STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

MICHAEL MOGUCKI,

Plaintiff,

v

File No. 02-22213-AW
HON. PHILIP E. RODGERS, JR.

MICHIGAN DEPARTMENT OF CORRECTIONS,
MICHIGAN PAROLE BOARD,

Defendants.

Michael Mogucki #187388
Plaintiff in Pro Per

H. Steven Langschwager (P52380)
Attorney for Defendants

ORDER REINSTATING CASE AND
GRANTING WRIT OF HABEAS CORPUS

On June 14, 2002, the Plaintiff filed a Complaint for Writ of Habeas Corpus. On July 11, 2002, this Court issued a Pre-Hearing Order giving any opposing party 21 days from the date of the Order to file a response and giving the Plaintiff 35 days from the date of the Order to file a reply. On July 26, 2002, before the expiration of these time limits, the Court issued an Order Vacating Pre-Hearing Order and Dismissing the Case for Improper Venue and giving any party objecting thereto seven days from the date of the order to file an objection. Both parties filed objections and briefs on the merits of the Plaintiff's Petition.

Believing that the Plaintiff's Complaint was "nothing more than an untimely attempt to appeal a January 24, 2002 decision of the Parole Board revoking Plaintiff's parol," the Court said that appeals of decisions of the Parole Board may be filed only in the circuit court of the sentencing county pursuant to MCR 7.104(D)(1).

The Court erred. Judicial review of a parole revocation, which is a "contested case" is proper under either the Administrative Procedures Act ("APA") or habeas corpus. *Triplett v Deputy Warden,* 142 Mich App 774; 371 NW2d 862 (1985). As pointed out by the Attorney General's office, the Plaintiff did not seek judicial review of the Parole Board's revocation decision within 60 days of the Parole Board's March 15, 2002 decision as required by the APA. MCL 24.304(1). MCR 7.105(O) permits a delayed petition for review only if the applicable review statute permits a delayed appeal. Neither MCL § 791.240a nor MCL § 24.304 permit a delayed appeal. Therefore, Plaintiff is barred from obtaining review under the APA.

The Plaintiff nonetheless has the option of filing a petition for a writ of habeas corpus, pursuant to MCL § 600.4303. The Michigan Supreme Court has provided for the proper jurisdiction and venue for such writs by MCR 3.303 which provides, in pertinent part, as follows:

> (1) An action for habeas corpus to inquire into the cause of detention of a person **may be brought in any court of record except the probate court.**
> (2) **The action must be brought in the county in which the prisoner is detained.** If it is shown that there is no judge in that county empowered and available to issue the writ or that the judicial circuit for that county has refused to issue the writ, the action may be brought in the Court of Appeals. (Emphasis added.)

Thus, while habeas corpus cannot serve as a substitute for an appeal and cannot be used to review the merits of a criminal conviction, *Cross v Dep't of Corrections* 103 Mich App 409; 303 NW2d 218 (1981), because such action may be abused and substituted for normal appellate proceedings, *Walls v Director of Institutional Services Maxie Boy's Training School,* 84 Mich App 355; 269 NW2d 599 (1978), habeas corpus is an appropriate avenue to challenge a parole revocation. Jurisdiction lies with "any court of record except the probate court." Venue is proper "in the county in which the prisoner is detained." This Court accepts both jurisdiction and venue of Plaintiff's Petition for Writ of Habeas Corpus.

Having reviewed the Complaint and Response, the Court now issues this Decision and Order and reluctantly grants the relief requested and orders the Plaintiff released on parole under the jurisdiction of the Parole Board.[1]

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[1] The Court's reluctance is based on a record where a clear parole violation was admitted, no delay is chargeable to the

The undisputed facts are these. The Plaintiff was originally incarcerated in the Michigan Department of Corrections for felony convictions in both Macomb and Oakland Counties. On or about October 29, 2001, the Plaintiff was granted parole and released from prison to the supervision in Oakland County. On or about that same day, the Plaintiff was arrested on charges of possessing cocaine and possessing drug paraphernalia. On October 5, 2001, the Plaintiff was served with notice of the two parole violations, possession of cocaine and a crack pipe. On November 13, 2001, the Plaintiff was released from the custody of the local jail and returned to the custody of the Michigan Department of Corrections. He was transferred to a Michigan Department of Corrections facility on November 30, 2001.

On December 17, 2001, the Plaintiff was arraigned on the parole violation charges, plead not guilty and requested a formal revocation hearing. On December 27, 2001, a formal revocation hearing was scheduled, but not held.[2] On December 28, 2001, the Plaintiff was released on bond (reinstated to parole).

On January 24, 2002, the revocation hearing was reconvened. The Plaintiff made a motion to dismiss based on the Parole Board's violation of the "45-day rule." The motion was denied. The hearing officer held that MCL 791.240a(1) applied only to the number of days a prisoner accused of a parole violation is actually detained in custody. The charge of possession of cocaine was ultimately dismissed and the Plaintiff plead guilty to the charge of possession of drug paraphernalia. The hearing officer recommended that his parole be revoked. The Parole Board revoked Plaintiff's parole and ordered a 12-month continuance.

