

No. 08-35902

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**BRIAN P. CARR,**

Plaintiff-Appellant,

v.

**STATE OF OREGON; CITY OF  
PORTLAND; LINDA MENG, in her  
official capacity as City Attorney of the  
City of Portland; HARDY MYERS, in  
his official capacity as Attorney General  
of the STATE OF OREGON ,**

Defendants-Appellees.

**D.C. No. 08-CV-00398-HA  
Portland, Oregon**

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**BRIEF OF APPELLEES CITY OF PORTLAND AND LINDA MENG**

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On Appeal from the United States District Court for the District of Oregon  
Hon. Ancer L. Haggerty, Chief Judge

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## **CORPORATE DISCLOSURE STATEMENT**

The City of Portland is a governmental party and is not required by FRAP 26.1 to file a corporate disclosure statement.

## TABLE OF CONTENTS

	<b>Page</b>
CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES.....	iii
I. STATEMENT OF JURISDICTION.....	1
II. ISSUES PRESENTED FOR REVIEW.....	1
III. STATEMENT OF THE CASE.....	1
IV. STATEMENT OF FACTS.....	3
V. SUMMARY OF ARGUMENT.....	4
VI. ARGUMENT.....	5
A. The District Court Properly Dismissed Plaintiff’s Complaint.....	5
1. Standard of Review.....	5
2. Plaintiff’s Claims Are Barred by <i>Rooker-Feldman</i> , Preclusion and/or the Statute of Limitations.....	5
B. The District Court Properly Denied Plaintiff Leave to Supplement His Complaint.....	10
1. Standard of Review.....	10
2. It Was Proper Not to Allow Addition of New Claims.....	10
VII. CONCLUSION.....	11

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Federal Cases</u>	
<i>Carmona v. Carmona</i> , 544 F.3d 988 (9th Cir. 2008) .....	6
<i>Carr v. Reed</i> , 2007 WL 3274914, *2 (W. D. Wash. Nov. 5, 2007).....	3, 4
<i>D.C. Court of Appeals v. Feldman</i> , 460 U.S. 462 (1983) .....	5
<i>Davis v. Harvey</i> , 789 F.2d 1332 (9th Cir. 1986) .....	9
<i>Henrichs v. Valley View Dev.</i> , 474 F.3d 609 (9th Cir. 2007) .....	6
<i>Holcombe v. Hosmer</i> , 477 F.3d 1094 (9th Cir. 2007) .....	6
<i>Knox v. Davis</i> , 260 F.3d 1009 (9th Cir. 2001) .....	9
<i>Negrete v. Allianz Life Insurance Co.</i> , 523 F.3d 1091 (9th Cir. 2008) .....	11
<i>Noel v. Hall</i> , 341 F.3d 1148 (9th Cir. 2003) .....	5
<i>Owens v. Okure</i> , 488 U.S. 235 (1985) .....	9
<i>Planned Parenthood v. Neely</i> , 130 F.3d 400 (9th Cir. 1997) .....	10
<i>Reusser v. Wachovia Bank, N.A.</i> ,	

525 F.3d 855 (9th Cir. 2008) ..... 5, 6  
*RK Ventures, Inc. v. City of Seattle*,  
 307 F.3d 1045 (9th Cir. 2002) ..... 10

*Rooker v. Fidelity Trust Co.*,  
 263 U.S. 413 (1923) ..... 5

*Rouse v. U. S. Dep't of State*,  
 548 F.3d 871 (9th Cir. 2008) ..... 5

*Sandpiper Village Condominium Assn., Inc. v. Louisiana-Pacific Corp.*,  
 428 F.3d 831 (9th Cir. 2005) ..... 11

State Cases

*Barackman v. Anderson*,  
 338 Or. 365, 109 P.3d 370 (2005) ..... 8

*Carr v. Hunting*,  
 153 P.3d 196 (2007) ..... 4

*Christensen v. Grant County Hospital District No. 1*,  
 152 Wash.2d 299, 96 P.2d 957 (2004) ..... 7

Federal Rules

28 U.S.C. § 1291 ..... 1, 2

28 U.S.C. § 2283 ..... 11

42 U.S.C. § 1983 ..... 3, 4, 9

State Statutes

ORS 12.110(1) ..... 9

ORS 137.225 ..... 4

## **I. STATEMENT OF JURISDICTION**

Plaintiff appeals the final judgment of the United States District Court for the District of Oregon. This Court has jurisdiction under 28 U.S.C. § 1291. Because plaintiff's complaint challenged the validity of judgments of the Oregon and Washington state courts, the District Court lacked subject matter jurisdiction, according to the *Rooker-Feldman* doctrine.

## **II. ISSUES PRESENTED FOR REVIEW**

**A.** Are plaintiff's claims barred by the *Rooker-Feldman* doctrine, by issue preclusion, and/or by the statute of limitations?

