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***RE: EDENS ET AL V. OREGON BOARD OF PAROLE  
MARION COUNTY CASE NOS. 07C22594 & 07C22595***

Dear Counsel:

This matter is before this Court on two consolidated cases, each seeking a writ of mandamus from this Court directed to the Oregon Board of Parole and requiring the Parole Board to vacate its orders of May 26, 1988 and October 23, 2007. The May 1988 order reduced Richard Troy Gillmore's prison term and the October 2007 order authorized his release on parole, effective later this month. The plaintiffs ask that the Board be required to conduct a new parole hearing that complies with the crime victim's rights, and in the event that the Board again decides to parole Gillmore, that it be required to first formulate a release plan that complies with the requirements of Oregon Law.

The plaintiffs and the defendant have each filed a motion for summary judgment, and Intervenor Richard Troy Gillmore has filed a motion to dismiss.

The motion to dismiss is denied. Mandamus is the appropriate procedural remedy for the kind of relief sought by plaintiffs in this case. There are no statutory remedies for either crime victims or the district attorney to correct alleged failures to comply with their statutory rights to be notified of pending parole hearings in a timely fashion, and to appear and be heard at the hearing in accordance with ORS 144.120 (7) and 144.228 (1)(a). Mandamus is appropriate "to compel the performance of an act which the law specifically enjoins, as a duty resulting from an

office, trust, or station.” ORS 34.110. Without any other more specific statutory avenue to relief, plaintiffs have no other recourse, but mandamus.

Plaintiffs’ motions for summary judgment are granted in part and denied in part, and defendant’s cross motion is denied.

ORS 144.120 (7) requires the Board of Parole to “attempt to notify the victim, if the victim requests to be notified and furnishes the Board a current address, and the district attorney of the committing county at least 30 days before all hearings by sending written notice to the current addresses of both.” Although there is some question as to why this duty was not fully complied with, it’s plain that it was not.

The victim filed a timely request to be notified and furnished the Board with a current address prior to the May 1988 hearing. However, because the offender’s name was misspelled (“Gilmore” vs. “Gillmore”) the Board did not match the request to its file prior to the May 1988 hearing, and the victim did not get prior notice of the hearing. The Board did correctly match the victim’s request to its file and added her address shortly thereafter, and did attempt to notify her by mail of the results of the May 1988 decision. The record is in conflict as to whether that written notification was ever received by the victim. However, it is not necessary to decide that issue in the present context of this case.

At the May 1988 hearing, the Board overrode one of the two fifteen-year consecutive minimum sentences Gillmore had received on his two consecutive thirty-year sentences. The Board also set an initial parole consideration date of December 18, 2001.

In the meantime, Gillmore requested an early parole-consideration hearing in 1993, and the Board made an attempt to notify the victim of that request. That mail was returned to the Board as undeliverable, apparently because a zip code change took place when Gresham incorporated a portion of Troutdale into Gresham’s boundaries. (In 1988 the victim’s mailing address was in Troutdale, OR 97060, but by governmental action it later changed to Gresham, OR 97030, although her physical address never changed.)

Further parole-consideration hearings for Gillmore took place in 2001, 2003, 2005, and in September of 2007, but the Board made no further attempt to notify the victim of any of those hearings. It is the Board’s position in this case that since the victim’s address was no longer current, the Board no longer had a legal duty under the statute to attempt to notify her of pending parole hearings.

At the parole-consideration hearing on September 11, 2007, the Parole Board found that Gillmore remained dangerous, as they had consistently found in 2001, 2003, and 2005. However, at the September 11, 2007 parole-consideration hearing, the Board also, and for the first time, concluded that he could be adequately controlled in the community with supervision and treatment. This was directly contrary to the conclusions reached on that point in 2001, 2003, and 2005. No explanation for that change was offered. A release date of December 18, 2007, was also set.

By September 20, 2007, the victim somehow learned that the hearing had been held and that a release date had been set. She called to complain of the lack of notice and the Board's Chair responded by letter, dated September 21, 2007. Later, on September 25, 2007, the victim and her family met with the Board's Chair and Board staff to discuss the lack of notice issue.

On October 4, 2007, the Board rescinded its earlier September 11, 2007, decision granting parole, and it decided to conduct another hearing to give the victim and her family their statutory opportunity to be heard, as well as to clarify statements made at the September 11, 2007, hearing concerning the applicable law. Accordingly, on October 5, 2007, the Board mailed written notice of the new parole-consideration hearing, which was then scheduled for October 23, 2007, to the victim. Clearly, however, this written notification did not comply with the statute's requirement that the victim receive thirty days advance written notice.

