

IN THE SUPREME COURT OF THE STATE OF OREGON

MARVIN LEE TAYLOR,

Plaintiff-Appellant,
Respondent on Review,

v.

COLLETTE PETERS, Director,
Oregon Department of Corrections,

Defendant-Respondent,
Petitioner on Review.

Marion County Circuit Court
Case No. 13C21251

CA A155794

SC S063763

BRIEF ON MERITS OF RESPONDENT ON REVIEW

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

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

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STATEMENT OF THE CASE

This is a habeas corpus case that presents the issue of whether an inmate incarcerated in Colorado under the authority of an Oregon criminal judgment and sentence can bring a habeas corpus claim in Oregon state court.

There are two questions before this court to resolve the issue. First, whether an Oregon court has jurisdiction under ORS 34.310¹ to consider plaintiff's claims. To resolve that question requires construction of ORS 34.310 and how it intersects with the Western Interstate Corrections Compact ("WICC"), ORS 421.282 to 421.294, and the Interstate Corrections Compact ("ICC"), ORS 421.245 to 421.254. Second, if Oregon courts have jurisdiction, whether plaintiff sufficiently alleged a ground for relief in this case.

ORS 34.310 allows a plaintiff to bring a habeas corpus case if he is "imprisoned or otherwise restrained of liberty, within this state." The statute

¹ 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."

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allows an inmate to pursue a habeas corpus claim as long as the legal entity that is imprisoning him is located “within” Oregon. The WICC and the ICC expressly provide that if an inmate is incarcerated in another state, the other state acts solely as an agent of Oregon and the inmate retains all legal rights he had when he was in Oregon. Consequently, a person who is incarcerated out-of-state under an Oregon judgment may pursue a habeas corpus claim in Oregon.

Before this court, defendant argues that plaintiff alleges claims about his treatment by Colorado officials. However, plaintiff’s petition alleged claims directed at Oregon officials, based on their actions – or rather, inaction – in this state. Specifically, plaintiff alleges that Oregon officials are violating his rights by knowing of his unconstitutional conditions of confinement and refusing to remedy them, such as by transferring him to a different location. Therefore, this court does not need to decide whether a habeas corpus action can be directed at constitutional violations caused by out-of-state actors.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

Where a habeas corpus plaintiff is serving an Oregon sentence in another state pursuant to the WICC, does ORS 34.310 allow a trial court to consider the plaintiff’s claims?

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First Proposed Rule of Law

ORS 34.310 applies to someone incarcerated “within this state.” The legislature supplemented that statutory text with the WICC, which provides that an inmate retains all of his legal rights when he is transferred out of state. The WICC also provides that the other state that receives the Oregon inmate acts solely as an agent of Oregon. Therefore, because an inmate could have pursued a habeas corpus claim in Oregon courts, he can also do so while incarcerated in another state.

Second Question Presented

May an inmate who was convicted in Oregon but is serving the sentence in another state pursuant to the WICC obtain state habeas corpus relief against the Director of the Oregon Department of Corrections (ODOC) based on allegations that Oregon officials know that plaintiff regularly has feces and urine thrown at him in his cell, and yet Oregon officials have done nothing to remedy plaintiff’s conditions of confinement?

Second Proposed Rule of Law

The Oregon official who is in charge of plaintiff’s legal confinement is the appropriately named defendant in the petition because plaintiff is legally in Oregon custody. Further, because the terms of the compact provide that Oregon officials

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have some control over plaintiff's conditions of confinement in Colorado, plaintiff can obtain relief with a writ of habeas corpus from an Oregon court.

Summary of Argument

ORS 34.310 allows an inmate who is "imprisoned or otherwise restrained of liberty, within this state," to seek a writ of habeas corpus for relief from unconstitutional conditions of confinement. The text and context of ORS 34.310 indicate that a plaintiff who is physically "within" Oregon or constructively "within" Oregon may seek a writ under the statute.

Inmates who are incarcerated in other states under the WICC or the ICC are constructively within the custody of Oregon. The interstate compacts expressly provide that a transfer to another state does not deprive the inmate of any rights he would have had in Oregon, and that the receiving state acts solely as an agent for Oregon. This court has held that the interstate compacts "supplement" the habeas corpus jurisdiction. Thus, when an inmate is transferred to another state under the compacts, he remains legally in Oregon's custody, and the other state acts merely as an agent of Oregon. In other words, the identity of the inmate's custodian has not changed. Therefore, if an inmate could have prosecuted a writ of habeas corpus while he was incarcerated in Oregon, he can also do so while incarcerated in another state.

