

IN THE SUPREME COURT OF THE STATE OF OREGON

CONRAD R. ENGWEILER,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

Supreme Court No. S060854

CONRAD R. ENGWEILER,

Plaintiff,

v.

ROB PERSSON, Superintendent, Oregon
State Correctional Institution,

Respondent.

Supreme Court No. S060793

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

Questions Presented and Proposed Rules of Law

Plaintiff committed aggravated murder in 1990. He was convicted and received an indeterminate life sentence. Pursuant to the applicable statutes, the parole board set plaintiff's "initial parole release date" and scheduled an "interview" with him after which it will determine whether his release to parole is appropriate.

First Question Presented

ORS 421.121 provides that, subject to limited exceptions, "each inmate sentenced to the custody of the Department of Corrections" for a felony "committed on or after November 1, 1989," may earn a reduction in his "term of incarceration" for good prison behavior. In giving plaintiff an "initial parole release date," did the board create a "term of incarceration" that is subject to reduction under ORS 421.121?

First Proposed Rule of Law

No. For purposes of ORS 421.121, a reduction in a "term of incarceration" is a reduction in a determinate term of imprisonment set pursuant to the sentencing guidelines. Although ORS 421.121 applies to "each inmate" in DOC custody for commission of a felony after the guidelines' effective date,

that statute has no operative effect where, as here, an inmate has an indeterminate life sentence and an initial parole release date set by the parole board.

Second Question Presented

If ORS 421.121 does apply and if plaintiff's initial release date on parole is advanced to a date already in the past, is plaintiff entitled to immediate release?

Second Proposed Rule of Law

No. Even if plaintiff's initial parole release date is subject to advancement through the application of earned time credits, he is not entitled to immediate release. The relevant statutes allow the parole board to "interview" all inmates prior to their actual release to parole. That review process explicitly applies to parole-eligible aggravated murderers, and it allows the parole board to defer parole release if, for example, an inmate poses a danger to the community. Consequently, plaintiff is not entitled to release until after successful completion of the interview process.

Statement of Facts

The facts relevant to the present cases are straightforward. Plaintiff committed aggravated murder in 1990, when he was 15 years old. *See generally Engweiler v. Board of Parole*, 340 Or 361, 363, 133 P3d 910 (2006) (*Engweiler II*) (describing factual history); *State ex rel Engweiler v. Cook*, 340

Or 373, 375-76, 133 P3d 904 (2006) (*Engweiler v. Cook* or *Engweiler III*) (same); *Engweiler v. Board of Parole*, 343 Or 536, 541-42, 175 P3d 408 (2007) (*Engweiler IV*) (same). He was sentenced to life imprisonment with no minimum period of confinement. (ER 57).¹

After several years of litigation related to plaintiff's sentence and parole eligibility, the Oregon Board of Parole and Post-prison Supervision (board) set plaintiff's initial parole release date. See *State ex rel. Engweiler v. Felton*, 350 Or 592, 260 P3d 448 (2011) (*Engweiler V*) (ordering parole board to set initial release date); (ER 64 (board order setting initial release date)). Plaintiff's initial release is currently set in February 2018. (ER 64).

Plaintiff filed the present habeas corpus action contending that he is entitled to earned time credits under ORS 421.121. He claims that those earned time credits will function to advance the initial release date recently set by the board, and that his new release date will be in the past, effectively requiring his immediate release to parole.

¹ Originally, plaintiff was sentenced to life imprisonment with a 30-year minimum. But that sentence was overturned on appeal in the Court of Appeals. *State v. Engweiler*, 118 Or App 132, 134, 843 P2d 1163 (1993) (*Engweiler I*). The Court of Appeals remanded the case for resentencing and plaintiff then received his current sentence.

Summary of Argument

Plaintiff is not entitled to earned time credits under ORS 421.121. That statute provides that, subject to limited exceptions not applicable here, “each inmate sentenced to the custody of the Department of Corrections” for a felony “committed on or after November 1, 1989,” may earn a reduction in his “term of incarceration” for good prison behavior. The text of that statute is subject to more than one plausible interpretation—it certainly authorizes reductions in determinate terms set pursuant to the sentencing guidelines, but it can also plausibly be read as affecting parole release dates set by the parole board. Therefore, it is ambiguous. Context, legislative history, and other maxims of statutory construction, however, demonstrate that when the legislature enacted ORS 421.121, it intended *only* to provide reductions in determinate periods of confinement set pursuant to the sentencing guidelines. The legislature did not intend earned time credits to advance parole release dates set by the parole board.

Because plaintiff was convicted of aggravated murder, his sentence is unlike most other offenders sentenced for felonies committed after November 1, 1989. Plaintiff did not receive a determinate sentence under the sentencing guidelines. Instead, he has an indeterminate life sentence and an initial parole release date set by the parole board. The earned time credit system has no effect on indeterminate sentences and credits do not work to advance parole

release dates set by the parole board. Therefore, ORS 421.121 has no operative effect on plaintiff's circumstances. He is not entitled to earned time credits.

Even if plaintiff's initial parole release date is subject to advancement through the application of earned time credits, however, he is not entitled to immediate release. Plaintiff contends that his release is mandatory because his parole release date—as adjusted by the application of earned time credits—is in the past. But as this court has recently explained, even if an inmate's board-ordered parole release date is in the past, the relevant statutes still allow the parole board to “interview” the inmate prior to his physical release to parole. As part of that interview, the board is entitled to defer parole release if, for example, it concludes that the inmate poses a danger to the community. Consequently, plaintiff is not entitled to release until after successful completion of the interview process.

ARGUMENT

Plaintiff is an inmate serving a life sentence for aggravated murder. The parole board recently set an initial parole release date in 2018. Plaintiff now contends that he is entitled to “earned time” credits for his good prison behavior and claims that application of those credits should advance his initial parole release date. Plaintiff is incorrect. As explained below, the statutes governing

earned time credit apply to determinate sentences only—they do not work to advance an aggravated murderer’s parole release date.²

A. Introduction and Background

Before turning to the merits of the parties’ dispute, some background on Oregon sentencing law is helpful. Until November 1989, Oregon felony sentencing was governed by the “parole matrix system.” “Under that system, a trial court imposed an indeterminate sentence of a specified duration.” *Hamel v. Johnson*, 330 Or 180, 185, 998 P2d 661 (2000). But that indeterminate sentence “stated only a maximum term to be served under the jurisdiction of the Department of Corrections”—including both time while incarcerated and after release. *Id.* at 185-86. The sentence was thus indeterminate in that it did “not establish the length of time that a defendant was to be incarcerated.” *Id.* at 186 (citing *Harris v. Board of Parole*, 288 Or 495, 503, 605 P2d 1181 (1980)). Instead, the parole board would “determine[] the actual duration of imprisonment.” *Id.* at 186 (quoting *Harris*).³

² This case involves both a “rule challenge” under ORS 183.400 and a petition for writ of habeas corpus under Article VII (Amended), section 2, of the Oregon Constitution. Plaintiff’s arguments in support of his rule challenge are functionally identical to arguments presented in support of the habeas corpus petition. Thus, DOC responds to both in one combined argument.

