

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
[O'Connell, P.J., Sawyer, J., and Talbot, J.]

PATRICK J. KENNEY,

Plaintiff-Appellant,

v

WARDEN RAYMOND BOOKER

Defendant-Appellee.

Supreme Court No. 145116

Court of Appeals No. 304900

Wayne Circuit Court

No. 11-003828-AH

**The appeal involves a ruling
that a provision of the
Constitution, a statute, rule or
regulation, or other State
governmental action is invalid.**

BRIEF ON APPEAL OF APPELLEE WARDEN RAYMOND BOOKER

ORAL ARGUMENT REQUESTED

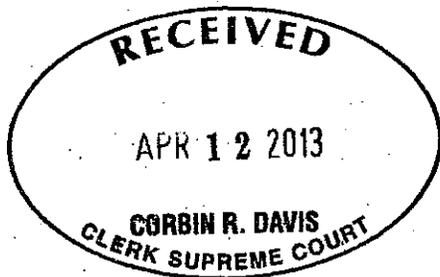
Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

B. Eric Restuccia (P49550)
Deputy Solicitor General

James Long
Scott Rothermel
Assistant Attorneys General
Attorneys for Warden Booker
Department of Attorney General
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124



Dated: April 12, 2013

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Index of Authorities.....	iii
Statement of Jurisdiction.....	ix
Counter-Statement of Questions Presented.....	x
Constitutional Provisions, Statutes, Rules Involved	xi
Introduction	1
Counter-Statement of Facts.....	4
Argument.....	7
I. The law on habeas corpus – both in statute and common law – only provides for relief for “radical defects” in jurisdiction or errors of equivalent significance that deprive the court with authority to act. (Questions 1-6).....	7
A. Standard of Review.....	7
B. Analysis.....	7
1. The Michigan statutory law on habeas is an enforcement of the common law, establishing a single standard in Michigan about whether habeas relief is warranted.....	8
2. A habeas petitioner who is subject to detention based on a criminal conviction must establish a radical defect in jurisdiction or its equivalent to qualify for relief.....	16
3. The scope of relief in habeas provided in MCL 600.4310 is the same as the relief available under Michigan common law.....	25
4. The availability of relief by other means does not change whether habeas relief is available – the standard requires proof of a radical defect of jurisdiction or its equivalent.	26
5. The “radical defect” requirement is the controlling standard in Michigan encompassing defects in subject	

	matter and personal jurisdiction and also defects that impugn the authority of the court or officer to act.	29
6.	The standard of review on appeal from a habeas decision by the Court of Appeals to this Court is <i>de novo</i>	30
II.	In granting relief, the court may either order the person's release, or condition release on the correction of the constitutional infirmity. (Question 7).....	31
A.	Standard of Review.....	31
B.	Analysis.....	31
III.	There is no distinction in Michigan law about eligibility for habeas relief that depends on whether the restraint is judicially-ordered or an executive one.....	34
A.	Standard of Review.....	34
B.	Analysis.....	34
	Conclusion and Relief Requested.....	37

INDEX OF AUTHORITIES

Cases

<i>Boumediene v Bush</i> , 553 U.S. 723 (2008).....	14
<i>Browning v Michigan Department of Corrections</i> , 385 Mich 179; 188 NW2d 552 (1971)	16, 21, 32
<i>Cross v Department of Corrections</i> , 103 Mich App 409; 303 NW2d 218 (1981).....	15, 24
<i>Ex parte Bobowski</i> , 313 Mich 521; 21 NW2d 838 (1946)	passim
<i>Ex parte Bollman</i> , 4 Cranch 75 (1807)	8
<i>Ex parte Casella</i> , 313 Mich 393; 21 NW2d 175 (1946)	36
<i>Ex parte Dawsett</i> , 311 Mich 588; 19 NW2d 110 (1945)	35
<i>Ex parte Holton</i> , 304 Mich 534; 8 NW2d 628 (1943)	36
<i>Ex parte Long</i> , 266 Mich 369; 254 NW 133 (1934)	11
<i>Ex parte Miller</i> , 303 Mich 81; 5 NW2d 575 (1942)	18
<i>Ex parte Roberts</i> , 310 Mich 372; 17 NW2d 218 (1945)	26
<i>Ex parte Satt</i> , 164 Mich 472; 129 NW 863 (1911)	35
<i>Ex parte Tobias Watkins</i> , 28 U.S. 193 (1830).....	14, 30
<i>Fay v Noia</i> , 372 U.S. 391 (1963).....	29
<i>Felker v Turpin</i> , 518 US 651 (1996).....	8, 13, 14

<i>Fritts v Krugh</i> , 354 Mich 97 (1958).....	23
<i>Hamilton's Case</i> , 51 Mich 174; 16 NW 327 (1883).....	18, 22
<i>Hatcher v Department of Social Services</i> , 443 Mich 426; 505 NW2d 834 (1993).....	23
<i>Hinton v Parole Board</i> , 148 Mich App 235; 383 NW2d 626 (1986).....	11
<i>Holley v White</i> , 2007 WL 4326913 (ED Mich, 2007).....	24
<i>Hopkins v Michigan Parole Board</i> , 237 Mich App 629; 604 NW 2d 686 (1999).....	33
<i>In re Allen</i> , 139 Mich 712; 103 NW 209 (1905).....	21
<i>In re Bourne</i> , 300 Mich 398; 2 NW2d 439 (1942).....	18, 19, 21
<i>In re Brazel</i> , 293 Mich 632; 292 NW 664 [1940].....	10
<i>In re Callahan</i> , 348 Mich 77; 81 NW2d 669 (1957).....	23, 36
<i>In re Elliott</i> , 315 Mich 662; 24 NW2d 528 (1946).....	17
<i>In re Ellis</i> , 79 Mich 322; 44 NW 616 (1890).....	26
<i>In re Gordon</i> , 301 Mich 224; 3 NW2d 253 (1942).....	18
<i>In re Jackson</i> , 15 Mich 417 (1867).....	11, 12, 13, 16
<i>In re Joseph</i> , 206 Mich 659; 173 NW 358 (1919).....	passim
<i>In re Lamanna</i> , 263 Mich 62; 248 NW 550 (1933).....	17, 31

<i>In re McLeod,</i> 348 Mich 434; 83 NW2d 340 (1957)	21
<i>In re Offill,</i> 293 Mich 416; 292 NW 352 (1940)	10
<i>In re Palm,</i> 255 Mich 632; 238 NW 732 (1931)	10, 17
<i>In re Stone,</i> 295 Mich 207; 294 NW 156 (1940)	passim
<i>In re Van Dyke,</i> 276 Mich 32; 267 NW2d 778 (1936)	19
<i>In re Wojtasiak,</i> 375 Mich 540; 134 NW2d 741 (1965)	16
<i>Jones v Department of Corrections,</i> 468 Mich 646; 664 NW 2d 717 (2003)	33
<i>Joslin v Frisbie,</i> 334 Mich 627; 55 NW2d 125 (1952)	17
<i>Knight v Department of Corrections,</i> 469 Mich 908; 670 NW2d 219 (2003)	30
<i>Lonchar v Thomas,</i> 517 US 314 (1996).....	9
<i>Lupu v Denniston,</i> 285 Mich 500; 281 NW 236 (1938)	11
<i>McCleskey v Zant,</i> 499 U.S. 467 (1991).....	14
<i>Morales v Michigan Parole Board,</i> 260 Mich App 29; 676 NW2d 221 (2004).....	27, 28
<i>Moses v Department of Corrections,</i> 274 Mich App 481; 736 NW2d 269 (2007).....	22
<i>Parks v Department of Corrections,</i> 493 Mich 925; 824 NW2d 566 (2013)	21, 23
<i>Penn v Department of Corrections,</i> 100 Mich App 532; 298 NW2d 756 (1980).....	28

