APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02808-MJW

ANDREW MARK LAMAR,

Applicant,

v.

JOHN O'DELL, Colorado Parole Board Member,

Respondent.

ORDER OF DISMISSAL

Before the Court is Applicant Andrew Mark Lamar's Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 1). The Court must construe Applicant's filings liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not act as an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110. For the following reasons, the Court denies the Application and dismisses this action with prejudice.[1]

I. Procedural Background

Applicant was convicted of a "class-four felony sexual assault." (ECF No. 28 at 1-2). After resolution of a direct appeal with instructions for resentencing, on May 5, 2010, he was sentenced to an indeterminate term of twelve years to life pursuant to the Colorado Sex Offender Lifetime Supervision Act ("SOLSA"), Colo. Rev. Stat.

[1] All parties consented to the jurisdiction of a U.S. Magistrate Judge. (ECF Nos. 22, 23, 24).

§ 18-1.3-1001, *et seq.* (*Id.*; *see also* ECF No. 1 at 2, ECF No. 25-1); *see also Lamar v. Zavaras*, No. 11-cv-01028-MSK, 2013 WL 2029835, at *2 (D. Colo. May 13, 2013).

On November 17, 2016, Applicant filed the instant § 2241 Application. (ECF No. 1). He sets forth three claims. First, he alleges that on November 7, 2016, he was denied parole in violation of the Fourteenth Amendment. (*Id.* at 2-3). More specifically, he claims he was not provided with "adequate review procedures . . . analogous to civil commitment." (*Id.* at 3). Second, he alleges he has a liberty interest which protects him from the parole board's power to determine whether he is rehabilitated or poses a continued threat or risk to the public. (*Id.*). Third, he states that the claims are properly presented under § 2241, not § 2254. (*Id.* at 3-4). He requests that the Court "interpret and construe federal precedent" to determine that his continued confinement infringes on his rights to due process and equal protection of the law. (*Id.* at 5).

As part of the preliminary consideration of the Application, the Court directed Respondent to file a Preliminary Response addressing the affirmative defenses of timeliness and exhaustion of state court remedies. (ECF Nos. 5, 9). Respondent submitted a Preliminary Response asserting that Applicant has failed to exhaust state court remedies. (ECF No. 12). Applicant filed a Reply, contending that pursuing state court remedies would be futile. (ECF No. 13).

On June 9, 2017, the Court entered an Order to Show Cause and Drawing Case. (ECF No. 17). In the Order, the Court declined to dismiss the Application for failure to exhaust available state court remedies and directed Respondent to show cause as to why the Application should not be granted. (*Id.*).

On June 30, 2017, Respondent submitted a Response to Order to Show Cause.

(ECF No. 25). Respondent argues that the Application should be denied because Applicant has no constitutional right to parole. (*Id.* at 2-4). Further, Respondent asserts that the Parole Board's decision to deny parole was rationally based, in part because Applicant requested that his parole interview be deferred. (*Id.* at 4-5). Attached to the Response is a Notice of Colorado Parole Board Action dated November 7, 2016, which indicates: "inmate req defer on record. States does not want the parole board to bother him anymore and they have no jurisdiction over him." (ECF No. 25-1). The Parole Board deferred the proceeding to November 2019. (*Id.*). The Notice of Colorado Parole Board Action also indicates that Applicant was assessed to be a "medium" risk, based on concerns for public safety and the severity/circumstances of the offense. (*Id.*).

Applicant filed a Reply on July 13, 2017 (ECF No. 27) and a "Supplemental Argument" on December 4, 2017 (ECF No. 28). Applicant reiterates his challenge to Colorado's indeterminate sentencing statute as lacking adequate review procedures in violation of due process and equal protection. (ECF No. 27 at 2). In support of this argument, Applicant cites *Specht v. Patterson*, 386 U.S. 605 (1967) and *Humphrey v. Cady*, 405 U.S. 504 (1972). (*Id.*; *see also* ECF No. 28 at 3). Applicant argues that, once the lower end of his sentence has expired, he has "an 'actual liberty interest' in being released on parole." (ECF No. 28 at 5; *see also* ECF No. 27 at 3-4). Further, Applicant contends "state law does confer on him a constitutionally protected liberty interest in a fair parole hearing . . . [and] an adequate review proceeding." (*Id.* at 6-7). He asserts that, based on *Specht*, the review procedures should include representation by counsel, an opportunity to be heard, and the opportunity to confront witnesses, cross-examine, and offer evidence. (*Id.* at 8).

