Approved: August 25, 2011
(Date)

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The Chairman called the meeting to order at 9:38 A.M. on February 22, 2011, in Room 548-S of the Capitol.

All members were present, except Senator Donovan, who was excused

Committee staff present:
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Jason Thompson, Office of Revisor of Statutes
Tamera Lawrence, Office of Revisor of Statutes
Theresa Kiernan, Committee Assistant

Committee Action:
The Chairman turned the committee's attention to **SB 135 -- Kansas racketeer influenced and corrupt organization act**.

Jason Thompson, Staff Revisor, reviewed the bill. He also stated that the bill was patterned after the law in Florida. He also reminded the committee of Senator King's concern with including the crime of involuntary manslaughter.

Senator Schodorf moved, Senator Bruce seconded, to strike the provisions of **SB 135** relating to manslaughter. The motion was adopted.

Senator Bruce moved, Senator Schodorf seconded, to strike the provisions of **SB 135** relating to vehicular homicide. The motion was adopted.

Senator Bruce moved, Senator Schodorf seconded, to strike the provisions of **SB 135** relating to voluntary manslaughter. The motion was adopted.

Senator Schodorf moved, Senator Bruce seconded, that **SB 135** be passed as amended. The motion was adopted.

The Chairman turned the committee's attention to **ERO 34 -- Abolishing Parole Board and Establishing the Prisoner Review Board within the Department of Corrections**.

The Chairman informed the committee that the ERO would become effective unless either the Senate or the House of Representatives adopts a resolution of disapproval within 60 days of the date that the ERO is filed. The ERO was filed on January 24, 2011. If the committee adopts a resolution of disapproval, action by the full Senate will be taken not later than March 22nd or March 23rd.

Senator Schodorf expressed concern for the policy established in **ERO 34**.

Senator Vratil expressed support for adoption of a resolution of disapproval. He stated that he does not believe an annual savings of $500,000 will be realized. In addition he stated that there is a need to maintain an independent neutral parole board.

Senator Haley expressed concern with the perception of a conflict of interest that **ERO 34** creates. Currently 49 of the 50 states have an independent parole board.

Senator Bruce suggested that the Constitutional issues could be addressed if the Board is placed within the Department of Corrections by maintaining the current process of gubernatorial appointment of members to the Parole Board.

Senator Bruce moved, Senator Kelly seconded, that the discussion of **ERO 34** be tabled. The motion passed on a vote of 5 to 4.

The Chairman turned the committee's attention to **SB 160 -- Collection of child support payments**.

The minutes of the Judiciary Committee at 10:30 a.m. on February 22, 2011, in Room 548-S of the Capitol.

Jason Thompson, Staff Revisor, reviewed the bill. Mr. Thompson also reminded the committee of the technical amendment that had been proposed on the date of the original hearings (Attachment 1).

Senator Lynn moved, Senator Bruce seconded, that the proposed amendment to **SB 160** be adopted. The motion was adopted.

Senator Lynn moved, Senator Bruce seconded, that **SB 160** be passed as amended. The motion was adopted.

The Chairman turned the committee's attention to information regarding the bed impact of **SB 63 -- Amending the crime of sexual exploitation of a child**, which had been provided by the sentencing commission (Attachment 2).

The Chairman called the committee's attention to information provided by Patti Biggs in response to questions raised by members of the committee relating to **ERO 34 -- Abolishing Parole Board and Establishing the Prisoner Review Board within the Dept of Corrections** (Attachment 3).