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Plaintiff's petition alleged essentially that Oregon officials knew of his unconstitutional conditions of confinement and refused to remedy his situation. Defendant argues that plaintiff's petition fails to state valid constitutional claims because he alleges violations against Colorado officials, not Oregon officials. Plaintiff's petition, however, squarely alleges claims against Oregon officials. And Oregon officials could provide a remedy by, among other things, transferring plaintiff to another jurisdiction. Therefore, this court does not need to decide whether a claim directed solely against out-of-state actors is proper under Oregon's habeas corpus statutory scheme.

Factual and Procedural Background

The Court of Appeals accurately described the relevant historical and procedural facts as follows:

“Plaintiff is an Oregon inmate incarcerated in Colorado pursuant to the Western Interstate Corrections Compact (WICC), ORS 421.282 to 421.294. According to the allegations in the petition, plaintiff is confined under conditions in which other prisoners are ‘continually’ throwing feces and urine into his cell. Those conditions, plaintiff alleges, violate his rights under the Eighth and Fifth Amendments to the United States Constitution. Plaintiff seeks relief from those conditions through a writ of habeas corpus under ORS 34.310, directing defendant, the Director of the Oregon Department of Corrections (ODOC)—plaintiff's legal custodian—to remove him from those conditions. The director filed a motion to deny plaintiff's petition, and the trial court granted that motion, accepting the director's arguments that the petition was not proper because the director does not have physical custody of plaintiff or control over his

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conditions of confinement in Colorado, and because plaintiff did not adequately allege a constitutional deprivation requiring immediate judicial attention.”

Taylor v. Peters, 274 Or App 477, 479-80, 361 P3d 54 (2015) (footnotes omitted).

As relevant to the issues before this court, plaintiff alleged several specific claims for relief, including the following claims that relied on the Oregon and United States Constitutions:

“FIRST CLAIM FOR RELIEF

“(Cruel and Unusual Punishment)

“ODOC officials are well aware that plaintiff is being forced to live in a dangerous and atypically stressful environment. ODOC officials have continuously been advised of plaintiff’s living conditions, but they continue to be deliberately indifferent to plaintiff’s pain, suffering, and the threat of harm under which plaintiff lives every moment of every day. Such indifference, and requiring plaintiff to remain in this dangerous environment, equates to cruel and unusual punishment under the 8th Amendment of the United States Constitution.

“* * * * *

“SECOND CLAIM FOR RELIEF

“(Unnecessary Rigor)

“Plaintiff asserts ODOC’s refusal to transfer him from the Colorado State prison system and requiring him to live in a dangerous environment amounts to Unnecessary Rigor under Art. I, § 13 of the Oregon Constitution. ODOC is aware of the danger and harmful living conditions in which plaintiff is required to live and ODOC has other alternative solutions for plaintiff’s confinement that are not dangerous or harmful.”

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App Br at ER 19-20.

In the petition, plaintiff alleged that his current conditions of confinement are unsafe. App Br at ER-18. Among other depredations, other inmates “regularly” throw feces and urine at plaintiff’s cell. App Br at ER-17. Plaintiff alleged that Oregon officials have “done nothing” to “stop plaintiff’s torture.” App Br at ER-17. “Plaintiff has consistently written to ODOC officials requesting that he be transferred out of Colorado,” but officials have denied his requests. App Br at ER-18. Plaintiff also described the relief that he seeks:

“[P]laintiff has not simply requested a return to Oregon. His request is to be placed in a safe environment. It has already been shown that ODOC officials would likely attempt to place plaintiff in GP [general population] if he were to return to Oregon, which continues to be a dangerous environment for him. However, a transfer to another state is not an unreasonable request. ODOC officials could also immediately remove plaintiff from Colorado and house him temporarily in Oregon or California administrative segregation. There are numerous options other than keeping plaintiff in a dangerous and hostile living environment in Colorado where both inmates and officials are seeking to harm him.”

App Br at ER-18-19.

After the trial court dismissed plaintiff’s petition, plaintiff appealed and raised two assignments of error: that the trial court erred in dismissing the petition for a writ of habeas corpus, and that the trial court erred in dismissing the petition

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with prejudice. Relying on the recently decided *Barrett v. Peters*, 274 Or App 237, 360 P3d 638 (2015), the Court of Appeals reached the following legal conclusions:

“(1) plaintiff did not lose his right to be incarcerated under conditions that comply with constitutional standards by virtue of his transfer to Colorado pursuant to the WICC; (2) plaintiff did not lose the right to petition for habeas corpus relief in Oregon by virtue of his transfer to Colorado pursuant to the WICC; and (3) plaintiff alleged sufficient facts to establish that he properly named the director as the defendant in this habeas corpus proceeding by alleging that he was in the custody of ODOC, but housed out of state under the WICC.”