People v Carpentier,
446 Mich 19; 5321 NW2d 195 (1994) passim

People v Cureton,
738 NW2d 762 (2007)21

People v Den Uyl,
320 Mich 477; 31 NW2d 699 (1948)13

People v Harris,
266 Mich 317; 253 NW 312 (1934)26, 28

People v Holder,
483 Mich 168; 767 NW2d 423 (2009)23

People v Idziak,
484 Mich 549; 773 NW2d 616 (2009)12

People v Jones,
467 Mich 301; 651 NW2d 906 (2002)17, 26

People v Kowalski,
492 Mich 106; 821 NW2d 14 (2012)7, 31, 34

People v McCager,
367 Mich 116; 116 NW2d 205 (1962)16, 31

People v New,
427 Mich 482; 398 NW2d 358 (1986)24

People v Price,
23 Mich App 663; 179 NW2d 177 (1970).....15, 22

People v Rayburn,
18 Mich App 468; 171 NW2d 460 (1969).....35

People v Rudnik,
333 Mich 216; 52 NW2d 671 (1952)21, 34

People v Young,
220 Mich App 420; 559 NW2d 670 (1996).....28

Petition of Seeney,
330 Mich 55; 46 NW2d 458 (1951)16

Petition of Vaughan,
371 Mich 386; 124 NW2d 251 (1963)21, 34

Preiser v Rodriguez,
411 U.S. 475 (1973).....29

Trentadue v Buckler Lawn Sprinkler,
479 Mich 378; 738 NW2d 664 (2007)12

Triplett v Deputy Warden,
142 Mich App 774; 371 NW2d 862 (1985).....28

Walls v Director,
84 Mich App 355; 269 NW2d 599 (1978)..... 14, 22, 27

Witzke v Withrow,
702 F Supp 1338 (WD Mich, 1988)15

Statutes

28 USC 2241.....13, 22

MCL 24.203(3).....28

MCL 600.4301 - 600.438713

MCL 600.430330

MCL 600.43079, 12

MCL 600.43109, 14, 25

MCL 600.4310(3).....10, 24

MCL 600.432216

MCL 600.435211

MCL 600.4352(1).....9, 31

MCL 791.20433

MCL 791.23427

MCL 791.240a33

MCR 3.30310

Other Authorities

39 CJS Habeas Corpus, § 6735
Criminal Law and Procedure, § 27:18, (2d ed) "Scope of inquiry," p. 36720
Michigan Pleading and Practice, Vol 12, § 93:3, p 9.....26

Rules

MCR 24.304(1).....28
MCR 3.303(A)30
MCR 6.5001, 22, 25
MCR 6.508(D).....19
MCR 6.508(D)(3).....18
MCR 7.301(A)(2).....30

Constitutional Provisions

Mich Const 1835, art 1, § 1229
Mich Const 1963, art 1, § 128
Mich Const 1963, art 1, § 630
Mich Const 1963, art 6, § 138
Mich Const 1963, art 6, § 48
U.S. Const, art I, § 9.....8

STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.302(1)(A)(2).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In its January 25, 2013 order, the Court requested that the parties brief the following eight questions:

1. What is the relationship between common law and statutory habeas corpus?
2. What is the standard for establishing a claim for habeas corpus relief, including whether there is a difference between the standard for providing relief at common law and by statute, MCL 600.4301, *et seq*?
3. What is the scope of the limitations on habeas corpus found in MCL 600.4310?
4. What is the effect, if any, of the availability of other means of review on claims for habeas corpus relief generally, and specifically in the context of parole revocation?
5. Address the validity and scope of the "radical defect" requirement in habeas corpus cases, including whether such requirement is limited solely to defects in subject matter or personal jurisdiction.
6. What is the standard of review applicable to habeas corpus claims, including if there is a difference at common law and by statute?
7. What type(s) of relief that may be granted to successful habeas corpus claimants?
8. Whether habeas corpus principles recognize a distinction between executive detention and judicially-ordered detention and, if so, the significance of that distinction?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

Michigan Constitution of 1963

Article 1

§ 12. The privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion or invasion the public safety may require it.

Michigan Compiled Law

MCL 600.4307

An action for habeas corpus to inquire into the cause of detention may be brought by or on the behalf of any person restrained of his liberty within this state under any pretense whatsoever, except as specified in section 4310.

MCL 600.4310

An action for habeas corpus to inquire into the cause of detention may not be brought by or on behalf of the following persons:

- (1) Persons detained by virtue of any process issued by any court of the United States, or any judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts;
- (2) Persons committed for treason or felony, or for suspicion thereof, or as accessories before the fact to a felony, where the cause is plainly and specially expressed in the warrant of commitment;
- (3) Persons convicted, or in execution, upon legal process, civil or criminal;
- (4) Persons committed on original process in any civil action on which they were liable to be arrested and imprisoned, unless excessive and unreasonable bail is required.

MCL 600.4352

- (1) If no legal cause is shown for the restraint, or for the continuation thereof, the court or judge shall discharge the person restrained from the restraint under which he is held.

INTRODUCTION

The writ of habeas corpus is an ancient one with its roots in the common law. Michigan has enshrined this right in its Constitution, while the scope and execution of the writ has been given written form by the Legislature. The statutory law has remained relatively unchanged since its promulgation in 1838 as reflected in the 1846 compiled law of Michigan. Throughout its history in Michigan, the writ has been a guarantor of liberty within confined limits. As an independent civil action, providing a collateral challenge, the writ has consistently been held only to correct “radical defects” that nullify the court or governmental official’s action – a narrow band of errors that relate either to a jurisdictional defect or to its equivalent by depriving the authority of the court or official to act at all. The scope of relief is limited because the writ of habeas corpus is not designed to replace an appeal or a “writ of error.”

In fact, the traditional common law rule for criminal prisoners limits habeas relief to only defects in jurisdiction. Given the fact that claims related to convictions and sentences may be challenged under MCR 6.500 *et seq* and given the expansion of the availability of federal habeas relief for constitutional violations in state court, there is good reason to return to the traditional limitation rooted in the common law that provided relief only where the court was actually without jurisdiction. At the very least, this Court should maintain the requirement that the defect be the equivalent to a jurisdictional error. Kenney’s argument that a habeas action should lie for a deficiency in evidence for a parole violation would effectively make the habeas corpus action just another writ of error. It would allow parolees to

file habeas actions at will for revocations or denials that would require review. The Court should reject this invitation.

With these general principles in mind, the State provides the following answers to this Court's eight inquiries, answers that may be digested into three groups.

With respect to the first six questions, Michigan statutory law on habeas corpus operates as an enforcement of the common law for the writ. Consistent with this Court's previous treatment of the state habeas statute, one set of rules governs this area of law, with the same standards and limits applying equally to the statute and common law. The standards are clear that habeas is not a replacement for an appeal and is not a "writ of error." The "radical defect" standard, identified by many cases of this Court, is the proper one, providing a very limited range of errors that may be challenged in habeas. This range includes defects in subject matter or personal jurisdiction, but this Court has included other fundamental errors – equivalent to jurisdictional errors – that deprive the court of any authority to act. This Court should not expand this standard.

For criminal prisoners, such as Patrick Kenney, the kinds of cases where this Court has held that an action for habeas corpus would lie are ones in which a prisoner is sentenced to a facility outside trial court's authority, is sentenced for a crime that does not exist in Michigan, has his probation revoked without an opportunity to be heard or without notice of the charge, has been discharged from parole and improperly placed on parole again, or has already served his maximum

sentence. These are all jurisdictional deficiencies or their equivalent, related to the basic authority of the court or governmental official to issue a decision. The claim of error raised by Kenney is not of this kind, but rather is an ordinary evidentiary one that he could have raised in an administrative appeal. That is the only way he could challenge the decision, because habeas does not lie here for this routine claim.

With respect to the seventh question, the only type of relief that this Court may impose is either to order release, or to condition release on the correction of the infirmity that gave rise to the claim.

With respect to the eighth question, the legal limitations and standards governing habeas law do not depend on whether the detention is judicially imposed, or, as here, is an executive detention. There is only one standard in Michigan law.

This Court should affirm the denial of relief in habeas, although for different reasons than provided by the Court of Appeals.

COUNTER-STATEMENT OF FACTS

Patrick Kenney is a parolee under the supervision of the Michigan Department of Corrections (MDOC). MDOC previously incarcerated Kenney as a result of two controlled substance convictions. Defendant in this action is Warden Raymond Booker, former warden at the Ryan Correctional Facility, where MDOC previously incarcerated Kenney.

On December 10, 2007, Kenney's parole agent charged Kenney with violating five conditions of his parole: failing to report to his field agent; three charges related to having a firearm in his possession stemming from a traffic stop where police discovered a firearm in the battery compartment of the car he was driving; and taking items from his mother's residence without her permission and selling them. (Appellee's Appendix, p 1b.)

