IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JAMES WILSON,	)	
	)	
Petitioner,	)	
	)	C.A. No. 01M-03-058 WCC
	)	
v.	)	
	)	
RAPHAEL WILLIAMS, et al.,	)	
	)	
Respondents.	)	

Submitted: July 17, 2002
Decided: October 30, 2002

O R D E R

On Respondents' Motion to Dismiss Petition for Writ of Mandamus. Granted in Part; Denied in Part.

James Wilson, Multi-Purpose Criminal Justice Facility, Wilmington, Delaware. *Pro se* Petitioner.

Stuart B. Drowos, Deputy Attorney General, 820 N. French Street, Wilmington, Delaware. Attorney for the State.

CARPENTER, J.

On this 30th day of October, 2002, upon consideration of Respondents' motion to dismiss, it appears to the Court that:

1. Petitioner James Wilson ("Petitioner") seeks a writ of mandamus compelling the Delaware Board of Parole ("Board") to "dismiss the parole violation warrant and or the dismissal of remaining parole time." The Respondents subsequently filed a motion to dismiss on the basis that the petition failed to state a claim upon which relief could be granted. This is the Court's decision on the Respondents' motion to dismiss. The factual circumstances surrounding this petition are as follows.[1]

2. Petitioner is currently an inmate at the Multi-Purpose Criminal Justice Facility ("MPCJF"). Respondents are the warden at the MPCJF, the chairperson of the Delaware State Board of Parole, and the Petitioner's parole officer. On March 16, 2001, Petitioner filed a petition for writ of mandamus with leave to proceed *in forma*

[1] The factual circumstances have been accumulated from the complaint, the motion and the Petitioner's response and the exhibits attached thereto. Despite this reliance on the exhibits, this motion will remain a motion to dismiss and will not convert into a summary judgment motion. While Rule 12(b) provides that when matters outside the pleadings are considered a motion becomes a motion for summary judgment and is disposed of pursuant to Rule 56, the Court notes that the correspondence attached as exhibits to the complaint and motion are part of the pleadings pursuant to Superior Court Rule 10(c). The statements contained in these exhibits were adopted by reference and attached, and as such are considered part of the pleadings and will be treated as a motion to dismiss and not as one for summary judgment. *See e.g.*, *Parker v. Kearney*, 2000 WL 1611119 (Del. Super. Ct.); *International Business Machines Corp. v. Comdisco, Inc.*, 1991 WL 269965, at *29 n.5 (Del. Super. Ct.).

pauperis alleging due process violations. Specifically, the Petitioner alleges that he was denied his constitutional rights by not having a preliminary hearing, not being allowed to cross-examine witnesses, by the Board considering evidence beyond that contained in the parole violation report, and by being denied the ability to present witnesses.

3. In December of 1985, the Petitioner was convicted in the Superior Court of robbery in the first degree, conspiracy in the second degree, resisting arrest, and possession of a deadly weapon during the commission of a felony. His conviction and sentencing was subsequently affirmed by the Delaware Supreme Court.[2] Since then he has traversed through both federal and state courts presenting every conceivable avenue to challenge his conviction.[3] While on parole for these offenses the Petitioner was arrested and convicted of speeding on June 4, 1999 and was also convicted on August 28, 1999 of driving while license was suspended or revoked. On

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[2] *Wilson v. State*, 1986 WL 17993 (Del. Supr.).

[3] *Wilson v. State*, 1986 WL 17993 (Del. Supr.) (challenging the sufficiency of the victim's identification and claiming the victim was not sufficiently cross-examined); *State v. Wilson*, 1989 WL 16985 (Del. Super. Ct.) (denying Rule 61 Postconviction relief); *Wilson v. State*, 1989 WL 136938 (Del. Supr.) (challenging the Superior Court's denial of Rule 61 Postconviction relief that no charge had been given to the jury on alibi); *State v. Wilson*, 1989 WL 158453 (Del. Super. Ct.) (denying Rule 61 Postconviction relief); *Wilson v. State*, 1990 WL 38338 (Del. Supr.) (appealing Superior Court's denial of second petition for Postconviction relief for illegal sentencing); *Wilson v. Redman*, Nos. 89-665/90-312-SLR, (D. Del. Feb. 19, 1992) (applying for federal habeas corpus relief); *Wilson v. State*, 1993 WL 307607 (Del. Supr.) (challenging Superior Court's third denial of Postconviction relief).

