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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

These two cases, *Dawson v. Board of Parole and Post-Prison Supervision (BOPPS)*, SC S055770, and *Fletcher v. BOPPS*, SC S055789, both arise from the Board of Parole and Post-Prison Supervision's ("the board") denial of a request to reopen an earlier decision. This court ordered the cases consolidated for purposes of argument and decision. Because different issues are presented by the factual record, different analytical models are offered in each case. As a result, separate briefs are filed for each.

Questions Presented and Proposed Rules of Law

First Question Presented

When is a board order denying a request to reopen a "final order" subject to judicial review under ORS 144.335?

First Proposed Rule of Law

If the board reached the merits of petitioner's reopening claim, but denied relief in whole or in part, that denial is a "final order" that is reviewable pursuant to ORS 144.335, under the second or third prong of *Esperum v. Board of Parole*.

Second Question Presented

How does a reviewing court determine if the board reached the merits of a reopening claim?

Second Proposed Rule of Law

In its response to the request to reopen, if the board adds to or alters the factual findings of the original decision, or adopts a legal position, argument, or conclusion not present in the original decision or contrary to the original decision, it has reached the merits of the reopening claim, and its denial of reopening is a final order that is reviewable under ORS 144.335.

Alternate Question Presented

Petitioner Dawson asserts that the first and second questions presented and proposed rules of law offer the best resolution to the facts of this case. However, should this court reject that approach, petitioner advances the question presented and proposed rule of law articulated in *Fletcher*.

The board has promulgated rules governing the exercise its discretion in deciding when to reopen past decisions. Is a board decision denying a request to reopen because the petitioner failed to meet the criteria in those rules reviewable as a final order?

Alternate Proposed Rule of Law

Yes. However, in that instance the board's denial of the request to reopen is reviewable solely under an abuse of discretion standard.¹

¹ Pursuant to ORAP 5.77(2) and (4)(b) petitioner adopts all arguments advanced in *Fletcher v. Board of Parole* in support of this question presented and proposed rule of law.

Summary of the Argument

Under this court's decisions in both *Esperum v. Board of Parole* and *Mastriano v. Board of Parole*, only a denial of a reopening request outright is exempted from judicial review. If the board reopened the past decision, but denied relief in whole, or in part, that is a "final order" for purposes of ORS 144.335.

In evaluating whether the board reopened a past decision but denied relief or, rather, denied the reopening request outright, a court looks to the substance of the administrative response, not its caption. The board cannot shield new legal rulings or factual findings from meaningful judicial review simply by titling their response a denial of the request to reopen. In its response to a reopening request, if the board reaches the merits of the reopening claim, it has reopened the case, and its decision is a final order and subject to judicial review.

In this case, petitioner Dawson asserted an *ex post facto* violation when the board calculated his rerelease date using rules not in effect at the time of his crime commission. In support, he submitted a seven-page legal memorandum, with particular reliance on a new federal case, *Himes v. Thompson*.

In its response, the board reached the legal conclusion that *Himes* was limited to its facts, and that the date discrepancy between the rules used in *Himes* and the rules used against petitioner did not give rise to *ex post facto* concerns. In reaching this wholly new legal conclusion, the board reopened petitioner's request, but denied relief. Its response is therefore a final order and reviewable.

Historical and Procedural Facts

On August 21, 2003, petitioner Dawson requested that the board reopen its 1996 decision in BAF #13, arguing that the original denial of rerelease was an *ex post facto* application of board rules, in violation of the Oregon and United States Constitutions, and *Himes v. Thompson*, 336 F 3d 848 (9th Cir 2003).

Specifically, petitioner argued:

“The Challenged Board Order Denying Re-Release on Parole Violates the *Ex Post Facto* Clauses of Article I, section 10, clause I, of the United States Constitution and Article I, section 21, of the Oregon Constitution.”

“On July 10, 2003, the Ninth Circuit Court of Appeals held in *Himes v. Thompson*, [336] F3d [848] (9th Cir 2003) that the Board’s application of OAR 255-075-0079 (1994) and OAR 255-075-0096 (1994), in denying re-parole consideration to a parole violator whose commitment offense(s) occurred in 1978 violated the Ex Post Facto Clause of Article I, section 10, clause 1, of the United States Constitution.”