II. Merits of the Application

As a preliminary matter, Applicant's claims that he was denied parole in violation of the U.S. Constitution are raised properly in a habeas corpus proceeding. "[A] challenge to the execution of a state sentence – here the denial of parole – is properly brought as an application for writ of habeas corpus under 28 U.S.C. § 2241." *Durre v. Zenon*, 116 F. App'x 179, 180 (10th Cir. 2004) (unpublished) (citation omitted); *see also Allen v. Falk*, 624 F. App'x 980 (10th Cir. 2015) (claim that parole was denied in violation of the constitution based on inmate's refusal to comply with sex offender treatment program should be brought under § 2241). However, for the reasons stated below, Applicant is not entitled to habeas corpus relief.

a. No Liberty Interest in Parole

The U.S. Court of Appeals for the Tenth Circuit has "already concluded that due process is not implicated in the denial of parole under SOLSA." *Diaz v. Lampela*, 601 F. App'x 670, 677 (10th Cir. 2015) (unpublished). A due process claim under the Fourteenth Amendment may arise only if Applicant has a cognizable liberty interest in securing parole, which he does not. *Id.* at 676. "Whatever liberty interest exists is, of course, a *state* interest created by [state] law. There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners." *Id.* (quoting *Swarthout v. Cooke,* 562 U.S. 216, 220 (2011)).

The Colorado Parole Board has "unlimited discretion to grant or deny parole" for defendants serving sentences for crimes committed on or after July 1, 1985. *See Mulberry v. Neal*, 96 F.Supp.2d 1149, 1150 (D. Colo. 2000) (citing *Thiret v. Kautzky*, 792

P.2d 801, 805 (Colo. 1990)); *see also id.* at 1151 ("there is no federal constitutional right to parole") (citation omitted). As noted above, Applicant was sentenced on May 5, 2010, for a charge occurring in 2005. *Lamar*, 2013 WL 2029835 at *1-2; (*see also* ECF No. 1 (Applicant describes himself as a "Lifetime Act 'sex offender'")). The Colorado Parole Board's ability to grant or deny parole under SOLSA is discretionary:

> On completion of the minimum period of incarceration specified in the sex offender's indeterminate sentence, less any credits earned by him, [SOLSA] assigns discretion to the parole board to release [a defendant] to an indeterminate term of parole of at least ten years for a class four felony, or twenty years for a class two or three felony, and a maximum of the remainder of the sex offender's natural life.

Vensor v. People, 151 P.3d 1274, 1276 (Colo. 2007) (citation omitted); *see also Beylik v. Estep*, 377 F. App'x 808, 2010 WL 1916414, at *3 (10th Cir. May 13, 2010) (unpublished) (the decision to grant parole under SOLSA is "wholly discretionary" and "does not create a legitimate expectation of release on the part of Colorado state prisoners"); *People v. Oglethorpe*, 87 P.3d 129, 136 (Colo. App. 2003) ("The decision to grant parole or absolute release to an inmate incarcerated for an indeterminate sentence under [SOLSA] is vested within the sound discretion of the state parole board.").