Meeting adjourned at 10:25 A.M. The next meeting is scheduled for February 24, 2011.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Tues Feb. 22, 2011

NAME	REPRESENTING
TED HENRY	C.S.
Tara Mays	KDOT
Ed Klumpp	KACP/KPCHA/KCSA
John Milburn	AP
Maria Mcneal	KDOC
Patte Biggs	KPB.
Claudia Larkin	Mirror, Inc
Brendan Yorkey	Budget
Kaissa Dugan	Sen Petersen
Paye Rauthier	Hein Law Firm
Patrick Vogelsberg	KCDAA
Kevin Brave	Cap Lob Grp.
Susan Mac	Legis
Jeff Bottenberg	State Farm
Jenni Roe	KCSL
Sarah Fertig	KSC

Session of 2011

SENATE BILL No. 160

By Senator Lynn

2-9

AN ACT concerning child support; relating to collection of support payments; amending K.S.A. 2010 Supp. 23-4,107 and 75-6202 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2010 Supp. 23-4,107 is hereby amended to read as follows: 23-4,107. (a) Any new or modified order for support shall include a provision for the withholding of income to enforce the order for support.

(b) Except as otherwise provided in subsection (j), (k) or (l), all new or modified orders for support shall provide for immediate issuance of an income withholding order. The income withholding order shall be issued without further notice to the obligor and shall specify an amount sufficient to satisfy the order for support and to defray any arrearage. The income withholding order shall be issued regardless of whether a payor subject to the jurisdiction of this state can be identified at the time the order for support is entered.

(c) Except as otherwise provided in this subsection or subsections (j) order, an income withholding order shall be issued by the court upon request of the obligee or public office, provided that the obligor accrued an arrearage equal to or greater than the amount of support payable for one month and the requirements of subsections (d) and (h) have been met. The income withholding order shall be issued without further notice to the obligor and shall specify an amount sufficient to satisfy the order for support and to defray any arrearage. The income withholding order shall be issued regardless of whether a payor subject to the jurisdiction of this state can be identified at the time the income withholding order is issued.

(d) Not less than seven days after the obligee or public office has served a notice pursuant to subsection (h), the obligee or public office may initiate income withholding pursuant to paragraph (1) or (2).

(1) The obligee or public office may apply for an income withholding order by filing with the court an affidavit stating: (A) The date that the notice was served on the obligor and the manner of service; (B) that the obligor has not filed a motion to stay issuance of the income withholding order or, if a motion to stay has been filed, the reason an

Katie Nitcher
District Court Trustee
Lawrence, KS

is receiving assistance in collecting that support under K.S.A. 39-756, and amendments thereto, or under part D of title IV of the federal social security act (42 U.S.C. § 651 *et seq.*), as amended; or

(3) owes a debt to a foreign state agency.

(b) "Debt" means:

(1) Any liquidated sum due and owing to the state of Kansas, or any state agency, municipality or foreign state agency which has accrued through contract, subrogation, tort, operation of law, or any other legal theory regardless of whether there is an outstanding judgment for that sum. A debt shall not include special assessments except when the owner of the property assessed petitioned for the improvement and any successor in interest of such owner of property; or

(2) any amount of support due and owing an individual, or an agency of another state, who is receiving assistance in collecting that support under *K.S.A. 23-495 or* K.S.A. 39-756, and amendments thereto, or under part D of title IV of the federal social security act (42 U.S.C. § 651 *et seq.*), as amended, which amount shall be considered a debt due and owing the district court trustee or the department of social and rehabilitation services for the purposes of this act.

(c) "Refund" means any amount of Kansas income tax refund due to any person as a result of an overpayment of tax, and for this purpose, a refund due to a husband and wife resulting from a joint return shall be considered to be separately owned by each individual in the proportion of each such spouse's contribution to income, as the term "contribution to income" is defined by rules and regulations of the secretary of revenue.

(d) "Net proceeds collected" means gross proceeds collected through final setoff against a debtor's earnings, refund or other payment due from the state or any state agency minus any collection assistance fee charged by the director of accounts and reports of the department of administration.

(e) "State agency" means any state office, officer, department, board, commission, institution, bureau, agency or authority or any division or unit thereof and any judicial district of this state or the clerk or clerks thereof. "State agency" also shall include any district court utilizing collection services pursuant to K.S.A. 75-719, and amendments thereto, to collect debts owed to such court.

