**IN THE SUPREME COURT OF THE STATE OF OREGON**

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

# RELATOR'S SECOND AMENDED OPENING BRIEF

**Mandamus Proceeding Regarding Circuit Court's Failure to Perform the Act Required by This Court's Writ Dated June 20, 2013**

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## STATEMENT OF THE CASE

Nature of the Proceeding, Relief Sought

The Relator[1] sought a protective order regarding the discovery of confidential information, specifically requesting that any information, documents and materials obtained *vis-à-vis* the discovery process be used only by the Adverse-Party and only for purposes litigating the claims presented in the petition for post-conviction relief. The proposed protective order prohibited disclosure of said materials to any other persons or agencies, including any other law enforcement or prosecutorial personnel or agencies, without an order from the Circuit Court. The Honorable Thomas M. Hart, Circuit Court Judge, denied the Relator's motion for a protective order.

On February 4, 2013, Relator filed with this Court a *Petition and Memorandum for Peremptory Writ of Mandamus, Or In Alternative, For Alternative Writ of Mandamus*, requesting this Court to command the Circuit Court to grant Relator's motion for a protective order. The Adverse Party filed its *Response to Petitioner's Writ of Mandamus* on February 20, 2013.

[1] For the sake of clarity and brevity, the "Relator – Petitioner" is referenced as "Relator" and "Adverse Party – Defendant" as "Adverse Party."

On June 20, 2013, this Court issued an Order permitting and granting Relator's petition for alternative writ of mandamus, stating:

> "Wherefore, in the name of the State of Oregon, you are commanded to vacate the order denying relator's motion for a protective order, entered December 26, 2012, and to enter an order allowing the motion, or in the alternative to show cause for not doing so, within 14 days from the date of this order."

The June 20, 2013, Order also consolidated the above-captioned matter with *Brumwell v. Premo*, Marion County Circuit Court No. 12C11135, Supreme Court No. S060980, for oral argument.

When the Circuit Court did "not perform the act required by the writ", this mandamus proceeding followed. ORS 34.250(7).[2] On August 13, 2013, this Court issued an order suspending ORAP 5.77 "in both matters to the extent it might prohibit a party in either case from adopting part or all of a brief filed in the other case." As of filing this Opening Brief, counsel for Relator has not received briefs from any other party. As such, counsel respectfully reserves the right to adopt part or all of brief filed in the other case.

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[2] "If the judge or court whom the alternative writ of mandamus is directed does not perform the act required by the writ, the mandamus proceeding will proceed to briefing and oral argument as provided in the rules of the Supreme Court or as directed by the Supreme Court. An answer or other responsive pleading need not be filed by any party to the proceeding unless the alternative writ specifically requires the filing of an answer or other responsive pleading."

The Relator seeks the enforcement of this Court's directive to the Circuit Court.

Statutory Basis of Appellate Jurisdiction

The Relator invokes the jurisdiction of this Court under ORS 34.240 – 34.250.

## QUESTION PRESENTED

The issue presented in this mandamus proceeding is whether, in a post-conviction proceeding, the post-conviction court erred when it denied a motion for a protective order that would allow for the discovery of privileged, confidential attorney-client communications and work product matters within the post-conviction proceeding, but limit the distribution and use of such material outside the confines of the post-conviction proceeding.[3]

## SUMMARY OF THE ARGUMENT

The Relator sought a narrowly drafted protective order that would permit the Adverse Party to receive discovery of privileged material for purpose of the post-

[3] The issues presented in the *Brumwell v. Premo* mandamus are: (1) With respect to a petition for post-conviction relief, to what extent does the lawyer-client privilege remain intact, and to what extent is it deemed waived? (2) Does any dissolution or waiver of the privilege exist for all purposes? (3) Can any information that otherwise would have been subject to the lawyer-client privilege be disclosed outside the parameters of a post-conviction proceeding and used in any retrial? (4) Did the post-conviction court err in denying petitioner's motions for a protective order, and his motions to quash the subpoenas unless the requested material first was reviewed *in camera*?

conviction proceeding, but would prohibit unnecessary and unjustified dissemination of the privileged materials beyond the confines of the post-conviction proceeding. The absence of a protective order would lead to prejudicial results that call into question constitutional and ethical considerations.

