

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.

Marion County Circuit Court No.
13C23141

CA A156271

SC S063744

RESPONDENT ON REVIEW'S BRIEF ON THE MERITS

April 2016

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.

Nadia H. Dahab, OSB No. 125630
STOLL STOLL BERNE LOKTING
& SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Email: ndahab@stollberne.com

Attorneys for Plaintiff-Appellant,
Respondent on Review

Jona J. Maukonen, OSB No. 043540
DOJ Appellate Division
1162 Court Street NE
Salem OR 97301
Telephone: (503) 378-4402
Email: jona.j.maukonen@doj.state.or.us

Attorneys for Defendant-Respondent,
Petitioner on Review

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I. STATEMENT OF THE CASE

This is a habeas case in which Plaintiff-Respondent on Review (“Plaintiff”) Jacob Barrett—who was sentenced by an Oregon state court to the custody of the Oregon Department of Corrections for a crime that he committed in Oregon—petitioned for habeas relief in Oregon state court. In 2012, the Oregon Department of Corrections, pursuant to its authority under the Interstate Corrections Compact (“ICC” or “the Compact”), ORS 421.245, transferred Plaintiff to an institution located in Florida. In 2013, Plaintiff petitioned for habeas relief in Marion County Circuit Court. The question presented on review is whether Plaintiff may seek habeas relief in an Oregon state court, naming the Director of the Oregon Department of Corrections as defendant, while he is incarcerated in Florida pursuant to the ICC.

Two statutory provisions resolve the question on review. The first is ORS 34.310, which permits “[e]very person imprisoned or otherwise restrained, within this state” to seek relief in the form of a writ of habeas corpus. The second is the ICC, which preserves an inmate’s “legal rights,” including Oregon constitutional rights, after the inmate is transferred and allows a transferred inmate to participate in “any action or proceeding in which the inmate could have participated if confined” within this state. ORS 421.245, Art IV, §§ 4, 8. The ICC further provides that the state to which an inmate is transferred, known

under the Compact as the “receiving state,” acts “solely as agent for the sending state.” *Id.* § 1.

Construed together, those provisions make clear that the ICC supplements the traditional habeas jurisdictional analysis by preserving the Oregon legal rights of out-of-state inmates and making clear the procedure through which those inmates can seek a remedy for violations of their legal rights by out-of-state agents of state actors. Plaintiff properly sought habeas relief in Oregon state court against the Oregon Department of Corrections.

II. QUESTIONS PRESENTED ON REVIEW

Plaintiff restates the questions presented on review as follows.

First Question Presented

ORS 34.310 permits “[e]very person imprisoned or otherwise restrained of liberty, within this state” to seek relief in the form of a writ of habeas corpus. The Interstate Corrections Compact, codified by statute at ORS 421.245, provides any inmate transferred to another state pursuant the ICC’s terms the right to participate in “any action or proceeding in which the inmate could have participated if confined” within this state. ORS 421.245, Art IV, § 8.

Construing those statutes together, may Respondent seek habeas relief in Oregon state court, even though he is not physically confined “within this state”?

First Proposed Rule of Law

Yes. Plaintiff is entitled to seek habeas relief in Oregon, even though he is not physically confined “within this state.” The terms of ORS 34.310 do not limit those with standing to prosecute a writ to Oregon’s geographic boundaries. Even if it does, the terms of the ICC, which must be construed together with those of ORS 34.310, unambiguously supplement the traditional habeas jurisdiction of the circuit courts.

Second Question Presented

The Interstate Corrections Compact provides that the “receiving state,” or the state to which an inmate is transferred, acts “solely as agent for the sending state” when providing “adequate quarters and care,” “rehabilitation,” or “treatment” to a transferred inmate. ORS 421.245, Art IV, § 1. May a transferred inmate obtain state habeas relief against the Oregon Department of Corrections arising out of conduct of Florida prison officials acting as agents of the State of Oregon?

Second Proposed Rule of Law

Yes. An inmate confined in an institution of a “receiving state” retains all legal rights, including constitutional rights, to which the inmate would be entitled were the inmate confined in Oregon. ORS 421.245, Art IV, § 5. If the conduct of out-of-state officials acting as agents of the State of Oregon violates an inmate’s constitutional rights, the inmate may seek relief against the Director

of the State of Oregon's Department of Corrections. *See State v. Sines*, 359 Or 41, 55-56, __ P3d __ (2016) (applying common-law agency principles to the Oregon constitutional analysis).

III. Nature of the Action, Relief Sought, and Trial Court Judgment

Plaintiff accepts Defendant's statement of the Nature of the Action, Relief Sought, and Trial Court Judgment, with one clarification. The trial court dismissed both of Plaintiff's petitions for habeas relief for lack of jurisdiction, concluding that Plaintiff could not seek habeas relief in Oregon state court because he was incarcerated in Florida. The trial court did not reach the merits of the alleged unconstitutional conditions of confinement.

IV. Statement of Facts

A. Interstate Corrections Compact and Contract No. 2777

In 1979, Oregon adopted the Interstate Corrections Compact ("ICC" or "the Compact"), to which 39 other states are now parties. The ICC facilitates the interstate transfer of prison inmates for the efficient and effective use of prison facilities, programs, and rehabilitative or treatment services. Its explicit purpose is to "provide for the mutual development and execution of * * * programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources." ORS 421.245, Art I. By its terms, the ICC authorizes party states to contract

with one another “for the confinement of inmates on behalf of a sending state in institutions situated within receiving states.” ORS 421.245, Art III, § 1.