(f) "Person" means an individual, proprietorship, partnership, limited partnership, association, trust, estate, business trust, corporation, other entity or a governmental agency, unit or subdivision.

(g) "Director" means the director of accounts and reports of the department of administration.

(h) "Municipality" means any municipality as defined by K.S.A. 75-1117, and amendments thereto.

23-495 or

17

Kansas Sentencing Commission
700 SW Jackson, Suite 501
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Kansas

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MEMORANDUM

TO: Senator Tim Owens, Chairman, Judiciary Committee

FROM: Sarah Fertig, Executive Director

DATE: February 21, 2011

RE: Follow-up information regarding the bed impact of SB 63

During the Senate Judiciary Committee hearing today, questions were raised as to the bed impact statement the Sentencing Commission prepared for SB 63. This impact statement was drafted prior to my arrival at the Sentencing Commission, so I took the liberty of reviewing the statement with my staff, and I believe I can answer the Committee's questions.

The new language at the bottom of page 1 and on page 2 of the bill is cleanup language from Jessica's Law legislation (2010 HB 2435) that was passed last year. The Sentencing Commission provided bed impact statements for that bill during the 2010 session. The Commission at that time noted that while the bill clarified the penalties for attempt, conspiracy and solicitation of certain sex offenses against minors, most offenders sentenced for those crimes were already sentenced as off-grid felonies. Thus, there was projected to be little impact (increase of 10 beds needed over 10 years) because current sentencing practice appeared to be in-line with the intent of that bill.

SB 63 amends the 2010 Session Laws to conform to other legislation passed during the 2010 session. The only substantive change is the additional language in sections (a)(1) and (a)(4) expanding the definition of the crime to include instances where the "victim" is not actually under 18 years of age but the offender believes he/she is. The Sentencing Commission estimated that this language would have no impact in FY 2012 and a minimal 10-year impact similar to the attempt, conspiracy and solicitation language added by 2010 HB 2435. However, if this language were to lead to widespread sting operations that result in an unanticipated surge of prosecutions, as conferee Jennifer Roth cautioned against in her previous testimony in opposition to this bill, then the impact could increase. We have no way of determining whether such sting operations could occur, whether any individuals would be prosecuted as a result, or what those theoretical sentences may look like, as and such cannot estimate the potential impact of such application of SB 63.

I would be happy to answer any other questions the Committee may have.

Senate Judiciary
2-22-11
Attachment 2

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Robert Sanders, Chairperson
Patricia Biggs, Member
Tom Sawyer, Member

Parole Board

Sam Brownback, Governor

ERO #34

MEMORANDUM

To: Members of Senate Judiciary Committee
Senator Tim Owens, Chair; Senator Jeff King, Vice Chair

From: Kansas Parole Board, Patricia Biggs, Member

Date: February 22, 2011

Re: Responses to Committee Questions

Honorable Senators:

In response to questions raised at last week's hearing, the Parole Board submits the following:

1. What is a typical month like for parole board members?
   In a typical month, each board member undertakes the following:
   - 7 days in facility hearing – parole release and post-incarceration violations
   - 10 days in file preparations – includes parole eligibility hearing preparation, case reviews in response to inmate letters, follow-up from other sources.
   - 1.5 days – miscellaneous file review – includes Sex Offender Override panel, Functional Incapacitation applications, Clemency Applications, Early Discharge Requests
   - 1.5 day each member for "partnership" meetings – these include Sentencing Commission, Victim Rights Panel, Accountability Panels, National Institute of Corrections work, Association of Paroling Authorities International Chairs group and Standards group, project review Center for Effective Pubic Policy, and the like.
   - 2.5 days – review of release plans and setting special conditions of supervision
   - 3 – 4 days in Open Public Comment hearings – Wichita, Topeka, Kansas City and Hays/Garden City.
   - 1 day per month for Full Board Case Review and Case Problem solving
     - Total: 27 days per month of work.