**B.** Did the District Court act within its discretion in denying plaintiff leave to supplement his complaint, to add claims arising out of a separate, unrelated incident?

## **III. STATEMENT OF THE CASE**

Plaintiff was arrested in Portland, Oregon on a complaint that he was in violation of an Order of Protection issued by the Superior Court in Clark County, Washington. Plaintiff unsuccessfully challenged the validity of the Order of Protection in the Washington courts. After the Multnomah County, Oregon District Attorney declined to prosecute plaintiff for violating the Order of Protection, plaintiff unsuccessfully sought an order from the Oregon courts to seal the records of his arrest.

Plaintiff then brought this action in the United States District Court for the District of Oregon challenging the constitutionality of the Order of Protection and of the denial of the expunction of his arrest records. Plaintiff named as defendants the State of Oregon and its Attorney General, and the City of Portland and its City Attorney. Plaintiff's complaint asserted five counts. The first four challenged, on various grounds, the failure of the Oregon courts to expunge plaintiff's arrest record and the validity of the underlying Order of Protection. The fifth count alleged that plaintiff's arrest was without due process of law. CER-1 – CER-17.<sup>1</sup>

On defendants' motions, the District Court dismissed plaintiff's action. The court held that, pursuant to the *Rooker-Feldman* doctrine, it "lack[ed] subject matter jurisdiction to hear counts I through IV" of plaintiff's complaint. CER-34. As to count V, the court held that, "[t]o the extent that plaintiff is requesting that this court revisit the question of whether to expunge his arrest record, count V is dismissed under the *Rooker-Feldman* doctrine." *Id.* Alternatively, the court held, "To the extent that plaintiff is requesting damages for the alleged warrantless arrest and detention, rather than the maintenance of his arrest record, . . . count V raises a

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<sup>1</sup> Plaintiff did not file or serve Excerpts of Record. As an unrepresented litigant, he is not required to do so. Ninth Circuit Rule 30-1.2. Appellees City of Portland and Linda Meng serve and file herewith the City Appellees' Excerpts of Record, which shall be referred to in this Brief as "CER."

challenge under 42 U.S.C. § 1983, and is barred by the applicable statute of limitations.” CER-34 – CER-35.

While defendants’ motions to dismiss were under advisement, plaintiff filed a motion to supplement his complaint to add a claim relating to the towing of his automobile, which was factually unrelated to the events surrounding the Order of Protection. CER-18 – CER-25. The District Court denied plaintiff’s motion. CER-25 – CER-28.

Plaintiff appeals.

#### **IV. STATEMENT OF FACTS**

The District Court’s Opinion and Order, CER-31 – CER-32, sets out the facts:

This spat of litigation began on October 15, 2004, when a Washington Superior Court judge in Clark County issued an Order of Protection against plaintiff requiring him to have no contact with his former spouse, Karyn. This Order of Protection was later extended to October 27, 2005 by a second Clark County judge. *Carr v. Reed*, 2007 WL 3274914, \*2 (W. D. Wash. Nov. 5, 2007).

On November 5, 2004, Karyn called the police from a restaurant in Portland, Oregon to report that plaintiff was violating the Order of Protection. Pl. Compl. ¶ 31. Portland police officers arrived at the scene and arrested plaintiff. *Id.* at ¶ 61. The Multnomah County District Attorney’s office declined to bring charges against plaintiff following his arrest. *Id.* at ¶ 3.

On November 12, 2004, plaintiff filed a petition for an Order of Protection against Karyn. *Carr v. Reed*, 2007 WL 3274914 at \*2. This petition was denied. *Id.*

On December 10, 2004, a third Clark County judge entertained plaintiff's motions and denied them. *Id.* at \*3. On January 18, 2005, plaintiff filed a notice of appeal with the Washington State Court of Appeals. *Id.* The Court of Appeals issued an opinion affirming the decisions of the Clark County Superior Court. *Id.* (see *Carr v. Hunting*, 132 W[ash].App. 1057 (2006)). Plaintiff appealed the Court of Appeals decision to the Washington Supreme Court. *Id.* On January 31, 2007, the Washington Supreme Court denied review. *Carr v. Hunting*, 153 P.3d 196 (2007).

Meanwhile in Oregon, plaintiff sought to have his arrest record expunged. On November 28, 2005, plaintiff moved the Multnomah County Circuit Court to have his arrest record sealed. However, the court concluded that under Oregon Revised Statute (ORS) § 137.225, arrests for violations of a civil restraining order may not be expunged. Pl. Compl. ¶ 4. Plaintiff appealed this decision to the Oregon Court of Appeals, which affirmed on November 7, 2007. Plaintiff then filed a Petition for Review in the Oregon Supreme Court. *Id.* On March 5, 2008, the Oregon Supreme Court denied review. *Id.*

## V. SUMMARY OF ARGUMENT

The District Court properly dismissed plaintiff's complaint. Plaintiff seeks to attack collaterally judgments of the Oregon and Washington state courts; the *Rooker-Feldman* doctrine dictates that the federal courts lack jurisdiction of his claims. Plaintiffs' claims also are barred by issue preclusion and by the applicable statute of limitations.