Thus, it is well settled that "[b]ecause Colorado's parole scheme for sex offenders is discretionary, with the parole board retaining its discretion to grant or deny parole regardless of whether the treatment criteria have been met, [Applicant] does not have a constitutionally protected liberty interest in being granted parole or in receiving a favorable parole certification or recommendation." *Conkleton v. Raemisch*, 603 F. App'x 713, 716 (10th Cir. 2015); *see also Jago v. Ortiz*, 245 F. App'x 794, 797 (10th Cir. 2007) ("Because [SOLSA] gives the board total discretion in granting parole . . . [applicant] has

no federally protected liberty interest.") (citing Colo. Rev. Stat. § 18-1.3-1006(1)(a) ("the parole board shall schedule a hearing to determine whether the sex offender *may* be released")).

b. Reasonableness of Parole Board's Decision

The Court may review a decision of the Colorado Parole Board to determine if it was arbitrary, capricious, or an abuse of discretion. *Schuemann v. Colo. State Bd. of Adult Parole*, 624 F.2d 172, 173 (10th Cir. 1980).

"As part of the Sex Offender Lifetime Supervision Act ('SOLSA'), Colorado requires sex offenders to serve the minimum sentence and to progress in treatment until a parole board determines that the offender no longer poses an undue threat to society if treated and monitored appropriately." *Jago*, 245 F. App'x at 796 (citing Colo. Rev. Stat. § 18-1.3-1006(1)(a)). If parole is denied, SOLSA requires the board to review its parole decision at least once every three years. *See id.* (citing Colo. Rev. Stat. § 18-1.3-1006(1)(c)).

Here, Applicant challenges the alleged denial of parole on November 7, 2016. (ECF No. 1 at 3). The Court has reviewed the audio recording of the proceeding on November 7, 2016. (ECF No. 26). In the recording, Applicant states that the parole board does not have "authority under statute" and did not accord "certain review procedures . . . so you can go ahead and resentence me to whatever time you prefer." (*Id.*). Applicant does not dispute that, based on his request, the parole board deferred its parole decision to November 2019. (*See* ECF No. 25-1). In the Notice of Colorado Parole Board Action, the board further identified Applicant's risk assessment as "medium" based on concerns for public safety and the severity/circumstances of the offense. (*Id.*).

In light of Applicant's statement to the parole board and noting the board's finding of assessed risk, the Court finds that the deferment was not arbitrary, capricious, or an abuse of discretion. *See Schuemann*, 624 F.2d at 173.

Applicant's argument that he is entitled to other "adequate review procedures" under *Specht* and *Humphrey* does not change this result. *Specht* concerned due process procedures at the time an indeterminate sentence was imposed and did not address parole determinations. *Specht*, 386 U.S. at 608 (Colorado's "Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill."); *see also Christensen v. People*, 869 P.2d 1256, 1259 n.8 (Colo. 1994) (recognizing that *Specht* required additional procedural due process considerations which were incorporated subsequently into § 16-13-206 of the Colorado Sex Offenders Act). Under SOLSA, "incarceration following the discretionary denial of parole is not a new punishment meted out by the parole board. It simply continues the punishment previously imposed by the court that sentenced him for the underlying offense." *Diaz*, 601 F. App'x at 676 (citation omitted).

Humphrey concerned the Wisconsin Sex Crimes Act which subjected offenders to commitment in the alternative to penal sentencing. *Humphrey*, 405 U.S. at 510-11. After the initial commitment, offenders are reviewed in "subsequent renewal proceedings, which result in five-year commitment orders based on *new findings of fact*, and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime." *Id.* at 511 (emphasis added). The Supreme Court compared the

Wisconsin Sex Crimes Act to the Wisconsin Mental Health Act, which provided that a person subject to commitment was entitled to a jury determination. *Id.* at 508. Because the Sex Crimes Act did not provide for a jury determination, the Supreme Court remanded the matter for an evidentiary proceeding as to whether the Sex Crimes Act violated the right to equal protection. *Id.* at 512-13. In *People v. Kibel*, the Colorado Supreme Court noted that, based on *Humphrey*, "the rational basis for distinguishing sex offenders from other persons committed because they constitute a public danger may disappear once the maximum sentence for the underlying crimes has expired." 701 P.2d 37, 42 n.8 (Colo. 1985).

