

STATE OF MICHIGAN
IN THE SUPREME COURT

PATRICK J. KENNEY,

Plaintiff-Appellee,

-vs-

WARDEN RAYMOND BOOKER,

Defendant-Appellant.

Supreme Court Docket: 145116

Court of Appeals No. 304900

Wayne County Circuit Court
No.: 11-003828-AH

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145116
**PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL**

EXHIBITS

PROOF OF SERVICE

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STATEMENT OF QUESTIONS PRESENTED

- I. Whether the proper standard for granting Plaintiff's habeas corpus complaint is set forth in MCL 600.4352(1).

Plaintiff-Appellee answers "Yes"

- II. Whether insufficient evidence at a parole violation proceeding should provide the basis for habeas relief.

Plaintiff-Appellee answers "Yes"

- III. Whether evidence that a parolee "should have known" of the presence of contraband is insufficient to establish a parole violation based on possession of that contraband.

Plaintiff-Appellee answers "Yes"

- IV. Whether the standards of review applicable to factual decisions by the parole board at a parole revocation hearing should be: whether a reasonable fact finder could find proof by a preponderance of the evidence on the issue of whether the parolee violated parole, and whether there is "some evidence" to support the decision to revoke parole, once a violation has been established.

Plaintiff-Appellee answers "Yes"

SUPPLEMENTAL STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On May 15, 2012, Plaintiff filed an application for leave to appeal. On September 19, 2012, this Court issued an order directing the parties to file supplemental briefs on the four issues set forth in the order.

ARGUMENT

I. THE PROPER STANDARDS FOR GRANTING HABEAS CORPUS

The standards for granting habeas corpus under Michigan law depend on whether the petitioner is eligible for habeas relief pursuant to Michigan's habeas statute, in which case the standard set forth therein govern the granting of habeas relief, or whether the petitioner is ineligible under Michigan's habeas statute, in which case the constitutional and common law standards for granting habeas relief govern. The proper standard under the common law and Michigan Constitution is further dependent on whether the habeas petition takes the form of an appeal from a criminal conviction or a civil order of commitment, or whether the petition seeks relief that does not challenge the underlying judicial process, such as when the petition seeks habeas relief from an executive detention.

Under Michigan law, the right to habeas corpus is guaranteed directly by the Michigan Constitution. Mich. Const. 1963, Article 1, Section 12 provides:

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.

(The Convention Comments indicate that it was adopted unchanged from the 1908 constitution.)

Mich. Const. 1963 Article 6, Section 1 confers general jurisdiction directly to the circuit court. It provides:

The judicial power of the state is vested exclusively in one court of justice which shall be divided into one Supreme Court, Court of Appeals, the trial court of general jurisdiction known as the circuit court, one probate court and courts of limited jurisdiction that the legislature may establish by two-thirds vote of the members elected to and serving in each house.

Mich. Const. 1963 Article 6, Section 13 confers general habeas powers directly to the circuit courts. It provides:

The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court.

Notably, the third clause, which governs the power to grant remedial writs, is the only clause which does not contain modifying language limiting the constitutional grant of jurisdiction or power. These constitutional provisions indicate that the circuit courts derive jurisdiction to grant habeas writs directly from the Michigan Constitution.

In *People v Den Uyl*, 320 Mich 477, 486 (1948) this Court noted that the principles of the English Habeas Corpus Act are part of Michigan's common law. In *Fay v Noia*, 372 U.S. 391, 400 (1963), the United States Supreme Court noted:

The English Habeas Corpus Act "expressly excepts judicial detentions that have ripened into criminal convictions". But this exception was not intended to have the effect of denying the protection of habeas corpus for such persons in appropriate cases. Rather, such persons were excluded simply from the coverage of the act and remitted to their common law rights to habeas . . .the English statutes governing habeas have never been regarded as preempting common law rights to the writ. Citations omitted.

Michigan's Habeas Corpus Act, MCL 600.4301 *et seq.* provides another source of jurisdiction. MCL 600.4304 provides:

The writ of habeas corpus to inquire into the cause of detention, or an order to show cause why the writ should not issue, may be issued by the following:

- (1) The supreme court, or a justice thereof.
- (2) The court of appeals, or a judge thereof.
- (3) The circuit courts, or a judge thereof.
- (4) The municipal courts of record, including but not limited to

- the recorder's court of the city of Detroit, common pleas court, or a judge thereof.
- (5) The district courts, or a judge thereof.

As demonstrated, there are two sources of habeas jurisdiction under Michigan law, the habeas jurisdiction conferred by statute, and the habeas protection recognized by common law as guaranteed directly by the Michigan Constitution.

A. The standard for obtaining relief under Michigan's habeas statute.

The standard governing the grant of relief under Michigan's Habeas Corpus Act, MCL 600.4301 et. seq., is set forth in section 4352(1) which provides:

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.

MCL 600.4301 is part of the Revised Judicature Act of 1961, MCL 600.101 et seq. (RJA). See, e.g. *Young v. State*, 171 Mich. App. 72, 77-78 (1988). MCL 600.102 states with regard to the RJA: "This act is remedial in character, and shall be liberally construed to effectuate the intents and purposes thereof." Statutes that are part of the RJA are also deemed remedial in nature and entitled to liberal construction. *Id.* While remedial statutes are to be construed liberally, their disqualification provisions should be construed narrowly. *Chrysler Corp. v. De Vine*, 92 Mich. App. 555, 558 (1979) (citing *OBrian v. Michigan Unemployment Compensation Comm*, 309 Mich. 18; (1944) See also *Park v. Employment Security Comm*, 355 Mich 103; 94 NW2D 407 (1959)).

As part of a remedial statute, the statutory provision that governs the standard for granting habeas relief, section 4352(1) should be liberally construed. Thus, no additional restrictions should be read into it. Furthermore, the language of the provision is

unambiguous and clear. In *Souter v Jones*, 395 F.3d 577, 598 (2005), a case also dealing with potential exceptions to the legislative requirements for obtaining habeas relief, the Sixth Circuit stated: 'It is not our place to engraft an additional judge-made exception onto congressional language that is clear on its face.' Likewise, this Court should resist any temptation to engraft any judge-made exceptions to the statutory requirements for granting relief under the Habeas Corpus Act promulgated by the Legislature in section 600.4352(1).

As a component of the standard governing relief under the statute, the Habeas Corpus Act also disqualifies certain persons from obtaining relief. MCL 600.4310 provides in part:

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.¹

¹ MCL 600.4358 creates an exception to the exception of for persons detained on civil process. It provides:

If the prisoner is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, the prisoner shall be discharged only if one of the following situations exists:

- (1) Where the jurisdiction of the court or officer has been exceeded, either as to matter, place, sum or person;
- (2) Where, though the original imprisonment was lawful, the party is entitled to be discharged;
- (3) Where the process is void;
- (4) Where the process, though in proper form, has been issued in a case not allowed by law;
- (5) Where the person having the custody of the prisoner is not the person empowered by law to detain him; or

These disqualification provisions should be narrowly construed. *DeVine, supra*. And, this disqualification provision has generally been narrowly construed by the Michigan courts as meaning that a habeas petitioner cannot inquire into the cause of the conviction on or execution of the legal process under which he is held in custody. See, e.g., *Cross, supra* 103 Mich App 409, 414-415 (1981), in which the court stated that a person is not precluded from habeas relief under the statute when he has been convicted on civil or legal process but is not challenging the conviction or sentence:

Plaintiff in this case concedes that he was validly convicted and sentenced, and he does not challenge his conviction or sentence in this appeal. Rather, through this action for habeas corpus he seeks to test the authority of the department of corrections to continue his incarceration in light of his argument that he has served the full term of his imprisonment. Furthermore, plaintiff's use of habeas corpus in this case fully comports with the function of that writ which is to "test the legality of the detention of any person restrained of his liberty." *Billingsley v Birzgalis*, 20 Mich App 279, 281 (1969).

See also *People v McCager*, 367 Mich 116, 121 (1962), discussing 1948 CL Section 637.1 et seq, a predecessor of the current Habeas Corpus Act:

The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but the right of liberty notwithstanding the act.

See again *Cross*, 103 Mich App, at 415 (citing *People v Price*, 23 Mich App 663, 669 (1970)):

This statutory prohibition is generally consonant with the often repeated

(6) Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law.

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.

B. The Common Law Standard for Granting Habeas Relief

The common law right to habeas corpus was constitutionalized by Mich. Const. 1963 Art. 1 Section 12 and its predecessors. And, unlike federal trial courts who derive their jurisdiction solely from Congress, Michigan circuit courts are general jurisdiction courts and derive habeas jurisdiction directly from the Michigan Constitution. Thus, the jurisdiction conferred by Michigan's Habeas Corpus Act does not necessarily exclude other sources of the circuit court's habeas jurisdiction. See for example *Triplett v Deputy Warden*, 142 Mich App 774, 779 (1985) wherein the Michigan Court of Appeals indicated that the limitations on judicial review set forth in the APA, "do not take precedence over or supplant the virtually unlimited right to file a complaint for a writ of habeas corpus. Pursuant to Article 1, Sec. 12 of the Michigan Constitution, a writ of habeas corpus is of paramount authority and its power is supreme" (citing *McCager, supra*). The *Triplett* Court concluded that if the APA were interpreted so as to preclude an action for habeas it would be unconstitutional.

See also *Walls v Director*, 84 Mich App 355, 357 (1978):

Initially we note that petitioner may not bring an action for habeas corpus under the statute. MCL 600.4310(3). If there is a radical jurisdictional defect in the proceedings however, the statutory prohibition does not bar a habeas corpus action.

Many Michigan courts have held, in many different contexts, that to obtain habeas relief, the petitioner must show a "radical jurisdictional defect". Many of these same courts have held that habeas cannot substitute for a writ of error. These pronouncements are

generally traceable, directly or indirectly, to *In Re Joseph*, 206 Mich 659 (1919) and its progeny. However, according to *Joseph*, these propositions are context specific.

First of all, with regard to whether habeas can substitute as an appeal, this Court stated in *Joseph*:

An appellate court may no doubt make use of the writ as one means of exercising its supervisory power, but it is not to be applied as a writ of error by tribunals not possessing the appellate authority. *Id* at 662.