The District Court acted within the bounds of its discretion when it denied plaintiff leave to supplement his complaint to add new claims that did not arise out of the incident underlying his original Complaint. Moreover, plaintiff's supplemental claims are barred by the Anti-Injunction Act.

## **VI. ARGUMENT**

### **A. The District Court Properly Dismissed Plaintiff's Complaint**

#### **1. Standard of Review**

This Court reviews the dismissal of the complaint *de novo*. *Noel v. Hall*, 341 F.3d 1148, 1154 (9<sup>th</sup> Cir. 2003). The Court may affirm on any ground apparent from the record. *Rouse v. U. S. Dep't of State*, 548 F.3d 871, 880 (9<sup>th</sup> Cir. 2008).

#### **2. Plaintiff's Claims Are Barred by *Rooker-Feldman*, Preclusion and/or the Statute of Limitations.**

##### **a. *Rooker-Feldman***

“The *Rooker-Feldman* doctrine is a well-established jurisdictional rule prohibiting federal courts from exercising appellate review over final state court judgments.” *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 858-59 (9<sup>th</sup> Cir. 2008).<sup>2</sup> The District Court properly dismissed plaintiff's Complaint because the

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<sup>2</sup> The name of the doctrine derives from two United States Supreme Court decisions: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

legal wrongs plaintiff asserted were allegedly erroneous decisions by the state courts of Oregon and Washington, and plaintiff sought relief from the state court judgments based on those decisions. *Id.* at 859; *Henrichs v. Valley View Dev.*, 474 F.3d 609, 613 (9<sup>th</sup> Cir. 2007).

Counts I, II and III of plaintiff's complaint challenged the Oregon courts' refusal to expunge the records of his arrest. Count IV challenged the validity of the restraining order issued by the Washington courts. Plaintiff expressly disclaims any argument that Count V sought relief based on his arrest and detention; rather, he argues that claim as well challenges the maintenance of the record of his arrest. Appellant's Brief at 17. Plaintiff argues that the state courts refused to consider his federal constitutional arguments; this is precisely the allegation of erroneous decision by a state court that only could be corrected by the United States Supreme Court on writ of certiorari from those decisions themselves. *Carmona v. Carmona*, 544 F.3d 988, 995 (9<sup>th</sup> Cir. 2008); *Henrichs v. Valley View Dev.*, 474 F.3d at 613. All of plaintiff's claims challenge final decisions of state courts, and the District Court correctly held that they are barred by the *Rooker-Feldman* doctrine.

**b. Issue Preclusion (Collateral Estoppel)**

Federal courts must apply state law in determining the preclusive effect of state court judgments. *Holcombe v. Hosmer*, 477 F.3d 1094, 1097 (9<sup>th</sup> Cir. 2007). Under Washington law, plaintiff is precluded from relitigating the issue of the

validity of the restraining order. Under Oregon law, plaintiff is precluded from relitigating the issue of his entitlement to have his arrest record sealed or expunged.

Under Washington law, “[f]or collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Christensen v. Grant County Hospital District No. 1*, 152 Wash.2d 299, 307, 96 P.2d 957 (2004).

Here, the Washington courts have already rejected the claims made by plaintiff concerning the validity of the Washington restraining order. CER-14. Under Washington law, plaintiff is collaterally estopped from raising any claims stemming from the alleged invalidity of the Washington restraining order.

Under Oregon law, a plaintiff will be precluded from relitigating an issue where: 1) the issue in the prior proceeding was the same as the issue in the current proceeding; 2) the issue was actually litigated and was essential to a determination on the merits; 3) the party sought to be precluded had a full and fair opportunity to be heard; 4) the party sought to be precluded was a party to the prior proceeding; and 5) the prior proceeding was the type of proceeding to which the Oregon courts

give preclusive effect. *Barackman v. Anderson*, 338 Or. 365, 368, 109 P.3d 370 (2005).

Here, plaintiff brought an action in Multnomah County Circuit Court alleging a right to have his arrest record sealed or expunged. The court determined that issue adversely to plaintiff. The Oregon Court of Appeals affirmed, and the Oregon Supreme Court denied review.

The elements for issue preclusion as to plaintiff's entitlement to have his arrest record sealed or expunged are all present. The issue of entitlement to expungement was litigated and was essential to the Circuit Court judgment. Plaintiff had a full and fair opportunity to be heard. Plaintiff was a party to the proceeding. And finally, circuit court judgments, affirmed by the Court of Appeals, are the type of decisions to which the Oregon courts give preclusive effect.