The federal and state constitutions guarantee an accused receive effective assistance of counsel. An implicit component of that right is the attorney-client privilege. Oregon has provided an avenue, namely post-conviction proceeding, to raise claims surrounding whether constitutional right to effective assistance of counsel was afforded. Generally, a person may waive the attorney-client privilege by putting the lawyer's performance at issue. However, the scope of the required disclosure should be limited to permit adjudication of the issue but still maintain the sanctity one's constitutional rights. A protective order limiting the disclosed privileged material to the confines of the post-conviction proceeding is consistent with these competing interests by allowing a fair adjudication of the post-conviction proceeding and securing a retrial untainted by constitutional error. Absent a protective order would thwart, if not obliterate, the full and frank attorney-client communications if post-conviction relief is granted and the privileged information is permitted to be used against the client at a retrial.

A protective order is also consistent with a lawyer's ethical obligation to a client. Except in limited circumstances, a lawyer is duty-bound not to reveal

information relating to the representation of a client. One such exception may exist when a lawyer reasonably believes it necessary to respond to allegations concerning the lawyer's representation. Even in such a situation, however, the lawyer's revelation of client's confidences and secrets is limited to the proceeding concerning the representation and to the information that is necessarily related to the representation. To safeguard the unwarranted dissemination of client's confidences and secrets beyond the proceeding and purpose, a lawyer should take necessary steps to limit access to the information. A protective order is one such step.

A protective order that prohibits the dissemination of privileged information beyond the post-conviction proceeding does not unfairly prejudice the Adverse Party since it permits access to the information in order to fairly adjudicate the issue. The same cannot be said without one as it would immediately and effectively skew a potential second trial by handing over to the prosecution and law enforcement privileged information and thus a prejudicial view into the defense's strategies, thought-processes and client communications.

## SUMMARY OF FACTS

Relator is the Petitioner in the case of *Christian M. Longo v. Jeff Premo,* Marion County Circuit Court No. 07C21285, a post-conviction proceeding that was filed on October 18, 2007. On April 24, 2012, Relator filed his *First Amended*

*Petition for Post-Conviction Relief* in *State of Oregon v. Christian M. Longo*, Lincoln County Circuit Court No. 016441.

On November 9, 2012, Relator, in response to the Adverse Party's *Request for Production of Documents*, filed in Marion County Circuit Court No. 07C21285 *Petitioner's Motion for Protective Order*, seeking an order granting him a protective order restricting the distribution of privileged materials outside the confines of the post-conviction proceeding.[4] Specifically, Relator requested that any information, documents and materials obtained *vis-a-vis* the discovery process and that is designated as privileged be used only by representatives from the Oregon Attorney General's Office and only for purposes of litigating the claims presented in the petition for post-conviction relief (and all amendments thereto) under Marion County Circuit Court No. 07C21285. On November 15, 2012, the Adverse Party filed *Defendant's Opposition to Petitioner's Motion for Protective Order*. Relator filed its *Reply to Defendant's Opposition to Petitioner's Motion for Protective Order* on November 21, 2012.

Argument on the matter was heard before the Honorable Thomas M. Hart, Circuit Court Judge, Marion County, on December 14, 2012. At the December 14,

[4] While often couched in terms of the attorney-client privilege, it should be equally applicable under the case law to the work product privilege. *See, In re Lott,* 424 F3d 446, n. 1 (6th Cir 2005) (citing *Upjohn Co. v. United States,* 449 US 383, 400 (1981); *Bittaker v. Woodford,* 331 F3d 715, 722 n. 6 (9th Cir 2003)).

2012, hearing, the Hon. Thomas M. Hart orally denied the *Petitioner's Motion for a Protective Order*. In denying the *Petitioners' Motion for a Protective Order*, the Circuit Court relied, in part, on its previous ruling in *Brumwell v. Premo*, Marion County Circuit Court No. 12C11135. Judge Hart suspended the execution of the order for the Relator to decide whether to seek a *Writ of Mandamus* with this Court.

On February 4, 2013, Relator filed with this Court a *Petition and Memorandum for Peremptory Writ of Mandamus, Or In Alternative, For Alternative Writ of Mandamus*. The Adverse Party filed its *Response to Petitioner's Writ of Mandamus* on February 20, 2013.

On June 20, 2013, this Court issued an Order permitting and granting Relator's petition for alternative writ of mandamus and directing the Circuit Court to vacate the order denying Relator's motion for a protective order and replace it with an order granting the protective order. Because the Circuit Court did "not perform the act required by the writ", the mandamus proceeding proceeded to briefing. ORS 34.250(7).

