FILED
ATTORNEY DISCIPLINE BOARD
December 6, 2021

STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition
of Gregory Bartko, P 30052,

Petitioner/Appellant.

Case No. 21-28-RP

Decided: December 6, 2021

Appearances:
Gregory Bartko, In Pro Per, Petitioner/Appellant
Dina P. Dajani, for the Grievance Administrator

BOARD OPINION

Tri-County Hearing Panel #26 of the Attorney Discipline Board entered an order dismissing the petition for reinstatement filed by petitioner Gregory Bartko. Petitioner now seeks review by the Attorney Discipline Board in accordance with MCR 9.118. For the reasons discussed below, the panel's dismissal of the petition is affirmed.

Petitioner was a long-time securities lawyer and securities dealer in Atlanta, Georgia. In 2010, petitioner was accused of leading an interstate criminal scheme to profit from "fraudulent sales of investments to individual members of rural Baptist churches and others, and to conceal those profits." The investments primarily concerned two private equity funds that petitioner created. On November 1, 2010, respondent went to trial on one count of conspiracy to commit mail fraud, money laundering, and the sale of unregistered securities; four counts of mail fraud and aiding and abetting; and one count of selling unregistered securities and aiding and abetting. After a thirteen-day trial, a jury convicted petitioner of all six counts on November 18, 2010. On April 4, 2012, petitioner was sentenced to 23 years in prison, and ordered to pay nearly $900,000 in restitution.[1]

[1] Petitioner appealed his conviction to the Fourth Circuit Court of Appeals, and on August 23, 2013, the Fourth Circuit issued a published opinion affirming the convictions and sentences. *United States v Bartko*, 728 F3d 327 (CA 4, 2013). A petition for writ of certiorari was denied by the U.S. Supreme Court on January 27, 2014. *Bartko v United States*, 571 US 1183 (2014).

Following his conviction, petitioner was remanded to the custody of the U.S. Marshal, and was incarcerated in a federal correctional facility until September 9, 2020, when he was placed under home confinement in accordance with the CARES Act.[2] During home confinement, petitioner is still considered to be in the legal custody of the Bureau of Prisons (BOP). See e.g., *United States v Earl*, 729 F3d 1064, 1068 (CA 9, 2013) (BOP's placement of defendant in home confinement did not commence his term of supervised release; defendant had not completed his federal term of imprisonment, even though he was "not technically 'imprisoned' in one sense of the word" during home confinement). Therefore, petitioner remains under the jurisdiction of the BOP until his release date of June 21, 2030.

On November 30, 2010, the Attorney Discipline Board issued a Notice of Automatic Interim Suspension that suspended petitioner's license to practice law in Michigan, effective November 18, 2010, the date of petitioner's felony conviction. The Grievance Administrator filed a notice of filing a judgment of conviction on May 26, 2011, which was assigned to Tri-County Hearing Panel #15. On October 1, 2012, after proceedings were held in accordance with MCR 9.120(B)(3), the hearing panel issued an Order of Disbarment (By Consent), effective November 18, 2010. *Grievance Administrator v Gregory Bartko*, 10-129-AI; 11-66-JC.

Petitioner filed his petition for reinstatement on May 13, 2021, asserting that he was in compliance with MCR 9.123 and MCR 9.124. The petition was assigned to Tri-County Hearing Panel #26. On June 9, 2021, counsel for the Grievance Administrator filed a motion to dismiss the petition for reinstatement, arguing that the petition should be dismissed because under MCR 9.123(D)(3), "[a]n attorney whose license to practice law has been suspended because of conviction of a felony for which a term of incarceration was imposed may not file a petition for reinstatement until six months after completion of the sentence, including any period of parole." In response to the Grievance Administrator's motion to dismiss, petitioner argued that MCR 9.123(D)(3) does not

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[2] Prior to the COVID-19 pandemic, the relevant statutory authority allowed the Bureau of Prisons (BOP) to "place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." 18 USC § 3624(c)(2). However, in response to the pandemic, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") was signed into law on March 27, 2020. The CARES Act provides, inter alia, that "if the Attorney General finds that emergency conditions will materially affect the functioning of the [BOP], the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under [18 USC § 3624(c)(2)], as the Director determines appropriate." Pub. L. No. 116-136 (2020). On April 3, 2020, the Attorney General made that finding. Regardless, the decision to place a prisoner in home confinement pursuant to 18 USC § 3624(c)(2) remains at the sole discretion of the BOP.

apply, because his license was revoked, not suspended. Instead, petitioner argued that his petition should be analyzed under MCR 9.123(D)(2), which provides that "[a]n attorney whose license to practice law has been revoked or who has resigned may not file a petition for reinstatement until 5 years have elapsed since the attorney's resignation or disbarment."

On July 8, 2021, the hearing panel issued an order granting the Grievance Administrator's motion to dismiss, determining that petitioner is not eligible to file a petition for reinstatement because he has not completed his sentence. The hearing panel concluded that, pursuant to MCR 9.123(D)(3), petitioner will not be eligible to file a petition for reinstatement until six months after the completion of his sentence, which at this time is not until 2030.

Petitioner filed a timely petition for review on July 12, 2021. Petitioner requests that the Board reverse the hearing panel's dismissal of the petition for reinstatement, and remand to the hearing panel for consideration on the merits. The Grievance Administrator requests that the Board affirm the dismissal of the petition.

The issue before us is whether a disbarred attorney is eligible to apply for reinstatement while he is still under the jurisdiction of the BOP. The rule applicable to petitions for reinstatement is MCR 9.123(D), which provides:

> (D) Petition for Reinstatement; Filing Limitations.
>
> > (1) Except as provided in subrule (D)(3), an attorney whose license to practice law has been suspended may not file a petition for reinstatement earlier than 56 days before the term of suspension ordered has fully elapsed.
> >
> > (2) An attorney whose license to practice law has been revoked or who has resigned may not file a petition for reinstatement until 5 years have elapsed since the attorney's resignation or disbarment.
> >
> > (3) An attorney whose license to practice law has been suspended because of conviction of a felony for which a term of incarceration was imposed may not file a petition for reinstatement until six months after completion of the sentence, including any period of parole.

> (4) An attorney who has been disbarred or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least 1 year from the effective date of the most recent hearing panel order granting or denying reinstatement.

Petitioner points out that, based upon a strict and literal reading of the rule, MCR 9.123(D)(3) applies only to attorneys whose licenses have been suspended because of a felony conviction; it does not apply to attorneys whose licenses have been revoked. The Grievance Administrator argues that petitioner's argument leads to an absurd and illogical result in this case. Under petitioner's interpretation, an attorney who receives a lengthy term of incarceration and is disbarred is in a much better position than an attorney whose license has been merely suspended.

For example, if an attorney is sentenced to 10 years in prison in 2010 and is disbarred, he/she would be eligible to petition for reinstatement under MCR 9.123(D)(2) in 2015, even though he/she is still imprisoned. However, if that same attorney received a lesser sanction, such as a suspension for 180 days or even two to three years because of a felony conviction, he/she would not be eligible to petition for reinstatement until at least 2020, under MCR 9.123(D)(3). The Grievance Administrator argues that surely this cannot be how the rule was intended to operate, and it was likely an oversight to not also include disbarred attorneys in MCR 9.123(D)(3) when it was amended in 1999.