December 15, 1999 a violation report was prepared by Officer Kerry Bittenbender, and on December 28, 1999 the Board notified the Petitioner of the charges and advised him of the hearing date of February 29, 2000. In this notice letter, he was informed that he had the right to have witnesses appear on his behalf and to cross-examine witnesses against him.

4. The violation report set forth four alleged violations of parole. First, it asserted that the Petitioner had committed a new criminal offense or moving motor vehicle offense during the supervision period. Second, he failed to report to his Supervising Officer at such times and places as directed, and failed to permit the Probation/Parole Officer to enter his home and/or visit his place of employment. Third, he failed to report any change of residence and/or employment within 72 hours to his Supervising Officer. Finally, he failed to abide by a curfew established by his Supervising Officer.

5. When deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must accept all well-pleaded allegations as true.[4] The test which determines whether the facts alleged are sufficient to withstand a motion to dismiss is a broad one, and thus, if a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint

[4] *Spence v. Funk*, 396 A.2d 967 (Del. 1978).

the motion must be denied.[5] The writ of mandamus is a command "'issued by a court of law having competent jurisdiction, to an inferior or lower court, to a tribunal or board, or to a corporation or person, requiring the performance of some duty named therein, said duty being attached to the official position of the party to whom the writ is directed, or resulting from operation of law.'"[6] The extraordinary writ of mandamus is appropriate only where the plaintiff is able to establish a clear legal right to the performance of a non-discretionary duty and the unavailability of any other adequate remedy.[7] The Court must now review Respondents' motion to dismiss with these principles in mind.

6. The Petitioner's first assertion is that he was not given a preliminary hearing within ten days of his arrest. Petitioner relies upon *Morrissey v. Brewer*[8] and

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[5] *Id*. at 968 (citing *Klein v. Sunbeam Corp.*, 47 A.2d 526 (Del. 1952)).

[6] *In re Brookins*, 736 A.2d 204, 206 (Del. 1999) (quoting *State ex rel. Lyons v. McDowell*, 57 A.2d 94, 97 (1947)).

[7] *In re Brookins*, 736 A.2d at 206; *Remedio v. City of Newark*, 337 A.2d 317, 318 (Del. 1975).

[8] 408 U.S. 471 (1972).

Rule 19[9] from the Rules of the Delaware Board of Parole. He claims that if a

[9] Rule 19 provides:

> **19. REVOCATION HEARINGS:** the Board's standards pertaining to hearings for revocation of parole or mandatory release are adopted from those prescribed by the 1972 Supreme Court decision on Morrisey v. Brewer [sic]. Essentially, the Court prescribed two hearings – the preliminary and revocation (or final) hearings – in cases where the offender has been alleged to have committed a "technical" violation of the conditions of release. In cases where the offender has been already convicted, a preliminary hearing is not held.
> **(a) Preliminary Hearing:** In accordance with procedures adopted by the Department, a preliminary hearing should be held within approximately ten (10) working days after the Hearing Officer receives the violation report to determine whether probable cause exists to conclude that the offender has violated the conditions of release on "technical" grounds. The offender, however, has the right to waive this hearing.
> **(b) Final Revocation Hearing:** The final revocation hearing is an informal process structured to assure that the findings of a parole hearing will be based on facts and that the decision will be based upon an accurate knowledge of the parolee's behavior (*Morrisey v. Brewer*) [sic]. The Board will attempt to conduct the final revocation hearing within two (2) months of receipt of the report alleging a new conviction or two (2) months of receipt of the results of the preliminary hearing alleging a "technical" violation, whichever is relevant. The offender is entitled to rights as follows:
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> 1) advance written notice of the time and place of the hearing, and of specific parole violations;
> 2) a written copy of charges;
> 3) presence of counsel of choice or to have counsel appointed;
> 4) an opportunity to be heard in person and to present evidence and/or witnesses and for a limited right to cross-examine witnesses;
> 5) a timely, written decision.
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> The testimony of witnesses must be relevant to the alleged violation and not cumulative. If there is any question about the nature of the testimony, the Board may require a written summary before the hearing. The written summary shall state how the testimony is relevant to the alleged violation. The offender has the right to confront and cross-examine adverse witnesses unless there is good cause (e.g., risk of harm to the witness) for not allowing this confrontation. At the request of the offender, the Board will postpone the hearing until the offender can have counsel present.