On March 25, 2008, MDOC afforded Kenney a hearing on these charges. The Administrative Law Examiner (ALE) found Kenney guilty by plea of failing to report to his field agent and guilty at a hearing on the firearms charges. The charge related to his mother's property was dismissed. (Appellee's Appendix, pp 2b-3b.)

On April 23, 2008, as a result of the ALE's determination that Kenney violated the conditions of his parole, the Parole Board revoked Kenney's parole and continued his prison sentence for 60 months. (Appellee's Appendix, pp 4b-7b.)

More than two years later, in October 2010, Kenney filed a writ of habeas corpus requesting that the Wayne County circuit court review the parole revocation. The circuit court granted Kenney's habeas request and ordered the MDOC to

provide him a new hearing to include exculpatory evidence regarding the firearm not heard at the first parole revocation hearing.

Kenney's second parole revocation hearing took place on November 18, 2010, and January 11, 2011. The ALE again found Kenney guilty by plea of failing to report to his field agent and guilty at a hearing on the firearms charges. (Appellee's Appendix, pp 8b-10b.) Specifically, the ALE found that Kenney had previously lent the vehicle to his friend and roommate, John Cook. Kenney admitted that he knew Cook was a drug dealer and that he allowed Cook to use the car in exchange for drugs. The ALE further concluded that Kenney "knew or should have known" about the gun found in the car because, just 17 days before the instant arrest, Cook had possession of the car when police found a gun in the same battery compartment. Further, the ALE concluded that it was not a far leap to connect drugs with guns. (Appellee's Appendix, pp 8b-10b.)

As a result of the guilty finding, the Parole Board continued Kenney's sentence for 24 months. (Appellant's Appendix, pp 50a-54a.) In response, Kenney filed a second habeas action and requested that the Wayne County circuit court vacate the guilty findings, enter an order finding him not guilty, and enter a judgment releasing and discharging him from parole. On March 22, 2011, the Parole Board granted Kenney a parole and released him on parole on June 1, 2011. (Appellant's Appendix, p 88a.)

Following a June 17, 2011 hearing, the circuit court held that the ALE used the wrong standard of proof for the firearms charges – that Kenney "knew or

should've known" about the firearm – which it determined amounted to a due-process violation. The circuit court held that the due-process violation resulted in a radical defect in jurisdiction and granted Kenney his requested habeas relief. (Def.'s Ex. 2, Circuit Court Transcript at 21-26; Appellant's Appendix, pp 114a-119a.) The court then unilaterally discharged Kenney from parole. (Def.'s Ex. 2, Circuit Court Transcript at 27-28; Appellant's Appendix, pp 120a-121a.)

PROCEEDINGS BELOW

On July 20, 2011, the Court of Appeals granted the Warden's application for leave and stayed the circuit court's decision. On April 3, 2012, in an unpublished opinion, the Court of Appeals reversed the circuit court's decision, holding that the evidence on which the ALE relied was not so lacking as to create a due-process violation and, thus, justify habeas relief. In short, the Court of Appeals held that the ALE's usage of the "knew or should have known" standard was "less than ideal," but that the ALE's reasoning supported a reasonable inference that Kenney knew about and had constructive possession of the gun. Kenney then filed for leave to appeal in this Court.

On September 19, 2012, this Court ordered oral argument on the application and directed the parties to submit supplemental briefs addressing four discrete questions. On January 10, 2013, this Court held oral arguments on Kenney's application for leave. On January 25, 2013, this Court then granted Kenney's application for leave, ordering the parties to address eight distinct issues.

ARGUMENT

I. The law on habeas corpus – both in statute and common law – only provides for relief for “radical defects” in jurisdiction or errors of equivalent significance that deprive the court with authority to act. (Questions 1-6).

A. Standard of Review

This Court reviews issues of law *de novo*. *People v Kowalski*, 492 Mich 106, 119; 821 NW2d 14 (2012).

B. Analysis

The first six questions present interrelated legal issues that should be addressed together. The common law and Michigan statutory law provide a single legal regime, and there is no difference in standard between them. It is a very high standard of proof – requiring evidence of a “radical defect” – but is not strictly limited to subject matter or personal jurisdiction, because it has also been found to encompass a small set of additional errors that would deprive the court or governmental official of authority to act. This standard should not be expanded to routine evidentiary claims such as here. Although habeas relief is not a substitute for an appeal and will not lie where there is available a “writ of error,” this very limited form of relief is applicable regardless whether there is an appeal available from the action at issue. Thus, parole revocations, which are appealable administratively, and parole denials, which are not, are governed by the same habeas standards. Because the merits of a decision are not reviewable in habeas, the standard of review whether there is a jurisdictional defect or its equivalent is *de novo*.

1. **The Michigan statutory law on habeas is an enforcement of the common law, establishing a single standard in Michigan about whether habeas relief is warranted.**

The conclusion that Michigan's statutory law and common law establishes a single standard for habeas relief in Michigan is supported by this Court's evaluation of habeas claims as well as the development of federal law on habeas corpus relief. It also accords with common sense.

This Court has never distinguished between the source of law – whether statute or common law – in identifying the standard for relief in state habeas cases. The Michigan constitution provides that the writ of habeas corpus shall not be suspended:

The privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion or invasion the public safety may require it. [Mich Const 1963, art 1, § 12.]

The Michigan Constitution also provides this Court, and the circuit courts, with the authority to “issue, hear and determine . . . remedial writs.” Mich Const 1963, art 6, §§ 4, 13. These provisions are not unique to Michigan law. Likewise, the United States Constitution provides that the writ of habeas corpus shall not be “suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const, art I, § 9.

The U.S. Supreme Court has made clear that the power to grant the writ of habeas corpus is provided by “written law.” *Felker v Turpin*, 518 US 651, 654 (1996), quoting *Ex parte Bollman*, 4 Cranch 75, 94 (1807) (“[T]he power to award the writ by any of the courts of the United States, must be given by written law.”).

The proper scope of the writ is “normally for the Congress to make.” *Lonchar v Thomas*, 517 US 314, 323 (1996).

The Michigan habeas statute has been in place for more than 150 years. It is a comprehensive statutory scheme – the Michigan compiled reporter for 1846 has 69 sections in Chapter 134 for Michigan’s habeas statute – and the authorization to bring a challenge to one’s confinement remains substantively unchanged today:

An action for habeas corpus to inquire into the cause of detention may be brought by or on the behalf of any person restrained of his liberty within this state under any pretense whatsoever, except as specified in section 4310. [MCL 600.4307. Compare R. S. 1846, c. 134, § 7.]

The same is true of the limitations on the ability to bring such a claim:

An action for habeas corpus to inquire into the cause of detention may not be brought by or on behalf of the following persons:

- (1) Persons detained by virtue of any process issued by any court of the United States, or any judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts;
- (2) Persons committed for treason or felony, or for suspicion thereof, or as accessories before the fact to a felony, where the cause is plainly and specially expressed in the warrant of commitment;
- (3) Persons convicted, or in execution, upon legal process, civil or criminal;
- (4) Persons committed on original process in any civil action on which they were liable to be arrested and imprisoned, unless excessive and unreasonable bail is required.

[MCL 600.4310. Compare R. S. 1846, § 10.]

The provision recognizing the court’s authority to grant relief, MCL 600.4352(1), states that “[i]f no legal cause is shown for the restraint, or for the continuation

thereof, the court or judge shall discharge the person restrained from the restraint under which he is held.” See also R.S. 1846, c. 146, § 7. Consistent with these statutory provisions, this Court has promulgated court rules governing the procedural requirements for filing habeas actions. MCR 3.301 *et seq.*

In examining the statutory limitations, most notably the third one on “[p]ersons convicted . . . upon legal process” under MCL 600.4310(3), this Court has not identified a different legal standard for determining whether relief was available distinct from the common law. In specific, in reviewing a request for habeas relief, this Court identified the statutory language in the predecessor statute to MCL 600.4310(3) (requiring that the process be “legal”), and concluded that this standard corresponded to the traditional requirement that habeas only provides relief for “radical defects” that rendered the proceeding “absolutely void”:

If we find that petitioner is confined under *legal* criminal process, the proceeding must be dismissed.