Id. at 483. Accordingly, the court reversed and remanded for further proceedings.

Id.

ARGUMENT

This case presents the issue of whether Oregon’s habeas corpus statutory scheme, including ORS 34.310, allows an inmate who was convicted in Oregon but is serving the sentence in another state under an interstate compact to challenge his conditions of confinement in an Oregon court. The Oregon legislature, through the habeas corpus scheme and the interstate compacts, intended to permit a person incarcerated in another state under an Oregon criminal judgment to seek a writ of habeas corpus in Oregon state court. In this case, plaintiff alleges constitutional violations by Oregon officials that are sufficient to state a valid claim for habeas corpus relief.

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I. ORS 34.310 allows a petition for a writ of habeas corpus from an inmate who is within Oregon’s legal jurisdiction.

To determine the reach of Oregon’s habeas corpus statutory scheme, this court must engage in the statutory interpretation of ORS 34.310 and two interstate compacts, the WICC and the ICC. To interpret a statute, this court looks at the text and context of the statute and any helpful legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 242 (2009). Context includes, “among other things, other provisions of the same statute, other related statutes, prior versions of the statute, and this court’s decisions interpreting the statute.” *Jones v. General Motors Corp.*, 325 Or 404, 411, 939 P2d 608 (1997).

A. A habeas corpus petition must allege that the inmate is imprisoned or restrained of liberty “within” Oregon.

ORS 34.310 provides as follows:

“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 issue in this case is whether a plaintiff in Colorado pursuant to an Oregon judgment is “imprisoned or otherwise restrained of liberty, within this state[.]”

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Defendant argues that the text and context of ORS 34.310 indicate that “within this state” means “inside of the geographic state boundary.” Petitioner’s Brief on the Merits (“BOM”) at 11. However, that does not answer the question of *what* must occur “within this state,” such as whether it must be the “person” or the cause of the person’s being “imprisoned or otherwise restrained of liberty.”

The text of ORS 34.310 does not, on its face, limit its scope to people who are physically present in Oregon, as opposed to (as is the case here) those who are constructively or legally restrained of their liberty from Oregon. This court has previously addressed the issue of whether constructive custody is sufficient for purposes of ORS 34.310, but without squarely answering the question here. In *White v. Gladden*, 209 Or 53, 60, 64, 303 P2d 226 (1956), this court noted that the “restraint” mentioned in ORS 34.310 “is a physical restraint within the state of Oregon and within some county or judicial district of the state,” but expressly avoided deciding whether “habeas corpus would lie in cases of constructive custody.” In *Anderson v. Britton*, 212 Or 1, 5-6, 318 P2d 291 (1957), the plaintiff initiated the habeas corpus case while in the custody of the sheriff, but was transferred to the penitentiary while the case was pending. This court held that the inmate’s appeal was not moot, relying on common-law rules to find that the plaintiff “remains constructively in the custody of the sheriff pending

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determination of the appeal.” *Id.* at 6. While this court noted constructive custody was sufficient to maintain a writ once it has initiated, this court did not address or decide whether constructive custody is sufficient to initiate a habeas corpus proceeding.

The text of ORS 34.310 does not clearly indicate whether the inmate or the inmate’s custodian must be “within this state.” The historical context of ORS 34.310 demonstrates that the writ is directed against the entity that has legal custody of the plaintiff, suggesting the statute requires that the custodian must be “within this state.”

“In Oregon, the writ of habeas corpus is intended to allow a detained person the opportunity to inquire into the legality of that detention, with a view to an order releasing the petitioner.” *Bartz v. State*, 314 Or 353, 365, 839 P2d 217 (1992). The writ of habeas corpus – which is “guaranteed by the Oregon Constitution” and has been statutorily available “from the beginning of statehood,” *Penrod/Brown v. Cupp*, 283 Or 21, 24, 581 P2d 934 (1978) – was initially a “collateral attack” on the judgment of conviction. *Anderson ex rel. Poe v. Gladden*, 205 Or 538, 544, 288 P2d 823 (1955). *E.g., Ex parte Stacey*, 45 Or 85, 87, 75 P 1060 (1904) (holding that “on a writ of habeas corpus the only question to be considered is whether or not the judgment, or the commitment issued thereunder, is void”).

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Oregon courts later expanded the scope of habeas corpus – based on a “review of the relationship between the writ of habeas corpus as codified in ORS 34.310-34.730, the Post-Conviction Hearing Act, ORS 138.510-138.680, and the Oregon Constitution” – to include allegations of unconstitutional treatment while an inmate is incarcerated. *Penrod/Brown*, 283 Or at 23 (so noting).