See Rules of the Delaware Board of Parole, Rule 19.

preliminary hearing were held, it would have established that his parole officer did not desire to pursue revocation for the June 4, 1999 and August 28, 1999 traffic violations, that he had reported in every Monday as required by his Level III supervisor, and that he had remained at the same address provided to his parole officer.[10] Petitioner's belief that he has an absolute right to a preliminary hearing within ten days of his arrest for the parole violation is misplaced. Rule 19 of the Board of Pardons is permissive in nature. Specifically, Rule 19 states that "a preliminary hearing *should* be held within approximately ten (10) working days."[11] This Court has specifically held that the use of the word "should" in Rule 19 is "permissive" and "nonmandatory" and "obviously equates with a recommendation, a preference for action within that time frame, and allows for flexibility and/or the use of discretion in the scheduling of such a hearing."[12] More important, however, is that the need for a preliminary hearing to establish probable cause is not necessary when the person has already been convicted of a new offense. Petitioner here was

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[10] Remarkably, Petitioner relies not upon the Board Rules which are widely available, but rather to an internal document possessed by members of the Board and not distributed to the public. How Petitioner obtained this document is unknown to the Court. However, this document is merely an expanded version of the rules. For purposes of permitting others to locate the citations, all citations will be made to the Published Board Rules.

[11] *See* Rules of the Delaware Board of Parole, Rule 19 (emphasis added).

[12] *See Burton v. Lichtenstadter*, 1999 WL 33116508, at *2 (Del. Super. Ct.), *aff'd*, 2000 WL 949654 (Del. Supr.).

convicted on June 4, 1999 and again on August 28, 1999 and the parole proceedings occurred thereafter. Therefore, no preliminary hearing was necessary or required.

7. The Petitioner's second claim is that his rights were violated when he was denied the right to cross-examine witnesses. First, Petitioner's new convictions were a matter of court record and there was no need to call witnesses to establish their existence. As to the technical violations, petitioner's parole officer was called and there is nothing to suggest that the Petitioner did not have the opportunity to cross-examine her. Petitioner cannot later complain when he has failed to take full advantage of his opportunity.

8. Petitioner's third claim is that the Board acted arbitrarily and capriciously when it brought up issues that were not alleged in the violation report, specifically his inattentive driving violation, resisting arrest and his arrest report. This Court finds that the Board was allowed to consider this additional information once a violation had been established in order to determine the appropriate sanction. Such action does not justify a writ of mandamus.

