

IN THE SUPREME COURT OF THE STATE OF OREGON

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JACOB HENRY BARRETT,  
Plaintiff-Appellant,  
Respondent on Review,

v.

COLLETTE PETERS, Director,  
Oregon Department of Corrections,  
Defendant-Respondent,  
Petitioner on Review.

Marion County Circuit  
Court No. 13C20437

CA A155789

SC S063743 (Control)

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JACOB HENRY BARRETT,  
Plaintiff-Appellant,  
Respondent on Review,

v.

COLLETTE PETERS, Director,  
Oregon Department of Corrections,  
Defendant-Respondent,  
Petitioner on Review,

and

GREG JONES, KARIN POTTS, and  
JANA RUSSELL,  
Defendants.

SC S063744

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BRIEF ON THE MERITS OF PETITIONER ON REVIEW, COLETTE  
PETERS, DIRECTOR, OREGON DEPARTMENT OF CORRECTIONS

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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

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Opinion Filed: October 7, 2015  
Author of Opinion: Lagesen, J.  
Before: Duncan, Presiding Judge, and Lagesen, Judge,  
and Wollheim, Senior Judge.

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**BRIEF ON THE MERITS OF PETITIONER ON REVIEW, COLETTE  
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**INTRODUCTION**

This case is about whether plaintiff, an inmate housed in a Florida prison pursuant to an interstate agreement, can bring a state habeas corpus action in Oregon to challenge the conditions of his confinement and treatment in the Florida prison. As explained below, there are two independent reasons why plaintiff cannot maintain such a state habeas action.

First, state habeas is a vehicle for prisoners *within Oregon* to challenge their treatment or manner of confinement by Oregon officials and to allege that treatment violates the state or federal constitution. Plaintiff is not within Oregon—he is thousands of miles away, in a prison over which Oregon officials have no control, and in a state governed by its own constitution as well as federal law. State habeas, by the plain terms of the statute, is not available in such circumstances.

Second, plaintiff has not alleged facts sufficient to support any viable constitutional claim as required for state habeas relief. His treatment by officials in another state does not constitute a violation of the Oregon constitution or a violation by Oregon officials of the federal constitution.

**Questions Presented on Appeal****FIRST QUESTION PRESENTED**

ORS 34.310 provides a habeas corpus remedy for inmates incarcerated “within this state.” Under the circumstances presented here, where plaintiff was convicted in Oregon but incarcerated in Florida pursuant to the Interstate Corrections Compact when he filed his petition, did the trial court properly dismiss his habeas corpus petition because he was not “within this state”?

**PROPOSED RULE OF LAW**

ORS 34.310 does not authorize an inmate incarcerated in another state to seek habeas corpus relief in Oregon.

**SECOND QUESTION PRESENTED**

May an inmate who was convicted in Oregon but is incarcerated in Florida pursuant to the Interstate Corrections Compact obtain state habeas corpus relief against the Director of the Oregon Department of Corrections based on independent conduct of Florida prison officials?

**PROPOSED RULE OF LAW**

An inmate who was convicted in Oregon but is incarcerated in Florida pursuant to the Interstate Corrections Compact may not obtain state habeas corpus relief against the Director of the Oregon Department of Corrections based on independent conduct of Florida prison officials.



## **Nature of the Action, Relief Sought, and Trial Court Judgment**

Plaintiff filed two state habeas corpus petitions against defendant, the director of the Oregon Department of Corrections, asserting that the conditions of his confinement in Florida violate his rights under state and federal law. The trial court dismissed both of plaintiff's petitions as meritless. The Court of Appeals reversed the trial court in both cases. *Barrett v. Peters*, 274 Or App 237, 360 P3d 638 (2015) (*Barrett I*); *Barrett v. Peters*, 274 Or App 251, 360 P3d 646 (2015) (*Barrett II*). This court granted defendant's petitions for review and consolidated the two cases.

