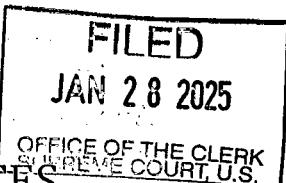


24-6509
No. _____

ORIGINAL

Application No. _____



IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO ALEJANDRO CHARLEMAGNE,

Petitioner

v.

BRAD CAIN,

Superintendent, Snake River Correctional Institution

and

OREGON BOARD OF PAROLE AND POST PRISON SUPERVISION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

FIRST QUESTION PRESENTED. Did the Parole Board retroactively applied the wrong administrative rules and parole standards when determining not to grant petitioner a parole Interim Hearing, while the state, district courts, and U.S. Court of Appeals, failed to recognize such violations that caused petitioner's parole denial violating U.S. Constitution's Sixth and Fourteenth Amendment's Due Process and Ex Post Facto guarantees, and deciding an important federal question in a way that conflicts with relevant decisions of this Court. And in such case, should a lawful determination occur based on the applicable administrative rules, parole standards, and facts as they were at the time of the interim hearing denial?

SECOND QUESTION PRESENTED. Because the parole board failed to follow the process mandated by Division 50 of the parole administrative rules guiding for deferment of parole because of misconduct, should the board be prohibited to consider misconduct as the only statutory factor quoted to deny petitioner an interim hearing. In doing so violating petitioner's Due Process and Ex Post Facto guarantees, and conditions of incarceration?

THIRD QUESTION PRESENTED. Did the state appeal courts, district court, and Ninth Circuit Court of Appeals incorrectly judged this case moot, when if petitioner is to prevail the board must provide a lawful basis for denying an interim hearing based on the correct administrative rules, parole standards, and facts as they were at the time of the interim hearing denial, which would cause for him to be released on parole?

FOURTH QUESTION PRESENTED. Should petitioner be given credits for time served and be released on parole if he prevails in this case?

PROCEEDINGS IN STATE, FEDERAL, AND APPELLATE COURTS

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Oregon Supreme Court; A168255 (S069601) (514 P.3d 1113); Antonio Alejandro Gutierrez, petitioner v. Board of Parole and Post-Prison Supervision, respondent; July 28, 2022.

U.S. District Court for Oregon; 2:23-cv-00088-SI (2023 WL7287497); Antonio A. Gutierrez, petitioner v. Brad Cain, respondent; October 20, 2023.

U.S. Court of Appeals for the Ninth Circuit; Antonio Alejandro Charlemagne, aka Antonio Gutierrez-Farah, aka Antonio Alejandro Gutierrez, petitioner v. Brad Cain, respondent; 23-3425 (WL4763066); August 26, 2024.

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COURTS AND ADMINISTRATIVE AGENCIES OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

On 11/1/2017 the Oregon Board of Parole (Board) denied petitioner's request for an Interim Hearing for parole purposes, Board Action Form (BAF) #23 (Ex 103, pgs. 136-138)¹. He appealed through an Administrative Review Request, and the Board upheld its decision in Administrative Review Response (ARR) #13 (Ex 103 pgs. 147-148].

Pursuant to Oregon Revised Statute (ORS) ORS 144.335² and Oregon Administrative Rule (OAR) OAR 255-080-0001 petitioner sought judicial review in Oregon's Court of Appeals and Supreme Court. In 2019, two years after oral arguments, the Oregon Court of Appeals dismissed the case as moot, *Gutierrez*, 506 P.3d 1129. The state Supreme Court upheld the decision, *Gutierrez*, 514 P.3d 1113. Petitioner petitioned to the Oregon U.S. District Court for habeas appealing the state courts decisions, the district court upholding the lower courts decisions to dismiss the case as moot, *Charlemagne*, 2:23-cv-00088-SI³. He appealed to the Ninth Circuit Court of Appeals to be granted Certificate of Appealability and was denied, *Charlemagne*, 23-3425.

JURISDICTION OF THIS COURT

The date of the order thought to be reviewed is November 8, 2024 (App 1) making this petition timely filed pursuant to the Court's Rule 13.

¹ Mention to the exhibits (Ex) within this brief are those exhibits provided by respondent that constitute the record of the case.

² All referenced Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) provided in the Appendix and mentioned herein are those applicable to Petitioner unless otherwise stated. The versions of Chapter 255 of the Board of Parole Rules of 1984 are applicable to petitioner.

³ By this time petitioner had legally changed his last name to Charlemagne.

United States Supreme Court Rule 10 prescribes that, a petition for a writ of certiorari will be granted only for compelling reasons. "The following, although neither controlling nor fully measuring the Court's discretion, indicates the character of the reasons the Court considers... (c) a state court or a United States court of appeals has decided an important question of federal law... in a way that conflicts with relevant decisions of this Court". This case falls under that category, it is of importance to the public, and the lower courts have engaged in an "objectively unreasonable application" and "contrary to" clearly established federal law as established by the U.S. Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth and Fourteenth Amendments to the U.S. Constitution regarding Due Process, and Ex Post Facto guarantees as established by the U.S. Supreme Court, (Oregon Revised Statute) ORS 144.120, and ORS 144.125; (Oregon Administrative Rule) OAR 255-60-005, OAR 255-062-0016, and OAR 255-062-0021.

