

**ORIGINAL**

STATE OF MICHIGAN  
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

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PATRICK J. KENNEY,

Plaintiff-Appellant,

Supreme Court No. 145116

v

WARDEN RAYMOND BOOKER,

Defendant-Appellee.

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Third Circuit Court No. 11-003828-AH  
Court of Appeals No. 304900

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**PLAINTIFF-APPELLANT'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

KEVIN ERNST (P44223)  
Counsel for Plaintiff-Appellant  
645 Griswold, Ste. 4100  
Detroit, MI 48226  
(313) 965-5555



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**STATEMENT OF JURISDICTION**

On January 25, 2012, this Court issued an order granting leave to appeal from a decision by the Court of Appeals. This Court has jurisdiction pursuant to MCR 7.301(2).

**STATEMENT OF QUESTIONS PRESENTED**

- I. Whether the relationship between common law and statutory habeas is complimentary.

**Plaintiff-Appellee answers "Yes"**

- II. Whether the standards for obtaining habeas relief are different under Michigan's Habeas Statute and common law.

**Plaintiff-Appellee answers "Yes"**

- III. Whether MCL 600.4310 limits the right to statutory habeas relief by making persons restrained as a result of judicial process ineligible, with certain exceptions for persons restrained by civil process, and 600.4310 does not apply to parole revocations.

**Plaintiff-Appellee answers "Yes"**

- IV. Whether the effect of the availability of other means of review on the availability of habeas review depends on the context of the underlying proceeding; however the potential for direct review of a parole revocation act does not preclude habeas review.

**Plaintiff-Appellee answers "Yes"**

- V. Whether habeas corpus principles have long recognized a distinction between executive detention and judicially-ordered detention and that distinction is relevant to the level of deference owed and the standards of review applied.

**Plaintiff-Appellee answers "Yes"**

- VI. To the extent the "radical defect" requirement remains valid in habeas corpus jurisprudence, whether it has evolved and is no longer limited to defects in personal and subject matter jurisdiction, if ever it was.

**Plaintiff-Appellee answers "Yes"**

- VII. Whether insufficient evidence at a parole violation proceeding provides the basis for habeas relief.

**Plaintiff-Appellee answers "Yes"**

VIII. Whether evidence that a parolee “should have known” of the presence of contraband is insufficient to establish constructive possession of the contraband.

**Plaintiff-Appellee answers “Yes”**

IX. Whether the standards of review applicable to parole revocations on petitions for habeas corpus.

**Plaintiff-Appellee answers “Yes”**

X. Whether successful habeas claimants are entitled to the relief of discharge from any form of restraint under which they are held, which includes discharge from parole.

**Plaintiff-Appellee answers “Yes”**

## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

### **Introduction**

On March 31, 2011, Plaintiff Patrick Kenney (hereafter "Plaintiff" or "Kenney") filed a complaint of habeas corpus claiming that at his parole revocation hearing, the hearing examiner found him guilty of possession of a weapon without any proof of knowledge because Kenney "should have known" there was a handgun hidden in the battery compartment of the car he was driving. Kenney also claimed that there was legally insufficient evidence to convict him, and that the hearing examiner implicitly found that he did not have actual or constructive possession. Kenney further maintained that he was entitled to a discharge from parole because the parole he was serving at the time of the alleged violation terminated in August of 2008, and his parole had otherwise terminated.

The trial court ruled that Kenney was entitled to habeas relief because he was convicted of parole violation based on an unconstitutional "should have known" standard. It ruled further that there was insufficient evidence as a matter of law to convict Kenney on the gun charge based on constructive possession, which the parole board was required to prove by a preponderance of the evidence. (Actual possession was never alleged.) It then ruled that the proper remedy was to discharge Kenney from parole.

In a two to one decision, with Judge Michael Talbot dissenting, the Court of Appeals reversed the trial court's order granting habeas relief. **(11a, Opinion and Order.)** The majority opinion acknowledged that Kenney was entitled to an acquittal

unless the parole board established a parole violation by a preponderance of the evidence, but held that Kenney was not entitled to habeas relief because there was "some evidence" to support the hearing examiner's decision that Kenney had knowledge of the presence of the gun because knowledge could be inferred from Kenney's association with the drug dealer who had placed the gun, which Kenney was charged with possessing, in the battery compartment of the car Kenney was driving.

As demonstrated below, Kenney was entitled to habeas relief because the hearing examiner found Kenney guilty based on a "should have known" standard, instead of requiring the parole board to prove actual or constructive knowledge by a preponderance of the evidence. Further, the proper test for state habeas review of sufficiency of evidence, when there is a state-created liberty interest in remaining on parole unless the parole board proves a parole violation by a preponderance of the evidence, is not whether there was "some evidence" to support the hearing examiner's decision, but whether there was sufficient evidence from which any reasonable fact finder could conclude that a parole violation had been proved by a preponderance of the evidence. Finally, there was insufficient evidence as a matter of law because the only "evidence" of Kenney's knowledge of the gun was that he associated with a man who put it there, and inferring guilt by association is a violation of due process, no matter what standard is applied.

### **Background Facts**

Kenney was originally incarcerated on two charges of simple possession of a controlled substance under 25 grams. He was paroled on October 4, 2005, and was scheduled to be discharged on August 3, 2008. On April 23, 2008, his parole was

revoked for charges of possession of a weapon as a result of a gun found in a motor vehicle in Southfield, Michigan, and he received a 60 month sentence of incarceration. The trial court initially granted Mr. Kenney a writ of habeas corpus on October 8, 2010<sup>1</sup>, Case No.: 10-009079-AH, because the Southfield Police failed to turn over crucial exculpatory evidence that tended to establish that another individual, John Cook, was responsible for the weapon found in the battery compartment of the car which Mr. Kenney was driving, (Specifically, the withheld evidence demonstrated that Cook, who was a passenger in the car Kenney was driving when Kenney was stopped by the Southfield police on November 23, 2007, was stopped by Southfield police in the same car without Mr Kenney on November 6, 2007 and during that stop, a handgun was found in virtually the same spot in the car, in the battery compartment ; the gun was previously stolen by an individual matching Cook's description from an area Cook was known to frequent; and Cook was seen brandishing a gun matching the description of the stolen gun several days before the November 6 arrest. **(18a-30a, police report.)** No criminal charges were bought against Kenney based on the November 23, 2007 arrest. **(18a-49a, police reports.)**

Kenney has a total of six felonies on his record. However, he was never convicted of a gun or assaultive crime. Besides his drug possession convictions on which he was paroled, Kenney has two convictions for uttering and publishing and two convictions for obtaining money by false pretenses over \$100.00. These property crimes occurred during a one week period between February 15 and February 22,

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<sup>1</sup> The initial writ is not the subject of the application for leave to appeal.