## ARGUMENT

Rule 36(c) of the Oregon Rules of Civil Procedure provides a mechanism for a party to disclose relevant discovery to opposing counsel while still maintaining the confidentiality of the material. Relator employed this mechanism by seeking a protective order that would provide a means by which Adverse Party could receive

discovery of privileged material for purpose of the post-conviction proceedings; but would prohibit unnecessary and prejudicial dissemination of the privileged materials beyond the confines of the post-conviction proceeding. Without explaining how it would be prejudiced by such a procedure, Adverse Party opposed the motion for a protective order, claiming that in the context of the post-conviction proceedings, Relator possesses "no privilege at all under OEC 503(2)."

In denying the Relator's request for a protective order, the Circuit Court considered the privilege as only a rule of evidence.[5] Moreover, the Circuit Court's limited inquiry to only a rule of evidence ignores the constitutional and ethical dimensions of the lawyer-client confidentiality, which support the issuance of such a protective order.[6]

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[5] The Circuit Court's ruling was, in part, based on the notion that if the post-conviction proceeding resulted in further criminal proceedings, the lawyer-client privilege may somehow be resurrected and made applicable. Such a rationale provides an inadequate protection since the Relator would suffer an irretrievable loss of information and tactical advantage which could not be restored later, *see State ex rel. Oregon Health Sciences University v. Haas*, 325 Or 492 (1997), as well as having an unacceptable chilling effect on defendant's exercise of right to counsel. *See e.g., Waitkus v. Mauet*, 757 P2d 615, 616 (Ariz Ct App 1988) (vacating trial court's disclosure order for trial counsel's entire file, which included provisions that, if new trial was granted, the "trial transcript would be sealed, the prosecutor would not disclose any information gleaned from the disclosure to any other attorney, and that the Pima County Attorney's Office would withdraw from prosecuting the second trial," because such disclosure would chill a defendant's exercise of right to counsel).

[6] Lawyer-client communications, confidences, and secrets are protected in Oregon by at least four sources: (1) Rule 503 of the Evidence Code; (2) Rule 1.6 of

**A. Attorney-Client Privilege in the Oregon Evidence Code.**

The general rule governing the attorney-client privilege is found in OEC 503(2), which provides, in part:

> "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[.]"

The attorney-client privilege conferred by OEC 503(2) may give way "to communications relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer." OEC 503(4)(c).

The Oregon Legislature has provided an avenue to raise claims that a constitutional right to effective assistance of counsel was violated. ORS 138.510 – 138.680. Generally, a litigant waives the attorney-client privilege by putting his lawyer's performance at issue during the course of litigation. *Bittaker v. Woodford,* 331 F3d 715, 718 – 719 (2003). OEC 503(4)(c) is a *limited exception* to the attorney-client privilege bestowed by OEC 503(2), applying to a specific type of communications: one that is relevant to an issue of breach of duty between

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the Professional Rules of Conduct; (3) ORS 9.460(3); and (4) the Oregon and United States Constitutions.

attorney and client. *Peterson v. Palmateer,* 172 Or App 537, 542-543, 19 P3d 364 (2001). This exception must be "narrowly construed to avoid disclosing any more of the client's confidences than are necessary for the lawyer to defend against the client's claim[.]" Kirkpatrick, *Oregon Evidence*, § 503.12[3].

The Adverse Party concedes that the disclosure of privileged information in a post-conviction proceeding must be based on the relevance of the privileged information to the specific breach of duty claim. *See Defendant's Response to Petitioner's Petition for Writ of Mandamus*, pg. 5-6, n. 6, 7. A limited disclosure to only those communications *relevant* to a specific claim is not only clear from the language of OEC 503(4)(c); but, also finds support in *Peterson v. Palmateer*, 172 Or App at 542-543, numerous other jurisdictions[7], and the American Bar

[7] *See, e.g., Johnson v. Alabama*, 256 F.3d 1156, 1179 (11th Cir 2001) ("[A] habeas petitioner alleging that his counsel made unreasonable strategic decisions waives any claim of privilege over the contents of communications with counsel *relevant* to assessing the reasonableness of those decisions in the circumstances") (emphasis added); *Waldrip v. Head*, 272 Ga 572, 532 SE2d 380, 387-88 (2000) ("[W]e hold that a habeas petitioner who asserts a claim of ineffective assistance of counsel makes a limited waiver of the attorney-client privilege and work product doctrine and the state is entitled only to counsel's documents and files *relevant* to the specific allegations of ineffectiveness.") (emphasis added); *State v. Lewis*, 36 So 3d 72, 77- 78 (Ala Crim App. 2008) (citing cases, noting "overwhelming majority of courts hold that the waiver of the attorney-client privilege should be narrowly applied," "ineffective assistance of counsel during the trial and direct appeal of these cases, the defendant waived the benefits of both the attorney-client privilege and the work product privilege, but only with respect to matters *relevant* to his allegations of ineffective assistance of counsel.") (emphasis added); *Petition of Dean*, 142 NH 889, 890-91, 711 A2d 257, 258 (1998) ("We hold that claims of ineffective assistance of counsel, whether brought in a motion for new trial or in a

