

# Oregon Habeas Cognizable to Challenge Confinement in Florida and Colorado Under Interstate Compact

**I**N A PAIR OF RULINGS, THE OREGON COURT of Appeals held that prisoners incarcerated in other states under the Interstate Corrections Compact (ICC) may challenge the conditions of their confinement in habeas corpus actions against Oregon prison officials.

In 1979, the Oregon legislature voted to codify the ICC under state law. Article IV § 5 specifies that prisoners transferred to other states retain all rights that they would have had if incarcerated in Oregon. Under § 8, prisoners also retain their 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.”

Oregon prisoner Jacob Henry Barrett has been transferred to several different states over a multi-year period. [See: *PLN*, Sept 2014, p.36]. Most recently he was incarcerated in Florida under the ICC.

The Florida DOC’s grooming policy prohibits beards and long hair, while Oregon does not have a similar grooming policy. Barrett claimed that while in Florida he was “forcibly shaved once a week or more ‘under the threat of adverse administrative action, as well as physical abuse.’”

He filed a petition for a writ of habeas corpus against the director of the Oregon Department of Corrections (ODOC) in Oregon circuit court. Barrett claimed that he was a practitioner of a religion called Glefiosa, or Celtic shamanism, which requires that he “maintain a beard and a ‘Celtic tonsure’ hairstyle. The hairstyle involves shaving most of the head except for the back, where the hair is grown long.” He alleged that Florida’s grooming policy prohibited him from doing so in violation of his right to the free exercise of his religion under the Oregon Constitution and the federal Religious Land Use and Institutionalized Persons Act (RLUIPA).

ODOC Director Colette S. Peters moved to dismiss, arguing that Barrett could not bring an Oregon habeas corpus action to challenge his conditions of confinement in Florida. She also alleged that “she was not a ‘proper defendant’ because she did not have physical custody of plaintiff, and because she was ‘not responsible

for the alleged actions of Florida.’” The trial court dismissed Barrett’s petition.

The Oregon Court of Appeals reversed on October 7, 2015. The appellate court first examined whether “plaintiff’s transfer to Florida deprived him of the right to be incarcerated under conditions that meet Oregon Constitutional standards.” Given the unequivocal language of Article IV, § 5 of the ICC, the Court of Appeals found “the easy answer” to that question was no. “That means that, if the Oregon Constitution affords an Oregon inmate the right to certain conditions of confinement, then the inmate does not lose those rights by virtue of a transfer to a state that does not recognize the same rights,” the Court concluded. “To hold otherwise would, in effect, convert the ICC into a mechanism for subverting the requirements of our own constitution, enabling Oregon officials to transfer Oregon inmates out of state to avoid complying with the legal standards for confinement set by the Oregon Constitution.”

In so holding, the appellate court was unpersuaded by the ODOC Director’s reliance on cases which held that ICC prisoners are not subject to the rules and disciplinary authority of the sending state. “Those cases all stand for the same general proposition that the ICC does not obligate a receiving state to provide a transferred inmate the exact same treatment that the inmate would receive in the sending state and, that the ICC does not entitle a transferred inmate to the application of the sending state’s institutional policies,” the Court of Appeals wrote. “However, the issue in this case is not whether the ICC required Florida to adhere to Oregon’s policies or to comply with Oregon’s Constitutional standards; the issue is whether Plaintiff lost the right to be incarcerated under conditions that comply with Oregon constitutional standards, by virtue of his transfer to Florida. The cases cited by the director have no bearing on that point.” Yet Article IV, § 5 of the ICC clearly provides that prisoners do not lose those rights.

The Court next followed *Barrett v. Belleque*, 344 Ore. 91, 176 P.3d 1272 (Or. 2008) (*Barrett I*) – an Oregon Supreme Court decision that allowed Barrett to (unsuccessfully) challenge Oklahoma

conditions of confinement in an Oregon habeas corpus action – and concluded that under the ICC, Barrett may seek habeas corpus relief within Oregon to challenge his Florida confinement due to conditions that violate Oregon constitutional standards. “Under *Barrett*, one of those legal rights that an Oregon inmate retains is the right to petition for a writ of habeas corpus in Oregon,” the appellate court held.

Finally, the Court of Appeals concluded that the ODOC director was a proper habeas corpus defendant. Under Oregon statutes, the proper defendant is the “officer or person by whom the party is imprisoned or restrained.”

“Plaintiff has sufficiently alleged facts showing that the director is ‘the officer or person by whom’ he is restrained,” the Court held. “Plaintiff has alleged that, although housed in Florida pursuant to the ICC, he remains in ODOC custody. He has further alleged that the director is the Oregon official ‘responsible in every particular for the enforcement of the ICC.’”

Peters did not dispute that she had the authority to remove Barrett from Florida. Rather, she argued she was not a proper defendant because: “(1) she is not plaintiff’s physical custodian; and (2) she does not control plaintiff’s day-to-day conditions of confinement in Florida.” The appellate court was not persuaded by either argument.

Where a prisoner “is in the legal custody of Oregon, but in the physical custody of another state,” the prison official “by whom the party is imprisoned or restrained” necessarily “applies to more than one person: the plaintiff’s legal custodian and the plaintiff’s physical custodian.” Additionally, under both habeas corpus common law and Oregon statutes, “a defendant’s lack of physical custody of a plaintiff does not defeat a petition for a writ of habeas corpus if the circumstances indicate that the defendant has legal or constructive custody of the plaintiff,” the Court of Appeals explained.

In ultimately concluding that Barrett had “properly directed the petition at the [ODOC] director,” the Court noted that in *Hundley v. Hobbs*, 456 S.W.3d 755 (Ark. 2015), the Arkansas Supreme Court relied heavily on *Barrett I* to reach the same con-

clusion concerning an Arkansas prisoner imprisoned in New Jersey.

The appellate court also rejected Peters' lack of personal involvement argument. "Plaintiff is seeking to be removed from confinement that is unconstitutional, either because the conditions are unconstitutional or because the confinement itself is unconstitutional," the Court observed. "A person need not have personally participated in the alleged unconstitutional conditions or circumstances from which the plaintiff seeks to be relieved in order to have the necessary authority to comply with any writ of habeas corpus that might issue." See: *Barrett v. Peters*, 274 Ore.App. 237, 360 P.3d 638 (Or. Ct. App. 2015) (*Barrett II*).

Two weeks after the ruling in Barrett's case, the Oregon Court of Appeals held that a state prisoner confined in Colorado under the Western Interstate Corrections Compact (WICC) likewise could challenge his conditions of confinement in an Oregon habeas action.

In the late 1950s, western states created the WICC to allow interstate use of their prison systems. The Oregon legislature enacted the WICC in 1959 and it later became the model for the nationwide Interstate Corrections Compact.

Like the ICC, the WICC provides that "The fact of confinement in the 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." Both statutes also provide that transferred prisoners retain 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."

Marvin Lee Taylor was transferred from Oregon to Colorado under the WICC. While confined in Colorado, he filed a habeas corpus petition in an Oregon circuit court against ODOC Director Peters.

Taylor alleged that Colorado and Oregon prison officials were deliberately indifferent to other prisoners continuously throwing feces and urine into his cell, in violation of the Oregon and U.S. Constitutions. The trial court dismissed the action, concluding that habeas corpus was not proper because Peters did not have physical custody of Taylor or control over his conditions of confinement in Colorado; the court also held that Taylor had failed to

adequately allege a constitutional deprivation requiring immediate judicial attention.

The Oregon Court of Appeals reversed, finding its decision in *Barrett II* was controlling. Although Barrett was confined in Florida under the ICC and Taylor was incarcerated in Colorado under the WICC, the Court held that "the ICC and the WICC are, for all practical purposes, identical."

"Based on the identical nature of the ICC and the WICC," and consistent with *Barrett II*, the appellate court concluded "that (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."

The Court of Appeals further rejected Peters' argument that Taylor failed to adequately allege a constitutional deprivation requiring immediate judicial attention. "Plaintiff has adequately alleged that he is confined in an environment that subjects him to serious health hazards," the Court found. "Those allegations alone sufficiently allege a serious, immediate, and ongoing

health hazard, and, thus, a constitutional deprivation requiring immediate judicial attention."

Peters also argued for the first time on appeal that Taylor had failed to show that "no other timely remedy was practicably available." She asserted that Taylor could have filed a federal civil rights action under 42 U.S.C. § 1983.

While refusing to consider that newly-raised argument, the appellate court noted the Oregon Supreme Court's ruling in *Tarver v. Cupp*, 300 Ore. 154, 707 P.2d 572 (Or. 1985) "would appear to foreclose that argument." In *Tarver*, the Supreme Court concluded that ORS 34.362(2)'s requirement that a plaintiff show the unavailability of another "timely remedy" referred "solely 'to timely remedies available under Oregon law.' ... It does 'not mean remedies available in federal courts for failure of Oregon to live up to federal standards.'" See: *Taylor v. Peters*, 274 Ore. App. 477, 361 P.3d 54 (Or. Ct. App. 2015).

In February 2016, petitions for review were accepted by the Oregon Supreme Court for the appellate rulings in both *Barrett II* and *Taylor*. ■

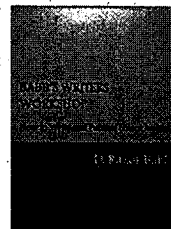
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