1995.

### **Summary Of Proceedings**

On August 8, 2010, the trial court granted Plaintiff's previous complaint for writ of habeas corpus and remanded the matter to the parole board for a new parole revocation hearing to allow Kenney to present the exculpatory evidence that had been previously withheld. The new revocation hearing occurred over two days, November 18, 2010 and January 11, 2011. At the conclusion of the January 11 hearing, the hearing examiner stated that she was finding Kenney guilty of violating his parole because he "should have known" of the presence of the weapon found in the motor vehicle that he was driving. **(85a, Tr. pp. 114-115.)** On February 22, 2011, Plaintiff received official notice of this conviction. **(50a-54a, NOA.)** This time, he received a twenty four month sentence, and was immediately eligible for parole. On March 11, 2011, Plaintiff was informed that his parole was conditionally granted. **(881-90a NOD.)**

On March 30, 2011, Plaintiff filed a complaint of habeas corpus, alleging a due process violation at his parole revocation hearing because he had been convicted of parole violation although the evidence was insufficient to establish that he had actual or constructive possession of the weapon for which he was convicted, but was instead convicted based on an unconstitutional "should have known" standard **(91a-93a)**. On May 12, 2011, Plaintiff filed a brief for summary judgment, based on the complaint, with documentary and testimonial exhibits, pursuant to MCR 3.303(Q). **(1a, register.)** On June 1, 2011, while the habeas complaint was pending, Kenney was paroled to a halfway house **(88a)**. On June 3, 2011, Defendant filed a response pursuant to MCR

3.303(K)(N) and (Q). On June 17, 2011, a summary hearing was held per MCR

3.303(Q). **(1a, register)** Kenney was released from the halfway house to attend the hearing, and was present. Following the hearing, the trial court entered an order granting the relief requested and discharging Kenney from the order of parole, the only restraint under which he was held at that time **(7a)**.

### **Substantive Facts**

Kenney was originally charged with five counts of parole violation. Counts one and five were not subject to his complaint for habeas corpus<sup>2</sup>. Counts two through four provided as follows:

2. On or about 11/26/2007U were involved in behavior which constitutes a violation of state law when you had in your possession or under your control weapon, a 45 caliber handgun;
3. On or about 11/26/2007, you did have in your possession of 45 caliber handgun; and
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 four in the magazine. **(50a.)**

The trial court succinctly summarized the facts at the parole violation hearing:

Hearings were held on November 18, 2010 and January 11, 2011. The Department of Corrections misplaced the recording of the proceedings on November 18, 2010. Consequently, no transcript was able to be prepared for the hearing on that date. The facts that relate to testimony that was given on that date is based upon Plaintiff's counsel's affidavit, the original revocation hearing, and police reports. The statement of facts set forth in Plaintiff's briefs is not controverted by the Defendant as to what occurred on November 18, 2010. The only dispute relates to an unsupported

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<sup>2</sup> Kenney pleaded guilty to count 1 on January 30, 2008, at the arraignment. **(Exhibit 4.)** It involved a single failure to report on one scheduled date, November 7, 2007. When Kenney was arrested for the gun charge on November 26, 2007, no absconding warrant had issued. Count 5, which was dismissed, involved an alleged conversion of which Kenney was acquitted following a bench trial. Neither Count 1 nor Count 5 were part of the original remand order for rehearing. Defendant's claim that on January 11, 2011, the ALE "again found Plaintiff guilty by plea of failing to report" is patently false. The conviction for failure to report was over three years old.

statement made in Defendant's brief that Plaintiff pleaded the Fifth Amendment when asked who might have put the firearm in the car. A review of Plaintiff's testimony on January 11, 2011, establishes that this never occurred.

Southfield police officers, Freeman and Bryant, testified that Plaintiff was stopped for speeding by Southfield Police at approximately 2:00 a.m. on November 26, 2007, while driving a white Mercedes owned by his mother. Plaintiff was driving. The front seat passenger was John Cook. The back seat passenger was Keanna Rivers. The police officers obtained Plaintiff's license and ran a lien check, which revealed an outstanding warrant for larceny from Novi. The police then arrested Plaintiff.

One police officer drove Cook and Rivers home. After they left, an engine compartment search occurred and police found a handgun in the battery compartment. Plaintiff denied the weapon was his or that he had any knowledge of it. Plaintiff subsequently asked Detective Rata to check the gun for fingerprints to prove the gun was not his. A fingerprint analysis was performed and a visible print was found. It did not belong to Plaintiff or Cook.

Detective Smartsy testified that on November 9, 2007 Cook was stopped in the same white Mercedes and another handgun was found in the battery compartment. Cook was arrested because he had no valid driver's license. During a search of the vehicle, the police found a semiautomatic .40 caliber handgun hidden in the battery compartment of the car.

Dominique Johns was also in the car when Cook was stopped on November 9. Approximately one month before the stop on November 9, Johns saw Cook waving around a black semiautomatic pistol.

John Cook testified that he met Plaintiff in approximately October, 2007. Cook regularly supplied Plaintiff with drugs. In exchange, Plaintiff let Cook use the Mercedes. As a result of the arrangement, Cook essentially had continuous possession of the car from the first day that he met Plaintiff.

On November 26, 2007, at approximately 2:00 a.m., Cook was driving the white Mercedes and picked up Plaintiff at Cook's drug house in Detroit. Prior to this, Cook had been driving around engaged in his drug trade. A friend of Cook's placed the gun under the hood of the white Mercedes. When Cook picked up Plaintiff, he asked Plaintiff to drive because he did not have a driver's license. Cook testified that Plaintiff did not know about the gun in the car. Plaintiff was not present when the gun was placed in

the car. Cook did not tell Plaintiff that the gun was in the car or imply that the gun was in the car.

Cook admitted that his father attempted to retrieve the white Mercedes from the police the day after the November 26 stop.

Cook acknowledged that on November 9, 2007, he was pulled over by the police driving the same white Mercedes and a handgun was found under the hood of the car in the battery compartment. Cook did not inform Plaintiff about the gun.

