IN THE SUPREME COURT OF THE STATE OF OREGON

CHRISTIAN M. LONGO, Petitioner-Relator, v. JEFF PREMO, Superintendent, Oregon State Penitentiary, Defendant-Adverse Party.	Marion County Circuit Court No. 07C21285 SC S061072 **MANDAMUS PROCEEDING**

ADVERSE PARTY'S ANSWERING BRIEF

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STATEMENT OF THE CASE

This mandamus proceeding arises from two capital post-conviction cases that are pending in Marion County Circuit Court: *Brumwell v. Premo*, case no. 12C11135, and *Longo v. Premo*, case no. 07C-2128.[1] The single, common issue before this court is whether the post-conviction court in those cases erred when it denied the petitioners' requests for a protective order over information that may be obtained by defendant Superintendent during discovery and at trial that relates to past communications between petitioners and their trial and appellate counsel.[2] As will be explained below, the post-conviction court acted well within its discretion under ORCP 36 C when it denied petitioners' requests.

Nature of the Proceedings

For purposes of this mandamus proceeding, defendant accepts the Statement of the Case that is set forth in each of the opening briefs filed by petitioners. (*Brumwell* Op Br 1-6; *Longo* Op Br 1-3, 5-7). In broad terms, the following is true in each case:

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[1] This brief is substantively identical to the brief that Defendant/Adverse Party has filed in *Brumwell v. Premo.*

[2] This brief will employ the party designations in the underlying post-conviction proceeding.

In each post-conviction case, petitioner has alleged numerous and varied claims that his trial or appellate counsel in the underlying criminal prosecutions failed to provide constitutionally adequate assistance, thereby denying him of his right to counsel under the Sixth Amendment to the United States Constitution and Article I, section 11, of the Oregon Constitution.[3] Defendant seeks to obtain, through discovery, certain information from each petitioner, his trial and appellate counsel, and others that relates to professional services those counsel provided to petitioner during the underlying criminal prosecution and on direct review. In response to defendant's discovery request, each petitioner asserted that the information requested is protected by the attorney-client privilege. Defendant replied that, as a result of OEC 503(4)(c), the attorney-client privilege does not apply to such information in this proceeding.[4] Each petitioner then contended that the attorney-client privilege nonetheless would still apply to that information in the event that the case is remanded to the trial court for a new trial, and he asked the post-conviction court to impose a

[3] Petitioner Brumwell's 36-page Third Amended Petition for Post-Conviction Relief alleges dozens of claims that his trial counsel failed to provide constitutionally adequate assistance. Petitioner Longo's 61-page Third Amended Petition for Post-Conviction Relief alleges dozens of claims that his trial and appellate counsel failed to provide constitutionally adequate assistance.

[4] As will be explained below, OEC 503(4)(c) provides that there is no attorney-client privilege with respect to "a communication relevant to an issue of breach of duty by the lawyer to the client."

protective order that essentially would preclude defendant from disclosing to the district attorney, law-enforcement agencies, or any other person any such information that defendant may obtain through discovery and at trial in this proceeding.[5] Defendant objected to imposition of a protective order. The court entered an order in each case that allows defendant to obtain discovery of the information at issue and denied petitioner's request for a protective order.

Each petitioner then filed in this court a petition for writ of mandamus asking for a peremptory writ that commands the post-conviction court to issue an appropriate protective order. This court issued an alternative writ, the post-conviction court declined to vacate its orders, and the case is now before this court for review of those orders.

[5] Neither petitioner has proffered this court the specific content and wording for the protective order that he contends would be appropriate under ORCP 36 C. Petitioner Brumwell generally describes the protective order he seeks as "precluding use of materials subject to OEC 503 (lawyer-client privilege) for any purposes other than litigating the post-conviction proceeding [and] barring Defendant from turning them over to any other persons or offices, including, in particular, law enforcement or prosecutorial agencies involved in the prosecution of *State v. Brumwell*." (*Brumwell* Op Br 2). Petitioner Longo generally describes the protective order that he seeks as providing that "any information, documents and material obtained *vis-à-vis* the discovery process and that is designated as privileged be used only for purposes of litigating the claims presented in [petitioner Longo's] petition for post-conviction relief." (*Longo* Op Br 6).

Question Presented[6]

Did the post-conviction court act outside its permissible range of discretion under ORCP 36 C when it denied petitioners' requests for a protective order that would preclude defendant from disclosing to the district attorney, law-enforcement agencies, or any other person any attorney-client communications that defendant may obtain through discovery and at trial in the post-conviction proceeding?

Summary of Argument

In each of the pending post-conviction cases, defendant is entitled to obtain discovery in accordance with the Oregon Rules of Civil Procedure and may obtain disclosure of attorney-client communications between petitioner and his trial and appellate counsel that relate to claims that petitioner has asserted in his petition. Petitioners' only claim is that the post-conviction court erred when it denied their requests for a protective order that would preclude defendant from disclosing to the district attorney, law-enforcement agencies, or

[6] Defendant generally accepts petitioner's Longo's statement of the question presented. (*Longo* Op Br 3). Petitioner Brumwell asserts that this case also "presents the question whether the trial court correctly determined that the Oregon legislature had destroyed and whether it may constitutionally destroy the lawyer-client privilege." (*Brumwell* Op Br 6). As will be explained below, the post-conviction court did not so rule, and that issue is not presented by this case.

any other person any attorney-client communications that defendant may obtain during the course of discovery and at trial in the post-conviction proceeding.