In this action, Applicant does not raise an equal protection claim based on differing laws enforced in Colorado akin to those evaluated in *Humphrey*. (*See* ECF No. 1). Further, a court in this District concluded, unlike the Wisconsin law considered in *Humphrey*, "CSOLSA does not require any additional findings beyond the fact of the conviction before a defendant becomes subject to indeterminate sentencing." *Purdy v. Brill*, No. 09-cv-00944-WYD, 2011 WL 834179, at *12 (D. Colo. Mar. 4, 2011)). Another distinction is that, contrary to Applicant's assertion that he is due additional review procedures at the expiration of the "lower-end" of his sentence, the Colorado Supreme Court construed *Humphrey* as potentially addressing review procedures "once the *maximum* sentence for the underlying crimes has expired." (ECF No. 1 at 2-3); *Kibel*, 701 P.2d at 42 n.8 (emphasis added). Applicant does not allege what he believes is the possible maximum permissible sentence for his underlying crimes or whether he has served that time. (*See* ECF No. 1).

In any event, the parole procedure set forth by SOLSA has been upheld in this

District as comporting with due process. *See Davies v. Young*, No. 12-cv-02794-MSK-KMT, 2013 WL 5450308 (D. Colo. Sept. 30, 2013); *see also Purdy*, 2011 WL 834179, at *13 ("Section 18-1.3-1006 clearly sets out the procedures to be followed when a convicted sex offender is evaluated for parole."); *Firth v. Shoemaker*, No. 09-cv-00224-MSK-MJW, 2010 WL 882505, at *12 (D. Colo. March 8, 2010) (concluding the plaintiff provided no "factual basis for contending that evaluation of inmates on a three-year schedule [set forth in SOLSA] somehow runs afoul of the Due Process clause"). Under the assumption that an offender may have a due process right to consideration for parole under SOLSA, a court in this District found that due process does not require the opportunity to confront and cross-examine a victim at a parole hearing. *Davies*, 2013 WL 5450308, at *6 (finding that the applicant did not identify "any 'exceptional circumstances' that warrant departing from the general rule that he has no due process right to cross-examine the victim at his parole hearing"). The *Davies* court noted that "the Supreme Court found that a parole hearing procedure in which inmates were permitted to appear before the Board and present letters and statements on their own behalf was sufficient to satisfy the due process clause." *Id.* (citing *Grenholtz v. Inmates of Nebraska,* 442 U.S. 1, 15 (1979)) (internal quotation and punctuation omitted). There is no indication in this action that Applicant was not afforded a parole hearing procedure in which he could appear before the Parole Board and make statements on his own behalf.

III. Conclusion

For the reasons set forth herein, the Court finds that SOLSA's parole procedure challenged by Applicant does not run afoul of the Fourteenth Amendment, and the

Colorado Parole Board's November 7, 2016 action was not arbitrary, capricious, or an abuse of discretion.

Accordingly, it is

ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 1) is DENIED and DISMISSED WITH PREJUDICE for the reasons stated herein. It is

FURTHER ORDERED that no certificate of appealability will issue because jurists of reason would not debate the correctness of this procedural ruling and Applicant has not made a substantial showing of the denial of a constitutional right. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* is denied for the purpose of appeal. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal he must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

Date: June 11, 2018
Denver, Colorado

s/ Michael J. Watanabe
Michael J. Watanabe
United States Magistrate Judge

APPENDIX B

FILED
United States Court of Appeal
Tenth Circuit

October 16, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANDREW MARK LAMAR,

Petitioner - Appellant,

v.

JOHN O'DELL, Colorado Parole Board Member,

Respondent - Appellee.

No. 18-1270
(D.C. No. 1:16-CV-02808-MJW)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BACHARACH**, **MURPHY**, and **MORITZ**, Circuit Judges.

Andrew Lamar, a Colorado prisoner proceeding pro se,[1] seeks to appeal the district court's order denying his 28 U.S.C. § 2241 petition.[2] But first, he must obtain a certificate of appealability (COA). *See Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir. 2000) (holding that state prisoner is required to "obtain a COA to appeal the denial of a habeas petition . . . filed pursuant to . . . § 2241").