Since its inception, the habeas corpus scheme has recognized a distinction between the named defendant and the source of the alleged constitutional violations. Claims regarding constitutional violations during the underlying trial were raised in habeas corpus, with the current warden as a named defendant and the alleged violations occurring by a trial court in a different county. *E.g.*, *Smallman v. Gladden*, 206 Or 262, 264-65, 291 P2d 749 (1956). This court recognized that disconnect in *Huffman v. Alexander*, 197 Or 283, 347-48, 253 P2d 289 (1953), noting the concern that the habeas corpus scheme “may impose heavy burdens upon the circuit court of Marion County, in which county the penitentiary is located,” yet will involve “extreme inconvenience * * * in securing in Marion County, the attendance, when necessary, of the officials of the convicting court.”

The named party in a habeas corpus proceeding is merely the person who can produce the body of the plaintiff before the court. The writ has historically been directed at “a person detaining another, commanding him to produce the body

of the person detained.” William S. Church, *A Treatise on the Writ of Habeas Corpus* § 87, 137 (2d ed 1893). The proper party was thus the person who has the power to “bring [the inmate] before the judge to explain and justify, if he could, the fact of imprisonment.” *Id.* § 88 at 140. See *White*, 209 Or at 64 (“When a convict is free to present himself before the appropriate court in Oregon, and, in effect, say ‘*habeo corpus*,’ there seems little common sense in directing a writ habeas corpus to some parole officer whose only authority to take physical custody of the parolee is dependent upon breach by the parolee of the conditions of his parole.”).

The historical context of habeas corpus suggests that the defendant, who can produce the plaintiff before the court, must be “within” Oregon. However, no matter how ORS 34.310 is construed, subsequently enacted interstate compacts demonstrate that an inmate convicted in Oregon but transferred to another state under the compacts is legally “within this state.”

B. The interstate corrections compacts, the WICC and the ICC, supplement the jurisdiction analysis of ORS 34.310.

As defendant notes, BOM at 3 n 1, two interstate compacts are at issue in this case, the WICC and the ICC.

In 1934, Congress granted authority to the 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 * * *.” Pub L

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293, ch 406, 48 Stat 909 (1934). Oregon enacted the WICC in 1959. *See* Or Laws 1959, ch 290. The WICC later became the model for the similarly worded ICC, which Oregon enacted in 1979. *See* Or Laws 1979, ch 486; Tape Recording, House Committee on Judiciary, HB 2070, Feb 2, 1979, Tape 6, Side 1 (statement of Dennis Bromka, Legal Counsel to Judiciary Committee) (identifying the ICC as a “uniform law” with essentially the same wording as the WICC).²

Both the WICC and the ICC contain substantially identical provisions that implicate the jurisdiction of the habeas corpus trial court in this case. Under both statutes, a state that has custody of an Oregon inmate under a compact acts “solely as agent” of Oregon. ORS 421.284, WICC Art IV, § a; ORS 421.245, ICC Art IV, § 1. Under both compacts, a transferred inmate remains “at all times * * * subject to the jurisdiction of” Oregon and “may at any time be removed [from the receiving state] for transfer to a prison or other institution within” Oregon or any other state with which Oregon has a contractual right to house inmates. ORS 421.284, WICC Art IV, § c; ORS 421.145, ICC Art IV, § 3. Both compacts

² Though the compacts are nearly identical, ORS 421.254 provides, “Whenever any state that is a party to the [WICC] becomes a party to the [ICC], this state will perform its duty toward that state under the [ICC] instead of under the [WICC] in so far as the two compacts conflict.” Because the relevant portions of the compacts are substantially identical in this case, there is no conflict and any distinction between the WICC and ICC does not affect the outcome of this case.

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 421.284, WICC Art IV, § e; ORS 421.245, ICC Art IV, § 5. A transferred inmate also retains the right “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 421.284, WICC Art IV, § h; ORS 421.245, ICC Art IV, § 8.

Taken together, the provisions of the interstate compacts establish that an inmate who has been transferred to another state under a compact is still legally – or constructively – imprisoned within Oregon. Here, under the WICC, Colorado is serving as Oregon’s “agent,” which means it is acting on Oregon’s behalf and subject to Oregon’s ultimate control. *See State v. Sines*, 359 Or 41, 55, ___ P3d ___ (2016) (“Common-law agency exists where a principal ‘manifests assent to another person’ – the agent – that the agent ‘shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.’”) (quoting *Restatement (Third) of Agency* § 1.01 (2006)). Indeed, this court has already taken that view, in *Barrett v. Belleque*, 344 Or 91, 176 P3d 1272 (2008).