Nevertheless, the hearing was held, and the victim, her family, and the district attorney's representative all appeared. At the end of the hearing, the Board again found that Gillmore remained dangerous, but again found that he could be adequately controlled in the community, once again, without any further elaboration or explanation. The Board set a new final release date of January 21, 2008, to allow for ninety days of release planning.

These cases were then filed by plaintiffs to bring this matter before this Court with the request that the Board be ordered to conduct new hearings to fully comply with the rights of the victim under the law.

At the outset, it should be stressed that this is not a judicial review proceeding to examine the substantive correctness of the Board's decision to release Gillmore. This Court has no authority under the law to correct any ill advised or mistaken release decision made by the Board in any case. This Court's only authority in this case is to review the procedures followed by the Board in reaching its decision in this case to determine whether the Board complied with this victim's rights as set forth by ORS 144.120 (7) and 144.228 (1)(a).

Nevertheless, plaintiffs' motions for summary judgment are being granted with respect to the October 2007 hearing, and since this matter will now be returning to the Board for a new hearing in the near future, I feel compelled to bring to the Board's attention a matter of substantial concern in the hope that it can be remedied during the next hearing.

As recently as April 25, 2007, after a remand from the Court of Appeals of an earlier decision denying parole, this Board concluded that Gillmore:

“has a mental or emotional disturbance, deficiency, condition or disorder predisposing offender to the commission of any crime to a degree rendering the offender to a danger to the health or safety of other; therefore, the condition that made inmate dangerous is not in remission and inmate does continue to remain a danger.” (Exhibit 101 at page 084.)

Five or six months later, in September and again in October of 2007, the Board again concluded that Gillmore remains dangerous, but without any further explanation then added: “However the Board finds that the offender can be adequately controlled with supervision and mental health treatment which are available in the community”.

The only intervening evidence in this proceeding submitted to the Board between April 25, 2007, and September and October of 2007 which addressed this concern was the Psychological Evaluation of Dr. Frank P. Colistro, Ed.D, dated June 22, 2007. This is a ten page confidential report which was a follow up to an earlier report of 2001. In his 2007 report, Dr. Colistro expresses strong concerns that Gillmore’s sexual violence risk potential has been significantly underestimated in his earlier report. His report concludes as follows:

“In this case, taking into consideration the results of the VRAG, which was not applied in 2001, and considering his risk profile in its totality, this examiner finds subject to continue to suffer from a severe personality disorder, one not amenable to community-based treatment or supervision.”

In sum, the only available expert evidence documents that Gillmore is even more dangerous and less amenable to be safely managed in the community than he appeared in 2001, 2003, 2005, and in April of 2007. This evidence, the only psychological evidence in this record which addresses this point, is directly in conflict with the Board’s conclusion in September and October of 2007 that Gillmore can be safely released. The only discussion in this record of the Board’s decision is this statement of one of the Board members:

“Mr. Gillmore, the Board did a lot of talking and a lot of thinking about this decision. We’re fully aware that - - that Dr. Colistro was very concerned about your potential for recidivism. And we listened carefully to everything you said, and we have decided that - - that we can take a risk with you. And that’s what we are doing.”

Apparently, in the Board’s view, Gillmore’s own reassurances outweighed Dr. Colistro’s strongly expressed professional concerns about Gillmore’s increased sexual violence risk potential and his inability to be safely managed in the community. Why this might be so is not explained. Hopefully, on remand this issue can be more directly and forthrightly addressed.

Turning to the merits of the victim’s procedural claims in this case, this Court finds as follows:

First, the October 5, 2007, mailed written notice of the parole-consideration hearing of October 23, 2007, is insufficient to comply with the statutory thirty day notice requirement under ORS 144.120 and 144.228 (1)(a).

Second, the thirty day notice requirement is not immaterial in this case, even though the victim did appear and did testify at that hearing. The apparent purpose of the thirty day notice is to give the victim an adequate opportunity to prepare for the hearing, and to obtain counsel,

should she so desire. By statute, the victim is also to be “given access to the information that the board or division will rely upon and shall be given adequate time to rebut the information.” ORS 144.120 (7). The thirty day notice period ensures that these other rights can be fully exercised.