STATEMENT OF THE CASE

Pro se petitioner asks for leniency in these complex pleadings, where Pro se pleadings must be construed liberally, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

Petitioner claims that the Oregon Board of Parole has retroactively applied new rules of parole that are "contrary to" established federal law as established by this Court in *Garner v Jones*, 529 US 244, 146 L Ed 2d 236, 120 S Ct 1392 (2000) and *Cal. Dept. of Corrections v Morales*, 131 L Ed 2d 588, 514 US 499 (1995), designed to allow parole boards through new rules to extend parole hearing intervals for longer periods than originally established, but only "when the original standards" for determining parole suitability are not enhanced. In doing so, the board is violating due process and ex post

facto guarantees. Petitioner first put the board on notice of these violations in 2013, whom have continued to run amuck in applying substantially altered new rules of parole retroactively, while the lower courts have remained silent on the issue and allowed it to continue to happen. In 1985 petitioner was found guilty of murder for offenses committed in 1984, ORS 163.115 (Count 1), and second-degree assault, ORS 163.175 (Count 2). He was sentenced to an indeterminate sentence of life in prison on Count 1, with the possibility of parole, and for Count 2 an indeterminate period to be not less than five years but not to exceed 10 years, consecutive to Count 1⁴. In 1986 pursuant to OAR 255-30-005 petitioner was given a prison term hearing. During a hearing to amend his prison term on 1/2/1991, due to the board having insufficient votes in the 1986 hearing, both sentences were "summed up" pursuant to OAR 255-35-022(4) and his new prison term established at 180 months (15 years) (Ex 103, pg. 27). "Prison Term: The actual amount of time the Board determines a prisoner will serve when it sets a parole release date", OAR 255-30-005(2) (App 11). On 1/2/1991 petitioner also received a good time reduction of 12 months establishing his new release date in 12/22/1998.

In 1998, the board at an initial exit interview and through the use of a compelled psychological evaluation, found petitioner had a Present Severe Emotional Disturbance (PSED) such as to constitute a danger to the health or safety of the community and deferred his release date for 24 months. Subsequently, and every two years, five more

⁴ In 1999 while incarcerated, petitioner plead to an Attempted Assault II receiving a 48 months consecutive sentence for an incident occurring in 1998.

exit interviews were conducted from 2000 to 2009 each time deferring his release date for successive two-year periods for the same reason.

In May 2011, the board, again, found petitioner had a PSED and deferred his parole. Unlike previously, and through the use of newly instituted administrative rules, pursuant to ORS 144.280 the board found that it would not be reasonable to expect petitioner to be granted a release date sooner than 10 years and set its next exit interview hearing for May 2021. He was then allowed by administrative rules to petition for interim hearings every two years periods, which he requested four times and was denied. The third request in 2017, 33 years into his incarceration is relevant to this case when the board denied his request on the basis that:

"The Board finds that inmate did not meet his burden of producing evidence sufficient to convince the Board that an interim hearing is warranted. Inmate received a major disciplinary report in 09/2016 for disobedience II. Therefore, the Board finds that there is not a reasonable cause to believe that the inmate may be granted a change in the terms of confinement or a firm release date before 11/06/2021. Interim hearing is denied pursuant to OAR 255-062-0021." BAF #23 (Ex 103, pg. 125).

On 12/4/2017, he filed an Administrative Review of that order (Ex 103, pgs. 127-144), upheld on 5/14/2018 (Ex 103, pgs. 147-148). Petitioner sought judicial review in Oregon's Court of Appeals and Supreme Court. Two years after oral arguments in 2019, the Oregon Court of Appeals dismissed the case as moot because in June 2021 the board had held a statutorily scheduled exit interview and had found petitioner suffered from a PSED that constituted a threat to the health or safety of the community, and thus had received all the remedies he was entitled to. After the Supreme Court upheld that decision, petitioner petitioned to the Oregon U.S. District Court for habeas appealing the lower court's decision, the district court upholding the lower court's decision to dismiss the

case as moot. He appealed to the Ninth Circuit Court of Appeals asking to be granted Certificate of Appealability to continue appealing his claims, which that court denied. He now asks the Court for Writ of Certiorari. The board's actions are capable of repetition and likely to evade review in violation of Due Process and Ex Post Fact guarantees. Preserved at Judicial Reviews (Ex's 110, pgs. 8-14; and 117, pgs. 21-23), in district court in PETITIONER'S BRIEF IN SUPPORT OF 28 USC § 2254... pgs. 18-20, and during the COA petition in the Ninth Circuit, pgs. 43-46. *Couey v. Atkins*, 357 Or. 460, 463, 355 P.3d 866 (2015) (holding that cases involving issues of public interest that are "likely to evade judicial review under the standard set out in ORS 14.175" are justiciable even if they are moot). These matters are not only likely to arise; but affected petitioner again almost exactly in 2019, *Gutierrez v. Board of Parole*, A174068, and whenever the board continues to apply the wrong parole standards. Because interim hearing procedures are the only statutory mechanism available to inmates to challenge the lawfulness of a prolonged deferment, it creates an illegal adverse effect on decisions affecting prisoners including petitioner. *Miller v. Board of Parole*, 2011 US App LEXIS 902, (Section A.) (2011), Oregon's "Matrix System" "gives rise to a constitutional liberty interest". The current statutory schemes used make it likely that the board will repeat its actions because those under the board's jurisdiction are likely to raise these claims often.

These issues are likely to evade review because it is not reasonable to expect a judicial review petition to fully litigate the matter within the two year interval set out in ORS 144.280(2). Petitioner's own judicial reviews experience from every successive interim hearing request since 2013, demonstrates all his petitions have been resolved

more than two years after the next interim hearing request. This history is emphasized because, if the court of appeal's mootness analysis is allowed, then such claims would be likely to be moot before the court can reach a decision on the merits. As a result, the board would continue to act on interim and parole hearings requests without any judicial guidance, depriving petitioner and other prisoners of their due process and liberty interest rights.

While the board continues applying an unconstitutional standard to deny interim hearing requests and parole considerations censured under *Garner* and *Morales*, there is currently no state or federal law interpreting the context by which Oregon's parole board is misapplying those rules and clarifying what the correct parole standards should be. The board has not disavowed the reasoning it employed in petitioner's case, instead, the board has consistently employed the same unconstitutional reasoning, defending its interpretation through its administrative review process and unconstitutional Oregon court's judicial decisions or lack of. Given the board's historical practice, the board is likely to continue to apply the same wrongful construction of the statutes in future cases.