This limitation serves to prevent courts of equal jurisdiction from reviewing the other's final judgment. See *Recorders Court Judge v. Wayne County Circuit Court Judge*, 347 Mich 567 (1957). However, the obvious implication of the second clause of the quoted passage from *Joseph* is that habeas can be applied as a writ of error by tribunals that do possess the appellate authority. But when it is applied in this manner, its application is extremely limited. As *Joseph* explained further:

Proceedings on habeas corpus to obtain release from custody under **final** judgment being in the nature of collateral attack, the writ deals only with such radical defects as render the proceeding or judgment absolutely void and cannot have the effect of an appeal, writ of error, or certiorari for the purposes of reviewing error and irregularities in the proceedings leading to the final judgment or sentence of a court of competent jurisdiction by virtue of which the prisoner is committed, nor are mere defects in the judgment or sentence itself, or irregularities after it is pronounced, reviewable in this matter. (Emphasis supplied.)

Thus, the radical defect requirement was born in the context of being required in a collateral attack on the underlying final judgment of conviction or sentence. The bar to using habeas as a writ of error went so far only to preclude "reviewing errors and irregularities in the proceedings leading to the final judgment". However, the pronouncements in *Joseph* subsequently has been applied to other contexts, and even

grafted onto the statutory standards governing the grant of habeas corpus, and even when the statutory action did not involve a challenge to the final judgment or sentence.

For example, in *Hinton v Parole Board*, 148 Mich App 235 (1986), the Michigan Court of Appeals considered a habeas action brought under MCL 600.4352 by a parolee. After noting that “if a legal basis for detention is lacking the judge must order the release of the detainee from confinement”, the court went on to state that “However, the writs of habeas corpus deal only with radical defects which render a judgment or proceeding absolutely void”, *Id. At 244-245*, citing *In Re Stone*, 295 Mich 207 (1940) and, curiously, *Walls, supra*. As previously demonstrated, *Walls* applied the radical defect test only after concluding that the petitioner could not bring an action under statute, but was not precluded from seeking relief if he could show a radical defect, 84 Mich App at 357. The *Hinton’s* court reliance on *Stone* is equally misplaced. In *Stone*, the plaintiff brought a habeas action to challenge his criminal conviction alleging mistakes of evidentiary rulings. This Court simply held, “Habeas corpus is not available to test questions of evidence,” and that “habeas relief is not available to one convicted of a crime and committed by a court that has acquired jurisdiction and has not abused its power.” *Stone* at 212.

When the statute and case law is read in proper context, the following standards emerge governing the grant of habeas corpus:

- (1) First, it is necessary to determine statute eligibility under MCL 600.4310. (Generally this will require a subsection (3) determination as to whether the plaintiff is challenging the final judgment, criminal or civil, which causes him to be in custody.)
- (2) If a person is eligible under the Habeas Act, the standard set forth in MCL 600.4352(1),

whether "legal cause is shown for the restraint or continuation thereof", governs whether a circuit court should grant habeas relief

(3) If a person is disqualified from relief under the Habeas Act because he seeks to challenge the final judgment, civil or criminal, which causes him to be in custody, he must establish

A. That the court in which he proceeds possesses the requisite appellate authority;
and

B. That the final judgment which causes him to be in custody resulted from a radical jurisdictional defect, or

C. If the person is in custody by virtue of civil process, one of the situations listed in MCL 600.4358

This Court should overrule any prior decision that stands for the proposition that a person seeking habeas relief must demonstrate a "radical jurisdictional defect" when seeking relief under the statute.

C. Definition Of Radical Jurisdictional Defect

In *People v Price*, 23 Mich App 663, 671 (1970) the court stated. "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 is important to note, however, that historically the "jurisdiction" requirement has not been limited to subject matter or personal jurisdiction. As the United States Supreme Court explained,

Nor is it true that at common law habeas corpus was available only to inquire into the jurisdiction, in a narrow sense, of the committing court." Bouchel's

case is again in point. Chief Justice Vaughn did not base his decision on the theory that the court of Oyer and Terminer "had no jurisdiction to commit persons for contempt, but on the plain denial of due process, violative of Magna Carta."

Fay v Noia, 372 U.S. 391, 404 (1963). In fact, "Vindication of due process is its historic office". *Id.* at 402.

Accord *Fritts v Krugh*, 354 Mich 97, 114-115 (1958) wherein this Court held that, "even where, as here, a court has jurisdiction of the person and the subject matter, an order affecting personal liberty which clearly exceeds the court's statutory authority may be attacked by habeas corpus." This Court continued:

The suggestion is made to us that the court which hears a writ of habeas corpus and finds a court order offered in justification of the detention or deprivation of freedom concerned, may only inquire as to whether or not the other court had jurisdiction in the narrow sense of (1) jurisdiction of the persons; and (2) jurisdiction of the subject matter of the dispute. This view would have the advantage of resolving many past varying usages of the word "jurisdiction." But it has the disadvantage of depriving the courts in a hearing on a writ of habeas corpus of the power to strike down an unjust order which is patently *ultra vires*, or an order entered in obvious violation of constitutional rights. The United States Supreme Court has many times, in cases of great historic importance, employed a broader concept of the power of habeas corpus. *Id.* at 120-121; other citations omitted.

Notably this Court went on to state that habeas relief may be granted to "strike down an unjust order which is patently *ultra vires* or an order entered in obvious violation of constitutional rights." *Id.* at 121; emphasis supplied. Thus, not only is the "radical jurisdictional defect" requirement not limited to the court's jurisdiction, in the strict sense, but it is not limited to constitutional violations.

See also *In Re Allen*, 139 Mich 712 (1905), in which this Court granted a habeas petition based on a lack of statutory authority to sentence the defendant to a particular

prison and *In Re Joseph Nowack*, 274 Mich 544, 548 (1936), in which this Court held that the failure to strictly comply with statutory requirements for civil commitment proceedings supply grounds for a writ of habeas corpus. This Court also noted that it was granting the writ although the commitment order was "regular on its face". The Court concluded, "the commitment of a person to an insane asylum is too serious to permit any slipshod methods or failure to strictly comply with the provisions of the law." *Id at 548*. Accord *In Re McKinney*, 326 Mich 190 (1949).

In the context of granting habeas relief, "radical defect is jurisdiction" should be defined as follows:

A radical defect in jurisdiction occurs when there is an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission. This standard is satisfied when the act or omission clearly exceeds the statutory authority on which it is based; where the act or omission results in an obvious violation of constitutional rights; or when the state authority's act or omission is otherwise *ultra vires*.

D. Applying the proper standard to the instant case.

In the instant case, Plaintiff is in custody (he is now on parole) because of an order revoking his parole following a parole violation hearing. The parole board is an administrative agency, part of the executive branch of government. *Penn v Dept of Corrections*, 100 Mich 532, 536 (1980). Its order revoking parole is neither civil nor criminal process. Further, in this action, Plaintiff is not challenging his judgment of conviction or sentence. Rather, he seeks to inquire into his detention and his right to liberty notwithstanding his criminal act. Accordingly, he should not be disqualified under MCL 600.4310(3) from bringing a statutory habeas action. Therefore, the standard set forth in

MCL 600.4352(1) should govern Plaintiff's habeas action.

However, even if Plaintiff were somehow deemed ineligible under the statute, Plaintiff would qualify for habeas relief. The circuit court in which he sought habeas relief possesses appellate authority over inferior tribunals, such as the parole board. Furthermore, as demonstrated in Plaintiff's original brief and more fully developed below, Plaintiff demonstrated that his custody resulted from a radical defect in jurisdiction because the parole hearing examiner clearly exceeded her statutory authority **and** deprived Plaintiff of his constitutionally protected right to due process.

II. INSUFFICIENT EVIDENCE AT A PAROLE VIOLATION PROCEEDING SHOULD PROVIDE THE BASIS FOR HABEAS RELIEF

A. A Parole Proceeding Is Akin to an Executive Detention, It Is an Administrative Proceeding in Which the Executive Branch of Government Acts Both as the Prosecutor and the Arbiter, and When a Violation Is Found, the Parolee Can Be Incarcerated

A parolee has a conditional liberty interest in remaining on parole that is protected by the Due Process Clause. See *Morrisey v Brewer*, 408 U.S. 471, 484 (1972). Under Michigan law, a parole revocation hearing is conducted solely by the executive, with the executive acting as prosecutor, fact finder, and the one imposing sentence. A parole revocation often results in the parolee being detained and imprisoned. Thus a parole revocation has many of the trappings of an executive detention. As the United States Supreme Court stated in *Homdee v Rumsfeld*, 542 U.S. 507, 536 (2004):

Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of

detentions. See *St. Cyr*, 533 U.S., at 301, 150 L. Ed. 2d 347, 121 S. Ct. 2271 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest").

Part of the judiciary's traditional role in maintaining the balance of power is to ensure that persons facing deprivation of their liberty receive due process. Part of the due process guarantee includes the right to be free from liberty deprivation if the evidence does not meet the quantum of proof necessary for a given proceeding. And the final determination of the question of sufficiency of evidence has always been a core function of the judiciary in our constitutional system of co-equal branches of government. In *In Re White*, 340 Mich 140, 148 (1954), this Court quoted with the approval the following passage from the Wisconsin Supreme Court:

Under the Constitution courts have become vested with the judicial power to determine the questions of the legal sufficiency of the evidence to establish the rights of the parties at issue and to apply the law to the facts when found, and this power cannot be withdrawn from them and conferred on juries. * * *

The Constitution having confided this high prerogative to the courts, they would be plainly derelict in their duty if upon any pretense whatever they permitted the powers so confided to them to be exercised by other than judicial officers.

Since the judicial power finally to determine questions of sufficiency of evidence is a core purposes of the judiciary, and since protecting against executive detentions is one of the core purposes of the writ of habeas corpus, it should not seem novel to assert that judicial review of the sufficiency of evidence in a parole revocation proceeding, a proceeding which looks a lot like an executive detention, should be available via habeas corpus.