We need not speculate as to whether a drafting oversight occurred. Nor do we need to apply rules of construction to interpret the rule in a manner that ignores either MCR 9.123(D)(2) or (D)(3) or yields an odd result. This is because our Supreme Court has supplemented the court rules governing reinstatement after disbarment with common law rules adopted in certain cases.[3]

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[3] See, e.g., *In re McWhorter*, 449 Mich 130; 534 NW2d 480 (1995), cert denied 516 US 1116 (1996) (notwithstanding MCR 9.123(B)(2) and (D)(2) (effective March 1, 1994), disbarred attorney may not apply for reinstatement until five years from date of release from federal parole). See also, *Grievance Administrator v Hibler*, 457 Mich 258, 262; 577 NW2d 449 (1998), holding that:

> [W]here a disbarred lawyer practices or attempts to practice law during the five-year period in which the lawyer is ineligible to seek reinstatement, [footnote citing MCR 9.123(D)(2)] the AGC and the ADB may proceed with a formal complaint against the lawyer. If the misconduct is proven, the result will be an additional term of five years in which the lawyer is precluded from petitioning for reinstatement. For example, if the ADB were to find that a disbarred lawyer had represented a client in the second year after the lawyer's license was revoked, the new total period of ineligibility for reinstatement would be eight years, i.e., the three years of ineligibility that remained after the initial disbarment plus an additional five years.

The present matter is governed by *In re McWhorter*, 449 Mich 130; 534 NW2d 480 (1995), cert denied 516 US 1116 (1996), a case in which the petitioner was disbarred as a result of several convictions, spent approximately five years in prison, and was ultimately released from parole in 1992. The petitioner applied for reinstatement three months prior to being released from parole. Reinstatement was granted by the hearing panel and affirmed by the Board, but the Michigan Supreme Court reversed, holding that:

> . . . Although in these proceedings the nature and scope of supervision may be relevant, the mere fact that petitioner has not been away from the supervision of parole authorities greatly influences the determination whether he has sincerely and sufficiently demonstrated that he will be able to understand and operate within the standards of the bar. Therefore, it is only after a petitioner has spent sufficient time outside the control of parole officers that the hearing panel or the Attorney Discipline Board is able to determine whether the petitioner has been rehabilitated and may therefore be safely recommended for reinstatement. Although he may not have been subject to strict scrutiny by parole authorities, petitioner was still serving his parole and, upon petition for reinstatement, must demonstrate his honorable behavior outside such authorities for a period that would enable this Court to safely recommend him to the public. To prevent the petitioner's immediate reapplication in the present case, we hold that petitioner is not eligible for reinstatement until June 28, 1997, five years from the date of his release from federal parole. [*Id*. at 141 (emphasis added.]

See also *In re Reinstatement of Callanan*, 440 Mich 1207 (1992) (reinstatement denied "because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission"); *In re Culpepper*, 770 F Supp 366, 374 (ED Mich 1991) (agreeing that "[r]einstatement prior to the elapse of parole would not comport with the principle that a parolee is not to be accorded complete liberty and privilege prior to successful completion of parole;" internal quotations omitted).

In the present case, petitioner has not even been released - he is merely completing his period of incarceration on home confinement. In other words, but for the COVID-19 pandemic, respondent would still be in prison. Petitioner's statement that he was "released by the U.S. Bureau of Prisons" is inaccurate. As stated above, a prisoner allowed to serve part of their term of imprisonment in home

confinement is still considered to be in the legal custody of the BOP. The fact that petitioner's day-to-day activities are similar to those prior to his conviction is irrelevant; petitioner is still under the jurisdiction of the BOP, is still being monitored by the BOP, and could potentially return to prison after the COVID pandemic is over or at the very least, upon a violation of the home confinement guidelines.[4]

McWhorter is controlling here. Under *McWhorter*, the earliest petitioner can apply for reinstatement is five years from the date he is released from federal supervision.[5]

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[4] In the final days of the Trump administration, the Justice Department's Office of Legal Counsel issued a memo outlining its interpretation of the CARES Act's home-confinement provision: the memo said that once the government declares the pandemic has ended, many of the inmates will have to return to prison. So far, the Biden administration has declined to rescind the memo. According to Bureau of Prisons statistics, roughly 4,400 inmates are on home confinement under the CARES Act, with only about half close enough to finishing their sentences that they likely will not have to return to prison.