     This total reflects the amount of time required of each member of the Board.

2. Please provide the Gilmore v. Kansas Parole Board case which establishes that parole release is a grace and not a right.
   a. Gilmore case attached.
      In relevant part:

   "Inmates did not have a liberty interest in parole release, as statutes creating parole system were not mandatory in nature, but ration empowered Parole Board to place inmate on parole in exercise of its discretion. K.S.A. 22-3717(e); U.S.C.A. Const.Amend. 14."

Senate Judiciary
2-22-11
Attachment 3

HGilmore v. Kansas Parole Bd.
Kan.,1988.

Supreme Court of Kansas.
Lamar GILMORE, Appellant,
v.
KANSAS PAROLE BOARD, Appellee.
John STASSE, Appellee,
v.
KANSAS PAROLE BOARD, Appellant.
Robert E. MURPHY, Appellee,
v.
KANSAS PAROLE BOARD, Appellant.
Gary Dean DARBY, Appellee,
v.
KANSAS PAROLE BOARD, Appellant.
Joseph DYCHE, Appellee,
v.
KANSAS PAROLE BOARD, Appellant.
Nos. 60882, 60905, 61030to -61032.

May 23, 1988.

Inmate sought review of decision of parole board denying his application for parole. The District Court, Reno County, William F. Lyle, Jr., J., denied inmate's petition for habeas corpus relief, and inmate appealed. Four other inmates sought review of parole board's denial of parole. The District Court, Leavenworth County, Frederick N. Stewart, J., granted habeas corpus petitions, and parole board appealed. Cases were consolidated for purposes of appeal. The Supreme Court, Miller, J., held that: (1) parole board was not required to provide inmates with individualized written reasons upon denial of parole; (2) parole statute did not create liberty interest in parole; and (3) parole board's adoption of internal rule requiring unanimous vote for parole for certain crimes did not violate ex post facto clause of Constitution.

Affirmed in part and reversed in part.

West Headnotes

[1] Pardon and Parole 284 58

284 Pardon and Parole
284II Parole
284k57 Proceedings
284k58 k. Evidence and Matters Considered. Most Cited Cases

Pardon and Parole 284 61

284 Pardon and Parole
284II Parole
284k57 Proceedings
284k61 k. Reasons for Decision. Most Cited Cases
Nature of defendant's crime is a consideration to be taken into account in parole decision and can be cited as reason for denial of parole. K.S.A. 22-3717(g).

[2] Pardon and Parole 284 61

284 Pardon and Parole
284II Parole
284k57 Proceedings
284k61 k. Reasons for Decision. Most Cited Cases
Parole board was not required to give individualized written reasons to inmates in connection with decision denying them parole; although Board used same language to describe reasons for denial or recommendations for guidance of inmates denied parole, notices were tailored to each individual inmate.

[3] 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
Inmates did not have a liberty interest in parole release, as statutes creating parole system were not mandatory in nature, but rather empowered Parole Board to place inmate on parole in exercise of its discretion. K.S.A. 22-3717(e); U.S.C.A. Const.Amend. 14.

3-2

[4] 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 ⚿60

284 Pardon and Parole
284II Parole
284k57 Proceedings
284k60 k. Decision; Reconsideration. Most Cited Cases
Parole board's adoption of internal rule requiring unanimous vote before granting parole in certain cases did not violate ex post facto clause of Constitution, as at time board changed from majority rule to unanimous rule, inmate was not yet eligible for parole. U.S.C.A. Const. Art. 1, § 9, cl. 3.

410 *173 Syllabus by the Court

1. K.S.A. 1987 Supp. 22-3717 does not create a liberty interest in parole release.

2. The notices given to each petitioner upon denial of parole are examined and found to comply with statutory requirements.

3. The present policy of the three-member parole board to require unanimity before parole is granted to persons convicted of a Class A or B felony is procedural, and is not a violation of the prohibition against ex post facto laws contained in article I, section 9, of the United States Constitution.