## **Statement of Facts**

Plaintiff was convicted in Oregon of aggravated murder. (App Br II 15).<sup>1</sup> He was sentenced to life in prison. (App Br II 15). He is currently housed in the custody of the Florida Department of Corrections pursuant to the Interstate Corrections Compact (ICC). (App Br II 1). The ICC, to which most states belong, establishes a framework for the interstate transfer of inmates.

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<sup>1</sup> "App Br" refers to plaintiff's brief to the Court of Appeals in A155789. "App Br II" refers to plaintiff's brief to the Court of Appeals in A156271.

Plaintiff filed two petitions for writ of habeas corpus in Marion County Circuit Court—one in July 2013 and another in November 2013. (ER 1, ERII 1).<sup>2</sup>

In his first petition, he asserted that his transfer to Florida violated his right to due process under the Fourteenth Amendment because he received no pre-transfer notice or hearing. (ER 3, 10–11). Plaintiff also alleged that the conditions of his confinement in Florida violated his rights under Article I, sections 2, 3, and 13, of the Oregon Constitution, and the Religious Land Use and Institutionalized Persons Act (RLUIPA). (ER 3–19). Specifically, defendant alleged that he was a member of a particular sect of druidism known as Glefiosa. (ER 5). He claimed that one tenet of his faith involves growing a beard and wearing a hairstyle that he describes as a “Celtic tonsure.” (ER 5). He alleged that when he arrived in Florida he had a full beard and Celtic tonsure and that the Florida prison administrators told him he needed to shave his beard and cut his hair. (ER 6). He requested Florida prison officials grant him a religious exemption from the grooming requirements, but that request was denied. (ER 6).

Plaintiff asserted that Florida prison officials forcibly shaved him and told him that if he attempted to grow his beard or hair, he would be disciplined.

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<sup>2</sup> “ER” refers to the Excerpt of Record in A155789 and “ERII” refers to the Excerpt of Record in A156271.

(ER 6). Plaintiff asserted that he filed an informal and formal grievance with Florida prison officials; both were denied. (ER 6–7). He appealed the denial of his formal grievance. (ER 7). He also “made defendant aware of the denial of the right of free exercise” and filed a formal grievance with the Oregon Department of Corrections (ODOC), which it denied. (ER 7).

Plaintiff claimed that the ban on his hairstyle and beard violates his Oregon constitutional right to free exercise of religion and violates RLUIPA. He further claimed that Florida forcibly shaving him violated his Oregon constitutional right to be free from “unnecessary rigor.” He asked that the court order defendant to remove plaintiff from Florida and transfer him to an institution in a different state. (ER 20).

In his second habeas corpus petition, plaintiff alleged that defendant denied him “timely meaningful rehabilitative treatment and programming” in violation of his federal constitutional rights to due process and equal protection. (ERII 2). He also claimed that denial of such programming was cruel and unusual punishment and violated the Oregon Constitution’s prohibition on unnecessary rigor. (ERII 2). He claimed that he requested rehabilitative treatment and programming in Florida and that those requests were denied. (ERII 14). He asserted that he filed a grievance with Florida prison officials, but it was denied. (ERII 14). He requested that the court order defendant to transfer him to the Oregon State Hospital. (ER II 29).

Defendant moved to deny plaintiff's first petition. (ER 22–27).

Defendant asserted that plaintiff alleged insufficient facts to state a claim for habeas corpus relief. (ER 22). Defendant argued that she did not have physical custody of plaintiff, that she did not control the conditions of his confinement in Florida, and that plaintiff had no constitutional right to transfer to another prison. (ER 22–26). The trial court granted defendant's motion. (ER 28–29). The court subsequently dismissed plaintiff's second petition *sua sponte* for the same reasons it dismissed the first petition. (ERII 52–53).

As noted above, the Court of Appeals reversed both dismissals and this court accepted review.

### **Summary of Argument**

The trial court properly dismissed plaintiff's petitions for state habeas corpus relief. State habeas corpus relief is available to a prisoner within Oregon who has suffered a constitutional violation that requires immediate judicial scrutiny. Plaintiff was not within this state when he initiated his habeas actions. For that reason alone the trial court properly dismissed the petitions.