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* This order isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

[1] Because Lamar proceeds pro se, we liberally construe his filings. *See Eldridge v. Berkebile*, 791 F.3d 1239, 1243 n.4 (10th Cir. 2015). But we won't act as his advocate. *See id.*

[2] A magistrate judge heard the case upon the parties' consent. *See* Fed. R. Civ. P. 73.

"To obtain a COA," Lamar "must make a substantial showing of the denial of a constitutional right"—i.e., he must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that)" the district court should have "resolved" his constitutional claims "in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). For the reasons discussed below, we conclude that Lamar fails to make this showing. Accordingly, we decline to issue a COA and dismiss this matter.

Background

Lamar is currently serving a sentence of 12 years to life in prison for sexual assault. *See* Colorado Sex Offender Lifetime Supervision Act (SOLSA) of 1998, Colo. Rev. Stat. Ann. §§ 18-1.3-1001 to -1012. In 2016, he filed the underlying § 2241 petition in federal district court. In that petition, Lamar asserted that (1) denying him parole and continuing to confine him after he has already served his minimum 12-year sentence violates the Fourteenth Amendment; (2) he has a liberty interest that prohibits the Colorado State Board of Parole (the Board) from determining whether he has been rehabilitated or whether he continues to pose a threat to the public; and (3) § 2241 is the appropriate vehicle in which to advance these arguments.

The district court agreed that Lamar could bring his claims under § 2241. But it nevertheless denied him relief. In doing so, the district court first pointed out that this court has repeatedly indicated SOLSA doesn't "create a liberty interest in parole of sex offenders" and therefore "due process is not implicated in the denial of parole

under SOLSA." *Diaz v. Lampela*, 601 F. App'x 670, 677 (10th Cir. 2015) (unpublished); *see also Conkleton v. Raemisch*, 603 F. App'x 713, 716 (10th Cir. 2015) (unpublished) ("Because Colorado's parole scheme for sex offenders is discretionary . . . [p]laintiff does not have a constitutionally protected liberty interest in being granted parole or in receiving a favorable parole certification or recommendation."); *Jago v. Ortiz*, 245 F. App'x 794, 797 (10th Cir. 2007) (unpublished) ("Because [SOLSA] gives the [B]oard total discretion in granting parole . . . [petitioner] has no federally protected liberty interest.").

Next, the district court noted that at Lamar's 2016 parole hearing, the Board "deferred its parole decision to November 2019" at Lamar's own behest. R. 68. The district court also pointed out that the Board determined Lamar continued to present a risk to the public. Under these circumstances, the district court reasoned, the Board's "deferment" of its decision until November 2019 wasn't "arbitrary, capricious, or an abuse of discretion." *Id.* at 69. Finally, the district court rejected Lamar's suggestion that *Humphrey v. Cady*, 405 U.S. 504 (1972), or *Specht v. Patterson*, 386 U.S. 605 (1967), might establish otherwise. Accordingly, the district court denied Lamar's petition.

Analysis

I. Due Process

In attempting to show that reasonable jurists would find the district court's resolution of his due-process claim debatable or wrong, Lamar first renews his assertion that he has "a due[-]process liberty interest" in parole "once the lower[]end

[of his] sentence has expired." Aplt. Br. 3. Specifically, Lamar argues that once he completed the first 12 years of his sentence, denying him parole and continuing to confine him amounts to imposing a new sentence. Thus, he insists, the district court erred in concluding that by declining to grant him parole, the Board merely "continue[d] the punishment previously imposed by the court that sentenced him for the underlying offense." R. 69 (quoting *Diaz*, 601 F. App'x at 676).

