

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

April 5, 2022

Christopher M. Wolpert
Clerk of Court

HUNTER ADAM MELNICK,

Petitioner - Appellant,

v.

COLORADO STATE BOARD OF
PAROLE,

Respondent - Appellee.

No. 22-1035
(D.C. No. 1:21-CV-00908-CMA)
(D. Colo.)

**ORDER DENYING CERTIFICATE
OF APPEALABILITY**

Before **PHILLIPS, MURPHY, and EID**, Circuit Judges.

Hunter Melnick, a Colorado state prisoner proceeding *pro se*, seeks permission to appeal the district court’s denial of his 28 U.S.C. § 2241 petition. The matter is before this court on his request for a certificate of appealability (“COA”). *See* 28 U.S.C. § 2253(c)(1)(A) (providing no appeal may be taken from a “final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court” unless the petitioner first obtains a COA); *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000) (holding § 2253(c)(1)(A)’s requirements apply when a state habeas petitioner is proceeding

under § 2241). Because Melnick has not made a “substantial showing of the denial of a constitutional right,” this court **denies** his request for a COA and **dismisses** this appeal. 28 U.S.C. § 2253(c)(2) (providing a COA “may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right”).

Melnick is serving an indeterminate sentence of three years to life with the Colorado Department of Corrections pursuant to his conviction for sexual assault. *See* Colo. Rev. Stat. §18-3-402(1)(a). The record reveals that Melnick has been released on parole several times and, each time, that parole has been revoked. In his § 2241 petition, Melnick sets out two claims. First, he asserts an entitlement to a new parole hearing based on the allegedly improper decision of the Colorado Parole Board (“CPB”) to defer his parole consideration for six months, from March of 2021 to September of 2021. The district court concluded Melnick’s claimed entitlement to a new parole hearing became moot when the CPB gave him a parole hearing in September of 2021. Second, Melnick asserted the CPB’s decision to defer his parole application until September 2021 was arbitrary and capricious, in violation of the Due Process clause. In denying this claim, the district court noted that under Colorado’s discretionary parole system, in general and as specifically applied to prisoners sentenced under Colorado’s Sex Offender Lifetime Supervision Act, parole denials do not implicate due process unless the

decision is so arbitrary and capricious as to amount to a constitutional violation. *See Schuemann v. Colo. State Bd. of Adult Parole*, 624 F.2d 172, 173 (10th Cir. 1980). The district court concluded Melnick’s claim failed to satisfy that standard because the CPB rationally relied on the inadequacy of Melnick’s parole plan and Melnick’s impending placement in specialized sex-offender treatment in deferring his parole hearing until September of 2021. Melnick seeks a COA to challenge the district court’s rulings.

A COA may issue if Melnick “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make this showing, he must demonstrate “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quotation omitted). In evaluating a request for a COA, it is not the role of this court to engage in a “full consideration of the factual or legal bases adduced in support of the claims.” *Id.* Instead, this court undertakes “a preliminary, though not definitive, consideration of the [legal] framework” applicable to each claim. *Id.* at 338. Melnick is not required to demonstrate his appeal will succeed to be entitled to a COA. He must, however, “prove something more than the absence of frivolity or the existence of mere good faith.” *Id.* (quotations omitted).

The district court’s resolution of Melnick’s § 2241 petition is not reasonably subject to debate. To the extent his appellate brief raises the issue, no reasonable jurist would doubt the correctness of the district court’s decision that the provision of a parole hearing in September of 2021 mooted Melnick’s request for a new hearing. Likewise, the district court’s decision that the CPB rationally deferred Melnick’s parole hearing from March to September of 2021 is not reasonably subject to debate. As noted by the district court, the inadequacy of a prisoner’s parole plan and the upcoming availability of specialized sex-offender treatment are well-recognized considerations in making predictive parole decisions. This is particularly true given Melnick’s lack of success in previous attempts at parole and the sexual-deviancy based reasons for the previous parole failures.¹

¹On appeal, Melnick’s entire argument as to the merits of the CPB’s decision to defer his parole consideration from March to September 2021 is based on the alleged failure of the CPB to engage with all of the factors set out in Colo. Rev. Stat. § 17-22.5-404(4). Even if this assertion were true, it would not state a valid entitlement to habeas relief. As the Supreme Court, this court, and the Colorado courts have made clear, grant or denial of parole in Colorado rests entirely within the discretion of the CPB. *See Sutton v. Mikesell*, 810 F. App’x 604, 611-12 (10th Cir. 2020) (collecting cases) (unpublished disposition cited solely for its persuasive value); Colo. Rev. Stat. § 17-22.5-403(7)(a) (vesting the CPB with discretion to determine whether an offender should be granted discretionary parole). Thus, based on any mix of factors set out in § 17-22.5-404(4), or any other factors it so chooses, the CPB can grant or deny parole. *Sutton*, 810 F. App’x at 611-12 (citing Colorado case law and statutes for the proposition that discretionary parole “‘is a privilege, not a right,’ and that ‘the (continued...)”)

For those reasons set out above, Melnick has not made a substantial showing of the denial of a constitutional right. Accordingly, this court **DENIES** his request for a COA and **DISMISSES** this appeal.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

¹(...continued)
parole board has the ultimate discretion to grant or deny parole based on the totality of the circumstances, including but not limited to the factors set forth in section 17-22.5-404(4)’”).