Moreover, plaintiff did not allege any viable claim for habeas corpus relief. Any statutory claims—such as plaintiff's claim under the federal RLIUPA statute or under the state ICC statute—cannot be the basis for habeas relief. Habeas relief is limited to constitutional claims.

Plaintiff's state constitutional claims against defendant based on freedom of religion and freedom from unnecessary rigor fail because the alleged conduct occurred in Florida, which is governed by its own state constitution, and is alleged to have been carried out by Florida officials over whom defendant has no control. Plaintiff's allegations regarding his treatment by Florida officials in a Florida prison cannot be the basis for a claim under the Oregon Constitution against an Oregon official.

To the extent that plaintiff's constitutional claims against defendant are rooted in defendant's refusal to grant his request to be transferred to a different prison, he also has not stated a claim for habeas corpus relief. Plaintiff's underlying allegations are still that Florida officials are violating the ICC by failing to afford him the same religious freedom he would have had under the Oregon Constitution if he were housed in Oregon. However, Florida need not afford plaintiff any special treatment, so it need not allow him those same religious freedoms. And even if Florida were required to afford plaintiff those same religious freedoms and failed to do so that is, at most, a statutory violation. A statutory violation by officials from another state does not support a constitutional claim against defendant. Nothing in the Oregon Constitution requires defendant transfer an inmate who is housed in another state in order to address an alleged statutory violation by officials of that state.

Plaintiff's federal due process claim fails because he has no liberty interest in a pre-transfer hearing. And, his federal equal protection and cruel and unusual punishment claims fail because they are directed at conduct of Florida prison officials and so do not involve state action on the part of defendant.<sup>3</sup>

### ARGUMENT

The trial court properly dismissed plaintiff's habeas corpus petitions against defendant, the director of ODOC. A defendant may move to deny issuance of a habeas corpus writ if the petition fails to state a claim for habeas corpus relief. ORS 34.370.<sup>4</sup> In deciding such a motion, the court assumes the

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<sup>3</sup> Defendant's arguments largely mirror those in *Taylor v. Peters*, S063763. The only significant difference between defendant's brief in *Taylor* and defendant's brief in this case, is with respect to the federal Due Process claim because here plaintiff complains about the lack of pre-transfer notice, which plaintiff in *Taylor* did not.

<sup>4</sup> ORS 34.370 provides:

“(1) Except as provided in subsection (6) of this section, the judge to whom the petition for a writ of habeas corpus is presented shall, without delay, issue an order directing the defendant to show cause why the writ should not be allowed.

“(2) Upon the issuance of a show cause order under subsection (1) of this section, the following shall apply:

\* \* \* \* \*

“(b) The judge shall rule on the show cause order within seven days after either the defendant files a written appearance in

*Footnote continued...*

truth of all well-pleaded allegations in the petition and gives plaintiff the benefit of all favorable inferences that may be drawn from those allegations. *Billings v. Gates*, 323 Or 167, 182, 916 P2d 291 (1996). The court also may, on its own motion, dismiss a meritless petition. ORS 34.370(6).

Here, the trial court properly dismissed both of plaintiff's petitions.

**A. Because plaintiff is not “within this state,” the trial court correctly dismissed his habeas corpus petitions.**

There is no dispute that plaintiff is not physically within Oregon. Rather, he is in Florida, and he was in Florida when he filed his state habeas petitions.

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(...continued)

opposition or the appearance period expires, whichever comes first. Upon making a ruling, the judge shall do one of the following, as appropriate:

“(A) If the petition is a meritless petition, issue a judgment denying the petition and ordering the plaintiff to pay the cost of attorney fees incurred by the defendant. In no case shall the award of attorney fees exceed \$100. The fees may be drawn from, or charged against, the inmate's trust account.

\* \* \* \* \*

“(3) Entry of a judgment under subsection (2)(b)(A) or subsection (6) of this section shall be without prejudice. The judgment shall explain to the parties the reason for the denial.

\* \* \* \* \*

“(6) The court may, on its own motion, enter a judgment denying a meritless petition brought under ORS 34.310 to 34.730.