Rec. 28.

Petitioner asserted that, per the *Himes* reasoning, the board violated state and federal prohibitions against *ex post facto* laws in 1996 by not applying the 1985 rerelease rules in place at the time of petitioner’s offense. Rec. 31.

Petitioner added that the board should grant his request to reopen its decision in BAF #13 because petitioner was unable to rely on the 2003 *Himes* decision when the board denied rerelease in 1996. Rec. 28.

On October 31, 2003, the board declined “to reopen and reconsider” petitioner’s case in Administrative Review Response (“ARR”) #7, stating:

“The board received your administrative review request * * * requesting that the board reopen and reconsider its findings in Board Action Form #13 * * * in light of the recent United States Ninth circuit ruling in *Himes v. Thompson*, 336 F3d 848 (9th Cir 2003). The board denied your request to reopen and reconsider its decision in BAF #13 for the following reasons. In *Himes*, the court addressed issues regarding the board’s rules that were in effect July 19, 1978 to January 31, 1979. You committed your crime on May 30, 1985. Consequently, the *Himes* decision does not apply to your case. As a result, your request for the board to reopen and reconsider its finding in BAF #13 is denied.”

Rec. 32.

Petitioner sought review in the Court of Appeals by filing a petition for judicial review on January 9, 2004. The board filed a motion to dismiss on February 10, 2004, arguing that ARR #7 was not a final order subject to judicial review and that the Court of Appeals therefore lacked subject matter jurisdiction. The Court of Appeals denied the board’s motion to dismiss by order dated April 19, 2004, stating: “The parties are directed to brief th[e] issue [of the court’s jurisdiction] in connection with any motion that petitioner may hereafter file for leave to proceed with this judicial review.”

Petitioner filed his motion for leave to proceed with judicial review on June 16, 2005. The board again moved to dismiss and again argued that the Court of Appeals lacked jurisdiction. By letter dated November 9, 2005, the Court of Appeals stated:

“* * *[R]espondent has filed a * * * motion to dismiss the judicial review * * * on the ground that petitioner is not adversely affected or aggrieved by the Board’s order denying petitioner’s request to reopen his case for reconsideration.

“The Supreme Court’s decision in *Richards v. BOPPS*, 339 Or 176 (2005), appears to be dispositive of the ground asserted in respondent’s motion to dismiss. However, it appears that this case raises the same issue as raised by the cases remanded by the Supreme Court case pursuant to *Richards*. Therefore, the court will hold this case in abeyance pending additional argument in one of those cases, *Borgos v. Board of Parole*, Court of Appeals No. A124647, and pending disposition of that case.”

The Court of Appeals denied the board’s motion to dismiss and granted petitioner’s motion for leave to proceed with judicial review by order dated February 23, 2006. The board filed a petition for reconsideration, and the Court of Appeals denied the petition by order dated April 19, 2006. The board filed a petition for review in this court, and, on September 19, 2006, this court ordered the case held in abeyance pending the decision of this court in *Wilcox v. Board of Parole*, CA A124435. On September 26, 2006, this court ordered the case held in abeyance pending the decision in *Mastriano v. Board of Parole and Post-Prison Supervision*, 342 Or 684, 159 P3d 1151 (2007). Following the decision in *Mastriano*, this court allowed the board’s petition for review, vacated the decision of the Court of Appeals, and remanded the case to the Court of Appeals for reconsideration in light of *Mastriano*, by order dated October 4, 2007. On December 27, 2007, the Court of Appeals ordered the case dismissed. Petitioner filed a petition for review in this court, and this court allowed review in *Dawson v. Board of Parole*, 343 Or 222, 118 P3d 1153 (2008).

Argument

I. A brief overview of the authority for board reopenings and judicial review.

The board has authority under two promulgated rules to reopen past decisions: OAR 255-080-0012 and OAR 255-075-0050. Division 80 of the board's rules concerns general procedures for administrative hearings and reopenings. It is the more general of the two reopening provisions and applies to a wide variety of board decisions. It states:

“1) If the Board or its designee determines that the request for review is consistent with the criteria in OAR 255-080-0010 and the limits of 255-080-0011, the Board may open the case for review.