The post-conviction court properly acted within its broad discretion under ORCP 36 C when it denied petitioners' requests for a protective order. First, such a protective order would unfairly impede defendant's defense of petitioners' post-conviction claims and would be unduly burdensome on defendant to manage. Second, petitioners' request is based only on their speculations regarding future events that are not likely to occur. Finally, and in any event, a protective order is not necessary, because if the post-conviction court sets aside a petitioner's convictions and remands for a new trial, the parties may litigate before the trial court whether information that defendant obtained during the post-conviction proceeding will be admissible at retrial, and that court will have authority to fashion appropriate relief if it concludes that it is necessary to exclude any such evidence.

ARGUMENT

A. Introduction

In their briefs in this court, petitioners and *amici* mischaracterize what the post-conviction court ruled, describing those rulings as far broader than they actually are. Consequently, it is necessary at the outset to isolate and define the narrow issue that is before this court by first identifying those legal points that

the parties do not dispute and then clarifying what the post-conviction court actually ruled. Once clarified, the narrow issue before this court is only whether the post-conviction court abused its discretion when it denied petitioners' requests for a protective order that would preclude defendant from disclosing to the district attorney, law-enforcement agencies, or other persons those attorney-client communications that defendant lawfully obtains during the course of discovery and trial in the post-conviction proceeding.

1. Petitioners concede that defendant is entitled to discovery of the information at issue.

First, petitioners and *amici* do not dispute that, in the underlying post-conviction proceedings, defendant is entitled to obtain discovery, through the Oregon Rules of Civil Procedure, of information relating their claims of inadequate assistance of trial and appellate counsel. *See Stevens v. Czerniak*, 336 Or 392, 400, 84 P3d 140 (2004) (discovery rules in ORCP apply in post-conviction proceedings). Petitioners also do not dispute that defendant's right to obtain discovery may include examining them, their trial and appellate counsel, and their defense investigators in depositions (*see* ORCP 39 and 40), and requiring such witnesses and other persons to produce documents and things in their possession that relate to the petitioners' claims (*see* ORCP 43).

Second, petitioner and *amici* concede that the attorney-client privilege does not apply in a post-conviction proceeding with respect to communications

that relate to inadequate-assistance claims that petitioners have asserted.

OEC 503(2) defines the scope of the attorney-client privilege:

> "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> "(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
>
> "(b) Between the client's lawyer and the lawyer's representative;
>
> " * * * * *; or
>
> "(e) Between lawyers representing the client."

But OEC 503(4) provides an exception to that privilege: "There is no privilege under this section: * * * (c) As to a communication relevant to an issue of breach of duty by the lawyer to the client[.]"

The Court of Appeals held in *Petersen v. Palmateer*, 172 Or App 537, 19 P3d 364 (2001), that the exclusion in OEC 503(4)(c) applies in a post-conviction proceeding in which the petitioner has alleged claims of inadequate assistance of counsel, to the extent that the attorney-client communications at issue are "relevant to petitioner's breach of duty claims." *Id.*, 172 Or App at 543. The court interpreted OEC 503(4)(c) as defining a "limited *exception* to the attorney-client privilege conferred by OEC 503(2)," and it held that when "OEC 503(4)(c) applies, 'there is no privilege' under OEC 503(2)." 172 Or App at 542-43 (emphasis in original).

Neither petitioner disputes that the exclusion in OEC 503(4)(c) applies in the context of his post-conviction case.[7] That is, neither petitioner disputes that defendant is entitled to obtain discovery of attorney-client communications that relate to professional services that his counsel provided for him during the underlying criminal prosecution and direct review, in order that defendant may respond to the claims that he has alleged in in his petition.

Finally, there is no dispute before this court that the information that defendant seeks is relevant to the claims that petitioners have alleged, or may lead to the discovery of evidence that is relevant to those claims. The rules governing discovery generally require that a party may obtain discovery of information that "is relevant to a claim or defense," regardless of whether that information may be admissible at trial:

> "For all forms of discovery, parties may inquire regarding any matter, not privileged, which is *relevant to the claim or defense* of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*"

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[7] Neither petitioner contends before this court that OEC 503(4)(c) is unconstitutional or that *Petersen* was wrongly decided. (*See Brumwell* Op Br 8-17). The *amici* also do not dispute that OEC 503(4)(c) applies in a post-conviction proceeding.

ORCP 36 B(1) (emphasis added). Similarly, as noted above, OEC 503(4)(c) provides that there "is no privilege" for attorney-client information with respect "to a communication *relevant to* an issue of breach of duty by the lawyer to the client." (Emphasis added.)