* * *

Recognizing that the writ of habeas corpus cannot function as a writ of error (*In re Offill*, 293 Mich 416; 292 NW 352 [1940]; *In re Brazel*, 293 Mich 632; 292 NW 664 [1940]), and that the writ ‘*deals only with radical defects rendering a proceeding or judgment absolutely void*’ (Wiest, J., *In re Palm*, 255 Mich 632; 238 NW 732, 733 [1931]), petitioner challenges the proceeding on supplemental information in several respects. [*In re Stone*, 295 Mich 207, 209; 294 NW 156 (1940) (emphasis added).]

These prior cases, *Offill* and *Brazel* as well as *Palm*, all cited by *Stone*, did not refer to the habeas statute, but rather to the traditional doctrines governing habeas relief. The logical inference to derive from this framework of analysis is that the statutory law and the common law form a single body of law. This Court’s

evaluation of the statute in *Stone* is consistent with its treatment in other prior cases. See, e.g., *Lupu v Denniston*, 285 Mich 500, 505; 281 NW 236 (1938) (citing Michigan statute, and denying habeas relief because “[n]o reason is now disclosed for vacating the order for his commitment, which is regular on its face.”); *In re Joseph*, 206 Mich 659, 663; 173 NW 358 (1919) (after quoting the statute, stating that “[t]he writ of habeas corpus may not be used as a substitute for a writ of error or to perform its functions”). The same is true regarding the standard for relief stated in MCL 600.4352 (“legal cause”). See *Ex parte Long*, 266 Mich 369, 370-371; 254 NW 133 (1934) (citing this statutory language and denying relief where the court had “jurisdiction of the person . . . [and] crime”).¹ In other words, the statutory language limiting those who may bring the writ is the same as the traditional common law restrictions.

On this point, this Court expressly examined the relationship between the statute and the common law in 1867, but reached no consensus. See *In re Jackson*, 15 Mich 417 (1867). The Court was examining Michigan’s jurisdiction in habeas cases where the child subject to the detention was no longer in the state. In the lead opinion, Justice Campbell, writing for himself and Justice Martin, noted that the statute established limits for the state’s jurisdiction:

The habeas corpus act of this state differs from the original English statute, in not being confined to persons held under charges of crime. Except in certain specified cases, in which the interference would be manifestly improper, the statute allows the writ, where the imprisonment or detention is “under any pretense whatever.” But it is

¹ The Court of Appeals has applied this statutory language in the same fashion. See, e.g., *Hinton v Parole Board*, 148 Mich App 235, 244-245; 383 NW2d 626 (1986).

also confined in its operation by the same section to persons detained “within this state:” Comp. L., § 5210.^[2]

* * *

The statute, then, furnishes no means for reaching a case like the present; and, according to the usual rules of construction, it is fair to presume the omission was not accidental, but was based upon some adequate reason. And it cannot be supposed that the possible existence of some common law application of the writ furnished any such reason, inasmuch as *the statute was framed expressly to improve upon the common law*, which was alleged to be deficient from the very fact that, by not compelling an immediate return, it gave parties facilities for evading the writ. [*Jackson*, 15 Mich at 420-421 (emphasis added).]

On this same issue, Justice Cooley reached a contrary conclusion, writing for himself and Justice Christiancy, that the statutory limits were not relevant. See *id.* at 438 (“Our jurisdiction does not depend upon the statute[.]”). Consistent with this Court’s later treatment of the habeas statute, Justice Campbell provided the more persuasive understanding of the relationship between the common law and the statute.

Generally, where there is a comprehensive legal system, such as the one here that describes “in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.” *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 390; 738 NW2d 664 (2007). See also *People v Idziak*, 484 Mich 549, 569; 773 NW2d 616 (2009). The statutory scheme originally in place included 69 sections,

² The current corresponding statutory provision, MCL 600.4307, still provides that a habeas corpus action may be filed by or on behalf of any person “restrained within this state.”

providing a comprehensive and detailed system for a person to seek relief from an illegal detention. See R.S. 1846, c. 134, §§1-69. The current statutory framework, running from MCL 600.4301 through MCL 600.4387, includes 29 sections. Indeed, Justice Campbell noted that the Michigan habeas statutory scheme was designed to “improve upon the common law.” *Jackson*, 15 Mich at 421 (Campbell, J., lead opinion). In reviewing this *Jackson* decision, this Court characterized Justice Cooley’s opinion as being one that “the habeas corpus act created no new rights, but afforded a better means of *enforcing* rights already established by the common law.” *People v Den Uyl*, 320 Mich 477, 486; 31 NW2d 699 (1948) (emphasis added). The fair inference is that the statutory habeas limitations were meant to be a codification of the common law limits. As already noted, this is how this Court has applied the statute. See *In re Joseph*, 206 Mich at 663.³

Moreover, the conclusion that Michigan’s statutory habeas law is an enforcement of the common law would then parallel the federal treatment of habeas relief under the federal statutory framework of the Anti-terrorism and the Effective Death Penalty Act (AEDPA), 28 USC 2241 *et seq.* In repelling a challenge to the significant changes to the AEDPA statute in 1996, the Supreme Court noted that the statutory revisions worked “substantial changes” but that nevertheless the revisions did not violate the Suspension Clause of the U.S. Constitution. *Felker*, 518 U.S. at 654. The U.S. Supreme Court identified that the doctrine placing limits

³ As contrary authority, the Michigan treatise *Criminal Law and Procedure* has stated that the statutory provisions “contain only essential provisions auxiliary to the constitutional grant of power. *Criminal Law and Procedure*, § 27:1, (2d ed) “Nature of writ,” p. 344. There was no cite of authority for this conclusion.

on successive writs at issue was a “complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.” *Id.* at 663, citing *McCleskey v Zant*, 499 U.S. 467, 489 (1991). These new limitations imposed on habeas relief in the 1996 AEDPA statute were found to be “well within the compass of this evolutionary process.” *Felker*, 518 U.S. at 664. Before there was federal statutory law on this point, the U.S. Supreme Court had recognized that Habeas Corpus Act of 1679, enacted during the reign of Charles II of England, and on which the Michigan statute was based, was passed to “enforce[] the common law.” *Ex parte Tobias Watkins*, 28 U.S. 193, 202 (1830).⁴

In contrast, in the Guantanamo Bay case, the U.S. Supreme Court found that the elimination of jurisdiction of the federal courts over any habeas cases for enemy combatants held at the U.S. naval station in Cuba was unconstitutional insofar as the replacement process was not “an adequate substitute for the writ of habeas corpus.” *Boumediene v Bush*, 553 U.S. 723, 792 (2008). Kenney raises here the same concerns regarding the adequacy of the writ available under Michigan’s statute, based on his reading of MCL 600.4310 that “habeas relief is virtually unavailable to persons who are restrained following judicial process in criminal cases due to the exceptions listed in MCL 600.4310.” (Kenney Brief, p 14). See also *Walls v Director*, 84 Mich App 355, 357; 269 NW2d 599 (1978) (“we note that petitioner may not bring an action for habeas corpus under the statute. MCL

⁴ The U.S. Supreme Court further explained that “[t]his statute excepts from those who are entitled to its benefit, persons committed for felony or treason plainly expressed in the warrant, as well as persons convicted or in execution.” *Watkins*, 28 U.S. at 202.

600.4310(3)"). A federal district court, in adopting a report and recommendation regarding whether state habeas relief would be available for parole revocation for a convicted prisoner, read the statute similarly narrowly. See *Witzke v Withrow*, 702 F Supp 1338, 1349-1350 (WD Mich, 1988) ("a state statute, on its face, precludes habeas relief"). But this Court has examined this provision as creating only the same limitations of relief as have been historically imposed on habeas petitioners under Michigan law, see, e.g., *In re Stone*, 295 Mich at 209, not as an absolute bar to relief. The Michigan Court of Appeals has generally reviewed this statutory provision in the same fashion. See *Cross v Department of Corrections*, 103 Mich App 409, 415; 303 NW2d 218 (1981), citing *People v Price*, 23 Mich App 663, 669; 179 NW2d 177 (1970) ("This statutory prohibition [i.e., MCL 600.4310(3)] is generally consonant with often repeated judicial declarations that habeas corpus cannot serve as a substitute for an appeal and cannot be used to review the merits of a criminal conviction.") (footnotes omitted). As a consequence, Kenney's argument that the proper construction of Michigan's statute operates as a suspension of the writ is not well founded.