³ The board determined the duration of imprisonment pursuant to a “matrix” developed for that purpose. See ORS 144.780 (requiring board to develop rules for determining imprisonment ranges). The board’s matrix set the

Footnote continued...

On November 1, 1989, the legislature replaced the parole matrix system with the “sentencing guidelines system.” For virtually all felony offenses, the sentencing guidelines eliminated “indeterminate” sentencing and created a new system of “determinate” sentencing. Under that new system, an offender’s “sentence” has two parts: a “term of incarceration,” and a “term of post-prison supervision.” Both terms are definite and the term of incarceration dictates the offender’s date of release from imprisonment. Unlike under the former system, under the guidelines, the parole board has no authority to set an offender’s release date. *See generally State v. Morgan*, 316 Or 553, 557-58, 856 P2d 612 (1993) (explaining determinate sentencing under the guidelines); *State v. Davis*, 315 Or 484, 847 P2d 834 (1993) (explaining sentencing guidelines); *see also Laird C. Kirkpatrick*, Mandatory Felony Sentencing Guidelines: The Oregon Model, 25 UC Davis L Rev 695, 710 (1992) (“Although the guidelines abolished the traditional concept of early release on parole, they retained the policy of post-prison supervision. * * * Thus, in addition to a specified period of incarceration, each offender who is sentenced to prison is also sentenced to a term of post-prison supervision.”).

(...continued)

imprisonment duration based on factors such as the offender’s criminal history and the severity of the crime. *See OAR 255-005-0005(29), (30)* (explaining matrix).

However, the creation of the sentencing guidelines did not affect sentencing for one significant felony offense: aggravated murder. *See* ORS 163.105 (1989). Instead, ORS 163.105 was materially unchanged and continued to govern aggravated murder sentencing as it had prior to 1989. Specifically, ORS 163.105 requires that an offender convicted of aggravated murder—with the exception of those sentenced to “death” or “true life”—“shall” be sentenced to an *indeterminate* life sentence. ORS 163.105(1)(a).⁴

Consequently, the legislature expressly retained the parole board’s release function for offenders convicted of aggravated murder even after 1989. In a legislative note following ORS 144.110, the legislature declared:

The provisions of ORS 144.110, 144.120, 144.122, 144.125, 144.130, 144.135, 144.185, 144.223, 144.245, 144.270 and 144.305 [all statutes governing the parole board’s release authority over inmates serving indeterminate sentences] apply only to offenders convicted of a crime committed prior to November 1, 1989, and to offenders convicted of aggravated murder regardless of the date of the crime.

⁴ As discussed more fully below, adults convicted of aggravated murder who receive an indeterminate life sentence also receive a 30-year minimum term during which they are not eligible for any form of release. ORS 163.105(1)(c). At the time of plaintiff’s offense, however, ORS 161.620 (1989) prohibited the imposition of any mandatory minimum term on juvenile offenders. Consequently, after plaintiff was convicted of aggravated murder, he received simply an indeterminate “life” sentence, without the 30-year minimum that would have otherwise applied.

Or Laws 1989, ch 790, § 28 (compiled as a Legislative Note following ORS 144.110). In short, unlike other felony offenses, the sentencing and release procedures for aggravated murder remained the same after the enactment of the sentencing guidelines.

Thus, because plaintiff was convicted of aggravated murder, he received an indeterminate sentence. Pursuant to ORS 144.120 (1989), the parole board conducted a “parole hearing” and “set [plaintiff’s] initial date of release on parole.” ORS 144.120(1)(a) (1989); *see generally Engweiler V*, 350 Or 592 (explaining ORS 144.120 (1989) and ordering parole board to set plaintiff’s initial release date); (ER 64). As noted, plaintiff’s initial release date is currently set in February 2018.

ORS 144.120(1)(a) (1989) dictates, however, that after receiving an initial release date, actual parole release “shall be contingent upon satisfaction of the requirements of ORS 144.125.” ORS 144.125, in turn, provides for a review process before an inmate’s scheduled release. For example, inmates are required to “furnish the board with a parole plan,” and if the board determines that the parole plan is “inadequate,” it may defer the inmate’s release for up to three months. ORS 144.125(4). Similarly, the board is authorized to conduct an “interview” with the inmate to review his “parole plan and psychiatric or psychological report, if any, and the record of the prisoner’s conduct during confinement.” ORS 144.125(1). If, based on that interview, the board

concludes that the inmate “has a present severe emotional disturbance such as to constitute a danger to the health or safety of the community,” the board is authorized to defer the inmate’s release for up to 10 years. ORS 144.125(3). If the board finds that the inmate has “engaged in serious misconduct during confinement,” it is required to defer parole release. ORS 144.125(2).

In sum, for offenders convicted of felonies committed on or after November 1, 1989, the trial court sets a determinate term of imprisonment. That term has a definite end date and the parole board has no authority over the inmate’s release. For offenders convicted of felonies committed prior to November 1, 1989, *and for offenders convicted of aggravated murder regardless of the date of the offense*, the trial court sets an indeterminate sentence and the parole board sets a parole release date. The board-ordered parole release date is not definite. Instead, the inmate’s actual release is contingent on satisfaction of several requirements found in ORS 144.125.

In these proceedings, plaintiff claims that he is entitled to “earned time” credits under ORS 421.121 and that application of those credits will function to advance the initial release date set by the board. Further, he contends that his new release date will be in the past, effectively requiring his immediate release to parole without first completing the process outlined in ORS 144.125. As explained below, plaintiff is incorrect.

B. Correctly construed, ORS 421.121 applies only to determinate sentences; aggravated murderers serving indeterminate sentences are not entitled to earned time credits under that statute.

All of plaintiff's claims in these consolidated proceedings are based on ORS 421.121. The question is whether under that statute plaintiff is entitled to have earned time credits applied to his initial release date. The text and context of ORS 421.121 suggest that plaintiff is not entitled to earned time credits and that credits do not work to advance board-ordered release dates. Admittedly, however, viewed in its total context, ORS 421.121 is subject to more than one plausible interpretation. Therefore, it is ambiguous. *State v. Owens*, 319 Or 259, 268, 875 P2d 463 (1994) (although text and context suggested that one interpretation of statute was correct, because alternative interpretation was not "wholly implausible," the statute was deemed ambiguous); *see also State v. Cooper*, 319 Or 162, 167, 874 P2d 822 (1994) (statute subject to more than one reasonable interpretation is ambiguous and "not decisive of the legislature's intent"). That ambiguity triggers further review of legislative history as well as other maxims of statutory construction, all of which confirm that DOC's interpretation of ORS 421.121 is correct: plaintiff is not entitled to earned time credits.