In their briefs on appeal, petitioners and *amici* emphasize that OEC 503(4)(c) abrogates the attorney-client privilege in a post-conviction proceeding only with respect to information that actually is *relevant* to a specific claim of inadequate assistance of counsel that is alleged in the case. (*See, e.g., Brumwell* Op Br 18-19; ACLU Am Br 24-29). As explained above, defendant certainly has no quarrel with that as a general proposition. But that point is not material to this mandamus proceeding.

Neither petitioner ever has raised an objection to any of defendant's discovery requests on the ground that the information that defendant seeks is *not relevant* to a claim that he asserted in his petition, and the post-conviction court has not ruled on any such objection. Nothing in either of the post-conviction court's rulings that provide the basis for this mandamus proceeding suggests that it will allow defendant to obtain discovery of attorney-client communications regardless of whether the specific communication at issue is relevant to one of petitioners' claims. If and when defendant seeks discovery of a particular attorney-client communication that a petitioner contends is irrelevant and he interposes such an objection, the post-conviction court will be

in a position to rule on that issue.[8] But there is no basis for this court in this mandamus proceeding to anticipate possible future disputes between the parties over the permissible scope of defendant's discovery requests. Nor is there any basis for this court to assume that the post-conviction court will not properly rule on any relevance objections that petitioners may assert in the future.

2. The post-conviction court did not rule that the attorney-client privilege is "destroyed."

Petitioners and *amici* incorrectly assert that the post-conviction court ruled that, as a result of OEC 503(4)(c), their attorney-client privilege is completely and irrevocably gone. For example, petitioner Brumwell asserts:

> "The trial court below, at Defendant's urging, found that the mere filing of a petition for post-conviction relief acted to destroy the lawyer-client privilege in total. After finding that the privilege no longer existed, the court then concluded that there was no need to protect it in any way—either insuring that the information Defendant sought is actually relevant to Petitioner's claims, or by limiting its use. Therefore, Defendant would be free to use all of the tools of civil discovery to gather information and communications formerly protected by the privilege, and use them in any way he sees fit."

[8] Given the numerous, varied, and extremely broad scope of the claims of inadequate assistance of counsel that petitioners have alleged in their petitions, it is unlikely that they will be able to successfully assert a relevance objection to any of defendant's discovery requests. Needless to say, defendant does not anticipate seeking to obtain attorney-client communications through discovery, or at trial, that would not be relevant to the defense of any of the petitioner's claims.

(*Brumwell* Op Br 6-7). To the contrary, defendant did not argue below—and does not argue before this court—that the "the mere filing of a petition for post-conviction relief acted to destroy the lawyer-client privilege in total."[9] And the post-conviction court did not so rule.

Defendant consistently has taken only a more narrow position—*i.e.*, that petitioners do not have an attorney-client privilege that they may assert *in their post-conviction proceedings* to resist defendant's discovery of those communications between them and their trial and appellate counsel that may relate to the inadequate-assistance claims they have alleged. Defendant has not contended that the privilege is thereby abrogated forever, for any other purposes, and in any other proceedings. Rather, defendant consistently has contended that the issue whether the privilege will resurrect later is not properly before the post-conviction court but must be litigated instead at some later time, in some other court, if and when that issue ever actually does present itself.

Petitioners have not cited anywhere in the record where the post-conviction court may have ruled that OEC 503(4)(c) irrevocably abrogated their attorney-client privilege over those communications. The court's written orders are silent on that subject. (*See Brumwell* Op Br, ER-36). At the hearing on

[9] Petitioners have not cited anywhere in the record where defendant may have suggested—much less argued—that OEC 503(4)(c) irrevocably abrogated their attorney-client privilege over those communications.

petitioner Longo's request for a protective order, the post-conviction court expressly stated its view that the exclusion in OEC 503(4)(c) applies *only* in that post-conviction proceeding and that the privilege would "resurface" and apply in a subsequent retrial:

> "[THE COURT:] To the extent that you're requesting that I have a protective order for certain information, it's unnecessary. That information to be derived by this exception to the attorney/client privilege can only be used in this proceeding and would not be usable subsequently in any other matter because the privilege would resurface. And I essentially — I think that's all you're asking for is to make sure that somehow this is not be redisclosure [*sic*], reused, or anything else. The privilege would exist somewhere else."

(*Longo* Tr 8; *see also Longo* Tr 20-21).

In summary, in neither case did defendant argue or the post-conviction court rule that the attorney-client privilege over the communications between petitioners and their counsel has been "destroyed" or is irrevocably abrogated. Rather, defendant argued and the court ruled only that that privilege did not apply in petitioners' post-conviction proceedings due to OEC 503(4)(c).

3. The issue that is presented to this court is only whether the post-conviction court abused its discretion under ORCP 36 C.