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In *Barrett*, the plaintiff filed a petition for a writ of habeas corpus, on the basis that he was entitled to a hearing before being removed from the “general prison population” and placed in “the prison’s intensive management unit (IMU).” The trial court dismissed the petition, and the plaintiff appealed. While the case was on appeal, the state moved to dismiss the appeal as moot because the plaintiff had been transferred to a prison in Oklahoma pursuant to the ICC. *Id.*

This court held that the appeal was not moot. As a preliminary matter, this court described the framework of the ICC:

“Under the ICC, transferred inmates remain under the jurisdiction of the sending state and may be returned to the sending state. An inmate still enjoys the legal rights that the inmate would have had in the sending state. In other words, an inmate’s rights do not change as a result of the transfer out of state.”

Id. at 98 (footnotes omitted). Notably, in support of each sentence describing the terms of the ICC, this court cited in a footnote the text of the ICC. *See id.* at 98 nn 4-6. The quoted text of the ICC is identical to the text of a provision in the WICC. *Compare* ORS 421.245, Art IV(3) (cited in footnote 4) *with* ORS 421.284, Art IV(c); ORS 421.245, Art IV(5) (cited in footnote 5) *with* ORS 421.284, Art IV(e); ORS 421.245, Art IV(8) (cited in footnote 6) *with* ORS 421.284, Art IV(h). Thus, the WICC should be interpreted the same as the ICC, in that (1) transferred inmates remain under the jurisdiction of the sending state, (2) a transferred inmate retains

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the legal rights he would have had in the sending state, and (3) an inmate's rights do not change if he is transferred to a different state.

This court noted that the plaintiff in *Barrett* was no longer in the physical custody of Oregon, but nevertheless held that the appeal was not moot, expressly rejecting the defendant's argument that the appeal was moot because the plaintiff was not "within this state" under ORS 34.310:

"The terms of the ICC, however, supplement the ordinary habeas jurisdictional analysis. Petitioner committed his crimes in Oregon, was convicted and sentenced in Oregon, and is serving an 'Oregon' sentence. Under the ICC, petitioner cannot be deprived of any legal rights that he would have enjoyed in Oregon. *See* ORS 421.245, Art IV(5) (so stating). Although Oregon officials contend that they have not instructed Oklahoma on the details of how petitioner must be treated, petitioner's declaration and documents indicate that Oklahoma officials, at least in part, will seek agreement from Oregon officials in determining petitioner's treatment in the Oklahoma prison system. Petitioner argues that Oregon prison officials' decision to place him in IMU still has consequences for his treatment in Oklahoma prison, and the evidence before us, while not conclusive, tends to support that claim. Based on the record before us, we cannot conclude that this dispute is moot. We therefore address petitioner's claims to the extent that they may affect his current incarceration in Oklahoma."

Id. at 100-01.³ Thus, even though the plaintiff was no longer in the physical custody of Oregon, this court held that the plaintiff's claims were still valid, insofar as they implicated actions that could be taken by Oregon officials.

To be sure, *Barrett* does not address the specific issue presented here, whether an inmate incarcerated in another state under the WICC or ICC can initiate a habeas corpus action in Oregon courts. Nevertheless, this court has also noted that the Oregon legislature made a receiving state – here, Colorado – the agent of the sending state – here, Oregon – under the WICC and the ICC. Given that

³ Other states have agreed with this court's analysis in *Barrett*. See *Hundley v. Hobbs*, 2015 Ark 70, 6, 456 SW3d 755 (Ark 2015) (holding that, “even though [the plaintiff] is confined in New Jersey under the ICC, for the purposes of our habeas statutes, [the defendant], as the Director of the [Arkansas Department of Correction], is the person in whose custody [the plaintiff] is detained, as he determines where [the plaintiff] is physically incarcerated”); *Boatwright v. Angelone*, 109 Nev 318, 321, 849 P2d 274 (Nev 1993) (holding that, where the plaintiff is incarcerated in Arizona under the WICC pursuant to a Nevada judgment of conviction, the plaintiff “is being held solely under the authority of a Nevada judgment of conviction,” and therefore he “remains in the custody of the respondent director of the department of prisons”).

Further, though the case is not directly on point with the issue here, Colorado has addressed the interstate compacts and held that the plaintiff – who was convicted in Wisconsin, transferred under the ICC to Colorado, and filed a petition for habeas corpus in Colorado – “is still subject to the jurisdiction of the Wisconsin authorities, * * * and a legal avenue therefore exists for him to be returned to the sending state.” *Brant v. Fielder*, 883 P2d 17, 21 (Colo 1994). The availability of that legal remedy “precludes the granting of habeas corpus relief by Colorado courts.” *Id.*

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understanding, the legal analysis in *Barrett* compels the conclusion that plaintiff's case is proper in Oregon.