Association, *Formal Opinion 10-456: Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim* (July 10, 2010) (hereinafter "ABA Formal Opinion 10-456").[8]

Nevertheless, the Adverse Party argues that a protective order is unwarranted, apparently taking the position that a person seeking review under ORS 138.510 – 138.680 on whether he or she received constitutionally adequate representation and who is ordered to disclose privileged, confidential attorney-client communications and work product matters under OEC 503(4)(c), may be subject to distribution and use of such material beyond the confines of the post-

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habeas corpus proceeding, constitute a waiver of the attorney-client privilege to the extent *relevant* to the ineffectiveness claim, the waiver is a limited one.") (emphasis added); *People v. Madera*, 112 P 3d 688, 692 (Colo 2005) ("Different types of ineffective assistance of counsel claims would raise very different implied waivers of the attorney-client privilege and the documents that would be *relevant* to the claims would be very different as well.") (emphasis added); *State v. Thomas*, 599 A2d 1171, 1177-78 (Md 1992) (citing numerous cases in adopting "universally accepted rule that the privilege is waived by the client in any proceeding where he or she asserts a claim against counsel of ineffective assistance and those communications, and the opinions based upon them are *relevant* to the determination of the quality of counsel's performance") (emphasis added).

[8] American Bar Association, *Formal Opinion 10-456: Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim*, which concludes that an ineffective assistance of counsel claim waives the attorney-client privilege only as to those communications that are *relevant* to the specific allegation of ineffective assistance, unless a client has given explicit and informed consent to broader disclosures. (emphasis added).

conviction proceeding.[9] The Adverse Party has never advanced any rational basis how disclosure to, for example, law enforcement agencies, other prosecutorial personnel or agencies, or use in any aspect of future prosecution, is "relevant to an issue of breach of duty" in a post- conviction proceeding; or how a protective order prohibiting such disclosure prevents a fair adjudication of such issues. Such a broad interpretation of OEC 503(4)(c) would lead to constitutionally and ethically unacceptable and unjustified results.

**B. Federal and State Constitutional Aspects of Lawyer-Client Confidentiality.**

Under the United States Constitution, an accused is afforded the right to have the assistance of counsel for his defense. US Const Amend VI.[10] Similarly, Article I, section 11, of the Oregon Constitution, guarantees that "[I]n all criminal prosecutions, the accused shall have the right . . . to be heard by himself and

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[9] It is unclear whether the Adverse Party's position is that OEC 503(4)(c) stands for the proposition that upon filing of a post-conviction petition for relief the lawyer-client privilege is forever destroyed or that if the post-conviction proceeding resulted in further criminal proceedings, the lawyer-client privilege may somehow resurrect later and be made applicable.

[10] The Sixth Amendment to the United States Constitution provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

counsel."[11] It is axiomatic that the Relator has the right to effective assistance of counsel under both the United States Constitution and Oregon Constitution. *Strickland v. Washington*, 466 US 668, 686 (1984); *State v. Smith*, 339 Or 515, 526 (2005).

Implicit in the right to counsel is the ability for attorneys and their clients to communicate fully and frankly. In *Upjohn Co. v. United States*, 449 US 383, 101 S Ct 677, 66 L Ed 2d 584 (1981), the United States Supreme Court acknowledged:

> "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that

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[11] Article I, Section 11 of the Oregon Constitution guarantees: In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.

> sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."

*Upjohn Co.*, 449 US at 389.