Judicial detentions, especially those that have ripened into convictions, are

further away from the core protections of habeas corpus. Yet, habeas review of sufficiency of evidence of these detentions is still available. See *Pilon v. Bodenkircher*, 444 US 1 (1979). Thus, it would seem the habeas review should have broader application when applied to situations closer to its core protections. And, in *Preiser v. Rodriguez*, 411 U.S. 475, 485-486 (U.S. 1973) the court stated:

The original view of a habeas corpus attack upon detention under a judicial order was a limited one. The relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction. E. g., *Ex parte Kearney*, 7 Wheat. 38 (1822); *Ex parte Watkins*, 3 Pet. 193 (1830). But, over the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction. *** Thus, whether the petitioner's challenge to his custody is that ***that he is being unlawfully detained by the Executive or the military, as in *Parisi v. Davidson*, 405 U.S. 34 (1972); or that his parole was unlawfully revoked, causing him to be reincarcerated in prison, as in *Morrissey v. Brewer*, 408 U.S. 471 (1972) -- in each case his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement.

In *Billingsley v Birzgalis*, 20 Mich App 279, 281-82 (1969), the Michigan Court of Appeals held that the relief available under a writ of habeas corpus in Michigan courts was no different than that under federal law. Accord, *Cross*, *supra* 103 Mich App at 415, (writ under Michigan law is not more restrictive than that which the United States Supreme Court has deemed available under federal writs of habeas corpus) (citing *Preiser v Rodriguez*, 411 U.S. 475 (1973)). And several Michigan courts have recognized that habeas review is available to review parole revocation hearings. See, e.g., *Triplett v. Deputy Warden Jackson Prison*, 142 Mich App 774, 779 (1985) and *Hinton v Parole Board*, 148 Mich App 235, 243 (1986). However, no Michigan court

decision found by Plaintiff ever specifically ruled on whether insufficient evidence can provide the basis for habeas relief.

However, at least two federal courts in the Eastern District of Michigan have recently recognized that a person would be entitled to habeas relief if the decision to revoke his parole was not based upon sufficient evidence. See *Holly v White*, 2007 U.S. District Lexis 90497 (ED Mich, Dec. 2, 2007), (Ex. 1) stating:

Petitioner asserts that he is entitled to habeas relief because the decision to revoke his parole was not based upon sufficiently reliable evidence. Although the United States Supreme Court has not specifically held that the Due Process Clause requires sufficiency of the evidence for a parole violation, it has suggested that this is so. See *Black v. Romano*, 471 U.S. 606, 615-16, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985); see also *Douglas v. Buder*, 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973) (per curiam). . . . In Michigan, the prosecution bears the burden of establishing a parole violation by a preponderance of the evidence. See *People v. Ison*, 132 Mich. App. 61, 66, 346 N.W.2d 894 (1984).

The court in *Holly* analyzed the sufficiency of the evidence, and after stating that it was not the office of federal habeas to review the resolution of evidentiary disputes, ruled that the MDOC witness's "testimony provided sufficiently reliable proof, by a preponderance of the evidence, that Petitioner committed the charged parole violation. Habeas relief is not warranted on this claim." See also *Wright v Vasbinder*, 2007 U.S. District Lexis 2118 (ED Mich, Jan. 11, 2007) (same) (Ex.1).

In *Wilkinson v Austin*, 545 US 209, 221 (1991), the United States Supreme Court recognized that state law could create a liberty interest recognizable by the Due Process Clause: "A liberty interest may arise from the Constitution itself, by reason of the guarantees expressed in the word "liberty", *** or it may arise from an expectation or interest created by state laws or policies". With regard to the state-created liberty

interest, the court stated that mandatory language which involves freedom from restraint creates a constitutionally protected interest. *Id.*

Michigan's parole revocation law creates a constitutionally protected interest.

MCL 791.240a governs parole revocation proceedings. It provides in part:

(8) If the **evidence** presented **is insufficient** to support the allegation that a parole violation occurred, the parolee **shall** be reinstated to parole status.

(9) If the parole board member or hearings officer conducting the fact-finding hearing **determines from a preponderance of the evidence** that a parole violation has occurred, the parole board member or hearings officer shall present the relevant facts to the parole board and make a recommendation as to the disposition of the charges.

(10) If a preponderance of the evidence supports the allegation that a parole violation occurred, the parole board may revoke parole, and the parolee shall be provided with a written statement of the findings of fact and the reasons for the determination within 60 days after the paroled prisoner has been returned or is available for return to a state correctional facility. (Emphasis supplied.)

Under *Austin*, the mandatory language in MCL 791.240a subsections 8 and 9 create a liberty interest protected by the Due Process Clause in remaining on parole unless there is sufficient evidence presented to support the allegation of parole violation by a preponderance of the evidence. These sections create a liberty interest; remaining on parole, and provide the procedure by which the liberty can be taken away: proof of sufficient evidence to prove parole violation by a preponderance of evidence. Thus, a revocation of parole based on evidence insufficient to prove a parole violation by a preponderance of the evidence constitutes a due process violation. And it would hardly be novel to contend that these types of deprivations should be reviewable via habeas corpus. This is not to suggest that a court, on habeas review,

should revisit evidentiary and credibility determinations. It clearly should not. It should, however, examine the record to determine if there is sufficient evidence such that a reasonable fact finder could conclude that a parole violation had been proved by a preponderance of the evidence.

In concluding that the "some evidence" test should apply to Mr. Kenney's claim, the Court of Appeals in this case relied on several federal court cases including *Swarthout v Cooke*, 131 S.Ct. 859 (2011) and *Walpole v Hill*, 472 US 445 (1985).

This reliance was misplaced. *Walpole* involved the denial of parole. The court noted there was no substantive liberty interest at stake because there was no right under the federal constitution to be conditionally released before the expiration of a valid sentence and the states are under no duty to parole their prisoners. *Id. at 862*. Thus, there was no substantive liberty interest involved. The court concluded that the only liberty interest at stake were procedural, and in the context of parole the only constitutionally required procedure was "the opportunity to be heard" and the right to be "provided with a statement of the reasons why parole was denied." *Id.* The court did not even consider the "some evidence" standard because no substantive liberty interest was involved.

The Court of Appeals reliance on *Walpole* was equally misplaced. *Walpole* involved the denial of good time credits for misconduct that occurred inside the prison walls. In *Walpole*, there was not state law standard setting the quantum of proof necessary to revoke good time credits. As the court noted

Where a prison disciplinary hearing may result in the loss of good time credits, the inmate must receive: (1) advance written notice of the

disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. Revocation of good time does not comport with the minimum requirements of procedural due process, unless the findings of the prison disciplinary board are supported by some evidence in the record. *Id.* at 454.

The court reasoned:

Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly **on the basis of evidence that might be insufficient in less exigent circumstances.** The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. Internal citation omitted; emphasis supplied. *Id.* at 456.

In the instant case, there is a state standard governing the quantum of proof in the underlying state proceeding. Furthermore, as demonstrated in *Morrisey, supra*, 408 U.S. at 499, a parolee has far greater procedural rights guaranteed by the due process clause including (1) written notice of the claimed violations of parole; (2) disclosure of the evidence against the parolee; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross examine adverse witnesses (unless there is specific finding of good cause for not allowing confrontation); (5) a neutral and detached hearing body; and (6) a written statement of the fact finder's conclusion as to the evidence relied on for revoking parole.

Thus, the due process procedural requirements for parole revocation are much more akin to a trial than those of a decision to revoke disciplinary credits. Notably, in

the good time credit context, there is no right to disclosure of the evidence against the prisoner, there is no right of confrontation or otherwise to contest the evidence against the prisoner, there is only a conditional right to present evidence, there is not even a right to a neutral and detached hearing body. Furthermore, as a parole revocation does not involve conduct that occurs inside the prison walls, it is not a proceeding that takes place in a "highly charged atmosphere" where prison officials must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances. In fact, as demonstrated in this case, Mr. Kenney's hearing took place over several months. Moreover, *Walpole* certainly implies that a greater standard of sufficiency of evidence would be required in proceedings like a parole revocation hearing.

Finally, given that Michigan has a proof-by-a-preponderance-of-evidence quantum of proof standard for the underlying parole revocation hearing, this results in a state created due process liberty interest to remain free on parole except on sufficient proof by preponderance of the evidence that a parole violation occurred. Thus, it would seem illogical to conclude that the reviewing court should consider *only* whether there is "some evidence" to support the hearing officer's finding of parole violation.

Furthermore, *Pilon v Bordenkircher*, 444 US 1 (1979), specifically rejected the notion that the "some evidence test" was a constitutionally adequate scope of review when the Due Process Clause required the state to meet a standard of proof higher than some evidence in the underlying proceeding. *Pilon* involved the due process right to not be convicted of a crime except upon proof beyond a reasonable doubt. That right was guaranteed by the substantive component of the Due Process Clause. Here, there

is a due process right not to be convicted of parole violation except upon proof by a preponderance of the evidence. This due process right is a creature of state creation. In both the criminal context and in the Michigan parole revocation context, there is a standard of proof the government must meet in the underlying proceeding before the liberty interest can be deprived. The court in *Pilon* held that

This constitutional requirement can be effectuated only if a federal habeas corpus court, in assessing the sufficiency of the evidence to support a state court convictions, inquires 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' quoting *Jackson v Virginia*, 443 U.S. 307, 319 (1979). *Id.* at 3

And, while it is true that the liberty interest in remaining on parole is a limited one, the state created liberty interest provides an additional procedural guarantee. This, it would seem, leads inevitably to the conclusion that in order to comport with due process, the state created liberty interest of remaining free on parole unless convicted of a parole violation by a preponderance of the evidence can only be effectuated if the habeas court, when assessing the sufficiency of the evidence to support a conviction for a parole violation, inquires whether, after viewing the evidence in the light most favorable to the MDOC, any rational trier of fact could have found the essential elements of the alleged violation were proved by a preponderance of the evidence.

III. EVIDENCE THAT A PAROLEE "SHOULD HAVE KNOWN" OF THE PRESENCE OF AN ITEM IS INSUFFICIENT TO ESTABLISH A PAROLE VIOLATION BASED ON POSSESSION OF THAT ITEM

As set forth in Plaintiff's brief in support of application for leave, (application brief) pp. 14-16, Michigan law has consistently defined possession of contraband to require

either actual possession, or constructive possession. Under Michigan law, constructive possession must be based on the present ability to control the contraband which, by necessity, requires knowledge of the presence of the contraband. This Court ordered the parties to file supplement briefs on the issue of whether the Plaintiff could be found guilty of parole violation for possession of contraband because he “should have known” of its presence.