If petitioner was to prevail in this case it would create the practical effect of being immediately paroled.

ARGUMENT OF THE CASE

FIRST QUESTION PRESENTED.

Did the Parole Board retroactively applied the wrong administrative rules and parole standards when determining not to grant petitioner a parole Interim Hearing, while the state, district courts, and U.S. Court of Appeals, failed to recognize such violations that caused petitioner's parole denial violating U.S. Constitution's Sixth and

Fourteenth Amendment's Due Process and Ex Post Facto guarantees, and deciding an important federal question in a way that conflicts with relevant decisions of this Court. And in such case, should a lawful determination occur based on the applicable administrative rules, parole standards, and facts as they were at the time of the interim hearing denial?

Argument

After the board pursuant to ORS 144.280(1)(b) (App 9) deferred petitioner's parole for more than two years (10 years) in 2011, the only mechanism available to him for release was that provided in ORS 144.280(2), where every two years he could request until his next statutory scheduled hearing in 2021 that the board hold interim hearings to consider whether to grant him an exit interview and be paroled. The board must grant the request if there is "reasonable cause to believe" that the prisoner "may be granted parole." *Id.* At the same time, *Garner v Jones*, 529 US 244, at 250-251, 146 L Ed 2d 236, 120 S Ct 1392 (2000) and *Cal. Dept. of Corrections v Morales*, 131 L Ed 2d 588, 514 US 499, at 507 (1995) both protect against Ex Post Facto violations in enhancement of parole standards in parole hearings like those in this case, "demanding" that the original statutory parole standards be applied for any parole decision during extended periods of time between hearings such as those in this case pursuant to ORS 144.280 and OAR 255-062-0021(2)(d). Petitioner's original applicable standards of parole are described within ORS 144.125(1) (App 8), and OAR 255-60-005(1) (App 15), where pursuant to that statute and rule it could have reviewed only three (3) applicable statutory factors to determine petitioner's eligibility for parole issues. The parties disagree whether the

board may deny a petitioner's request for an interim hearing for reasons other than as specifically provided in ORS 144.125. Petitioner in 2017, pertaining to this case, was forced to submit an Interim Hearing Request following the inapplicable requirements of OAR 255-062-0021(2)(d) (App 17) and OAR 255-062-0016 (App 16) to show there was "reasonable cause to believe" that he "may be granted parole". When answering petitioner's Interim Hearing Request in BAF #23 (Ex 103, pg. 147), the board stated through a blanket default statement repeatedly printed on most BAF's that the board "applies procedural rules in effect at the time of the hearing", not that it applied those applicable as to the time of the offenses. The board concluded in BAF #23 (Ex 103, pg. 125) that:

"The Board finds the inmate did not meet his burden of producing evidence sufficient to convince the Board that an interim hearing is warranted. Inmate received a major disciplinary report in 09/2016 for disobedience II. Therefore, the Board finds that there is not a reasonable cause to believe that the inmate may be granted a change in the terms of confinement or a firm release date before 11/06/2021. Interim hearing is denied pursuant to OAR-062-0021".

Statutorily applicable to petitioner, ORS 144.120(2) (App 7) states that: "Release shall be contingent upon satisfaction of the requirements of ORS 144.125". ORS 144.125(1) (App 8) and its relative administrative rule OAR 255-60-005(1) (App 15), both demand that only three (3) factors shall be reviewed for parole hearings: "the parole plan, the prisoner's psychiatric or psychological report, *if any*, and the record of the prisoner's conduct during confinement", articulated in *Jones v. Board of Parole*, 283 Or.App. 650, 659, 391 P.3d 831 (2017) (describing the factfinding criteria of ORS 144.125). "Further, "[o]nce the date is set, it can be postponed only for three statutorily prescribed reasons... Those reasons are that (1) petitioner has a history of serious misconduct during

confinement, (2) petitioner has a PSED that constitutes a danger to the community, or (3) the board deems the petitioner's release plan to be inadequate." *Id.*

The board in this case instead, pursuant to OAR 255-062-0021(2)(d), reviewed fourteen (14) factors within OAR 255-062-0016. Eleven of those fourteen factors, while also being highly subjective and discretionary, are new and not part of petitioner's original parole standards. Such process is clear violation of clearly established federal law pursuant to *Garner* and *Morales*, when applying such "altered standard" in parole determinations contrary to petitioner's original statutory applicable parole system; compare OAR 255-60-005(1) (App 15) and OAR 255-062-0016 (App 16). This matter, though previously litigated by petitioner, has never been reached upon its merits.

The current application of these new substantively altered and discretionary standards applied during interim hearings requests affecting other parole decisions, constitute bad law and a board's gross abuse of discretionary power violative of the legislative intent of the applicable Matrix System, and violative of Due Process and Ex Post Facto protections guaranteed by *Garner* and *Morales*. Here, the parole board's application of the new rule's standards, violates the federal ex post facto clause, and satisfies the "controlling inquiry" as to "whether retroactive application of the change *** created a 'sufficient risk of increasing the measure of punishment attached to the covered crimes'" *Garner v Jones*, 529 US 244, at 255. It doesn't matter how long the board has engaged in these violations as it has in this case.

"Nor did the amendment alter the standards for determining either the initial date for parole eligibility or an inmate's suitability for parole... The amendment did not change the basic structure of California's parole law. It vested the California parole board with discretion to decrease the frequency with which it reconsidered parole for a limited class" (Emphasis added) *Garner*, 529 US 244, at 250.

"The amendment had no effect on the standards for fixing a prisoner's initial date of "eligibility" for parole... or for determining his "suitability" for parole and setting his release date." (Emphasis added). *Morales*, 514 US 499, at 507.

"However, absent evidence to the contrary, this court must presume the Board will exercise its discretion in a manner consistent with the Ex Post Facto Clause." *Gilman v Schwarzenegger*, 638 F3d 1101, at 1109 (9th Cir 2010).