Federal courts have strongly suggested that there is a constitutional dimension to lawyer-client confidentiality under the Sixth Amendment:

> "We need not decide whether the attorney-client privilege has a constitutional dimension in the criminal context; we note only that doing away with the privilege in all criminal cases would raise a nontrivial question whether defendants would still be getting effective assistance. *See, e.g., Black v. United States,* 385 US 26, 87 S Ct 190, 17 L Ed 2d 26 (1966) (per curiam) (remanding the case for a new trial after government agents monitored and listened to confidential conversations between defendant and his attorney); *Williams v. Woodford,* 306 F3d 665, 682 (9th Cir 2002) ("When the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, that interference violates the Sixth Amendment right to counsel if it substantially prejudices the criminal defendant. Substantial prejudice results from the introduction of evidence gained through the interference against the defendant at trial, from the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial." (citations omitted)); *Clutchette v. Rushen,* 770 F2d 1469, 1471 (9th Cir 1985) ("[Although] the attorney-client privilege is merely a rule of evidence ..., government interference with the confidential relationship between a defendant and his counsel may implicate Sixth Amendment rights."); *United States v. Castor,* 937 F2d 293, 297 (7th Cir 1991)("Where the sixth amendment right to attorney-client confidentiality exists, prosecutorial violation of that privilege might lead to reversal of a resulting conviction if the defendant could show prejudice."); *Greater Newburyport Clamshell Alliance,* 838 F2d at 21 ("[U]tmost candor between an attorney and client is essential to effective assistance of counsel."); *United States v. Rosner,* 485 F2d 1213, 1224 (2d Cir 1973) ("[T]he essence of the Sixth Amendment right is, indeed, privacy of

> communication with counsel."); *Caldwell v. United States,* 205 F2d 879, 881 (DC Cir 1953) ("The Constitution's ... guarantees of due process of law and effective representation by counsel[ ] lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense."); Mueller & Kirkpatrick § 5.8, at 434 ("It is doubtful that constitutional standards for adequacy of legal representation could be satisfied if a defendant's communications to his attorney were subject to unrestricted scrutiny by the prosecutor.").

*Bittaker v. Woodford,* 331 F3d 715, 724 n. 7 (9th Cir 2003)).

Likewise, under Article I, section 11 of the Oregon Constitution, "[w]hen one seeks legal advice, the protections of the lawyer-client privilege are implicated, because appropriate legal advice requires frank communication between the client and the lawyer." *State v. Durbin*, 335 Or 183, 190, 63 P3d 576, 579 (2003). This Court has also recognized that "the purpose of the . . . privilege 'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *State ex rel OHSU v. Haas,* 325 Or 492, 500, 942 P2d 261 (1997) (*quoting Upjohn Co. v. United States,* 449 US at 383); *see also State v. Jancsek,* 302 Or 270, 274, 730 P2d 14 (1986) ("Lawyers can act effectively only when fully advised of the facts by the parties whom they represent[.]"). This Court expanded on the "inherent" role that confidentiality plays within the right to counsel:

> "[T]he purpose of the lawyer-client privilege cannot be fulfilled unless the communications between a client and a lawyer are

> confidential. Confidentiality lies at the heart of the privilege, for unless the communication is 'not intended to be disclosed to third persons,' it is not protected by the privilege at all. See OEC 503(1)(b) (defining 'confidential communication' for purposes of lawyer-client privilege). For that reason, we agree with defendant—and with both the majority and dissenting opinions in the Court of Appeals— that confidentiality is 'inherent' in the right to counsel. Accordingly, we hold that, when an individual has a constitutional right to consult with counsel, that right includes the right to confer privately with counsel."

*Durbin*, 63 P3d at 579-80 (internal citations omitted).

### C. Interpreting OEC 503(4)(c) as Abolishing the Attorney-Client Privilege for all Purposes Beyond the Post-Conviction Proceeding Conflicts with a Person's Right to Counsel.

In *Bittaker v. Woodford,* 331 F3d 715 (2003), the Ninth Circuit Court of Appeals addressed a protective order precluding the use of privileged attorney-client materials for any purpose other than litigating the claim in a federal habeas petition. The *Bittaker* Court, acknowledged that a litigant waives the attorney-client privilege by putting the lawyer's performance at issue, but noted that "[t]he scope of required disclosure should not be so broad as to effectively eliminate any incentive to vindicate [one's] constitutional right[s]." *Bittaker,* 331 F3d at 724, quoting *Greater Newsbury Clamshell Alliance v. Pub.Serv.Co*., 838 F2d 13, 21-22 (1st Cir 1988). Without such limitations, the *Bittaker* Court concluded that "[a] broad waiver rule would no doubt inhibit the kind of frank attorney-client communications and vigorous investigation of all possible defenses that the

attorney-client and work product privileges are designed to promote." *Bittaker*, 331 F3d at 722. The Court reasoned,

> "A narrow waiver rule is also consistent with the interests of the habeas petitioner in obtaining a fair adjudication of his petition and securing a retrial untainted by constitutional errors. Here, Bittaker is claiming that he was denied a constitutionally adequate criminal trial because he had ineffective counsel and for many other reasons as well. If he succeeds on any of these claims, it will mean that his trial was constitutionally defective. Extending the waiver to cover Bittaker's retrial would immediately and perversely skew the second trial in the prosecution's favor by handing to the state all the information in petitioner's first counsel's case file. If a prisoner is successful in persuading a federal court to grant the writ, the court should aim to restore him to the position he would have occupied, had the first trial been constitutionally error-free. Giving the prosecution the advantage of obtaining the defense case file-and possibly even forcing the first lawyer to testify against the client during the second trial-would assuredly not put the parties back at the same starting gate."

