

OREGON COURT OF APPEALS

Harless v. Board of Parole and Post-Prison Supervision

348 Or. App. 289 (2026) · No. A186229 · Decided April 8, 2026

SUMMARY

The Oregon Court of Appeals reviewed a Board of Parole and Post-Prison Supervision order setting Mark Todd Harless's sex offender notification level at Level 3. The court declined to address arguments concerning amendments to ORS 163A.100 and related due process issues in the first instance, vacated the board's order, and remanded for a new assessment.

CASE DETAILS

COURT	Oregon Court of Appeals
WRITING FOR THE COURT	Tookey, Presiding Judge; Kamins, Judge; Jacquot, Judge
JURISDICTION	Oregon Court of Appeals
DECIDED	April 8, 2026
DOCKET	A186229
DISPOSITION	vacated
PROCEDURAL POSTURE	Petitioner sought judicial review of a final order of the Board of Parole and Post-Prison Supervision setting his sex offender notification level at Level 3. The board conceded that it had not considered petitioner's offense-free time in the community, and the parties disputed whether the order should be reversed and remanded or vacated and remanded after statutory amendments became effective.
STANDARD OF REVIEW	Under ORS 144.335(3) and ORS 183.482(8), the court reviews the board's order for legal error and may affirm, reverse, or remand; when an agency has erroneously interpreted a provision of law, the court may set aside or modify the order or remand for further action under the correct interpretation.
PRECEDENTIAL VALUE	Published and precedential Oregon Court of Appeals opinion
PARTIES	Mark Todd Harless v. Board of Parole and Post-Prison Supervision

TOPICS

- judicial review of agency action
- administrative law
- statutory interpretation
- appellate procedure
- mootness

PRACTICE AREAS

administrative law

appellate procedure

sex offender registration and notification

QUESTIONS PRESENTED

1. Whether the Court of Appeals should reverse and remand or vacate and remand the board's final order after the legislature amended ORS 163A.100.
2. Whether the Court of Appeals should decide in the first instance the effect of Senate Bill 1122 and petitioner's related due process arguments.
3. Whether the board's mootness argument should be decided on the assumption that the statutory amendments rendered its assessment correct.

HOLDINGS

1. The court declined to decide arguments concerning the effect of Senate Bill 1122, including petitioner's due process arguments, because the board should address them in the first instance on remand and petitioner may then seek judicial review of the board's new order.
2. The court declined to consider the board's mootness argument because it depended on the unresolved premise that the 2025 amendments demonstrated that the board had correctly assessed petitioner's sex offender notification level.
3. Because the governing law changed while the case was pending and the board must reconsider its decision under the amended law, the court vacated the board's order and remanded for a new assessment of petitioner's sex offender notification level.

KEY QUOTATIONS

“Based on the change in the law, we vacate the board’s order and remand for a new assessment of petitioner’s SONL.” (348 Or. App. at 292)

“We decline to consider arguments about the effect of SB 1122 on how the board assessed or should assess petitioner’s SONL until the board has had an opportunity to consider those arguments in the first instance, after which petitioner will have the opportunity to seek judicial review of the board’s new order.” (348 Or. App. at 291)

FACTUAL BACKGROUND

The Board of Parole and Post-Prison Supervision set Mark Todd Harless's sex offender notification level at Level 3 in a December 2024 final order, relying on a Static-99R score of 8. The board conceded that, in assessing Harless's risk of re-offense, it had not considered his offense-free time in the community. While judicial review was pending, the legislature amended ORS 163A.100, effective May 27, 2025, potentially affecting the board's risk-assessment methodology.

PROCEDURAL HISTORY

The board issued a December 2024 final order assigning petitioner a Level 3 sex offender notification level based on a Static-99R score of 8. Petitioner petitioned for judicial review, arguing that the board was required to assess his present risk of re-offense and had failed to consider his offense-free time in the community. While the case was pending, Senate Bill 1122 amended ORS 163A.100, and the Court of Appeals declined to decide the effect of the amendments or the related due process and mootness arguments before the board considered them in the first instance.

DISPOSITION

vacated

REMAND INSTRUCTIONS

The Board of Parole and Post-Prison Supervision must conduct a new assessment of petitioner's sex offender notification level, consider the effect of the amendments to ORS 163A.100 and petitioner's due process arguments in the first instance, and issue a new order subject to judicial review.

CASES CITED

- Thomsen v. Board of Parole, 333 Or. App. 703, 554 P.3d 308, rev. denied, 373 Or. 81 (2024)
- Allen v. Board of Parole, 334 Or. App. 447, 557 P.3d 178, rev. denied, 373 Or. 121 (2024)
- Sohappay v. Board of Parole, 329 Or. App. 28, 30, 41, 540 P.3d 568 (2023)
- State v. Cunningham, 345 Or. App. 546, 551, 582 P.3d 1184 (2025)
- Van Gordon v. Oregon State Board of Dental Examiners, 63 Or. App. 561, 566, 666 P.2d 276 (1983)
- Moreau v. Samalin, 295 Or. App. 534, 535, 435 P.3d 794 (2019)
- State v. D. J. P., 342 Or. App. 422, 425, 576 P.3d 1043 (2025)
- State v. Stutte, 339 Or. App. 87, 99 n. 7, 568 P.3d 247 (2025)
- Forbus v. Board of Parole, 309 Or. App. 296, 310-11, 482 P.3d 95 (2021)
- State v. Cruz-Aguirre, 179 Or. App. 546, 547, 40 P.3d 560 (2002)

OPINION

Harless v. Board of Parole 348 Or. App. 289

PER CURIAM.

No. 281 April 8, 2026 289

IN THE COURT OF APPEALS OF THE

STATE OF OREGON

MARK TODD HARLESS,

Petitioner, v.

BOARD OF PAROLE

AND POST-PRISON SUPERVISION,

Respondent. Board of Parole and Post-Prison Supervision A186229 Argued and submitted March

5, 2026. Anna Sammons argued the cause and filed the briefs for petitioner. Philip Thoennes, Assistant Attorney General, argued the cause for respondent. Also on the briefs were Dan Rayfield, Attorney General, and Benjamin Gutman, Solicitor General. Before Tookey, Presiding Judge, Kamins, Judge, and Jacquot, Judge. TOOKEY, P. J. Vacated and remanded. 290 Harless v. Board of Parole TOOKEY, P. J. ORS 163A.100 requires the Board of Parole and Post-Prison Supervision to “adopt by rule a sex offender risk assessment methodology for use in classifying sex offend- ers.” Petitioner seeks judicial review of a final order of the board from December 2024 setting petitioner’s sex offender notification level (SONL) at Level 3 based on his Static-99R score of 8.1 Petitioner argued that the board erred in assess- ing his risk of re-offense, and that, under Thomsen v. Board of Parole, 333 Or App 703, 554 P3d 308, rev den, 373 Or 81

(2024), and Allen v. Board of Parole, 334 Or App 447, 557

P3d 178, rev den, 373 Or 121 (2024), the board was required to determine his present risk of re-offense, not his risk at the time of his release from the index offense. Petitioner requested that we set aside the final order and remand to the board for a new assessment. The board conceded that, when assessing petitioner’s risk of re-offense, it had not con- sidered his offense-free time in the community. The board argued that we should reverse the final order and remand for further proceedings. On the same day that the case was submitted on the briefs, petitioner moved to file a supplemental brief, which we granted, in which he argues that we should vacate and remand the board’s order, rather than reverse and remand, because Senate Bill (SB) 1122 (2025) amended ORS 163A.100, which is the statute that requires the board to adopt a risk assessment methodology for use in classify- ing sex offenders. Petitioner argues about the effect of SB 1122 on his case, and he raises a due process argument. The board responds that, if we reverse and remand, then the board will assess petitioner’s risk of re-offense in light of the amendments to ORS 163A.100, which became effective on May 27, 2025, and petitioner can raise arguments about the amendments and any due process concerns to the board in the first instance. Alternatively, the board argues that, as a 1 “The Static-99R is an actuarial risk assessment instrument designed to assess risk of sexual recidivism for adult males who have already been charged with or convicted of at least one sex offence against a child or a non-consenting adult.” Sohapp v. Board of Parole, 329 Or App 28, 41, 540 P3d 568 (2023) (internal quo- tation marks omitted). Level 3 offenders are those who present the highest risk of re-offending and require the widest range of notification. Id. at 30. Cite as 348 Or App 289 (2026) 291 result of the amendments to ORS 163A.100, the board cor- rectly and lawfully assessed petitioner’s risk of re-offense, and that we should either affirm the board’s final order or dismiss the petition as moot. We decline to consider arguments about the effect of SB 1122 on how the board assessed or should assess peti- tioner’s SONL until the board has had an opportunity to consider those arguments in the first instance, after which petitioner will have the opportunity to seek judicial review of the board’s new order. Because the board’s mootness argu- ment is premised on the assumption that the amendments to ORS 163A.100 show that the board correctly assessed petitioner’s SONL, we

decline to consider that argument as well. Petitioner argues that we should vacate, or vacate and remand, while the board argues that we should reverse and remand. We note that either vacating or reversing sets aside—that is, invalidates—the board’s order and, if the disposition includes remanding to the board, each requires further action from the board.² ORS 144.335(3) provides that we may “affirm, reverse or remand” the board’s order on the same basis as provided in ORS 183.482(8). If we find “that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action,” then we are required to “[s]et aside or modify the order,” ORS 183.482(8)(a)(A), or “[r]emand the case to the agency for further action under a correct interpretation of the provision of law,” ORS 183.482(8)(a)(B). We have reversed and remanded when we have concluded that the board applied administrative rules regarding how to assess the registrant’s risk of re-offense that 2 See, e.g., *State v. Cunningham*, 345 Or App 546, 551, 582 P3d 1184 (2025) (vacating and remanding for the trial court to reconsider whether to revoke probation after we determined that one of the bases for revocation was erroneous); *Van Gordon v. Ore. State Bd. of Dental Examiners*, 63 Or App 561, 566, 666 P2d 276 (1983) (“A ‘reversal’ represents a complete defeat, in this court, of the agency’s position,” but when “an agency order is ‘reversed and remanded,’ * * * there remains the possibility that the agency’s proposed action may ultimately be justified,” or “some further agency action must occur, although its outcome is uncertain.” (Emphasis in original.)). When we vacate a judgment or order, it leaves open the possibility for re-entry of the prior judgment or order, but it does not leave the prior judgment or order in place. *Cunningham*, 345 Or App at 551. 292 *Harless v. Board of Parole* were invalid because they did not comply with the previous version of ORS 163A.100, which required the board to adopt rules that considered the present risk of re-offending. See *Thomsen*, 333 Or App at 715-17 (reversing and remanding); *Allen*, 334 Or App at 448 (same). By contrast, we have tended to vacate and remand when the trial court or agency failed to adequately explain its rationale, see, e.g., *Moreau v. Samalin*, 295 Or App 534, 535, 435 P3d 794 (2019), when required written findings were insufficient, see, e.g., *State v. D. J. P.*, 342 Or App 422, 425, 576 P3d 1043 (2025), or when the trial court or agency is required to reconsider its decision in light of new law but might ultimately reinstate the same order or judgment after doing so, see, e.g., *State v. Stutte*, 339 Or App 87, 99 n 7, 568 P3d 247 (2025) (vacating and remanding “to signify our recognition that, after reconsidering the issue, the trial court could reinstate the same judgment in the probation-revocation case”); *Forbus v. Board of Parole*, 309 Or App 296, 310-11, 482 P3d 95 (2021) (vacating and remanding where the board had determined that it could not consider petitioner’s post-incarceration evidence in setting his prison term but where a subsequent case determined that it could); *State v. Cruz-Aguirre*, 179 Or App 546, 547, 40 P3d 560 (2002) (vacating and remanding a trial court’s order suppressing evidence for the trial court to apply the correct analysis as established by the Supreme Court after the trial court’s decision). Here, the parties agree that the law has changed because the legislature amended ORS 163A.100, and those amendments became effective on May 27, 2025. Petitioner argues about the effect of

those amendments, including that they violate his due process rights, but those are arguments that the board can address in the first instance on remand. Based on the change in the law, we vacate the board's order and remand for a new assessment of petitioner's SONL. Vacated and remanded.

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