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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	1
OPINIONS BELOW.....	2
JURISDICTION.....	3
CONSTITUTIONAL PROVISIONS.....	4
PROCEEDINGS BELOW.....	5
STATEMENT OF THE CASE.....	6
REASONS FOR GRANTING THE WRIT.....	10
CONCLUSION.....	14

TABLE OF AUTHORITIES

<i>Cullop v. Offender Information Center</i> , 226 Or. App. 167, 203 P.3d 276 (2009).....	9
<i>Himes v. Thompson</i> , 336 F.3d 848 (9th Cir. 2003).....	1, 10, 11, 12, 13, 14
<i>State ex rel Crabtree v. Board of Parole and Post-Prison Supervision, and Department of Corrections</i> , Marion County Case No. 20CV43386.....	2
<i>Crabtree v. Board of Parole & Post-Prison Supervision</i> , 301 Or.App. 636 (2019), review denied, 366 Or 382 (2020).....	8
<i>State ex rel Crabtree v. Board of Parole and Post-Prison Supervision</i> , 323 Or.App. 322, 522 P.3d 566 (2022).....	2
<i>State ex rel Crabtree v. Board of Parole and Post-Prison Supervision</i> , 371 Or. 21, 527 P.3d 1001 (2023).....	2
Article 1, section 10, clause 1 of the United States Constitution	4
28 U.S.C. § 1257.....	3
Or.Rev.Stat. § 163.115.....	5, 6
Or.Rev.Stat. § 137.700 (1996).....	6
Or.Rev.Stat. §§ 34.105 to 34.240.....	8

QUESTIONS PRESENTED

1. Is the Ex Post Facto Clause of Article 6 of the United States Constitution violated when prison officials take away a determinate release date imposed by a court in 1996 and exchange it with an indeterminate release date based on retroactive laws enacted in 1999?

2. When 1999 laws were applied to petitioner's 1996 conviction to deny him parole for two years in 2021, and perhaps indefinitely, was the Oregon Board of Parole required to adhere to *Himes v. Thompson*, 336 F.3d 848 (9th Cir. 2003)(holding that the Oregon Board of Parole violated the Ex Post Facto Clause by applying 1994 laws to a prisoner's 1978 conviction)?

OPINIONS BELOW

This case originated in the Circuit Court of the State of Oregon for Marion County. *State ex rel Crabtree v. Board of Parole and Post-Prison Supervision, and Department of Corrections*, Marion County Case No. 20CV43386.

An appeal was filed in the Oregon Court of Appeals, and the docket number is CA A176241. The official report is *State ex rel Crabtree v. Board of Parole and Post-Prison Supervision*, 323 Or.App. 322, 522 P.3d 566 (2022).

A petition for review was filed in the Oregon Supreme Court, and the docket number is S070018. The official report is *State ex rel Crabtree v. Board of Parole and Post-Prison Supervision*, 371 Or. 21, 527 P.3d 1001 (2023).

JURISDICTION

On November 20, 2020, petitioner sought a petition for an alternative writ of mandamus in the Marion County Circuit Court, which the court allowed on February 18, 2021, and dismissed on June 9, 2021. A timely appeal was filed, and denied without opinion on December 14, 2022. A timely petition for review was filed, and denied without opinion on April 20, 2023. Petitioner now brings this petition for a writ of certiorari.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1257 to review by writ of certiorari a final judgment rendered by the highest court of a state in which a decision could be had.

CONSTITUTIONAL PROVISIONS

This case involves Article 1, section 10, clause 1 of the United States Constitution which prohibits the states from passing Ex Post Facto laws. This provision provides:

“No State shall *** pass any Bill of Attainder, ex post facto Law[.]”

PROCEEDINGS BELOW

On April 17, 1996, petitioner was arrested in Washington County, Oregon, of murder pursuant to Or.Rev.Stat. § 163.115, and he was sentenced to a flat term of 25 years, which established a firm release date for April 26, 2021. When prison officials changed petitioner's sentence, and substituted his firm release date with a parole board review on April 14, 2021, and then denied him release for two additional years, petitioner filed a petition for a writ of mandamus in the Marion County Circuit Court seeking to restore his original sentencing judgment. The Marion County Circuit Court allowed the writ on February 18, 2021, and dismissed it on June 8, 2021. Petitioner filed a timely notice of appeal. The Oregon Court of Appeals affirmed without opinion on December 14, 2022, and the Oregon Supreme Court denied review on April 20, 2023.

STATEMENT OF THE CASE

Petitioner was arrested for murder in Washington County, Oregon, on April 17, 1996. On September 12, 1997, petitioner plead no contest to the offense charged and received a flat, day-for-day, incarceration term of 300 months (25 years) with a fixed release date of April 26, 2021. A copy of petitioner's Judgment is attached as Appendix A. Petitioner was sentenced under Or.Rev.Stat. § 137.700 (1996), which, at the time petitioner was sentenced, carried a determinate sentence of 300 months in prison and a term of post-prison supervision for life. There was no parole review, consideration, or process as part of the sentencing scheme for murder under Or.Rev.Stat. § 163.115.

On March 30, 1998, the Oregon Department of Corrections computed petitioner's sentence to reflect the exact terms of the sentencing judgment and set his release date for April 26, 2021. A copy of petitioner's first "face sheet" is attached as Appendix B.

On October 23, 1999, the Oregon Legislature amended the murder sentencing law to provide discretionary release authority for murder sentences to the Parole Board, regardless of the date of the crime. See Or. Laws 1999, ch. 782, § 2. Please see Appendix C.

On January 6, 2015, over 18 years later, the Oregon Department of Corrections; the division of “Information and Sentence Computation Unit (OISC)” sent petitioner a “memo” informing him that it had recomputed his incarceration term and that he would now be required to petition the Oregon Parole Board for a hearing on to request a change in the terms of his confinement rather than be released on April 26, 2021. A copy of the OISC memo is attached as Appendix D. This profound change in petitioner’s sentence *was not* the product of any court order from any jurisdiction—particularly the Washington County Circuit Court. The Department of Corrections changed petitioner’s sentencing structure on its own initiative based on the application of ex post facto laws that were enacted in 1999.

On May 16, 2017, the Parole Board issued *Board Action Form No. 1* establishing the date upon which it would hold its next hearing to consider petitioner's release, which is attached as Appendix E. Petitioner timely filed for an administrative review, and then timely filed for judicial review. The appeal was affirmed without opinion. See *Crabtree v. Board of Parole & Post-Prison Supervision*, 301 Or.App. 636 (2019), review denied, 366 Or 382 (2020).

On November 20, 2020, petitioner sought a petition for an alternative writ of mandamus under Or.Rev.Stat. §§ 34.105 to 34.240 in the Marion County Circuit Court, which was both substantively and procedurally proper. See *Cullop v. Offender Information Center*, 226 Or. App. 167, 203 P.3d 276 (2009). The writ was dismissed, and the appeal thereafter was affirmed without opinion on April 20, 2023. This is the underlying case for which petitioner brings this petition for a writ of certiorari.

On or around April 14, 2021, petitioner saw the Parole Board, and he was denied all possibility of release.

The Parole Board issued *Board Action Form No. 2* and scheduled the next review for April of 2023, which is attached as Appendix F. Petitioner filed a timely administrative review, which was denied and then a timely request for a judicial review, which was affirmed without opinion by the Oregon Court of Appeals, which is attached as Appendix G, and denied review by the Supreme Court on December 15, 2022, which is attached as Appendix H.

Petitioner now seeks a petition for a writ of certiorari in this court.

REASONS FOR GRANTING THE WRIT

Petitioner asks this Court to vacate and remand this case back to the Oregon Supreme Court in light of *Himes v. Thompson*, 336 F.3d 848 (9th Cir. 2003)(holding that the Oregon Board of Parole violated the Ex Post Facto Clause by applying 1994 laws to his 1978 conviction). Petitioner's case is identical to the Ninth Circuit precedent in *Himes* and the same result should obtain.

The petitioner in *Himes* committed his crimes in 1978, and he was sentenced to a 70-year term of imprisonment. After serving fifteen years, the Oregon Parole Board released him on April 24, 1994. On August 1, 1994, less than four months after his release, the Board of Parole formally revoked Himes' parole. After unsuccessful appeals of the revocation decision in state court, Himes filed in federal district court a petition for a writ of habeas corpus, challenging the parole revocation. The district court denied the writ, and this court affirmed in an unpublished opinion. *Himes v. Thompson*, 225 F.3d 662 (9th Cir.2000).

On October 27, 1994, approximately three months after revoking Himes' parole, the Oregon Board of Parole held a hearing to determine Himes' eligibility for rerelease. He was denied and scheduled his next review for May of 2024, two years shy of his projected statutory "good-time" date. In other words, as a result of the parole violations, Himes will be required to serve a minimum of twenty-nine-and one-half additional years in prison. As noted by the Ninth Circuit, the application of the 1978 regulations—as opposed to the 1994 regulations—would quite likely have led to a different result.

The Ninth Circuit held in *Himes* that although the new parole regulations were applied in a 1994 hearing, they affected the punishment Himes received for crimes committed in 1978. Therefore, the regulations were applied retroactively. The Court then shifted its analysis to determine whether the 1994 regulations thus adopted, as compared to the 1978 regulations, created a significant risk of a more onerous sentence.

In reversing the district court's order denying Himes' petition for habeas corpus, and remanding with instruction to grant the writ, the Ninth Circuit held that the change in the measure of punishment for parole revocations between the time of Himes' offense (1978) and those in effect when his parole was revoked was extreme (1994). The Ninth Circuit concluded that it was objectively unreasonable for the Oregon Courts to decide that there was no ex post facto violation.

This case presents the same situation whereby petitioner receives a judgment in 1997 for a determinate sentence—a flat, day-for-day term of 300 months in prison—establishing a firm release date for April 24, 2021, which remained unchanged for 18 years. Then, the Department of Corrections intervenes and gets the Parole Board involved to apply *new* laws retroactively to *remove* the terms of the judgment and change it to an indeterminate sentence and parole board review. The substituted firm release date for parole board review, and the subsequent denial of release has

kept petitioner in prison two years past his original release date, and for every two years thereafter he could continue to be "flopped" by the Oregon Parole Board indefinitely.

CONCLUSION

The petition for a writ of certiorari should be granted.
Petitioner asks this Court to vacate and remand this case back
to the Oregon Supreme Court in light of *Himes v. Thompson*,
336 F.3d 848 (9th Cir. 2003).

DATED this 18th day of July, 2023.



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