IN THE SUPREME COURT OF THE STATE OF OREGON

CONRAD R. ENGWEILER, Plaintiff, v. ROB PERSSON, Superintendent, Oregon State Correctional Institution, Defendant.	)	HABEAS CORPUS PROCEEDING S Ct S060793
CONRAD R. ENGWEILER, Petitioner, v. DEPARTMENT OF CORRECTIONS, Respondent.	)	CA A152455 SC S060854

BRIEF OF PLAINTIFF/PETITIONER,
CONRAD R. ENGWEILER

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PLAINTIFF'S BRIEF ON THE MERITS

Questions Presented

1) Does the doctrine of issue preclusion foreclose Superintendent Persson (the Superintendent) and the Department of Corrections (DOC) from asking this court to revisit its construction of ORS 421.121 (1989), in *State ex rel Engweiler v. Cook*, 340 Or 373, 133 P3d 904 (2006)?

2) If the answer to the first question presented is "no," is an inmate who is serving a life sentence for a crime committed on or after November 1, 1989, eligible for a reduction in his or her "term of incarceration" pursuant to ORS 421.121(1) (1989)?

3) If the answer to the first question presented is "no," does the phrase "term of incarceration" in ORS 421.121(1) (1989) mean the indeterminate life sentence imposed by the court or does it mean the amount of time that an inmate must spend in prison before the inmate is eligible for release from physical custody?

4) Are administrative rules that would deny eligibility for earned time for a remanded juvenile whose offense occurred on or after November 1, 1989, invalid?

5) Does the exit interview process authorized by ORS 144.125 apply to inmates who are to be released onto post-prison supervision?

6) If the exit interview process authorized by ORS 144.125 does apply to inmates who are to be released onto post-prison supervision, may DOC continue to incarcerate an inmate beyond his or her "term of incarceration" if the Board of Parole and Post-Prison Supervision declines to conduct an exit interview?

7) Is Engweiler entitled to immediate release from incarceration?

Plaintiff's Proposed Rules of Law

1) When parties to a proceeding have litigated an issue in a prior proceeding that culminated in a decision on that issue in the Oregon Supreme Court, the doctrine of issue preclusion forecloses the party against whom the issue was decided from re-litigating the issue.

2) Each inmate sentenced to the custody of DOC for a felony committed on or after November 1, 1989, is eligible to earn a reduction in his or her term of incarceration under ORS 421.121(1).

3) The phrase "term of incarceration" in ORS 421.121(1) means the amount of time that an inmate must spend in prison before the inmate is eligible for release from physical custody. ORS 421.121(1) makes no distinction between terms of incarceration that are established pursuant to the sentencing

guidelines grid and those established by the Board of Parole and Post-Prison Supervision (the Board).

4) DOC rules that would deny eligibility for earned time for a remanded juvenile whose offense occurred on or after November 1, 1989, violate ORS 421.121(1) (1989), and are therefore invalid.

5) By its express terms, ORS 144.125 applies to inmates who are to be released onto parole. It has no application to offenders serving sentences for crimes committed on or after November 1, 1989, because those offenders, if they are to be released, will be released to post-prison supervision.

6) The exit interview process authorized by ORS 144.125 is a discretionary function of the Board. DOC may not incarcerate an inmate beyond the expiration of that inmate's term of incarceration if the Board declines to conduct an exit interview prior to the expiration of the term of incarceration.

7) An inmate whose release date has elapsed is entitled to immediate release from physical custody.

Nature of the Actions

On March 20, 2012, the Board established Engweiler's projected release date in BAF No. 9. Using DOC's formula for calculating earned time under ORS 421.121(1) (1989), Engweiler asserts that he should have been released from physical custody on July 17, 2012. Case number S060793 is an original

jurisdiction *habeas corpus* case pursuant to Article I, section 23, and Article VII, section 2, of the Oregon Constitution, seeking to have this court require DOC to release him. A copy of Engweiler's Petition for Writ of Habeas Corpus is included in the Excerpt of Record at ER-47. On January 25, 2013, this court granted Engweiler's motion to waive Return and Replication requirements.

DOC has promulgated rules that could be construed to deprive an inmate convicted of a murder or aggravated murder committed on or after November 1, 1989, of eligibility for a reduction in his or her term of incarceration pursuant to ORS 421.121(1) (1989). Case number S060854 is a Rule Challenge case pursuant to ORS 183.400(1) seeking judicial determination of the validity of those rules. A copy of Engweiler's Petition for Judicial Determination of Validity of Rules is included in the Excerpt of Record at ER-1. On November 15, 2012, this court issued an Order Accepting Certified Appeal.

On January 25, 2013, this court issued an order consolidating the cases for briefing and oral argument.

Summary of Facts

On February 21, 1990, Engweiler raped and sodomized an acquaintance, then killed her to conceal his crimes. *Engweiler v. Board of Parole*, 343 Or 536, 543 n 7, 175 P3d 408 (2007) (*Engweiler V*); *State v. Engweiler*, 118 Or App 132, 134, 846 P2d 1163, *rev den* 317 Or 486 (1993) (*Engweiler I*). He was

15 years old at the time. *State ex rel Engweiler v. Felton*, 350 Or 592, 597, 260 P3d 448 (2011) (*Engweiler VII*).[1]

Engweiler was arrested on February 22, 1990, and was remanded to the circuit court for trial as an adult. (Exhibit 14, page 1, ¶ 3);[2] *State ex rel Juv. Dept. v. Engweiler*, 114 Or App 575, 577, 836 P2d 157 (1992). Engweiler was convicted of two counts of aggravated murder and other crimes. For the aggravated murder convictions, the trial court imposed a sentence of life imprisonment with a 30-year minimum period of incarceration. *Engweiler I*, 118 Or App at 134-36. Engweiler was delivered to the custody of the Department of Corrections (DOC) on April 10, 1991, and has remained in DOC custody since then. He has remained in the custody of the State of Oregon continuously since the date of his arrest in 1990. (Exhibit 3; Exhibit 14, page 1, ¶¶ 2-5).

The minimum period of incarceration violated of ORS 161.620 (1989), and so the Court of Appeals reversed the judgment and remanded his case to the

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[1] As this court noted in *Engweiler v. Felton*, 350 Or at 595 n 3, Engweiler has appeared in this court and the Court of Appeals several times, generating multiple published opinions. All of the cases stem from his single criminal episode and how the legal system has dealt with him since his arrest. For the sake of continuity and clarity, where possible, this brief will use the same convention is did this court in *Engweiler v. Felton* to identify the various cases. *Engweiler v. Felton* will be referred to as *Engweiler VII*.

[2] On January 25, 2013, this court granted Plaintiff's motion to admit 13 of the 14 documentary exhibits he submitted in support of his Memorandum in Support of Petition for Writ of Habeas Corpus. Copies of the admitted exhibits are included in the Excerpt of Record at ER-57 to ER-85.

circuit court for re-sentencing. On remand the circuit court imposed what this court has previously described as "the only sentencing option available [which] was life imprisonment with the possibility of release or parole." *Engweiler VII*, 350 Or at 610; *State ex rel Engweiler v. Cook*, 340 Or 373, 383, 133 P3d 904 (2006) (*Engweiler IV*).

Exhibit 1 is a copy of the judgment that the circuit court entered on remand in Engweiler's criminal case. Page 3 of the judgment indicates that two convictions for aggravated murder merged. Paragraph 13(a) on the same page indicates that the court imposed "A term of imprisonment for LIFE and a period of post-prison supervision for LIFE." (Capitals in original). The top right corner of each page of the four-page judgment bears the notation "SGL."

Since the date of his arrest, Engweiler has never been subject to any disciplinary proceeding, and he has fully complied with all DOC rules that define appropriate institutional behavior. (Exhibit 3; Exhibit 14, page 1, ¶¶ 3-5).

In June of 1999, the Board of Parole and Post-Prison Supervision (the Board) conducted a prison term hearing. Using a matrix that the Board had adopted earlier that year for juveniles convicted of aggravated murder, the Board imposed a 480-month prison term. *Engweiler IV*, 340 Or at 375. The 1999 matrix was part of a set of administrative rules known as the JAM (juvenile aggravated murder) rules. *Engweiler VII*, 350 Or at 595.

After the Board established the 480-month prison term pursuant to the JAM rules, Engweiler sought to compel DOC to credit his earned time against his "term of incarceration" under ORS 421.121 (1989). *Engweiler IV*, 340 Or at 375. In that case, Engweiler and DOC disputed the meaning of the phrase "term of incarceration" in ORS 421.121 (1989), which provided in part:

> "(1) Except as provided in chapter 1, Oregon Laws 1989 (Ballot Measure 4, 1988), each inmate sentenced to the custody of the department for felonies committed on or after November 1, 1989, shall be eligible for a reduction in the term of incarceration for appropriate institutional behavior, as defined by rule of the Department of Corrections.
>
> "(2) The maximum amount of time credits earned for appropriate institutional behavior shall not exceed 20 percent of the total term of incarceration in a Department of Corrections institution."

A copy of Engweiler's Brief on the Merits in *Engweiler IV* is included in the Appendix at App-1. The excerpt of record and appendix from that brief have been omitted from the copy of the brief that appears in the appendix to this brief. *See* ORAP 5.50(6) ("Omissions [to the excerpt of record], if not apparent, shall be noted"). The defendants in *Engweiler IV* were DOC Director Dave Cook and Charles Kliewer, the administrator of the Offender Information and Sentence Computation Agency (OISC). A copy of their brief in *Engweiler IV* is included in the Appendix at App-28.

The first question presented to this court by Engweiler in that case was:

> "Is an inmate who is serving a life sentence for a crime committed on or after November 1, 1989, eligible for a reduction in his or her 'term of incarceration' pursuant to ORS 421.121 (1)?"