In December 2002, pursuant to its authority under the ICC, the State of Oregon executed an agreement (“the agreement” or “Contract No. 2777”) with the State of Florida “for the implementation of the Interstate Corrections Compact.”¹ The agreement provides that, “[e]xcept where expressly otherwise provided, the laws and administrative regulations of the sending state shall govern the treatment and disposition of inmates confined pursuant to this agreement and the Interstate Corrections Compact.” Contract No. 2777 at ¶ 2. Under the agreement, and consistent with the terms of the ICC, the State of Oregon retains the

right to inspect * * * any institution [in Florida] in which inmates of [the State of Oregon] are confined in order to determine if that institution maintains standards of care and discipline not incompatible with those of [Oregon] and that all inmates therein are treated equally, regardless of race, religion, color, creed, national origin or physical disability.

Id. at ¶ 8. While confined in a Florida institution, Oregon’s inmates are “subject to all provisions of law and regulations applicable to persons committed for violations of law of [the State of Florida],” unless those provisions of law are “inconsistent with any constitutional provisions.”

¹ Plaintiff attached Contract No. 2777 to his Response to Defendant’s Petition for Review. Plaintiff requests that this Court judicially notice the contents of that agreement. *See* OEC 201(b).

Id. at ¶ 19. Again consistent with the terms of the ICC, under the agreement, the State of Oregon retains sole authority to remove its inmates from Florida institutions, except in cases of emergency. *Id.* at ¶ 22.

B. Plaintiff's Underlying Criminal Proceedings and Sentence

In 1994, Plaintiff was convicted of a crime in Klamath County Circuit Court. He was sentenced to life in prison with a 30-year minimum term. Pursuant to an amended judgment of conviction issued on December 18, 2000, the trial court ordered Plaintiff “committed to the custody of the Oregon Department of Corrections * * * for service of this sentence.” Judgment of Conviction and Sentence on Remand, *State v. Barrett*, Case No. 9402002CR (Dec 18, 2000). In December 2012, the Oregon Department of Corrections, pursuant to its authority under the ICC, transferred Plaintiff to Florida's Santa Rosa Correctional Institution, where he is currently incarcerated.

C. Plaintiff's Petitions for Habeas Relief

In late 2013, Plaintiff filed two petitions for habeas relief in Marion County Circuit Court, naming the Director of the Oregon Department of Corrections as defendant in each petition. In his first petition, Case No. 13C20437, Plaintiff alleged that certain aspects of the conditions of his confinement in Florida violate Article I, sections 2, 3, and 13, of the Oregon

Constitution;² the Fourteenth Amendment’s Due Process Clause; and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).³ ER 2.⁴ In his second petition, Case No. 13C23141, Plaintiff alleged that other aspects the conditions of his confinement in Florida violate Article I, section 13, and the Eighth and Fourteenth Amendments. ER 2. Given the posture of this case, this Court must assume as true all of Plaintiff’s well-pleaded allegations in determining whether his petitions state a claim for relief. *Bedell v. Schiedler*, 307 Or 562, 567, 770 P2d 909 (1989).

1. Petition for Habeas Relief in Case No. 13C20437

The allegations of Plaintiff’s first petition describe conduct by Oregon and Florida officials that Plaintiff contends violates his federal and state constitutional rights to due process, free exercise of religion, and protection against unnecessary rigor. ER 2. Plaintiff adheres to the faith of Druidism;

² Article I, section 2, of the Oregon Constitution provides, “All men shall be secure in the National right, to worship Almighty God according to the dictates of their own consciences.” Or Const, Art I, § 2.

Article I, section 3, provides, “No law shall in any case whatever control the free exercise, and enjoyment of religious [*sic*] opinions, or interfere with the rights of conscience.” Or Const, Art I, § 3.

Article I, section 13, provides, “No person arrested, or confined in jail, shall be treated with unnecessary rigor.” Or Const, Art I, § 13.

³ 42 USC §§ 2000cc–2000cc-5.

⁴ Throughout this brief, Plaintiff follows Defendant’s convention for citations to the excerpts of record. *See* Opening Brief at 4 n 2.

specifically, he practices “Gléfiosa,” or “Bright Knowledge,” which is a sect within the Druid faith. ER 5. A central belief within the practice of Gléfiosa is the growth of a beard and Celtic tonsure. ER 5. The beard and tonsure are “honor symbolisms to the Gods. * * * The hair is not to be cut except as a matter of ritual or in the case of a death of a loved one.” ER 5-6.