1. **Although subject to more than one “plausible” interpretation, ORS 421.121’s text and context suggest that earned time credits are not available to aggravated murderers serving indeterminate sentences.**

ORS 421.121 provides that, subject to limited exceptions, “each inmate sentenced to the custody of the Department of Corrections” for a felony “committed on or after November 1, 1989,” may earn a “reduction” in his “term of incarceration.”⁵ Plaintiff correctly points out that he is an “inmate” and that he was sentenced to DOC’s custody for a felony offense committed after November 1, 1989. The parties’ dispute, therefore, focuses on the phrase “term of incarceration.” Specifically, the question presented is whether plaintiff’s

⁵ ORS 421.121 provides, in pertinent part:

(1) Except as provided in ORS 137.635, each inmate sentenced to the custody of the Department of Corrections for felonies committed on or after November 1, 1989, is eligible for a reduction in the term of incarceration for:

(a) Appropriate institutional behavior, as defined by rule of the Department of Corrections; and

(b)(A) Participation in the adult basic skills development program described in ORS 421.084; or

(B) Obtaining a high school diploma, a General Educational Development (GED) certificate, a certificate or degree from a post-secondary education institution as defined in ORS 337.511 or a journey level certification from a registered apprenticeship program as defined in ORS 660.010.

initial parole release date effectively creates a “term of incarceration” that can be “reduced” through the application of earned time credits.

Notably, the phrase “term of incarceration” is not defined in any statute. In ordinary usage, the word “incarcerate,” of course, simply means “to put in prison.” *Webster’s Third New Int’l Dictionary* 1141 (unabridged ed 2002). And a “term” is “a limited or definite extent of time,” or “the time for which something lasts.” *Webster’s* at 2359. Thus, the phrase “term of incarceration,” on its face, appears to refer to a “definite” length of incarceration rather than a variable length of time. Inmates subject to the sentencing guidelines receive “determinate” terms of incarceration which are subject to reductions under ORS 421.121. As explained above, however, a parole release date does not create a “definite” incarceration period. Instead, under ORS 144.120 and ORS 144.125, the time an inmate spends incarcerated prior to parole release is variable—it is “contingent” on several factors and subject to change for a variety of reasons. Thus, the plain text at least suggests that the phrase “term of incarceration” does not refer to a term created by and leading up to an initial release date set by the parole board.

Context further supports that conclusion. ORS 421.121 was enacted as part of the sentencing guidelines legislation. *See generally* Or Laws 1989, ch 790. The phrase “term of incarceration” is used repeatedly throughout the guidelines. In that context, the phrase uniformly describes either the

incarceration portion of a determinate sentence imposed by a sentencing court or a determinate incarceration sanction imposed by the parole board for a post-prison supervision violation. *See, e.g.*, OAR 213-005-0001 (sentencing court); OAR 213-011-0004 (board-ordered sanction); *see also State ex rel. Engweiler v. Cook*, 197 Or App 32, 39-40, 103 P3d 1205 (2005) (in guidelines legislation, phrase “term of incarceration” “uniformly” describes determinate length of prison time “imposed either as a sentence or as a sanction for prohibited conduct”).⁶ Because ORS 421.121 was enacted as part of the sentencing guidelines, it likely has the same meaning that the phrase has throughout the relevant legislation. *Davis*, 315 Or at 490 (terms used in statutes enacted as part of the guidelines should be considered in context of their use throughout the guidelines; “the guidelines provide a context in which the statutory provisions in Oregon Laws 1989, chapter 790, are to be read”). Thus, the phrase “term of incarceration” most likely refers to a determinate length of incarceration time imposed pursuant to the guidelines; it does not refer to an initial parole release date set by the board.

⁶ “Terms of incarceration” imposed by the board as a post-prison supervision sanction are not eligible for earned time credit reductions, however. ORS 144.108(3)(a). Thus, the only “terms of incarceration” eligible for reduction under ORS 421.121 are those terms imposed by a sentencing court.

Further, ORS 421.121 applies only to felonies committed on or after November 1, 1989—the effective date of the sentencing guidelines. The fact that the legislature drew a line on that date further indicates its intent to make earned time credits apply only to definite terms of incarceration imposed pursuant to the sentencing guidelines. To put it bluntly, the date “November 1, 1989” enjoys a status in Oregon akin to a term of art. That date has great significance in Oregon sentencing law because it marks the effective date of the guidelines sentencing scheme. But it has no significance whatsoever to aggravated murder sentencing, which, as explained above, was unaffected by the creation of the sentencing guidelines. Its inclusion in ORS 421.121 indicates the legislature’s intent to apply the earned time credit system to guidelines sentences only. Essentially, the earned time credit system is part and parcel of the guidelines sentencing scheme and the credit system was designed and intended to apply to guidelines sentences.

The history of good-behavior credits confirms that interpretation. *Cf. Dept. of Rev. v. Faris*, 345 Or 97, 102, 190 P3d 364 (2008) (“predecessor statutes” are relevant context in determining legislative intent). Under the pre-1989 indeterminate sentencing system, a prisoner could accrue “good time credits”—the pre-1989 statutory counterpart to “earned time credits.” *See* ORS 421.120 (1987). Those credits applied only to the overall indeterminate sentence imposed by the court, not to the incarceration period set by the parole

board. ORS 421.120(1) (1987) (inmates incarcerated pursuant to a “judgment of sentence” entitled to “deduction from the term of sentence”). Offenders serving “life” sentences were, naturally, exempt: unlike all other indeterminate sentences in the pre-1989 sentencing system, a life sentence has no end date and, thus, cannot be reduced through the application of credits.

ORS 421.120(1) (1987). Even if the parole board set an initial release date for an offender with a life sentence, the good-time system did not apply: the credits simply did not operate to advance parole release dates.

Because aggravated murder was unaffected by the guidelines, in the guidelines’ initial wake it was the *only* felony offense left carrying an indeterminate sentence subject to the parole board’s release authority. That sentence was—and still is—an indeterminate “life” sentence. Good behavior credits historically had never applied to life sentences and historically had never worked to advance board-ordered parole release dates. It is not likely that when the legislature created the new “earned time” system for post-1989 sentences, it intended to completely alter the way that good behavior credits apply to aggravated murder sentencing. Certainly nothing in ORS 421.121 indicates such an intent. Instead, given its historical context, ORS 421.121 most likely was intended to apply only to the determinate sentences created by the sentencing guidelines.

