IN THE SUPREME COURT OF THE STATE OF OREGON

MARVIN LEE TAYLOR, Plaintiff-Appellant, Respondent on Review, v. COLLETTE PETERS, Director, Oregon Department of Corrections, Defendant-Respondent, Petitioner on Review.	Marion County Circuit Court No. 13C21251 CA A155794 SC S063763

REPLY BRIEF ON THE MERITS OF PETITIONER ON REVIEW, COLLETTE PETERS

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Marion County
Honorable COURTLAND GEYER, Judge

Opinion Filed: October 21, 2015
Author of Opinion: Lagesen, Judge
Before: Duncan, Presiding Judge, and Lagesen, Judge, and Flynn, Judge

---

Continued…

JED PETERSON #084425
O'Connor Weber
522 SW 5th Ave., Ste. 1125
Portland, OR 97204
Telephone: (503) 226-0923
Email: jed@oconnorweber.com

Attorney for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General
JONA J. MAUKONEN #043540
Assistant Attorney-In-Charge,
Civil/Administrative Appeals
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: jona.j.maukonen@doj.state.or.us

Attorneys for Petitioner on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

REPLY BRIEF ON THE MERITS OF PETITIONER ON REVIEW, COLLETTE PETERS

SUMMARY OF ARGUMENT

The trial court properly dismissed plaintiff's petition for state habeas corpus because he was not restrained within Oregon when he filed it, but rather was in prison in Colorado. The legislature has expressly limited jurisdiction for state habeas actions in ORS 34.310 to those persons restrained within the state's geographic boundaries. The Interstate Corrections Compact (ICC) contains no express or clear indication that the legislature intended to supplement that jurisdiction. Accordingly, plaintiff could not initiate a state habeas action while incarcerated in Colorado.

Moreover, plaintiff failed to allege any viable constitutional claim because the rights that he retains pursuant to the ICC do not include the right to any conditions of confinement that differ from other Colorado inmates. And any claims he may have based on the conditions of his Colorado confinement do not sound in state habeas against defendant.

ARGUMENT

A. Because plaintiff is not "within this state," the trial court correctly dismissed his state habeas corpus petition.

As defendant explained in her opening brief, ORS 34.310 permits only a person confined within Oregon's geographic boundaries to initiate a state habeas corpus proceeding. (Pet Br 9–11). Plaintiff does not dispute that the

phrase "within this state" refers to the state's geographic boundaries. (Resp Br 10). Rather, he asserts that it is unclear whether the "within this state" requirement applies to the person imprisoned, the person controlling that imprisonment, or the conviction leading to the imprisonment. (Resp Br 10). He then argues that it is enough for purposes of initiating a state habeas action that a person who has legal custody over him be within the state. (Resp Br 10–13).

Plaintiff's position is inconsistent with the statute. The statute connects "within this state" to the "*person* imprisoned or restrained." It states: "Every person imprisoned or otherwise restrained of liberty, within this state, may prosecute a writ of habeas corpus to inquire into the cause of imprisonment or restraint, and if illegal, to be delivered therefrom." ORS 34.310. If the legislature had intended to provide that state habeas was available to a person imprisoned because of an Oregon conviction, then it would have provided that habeas was available to a person imprisoned or restrained "by the state" rather than "within the state." It did not do so. The text and context[1] do not support

---

[1] As defendant noted in her opening brief, ORS 34.380 confirms that "within this state" refers to the person imprisoned. The legislature created an exception in ORS 34.380 to the requirement that a habeas action be filed in the circuit court where the plaintiff is restrained. ORS 34.380 provides that if "there is good reason to believe that" the person restrained "will be carried out of state," then the person may obtain a writ of habeas corpus from any circuit

Footnote continued…

that "within this state" refers to anything other than the person imprisoned or restrained.

Plaintiff relies on two cases to argue that "constructive restraint" can be sufficient for purposes of the statute. (Resp Br 10–11). But even if constructive restraint amounts to being "restrained of liberty," an issue this court need not decide here, the statute still requires that the restraint occur "within this state."