(Relator's Brief at 1; App-6).

In support of his argument for a "yes" answer to that question, Engweiler first pointed to the text of ORS 421.121(1). After noting that the only exception in that provision did not apply to him, Engweiler argued that, "the express and unambiguous terms of ORS 421.121(1) make Relator eligible 'for a reduction in the term of incarceration for appropriate institutional behavior.'" (Relator's Brief at 13; App-18).

Engweiler then discussed the statutory context of ORS 421.121(1), observing that ORS 421.121(2) also used the phrase "term of incarceration," while contemporaneously enacted ORS 421.120, which applies to offenses committed before November 1, 1989, instead used the phrase "term of sentence." (Relator's Brief at 16-17; App-21 to App-22).

In a footnote, Engweiler indicated that a review of the legislative history to HB 2250, the bill that enacted ORS 421.121, did not discuss any exceptions to ORS 421.121, nor did it define the phrase "term of incarceration." (Relator's Brief at 13; App-18).

In their responding Brief on the Merits in *Engweiler IV*, defendants Cook and Kliewer consistently referred to themselves as "the state defendants." (Defendants' Brief at 1-2, 12; App-32 to App-33, App-43). They did not dispute that a person with a "term of incarceration" for a felony committed on or after November 1, 1989, was entitled to earn "a reduction in the term of incarceration for appropriate institutional behavior" under ORS 421.121(1).

The second question presented to this court by Engweiler in *Engweiler IV* was:

> "With respect to an inmate serving a life sentence for a crime committed on or after November 1, 1989, does the phrase 'term of incarceration' in ORS 421.12l(1) mean the 'sentence' that was imposed by the trial court, or does it mean the 'prison term' that was established by the Board of Parole and Post-Prison Supervision (the Board)?"

(Relator's Brief at 1; App-6).

Engweiler argued that the "prison term" imposed by the Board was synonymous with "term of incarceration" for the purposes of ORS 421.121. (Relator's Brief at 8-19 ; App-13 to App-24).

The state defendants argued that "'term of incarceration,' as used in ORS 421.121(1), means the incarcerative term that a court can or does impose, and not a term that is set by the Board." (Defendants' Brief at 6; App-37). This court rejected the state defendants' contention that a "term of incarceration" meant the "the incarcerative term that a court can or does impose" in the context of an indeterminate life sentence. *Engweiler IV*, 340 Or at 383

(Engweiler's sentence "did not establish the actual length of time that he was to be incarcerated").

With respect to the first question presented in *Engweiler IV*, this court stated:

> "we observe that there is no dispute concerning the following: (1) petitioner was 'sentenced to the custody of the Department of Corrections' for a felony committed after November 1, 1989; (2) ORS 421.121(1) applies to 'each inmate' so sentenced, subject only to an exception not applicable here; (3) ORS 421.121 contains no explicit exception for inmates convicted of any particular crimes, including aggravated murder, for inmates not sentenced under the sentencing guidelines, or for inmates sentenced to life imprisonment; and (4) the phrase 'each inmate * * * *shall be eligible* for a reduction in the term of incarceration' (emphasis added) indicates that DOC's duty to reduce the 'term of incarceration' is mandatory for each inmate who meets the criteria for such reductions elsewhere described in ORS 421.121."

Engweiler IV, 340 Or at 377-78 (emphasis in original).

With respect to the second question presented, this court agreed with Engweiler that his "term of incarceration" was something that the Board was responsible for establishing. However, it rejected his contention that his "prison term" under the JAM rules and a "term of incarceration" under ORS 421.121 were the same thing. *Engweiler IV*, 340 Or at 383-84. In reaching that conclusion, this court explained that the 480-month "prison term" meant only

that the Board would conduct a murder review hearing[3] at the conclusion of that term "and, if he is considered an appropriate candidate, the board will set a release date." *Id.* at 383.

This court held that:

> "'term of incarceration' refers to the amount of time that an inmate must spend in prison before the inmate is eligible for parole."

Engweiler IV, 340 Or at 380.

Because the Board was not a party to *Engweiler IV*, and Engweiler had therefore confined his mandamus proceeding "to the theory that he was entitled to have the credits deducted from his next hearing date," this court's construction of "term of incarceration" meant that, at that time, there was not yet any date against which Engweiler's earned time could be credited. *Id.*

In a set of related cases, Engweiler and inmate Sopher sought to invalidate the JAM rules and require the Board to establish their terms of incarceration. This court consolidated the cases. *Engweiler VII*, 350 Or at 592. This court concluded that the JAM rules were invalid, because a murder review

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[3] At the time, OAR 255-032-0005(4) (2000) provided:

> "Inmates, who were juveniles and waived to adult court pursuant to ORS 419C.340 through 419C.364, and were under the age of 17 years at the time of their crime(s), and were convicted of Aggravated Murder, per ORS 163.095, and whose crimes were committed after October 31, 1989 and prior to April 1, 1995, shall receive a prison term hearing. At the hearing, the Board shall set a review date consistent with the terms set forth in OAR 255-032-0011 rather than a projected parole release date."

hearing to "conver[t] of the prisoner's mandatory minimum sentence to life with the possibility of parole" would be "pointless" in the face of ORS 161.620. *Engweiler VII*, 350 Or at 612. This court agreed with Engweiler that ORS 144.120(1)(a) (1989) required the Board to conduct a hearing within Engweiler's first year of incarceration and set his initial release date unless the Board chose, pursuant to ORS 144.120(4) (1989), not to set a release date.[4]

On March 20, 2012, the Board conducted the prison term hearing required by ORS 144.120(1)(a) (1989). At the conclusion of that hearing, the Board issued Board Action Form (BAF) No. 9, in which it established February 22, 2018, as Engweiler's projected release date. This court has admitted a copy of BAF No. 9 as Exhibit 4. (ER-63).

On July 16, 2012, Engweiler sent a kyte[5] to OISC, indicating that, with credit for time served, his initial release date should be corrected to February 21, 2018. Engweiler, noting that he had "fully complied with DOC's rules defining appropriate institutional behavior during my entire prison term," indicated that, "I will have completed my incarceration term as of July 17, 2012, and should be released on that date." (Exhibit 5; ER-67). According to Engweiler's calculations, the July 17, 2012, date reflected 2045.4 days of credit,

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[4] In a footnote, this court observed that it was unnecessary to determine whether the Board could invoke ORS 144.120(4) (1989) in a case involving a juvenile. *Engweiler VII*, 350 Or at 621 n 17.

[5] An Inmate Communication Form is formally referred to as a "CD 214" but is "commonly referred to as a 'kyte or kite.'" OAR 291-006-0011(6).

as determined using DOC's own formula for Earned Time Credit Calculation, which has been admitted as Exhibit 2. (Exhibit 14, page 2, ¶ 7; Memorandum in Support of Petition for Writ of Habeas Corpus at 8-9). The date also reflects consideration of pre-sentence incarceration, to which Engweiler also contended he was entitled to receive credit. (Memorandum in Support of Petition for Writ of Habeas Corpus at 8 n 4).

On July 18, 2012, Engweiler sent a kyte to OISC counselor Beal, thanking her for meeting with him and confirming that he had remained in full compliance with DOC rules from the date indicated in Exhibit 3. Exhibit 3 is a memo from a counselor named Merrell. It is dated April 9, 2008, and confirms that Engweiler had been in full compliance with DOC rules from the date he entered into DOC custody, which was April 10, 1991.

On July 19, 2012, Engweiler submitted a grievance form to OISC prison term analyst Tim Welsh. This court has admitted a copy of that grievance form as Exhibit 7. (ER-69). In the grievance form, Engweiler indicated the action he wanted taken as:

> "I would ask for earned time credit to be applied, for a full 20% reduction to be made to my term of incarceration and my release date to be set @ July 17, 2012, and for release to post-prison supervision as of that date. If OISC disputes my credit calculations, I would request a hearing & other due process."

On August 9, 2012, OISC issued its calculation of Engweiler's earned time. According to OISC's calculations, Engweiler earned a total of 1929.75

days, none of which had ever been retracted. This court has admitted a copy of OISC's calculation as Exhibit 8. (ER-70).

On July 21, 2012, Engweiler sent a kyte to Janet Worley, the DOC Rule Coordinator. (ER-7). Engweiler told Worley:

> "I was recently informed that the OISC unit is relying on a 'policy' that precludes earned time credits under ORS 421.121 (1989) from applying to juvenile aggravated murderers (inmates) who were sentenced to life imprisonment for crimes they committed after November 1, 1989."

Engweiler asked for a copy of the policy, if it existed, because it wasn't available in the Oregon State Correctional Institute (OSCI) law library. On September 7, 2012, DOC gave Engweiler 13 pages from what appear now as Item 28 and Item 29 in the Judicial Review Record (the Record) supplied by the Department of Justice. (ER-32 to ER-44; Record at 134-48). The Department of Justice identifies Item 28 as "Chapter 11-- Crime Specific -- Section 1 (2/9/09)" and Item 29 as "Chapter 13 -- Earned Time -- Section 1 (6/30/11)" of the OISC Manual. (Record Index).

On September 4, 2012, prison term analyst Welsh responded to Engweiler's grievance. This court has admitted a copy of Mr. Welsh's response as Exhibit 9. (ER-77). In his response, Welsh stated:

> "It is DOC policy as reflected in Oregon Administrative Rule 291-097-0005(3)(e) to not calculate earned time for inmates serving life sentences. Per statute, the Board of Parole and Post Prison Supervision establishes the parole release dates for inmates serving life sentences and they have set a parole release date of February 22, 2018."