**411 William F. Bradley, Jr., of Martindell, Swearer, Cabbage, Ricksecker & Hertach, of Hutchinson, argued the cause and was on the brief for appellant Lamar Gilmore.
John K. Bork, Asst. Atty. Gen., argued the cause and was on the brief for appellant and appellee Kansas Parole Bd.
Edward V. Byrne, of Byrne Law Offices, of Olathe, argued the cause and was on the brief for appellees John Stasse, Robert E. Murphy, Gary Dean Darby, and Joseph Dyche.
*174 MILLER, Justice:

Lamar Gilmore, John Stasse, Robert E. Murphy, Gary Dean Darby, and Joseph Dyche are all in the custody of the Secretary of Corrections of the State of Kansas, following their respective convictions for various felony offenses. Each petitioner met with the Kansas Parole Board, and each was denied parole. Petitioners then commenced separate actions against the Kansas Parole Board, claiming that the reasons given by the Board for denying parole do not comply with constitutional and statutory requirements, and petitioner Gilmore also contends that the "unanimous vote rule," implemented by the Board, violates his constitutional rights.

The district court of Reno County denied Gilmore's petition for habeas corpus, finding that he has no constitutional or inherent right to parole; that the reasons set forth by the Board for denial of parole were sufficient; and that the Board has the authority to adopt the "unanimous vote rule." On the other hand, the district court of Leavenworth County granted the petitions of Stasse, Murphy, Darby, and Dyche, finding that the Board had not furnished each of them with specific, articulated reasons for denial of parole, and the court ordered the Board to furnish a new parole hearing for each of those petitioners, and directed that a detailed statement of reasons be furnished if the Board denied parole to any of those men. Gilmore appeals from the decision of the Reno District Court, and the Kansas Parole Board appeals from the decision of the Leavenworth District Court. All five cases were consolidated for hearing before this court.

The first issue is whether the reasons given by the Parole Board for denying parole to each of the petitioners complies with constitutional and statutory requirements. We turn first to the statutory law. K.S.A. 1987 Supp. 22-3717(h) provides in applicable part:

> "Whenever the Kansas parole board formally considers placing an inmate on parole and does not grant the parole, the board shall notify the inmate in writing of the reasons for not granting the parole."

The Kansas Administrative Regulation, K.A.R. 45-4-7 (1987 Supp.), provides not only for the furnishing of written reasons for denial of parole but also for recommendations. The regulation reads:

*175 "Inmates who have not been granted parole shall be furnished written reasons for the board's decision as soon as practical through the unit team as well as any recommendations as to the manner in which the inmate may improve the inmate's status at the designated pass date."

The Reno District Court found:

"The reasons set forth by the Kansas Parole Board for denial of Petitioner's parole request were sufficiently stated to show that the Board considered appropriate information to deny the Petitioner's parole."

The Leavenworth District Court found that

" 'boiler plate' language ... is routinely and customarily employed by respondent Kansas Parole Board in denying parole *en masse* to applicants who in fact may be quite dissimilarly situated. Petitioners' contention that they and other inmates have not been afforded individually-tailored explanations for the denial of their parole applications is well established by the testimony and exhibits presented, and respondent has produced no evidence to the contrary...."

Let us now examine the reasons advanced by the Board in denial of petitioners' parole. Each of the petitioners received a written notification, listing four or **412 five reasons why parole was denied. One paragraph appears in all of the documents. It reads:

"The [Parole] Board recommends that you cooperate with institutional staff, participate in programs recommended by the staff, and maintain a good conduct record, all of which will be considered by the [Parole] Board at your next scheduled hearing."

All except the notice to Murphy contained the following two paragraphs:

"In view of the serious nature and circumstances of the offense, the Parole Board feels that your release at this time would depreciate the seriousness of the sentence which was imposed by the court, promote disrespect for the law, and is incompatible with the prevailing social opinion.

"The Parole Board also notes strong objection from the community regarding your parole at this time."