Additionally, following the correct parole standards, the board should have included, if it so chose to, a psychological evaluation to conclude whether petitioner suffered from a PSED or not, not later rely on one done four years later to speculate on such conclusion. Those psychological evaluations nevertheless, embrace a number of reasons for being questionable that include a possible Fifth Amendment violation (see App 20-22). It continues to be petitioner's argument they were meant by the legislation, to be used only on those with real and very serious mental illnesses, a mandate of every prisoner never legislated (see App 6, pg. 14 ¶ 8; and pg. 15 ¶'s 4 and 5).

While the board may have authority pursuant to *Garner* and *Morales* and ORS 144.280 (App. 9) to increase the periods between parole hearings, their application of OAR 255-062-0021(2)(d) (App 17) and OAR 255-062-0016 (App 16) is an altered parole standard not applicable to petitioner and in violation of Due Process and Ex Post Facto rights.

Respondent and lower courts have continued to remain silent on petitioner's claims, or to rely on interpretations that are contrary to clearly established federal law pursuant to *Garner* and *Morales*. In this case, respondent first maliciously claimed that petitioner had not exhausted this claim, when in fact he did (Ex 103, pgs. 130-131). Then, respondent's argument (Ex 106, pgs. 13-22), is totally contrary to established federal law required by *Garner* and *Morales* where for interim hearings extensions of period of time

between parole hearings, the board must still follow the parole standards that are originally applicable to a prisoner, in this case ORS 144.125(1), and OAR 255-60-005(1), not those of ORS 144.280, OAR 255-062-0021(2)(d), and OAR 255-062-0016.

It is worth of mention that during the scheduled statutory parole hearing in 2021 respondent fervently relies to claim petitioner's case should be deemed moot, the evaluation conducted for that hearing concluded that "petitioner's parole *could be potentially be managed in the community*" (2021 hearing), while another one conducted for a 2023 hearing states "petitioner's parole *could be safely managed in the community*". Supporting that the board's failure to make a PSED finding in 2017 also was reason to not have denied petitioner the hearing and parole.

It is also of importance how pursuant to OAR 255-60-005(4)(c) (App 15) applicable to petitioner and a small number of other prisoners and in effect only during 1981-1985, that statutorily is applicable to this interim hearing request, the board could not have denied petitioner parole *solely* because of the presence of a PSED diagnosing him as a danger to himself or others, as it has been the customary "blanket go to excuse" from the board. In such case, it must have either nevertheless released petitioner, or it should have initiated commitment proceedings.

"The Board may not deny release on parole solely because of a prisoner's severe emotional disturbance. Should the prisoner be diagnosed as a danger to himself or others or unable to provide for the basic personal needs necessary for his health or safety, the Board may initiate the civil commitment procedure as provided in ORS Chapter 426". OAR 255-60-005(4)(c) (App 15).

While, for misconduct, the only allowed reason the board statutorily correct mentioned in BAF #23 and could have used to deny petitioner the hearing and parole, was forfeited by the board by not using the mandatory process of Division 50 of the

Oregon parole rules also applicable to petitioner. This matter is discussed in the next question presented to the Court.

The board's statement in ARR #13 that its "application of statutes that allow the Board to defer a release date by up to ten years does not constitute a facial ex post facto violation" (Ex 103, pg. 147), is contrary to the established federal law in *Garner* and *Morales* prohibiting use of such altered standards. Here, it forced petitioner to have to address one such enhanced altered standard within ORS 144.280, OAR 255-062-0021 and OAR 255-062-0016 (Ex 103, pg. 148). While, for the only statutory applicable factor the board specifically mentions, a major disciplinary report, the board not only forfeited it by not following its procedures, but declined to address the issue (Ex 103, pgs. 125 and 148).

When the board failed to apply any of the original statutory standards, pursuant to *Jones*, 283 Or.App. at 659, it had the practical effect as having chosen not to apply them. They have been on notice for years prior to this request that they have been applying the wrong standards of parole, but have chosen not to correct themselves. They should have followed the usual requirements including a psychological evaluation part of the applicable standards of parole, that is not part of an interim hearing, and the process of Division 50 for deferrals for misconduct. By law, the evaluations results must form the basis for the board's conclusion of a PSED. So, if the board fails to order such evaluation or follow Division 50, it then forfeits its right to pronounce those factors as reasons for denying any parole decision. *Garner* and *Morales* both demand the applicable statutory process be conducted and applied for an interim hearing as well.

To satisfy an Ex Post Facto claim an increase in punishment need not only increase the statutory sentence term of imprisonment, but also exists when the overall length of actual incarceration is affected.

"Oregon's Board of Parole "through its rules governing release dates" affects "the amount of freedom or punishment that a prisoner in fact receives." ... "Parole eligibility affects the length of a prison term and therefore affects the measure of punishment attached to the original crime"." (Emphasis added) *Himes v. Thompson*, 336 F.3d 848, 854 (9th Cir. 2003).

"It is the effect, not the form, of the law which determines whether it is ex post facto. The critical question is whether the law changes the legal consequences of acts completed before its effective date.... Rodriguez v. U.S. Parole Comm'n, 594 F.2d 170 (CA7 1979) (elimination of parole eligibility held an ex post facto violation)" *Weaver v. Graham*, 450 U.S. 24, 31-32, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

"[A] person raising an ex post facto challenge to a change in parole procedure [under the Oregon Constitution or the US Constitution] must demonstrate in a non-speculative way that the change has resulted in a significant risk that the person's punishment will be increased." *Morrison*, 277 Ore. App. At 866 (2016).

Respondent is clearly wrong when claiming that "the change in law does not by its own terms show a significant risk of increasing his punishment", and that petitioner did not "demonstrate, by evidence drawn from the rule's practical implementation, that as applied to the petitioner's own sentence the new implemented law did create a significant risk of increasing his punishment" (Ex 103, pgs. 147-148).

