

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROBERTO I. TOME,	:	
	:	
Petitioner,	:	
	:	
v.	:	No. 01-CV-03372
	:	
SUPERINTENDENT EDWARD T. BRENNAN,	:	
and THE ATTORNEY GENERAL OF THE	:	
STATE OF PENNSYLVANIA,	:	
	:	
Respondents.	:	

**MEMORANDUM**

**Green, S.J.**

**February 17, 2005**

Presently before the Court is Petitioner’s Motion to Enforce Habeas Corpus Judgment and the responses thereto. For the reasons set forth below, Petitioner’s Motion to Enforce Habeas Corpus Judgment will be denied in its entirety.

On July 5, 2001, Petitioner filed a petition for a writ of habeas corpus.<sup>1</sup> After considering his petition, the assigned magistrate judge recommended that the petition be denied. Petitioner then filed his objections to the magistrate judge’s recommendation on May 10, 2002. On September 11, 2003, this Court permitted the parties to submit supplemental memoranda regarding the impact of Mickens-Thomas v. Vaughn, 321 F.3d 374 (3d Cir. 2003) on Petitioner’s habeas petition. Petitioner then filed a summary judgment motion on April 2, 2004. On June 25, 2004, this Court sustained Petitioner’s objections and granted summary judgment, in part, as to further proceedings before the Pennsylvania Board of Probation and Parole (“Parole Board” or “Board”). In the same order, this Court also denied summary judgment in so far as Petitioner sought immediate release from prison.

<sup>1</sup> The factual and procedural background of this matter is cited in more detail in the Court’s June 25, 2004 Memorandum and Order.

Petitioner filed this Motion to Enforce Habeas Corpus Judgment on September 29, 2004. This motion requests the Court to hold Respondents in contempt for not complying with the Court's June 25, 2004 Order. Petitioner alleges that the Parole Board failed to apply the pre-1996 Parole Act statute and corresponding rules to his parole application as directed by this Court. He contends that if the pre-1996 statute and rules were applied, he would be granted a permanent discharge from prison or a release on parole. He now seeks this Court to order the Board to immediately release him from prison.

This motion will be denied because Petitioner has not established that the Board failed to apply the pre-1996 Parole Act statute and rules. Specifically, Petitioner contends that the Board should have followed the recommendation of the Parole Guidelines ("Guidelines"). Under the Guidelines, numerical values are assigned to various criteria of a parole applicant's history to predict the likelihood of a successful parole. See id. at 378. "Factors considered within the Guidelines analysis include substance abuse, prison misconduct, nature of the underlying offense, and victim injury." Id. at 379. In the instant matter, the numerical analysis under the Guidelines recommended parole for Petitioner. Although the Board has the power to depart from this recommendation, it is required to justify its decision. See id.

In 2004, the Board reconsidered Petitioner's application and subsequently denied his parole. As a result, the Board departed from the Guidelines recommendation and had to justify its decision. The reasons that the Board provided included: (1) Petitioner's past substance abuse; (2) his assaultive instant offense; (3) victim injury during the offense; (4) the fact that a weapon was involved in the commission of the offense; (5) an unfavorable recommendation from the Department of Corrections ("DOC"); and (6) his refusal to discuss the crime or show insight or remorse. Petitioner argues that Mickens-Thomas I holds that the Board can only consider factors within the Guidelines, i.e., the first four factors (substance abuse, assaultive instant offense, victim injury, and use of weapon in offense). See Mickens-

Thomas, 321 F.3d at 379 (“[i]n reaching a decision outside the Guidelines, the Board cannot merely recite factors already incorporated in the Guidelines.”). He further contends that when only these four factors are considered, the Board must grant him parole pursuant to Mickens-Thomas I. However, Mickens-Thomas I, merely states that when departing from a Guidelines recommendation, the Board needs to give an additional reason that is not within the Guidelines. Here, the Board gave two extra reasons -- the unfavorable recommendation from the Department of Corrections and Petitioner’s refusal to discuss the crime or show insight or remorse. Accordingly, Petitioner’s argument that the Board improperly considered factors outside of the Guidelines during his parole review must fail.

Next, Petitioner claims that the Parole Board improperly considered factors 5 and 6 (lack of DOC recommendation and refusal to discuss the crime or show insight/remorse) because both factors consider Petitioner’s refusal to admit guilt. Petitioner interprets the Third Circuit’s 2004 Mickens-Thomas II decision as holding that this is improper under the pre-1996 Parole Act statute. See Mickens-Thomas v. Vaughn, 355 F.3d 294, 304 (3d Cir. 2004) (“[t]he Board also defies our instruction to discontinue its manipulation of the hitherto insignificant factors of Thomas’ non-admission of guilt...”). Assuming, arguendo, that Petitioner’s refusal to discuss his crime was tantamount to a refusal to admit guilt, Petitioner’s argument would still fail. Petitioner contends that Mickens-Thomas II holds that refusal to admit guilt is insignificant in reviewing a parole application. Mickens-Thomas II does not hold this. Instead, this case holds that the Board cannot use non-admission of guilt as a pretextual factor in denying parole. There, the Board had not previously considered non-admission of guilt to be a factor precluding parole approval. Admission of guilt only became a factor after the Board was ordered to reconsider the petitioner’s parole application. The Third Circuit determined that this was evidence of the Board’s pretext, i.e., that after being ordered to reconsider the petitioner’s parole, the Board did not reconsider it and only cited admission of guilt as a reason in order to

justify its initial denial. See Mickens-Thomas, 355 F.3d at 305-06. Here, Petitioner cannot establish pretext because the Board's denials of Petitioner's parole in 1994 and 1998 referenced his lack of remorse or insight into his crime. Since this factor was considered before the enactment of the 1996 Parole Act, the Board's reliance on Petitioner's non-admission of guilt in 2004 was not a sudden or new reason which could evidence pretext. With no other evidence establishing pretext or an ex post facto application of the 1996 Parole Act, Petitioner's argument that the Board improperly considered his non-admission of guilt under law set forth in Mickens-Thomas II must fail.

In closing, Petitioner has not established that the Board failed to apply the pre-1996 Parole Act statute and corresponding rules as directed by this Court in its June 25, 2004 Order. Petitioner's Motion to Enforce Habeas Corpus Judgment will therefore be denied.

BY THE COURT:

S/\_\_\_\_\_  
CLIFFORD SCOTT GREEN

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	:	
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**ORDER**

**AND NOW**, this 17th day of February 2005, upon due consideration, **IT IS HEREBY ORDERED** that Petitioner’s Motion to Enforce Habeas Corpus Judgment is **DENIED** in its entirety.

**IT IS FURTHER ORDERED** that Petitioner’s Sur-reply Brief (Dkt. # 42) and Sur-reply Brief II (Dkt. # 43) have been reviewed and considered by the Court. The accompanying motions for leave to file these briefs are **GRANTED**.

BY THE COURT:

S/\_\_\_\_\_  
CLIFFORD SCOTT GREEN