“(2) The Board may open a case for reconsideration of a finding without receiving a request, without regard to time limits, and without opening all findings for review and appeal.

“(3) The Board may conduct the review using the following methods:

“(a) Administrative file pass, with the number of concurring votes required by OAR 255-030-0015; or

“(b) Other administrative action by the Board or its designee, e.g., to correct errors in the history risk score, crime category, credit for time served, inoperative time or adjusted commitment dates; or

“(c) Administrative hearing, in cases where review would cause an adverse result for the prisoner.

****”

OAR 255-080-0012.

Division 75 of the board rules deals with parole revocation and future disposition determinations, as applicable in *Dawson*. That division has a specific provision for reopening of such determinations. It states:

“(1) After the completion of a violation hearing, the Sanction Authority or Hearings Officer may reopen a hearing if substantial new information is discovered which was not known or could not be anticipated at the time of the hearing and which would significantly affect the outcome of the hearing.

(2) The Sanction Authority or Hearings Officer shall send the offender notice of the decision to reopen the hearing and the new information to be considered. The reopened hearing shall conform to the procedures of this Division.”

OAR 255-075-0055.

Under either reopening provision, however, judicial review of the board’s decision is determined by statute, ORS 144.335:

“(1) A person over whom the State Board of Parole and Post-Prison Supervision exercises its jurisdiction may seek judicial review of a final order of the Board as provided in this section if:

“(a) The person is adversely affected or aggrieved by a final order of the Board, and;

“(b) The person has exhausted administrative review as provided by Board rule.”

Under ORS 144.335 a petitioner must meet three criteria for judicial review: (1) a final order of the board that, (2) affected or aggrieved petitioner, and (3) the petitioner properly utilized the review process to exhaust their remedies prior to seeking judicial review. There is no dispute that petitioners *Dawson* and *Fletcher* exhausted their administrative remedies.

Likewise, under *Richards v. Board of Parole*, 339 Or 176, 118 P3d 261 (2005), it is clear that the board's refusal to reopen the prior proceeding was an action that affected and aggrieved the petitioners:

“* * * [T]he Board considered and rejected petitioner's argument in ARR 6. Whatever the merits of the argument, he did not receive all the relief that he sought * * * [P]etitioner advanced an argument * * * The Board understood petitioner's objection * * * [and] rejected that argument in ARR 6 and, in doing so, adversely affected or aggrieved petitioner by denying him the relief that he had sought.”

Richards, 339 Or at 183-84. Here, the petitioners sought specific relief. Dawson sought reopening to recalculate his release date. Fletcher sought reopening to challenge a PSO designation that was imposed without notice and an opportunity to be heard. Neither petitioner received even a portion of the relief sought.

Two of the three criteria for judicial review being met, these cases present solely the question of whether the board's denial of the request to reopen is a final order. Twice before, in *Esperum v. Board of Parole*, 296 Or 789, 681 P2d 1128 (1984), and *Mastriano v. Board of Parole*, 342 Or 684, 159 P3d 1151 (2007), this court has held that denial of reopening is not always a final order. The question in these cases is what constitutes a reopening on the merits and qualifies as a final order for purposes of judicial review.

II. A board order that purports to deny reopening, but, in fact, reaches the merits of the reopening claim is reviewable under *Esperum*.

Mastriano and *Esperum* identify three categories of board responses to a request to reopen:

“(1) the board could deny the request outright; (2) the board could allow the request and grant some or full relief by changing its prior final order; or (3) the board could allow the request, but deny relief. *Esperum*, 296 Or at 795-96. The court concluded that the second and third responses – in which the board reexamines a prior order, even if it reaffirms the order in full – resulted in orders that were final for purposes of judicial review. *Id.* at 796-98. The court concluded, however, that the first response -- a *denial* of review or reconsideration, which does not reexamine the prior order -- was not a final order subject to judicial review * * *.”

Mastriano, 342 Or at 690 (emphasis in original).

Mastriano and *Esperum* hold that in the context of a request to reopen, only board decisions that clearly fall under the first category, a “denial of the request outright,” are exempted from judicial review under ORS 144.335. In contrast, an order that reflects that the board reached the merits of petitioner’s argument, but denied relief in whole, or in part, is reviewable.