Moreover, the conclusion that Michigan law is a unitary system comports with common sense. The habeas statutory provision governing the limits on who may bring a suit has been in place for more than 150 years and has never been determined to be a suspension of the writ. The claim that there are two parallel frameworks for evaluating habeas is not only foreign to Michigan case law examining this area, but would create a confusing system, two sets of standards for

this single area of law. The straight-forward answer is the right one here.

Michigan statutory habeas law is consonant with its common law.

2. A habeas petitioner who is subject to detention based on a criminal conviction must establish a radical defect in jurisdiction or its equivalent to qualify for relief.

This Court has noted the writ of habeas corpus is “of paramount authority over all other writs.” *McCager*, 367 Mich at 207. Its origins are ancient. *In re Jackson*, 15 Mich at 435 (Cooley, J., concurring) (“[t]he writ is so ancient that its origin is lost in obscurity”). The law of habeas governs criminal prisoners, arrestees, civil commitments for the mentally infirm, and children who are subject to custody disputes. See *Browning v Michigan Department of Corrections*, 385 Mich 179, 189; 188 NW2d 552 (1971) (granting habeas relief for a criminal prisoner); *People v McCager*, 367 Mich 116, 121-124; 116 NW2d 205 (1962) (evaluating a habeas request in Recorder’s Court for an arrestee); *In re Wojtasiak*, 375 Mich 540, 544-545; 134 NW2d 741 (1965) (granting habeas relief to a person civilly committed for a mental illness); and *Petition of Seeney*, 330 Mich 55, 59; 46 NW2d 458 (1951) (affirming a denial of habeas relief for a challenge to the custody of a child).

Consistent with this point, the habeas statutory definition of “prisoner” includes an inmate of a “penal” or “mental” institution, a “child whose custody is sought” as well as “other persons alleged to be restrained of their liberty.” MCL 600.4322.

Several threads run through Michigan law in habeas cases. This Court has traditionally recognized the very limited nature of habeas relief, explaining that it is reserved to claims of “radical defects” that would deprive the judicial officer that

detained the movant of jurisdiction. *In re Stone*, 295 Mich at 209, 212 (“As any claimed errors in the proceeding were non-jurisdictional in character and did not invalidate the process, the writs are dismissed.”). See also *Joslin v Frisbie*, 334 Mich 627, 631; 55 NW2d 125 (1952) (“The granting of habeas corpus and ancillary certiorari in the case at bar is dependent upon the lack of jurisdiction of the trial court to arraign, accept a plea of guilty, and impose sentence upon petitioner.”); *In re Elliott*, 315 Mich 662, 670; 24 NW2d 528 (1946) (“The accompanying writ of certiorari is merely ancillary, not to be a substitute for writ of error nor to change the scope of review on habeas corpus, but to supply material for determination of jurisdiction.”); *In re Lamanna*, 263 Mich 62, 64; 248 NW 550 (1933) (“Questions decided in review on writ of error may not be reviewed in habeas corpus proceeding, nor may further review of alleged errors, short of jurisdiction of circuit court, be had.”). This Court has generally wedded this point to the idea that the habeas writ is not a substitute for a “writ of error.” *Stone*, 295 Mich at 209. See also *People v Jones*, 467 Mich 301, 306; 651 NW2d 906 (2002), quoting *In re Palm*, 255 Mich at 634 (“The writ of habeas corpus cannot function as a writ of error”).

At the same time, this Court has also recognized the equitable nature of the writ, and provided relief without alluding to this line of precedent, and its description of the limited nature of relief under the writ. In a case in which a habeas petitioner’s probation was violated, this Court described the standard as suggesting a broader basis for relief:

Where defendant is not given an opportunity to present his case, habeas corpus is the proper remedy to inquire into the reason of the

detention. *In re Bourne*, 300 Mich 398, 2 NW2d 439 [1942]; *In re Gordon*, 301 Mich 224, 3 NW2d 253 [1942]; *Ex parte Miller*, 303 Mich 81; 5 NW2d 575 [1942]. We issued a writ of habeas corpus together with an ancillary writ of certiorari. [*Ex parte Bobowski*, 313 Mich 521, 522; 21 NW2d 838 (1946).]

There is no indication that this line was predicated on the nature of the detention, as *Bobowski* and *Bourne* related to persons held under criminal conviction, while the petitioners in *Gordon* and *Miller* were subject to civil commitments based on determinations of mental illness.

The proper understanding of these two lines of cases, reconciling them into a single coherent narrative, was provided by a concurrence from Justice Riley in *People v Carpentier*, 446 Mich 19, 44-48; 5321 NW2d 195 (1994).⁵ In *Carpentier*, this Court examined whether a defendant could bring a collateral challenge to a juvenile adjudication obtained without counsel under MCR 6.508(D)(3). The Court held that a criminal defendant could bring such a challenge, concluding that deprivation of counsel was a “jurisdictional defect.” *Id.* at 22, 29. In her concurrence, Justice Riley explained the nature of “jurisdictional defects” generally, describing this Court’s case law in habeas and jurisdiction for criminal prosecutions, addressing both *Stone* and *Bourne*:

While other writs permitted a defendant to challenge other alleged errors, Michigan law has long understood our writ of habeas corpus to permit a criminal defendant to attack a criminal conviction only when the court that convicted and sentenced the defendant was without jurisdiction to try him for the crime in question. [*Carpentier*, 446 Mich at 45-46, citing Justice Cooley in *Hamilton’s Case*, 51 Mich 174, 175; 16 NW 327 (1883) and *In re Stone*, 295 Mich at 211-212 among other cases.]

⁵ Justice Riley’s concurrence was joined by Justices Boyle and Griffin.

On the key point, Justice Riley concluded that “[n]ot all constitutional errors, therefore, deprive the court of jurisdiction, *only those that impugn the very authority of the court to try and convict the criminal defendant.*” *Carpentier*, 446 Mich at 47 (Riley, J., concurring). She then cataloged the list of cases that met this high threshold, of not just constitutional error, but errors that were either jurisdictional or their “equivalent”:

[A] jurisdictional defect or its equivalent has been found when the defendant raises [1] the issue of improper personal jurisdiction, [2] improper subject matter jurisdiction, [3] double jeopardy, [4] imprisonment when the trial court had no authority to sentence defendant to the institution in question, and [5] the conviction of a defendant for no crime whatsoever. [*Carpentier*, 446 Mich at 47-48 (five footnotes with corresponding cases omitted).]

Justice Riley cited the *Bourne* case in support of the fifth example of the equivalent of lack of jurisdiction, sentencing someone to a crime that does not exist in Michigan law. *Carpentier*, 446 Mich at 48 n 8 (Riley, J., concurring).⁶ At the same time, this analysis identifies the kinds of categories of errors that would not qualify for habeas relief because they are non-jurisdictional: “mere irregularities”; errors that would require a “review of the merits of the case”; “evidentiary” errors; and “procedural errors.” *Id.* at 46. This is consistent with the principle that “[h]abeas corpus is not available to test questions of evidence.” *In re Stone*, 295 Mich at 212, citing *In re Van Dyke*, 276 Mich 32; 267 NW2d 778, 799 (1936).

⁶ Justice Riley concluded that the *Carpentier* Court’s conclusion that a trial court is deprived of jurisdiction for lack of counsel is “dubious,” but agreed that such a claim of error would lie under MCR 6.508(D). *Id.*

This concurrence is persuasive because it accomplishes two essential tasks. It integrates the case law into a single whole, reconciling the cases in which this Court has granted relief with repeated holdings about the limited nature of habeas relief. It also honors the ancient and equitable nature of the writ without allowing it to replace the standard forms of relief anticipated by Michigan law, appeal and review.

Justice Riley's conclusion that the scope of the writ is limited to jurisdictional errors or their equivalents is also supported by the critical literature in this area. The treatise on Michigan Criminal Law and Procedure concludes that writ of habeas corpus only addresses jurisdictional defects:

The writ deals only with radical defects rendering a proceeding or judgment absolutely void. [Criminal Law and Procedure, § 27:18, (2d ed) "Scope of inquiry," p. 367.]