On September 14, 2012, OISC issued a new calculation of Engweiler's earned time. According to the new calculation, Engweiler earned a total of 1676.50 days, none of which had ever been retracted. OISC gave no explanation why its earned time calculation was different than it had been on August 9, 2012. This court has admitted a copy of OISC's September 14, 2012, calculation as Exhibit 10. (ER-78).

Summary of Arguments

1) Engweiler and the State have previously litigated in this court the meaning of ORS 421.121 (1989) and how it applies to him. The doctrine of issue preclusion forecloses the State from asking this court to reconsider its holdings in *Engweiler IV*.

2) Even if the State were not foreclosed from asking this court to revisit its construction of ORS 421.121 (1989), the State does not provide any good reason to do so. This court considered the meaning of the statute in the light of the statute's text, context and legislative history. There is no reason for this court to revisit its holdings in *Engweiler IV*.

3) Even if this court elects to reconsider its holdings in *Engweiler IV*, the text, context and legislative history still support this court's original conclusions.

4) ORS 421.121(1) (1989), makes each person sentenced to DOC custody for a felony committed on or after November 1, 1989, eligible for a

reduction in his or her term of incarceration. Regardless of whether an offender's term of incarceration is established by the sentencing court under the felony sentencing guidelines grid or by the Board of Parole and Post-Prison Supervision, any administrative rule that conflicts with ORS 421.121 (1989) is invalid.

5) The exit interview process authorized by ORS 144.125 applies only to a contemplated release onto parole. The statute uses the word "parole" nine times and does not use the phrase "post-prison supervision" once. The legislature amended ORS 144.125 in the same bill in which it adopted the guidelines and has amended it three times since then. This court should not insert the phrase "post-prison supervision" into ORS 144.125 when the legislature has chosen repeatedly to omit it.

6) Even if ORS 144.125 could be construed as applying to guidelines sentences, the Board's function under that statute is discretionary. DOC cannot be foreclosed from releasing an inmate at the expiration of his or her term of incarceration simply because the Board has chosen not to conduct an exit interview.

7) ORS 421.121(1) (1989) applies to Engweiler. Once the Board established his projected release date, Engweiler then had a date under ORS 421.121 (1989) against which his earned time could be credited. DOC has not disputed Engweiler's contention that, if ORS 421.121(1) (1989) applies to him,

he is entitled to a full 20% reduction in his term of incarceration. Because Engweiler's term of incarceration has elapsed, DOC must release him immediately from physical custody, regardless of whether ORS 144.125 could have been applied to him.

Arguments

I. Introduction

Engweiler committed aggravated murder on February 21, 1990. He was arrested for that crime the next day, tried as an adult, convicted and delivered to the custody of DOC on April 10, 1991.

On March 20, 2012, the Board of Parole and Post-Prison Supervision (the Board) belatedly conducted a hearing pursuant to ORS 144.120(1)(a) (1989), after being ordered to do so by this court. At the conclusion of that hearing, the Board established February 22, 2018, as Engweiler's projected release date.

At the time Engweiler committed his crime, ORS 421.121 (1989) provided, in part:

> "Except as provided in chapter 1, Oregon Laws 1989 (Ballot Measure 4, 1988), each inmate sentenced to the custody of the department for felonies committed on or after November 1, 1989, shall be eligible for a reduction in the term of incarceration for appropriate institutional behavior, as defined by rule of the Department of Corrections.
>
> "(2) The maximum amount of time credits earned for appropriate institutional behavior shall not exceed 20 percent of the total term of incarceration in a Department of Corrections institution."

At Engweiler's request, on August 9, 2012, OISC calculated Engweiler's earned time to be 1929.75 days. When added to his credit for time served, Engweiler's earned time meant that he should have been released from physical custody on July 17, 2012. To date, Engweiler remains in physical custody at the Oregon State Correctional Institute (OSCI), a facility within the Oregon Department of Corrections (DOC).

On December 27, 2012, this court issued an order to Defendant Persson (the Superintendent), to show cause why a writ of habeas corpus should not be issued. The Superintendent submitted his response on January 10, 2013.

In that response, the Superintendent asserted that Engweiler is not entitled to earned time under ORS 421.121. (Defendant's Response to Order to Show Cause at 5-10). The bases for that contention were two-fold. First, the Superintendent asserted that this court's opinion in *Engweiler IV* "is not binding on this court." (Defendant's Response at 6). Second, the Superintendent asserted that *Engweiler IV* "is incorrect. Therefore, this court should not follow it." (Defendant's Response at 8).

Next, the Superintendent asserted that, even if this court is bound by its own legally correct opinion, Engweiler was not entitled to release on July 17, 2012, because:

"under ORS 144.125, the board has the authority to hold an exit

> interview prior to releasing 'any prisoner' -- and that includes [Engweiler]."

(Defendant's Response at 18).

Contrary to the Superintendent's assertions, this court's holdings in *Engweiler IV* were not *dicta*. Consequently, this court "may consider itself bound to follow [its] prior construction [of ORS 421.121] as a matter of *stare decisis*." *Halperin v. Pitts*, 352 Or 482, 492, 287 P3d 1069 (2012). As the proponent of a departure from precedent, the Superintendent "must assume responsibility for affirmatively persuading us that we should abandon that precedent." *State v. Hemenway*, 353 Or 129, 137, ___ P3d ___ (2013) (quoting *State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005)).

As will be explained below, the Superintendent cannot sustain his burden as the proponent of abandoning precedent. Any rule or policy of DOC that is not consistent with ORS 421.121 is invalid.

Because Engweiler's release from physical custody will be onto post-prison supervision and not parole, ORS 144.125 does not apply to him. Even if ORS 144.125 could have been applied to Engweiler, the Board's authority under that statute to conduct an exit interview and defer an inmate's release date is discretionary. The Board did not conduct an exit interview prior to the expiration of Engweiler's term of incarceration.

Engweiler's continued incarceration is unlawful, and he is entitled to immediate release pursuant to Article I, section 23, and Article VII, section 2, of the Oregon Constitution, and ORS 34.310.

II. ORS 421.121(1) (1989) and Engweiler's Term of Incarceration

A. Issue Preclusion

DOC's administrative rules regarding appropriate institutional behavior encompass everything from "major misconduct"[6] to such minutia as a proscription against "misusing food"[7] and ensuring that an inmate's fingernails are "neatly trimmed and clean."[8] In the nearly 22 years that Conrad Engweiler has been in the custody of the Department of Corrections, he has not received a single disciplinary write-up.

During that time Engweiler has litigated virtually endlessly to require the State to impose a lawful sentence and to establish a lawful term of incarceration, and to then permit him to go home after successfully completing that term of incarceration.[9] That litigation has produced no fewer than ten published opinions between this court and the Court of Appeals. As this court

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[6] OAR 291-097-0020; OAR 291-105-0069.

[7] OAR 291-083-0010(1).

[8] OAR 291-123-0015(1)(b).

[9] The Appellate Case Management System (ACMS) indicates that Engweiler filed his notice of appeal in *Engweiler I* on May 7, 1991, less than a month after he entered into DOC custody.

observed in *Engweiler VII*, "this court is not writing on a clean slate." *Engweiler VII*, 350 Or at 607.

And yet, here we are again.

This court has described the concept of issue preclusion as "a jurisprudential rule that promotes judicial efficiency." *Barackman v. Anderson*, 338 Or 365, 368, 109 P3d 370 (2005). This court has long recognized that issue preclusion promotes "the public interest in the finality of judgments." *State Farm v. Century Home*, 275 Or 97, 107, 550 P2d 1185 (1975) (quoting *In re Robert Neil Gygi*, 273 Or 443, 541 P2d 1392 (1975)). That interest "would obviously be ill-served by refusing to give effect to a prior determination on the hypothetical possibility of a contrary decision if the case were continuously retried." *Id.* at 108. The doctrine of issue preclusion applies with equal force to questions of fact and questions of law. *Drews v. EBI Companies*, 310 Or 134, 140, 795 P2d 531 (1990). The interest in finality of judgments means that issue preclusion is appropriate even if the previous ruling was erroneous. *Ram Technical Services, Inc. v. Koresko*, 346 Or 215, 228, 208 P3d 950 (2009).

The elements of issue preclusion are:

> "(1) the issue in the two proceedings is identical; (2) the issue actually was litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a

> party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which this court will give preclusive effect."

Barackman, 338 Or at 368 (quoting *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 862 P2d 1293 (1993); internal punctuation omitted).

The question of whether "an inmate who is serving a life sentence for a crime committed on or after November 1, 1989, [is] eligible for a reduction in his or her 'term of incarceration' pursuant to ORS 421.121(1)" was the first question presented to this court in *Engweiler IV*. (Relator's Brief at 1; App-6).[10] As outlined in the Summary of Facts above, Engweiler thoroughly examined the text, context and legislative history of ORS 421.121 in support of a "yes" answer to that question. It was the central issue in that case, and it was actually litigated. This court's affirmative answer to that question made it necessary for this court to also address the question of what the phrase "term of incarceration" in ORS 421.121 means.

There is no question that the state defendants had a full and fair opportunity to be heard on both issues. Defendant Persson is the superintendent of the Oregon State Correctional Institute, a DOC facility. Defendant Cook in *Engweiler IV* was the director of DOC. Defendant Kliewer was the administrator of OISC. It can hardly be gainsaid that the Superintendent and DOC are not in privity with the state defendants in *Engweiler IV*. *Kellas v.*

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[10] It was the second question listed in his petition for review in that case.

Dept. of Corrections, 341 Or 471, 475, 145 P3d 139 (2006) (identifying DOC and the Criminal Justice Commission as "collectively, the state"). Likewise, there shouldn't be much doubt that a proceeding in the highest court in this state is the type of proceeding to which preclusive effect should be given. *Halperin*, 352 Or at 492.