“(7) As used in this section, “meritless petition” means one which, when liberally construed, fails to state a claim upon which habeas corpus relief may be granted.”

Because, as explained below, only people restrained “within this state” may petition an Oregon state court for habeas corpus, the trial court correctly dismissed his petitions.

**1. Pursuant to ORS 34.310, only a person confined within Oregon’s geographic boundaries can maintain an Oregon state court habeas corpus action.**

State habeas corpus is available to a person “imprisoned or otherwise restrained of liberty, *within this state*.” ORS 34.310<sup>5</sup> (emphasis added). The statute sets forth jurisdictional requirements for habeas corpus. *See Barrett v. Belleque*, 344 Or 91, 99, 176 P3d 1272 (2008) (recognizing that ORS 34.310 is part of the “habeas jurisdictional analysis”).

The text of ORS 34.310 indicates that “within this state” means physically within the geographic boundaries of the state. *See State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009) (“[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature

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<sup>5</sup> ORS 34.310 provides:

“The writ of habeas corpus ad subjiciendum is the writ designated in ORS 34.310 to 34.730, and every other writ of habeas corpus is abolished. Every person imprisoned or otherwise restrained of liberty, within this state, except in the cases specified in ORS 34.330, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom.”

The exception in ORS 34.330 identifies specific circumstances under which habeas is not available—for example, when the person is imprisoned by the federal government.



undertook to give expression to its wishes”). ORS 34.310 was part of the original Oregon Revised Statutes adopted in 1862, and the “within this state” requirement for habeas corpus was in the Deady Code that preceded those statutes. General Laws of Oregon, Civ Code, ch VII, title III, § 597, p 300 (Deady 1845–1864).<sup>6</sup> When the legislature enacted the Deady Code, it would have understood “within this state” to mean inside of the geographic state boundary. “Within” was defined in Noah Webster’s contemporaneous dictionary as: “In the inner part; as the space *within* the walls of a house” and as “[i]n the limits or compass of; not beyond; used of place and time.” Noah Webster, 2 *An American Dictionary of the English Language*, 114 (1828).

The context of the original statute and current habeas statutes also supports that “within” refers to inside a geographic boundary. In particular, the Deady Code and the subsequent habeas statutes provided that jurisdiction for a

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<sup>6</sup> The Deady Code was very similar to current ORS 34.310, providing:

“The writ of habeas corpus ad subjicendum is the writ herein designated, and every other writ of habeas corpus is abolished. Every person imprisoned or otherwise restrained of his liberty, within this state, under any pretense whatsoever, except in the cases specified in the next section, may prosecute a writ of habeas corpus according to the provisions of this title, to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom.”

General Laws of Oregon, Civ Code, ch VII, title III, § 597, p 300 (Deady 1845–1864).

habeas corpus action is in the “circuit court for the judicial district wherein the party is imprisoned or restrained.” General Laws of Oregon, Civ Code, ch VII, title III § 638, p 310 (Deady 1845–1864); ORS 34.320. And both the Deady Code and revised statutes provide for a specific procedure that allows any judge who is authorized to issue a writ of habeas corpus to do so when it appears the person is being illegally restrained and “there is good reason to believe that he will be carried out of the state.” General Laws of Oregon, Civ Code, ch VII, title III § 625, p 307 (Deady 1845–1864); ORS 34.380. The geographic references in those provisions demonstrate that the legislature believed it was authorizing habeas corpus actions only for a person who is restrained within the geographic boundary of the state.

This court has previously recognized that the “logical inference from” the habeas statutes discussed above “is that the kind of restraint to which reference is made is physical restraint within the state of Oregon and within some county or judicial district of the state.” *White v. Gladden*, 209 Or 53, 60, 303 P2d 226 (1956). That construction supports defendant’s position in this case. Because plaintiff is not incarcerated in Oregon, he cannot maintain a state habeas action.

**2. That plaintiff was transferred out of state does not compel a different result.**

Plaintiff, relying on *Barrett v. Belleque*, 344 Or 91, asserts that because defendant transferred him to Florida pursuant to the ICC, he can maintain a

state habeas action against defendant while out-of-state. (See ER 4–5; ERII 3–4). But *Barrett v. Belleque* does not support plaintiff’s argument.