Plaintiff testified that when the gun was found in the car on November 26, he told the police officer that it was not his gun. Plaintiff also testified that he told the officer that it probably belonged to Cook. Later, Plaintiff testified he told the detective he wanted the gun fingerprinted to prove that it did not belong to him.

Plaintiff also testified that Cook never told Plaintiff the gun was under the hood or there was a gun in the car. Plaintiff further testified that he had never seen Cook in possession of a gun, had never seen a gun in the car, and was not aware that a gun had been found in the battery compartment when Cook was stopped on November 9. Likewise, Plaintiff indicated that Cook never told him about the gun found in the car on November 9. **(109a-113a, Hearing Transcript, pp. 16-20.)**

After citing at length from the hearing examiner's decision, **(106a-109a, Tr. pp. 13-16)**, the trial court stated: "It is clear from the opinion of the hearing officer that the hearing officer did not find that the Plaintiff had actual or constructive possession of the gun. Rather, she concluded that Plaintiff should have known that the handgun was in Plaintiff's mother's car because he was associating with John Cook, a known drug dealer." **(109a, Tr. p 16).**

With regard to the "should have known" basis for the hearing examiner's decision, the record demonstrates as follows: At the close of proofs, the government argued "when you choose to associate with a drug dealer and those of their like, **you take on the burden of responsibility of knowing that they oftentimes have a gun in**

**their possession". (82a, Tr. p 105.)** The government continued,

"so if you knowingly associate with the person that's involved in a crime he must take what comes with it which is why the association condition is placed upon parolees". . . . **(83a, Tr. p. 106.)**

And another -- again, **a condition of parole and the comment is knew or should have known**, when you hang out with a drug dealer and your driving in the car and there was a smell of marijuana noted in the car... you know or should have known that there were drugs in the car one and **you knew or should have known that there was possibly a weapon in the car based on the November 9 stop the vehicle". (83a Tr p 107 )**

The government concluded as follows: "So point the finger at Mr. Cook, but you can't put aside the fact that Mr. Kenny is on parole, **and when it's in your area of control, its your responsibility to know or you should have known** who was in your car **and what was brought into the car** with it, so that's why we find [sic.] for the finding of guilt." **(83a, Tr, . p. 109.)**

Kenny responded by pointing out that he could not be convicted, consistent with due process, based on a "should have known" standard:

First of all, Your Honor, you cannot convict a person and deprive him of liberty based on what he should have known. There is no standard in the law that recognizes that. The standard is did he know. Not that he should have assumed or that he could have known or that he should have known. The question is did he know. That's the standard that the law recognizes and the only one. There is no constructive possession definition anywhere that says "should have known." **(83a, Tr. p. 108-109.)**

Kenny concluded by pointing out that to be convicted, even for constructive possession, the government had to prove knowledge, "Because you can't control something that you don't know is there, and there's no evidence that shows he knows it's in there" **(84a, Tr. p. 110.)**

In its rebuttal argument, the government maintained that the knowledge requirement recognized at law was not something it had to prove at a parole revocation hearing:

Mr. Kenney is driving the car, so there might not be something in law, **but in parole, knew or should have known is past practice and very common. It's in the prison system, you knew or should have known what was in your area of control. That's why it's stated so specifically in the parole orders it's parolee's responsibility to know.** So again, we asked for the finding, thank you. (84a, p.111.)

The hearing examiner agreed with the government position that it could revoke Kenney's parole based on a should have known standard. After first indicating that she found credible the testimony of the police officers, the parole officer and Mr. Cook, the hearing examiner stated:

It's not a stretch to believe that Cook was dealing in guns, he was admittedly a drug dealer and obviously a high drug dealer because he had several houses. He admitted that today. So it's not too much of a stretch to say that guns and drugs go together. . . . **Area of control does deal with whether or not you knew or should have known. There is a standard for the Department of Corrections and that they are allowed to have and whether he knew or should have known. Here sir, should have known comes about when you were living with a known drug dealer, and the drug dealer, like I said it's not too much of a stretch to say that drug dealers deal with guns.** He had been in your car that you claim was yours. . . . the gun was found in the same vehicle... **there's no indication that you -- when you got behind the wheel of the car in November 26 that you even talked to him or asked him were there any weapons in the car. And you sir, you were on parole, you have for all intents and purposes, you have a higher degree than any normal citizen, and you have to -- have to know. And that's where the should have known comes in at. If you didn't ask, if you didn't check, and your being on parole you owned it sir** So I'm going to find you guilty of possessing the gun by it being in your area of control. (85a, Tr. p. 114-115.)

Notably, the hearing examiner also stated in her written summary provided to the

parole board that she did not believe Cook had a *modus operandi* of hiding guns in battery compartment because the gun found in the battery compartment of the car Kenney was driving on November 26 was "not the same gun" as the one found by the Southfield police on November 9 (52a, NOA). The gun found in the battery compartment on November 9, 2007, was reported on LIEN as stolen and the Southfield Police seized it. (19a-21a, report.) She also maintained that Kenney had asserted his Fifth Amendment privilege when asked if he knew who put the gun in the battery compartment. (52a, NOA.) That never happened. She also stated that because a parole revocation was a civil proceeding, "The burden therefore can shift to parolee to offer some rebuttal as to how a handgun was located within his area of control and this did not occur". (52a, NOA.)

The circuit court concluded that the hearing officer found Plaintiff guilty based on an unconstitutional "should have known" standard regarding knowledge, and ruled that the evidence was insufficient as a matter of law to establish constructive possession. (117a, Tr. p. 24.) It then ordered Kenney discharged from parole.

### ARGUMENT

#### I. THE RELATIONSHIP BETWEEN COMMON LAW AND STATUTORY HABEAS IS COMPLIMENTARY.

##### **A. Under Michigan Common Law, Habeas Corpus Provides Relief, In Limited Situations, Where Relief Is Unavailable Under Michigan's Habeas Statute.**

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.

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.

These constitutional provisions indicate that the circuit courts derive habeas jurisdiction directly from the Michigan Constitution.

In *People v Den Uyl*, 320 Mich 477, 486 (1948) this Court indicated that the principles of common law in effect at the passage 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.

See, also, in *In re Jackson*, 15 Mich. 417, 438-439 (1867) (Cooley concurring).

When the constitution gave this court jurisdiction of the writ, I think it conferred the same full powers upon the court, as representing the sovereignty of the people, which the court of king's bench possessed as representing the crown of England. Our jurisdiction does not depend upon the statute . . . .

