

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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DAVID MICHAEL CENA,

Petitioner,

v

File No. 2014030153AH  
HON. PHILIP E. RODGERS, JR.

WARDEN SHIRLEE HARRY, THOMAS  
COMBS and MICHIGAN PAROLE BOARD.

Respondents.

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Petitioner Acting in Pro Per

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pc: Shirlee Harry  
Thomas Combs  
Michigan Parole Board

DECISION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

David Michael Cena (hereinafter “Petitioner”) was charged in Ingham County with one count of Unarmed Robbery, pursuant to MCL § 750.530.<sup>1</sup> After pleading guilty, Petitioner was sentenced on August 8, 2007, to serve 50 to 180 months with the Michigan Department of Corrections (hereinafter “MDOC”). According to Petitioner, he was granted parole by the Michigan Parole Board (hereinafter “Board”), however, his parole was revoked on or about November 30, 2011, after he violated his Parole Order.<sup>2</sup> On April 3, 2012, after a revocation hearing was held, the Board continued Petitioner’s sentence for an additional 24-months.<sup>3</sup>

On January 23, 2013, the Petitioner was found guilty of misconduct for possessing marijuana/contraband.<sup>4</sup> Subsequently, on June 18, 2013, the Board issued a decision denying Petitioner parole for 24-months, with a reconsideration date of November 29, 2015. On January 17, 2014, the Petitioner filed a Petition for Writ of Habeas Corpus with this Court challenging

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<sup>1</sup> In addition, Petitioner was subject to sentence enhancement as a third-time habitual offender.

<sup>2</sup> Petitioner was found to be in possession/control of a firearm and had engaged in assaultive, abusive, threatening and/or intimidating behavior.

<sup>3</sup> Petitioner is not contesting this particular revocation decision by the Board.

<sup>4</sup> On February 10, 2013, the Petitioner filed a Request for Rehearing, however, this request was denied by Richard D. Russell on or about July 30, 2013 for failing to meet the required conditions pursuant to MDOC Policy Directive 03.03.105.

the legality of his incarceration at Pugsley Correctional Facility in Grand Traverse County. Petitioner argues that the Board unjustly, and without due process of law, continued Petitioner's sentence.<sup>5</sup> Furthermore, the Petition alleges that the Board failed to state a substantial and compelling reason as to why it lacks reasonable assurance that the prisoner will not become a menace to society or to the public safety.

Pursuant to MCL § 600.4301 *et seq*:

[A]n action for habeas corpus to inquire into the cause of detention may be brought by or on the behalf of any person restrained of his liberty within this state under any pretense whatsoever, except...persons convicted, or in execution, upon legal process, civil or criminal [and] 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>6</sup>

Thus, habeas corpus cannot serve as a substitute for an appeal or writ of error and cannot be used to review the merits of a criminal conviction.<sup>7</sup> MCL § 600.4310(3) prohibits a habeas action by or on behalf of “persons convicted, or in execution, upon legal process, civil or criminal,” and is not a means of testing the conditions of admittedly lawful custody.<sup>8</sup>

A prisoner enjoys no constitutional or inherent right to be conditionally released from a validly imposed sentence.<sup>9</sup> A prisoner comes under the jurisdiction of the Board after serving his minimum sentence, adjusted for good time or disciplinary credits.<sup>10</sup> Statutorily mandated parole guidelines form the backbone of the parole-decision process and the guidelines attempt to quantify various factors relevant to the parole decision in order to inject more objectivity and uniformity into the parole process, but ultimately matters of parole lie solely within the broad discretion of the Board and the freedom enjoyed by a paroled prisoner is a limited freedom.<sup>11</sup> Each member of the Board has the discretion to consider the evidence and make a reasonable choice regarding which version of evidence to believe, and it is not an abuse of discretion for two

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<sup>5</sup> *Morales v Parole Bd*, 260 Mich App 29, 34–40; 676 NW2d 221 (2003) [In the event the Board has denied a prisoner parole or revoked a prisoner's parole exclusively on the basis of race, religion, natural origin, then a complaint of habeas corpus would be proper.]

<sup>6</sup> MCL § 600.4307; § 600.4310.

<sup>7</sup> *Cross v Dep't of Corrections*, 103 Mich App 409; 303 NW2d 218 (1981).

<sup>8</sup> *Harris v Nelson*, 394 US 286; 89 S Ct 1082; 22 L Ed 2d 281 (1969); *Walker v Wainwright*, 390 US 335; 88 S Ct 962; 19 L Ed 2d 1215 (1968), rehearing denied, 390 US 1036; 88 S Ct 1420; 20 L Ed 2d 299.

<sup>9</sup> *Jones v Dep't of Corrections*, 468 Mich 646; 664 NW2d 717 (2003).

<sup>10</sup> *In re Parole of Hill*, 298 Mich App 404; 827 NW2d 407 (2012).

<sup>11</sup> *Jones v Dep't of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003); *Haeger, supra*.

fact-finders to reach different conclusions from the complex and potentially conflicting information within a prisoner's record.<sup>12</sup> The granting of parole is conditioned upon the inmate not being released until satisfactory evidence, pursuant to statute, is provided to the Board.<sup>13</sup>

In situations where the Board enters an order granting parole, either the prosecutor of the county from which the prisoner was committed or the victim of the crime may apply for leave to appeal the Board's decision in the circuit court.<sup>14</sup> After the Board enters said order, it retains discretion to rescind that order for cause before the prisoner is released and after the Board conducts an interview with the prisoner.<sup>15</sup> Furthermore, the entrance of such an order does not grant the prospective parolee a constitutionally protected liberty interest until the order is effectuated.<sup>16</sup>

The Legislature has included a mechanism in the parole process allowing a prosecutor or victim to appeal a Board decision granting parole in the circuit court.<sup>17</sup> This discretionary review process is however, distinct from parole revocation proceedings.<sup>18</sup> Courts have recognized that:

[A] parole-release decision is more subtle and depends on an amalgam of elements, some of which are factual, but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release.<sup>19</sup>

Therefore, during circuit court review, the court is limited to the abuse-of-discretion standard in determining whether the Board abused its discretion and/or violated any

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<sup>12</sup> *Haeger, supra*.

<sup>13</sup> *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 154; 532 NW2d 899 (1995).

<sup>14</sup> MCL § 791.234(11); *In re Parole of Elias*, 294 Mich App 507, 538; 811 NW2d 541 (2011). A prisoner may respond to the application for leave to appeal through retained counsel or in propria persona, although no response is required, however, a prisoner has no right to appeal the Board's decision to deny parole. MCR 7.118(D)(3)(b)(i); see also *Morales v Parole Bd, supra*.

<sup>15</sup> MCL § 791.236(2).

<sup>16</sup> US Const, Am XIV [Potential parolee who remains in prison has no liberty interest to protect for due process purposes]; *Hill, supra* citing *Greenholtz v Inmates of Neb Penal & Correctional Complex*, 442 US 1, 9; 99 S Ct 2100; 60 L Ed 2d 668 (1979). [A potential parolee, while imprisoned, has not yet acquired a protected liberty interest. The United States Supreme Court found, and Michigan courts have affirmed, that parole release and parole revocation are different. The Michigan Court of Appeals has held that, "There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires. A prisoner awaiting release on parole remains confined and thus subject to all of the necessary restraints that inhere in a prison. The mere hope that the benefit of parole will be obtained is too general and uncertain, and therefore, is not protected by due process."]

<sup>17</sup> MCL § 791.234(11); *Hill, supra*.

<sup>18</sup> *Hill, supra*.

<sup>19</sup> *Id.* citing *Greenholtz, supra*.

constitutions, statutes, administrative rules or other regulations in reaching its decision.<sup>20</sup> An abuse of discretion occurs when the Board's decision falls outside the range of reasonable and principled outcomes.<sup>21</sup> However, a reviewing court may not substitute its judgment for that of the Board.<sup>22</sup> Conversely, when the Board denies granting parole or rescinds an order granting parole for cause before the prisoner is released, there is no appeal of right.<sup>23</sup>

Pursuant to MCL § 791.233e(6), the parole board may depart from the parole guidelines by denying parole to a prisoner who has a high probability of parole as determined under the parole guidelines or by granting parole to a prisoner who has a low probability of parole as determined under the parole guidelines. However, a departure must be for substantial and compelling reasons and must be stated in writing.<sup>24</sup>

After noting that Michigan courts had not yet defined the phrase “substantial and compelling” in a parole context, the Court of Appeals found:

Under the parole guidelines, the Board is not held to a requirement of absolute objectivity. Rather, the Board must consider ‘all of the facts and circumstances, including the prisoner’s mental and social attitude.’ An evaluation of a prisoner’s mental and social attitude involves a subjective determination for which the parole guidelines cannot account. As the Legislature has directed the Board to consider certain subjective factors in making a parole decision, reliance on the objective analytical process underlying *Babcock*’s definition of ‘substantial and compelling’ reasons for a sentencing departure would be misplaced. [*People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), defined ‘substantial and compelling’ as ‘an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases.’] The Board may identify reasons ‘that keenly or irresistibly grab its attention’ and ‘are of considerable worth in deciding’ whether it should deny parole to a prisoner who was otherwise assessed as having a high chance of parole...And, if those substantial and compelling reasons also qualify as ‘objective and verifiable,’ a reviewing court would be more apt to affirm the Board’s decision.<sup>25</sup>

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<sup>20</sup> *Elias, supra* at 538; *Haeger, supra*.

<sup>21</sup> *Id.* [In parole cases, an abuse-of-discretion will generally be found where an unprejudiced person, considering the facts on which the decision maker acted, would say there is no justification or excuse for the ruling.]

<sup>22</sup> *Haeger, supra*.

<sup>23</sup> MCR 7.118.

<sup>24</sup> MCL § 791.233e(6)

<sup>25</sup> *In re Todd*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2012 (Docket No. 299967).

*In re Parole of Elias*, the Defendant was convicted in 1985 of second-degree murder and possession of a firearm during the commission of a felony.<sup>26</sup> The Defendant first became eligible for parole in 2006.<sup>27</sup> The Board noted that, since her imprisonment, the Defendant had earned her GED, completed a vocational training program, worked full-time, voluntarily participated in several substance abuse programs and completed group therapy for assaultive offenders (AOT).<sup>28</sup> The AOT report stated that Defendant displayed honesty and was able to describe what led to her crimes and to accept responsibility for those acts.<sup>29</sup> After interviewing the Defendant, the Board found that she minimized her responsibility by rationalizing she had been under the influence when she committed her crimes and it denied her parole.<sup>30</sup>

In 2007, the Defendant's parole-guideline score had improved such that she was placed in the high-probability-of-parole category.<sup>31</sup> After being interviewed, the Board indicated that the Defendant had accepted responsibility for her crime and felt remorse for her actions.<sup>32</sup> However, the Board again denied parole, stating as its substantial and compelling reasons for departure that the Defendant did not demonstrate enough insight into her crime and had showed no empathy for her victim.<sup>33</sup> In 2008, the Board denied parole because the Defendant minimized her criminal responsibility, failed to comprehend the seriousness of her offense and related little interest in the victim.<sup>34</sup> In 2009, the Board denied parole because the Defendant demonstrated a lack of insight into her behavior and emotions.<sup>35</sup> Each time the Board was required to provide substantial and compelling reasons for denying parole to a high-probability parole candidate, its explanation was limited, but succinctly stated.

The Board's rationale in this case is comparable and equally concise and to the point. The Notice of Decision provides multiple reasons in support of the Board's denial, which include:

**The assaultive crime:**  
Had multiple victims

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<sup>26</sup> *Supra*, at FN 13.

<sup>27</sup> *Id.* at 523.

<sup>28</sup> *Id.* at 524.

<sup>29</sup> *Id.* at 525.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 525-526.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 528.

<sup>35</sup> *Id.*

Victimized a stranger

Arose during commission of another crime

**The prisoner has a criminal history:**

Includes criminal conviction(s) as a juvenile

Involving similar behavior to current offense

**The behavior reflected in the misconducts:**

Involves substance abuse

This is a disciplinary time case

Shows the prisoner has received misconduct(s) since coming to MDOC or since last PBI

**The prisoner's prior post conviction corrections history includes:**

A history of parole failure

Absconding/failure to report

A history of probation failure

Assaultive behavior on parole/probation

**The prisoner has a history of substance abuse which:**

Is of a polysubstance nature

Is of a long standing duration

**The prisoner's social history indicates:**

Unstable social or family history

The Board considered objective factors such as the Petitioner's social history, criminal history and post conviction history, in addition to the Petitioner's misconduct history and substance abuse history.<sup>36</sup> While the Petitioner's misconduct ticket for possession of marijuana/contraband was a factor considered by the Board in its decision, numerous additional, valid reasons were provided as to why Petitioner was denied parole. There is insufficient evidence to suggest that the Board used the misconduct report and substance abuse as "its basis for the new continuance," as argued by the Petitioner, and this Court cannot say that the Board improperly relied upon or weighed the misconduct charge in their parole determination.

Further, the Board recommended corrective actions including: demonstrating responsible behavior by earning positive reports in any programs, avoiding situations resulting in misconduct citations, demonstrating leadership qualities by participating in department sanctioned activities and complying with recommendations for psychological screening and/or therapeutic programming when referred.

This Court, after reviewing the Board's June 18, 2013 Decision denying parole, does not find that the Board abused its discretion or violated any constitutions, statutes, rules or

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<sup>36</sup> Petitioner claims are that consideration of his misconduct history and substance abuse history resulted in bias by the Board because these factors are subjective.

regulations. The Decision issued by the Board falls within the range of reasonable and principled outcomes and this Court finds that the substantial and compelling reasons provided qualify as objective and verifiable.

The Board met the requirements imposed under MCL § 791.233 *et seq.*, therefore, the Court finds the Board's Decision denying Petitioner's parole for 24-months was properly issued. Further, the Court finds that Petitioner's due process rights were not infringed. For the reasons stated herein, the Petition for Writ of Habeas Corpus is denied.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge