

NO. 19-7413

In the
Supreme Court of the United States

BRENNEN CLANCY,
Petitioner,
v.

FLORIDA DEPARTMENT OF CORRECTIONS;
INTERSTATE COMMISSION FOR ADULT OFFENDER
SUPERVISION; and NORTHAMPTON COUNTY CORRECTIONS,
Respondents,

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit**

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

Eric R. Elms, Esquire
Counsel of Record
FISHER RUSHMER, P.A.
Post Office Box 3753
390 N. Orange Ave., #2200 (32801)
Orlando, FL 32802
(407) 843-2111
Email: eelms@fisherlawfirm.com
*Attorneys for Appellee, Interstate
Commission for Adult Offender Supervision*

**COUNTER-STATEMENT OF THE
QUESTION PRESENTED FOR REVIEW**

Whether this Court should accept certiorari regarding the Eleventh Circuit unpublished decision finding Petitioner's Complaint failed to state a cause of action where it questioned the State of Florida's classification of Petitioner's three Pennsylvania DUI convictions as a felony when his probation status was transferred at his request from Pennsylvania to Florida, given that (1) the Eleventh Circuit decision does not conflict with any other decision on this issue and (2) this case does not involve an important unresolved federal question.

TABLE OF CONTENTS

	Page(s)
Counter-Statement of the Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Counter-Statement of the Case	1
Reasons for Denying the Petition	2
A. There is no conflict between the courts on the legal issues raised in Clancy's Petition, nor does Clancy's Petition raise any important unresolved federal question.....	2
Conclusion	9

TABLE OF AUTHORITIES

	Page(s)
CASES	
<u>Ashcroft v. Iqbal</u> , 556 U.S. 662 (2009).....	7
<u>Bell Atlantic Corp. v. Twombly</u> , 550 U.S. 544 (2007).....	7
<u>Braxton v. U.S.</u> , 500 U.S. 344 (1991).....	6
<u>Castaneira v. Potteiger</u> , 621 F. App'x 116 (3d Cir. 2015).....	3, 4, 5
<u>Clancy v. Florida Dep't of Corrections</u> , 782 F. App'x 779 (11 th Cir. 2019).....	1, 7
<u>Cuciak v. Ocean County Probation Office</u> , 2009 WL 1058064 (D.C.N.J.)	3
<u>Cuiler v. Adams</u> , 449 U.S. 433 (1981).....	3
<u>Doe v. Jindal</u> , 2015 WL 7300506 (E.D. La.).....	5
<u>Doe v. Pennsylvania Bd. of Probation</u> , 513 F.3d 95 (3d Cir. 2008)	2, 3, 4, 5, 6
<u>Hardcastle v. Sebelius</u> , 2010 WL 2598632 (D.C. Mass.)	3
<u>M.F. v. State of NY</u> , 640 F.3d 491 (2d Cir. 2011)	2, 3
<u>Penland v. Adger</u> , 2017 WL 2628008 (D.C.S.C.)	3, 4

<u>Skaggs v. Sanky,</u> 2012 WL 243329 (D.C. Neb.)	3
---	---

<u>Verrier v. Perrino,</u> 2015 WL 7890091 (M.D. Fla.)	3, 4
---	------

STATUTES

Florida Statute §948.08	8
42 U.S.C. §1983	4
U.S. Supreme Court Rule 10, 28 U.S.C.A.	5

OTHER AUTHORITIES

Civil Rights Act of 1964	5
Privacy Act of 1974	5

COUNTER-STATEMENT OF THE CASE

Petitioner Brennen Clancy was convicted of three DUIs in the State of Pennsylvania. Under Pennsylvania law, the three DUI convictions were classified as a misdemeanor. Clancy decided to move to Florida. He was still on probation for his convictions. The State of Florida in conjunction with his probation transfer reclassified his three DUI convictions as a felony. This is in accordance with Florida law under which three DUI convictions are classified a felony. Clancy then filed the instant suit against the Florida Department of Corrections, the Northampton Pennsylvania County Corrections Office, and Respondent the Interstate Commission for Adult Offender Supervision (ICAOS). ICAOS is an interstate compact authorized by Congress. It permits the transfer of supervision of parolees and probationers from one state to another. Clancy eventually proceeded forward on a Third Amended Complaint. The District Court dismissed Clancy's Third Amended Complaint for failing to state a cause of action. The District Court entered a final dismissal of Clancy's claims concluding any further amendment of the Complaint would be an exercise in futility. Clancy then appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit Court of Appeals upheld the dismissal of Clancy's Complaint through an unpublished decision reported at Clancy v. Florida Dep't of Corrections, 782 F. App'x 779 (11th Cir. 2019). The decision is attached as Appendix A to Clancy's Petition for a Writ of Certiorari.

After the Eleventh Circuit entered its Opinion, Clancy filed a Petition for Rehearing and a Petition for Rehearing En Banc. These were denied by the Eleventh Circuit. This is reflected in Appendix C to Clancy's current Petition. Clancy then filed his Petition for a Writ of Certiorari to this Court.