[5] The Sentencing Reform Act of 1984 sought to introduce uniformity and consistency in federal sentencing. See generally Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420 (2008). As a result, the United States Sentencing Commission and Federal Sentencing Guidelines were created. *Id.* at 1427-34. Federal parole was abolished and supervised release was created for federal crimes committed after November 1, 1987.

> Like parole, supervised release is a period of restricted freedom following a defendant's release from prison. The nature of supervision and the conditions imposed during supervised release are similar to those that applied in the earlier system of federal parole. However, while parole operates in lieu of the remainder of an unexpired prison term, supervised release begins only after a defendant has completed his full prison sentence. Where revocation of parole could result in a defendant's return to prison to finish out his original sentence, revocation of supervised release can lead to a return to prison for a term in addition to that imposed for the defendant's original sentence. [*Supervised Release (Parole): An Overview of Federal Law,* Congressional Research Service (September 28, 2021)].

Despite the shift from parole to supervised release, *McWhorter* is still applicable. Under both parole and supervised release, a petitioner is under the control of federal authorities and the petitioner's behavior is still being monitored. Under 18 USC§ 3583, all supervised release orders have mandatory conditions that require defendants to: refrain from criminal activity; forgo the unlawful possession of controlled substances; refrain from the unlawful use of controlled stances and submit to periodic drug tests; cooperate with collection of DNA samples; prior to release, agree to adhere to the payment schedule for any unpaid fine imposed; and pay any remaining restitution and special assessment balances. 18 USC §3583(d). Courts also have relatively broad discretion to impose other conditions of supervised release to supplement the mandatory conditions. For example, § 3583 has adopted the statutory list of conditions for probation listed in USC § 3563(b)(2), which includes conditions such as "support his dependents and meet other family responsibilities;" "make restitution to a victim of the offense . . . ;" "work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;" "refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;" "refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance . . . ;" "undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;" and "reside in a specified place or area, or refrain from residing in a specified place or area[.]"

Petitioner argues that *McWhorter* is distinguishable because it involved a hearing at which a panel analyzed the reinstatement requirements under MCR 9.123(B), specifically (B)(6) and (B)(7).[6] Here, the petition for reinstatement was dismissed prior to a hearing, so it was not analyzed under these factors. Accordingly, petitioner seeks a remand and a hearing "on the merits" of whether he can meet MCR 9.123(B)'s standards for reinstatement. This argument is groundless. The only reason the panel and the Board decided McWhorter's case on the merits of MCR 9.123(B) is because the Court had not yet adopted the separate five-year waiting period announced in the appeal in that case. It would be futile, and inappropriate, to remand this matter to the hearing panel because the hearing panel could not even entertain the petition for reinstatement based upon *McWhorter, supra*.

Accordingly, we affirm the dismissal of the petition for reinstatement on the basis that, as a matter of law, petitioner is not eligible to petition for reinstatement under *McWhorter* until five years after the completion of his sentence and any period of parole or supervised release.[7]

Board members Michael B. Rizik, Jr., Linda S. Hotchkiss, MD, Rev. Dr. Louis Prues, Karen O'Donoghue, Michael S. Hohauser, Peter A. Smit, Linda M. Orlans, Alan Gershel, and Jason M. Turkish concur in this decision.

Supervised release has strict conditions and monitoring standards. Therefore, even if petitioner in the present case is on supervised release instead of parole once he is released from the custody of the BOP, he would still not be able to show he spent sufficient time outside the supervision of federal authorities; thus, it would not be possible for a hearing panel or the Attorney Discipline Board to determine the fitness of the applicant for reinstatement until five years from the date he is released from his term of "supervised release."

[6] MCR 9.123(B)(6) provides that an attorney petitioning for reinstatement must establish by clear and convincing evidence that "he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;" and under subsection (7), "taking into account all of the attorney's past conduct, including the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court."

[7] "When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning." *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998). See also *Washburn v Michailoff*, 240 Mich App 669; 613 NW2d 405 (2000) (an appellate court can affirm the trial court where it reached the right result, albeit for a different reason).