As discussed above, there is no dispute that, in the pending post-conviction cases, defendant is entitled to obtain discovery, that the exclusion in OEC 503(4)(c) applies, and that defendant thus is entitled to obtain disclosure of attorney-client communications between petitioners and their trial and

appellate counsel that relate to claims that petitioners have asserted in their petitions. Because neither petitioner has yet asserted a relevance objection to any of defendant's discovery requests, and the post-conviction court has not yet ruled on any such objection, this case does not present a question whether any of defendant's discovery requests exceeds the scope of the exception created by OEC 503(4)(c). Thus, petitioners' only viable claim before this court is that the post-conviction court erred when it denied their requests for a protective order that would preclude defendant from disclosing to the district attorney, law-enforcement agencies, or any other person any attorney-client communications that defendant lawfully may obtain during the course of discovery and trial in the post-conviction proceedings.

Petitioners' request for a protective order is based on ORCP 36 C. (*Brumwell* Op Br 26-28; *Longo* Op Br 7-8). That rule provides, in pertinent part:

> "Upon motion by a party or by the person from whom discovery is sought, and *for good cause shown, the court* in which the action is pending *may make any order which justice requires* to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a

> deposition after being sealed be opened only by order of the court; (7) that a trade secret or other *confidential* research, development, or commercial *information not be disclosed or be disclosed only in a designated way*; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery."

(Emphasis added.) ORCP 36 C thus expressly grants a trial court *discretion*—"the court * * * may make any order"[10]—to impose a protective order over information that is subject to discovery, but only if the moving party establishes "good cause" and the court then determines that "justice requires" such an order. Neither petitioners nor *amici* contend that any other statute or rule other than ORCP 36 C is applicable here.

Because ORCP 36 C grants the post-conviction court *discretion* whether to issue a protective order—rather than imposing a mandatory obligation on it to do so—the applicable scope of review in this mandamus proceeding is correspondingly limited. It is axiomatic that a writ of mandamus "shall not control judicial discretion." ORS 34.110. Consequently, a peremptory writ of mandamus directing the post-conviction court to impose a protective order is permissible only if this court determines that that court's ruling was, as a matter

[10] *See Doe v. Corp. of Presiding Bishop*, 352 Or 77, 86, 280 P3d 377 (2012) (ORCP 36 C grants a court "discretion" to impose protective order). Petitioners do not appear to dispute that the post-conviction court had discretion under the rule whether to impose a protective order.

of law, outside the permissible range of its discretion under the circumstances. *See, e.g., State v. Orians*, 335Or 257, 265, 66 P3d 468 (2003) (issuing peremptory writ of mandamus based on holding that, under the circumstances, trial court's ruling "was an abuse of discretion").

In summary, the narrow issue that is presented by this mandamus proceeding is only whether the post-conviction court acted outside its permissible range of discretion under ORCP 36 C when it denied petitioners' requests for a protective order that would preclude defendant from disclosing to the district attorney, law-enforcement agencies, or any other person any attorney-client communications that defendant lawfully may obtain during the course of discovery and trial in this proceeding.

B. Post-Conviction Court Properly Denied Request For Protective Order

Defendant has no substantial quarrel—at least in a general sense—with the extended discussions that are set out in the briefs filed by petitioner and *amici* relating to the history, importance, and scope of the attorney-client privilege in the context of a criminal prosecution.[11] But, with all due respect,

[11] Petitioners and *amici* acknowledge that there is no controlling authority for the proposition that the attorney-client privilege is compelled by the right-to-counsel clauses in Article I, section 11, or the Sixth Amendment, but they urge this court to adopt such a rule. (*See Brumwell* Op Br 23-25; *Longo* Op Br 12-16). For the reasons discussed in the text, it is not necessary in this case for this court to consider that question.

that discussion is beside the point. For four separate reasons, the post-conviction court properly exercised its discretion under ORCP 36 C to deny petitioners' requests for a protective order: (1) such an order will directly interfere with, and unfairly impede, defendant's investigation and presentation of a defense against petitioners' claims; (2) it will be an onerous burden for defendant to comply with such an order; (3) petitioners' concerns are all speculative and contingent at best; and (4) a protective order is unnecessary to protect petitioners' interest, because they will have a complete and timely remedy if their concerns ever become ripe.

1. A protective order will interfere with defendant's defense.

Depending on the nature of the claims petitioners have asserted and the specific information that defendant obtains from them and their counsel through discovery, it may become necessary for defendant to disclose that information to the prosecutor, appropriate law-enforcement personnel, an expert witness, or another person in order to investigate the significance of the information and thus to defend against the claim. In that respect, the protective order that petitioners demand could unfairly impede defendant in the legitimate defense of the claims they have chosen to assert.

For example, petitioner Brumwell alleges as one of his first claims that his trial counsel "failed adequately to seek disclosure of relevant evidence, including exculpatory evidence, that would have benefited petitioner at trial."