Neither case cited by plaintiff addresses whether a person may initiate a state habeas action while imprisoned outside of Oregon. And the court's reasoning in both cases actually supports defendant's position. The first case, *White v. Gladden*, 209 Or 53, 59, 303 P2d 226 (1956), involves whether a person on parole is entitled to bring a state habeas corpus action. This court said that the "logical inference" from the state habeas statute "is that the kind of restraint to which reference is made is a physical restraint within the state of Oregon." *Id.* at 60. The court went on to note that, even if "constructive" custody was enough to maintain a state habeas action, the plaintiff had sought to name the board of parole as defendants when it was the director, not the board, who had "quasi or constructive" custody over plaintiff. *Id.* at 63. That

---

(…continued)
court. The legislature thus understood and intended that the only persons who might file for habeas relief are those within the state's geographic boundaries.

was so, this court explained, because the board had "place[d]" plaintiff "in the custody of the director." Thus, the court seemed to suggest that when custody is transferred, the person who takes custody is the proper defendant. That is entirely consistent with defendant's contention that, because plaintiff is in the physical custody of the Colorado corrections department, she is not the proper defendant.

The second case, *Anderson v. Britton*, 212 Or 1, 318 P2d 291 (1957), was discussed briefly in defendant's opening brief. That case, like *Barrett v. Belleque*, 344 Or 91, 176 P3d 1271 (2008), stands for the unremarkable proposition that transferring a prisoner between institutions during the pendency of a habeas case does not necessarily make the case moot. In *Anderson*, an inmate in county jail filed a state habeas petition against the county sheriff. The trial court issued the writ and then, after the trial court dismissed the petition on the merits and plaintiff appealed, plaintiff was transferred to the Oregon State Penitentiary. *Id.* at 4–5. This court affirmed dismissal of the writ on the merits. Significant to this case, this court also recognized that if it had reinstated the writ, then the warden of the penitentiary could have been made defendant. *Id.* at 6. That supports defendant's position that state habeas properly lies against the person with physical custody of plaintiff.

Plaintiff also relies on the historical context of state habeas writs to assert that the proper focus is on defendant's ability to release plaintiff. (Resp Br 11–

12). Defendant's legal authority to release plaintiff, even though not having *physical* custody, is not enough to establish habeas jurisdiction when the statute itself limits jurisdiction to persons within the state's geographic boundaries and plaintiff is outside the state.

B. The Interstate Corrections Compact does not supplement state habeas jurisdiction.

The department recognizes that this court stated in *Barrett v. Belleque*, 344 Or at 100, that "the terms of the ICC" "supplement the ordinary jurisdictional analysis" for state habeas. But as explained in defendant's opening brief, that statement was unnecessary to the court's mootness analysis, and this court should not adhere to that dicta.

In order for one statute (or set of statutes) to supplement jurisdiction established by a jurisdictional statute, the intent to modify the jurisdictional statute must be clear. *See Friendly v. Olcott*, 61 Or 580, 123 P 53 (1912) (a "statute will not be construed to expand original chancery jurisdiction of the courts beyond the *express* terms of the enactment"); *Wilson v. Matthews*, 291 Or 33, 37, 628 P2d 393 (1981) (as a matter of statutory interpretation, court generally does "not assume that a statute is intended to" "amend another by implication"); *State ex rel. Medford Pear Co. v. Fowler*, 207 Or 182, 195, 295 P2d 167 (1956) (amendment by implication is "disfavored by this court" and is only recognized "when the matter is clear").

Here the ICC does not provide an express or clear intent to modify state habeas jurisdiction. It says nothing expressly about habeas actions. In *Barrett v. Belleque*, this court cited to Article IV, section 5 of the ICC, which provides that inmates transferred under the compact retain the legal rights they would have enjoyed in Oregon. 344 Or at 100. But an inmate could retain his or her "legal rights" without state habeas being available as the vehicle to vindicate those rights. So that provision does not contain a clear intent supplement state habeas jurisdiction.

Plaintiff relies on Article IV, section 8 of the ICC. (Resp Br 19–20). That section states:

> Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive benefits or incur or be relieved of any obligation or have such obligations modified or the status of the inmate changed on account of any action or proceeding in which the inmate could have participated if confined in any appropriate institution of the sending state located within such state.