These authorities compel the conclusion that the statutory Habeas Corpus Act does not foreclose resort to relief otherwise available under common law habeas corpus. 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.

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

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.

MCL 600.4307 governs the scope of habeas relief. It provides:

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

Section 4352(1) governs the type of relief available. It 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.

As demonstrated, there are two sources of habeas jurisdiction under Michigan law, that conferred by statute, and that existing at common law as guaranteed directly by the Michigan Constitution. Moreover, nothing in the statute indicates that it is meant to be the exclusive avenue for obtaining habeas relief. And even if it did, it could not, consistent with the Michigan Constitution, be given that effect to the extent it would be more restrictive than the habeas relief that is constitutionally guaranteed. Thus, it follows that the relationship between the common law and statutory right to habeas

corpus is complimentary. A person can seek habeas relief under the statute if he is not disqualified under section 4310, in which case he can seek common law habeas relief pursuant to his constitutional right to do so under Article 1, Section 12.

## II. THE STANDARDS FOR OBTAINING HABEAS RELIEF ARE DIFFERENT UNDER MICHIGAN'S HABEAS STATUTE AND COMMON LAW.

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

### A. The Standard For Obtaining Relief Under Michigan's Habeas Statute.

Michigan's Habeas Corpus Act, 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.*

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), *supra*. It provides for relief when

“no legal cause is shown for the restraint, or for the continuation thereof”. The phrase “legal cause” is not defined in the Act. However, it should be liberally construed to effect the intents and purposes of the Act which is to compel the courts of this state to liberate persons who are unlawfully restrained. Statutory habeas relief is virtually unavailable to persons who are restrained following judicial process in criminal cases due to the exceptions listed in MCL 600.4310. Further, it is conceded that even a liberal construction of “no legal cause” would not seem to encompass technical irregularities in the process leading to the restraint if his restraint was otherwise lawful. But the definition of “no legal cause” would seem to encompass situations where fundamental constitutional violations occurred in the process leading to the restraint, and would seem to encompass situations, such as the one presented in the case *sub judice*, where a person is restrained based on legally insufficient evidence to support the reason for the restraint, or where the restraint is based on a definition of an essential element of the charged offense not recognized by law. See, e.g., *In re Haines*, 315 Mich 657 (1946) (habeas petitioner discharged when there was legally insufficient evidence to support insanity commitment); and *In re Bourne*, 300 Mich 398 (1942) (crime of incest could not be defined to include relatives by affinity when statute did not so provide). Since the standard for granting habeas relief must be liberally construed, a restrictive definition of “no legal cause” should be avoided.

#### **B. The Common Law Standard For Granting Habeas Relief.**

The standards for granting habeas relief under Michigan common law have varied with the context and have evolved considerably. The standards have been

applied in the most restrictive terms in the context of habeas relief from criminal conviction and sentence, and in less restrictive terms outside this context. However, one standard that has been consistently applied: The court issuing the writ should have supervisory authority over the tribunal ordering the detention. See, e.g., *In re Hamilton's Case*, 51 Mich. 174, 176 (1883): "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 employed as a writ of error by tribunals not possessing the appellate authority" and *In Re Joseph*, 206 Mich 659, 662 (1919) (same). This limitation serves to prevent courts of equal jurisdiction from reviewing another's final judgments and orders.

Another standard that can be gleaned from the case law is that habeas review is generally not available to correct irregularities or generic errors in the judicial processes that result in the person's restraint. However, the strictness with which this principle is followed would seem to depend on the context. It is most restrictive in criminal cases that challenge the merit of the underlying conviction or sentence. In this context, many courts have noted that habeas review cannot substitute for an appeal "for the purposes of reviewing error and irregularities in the proceedings leading to the final judgment or sentence of a court of competent jurisdiction". To obtain common law habeas relief from a final judgment of conviction or sentence of a court, the habeas petitioner must show considerably more, which generally includes a "radical defect" which renders the proceeding "void" *In Re Joseph*, 206 Mich 659 (1919). This principle was sometimes interpreted to mean that a criminal defendant convicted of a crime could only seek habeas relief from his conviction based on lack of jurisdiction in the strict sense. See

*Recorders Court Judge v. Wayne County Circuit Court Judge*, 347 Mich 567 (1957).

(Habeas relief "not available to one convicted of a crime and committed by a court which has acquired jurisdiction and has not abused its power, citing *In re Joseph*); *People v. Harris*, 266 Mich 317, 321 (1934 ) (same); and *In re Van Dyke*, 276 Mich 32, 34 (1936 ) (same).

Outside the context of criminal convictions and sentences, the standards for granting habeas relief have been applied in a much less restrictive manner. In *In re Haines, supra*, a case involving an involuntary commitment of an allegedly insane person, this Court conducted a full review of the evidence which supported the commitment and stated:

"We are unable to reach any other conclusion than that the testimony taken did not in any reasonable sense tend to prove insanity and in the absence of any proof of insanity the commitment of petitioner was and is illegal." *Haines*, 315 Mich at 661.

This Court also noted that it was granting the writ even though "at the hearing the probate judge had before him the certificates of two duly appointed physicians, each of whom certified that Harold H. Haines was an insane person." *Id.*

Moreover, this Court has repeatedly recognized the right to habeas relief from civil commitments when the proceedings did not strictly comply with statutory requirements. See *In Re Joseph Nowack*, 274 Mich 544, 548 (1936), in which this Court held that the failure to strictly comply with statutory requirements for insanity commitment proceedings supply grounds for habeas relief. The 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) and *Freedman v. Freedman*, 303 Mich 647 (1942). See also *In re Mills*, 131 Mich 325 (1902) involving a juvenile adjudication, where this Court granted habeas relief for a technical failure to comply with statutory juvenile adjudication proceedings.

Originally, the “radical defect” requirement was only applied in the context of a collateral attack on an underlying criminal conviction or sentence following a judicial proceeding, and only when the habeas action sought to challenge the merits of the conviction or sentence. However, this requirement has subsequently been applied to other contexts, and was even grafted onto the statutory standards governing the grant of habeas corpus. 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*. *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. *Stone* involved a common law habeas action challenging a criminal conviction that alleged mistaken evidentiary rulings.