First of all, it is important to note that the hearing officer found that Plaintiff “should have known” of the presence of the contraband because he failed to make diligent inquiries by not asking the passenger, to whom he had previously loaned the car, if there were any guns in the car, and by not searching the car himself. After concluding that it was “not much of a stretch” to conclude that Cook was “dealing in guns” because he was “admittedly a drug dealer” the hearing examiner stated that there was no indication that Plaintiff “talked to him or asked him were there any weapons in the car.” She then stated that it was Plaintiff’s duty to know². The hearing examiner then stated that “and that’s where the should have known comes in at [sic]. If you didn’t ask, if you didn’t check and your being on parole you owned it sir so I am going to find you guilty of possessing the gun by it being in your area of control.” *Transcript, pp. 114-115.*

Thus, the hearing examiner essentially found that Plaintiff negligently possessed the gun by his failure to make diligent inquiry as to whether there was a gun present in his mother’s car which he was driving. This is not a case where a fact finder uses

² “And you sir, you are on parole . . . you have a higher degree than any normal citizen and you have to, have to know.” *Transcript, pp. 114-115.*

inartful language and says that the accused "should have known" while really meaning that there were sufficient facts presented from which to infer that the accused had actual knowledge.

To the best of Plaintiff's knowledge after conducting considerable research, there is no case or holding anywhere in the country which allows a person to be incarcerated based on any type of negligent possession of contraband. This is especially true given that Plaintiff's conditions of parole do not include any definition or language that would encompass a "should have known" standard of possession of a firearm.

A. There is no legal precedent for allowing a negligent failure to discover the presence of contraband to substitute for the knowledge requirement of constructive possession.

Federal courts have repeatedly rejected the notion that negligence can substitute for knowledge. In *U.S. v Reese*, 86 F3d 994, 996-997 (10th Cir. 1996), the court held that a drug conviction could not "be based only upon evidence that tends to show that a defendant was negligent or otherwise should have known about a criminal venture, citing *U.S. v deFransico-Lopez*, 939 F2d 1405, 1410-1411 (10th Cir. 1991). Notably, the Reese Court also stated "even if the jury disbelieved the entire testimony presented by the defendant, that disbelief cannot constitute evidence of the crime charged or somehow substitute for the requirement that affirmative evidence must be presented to demonstrate constructive possession by Mr. Reese of the contraband discovered." Accord *U.S. v Sanders*, 240 F3d 1279, 1284 (10th Cir. 2001), (government must affirmatively prove knowledge where that element is disputed and generally fact-finders disbelief of defense evidence is not sufficient to establish knowledge).

Similarly, in *U.S. v Astorga-Torres*, 682 F2d 1331, 1337 (9th Cir. 1982), the 9th Circuit reversed a conviction where the jury instruction would have allowed the jury to convict a co-defendant of joint possession because he “knew or should have known [a] co-defendant had heroin he planned to sell.” The court went on to state that, “mere proximity of the drug, mere presence, or mere association with the person who does control the drug is insufficient to support a finding of possession.” Citing *U.S. v Batimana*, 623 F2d 1366, 1369 (9th Cir. 1980).

Other courts have held that a “should have known” standard is constitutionally infirm even when it applies to knowledge of the characteristics of the property possessed, and even when there is knowledge of the presence of the illegal property. In *U.S. v Rokoski*, 30 CMR 433, 434-435 (1960), the court held that a conviction based on receipt of stolen property should be reversed because the government failed to prove knowledge. The court reasoned, “actual knowledge, and not a negligent failure to make diligent inquiry concerning the ownership of the property is required to support a conviction.”

Michigan’s sister states are in agreement. Knowledge of the presence or illegality of the contraband must be proven to prove constructive possession, whenever the issue of possession is contested, and especially in the situation when there is more than one person on the premises or in the vehicle where the contraband is discovered. See *Wally v State*, 353 Ark 586, 595-596 (Ark. 2003) (person cannot be found to constructively possess stolen vehicle jointly with other defendant because he “should have known” the vehicle was stolen); *Avett v State*, 325 Ark 320, 321-322 (Ark. 1996)

same; *State v Drake*, 37 So. 3d 582, (Louisiana Ct. Of Appeals, 2010) evidence insufficient to support defendant's illegal possession of a stolen firearm conviction where, although defendant knew of the presence of the firearm, there was no evidence of defendant's guilty knowledge that the pistol was stolen; *State v Reeves*, 209 NW2d, 822 (Iowa 1973) (where accused not in exclusive possession of the premises but only in joint possession, knowledge of presence of contraband on the premises and ability to maintain control over it by accused will not be inferred but must be established by proof); *State v Gaddard*, 422 NW2d 246, 251 (S.D. 1989) (possession signifies dominion or right of control over a control substance with knowledge of its presence and character). See also *Hancock v Commonwealth*, 21 VA App 466, 468-469 (VA Ct. Of Appeals 1995). (trial court acting as finder of fact wrongfully convicted defendant because it believed that government could establish constructive possession based on should have known standard. To prove constructive possession, the government must prove defendant's actual knowledge of the firearm.)

Finally, other courts have squarely rejected inferring guilty knowledge based on a "should have known" standard because of the association with nefarious individuals. See for example, *People v Perez*, 189 Ill 2d 254-266 (2000) wherein the Illinois Supreme Court held, "guilt by association is a thoroughly discredited doctrine." Citing *Uphaus v Wyman*, 360 US 72, 79 (1959).

Black's Law Dictionary defines the term possession thusly:

The law in general recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who although not in actual possession knowingly has both the power

and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession.” Black’s Law Dictionary, 5th Ed. p. 1047.

In short, there no is definition of possession, in the context of possession of contraband, that would include a form of constructive possession based on a “should have known” standard in the sense that the accused can be deemed to possess the contraband based on a failure to make diligent inquiry to determine whether any contraband was present. Indeed, to the extent the hearing officer found Kenney ‘should have known” of the presence of the contraband because he should have known Cooke, a bad guy, might put a gun under his hood, the standard would seem nothing other than a substitute for guilt by association. To the extent she found Kenney “should have known” of the presence of the gun because he did not search the car before he got in, this standard would seem nothing other than a substitute for guilt based on mere presence. These are constitutionally infirm bases for punishment, especially in the form of incarceration

In fact, even if Kenney was negligent by failing to ask Cooke if there were any guns in the car and by failing to search the vehicle, the conclusion that he therefore negligently possessed the gun is, in the words of the hearing officer, “a stretch”. For example, finding that Kenney negligently possessed the gun because he failed to ask Cook if there was a gun in the car presupposes that even if he had, Cook would have truthfully answered. But it is not hard to imagine that Cook had incentive to lie and say no. Even if Plaintiff would have made the inquiry and Cook would have said “No” why, under the hearing examiner’s “should have known” standard, would that discharge Plaintiff’s purported duty. Could Plaintiff rely on the mere words of Cook, knowing

Cook might have incentive to lie and state there was no gun in the car?

She also found that Kenney negligently possessed the gun because he should have checked the car. But this presupposes that the gun was readily discernible upon a reasonable inspection. But the gun was not found in plain view, under the seat, or even in the glove box. It was not even found in the trunk. It was found in the battery compartment, under the hood. So even if Plaintiff would have checked the passenger compartment he would not have found a weapon. And even if he would have checked the trunk, he would not have found a weapon. And even if he would have lifted up the hood and casually looked inside, he would not have found the weapon. And since the gun was not found in the passenger compartment, not in the trunk, and not even in plain view under the hood, searching those areas would apparently not have discharged his duty to "check" since the hearing officer found he negligently possessed a gun found in the battery compartment because of the failure to check.

The concept of what is essentially "negligent possession" of contraband as a basis for depriving a person of his liberty has never been embraced by any court in this country. The concept of negligent possession has never been included within the definition of constructive possession of contraband by any court of this country. Instead, it is a concept which have been squarely rejected by the courts of this country as a basis for depriving liberty.

B. Because a Parole Revocation Hearing Can Result in a Significant Deprivation of Liberty, Substituting a "Should Have Known" Standard for the Proof of Knowledge Requirement to Prove Constructive Possession of Contraband Would Be a Violation of Due Process.

In *Seal*, cited in Plaintiff's Brief in Support of Application, the 6th Circuit held"

Indeed the entire concept of possession - - in the sense of possession for which the state can legitimately prescribe and mete out punishment - - ordinarily implies knowing or conscious possession.

The *Seal* court went on to conclude that the state could not mete out punishment based on unknowing possession even in the context where no liberty interest was at stake. *Id* at 575-576. And even though there was no liberty interest at stake, the 6th Circuit rejected the government's contention that the legal requirement of knowing or conscious possession "should not be imported into school suspension cases." *Id* at 576.

Surely then, if the "knowing our conscious progression" concept must be imported into school suspension cases where no liberty interest is at stake, it must be imported into the parole revocation context, where a compelling liberty interest, avoiding incarceration, is at stake. And although the liberty interest in remaining on parole is a conditional one, the deprivation of it is hardly inconsequential. As one commentator noted:

If the prisoner still has many years left before serving the maximum sentence, he or she can be returned to prison for years as a technical parole violator for conduct that might have brought only a year or less in the county if prosecuted [or nothing at all]. Hems, Citizens Alliance on Prison and Public Spending, August, 2009.

C. In this Case, the Charge of Parole Violation Based on Possession of a Firearm Would Not Have Provided Adequate Notice to Defendant That He Could Be Found Guilty of Parole Violation Based on a "Should Have Known" Standard.

In this case, the possession of a firearm charge, as it applied to violating the conditions of parole, stated as follows:

Count 2. On or about 11/26/07, you were involved in behavior which constitutes a violation of state law, when you had in your possession and under your control a 45 caliber handgun.

Count 3. On or about 11/26/07, you did have in your possession a 45 caliber handgun.