The construction of ORS 421.121(1989) and its application to Engweiler have been litigated to conclusion in this court. The State should not be heard now to complain that it was on the losing side of what it now contends is incorrect *dictum*.

B. *Stare Decisis*

As discussed in the preceding section, the first question presented to this court in *Engweiler IV* was whether "an inmate who is serving a life sentence for a crime committed on or after November 1, 1989, eligible for a reduction in his or her 'term of incarceration' pursuant to ORS 421.121(1)." In response to that question, this court answered:

> "there is no dispute concerning the following: **(1) petitioner was 'sentenced to the custody of the Department of Corrections' for a felony committed after November 1, 1989; (2) ORS 421.121 (1) applies to 'each inmate' so sentenced, subject only to an exception not applicable here**; (3) ORS 421.121 contains no explicit exception for inmates convicted of any particular crimes, including aggravated murder, for inmates not sentenced under the sentencing guidelines, or for inmates sentenced to life imprisonment; and (4) the phrase 'each inmate * * * *shall be eligible* for a reduction in the term of incarceration' (emphasis added) indicates that DOC's duty to reduce the 'term of

> incarceration' is mandatory for each inmate who meets the criteria for such reductions elsewhere described in ORS 421.121."

Engweiler IV, 340 Or at 377-78 (italics in original; bold emphasis added).

Given that context, Engweiler is simply at a loss to explain the Superintendent's contention this court's answer to the first question presented *Engweiler IV* was *dictum*. Having answered Engweiler's first question in the affirmative, this court went on to explain that, in the context of the mandamus proceeding initiated by Engweiler against DOC, it was not yet possible to credit his earned time against his 'term of incarceration,' because this court disagreed with Engweiler about what that phrase meant. This court indicated that DOC could not credit Engweiler with his earned time until the Board, which was not a party to that proceeding, established his term of incarceration. Consequently, this court's construction of the phrase "term of incarceration" was not "something said in passing," but was instead an explanation that was "necessary to the decision." *Halperin*, 352 Or at 492 (quoting *Black's Law Dictionary* (8th ed 2004), for the definition of *obiter dictum*).

As the parties seeking to have this court overturn precedent, the Superintendent and DOC bear the burden of persuading this court not only that it was wrong in *Engweiler IV*, but that is should revisit the issues decided in that case. *Hemenway*, 353 Or 137. The Superintendent and DOC cannot meet that burden in this case.

In the constitutional context, this court has indicated that it would reconsider precedent when "the rule was not formulated by means of the appropriate paradigm or some suitable substitute, and whether the application of the correct paradigm would confirm that the challenged constitutional rule was incorrect." *Hazell v. Brown*, 352 Or 455, 478, 287 P3d 1079 (2012). The same standards apply when determining whether to reconsider a prior construction of a statute:

> "when we 'failed to apply our usual framework for decision or adequately analyze the controlling issue,' we must be open to reconsidering earlier case law."

Ass'n of Unit Owners of Timbercrest Condos. v. Warren, 352 Or 583, 598, 288 P3d 958 (2012) (quoting *Farmers Ins. Co. v. Mowry*, 350 Or 686, 261 P3d 1 (2011)).

This court's "usual framework" for construing statutes was articulated in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), then updated in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), to account for the legislative's 2001 amendment to ORS 174.020.[11] Although ORS 174.020 may

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[11] ORS 174.020 (2001) provides:

> "(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.
>
> "(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.
>
> "(2) When a general and particular provision are inconsistent, the latter is paramount to the former so that (cont.)

permit a court to examine the legislative history to a statute without a prerequisite textual ambiguity, the text and context of a statute remain the best evidence of what the legislature intended. *Polacek and Polacek*, 349 Or 278, 284, 243 P3d 1190 (2010) (citing *Gaines*).

In his Brief on the Merits in *Engweiler IV*, Engweiler addressed the text, context and legislative history to ORS 421.121 (1989). Engweiler specifically addressed the 2001 amendments to ORS 174.020. (Relator's Brief at 10-11; App-15 to App-16). Engweiler then asserted:

> "Whatever the meaning of the phrase 'term of incarceration' may be, ORS 421.12l(1) provides that 'each inmate sentenced to the custody of the Department of Corrections for felonies committed on or after November 1, 1989, shall be eligible for a reduction' thereof. (Emphasis added)."

(Relator's Brief at 11; App-16; emphasis in brief).

Engweiler then proceeded to explain that the plain meaning of the word "each" in ORS 421.121(1) meant that it applied to "EVERYBODY" who was sentenced to DOC for a felony committed on or after November 1, 1989, with the express exception of "one and only one [exception] in the text of the statute." (Relator's Brief at 11-12; App-16 to App-17) (quoting *Webster's*

> a particular intent controls a general intent that is inconsistent with the particular intent.
>
> "(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate."

Third New Int'l Dictionary (unabridged ed 1993) for the definition of "each"). Engweiler discussed how contemporaneously enacted ORS 421.120 (1989) provided context for interpreting ORS 421.121 (1989), in that it dealt with felonies committed before November 1, 1989, and it used the term "sentence" instead of "term of incarceration." (Relator's Brief at 17-18; App-22 to App-23). Engweiler also noted that, "Nothing in the legislative history [to HB 2250] discussed exceptions to ORS 421.12l(1)" (Relator's Brief at 13 n 9; App-18).

In *Engweiler IV*, both Engweiler and the state defendants thoroughly discussed their contentions regarding the meaning of the phrase "term of incarceration" in ORS 421.121(1) (1989) in terms of text and context. In addition, Engweiler noted that the legislative history to HB 2250 contained "no discussion of the meaning of the phrase 'term of incarceration.'" (Relator's Brief at 13 n 9; App-18).

The Superintendent calls on this court to revisit its holdings that ORS 421.121(1) applies to persons, such as Engweiler, who were sentenced to life imprisonment for felonies committed on or after November 1, 1989, and that the "term of incarceration" for someone sentenced to life imprisonment is established by the Board and not the court. In doing so, the Superintendent contends that this court "failed to consider relevant statutory context, and did

not consider legislative history." (Defendant's Response to Order to Show Cause at 8). The Superintendent is incorrect.

This court was presented with text, context and legislative history-based arguments in *Engweiler IV* -- the "usual framework" for statutory construction -- and then it construed ORS 421.121(1) (1989). This court should decline the State's invitation to do so again.

C. Revisiting the Construction of ORS 421.121(1) (1989)

1. ORS 421.121 Applies to Engweiler

In the event this court does accept the State's invitation to construe ORS 421.121(1) (1989) anew, Engweiler notes that, prior to the 2001 amendments to ORS 174.020, this court would not examine legislative history if the text and context of a statute yielded an unambiguous meaning. *E.g., State v. Chakerian*, 325 Or 370, 376-77, 938 P2d 756 (1997). Now, this court may "give the weight to the legislative history that the court considers to be appropriate." ORS 174.020(3) (2001).

Engweiler questions whether ORS 174.020 (2001) should be applied in the construction of a statute that was enacted prior to the effective date of the 2001 amendments. The task of this court under the current version of ORS 174.020 is the same as it was under the old version -- to discern what the legislature intended. It would be incongruous to apply ORS 174.020 (2001) to construe ORS 421.121(1) (1989) if doing so had any possibility of yielding a

different result than would the version of ORS 174.020 that was in effect when the legislature enacted ORS 421.121(1). Whatever it was that the legislature intended in 1989, that intent did not change in 2001 when the legislature amended ORS 174.020. *Cf. DeFazio v. WPPSS*, 296 Or 550, 561, 679 P2d 1316 (1984) ("views legislators have of existing law may shed light on a new enactment, but it is of no weight in interpreting a law enacted by their predecessors").

Even if ORS 174.020 (2001) is employed in the construction of ORS 421.121(1), the first step in that construction is still to examine the statutory text and its context. *Gaines*, 346 Or at 171. In *Gaines*, this court observed that, "Only the text of a statute receives the consideration and approval of a majority of the members of the legislature, as required to have the effect of law." *Id.* Consequently, the text of a statute within its statutory context remains the best evidence of what the legislature intended. *Polacek*, 349 Or at 284.

Though an ambiguity is no longer required to permit this court to examine legislative history, "a party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it." *Gaines*, 346 Or at 172. As this court subsequently explained in *Halperin*:

> "It is one thing to resort to legislative history to resolve an ambiguity in statutory phrasing * * *. It is another thing entirely, however, to resort to legislative history as a justification for

> inserting wording in a statute that the legislature, by choice or oversight, did not include."

Halperin, 352 Or at 495.

Here, Engweiler reiterates -- the legislature inserted one and only one exception into ORS 421.121(1) (1989). The single exception in ORS 421.121(1) (1989) was for persons subject to Measure 4, which had been enacted in 1988. Measure 4 was codified at ORS 137.635. 1989 Or Laws, ch 1, § 1.

The Superintendent's construction of ORS 421.121(1) (1989) would insert another exception to that provision -- one for persons sentenced to life imprisonment for felonies committed on or after November 1, 1989. In support of that contention, the Superintendent points to the felony sentencing guidelines as context for his proposition that a life sentence is not a guidelines sentence and the legislature only "intended to authorize a reduction in a definite term of imprisonment set pursuant to the sentencing guidelines." (Defendant's Response at 9-11).

The Superintendent's contention is wrong for at least two reasons. The text of ORS 421.121(1) (1989) still has only one exception in it. Whether a life sentence is a guidelines sentence or not, the express inclusion of one and only one exception to ORS 421.121(1) (1989) indicates that the legislature did not implicitly intend any additional unstated exceptions. Just as legislative history may not be used to insert wording into a statute that the legislature omitted, the

same must be true with context. *Gaines*, 346 Or at 171 (it is only the actual text of a statute that received the consideration and approval of the legislature).

Though context and legislative history may not serve to insert any additional exception into ORS 421.121(1) (1989), context can serve to confirm that the legislature did not intend wholesale exclusion of life sentences from ORS 421.121(1) (1989).

If the court looks at ORS 137.635, the one exception that the legislature did include in ORS 421.121(1) (1989), it provides:

> **"(1) When, in the case of a felony described in subsection (2) of this section, a court sentences a convicted defendant who has previously been convicted of any felony designated in subsection (2) of this section**, the sentence shall not be an indeterminate sentence to which the defendant otherwise would be subject under ORS 137.120, but, unless it imposes a death penalty under ORS 163.105, the court shall impose a determinate sentence, the length of which the court shall determine, to the custody of the Department of Corrections. Any mandatory minimum sentence otherwise provided by law shall apply. The sentence shall not exceed the maximum sentence otherwise provided by law in such cases. The convicted defendant who is subject to this section shall not be eligible for probation. The convicted defendant shall serve the entire sentence imposed by the court and shall not, during the service of such a sentence, be eligible for parole or any form of temporary leave from custody. **The person shall not be eligible for any reduction in sentence pursuant to ORS 421.120 or for any reduction in term of incarceration pursuant to ORS 421.121.**
>
> **"(2) Felonies to which subsection (1) of this section applies include and are limited to:**
>
> **"(a) Murder, as defined in ORS 163.115, and any aggravated form thereof.**

> "(b) Manslaughter in the first degree, as defined in ORS 163.118.
>
> "(c) Assault in the first degree, as defined in ORS 163.185.
>
> "(d) Kidnapping in the first degree, as defined in ORS 163.235.
>
> "(e) Rape in the first degree, as defined in ORS 163.375.
>
> "(f) Sodomy in the first degree, as defined in ORS 163.405.
>
> "(g) Unlawful sexual penetration in the first degree, as defined in ORS 163.411.
>
> "(h) Burglary in the first degree, as defined in ORS 164.225.
>
> "(i) Arson in the first degree, as defined in ORS 164.325.
>
> "(j) Robbery in the first degree, as defined in ORS 164.415.
>
> "(3) When the court imposes a sentence under this section, the court shall indicate in the judgment that the defendant is subject to this section."

(Emphasis added).

The legislature could not possibly have been more clear. Murder and aggravated murder are among the offenses to which ORS 137.635 applies, but only in cases in which the person has previously been convicted of an offense listed in ORS 137.635(2). Then and only then are the crimes of murder and aggravated murder exempt from the requirements of ORS 421.121.

The second reason that the Superintendent's argument fails is that the Superintendent incorrectly assumes that a sentence for a murder or an aggravated murder committed on or after November 1, 1989, is independent of the felony sentencing guidelines. That assumption is understandable in light of

the use of the pre-guidelines term "parole" by this court, by the State and by the undersigned attorney in the course of prior litigation between Engweiler and the State. For example, in *Engweiler v. Board of Parole*, 340 Or 361, 366, 133 P3d 910 (2006) (*Engweiler III*), this court referred to BAF No. 1 as an order "*indirectly* 'related' to the granting of **parole**." (italics in original; bold emphasis added).

Here, it should be noted that ORS 161.620 (1989), which played a central role in *Engweiler I* and *Engweiler VII*, provided:

> "Notwithstanding any other provision of law, a sentence imposed upon any person remanded from the juvenile court under ORS 419.533 shall not include any sentence of death or life imprisonment without the possibility of **release or parole** nor imposition of any mandatory minimum sentence, except that a mandatory minimum sentence under ORS 163.105(1)(c) shall be imposed where the person was 17 years of age at the time of the offense."

1989 Or Laws, ch 720, § 3 (emphasis added).

HB 3303, which enacted the 1989 amendment to ORS 161.620, was signed by the governor on July 19, 1989, and filed by the Secretary of State the following day under an emergency clause. 1989 Or Laws, ch 720, § 4. Considering that it was enacted before the felony sentencing guidelines were adopted, it is understandable that the legislature retained the word "parole" in ORS 161.620 (1989). For sentences imposed for felonies committed on or after November 1, 1989, release from DOC custody is to post-prison supervision, not parole.

When the legislature adopted HB 2250, the bill that approved the felony sentencing guidelines, it added what is codified as subsection (2) of ORS 137.120(2). 1989 Or Laws, ch 790, § 11. It provides:

> "Whenever any person is convicted of a felony committed on or after November 1, 1989, the court shall impose sentence in accordance with rules of the Oregon Criminal Justice Commission."

The "rules of the Oregon Criminal Justice Commission" are, of course, the sentencing guidelines. ORS 137.669 ("guidelines adopted under ORS 137.667, together with any amendments or repealing provisions, shall control the sentences for all crimes committed after the effective date of such guidelines"); *State v. Cloutier*, 351 Or 68, 90, 261 P3d 1234 (2011) (1989); *State v. Dilts*, 337 Or 645, 651-52, 103 P3d 95 (2004).

Among the rules contained in the sentencing guidelines is OAR 213-003-0001(14), which defines "person felonies" for the purposes of the guidelines. It includes murder, felony murder and aggravated murder. OAR 213-004-0003 provides:

> "The offense of Aggravated Murder is not ranked in the Crime Seriousness Scale because the sentence is set by statute as death or mandatory life imprisonment (ORS 163.095-163.105)."

Although the sentence of life imprisonment is set by statute:

> "The term of post-prison supervision for an offender serving a sentence for murder or aggravated murder shall be for the remainder of the offender's life, unless the Board finds a shorter

> term appropriate. In no case shall the term of supervision be less than three years."

OAR 213-005-0004(1).

The term of post-prison supervision provided by OAR 213-005-0004(1) is in accordance with ORS 137.010(10), which provides, in part:

> "A judgment of conviction that includes a term of imprisonment for a felony committed on or after November 1, 1989, shall state the length of incarceration and the length of post-prison supervision."

In short, the legislature clearly understood that post-prison supervision supplanted parole for all felonies committed on or after November 1, 1989. The legislature approved the guidelines in 1989, "giving them the authority of statutory law." *State v. Langdon*, 330 Or 72, 74, 999 P2d 1127 (2000). For any felony committed on or after November 1, 1989, "release or parole" from DOC custody in ORS 161.620 (1989) was necessarily restricted to "release" onto post-prison supervision.

Engweiler acknowledges that ORS 144.120(1)(a) (1989), which required the Board to conduct a prison term hearing within Engweiler's first year of DOC custody,[12] referred to the hearing as a "parole hearing." Although the legislature enacted SB 254 to amend ORS 144.120 in 1989, the phrase "parole hearing" in the statute pre-dated the 1989 amendments. 1989 Or Laws, ch 589, § 3. SB 254 was signed by the governor on July 1, 1989, and filed by the

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[12] *Engweiler VII*, 350 Or at 628.

Secretary of State two days later. HB 2250, which adopted the guidelines and enacted ORS 421.121, was adopted later in the month. It contained an emergency clause and was filed by the Secretary of State on July 25, 1989. 1989, Or Laws, ch 790, § 136.

Because SB 254 was enacted before HB 2250, it would have made no sense to use the phrase "post-prison supervision" in SB 254. When the legislature subsequently passed HB 2250, the word "parole" in ORS 144.120(1)(a) (1989) became an artifact, insofar as it related to an offense committed on or after November 1, 1989. As discussed above, the legislature fully intended the sentence for any releasable murder or aggravated murder committed on or after that date to include a lifetime term of post-prison supervision under the sentencing guidelines.[13]

It is against this backdrop that the Superintendent asks this court to consider history to SB 1073 that was supplied by the Criminal Justice Council (CJC) in the form of a documentary exhibit. (Defendant's Response at 13). In a footnote, the Superintendent acknowledges that SB 1073 was not even the bill that enacted ORS 421.121(1) (1989). Given that fact, and the text and context

[13] Obviously, neither parole nor post-prison supervision would have any application in a case in which the defendant was sentenced to death or life with no possibility of parole. "True life" was enacted by HB 3303, which was signed by the governor on July 19, 1989, and filed by the Secretary of State the next day. 1989 Or Laws, ch 720.

of ORS 421.121(1) (1989), "the weight to [that] legislative history that the court considers to be appropriate"[14] should be little or none.

Even if this court were to give consideration to CJC's "explan[ation] that the current parole function would need to be retained for offenders convicted of Aggravated Murder because that crime is excluded from the guidelines system,"[15] that says nothing about excluding non-guidelines sentences from the ambit of ORS 421.121(1). It simply says that, in CJC's view, the Board would retain some authority to make decisions that affect when an inmate with a life sentence will be released from physical custody.

Engweiler had no prior conviction for any offense listed in ORS 137.635(2). His offense is not one that is exempt from ORS 421.121(1) (1989).

2. Engweiler's Term of Incarceration

In *Engweiler IV*, Engweiler argued that the Board had established his "term of incarceration" for the purposes of ORS 421.121(1) (1989), when it established his 480-month "prison term" under the JAM rules. Considering that this court has since invalidated the JAM rules and that the Board subsequently set a projected release date in BAF No. 9, Engweiler does not resurrect that argument.

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[14] ORS 174.020(3).

[15] Defendant's Response at 13 (internal punctuation omitted).

That leaves this court with two alternatives. First, this court could find its own reasoning in *Engweiler IV* to be persuasive. In that case, it concluded that, "the phrase 'term of incarceration' refers to the amount of time that an inmate must spend in prison before the inmate is eligible for parole." *Engweiler IV*, 340 Or at 380. Aside from the fact that a post-1989 offender is released to post-prison supervision instead of parole, adhering to precedent provides a workable system, whereby an inmate's earned time has an actual date against which it can be credited.

The second alternative would be to adopt the construction of "term of incarceration" that the state defendants proffered in *Engweiler IV*. Under their construction, "term of incarceration" would mean "the incarcerative term that a court can or does impose, and not a term that is set by the Board." The state defendants did not proffer any explanation how and when earned time under ORS 421.121(1) (1989) would actually inure to the inmate's benefit.

As the party seeking to overturn precedent, the Superintendent bears the burden of persuading this court that its prior construction was wrong. That construction would leave an inmate with a life sentence without a date against which his earned time could be credited. This court should decline the invitation to trade a workable construction for an unworkable one.

III. The Rule Challenges

The Department of Corrections (DOC) is an entity created by the Oregon legislature. ORS 423.020(1). Among its functions are the responsibility to:

> "(b) Carry out legally mandated sanctions for the punishment of persons committed to its jurisdiction by the courts of this state;
>
> "(c) Exercise custody over those persons sentenced to a period of incarceration until such time as a lawful release authority authorizes their release."

ORS 423.020(1)(b)-(c).

DOC's enumerated "duties, functions and powers in ORS 423.020 [are] not exclusive." ORS 423.030. The director of DOC the authority to make rules "for the government and administration of the department." ORS 423.075(5)(d).

Like any agency, that rulemaking authority must comport with the authority vested to the agency by law. ORS 183.400(4)(b); *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 141-42, 903 P2d 351 (1995). Consequently, any DOC rule that is inconsistent with the requirements of ORS 421.121 or ORS 423.020 would be invalid.

ORS 421.121(5) specifically requires DOC to "adopt rules pursuant to the rulemaking provisions of ORS chapter 183 to establish a process for granting, retracting and restoring the time credits earned by the offender as allowed in subsections (1) to (4) of this section." As discussed above, and as

previously held by this court -- that includes offenders, like Engweiler, who committed murder or aggravated murder on or after November 1, 1989.

DOC has promulgated two sets of administrative rules that relate to its obligations under ORS 421.121 -- Division 97 and Division 100, within Chapter 291 of the Oregon Administrative Rules. *See* OAR 291-097-0005(2) (calculating, applying, retracting and restoring earned time); OAR 291-100-0005(2) (computation of sentences).

OAR 291-097-0005(2)(a) provides:

> "It is the policy of the Department of Corrections that inmates serving sentences for crimes committed on or after November 1, 1989 (sentencing guidelines), may be considered for a reduction in their term of incarceration pursuant to ORS 421.121, as set forth in these rules."

As discussed above, any felony committed on or after November 1, 1989, is subject to ORS 421.121(1), if the offender was "sentenced to the custody of the Department of Corrections." That is true, regardless of whether the "term of incarceration" is established by the sentencing court under the felony sentencing guidelines grid or by the Board after conducting a hearing required by ORS 144.120(1)(a). The statute makes no distinction between guidelines and non-guidelines sentences, and for good reason. Even life sentences for murder and aggravated murder are related to the guidelines. Even if they were not, ORS 421.121(1) applies generally to terms of incarceration for murder and aggravated murder, with the sole exception being a sentence for one of those

offenses that is imposed on an offender who was previously convicted of an offense listed in ORS 137.635(2).

OAR 291-097-0005(2)(a) is valid.

OAR 291-097-0005(2)(e) provides:

> "It is the policy of the Department of Corrections to not calculate earned time for boarders from another state or those inmates serving only pre-sentencing guidelines sentences or sentences of death, life without the possibility of parole or life with the possibility of parole."

As discussed above, no crime committed on or after November 1, 1989, is subject to parole. Instead, post-prison supervision under the guidelines is a component of the sentence for any releasable felony. To the extent OAR 291-097-0005(2)(e) uses the term "parole" apart from its exemption for "pre-sentencing guidelines sentences," DOC must have intended the last exemption in the rule to mean "life with the possibility of post-prison supervision."

As the phrase "term of incarceration" was construed by this court in *Engweiler IV*, an inmate under sentence of death or life without the possibility of release does not have, and never will have, a release date against which earned time may be credited. To the extent that OAR 291-097-0005(2)(e) states a policy of not calculating earned time for those offenders, it is valid. However, because ORS 423.020(1)(c) precludes DOC from continuing to incarcerate beyond the period for which incarceration is authorized, ORS 421.121 precludes DOC from ignoring "a reduction in the term of incarceration" earned

under ORS 421.121 for a person who is serving a life sentence for which the term of incarceration has been established by the Board.

Engweiler acknowledges that, OISC actually did calculate his earned time on August 9, 2012, and again on September 14, 2012, notwithstanding DOC's policy in OAR 291-097-0005(2)(e). As a consequence, Engweiler's challenge to OAR 291-097-0005(2)(e) may not have any practical application to him, but that neither deprives him of standing to make his rule challenge nor does it preclude this court from addressing it. *Kellas*, 341 Or at 477-86.

Because OAR 291-097-0005(2)(e) states a policy that would permit DOC to ignore reductions that inmates serving life sentences have earned in their terms of incarceration, it is invalid. *See Janowski/Fleming v. Board of Parole*, 349 Or 432, 455 n 21, 245 P3d 1270 (2010) (rule invalid if it creates an exception not authorized by statute). Engweiler takes no position on whether the offending portion of the rule is severable.

OAR 291-097-0010(2) defines "earned time credits" as:

> "Sentence reduction credits (days), up to 30 percent of the sentence imposed, that can be earned by an inmate sentenced under the sentencing guidelines, pursuant to ORS 421.121, and these rules. The inmate earns the reductions by compliance with his/her Oregon Corrections plan and institution conduct."

Similarly, OAR 291-100-0008(6) defines "earned time credits" as:

> "Sentence reduction credits that can be earned by an inmate sentenced under Sentencing Guidelines, pursuant to ORS 421.121 and the department's rule on Prison Term Modification, OAR 291-097."

OAR 291-100-0100(2) provides:

> "Earned Time Credits: Each inmate sentenced to the custody of the Department of Corrections for felonies committed on or after November 1, 1989 under Sentencing Guidelines, except those inmates subject to the provisions of ORS 137.635, any other Oregon statutes restricting earned time credits, or those inmates serving a term of incarceration as a sanction for violations of conditions of post-prison supervision, shall be eligible to earn sentence reduction credits up to 20 percent of the total sentencing guidelines incarceration term for acceptable participation in work and self-improvement programs in accordance with the Oregon Corrections Plan, as well as maintaining appropriate institution conduct, in accordance with ORS 421.121 and the department rule on Prison Term Modification. OAR 291-097."

To the extent that OAR 291-097-0010(2), OAR 291-100-0008(6) and OAR 291-100-0100(2) could be construed as excluding sentences for murder or aggravated murder committed on or after November 1, 1989 (in addition to those subject to ORS 137.635), they would be invalid. So long as those rules are construed to be consistent with ORS 421.121, they are valid.

OAR 291-097-0010(3) defines "earned time release date" as:

> "The release date that has been achieved by an inmate, calculated by subtracting the earned time credits accrued from the maximum date."

OAR 291-097-0010(3) is valid.

OAR 291-097-0010(13) defines "parole release date" as:

> "The date on which an inmate is ordered to be released from an indeterminate prison sentence(s) to parole by the Board of Parole and Post-Prison Supervision. Parole release may be to the community, detainer or to another Department of Corrections sentence."

For felonies committed on or after November 1, 1989, release from physical custody is to post-prison supervision, even in the case of offenders serving life sentences for murder or aggravated murder. So long as the word "parole" in OAR 291-097-0010(13) is construed to encompass post-prison supervision, it is valid. To the extent it could be construed as excluding the projected release date established by the Board for a murder or aggravated murder committed on or after November 1, 1989, it is invalid.

OAR 291-097-0010(16) gives two definitions for the phrase "prison term." Subsection (a) defines the phrase for the purposes of sentencing guidelines sentences. Subsection (b) of that rule defines "prison term" for the purposes of pre-sentencing guidelines cases. The omission of any mention of non-guidelines "prison terms" for felonies committed on or after November 1, 1989, is correct, because there is no such thing. OAR 291-097-0010(16)(a) provides:

> "Sentencing Guidelines Sentences: The length of incarceration time within a Department of Corrections facility as established by the court in the judgment for each crime of conviction."

Similarly, OAR 291-100-0008(26)(a) defines "prison term" for "sentencing guidelines sentences" as:

> "The length of incarceration time within a Department of Corrections facility as established by the court in the judgment."

Standing by themselves, OAR 291-097-0010(16)(a) and OAR 291-100-0008(26)(a) present no problem, as they could be understood as encompassing both (a) the "term of incarceration" as this court construed it in *Engweiler IV* for sentences in which the "term of incarceration" was established by the sentencing court under the guidelines grid and (b) the indeterminate life sentence imposed by the sentencing court for murder and aggravated murder. They would not, by their terms, include "term of incarceration" in cases where that was established by the Board after conducting a hearing pursuant to ORS 144.120(1)(a).

They become problematic when they are read in conjunction with OAR 291-097-0010(18), which defines "projected release date" as "the date upon which an inmate is anticipated to complete service of the prison term." As discussed in *Engweiler IV*, the release date is set by the Board in cases where the offender is serving a life sentence. In those cases, the "term of incarceration" is established by the Board. In Engweiler's case, the Board conducted the required hearing under ORS 144.120(1)(a) after being ordered to do so by this court, and the Board established Engweiler's projected release date in BAF No. 9.

To the extent that OAR 291-097-0010(13)(a) and OAR 291-097-0010(18) could be read together as excluding an offender's "term of

incarceration" from any calculation involving earned time under ORS 421.121, they are invalid.

OAR 291-097-0015(1) provides:

> "(1) **Pursuant to ORS 421.121, inmates sentenced under sentencing guidelines may earn sentence reduction credits up to 20 percent** of the total sentencing guidelines prison term imposed for acceptable participate in OCP requirements and for maintaining appropriate institution conduct, except inmates:
>
> "(a) Serving a sentence subject to ORS 137.635;
>
> "(b) Serving presumptive sentences or required incarceration terms under ORS 161.737;
>
> "(c) Serving statutory minimum sentences or required incarceration terms under ORS 161.373;
>
> "(d) Serving a presumptive sentence under ORS 137.719;
>
> "(e) Subject to ORS 137.750 and whose judgment does not state that the inmate may be considered for sentence reductions;
>
> "(f) Serving time as a sanction for violation of conditions of post-prison supervision; or
>
> "(g) Subject to any other Oregon statutes restricting earned time credits."

(Emphasis added).

The emphasized portion of OAR 291-097-0015(1) restricts its application to "inmates sentenced under sentencing guidelines."

OAR 291-100-0008 actually has two definitions for "sentencing guidelines sentences." OAR 291-100-0008(31)(a) defines "sentencing

guidelines sentences" as:

> "For purposes of these rules and Department of Corrections sentence computation, 'sentence' means the length of incarceration time within a Department of Corrections facility, as established by the court in the judgment."

OAR 291-100-0008(32) defines "sentencing guidelines sentence" as:

> "Sentences imposed for crimes committed on or after November 1, 1989."

OAR 291-100-0008(32) accurately reflects statutory law. It is valid. As discussed above, an indeterminate life sentence for a murder or aggravated murder committed on or after November 1, 1989, is dictated by statute, but that does not disengage such a sentence from the sentencing guidelines. Consequently, to the extent that OAR 291-097-0015(1) and OAR 291-100-0008(31)(a) are construed as making earned time credits available to offenders serving life sentences for murder or aggravated murder once the Board establishes their terms of incarceration, they are valid. To the extent that they could be construed as excluding such offenders from eligibility, they are inconsistent with ORS 421.121(1) and are invalid.

OAR 291-097-0020(1) provides:

> "For inmates sentenced on or after November 1, 1989, the maximum amount of earned time credits is 20 percent of the sentencing guidelines sentence."

Subsection (a) of that rule establishes that 10% is available for compliance with the Oregon Corrections Plan and 10% is available for appropriate institutional conduct.

OAR 291-097-0020(1) is not quite consistent with ORS 421.121(1), as construed by this court in *Engweiler IV*. It may be consistent with the construction of the phrase "term of incarceration" that was propounded by the state defendants in that case, namely the life sentence that was imposed by the sentencing court. However, it an inmate may only receive a deduction in his or her "term of incarceration." In cases in which the "term of incarceration" is established by the Board, an inmate would be eligible to earn a deduction from that "term of incarceration," but not from his or her entire life sentence.

To the extent that OAR 291-097-0020(1) could be construed as either authorizing more than a 20% reduction or as depriving a person convicted of a murder or aggravated murder committed on or after November 1, 1989, of eligibility for earned time up to 20% of his or her term of incarceration, it is inconsistent with ORS 421.121 and is invalid.

OAR 291-097-0020(3)(a)-(b) define compliance with the Oregon Corrections Plan and "conduct compliance." At the end of each review period, a prison term analyst checks an inmate's computer records and is required to apply a "O, 10 or 20 percent reduction to the sentencing guidelines sentences proportional for the review period under consideration for inmates sentenced on

or after November 1, 1989" as a ministerial function. OAR 291-097-0020(3)(c)(A).

Again, even murder and aggravated murder sentences are guidelines sentences, for crimes committed on or after November 1, 1989. To the extent that OAR 291-097-0020(3)(c)(A) could be construed as excluding post-November 1, 1989, sentences from its scope in cases where the "term of incarceration" is established by the Board, it is invalid.

OAR 291-097-0040(1) provides, in part:

> "(1) Four months prior to an inmates' projected release date, prison term analysts (or the designated counselor for inmates housed in non-Oregon Department of Corrections facilities) will conduct a final review of inmates' earned time compliance.
>
> "(a) Final reviews will be conducted only for inmates serving a sentencing guidelines sentence. Prison term analysts will advance and apply earned time credits for the final review period."

To the extent that OAR 291-097-0040(1)(a) can be construed as excluding from final review sentences for crimes committed on or after November 1, 1989, for which the Board establishes the "term of incarceration," it is invalid.

In response to Engweiler's request for a copy of any DOC policy relating to earned time for juvenile aggravated murderers who were serving sentences for crimes committed on or after November 1, 1989, DOC gave him excerpts from the OISC Manual. A document that implements an agency policy, as the OISC Manual does, constitutes a rule, "whatever informality attended its

promulgation." *Burke v. Children's Services Division*, 288 Or 533, 538, 607 P2d 141 (1980); ORS 183.310(9) (defining "rule").

Chapter 11 of the OISC Manual indicates that it first became effective on March 9, 2002. Section VI(B)(4) of that chapter deals specifically with murder committed by juveniles on or after November 1, 1989, and before April 1, 1995. It expressly states that they are "eligible for earned time credits on the entire sentence." (Record at 139). Because that section expressly recognizes that a juvenile who committed murder on or after November 1, 1989, is eligible to earn a reduction in his or her term of incarceration, it is consistent with ORS 421.121(1) (1989), and is valid.

Section VII(B)(3) of Chapter 11 deals specifically with aggravated murder committed by juveniles on or after November 1, 1989, and before April 1, 1995. It is silent about whether a juvenile who committed aggravated murder on or after November 1, 1989, is eligible to earn a reduction in his or her term of incarceration. Because aggravated murder is a subset of murder, Section VII(B)(3) of Chapter 11, when read in conjunction with Section VI(B)(4), evinces a policy confirming that a juvenile who committed aggravated murder on or After November 1, 1989, is eligible to earn a reduction in his or her term of incarceration. Viewed in that light, Section VII(B)(3) of Chapter 11 is valid.

Chapter 13 indicates that it became effective on August 18, 2003. Pages 2-12 of Chapter 13 are missing from Item 29. Page 13 of Chapter 13 appears in

the Record as page 147. Because the preceding 11 pages are missing, it is not possible to determine from the Record supplied by the Department of Justice what Section of Chapter 13 that subsection (4)(b) on that page belongs to.

In any event, subsection (4)(b) of Item 29 at page 147 of the Record relates to persons convicted of aggravated murder. It provides, in part:

> "An inmate is not eligible for earned time on a life sentence for Aggravated Murder because a life sentence has no know [sic] ending date and it is the BPPPS rather than DOC that determines and sets the inmate's release date."

(Record at 147).

Subsection (4)(b) on page 147 of the Record is inconsistent with eligibility for a reduction in the term of incarceration, as this court explained in *Engweiler IV*. It is invalid.

Page 147 of the Record does contain a note regarding juveniles under the age of 15, which indicates that they "are eligible for earned time on the entire sentence unless ineligible based on some other statute (such as ORS 137.750, etc)." (Record at 147) (emphasis in original). Although that policy statement does not say anything about whether a 15-year old (Engweiler's age when he committed his crime) would be eligible for a reduction in his or her term of incarceration, to the extent that it recognizes eligibility for a person under 15 years of age, the note is valid.

In sum, insofar as Chapter 11 of the OISC Manual recognizes that a juvenile who committed murder or aggravated murder on or after November 1, 1989, would be eligible for a reduction in his or her term of incarceration, the rule embodied by that policy is valid.

However, to the extent that any subsequently adopted part of Division 97 or Division 100 could be construed as contravening that policy, it is invalid not only because it violates ORS 421.121(1) (1989), but also because such a rule retroactively applied to time actually earned would violate the proscriptions against *ex post facto* laws. Or Const, Art I, § 21; US Const, Art. I, § 10; *Lynce v. Mathis*, 519 US433, 117 S Ct 891, 137 L Ed 2d 63 (1997). By the same token, any rule that would, without valid reason and appropriate process, deprive Engweiler of any reduction in his term of incarceration that he had earned, would violate the due process requirements of the Fourteenth Amendment. US Const, Amend XIV; *Wilkinson v. Austin*, 545 US 209, 125 S Ct 2384, 162 L Ed 2d 174 (2005).

IV. Engweiler is Entitled to Immediate Release

A. The Quantity of Engweiler's Earned Time is Uncontested

DOC's contention that ORS 421.121(1) (1989) does not apply to Engweiler was rejected by this court in *Engweiler IV*. There is no occasion to revisit the holdings in that case.

Because ORS 421.121(1) (1989) requires that "each inmate sentenced to the custody of the department for felonies committed on or after November 1, 1989, **shall** be eligible for a reduction in the term of incarceration," (emphasis added), DOC has no discretion to exclude any such inmate from eligibility. There is no dispute that Engweiler hasn't so much as failed once to keep his fingernails neatly trimmed in the last 22 years.

Although OISC prison term analyst Tim Welsh told Engweiler on September 4, 2012, that DOC does "not calculate earned time for inmates serving life sentences, the Board of Parole and Post Prison Supervision establishes the parole release dates for inmates serving life sentences and they have set a parole release date of February 22, 2018."

Welsh's assertion suggests that DOC believes that the Board, rather than DOC or OISC is responsible for calculating Engweiler's earned time. The assertion is somewhat beside the point. It does not matter to Engweiler who does the calculation. What matters to him is that, when his earned time is credited against the projected release date that the Board established for him in BAF No. 9, the adjusted release date has already transpired.