Under *Barrett*, the provisions of the WICC and ICC "supplement" the jurisdiction of Oregon's habeas corpus statutes. Oregon has the legal custody of plaintiff, and Colorado is merely acting as Oregon's agent. Whether plaintiff is physically present in Oregon or another state does not change that he is within the state for purposes of ORS 34.310. Therefore, the analysis in this case reduces to one question: could plaintiff have initiated the present case while he was incarcerated in Oregon? Under the interstate compacts, an inmate retains all the legal rights he had in Oregon, including the right "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 421.284, WICC Art IV, § h; ORS 421.245, ICC Art IV, § 8. In other words, if plaintiff could have participated in a habeas corpus proceeding while incarcerated in Oregon, the WICC and the ICC allow him to do the same even if he is transferred to custody in a different state.

Here, defendant does not dispute that plaintiff could have pursued constitutional claims, such as unnecessary rigor or cruel and unusual punishment, while he was incarcerated in Oregon. Under the interstate compacts, the analysis

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ends at that point: because plaintiff could have raised a habeas corpus petition while incarcerated in Oregon, he can do so still while incarcerated in Colorado under the WICC.

II. Plaintiff alleged valid claims for habeas corpus relief.

This court has described “two kinds of cases” that fall within the scope of the writ of habeas corpus:

“(1) When a petition makes allegations which, if true, show that the prisoner, though validly in custody, is subjected to a further ‘imprisonment or restraint’ of his person that would be unlawful if not justified to the court, and (2) when a petition alleges other deprivations of a prisoner’s legal rights of a kind which, if true, would require immediate judicial scrutiny, if it also appears to the court that no other timely remedy is available to the prisoner.”

Penrod/Brown, 283 Or at 28.

Those requirements are codified in ORS 34.362, which provides, in relevant part:

“If the person is imprisoned or restrained by virtue of any order, judgment or process specified in ORS 34.330 and the person challenges the conditions of confinement or complains of a deprivation of rights while confined, the petition shall:

“* * * * *

“(2) State 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.”

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To state a cognizable claim for habeas corpus relief under the Eighth Amendment, “a prisoner must allege that the prisoner has a serious medical need that has not been treated in a timely and proper manner and that prison officials have been deliberately indifferent to the prisoner’s serious medical needs.” *Billings v. Gates*, 323 Or at 167, 180-181, 916 P2d 291 (1996) (stating the standard under Article I, section 16, of the Oregon Constitution, but adopting the Eighth Amendment standard stated in *Estelle v. Gamble*, 429 US 97, 106, 97 S Ct 285, 50 L Ed 2d 251 (1976)).⁴

As a preliminary matter, defendant does not appear to dispute the Court of Appeals holding that the flinging of feces and urine at plaintiff constitutes “a serious, immediate, and ongoing health hazard, and, thus, a constitutional deprivation requiring immediate judicial attention.” *Taylor*, 274 Or App at 481 (citing *McCray v. Burrell*, 516 F2d 357, 369 (4th Cir 1975)), for the proposition that a “prisoner being placed in an excrement-encrusted cell constitutes [an] Eighth Amendment violation”).

Instead, defendant’s arguments before this court are principally (1) that a violation by Colorado officials is not cognizable in a habeas corpus case in

⁴ As the Court of Appeals noted, plaintiff raised claims “under the Eighth and Fifth Amendments to the United States Constitution and Article I, sections 13 and 10, of the Oregon Constitution.” *Taylor*, 274 Or App at 479.

Oregon, and (2) that plaintiff failed to allege that Oregon officials violated plaintiff's rights. Neither argument, however, withstands scrutiny or defeats plaintiff's argument.

A. Plaintiff alleged a sufficient violation of the Oregon Constitution.

Defendant argues that plaintiff's allegations refer to his confinement in Colorado, and that his claim under the Oregon Constitution fails because the Oregon Constitution "has no direct application in Colorado." BOM at 18. Defendant's argument relies on a misstatement of plaintiff's actual allegations.

Plaintiff alleged violations in Oregon, namely, Oregon prison officials being aware of his unconstitutional conditions of confinement and failing to remedy the situation by, among other things, transferring him to a state that will not violate his constitutional rights. Plaintiff's specific claim under Article I, section 13, of the Oregon Constitution,⁵ is as follows:

"Plaintiff asserts ODOC's refusal to transfer him from the Colorado State prison system and requiring him to live in a dangerous environment amounts to Unnecessary Rigor under Art. I, § 13 of the Oregon Constitution. ODOC is aware of the danger and harmful living conditions in which plaintiff is required to live and ODOC has other alternative solutions for plaintiff's confinement that are not dangerous or harmful."

⁵ Article I, section 13, provides, "No person arrested, or confined in jail, shall be treated with unnecessary rigor."

App Br at ER 19-20. Defendant reads plaintiff's allegations to assert that "Colorado officials are violating the ICC by failing to afford him the protections to which he claims he *would* be entitled *if* he were a prisoner in Oregon." BOM at 21 (emphasis in original). However, as excerpted above, Colorado officials are not involved in plaintiff's claim. Instead, plaintiff only alleges that Oregon's director of ODOC (1) "is aware of the danger and harmful living conditions in which plaintiff is required to live," (2) "has other alternative solutions for plaintiff's confinement that are not dangerous or harmful," and (3) "refus[es] to transfer him from the Colorado State prison system and require[es] him to live in a dangerous environment." App Br at ER-19-20.

Plaintiff's allegation is in all material respects similar to that at issue in *Billings v. Gates*, 323 Or at 182, in which this court held that the plaintiff sufficiently alleged a constitutional violation where prison officials (1) knew the plaintiff needed arch supports for his feet, (2) knew the plaintiff could not afford them, and (3) refused to provide him with arch supports. Under *Billings*, plaintiff sufficiently alleged a constitutional violation by Oregon officials refusing to act. Therefore, that Colorado officials might also be violating plaintiff's constitutional rights does not deprive Oregon courts of jurisdiction over his claims.

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When plaintiff's allegations are properly construed, they encompass a violation of the Oregon Constitution. Plaintiff does not necessarily dispute defendant's argument that the "Oregon Bill of Rights protects citizens from *Oregon* state action." BOM at 18 (emphasis in original). Defendant's argument, however, focuses solely on a legal straw man – specifically, refuting the argument that Colorado officials are subject to the Oregon Constitution. Defendant's argument ignores the substance of plaintiff's actual claims, which is generally that he has informed Oregon officials of his unconstitutional conditions of confinement and that Oregon officials have done nothing to remedy his situation.

Therefore, much of defendant's argument is beside the point. Under defendant's construction of Article IV, section 5, of the ICC,⁶ "plaintiff's conditions of confinement are governed by Colorado law," while "for other matters, such as sentence calculation and parole eligibility, Oregon rather than Colorado law applies." Even under defendant's construction, defendant cannot

⁶ That section provides as follows:

"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."

avoid responsibility for being deliberately indifferent to an inmate incarcerated pursuant to an Oregon judgment. Colorado officials act as Oregon's agents in imprisoning plaintiff. Defendant retains legal authority over plaintiff's imprisonment and must accept the legal responsibility that comes with that.

Plaintiff specifically alleged conduct by Oregon officials in ignoring the conditions of his confinement. Defendant does not argue that those allegations are insufficient or fail to state a claim for relief. The failure to do so should dispose of this case.

B. Plaintiff alleged a sufficient violation of the United States Constitution.

Defendant's argument regarding the federal constitution relies on the similar premise that the violation of plaintiff's constitutional rights is "due to Colorado's action, not Oregon's." BOM at 22. Again, defendant's argument ignores plaintiff's allegations of the involvement of Oregon officials being informed of plaintiff's living conditions, having the ability to do something to remedy them, and doing nothing. Plaintiff's specific allegation under the federal constitution is as follows:

"ODOC officials are well aware that plaintiff is being forced to live in a dangerous and atypically stressful environment. ODOC officials have continuously been advised of plaintiff's living conditions, but they continue to be deliberately indifferent to plaintiff's pain, suffering, and the threat of harm under which plaintiff lives every moment of every day. Such indifference, and requiring

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plaintiff to remain in this dangerous environment, equates to cruel and unusual punishment under the 8th Amendment of the United States Constitution.”

App Br at ER 19-20. *See also* App Br at ER-20 (plaintiff’s fourth claim for habeas corpus relief alleged “ODOC’s deliberate indifference to plaintiff’s dangerous and harmful living situation amounts to a violation of plaintiff’s due process rights under the 5th Amendment to the United States Constitution”). Plaintiff’s claim is against Oregon officials, not Colorado officials. Therefore, this court does not need to decide whether an Oregon habeas corpus proceeding can challenge actions by officials in other states.

Even if plaintiff had alleged constitutional deprivations by Colorado officials, ORS 34.310 would still be the proper vehicle to raise those arguments. Defendant cites no authority for the proposition that the named defendant in a habeas corpus proceeding must be the entity that is directly responsible for depriving the person of his constitutional rights. Instead, such a construction would be contrary to the statutory scheme.