In conclusion, pursuant to *Garner* and *Morales*, the applicable parole standards of 1984 at the time of petitioner's offenses, should be applicable for all parole decisions including interim hearings, not just when deciding to grant him parole.

The Oregon Parole Board, state courts, and Ninth Circuit, whom have stubbornly remained silent on this issue, should be put on notice that they are in violation of clearly established federal law and made to correct such errors that they continue to enforce to

this date. At the very least petitioner's case should be remanded back to the board, for a disposition based on the correct parole standards and facts as they were available to the board in 2017 at the time of his interim hearing request.

SECOND QUESTION PRESENTED:

Because the parole board failed to follow the process mandated by Division 50 of the parole administrative rules guiding for deferment of parole because of misconduct, should the board be prohibited to consider misconduct as the only statutory factor quoted to deny petitioner an interim hearing. In doing so violating petitioner's Due Process and Ex Post Facto guarantees, and conditions of incarceration?

Argument

During this pertaining review period petitioner received a disciplinary report for Disobedience II, which the board solely quoted and appears to originally been relied upon to deny him an interim hearing because of misconduct pursuant to OAR 255-062-0021(2)(d) and OAR 255-062-0016(2).

"The Board finds the inmate did not meet his burden of producing evidence sufficient to convince the Board that an interim hearing is warranted. *Inmate received a major disciplinary report in 09/2016 for disobedience II.* Therefore, the Board finds that there is not a reasonable cause to believe that the inmate may be granted a change in the terms of confinement or a firm release date before 11/06/2021. Interim hearing is denied pursuant to OAR-062-0021". (Emphasis added). BAF #23 (Ex 103, pgs. 125 and 148).

Other than claiming how it adhered to the criteria within OAR-062-0021; and subsequently OAR 255-062-0016 of a misconduct to determine petitioner did not produce sufficient evidence to warrant an interim hearing, it did not clearly explain what other particular evidence if any it was referring to. Therefore, a misconduct issue was the only statutory reason for which it denied a hearing affecting his parole release.

In Administrative Review Response (ARR) #13, the board states how it "applies procedural rules in effect at the time of the hearing" (Ex 103, pg. 147 ¶ 5), but pursuant to *Garner* and *Morales* as previously discussed, it should have used the statutory applicable rules that includes Division 50 of the parole rules dealing with deferments because of misconduct, which the board did not apply nor addressed in this case.

During the Interim Hearing Request petitioner explained the misconduct was the result of his peaceful refusal to live with an inmate already alienated from the general population because of his associations with sex offenders (Ex 103, pgs. 107-108). He explained the move would have put him in physical danger, alienated him from the prison's general population, and would have made his living conditions very difficult everywhere within the state's penal system. Presently at the Snake River Correctional Institution where petitioner is incarcerated, that practice of assigning cell assignments between sex offenders or at risk inmates with other general population inmates, has been curtailed almost entirely. During an intake class, inmates are now being told to "tow the line" or follow those "prisoner's rules" so as to stay safe and out of trouble with other prisoners. Petitioner explained how staff even tried to arrange another cell assignment but was refused, and how the disciplinary hearing adjudicator volunteered that such incident should not have taken place in the first place and he should not have been put in such position, lowering his infraction classification and sanctions (Ex 103, pg. 123). Issue the board continues to adamantly contradict.

Nevertheless, demanded by administrative rule, the board for any misconduct or new offenses affecting parole eligibility or deferment, must of followed the applicable process of Division 50 (App's 13-14), which it did not. Not inapplicably pursuant to OAR

255-062-0021(2)(d) just use OAR 255-062-0016 and its misconduct factor to defer his parole (Ex 103, pgs. 125, and 148). Division 50 explains the mandatory applicable process specifically created to defer a release date because of misconducts or new offenses (see App's 13-14; App 4, pg. 3 Section 6(2); and App 6, pg. 15 ¶ 1). "The Board must follow its own created rules as they apply to a prisoner as to the time of his offenses..." *Price v Board of Parole*, 300 Or 283, 289, 7.09 P2d 1075 (1985). "... Oregon Parole Board's rules are "laws" for the purposes of the Ex Post Facto Clause..." *Nulph v Faatz*, 27 F3d 451, 455 (9th 1993). Also reviewable pursuant to *Garner v Jones*, 529 US 244, 146 L Ed 2d 236, 120 S Ct 1392 (2000), and *Cal. Dept. of Corrections v Morales*, 131 L Ed 2d 588, 514 US 499 (1995) (amendment had no effect on the standards).

OAR 255-50-005(1)(2)(a)(b) (App. 13), applicable to petitioner, describes how "a parole release date may be reset to a later date for serious misconduct" upon "the institution's disciplinary committee or the Corrections Division Hearings Officer recommendation", and how it "must be approved by the institutional superintendent". OAR 255-50-010(1) (App 14) describes how "the Board shall conduct a hearing to determine whether the misconduct was serious" enough demanding a parole deferment. No recommendation because of misconduct during all of petitioner's incarceration has ever been made including pertaining to this case, the institution's superintendent has never approved any such recommendation, and no hearing has ever been conducted by the board. Furthermore, pursuant to OAR 255-50-005(2)(b), the disciplinary sanctions petitioner received were more than adequate for the offense (Ex 103, pg. 123).

Nor did the board followed the applicable sanction guidelines of Table I of Division 50, where it lists the applicable legislatively recommended sanctions the Board must

follow pursuant to its rules to deal with misconduct. (App. 4, pg. 3, at Section 6(2)). Petitioner's misconduct was not representative of a serious incident, and the institutional sanctions he received were sufficient enough to not warrant the additional punishment of denying him an interim hearing elongating his already long incarceration.

To deny petitioner an opportunity for parole because of this misconduct, and keep him indefinitely incarcerated (33 years at the time, 40 now) without following the mandatory process of Division 50, but instead through the board's "whim" and use of inapplicable parole standards, constitutes an abuse of power and a violation of Due Process and Ex Post Facto guarantees including *Garner* and *Morales*. No other statutory applicable reasons for having deferred his parole was provided.