The notice to Darby and Stasse contained the following paragraph:

"The [Parole Board] recommends that you participate in mental health counseling prior to your next scheduled hearing."

The following paragraphs appeared in only one of the notices. The one provided to Dyche said:

"The [Parole Board] recommends that you participate in sex offenders program prior to your next scheduled hearing."

*176 Gilmore's said:

"The Kansas Parole Board also recommends that you participate in continued mental health counseling for sexual offenders and anger management, and substance abuse counseling prior to your next scheduled hearing."

Murphy's notice included the following four paragraphs:

"From an assessment of your case, it appears you have certain behavioral problems which should receive further attention prior to positive consideration for release on parole.

"You have a hostile attitude.

"The [Parole] Board recommends that you cooperate with institutional staff, participate in programs recommended by the staff, and maintain a good conduct record, all of which will be considered by the [Parole] Board at your next scheduled hearing.

"The Kansas Parole Board also recommends that you participate in mental health sexual offenders counseling and adjustment counseling prior to your next scheduled hearing."

Finally, Stasse's notification included this paragraph:

> "Because of your prior criminal history, the [Parole Board] feels your continued confinement within the institution will enhance your capacity to lead a law abiding life when released at a later date."

In *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), the United States Supreme Court recognized that the rationale behind requiring reasons for a denial of parole is to guide the prisoner in future conduct. 442 U.S. at 15-16, 99 S.Ct. at 2108. The opinion, however, does not require that a separate and individually written statement, in language entirely different from that written for any other inmate, be provided. Similarly, neither the Kansas statute nor the administrative regulation requires separately written and distinctive language addressed to each inmate. It is obvious that the Board has formulated certain language which it uses to address most of the common reasons and recommendations. The Board, however, does not issue the same statement to each inmate. The reasons and recommendations appear to be carefully selected in order that each inmate may know the reasons for denial of parole and may receive guidance as to his (or her) further conduct and activity while in custody.

[1][2] The Board is required by K.S.A. 1987 Supp. 22-3717(h) to interview each inmate. Under 22-3717(g), the Board is required ***177** to consider all pertinent information regarding each inmate, including, but not limited to, the circumstances of the ****413** offense; the presentence report; the previous social history and criminal record; the conduct, employment, and attitude of the inmate in prison; and the reports of any physical and mental examinations. The argument is advanced that the crime itself cannot be the reason for denial of parole unless all inmates convicted of a certain crime are denied parole. In support of this contention, petitioners cite *U.S. ex rel. Scott v. Ill. Parole and Pardon Bd.,* 669 F.2d 1185, 1190 (7th Cir.1982). That case is distinguishable. The Seventh Circuit found that the Illinois parole statute created a liberty interest in parole release. However, the Kansas statute, which we shall discuss later, does not create a liberty interest. Thus, the question is whether the reasons for denial comply with Kansas statutory law. Certainly the nature of the crime is a consideration to be taken into account and thus can be cited as a reason for denial of parole. K.S.A. 1987 Supp. 22-3717(g) requires the Board to consider the circumstances of the offense of the inmate. The acts of one person in committing an offense may be quite different and much less or much more shocking and heinous than the acts of another person in committing the same statutorily defined offense.

That a parole board may properly consider the nature of the crime is answered in *Greenholtz,* where the United States Supreme Court stated:

> "A state may, as Nebraska has, establish a parole system, but it has no duty to do so. Moreover, to insure that the state-created parole system serves the public-interest purposes of rehabilitation and deterrence, the state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority. It is thus not surprising that there is no prescribed or defined combination of facts which, if shown, would mandate release on parole. Indeed, the very institution of parole is still in an experimental stage. In parole releases, like its siblings probation release and institutional rehabilitation, few certainties exist. In each case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community. This latter conclusion requires the Board to assess whether, *in light of the nature of the crime,* the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice. The entire inquiry is, in ***178** a sense, an 'equity' type judgment that cannot always be articulated in traditional findings." (Emphasis added.) 442 U.S. at 7-8, 99 S.Ct. at 2104.