ORS 34.362(1) provides that, when an inmate pursues a habeas corpus claim challenging “the conditions of confinement” or “a deprivation of rights while confined,” the petition must comply with the requirements of ORS 34.360, which sets forth the contents of a petition that challenges the authority of confinement.

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ORS 34.360(1), in turn, requires a petition to state, *inter alia*, the “officer or person by whom the party is imprisoned or restrained, naming both parties if their names are known, or describing them if not known.” *See also* ORS 34.430(1) (providing that a petition is sufficient and shall not be dismissed for a defect of form, “[i]f the officer or person having the custody of the person imprisoned or restrained is designated either by name of office”).

In other words, the habeas corpus statutory scheme contains two independent requirements: (1) that the petition name the party who is imprisoning or restraining the plaintiff, and (2) that the petition describe the unconstitutional conditions. There is no requirement, either explicit or necessarily implied by the statutory text, that the named defendant is the party who is responsible for the unconstitutional conditions. For example, in *Billings*, the named defendant was the superintendent of the penitentiary, yet the only alleged constitutional violations involved a prison doctor and “prison officials.” To be sure, the doctor and officials may have been acting as agents of the superintendent. However, that is no different than Colorado acting as Oregon’s “agent” under the WICC and ICC. ORS 421.284, WICC Art IV, § a; ORS 421.245, ICC Art IV, § 1.

Plaintiff alleges that Oregon officials are violating his constitutional rights, and defendant has not argued that plaintiff's actual claims insufficiently allege a habeas corpus claim.

III. This court should reverse and remand, regardless of whether it agrees with plaintiff's argument.

Even if this court disagrees with plaintiff's argument, this court should still reverse and remand to the trial court for further proceedings. In this case, the trial court entered a judgment with the caption, "General Judgment of Dismissal Without Prejudice, Order Withdrawing Show Cause and Money Award." App Br at ER-22. However, the tagline at the end of the judgment reads, "[T]he Petition for Writ of Habeas Corpus filed herein is DISMISSED WITH PREJUDICE." App Br at ER-23.

ORS 34.370 describes what a trial court should do upon receiving a petition for writ of habeas corpus and provides, in relevant part, as follows:

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

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“(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.”

ORS 34.370. The statute also requires a circuit court to enter a judgment without prejudice when it dismisses a petition for habeas corpus prior to issuance of a writ: “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.” ORS 34.370(3). Requiring a court to dismiss a judgment without prejudice is consistent with the purpose of the statute, which is to allow a plaintiff to remedy any deficiencies in the petition. *See Troxel v. Maass*, 120 Or App 397, 399 n 1, 853 P2d 294 (1993) (noting that “[a] judgment dismissing a petition need not be exhaustive,” but “it should indicate the petition’s shortcomings so that they can be remedied”).

In this case, the trial court dismissed plaintiff’s petition for a writ of habeas corpus prior to the issuance of the writ. In such circumstances, the plain text of ORS 34.370(3) unambiguously required the court to enter a judgment without prejudice. The caption of the document in this case indicates the judgment is dismissed without prejudice, but the tagline states the opposite. It is unclear whether a subsequent court would conclude that the judgment was dismissed with or without prejudice. *See Dawson/Fletcher v. Board of Parole*, 346 Or 643, 656,

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217 P3d 1055 (2009) (declining to determine the effect of an order based solely on the tagline, and instead noting that “we must determine the legal effect or legal substance of an order by examining it in its entirety, not by focusing solely on one or more of its parts, such as the order’s caption or a statement of disposition”).

The Court of Appeals, however, treats the judgment in this case as dismissing with prejudice. *Taylor*, 256 Or App at 851 n 1 (so noting, based on the proposition that the court treats the “body of judgment as controlling over conflicting caption”).

Even if this court disagrees with plaintiff’s argument, this court should reverse the judgment and remand to the trial court, so it can enter a judgment that clearly shows plaintiff’s petition was dismissed without prejudice. Therefore, to the extent this court finds deficiencies in plaintiff’s pleadings – for example, an insufficient allegation regarding actions by Oregon officials – plaintiff can attempt to remedy them in a subsequent habeas corpus pleading.

CONCLUSION

For all the reasons explained above, this court should affirm the judgment of the Court of Appeals and reverse the order of the trial court dismissing plaintiff's petition for a writ of habeas corpus.

DATED April 25, 2016

Respectfully Submitted,

s/ Jed Peterson

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

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I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) that the word count of this brief (as described in ORAP 5.05(2)(a)) is 7,136 words.

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I certify that the size of the type in this brief is not smaller than 14 point font for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Opening Brief to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Opening Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Jona J. Maukonen #043540, attorney for Defendant-Respondent.

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