However, the Florida Department of Corrections (“FDOC”) has a policy that prohibits inmates from growing hair or facial hair. ER 6. Thus, after the ODOC transferred Plaintiff to Florida, he was “forcefully shaved”—which Plaintiff describes as a “physical assault” or “battery”—by FDOC officials “against his will and religious beliefs.” ER 6. Since the first time he was forcefully shaved, Plaintiff “has been forcefully shaved against his will once to twice a week * * * under the threat of adverse administrative action, as well as physical abuse.” ER 6. Plaintiff filed a series of informal and formal grievances and sought a religious exemption from the prison policy, but each has been denied. ER 6-7.⁵

⁵ Plaintiff also petitioned for a writ of mandamus in Florida state court, seeking to compel Florida prison officials to grant him a religious exemption from prison policies. His petition was denied because, among other things, “other remedies exist” for Plaintiff’s claims. *See* Order Denying Mandamus Relief at 3, *Barrett v. Dep’t of Corrections*, Case No. CA 002439 (Fla 2d Cir Aug 21, 2014). As is explained later, Florida courts have also held that habeas is not a remedy for Plaintiff, either. *See Meyer v. Moore*, 826 So 2d 330, 331 (Fl App 2d Dist 2002).

Oregon officials have likewise declined to respond to or act on Plaintiff's informal or formal requests for relief from the continued denial of his constitutional rights. ER 7. Indeed, Defendant "expressly approved" the conduct of FDOC officials, knowing that it "violate[s] Oregon law." ER 8, 11. That is so notwithstanding the fact that Defendant "is responsible in every particular for the enforcement of the ICC," and therefore the protection of his constitutional rights. ER 11. Plaintiff's petition seeks relief in the form of an order directing Defendant to remove Plaintiff from the FDOC or "to do what shall be considered by the court appropriate." ER 20.

2. Petition for Habeas Relief in Case No. 13C23141

Plaintiff's second petition for habeas relief describes conduct, again committed by Oregon and Florida officials, that Plaintiff alleged violates the Eighth and Fourteenth Amendments and his state constitutional right to protection against unnecessary rigor. Specifically, Plaintiff was convicted and is imprisoned pursuant to ORS 163.105, which entitles an inmate to a parole hearing to determine whether, in light of the inmate's "likel[i]hood] to be rehabilitated within a reasonable period of time," the terms of the inmate's sentence should be changed to allow the possibility of parole. ER II 3 (citing ORS 163.105(2)-(3)). Nonetheless, the "ODOC and [its] acting agents" lack adequate staffing, resources, record keeping, and meaningful medication management, ER II 8-18, necessary to satisfy Plaintiff's federal and state

constitutional rights to adequate rehabilitative treatment and programs, ERII 21-26. Furthermore, the ODOC's and FDOC's decisions to place Plaintiff in special housing units, deny him work opportunities and education, and deny him spiritual rehabilitation and more specialized treatment likewise violate his federal and constitutional rights. ERII 11-18, 21-26.

According to Plaintiff, Defendant "was in a position of authority," "opted to take no action" in response to his transfer requests, and "knew or should have known that by denying, delaying and preventing adequate, timely and meaningful [r]ehabilitative [t]reatment and [p]rogramming and by transferring [Plaintiff] to a state [in which he] would have reduced religious exercise rights [she would] be violating well established constitutional rights." ERII 19. Plaintiff's petition seeks relief in the form of an order directing Defendant to transfer him to the Oregon State Hospital or to "do what shall be considered by the court appropriate." ERII 29.

3. Proceedings Below

Defendant moved to deny the petition for habeas relief in Case No. 13C20437, arguing that (1) Defendant did not have physical custody of Plaintiff and therefore was not responsible for his conditions and confinement, and (2) the fact that Plaintiff was incarcerated pursuant to the ICC did not compel a contrary conclusion. ER 22-27. The trial court granted the motion and ordered the petition dismissed, adopting Defendant's arguments and further noting that

Plaintiff does not have a constitutional right to incarceration in a particular state and that interstate transfer does not deprive an inmate of any constitutionally protected liberty interest. ER 28-29 (citing *Olim v. Wakinekona*, 406 US 238, 245, 103 S Ct 1741 (1983)). In Case No. 13C23141, the trial court, acting *sua sponte*, dismissed Plaintiff's petition for the same reasons. ER 52-53. On appeal in both cases, the Oregon Court of Appeals reversed. See *Barrett v. Peters (Barrett I)*, 274 Or App 237, 360 P3d 638 (2015); *Barrett v. Peters (Barrett II)*, 274 Or App 251, 360 P3d 646 (2015). This Court allowed review and consolidated the cases for argument and decision.

V. SUMMARY OF ARGUMENT

A straightforward application of this Court's paradigm for statutory construction resolves the questions presented on review. Construed together, ORS 34.310 and the ICC preserve Plaintiff's right to participate in any proceedings, including habeas proceedings, that he could participate in were he incarcerated in Oregon. The ICC further preserves a transferred inmate's legal rights, including Oregon constitutional rights, while that inmate is confined out of state. Florida officials, acting as agents of the State of Oregon, continue to deny Plaintiff his federal and state constitutional rights. Under ORS 34.310 and the ICC, then, Plaintiff may seek a remedy for those violations by petitioning for habeas relief in Oregon state court, naming the Director of the Oregon Department of Corrections as defendant. To hold otherwise would allow the

ODOC to transfer away the constitutional rights of any inmate committed to its custody.

VI. ARGUMENT

A. Plaintiff properly petitioned for habeas relief in Oregon state court.

In Oregon, the remedy of habeas is made available by statute. Thus, the resolution of this case turns on the interpretation of two Oregon statutory schemes: the statutes permitting Oregon inmates to seek a writ of habeas corpus, ORS 34.310 & 34.362, and the Interstate Corrections Compact (“ICC” or “the Compact”), ORS 421.245–421.254. Consistent with this Court’s paradigm for statutory construction, *see State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009), those statutes, construed together, make clear that Plaintiff properly petitioned for habeas relief in Oregon state court.