In that case, plaintiff, while housed in an ODOC institution, was moved to the Intensive Management Unit (IMU) for fighting and gang activity. 344 Or at 93. He filed a state habeas petition challenging his placement in IMU without a pre-placement hearing. *Id.* The trial court dismissed his petition. *Id.* While plaintiff’s appeal from that dismissal was pending, ODOC transferred him to an Oklahoma prison pursuant to the ICC. *Id.* This court concluded that plaintiff’s appeal of his habeas petition was not moot even though he had been transferred out of state. *Id.* at 99–101.

This court explained that the habeas action was not moot because plaintiff had produced evidence that Oregon prison officials were advising Oklahoma prison officials to place plaintiff in its maximum-security housing unit and that Oklahoma would not move plaintiff to medium-security without Oregon’s approval. *Id.* at 99. The court further explained that the “terms of the ICC supplement the ordinary habeas jurisdictional analysis” and that, in light of the evidence that Oregon officials were determining plaintiff’s status in the Oklahoma prison, the court could not conclude the dispute was moot. *Id.* at 100.

*Barrett v. Belleque* ultimately stands for two unremarkable and well-settled principles of law, neither of which is at issue here. First, jurisdiction

under the habeas statute is determined by the facts that existed at the time the petition was filed. This court held over fifty years ago that transfer of a habeas plaintiff during the pendency of appeal does not divest the court of the jurisdiction that attached at the filing of the petition. *See Anderson v. Britton*, 212 Or 1, 5, 318 P2d 291 (1957), *cert den*, 356 US 962 (1958), *superseded by statute on other grounds as stated in Delaney v. Gladden*, 232 Or 306, 308, 374 P2d 746 (1962) (“the function of habeas corpus cannot be defeated by a transfer of custody after a ruling in the trial court and pending appeal to this court”); *see also McGee v. Johnson*, 161 Or App 384, 984 P2d 341 (1999) (then-Judge Landau explaining that jurisdiction over a habeas corpus petition “cannot be divested merely upon a change in the physical location of a plaintiff”). *Barrett v. Belleque* stands for the same proposition as those older cases—transfer of an inmate outside of Oregon *after* he or she filed a habeas corpus petition does not divest the Oregon courts of jurisdiction over a petition filed when the inmate was within the state.<sup>7</sup> That holding simply has no bearing on this situation, where plaintiff was not within the state at the time of filing.

Second, a case that otherwise falls within a court’s jurisdiction should be dismissed as moot only if the court’s decision will have no practical effect on

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<sup>7</sup> Federal law is consistent with that approach. Federal courts determine jurisdiction for habeas corpus petitions at the time of filing and transfer of the inmate does not divest the court of jurisdiction. *Francis v. Rison*, 894 F2d 353, 354 (9th Cir 1990).

the parties' rights. *See, e.g., Brumnett v. PSRB*, 315 Or 402, 406, 848 P2d 1194 (1993). In *Barrett v. Belleque*, the court explained that notwithstanding plaintiff's transfer to Oklahoma, its decision would have a practical effect because there was evidence (at least for purposes of a motion to deny) that defendant had direct control over whether plaintiff was classified as a maximum-security prisoner in Oklahoma. 344 Or at 100. Here, where the issue is not mootness, the question of whether the court's decision would have any practical effect is not germane.

Moreover, the type of direct control that this court found significant in *Barrett v. Belleque* is not present here. Nothing suggests that defendant is controlling the conditions plaintiff challenges—the grooming policies or lack of programming in the Florida prison. On the contrary, as the terms of the ICC demonstrate, defendant has no control over those conditions.