When the statute and case law is read in proper context, the following standards

emerge governing the grant of habeas corpus:

(1) The court in which the habeas petitioner proceeds must possess the requisite appellate authority;

(2) It is necessary to determine statute eligibility under MCL 600.4310.

(3) If a person is eligible under the Habeas Act, the standard set forth in MCL 600.4352(1), whether "no legal cause is shown for the restraint or continuation thereof", governs the court's decision of whether to grant habeas relief

(4) If a person is disqualified MCL 600.4310, he must establish:

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

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

This Court should overrule prior decisions holding that a person seeking habeas relief under the Habeas Act must demonstrate a "radical defect".

### III. MCL 600.4310 LIMITS THE RIGHT TO STATUTORY HABEAS RELIEF BY MAKING PERSONS RESTRAINED AS A RESULT OF JUDICIAL PROCESS INELIGIBLE, WITH CERTAIN EXCEPTIONS FOR PERSONS RESTRAINED BY CIVIL PROCESS, AND 600.4310 DOES NOT APPLY TO PAROLE REVOCATIONS

MCL 600.4310 disqualifies certain persons and provides:

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.<sup>3</sup>

These disqualification provisions should be narrowly construed. *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)). *DeVine, supra*.

Subsection 1 is clear. Michigan courts cannot issue a habeas writ to discharge a person in federal custody. Subsection 2 is also clear. It applies to pretrial detainees who have been charged with a felony or treason. (It could not apply to persons detained post-trial without rendering subsection 3 surplusage.) Subsection 4 is also clear; it applies generally to civil detentions, most usually contempt proceedings. With regard to subsection 3, "legal process is not defined in the Act. Blacks Law Dictionary, 5<sup>th</sup> Edition, p. 1085 defines legal process in relevant part as:

[L]egal process means process not merely fair on its face, but in fact valid. But properly, it means a summons, writ, warrant, mandate, or other process issuing from a **court**. (Emphasis supplied.)

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<sup>3</sup> 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, through 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
- (6) Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law.

Michigan courts have consistently held with regard to this provision,

This statutory prohibition is generally consonant with the often repeated judicial declarations that habeas corpus cannot serve as a substitute for an appeal and cannot be used to review the merits of a criminal conviction.

*Cross, supra* 103 Mich App 409, 414-415 (1981), (citing *People v Price*, 23 Mich App 663, 669 (1970).

Several federal court decisions have specifically ruled that parole violations are not excepted from habeas review under MCL 600.4310. See *Caley v. Hudson*, 759 F. Supp. 378, 381 (E.D. Mich. 1991) finding state habeas review of parole revocation was not barred by MCL 600.4310, and federal habeas petitioner failed to exhaust state remedies by not pursuing state habeas relief of his parole revocation; and *Blosser v. Scutt*, 2008 U.S. Dist. LEXIS 100475 ( E.D. Mich. Dec. 10, 2008).

In *Billingsley v Birzgalis*, 20 Mich App 279, 281 (1969), the court stated that a person is not precluded from habeas relief under subsection 4310 when he has been convicted following judicial 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."

In this case, Plaintiff is not excluded from habeas relief by 600.4310. He is not detained pursuant to legal process. He is being detained pursuant to a parole revocation, an order of the executive. Moreover, he is not challenging his conviction or

sentence. He is challenging the legality of his detention notwithstanding either.

IV. THE EFFECT OF THE AVAILABILITY OF OTHER MEANS OF REVIEW ON THE AVAILABILITY OF HABEAS REVIEW DEPENDS ON THE CONTEXT OF THE UNDERLYING PROCEEDING; HOWEVER THE POTENTIAL FOR DIRECT REVIEW OF A PAROLE REVOCATION ACT DOES NOT PRECLUDE HABEAS REVIEW.

#### **A. Statutory Habeas Relief**

As set forth in MCL 600.4307, the only limitations on relief available under the remedial Habeas Act are those enumerated in MCL 600.4310. No provision in subsection 4310 or elsewhere in the Act indicates that habeas relief is foreclosed by the availability of other means of review, direct or otherwise. To preclude the review available under the Act based on the availability of other means of review, something the Act itself does not require, would thwart the remedial purposes of the legislation.

It should also be noted that the Legislature installed numerous enforcement mechanisms and modes for compelling compliance that are not contained in other laws providing a means of review. For example, 600.4325 commands the custodian of the prisoner to bring him promptly to the court issuing the writ. 600.4331 coerces compliance with this requirement by subjecting the custodian to arrest if he fails to do so. Once the writ is issued, custody of the prisoner is relinquished to the court issuing it. MCL 600.4349. And if court determines that no legal cause is shown for the restraint of the prisoner, MCL 600.4352 commands the court to discharge the person from the restraint. These provisions provide a streamlined and efficient method for obtaining discharge from restraint that are unavailable under the APA, the only other conceivable alternate form of review. These provisions, along with the lack of any statutory requirement of exhaustion of other means or review, evidence a legislative

policy judgment that a person should be entitled to habeas review to obtain discharge from unlawful restraint irrespective of the availability of other means of review.

It is also notable that the Michigan Court Rules provide for expedited disposition of habeas proceedings. MCR 3.303(Q)(1) provides that "The court shall proceed promptly to hear the matter in a summary manner and enter judgment." (Q)(2) instructs that "adjournment may be granted only for a brief delay" to allow the defendant to prepare a written answer or present evidence. It would seem inconsistent with these pronouncements, pronouncements clearly designed to allow a person restrained of his liberty to obtain a prompt judicial determination of the legality of his restraint, to require a person deprived of his liberty to proceed first with the often lumbering and arduous appellate process prior to seeking habeas relief.

### **B. Common Law Habeas Relief**

Whether the availability of other forms of review foreclose the availability of habeas relief at common law depends in part on the context of the underlying proceeding. In the context of review of criminal convictions or sentences, the availability of direct review generally forecloses habeas review, absent some type of structural error, see *In re Palm*, 255 Mich 632, 634 (1931). This question has been treated differently in the context of commitments or detentions resulting from probate proceedings. Although these proceedings would generally constitute a form of "civil process" and therefore be excluded from review by MCL 600.4310 except as provided in 600.4358, this Court has often granted habeas relief to persons restrained following probate proceedings without resort to 600.4358, and thus presumably in reliance on

common law. Further, Plaintiff's research did not uncover a single case in which this Court refused habeas relief involving a probate proceeding because of the availability of direct review.

In fact, in *Shantz v Ruehs*, 348 Mich 680 (1957), (a case involving an involuntary commitment of a mental patient) this Court stated that the patient was not entitled to equitable relief because the patient's "search for his freedom" could include "**one or more** of the following" legal remedies: A writ of habeas, a delayed appeal, or a petition for finding of restoration of mental competency. *Id* at 683; emphasis supplied. Thus, in the context of detention resulting from probate proceedings, it would appear that the availability of other forms of review has never foreclosed habeas review.

### **C. The Availability Of Habeas Review Of Parole Revocations**

The availability of direct review of a parole revocation via the Administrative Procedures Act does not foreclose habeas review. As demonstrated in section *supra*, restraint following a parole revocation does not result from civil or criminal process and review of a parole revocation does not seek review of the merits of a conviction or sentence. Thus, it is not excepted from review under MCL 600.4310. Since a person should not be precluded from seeking habeas review under the Act despite the availability of other means or review, he would be entitled to statutory habeas review of a parole revocation. Moreover, review of parole revocations should not be foreclosed even under common law habeas principles, given that the Court has generally not precluded review, based on the availability of other means of relief, outside the context of criminal convictions and sentences. This is especially true since

parole revocation is a form of executive detention. See Section V, *infra*, and see *Boumediene v. Bush*, 553 U.S. 723, 782-783 (U.S. 2008), declining to require exhaustion of direct review remedies before engaging in habeas review of executive detentions.

See also *Triplett v Deputy Warden*, 142 Mich App 774, 779 (1985), stating 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.

V. HABEAS CORPUS PRINCIPLES HAVE LONG RECOGNIZED A DISTINCTION BETWEEN EXECUTIVE DETENTION AND JUDICIALLY-ORDERED DETENTION AND THAT DISTINCTION IS RELEVANT TO THE LEVEL OF DEFERENCE OWED AND THE STANDARDS OF REVIEW APPLIED.

The need for meaningful habeas review is greatest in the realm of executive detention. In *Boumediene, supra*, 553 U.S. at 782-783, the United States Supreme Court stated:

[W]here relief is sought from a sentence that resulted from the judgment of a court of record . . . , considerable deference is owed to the court that ordered confinement.

However, with regard to executive detentions,

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics

are not inherent in executive detention orders **or executive review procedures**. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain. *Id.*; emphasis supplied.

In a similar vein, the United States Court of Appeals for the Sixth Circuit ruled that habeas standards of review applicable to post-conviction cases were inapplicable to habeas claims brought by persons subject to executive detention. In *Pak v. Reno*, 196 F.3d 666, 674 (6th Cir. 1999), the habeas petitioner sought to challenge the government's decision finding him ineligible to be considered for discretionary relief under the applicable statute. The court found that it could review the statutory claim via habeas corpus and stated:

The government also suggests that should we choose to permit aliens to bring claims of statutory construction via a habeas petition, we should allow only those claims of statutory violations that result in a fundamental miscarriage of justice. See *Yang v. INS*, 109 F.3d 1185, 1196 (7th Cir.), cert. denied, 118 S. Ct. 624 (1997). We decline the government's invitation to import standards for habeas review in post-conviction cases into the analysis required for immigration cases because in contrast to executive detention cases, petitioners in post-conviction cases have already had substantial judicial review of their claims.

This Court should likewise refuse to extend the deferential standards and limitations applicable to habeas review of criminal convictions following judicial process into the realm of executive detentions that result from executive orders or executive review procedures. This principle would seem particularly applicable in the context of parole revocations. In those proceedings, there is no "tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence". In

parole revocation proceedings, there is a hearing officer (occasionally, even often, an inexperienced attorney, as was the case here) who serves at the discretion of the executive. There is a prosecutor, also employed by the executive, who is not an attorney and thus not subject to the constraints of MRPC 3.8. Further, these executive officers are not segregated in any way, and often share office resources. In short, the procedural safeguards to guarantee that constitutional rights are observed, and that due process is adhered to, should not be entitled to the presumptions in parole revocation procedures as they are in judicial procedures, and the deference owed and standards of habeas review should not be the same.

VI. TO THE EXTENT THE "RADICAL DEFECT" REQUIREMENT REMAINS VALID IN HABEAS CORPUS JURISPRUDENCE, IT HAS EVOLVED AND IS NO LONGER LIMITED TO DEFECTS IN PERSONAL AND SUBJECT MATTER JURISDICTION, IF EVER IT WAS.

Michigan courts have held in many different contexts that it was necessary to demonstrate a "radical defect" or some permutation of this requirement, to obtain habeas relief. This requirement is generally traceable, directly or indirectly, to *In Re Joseph*, 206 Mich 659 (1919) and its progeny. However, according to *Joseph*, this requirement is context specific and applies only to habeas actions that seek to challenge the merits of final judgments and convictions following judicial process:

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. (*Id* at 662; emphasis supplied.)

In *In Re Stone, supra*, 295 Mich at, 212, the Court stated the test as: "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." As in *Joseph*, this requirement was context specific to a habeas action seeking relief from a criminal conviction. However, many Michigan courts applied the test outside this context, and even to statutory habeas actions that did not challenge a criminal conviction or involve judicial process.

Habeas relief, even in the context of challenging detentions based on judicial process, has evolved considerably. In *Preiser v. Rodriguez*, 411 U.S. 475, 485-486 (U.S. 1973) the United States Supreme 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 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.

However, even this "jurisdiction" requirement was not strictly applied. As the United States Supreme Court explained in *Fay v Noia*, 372 U.S. 391, 404 (1963).

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.”

In fact, “Vindication of due process is its historic office”. *Id.* at 402.

Similarly, in *Fritts v Krugh*, 354 Mich 97, 114-115 (1958) the Court stated: “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.” The Court also specifically rejected the contention that habeas review was limited to matters of subject matter and personal jurisdiction and recognized it was available to review obvious violations of constitutional rights:

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 on 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.

More recently, the Michigan Courts of Appeals defined the “radical defect” requirement in the oft-cited *People v Price*, 23 Mich App 663, 671 (1970). The court somewhat conflated principles by stating that a habeas petitioner needed to demonstrate “a radical defect in jurisdiction” but defined it as “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 then considered whether a constitutional violation (deprivation of the right to counsel at a juvenile waiver proceeding) could establish a

radical defect in jurisdiction, but concluded that it could not, because the right was not recognized at the time of the alleged error.) Notably, the *Price* Court cited no authority to support its definition, but reasoned that unsettled areas of law should not be resolved by trial courts on habeas review. And the test set forth in *Price* would not seem to be much different than the "obvious constitutional violation" requirement articulated in *Fritts*

The "radical defect" requirement should be limited to its historical context of applying when a person seeks habeas review of a conviction or sentence. And it is respectfully submitted that it should be defined as follows:

A radical defect 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 patently *ultra vires*.

## VII. INSUFFICIENT EVIDENCE AT A PAROLE VIOLATION PROCEEDING PROVIDES THE BASIS FOR HABEAS RELIEF

### A. A Parole Revocation Following An Administrative Proceeding In Which The Executive Acts As Both The Prosecutor And The Arbiter, Is An Executive Detention

On appeal, sufficiency of evidence claims are reviewed *de novo*. *People v Wolfe*, 440 Mich 508, 513-516 (1992). A parolee has a conditional liberty interest in remaining on parole that is protected by the Due Process Clause. See *Morrissey v Brewer*, 408 U.S. 471, 484 (1972). Under Michigan law, a parole revocation hearing is conducted solely by the executive branch of government, with the executive branch acting as prosecutor, fact finder, and the one imposing sentence. A parole revocation results in a detention at the discretion of the executive. Thus a person whose parole is

revoked is detained by the executive, and is entitled to judicial review of the detention to ensure, at a minimum, that his constitutionally guaranteed rights to due process were faithfully observed. Historically, the office of the writ of habeas corpus was to review executive detentions. As the United States Supreme Court stated in *Hamdi 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 through judicial review. 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 required by the state for a given proceeding. And the final determination of the question of legal sufficiency of evidence has always been a core function of the judiciary in our constitutional system of co-equal branches of government. See *In Re White*, 340 Mich 140, 148 (1954), in which 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 reviewing the legality of executive detentions is a core purposes of the writ of habeas corpus, it would hardly seem novel to contend that judicial review of the sufficiency of evidence in a parole revocation proceeding which results in executive detention should be available via habeas corpus. Judicial detentions, especially those that have ripened into convictions, are, perhaps, the furthest away from the core protections of habeas corpus. Yet even in those proceedings, habeas review of sufficiency of the evidence is available. See *Pilon v. Bodenkircher*, 444 US 1 (1979). It would seem the habeas review would have broader application when applied to situations closer to its core protections.

In *Billingsley*, supra, 20 Mich App at 281-82, the Michigan Court of Appeals held that habeas relief available in Michigan courts was coextensive with that available in federal courts. Accord, *Cross*, supra 103 Mich App at 415. And several Michigan courts have recognized that habeas review is available for 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 at a parole revocation hearing 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), 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).

Accord, *Wright v Vasbinder*, 2007 U.S. District Lexis 2118 (ED Mich, Jan. 11, 2007).

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 concerning freedom from restraint creates a constitutionally protected interest. *Id.*

Michigan law creates a constitutionally protected liberty interest in remaining on parole unless parole violation is proven by a preponderance of the evidence. MCL 791.240a provides in relevant 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 creates a liberty interest protected by the Due Process Clause. These provisions also set forth the procedure by which the liberty interest can be taken away: sufficient evidence to prove parole violation by a preponderance. It follows that 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 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 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 denied relief because it held that there was no substantive liberty interest at stake because there was no right under the federal constitution to be paroled. *Id.* at 862. The court concluded that the only liberty interests 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 *Morrissey, 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.

The due process procedural requirements for parole revocation are much greater than for good time credits revocation. In the latter context, there is no right to disclosure of the evidence, there is no right of confrontation or otherwise to contest the evidence, there is only a conditional right to present evidence, and 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 quantum of evidence would be required in proceedings like parole revocation.

Finally, Michigan has a proof-by-a-preponderance-of-evidence quantum of proof requirement in the underlying proceeding that 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 *Pilon* Court 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.

VIII. EVIDENCE THAT A PAROLEE "SHOULD HAVE KNOWN" OF THE PRESENCE OF CONTRABAND IS INSUFFICIENT TO ESTABLISH CONSTRUCTIVE POSSESSION OF THE CONTRABAND

On appeal, issues of law are reviewed *de novo*. *People v. Carpentir*, 446 Mich, 19, 60 (1994). Plaintiff was charged with parole violation for constructive possession of a weapon in violation of the conditions of parole and Michigan law. The hearing examiner found Plaintiff guilty of parole violation because he "should have known" of the presence of a gun in the battery compartment of the car he was driving. Under Michigan law, one of the requirements for proving constructive possession is "knowledge". See *People v. Emery*, 150 Mich App 657, 667-668 (1986), citing *People v. Butler*, 413 Mich 377 (1982), (proving knowledge of the presence of the weapon was essential to proving the charge of CCW); *People v DeLongchamps*, 103 Mich App 151, 159 (1981), (proving possession requires proof that defendant was aware of presence and character of the contraband, and intentionally and consciously possessed it); *People v Gould*, 61 Mich App 614, 620 (1975), (constructive possession requires, *inter alia*, that defendant exercised control, or had the right to exercise control, over the contraband, and knew the contraband was present); *People v. Davenport*, 39 Mich App 252, 257 (1972) (More than mere association required to establish joint possession, an independent link between defendant and narcotic required"; *People v Johnson*, 293 Mich App 79, 83 (2011) (defendant has constructive possession of firearm if location of weapon is **known** and it is reasonably accessible to defendant)

The parole board derives its authority entirely by statute. *People v. Holder*, 483 Mich 168, 175 n. 29 (2009). It has no authority to create common law or deviate from

its statutory mandates that require proof by a preponderance of the evidence in parole revocation proceedings. It has no authority to redefine "constructive possession" so as not to require proof of knowledge. And in this case, the hearing examiner found that Plaintiff "should have known" of the presence of the contraband because he failed to make diligent inquiry 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", and that it was Plaintiff's duty to know<sup>4</sup>. She then stated:

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." (85a, Tr. pp. 114-115.)

Thus, this is not a case where a fact finder uses inartful language and says that the accused "should have known" but really means that there were sufficient facts presented from which to infer that the accused had actual knowledge. This is a case where the hearing officer created a new offense: unwitting but negligent possession.