Count 4. On or about 11/26/07 you did have in your possession a weapon and ammunition, a 45 caliber handgun loaded with 1 round and 4 in the magazine.

With regard to Plaintiff's parole conditions, condition No. 7, which addresses weapons, provides as follows:

You may not use any object as a weapon. You must not own, use or have under your control or area of control a weapon of any type or any imitation of a weapon, any ammunition, or any firearm parts, or be in the company of anyone you **know** to possess these items. (Emphasis supplied) (Ex. 2)

The word "have" is defined most commonly as,

"1(a) to hold in possession as property: own; (b) to hold, keep, or retain especially in ones use, service, regard or affection or at ones disposal.

Webster's Third New International Dictionary, Unabridged, p. 1039.

Nothing in Plaintiff's parole conditions, notice of parole violations, or any previous definition known to law regarding possession of contraband, would put Plaintiff on notice that he could be found guilty for a parole violation for possession based on an alleged failure to make diligent inquiry as to the potential existence of any contraband in his proximity. Moreover, if the Court did construe possession as including a "should have known" standard, this would be an unforeseeable construction of law, and could not, consistent with constitutional due process, be used to punish Plaintiff in this case. See *Douglas v Buder*, 412 US 430 (1973) (unforeseeable interpretation of law used to revoke probation not consistent with notice requirement of Due Process Clause).

IV. THE STANDARDS OF REVIEW APPLICABLE TO FACTUAL DECISIONS BY THE PAROLE BOARD

As indicated in *Morrissey*, 408 U.S. at 479-80:

The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?

Thus, a parole board makes essentially two factual decisions in a parole revocation hearing. The first is akin to a trial proceeding, the second akin to a sentencing proceeding. And, since any factual decisions in these separate phases involve distinct and separate functions, they should be subject to different standards of review.

A. The sentencing phase

With regard to the second factual determination as to whether parole should be revoked upon a finding that a parole violation has occurred, the parole board should be given wide latitude and has virtually plenary discretion granted by the Michigan Legislature, see 791.240a(10). Furthermore, this factual decision lies at the heart of the parole board's expertise with regard to balancing the interest of the parolee in rehabilitation and reintroduction into society, with the public safety interest. It follows that judicial review of these decisions should be extremely limited and based on an abuse of discretion. With regard to factual determinations at this stage of the proceeding, an abuse of discretion results only when there is no factual support for the parole board's decision, and guards against arbitrary decisions. See for example *Massachusetts Corr. Inst. v Hill*, 472 U.S. 445, 456 (1985).

B. The trial phase

With regard to the first factual decision, whether a parole violation has occurred,

this should not be considered discretionary. As plainly indicated MCL 791.240a(8), the parolee "shall" be reinstated to parole if there is insufficient evidence of a parole violation. Only if there is a finding of parole violation by a preponderance of the evidence can a parolee be found guilty and become subject to the Parole board's discretion to revoke parole, 791.240a(9). This precatory language does not confer discretion.

Furthermore, determining whether there is sufficient evidence to prove a parole violation by a preponderance of the evidence is a quasi-judicial function. The question of whether there is sufficient evidence to prove a matter by a preponderance of the evidence is a standard very familiar to the judiciary, and is certainly not something for which the parole board has any unique qualifications or expertise. In fact, as previously demonstrated, determining sufficiency of the evidence is a core function of the judiciary. Accordingly, judicial review of the parole board's decision on this factual determination should be governed by a different and far less deferential standard.

Notably, the great State of Idaho has a very similar parole revocation procedure and similar parole revocation law. In *Craig v Idaho*, 123 Idaho 121; 844 P.2d 1371 (1992) the Idaho Court of Appeals addressed, in an issue of first impression, what standards of judicial review should apply to Idaho parole revocation hearings. The court began by noting that a revocation decision by the parole board involves two decisions, one factual, the other discretionary. With regard to the scope of judicial review of the factual decision of whether a parole violation has occurred, the court noted initially that the violation of the conditions of parole had to be proved, under Idaho statutory law, by a preponderance of the evidence. The court also noted that judicial

review via habeas corpus was available because the petition alleged a due process violation under state and federal law. *Id.* at 125. The court then turned to the issue of review.

The court stated, "any review of the commission's decision to revoke parole must recognize and address the separate procedural requirements of the process," and continued:

The weighing of evidence is normally a function of a trier of fact, either a jury or judge, or, as in this case, a commission. We review factual finding of a jury by the substantial evidence standard and of a judge by the clearly erroneous standard. However, clear error and substantial evidence have been equated by this Court; "[c]lear error will not be deemed to exist if the findings are supported by substantial and competent, though conflicting, evidence.

As a fact finder, performing a quasi-judicial function, the commission is charged by the legislature to make its finding of parole violation based upon sufficient evidence. With this in mind and using the above examples to guide this Court, we hold that the proper standard of review that the magistrate should have applied is substantial evidence.

We regard evidence as "substantial" if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven. *Id.* at 126

Notably, the standard is, in all material respects, similar to the standard articulated in *Jackson and Pilon, supra*, for granting habeas relief based on insufficient evidence.

Under this standard, the reviewing court is not free to substitute its judgment for that of the parole board. It is not free to re-weigh credibility determinations. Its review is limited to whether there was evidence such that a reasonable fact finder could conclude that the parole violation had been proven by a preponderance of the evidence. However, the court would have to review the evidence to make this determination. But this standard of review would be consistent with the Michigan Court

Rules governing extraordinary writs, MCR 3.301 *et seq.*, specifically MCR 3.303(E) which allows the trial court to consider proceedings in another court or agency, including review of transcripts, subsection (N) which requires the defendant to answer the writ or order to show cause, subsection (O) which allows the plaintiff to controvert the defendant's answer under oath, to show "either that the restraint is unlawful or that the prisoner is entitled to discharge" and subsection (Q) which requires the court "promptly to hear the matter in a summary manner and enter judgment".

It would also be consistent with the review implicit in Michigan's habeas statute, MCL 600.4301 *et seq.* specifically MCL 600.4352(1), which requires the court to determine if there is "legal cause shown for the restraint or the continuation thereof." And it would be consistent with the long and well established common law procedures for governing habeas review of executive detentions. See *Falkoff, Back to Basics: Habeas Corpus Procedures in Long Term Executive Detention*, 86 Denv. U.L. Rev. 961, 2009:

When a petitioner was held in non-criminal detention, historical practice consistently allowed the prisoner to contest the facts justifying his detention.

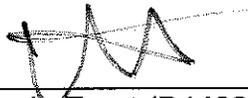
While courts generally did not allow criminal detainees-who had already received a trial and a jury verdict-to contradict the facts stated in the return, they commonly exercised independent review over the factual assertions of prisoners in cases of executive and other non-criminal detention that lacked the safeguards of a jury trial. The courts, in short, would consider additional evidence and seek to ensure that individuals challenging executive detention received meaningful review of their claims. *Id. at 972-973*

Accordingly, the proper standard of review should not be limited to determining whether "some evidence" supports the finding of guilt.

RELIEF REQUESTED

For the foregoing reasons and those set forth in Plaintiff's Application Brief Plaintiff respectfully requests the Court grant the relief requested in Plaintiff's Application Brief.

Respectfully submitted,



Kevin Ernst (P44223)
Counsel for Plaintiff-Appellee

Dated: October 31, 2012

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*2007 U.S. Dist. LEXIS 90497, **

KERRY BYRON HOLLEY, Petitioner, -vs- JEFF WHITE, Respondent.

CASE NO. 07-CV-11503

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2007 U.S. Dist. LEXIS 90497

December 10, 2007, Decided

December 10, 2007, Filed

SUBSEQUENT HISTORY: Certificate of appealability denied, Motion denied by Holley v. White, 2008 U.S. Dist. LEXIS 2186 (E.D. Mich., Jan. 11, 2008)

PRIOR HISTORY: Holley v. White, 2007 U.S. Dist. LEXIS 26014 (E.D. Mich., Apr. 9, 2007)

CORE TERMS: parole, appealability, certificate, parolee, parole violations, parole revocation, hearing examiner, hearsay, habeas corpus, leave to proceed, federal habeas, forma pauperis, parole violation, reliable, customer, habeas petition, constitutional rights, threatening, evidentiary, parole board, parole revocation, revocation hearing, evidence to support, sufficient evidence, per curiam, criminal trial, well-established, preponderance, inadmissible, contradicts

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For Jeff White, Respondent: Raina I. Korbakis ↘, LEAD ATTORNEY, Michigan Department of Attorney General, Lansing, MI.

JUDGES: PAUL D. BORMAN ↘, UNITED STATES DISTRICT JUDGE.

OPINION BY: PAUL D. BORMAN ↘

OPINION

OPINION AND ORDER

- (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS;**
- (2) DENYING PETITIONER'S MOTION FOR JUDGMENT ON THE PLEADINGS;**
- (3) DENYING A CERTIFICATE OF APPEALABILITY; AND**
- (4) DENYING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL**

Petitioner Kerry Byron Holley ("Petitioner"), a Michigan prisoner, has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his April 2004 state parole revocation. Petitioner has also filed a motion for judgment on the pleadings. Having considered the entire record, and for the reasons that follow, the Court DENIES the petition for writ of habeas corpus, DENIES Petitioner's motion for judgment on the pleadings, DENIES a certificate of appealability, and DENIES leave to proceed *in forma pauperis* on appeal.

I. BACKGROUND

Petitioner was convicted of bank robbery in the Oakland County Circuit Court and sentenced as a second habitual offender to 1.5 years to 20 years imprisonment in 2001. He was initially paroled [*2] in June 2003. Petitioner was charged with parole violations in August 2003, participated in technical rule violation programming, and was re-paroled. In January 2004, Petitioner was charged with violating the conditions of his parole by making threats against his employer and a customer. A parole violation warrant was issued, and Petitioner was taken into custody. Petitioner was appointed counsel, arraigned on two parole violation charges of engaging in assaultive, abusive, threatening, or intimidating behavior, and pleaded not guilty. A formal parole revocation hearing was conducted on March 4, 2004. At that hearing, Petitioner's employer, Christopher Jollie, and Petitioner's parole agent, Michael Perilloux, testified. The hearing examiner summarized the evidence as follows:

Christopher Jollie testified that he is the manager of Labor Ready in Pontiac, MI. Jollie indicated that he has known Holley since 5/99, when he started working there. Jollie testified that on the day of this incident, he received a phone call from one of his customers with some complaints against Holley. Witness indicated that the customer said she didn't want parolee to return to work. Jollie testified that he [*3] phoned Holley and told him he was going to be suspended while Jollie checked out the complaint. Witness stated that parolee said "the bitch is lying" and told Jollie he was going to kick his ass and kill him. Jollie also stated that parolee was very angry and said watch your back. Witness indicated that he did take the words as a threat and did make a written report of the incident but did not make a police report. Jollie indicated that he then fired parolee and sent a copy of the incident report to the Parole Agent.