1. The text of ORS 34.310 and the ICC make clear that issuance of the writ is not limited to persons physically confined within this state.

ORS 34.310 is the primary basis for habeas jurisdiction in the circuit courts. That statute 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.*

ORS 34.310 (emphasis added). The wording of ORS 34.310 dates back to the Deady Code, which similarly provided for habeas relief to “[e]very person imprisoned or otherwise restrained of liberty, within this state.” General Laws of Oregon, Civil Code, ch VII, tit III, § 597, p 300 (Deady 1845-1864). At that time, and until 1975, issuance of the writ was limited to circumstances in which the trial court’s judgment was void for lack of personal or subject-matter jurisdiction. *See Bekins v. Cupp*, 274 Or 115, 117, 545 P2d 861 (1976) (citing *Greenfell v. Gladden*, 241 Or 190, 192, 405 P2d 532 (1965)). In 1975, this Court held, for the first time, that habeas is the appropriate procedure for challenging the condition of one’s confinement and the treatment of an inmate by prison officials. *Bekins*, 275 Or at 117.

The text of ORS 34.310 contemplates the notion that an individual seeking habeas relief need not be physically confined within the State of Oregon.⁶ Although the word “imprisoned” suggests physical confinement, *see Bock v. Collier*, 175 Or 145, 151, 151 P2d 732 (1944), the phrase “otherwise restrained” is not so limited. Restraint may be physical or constructive; an individual is “restrained” when he or she is merely “deprived of liberty.” *Webster’s Third New Int’l Dictionary* 1936 (unabridged ed 2002) (defining

⁶ Defendant relies on *White v. Gladden*, 209 Or 53, 60, 303 P2d 226 (1956), for a contrary proposition. *See* Opening Brief at 12. In *White*, however, this Court expressly left open the question whether habeas is an appropriate procedure “in cases of constructive custody.” *Id.* at 64.

“restrain” as “to deprive of liberty”; “abridge the freedom of”). That the statute applies to those “*otherwise* restrained” further suggests that the writ might extend to circumstances of constructive restraint, in addition to those of physical imprisonment. *Id.* at 1598 (defining “otherwise” to mean “in a different way or manner”). If that is so, where an individual is not physically imprisoned in this state, but is “otherwise restrained” pursuant to a judgment of conviction issued within this state, that individual is “otherwise restrained, within this state” and entitled to seek relief under ORS 34.310.

To resolve this case, however, this Court should not consider the wording of ORS 34.310 on its own. In 1979, the Oregon legislature supplemented the jurisdiction of the circuit courts to issue the writ when it adopted, and thereby made Oregon a party to, the Interstate Corrections Compact. *See* ORS 421.245; *Barrett v. Belleque*, 344 Or 91, 100, 176 P3d 1272 (2008) (“The terms of the ICC * * * supplement the ordinary habeas jurisdictional analysis.”). The ICC provides a mechanism through which states may cooperate “for the confinement, treatment and rehabilitation of offenders” by allowing party states to contract with one another for the confinement and detention of inmates in the institutions of other party states. ORS 421.245, Art I. Under the ICC, when an inmate is transferred from a “sending state”—in this case, Oregon—to a “receiving state”—here, Florida—that inmate remains within the legal and constructive custody of the sending state. *See* ORS 421.245, Art IV, § 3.

Florida, as the “receiving state,” acts “solely as agent” of the State of Oregon. ORS 421.245, Art IV, § 1; *see also* ORS 421.245, Art III, § 1 (providing “for the confinement of inmates *on behalf of a sending state* in institutions situated within receiving states”).

The ICC further provides the sending state with a host of rights and obligations relative to inmates within its legal custody but physically incarcerated out of state. For instance, officials of the sending state have the right to reasonable access to out-of-state institutions in which the sending state’s inmates are confined. ORS 421.245, Art IV, § 2. A sending state retains jurisdiction over transferred inmates and has the sole authority to release an inmate on probation, discharge an inmate, transfer an inmate to another party state, or take any other act “permitted by the laws of the sending state.” *Id.* § 3. The sending state is entitled to reports, prepared by the receiving state, on the “inmates of that sending state,” which the sending state may use to “determin[e]” or “alter” the disposition of an inmate. *Id.* § 4. The sending state is likewise obligated to provide, pursuant to its contract with the receiving state, funding for medical and dental expenses, rehabilitative or correctional services, employment programs, and inmate delivery or transfer costs. ORS 421.245, Art III, § 1.

In addition to providing for rights and obligations of its respective party states, the ICC further protects the rights of inmates confined pursuant to its

provisions. Particularly relevant here, the ICC provides all such inmates with “any and all rights to participate in * * * 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. Moreover, “[a]ll inmates” confined in a receiving state’s institution “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, Art IV, § 5. No such inmate may be deprived of “any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.” *Id.* “In other words, an inmate’s rights do not change as a result of the transfer out of state.” *Barrett v. Belleque*, 344 Or at 98 (citing ORS 421.245, Art IV, § 8).

By its very terms, then, the ICC supplements the traditional habeas jurisdictional analysis by preserving the Oregon legal rights of out-of-state inmates and making clear that those inmates may seek a remedy for violations of their legal rights by out-of-state agents of state actors. Pursuant to those terms, even after his transfer to Florida, Plaintiff continues to be entitled to all legal rights afforded to him under the Oregon Constitution, including the rights to free exercise of religion and to be free from unnecessary rigor. He also retains his right to “participate in * * * any action or proceeding” in which he could participate were he confined in Oregon, including habeas proceedings.

See ORS 34.310. In other words, an inmate need not physically be “within this state” to seek habeas relief in an Oregon state court.

2. The statute’s context makes clear that the ICC supplements the habeas jurisdiction of the circuit courts.

Consideration of the statute’s text in context with earlier judicial constructions leads to the same conclusion. *See State v. McAnulty*, 356 Or 432, 441, 338 P3d 653 (2014) (considering prior judicial constructions at the first step of the interpretive paradigm). In *Barrett v. Belleque*, this Court noted that the same plaintiff “committed his crimes in Oregon, was convicted and sentenced in Oregon, and is serving an ‘Oregon’ sentence.” 344 Or at 100. The Court further observed that, notwithstanding the text of ORS 34.310, the ICC served to “supplement the ordinary habeas jurisdictional analysis.” *Id.* The Court held that, under the ICC, a habeas petitioner “cannot be deprived of any legal rights that he would have enjoyed in Oregon.” *Id.* (citing ORS 421.245, Art IV, § 5).

To be sure, the Court’s holding in *Barrett v. Belleque* deals primarily with mootness, which is not at issue here. Specifically, the Court held that, to determine whether a claim asserted in a petition for habeas relief is moot, the trial court must look to the circumstances existing at the time the petition was filed and determine whether, after the transfer occurred, those circumstances continue to exist. *See* 344 Or at 100-01. That holding, as the State points out, is fairly well settled in this Court’s caselaw. *See, e.g., Anderson v. Britton*, 212

Or 1, 5, 318 P2d 291 (1957), *cert den* 356 US 962, 78 S Ct 999 (1958), *superseded by statute on other grounds as stated in Delaney v. Gladden*, 232 Or 306, 308, 374 P2d 746 (1962); *see also McGee v. Johnson*, 161 Or App 384, 387, 984 P2d 341 (1999). But Plaintiff does not argue that the mootness discussion of *Barrett v. Belleque* should apply here; rather, Plaintiff argues that this Court’s construction of the ICC, which was a necessary predicate to the Court’s mootness holding, should and does apply as law of this Court. *See Engweiler v. Persson*, 354 Or 549, 558-59, 316 P3d 264 (2013).⁷

3. Considerations of uniformity compel the same conclusion.

When the Oregon legislature enacted the ICC, it understood the compact to be a “uniform law” that was “essentially the same” as the Western Interstate Corrections Compact, to which Oregon was already a party. Tape Recording, House Committee on Judiciary, HB 2070, Feb 2, 1979, Tape 6, Side 1 (statement of Dennis Bromka, Counsel to the Judiciary Committee). This Court should therefore construe it as such. *See Health Net, Inc. v. Dep’t of Revenue*, 22 ORT 128, 149 (2015) (construing the Multistate Tax Compact as a uniform law where it was likely that the legislature understood it to be one). To that end, decisions of other state courts are persuasive in the interpretive analysis.

⁷ Even if this Court were to consider its pronouncement in *Barrett v. Belleque* dictum, it still has persuasive force. *See Halperin v. Pitts*, 352 Or 482, 494, 287 P3d 1069 (2012).

See, e.g., GPL Treatment, Ltd. v. Louisiana-Pacific Corp., 323 Or 116, 124, 914 P2d 682 (1996) (looking to other jurisdictions’ interpretations of a uniform law as part of the court’s contextual analysis).

Other state courts, including Florida courts, have likewise held that the sending state is the appropriate jurisdiction in which an inmate confined under the ICC should seek habeas relief. *See, e.g., Fest v. Bartee*, 804 F2d 559, 560 (9th Cir 1986); *Findlay v. Lewis*, 172 Ariz 343, 345, 837 P2d 145 (1992); *Hundley v. Hobbs*, 2015 Ark 70, *6-*8, 456 SW3d 755 (Ark 2015); *Meyer v. Moore*, 826 So 2d 330, 331 (Fl App 2d Dist 2002); *Leach v. Dahm*, 277 Neb 452, 455, 763 NW2d 83 (2009); *Gibson v. Morris*, 646 P2d 733, 736 (Utah 1982). Lest this Court upset the uniformity that already exists between party states, the same should hold true here.⁸

⁸ In *Taylor v. Peters*, 274 Or App 477, 361 P3d 54 (2015), the case with which this Court consolidated Plaintiff’s case, the Court of Appeals held that both the Western Interstate Corrections Compact (“WICC”) and the ICC were “created pursuant to a 1934 grant of authority from Congress that authorized states ‘to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies * * * .’ ” *Id.* at 482 (quoting Pub L 293, ch 406, 48 Stat 909 (1934)). If that is so, both statutes could be considered as having been “transform[ed]” into federal law under the Compact Clause of the U.S. Constitution. *See Cuyler v. Adams*, 449 US 433, 440, 101 S Ct 703, 66 L Ed 2d 641 (1981) (setting forth the test for determining whether an interstate compact falls within the ambit of the Compact Clause); *Cameron v. Mills*, 645 F Supp 1119, 1127-28 (SD Iowa 1986) (so construing the Interstate Compact Clause). *But see Ghana v. Pearce*, 159 F3d 1206, 1208 (9th Cir 1998); *Clemmons v. Read*, 1996 WL 164408, at *2-3 (ND Ill); *Griffin v. Riveland*, 148 FRD 266, 268-69 (ED Wash 1993). And, if that is so, the text of the ICC, and the

4. Plaintiff properly sought habeas relief in Oregon state court.

Applying the interpretive paradigm of *Gaines* resolves the question before this Court. The ICC supplements the traditional habeas jurisdictional analysis by preserving the Oregon legal rights of out-of-state inmates and making clear the procedure, *see* ORS 34.310, through which those inmates may seek a remedy for violations of their rights by out-of-state agents of state actors. Thus, even in the physical custody of an out-of-state institution, Plaintiff, who is in the legal and constructive custody of the ODOC and is therefore constructively restrained “within this state,” is entitled to all legal rights afforded to him under the Oregon Constitution. He may therefore seek habeas relief pursuant to ORS 34.310. A conclusion to the contrary would allow the Oregon Department of Corrections to abdicate its obligations under the state constitution by transferring its prisoners out of state. Such a result does not follow from the ICC’s text, its context, or its underlying purpose.

B. The Director of the Oregon Department of Corrections is the appropriate defendant in this proceeding.

Defendant Peters is the appropriate defendant in Plaintiff’s habeas proceedings. Under Oregon’s habeas statutes, an inmate seeking to challenge the conditions of his confinement must name, as a party to the petition, the

decisions of other courts that have construed that text, should be given far greater weight in this Court’s interpretive analysis.

“officer or person by whom the [inmate] is imprisoned or restrained.” ORS 34.360; ORS 34.362. Pursuant to Plaintiff’s judgment of conviction, Plaintiff was committed to the custody of the Oregon Department of Corrections for service of his sentence. *See* Judgment of Conviction and Sentence on Remand, *State v. Barrett*, Case. No. 9402002CR (Dec 18, 2000). Under the ICC, Plaintiff remains in the Department’s legal custody. *See* ORS 421.245 Art IV, §§ 1, 3 (providing that the receiving state acts “solely as agent” of the sending state and that the sending state retains jurisdiction in all respects over the transferred inmate). Thus, even while Plaintiff is confined in Florida, the Director of the Oregon Department of Corrections is the “officer or person by whom [Plaintiff] is imprisoned or restrained.”

That conclusion is also consistent with the historical understanding of the writ of habeas corpus. Historically, the proper party to a petition for a writ of habeas corpus was the individual with the power to “release [the inmate’s] constraint.” *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 US 484, 495, 93 S Ct 1123 (1973) (quoting *In the Matter of Jackson*, 15 Mich 417, 439-40 (1867)); *see also Penrod/Brown v. Cupp*, 283 Or 21, 29, 581 P2d 934 (1978) (Holm, J., concurring). Under the ICC, the Oregon Department of Corrections has the sole authority, were a writ to issue, to remove Plaintiff from the FDOC. ORS 421.245, Art IV, § 3. Indeed, in this case, Defendant is the *only* individual with the power to grant Plaintiff the relief that he seeks.

Furthermore, Plaintiff adequately alleged facts showing that Defendant is the “officer or person by whom [Plaintiff] is imprisoned or restrained.” ORS 34.360. He alleged, for instance, that he is “imprisoned and restrained by Defendant Peters in the State of Florida.” ER 4. He further alleged that “Defendant is tasked with the duty to enforce the terms of the ICC in every particular. Defendant Peters is the duly appointed and qualified, and acting director of the Oregon Department of Corrections (ODOC), in the [*sic*] Marion County, Oregon.” ER 4; ER II 19. He alleged that Defendant, “pursuant to the ICC, transferred [Plaintiff] to the FDOC” and that, by either action or inaction, Defendant’s conduct deprived Plaintiff of his constitutional rights. *See* ER 7, 8, 9, 11; ER II 14, 19. Taking those facts as true, Plaintiff’s allegations are sufficient to show that, were a writ to issue, Defendant would be in the position to grant Plaintiff relief.

C. Plaintiff’s petitions for habeas relief present meritorious constitutional claims.

In his petitions for habeas relief, Plaintiff asserted meritorious claims that Defendant violated his Oregon constitutional rights to the free exercise of religion and to be free from unnecessary rigor. He also asserted meritorious claims that Defendant violated his rights under the U.S. Constitution to due process, equal protection, and to be free of cruel and unusual punishment. Each allegation provides a viable basis for habeas relief.

1. Plaintiff alleged violations of his Oregon constitutional rights by a state actor.

Under the Oregon constitution, Plaintiff is entitled to the free exercise of his religion and to be protected against unnecessary rigor. *See* Or Const, Art I, §§ 2, 3, & 13. Plaintiff adequately alleged that Oregon and Florida officials violated his Oregon constitutional rights.

Defendant correctly notes that the protections afforded in the Oregon constitution apply against state, not private, actors. *See, e.g., Smith v. Emp’t Div. of Or.*, 301 Or 209, 215-16, 721 P2d 445 (1986), *vacated on other grounds by Emp’t Div. of Or.*, 485 US 660, 108 S Ct 1444, 99 L E 2d 753 (1988) (interpreting Article I, sections 2 & 3). A “state actor,” however, for the purposes of the Oregon constitution, includes non-state actors acting at the direction or as agent of the state. *State v. Sines*, 359 Or at 41, 55__ P3d __ (2016). Thus, where the state directs a non-state actor to act on the state’s behalf, the non-state actor’s conduct becomes a state action. *Id.* at 53.

Here, the State of Florida, in its capacity as “agent for the [State of Oregon],” is a state actor for the purposes of the Oregon constitutional analysis. ORS 421.245, Art IV, § 1; *see Sines*, 359 Or at 52 (stating the common-law principle that an “agency relationship results from the manifestation of consent by one person to another that the other shall act on behalf and subject to his control, and consent by the other to so act” (internal quotation marks omitted)). By way of its contract with the State of Oregon and its status as a party to the

ICC, Florida, acting on behalf of Oregon, is bound to protect the legal rights, including Oregon constitutional rights, of the inmates it receives. ORS 421.245, Art I, § 5; *see also* Contract No. 2777 at ¶ 2. Thus, to seek relief from violations committed by Florida officials, acting as agents of the State of Oregon, Plaintiff properly sought relief against the State of Oregon. *See Sines*, 359 Or at 52 (noting that the principal in an agency relationship is liable for the actions of its agents to which it consents).

Moreover, contrary to Defendant’s position,⁹ this Court previously has held that the conduct of non-Oregon state actors may implicate Oregon constitutional protections. In *State v. Davis*, 313 Or 246, 253, 834 P2d 1008 (1992), in the context of Article I, section 9, the Court held that out-of-state conduct of non-Oregon officials is governed by the same standard as conduct of Oregon officials taking place in Oregon. In so holding, the Court noted that the rights afforded under Article I, section 9, which are remedied only at trial, could not otherwise adequately be protected. *Id.* The same should hold true here; the rights afforded under Article I, sections 2, 3, and 13, for inmates in the legal and constructive custody of the State of Oregon but incarcerated out of state, cannot adequately be protected unless the conduct of out-of-state actors is subject to Oregon constitutional standards.

⁹ Defendant argues, in her brief on the merits, that “[t]he Oregon Bill of Rights protects citizens from *Oregon* state action.” *See* Opening Brief at 18. Defendant cites no authority for that particular proposition.

2. Plaintiff alleged violations of constitutional, not statutory, rights.

Article IV, section 5, of the ICC reads,

All inmates who may be confined in an institution pursuant to the provisions of this compact 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. The 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, Art IV, § 5. The first clause of section 5, requiring that inmates be treated in a “reasonable and humane manner” and “equally” with other inmates, sets a floor, not a ceiling—under that clause, all transferred inmates must, *at the very least*, be subject to the same “reasonable and humane” treatment as all other inmates of the receiving state. Thus, many courts have held that transferred inmates are subject to the same day-to-day prison policies—such as “disciplinary, classification, visitation, and grooming policies,” or policies to which no prisoner has any legal right—as are the inmates of the receiving state. *See, e.g., Stewart v. McManus*, 924 F.2d 138, 141-42 (8th Cir. 1991); *Daye v. State*, 171 Vt 475, 481-82, 769 A2d 630 (Vt 2000); *Glick v. Holden*, 889 P2d 1389, 1393-94 (Ut App 1995); *Cranford v. State*, 471 NW 2d 904, 905-06 (Iowa 1991). Plaintiff does not take issue with those holdings. For the purposes of this case, however, those holdings are irrelevant.

Those holdings are irrelevant because this case is not about the existence or nonexistence of such policies. This case, by contrast, is about violations of Plaintiff's "legal rights," which, under the second clause of section 5, are distinct from mere disciplinary rules or policies. *See Ex parte Anderson*, 191 Or 409, 432, 229 P2d 633 (1951) (so stating). Under Oregon law, "legal rights," which include the right to conditions of confinement that comply with Oregon constitutional standards, must be accompanied by a concomitant legal remedy. *See Penrod/Brown*, 283 Or at 23-28 (requiring the state to provide a remedy for the invasion of a constitutionally protected right). And, under the ICC, an inmate retains all of those legal rights even after he has been transferred to an out-of-state institution. ORS 421.245, Art IV, § 5, cl 2. Defendant's attempt to narrow clause 2 to "rights related to [the inmate's] conviction" is not supported in statutory text, *see* ORS 421.245, Art X (requiring the terms of the ICC to be construed liberally),¹⁰ nor is it rooted in the purpose for which the

¹⁰ The ICC's legislative history, albeit limited, confirms that the legislature understood, at the time that the ICC was enacted, that the *constitutional rights* of Oregon inmates would be preserved upon transfer to an out-of-state institution.

When the ICC was presented to the House Judiciary Committee in 1979, the primary issue the Committee discussed was whether a receiving state would be required to honor the legal rights of a sending state if the sending state "had a provision or a legal right for their inmates, such as conjugal visits or something like that, and [the receiving state] did not." Tape Recording, House Committee on Judiciary, HB 2070, Feb 2, 1979, Tape 6, side 2 (comments of Rep Lombard). Committee Counsel responded that, yes, by the terms of HB 2070, the receiving state would be required to provide such rights.

ICC was created. *See also* ORS 174.010 (precluding this Court from inserting what the legislature has omitted).

Moreover, Defendant’s argument that the existence of Article IV somehow transforms Plaintiff’s constitutional rights into statutory rights is unavailing. Plaintiff alleged that the state’s conduct—committed by both Oregon and its agents in Florida—violates his *Oregon constitutional rights*. He did not allege that the state’s conduct contravened any statutory right he might have under the ICC. Contrary to Defendant’s position, Plaintiff does not seek a remedy for the FDOC’s “grooming policies” or “lack of programming”; rather, Plaintiff seeks a remedy for the constitutional violations that flow from those policies. Such a remedy may properly be the subject of a petition for habeas relief in Oregon state court.

3. Plaintiff asserted viable claims under the U.S. Constitution.

In his petition in Case No. 13C20437, Plaintiff alleged that Defendant had violated his due process rights by failing to provide notice and an

That discussion confirms that the type of “legal right” contemplated under Article IV, section 5, is a legal, and potentially constitutionally protected, right for which there is a remedy at law. As noted, the primarily “legal right” with which the committee was concerned was conjugal visiting rights. At that time, the question whether conjugal visiting rights were constitutionally protected, and to what extent, had not yet squarely been answered. *See Turner v. Safley*, 482 US 78, 94-99, 107 S Ct 2254 (1987).

opportunity to be heard before he was transferred to an institution in which he would be subject to significant “hardships * * * to his religion.” ER 10. The trial court rejected that argument. Citing *Olim v. Wakinekona*, 461 US 238, 248 103 S Ct 1741, 75 LE 2d 813 (1983), the trial court noted that a prison inmate does not have a due process right to be incarcerated in any particular state.

But Plaintiff does not claim that he has a constitutionally protected liberty interest in confinement in a particular state. He does, however, claim that, where Oregon officials knew or should have known that incarceration in Florida would present him with significant hardships to his federal and state constitutional rights, a liberty interest arose such that he should have been provided with adequate notice and an opportunity to be heard with respect to the transfer. Plaintiff’s petition states a viable federal constitutional claim that is not precluded by earlier decisions of any federal court. The trial court and the Court of Appeals, *see Barrett I*, 274 Or App at 241 n 7, erred by concluding otherwise.

For the same reasons that Defendant’s arguments fail with respect to Plaintiff’s state constitutional claims, they also fail with respect to his due process, equal protection, and Eighth Amendment claims. Plaintiff’s petitions allege that state actors—specifically, *Oregon or its agents*—are committing ongoing violations of his federal constitutional rights. Thus, his petition was properly filed in Oregon state court against the Director of the ODOC.

D. The trial court erred when it dismissed Plaintiff's petition with prejudice.

Under Oregon law, a trial court that enters a judgment denying a meritless petition for habeas relief must deny the petition *without prejudice*. ORS 34.370(3) (emphasis added); *Billings v. Gates*, 323 Or 167, 172 n 7, 916 P2d 291 (1996). A “meritless petition” is “one which, when liberally construed, fails to state a claim upon which habeas relief may be granted.” ORS 34.370(7). In Case No. 13C20437, the trial court’s dismissal is captioned “WITHOUT PREJUDICE,” but the body of the judgment states that it was dismissed “WITH PREJUDICE.” The State conceded the error in the Court of Appeals, but, because that court reversed the trial court’s judgment on other grounds, it did not reach the issue. *Barrett I*, 274 Or App at 240 n 5. Respondent renews that assignment of error in the event that this Court reaches a contrary conclusion with respect to the arguments detailed above. Were this case to be remanded, Plaintiff would allege additional facts demonstrating ongoing violations of his constitutional rights by Oregon state actors.

VII. CONCLUSION

For the reasons explained above, Plaintiff asks this Court to affirm the decision of the Court of Appeals.

DATED this 25th day of April, 2016.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

By: /s/ Nadia H. Dahab
Nadia H. Dahab, OSB No. 125630

209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: ndahab@stollberne.com

Attorneys for Plaintiff-Appellant,
Respondent on Review

CERTIFICATE OF COMPLIANCE

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 7,278 words.

I 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 in ORAP 5.05(2)(d).

/s/ Nadia H. Dahab

Nadia H. Dahab, OSB No. 125630

Attorneys for Plaintiff-Appellant,
Respondent on Review

CERTIFICATE OF FILING AND SERVICE

I certify that on April 25, 2016, I filed the original of **RESPONDENT ON REVIEW'S BRIEF ON THE MERITS** with the State Court Administrator in .pdf, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

Participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system.

I further certify that on April 25, 2016, I served two (2) true copies of said document on the party or parties listed below, via first class mail, postage prepaid, and addressed as follows:

Jona J. Maukonen
DOJ Appellate Division
1162 Court Street NE
Salem OR 97301

Attorneys for Defendant-Respondent,
Petitioner on Review

**STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.**

By: /s/ Nadia H. Dahab
Nadia H. Dahab, OSB No. 125630

209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: ndahab@stollberne.com

Attorneys for Plaintiff-Appellant,
Respondent on Review