**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.**

Plaintiff's research uncovered no case in the country which allowed a person to be detained based on any form of "negligent possession" of contraband. Nothing in Plaintiff's conditions of parole include any definition or language that would encompass

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<sup>4</sup> "And you sir, you are on parole . . . you have a higher degree than any normal citizen and you have to, have to know." (85a, Tr. pp. 114-115.)

a "should have known" standard of possession of a firearm. Thus Plaintiff had no notice that he was required to make diligent inquiry about the possibility of the presence of contraband under penalty of being guilty of possession of it.

Federal courts have repeatedly rejected the notion that negligence can substitute for knowledge. In *U.S. v Reese*, 86 F3d 994, 996-997 (CA 10 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 (CA 10 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 (CA 10 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 (CA 1982), the court reversed a conviction where the jury instruction allowed the jury to convict a defendant of joint possession because he "knew or should have known [a] co-defendant had heroin he planned to sell." The court stated: "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 (CA 9 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 knowingly possessed. In *U.S. v Rokoski*, 30 CMR 433, 434-435 (1960), the court stated: "actual knowledge, and not a negligent failure to make diligent inquiry concerning the ownership of the property is required to support a conviction [for stolen property]."

Michigan's sister states agree that when the issue of possession is contested, knowledge of the presence or illegality of the contraband must be proven to establish constructive possession, especially 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, 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)

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).

In short, there no is legal definition of possession of contraband that includes 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. To the extent the hearing examiner 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 that 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 assumes that Cook would have truthfully answered. But it is not hard to imagine that Cook had incentive to lie and say no. Thus, 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 assumes that the gun would be discovered upon a reasonable inspection. And 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 and 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 examiner found he negligently possessed a gun found in the battery compartment.

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 Would Be A Violation Of Due Process.**

In *Seal v Morgan*, 229 F3d 567 (CA 6 2000), a student brought a due process claim against a school board for suspending him for a knife, about which he had no knowledge, found in the glovebox of his the car. The court denied the defendant summary judgment even though it found there was no liberty interest at stake, stating:

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.

*Id* at 575-576. The court also 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 the parolee’s very liberty 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.

As previously noted, Mr Kenney received a five year sentence.

**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. **(50a, NOA.)**

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) **(123a.)**

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).

#### IX. THE STANDARDS OF REVIEW APPLICABLE TO PAROLE REVOCATIONS ON PETITIONS FOR HABEAS CORPUS

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 sentencing. 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 after a finding that parole violation has occurred, the parole board should be given wide latitude and has virtually plenary discretion granted by the Michigan Legislature, see MCL 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. At this stage of the proceeding, an abuse of discretion results only when there is no factual support for the parole board's decision, which guards against arbitrary decisions. See *Massachusetts Corr. Inst. v Hill*, 472 U.S. 445, 456 (1985).

#### **B. The trial phase**

As to whether a parole violation has occurred in the first place, this is not 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 law and procedure. In *Craig v Idaho*, 123 Idaho 121; 844 P.2d 1371 (1992) the court addressed what standards of judicial review should apply to Idaho parole revocation hearings. Notably, the court found that habeas review was available because the petition alleged a due process violation under state and federal law. *Id.* at 125. The court stated parole revocation 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 then turned to the issue of review, stating "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 practice 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. And it would be consistent with

the common law practices of the courts of this State,, and with the common law

practices of the federal courts 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.

**X. SUCCESSFUL HABEAS CLAIMANTS ARE ENTITLED TO THE RELIEF OF DISCHARGE FROM ANY FORM OF RESTRAINT UNDER WHICH THEY ARE HELD, WHICH INCLUDES DISCHARGE FROM PAROLE.**

MCL 600.4352(1) provides that a successful habeas claimant is entitled to “discharge” from “the restraint under which he is held”. Discharge from the restraint under which a person was held has also been the long-recognized habeas corpus

remedy at common law. See, e.g., *In re Haines, supra* (discharge from restraint of involuntary commitment). Parole is a form of restraint. *Jones v. Dep't of Corr.*, 468 Mich 646, 652 (2003). Thus, a successful habeas claimant could be entitled to discharge from this form of restraint.

However, the question of the proper relief will always turn on the nature of the error. In certain instances, when errors are made that are subject to being cured, remand could be the appropriate remedy. See e.g., *Witzke v. Kelley*, 702 F. Supp. 1338, 1354-1355 (W.D. Mich. 1988) where the court granted federal habeas relief to a Michigan parolee who had his parole revoked without being allowed to present evidence in mitigation. There, the court held that the proper relief was remand to the parole board to allow the parolee to present his mitigation evidence.

Whenever a parole violation hearing occurs **after** a parolee's term of parole would have otherwise expired, and the parolee is found not guilty of the alleged parole violation, the only proper remedy would be to discharge the parolee from his parole. If, for example, a person's parole were set to expire in December 2011, and in November 2011 he was charged with violating his parole, but did not receive his hearing until January 2012, and was found not guilty at the January hearing, reinstating the prisoner to his parole status (which would be required by MCL 791.240a(8)) would mean reinstating him to the parole set to expire in December. And the parolee would then be entitled to discharge.

This is the situation that pertains in this case. Kenney was due to be discharged from parole in August 2008. The alleged parole violation occurred in November 2007.

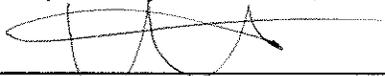
He was wrongfully convicted of parole violation first in April of 2008 and then again in January, 2011, (after a remand for rehearing on the November 2007 charge). He received a sixty month sentence the first time he was violated and a twenty-four month sentence the second time. Both parole revocations were clearly based on the gun charges, and both were found to be constitutionally infirm. Kenney was wrongfully incarcerated for well over three years, and should have been discharged from parole some 29 months before the January 2011 proceeding.

On June 1, 2011, while Kenney's second habeas action was pending, he was granted a new parole. Because his parole violation conviction was reversed and vacated, and the court found the parole violation was based on legally insufficient evidence, he was entitled to discharge. If Kenney had still been incarcerated as of the date the circuit court granted habeas and discharged him, Kenney would have been entitled to discharge from custody, which would include his parole status. The gratuitous grant of parole on June 1, 2011, should not serve to deprive Mr. Kenney of this remedy.

**RELIEF REQUESTED**

For the foregoing reasons and those set forth in Plaintiff's Application Brief Plaintiff respectfully requests the Court reverse the court of appeals and reinstate the trial court's judgment granting the writ and ordering that Plaintiff be discharged from parole.

Respectfully submitted,



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Kevin Ernst (P44223)  
Counsel for Plaintiff-Appellee

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