REASONS FOR DENYING THE PETITION

- A. There is no conflict between the courts on the legal issues raised in Clancy's Petition, nor does Clancy's Petition raise any important unresolved federal question.**

Clancy's claims are his constitutional and statutory rights were violated when the State of Florida reclassified his three misdemeanor DUI convictions under Pennsylvania law as a felony under Florida law. This was in conjunction with Clancy voluntarily moving the supervision of his probation from Pennsylvania to Florida. The transfer of Clancy's supervision of parole/probation was made under the Interstate Commission for Adult Offender Supervision (ICAOS) which is an interstate compact. The compact is an interstate agreement permitting the transfer and supervision of parolees and probationers from one state to another. M.F. v. State of NY, 640 F.3d 491, 492 (2d Cir. 2011); Doe v. Pennsylvania Bd. of Probation, 513 F.3d 95, 104-105 (3d Cir. 2008). The compact is a formal agreement between its member states to promote public safety by systematically controlling the interstate movement of adult offenders on parole or

probation. Doe, supra at 103-107; Penland v. Adger, 2017 WL 2628008 (D.C.S.C.). The compact provides a means to aid states in crime prevention and is an alternative to extradition, which is the reason why congressional consent was required to its enactment. Cuiler v. Adams, 449 U.S. 433, 440 (1981). It is not, however, a vehicle to provide procedural rights for probationers and parolees. Doe v. Pennsylvania Bd. of Probation, 513 F.3d 95, 104-105 (3d Cir. 2008). The act creates rights for the states who are signatories to it, and it creates no rights in parolees and probationers. Doe v. Pennsylvania Bd. of Probation, 513 F.3d 95, 104-107 (3d Cir. 2008); Castaneira v. Potteiger, 621 F. App'x 116, 118-119 (3d Cir. 2015). Courts have unanimously held the interstate compact does not create a private right of action, either express or implied, for parolees and probationers. See M.F. v. State of NY, 640 F.3d 491 (2d Cir. 2011); Doe v. Pennsylvania Bd. of Probation, 513 F.3d 95 (3d Cir. 2008); Castaneira v. Potteiger, 621 F. App'x 116 (3d Cir. 2015); Penland v. Adger, 2017 WL 2628008 (D.C.S.C.); Verrier v. Perrino, 2015 WL 7890091 (M.D. Fla.); Skaggs v. Sanky, 2012 WL 243329 (D.C. Neb.); Hardcastle v. Sebelius, 2010 WL 2598632 (D.C. Mass.); Cuciak v. Ocean County Probation Office, 2009 WL 1058064 (D.C.N.J.). Because courts have unanimously held the interstate compact act does not create a private cause of action, there is no conflict in decisions which would be a basis to grant the Petition for a Writ of Certiorari.

Further, Clancy has no other legal rights that provide a cause of action based on what occurred in this matter. Clancy asserted a claim for violation of 42 U.S.C. §1983. Courts have uniformly held, however, because no private cause of action exists under the interstate compact, an alleged violation of the act cannot be used as a basis for pursuing a §1983 claim. See Doe v. Pennsylvania Bd. of Probation, 513 F.3d 95, 105 (3d Cir. 2008); Castaneira v. Potteiger, 621 F. App'x 116, 119 (3d Cir. 2015); Penland v. Adger, 2017 WL 2628008, *4 (D.C.S.C.); Verrier v. Perrino, 2015 WL 7890091, *2 (M.D. Fla.). Because courts have uniformly found there to be no §1983 cause of action in relationship to the interstate compact, there is no conflict of decision on this issue which would support review of the Eleventh Circuit decision.

The Eleventh Circuit decision also found no violation of any constitutional rights being alleged in Clancy's Complaint. The interstate compact act requires the receiving state to apply the same procedures and standards it applies to its own probationers and parolees. Doe v. Pennsylvania Bd. of Probation, 513 F.3d 95, 105 (3d Cir. 2008). The Eleventh Circuit Opinion recognizes the State of Florida treated Clancy the same way it treats its own citizens who have been convicted of three DUI defenses, classifying such convictions as a felony. There is no conflict in the decisional case law. Courts have consistently and uniformly held a probationer in the status of Clancy has no claim for violation of equal protection or

due process rights. Castaneira v. Potteiger, 621 F. App'x 116, 118-119 (3d Cir. 2015); Doe v. Pennsylvania Bd. of Probation, 513 F.3d 95, 105 (3d Cir. 2008); Doe v. Jindal, 2015 WL 7300506, *7-*8 (E.D. La.). Because Clancy was treated by the State of Florida in the same way it treats its own citizens who have three DUI convictions, no constitutional violation has occurred. Further, there is no conflict in the case law on this issue since courts have uniformly found no constitutional violation in a case like this.

The Eleventh Circuit also found Clancy's Complaint did not state a cause of action for violation of the constitutional right to travel. The court concluded this right can be lawfully abridged by the condition of a criminal sentence, including probation. There is no contrary decision on this issue, and, therefore, Clancy has not shown a conflict in decisions which would support review by this Court.

The Eleventh Circuit also found Clancy's Complaint failed to state a cause of action under the Civil Rights Act of 1964, federal sentencing and probation requirements, and the Privacy Act of 1974. The court properly concluded no cause of action is stated under these statutes. Further, there is no conflict in the case law which would support this Court addressing these claims.

In U.S. Supreme Court Rule 10, 28 U.S.C.A. outlining the considerations governing review on certiorari, said rule makes clear this Court should hear significant disputes that involve conflicts in decisions. The principal purpose for

which this Court uses certiorari jurisdiction is to resolve conflicts among the United States Courts of Appeals and state courts concerning the meaning and provisions of federal law. Braxton v. U.S., 500 U.S. 344, 347 (1991). Clancy identifies no actual conflicting authority with the Eleventh Circuit Opinion. In his Petition for a Writ of Certiorari, Clancy cites three decisions claimed to be in conflict with the Eleventh Circuit Opinion. These cases do not demonstrate a conflict, but rather demonstrate the correctness of the Eleventh Circuit decision. In Doe v. Pennsylvania Bd. of Probation, 513 F.3d 95 (3d Cir. 2008), the court held to protect the constitutional equal rights of probationers and parolees, a receiving state is required to treat transferee parolees/probationers the same as it treats its own citizens. The court in that case found a constitutional violation because the State of Pennsylvania imposed upon transferee parolees/probationers conditions and terms not imposed upon parolees/probationers in the State of Pennsylvania. In the instant case, the State of Florida treated Petitioner exactly as it treats its own citizens. A citizen of Florida who has been convicted of three DUI offenses has committed a felony. In this matter, the State of Florida merely treated Clancy like it treats its own citizens when it classified his three DUI convictions as a felony. The Doe v. Pennsylvania Bd. of Probation, supra, decision merely requires states treat its citizen probationers the same as it treats transferee probationers. The Eleventh Circuit Opinion cites Doe v. Pennsylvania Bd. of Probation, supra, in

concluding Clancy was properly treated from a constitutional perspective. See Clancy v. Florida Dep't of Corrections, 782 F. App'x 779, 782, fn 2 (11th Cir. 2019).

The other two decisions cited by Clancy are cases which just simply set forth the standard for determining if a cause of action has been alleged in a complaint. The Eleventh Circuit's decision to dismiss Clancy's claims is in compliance with the approach of these decisions. See Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). There is no conflict between the Eleventh Circuit Opinion and this Court's prior guidance on how a court should determine if a complaint states a cause of action. The Eleventh Circuit Opinion follows this Court's prior precedent.

The Eleventh Circuit's decision also does not present an important unresolved federal question. The Eleventh Circuit merely applied well-established precedent relating to interpretation of the Interstate Commission for Adult Offender Supervision compact and related constitutional concepts. Simply put, the Eleventh Circuit decision found the act requires the State of Florida to treat an out of state parolee/probationer the same way it treats its citizen probationers/parolees. The court then concluded the State of Florida treated Clancy properly since he was treated like a Florida citizen convicted of three DUI offenses. This case does not

involve an important federal question. It only involves a proper application of well-established federal precedent.

Clancy's Petition asserts he should have been treated as if he was in Florida's pretrial intervention program. See Florida Statute §948.08. The obvious problem with this argument is Clancy came to the State of Florida having already been convicted of three DUI violations. He was not at the pretrial stage. He was already convicted. Thus, Florida's pretrial intervention program is simply inapplicable to this situation where Clancy was already convicted three times of DUI offenses.

Clancy's claims against the Interstate Commission on Adult Offender Supervision were also properly dismissed because the Complaint fails to state how the actions of ICAOS affected Clancy's rights. His Complaint specifically alleges it was the State of Florida that reclassified his convictions. His Petition for a Writ of Certiorari also specifically claims the State of Florida improperly classified his three DUI convictions as a felony. Clancy has not alleged or claimed ICAOS had anything to do with this decision by the State of Florida. Thus, ICAOS is not even a proper Defendant to this action, and Clancy's Complaint was, therefore, properly dismissed.¹

¹ Clancy sued the Florida Department of Corrections. He apparently, however, never properly served the Florida Department of Corrections. The only appearance they made in this proceeding was a Notice of Limited Appearance and Notice of Non-participation in Appeal Due to Lack of Service of Process in Lower Court Action

This case does not involve a situation where the Eleventh Circuit Opinion conflicts with any other decision. The Eleventh Circuit Opinion comports with existing law. Further, this case does not raise an important federal question. Accordingly, this Court should not grant the Petition for a Writ of Certiorari.

◆

CONCLUSION

For the reasons described herein, Respondent, the Interstate Commission for Adult Offender Supervision, opposes the Petition for a Writ of Certiorari.

Respectfully submitted this 24th day of February, 2020.

s/ Eric R. Elms
Eric R. Elms, Esquire
Counsel of Record
FISHER RUSHMER, P.A.
Post Office Box 3753
390 N. Orange Ave., #2200 (32801)
Orlando, FL 32802
(407) 843-2111
Email: eelms@fisherlawfirm.com
*Attorneys for Appellee, Interstate
Commission for Adult Offender Supervision*