In support, Lamar first cites *People v. Kibel*, 701 P.2d 37 (Colo. 1985). In *Kibel*, the Colorado Supreme Court indeed noted, "Several courts . . . have held that, following the expiration of a period equal to the *maximum* permissible sentence for the underlying crimes, sex offenders must be afforded the same procedural protections as civil committees or other groups whose commitment serves the state interest in public protection." 701 P.2d at 42 n.8 (emphasis added). But the Colorado Supreme Court then went on to explain that "[s]ex offenders are confined for an indeterminate period." *Id.* Here, for instance, Lamar is serving a sentence of 12 years to life in prison. And although Lamar points out that he has already served his *minimum* 12-year sentence, the district court correctly noted that Lamar neither identifies "what he believes [to be] the . . . *maximum* permissible sentence for his underlying crimes" nor alleges that "he has served that time." R. 70 (emphasis added). Thus, we reject Lamar's assertion that *Kibel* "supports [his] claim." Aplt. Br. 3.

Next, Lamar cites *Block v. Potter*, 631 F.2d 233 (3d Cir. 1980). There, the Third Circuit held that "[e]ven if a state statute does not give rise to a liberty interest

in parole release," prisoners nevertheless "have a liberty interest flowing directly from the due[-]process clause in not being denied parole for arbitrary or constitutionally impermissible reasons." *Block*, 631 F.2d at 236. Yet *Block*'s approach has since "been rejected by other circuits" and even "called into doubt by the Third Circuit itself." *Wildermuth v. Furlong*, 147 F.3d 1234, 1239 n.7 (10th Cir. 1998) (Anderson, J., dissenting). And in any event, the district court in this case reviewed the Board's 2016 "deferment" decision and determined that it wasn't "arbitrary, capricious, or an abuse of discretion." R. 69. Lamar doesn't challenge that aspect of the district court's ruling on appeal. *See* Fed. R. App. P 28(a)(8)(A); *Jordan v. Bowen*, 808 F.2d 733, 736 (10th Cir. 1987). Nor could he credibly do so, as it appears the Board deferred its decision upon Lamar's express request. Thus, Lamar isn't entitled to a COA on this basis. *See Slack*, 529 U.S. at 484.

II. Equal Protection

Lamar next alleges the district court erred in concluding that he failed to adequately "raise an equal[-]protection claim based on" the Supreme Court's decision in *Humphrey*, 405 U.S. 504. R. 70. Construed liberally, Lamar insists, his petition was sufficient to place this issue before the district court.

Yet even if we agree with Lamar that his equal-protection claim is "properly" before us, his opening brief suffers the same deficiency as did his petition. Aplt. Br. 4. Namely, *Humphrey* involved a state statutory scheme that, for purposes of making involuntary-commitment decisions, treated sex offenders differently from certain other individuals. *See Humphrey*, 405 U.S. at 508 (noting contrast between

Wisconsin's Mental Health Act, which provided individuals with "a statutory right to have a jury determine whether" they satisfied "the standards for commitment," with Wisconsin's Sex Crimes Act, which afforded no such right). And as the district court pointed out below, Lamar failed to identify in his petition any "differing laws enforced in Colorado akin to those evaluated in *Humphrey*." R. 70.

Lamar likewise fails to identify any such "differing laws" on appeal. *Id.* Thus, he fails to make the "threshold showing" necessary to state a viable equal-protection claim—i.e., "that [he was] treated differently from others who were similarly situated." *Brown v. Montoya*, 662 F.3d 1152, 1173 (10th Cir. 2011) (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998)). Accordingly, Lamar isn't entitled to a COA on this basis. *See Slack*, 529 U.S. at 484.

Conclusion

Lamar doesn't demonstrate that reasonable jurists could debate the district court's resolution of his constitutional claims. We therefore decline to issue a COA and dismiss this appeal. As a final matter, we deny Lamar's motion to proceed in forma pauperis. *See Lister v. Dep't of Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005) ("[I]n order to succeed on a motion to proceed [in forma pauperis], the movant must show a financial inability to pay the required filing fees, as well as the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues

raised in the action.").

Entered for the Court

Nancy L. Moritz
Circuit Judge

APPENDIX C

FILED
United States Court of Appeals
Tenth Circuit

November 5, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANDREW MARK LAMAR,

Petitioner - Appellant,

v.

JOHN O'DELL, Colorado Parole Board Member,

Respondent - Appellee.

No. 18-1270

ORDER

Before **BACHARACH**, **MURPHY**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

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

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk