

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

JAMES JOSEPH FEHRMAN #225893,

Plaintiff,

v

File No. 04-23635-AW
HON. PHILIP E. RODGERS, JR.

MICHIGAN PAROLE BOARD,

Defendant.

William B. Conklin (P27560)
Attorney for Plaintiff

ORDER DENYING EX PARTE MOTION
FOR ORDER TO SHOW CAUSE
AND
DENYING COMPLAINT FOR WRIT OF MANDAMUS

On July 7, 1992, the Plaintiff was sentenced in the Circuit Court for Kalkaska County to consecutive terms of 12 to 20 years for criminal sexual conduct in the first degree and 4 to 15 years for criminal sexual conduct in the second degree. He also received two 2-year terms for felony firearm violations. Plaintiff is currently housed at the Pugsley Correctional Facility in Grand Traverse County, Michigan.

The Plaintiff's earliest release date was April 1, 2004. The Plaintiff has not had any misconduct tickets during his incarceration. His parole guidelines were scored by the Parole Board at +8 or high probability of parole. The Parole Board nonetheless denied parole and continued his incarceration for 12 months. The Parole Board cited the following as its substantial and compelling reasons for departing from the parole guidelines:

DESPITE COMPLETION OF SOT, PB NOT ASSURED THAT PRISONER'S RISK OF RE-OFFENDING HAS BEEN DIMINISHED. HIS PRIOR RECORD OF DISCONTINUING MENTAL HEALTH TREATMENT LEADS TO THE IMPRESSION THAT HE IS STILL A RISK. DEPARTURE WARRANTED.

The Plaintiff filed an Ex Parte Motion [for Order] to Show Cause requesting that the Parole Board be required to appear and show cause why parole should not be granted because the reasons for denying parole were not substantial and compelling reasons for departing from the parole guidelines.

The Plaintiff also filed a Complaint for Writ of Mandamus seeking to have this Court issue a writ of mandamus compelling the Parole Board to grant the Plaintiff parole. In seeking mandamus, the Plaintiff relies upon the Court of Appeals holding in *Morales v Michigan Parole Board*, Docket No. 239936, that prisoners do not have a right to appeal a denial of parole under MCL 600.631 of the RJA, but that “an action for mandamus is an option for prisoners in certain circumstances. . .” The Court of Appeals, however, further indicated:

. . . that the issuance of a writ of mandamus is proper only where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result, would be proper.

The Plaintiff argues that the parole guidelines mandate that he be granted parole because he scored +8, high probability of parole. In other words, if a prisoner scores a high probability of parole, the Parole Board has no discretion but must grant parole.

MCL 791.233e provides, in pertinent part, as follows:

(6) The parole board **may** depart from the parole guideline 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. A departure under this subsection shall be for substantial and compelling reasons stated in writing. The parole board shall not use a prisoner’s gender, race, ethnicity, alienage, national origin, or religion to depart from the recommended parole guidelines.

As the Court said in *Killebrew v Department of Corrections*, 237 Mich App 650; 604 NW2d 696 (1999), app den 461 Mich 1001; 611 NW2d 794, “[o]bjective, legislatively mandated decisional process to determine whether to parole [an inmate] does not mandate a certain result.” While the parole guidelines provide greater restrictions on the Parole Board’s exercise of discretion concerning a prisoner at either extreme of probability of parole, the Parole Board still has the discretion to grant or deny parole. Its decision does not become ministerial and involves

no exercise of discretion or judgment solely because a prisoner scores a high probability of parole. Therefore, an action for mandamus is not an option for challenging the Parole Board's exercise of its discretion and departure from the parole guidelines.¹

The Ex Parte Motion [for Order] to Show Cause is denied. The Complaint for Writ of Mandamus is dismissed.

This order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____ S/ 04/29/04 _____

¹ An application for a writ of *habeas corpus* would not be proper either because there is no radical defect which renders the judgment or proceedings absolutely void. See, *Morales* at page 6.