In short, the text and context suggest that the legislature did not intend earned time credits to apply to parole release dates set by the board. Instead, the most plausible reading of the statute is that earned time credits apply to determinate “terms of incarceration” set by the then-new sentencing guidelines.

Some other contextual clues, however, make the issue somewhat less clear. As noted, throughout the sentencing guidelines, the phrase “term of incarceration” consistently describes two related concepts: determinate terms of imprisonment imposed as part of criminal sentences, and determinate terms of imprisonment imposed by the parole board as sanctions for post-prison supervision violations. In statutes enacted *prior* to the enactment of the guidelines, however, the phrases “term of incarceration” and “term of imprisonment”—synonymous terms used interchangeably throughout the Oregon Revised Statutes—are used in several different ways. For example, in ORS 144.110, the phrase “term of imprisonment” refers to a judicially imposed minimum sentence. In ORS 144.120, the same phrase refers to the total indeterminate sentence imposed by a sentencing court. In ORS 144.343, the same phrase again refers to a parole violation sanction imposed by the board.

In one statute, significant here, the phrase “term of imprisonment” appears to refer to the board’s authority to set a parole release date. ORS 144.783 relates to parole release dates in cases involving consecutive indeterminate sentences. It provides, in part, that “[w]hen a prisoner is

sentenced to two or more *consecutive terms of imprisonment*, the *duration of the term of imprisonment* shall be the sum of the terms set by the [parole board] pursuant to the ranges established for the offenses.” ORS 144.783(1). In that statute, the first reference to a “term of imprisonment” refers to the indeterminate sentence imposed by the sentencing court. The next reference—this time to the “duration of the term of imprisonment”—appears to refer to the board’s authority to set a parole release date.⁷

In sum then, although the phrase “term of incarceration” in ORS 421.121 is *best* understood as a reference to a determinate term of imprisonment set pursuant to the sentencing guidelines, the fact that that phrase can be and has been used to mean other things—including the period of time leading up to a parole release date—shows that an alternative construction of the statute is at least plausible. Consequently, ORS 421.121 is ambiguous.

⁷ Several statutes refer to the board’s function as the authority to set a “*duration of imprisonment*.” *See, e.g.*, ORS 144.780(1) (“requiring board to establish ranges for ‘duration of imprisonment to be served’”); ORS 144.079(3) (using that term); ORS 144.775(7) (same); ORS 144.785 (using “duration” term); ORS 144.787 (referring to the “duration of imprisonment” determined by the board). *See generally Engweiler v. Cook*, 197 Or App at 38 (citing statutes).

2. Plaintiff's arguments to the contrary are incorrect.

Plaintiff appears to contend that ORS 421.121 unambiguously supports his position. He relies, primarily, on two textual and contextual arguments. But neither of his arguments has merit.

First, plaintiff points out that ORS 421.121 applies on its face to “each inmate” sentenced for a felony on or after November 1, 1989 and that it contains no explicit exception for aggravated murder or for any other felony offense. He contends that DOC is attempting to “insert what has been omitted,” in violation of ORS 174.010.

Plaintiff's argument has some facial appeal, but it is not correct. DOC's argument in this case does not insert anything into the statute. Instead, DOC's interpretation of the statute relies on the meaning of the phrase “term of incarceration,” which is found *in* the text of the statute. As explained above, as used in that statute, the phrase “term of incarceration” means a definite term imposed pursuant to the sentencing guidelines. So understood, ORS 421.121, although it may apply to “each inmate,” has effect only for those inmates with a “term of incarceration” to which earned time credits may be applied. DOC's

interpretation of the statute does not require this court to insert anything that has been omitted.⁸

Next, plaintiff points to an exception to the application of earned time credits and contends that the scope of that exception informs the scope of ORS 421.121's application. ORS 137.635. Again, however, plaintiff's argument is not correct.

ORS 137.635—enacted *before* the sentencing guidelines—was intended to prohibit early release for certain repeat offenders. *State v. Allison*, 143 Or App 241, 260, 923 P2d 1224 (1996) (explaining statute's background and intent).⁹ To that end, the statute provides that offenders convicted repeatedly of

⁸ Plaintiff even admits that ORS 421.121 does not apply to *all* inmates sentenced for felonies committed on or after November 1, 1989, and his reasoning mirrors DOC's reasoning throughout this brief. Plaintiff points out, correctly, that inmates sentenced to "true life" do "not have, and never will have, a release date against which earned time may be credited." (Pet BOM 41).

⁹ ORS 137.635 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

Footnote continued...

certain identified crimes otherwise subject to *indeterminate* sentencing—and therefore subject to parole release through the parole board—must receive a *determinate* sentence instead. The statute then goes on to prohibit the application of good time credits or earned time credits under ORS 421.120 and ORS 421.121 when an offender is so sentenced.

Plaintiff points out that ORS 137.635 expressly lists aggravated murder as an offense for which, if subject to ORS 137.635's terms, the good time and earned time credit systems found in ORS 421.120 and ORS 421.121 do not apply. Plaintiff argues that by providing an *exception* to the good time and

(...continued)

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.

* * * * *

(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.

earned time credit systems for *repeat* offenders convicted of aggravated murder, the statute implies that the good time and earned time credit systems *do apply* to aggravated murders not predicated by another qualifying conviction.

Again, plaintiff's contention has superficial appeal but is ultimately incorrect. ORS 137.635's primary function is to require a determinate sentence when one would otherwise not be required. The statute prohibits the application of good time and earned time credits to *that* determinate sentence. Thus, for the crimes to which it applies, ORS 137.635 does nothing more than prohibit the application of earned time credits to determinate sentences imposed pursuant to its own terms. Contrary to plaintiff's suggestion, the statute says nothing about the application of earned time credits to *indeterminate* sentences imposed pursuant to other statutes. Consequently, it does not support his argument.¹⁰

¹⁰ Additionally, DOC notes that ORS 137.635's application to aggravated murder is not entirely clear. ORS 163.105 requires that an offender convicted of aggravated murder "shall" receive a sentence of death, true life, or indeterminate life. ORS 163.105(1)(a). A 30-year minimum generally accompanies the indeterminate life sentence. ORS 163.105(1)(c). Nothing in ORS 137.635 prevents a trial court from imposing those required sentences—ORS 137.635 *prohibits* only those indeterminate sentences otherwise required under ORS 137.120, which has no application to aggravated murder. But ORS 137.635 nevertheless does require a trial court to impose a determinate sentence of no specified duration. Thus, most likely, in sentencing aggravated murders subject to ORS 137.635—those predicated by a qualifying conviction—a trial court is required to comply with both ORS 163.105 and with

Footnote continued...