9. Petitioner's final claim is that he was denied the right to present witnesses on his own behalf. He claims these witnesses would have brought documentary evidence of his lease to show his residence and to testify that Petitioner was home at the time of the curfew checks. Petitioner is correct that he is entitled to

present witnesses on his own behalf. However, Rule 19(b) of the Delaware Board of Parole requires that any evidence presented must be relevant and not cumulative. It further provides that "[i]f there is any question about the nature of the testimony, the Board may require a written summary before the hearing. The written summary shall state how the testimony is relevant to the alleged violation." Petitioner received notification on December 28, 1999 that a hearing would be held and that he would be able to call witnesses and present evidence. Approximately two weeks before the hearing the Petitioner advised the Board that he would present several witnesses. Subsequently, the Board responded in a letter dated February 18, 2000, and informed the Petitioner that:

> Pursuant to Parole Board Rule 19, the testimony of witnesses must be relevant to the alleged violation. You should advise your witnesses to contact me ... so that I may determine if a written summary will be necessary before the hearing.
>
> Any witnesses that you may have on your behalf will be permitted to wait at the gatehouse at DCC. However, in cases where prior approval has not been granted, it will be at the Board's discretion whether or not your witnesses will be called to give testimony at the hearing.

What makes this issue somewhat troublesome is the inconsistency between the obvious form letter used by the Board which included the above language and the requirements of the Board's Rule 19 in this area. A fair reading of the rule requires the Board to make an initial determination as to whether, from the list of witnesses

provided by a parolee, there is a question as to the relevance of a witnesses' testimony or whether it would be cumulative, and only upon such a finding would a written submission be required. It is obvious to the Court that the rule was created to avoid potential abuses by inmates who could cause havoc to the hearing process by naming hundreds of alleged "witnesses" that had no relevant information about the alleged violations. While the rule is fair and appropriate, it does not equate to a requirement that every witness listed by a petitioner must contact the Board before being allowed to testify. The rule allows for the proffering of testimony when it appears the witness would not be in a position to provide relevant information or the testimony would simply be cumulative. However, it does not provide a discovery mechanism for the Board to preview and screen all testimony. As an example, if it was alleged that a parolee was consistently out past his curfew hour and a defendant listed his mother who he resided with as a potential witness, the relevance of the testimony would be clear simply by the allegation and no further inquiry would be necessary. Further, as an example, if a defendant identified as potential witnesses individuals who were listed in a police report as witnessing the crime, it would be difficult to argue that they would have no relevant testimony to offer.

Unfortunately, it appears that the Board has taken a reasonable and logical rule which provides a mechanism for an orderly hearing process and has modified it into

a screening process mandating a pre-hearing discovery of all testimony. However, the rule does not appear to authorize the conduct exhibited here, and before a written summary can be required, a question as to the relevance or cumulative nature of the proposed testimony must be raised by the Board. The Board is not required to justify this assertion to the parolee and will be given significant latitude by the Court in making this finding. However, since it is not clear that the procedure utilized in this hearing was consistent with the Board's rules and may have inappropriately chilled the Petitioner's right to the presentation of relevant evidence to the Board, the Court at this juncture cannot grant the Respondents' motion to dismiss on this issue.

10. Because the Respondents have chosen to seek dismissal of this action prior to answering the complaint, the information available to the Court as to what was provided by the Petitioner to the Board regarding witnesses and the reasons for the Board letter of February 18, 2000 remains unclear and at this point in the litigation the Court is not in a position to rule that there are no reasonably conceivable facts under which the Petitioner would prevail in this litigation. However, the Petition will only proceed as to the allegation relating to the denial of the Petitioner's right to present witnesses. The other allegations are without merit, would not justify a writ of mandamus, and thus the motion to dismiss as to those allegations is granted.

11. Consistent with the reasoning set forth above, the motion to dismiss is GRANTED as to the allegations relating to the preliminary hearing, cross-examination of witnesses and consideration of information beyond the violation report. As to the assertion relating to the denial of the presentation of witnesses by the Petitioner to the Board, said motion is DENIED. The Respondents have twenty (20) days from the date of this order to answer the Petitioner. Of course, the Board could moot the litigation by vacating its previous decision and agreeing to conduct another parole hearing and following its rules regarding the presentation of witnesses. This would seem to be a reasonable course to follow, but the Court will leave that decision to the Respondents.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.