The ICC establishes a framework under which issues related to sentencing and release are controlled by the sending state. *See* ORS 421.245, ICC Art IV § 3, 4, 6, 8 (sending state maintains “jurisdiction” over an inmate and the sending state's laws and regulations control with respect to conviction-related issues including parole hearings and release of an inmate). The receiving state controls day-to-day conditions of confinement, including discipline. *See* ORS 421.245, ICC Art IV, § 5 (sending state will treat inmate transferred pursuant to ICC in “reasonable and humane manner” and “equally

with” other inmates); *Daye v. State*, 769 A 2d 630 (Vt 2000) (“courts have uniformly rejected claims that transferred prisoners are entitled to the same disciplinary, classification, visitation, and grooming policies of the sending state”); *Glick v. Holden*, 889 P2d 1389, 1393 (Ut App 1995) (“A common sense reading of these provisions must allow authorities having daily physical custody of a transferred inmate to determine discipline, visitation, classification, and grooming aspects of the inmate’s incarceration.”).

Because defendant does not control the conditions about which plaintiff complains—grooming policies and lack of programming—there is no basis to extend habeas jurisdiction to reach those conditions in the Florida prison.

In sum, because plaintiff cannot bring a habeas action in Oregon while confined out-of-state to challenge conditions not within defendant’s control, the trial court properly dismissed his habeas corpus petitions.

**B. The trial court properly dismissed plaintiff’s petitions because he did not allege any claim cognizable in state habeas.**

To state a claim for habeas corpus, a plaintiff must plead “facts in support of a claim that the person is deprived of a constitutional right that requires immediate judicial attention and for which no other timely remedy is practicably available to the plaintiff.” ORS 34.362. Here plaintiff failed to plead facts to establish that he had any viable claim against defendant that could be pursued in a state habeas proceeding.

**1. Plaintiff's statutory claims are not a basis for habeas corpus relief.**

Plaintiff asserted that defendant violated the RLUIPA, a federal statute.

But a habeas corpus proceeding may only address constitutional claims. As noted above, the habeas statute provides that a plaintiff must allege facts to support a claim that the person was denied a "constitutional right."

ORS 34.362. Accordingly, RLUIPA provides no basis for habeas corpus relief.

The same is true with respect to any alleged state statutory violation.

Plaintiff did not expressly base any of his claims on an alleged violation, by defendant, of an Oregon statute. But his allegations include such assertions. (*See* ER 8 (plaintiff alleging that defendant violated Oregon statutes that require defendant to provide for the safety of inmate); ER 4, 11 (plaintiff alleging that defendant was violating the ICC)). Because habeas is not available for statutory violations, to the extent plaintiff attempted to assert a habeas claim based on an alleged violation of any Oregon statute, including the ICC, he failed to allege a claim for habeas corpus relief.<sup>8</sup>

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<sup>8</sup> Defendant acknowledges that she did not make this precise argument to the trial court, but she generally asserted that plaintiff had failed to state a claim for habeas corpus. (*See* ER 22). Because the issue of whether violation of a statutory right can be the basis for habeas corpus relief is purely legal, this court should reach it as an alternative basis to affirm the trial court's dismissal of the statutory claims in plaintiff's petitions. *See Williams v. Philip Morris Inc.*, 344 Or 45, 57, 176 P3d 1255 (2008) (appellate court may affirm on an alternative basis when issue is purely legal).

**2. Plaintiff alleged no constitutional claim against defendant that could be a basis for habeas corpus relief.**

Plaintiff also asserted that defendant violated his Oregon constitutional right to free expression of his religion and to be free from unnecessary rigor and that she violated his federal rights to due process, equal protection, and to be free of cruel and unusual punishment. None of those allegations provides a viable basis for habeas corpus relief on the facts pleaded here.

**a. Plaintiff alleged no viable Oregon constitutional claim against defendant.**

Plaintiff framed his state constitutional claims in terms of ODOC's transferring him to, and leaving him in, the custody of Florida's Department of Corrections in light of the conditions there. He specifically asserted that he was not bringing a "conditions of confinement" case, "but that he was challenging "his transfer to and continued confinement in" Florida as unlawful. (ER 9). But the bases for the alleged unlawfulness of his confinement are the conditions of his confinement in Florida. And the Oregon Constitution has no direct application in Florida.