PA Perilloux testified that he got parolee's case on 6-5-03 and when he served him the charges, parolee indicated that he "got into it" with his boss but denied making any threats. According to Perilloux, parolee did admit saying "kiss my ass."

Summary of Evidence, 3/19/04 Hrg. Report.

Petitioner denied the charges at the hearing. Through counsel, he had an opportunity to question witnesses and present evidence and arguments in his defense. Following the hearing, the hearing examiner issued a report crediting Jollie's version of events and finding Petitioner guilty of the parole violation charge involving the threats to Jollie. The hearing examiner dismissed the charge involving [*4] the alleged threats to the customer.

On April 1, 2004, the Michigan Parole Board issued a decision revoking Petitioner's parole and continuing his incarceration for 12 months before further parole consideration. Petitioner sought rehearing of the decision, but his request was denied.

Petitioner filed a complaint for superintending control with the Michigan Court of Appeals alleging that there was insufficient evidence to support a finding of guilt on the parole violation charge and that the decision was based upon inadmissible hearsay. The Michigan Court of Appeals dismissed the complaint for failure to pay filing fees. See *Holley v. Parole Bd.*, No. 266983 (Mich. Ct. App. Dec. 19, 2005). Petitioner filed an application for leave to appeal with the Michigan Supreme Court, which was denied in a standard order. See *Holley v. Parole Bd.*, 477 Mich. 927, 723 N.W.2d 205 (2006).

Petitioner thereafter filed his federal habeas petition, raising the following claim as a basis for relief:

The two forms of hearsay evidence which was relied upon to find Mr. Holley guilty at the formal parole revocation hearing was not sufficient enough alone, absent any reliable indications of its trustworthiness, to find Mr. Holley [*5] guilty without violating his Fourth, Fifth, Sixth, and Fourteenth Amendment rights of the United States Constitutional rights.

Respondent filed an answer to the petition, asserting that it should be denied based upon procedural default and/or for lack of merit. Petitioner filed both a Reply and a motion for judgment on the pleadings.

II. ANALYSIS

A. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq.*, govern this case because Petitioner filed his habeas petition after the AEDPA's effective date. See *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). Section 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in [*6] light of the evidence presented in the State court proceeding.

"A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent.'" *Mitchell v. Esparza*, 540 U.S. 12, 15-16, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). "[T]he 'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (quoting *Williams*, 529 U.S. at 413). However, "[i]n order for a

federal court find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. The state court's application must have been 'objectively unreasonable.'" *Wiggins*, 539 U.S. at 520-21 [*7] (citations omitted).

Section 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with clearly established federal law as determined by the Supreme Court at the time the state court renders its decision. See *Williams*, 529 U.S. at 412. Section 2254(d) "does not require citation of [Supreme Court] cases - indeed, it does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (emphasis in original). While the requirements of "clearly established law" are to be determined solely by the holdings of the Supreme Court, the decisions of lower federal courts are useful in assessing the reasonableness of the state court's resolution of an issue. See *Dickens v. Jones*, 203 F. Supp. 2d 354, 359 (E.D. Mich. 2002).

Lastly, a state court's factual determinations are entitled to a presumption of correctness on federal habeas review. See 28 U.S.C. § 2254(e)(1). A habeas petitioner may rebut this presumption with clear and convincing evidence. See *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

B. [*8] Habeas Petition

Petitioner asserts that he is entitled to habeas relief because the decision to revoke his parole was not based upon sufficiently reliable evidence. Although the United States Supreme Court has not specifically held that the Due Process Clause requires sufficiency of the evidence for a parole violation, it has suggested that this is so. See *Black v. Romano*, 471 U.S. 606, 615-16, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985); see also *Douglas v. Buder*, 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973) (per curiam). Proof beyond a reasonable doubt is not required for a parole revocation. See *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 2197-98, 165 L. Ed. 2d 250 (2006). In Michigan, the prosecution bears the burden of establishing a parole violation by a preponderance of the evidence. See *People v. Ison*, 132 Mich. App. 61, 66, 346 N.W.2d 894 (1984).

In this case, the hearing examiner reviewed the testimony presented at the parole revocation hearing and found Petitioner guilty of the parole violation charge based upon the testimony of the victim, Jollie. As a result, the Michigan Parole Board revoked Petitioner's parole.

That decision was neither contrary to Supreme Court precedent nor an unreasonable application of the law or the facts presented at the revocation hearing. The testimony [*9] of Jollie, if believed, provided sufficient evidence to sustain the conclusion that Petitioner engaged in threatening behavior and violated the terms of his parole. See *United States v. Howard*, 218 F.3d 556, 565 (6th Cir. 2000) (testimony of victim alone provided sufficient evidence for conviction). Petitioner's insufficient evidence claim challenges the credibility and weight to be accorded the evidence. However, it is well-settled that "[a] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Walker v. Engle*, 703 F.2d 959, 969-70 (6th Cir. 1983). It is the job of the fact-finder, not a federal habeas court, to resolve evidentiary conflicts. See *Martin v. Mitchell*, 280 F.3d 594, 618 (6th Cir. 2002). Jollie's testimony provided sufficiently reliable proof, by a preponderance of the evidence, that Petitioner committed the charged parole violation. Habeas relief is not warranted on this claim.

Petitioner asserts that Jollie's testimony and his incident [*10] report were unreliable hearsay which could not provide sufficient evidence to support the finding of guilt. It is well-established, however, that a parole board or a court may consider evidence at a parole revocation hearing that would be inadmissible in a criminal prosecution. See *Morrissey v. Brewer*, 408 U.S. 471,

489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (stating that the parole revocation process "should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial"); *United States v. Kirby*, 418 F.3d 621, 627 (6th Cir. 2005). Furthermore, an alleged error in the application of state evidentiary law is generally not a cognizable basis for federal habeas relief. See *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Serra v. Michigan Dept. of Corrections*, 4 F.3d 1348, 1354 (6th Cir. 1993). Only when an evidentiary ruling is "so egregious that it results in a denial of fundamental fairness," may it violate due process and warrant habeas relief. *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003).

Petitioner has not shown that the admission of Jollie's testimony or the incident report violated his constitutional rights. Contrary to **[*11]** Petitioner's assertion, Jollie's testimony recounting Petitioner's threatening remarks was not hearsay. Petitioner's remarks to Jollie were party admissions and not hearsay as a matter of state law. See Mich. R. Evid. 801(d)(2); see *People v. Lundy*, 467 Mich. 254, 257, 650 N.W.2d 332 (2002).

Furthermore, it is well-established that revocation hearings are more flexible than criminal trials and that a hearing examiner may consider hearsay if it is reliable. See, e.g., *United States v. Stephenson*, 928 F.2d 728, 732 (6th Cir. 1991). Petitioner has not shown that the disputed evidence was unreliable or that the hearing examiner improperly relied upon such evidence in finding him guilty of the parole violation. Conclusory allegations are insufficient to warrant habeas relief. See, e.g., *Workman v. Bell*, 160 F.3d 276, 287 (6th Cir. 1998). Petitioner has failed to establish that the admission of Jollie's testimony or the incident report rendered his parole revocation hearing fundamentally unfair. Habeas relief is therefore not warranted in this case.

C. Certificate of Appealability

Before Petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. See 28 U.S.C. § 2253(c)(1)(A); **[*12]** Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

When a federal district court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. See *Slack v. McDaniel*, 529 U.S. 473, 484-85, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). In applying this standard, a district court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims. *Id.* at 336-37.

Having considered the matter, the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right as to his habeas claim. A certificate of appealability is not warranted. The Court further concludes that Petitioner should not be granted **[*13]** leave to proceed on appeal *in forma pauperis* as any appeal would be frivolous. See Fed. R. App. P. 24(a). Accordingly, the Court denies a certificate of appealability and denies leave to proceed *in forma pauperis* on appeal.

III. CONCLUSION

For the foregoing reasons, the Court:

- (1) **DENIES** the petition for writ of habeas corpus;
- (2) **DENIES** Plaintiff's Motion for Judgment on the Pleadings (Doc. No. 11);

(3) **DENIES** a certificate of appealability; and

(4) **DENIES** leave to proceed *in forma pauperis* on appeal.

SO ORDERED.

s/ Paul D. Borman

PAUL D. BORMAN

UNITED STATES DISTRICT JUDGE

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CASE NO. 05-CV-72718-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN
DIVISION

2007 U.S. Dist. LEXIS 2118

January 11, 2007, Filed

SUBSEQUENT HISTORY: Certificate of appealability denied, Motion denied by **Wright v. Vasbinder**, 2007 U.S. Dist. LEXIS 11749 (E.D. Mich., Feb. 21, 2007)**PRIOR HISTORY:** **Wright v. Dep't of Corr.**, 472 Mich. 938, 698 N.W.2d 399, 2005 Mich. LEXIS 926 (2005)**DISPOSITION:** [*1] DENIED WITH PREJUDICE.**CORE TERMS:** parole, parole violation, hearing examiner, habeas corpus, parole revocation, federal habeas, parole board, state law, supplemental report, leave to appeal, revocation hearing, parolee, habeas petition, sexual assault, criminal charges, laboratory report, judicial review, preponderance, evidentiary, constitutional rights, parole revocation hearing, reasons stated, criminal cases, opportunity to challenge, victim's testimony, reliable evidence, process rights, per curiam, citations omitted, entitled to relief**COUNSEL:** Robert **Wright**, Petitioner, Pro se, Adrian, MI.For Douglas **Vasbinder**, Warden, Respondent: Brian O. Neill, LEAD ATTORNEY, Michigan Department of Attorney General (30217), Lansing, MI.**JUDGES:** George Caram Steeh, UNITED STATES DISTRICT JUDGE.**OPINION BY:** George Caram Steeh**OPINION**

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Robert Thomas **Wright**, a state prisoner currently confined at the Parr Highway Correctional Facility in Adrian, Michigan, ¹ has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that he is incarcerated in violation of his constitutional rights. Petitioner challenges his April 14, 2003 state parole revocation. For the reasons stated below, the petition for writ of habeas corpus is **DENIED**.