See also Michigan Pleading and Practice, Vol 12, § 93:2, p 8 ("A writ of habeas corpus deals only with radical defects rendering a judgment or proceeding absolutely void.").⁷

The cases cited by Justice Riley as well as from this Court's jurisprudence granting relief for criminal defendants can then generally be placed in this category of "radical defects" that deprived the Court of jurisdiction or of its authority to act:

⁷ The digest for Michigan Court Rules Practice provided the same conclusion. Michigan Court Rules Practice, Rule 3.303.1, p 355 ("While the substantive requirements for release on habeas corpus are beyond the scope of this procedural work, it can generally be said that habeas corpus proceedings must often involve challenges to the jurisdiction of the court or officer causing detention, or allegations that radical defects render a judgment or proceeding absolutely void.").

- No authority to sentence criminal defendant to prison where only convicted of a misdemeanor. *In re Allen*, 139 Mich 712, 713; 103 NW 209 (1905). [Cited in *Carpentier*, 446 Mich at 47-48, n 7.]
- No authority to sentence criminal defendant to prison for a crime that does not exist in Michigan law. *In re Bourne*, 300 Mich at 401-402 (no state crime of incest where there is no tie by consanguinity). [Cited in *Carpentier*, 446 Mich at 47-48, n 8.]
- No authority to revoke a criminal defendant's probation where he was not given an opportunity to present his witnesses, *Ex parte Bobowski*, 313 Mich at 522-523, or not informed of the charge or the hearing, *People v Rudnik*, 333 Mich 216, 218-219; 52 NW2d 671 (1952). See also *In re McLeod*, 348 Mich 434, 437-438; 83 NW2d 340 (1957) (no notice of the violation charged before the hearing).⁸
- No authority for the parole board to place a criminal defendant back on parole after he has already been discharged. *Parks v Department of Corrections*, 493 Mich 925; 824 NW2d 566 (2013); *People v Cureton*, 738 NW2d 762 (2007).
- No authority for the Department of Corrections to hold prisoner after criminal defendant has served his full sentence. *Browning v Department of Corrections*, 385 Mich 179, 189; 188 NW2d 552 (1971) (prisoner had "fully satisfied his penal obligation to this State").

The guidance provided by Justice Riley in her concurrence extended to criminal defendants, but did not address detentions based on mental illness or child custody.

⁸ This Court has expanded this concept beyond the scope of errors that were equivalent to a jurisdictional error. See *Petition of Vaughan*, 371 Mich 386, 393; 124 NW2d 251 (1963) (finding the parole board decision a "nullity" where parolee was unable to "meet," i.e., cross-examine, witnesses against him and unable to call his own witnesses). But this is a mere "evidentiary . . . error," see *Carpentier*, 446 Mich at 46, citing *Stone*, 295 Mich at 211-212, that should not serve as a basis for habeas relief. *Vaughan* should be limited to its facts.

Carpentier, 446 Mich at 206 (Riley, J., concurring). These standards should govern regardless whether the claim arises from statute or the common law.⁹

Even given Justice Riley's efforts to reconcile cases that expanded the scope of habeas, there is a good reason to return to the traditional formulation that reserved habeas corpus claims to genuine jurisdictional defects for criminal prisoners. The historic principle was stated by Justice Cooley in *In re Hamilton*: "If the warrant showed a conviction without jurisdiction, habeas corpus would be the proper remedy; but when the defects are mere irregularities, the party must seek redress in some of the modes provided by statute for review by some appellate tribunal." *Id.* The point is applicable here where Kenney could have perfected his administrative appeal and challenged the validity of the revocation. He failed to do so.

Restoring the historic understanding of the writ is particularly compelling because general challenges to convictions and sentences are available in MCR 6.500 *et seq* and, for those criminal defendants dissatisfied with these decisions, in federal court under AEDPA. The current universe of criminal prisoners who properly avail

⁹ This requirement that the radical defect be either jurisdictional or strip the court with authority to act is narrower than the way the Court of Appeals has formulated the definition. See *Walls*, 84 Mich App at 357, quoting *Price*, 23 Mich App at 671 ("A radical defect in jurisdiction contemplates, we think, an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission"). It has been repeated by the Court of Appeals on several occasions. See most recently *Moses v Department of Corrections*, 274 Mich App 481, 486; 736 NW2d 269 (2007). This standard taken from *Price* has no foundation in Michigan's law, and would allow any ordinary claim of error to serve as a claim for habeas relief. This Court should expressly repudiate it. Rather, the formulation from Justice Riley's concurrence is faithful to this Court's precedent.

themselves of state habeas currently are parolees and probationers who challenge whether they have served their maximum sentence, see *In re Callahan*, 348 Mich 77, 83; 81 NW2d 669 (1957), or whether they have been improperly placed back on parole after being discharged, *Parks*, 493 Mich at 925, citing *People v Holder*, 483 Mich 168, 175; 767 NW2d 423 (2009). These are genuine questions of jurisdiction. The claim, however, that parole revocations and parole denials that are insufficiently supported may be subject to challenge in habeas would be a fundamental change – a dramatic expansion – in the nature of the writ. This Court should reject this effort.

Even without returning to the historic view of the writ as limited to jurisdictional errors strictly construed, but rather in applying the standard as articulated by Justice Riley in *Carpentier* to Kenney's case, this Court should find that Kenney's claim of error does not rise to the level of a jurisdictional error or its equivalent. Kenney argues on appeal that there was insufficient evidence to support the finding of a parole violation. (Kenney Brief, pp 29-36).¹⁰ Habeas relief does not lie for such a claim.

A challenge to the sufficiency of the evidence is not a jurisdictional claim and is not equivalent to one. Where the court that issued the decision had proper

¹⁰ One of the cases on which Kenney relies, *Fritts v Krugh*, 354 Mich 97 (1958) for the proposition that these standards have evolved and expanded was reversed. (Kenney Brief, p 28). See *Hatcher v Department of Social Services*, 443 Mich 426, 442, 444; 505 NW2d 834 (1993) (referring to the decision as “confused” and overruling it).

jurisdiction, the argument that there was inadequate evidence to sustain the judgment does not lie in habeas:

If the court has jurisdiction of the person and the subject-matter, and could render a judgment upon a showing of any sufficient state of facts, *any judgment which it may render, however, erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus.* This rule applies to inferior courts, and the judgment of an inferior court, such as a police court, mayors, magistrates, or justices, having jurisdiction conferred by law to try and dispose of a criminal case, is as conclusive and rests upon the same basis, when the jurisdiction has attached, as the adjudication of any other common-law court. [*In re Joseph*, 206 Mich at 662-663 (emphasis added).]

This same point was reiterated by Justice Riley in her concurrence in *Carpentier* explaining that the kinds of claims that lie in habeas extend beyond “the factual determination of defendant’s guilt and implicate the very authority of the state to bring a defendant to trial.” *Carpentier*, 446 Mich at 47, quoting *People v New*, 427 Mich 482, 491; 398 NW2d 358 (1986).

Such a conclusion makes sense. Kenney’s is a routine claim, one that arises in the ordinary case, regardless of the specific strength of the particular claim. If this action would lie here, it would be available as a claim in virtually every determination by the parole board. It would not reflect the extremely narrow form of relief that has been repeatedly emphasized by this Court throughout its history. That result would defeat the limitations created by the Legislature in the habeas statute, particularly in MCL 600.4310(3).¹¹

¹¹ A petitioner may file a writ of habeas corpus in federal court and seek relief for a parole violation based on a claim of insufficient evidence. See *Holley v White*, 2007 WL 4326913, *3 (ED Mich, 2007). Kenney’s claim, however, arguing that Michigan provides the same protections in habeas as federal court is wrong. (See Kenney Brief, p 31). The case on which he relies, *Cross*, 103 Mich App at 415, has been

Rather, the proper action here would have been for Kenney to file an administrative appeal from the parole board's revocation. Kenney failed to file during the 60-day window and is now foreclosed from taking an appeal. See argument 4 below. The point bears repeating, however, that Kenney was not foreclosed from relief just because he had another possible avenue of relief that he failed to perfect; rather it is because of the nature of habeas relief – which does not replace a writ of error – in only providing relief for certain kinds of fundamental errors, that he is foreclosed from relief.