ORS 421.245, Art IV, § 8. At first glance, that provision may seem to support plaintiff's argument, but on closer inspection it does not. As explained above, any extension of jurisdiction must be express or clear. The statute does not contain such an express or clear extension. Again, there is no express reference to habeas actions. And the statute refers to the right to "participate" in proceedings and actions, not the right to initiate actions. It appears to apply to rights related to such things as classification of the prisoner and parole hearings.

That construction is supported by Article IV, section 6 of the ICC, which provides that any hearing to which an inmate may be entitled by the laws of the sending state can take place in the receiving state before appropriate officials. Those provisions taken together suggest that the hearings do not extend to state habeas proceedings initiated in circuit court. Ultimately, because it is not clear that the ICC extends state habeas jurisdiction, this court should not construe it to amend the express language of ORS 34.310.

C. To the extent the Interstate Corrections Compact supplements state habeas jurisdiction, it does not do so in a way that confers jurisdiction over plaintiff's claims related to the conditions of his Colorado confinement.

Even if the ICC supplements the state habeas jurisdiction, it does so in a limited way. The expanded jurisdiction is limited to issues within Oregon's control—that is, issues such as length of sentence and parole. That is so because, as explained in defendant's opening brief, those are the issues over which Oregon maintains controls under the ICC. A more expansive reading would contradict the ICC mandate that transferred inmates be treated equally with other inmates in the receiving state.

In *Barrett v. Belleque*, this court focused on defendant's actual control over plaintiff's status as an inmate that should be placed in maximum security while in the receiving state's prison. 344 Or at 99–101. Here, there is no assertion that defendant controls the conditions in the Colorado prison. Rather,

pursuant to Article IV, Section 5 of the ICC, the receiving state is tasked with treating transferred inmates in a "reasonable and humane manner" and "equally with" inmates in the receiving state. Absent control by defendant over conditions in the receiving state, habeas jurisdiction does not extend to those issues.

D. In any event, plaintiff failed to allege valid claims for state habeas relief because he did not allege a viable state or federal constitutional violation.

Plaintiff asserts that defendant's failure to transfer him to another prison after he expressed concerns about the conditions of his Colorado confinement constitutes "deliberate indifference" that violates the Oregon constitution. But that assumes that the Oregon constitution applies to plaintiff's conditions of confinement in Colorado. Plaintiff does not directly address defendant's assertions that (1) whatever rights he has based on the terms of the ICC, are statutory, not Oregon constitutional rights; and (2) those rights do not include the right to conditions of confinement that differ from other Colorado inmates. (*See* Pet Br 18–21). Because plaintiff has no right under the Oregon Constitution to specific conditions while confined in Colorado (irrespective of who is responsible for those conditions), he has not stated a viable state constitutional claim.

Moreover, with respect to defendant not transferring plaintiff to a different prison, as explained in defendant's opening brief, in order to be an

Oregon constitutional violation, there has to be some state action that violates a specific constitutional provision. Deliberate indifference to something that does not violate the state constitution, does not itself take on constitutional dimensions. It is that predicate state constitutional violation that is lacking here where the ultimate conduct at issue is that of out-of-state prison officials.

With respect to both the state and federal constitutional claims, plaintiff also points out that Colorado is Oregon's agent. (Resp Br 24–25). However, the provision making Colorado Oregon's agent must be read in context with the rest of the ICC, including with the provision that makes Colorado responsible for treating prisoners transferred pursuant to the compact in a "reasonable and humane manner." To the extent Colorado officials may be failing to do so, and thereby violating plaintiff's federal constitutional right or the terms of the ICC, plaintiff's claim should be against those officials, not defendant.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
PAUL L. SMITH
Deputy Solicitor General

/s/ Jona J. Maukonen

JONA J. MAUKONEN #043540
Assistant Attorney-In-Charge,
Civil/Administrative Appeals
jona.j.maukonen@doj.state.or.us

Attorneys for Petitioner on Review
Collette Peters, Director, Oregon
Department of Corrections

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 16, 2016, I directed the original Reply Brief on the Merits of Petitioner on Review, Colette Peters, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jed Peterson, attorney for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,090 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Jona J. Maukonen

JONA J. MAUKONEN #043540
Assistant Attorney-In-Charge,
Civil/Administrative Appeals
jona.j.maukonen@doj.state.or.us

Attorneys for Petitioner on Review
Collette Peters, Director, Oregon
Department of Corrections

JJM:aft/7386201