(*Brumwell*, Third Amended Petition for Post-Conviction Relief, ¶ 10(c)). Because the petition does not specifically allege what evidence that might have been, it will be necessary for defendant to depose petitioner and ask him to identify what possible evidence is the basis for this claim. Then, it will be necessary for defendant to depose petitioner's trial counsel to explore what, if any, conversations they might have had with him about possibly discovering, obtaining, and using that evidence. Then, depending on whether there is any plausible basis for the claim, it may become necessary for defendant to confer with the prosecutor and the investigating officers to determine whether such evidence actually existed and was in the state's possession and, if so, whether it was provided to petitioner's counsel in discovery. To accomplish that, it may be necessary for defendant to disclose to the prosecutors and investigating officers the substance of the information that was obtained from petitioner and his trial counsel regarding the claim.

Ultimately, to resolve such a claim, the post-conviction court may need to answer a slew of factual questions: whether the evidence at issue actually existed and was available at the time of trial; whether petitioner's trial counsel knew, or should have known, about the evidence, either from petitioner or otherwise; whether the evidence was within the custody or control of the police or the prosecutor and, if so, whether the state provided discovery of the evidence to petitioner's counsel; whether petitioner and his counsel discussed

the matter and made a tactical decision not to investigate, obtain, or use the evidence; and, if petitioner's trial counsel neglected to obtain and use evidence that actually was available and thus failed to provide constitutionally adequate assistance, whether petitioner suffered any actual prejudice as a result. To fairly litigate and resolve all of those questions, defendant may need to have in-depth discussions about the evidence at issue with the prosecutor, the investigating officers, expert witnesses, or other persons, which may necessitate disclosure of the substance of the attorney-client communications that were obtained during discovery. Moreover, in order to litigate that claim, defendant may need to present at trial, in open court, evidence regarding the attorney-client communications that were obtained during discovery and evidence derived from those communications.[12]

If a post-conviction court is required in these circumstances to impose a protective order under ORCP 36 C that precludes the defendant from disclosing to the prosecutor, to the investigating officers, or anyone else the contents of any attorney-client communications that are lawfully obtained during discovery, the defendant would be substantially and unfairly disadvantaged in the defense

[12] *See generally Gable v. State of Oregon*, 353 Or 750, 758-59, __ P3d __ (2013) (discussing the standards of proof that apply to resolution of a claim of constitutionally inadequate assistance of trial counsel); *Galloway v. Nooth*, 247 Or App 164, 177-79, 268 P3d 736 (2011) (detailing substance of testimony by petitioner's trial attorney at the post-conviction trial during which she responded to his claims that she provided inadequate assistance).

of the petitioner's claims of inadequate assistance of counsel. In effect, the defendant would be required to defend against such claims with one, and possibly both, arms tied behind his back.[13]

2. Complying with a protective order will be unduly onerous.

In the usual case, perhaps, it may not be unduly burdensome for a party to comply with a protective order imposed pursuant to ORCP 36 C that limits the further disclosure and use at retrial of confidential information obtained during discovery. In the usual case, the information at issue may be relatively compact and easy to segregate, and the active life of the protective order would be of short duration, limited by the occurrence or not of a retrial. That is, in the usual case it may not be much of an administrative burden for a party who obtains discovery of confidential information to manage and comply with such

[13] Petitioners have suggested that the type of protective order they seek may allow defendant to seek leave from the post-conviction court on an item-by-item basis to disclose specific information to specific persons. (*See Longo* Op Br 1). But such an escape valve would not necessarily solve the problem. Given the dozens of claims and extensive discovery that these cases involve, it will be unduly burdensome for both defendant and the post-conviction court if defendant is required to obtain leave in advance every time defendant questions a potential witness based on attorney-client information that was obtained during discovery. Moreover, as will be explained below, the extensive record-keeping that would be required of defendant to segregate and keep track of the "privileged" information that was obtained only from the petitioner and his counsel during discovery and then to document precisely when, where, and to whom that information was further disclosed in the course of pretrial investigation—all under threat of a contempt-of-court sanction—could end up being a staggering burden on defendant.

a protective order. But these capital post-conviction cases are not the usual case, for two reasons: (1) the scope of the evidence at issue, and (2) the length of time the cases remain active.

First, almost all of the claims that petitioners have asserted in their petitions for post-conviction relief are that their trial or appellate counsel provided constitutionally inadequate assistance, and the principal evidence that will be generated in discovery on those claims will come from the petitioners, their trial and appellate counsel, and the investigators employed by their counsel. The discovery process relating to such claims typically will uncover a mix of privileged and non-privileged information. Some of the evidence that will be generated in that process will constitute attorney-client communications that otherwise would be subject to the privilege in OEC 503(2), but the rest of the evidence obtained will not be subject to that privilege—*i.e.*, there will be bits and pieces of privileged information that will be larded in among non-privileged information. To scrupulously comply with a broad pre-emptive protective order of the type requested by petitioners, defendant will be obliged to go through boxes and boxes and volumes and volumes of discovery line by line, marking and segregating out the arguably privileged materials.

But marking and segregating the discovery is only the beginning of the administrative difficulties that would be imposed on defendant. Because petitioners want all of that information to be kept strictly secret from the

prosecutors, law-enforcement agencies, and any other persons, it would be necessary to ensure that all of that information was also segregated out and kept confidential during the pretrial briefing and at trial. The parties would be obliged to file confidential trial memoranda and trial exhibits that black out the arguably privileged material, and steps would have to be taken at trial to limit the disclosure of such information in open court. The post-conviction court's written rulings could not disclose that information. Because the nature of evidence in a post-conviction proceeding is a mixture of privileged and non-privileged materials, the redaction might have to be done on a line-by-line basis. If the case ended up on appeal, the same process would have to be maintained through the appellate briefing, argument, and decision. If the case thereafter ended up in federal court in a *habeas corpus* proceeding, the same process would have to be maintained through briefing, argument, trial, and decision. In sum, imposing a protective order of the type that petitioners request could effectively impose a continuous record-keeping burden on defendant (and on the trial and appellate courts) that could be quite onerous and exacting.[14]

[14] That record-keeping burden will be multiplied if defendant finds it necessary, during the pretrial investigation, to disclose some of the attorney-client information, with leave from the court, to the prosecutors, law-enforcement officers, or other persons, because the protective order likely will

Footnote continued…

Second, the burden on defendant that would be imposed by a protective order would be exacerbated by the reality that capital cases continue for years and years through many courts. Although *Brumwell* and *Longo* have been in the post-conviction process for only the past six years, other capital cases have been progressing on post-trial review for up to 20 years now, through numerous different courts and shepherded by numerous different counsel, on both sides. As the cases step though each different court in the post-trial process of review, the files grow bigger and bigger. It is easy to see that complying with a protective order through numerous courts over the course of 20 or more years as the case wends its way through collateral-review process easily could become an administrative and record-keeping nightmare for defendant.

Petitioners and *amici* appear to assume that imposing a protective order over the attorney-client communications that are disclosed during the post-conviction proceeding would be easily manageable by the parties. The reality very likely will be quite different: because of the nature of the claims that they have alleged, the nature of the evidence that will be generated and presented at trial, and the longevity of the cases, such a protective order likely would impose a record-keeping burden primarily (if not solely) on defendant, that burden

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(…continued)
obligate defendant to keep detailed records of what information was disclosed, when, and to whom.

could be quite onerous and exacting, and that burden could continue for *decades*. As part of the post-conviction court's discretionary decision under ORCP 36 C whether it is appropriate to impose a protective order, the court properly could consider—as part of the "good cause" and "justice requires" analysis—the nature and extent of the burden that such an order would impose on defendant and the judicial system. Under the circumstances of this case, that burden very likely would be substantial, onerous, and long-lived.

3. Petitioners' concerns are speculative and contingent.

In contrast to the onerous burden that a protective order would impose on defendant, such an order likely would not provide any actual benefit to petitioners. Their requests for a protective order are premised only their speculations about a series of future events that are not inevitable and actually are not likely ever to occur.[15] Each petitioner premises his request on the assumption that the following sequence of events may occur:

> (1) Defendant will obtain through discovery in the post-conviction proceeding some attorney-client communications that otherwise would be privileged and that could be prejudicial to

[15] Neither petitioner has identified any actual prejudice that he likely would suffer *presently* from a disclosure in his post-conviction proceeding of the attorney-client communications without a protective order. Rather, each petitioner's claim of prejudice is based only on his speculation about possible *future* events—if the case is ever remanded for a new trial and the case is actually retried.

petitioner if the case is retried;[16]

(2) petitioner ultimately will prevail in his post-conviction proceeding and the court will remand for a new trial;

(3) the district attorney will choose to retry the case and the parties will not settle the case before trial;

(4) at the retrial, the state will seek to introduce the prejudicial attorney-client communication that defendant discovered in the post-conviction proceeding; and

(5) the state will not have an independent basis for discovery of that same information.

It is only if each of those events actually does happen that a protective order would have any possible useful application at the retrial.

In the past 30 years, since re-enactment of the death penalty in Oregon in 1983, there has not been even one instance in which a post-conviction court vacated a death sentence and remanded for a new trial and then the underlying criminal case actually was retried.[17] Petitioners' requests are based only on

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[16] Petitioners have not asserted that any *specific* document or communication that is subject to discovery contains privileged information that would be especially prejudicial to disclose and hence deserves special protection. Rather, petitioners' requests for a protective order are based only on their general, hypothetical concern that disclosing any communications possibly could result in the disclosure of privileged information that possibly could be prejudicial to him if the case is retried.

[17] Currently, there is one case—*viz.*, *State v. Fanus*, Douglas County case no. C98CR1510FE —that is back pending before the trial court for retrial of the penalty phase after a remand from a post-conviction court. In several other capital cases, a post-conviction court has granted relief in some form, but in each of those cases either an appeal is now pending from the post-conviction

Footnote continued…

their speculations about the possible occurrence of a sequence of events in the future, and such a sequence of events has never actually occurred, at least to date. That is not to say, of course, that such a sequence of events cannot or will not happen in petitioners' cases, but historical experience is that such a sequence of events would be exceedingly rare.