In both *Dawson* and *Fletcher*, petitioners acknowledge that the board response is captioned as a denial of the request to reopen. But, as this court has repeatedly noted, it is the body of a document, not its caption, that controls.

Welker v. TSPC, 332 Or 306, 312, 27 P3d 1038 (2001); *see also Burden v. Copco Refrigeration, Inc.*, 339 Or 388, 393, 121 P3d 1133 (2005) (where the defendant incorrectly labeled its motion as a motion to dismiss under ORCP 21 A, rather than as an application for a preliminary hearing under ORCP 21 C, that mistake did not prevent the trial court from reaching the merits).

The administrative response in *Dawson* reflects that the board reached the merits of the reopening claim, and in so doing the board “constructively reopened”

the case, but denied relief. As such, the board's ARR fall under the third *Esperum* category, and is a final orders subject to judicial review.

A. Constructive Reopening

Petitioner is unaware of an Oregon case using the term "constructive reopening." However, the term is regularly used in federal administrative proceedings where an administrative agency has broad discretionary power to reopen past decisions, usually for grounds of "good cause" when presented with "new and material evidence." *Schmidt v. Callahan*, 995 F Supp 869, 879 (ND Ill 1998), *aff'd*, 201 F3d 970 (7th Cir 2000); *Morin v. Secretary of Health and Human Services*, 835 F Supp 1414, 1422 (D NH 1992).

Cases advancing the doctrine initially note that a denial of a request to reopen an earlier decision is usually not reviewable on appeal. *See e.g. Califano v. Sanders*, 430 US 99, 108, 97 S Ct 980, 51 L Ed 2d 192 (1977) ("[A]n interpretation that would allow a claimant judicial review simply by filing and being denied a petition to reopen his claim would frustrate the congressional purpose * * * to impose a 60-day limitation upon judicial review * * *"). This court has identified a similar presumption and rationale under Oregon law, recognizing:

"* * * the procedural reality that a denial of reconsideration left the prior final order undisturbed and that permitting judicial review to be triggered by such a denial would nullify the 60-day time limit that the legislature placed on seeking judicial review."

Mastriano, 342 Or at ____.

However, if an administrative agency “reconsiders the merits of an application previously denied, the matter is considered reopened and subject to judicial review.” *Underwood v. Bowen*, 807 F2d 141, 143 (1986) (citing *Jelinek v. Heckler*, 764 F2d 507, 508 (1985)). An administrative agency cannot shield its substantive decisions on the merits by merely captioning its order as a denial of a request to reopen. Instead:

“Under these cases, where the Secretary, in denying a request for reopening an earlier application, nevertheless addresses the merits of that application, the application can be treated as having been ‘constructively reopened’ as a matter of administrative discretion. A district court may then review the Secretary’s refusal to reopen the application, to the extent that it addresses the merits.”

Boock v. Shalala, 48 F3d 348, 351 (1995) (internal citations omitted).

Application of the doctrine is limited. The doctrine is only applicable if the reconsideration occurred within the time permitted by statute or rule for agency reopening. *Id.* at 351-52. Also, an agency’s examination of the proffered evidence in support of the reopening request, to determine whether it is new or material does not constitute constructive reopening:

“[W]hile of course the Secretary must look into the facts of a claimant’s earlier applications to determine whether there is cause to reopen them * * *, that ‘threshold inquiry into the nature of the evidence should not be read as a reopening of this claim on the merits.’

Malave v. Sullivan, 777 F Supp 247 (1991) (citing *McGowen v. Harris*, 666 F2d 60, 68 (1981)).

III. In denying the reopening request of petitioner Dawson, the board reached the merits of the claim, thereby constructively reopening the earlier decision. Its denial of reopening is therefore reviewable.

Dawson involves a request to reopen the board's previous future disposition decision. The reopening of revocation and future disposition decisions is governed by OAR 255-075-0055. It provides:

“(1) After the completion of a violation hearing, the Sanction Authority or Hearings Officer may reopen a hearing if substantial new information is discovered which was not known or could not be anticipated at the time of the hearing and which would significantly affect the outcome of the hearing.”