We conclude that the reasons given by the Board in written form to each inmate upon denial of parole comply with the statutory requirements. Though the Board uses the same language to describe the same reasons for denial or recommendations for the guidance of the inmates, the notices are tailored to each individual inmate. We find no valid objection to the notices employed.

[3] We turn now to whether the petitioners have a liberty interest in parole release which is protected under the Due Process Clause of the Fourteenth Amendment. In *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972), the United States Supreme Court defined a property interest. The Court said:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."

Similarly, to have a liberty interest in parole release, an inmate must have more than an abstract desire for it or a unilateral expectation of it. Instead, he must have a legitimate claim of entitlement to it under the statutes which provide for parole.

In *Greenholtz,* the Court said:

> "That the state holds out the *possibility* of parole provides no more than a ****414** mere hope that the benefit will be obtained. *Board of Regents v. Roth,* 408 U.S. [564, 577, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972)]. To that extent the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process." 442 U.S. at 11, 99 S.Ct. at 2105-06.

However, in both *Greenholtz* and *Board of Pardons v. Allen,* 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987), the United States Supreme Court found that the Nebraska and Montana statutes provided a liberty interest in parole release because of the mandatory language of the respective state statutes. The Nebraska statute said that:

> " 'Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, *it shall order his release* unless it is of the opinion that his release should be deferred because [of one of several reasons].' " (Emphasis added.) Neb.Rev.Stat. § 83-1,114(1) (1976), quoted in *Greenholtz,* 442 U.S. at 11, 99 S.Ct. at 2106.

***179** The *Greenholtz* court held that the establishment of a parole system by the state does not automatically give rise to a protected liberty interest in parole. The language of the Nebraska statute, however, was mandatory, and the court held that such language created an exception to the general rule and created a liberty interest in parole. Thus, to satisfy due process, the Nebraska Parole Board was required to provide each inmate an opportunity to be heard, and to notify the inmate of the reasons for denial-a statement of those respects in which the inmate fell short of qualifying for parole. The Kansas Board, under statute and regulation, takes similar action.

The Montana statute read:

> " '(1) Subject to the following restrictions, the board *shall release on parole* [certain persons] ... when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.]
>
> ....
>
> " '(2) A parole shall be ordered only for the best interests of society....' " (Emphasis added.) Mont.Code Ann. § 46-23-201 (1985), quoted in *Board of Pardons v. Allen,* 482 U.S. at ----, 107 S.Ct. at 2420, 96 L.Ed.2d at 311-12.

The Kansas statute, K.S.A. 22-3717(e), does not say that the Kansas Parole Board "shall release on parole" or "shall order his release." Instead, 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. The statute provides:

> "[T]he Kansas parole board *shall have the power* to release on parole those persons confined in institutions who are eligible for parole when, in the opinion of the board, there is reasonable probability that such persons can be released without detriment to the community or to themselves." (Emphasis added.) K.S.A. 1987 Supp. 22-3717(e).

In *Board of Pardons v. Allen,* 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303, the Court stated that when statutes or regulatory provisions are phrased in mandatory terms or explicitly create a presumption of

release, courts find a liberty interest. Conversely, statutes or regulations that provide that a parole board "may" release an inmate on parole do not give rise to a protected liberty interest. In *Parker v. Corrothers,* 750 F.2d 653 (8th Cir.1984), the Eighth Circuit found ***180** that the Arkansas parole statute did not create a liberty interest. That statute, Ark.Stat.Ann. § 43-2804 (1977), like the Kansas statute, provides: "The Parole Board shall have the power...."

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,****415** 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, 90 S.Ct. 218, 24 L.Ed.2d 180 (1969), and *Morrissey v. Brewer,* 408 U.S. 471, 481, 482, 92 S.Ct. 2593, 2600-01, 33 L.Ed.2d 484 (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. The notices furnished to petitioners upon denial of parole are not constitutionally deficient.