The Oregon Bill of Rights protects citizens from *Oregon* state action. *See State v. Tucker*, 330 Or 85, 89, 997 P2d 782 (2000) ("Article I, section 9, prohibits only state action that infringes on a citizen's constitutional rights"); *State ex rel Juvenile Dep't of Washington Cty v. Deford*, 177 Or App 555, 567, 34 P3d 673 (2001) ("Article I, section 12, like the other sections of the Oregon



Constitution's Bill of Rights, protects citizens from state action.'). Here, the Florida prison conditions are not the result of Oregon state action. Moreover, plaintiff has no right under the Oregon Constitution to practice his religion in a particular way, or to do anything else, while he is in Florida. And because plaintiff's state constitutional rights are not being violated by Florida in Florida, defendant's failure to transfer him likewise is not of constitutional dimension.

Plaintiff has a *statutory* right under the ICC to be treated in a reasonable and humane manner consistent with how Florida treats its own inmates, but that right does not incorporate Oregon constitutional rights. Specifically, Oregon and Florida signed on to section 5 of the ICC. That section begins: "All inmates who may have been confined in an institution pursuant to the [ICC] shall be treated in a reasonable and humane manner and shall be treated equally with such similar inmates of the receiving state as may be confined in the same institution." ORS 421.245, ICC Art IV, § 5. It goes on to also provide that, "[t]he fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state." ORS 421.245, ICC Art IV, § 5.

The Court of Appeals focused solely on this second sentence in concluding that plaintiff retained his Oregon constitutional rights in Florida, even if those Oregon rights are different from the rights that other inmates confined in Florida have. 274 Or App 237. But that expansive reading of the

second sentence conflicts with the first sentence, which requires that plaintiff be treated equally with Florida's own inmates. The section has to be read as a whole, not each sentence in isolation. *See Gaines*, 346 Or at 171 (statutory text is construed in context); ORS 174.010 (statute with several particulars should be construed, if possible, to "give effect to all"). And when read as a whole, the two sentences can be harmonized: The first sentence governs conditions of confinement in the receiving state, and the second governs other rights related to the conviction that the inmate may have—for example, rights related to the length of the sentence, good-time credit, and parole. Thus, plaintiff's conditions of confinement are governed by Florida law, which must ensure at a minimum that he is treated reasonably and humanely. Oregon law does not supplant or supplement those requirements. But for other matters, such as sentence calculation and parole eligibility, Oregon rather than Florida law applies.

That construction is consistent with other provisions of the ICC and the framework of the ICC, as well as the way the compact has been interpreted by other courts. Pursuant to the ICC, the sending state maintains "jurisdiction" over an inmate and the sending state's laws and regulations control with respect to conviction-related issues including parole hearings and release of an inmate. *See* ORS 421.245, ICC Art IV § 3, 4, 6, 8. Conditions of confinement, on the other hand, are the responsibility of the receiving state. *See e.g., Stewart v.*

*McManus*, 924 F2d 138 (8th Cir 1991) (ICC does not require receiving state to apply sending state's disciplinary rules or procedures); *Daye*, 769 A 2d 630 (transferred prisoner not entitled to disciplinary and grooming policies of sending state); *Glick*, 889 P2d at 1393 (same). Because the ICC precludes the sending state from treating an ICC-inmate differently from other inmates, plaintiff has no Oregon constitutional right to any religious practices or programming that would require he receive special treatment while in Florida.

In any event, even if the Court of Appeals' reading of the ICC were correct—which as explained above it is not—plaintiff still would not have stated a claim for habeas relief. That is because any right he may have had in Florida to be treated in accordance with Oregon constitutional principles would be a *statutory* right under the ICC, not a right directly under the Oregon Constitution. And because Florida's failure to afford plaintiff the legal rights he might have under the ICC would not be a *constitutional* violation, it would not be cognizable in habeas.