Division 50's and its administrative rules regulatory standard must be followed regardless of whether it is considered in the context of an interim hearing petition, or determination whether to grant parole release, as pursuant to *Garner* and *Morales* the original standards of parole should be applied in both circumstances. In fact, for "any board decision" affecting petitioner's duration of incarceration because of misconduct, the board should always follow the statutorily applicable and more than adequate procedures of Division 50. Petitioner's minor misconduct history gave no cause for such harsh punishment after 33 years of incarceration.

The board's failure to follow Division 50's mandatory process, instead relying on the "altered" standards of OAR 255-062-0021 and OAR 255-062-0016, affected the interim hearing's decision and petitioner's parole in a manner contrary to established federal law pursuant to *Garner* and *Morales*. The board's conduct was an illegal statutory and regulatory process to use as a factor to have denied petitioner an interim hearing or

any redress from this petition, that process by now corrupted, preventing him from the opportunity of being granted parole in the absence of any other applicable statutory factor. Therefore, the board could not have claimed that petitioner "did not meet the burden of producing evidence" to warrant denial of an interim hearing based on misconduct. The board's statement that "application of statutes that allow the Board to defer a release date by up to ten years does not constitute a facial ex post facto violation", is contrary to what the established federal law in *Garner* and *Morales* conveys.

THIRD QUESTION PRESENTED.

Did the state appeal courts, district court, and Ninth Circuit Court of Appeals incorrectly judged this case moot; when if petitioner is to prevail the board must provide a lawful basis for denying an interim hearing based on the correct administrative rules, parole standards, and facts as they were at the time of the interim hearing denial, which would cause for him to be released on parole?

Argument

As explained in Questions I and II, in 2017, the board failed to follow the statutory applicable procedural requirements to deny petitioner an interim hearing and subsequently parole. No substantial or legal reason existed at the time to have denied him the hearing or parole. Thus, he should have begun serving the 48 months consecutive sentence he must serve, from which he would have received 20% good time credits, resulting for him to be theoretically presently on supervised parole.

The same matters discussed throughout this writ again occurred at the time of another interim hearing request in 2019, case *Gutierrez v Board of Parole*, A174068, with

the Oregon and district courts coming to the same conclusions including mootness of the case. Therefore, these matters were, and continue to be capable of repetition.

Pursuant to clearly established federal law, statutory power, and state precedent, the board could only have denied an interim hearing or deferred petitioner's parole if it found one of the three factors articulated in ORS 144.125 and in *Jones*, 283 Or.App., at 659, that "(1) petitioner has a history of serious misconduct during confinement, (2) petitioner has a PSED that constitutes a danger to the community, or (3) the board deems the petitioner's release plan to be inadequate".

Here, the only factor the board quoted in their Board Action Form and Administrative Review Response was that petitioner had had a major disciplinary report, but the board admits it did not follow *the applicable and mandatory process* of Division 50 for deferment because of misconducts. The lack of presenting a parole plan was not part of the requirements of inapplicable OAR 255-062-0021(2)(d) and OAR 255-062-0016, which petitioner was demanded to follow⁵. Also, the board did not order a psychological evaluation because under the inapplicable rules it followed it was not demanded. Because of their errors, the board could not support any of the three statutory factors pursuant to *Jones* and ORS 144.125 to have denied parole or an interim hearing as claimed in this writ, forfeiting the use of all three statutory factors.

Regarding mootness, the Oregon Court of Appeals incorrectly in *Gutierrez*, 317 Or.App. at 556, applied how "the responding party must identify any collateral consequences that he or she contends has the effect of producing the required practical

⁵ Nevertheless, ORS 144.125(4) (App 8) explains petitioner's parole could not have been deferred for more than 90 days for lacking a parole plan.

effects of a judicial decision"; and how "in order to prevent a case from being considered moot, a collateral consequence must be something beyond mere speculation," that is, "a collateral consequence must have a significant probability of actually occurring; a speculative or merely possible effect is not enough" (Ex 113, pgs. 4-5).

Petitioner has demonstrated that a collateral consequence exists when his incarceration is elongated by the board's failure to follow the legal standards of parole applicable to him. In 2017 the board had no statutory reasons nor gave any other specific explanations for its interim hearing request denial, it only stated that petitioner "did not meet the burden of persuasion", under standards of parole that did not apply to petitioner.

"Oregon's Board of Parole "through its rules governing release dates" affects "the amount of freedom or punishment that a prisoner in fact receives."... *"Parole eligibility affects the length of a prison term and therefore affects the measure of punishment attached to the original crime."*" (Emphasis added) *Himes v. Thompson*, 336 F.3d 848, 854 (9th Cir. 2003).

The lower courts should not have determined the case moot, but should have acknowledged that the right process for an interim hearing had not been followed, and should have remanded back to the board for a determination based on the correct parole standards and facts as they existed at the time of the petition in 2017.

Mootness here, is not a fair judiciary legal remedy because the failure from the board to follow the correct applicable statutory requirements demand petitioner receives any and all legal remedies available. Those available legal remedies demand petitioner's case be at the very least reconsidered based on the correct applicable parole rules and standards and facts as they existed in 2017.

"A case 'becomes moot only when it is impossible for a court to grant *any effectual relief* whatever to the prevailing party.' *Chafin v. Chafin*, 568 US 165, 172, 133 S.C. 1017, 185 L.Ed.2d 1 (2013) (emphasis added)." 'As long as the parties have a

concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ibid*.

A conclusion that an interim hearing should have been provided and parole given following the statutory requirements of ORS 144.125 is "something beyond mere speculation," which "collateral consequence", receiving a hearing and parole, "has a significant probability of actually occurring" not simply "speculative". It would have caused to retroactively receiving credits towards his consecutive sentence and parole time from the board's final order. Here, resulting in his immediate parole release and credits to time served on parole.