[4] Gilmore contends that the present policy of the Board to require a unanimous vote before parole is granted to a person convicted of a Class A or B felony violates article 1, section 9 of the United States Constitution, and constitutes the application of an ex post facto law. Gilmore was convicted of rape, and began serving a ten-year to life sentence on February 26, 1980. In February of 1986, he became eligible to meet with the Board, but parole was denied. At the time of his conviction, Kansas had a five-member Adult Authority. An affirmative vote of a majority of the Authority, three members, was required before parole could be granted. In 1984, the Kansas Legislature amended K.S.A. 22-3707 and 22-3707a, changing the name of the Kansas Adult Authority to the Kansas Parole Board, and reducing the membership to three. K.S.A. 1987 Supp. 22-3707, -3707a. Although not required by statute, the Board has adopted a policy whereby it will grant parole to those convicted of A and B felonies only upon a unanimous vote of the Board.

***181** Gilmore relies upon the decision in *United States ex rel. Steigler v. Board of Parole,* 501 F.Supp. 1077 (D.Del.1980). At the time Steigler was convicted and sentenced, the Delaware statutes provided that parole was to be determined by a simple majority of a five-member Board. Before Steigler became eligible for parole, the Delaware statute was amended to require an affirmative vote of four of the five members before parole could be granted to inmates convicted of certain serious crimes. Steigler received a letter after his parole was denied, stating that three members of the Board had voted for parole but the law then required four affirmative votes before parole could be granted. The *Steigler* court, admitting that the amendment could be characterized as procedural rather than substantive, noted that the clear purpose of the statutory change was to make parole substantially more difficult for particular classes of defendants and to require a greater quantity of proof of fitness for parole than would have been required under the prior law. Holding that the law violated the ex post facto clause of article I, section 10, of the United States Constitution the *Steigler* court relied upon *Thompson v. Utah,* 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898), finding that case indistinguishable. Thompson had been charged with a felony and tried in the territory of Utah before a jury composed of twelve persons. That conviction was set aside, and after Utah was admitted to the Union, Thompson was retried and convicted by a jury composed of only eight persons. The United States Supreme Court held that Thompson's right to a twelve-member jury vested at the time of his first trial.

We find both *Steigler* and *Thompson* distinguishable. If Thompson's right to a twelve-person jury vested at the time of his first trial, then Gilmore's right to a parole board of a certain size vested at the time of his first appearance before the Board-which occurred after the Board was reduced to three members. At the time Gilmore was convicted, the Board consisted of five members. The statute then in force, K.S.A. 1980 Supp. 22-3717, like the later amendments, did not fix the number of members of the Adult Authority who

had to vote in favor of parole before one could be granted. The Authority, by internal rule, could have required 3, 4, or 5 votes. ****416** At that time, 1980, the ***182** Authority went by the majority vote rule, and only three affirmative votes were required before parole could be granted. At the present time, the Board consists of only three members and, under the Board's internal rule, all three must agree before Gilmore can be placed on parole. In *Steigler,* state statutory law originally required a 60% majority, and the Delaware Legislature raised the required majority to 80%, or four affirmative votes on the five-person Board. Here, the legislature has not fixed the voting requirements for the Board, but has left that matter to the discretion of the Board itself. We conclude that the matter is internal and procedural, and not a substantive change. Gilmore has no liberty interest in parole under Kansas law, and this procedural change is not unconstitutional. We find no ex post facto violation.

The judgment of the district court of Reno County in the case of *Lamar Gilmore v. Kansas Parole Board* is affirmed. The judgment of the Leavenworth District Court in the consolidated cases of *John Stasse v. Kansas Parole Board, Robert E. Murphy v. Kansas Parole Board, Gary Dean Darby v. Kansas Parole Board,* and *Joseph Dyche v. Kansas Parole Board* is reversed.

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