“(2) The Sanction Authority or Hearings Officer shall send the offender notice of the decision to reopen the hearing and the new information to be considered. The reopened hearing shall conform to the procedures of this Division.”

Under this rule the board has the authority to reopen earlier division 75 decisions when the inmate meets two predicate showings: (1) the presentation of new information that (2) would have significantly affected the outcome of the original hearing. The authority to reopen under OAR 255-075-0055 is not limited by time or the manner in which the request is presented. The board has discretionary authority to revisit any division 75 decision, no matter how old. And the request to reopen may be made through a formal petition for administrative review under Division 80 or through unspecified informal means.²

² The Board appears to have the authority to limit the time for filing a re-opening request under Division 75 through its own agency rulemaking procedures.

Petitioner Dawson sought reconsideration of the board's previous decision concerning his future disposition and the calculation of his rerelease date. A seven-page legal memorandum accompanied his request to reopen. Petitioner argued that the board's revocation of his parole and imposition of a true life sentence violated the *Ex Post Facto* provisions of both the Oregon and United States Constitutions. In support of that argument, and as a basis for why reconsideration would be appropriate, petitioner Dawson asserted that pertinent information was now available, which was not available at the time of the original 1996 hearing, namely the 2003 Ninth Circuit decision in *Himes v. Thompson*, 336 F3d 848 (9th Cir 2003).

A. A brief overview of the legal analysis of Ex Post Facto claims, and the reasoning of *Himes v. Thompson*.

To determine whether the board reached the merits of petitioner Dawson's reopening request, it is first necessary to understand the issue raised by petitioner in his request. For this reason, a brief discussion of *ex post facto* claims and the specific holding of *Himes v. Thompson* follows.

1. *Ex Post Facto* application to board decisions

Article I, section 10, of the United States constitution provides: "No State shall ... pass any ... Ex Post Facto Law." The Ex Post Facto clause "is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" *Cal Dep't of Corr v. Morales*, 514 US. 499, 504, 115 S Ct. 1597, 131 L Ed 2d 588 (1995) quoting *Collins v. Youngblood*, 497 US 37, 43, 110

S Ct 2715, 111 L Ed 2d 30 (1990). Because the clause expressly applies to “laws,” the clause reaches “every form in which the legislative power of a state is exerted,” including “a regulation or order.” *Ross v. State of Oregon*, 227 US 150, 162-63, 33 S Ct 220, 57 L Ed 458 (1913).

Oregon’s Board of Parole and Post-Prison Supervision “through its rules governing release dates” affects “the amount of freedom or punishment that a prisoner in fact receives.” *Williams v. Board of Parole*, 98 Or App 716, 720, 780 P2d 793 (1989). Therefore, the board’s rules are subject to scrutiny under the federal Ex Post Facto clause. *Id.*

Assessing an asserted federal Ex Post Facto violation implicates two components. First, the regulations must have been applied retroactively to the defendant. Second, the new regulations must have created a “sufficient risk” of increasing the punishment attached to the defendant’s crimes. *Morales*, 514 U.S. at 509; *Weaver v. Graham*, 450 US 24, 29, 101 S Ct 960, 67 L Ed 2d 17 (1981).

As for retroactive application, the “critical question is whether the [regulations] change the legal consequences of acts completed before [the] effective date[of the regulations.]” *Weaver*, 450 US at 31. “Sufficient risk” is apparent from the face of the changed regulations if, after comparing the two regulatory schemes as a whole, it is apparent that the new regulations are more detrimental to liberty interests. *Miller v. Florida*, 482 US 423, 432, 107 S Ct 2446, 96 L Ed 2d 351 (1987). Whether an individual can show definitively that *he* would have received a lesser sentence is not determinative. *Id.* Stated differently,

“[t]he inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual.” *Weaver*, 450 US at 33.

2. Application of the Federal *Ex Post Facto* analysis in *Himes*.

In *Himes*, the petitioner was an Oregon inmate sentenced to prison for 70 years for acts committed in 1978. The board released him on parole on April 24, 1994, then revoked his parole four months later. Applying OAR 255-075-0079 (1994) and OAR 255-075-0096 (1994), the board found aggravation, denied rerelease, and scheduled the petitioner’s next parole review for 2024. *Himes*, 336 F3d at 850-52.

