IN THE SUPREME COURT OF THE STATE OF OREGON

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)
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

REPLY BRIEF ON THE MERITS OF PETITIONER ON REVIEW, COLETTE 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 7, 2015
Author of Opinion: Lagesen, J.
Before: Duncan, Presiding Judge, and Lagesen, Judge,
and Wollheim, Senior Judge.

Continued…

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

REPLY BRIEF ON THE MERITS OF PETITIONER ON REVIEW, COLETTE 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 Florida. 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 Florida.

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 Florida inmates. And any claims he may have based on the conditions of his Florida 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 10–12). Plaintiff does not dispute that the

phrase "within this state" refers to the state's geographic boundaries. Rather, he asserts that the phrase "otherwise restrained," suggests that physical restraint is not required and that constructive restraint based on an Oregon conviction is sufficient. (Resp Br 13–14). However, even accepting that constructive restraint is sufficient, it remains that the statute connects "within this state" to the "*person* imprisoned or restrained," not to the location of the conviction. 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.

Had the legislature intended to provide that state habeas was available to a person imprisoned because of an Oregon conviction, 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 that "within this state" refers to anything other than the person imprisoned or restrained.

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[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 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.

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

Plaintiff argues that the jurisdiction for state habeas proceedings provided in ORS 34.310 has been supplemented by the ICC. (Resp Br 14). The department recognizes that this court stated in *Barrett v. Belleque*, 344 Or 91, 176 P3d 1271 (2008), 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. As discussed in defendant's opening brief and further below, at the very least it is unclear what "legal rights" an inmate retains. But, even if plaintiff retained "legal rights" that are implicated here, that does not require that state habeas be available as the vehicle to vindicate those rights. So that provision does not contain a clear intent supplement state habeas jurisdiction.

In addition to that section, plaintiff relies on Article IV, section 8 of the ICC. (Resp Br 16–17). 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 Florida 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 for two reasons.

First, such a limited expansion of jurisdiction reconciles the provision in the ICC that an inmate retains his legal rights he would have had in the sending state and that he also be treated equally with inmates in the receiving state. Plaintiff asserts that considerations of uniformity suggest that the ICC supplements Oregon state habeas jurisdiction in an apparently unlimited manner. (Resp Br 18–19). But plaintiff cites no case that involves claims related to conditions of confinement. *See Fest v. Bartee*, 804 F2d 559, 560 (9th

Cir 1986) (claim against parole board); *Findlay* v. *Lewis*, 172 Ariz 343, 837 P2d 145 (1992) (transfer request but no claim related to conditions of confinement) *Hundley v. Hobbs*, 456 SW3d 755 (Ark 2015) (challenge to life sentence for juvenile); *Meyer v. Moore*, 826 So2d 330 (Fl App 2d Dist 2002) (challenge to length of incarceration); *Leach v. Dahm*, 763 NW2d 83 (Neb 2009) (challenge to sentence); *Gibson v. Morris*, 646 P2d 733 (Utah 1982) (challenge to transfer to third state to stand trial). Thus, those cases are consistent with defendant's position that *if* the ICC supplements state habeas jurisdiction it does not extend it to claims related to conditions of confinement. A more expansive reading would contradict the ICC mandate that transferred inmates by treated equally with other inmates in the receiving state.

Second, as explained in defendant's opening brief, pursuant to ICC, Oregon retains control over such things as sentence length, status, and parole. In *Barrett v. Belleque*, this court focused on defendant's actual control over plaintiff's status as a maximum-security inmate while in the receiving state's prison. 344 Or at 99–101. Here, there is no assertion that defendant controls the *conditions* in the Florida prison. Rather, pursuant to Article IV, Section 5 of the ICC, the receiving state—in this case Florida—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 Florida, 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 acknowledges that his state constitutional claims require Oregon state action. (Resp Br 23). He asserts that Florida was an Oregon "state actor" because Oregon can "direct" Florida's conduct. (Resp Br 23). But Oregon does not have any control over the conditions of confinement in Florida's prisons. And plaintiff's argument presumes that his conditions of confinement in Florida can be the basis for an Oregon constitutional claim. They cannot because (1) the rights he retained pursuant to the ICC do not include the right to conditions of confinement that differ from other Florida inmates; and (2) whatever rights he has based on the terms of the ICC, are statutory, not Oregon constitutional rights (*See* Pet Br 18–22).

With respect to the rights that a transferred inmate must be afforded, plaintiff asserts that the requirement that the receiving state treat a transferred inmate "in a reasonable and humane manner" and "equally" with other inmates merely sets a floor. (Resp Br 25). But that reads out of the compact the equal treatment requirement. Plaintiff's argument would be more compelling if the ICC only required Florida to treat a transferred inmate in a reasonable and humane manner. But it does not. It also specifically provides that Florida "shall" treat a transferred inmate "equally" with other Florida inmates. That equal treatment mandate is the basis for the decisions in other jurisdictions that

transferred inmates are subject to the same discipline, classification, visitation and grooming policies as other inmates in the receiving state.

Plaintiff also appears to suggest that the equal treatment requirement is limited to prison policies and has no impact on what "legal rights" he retains (even though he claims his legal rights are violated by those policies). (Resp Br 26). But nothing in the ICC indicates such a limitation. And, that the equal treatment requirement is part of the same provision that states that an inmate retains his legal rights, suggests that equal treatment also pertains to legal rights.

Plaintiff further argues that his claims are not statutory, but are direct claims for violation of the Oregon constitution. (Resp Br 27). Because plaintiff is relying on the ICC to extend Oregon constitutional protections to his conditions of confinement by Florida officials, his claims are rooted in the ICC. To the extent any failure by Florida to extend plaintiff the rights to which he is entitled because of the ICC is a cognizable claim, it is statutory in nature.

With respect to his federal claims, plaintiff first asserts that the trial court and Court of Appeals misunderstood his due process claim regarding his initial transfer to Florida. (Resp Br 28). Plaintiff did not preserve that issue below. The Court of Appeals specifically stated that it was not considering the trial court's determination that plaintiff's due process claim was foreclosed by *Olim v. Wakinekona*, 461 US 238, 103 S Ct 1741, 75 L Ed 2d 813 (1983), because

"plaintiff does not contest that ruling." *Barrett v. Peters*, 274 Or App 237, 241 n 7, 360 P3d 638 (2015). He cannot, for the first time in his response brief to this court, assert that the trial court erred in rejecting that claim.

Plaintiff also asserts that because the ICC makes Florida Oregon's agent, he asserted viable federal constitutional claims. (Resp Br 28). However, the provision making Florida Oregon's agent must be read in context with the rest of the ICC, including the provision that makes Florida responsible for treating prisoners transferred pursuant to the compact in a "reasonable and humane manner." To the extent Florida 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,

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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 Nadia Dahab, attorney for respondent on review, 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 2,145 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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