Third, the Board’s administrative rule limiting the time allocated to the victim’s testimony, personally or by counsel or other representative, for testimony to three minutes only, OAR 255-030-0027, is inconsistent with the terms, context, and intent of ORS 144.120 (7). In this case, the victim was told in advance of the time limit under this rule, and although she was then allowed to exceed it without interruption, and was also allowed to offer the testimony of other family members, nevertheless the rule has a chilling effect on the full exercise of the victim’s rights and is unnecessarily intimidating even when it is actually applied only in a somewhat relaxed format. The statute itself sets forth no such restriction; rather, it requires that the victim be given adequate time to rebut the information being presented to the Board in support of a parole release. (ORS 144.120 (7).)

Fourth, an ancillary right that springs from the right to be heard is the right to a statement by the decision maker of the reasons for the decision reached. Notably, ORS 144.135 requires the board to “state in writing the detailed basis of its decisions.” ORS 144.120. See also ORS 144.228 (1)(a). The Board’s own Administrative Rules also require written findings to support its decisions. OAR 255-036-0005. Inexplicably, that did not occur in this case. As noted earlier, there was no statement, written or otherwise of the basis for the Board’s decision; just an articulation of the bare statutory conclusion.

As the Oregon Supreme Court recently explained in another Parole Board case, *Gordon v. Board of Parole and Post-Prison Supervision*, (Dec. 28, 2007), bare conclusions are simply not enough. In fact, the *Gordon* court made it plain that the Parole Board’s decision must reflect a rational connection between the agency’s reasoning and its conclusions: the Parole Board is required to demonstrate in its opinion the reasoning that leads the agency from the facts that it has found to the conclusions that it draws from those facts. *Gordon v. Board of Parole*, supra, slip. op. at page 9. See also *Green v. Hayward*, 275 Or 693, 706-08, 552 P2d 815 (1976). In other words, the Board’s findings, reasoning, and conclusions must demonstrate that it acted in a rational, fair, and principled manner, and not on an arbitrary or ad hoc basis. *Gordon*, supra, slip. op. at 10.

Finally, the evidence presented to the Board never addressed in the third statutory requirement “that the necessary resources for supervision and treatment are available to the prisoner” in the community. Here, as elsewhere, the Board’s findings and conclusions must be based on evidence presented at the parole-consideration hearing. Apparently, however, it is the Board’s practice to defer all issues relating to the resources actually available to the prisoner in the community to a later date. Under the Board’s present practices, only well after the actual release decision is made is a subsequent Release Plan prepared and an Order of Supervision Conditions reviewed and approved by the Board, and apparently, then only by one of the three Board members. (In this case, although the release decision was made in October, the Supervision Conditions were reviewed and approved on January 4, 2008.) Again this is inconsistent not only with ORS 144.228 (1)(b) and with 144.135, but also with the victim’s

explicit rights to be given adequate time to review and rebut all the material information presented on the release decision in accordance with ORS 144.120.

Accordingly, this matter must be remanded back to the Parole Board with directions to conduct an entirely new parole-consideration hearing where the victim is given adequate notice and full opportunity to participate in the hearing in accordance with the provisions of ORS 144.120 (7), and with the directives of this Court as set forth above.

Plaintiffs' motion for summary judgment on the issues related to the 1988 hearing, however, is denied with respect to all such issues. Although it is certainly regrettable and unfortunate that the Board was unable at that time to match a request to be notified of any decisions related to Richard Troy "Gilmore's" parole hearings to Richard Troy "Gillmore's" parole hearings, there is a factual dispute in the evidence in this case as to whether the victim eventually had actual notice that the hearing had taken place without her shortly after the fact. If she did have actual notice and failed to act promptly to request relief, then the principle of laches would clearly preclude reopening that hearing at this late date.<sup>1</sup> Accordingly, this case is not ripe for summary judgment on that issue at this time because of that factual dispute.

Other issues and concerns have been raised by each of the parties involved in this case. However, each of them are either inconsequential or immaterial to the resolution of this matter at this juncture. In the interests of judicial economy, particularly with the short time period allotted for resolution of this matter, this opinion will not be further extended by discussion of those issues.

Mr. Beloof may prepare an order granting plaintiffs' motions for summary judgment, in part, and denying them in part, as well as an order directing the Parole Board to conduct a new parole-consideration hearing that fully complies with ORS 144.120 and with the directions of this Court.

Sincerely,

Paul J. Lipscomb  
Presiding Judge  
Marion County Circuit Court

PJL:kja

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<sup>1</sup> Even if she did not have actual notice, other considerations could still preclude reopening that hearing at this time, but resolving that issue would require a hearing on the merits. It can not be resolved at the summary judgment stage.