A federal district court denied the petitioner’s petition for habeas corpus. The court on appeal disagreed with that decision, stating: “The question for decision is whether that determination violated the Ex Post Facto Clause of the United States Constitution. We conclude that it did and therefore reverse the district court’s denial of Himes’ petition for habeas corpus.” *Himes*, 336 F3d at 850 (internal citation omitted).

In supporting that conclusion, the court began: “Our inquiry focuses on the parole *regulations*. * * * We must therefore consider whether the 1994 regulations thus adopted, as compared to the 1978 regulations, created a significant risk of a more onerous sentence.” *Himes*, 336 F3d at 855 (emphasis in original). The court found that the “change in Oregon’s parole regulations”

between 1978 and 1994 “created a substantial – rather than attenuated or speculative – risk of increasing Himes’ incarceration, and therefore violated the Ex Post Facto Clause.” *Id.* at 856.

While the court found changes in the board’s methods for determining aggravation “troubl[ing]” for purposes of an *ex post facto* analysis, the court “could not say that Oregon unreasonably applied the federal Ex Post Facto Clause to the change in factors,” reasoning that the board “could well have made an aggravation finding” under the 1978 regulations as it did in 1994. *Himes*, 336 F3d at 857. What the court found dispositive was what it deemed the “[c]hange in the [p]resumption of [p]unishment” between 1978 and 1994. *Id.* at 858. The court examined the regulations and determined:

“Application of the 1994 regulations as a whole substantially increased the risk of a longer sentence by instructing the Board of Parole, once it made a finding of aggravation, to deny rerelease entirely, thereby requiring Himes to serve out the remainder of his sentence. * * * In contrast, the 1978 regulations would almost surely have resulted in a more moderate re-incarceration period.”

Himes, 336 F3d at 858.

The court observed that the “1994 regulations applicable to Himes *compelled* the board to deny rerelease upon a finding of aggravation.” *Himes*, 336 F3d at 858 (emphasis added). OAR 255-075-0079 (1994) provided:

“ (1) For technical violation(s):

“(a) An offender whose parole has been revoked may serve further incarceration of up to 90 days for each revocation.

“* * * * *

“(9) Notwithstanding subsections 1-8 of this rule, the Board may choose to postpone rerelease on parole pursuant to Divisions 50 and 60 of this chapter.

“(10) Notwithstanding subsections 1-9 of this rule, the Board may choose to deny rerelease on parole pursuant to [Or. Admin. R.] 255-075-0096.”

Himes, 336 F3d at 858 (quoting OAR 255-075-0079 (1994)).

Likewise, OAR 255-075-0096(1) (1994), pertaining to denial of release consideration, stated:

“Upon a finding of aggravation pursuant to Exhibit E or Exhibit H, the Board may deny rerelease on parole and require the parole violator to serve to the statutory good time date or, in the case of aggravated murder, for life. This action requires the affirmative vote of a majority of members, except that if the result is life imprisonment, the full Board must vote unanimously.”

Himes, 336 F3d at 858 (quoting OAR 255-075-0096(1) (1994)).

The *Himes* court interpreted those rules as follows:

“The 1994 regulations gave the Board of Parole a binary choice between the 90 days contemplated in Or. Admin. R. 255-075-0079(1) (1994), and the outright denial of rerelease contemplated by Or. Admin. R. 255-075-0079(10) (1994) and 255-075-0096(1) (1994). Once the Board found aggravation, and, as a result, determined to extend the revocation period beyond the 90 days otherwise applicable, it had no choice but to deny *Himes* rerelease on parole.”

Himes, 336 F3d at 859.

Turning to the 1978 regulations, the court stated: “Unlike the 1994 regulations, the 1978 regulations relevant to *Himes*’ parole rerelease did not

mandate outright denial of rerelease as the only available aggravation penalty.”

Himes, 336 F3d at 859. OAR 254-70-042 (1978) provided:

“(1) A parolee revoked and returned after release with an original crime severity of 1 through 5 shall serve four to six months before rerelease unless aggravating or mitigating factors are present.

“(2) A parolee revoked and returned after release with an original crime severity of 6 or 7 shall serve six to ten months unless aggravating or mitigating factors are present.