The Plaintiff contends that the Parole Board lost jurisdiction to proceed with the revocation hearing when it failed to conduct the hearing within 45 days of when he became available and the Parole Board is now estopped from conducting the hearing. He relies upon MCL § 791.240a and the unpublished case of *Jones v Dep't of Corrections*, Court of Appeals Docket No. 236835, decided November 30, 2001 which is directly on point.

The Attorney General contends that the Plaintiff must show that there was a radical defect that renders the judgment or proceeding absolutely void. *In re Stone*, 295 Mich 107; 294

Plaintiff and the Department of Corrections has offered no excuse for not providing a hearing within 45 days.

[2] No reason for delay chargeable to the Plaintiff has been argued to this Court.

NW2d 156 (1940); *Walls v Director of Institutional Services*, 84 Mich App 355; 269 NW2d 599 (1978). A radical defect in jurisdiction contemplates an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission. *Hinton v Parole Board*, 148 Mich App 235; 383 NW2d 626 (1982), quoting from *People v Price*, 23 Mich App 663, 671; 179 NW2d 177 (1970). The Attorney General takes the position that failure to complete a revocation hearing within 45 days is not a radical defect. It analogizes the 45-day requirement of MCL § 791.240a to the 180-day speedy trial rule in MCL § 780.181 and argues that the Court should consider the length of the delay, the reasons for the delay, whether the parolee has asserted the right, and whether the parolee has been prejudiced by the delay. *Baker v Wingo*, 408 US 514; 94 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Bailey*, 101 Mich App 144; 300 NW2d 474 (1980).

The statutory provision in question is MCL § 791.240a which provides, in pertinent part, as follows:

> (1) Within 45 days after a paroled prisoner has been returned or is available for return to a state correctional facility under accusation of a parole violation other than conviction for a felony or misdemeanor punishable by imprisonment under the laws of this state, the United States, or any other state or territory of the United States, the prisoner is entitled to a fact-finding hearing on the charges before 1 member of the parole board or an attorney hearings officer designated by the chairperson of the parole board. The fact-finding hearing shall be conducted only after the accused parolee has had a reasonable amount of time to prepare a defense. The fact-finding hearing may be held at a state correctional facility or at or near the location of the alleged violation.
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> (3) A fact-finding hearing may be postponed for cause beyond the 45-day time limit on the written request of the parolee, the parolee's attorney, or, if a postponement of the preliminary hearing has been granted beyond the 10-day time limit, by the parole board.

The Supreme Court explained the primary rule for statutory interpretation in *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 11 (1999):

> The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). See also *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). This task begins by examining the language of the statute itself. The words of a statute provide "the most reliable evidence of its intent . . .

> ." *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). If the language of the statute in unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. *Tryc v Michigan Veterans' Facility*, 151 Mich 129, 135; 545 NW2d 642 (1996). Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. *Luttrell v Dep't of Corrections*, 421 Mich 93; 365 NW2d 74 (1984).

See also *People v McIntire*, 461 Mich 147, 152-153; 599 NW2d 102 (1999).

In addition, courts must give effect to every phrase, clause, and word in a statute in order to avoid rendering any part of a statute meaningless. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). Unless specifically defined in the statute, every word or phrase in a statute should be given its obvious and ordinary meaning, considering the context and any technical terms, which must be given their particular connotation. *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997). Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible. *Baker v General Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

MCL § 791.240a(1) unambiguously states that the prisoner is entitled to a fact finding hearing within 45 days of being returned to or available for return to a state correctional facility. MCL § 791.240a(3) makes provision for postponement "for cause" in very limited circumstances, i.e., "upon the written request of the parolee, the parolee's attorney, or, if a postponement of the preliminary hearing has been granted beyond the 10-day time limit, by the parole board." Construing these statutory provisions as analogous to the 180-day speedy trial rule and requiring the Court to look at such factors as the length of the delay, the reasons for the delay, whether the parolee has asserted the right, and whether the parolee has been prejudiced by the delay, effectively renders subsection (3) nugatory.

This interpretation of MCL § 791.240a is supported by case law. In *Stewart v Dep't of Corrections, Parole Board*, 382 Mich 474; 170 NW2d 16 (1969), the Supreme Court held that violation of the statute deprived the parole board of the jurisdiction over the alleged parole violations, even where the parolee admitted his guilt. In such case, the parolee was entitled to be discharged from prison and returned to the jurisdiction of the parole board. *Id* at 479. See also,

In re Lane, 2 Mich App 140, 144; 138 NW2d 541 (1965), reversed 377 Mich 695 (1966) where a writ of habeas corpus was granted (Supreme Court rejected Court of Appeals holding that violation of statute was cause for issuance of writ of mandamus, but not cause for issuance of a writ of habeas corpus); and *Lodaido v Dep't of Corrections, Parole Board*, 37 Mich App 171; 194 NW2d 444 (1972) (failure of parole board to hold hearing timely constituted waiver of any claim based upon the alleged parole violations)

The loss of jurisdiction is a radical defect in the proceedings. The Plaintiff is entitled to the relief requested. A writ of habeas corpus shall issue. Pursuant to MCR 7.206(D)(3) and MCR 7.216(A)(7), the Plaintiff is to be discharged from prison and returned to the jurisdiction of the Parole Board.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____