The board following the wrong standards, causing petitioner to still be incarcerated, creates the practical effect to the advancement of his parole based on the standards and facts as they existed in 2017 and grant of parole. Their failure should not fall on petitioner's shoulders, causing the deprivation of an effectual relief. A case is considered moot if a court's decision "will no longer have a practical effect on the rights of the parties." *State v. KJB*, 362 Pr 777, 785, 416 P3d 291 (2018). A practical effect includes both direct effects and collateral consequences of a court's decision, *Smith v. Board of Parole*, 305 Or App 773, 776, 472 P3d 805 (2020). The consequences of this case being moot is more than just speculation, the consequence, continued incarceration, is occurring, and the courts should have not simply dismissed the case as moot instead of addressing the significant constitutional violations conducted by the board.

"An incarcerated convict's (or a parolee's) challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration (or the restriction imposed by the terms of the parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." *Spencer v. Kemna*, 523 US 1, at II (1998).

The district court correctly established in *Gutierrez*, 317 Or.App. at 556, that petitioner relied on *Jones v. Board of Parole*, 283 Or.App. 650, 659, 391 P.3d 831 (2017), arguing his petition is not moot because “the board must establish that a valid statutory reason for postponement exists (or existed) prior to that postponement”. But wrongfully concluded *Jones* involves a different context, contrarily, petitioner continues to assert that the board in 2017 did not follow the correct applicable standards of ORS 144.125 and *Jones*, and that no statutory reason existed to have denied his hearing or parole.

It also wrongfully equated petitioner’s case with that of *Janowski / Fleming v. Board of Parole*, 349 Or. 432, at 459, 245 P.3d 1270 (2010), because petitioner’s “argument misreads the statute and fails to take into account that the board has not yet set his parole release date; rather, the board must conduct a hearing in the immediate future to do so”. In *Janowski*, the petitioner had to participate in a hearing to first change his status after a 30 years minimum, to life imprisonment with the possibility to parole, then he had to participate in a “prison term” hearing (petitioner had in 1985) to determine what his matrix would be under the applicable matrix system, and then and only then he could participate in an exit interview. Petitioner on the other hand already had an statutory scheduled release date of November of 2021, and was petitioning for an exit interview that pursuant to *Garner* and *Morales* was an illegal and flawed process.

The district court also claimed that, “petitioner does not establish a collateral consequence to prevent mootness because petitioner has received the only relief to which he may have been entitled—an exit interview. At the outset, we reject petitioner’s argument that his judicial review is not moot because the court cannot retroactively justify his denial... In coming to that conclusion, an understanding of the procedure

pursuant to ORS 144.280 is necessary", *Gutierrez*, 317 Or.App. at 557. But that statement is contrary to the precedent in *Jones v. Board of Parole*, 283 Or.App. 650, 659, because just as in *Jones*, the board relied on facts and parole process during an exit interview four years later and not contemporary to the period petitioner was asking for a hearing and parole in 2017. In such context and through no fault of petitioner, here the board illegally failed to use the correct parole standards and process of ORS 144.125 and OAR 255-60-005, instead requiring and following those of ORS 144.280, OAR 255-062-0021, and OAR 255-062-0016, depriving petitioner from receiving any relief he was entitled to. The board should have at the very least rectified its mistake, re reviewed petitioner under the correct applicable standards and facts as they existed, and be given any appropriate relief including being released on parole. He not only was reviewed for the interim hearing under the wrong standards, but was also denied any other subsequent relief under the same wrong standards by the board and the courts.

Petitioner's arguments also satisfy the legal remedies requirement alike that in *Hamel v. Johnson*, 330 Or 180, 998 P2d 661, at 666 (Or. 2000), when petitioner in that case also alleged that the reason the board gave for postponing his release date was not valid, because the board used information after the fact and thus the board was required to release petitioner on parole on the scheduled release date unless it had a valid reason for postponing that release date. Alike *Hamel*, here too the board used information that was constitutionally invalid and not contemporary to satisfy another deferment, having no valid legal reasons to deny a hearing or parole. The *Hamel* court agreed that his petition should not be rendered moot because the board had also relied on invalid reasons for postponing the petitioner's parole, *Id* at 666.

The use of wrong standards and facts at the time of the hearing is something the board, and state and district courts should have corrected, not just simply moot the case. Sufficient reasoning did not exist to have denied the hearing and parole allowing petitioner to begin serving his consecutive sentence. The board not having a valid reason for denying a hearing and parole in 2017, created "a practical effect on the rights of the parties [petitioner]", *State v. KJB*, 362 P.3d at 785. A practical effect on petitioner's rights exists. Credits for time served should be applicable towards the consecutive sentence, which would have put petitioner under supervised parole sometime in the summer of 2021.

The board's repetitive failure to comply with statutory requirements violates petitioner's Due Process and Ex Post Facto guarantees and protections against cruel and unusual punishment by unlawful incarceration, just as the lower courts' failure to continue to address this repetitive matter does. This case demands that it does not end in mootness, but that in the interest of justice at the very least its issues be litigated to their fullest on its merits.

FOURTH QUESTION PRESENTED.

Should petitioner be given credits for time served and be released on parole if he prevails in this case?

Preserved on appeal at Judicial Review (Ex 117, pgs. 18-21). Raised in district court in Petitioner's Brief in Support of 28 USC § 2254... pg. 30, and in COA petition to the Ninth Circuit.

Argument

District courts have ruled that should a state prisoner being currently held on sentence that were invalid, "if the earlier sentences were invalid, his commencement of service of subsequent sentences would be advanced, and that, if his subsequent custody is attributable to the valid sentences, he has fully served them"; *Tucker v. C.C. Peyton, C.A. 4th, 1966, 357 F2d 115, at 116.*

If petitioner prevails in this case, he should be given credits for time served since his interim hearing petition in 2017 and be released on supervised parole.

IN CONCLUSION.

First, the Oregon Parole Board unconstitutionally considered whether there was reasonable cause that petitioner may be granted an interim hearing and parole by reference to unlawful basis to defer parole under ORS 144.280, OAR 255-062-0021(2)(d), and OAR 255-062-0016. It should have used the statutory applicable parole standards of ORS 144.125 and OAR 255-60-005. Both *Garner* and *Morales* clearly explain why the board's action was an unconstitutional Ex Post Facto violation, because in cases where the original period between hearings have been amended allowing them to be extended, the board whether in deciding that a hearing should take place or whether in making a parole release determination, the board must follow the same original statutory requirements of parole as to the time of the prisoner's offenses, which the board did not do in this case. "The amendment had no effect on the standards for fixing a prisoner's initial date of "eligibility" for parole... or for determining his "suitability" for parole and setting his release date." (Emphasis added) *Morales*, 514 US 499, at 507. In Oregon the board continues to follow these unconstitutional processes without any established state

or circuit precedence to give them guidance on the matter, it is imperative that the Court address this issue and stops Oregon's unconstitutional violations.

Secondly, regarding the misconduct issue, the only truly applicable statutory reason the board directly quoted, it could not have denied the interim hearing or parole that, in this case, does not on its own justify deferring parole. Again, pursuant to *Garner* and *Morales*, the board failed to follow the mandatory process of Division 50 of the parole rules applicable to petitioner to legally defer his parole because of misconduct. While additionally, refusing to live with someone alienated from the rest of the prison's general population putting petitioner's own safety in jeopardy is not only justifiable, but also not serious enough to maintain someone incarcerated after 40 years of incarceration. Something Division 50 also addresses, including a table for parole deferral sanctions because of misconduct. Petitioner's rehabilitative achievements through the years speak of his character and the positive personal changes he has accomplished (see App 24-25).

Thirdly, the Oregon courts had an obligation to examine this case's mootness, *Penn v. Board of Parole*, 365 Or 607, 451 P3d 489 (2019), regarding standing of review, petitioner here had standing to challenge the lawfulness of the board's action, where he was subject to the conditions when he commenced his action. A "public action" encompasses proceedings that challenge "the lawfulness of an action, policy, or practice of a public body, and such matters are precisely those to which ORS 14.175 applies." *Id* at 619. Regarding repetition, "We conclude that ORS 14.175(2) requires that the act of the public body that no longer is affecting the plaintiff or complaining party be reasonably susceptible to repetition as to someone" *Id* 622, and " fact that there are a few reported cases in which a party in similar circumstances was able to complete the litigation before

the challenged act ceased or expired is insufficient to establish that the act is not likely to evade review", *Id* at 623. In this case, the court should have exercised its discretion under ORS 14.175 to review a challenge to a condition imposed by the parole board because petitioner raises "a serious challenge to the statutory authority of the board and the constitutionality of the board's imposition", *Id* at 624. "The incarceration (or the restriction imposed by the terms of the parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." *Spencer v. Kemna*, 523 US 1, at II (1998).

The board's applications of the incorrect legal standard is capable of repetition because it happened to petitioner every time he petitioned beginning in 2011 and then again in 2019 (his 2019 petition also dismissed as moot), and is currently happening to other prisoners in the interim hearings phase. It is likely to evade review because it is unreasonable to expect complete judicial review within the two year timeline between interim hearings, as it has happened to petitioner time and time again.

The Oregon courts erred in a number of ways. To justify petitioner's continued incarceration, the board must have demonstrated that its denial for an interim hearing was lawful, not retroactively and unconstitutionally applied incorrect parole standards in violation of Due Process and Ex Post Facto guarantees. The fact that a later exit interview took place does not retroactively justify petitioner's continued incarceration, the board not only failed to follow, but forfeited its right to conduct the applicable process. Petitioner having had a statutorily scheduled parole hearing does not excuse the board from having to address petitioner's hearing petition following all statutory and administrative rules applicable to him part of his original parole system standards.

United States v. Aruda, 993 F.3d 797, 799 (9th Cir. 2021). “A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact”.

The action is not moot because if petitioner prevails, the board is required to either release him or show that a lawful basis existed in 2017 to have denied him a hearing and parole, all based on the record and facts as existed then. At the very least, the substance of the constitutional claims in this case should have been decided on the merits before making a determination of rendering the judicial review moot. In this case, the minimum legal remedy available would be for the board to have to review petitioner following the correct applicable parole process and all the facts as they were available at the time of the interim hearing petition in 2017, with the further remedy of getting time served credits, that would cause him to receive credits towards his consecutive sentence and parole, resulting in petitioner at this time almost finishing his parole period in the community.

Factors present in this case justify the exercise of discretion the Court can provide. Petitioner has raised serious challenges to the authority of the Oregon board and courts regarding procedures “they have instituted” and are applying contrary to established federal law as established by this Court, resulting in the illegal continued incarceration of many prisoners. These are issues of great importance to present and future prisoners presenting constitutional questions. Yet, even though petitioner has continued to present these claims for over a decade, in Oregon not a single published decision has addressed the constitutionality of his claims, one way or another, that in this case are supported by the constitutional precedents in *Garner* and *Morales*, legislators having raised similar concerns in the past (see Ex 108, pgs. 1-4).

In order to constitutionally be able to satisfy due process requirements, this court should exercise its discretion to review this case because "(1) it is an important and recurring matter of statutory interpretation on which there is no appellate guidance; (2) deciding the matter in this case promotes efficiency by reducing repetitive claims; and (3) addressing the issue promotes access to justice for inmates whose ability to access review is limited by indigence, the lack of counsel at the agency level, and fear of the risk of incurring litigation costs".

Petitioner respectfully asks for the Court to address this abuse of power in Oregon of these recurring matters of statutory interpretation for which there is no appellate guidance.

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Dated this 28 day of January, 2025.