*Bittaker*, 331 F3d at 722.

The *Bittaker* Court further explained that requiring a petitioner to enter such a broad waiver would force him into the painful choice of, on the one hand, asserting his ineffective assistance claim and risking a trial where the prosecution can use against him every statement he made to his first lawyer and, on the other hand, retraining the privilege at the detriment of giving up his ineffective assistance claim. *Bittaker*, 331 F3d at 723-724. And without a protective order precluding the use of privileged attorney-client materials for any purpose beyond the post-conviction proceeding violates the spirit, and perhaps the letter, of

*Simmons v. United States*, 390 US 377, 394 (1968), which holds it constitutionally unacceptable to require a criminal defendant to choose between two constitutional rights. *Bittaker*, 331 F3d at 723-724.

The principles set forth in *Bittaker* were recently echoed in *Lambright v. Ryan*, 698 F3d 808, 818-819 (9th Cir 2012). In *Ryan*, the district court issued a protective order; however, determined that it covered only materials produced after the order was issued. *Ryan*, 698 F3d at 817. The Ninth Circuit Court of Appeals concluded that the district court abused its discretion "because it had a *duty* to enter a protective order prior to ordering the disclosure of privileged materials." *Ryan*, 698 F3d at 818 (emphasis added). The *Ryan* Court concluded:

> "[d]istrict courts have the *obligation,* whenever they permit discovery of attorney-client materials as relevant to the defense of ineffective assistance of counsel claims in habeas cases, to ensure that the party given such access does not disclose these materials, except to the extent necessary in the habeas proceeding...."

*Ryan*, 698 F3d at 818; quoting *Bittaker*, 331 F3d at 727-728 (emphasis added).

In *People v. Ledesma*, 140 P3d 657 (Cal 2006), the California Supreme Court was presented with a similar issue raised here, namely whether the applicability of California Evidence Rule section 958 exception in the habeas corpus proceeding rendered the attorney-client privilege inapplicable in all further proceedings. Like OEC 503(4)(c), California's Evidence Rule section 958 states "there is no privilege under this article as to a communication relevant to an issue

of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." Relying on section 958, the Attorney General argued that a defense expert's testimony was admissible at a subsequent trial because the defendant waived all privileges when, in the habeas corpus proceeding, claimed that his trial counsel provided ineffective assistance of counsel. *Ledesma*, 140 P3d at 696.

The California Supreme Court acknowledged that Evidence Code section 958 was, strictly speaking, an *exception* and not a *waiver* to the attorney-client privilege. *Id*. Nevertheless, the California Supreme Court concluded that the weight of the authority from other jurisdictions, including *Bittaker*, supported that the exception under Evidence Rule section 958 only extends to litigation of the ineffective assistance claim and does not extend to subsequent hearings. *Ledesma*, 140 P3d at 697 – 698. To conclude otherwise, the California Supreme Court reasoned, would raise serious questions as to whether section 958 conflicts with the defendant's Sixth Amendment right to counsel, a right that the privilege is intended to promote. *Id*. at 698.

Other jurisdictions have also recognized that the failure to restrict subsequent use of disclosure of privileged information could force a petitioner to choose between vindication of the Sixth Amendment right to effective assistance of counsel or enforcement of the Fifth Amendment privilege against compelled self-incrimination. *See e.g., State v. Samuels*, 965 SW2d 913, 919 (Mo. App.