“(3) Usual, but not exclusive factors in aggravation or mitigation are shown in Exhibit G.”

Himes, 336 F3d at 859 (quoting OAR 254-70-042 (1978)).

As to that rule, the court stated:

“While [OAR] 254-70-042 allows the Board of Parole to deviate from the presumptive ranges, it contains no requirement that the Board deny rerelease altogether once it so deviates. The “unless” clause allows deviation from the presumptive ranges for either aggravation *or mitigation*, indicating that the clause operates to allow the board to increase *or decrease* the resulting incarceration period, commensurate with the degree of aggravation or mitigation found. Additionally, there was no reference in the 1978 regulations, as there was in 1994, to denying rerelease altogether, or to serving to the statutory good time date. While those actions may have been permissible under the 1978 regulations, there is no reasonable reading of the regulations *mandating* complete denial of rerelease if the Board wished, upon a finding of aggravation, to impose an incarceration period longer than the presumptive terms set out in former [OAR] 254-70-042 (1978). So the 1978 regulations created a continuum of sanctions, depending on the level of aggravation or mitigation, not a binary choice.”

Himes, 336 F3d at 859 (emphasis in original). The court thus reasoned:

“The two different sets of regulations therefore produce startlingly divergent results. In 1994, if the Board wished to

impose an aggravation penalty, it was compelled to re-incarcerate an inmate for the remainder of his term – in Himes’ case, over twenty-nine and a half years. In 1978, the Board would have chosen from a continuum of sanctions: anywhere from a few months to the entirety of the prison term. For prisoners like Himes, for whom the remaining prison term was quite lengthy, the Board of Parole in 1978 would likely have imposed the entire prison term only under extraordinary circumstances. So the change in regulatory regime, viewed in its entirety, significantly increased the possibility of serving a lengthy re-incarceration period under the new regime.”

Himes, 336 F3d 859 -60.

In light of the foregoing, the *Himes* court concluded that the regulatory changes violated the Ex Post Facto Clause, stating:

“The 1994 regulations removed the Board of Parole’s ability to grant a continuum of sanctions for aggravated violation of parole, in favor of an all-or-nothing choice between a 90-day sanction and outright denial of release. This change disadvantaged any inmate whose conduct warranted a finding of intermediate aggravation (*e.g.* any aggravation that merited some upward departure, yet did not rise to the extreme level required to impose the outermost sanction on the continuum, outright denial of rerelease). Under the 1978 regulations, a finding of intermediate aggravation could result in an intermediate re-incarceration sanction. In 1994, any finding of aggravation finding could result only in the denial of rerelease. This change drastically restricted the opportunity to re-qualify for parole for a substantial class of inmates, thereby increasing the incarceration period attached to the original crime.

“It is true that the change in parole regulations may have marginally helped a different class of inmates. However, these ameliorative effects are small in comparison to the possibility- a reality for inmates such as Himes – that postrevocation rerelease eligibility would be severely curtailed. Overall, the change in parole regulations greatly increased the risk that an inmate would serve a longer sentence for his crime.

“In summary, the new regulations created a new substantive formula for the calculation of parole rerelease. The ‘new restrictions on eligibility for release’ were disadvantageous. The re-incarceration ‘presumption,’ for technical violators with aggravation switched from a flexible continuum to a compelled determination that the inmate be returned for his entire remaining sentence. In other words, this switch increased the ‘mandatory minimum’ punishment for a particular category of inmates, creating a ‘sufficient risk’ of increasing the measure of punishment attached to Himes’ crime.

“Overall, the change in the measure of punishment for parole revocations between the time of Himes’ offense and those in effect when his parole was revoked was extreme. We conclude that it was objectively unreasonable for the Oregon Courts to decide that there was no Ex Post Facto violation. The petition is granted. Himes is entitled to have his parole rerelease considered under the guidelines in place in 1978.”

Himes, 336 F3d at 863 -64.

- B. In rejecting *Himes*’ applicability to petitioner’s case, the board reached the merits of the claim and constructively reopened the decision.