In sum, plaintiff has already litigated the issue of the validity of the restraining order in the Washington courts, and the issue of his entitlement to expungement or sealing of the arrest record in the Oregon courts. Those issues have been determined adversely to him, and they may not be relitigated in this proceeding. Because all of plaintiff's claims are based on the asserted invalidity of the restraining order and/or plaintiff's alleged entitlement to have his arrest record sealed or expunged, those counts are all precluded.

**c. The Statute of Limitations.**

All of plaintiff's claims against the City defendants are based on his arrest and on the subsequent entry and maintenance of the record of that arrest. Plaintiff was arrested on November 5, 2004, and it is clear that he knew of the record of that arrest by November 28, 2005, when he applied to the Circuit Court to have that record sealed. CER-1 – CER-2. Plaintiff commenced this action on March 31, 2008, more than two years after the events of which he complains. CER-17. His claims are barred by the applicable statute of limitations.

Oregon's two-year statute of limitations for personal injury actions applies to actions brought in the United States District Court for the District of Oregon under 42 U.S.C. § 1983. ORS 12.110(1); *Owens v. Okure*, 488 U.S. 235, 236 (1985); *Davis v. Harvey*, 789 F.2d 1332, 1333 (9<sup>th</sup> Cir. 1986). The time commences to run when plaintiff knows of his injury. *Knox v. Davis*, 260 F.3d 1009 (9<sup>th</sup> Cir. 2001). Both plaintiff's arrest and the publication of the record occurred, and plaintiff had notice of them, more than two years before he commenced this action. The maintenance of the record is the inevitable consequence of the decision to enter it, and not the result of any "discrete act" by these defendants that occurred within the limitations period. *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1059-61 (9<sup>th</sup> Cir. 2002). All of plaintiff's claims against the City defendants are barred by the applicable statute of limitations.

**B. The District Court Properly Denied Plaintiff Leave to Supplement His Complaint**

**1. Standard of Review**

This court reviews for abuse of discretion the district court's decision to deny plaintiff's request to supplement his complaint. *Planned Parenthood v. Neely*, 130 F.3d 400, 402 (9<sup>th</sup> Cir. 1997).

**2. It Was Proper Not to Allow Addition of New Claims.**

The claims that plaintiff brought in his original Complaint concerned his arrest on November 5, 2004, for violation of the Order of Protection. After the motions to dismiss had been filed and submitted, plaintiff sought to supplement his complaint to add two new claims based upon the unrelated towing of his automobile in April 2008.

While leave to permit supplemental pleading is favored, it cannot be used to introduce a separate, distinct and new cause of action. *Planned Parenthood v. Neely*, 130 F.3d at 402. Rather, where, as here, “[t]he supplemental complaint filed by plaintiff[ ] involved a new and distinct action that should have been the subject of a separate suit,” *id.*, the District Court would have abused its discretion by permitting the supplemental pleading. *Id.* at 403.

In any event, the relief that plaintiff sought through these claims, an injunction against the Multnomah County Circuit Court, is barred by the Anti-Injunction Act,

28 U.S.C. § 2283.<sup>3</sup> *Negrete v. Allianz Life Insurance Co.*, 523 F.3d 1091, 1100-01 (9<sup>th</sup> Cir. 2008); *Sandpiper Village Condominium Assn., Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831, 842 (9<sup>th</sup> Cir. 2005). The District Court did not abuse its discretion in denying plaintiff's motion to supplement.

## VII. CONCLUSION

The claims plaintiff asserted in his Complaint are barred by *Rooker-Feldman*, issue preclusion and the statute of limitations. The District Court properly dismissed them. The claims plaintiff sought to add through his motion to supplement would have added a separate, distinct and new cause of action, which, in any event, would have been barred by the Anti-Injunction Act. The District Court did not abuse its discretion in denying plaintiff's motion to supplement the complaint.

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<sup>3</sup> 28 U.S.C. § 2283 provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The District Court committed no error; the judgment appealed from must be affirmed.

Dated: January 27, 2009.

Respectfully submitted,

*/s/ Harry S. Auerbach*  
\_\_\_\_\_  
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## CERTIFICATE OF COMPLIANCE

I certify that the attached brief is **not** subject to the type-volume limitations of Fed R App P 32(a)(7)(B) because this brief complies with Fed R App P 32(a)(1)-(7) and is a principal brief of no more than 30 pages.

Dated: January 27, 2009.

Respectfully submitted,

*/s/ Harry Auerbach*

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**STATEMENT OF RELATED CASES**

This case may be related to *Carr v. Reed*, Docket No. 07-35962.

Dated: January 27, 2009.

Respectfully submitted,

*/s/ Harry Auerbach*

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