1998)(holding subsequent use of defendant's testimony at retrial would force him to sacrifice Fifth Amendment privilege against self-incrimination to vindicate his Sixth Amendment right to counsel); *Commonwealth v. Chimiel*, 558 Pa 478, 511, 738 A.2d 406, 424 (1999)("policy inherent in the . . . attorney-client privilege, as it implicates a defendant's exercise of the right to effective assistance of counsel and to freedom from compelled self-incrimination, restricts the use as well as the scope of the permitted disclosure"); *Waitkus v. Mauet*, 757 P2d 615, 616 (Ariz Ct. App. 1988)(finding trial court's disclosure order for trial counsel's entire file, which included provisions that, if new trial was granted, the "trial transcript would be sealed, the prosecutor would not disclose any information gleaned from the disclosure to any other attorney, and that the Pima County Attorney's Office would withdraw from prosecuting the second trial," as being inappropriate because such disclosure order "does not avoid the obvious chilling effect" on a defendant's right to raise a claim of ineffective assistance of counsel); *United States v. Nicholson*, 611 F3d 191, 216-217 (4th Cir 2010)(on remand for resentencing, petitioner should be entitled to a protective order prohibiting the government from using privileged information revealed in litigating actual conflict).

The same Constitutional principles and concerns expressed in *Bittaker, Ryan* and *Ledesma* are applicable anytime ineffective claims are pursued under ORS 138.510 – 138.680. The right to litigate a claim of ineffective assistance of counsel

claim is of constitutional magnitude, rooted in the Sixth Amendment to the United States Constitution and in Article I, section 11, of the Oregon Constitution. To ensure compliance with the fairness principle, the trial court should be obligated to comply with this Court's directive to issue a protective order prior to ordering disclosure of privileged material on a defendant's ineffective assistance of counsel claim to ensure that the party given such access does not disclose the materials, except to the extent necessary to litigate the issue in the instant proceeding. *Bittaker*, 331 F3d at 727-728; *Ryan*, 698 F3d at 818.

**D. Ethical Considerations Further Warrant a Protective Order Limiting the Distribution of Privileged, Confidential Attorney-Client Communications and Work Product Outside the Confines of the Post-Conviction Proceeding.**

Seeking appropriate protective orders limiting disclosure addressing ineffective assistance claims beyond the confines of the post-conviction proceeding also finds support in the Rules of Professional Conduct (RPC). The Circuit Court, in denying the Relator's request for a protective order, considered the privilege as only a rule of evidence under OEC 503. However, an attorney's obligation to preserve client's secrets, as codified by statute, is broader than evidentiary attorney-client privilege. *State v. Keenan*, 307 Or 515, 771 P2d 244 (1989); *In re Conduct of Spencer*, 335 Or 71, 82, 58 P.3d 228 (2002)(A lawyer has a duty to

protect client "secrets," a term that is not limited to matters covered by the lawyer-client privilege).[12]

Oregon's Rules of Professional Conduct further mandates that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is otherwise permitted. RPC 1.6(a)-(b). Oregon's RPC 1.6(b)(4) allows a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonable believes necessary to respond to allegations in any proceeding concerning the lawyer's representation of the client. A similar provision is found in American Bar Associations Model Rules of Professional Conduct 1.6(b)(5). In July, 2010, the American Bar Association issued Formal Opinion 10-456 to provide guidance and caution when disclosing confidential information under Rule 1.6.(b)(5). One such caution is for lawyers to "take steps to limit 'access to the information to the tribunal or other persons having a need to know it' and to seek '*appropriate protective orders* or other arrangements . . . to the fullest extent practicable." ABA Formal Opinion 10-456, pg. 4, n .23; citing to Rule 1.6, Cmt. 14. (emphasis added).

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[12] Compare OEC 503(2), which protects against disclosure of "confidential communication" with Oregon Revised Statute (ORS) 9.460(3), which places a mandatory duty on an attorney to "maintain the confidences and secrets of the attorney's client with the rules of the professional conduct."

### E. Performance Standards Also Support a Protective Order Limiting the Distribution of Privileged, Confidential Attorney-Client Communications and Work Product Outside the Confines of the Post-Conviction Proceeding.

Expectations of post-conviction counsel as dictated by the Oregon State Bar Association also support a protective order limiting access to and the use of disclosed privileged, confidential attorney-client communications and work product. In February 2009, the Board of Governors of the Oregon State Bar Association approved Principles and Standards for Post-Conviction Relief Practitioners. Standard 6.4, Independent Investigation, tasks post-conviction counsel to begin an independent review and investigation into the case, including obtaining information, research and discovery necessary to file or amend pleadings and to prepare the case for trial. The implementation of this Standard states that post-conviction counsel:

> "[s]hould be familiar with the limited nature of the attorney 'self defense' provision in both Oregon RPC 1.6(b)(4) and Oregon Evidence Code 503(4)(c). OSB Legal Ethics Op. No. 2005-104; Kirkpatrick, *Oregon Evidence*, at 322 (5th Ed 2007). Post-conviction counsel should also consider requesting protective orders limiting access to and the use of disclosures made by prior counsel during the course of post-conviction litigation. OSB Legal Ethics Op. No. 2005-136: *Bittaker v. Woodford*, 331 F3d 715 (9th Cir 2003)."