In sum, plaintiff's allegations do not state a claim against defendant for violating the Oregon Constitution. His underlying allegations are that Florida officials are violating the ICC by failing to afford him the religious freedom to which he claims he *would* be entitled *if* he were a prisoner in Oregon. But the ICC, as correctly construed, does not require Florida to afford plaintiff special treatment to accommodate any religious freedoms to which he would be entitled

to in Oregon. And even if the ICC did require Florida to provide such special treatment, Florida's alleged failure to do would not support a state habeas claim against defendant. To the extent the ICC required Florida to make a special exceptions to grooming rules for plaintiff or to provide him with specific treatment, its failure to do so is at most a statutory violation and would not support an Oregon constitutional claim against defendant for failing to remove him.

**b. Plaintiff alleged no viable federal constitutional claim against defendant.**

The trial court properly concluded that plaintiff's claim due process claim—based on a lack of pre-transfer notice and a hearing before ODOC transferred him to Florida—was meritless. (*See* ER 29). Plaintiff did not contend otherwise before the Court of Appeals and so this court should not consider that claim. At any rate, when a sending state has authority to transfer a prisoner for any reason or no reason at all, interstate transfer of an inmate does not deprive the inmate of any liberty interest protected by due process. *Olim v. Wakinekona*, 461 US 238, 249, 103 S Ct 1741, 75 L Ed 2d 813 (1983). Here, defendant had such discretion to transfer plaintiff. *See* ORS 421.215 (providing that an inmate convicted and sentenced in Oregon may be transferred to any state with which ODOC has a contract for the transfer of inmates without any

requirement for a specific reason for the transfer).<sup>9</sup> Accordingly, plaintiff did not state a viable due process claim base on his transfer.

Plaintiff's other constitutional claims against defendant, for violation of his right to equal protection and to be free of cruel and unusual punishment, fail because they involve no action by defendant. Like the state constitutional provisions discussed above, the federal provisions protect an individual from state action. *See* US Const, Amend XIV ("nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws") (emphasis added); *Cooper Indus. v. Leatherman Tool Group*, 532 US 424, 433–34, 121 S Ct 1678, 149 L Ed 2d 674 (2001) (the Due Process Clause "imposes substantive limits" on sentencing and "makes the Eighth Amendment's prohibition against" "cruel and unusual punishments applicable to the States").

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<sup>9</sup> ORS 421.210 provides:

"After entering into a contract under ORS 421.205 [with the federal government or any state that is part of the ICC or Western Interstate Corrections Compact], the Department of Corrections may convey persons convicted of a felony in the courts of this state and sentenced to the legal and physical custody of the department to the jurisdiction named in the contract. They shall be delivered to the authorities of the contracting jurisdiction and, unless they are eligible for any form of temporary or transitional leave from custody, work release or a program of conditional or supervised release, that is authorized by the department, shall remain confined until their respective sentences have expired or until they are otherwise discharged by law."

Here, if there has been a violation of plaintiff's federal constitutional rights based on Florida's grooming policies or lack of programming, it was due to Florida's action, not Oregon's. It follows that plaintiff has no federal constitutional claim against defendant and the trial court properly dismissed his petitions.

Plaintiff also has advanced no good reason why, as a practical matter, his federal constitutional claims about his conditions of confinement should be heard in the Oregon courts. The Florida prison officials who he alleges are violating his rights are bound by the federal constitution just as much as defendant is. If his current conditions of confinement in fact violate the federal constitution (or, for that matter, a federal statute), he presumably can seek relief in a federal or state court in Florida against the state actors who are directly responsible for those conditions. The witnesses and physical evidence relevant to a conditions-of-confinement claim are all in Florida. Allowing the claims to be brought in Oregon—thousands of miles from the location of the alleged constitutional violation—and against a defendant who has no direct control over or knowledge of the conditions will raise a host of problems for the trial court in managing this litigation. These practical considerations counsel in favor of ruling that plaintiff has not stated a viable claim under the federal constitution against defendant when defendant is not responsible for the conditions of confinement in Florida.

**CONCLUSION**

This court should reverse the decisions of the Court of Appeals and affirm the trial court's judgments dismissing plaintiff's petitions for habeas corpus relief.

Respectfully submitted,

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## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on March 14, 2016, I directed the original Brief on the Merits of Petitioner on Review, Colette Peters, Director, Oregon Department of Corrections to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Nadia Dahab, 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 5,839 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

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