4. A protective order is not necessary to protect petitioners' interest.

Finally, if all of the events described above actually do occur, and the case is back before the trial court on remand for retrial, the petitioner will have a complete remedy available if he chooses to seek exclusion of potentially prejudicial attorney-client communications that were disclosed to defendant during the post-conviction proceeding. If petitioner has a valid evidentiary or constitutional objection that will require exclusion of the evidence, he will be able file a motion to exclude the evidence, and the trial court will have an opportunity to address the claim. If the court denies the petitioner's motion to exclude, that decision will be reviewable by this court, either on direct review or in an interlocutory mandamus proceeding.

Petitioners do not provide this court a legal or experiential basis for assuming that if the case is remanded the trial court for retrial and that court

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court's judgment or the parties have settled the case on remand, without a retrial.

agrees with him that the attorney-client communications are again subject to the attorney-client privilege, the court will not be able to fashion an appropriate remedy to protect the privileged information. Appropriate remedies may include excluding the evidence, requiring the district attorney to purge his or her file of any information that is subject to the resurrected privilege, and perhaps requiring another prosecutor to prosecute the case, if the district attorney personally had become aware of any privileged information, to the petitioner's prejudice.

In every other instance in which incriminating evidence was obtained as a result of some state action that violated a defendant's constitutional rights under Article I, sections 9, 11, or 12, of the Oregon Constitution—including a violation of the defendant's right to counsel—the remedy that this court has ordered is simply the suppression or exclusion of the evidence that was unlawfully obtained as a result of the violation, and any derivative evidence.[18] Neither petitioners nor *amici* cite any case in which this court ever has ordered, as a remedy for such a violation, a protective order or disqualification of the prosecutor who had gained knowledge of the information. Petitioners do not explain why the extraordinary remedy of a protective order is mandated in these

[18] *See, e.g., State v. Joslin*, 332 Or 373, 386-87, 29 P3d 1112 (2001) (ordering suppression of statements that were unlawfully obtained after lawyer was retained by defendant's family).

circumstances, particularly given that there has not yet been a violation of Article I, section 11, and the possibility of a violation in the future is exceedingly remote. In short, the concern that underlies petitioners' request for a protective order is one that can be fully litigated and resolved if and when it ever actually is presented. Thus, it is not necessary for this court at this point to speculate about what may happen years from now and then rule prospectively.[19]

One additional concern merits comment. In the pending post-conviction proceedings, defendant Superintendent Premo is represented only by the Oregon Department of Justice—the district attorneys for Marion and Lincoln counties are not participating in the defense. Moreover, the district attorneys are not parties to this mandamus proceeding. In a practical sense, it is only the district attorneys—and not defendant—who have the primary interest in litigating whether the attorney-client communications that defendant obtains in the post-conviction proceedings may be admissible in a subsequent prosecution. As explained above, all parties to this proceeding agree that, as a result of OEC 503(4)(c), defendant may lawfully obtain and use that evidence in the pending post-conviction proceedings. But petitioners and *amici* are asking this court to *prospectively* order that the *district attorneys* cannot have access to and

[19] As noted above, when the post-conviction court denied petitioner Longo's request for a protective order, it commented that "it's unnecessary," because the issue could be fairly litigated before the trial court on remand when and if it ever actually was presented. (*Longo* Tr 8).

use that evidence for purposes of a *subsequent retrial*. Because they are not parties to this mandamus proceeding and it is not certain at this point what the legal issues and possible arguments they may have if and when either of these cases is retried, it is neither convenient nor fair for this court to resolve that issue at this point, based merely upon speculation and assumptions of what possibly may occur in the future and without consideration of what arguments the district attorney possibly could make in response.

Moreover, it is entirely possible that if one of these cases comes before the trial court for retrial the district attorney may have a valid basis for arguing that the *manner* in which the evidence at issue was disclosed in the post-conviction proceeding actually did constitute an irrevocable *waiver* by petitioner of the attorney-client privilege. For example, the petitioner may choose in the post-conviction case to voluntarily disclose the contents of an attorney-client communication to prove of one of his claims—*i.e.*, petitioner discloses the communication himself for tactical reasons rather than the disclosure being compelled by defendant through discovery.[20] Although

[20] There may be a variety of other circumstances that may give rise to argument that attorney-client communications disclosed during discovery in the post-conviction proceeding should not be excluded as privileged in a subsequent retrial. For example, the communications may relate to the petitioner's attempt to present false testimony in support of a defense. *See* OEC 503(4)(a) (no privilege for communications relating to a plan to commit "a crime or fraud"). Or the communication was disclosed in response to a

Footnote continued…

petitioners ultimately may be correct that a compelled disclosure of such communications upon a discovery request by defendant might not constitute a valid, irrevocable waiver in the usual case, there may be circumstances in which the manner in which communication is either disclosed or used in a post-conviction proceeding would constitute a waiver. In short, even if petitioners are correct that, in the usual case, the privilege may resurrect upon retrial, this court cannot say prospectively, on a *per se* basis, that *any* attorney-client communications disclosed in the underlying post-conviction proceedings *necessarily* will be subject again to the attorney-client privilege if the criminal case ever is retried. That should be an issue that is reserved for later litigation between the proper parties, in the proper case, before the proper court, and based on actual evidence, rather than merely based on hypothetical assumptions about what could happen.

In summary, a protective order of the type requested by petitioners will substantially and unfairly impede defendant's ability to defend against their claims. Such an order would impose an onerous and long-lasting burden on defendant. Petitioners base their request only on speculations about future events that are not likely ever to happen. And even if those future events

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(…continued)
specific accusation by petitioner against his counsel, and the post-conviction court found that accusation to be false.

actually do occur, the privilege issue can be fairly litigated before the trial court. In these circumstances, the post-conviction court properly exercised its discretion under ORCP 36 C when it denied petitioners' request to impose a protective order.

C. Cases From Other Jurisdictions Do Not Provide Basis for Protective Order

Petitioner Longo and amicus ACLU rely on *Bittaker v. Woodford*, 331 F3d 715 (9th Cir 2003), in support of his request for a protective order. (*Longo* Op Br 16-18; ACLU Am Br 12-15). But that case clearly is inapposite because it involved a *habeas corpus* proceeding in *federal* court under 28 USC § 2254. *See* 331 F3d at 716. That case did not involve application of a statute such as OEC 503(4)(c) that expressly *excluded* the communications at issue from the attorney-client privilege. *See* 333 F3d at 721. Rather, the court in *Bittaker* merely addressed whether, and the extent to which, the common-law "implied waiver" exception under federal law should be applied in a *habeas corpus* proceeding in federal court. *Id.* at 718-27. The court in *Bittaker* did not purport to base its decision on some provision of the federal constitution, nor did it otherwise purport to impose a comparable exception on state rules of evidence as applied in state courts in a post-conviction proceeding. In short, *Bittaker* provides no authority for this court to ignore the express *exclusion* in

OEC 503(4)(c) and thus to impose a protective order in the absence of any privilege.

Petitioner Longo also relies on some cases that actually support defendant's argument set forth above. In *People v. Ledesma*, 140 P3d 657 (Cal 2006), the California Supreme Court addressed the question whether information obtained in a collateral *habeas corpus* proceeding could properly be admitted on retrial over the defendant's invocation of the attorney-client privilege. The court held that the state's evidentiary rule that excluded the application of the privilege in a *habeas corpus* proceeding—in language similar to OEC 503(4)(c)—did not preclude the defendant from invoking the privilege on retrial of the criminal charges. 140 P3d at 697-98. Regardless of whether *Ledesma* may be persuasive authority on the merits—*i.e.*, whether OEC 504(3)(c) should be construed as only a case-specific exception rather than an irrevocable waiver of the attorney-client privilege—that decision illustrates that petitioners will have an adequate opportunity to litigate the substantive issue if and when the issue actually is presented on retrial and that they will be able to obtain appropriate relief if the court agrees that the privilege applies again on retrial. That is, the *Ledesma* decision buttresses the point made above that a protective order is unnecessary in these circumstances because petitioners will have an adequate remedy later if the state ever attempts to use

the evidence later in another proceeding.[21]

Finally, petitioner Longo complains, based on these cases, that the lack of a protective order "would permit the prosecution to obtain information it would not otherwise be privy to, resulting in an unfair advantage at a potential subsequent trial." (*Longo* Op Br 26). But, as explained above, that is an argument that petitioner can raise before the trial court if and when the case is remanded for a new trial and that issue actually is presented on retrial. If the trial court concludes that OEC 503(4)(c) creates only a case-specific exclusion, that some potentially prejudicial privileged attorney-client communications were disclosed during the post-conviction proceeding, that the district attorney was actually aware of that information, and that the district attorney's knowledge of that information provided the state with "an unfair advantage" in the particular context of the case, the court would be in a position to grant appropriate relief. Petitioner Longo's argument before this court merely assumes that because he may conjure up a *hypothetical possibility* that sometime in the future he might be prejudiced by disclosure of the information the post-conviction court now has a *mandatory duty* to impose a protective order. But that argument fails to take into consideration that, if that event ever

[21] Some of the other cases cited by amicus ACLU are of the same type—*i.e.*, the court merely held that the prosecutor on retrial could not present attorney-client communications that were disclosed in the post-conviction proceeding. (*See* ACLU Am Br 14-16).

does occur, he will have an adequate opportunity to litigate the issue and obtain appropriate relief.

CONCLUSION

For the reasons discussed above, this court should conclude that the post-conviction court properly exercised its discretion under ORCP 36 C when it denied petitioners' requests for a protective order. Therefore, this court should deny petitioners' request for mandamus relief.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 1, 2013, I directed the original Adverse Party's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Mark A. Larranaga, attorney for relator, by using the court's electronic filing system.

I further certify that on October 1, 2013, I directed the Adverse Party's Answering Brief to be served upon Michelle A. Ryan and Bert Dupre, attorneys for relator, and upon the Honorable Thomas M. Hart, Circuit Court Judge, by mailing two copies, postage prepaid, in an envelope addressed to:

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,960 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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