3. The scope of relief in habeas provided in MCL 600.4310 is the same as the relief available under Michigan common law.

As already argued above, the scope of relief under MCL 600.4310 – particularly the limitations identified in paragraph (3) – are based on the same standards that this Court has always identified for habeas relief. See *In re Stone*, 295 Mich at 209; *In re Joseph*, 206 Mich at 663. Michigan law comprises a single coherent system of analysis.¹²

superseded. The relief available under MCR 6.500 *et seq* provides the parallel to federal habeas corpus claims, in which state defendants may seek relief from their criminal convictions and sentences.

¹² Kenney argues that the provision in paragraph (3) is limited to judicially-imposed detentions, rather than executive detentions based on its definition of “legal process.” (Kenney Brief, pp 19-20.) The case law does not support this construction. Moreover, the better understanding of “legal” here is that the court or officer claims the detention is supported in law, i.e., is “legal.”

4. **The availability of relief by other means does not change whether habeas relief is available – the standard requires proof of a radical defect of jurisdiction or its equivalent.**

This Court has repeatedly reiterated the point that habeas relief is not to replace a “writ of error,” referring to another avenue in which to seek relief. See, e.g., *People v Jones*, 467 Mich at 306. The Court has referenced the point in denying relief in habeas. See, e.g., *Ex parte Roberts*, 310 Mich 372, 374; 17 NW2d 218 (1945) (“None such can be considered now as the issues here bar review which could have been the subject-matter of an appeal if properly taken.”). And this standard applies even where the error was sufficient as to require relief on appeal. *People v Harris*, 266 Mich 317, 321; 253 NW 312 (1934) (“But, where the court has jurisdiction, an error in the proceedings cannot be passed upon by habeas corpus, even though it would require reversal on appeal”), citing *In re Ellis*, 79 Mich 322; 44 NW 616 (1890). The point has also been reflected in the Michigan treatises evaluating habeas law. Michigan Pleading and Practice, Vol 12, § 93:3, p 9 (“habeas corpus is not a proper remedy where there is another remedy available in regular course such as an appeal”).

Nevertheless, this Court has stated that relief in habeas would not lie for a claim – even where there was no other avenue of relief available – unless the standard of proving a radical defect had been proven. This point was stated in *In re Joseph*:

If the court has jurisdiction of the person and the subject-matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however, erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus.

* * *

This rule that mere errors or irregularities are not ground for habeas corpus has been held to apply, *though no appeal or writ of error will lie to the judgment*. [*Id.* at 662-663, quoting 12 R. C. L. 1192 (emphasis added; internal quotes omitted).]

Thus, the fact that an appeal could be taken from the judgment does not affect the standard that applies.¹³

This point is significant for parole revocations, probation revocations, and parole denials. The Michigan Court of Appeals has addressed and provided guidance on the question whether an appeal may be taken from a parole revocation and from a parole denial.

For a parole denial, there is no appeal. In 1999, the Legislature deleted the language allowing inmates to appeal parole board decisions from MCL 791.234. The Court of Appeals concluded that this statutory revision eliminated parole denial appeals, that there was no appeal available for such a decision within the Administrative Procedures Act, and that the Revised Judicature Act also does not provide for an appeal. *Morales v Michigan Parole Board*, 260 Mich App 29, 35-40; 676 NW2d 221 (2004). Significantly, the Court of Appeals noted that there is still

¹³ This position is distinct from the one that the State advanced in its brief at the application stage, see p 9, and at oral argument. The State now asks this Court to reject the claim that there is a conflict between the statute and the constitutional protection of the writ, and asks this Court to reverse *Walls*, 84 Mich App at 357, insofar as it found one. *Id.* (“If there is a radical jurisdictional defect in the proceedings, however, the statutory prohibition does not bar a habeas corpus action”).

possible review of parole denials under habeas for “certain radical circumstances.”

Id. at 40.¹⁴

In contrast, for a parole revocation as here, there is a right to seek an appeal. The Court of Appeals explained that the revocation of parole is a contested case under MCL 24.203(3) and that the parolee had a “liberty interest” at stake. *Penn v Department of Corrections*, 100 Mich App 532, 537; 298 NW2d 756 (1980). See also *People v Young*, 220 Mich App 420, 425; 559 NW2d 670 (1996). On this basis, the Court found that a parolee would be able to file an appeal from a revocation decision. *Penn*, 100 Mich App at 537. The APA provides for 60 days in which to file an appeal from an adverse agency decision, such as one from the parole board. MCR 24.304(1). Kenney did not file an appeal, and only filed his habeas action more than two years after the original adverse decision.¹⁵

Even so, as already noted, Kenney would only be able to establish a basis for habeas relief where he could demonstrate a radical defect in jurisdiction or its equivalent. The fact that he may have been entitled to relief on appeal – had he sought it – does not govern the question. *Harris*, 266 Mich at 321. This Court should affirm the denial of relief from the Court of Appeals, albeit on different grounds.

¹⁴ The example that the Court of Appeals identified in *Morales* of a “radical defect” for which habeas relief would be “proper,” was where the parole board “denied a prisoner parole exclusively on the basis of his race, religion, or national origin.” *Id.* at 40-41.

¹⁵ There is no time limitation for the filing of state habeas claims, but the person must still be in custody. *Triplett v Deputy Warden*, 142 Mich App 774, 779; 371 NW2d 862 (1985).

5. **The “radical defect” requirement is the controlling standard in Michigan encompassing defects in subject matter and personal jurisdiction and also defects that impugn the authority of the court or officer to act.**

As already noted from the arguments above, the “radical defect” requirement of habeas law is the existing standard. The concurrence from Justice Riley in *Carpentier*, joined by Justices Boyle and Griffin, provides the proper legal framework in which to evaluate the scope of relief available in Michigan in habeas corpus actions. *Carpentier*, 446 Mich at 47-49. The scope includes not only defects in subject matter and personal jurisdiction, but also radical defects that are the equivalent, i.e., those that relate to the “very authority of the court” over the criminal prisoner. *Id.* at 47. See pp 18-25 above for the brief’s analysis of this point (including the State’s argument on restoring the original habeas standard).

In opposition to this position, Kenney relies in part on federal common law habeas authority to argue that the limited nature of habeas relief articulated in Michigan cases is no longer good law. (Kenney Brief, pp 27-28). The cases on which he relies, *Preiser v Rodriguez*, 411 U.S. 475 (1973) and *Fay v Noia*, 372 U.S. 391 (1963), reflect 150 years of federal common law development separate from Michigan law’s development. Rather, the proper point of reference is the U.S. Supreme Court’s understanding of the common law at the time that Michigan first recognized the authority of the writ under its first constitution in 1835. Like the 1963 Constitution, that constitution provided that the “writ of habeas corpus shall not be suspended.” Mich Const 1835, art 1, § 12. Consistent with Michigan law, the U.S. Supreme Court explained the content of the common law of habeas corpus,

describing the limitations on the writ in the fashion that Michigan has continued to apply:

An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. [Watkins, 28 U.S. at 203 (1830).]

The standard as articulated by Justice Riley in *Carpentier* may be broader, but that reflects developments in Michigan law, not the federal common law.

6. The standard of review on appeal from a habeas decision by the Court of Appeals to this Court is *de novo*.

The Michigan court rules provide that this Court may review a decision from the Court of Appeals on appeal. MCR 7.301(A)(2). This Court also enjoys original jurisdiction to issue habeas writs. This is provided by the constitution, Mich Const 1963, art 1, § 6, and by statute, MCL 600.4303. The court rule provides that such an action may be brought in “any court of record,” excluding probate courts. MCR 3.303(A). The practice of this Court has been to treat complaints filed as original actions as applications for leave where there was a decision from the Court of Appeals rejecting habeas relief. See, e.g., *Knight v Department of Corrections*, 469 Mich 908; 670 NW2d 219 (2003) (“Complaint for writ of habeas corpus is treated as an application for leave to appeal from the March 28, 2003 order of the Court of Appeals and, so treated is DENIED.”).

The standard for reviewing these decisions on appeal, or as an original matter, insofar as they raise legal questions is *de novo*. This conclusion may be inferred from this Court’s evaluation of these claims. See, e.g., *In re Stone*, 295

Mich at 211-212. Regarding determinations of factual findings, the review would be clear error. Because the merits of the decision are not reviewable in habeas, see *In re Lamanna*, 263 Mich at 64, the typical review standards are generally not relevant.