Thus, ultimately, neither of plaintiff's textual and contextual arguments supports his position. Instead, read in context, ORS 421.121's earned time credit system most likely applies only to determinate periods of confinement imposed pursuant to the sentencing guidelines. As explained above, however, DOC's interpretation is not the statute's only plausible reading. Consequently, DOC turns to the legislative history to establish the legislature's intent. ORS 174.020; *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611-12, 859 P2d 1143 (1993).¹¹

(...continued)

ORS 137.635: the court must order at least life with a 30-year minimum, and must also order a determinate term of no specified duration.

ORS 137.635's prohibition on the application of *good time* credits then is superfluous: inmates serving life sentences are not eligible for good time credits in the first place. ORS 421.120(2). ORS 137.635's prohibition on the application of earned time credits merely prohibits the reduction of the determinate term set pursuant to ORS 137.635 itself.

¹¹ ORS 174.020 provides that parties may provide legislative history to the court and that the court shall give that history appropriate weight. ORS 174.020(1)(b), (3). In *Gaines*, this court relied on that statute and concluded that consideration of legislative history is not dependent on statutory ambiguity: this court may consider legislative history even in the absence of ambiguous text. Plaintiff contends that because the pertinent amendments to ORS 174.020 were enacted after the version of ORS 421.121 at issue in this case, *Gaines* does not apply. (Pet BOM 28). But this court need not resolve that issue in this case. Because ORS 421.121 is ambiguous, even under pre-*Gaines* law, examination of legislative history is appropriate. *PGE*, 317 Or at 611-12.

3. The legislative history confirms that plaintiff is not entitled to earned time credits.

The available legislative history confirms what the text and context suggest: under ORS 421.121, earned time credits apply to reduce determinate terms of incarceration; credits do not work to advance parole release dates set by the parole board.

As explained above, ORS 421.121 was enacted as part of a larger bill creating the sentencing guidelines system. *See generally* Or Laws 1989, ch 790. The sentencing guidelines replaced the former “parole matrix system” with a new determinate sentencing scheme. The guidelines, however, did not affect aggravated murder sentencing in any way. Instead, ORS 163.105, which was materially unchanged in 1989, *see* Or Laws 1989, ch 720, § 1, continued to require an *indeterminate* sentence for aggravated murder. Notably, at the time that the guidelines went into effect, aggravated murder was the *only* felony offense unaffected by the guidelines. No other felony carried an indeterminate sentence.

Consequently, in recommending the bill that would create the sentencing guidelines, the Oregon Criminal Justice Council explained 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.*” Senate Judiciary Committee, SB 1073, May 5, 1989, Ex A (Statement

of Oregon Criminal Justice Council) (emphasis added).¹² Essentially, the legislature understood that the sentencing guidelines applied to all felony offenses *other than* aggravated murder. That one offense remained an exception to the new determinate sentencing scheme.

Then in a bill summary section specific to ORS 421.121, the Criminal Justice Council explained that the “new good-time program” provides for a “prison-term reduction for appropriate institutional behavior for all offenders *sentenced under the guidelines.*” Senate Judiciary Committee, SB 1073, June 15, 1989, Ex D at 13 (Bill Summary explaining provision that would become ORS 421.121) (emphasis added).

In its totality then, the legislative history reveals that (1) in enacting ORS 421.121, the legislature intended to create an earned time credit system applicable to sentencing guidelines sentences; and (2) the legislature understood that aggravated murder was “excluded” from the guidelines system. Considered in light of that history, the phrase “term of incarceration” naturally refers to a determinate sentence set pursuant to the guidelines. It does not refer to an indeterminate life sentence or to an initial parole release date set by the parole board.

¹² Originally, the statute was part of Senate Bill 1073 (1989). That bill became House Bill 2550 (1989) before it was ultimately passed.

Again, prior to the enactment of the sentencing guidelines, no inmate was entitled to have good behavior credits advance his parole release date. And more specifically, because aggravated murder always carried at least an indeterminate life sentence, no inmate convicted of aggravated murder was entitled to the benefit of good behavior credits at all. Credits simply did not apply. DOC's position in this case would, thus, put plaintiff—and other post-guidelines aggravated murderers—in exactly the same position as every other aggravated murderer sentenced before the sentencing guidelines. The legislative history reveals that that is exactly what the legislature intended.

4. DOC's interpretation is also consistent with other maxims of statutory construction.

As demonstrated above, ORS 421.121's text, context, and legislative history establish that earned time credits have no application to an initial parole release date set by the parole board. Instead, the statute applies only to determinate terms of incarceration set pursuant to the sentencing guidelines. If this court concludes that ambiguity remains, however, it should turn to other maxims of statutory construction to determine the legislature's intent. As explained below, the applicable maxims of construction support DOC's arguments.

To resolve any remaining ambiguity in the statute at this stage, this court should “attempt to determine how the legislature would have intended the

statute be applied, had it considered the issue.” *Carlson v. Myers*, 327 Or 213, 225, 959 P2d 31 (1998). In doing so, this court “draw[s] guidance” from the sources already considered in the first two steps of the statutory construction analysis. *State v. Tannehill*, 341 Or 205, 211, 141 P3d 584 (2006). Here, considering the statutory text, context, and history demonstrates that, had the legislature recognized any ambiguity in ORS 421.121, it would have clarified that ambiguity by more expressly exempting indeterminate life sentences from its scope.

The analysis at this stage is not complicated. Although the phrase “term of incarceration” can take on different meanings in different contexts, and although plaintiff’s proposed construction of that phrase may not be “wholly implausible” in this context, the most relevant textual and contextual clues indicate that ORS 421.121 was not intended to apply as plaintiff suggests. As explained fully above, ORS 421.121 was enacted as part of the sentencing guidelines legislation and the phrase “term of incarceration” is used throughout the guidelines to indicate a definite length of incarceration time. In addition, the pre-guidelines “good time” system—applicable to indeterminate sentences—exempts indeterminate life sentences from its scope, and never had any impact on initial parole release dates set by the board.

In short, the legislature never has allowed good behavior credits to affect parole release dates and nothing in ORS 421.121 indicates an intention to alter

that policy. Instead, ORS 421.121 indicates an intention to create a system for reducing determinate incarceration terms set pursuant to the guidelines.

The legislative history confirms that conclusion. The history reveals that when the legislature enacted ORS 421.121 it intended nothing more than to create a good behavior credit system applicable to guidelines determinate sentences. Nothing in the legislative history indicates any intent to change the treatment of indeterminate life sentences. Instead, the legislature understood aggravated murder—the only crime carrying an indeterminate life sentence in the initial wake of the guidelines—to be unaffected by the guidelines legislation.