Performance Standards – 6, p. 8-9.

**F. Failure to Issue a Protective Order that Prohibits the Distribution of Privileged, Confidential Attorney-Client Communications and Work Product Matters Beyond the Confines of the Post-Conviction Proceeding Would Have a Chilling Effect on the Attorney-Client Relationship and Provide the Prosecution an Unfair Advantage.**

State and federal courts have a long-standing and well-accepted power to delimit how parties may use information obtained through the court's power of compulsion. *See e.g*., ORCP 36; *Carlton v. Shisler*, 146 Or App 513, 934 P.2d 448 (1997); *Bittaker*, 331 F3d at 726; *See, e.g., Degen v. United States,* 517 US 820, 826, 116 SCt 1777, 135 L Ed 2d 102 (1996) (noting that protective orders may be used "to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases"); *see also* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2043, at 566 (2d ed.1994) (listing examples of protective orders "limiting the persons who are to have access to the information disclosed and the use to which these persons may put the information").

Here, Relator sought such a protective order, specifically requesting that any confidential information, documents and materials obtained *vis-à-vis* the discovery process be used only by the Adverse-Party and only for purposes litigating the claims presented in the petition for post-conviction relief. The Adverse Party has not set out forth any basis how disclosure beyond the confines of the post-conviction proceeding is relevant to an issue of breach of duty in a post- conviction

proceeding or how a protective order prohibiting such disclosure prevents a fair adjudication of such issues.

However, the absence of a protective order has significant, prejudicial and practical implications. It is well acknowledged that the attorney-client privilege is one of the oldest of the privileges, which seeks to encourage full and frank communications between attorneys and their clients. In the context of capital cases, full and frank communications are the result of a relationship of trust with the client that typically requires ongoing contact.

> "Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea. Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client."

American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, (2003) (hereinafter *ABA Guidelines*), Guideline 10.5(A) – Relationship With Client, Commentary "Counsel's Duty".

The refusal to grant a protective order limiting the disclosure of privileged information to the post-conviction proceedings would eviscerate the fundamental principles of the attorney-client privilege if post-conviction relief is granted and privileged information is permitted to be used against him at a retrial.

Additionally, the absence of a protective order creates the risk that prior defense counsel could be called as a witness to testify against his or her former client about privileged information since such information was no longer protected once the client sought legal review in a post-conviction proceeding.

Furthermore, the unrestricted, court-mandated disclosure of privileged material to the Adverse Party in a post-conviction proceeding would permit the prosecution to obtain information it would not otherwise be privy to, resulting in an unfair advantage at a potential subsequent trial. For instance, the prosecution, *via* discovery for purposes of a post-conviction proceeding, would have access to prior trial counsel's file and all of the "full and frank communications" between the defendant and his attorney to be used as the prosecution sees fit to re-prosecute the defendant. And applying the rules of evidence at a subsequent trial does not create a safe haven from the unfair prosecutorial advantage created by the absence of a protective order. Even if the privileged information - whether testimony or documentation - which is now in the hands of the prosecutor is ruled inadmissible at the subsequent trial, the rules of evidence do nothing to prohibit the prosecution or law enforcement from using the privileged information for other purposes. There would be nothing to prohibit the prosecution or law enforcement from using the privileged information to investigate potential defense witnesses, experts, or strategies. The refusal to grant a protective order limiting the use of privileged

material to litigating the claims presented at the post-conviction proceeding and prohibiting disclosure of such materials to any other person or agency would unfairly provide the prosecution and law enforcement with an unfettered glimpse into the defense's strategies, thought-processes and the "full and frank communications" between attorney and client.

## CONCLUSION

For the reasons expressed above, the Relator respectfully requests this Court to direct the Circuit Court to comply with this Court's June 20, 2013, order to grant *Petitioner's Motion for Protective Order*.

Submitted this 4th day of September, 2013.

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## CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the 14,000 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 8001 words.

Type size

I 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(4)(f).

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## CERTIFICATE OF SERVICE AND FILING

I hereby certify that I served the foregoing *Relator's Second Amended Opening Brief* on the following person on this date by eFiling:

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I further certify that I filed the foregoing document today by eFiling to:

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