Petitioner’s request for reopening applied *Himes* to the facts of his case, arguing that the 1985 rules in effect at the time of his crime commission were substantively different from the 1996 rules and, as in *Himes*, the board’s application of those 1996 rules to his future disposition hearing violated federal Ex Post Facto. As a result, he requested that the board reopen the matter and calculate his rerelease date in a constitutionally permissible manner.

While the record does not make clear precisely which versions of the rules the board applied, the record does support the conclusion that the board did not apply the rerelease rules in effect at the time of petitioner’s crime. Petitioner

committed his crime in 1985. The board thereafter released him on parole and revoked his parole sometime before May 7, 1996. BAF #13, which denied rerelease, cites as authority OAR 255-75-079 and OAR 255-75-096. OAR 255-75-079 did not exist in 1985 but was promulgated in 1989. Likewise, BAF #13 makes reference to “aggravating factors,” a term that does not appear in OAR 255-075-0096 until 1989. Therefore, it appears that the board retroactively applied rules to petitioner in denying rerelease. The only remaining question in petitioner’s *ex post facto* claim is the existence of a “significant risk” of increased punishment between the rules in effect in 1985, and the rules employed by the board at the hearing.

The board’s response in ARR No 7 went beyond simply denying the reopening outright. Rather, the board reached a legal conclusion on the merits of petitioner’s claim, concluding that the holding in *Himes* did not apply to petitioner Dawson because the facts of his case did not match the facts in *Himes*:

“The board denied your request to reopen and reconsider its decision in BAF #13 for the following reasons. In *Himes*, the court addressed issues regarding the board’s rules that were in effect July 19, 1978 to January 31, 1979. You committed your crime on May 30, 1985. Consequently, the *Himes* decision does not apply to your case. As a result, your request for the board to reopen and reconsider its finding in BAF #13 is denied.”

ARR No. 7 (Rec. 32).

In making this ruling, the board reached two legal conclusions. First, it made the express legal determination that the *ex post facto* analysis of *Himes* is limited solely to the facts of that case. Secondly, it apparently made an implicit

legal conclusion: that the differences in the board rules in effect in 1985, and the rules in effect in 1996, did not create a “sufficient risk” of increased punishment for petitioner’s crimes under the latter rules.

The board’s legal ruling on that issue is wholly novel. The board does not rely on a previous decision by this court, or any court, on the matter. Rather, faced with a question of law, the board reached its own, independent, legal ruling. In so doing, the board reached the substantive merits of petitioner’s legal memorandum, constructively reopening its earlier decision and denying petitioner relief. That action by the board places its ARR squarely in the third *Esperum* category: a final order subject to judicial review by this court.

The board’s action in this case is no different than a judicial treatment of a petition for reconsideration. The board could have disposed of such a request in exactly the same way this court or the Court of Appeals often does by simply issuing an order stating “petition for reconsideration denied.” But, rather, the board considered the reconsideration merits and found them unavailing. It responded and rejected those arguments much like a court might. However, while a court’s order might read “reconsideration allowed, former opinion adhered to” the board’s ARR states “request to reopen and reconsider denied.” But that tagline is not an accurate summation of the board’s actions.

The board did not deny the request outright, although it certainly could have. Instead it issued, in essence, a reconsideration opinion expressing its reasoning to reject the substantive claim. The board cannot be allowed to both

simultaneously issue new legal rulings in a case and also shield those rulings from any meaningful review. Until ARR #7, a legal determination of the *ex post facto* application of board rules in this case had never been made. Now, it has. By taking the step to make such a ruling, the board has reached the merits of the claim. Its order is therefore final, and subject to review.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays this court reverse the decision of the Court of Appeals granting the state’s motion to dismiss.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

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DEPUTY PUBLIC DEFENDER

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Attorneys for Petitioner-Appellant
Craig Thomas Dawson

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on January 7, 2009.

I further certify that I directed the Petitioner's Brief on the Merits to be served upon Mary H. Williams, attorney for Plaintiff-Respondent, on January 7, 2009, by having the document personally delivered to:

Mary H. Williams #911241
Solicitor General
400 Justice Building
1162 Court St. NE
Salem, OR 97301
Phone: (503) 378-4402
Attorney for Plaintiff-Respondent

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

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DEPUTY PUBLIC DEFENDER

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Attorneys for Petitioner-Appellant
Craig Thomas Dawson