The ambiguity in this case arises primarily from the fact that ORS 421.121, on its face, applies to “each inmate sentenced to the custody of the Department of Corrections for felonies committed on or after November 1, 1989.” Considered in light of its context and legislative history, that phrase is plainly meant to limit the scope of the statute to inmates sentenced pursuant to the sentencing guidelines and not to inmates receiving indeterminate sentences for aggravated murder. Had the legislature recognized the ambiguity in its word choice, it would have resolved that ambiguity by simply limiting the application of earned time credits to “each inmate sentenced to the custody of the Department of Corrections pursuant to the felony sentencing guidelines.”

In addition, applying earned time credits to aggravated murder sentences creates an absurd result. *See State v. Vasquez-Rubio*, 323 Or 275, 917 P2d 494 (1996) (at third level of statutory construction analysis, court will attempt to avoid construction that would lead to an “absurd result”). As noted, in 1989, aggravated murder was the only felony offense left unaffected by the sentencing guidelines. At that time, ORS 163.105 required a trial court to impose at least a sentence of life imprisonment with a 30-year minimum. ORS 163.105(1)(c) (1989). After the expiration of 20 years of that sentence, the inmate was entitled to a hearing before the board and, upon making certain findings, the board was authorized to remove the 30-year minimum. ORS 163.105(2), (3) (1989). *See generally Janowski/Fleming v. Board of Parole*, 349 Or 432, 245 P3d 1270 (2010) (explaining statutory scheme). Prior to that hearing—no earlier than 20 years into the offender’s sentence—an aggravated murderer had no possibility of release to parole.

Given that sentencing scheme, earned time credits likely have little to no effect on most aggravated murderers’ incarceration. Offenders in those circumstances would receive initial release dates, but in many cases—if not most cases—that initial release date would not be longer than the judicially-imposed 30-year minimum, or the 20-year minimum period required before the

earliest possible release.¹³ Thus, “advancing” that initial release date accomplishes nothing. If the offender cannot be released any earlier than 20 or 30 years, advancing the initial release date to a date earlier than 20 or 30 years into the overall life sentence has no effect on actual release. It is not likely that the legislature intended that absurd result.¹⁴

Thus, considering all of the available information about the legislature’s intent, this court should conclude that the legislature did not intend ORS 421.121 to apply as plaintiff contends it does. Had the legislature recognized ORS 421.121’s ambiguity, it would have resolved the ambiguity by more clearly indicating that the statute has no effect on initial release dates set by the parole board.

¹³ OAR 255, Exhibit C contains the “Parole Matrix” used to set an inmate’s initial release date. Most offenses, including aggravated murder, carry a matrix range below 25 years.

¹⁴ Finally, DOC notes that it is unclear how, if at all, DOC would be able to apply ORS 421.121 under plaintiff’s proposed construction. Again, if plaintiff is correct, earned credits apply to advance the initial parole release date set by the parole board. But that parole release date—even if adjusted to account for earned credits—is not definite. It is subject to “deferral” for a variety of reasons. Thus, even if an inmate’s initial parole release date were advanced through the application of credits, the board could still defer the inmate’s actual release. Nothing in the earned time credit system contemplates that possibility. For example, it is not clear whether or not the inmate would be entitled to earn new credits applicable to his lengthened period of incarceration created by the deferral. Simply put, applying earned time credit to a parole release date creates tension in the statutory scheme, and no statute resolves that tension.

C. This court's 2006 opinion in *Engweiler v. Cook* does not require a different result.

In *Engweiler v. Cook*, decided in 2006, plaintiff litigated claims similar, but not identical, to the claim that he raises now. Although plaintiff did not prevail in that litigation, he claims that this court's opinion controls the outcome of this case. Plaintiff is incorrect. Although this court's opinion in *Engweiler v. Cook* contains several statements that are contrary to DOC's position in this case, those statements were *dicta* and are not controlling here. In any event, this court's reasoning in *Engweiler v. Cook* should be revisited.

1. Background

As explained above, plaintiff was sentenced to life imprisonment with no minimum period of confinement. Initially, pursuant to its then-applicable rules governing juvenile aggravated murderers,¹⁵ the parole board conducted a hearing and scheduled plaintiff for a "murder review" hearing after 480 months of incarceration. *Engweiler IV*, 343 Or at 541-42. Notably, the board did not set plaintiff's "initial release date" pursuant to ORS 144.120.

Plaintiff's murder review date was not the same as an initial release date. *Engweiler IV*, 343 Or at 541-42. It did not establish any date on which plaintiff might be released to parole. Instead, the murder review date did nothing more

¹⁵ Those rules are no longer in effect. For reference, the rules were found in OAR 255-032-0005 and OAR 255-032-0011. The rules were commonly referred to as the "Juvenile Aggravated Murder" or "JAM" rules.

than “establish[] a date for further parole review.” *Engweiler II*, 340 Or at 371.

It was merely a prerequisite that could result—but was not guaranteed to result—in the receipt of an initial release date.

Dissatisfied with his treatment before the board, plaintiff attempted to obtain review in the appellate courts several different ways. In *Engweiler v. Cook*, plaintiff filed a petition for writ of mandamus asking this court to order DOC to award him earned time credits under ORS 421.121. Because at that time plaintiff did not have an initial release date, he argued that his earned time credits should apply against his murder review date.

In that litigation, plaintiff “confined his arguments” to whether ORS 421.121 credits apply to the “murder review” date the parole board had set. *Engweiler v. Cook*, 340 Or at 377. Consequently, this court described the issue as “whether plaintiff *presently* is serving an identifiable ‘term of incarceration’ for purposes of computing earned-time credits under ORS 421.121.” 340 Or at 380 (emphasis added). Given that characterization of the issue, this court rejected plaintiff’s arguments. At that time plaintiff was serving an indeterminate life sentence and the parole board had done nothing beyond setting a date on which plaintiff would be “reviewed” for potential parole eligibility. Neither the sentence nor any action by the board identified any date on which plaintiff would or could be released. *Id.* at 383.

Consequently, this court concluded that plaintiff could not be viewed as possessing a “term of incarceration” for purposes of ORS 421.121. *Id.*

Having rejected plaintiff’s claim, however, this court nevertheless opined about plaintiff’s potential *future* circumstances. This court explained the phrase “term of incarceration” means “the amount of time that an inmate must spend in prison before he is eligible to be paroled,” and that it can refer to an amount of time set by the parole board. 340 Or at 380. Given that definition, this court opined that if in the future the parole board were to set plaintiff’s initial release date under ORS 144.120—a prospect that at that time was not guaranteed—the resulting period of years leading to that release date would qualify as a “term of incarceration” subject to earned time reductions under ORS 421.121. 340 Or at 383.

Plaintiff now claims that that conclusion in *Engweiler v. Cook* is controlling. The parole board has recently withdrawn plaintiff’s “murder review” date and has set plaintiff’s initial release date instead.¹⁶ DOC admits that if this court’s statements in *Engweiler v. Cook* are controlling, then ORS 421.121 now requires DOC to apply earned time credits to advance

¹⁶ In *Engweiler V*, 350 Or 592 (2011), this court concluded that plaintiff was not required to participate in a murder review hearing. Instead, this court ordered the board to hold a hearing and set plaintiff’s initial release date on parole pursuant to ORS 144.120.

plaintiff's initial release date. But, as explained in more detail below, those statements were *dicta* and are, therefore, not controlling. In any event, they were incorrect and should be revisited.

2. *Engweiler v. Cook*'s comments about initial parole release dates were dicta.

This court's comments in *Engweiler v. Cook* about the ORS 421.121's potential application to a parole release date set by the board were *dicta* because they were not necessary to the decision. "*Dicta*" refers to statements in judicial opinions that are "not necessary to the outcome of the case." *State ex rel. Huddleston v. Sawyer*, 324 Or 597, 621 n 19, 932 P2d 1145 (1997). Statements that qualify as *dicta* have no precedential effect. *Mastriano v. Board of Parole*, 342 Or 684, 692 n 8, 159 P3d 1151 (2007). *See generally Halperin v. Pitts*, 352 Or 482, 492, 287 P3d 1069 (2012) (explaining doctrine).

As explained, in *Engweiler v. Cook*, plaintiff had "confined his arguments" to the applicability of ORS 421.121 to the "murder review" date the parole board had set. And this court described the sole issue in the case as "whether plaintiff *presently is serving* an identifiable 'term of incarceration' for purposes of computing earned-time credits under ORS 421.121." (Emphasis added). Because plaintiff had not at that time received an initial parole release date from the board, the significance of such a date was not presented and did not need to be addressed.

Essentially, this court could have resolved *Engweiler v. Cook* without purporting to define ORS 421.121's scope in all circumstances. This court could have simply concluded that (1) the phrase "term of incarceration" implies some defined period of incarceration ending in some form of release, and (2) an order setting a review date is, therefore, not sufficient to create a term of incarceration. It was not necessary to articulate the effect of other board actions or to determine what the legislature meant by the phrase "term of incarceration" in all different circumstances. For that reason, this court's discussion of ORS 421.121's meaning, and specifically its conclusion that earned time credits under that statute apply to advance a parole release date set by the board, is *dicta* and is not binding in this case.¹⁷

3. In any event, this court should reconsider its reasoning in *Engweiler v. Cook*.

Even if this court concludes that the relevant comments in *Engweiler v. Cook* are not *dicta*, it should refuse to follow the reasoning in those comments

¹⁷ For the same reason, respondents are not barred under the doctrine of issue preclusion. That doctrine bars relitigation of issues that are "identical" to issues already litigated, and that were "essential to a final decision on the merits in the prior proceeding." *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104, 862 P2d 1293 (1993). The issue presented in this case is not "identical" to the issue presented in *Engweiler v. Cook*, and the disputed statements from *Engweiler v. Cook* were not "essential" to the "final decision" in that case.

here. This court's opinion did not follow the correct methodology for statutory interpretation and, consequently, it reached an incorrect result.

This court has recently explained that its "obligation when interpreting constitutional and statutory provisions * * * is to reach what [it] determine[s] to be the correct result in each case." *Farmers Ins. Co. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011). Consequently, if a party demonstrates that this court "erred in deciding a case" because it was "not presented with an important argument," because it "failed to apply [its] usual framework for decision," or because it failed to "adequately analyze the controlling issue," this court will "reconsider the earlier case." *Id.*; see also *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000) (explaining principle).

In *Engweiler v. Cook*, this court failed to consider pertinent arguments and failed to apply the correct framework in making its decision. Specifically, this court did not consider several pieces of relevant context, and it failed to apply the correct standard for assessing ambiguity in a statute. As explained above, although the phrase "term of incarceration" plausibly could refer to a parole release date, that is not the only reasonable interpretation. Consequently, the statute is ambiguous. Because this court failed to acknowledge any ambiguity in the statute, it did not consider legislative history or other construction aids. The history and other interpretation aids confirm DOC's interpretation of ORS 421.121's meaning: earned time credits under that statute

do not apply to advance parole release dates set by the board. This court should revisit and reject its prior conclusion to the contrary.

D. Even if plaintiff is entitled to earned time credits, he is not entitled to immediate release.

Even if this court rejects all of DOC's arguments regarding plaintiff's eligibility for earned time credits, it should still deny plaintiff's petition for writ of habeas corpus. Plaintiff's habeas corpus petition proceeds on two premises. First, he contends that earned time credits should advance the initial parole release date set by the parole board. Second, he claims that because that adjusted release date is in the past, he is entitled to immediate release. Even assuming that the first premise is correct, plaintiff's second premise fails: plaintiff is not entitled to immediate release because his release to parole is conditioned on completion of the "interview" process outlined in ORS 144.125.

ORS 144.245 provides that when the parole board "has set a date on which a prisoner is to be released upon parole, the prisoner shall be released on that date unless the prisoner on that date remains subject to an unexpired minimum term." ORS 144.245(1). ORS 144.125, however, provides that, "[p]rior to the scheduled release of any prisoner on parole * * * the [parole board] may * * * interview the prisoner" to review the prisoner's suitability for release. ORS 144.125(1). Upon making certain findings, the board can defer parole release. ORS 144.125(2)-(4).

Plaintiff contends that the “scheduled release” referred to in ORS 144.125 is the same as the “initial parole release date” set by the board pursuant to ORS 144.120, and that *his* initial parole release date—as adjusted by the application of earned time credits—is in the past. Therefore, he asserts that DOC is required to order his release pursuant to ORS 144.245 and that it is too late for the board to defer release under ORS 144.125.

Plaintiff is incorrect. This court has already considered and rejected that exact argument. This court’s decision was correct and it controls the outcome here.

As explained above, former versions of ORS 163.105 required at least a life sentence with a 30-year minimum upon a conviction for aggravated murder. After 20 years of that sentence expired, the offender was entitled to hearing before the board, and if the board made certain findings, it would eliminate the 30-year minimum. In *Janowski/Fleming v. Board of Parole*, 349 Or 432, 245 P3d 1270 (2010), the board held the hearing required by ORS 163.105 (1985), and found that the petitioner, *Janowski*, was likely to be rehabilitated within a reasonable period of time. It entered an order to that effect, but it set *Janowski*’s release date at the *conclusion* of his 30-year mandatory minimum sentence. *Id.* at 436-38.

Janowski challenged the board’s decision arguing that the board’s finding had the effect of overriding—and thus eliminating—his 30-year mandatory

minimum. This court agreed, ruling that *Janowski's* 30-year minimum was effectively removed. Because *Janowski* then had nothing but an indeterminate life sentence, this court instructed the board to set his parole release date in accordance with the matrix system in place when he committed his crimes. *Id.* at 445, 453.

At the time the court issued its opinion, however, the matrix-based initial release date that could be imposed for *Janowski* had already passed. Thus, *Janowski* argued that he must be immediately released on parole. Specifically, just as plaintiff argues now, *Janowski* argued that under ORS 144.245, when the board “has set a date on which a prisoner is to be released upon parole, the prisoner shall be released on that date,” and that because his matrix-based release date was in the past, it was too late for the board defer release under ORS 144.125(1). *Id.* at 456, 459.

This court rejected *Janowski's* argument and concluded that even though he had already reached and passed his matrix-based release date, the board still had an opportunity to conduct an interview and defer release if appropriate:

ORS 144.125(1) (1985) provides that, ‘*prior to the scheduled release of any prisoner,*’ the board may interview the prisoner to determine if any of the statutory grounds for postponement of a parole release date are present. The phrase ‘scheduled release’ is not defined in the statute or in the applicable regulations. However, the plain and natural meaning of that phrase is the date that the board ultimately schedules for the prisoner’s release. Again, in this case, *Janowski* still is incarcerated; the board has not yet scheduled his release. *Once the board sets Janowski’s release date, it will have an opportunity to interview him to determine whether any of the grounds for postponement of his release are present.*

Id. at 459 (first emphasis in original; second emphasis added; footnotes omitted).

This court’s resolution of the issue in *Janowski/Fleming* was correct. ORS 144.125 authorizes the board to conduct its pre-release interview any time prior to the “scheduled” release of the inmate. In common usage, “schedule” means to “designate to do * * * something at a fixed time *in the future*.” *Webster’s* at 2028 (emphasis added). Thus, *Janowski’s* argument—that because his matrix-based release date had passed, the board had missed its opportunity to conduct a pre-release interview—was incorrect. At the time of this court’s decision, the board had not scheduled *Janowski’s* release. And it is impossible to “schedule” an event to occur in the past. Therefore, the board necessarily would be required to schedule *Janowski’s* release *in the future* and would have an opportunity to conduct its interview prior to that scheduled date.

Here, plaintiff’s situation is materially identical to *Janowski’s*. Currently, plaintiff’s scheduled release date is in 2018. Even if the application of earned time credits advances plaintiff’s “initial release date” to a date in the past, the board cannot “schedule” his physical release for a date in the past. Plaintiff’s physical release will still necessarily be scheduled in the future. And prior to

that date, the board will have the opportunity to conduct its pre-release interview.¹⁸

Accepting plaintiff's contrary argument would lead to unreasonable results that the legislature could not have intended. Again, ORS 144.245 requires release on the date "set" by the parole board for the offender "to be released upon parole," unless the offender "remains subject to an unexpired minimum term." ORS 144.125 allows for deferral "prior to" the inmate's "scheduled release." Because of the unique structure of aggravated murder sentencing, many aggravated murderers' matrix-based initial release dates arrive before their 20-year hearing. That is especially true if the release dates are advanced by the application of earned time credits. At that 20-year hearing, the offender's 30-year minimum may be eliminated entirely. Thus, due to the peculiarities of aggravated murder sentencing, many aggravated murderers find themselves without an unexpired minimum and with a matrix-based release

¹⁸ Plaintiff cites *Hamel* in support of his argument, but *Hamel* is not controlling. In *Hamel*, this court addressed a board decision that "invalidly" deferred parole because the deferral decision was inconsistent with the law. The question was whether a later and unrelated board decision—this time postponing the plaintiff's parole on a lawful basis—rendered the prior decision irrelevant, and thus rendered the case moot. This court concluded that it did not because, had the earlier of the two decisions been consistent with the law, the plaintiff would have been entitled to release. 330 Or at 186-87. *Hamel* says nothing about the timing of an interview under ORS 144.125—*i.e.*, whether the interview must be held prior to the expiration of an inmate's matrix-based release date. Instead, *Janowski/Fleming* is the sole authority on that point.

date already in the past. By plaintiff's interpretation of the relevant statutes, all of those aggravated murderers are entitled to immediate release under ORS 144.245, and are entitled to bypass the pre-release interview process under ORS 144.125.

But that cannot be the legislature's intent. Aggravated murder is the most serious offense in Oregon criminal law. It carries Oregon's harshest penalties. *See State v. Haugen*, 349 Or 174, 203, 243 P3d 31 (2010). ORS 144.125's review process exists to ensure that offenders are not released to parole until the board is satisfied that they will be safe in the community. And the legislature expressly made that review process applicable to aggravated murder "regardless of the date of the crime." Or Laws 1989, ch 790, § 28 (compiled as a Legislative Note following ORS 144.110). It is impossible to believe that the legislature intentionally created a system in which many offenders convicted of aggravated murder would be entitled to parole release without any prior review by the parole board. In fact, by expressly making ORS 144.125 applicable to aggravated murder, the legislature demonstrated the exact opposite intent.

Instead, the legislature intended the board to have authority to "schedule" an aggravated murderer's release for a future date and to conduct a pre-release hearing under ORS 144.125 regardless of whether the offender's matrix-based

release date has already passed. That process should apply in this case.

Therefore, plaintiff is not entitled to release at this time.

CONCLUSION

Plaintiff is not entitled to earned time credits under ORS 421.121 because he does not have a “term of incarceration” to which credits can be applied. Properly understood, a “term of incarceration” under that statute is a determinate period of incarceration set pursuant to the sentencing guidelines. Because plaintiff was convicted of aggravated murder—an offense “excluded” from the guidelines—he received an indeterminate life sentence and he has an initial parole release date set by the board. As has historically been the case, and as the legislative history reveals was the legislature’s intent going forward, earned time credits simply have no application in those circumstances.

Even if plaintiff is entitled to earned time credits, however, he is not entitled to immediate release. As this court explained in *Janowski/Fleming*, prior to an aggravated murderer’s scheduled release to parole, the parole board is entitled to interview the inmate to determine whether parole is appropriate. Even if plaintiff’s matrix-based initial parole release date is in the past, his physical release must still be scheduled in the future. Prior to that scheduled release, the parole board will have an opportunity to interview plaintiff and potentially defer his release.

This court should uphold the various rules challenged in plaintiff's rule challenge proceeding. This court should deny plaintiff's petition for writ of habeas corpus.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 12, 2013, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Andy Simrin, attorney for petitioner, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10,131 words. I further 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(2)(b).

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