As it turns out, DOC actually did calculate Engweiler's earned time on August 9, 2012. Its initial calculation of 1929.75 was consistent with Engweiler's contention about how much of a reduction in his "term of incarceration" he had earned under ORS 421.121(1) (1989). Engweiler

apprised OISC that, according to his calculation, his 20% earned time meant that he should have been released on July 17, 2012. He asked OISC to conduct a hearing in accordance with the requirements of due process if OISC disagreed with his calculation.

Neither DOC nor OISC indicated any disagreement with Engweiler's calculations. Nor did DOC or OISC conduct any hearing. Nonetheless, when OISC recalculated Engweiler's earned time on September 14, 2012, its total was 1676.50 days. Nothing in OISC's new calculation indicated that any earned time had been retracted.

The unexplained evaporation of 253.25 earned time credits without any explanation or a hearing violated due process. US Const, Amend XIV; *Cf. Edwards v. Balisok*, 520 US 641, 647-48, 117 S Ct 1584, 137 L Ed 2d 906 (1997) (reaffirming that retraction of good time credits requires findings that enjoy at least "some evidence" in the record). That constitutional violation is evidently moot, though, because the 253rd day after July 17, 2012, is March 27, 2013. That date will come and go by the time this court conducts oral argument on June 4.

While DOC has promulgated rules that would deny Engweiler his earned time, those rules are flatly inconsistent with this court's holdings in *Engweiler IV*. It is of some interest that DOC's policy manual acknowledges that a juvenile convicted of murder on or after November 1, 1989, does get a

reduction in his or her "term of incarceration" pursuant to ORS 421.121. The same policy manual discusses juvenile aggravated murder, but says nothing about whether those offenders get the same statutory benefit credited against their terms of incarceration. To the extent that Policy (VI)(B)(4) can be applied to Engweiler to comport with the requirements of ORS 421.121(1) (1989), it should.

Whether by invalidation of rules, compulsion to apply Policy (VI)(B)(4), or simply by the dictates of ORS 421.121(1) (1989), and because OISC actually confirmed at one point the accuracy of Engweiler's 20% calculation for his earned time, this court should make a finding, based on the evidence admitted, that when Engweiler's earned time is credited against the projected release date that the Board established, his adjusted release date was July 17, 2012.

That date has obviously come and gone.

B. The Exit Interview Process Does not Apply to Engweiler

In his Response to this court's Order to Show Cause, the Superintendent asserted that Engweiler is not entitled to immediate release because, "under ORS 144.125, the board has the authority to hold an exit interview prior to releasing 'any prisoner' -- and that includes [Engweiler]." (Defendant's Response at 18; citing *Janowski/Fleming v. Board of Parole*, 349 Or 432, 245 P3d 1270 (2010)). The Superintendent is wrong.

Kenneth Janowski and Ridge Fleming committed aggravated murder in 1985. *Janowski/Fleming v. Board of Parole*, 349 Or at 435-36. Their crimes occurred four years before the legislature approved the felony sentencing guidelines. Consequently, Janowski's and Fleming's release from incarceration, if ever, would be to parole.

Engweiler committed aggravated murder on February 21, 1990, after the guidelines were adopted. The judgment in Engweiler's criminal case correctly states that his release, if any, is to post-prison supervision.

ORS 144.125 provides:

> "(1) **Prior to the scheduled release of any prisoner on parole** and prior to release rescheduled under this section, the State Board of Parole and Post-Prison Supervision may upon request of the Department of Corrections or on its own initiative interview the prisoner to review the prisoner's **parole plan** and psychiatric or psychological report, if any, and the record of the prisoner's conduct during confinement. To accommodate such review by the board, the Department of Corrections shall provide to the board any psychiatric or psychological reports held by the department regarding the prisoner. However, if the psychiatrist or psychologist who prepared any report or any treating psychiatrist or psychologist determines that disclosure to the prisoner of the contents of the report would be detrimental to the prisoner's mental or emotional health, the psychiatrist or psychologist may indorse upon the report a recommendation that it not be disclosed to the prisoner. The department may withhold from the board any report so indorsed.
>
> "(2) The board shall postpone a prisoner's scheduled release date if it finds, after a hearing, that the prisoner engaged in serious misconduct during confinement. The board shall adopt rules defining serious misconduct and specifying periods of postponement for such misconduct.

> "(3)(a) If the board finds the prisoner has a present severe emotional disturbance such as to constitute a danger to the health or safety of the community, the board may order the postponement of the **scheduled parole release** until a specified future date. The board may not postpone a prisoner's scheduled release date to a date that is less than two years, or more than 10 years, from the date of the hearing, unless the prisoner would be held beyond the maximum sentence. The board shall determine the scheduled release date, and the prisoner may petition for interim review, in accordance with ORS 144.280.
>
> "(b) If the board finds the prisoner has a present severe emotional disturbance such as to constitute a danger to the health or safety of the community, but also finds that the prisoner can be adequately controlled with supervision and mental health treatment and that the necessary supervision and treatment are available, **the board may order the prisoner released on parole** subject to conditions that are in the best interests of community safety and the prisoner's welfare.
>
> "(4) Each prisoner shall furnish the board with a **parole plan** prior to the scheduled **release of the prisoner on parole**. The board shall adopt rules specifying the elements of an adequate **parole plan** and may defer release of the prisoner for not more than three months if it finds that the **parole plan** is inadequate. The Department of Corrections shall assist prisoners in preparing **parole plans**."

(Emphasis added).

ORS 144.125 uses the word "parole" no less than nine times, not counting the reference to the Board of Parole and Post-Prison Supervision. By its own terms, it has nothing to do with inmates who may be released to post-prison supervision. It does not mention post-prison supervision once.

To be sure, ORS 144.125 pre-dated the adoption of the guidelines, and so it makes sense that any pre-guidelines version of the statute would have the

word "parole" in it. Here, it is important to note that the legislature amended ORS 144.125 in the very same bill in which it approved the guidelines. 1989 Or Laws, ch 790, § 68.

The legislature obviously knew full well that it was approving the guidelines and requiring post-prison supervision to be a component of any sentence for a releasable felony committed on or after November 1, 1989. Nowhere in the guidelines does it say anything about the Board conducting exit interviews prior to releasing an inmate onto post-prison supervision.

The legislature has amended ORS 144.125 three times since it approved the guidelines. 1993 Or Laws, ch 334 § 1; 1999 Or Laws, ch 141 § 1; 2009 Or Laws, ch 660 § 3. The legislature could have inserted the phrase "or post-prison supervision" into ORS 144.125 on any of those occasions if it intended the statute to apply to post-prison supervision. The legislature chose not to.

It wasn't as if the legislature hasn't given any thought to the guidelines since 1989. In 2003, the legislature enacted HB 2174, in which it adopted the guidelines anew in their entirety. 2003 Or Laws, ch 453, §§ 1-4. Although HB 2174 did make reference to two statutes in chapter 144 of the Oregon Revised Statutes (ORS 144.103 and ORS 144.232), the bill made no mention of ORS 144.125 or any exit interview process.

The Superintendent's reliance on ORS 144.125 constitutes another invitation to insert a term into a statute that the legislature could have inserted, but that the legislature chose instead to omit. That invitation cannot be accepted. ORS 174.010.

C. If ORS 144.125 Ever Applied, It Doesn't Anymore

Even if this court were inclined to insert "post-prison supervision" into ORS 144.125, the time for that statute to have had any application to Engweiler would already have passed. ORS 144.125(1) provides, in part:

> "Prior to the scheduled release of any prisoner on parole and prior to release rescheduled under this section, the State Board of Parole and Post-Prison Supervision **may** upon request of the Department of Corrections or on its own initiative interview the prisoner to review the prisoner's parole plan and psychiatric or psychological report, if any, and the record of the prisoner's conduct during confinement."

(Emphasis added).

The word "may" is a discretionary term. *Friends of Columbia Gorge v. Columbia River*, 346 Or 415, 426-27, 212 P3d 1243 (2009). In cases in which the Board is authorized to conduct an exit interview, it has no obligation to do so. That being the case, DOC cannot be foreclosed from releasing an inmate on his or her release date on the ground that the Board has chosen not to conduct an exit interview.

Neither the Superintendent nor DOC claim to have made any request to the Board, prior to July 17, 2012, to conduct an exit interview with Engweiler. Having foregone that opportunity, their non-discretionary function on that date was to open the door to OSCI and let him out. ORS 144.245; *Hamel v. Johnson*, 330 Or 180, 187, 998 P2d 661 (2000) (inmate whose release has not been postponed as of that date pursuant to ORS 144.125 must be released); OAR 291-100-0150(2) ("Inmates serving a sentence(s) for crime(s) committed on or after November 1, 1989, shall be released from confinement on that sentence(s) only upon completion of their incarceration term").

Habeas corpus relief is warranted when an inmate's "further 'imprisonment or restraint' of his person that would be unlawful if not justified to the court." *Penrod/Brown v. Cupp*, 283 Or 21, 28, 581 P2d 934 (1978). The Superintendent and DOC have not justified further imprisonment and cannot do so under the law.

CONCLUSION

The Board established Engweiler's term of incarceration when it set his projected release date in BAF No. 9. Engweiler earned the full 20% reduction of his term of incarceration for which he was eligible under ORS 421.121(1) (1989), and none of that earned time has ever been retracted. Engweiler should

have been released on July 17, 2012. This court should issue judgment in Engweiler's favor and order DOC to immediately release him from physical custody.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05
AND PROOF OF SERVICE

I certify that (1) this Plaintiff's/Petitioner's Brief complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a) is 13,721 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

I certify that, on February 28, 2013, I filed this Plaintiff's/Petitioner's Brief electronically with the State Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that, on the same date, I served the foregoing Plaintiff's/Petitioner's Brief by electronic service on the attorney listed below by using the court's electronic filing system.

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