FOOTNOTES

¹ At the time he initiated this action, Petitioner was incarcerated at the G. Robert Cotton Correctional Facility in Jackson, Michigan where Doug **Vasbinder** is the warden.

[*2] I. Facts and Procedural History

Petitioner was serving a one to five year sentence for operating a motor vehicle while intoxicated third offense when he was released on parole on May 1, 2002. On June 15, 2002, he was charged with a parole violation arising from a May 26, 2002 incident in which he allegedly committed a sexual assault upon his 20-year-old niece, Barbara Ann **Wright**. Petitioner was criminally charged for the incident, but those charges were dismissed upon the prosecution's motion due to a perceived inability to meet the burden of proof in criminal proceedings.

A parole violation report was nonetheless issued and counsel was appointed to represent Petitioner. A formal revocation hearing on the charges was conducted in February, 2003. At that hearing, Ms. **Wright** essentially testified that Petitioner coerced her to engage in sexual activity against her will. Petitioner denied the charge and testified that Ms. **Wright** initiated and voluntarily performed oral sex on him. Exhibits admitted at the hearing included a State Police laboratory report which indicated that testing failed to identify seminal fluid or foreign hairs on samples and materials taken from Ms. **Wright**, [*3] as well as a supplemental report with the same findings and an added notation that the absence of seminal fluid did not rule out the possibility that a sexual act occurred. The dismissal of the criminal charges was also placed on the record. Petitioner, through counsel, had an opportunity to question witnesses and present evidence and arguments in his defense. On March 20, 2003, the hearing examiner issued a report crediting Ms. **Wright's** version of events and finding Petitioner guilty of the parole violation charge. On March 14, 2003, the Michigan Parole Board issued a decision revoking Petitioner's parole and continuing his incarceration for 24 months before further parole consideration. Petitioner sought rehearing of the decision, but his request was denied.

Petitioner filed a petition for judicial review of the parole board decision with the Ingham County Circuit Court, which was denied for lack of jurisdiction. *Wright v. Michigan Parole Bd.*, No. 04-490-AA (Ingham Co. Cir. Ct. April 22, 2004).

Petitioner then filed a complaint for writ of habeas corpus challenging the parole revocation decision with the Jackson County Circuit Court, which was denied on the merits. The court [*4] concluded that Petitioner failed to show a radical defect in jurisdiction given the victim's testimony, the hearing examiner's credibility determination, and the lower standard of proof in parole proceedings. *Wright v. Vasbinder, et al.*, No. 04-003813-AH (Jackson Co. Cir. Ct. June 9, 2004). Petitioner filed an application for leave to appeal with the Michigan Court of Appeals, which was denied for lack of merit in the grounds presented. *Wright v. Department of Corrections*, No. 256404 (Mich. Ct. App. Oct. 29, 2004). Petitioner filed an application for leave to appeal with the Michigan Supreme Court, which was denied in a standard order. *Wright v. Department of Corrections*, 472 Mich. 938, 698 N.W. 2d 399 (Mich. 2005).

Petitioner thereafter filed the present federal habeas petition, raising the following claims as

grounds for relief:

I. The Ingham County Circuit Court erred by dismissing the petition for judicial review of a decision to revoke parole on the grounds that the court lacked jurisdiction where prisoners can no longer appeal decisions of the Michigan Parole Board whether to grant or deny parole.

II. The Jackson County Circuit Court's summary dismissal of the [*5] petition for writ of habeas corpus was improper and contrary to or an unreasonable application of clearly established Supreme Court precedent and was an abuse of discretion.

III. The hearing examiner's decision to find Petitioner guilty was not based on sufficiently reliable evidence.

IV. Petitioner's due process rights were violated when the parole officer requested that a document be altered to be used against Petitioner and the hearing examiner knowingly used the altered document as evidence to find Petitioner guilty of the parole violation charge.

Respondent has filed an answer to the petition, asserting that it should be denied for lack of merit. Petitioner has filed a reply to that answer.

II. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq.*, govern this case because Petitioner filed his habeas petition after the AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). The AEDPA provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant [*6] to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1996).

"A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent.'" *Mitchell v. Esparza*, 540 U.S. 12, 15-16, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)); *see also Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). [*7] "The 'unreasonable application' prong of § 2254(d) (1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (quoting *Williams*, 529 U.S. at 413); *see also Bell*, 535 U.S. at 694. However, "in order for a federal court find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. The state court's application must have been 'objectively unreasonable.'" *Wiggins*, 539 U.S. at 520-

21 (citations omitted); see also *Williams*, 529 U.S. at 409.

Section 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with clearly established federal law as determined by the Supreme Court at the time the state court renders its decision. See *Williams*, 529 U.S. at 412; see also *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). [*8] Section 2254(d) "does not require citation of [Supreme Court] cases--indeed, it does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002); see also *Mitchell*, 540 U.S. at 16. While the requirements of "clearly established law" are to be determined solely by the holdings of the Supreme Court, the decisions of lower federal courts are useful in assessing the reasonableness of the state court's resolution of an issue. See *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003); *Dickens v. Jones*, 203 F. Supp. 2d 354, 359 (E.D. Mich. 2002).

Lastly, a state court's factual determinations are entitled to a presumption of correctness on federal habeas review. See 28 U.S.C. § 2254(e)(1). A habeas petitioner may rebut this presumption with clear and convincing evidence. See *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

III. Analysis

A. Ingham County Circuit Court Claim

Petitioner first asserts that [*9] he is entitled to habeas relief because the Ingham County Circuit Court improperly dismissed his petition for judicial review on jurisdictional grounds by relying upon *Morales v. Michigan Parole Bd.*, 260 Mich. App. 29, 676 N.W.2d 221 (2003). The determination of whether a particular state court is vested with jurisdiction under state law and is the proper venue to hear a case is a "function of the state courts, not the federal judiciary." *Wills v. Egeler*, 532 F.2d 1058, 1059 (6th Cir. 1976); see also *Chandler v. Curtis*, 2005 U.S. Dist. LEXIS 26398, 2005 WL 1640083, *2 (E.D. Mich. July 13, 2005) (Cohn, J.); *Groke v. Trombley*, 2003 U.S. Dist. LEXIS 5425, 2003 WL 1708109, *5 (E.D. Mich. April 1, 2003) (Lawson, J.); accord *Wright v. Angelone*, 151 F.3d 151, 157-58 (4th Cir. 1998); *Rhode v. Olk-Long*, 84 F.3d 284, 287 (8th Cir. 1996). Petitioner only alleges a state law error with respect to this issue. It is well-settled that a perceived violation of state law may not provide a basis for federal habeas relief. See *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Petitioner has thus failed to state a claim upon [*10] which federal habeas relief may be granted as to this claim. ²

FOOTNOTES

² Moreover, even if the Ingham County Circuit Court erred in dismissing Petitioner's appeal, see *People v. Kaczmarek*, 464 Mich. 478, 485, 628 N.W.2d 484, 488 (2001); *Nival v. Burt*, No. 03-CV70783-DT, 2003 U.S. Dist. LEXIS 17651, 2003 WL 22284562, *3 (E.D. Mich. Sept. 26, 2003) (discussing Michigan parole revocation appeals), Petitioner was not denied due process as he had an opportunity to challenge the parole revocation decision in the state courts via his state habeas proceedings.

B. Jackson County Circuit Court Claim

Petitioner next contends that he is entitled to habeas relief because the Jackson County Circuit Court dismissed his state habeas petition without requiring an answer from the State and without fully addressing his issues. Petitioner relies upon *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), in making this claim. [*11]

Those cases make clear that the requirements of due process apply to the revocation of an individual's parole. The United States Supreme Court has held that a parolee is entitled to two hearings. First, due process requires a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the parolee has committed acts that would constitute a violation of parole conditions. *Morrissey*, 408 U.S. at 485 (citations omitted). Second, a parolee is entitled to a revocation hearing prior to the final decision by the parole authority. *Id.* at 487-88. The procedures required at the formal revocation hearing include written notice of the alleged parole violations, disclosure of evidence against the parolee, an opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses, a "neutral and detached" hearing body such as a traditional parole board, and a written statement by the fact-finders as to the evidence relied on and the reasons for revoking parole. *Id.* at 489.

The record in this case reveals that Petitioner received all [*12] of the process he was due under *Morrissey* during his proceedings before the Michigan Parole Board. *Morrissey* does not require that the State grant an appeal from a formal revocation proceeding. See *Hopkins v. Tate*, 876 F.2d 894, 1989 WL 63271, *1 (6th Cir. 1989) (unpublished); *Manus v. Hudson*, No. 1:05-CV-122-TS, 2005 U.S. Dist. LEXIS 37386, 2005 WL 2105948, *1-2 (N.D. Ind. Aug. 31, 2005). Further, there is no federal constitutional right to appeal in criminal cases. See *Martinez v. Court of Appeal*, 528 U.S. 152, 165, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000) (concurring opinion, Scalia, J.) (citing *McKane v. Durston*, 153 U.S. 684, 687, 14 S. Ct. 913, 38 L. Ed. 867 (1894)). Of course, once the State creates an appellate system, the process must comport with due process and equal protection guarantees. See, e.g., *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Petitioner, however, has not shown that the Jackson County Circuit Court violated his due process or equal protection rights in denying him relief. The court issued a written opinion stating the reasons for its decision. While Petitioner may have desired that more detailed [*13] attention be given to his case, the court's dismissal does not establish that he failed to receive due process. See, e.g., *Perks v. Vasbinder*, No. 05-CV-72657-DT, 2006 U.S. Dist. LEXIS 64244, 2006 WL 2594470, *9 (E.D. Mich. Sept. 8, 2006) (indicating that due process is not violated by short order denying leave to appeal for lack of merit as opposed to detailed appellate opinion as both consider case merits); *Walker v. McKee*, 366 F. Supp. 2d 544, 549 (E.D. Mich. 2005). The alleged failure of the Jackson County Circuit Court to serve the State or to more fully address Petitioner's claims thus raises, at most, an issue of state law. As noted, a federal court may not grant habeas relief based on a perceived state law error. See *Estelle*, 502 U.S. at 67-68. Petitioner is thus not entitled to relief on this claim.

C. Sufficiency of Evidence Claim

Petitioner next asserts that he is entitled to habeas relief because the decision to revoke his parole was not based upon sufficiently reliable evidence. Although the Supreme Court has not specifically held that the Due Process Clause requires sufficiency of the evidence for a parole violation, it has suggested this [*14] is so. See *Black v. Romano*, 471 U.S. 606, 615-16, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985); see also *Douglas v. Buder*, 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973) (per curiam). Proof beyond a reasonable doubt is not required for a parole revocation. See *Samson v. California*, U.S. , 126 S. Ct. 2193, 2197-98, 165 L. Ed. 2d 250 (2006) (citing *United States v. Knights*, 534 U.S. 112, 120, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001)). In Michigan, the prosecution bears the burden of establishing a parole violation by a preponderance of the evidence. See *People v. Ison*, 132 Mich. App. 61, 66, 346 N.W.2d 894 (1984).

In this case, the hearing examiner reviewed the testimony presented at the parole hearing and found Petitioner guilty of the parole violation charge based upon the testimony of the victim, Ms. **Wright**. The parole board revoked Petitioner's parole. The Jackson County Circuit Court subsequently denied Petitioner habeas relief because the parole decision was supported by Ms. **Wright's** testimony. The court noted that the parole revocation decision was not inconsistent with the dismissal of related criminal charges because [*15] of the differing burdens of proof in criminal cases (proof beyond a reasonable doubt) and parole revocation cases (proof by a preponderance of the evidence). The Michigan Court of Appeals denied leave to appeal for lack

of merit in the grounds presented.

Those decisions are neither contrary to Supreme Court precedent nor an unreasonable application of the law or the facts presented at the revocation hearing. The testimony of Ms. **Wright**, if believed, provided sufficient evidence to sustain the conclusion that Petitioner committed a sexual assault and violated the terms of his parole. See *United States v. Howard*, 218 F.3d 556, 565 (6th Cir. 2000) (testimony of sexual assault victim alone provided sufficient evidence for conviction). Petitioner's insufficient evidence claim challenges the credibility and weight to be accorded the evidence. However, it is well-settled that "[a] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." [*16] *Walker v. Engle*, 703 F.2d 959, 969-70 (6th Cir. 1983). It is the job of the fact-finder, not a federal habeas court, to resolve evidentiary conflicts. See *Martin v. Mitchell*, 280 F.3d 594, 618 (6th Cir. 2002). Moreover, a person may be found guilty of a parole violation even if criminal charges arising from the same conduct are dismissed prior to trial. See *United States v. Stephenson*, 928 F.2d 728, 732 (6th Cir. 1991); *Taylor v. United States Parole Commission*, 734 F.2d 1152, 1155 (6th Cir. 1984). The victim's testimony provided sufficiently reliable proof, by a preponderance of the evidence, that Petitioner committed the charged parole violation. Habeas relief is not warranted on this claim.

D. Documentary Evidence Claim

Lastly, Petitioner contends that he is entitled to habeas relief because a parole officer requested and obtained a supplemental police laboratory report which the hearing examiner relied upon to find him guilty of the parole violation charge.

It is well-established that a parole board or a court may consider evidence at a parole revocation hearing that would be inadmissible in a criminal [*17] prosecution. "Morrissey states that the parole revocation process 'should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.' 408 U.S. at 489." *United States v. Kirby*, 418 F.3d 621, 627 (6th Cir. 2005). Furthermore, alleged errors in the application of state evidentiary law are generally not cognizable as grounds for federal habeas relief. See *Estelle*, 502 U.S. at 67-68; *Serra v. Michigan Dep't of Corrections*, 4 F.3d 1348, 1354 (6th Cir. 1993). Only when an evidentiary ruling is "so egregious that it results in a denial of fundamental fairness," may it violate due process and warrant habeas relief. See *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003).

The Michigan Court of Appeals denied leave to appeal on this issue for lack of merit in the grounds presented. That decision is neither contrary to Supreme Court precedent nor an unreasonable application of the law or the facts. Petitioner has not shown that the admission of the supplemental laboratory report violated his constitutional rights. Both [*18] the original report and the supplemental report were exhibits at the parole revocation hearing. Petitioner, through counsel, had the opportunity to challenge the supplemental report. The hearing examiner was Case thus well aware of the distinction between the reports. The hearing examiner was also aware that the criminal charges against Petitioner had been dismissed. Even if the parole agent requested a supplemental report as claimed, Petitioner has not shown how such a request invalidates the report or otherwise violates his due process rights. Petitioner has also not shown that the hearing examiner improperly relied upon the supplemental report. Conclusory allegations are insufficient to warrant habeas relief. See, e.g., *Workman v. Bell*, 160 F.3d 276, 287 (6th Cir. 1998). Petitioner is not entitled to relief on this issue.

IV. Conclusion

For the reasons stated, this Court concludes that Petitioner has not established that he is entitled to habeas relief on the claims presented. Accordingly,

IT IS ORDERED that the petition for writ of habeas corpus is **DENIED WITH PREJUDICE**.

Dated: January 11, 2007

S/ George Caram Steeh

UNITED STATES [*19] DISTRICT JUDGE

Source: **Legal > / . . . / > MI Federal & State Cases, Combined**

Terms: **wright v. vasbinder** (Suggest Terms for My Search | Feedback on Your Search)

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Date/Time: Wednesday, October 31, 2012 - 1:30 PM EDT

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 -  - Caution: Possible negative treatment
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(2)

Name: KENNEY, PATRICK	Number: B256535	Location: RRF	Mailed: 02/22/2011
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The Michigan Parole Board, having attained jurisdiction over the sentence of the above prisoner, having considered the facts and circumstances involved in this case and having exercised the discretion granted by the legislature, says as follows:

MAILED
MI DEPT OF CORRECTIONS

FEB 17 2011

The Parole Board lacks reasonable assurance that the prisoner will not become a menace to society or to the public safety and revocation of parole is warranted with action as follows:

Parole and Commutation Board

DECISION DATE: 02/15/2011	ACTION: Continue with Interview	TERM OF DENIAL: 24 Months	RECONSIDERATION DATE: 1/6/2010
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19

Parole Violations:

- 1 On or about 11/7/2007, you failed to make your regularly scheduled report to your field agent or to make any subsequent report. Guilty by Plea
- 2 On or about 11/26/2007, you were involved in behavior which constitutes a violation of State law., when you had in your possession and or under your control a weapon, a 45 caliber handgun. Guilty by Hearing
- 3 On or about 11/26/2007, you did have in your possession a 45 caliber handgun. Guilty by Hearing
- 4 On or about 11/26/2007, you did have in your possession a weapon and ammunition, a 45 caliber handgun loaded with one round and 4 in the magazine. Guilty by Hearing
- 5 On or about 10/15/2007, you were involved in behavior which constitutes a violation of State law, you took items from your mother residence, and pawned them without her permission. Dismissed by OFP for Cause

PAROLE CONDITIONS

Parole supervision is intended to protect the public while providing assistance and guidance to facilitate the parolee's transition from confinement to free society. To meet these goals, minimum conditions are established which may be enhanced by special individual conditions. A parolee's failure to comply with any condition may result in revocation and return to confinement.

- (1) **REPORTS:** You must contact the field agent as instructed no later than the first business day following release. Thereafter, you must report truthfully as often as the field agent requires. You must report any arrest or police contact or loss of employment to the field agent within 24 hours, weekends and holidays excepted.
- (2) **RESIDENCE:** You must not change residence without prior permission of the field agent.
- (3) **TRAVEL:** You must not leave the state without prior written permission.
- (4) **CONDUCT:** You must not engage in any behavior that constitutes a violation of any criminal law of any unit of government. You must not engage in assaultive, abusive, threatening or intimidating behavior. You must not use or possess controlled substances or drug paraphernalia or be with anyone you know to possess these items.
- (5) **TESTING:** You must comply with the requirements of alcohol and drug testing ordered by the field agent or law enforcement at the request of the field agent. You must not make any attempt to submit fraudulent or adulterated samples for testing. You must not hinder, obstruct, tamper, or otherwise interfere with the testing procedure.
- (6) **ASSOCIATION:** You must not have verbal, written, electronic, or physical contact with anyone you know to have a felony record without permission of the field agent. You must not have verbal, written, electronic, or physical contact with anyone you know to be engaged in any behavior that constitutes a violation of any criminal law of any unit of government.
- (7) **WEAPONS:** You must not use any objects as a weapon. You must not own, use, or have under your control or area of control a weapon of any type or any imitation of a weapon, any ammunition, or any firearm parts, or be in the company of anyone you know to possess these items.
- (8) **EMPLOYMENT:** You must make earnest efforts to find and maintain legitimate employment, unless engaged in an alternative program approved by the field agent. You must not voluntarily change employment or alternative program without the prior permission of the field agent.
- (9) **SPECIAL CONDITIONS:** You must comply with special conditions imposed by the parole board and with written or verbal orders made by the field agent.

WAIVER OF EXTRADITION: I hereby waive extradition to the state of Michigan from any jurisdiction in or outside the United States where I may be found and also agree that I will not contest any effort to return me to the state of Michigan.

AGREEMENT OF PAROLE: I have read or heard the parole conditions and special conditions and have received a copy. I understand that failure to comply with any of the conditions or special conditions may result in revocation of parole and return to confinement. I understand and agree to comply with the parole conditions and special conditions.

SIGNED: _____

(PAROLEE)

DATED: _____

7/28/03

SIGNED: _____

(WITNESS)

RELEASED BY: _____

DATED: _____

7/28/03