II. In granting relief, the court may either order the person's release, or condition release on the correction of the constitutional infirmity. (Question 7).

A. Standard of Review

This Court reviews issues of law *de novo*. *Kowalski*, 492 Mich at 119.

B. Analysis

Consistent with the common law understanding of habeas relief, MCL 600.4352(1) explains that "the court or judge shall discharge the person restrained from the restraint under which he is held" where there is no legal cause for the detention. The relief contemplated by habeas is release from the constitutional restraint, but this Court has ordered either immediate release or conditioned this release on further action, depending on the circumstances of the claim.

There are two situations in which a habeas claimant may be successful. The first is where the court determines that there was a lack of subject matter or personal jurisdiction regarding the petitioner. In this case, the proper type of relief is to release the petitioner, as the main purpose of the writ is to cause the release of a person illegally detained. *McCager*, 367 Mich at 121. An example of such an instance is where the Department of Corrections holds a prisoner beyond his

maximum sentence (an “over-stay”). See, e.g., *Browning*, 385 Mich at 189 (“fully satisfied his penal obligation”). In that circumstance, the proper recourse is to order the prisoner’s discharge from custody. This is described as an “unconditional grant” of habeas relief in federal court.

The second situation is where the court finds that the radical defect was the equivalent of a jurisdictional error, i.e., deprived the court with authority to act. In that circumstance, the proper type of relief should be no more than what may be achieved via an appeal brought under the APA, an instruction to either cure the constitutional infirmity or release the person within a reasonable time period. See, e.g., *Bobowski*, 313 Mich at 523 (“The order revoking the probation is set aside, the sentence vacated and petitioner remanded to the custody of the court without prejudice on the part of the trial court to conduct a hearing as to the violation of the terms of the probation order”). This order is termed a “conditional grant” of habeas relief in federal court.

With respect to Kenney, the circuit court had no authority to reach his claims of error because he did not allege a radical defect in jurisdiction or its equivalent. But this Court might wish to address the erroneous nature of the circuit court’s order, even though habeas did not lie here, to provide additional guidance to the bench and bar. After finding that there was a constitutional violation, the circuit court discharged Kenney without allowing the agency – the parole board – an opportunity to correct any alleged constitutional deficiency.

MCL 791.204 provides *exclusive* jurisdiction to the Michigan Department of Corrections regarding matters of parole: “subject to constitutional powers vested in the executive and judicial departments of the state, the department shall have exclusive jurisdiction over all of the following . . . Pardons, reprieves, commutations, and paroles.” MCL 791.204. Moreover, MCL 791.240a provides the remedy after a finding that a parole revocation hearing did not establish a parole violation. MCL 791.240a (“[i]f the evidence presented [at the parole revocation hearing] is insufficient to support the allegation that a parole violation occurred, the parolee shall be reinstated to parole status.”).

The Legislature intended the MDOC and Parole Board to have exclusive jurisdiction over parole issues, including the discharge of a parolee. See, e.g., *Hopkins v Michigan Parole Board*, 237 Mich App 629, 646-649; 604 NW 2d 686 (1999). The point is supported by this Court’s decision in *Jones v Department of Corrections*, 468 Mich 646; 664 NW 2d 717 (2003). The Court in *Jones* held that the parole board’s jurisdiction over parolees prevented a trial court from granting habeas relief when the Parole Board violated MCL 791.240a by not giving a revoked parolee a revocation hearing within the statutory time period. *Jones*, 468 Mich at 658. The appropriate remedy was for a prisoner to seek mandamus relief, seeking compliance with the statutory duty of holding a hearing, not to force discharge. *Jones*, 468 Mich at 658.

Likewise, in the circumstance in which a parolee did not have an opportunity to present witnesses, *Bobowski*, 313 Mich at 522-523, or was not informed of the

charge or the hearing, *Rudnik*, 333 Mich at 219, the proper remedy is to remand for a proper hearing, not just order unilateral discharge. *Rudnik*, 333 Mich at 219 (“The order revoking the probation is set aside, the sentence vacated, and petitioner is remanded to the custody of the Recorder’s Court for the city of Detroit, where a proper hearing is ordered after information is given Rudnik of the charge that he may be required to meet.”). But see *Vaughan*, 371 Mich at 394 (“Petitioner will be discharged from custody as on parole”). A reviewing court should not unilaterally discharge a parolee from parole where habeas relief is appropriate but the error that is the equivalent of a radical jurisdictional error may be corrected.

III. There is no distinction in Michigan law about eligibility for habeas relief that depends on whether the restraint is judicially-ordered or an executive one.
(Question 8)

A. Standard of Review

This Court reviews issues of law *de novo*. *Kowalski*, 492 Mich at 119.

B. Analysis

Under Michigan law, there is only a single standard governing whether a person is eligible for state habeas relief. The habeas petitioner must establish that there was a radical defect in jurisdiction from the court or governmental official, or its equivalent, in order to be entitled to relief.

The validity of a detention for a person held under executive authority is properly the subject of a habeas action. *People v Rayburn*, 18 Mich App 468, 461;

171 NW2d 460 (1969). Generally, however, where the question of detention is subject to the exercise of discretion, the exercise of that discretion is not the subject of review in habeas. 39 CJS Habeas Corpus, § 67; cf. *Ex parte Dawsett*, 311 Mich 588, 596; 19 NW2d 110 (1945) (“[Parolee] was properly removed to the State prison at Marquette to serve out his sentence and should remain there until its completion, unless the Bureau of Pardons and Paroles should determine otherwise”).

This Court has not identified any difference in standard between examining a detention based on a judicial decision, and one rooted in an executive determination, such as the one here in revoking parole. In the few cases evaluating the question of parole or probation revocation specifically in the context of a habeas action, this Court has not been consistent in stating that the person seeking relief must establish either a defect in jurisdiction or its equivalent. In denying habeas relief, however, the Court has stated the substance of the point in rejecting a claim that a probation violation was improperly entered:

It is apparent that the commitment describes no offense, upon conviction of which the sentence may be lawfully imposed. . . . The judgment of the court is not a nullity, and such mistakes, if any, as were made by the court ought to be asserted in a court of errors. . . . The error of recital, or rather the want of a complete recital, of the statute offense in the commitment is not, in view of the facts disclosed and above stated, reason for enlarging the petitioner.

A contention is made, based upon the conduct of the trial court in first releasing petitioner upon probation and later imposing sentence. . . . *The contention is answered by what has already been said.* The court, respondent, being then in custody, exercised the discretion reposed by the statute in the court. *The judgment of the court was not a nullity.* [*Ex parte Satt*, 164 Mich 472, 475; 129 NW 863 (1911) (emphasis added).]

See also *Ex parte Casella*, 313 Mich 393, 401-402; 21 NW2d 175 (1946) (“No claim is made that said warrant was not in the form contemplated by the statute. . . . On the filing of the answer to the petition for the writ, and the introduction in evidence of the warrant, it was shown that appellee was lawfully in custody, and the proceeding should have been dismissed. . . . *In re Stone*, 295 Mich 207”). But in granting relief, the Court has not referenced the point. See, e.g., *Bobowski*, 313 Mich at 522, which is quoted above on pp 17-18.¹⁶ The response, as already argued, is that Justice Riley’s concurrence in *Carpentier* provides the proper understanding of the relationship of these cases. Kenney’s contention that executive detentions should be subject to closer scrutiny because there has been no review by a judicial officer, (Kenney Brief, pp 24-26), is not supported by this Court’s jurisprudence. This Court should hold that there is only a single standard in Michigan.

¹⁶ Many of this Court’s cases examining parolees address the issue about whether the Department of Corrections is holding the prisoner beyond their maximum date served. See, e.g., *In re Callahan*, 348 Mich 77, 83; 81 NW2d 669 (1957); *Ex parte Holton*, 304 Mich 534, 541; 8 NW2d 628 (1943).

CONCLUSION AND RELIEF REQUESTED

This Court should affirm the decision of the Court of Appeals for the reasons stated in this brief.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

B. Eric Restuccia

B. Eric Restuccia (P49550)
Deputy Solicitor General

Scott Rothermel
Assistant Attorneys General
Attorneys for Warden Booker
Department of Attorney General
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124