s trial, the expert averred the forensic evidence linked Parker to commission of his crime. Parker now seems to allege the Board’s parole decision was based on his guilt, an improper

consideration because the verdict was based on false testimony. We have previously considered and rejected Parker’s claim that he was falsely convicted based upon tainted expert testimony. *Parker v. Sirmons*, 237 Fed. Appx. 334 (2007). That determination is not subject to reconsideration in this context. Not only has Parker failed to show the evidence of his guilt false, he has failed to allege any facts demonstrating the expert’s testimony was considered by the Board in denying his parole. Under *Monroe*, “prisoners do not state a due process claim by merely asserting that erroneous information *may* have been used during their parole consideration.” 932 F.2d 1442 (emphasis added). Other than connecting Parker to the crime for which he was convicted, he fails to allege how the expert testimony might be relevant to parole considerations.

We **DENY** Parker’s request for a COA and **DISMISS** his appeal. The “Petition for Writ of Extraordinary Writ of Habeas Corpus,” is **DENIED**.

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