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

REPLY BRIEF OF PLAINTIFF/PETITIONER,
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PLAINTIFF'S REPLY BRIEF

Summary of Arguments

1) Plaintiff's First Question Presented in *State ex rel Engweiler v. Cook*, 340 Or 373, 133 P3d 904 (2006), was whether an inmate serving a life sentence for a crime committed on or after November 1, 1989, was entitled to earned time under ORS 421.121. This court answered that question in the affirmative, but observed that the Board had not, at that time, established Plaintiff's term of incarceration. This court's answer to that question was correct. The State defendants may have new legal arguments that the State did not make in *Engweiler v. Cook*, but that doesn't alter the fact that this court resolved Plaintiff's First Question Presented in that case. The State cannot relitigate that issue now.

2) Even if ORS 144.125 generally applies to inmates who committed murder or aggravated murder on or after November 1, 1989, ORS 161.620 (1989) created an exception to its application. It does not apply to juveniles for whom a mandatory minimum sentence could not be imposed. In any event, any discretionary authority that the Board had to conduct an exit interview under ORS 144.125 expired with the passage of Plaintiff's earned time date on July 17, 2012. Plaintiff is entitled to immediate release from physical custody.

REPLY TO RESPONDENTS' FIRST PROPOSED RULE OF LAW

This court properly construed ORS 421.121 in *Engweiler v. Cook*. The State defendants identify no basis for overruling this court's prior decision.

REPLY TO RESPONDENT'S SECOND PROPOSED RULE OF LAW

The exit interview process authorized by ORS 144.125 does not apply to juveniles for whom ORS 161.620 precluded the imposition of a minimum period of incarceration. Even if the process applies to inmates who are to be released onto PPS, the Board of Parole and Post-Prison Supervision (the Board) is not required to conduct an exit interview. The State defendants do not address Plaintiff's contention that any authority to conduct an exit interview and defer Plaintiff's release expired with the passage of his earned time date of July 17, 2012.

ARGUMENT

I. ORS 421.121 Applies to All Felonies Committed On or After November 1, 1989

The State defendants argue that, despite the fact that ORS 421.121(1) contains the phrase "each inmate sentenced to the custody of the department for felonies committed on or after November 1, 1989," the statute has implicit exceptions in addition to the single express exception that it does contain. According to the State defendants, in addition to the express exception for

sentences imposed under Ballot Measure 4,[1] the phrase "term of incarceration" creates additional unstated exceptions. In particular, according to the State defendants, indeterminate sentences for aggravated murder are excepted. That is so, defendants posit, because a "term of incarceration" simply never exists for a person for whom a court has imposed an indeterminate sentence. (Defendants' Brief on the Merits at 12-18).

Defendants' argument reduces to two fundamental contentions: 1) this court didn't mean what it said in *Engweiler v. Cook* and, 2) if this court meant what it said in *Engweiler v. Cook*, it was wrong.

With respect to the first contention, Plaintiff's First Question Presented in his Brief on the Merits in *Engweiler v. Cook* 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)?"

This court answered that question in the affirmative, subject to the caveat that, as of that time, the Board had not yet established Plaintiff's term of incarceration. *Engweiler v. Cook*, 340 Or at 383-84. Defendants assert that this court's affirmative answer to Plaintiff's first question presented was incorrect. They contend that this court did not properly consider the text, context and legislative history to ORS 421.121 (1989). Defendants do not acknowledge that, in support of his contentions in *Engweiler v. Cook*, Plaintiff made

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[1] ORS 137.635.

arguments in that case based on the text, context and legislative history to that statute. Because Plaintiff's First Question Presented was done so in the framework of this court's usual paradigm for statutory construction, this court's answer to that question is "authoritative." *State v. Running*, 336 Or 545, 562, 87 P3d 661, *cert den* 543 US 1005 (2004).

Although Defendants point to ORS 421.120 (1989) as context for their proposed construction of ORS 421.121 (1989), they do not include the text of that statute anywhere in their brief. (Defendants' Brief on the Merits at 15-23). It provided, in part:

> "(1) Each inmate confined in execution of the judgment of sentence upon any conviction in the Department of Corrections institution, <u>for any term other than life</u>, and whose record of conduct shows that the inmate faithfully has observed the rules of the institution, shall be entitled to a deduction from the term of sentence[.]"

1989 Or Laws, ch 790, § 56 (emphasis added).

The legislature amended ORS 421.120 in the very same bill, HB 2250, in which it enacted ORS 421.121 (1989). 1989 Or Laws, ch 790, § 60. ORS 421.120(1) (1989) expressly identifies life sentences as being exempt from its operation. ORS 421.120(3) (1989) expressly stated that that statute applies to "felonies committed prior to November 1, 1989." 1989 Or Laws, ch 790, § 56.

When the legislature includes a term or phrase in one statute but omits that term or phrase from a related statute, this court infers that the legislature's

omission from the latter statute was "purposive." *State v. Rainoldi*, 351 Or 486, 496-97, 268 P3d 568 (2011) (citing *State v. Bailey*, 346 Or 551, 213 P3d 1240 (2009)). That is all the more true when the two statutes were integrally affected by the same bill. Defendants provide no explanation why the legislature would purposively choose to explicitly exempt life sentences from ORS 421.120 while at the same time requiring this court to infer an implicit exception for the very same thing in ORS 421.121.

With respect to the one express exception found in ORS 421.121 (1989) for sentences imposed under ORS 137.635, the State defendants assert:

> "the statute says nothing about the application of earned time credits to *indeterminate* sentences imposed pursuant to other statutes."

(Defendants' Brief on the Merits at 22).

While that may be true, this court has certainly done so. In *State v. Davis*, 315 Or 484, 847 P2d 834 (1993), this court addressed limits imposed by the felony sentencing guidelines on dangerous offender sentences. *Id.* at 486. In doing so, this court observed that dangerous offender sentences are indeterminate to the extent that they exceed the presumptive term required under the guidelines grid. *Id.* at 488-89. Within that context, this court noted that the 20% reduction authorized by ORS 421.121 applies to the defendant's "total term of incarceration," which includes the indeterminate portion of the dangerous offender sentence. *Id.* at 489 n 12.

Plaintiff is unable to discern any reason why ORS 421.121 (1989) should apply to some post-1989 indeterminate sentences but not others. Defendants offer none.

Even if ORS 421.121 (1989) contains unstated exceptions in addition to its sole express exception, the fact of the matter is that the legal question that the State defendants attempt to litigate here was the First Question Presented by Plaintiff in *Engweiler v. Cook*. By presenting legal arguments now that the State could have presented in that case does not alter the fact that, as far as Plaintiff and the State are concerned, this court decided the legal issue presented by Plaintiff in that case.

Defendants' efforts to circumvent issue preclusion with new legal arguments should be rejected:

> "An issue on which relitigation is foreclosed may be one of evidentiary fact, of 'ultimate fact' (i.e., the application of law to fact), or of law. * * * if the issue was one of law, new arguments may not be presented to obtain a different determination of that issue."

The American Law Institute, *Restatement (Second) of Judgments* § 27 (1982).[2]

That should end the inquiry as to Plaintiff and the State, even if, as the

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[2] This court relied on Section 27 of the *Restatement* on four prior occasions. *Hawkins v. LaGrande*, 315 Or 57, 72 n 7, 843 P2d 400 (1992); *Drews v. EBI Companies*, 310 Or 134, 140-41, 795 P2d 531 (1990); *State Farm Fire & Cas. v. Reuter*, 299 Or 155, 167 n 10, 700 P2d 236 (1985); *Hellesvig v. Hellesvig*, 294 Or 769, 776 n 5, 662 P2d 70 (1984).

State defendants now suggest, this court was wrong in *Engweiler v. Cook*. *Ram Technical Services, Inc. v. Koresko*, 346 Or 215, 228, 208 P3d 950 (2009).

II. ORS 144.125 Does Not Apply to Juveniles Subject to ORS 161.620 (1989)

The State defendants point to the legislative note following ORS 144.110 in support of their claim that ORS 144.125 applies to Plaintiff. (Defendants' Brief on the Merits at 42). That note provides:

> "The provisions of ORS 144.110, 144.120, 144.122, 144.125, 144.130, 144.135, 144.185, 144.223, 144.245 and 144.270 apply only to offenders convicted of a crime committed prior to November 1, 1989, and to offenders convicted of aggravated murder or murder regardless of the date of the crime."

1989 Or Laws, ch 790, § 28.

Here, however, it must be recalled that ORS 144.110(2) provides, in part:

> "(2) Notwithstanding the provisions of ORS 144.120 and 144.780:
>
> "* * * * *
>
> "(b) The board shall not release a prisoner on parole:
>
> "(A) Who has been convicted of murder defined as aggravated murder under the provisions of ORS 163.095, except as provided in ORS 163.105; or
>
> "(B) Who has been convicted of murder under the provisions of ORS 163.115, except as provided in ORS 163.115 (5)(c) to (f)."

In *State ex rel Engweiler v. Felton*, 350 Or 592, 260 P3d 448 (2011), this court held that ORS 144.110(2)(b), when read in the context of ORS 161.620 (1989), does not apply to juveniles who cannot be subjected to mandatory

minimum periods of incarceration, even if convicted of aggravated murder. Despite the text of 1989 Or Laws, ch 790, § 28, ORS 161.620 (1989) created an exception to its application.

Even if ORS 144.125 applies to adult offenders who may be released onto post-prison supervision for a murder or an aggravated murder committed on or after November 1, 1989, the legislature did not intend the terms of 1989 Or Laws, ch 790, § 28 to apply to juveniles who were exempt from its provisions by virtue of ORS 161.620 (1989).

In any event, the State defendants do not dispute Plaintiff's calculation that, if ORS 421.121 applies to him as this court said that it did in *Engweiler v. Cook*, his earned time date came and went on July 17, 2012. The Board's authority to take any action that might have been authorized by ORS 144.125 was discretionary, because that statute clearly states that the Board "may upon request of the Department of Corrections or on its own initiative interview the prisoner to review the prisoner's parole plan[.]" (Emphasis added).

The State defendants do not dispute that the Board did not conduct an interview pursuant to ORS 144.125 prior to July 17, 2012. The State defendants do not contend that the Department of Corrections asked the Board to conduct an interview pursuant to ORS 144.125 prior to July 17, 2012.

The State defendants do not contend that the Department of Corrections is foreclosed from releasing an inmate on his earned time date if the Board has

not, on or before that date, performed a discretionary function that could extend that date. To the contrary, if Plaintiff is entitled to earned time under ORS 421.121, then "Adjusting the parole release date [was] a ministerial act." *Plumb v. Prinslow*, 847 F Supp 1509, 1518 (D Or 1994). Consequently,

> "if plaintiff had an absolute right to those credits, state law cannot deprive him of that right merely because the state's employees failed to timely perform their duties."

Id. at 1517 (citing *Logan v. Zimmerman Brush Co.*, 455 US 422, 71 L Ed 2d 265, 102 S Ct 1148 (1982)).

CONCLUSION

For the foregoing reasons, and for the reasons explained in Plaintiff's Brief on the Merits, court should issue judgment in Plaintiff'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 Reply 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 1,994 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 May 16, 2013, I filed this Reply Brief 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 Reply Brief by electronic service on the attorney listed below by using the court's electronic filing system.

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